

Laws Enacted Will Stay Enacted: Why Are Mandatory Arrest Laws Still Commonplace?

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Abstract: Mandatory arrest laws, which require that a police officer make an arrest if they have probable cause to believe that a crime of domestic violence¹ has been committed, were once widely embraced as a tool for curtailing domestic violence. States rushed to pass these laws, while academics and advocates generally applauded such efforts. But almost as quickly as these laws were enacted, their perverse consequences began to emerge. Today, a consensus exists that mandatory arrest laws do not protect victims of domestic violence, nor do they deter these crimes. Experts agree that mandatory arrest laws pose significant harmful consequences and have advocated for their repeal. Advocacy groups that once championed these laws no longer defend them, and the federal government has silently stopped promoting them. All of this poses the question: why have states not repealed their mandatory arrest laws?

These laws remain on the books in twenty-nine states and the District of Columbia, with sixteen of those jurisdictions requiring at least one arrest if there is probable cause to believe abuse occurred, no matter the circumstances.² This Article takes a comprehensive look at how the dialogue surrounding mandatory arrest laws has changed—and why these laws are still on the books. It sheds light on the pervasive gap between the consensus among scholars and activists that mandatory arrest laws are more harmful than helpful and the persistence of these laws. It argues that the endurance of these laws is partly a product of a perverse incentive structure and the shortcomings of the legislative process.^{3 4}

¹ Several terms, including “domestic violence” and “intimate partner violence,” are used interchangeably throughout this Article, even though they are not perfect synonyms in many contexts. This Article also uses now antiquated phrases such as “wife-beating” and “battered women” to demonstrate how these issues were publicly perceived at various points in time. The terms “survivor” and “victim” are also used throughout. Some individuals may prefer one term over the other in defining their experience. Use of one term or the other in this Article is not meant to diminish the unique experience of any individual who may identify as a survivor, a victim, or neither of those terms.

² See *infra* Figure A.

³ This Article primarily focuses on male violence against women to narrow its scope. It focuses in part on how academic, activist, and public perceptions of intimate domestic violence have changed over time. Because early efforts to address domestic violence focused almost exclusively on protecting women from abuse, and many victim advocacy groups today focus primarily on protecting women, this Article focuses on male violence against women. That focus is not meant to undermine the importance of recognizing or studying other forms of violence, including violence against men and those who are members of the LGBTQ+ community.

⁴ The following contains a personal account of mandatory arrest laws applied in practice from a former editor of *The Journal of Gender, Race & Justice*, Nora Harding:

Personal stories have the power to move policy discussions from theory to reality. Though it is always difficult to share my own experience, I know it can inspire deeper understanding and meaningful change. I appreciate *JGRJ* and Hayley Brower for highlighting the urgent need to examine mandatory arrest laws in domestic violence cases.

I. INTRODUCTION

Nora Harding's boyfriend lunged to restrain her and threw her phone out of reach.⁵ He then pinned her down to the bed while she cried and screamed. She implored him to stop. Then the police arrived. She felt relieved—grateful that they were coming to her rescue. Nora was arrested and charged with Class B domestic abuse assault causing bodily injury. She was handcuffed, placed in the back of a squad car, and sent to jail. When the officers arrived at Nora's house, they observed the aftermath of an argument between two people who had been drinking. They saw scratches on Nora's boyfriend's arm. They did not see what had happened just moments prior—that Nora had scratched her boyfriend in an effort to retrieve her cell phone, which he had taken. But without a clear perpetrator and a statutory directive requiring the arrest of *someone*, the officers arrested both persons.

Nora's experience is not unique among domestic violence victims living in mandatory arrest states. Mandatory arrest laws require that a police officer make an arrest if there is probable cause to believe that a crime of domestic violence has occurred, regardless of whether the officer witnessed the alleged crime.⁶ These laws pressure an officer to choose one person to arrest or, to make the decision easier, to arrest both.

Domestic violence offenses are typically classified as misdemeanors unless there are other factors giving rise to felony status.⁷ Unlike felonies, most misdemeanors have an "in presence" requirement, mandating that officers only arrest without a warrant if the crime was committed in their presence. However, in the mid-1980s, state legislatures started creating an exception to the "in presence" requirement for domestic violence offenses.⁸ As a result, officers could make an arrest if they had probable cause to believe abuse occurred, just as they would in incidents involving felonies.

Outside of the domestic violence context, police have discretion not to make an arrest for any reason permitted by law.⁹ Uniquely, mandatory arrest

⁵ Nora K. Harding, *Domestic Violence Mandatory Arrest Laws: Overview and Victim Impact*, J. OF GENDER, RACE & JUST. (Oct. 13, 2023), <https://jgrj.law.uiowa.edu/news/2023/10/domestic-violence-mandatory-arrest-laws-overview-and-victim-impact> [https://perma.cc/LED9-PND8].

⁶ Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 15 (2004); Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Triecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 545–46 (2014).

⁷ See Annual Review, *Domestic Violence*, 13 GEO. J. GENDER & L. 203, 234 (2012).

⁸ Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 61 (1992); Harding, *supra* note 5.

⁹ See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 780 n. 76 (2012) ("Our criminal justice system gives police enormous discretion with the expectation they will often 'exercise discretion *not* to search and arrest.") (quoting William J. Stuntz, *Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 445 (1997)); Jordan Blair Woods,

laws prevent an officer from exercising discretion, for example, by deciding not to arrest when extenuating circumstances are present or the identity of the perpetrator is unclear. In states with mandatory arrest laws, police are not just permitted but *required* to make an arrest when there is probable cause to believe abuse occurred. The result is that, despite being classified as misdemeanors, domestic violence offenses have more procedurally stringent arrest laws than any other offense in the criminal code, making them a substantial and singular break from traditional discretion and ordinary arrest authority.¹⁰

The initial purpose behind mandatory arrest laws was laudable. They were intended to influence society in general—and police officers in particular—into taking intimate partner violence seriously. Even after states passed laws excluding misdemeanor domestic violence crimes from the “in presence” requirement, officers were still reluctant to arrest perpetrators.¹¹ And the lack of police response was not limited to incidents outside officers’ presence. High-profile examples of police officers standing idly by while witnessing domestic abuse but failing to arrest drew public attention.¹² Outraged, anti-domestic violence and women’s advocates pushed for laws requiring a police officer to arrest if called to the scene of an alleged domestic violence incident, and there is probable cause to make an arrest, regardless of

Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. REV. 672, 686 (2015) (“With respect to law enforcement, this approach rests on informal policies that call for police officers to exercise discretion not to enforce existing criminal laws; there are no formal restrictions on police authority.”).

¹⁰ Police are not required to make arrests in any other area of criminal law, even in circumstances in which they have probable cause to believe a felony has occurred. Even in other movements in which advocates have similarly pushed for certain crimes to be taken more seriously, they have typically called for increased criminalization—not changes to existing criminal procedure. For example, around the same time as the push for mandatory arrest laws, advocacy groups—most notably Mothers Against Drunk Driving (MADD)—pushed for the increased criminalization of driving while intoxicated, but these efforts did not include calls for mandatory arrests of drunk drivers. See H. L. Ross, *Social Control Through Deterrence: Drinking-and-Driving Laws*, 10 ANN. REV. SOCIO. 21, 22 (1984). Notably, some states even have laws prohibiting, discouraging, or creating a presumption against arrests for misdemeanors. See Duke Carter, *Virginia Bill Will Prohibit Traffic Quotas, Arrests for Police Job Performance*, 10NEWS (May 4, 2022, 6:53 PM), <https://www.wsls.com/news/local/2022/05/04/virginia-bill-will-prohibit-traffic-quotas-arrests-for-police-job-performance> [https://perma.cc/U63B-QTKM] (describing a Virginia bill prohibiting arrests for traffic offenses).

¹¹ G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 274 (2005) (“During the second wave of feminism, activists realized that violence against women by male intimate partners was a nonissue for law enforcement. Police arrest avoidance was the rule rather than the exception.”).

¹² See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1525 (D. Conn. 1984); *Bruno v. Codd*, 396 N.Y.S.2d 974, 976–77 (N.Y. Sup. Ct. Special Term 1977), *rev’d*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978).

whether the officer witnessed the abuse.¹³ It worked. Arrests for domestic violence offenses went up, and over time, the public took domestic violence more seriously. But more arrests do not necessarily mean increased protection for victims. Mandating arrests had unforeseen consequences.

Today, a consensus exists that mandatory arrest laws do not deter domestic violence, nor do they protect victims in many circumstances. Advocacy groups—many of which pushed for the enactment of these laws initially—are now silent about them.¹⁴ The federal government has also passively backed away from its prior support. And still, proposals to repeal these laws are largely nonexistent, so they remain on the books.

¹³ See *Women and Violence: Hearing Before the S. Comm. on the Judiciary, Part 1*, 101st Cong. 71 (1990) (statement of Helen R. Neuborn, NOW Legal Defense Fund); *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Just. of the H. Comm. on the Judiciary*, 103rd Cong. 57–60 (1994) (statement of Joan Zorza, Senior Attorney, Nat'l Center on Women and Family Law); Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis on Mandatory Arrest*, 39 SANTA CLARA L. REV. 765, 768 (1999); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 7 (2009).

¹⁴ See, e.g., J.C. Martin, *State's Domestic Violence Bill Praised*, ARIZ. DAILY STAR, Aug. 8, 1991, at 1 (“‘You may not be able to change behavior,’ says Ann Yellot, a counselor for the Our Town Family Center and, along with [Margarita] Bernal, a member of the Southern Arizona Task Force Against Domestic Violence, ‘but you can change the community’s response to it.’”); Scott Armstrong, *Colorado Offers Answers on Domestic Violence: Activist Policy Serves as a Model for Other States*, CHRISTIAN SCI. MONITOR (July 19, 1994, 12:07 PM ET), <https://www.csmonitor.com/1994/0719/19032.html> [<https://perma.cc/U6LB-P8D6>] (“‘All this really changes the way Colorado deals with domestic violence on every front,’ says Jan Mickish, executive director of the Colorado Domestic Violence Coalition.”); Charlotte Libov, *Connecticut Q&A: Anne Menard, ‘95 Percent of Victims are Women’*, N.Y. TIMES, May 15, 1988, at 3 (interviewing Anne Menard, executive director of the Connecticut Coalition Against Domestic Violence, saying mandatory arrest laws are very important); Sari Horwitz, *D.C. Police to Make Arrests in Domestic Violence Disputes; Cases to be Treated as Criminal Offenses*, WASH. POST (June 2, 1987), <https://www.washingtonpost.com/archive/politics/1987/06/03/dc-police-to-make-arrests-in-domestic-violence-disputes/ca855f16-16e4-4083-a637-ffb141ec3b5b> (on file with the author) (quoting Meshall Thomas, director of the Women’s Legal Defense Fund’s emergency domestic relations project and president of the D.C. Coalition Against Domestic Violence, describing mandatory arrest laws as “a tremendous turnaround”); Gina Holland, *More Spousal Abuse Protection Considered in Miss.*, COM. APPEAL, June 28, 1994, at B1 (“Some advocates for abuse victims support stronger laws, including felony charges against spouse beaters, mandatory arrests during domestic abuse calls and required cash bonds for accused spouses.”); Robert Goodrich, *Domestic Violence is Targeted*, ST. LOUIS POST DISPATCH, June 1, 1994 (explaining how the executive director of the Missouri Coalition Against Domestic Violence helped draft the mandatory arrest law and lobbied for its passage); Pat Swift, *At the Intersection of Racial Politics and Domestic Abuse*, BUFFALO NEWS, Dec. 27, 1997 (explaining how the director of the newly created Institute for the Prevention of Sexual Violence Against Women defends mandatory arrest laws); *Women and Violence: Hearing Before the S. Comm. on the Judiciary, Part 1*, 101st Cong. 71 (1990) (statement of Helen R. Neuborn, NOW Legal Defense Fund); *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Just. of the H. Comm. on the Judiciary*, 103rd Cong. 57–60 (1994) (statement of Joan Zorza, Senior Attorney, Nat'l Center on Women and Family Law).

Legal scholarship on domestic violence arrests thus far has focused almost exclusively on making a case for or against mandatory arrest laws.¹⁵ This Article sheds light on the discrepancy between the longevity of these laws and the near-unanimous opinion among scholars and activists that they are harmful. It also details the forces contributing to this disconnect. Part I provides background on the gradual criminalization of domestic violence. Part II describes how scholarship on mandatory arrest and advocacy for these laws have shifted from widespread support for them to calls for their repeal. Part III includes a comprehensive survey of states that still have mandatory arrest laws and reveals a phenomenon not previously discussed in legal scholarship: the persistence of mandatory arrest laws despite their known inefficiency. Finally, Part IV proposes possible explanations for these laws' persistence.

II. THE DYNAMIC HISTORY OF POLICING DOMESTIC VIOLENCE

Public perceptions of intimate partner violence have changed dramatically since the nineteenth century. So have the laws aimed at curtailing such violence. Changes in public perception have spurred legislative change. And legislative change has motivated shifts in public perception. Domestic violence was once perceived as a household problem. Then, social work methods, rather than police intervention, in domestic violence disputes became the norm. When police failures to intervene in domestic violence disputes gained national media attention, advocates swiftly promoted mandatory arrest statutes. And their enactment across the country was almost immediate.

A. Beyond the Reach of the Law

For most of the history of the United States, intimate partner violence has been seen as a household issue existing only in the private sphere.¹⁶ Through the nineteenth century, marital privacy superseded all else, and because husbands were legally responsible for their wives' conduct, they

¹⁵ See, e.g., Goodmark, *supra* note 13 (arguing that mandatory arrest laws are problematic and advocating for reformation of domestic violence law); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging Solutions*, 60 WASH. L. REV. 267, 310 (1985); AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 70 (2020); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 989 (1991); Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 289 (1997); David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. CRIM. L. & CRIMINOLOGY 255, 295 (2007); Mimi E. Kim, *The Carceral Creep: Gender-Based Violence, Race, and the Expansion of the Punitive State, 1973–1983*, 67 SOC. PROBS. 251 (2020) (arguing that domestic violence laws such as mandatory arrests have contributed to carceral creep); Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 77 (1983).

¹⁶ See KRISTIN A. KELLY, *DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY* 37–47 (2003).

reserved the right to “control” their wives by all means necessary.¹⁷ While courts have sporadically suggested that the “moral sense of the community” would not permit spousal violence,¹⁸ legal recourse to back that sentiment was nonexistent until the end of the nineteenth century. In 1882, Maryland became the first state to outlaw domestic abuse, but similar laws struggled to gain momentum in other states.¹⁹ A Pennsylvania bill proposed in 1886 that would have made wife-beating a crime failed to pass.²⁰ Twelve other states also considered similar legislation between 1876 and 1906, but only three states enacted such laws.²¹

B. Police Intervention Through Mediation

By the 1920s, most cities erected courts staffed by social workers to mediate complaints of spousal violence.²² Social work methods became the gold standard for resolving these “family disturbances,” which “required no police action.”²³ This new philosophy discouraged wives from reporting their husbands²⁴ and instructed police officers to stay out of the way.²⁵ The mediation approach to addressing domestic violence reigned into the 1960s, when many police departments adopted formal department policies that endorsed mediation and described arrest as an option of last resort.²⁶

Public perception shifted in the 1970s with the rise of “grassroots feminism,” and more resources became available to battered women.²⁷ Some advocates called for increased police intervention in domestic violence

¹⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

¹⁸ *Perry v. Perry*, 2 Paige Ch. 501, 503 (N.Y. Ch. 1831).

¹⁹ U.S. COMM’N ON C.R., UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982).

²⁰ *Id.*

²¹ ELIZABETH H. PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 109 (1987).

²² Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2170 (1996).

²³ *Id.* at 2171 (citing INT’L ASS’N OF POLICE CHIEFS, TRAINING KEY NO. 16, HANDLING DISTURBANCE CALLS 94–95 (1968–69)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666 (2004) (“For all of our history, until approximately twenty-five years ago, the criminal justice system did not recognize domestic violence as an issue of concern, much less focus on methods to attack it. It was the women’s movement of the late 1960s and 1970s that brought attention to violence to women by intimate partners.”); LORETTA M. FREDERICK & KRISTINE C. LIZDAS, BATTERED WOMEN’S JUST. PROJECT, THE ROLE OF RESTORATIVE JUSTICE IN THE BATTERED WOMEN’S MOVEMENT 12–13 (2003).

disputes.²⁸ However, these calls were far from universal. In 1973, a publication by the American Bar Association emphasized that “criminal codes should be reevaluated to determine whether there are adequate ways of enforcing the prohibition” and “noncriminal solutions to all or a portion of the problem should be considered.”²⁹ At least one scholar has characterized this period as one of “police arrest avoidance,” in which officers were trained to avoid arrest and instead engage in “crisis intervention,” thereby circumventing the need to exercise discretion in arresting an alleged perpetrator.³⁰

Studies from the late 1970s and early 1980s indicate that police departments often delayed responding to domestic violence calls, both because officers viewed these disputes as low priority and because they hoped the situation would de-escalate before they arrived.³¹ In response to “[t]he widespread refusal or failure of police officers to remove persons involved in episodes of domestic violence,” the Oregon legislature enacted the nation’s first-ever mandatory arrest statute in 1977,³² while the rest of the country lagged behind. A report from the Attorney General’s Task Force on Family Violence, published in 1984, described police failure to intervene in domestic violence disputes as a nationwide problem.³³

C. Failure to Protect

As “police arrest avoidance” policies and practices became more well-known, feminist advocates focused on ramping up legal responses aimed at protecting women and punishing perpetrators.³⁴ Advocates believed that increasing the certainty and severity of criminal sanctions for domestic violence offenses would afford increased protection to victims. As a result of

²⁸ Barbara J. Hart, *Arrest: What’s the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 209 (1997) (“Arrest facilitates agency when it both informs battered women of the social and legal options essential for sustained agency and when it brokers access to these legal and human services options.”); Sack, *supra* note 27, at 1666 (“Battered women’s advocates also worked to change laws and policies to increase access for domestic violence victims to civil protection orders against their abusers. In addition, they advocated for increased enforcement of the criminal law, including aggressive police involvement and prosecution in domestic violence cases.” (citations omitted)).

²⁹ AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 7 (1973).

³⁰ G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. C.R. & SOC. JUST. 405, 412 (2009).

³¹ Nan Oppenlander, *Coping or Copping Out: Police Service Delivery in Domestic Disputes*, 20 CRIMINOLOGY 449, 450 (1982).

³² *Nearing v. Weaver*, 670 P.2d 137, 142 (Or. 1983).

³³ WILLIAM L. HART ET AL., ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 11 (1984).

³⁴ Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 524–30 (2010).

these efforts, marital rape first became a crime in 1970.³⁵ And, starting in the late 1970s, women could seek protective orders against their husbands without simultaneously filing for divorce.³⁶ But women's advocates believed that, without police enforcement of these reforms, their deterrent effect would be minimal. Attention, then, turned to the failure of police to enforce domestic abuse crimes.

In the late 1970s, police departments in Oakland, California, and New York City faced lawsuits over their arrest avoidance policies.³⁷ The Legal Aid Society of Alameda County in Oakland filed suit on behalf of "women in general and [B]lack women in particular who are victims of domestic violence."³⁸ The court held that a "police policy that de-emphasizes and discourages arresting assailants . . . is arbitrary, capricious, discriminatory, and deprives plaintiffs and the plaintiff class of the right to equal protection of the laws."³⁹ In *Bruno v. Codd*, twelve women sued the New York City Police Department, among other entities, seeking declaratory and injunctive relief for alleged failure to enforce state laws and arrest their abusive husbands.⁴⁰ One of the women's affidavits alleged that her husband "grabbed [her] by the throat and beat [her]" and "brandished a straight razor and threatened [her] with it . . . [and] tore [her] blouse off [her] body and gouged [her] face, neck, shoulders and hands with his nails, in full public view."⁴¹ A police officer informed her "that since this was a 'family matter' there was nothing they could do and that [she] would have to go to Family Court."⁴² The New York Supreme Court found that the New York Police Department failed in its duty to protect survivors of domestic violence by "show[ing] a callous disregard . . . [for] women . . . [in need of] immediate protection [from their abusive husbands]."⁴³ The parties entered a consent decree that outlined policy changes aimed at improving response times and rates of arrest in domestic violence incidents.⁴⁴

³⁵ Zorza, *supra* note 8, at 50–51.

³⁶ Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy"*, 11 S. CAL. INTERDISC. L.J. 361, 390 (2002).

³⁷ See *Bruno v. Codd*, 396 N.Y.S.2d 974, 976–77 (N.Y. Sup. Ct. Special Term 1977), *rev'd*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978); Pauline W. Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 WOMEN AND VIOLENCE 554, 554 (1983).

³⁸ Zorza, *supra* note 8, at 54 (quoting Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus at 1, *Scott v. Hart*, C-76-2395 (N.D. Cal., 1976)).

³⁹ *Id.* at 55 (quoting *Scott v. Hart*, No. C-76-2395 (N.D. Cal., 1976)).

⁴⁰ See *Bruno*, 396 N.Y.S.2d at 976.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 979.

⁴⁴ See Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 309–10 (2004).

These lawsuits displayed police departments' failure to intervene in incidents involving intimate partner violence. They also highlighted how departments might be vulnerable to lawsuits if they fail to protect victims' rights.⁴⁵ Realizing this vulnerability existed, police departments began to proactively change their policies and practices in ways that prioritized protecting victims of domestic violence.⁴⁶ Women's advocates had a new tool at their disposal in their effort to ensure police departments took the plight of battered women seriously: the threat of liability.⁴⁷

D. Calls to Solve the "Charles Thurman Problem"

This new tool became even more effective when the police's failure to intervene in domestic violence incidents reached the mainstream media. The police's failure to intervene in such cases was instantly brought to the forefront by news reports of a 1983 incident that sparked outrage.⁴⁸ For nine months, Tracey Thurman notified her city's police department of repeated threats made by her estranged husband, Charles Thurman, on her life and the life of her child.⁴⁹ When Charles unexpectedly arrived at her house one afternoon, demanding to see her, Tracey called the police.⁵⁰ Fifteen minutes later, they had not come.⁵¹ Tracey went outside and asked Charles not to take or hurt their son.⁵² Charles responded by stabbing Tracey repeatedly.⁵³ After another ten minutes, a police officer arrived.⁵⁴ In the presence of the officer, Charles dropped the bloody knife he was holding and kicked Tracey in the head.⁵⁵ Charles then ran inside the residence, returned holding his son, and dropped him on his mother.⁵⁶ Charles kicked Tracey in the head again.⁵⁷ Three more officers arrived on the scene.⁵⁸ Now in the presence of four

⁴⁵ Zorza, *supra* note 8, at 59.

⁴⁶ EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 75 (1990).

⁴⁷ Zorza, *supra* note 8, at 60.

⁴⁸ Paul H. Robinson et al., *Red Codes, Blue Codes? Factors Influencing the Formulation of Criminal Law Rules*, 9 U. PA. J.L. & PUB. AFF. 346, 369 (2024).

⁴⁹ *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1525–26 (D. Conn. 1984).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1525–26.

⁵⁵ *Thurman*, 595 F. Supp. 1521, 1526 (D. Conn. 1984).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

police officers, Charles continued threatening Tracey.⁵⁹ Only when Charles approached Tracey while she was lying on a stretcher did these officers arrest Charles and take him into custody.⁶⁰

Tracey survived the attack and sued her city's police department.⁶¹ She alleged the police department engaged in discriminatory treatment violative of the Equal Protection Clause because police protection was routinely bestowed on victims with no domestic relationship to the perpetrator, but victims abused by a spouse or boyfriend were consistently afforded lesser protection.⁶² She won.⁶³ Tracey was awarded \$2.3 million for the city's failure to protect her.⁶⁴

The *Thurman* case was notable for several reasons. First, it demonstrated the liability risk for police departments that failed to adequately protect victims of domestic violence.⁶⁵ Second, the court's focus on the police department's failure to make an arrest portrayed arrest as the primary means through which police could prevent the escalation of intimate partner violence. Finally, it further propelled the battered women's movement into public view, fueling increased advocacy criticizing the criminal justice system's failures to protect victims of domestic violence.⁶⁶

This increased public attention coincided with the results of a study by Professors Lawrence Sherman and Richard Berk, which later became known as the Minneapolis Domestic Violence Experiment.⁶⁷ The study sought to determine which method—arrest, mediation, or separation—was the most effective for deterring future incidents of domestic violence.⁶⁸ The study supported the finding that arrest was the most effective deterrent of repeat incidents of domestic abuse and disputed their pre-experiment prediction

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Thurman*, 595 F. Supp. 1521, 1526 (D. Conn. 1984).

⁶² *Id.*

⁶³ *Id.* at 1529.

⁶⁴ *Officers Must Pay \$2.3 Million to Wife Maimed by Husband*, N.Y. TIMES, June 26, 1985, at B6.

⁶⁵ Eve S. Buzawa et al., *Role of Victim Preference in Determining Police Response to Victims of Domestic Violence*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 255, 267 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

⁶⁶ *Id.*

⁶⁷ Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOCIO. REV. 261, 270 (1984) [hereinafter Sherman & Berk, *The Specific Deterrent Effect*]; LAWRENCE W. SHERMAN & RICHARD A. BERK, MINNEAPOLIS POLICE DEPT. POLICE FOUND., THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1 (1984) [hereinafter SHERMAN & BERK, MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT].

⁶⁸ Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 212 (1992).

that arrests increase recidivism rates.⁶⁹ And it demonstrated that arrest was even more effective than conviction in preventing future incidents of domestic violence.⁷⁰ Thirty-five percent of victims surveyed in the study reported a recurrence of violence within six months when police did not make an arrest.⁷¹ Conversely, only nineteen percent of study participants reported subsequent assaults in cases in which police did make an arrest.⁷²

Perhaps even a surprise to the study's authors, it received widespread public attention. The study's preliminary findings appeared in *The New York Times* and on prime-time television.⁷³ The complete results were published in the *American Sociological Review*⁷⁴ and were subsequently picked up by 107 newspapers nationally.⁷⁵ Despite this media reach, the experiment's authors suggested a cautious interpretation of their findings, warning that the results of the study should be replicated before any policy changes based on it were made, stating, "[i]t may be premature to conclude that arrest is always the best way for police to handle domestic violence"⁷⁶ Still, the results of the experiment, alongside the intense media attention on the plight of women subjected to domestic abuse and the eagerness among women's advocates to see assaults against spouses treated the same way as those against strangers, spurred a sudden rush to adopt mandatory arrest policies.⁷⁷

The United States Department of Justice (DOJ) did not wait for the results of replication studies. In 1984, the Attorney General's Task Force on Domestic Violence called for a robust criminal legal response to the newly publicized problem, lending credibility to the swift enactment of mandatory arrest policies.⁷⁸ Notably, however, the Task Force's report fell short of recommending that states enact mandatory arrest laws, suggesting that states instead permit officers to make warrantless arrests "when the officer has

⁶⁹ SHERMAN & BERK, MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT, *supra* note 67, at 1.

⁷⁰ Sherman & Berk, *The Specific Deterrent Effect*, *supra* note 67, at 262.

⁷¹ Frisch, *supra* note 68.

⁷² *Id.*

⁷³ Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC'Y REV. 117, 144 (1989); *Arrest May Be Deterrent in Domestic Violence, Study Shows*, N.Y. TIMES, May 30, 1984, at C4.

⁷⁴ Sherman & Berk, *supra* note 67, at 265–68.

⁷⁵ *Arrest May Be Deterrent in Domestic Violence, Study Shows*, *supra* note 73, at C4; Sherman & Cohn, *supra* note 73, at 120.

⁷⁶ Ahmet Çelik, *An Analysis of Mandatory Arrest Policy on Domestic Violence*, 10 INT'L J. HUM. SCIS. 1503, 1517 (2013) (quoting SHERMAN & BERK, MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT, *supra* note 67, at 8).

⁷⁷ See Mordini, *supra* note 44, at 309–10.

⁷⁸ HART ET AL., *supra* note 33, at 11.

probable cause to believe a crime has occurred and the safety of the family is in jeopardy.”⁷⁹

E. Quick Implementation of Mandatory Arrest Statutes

The flurry of media reports and recommendations from the federal government had a virtually unprecedented impact in changing then-current police practices.⁸⁰ In 1984, only two states had mandatory arrest statutes, but by 1991, twenty-two states had enacted such laws.⁸¹ The rapid enactment of mandatory arrest laws was especially striking because, “[u]ntil the mid-1980s, most states prohibited warrantless arrests for misdemeanor offenses unless the crimes were committed in the presence of a police officer.”⁸² In the 1980s, in response to mounting pressure from women’s advocates, all but two states changed their laws to permit arrest if the officer had probable cause to believe a crime had been committed, creating the only exception to the misdemeanor “in presence” requirement.⁸³

After the murder of Nicole Brown Simpson, who allegedly suffered years of abuse at the hands of her former husband and football star, O.J. Simpson, domestic violence was once again in the spotlight.⁸⁴ As one scholar put it, “politicians raced to the state house to invoke domestic violence laws, jumping on the ‘zero tolerance’ bandwagon.”⁸⁵ Congress quickly responded, passing the Violence Against Women Act (VAWA) of 1994.⁸⁶ Through VAWA, for the first time, the federal government communicated a clear preference for law enforcement intervention in domestic violence incidents.⁸⁷ The law’s successful passage was largely due to formidable lobbying from

⁷⁹ *Id.* at 102.

⁸⁰ See generally EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 98–101 (3d ed. 2003) (documenting the impact mandatory arrest laws had on police behavior).

⁸¹ The existing literature is ripe with inconsistencies on the passage of mandatory arrest laws. These statistics reflect detailed inspections of state laws concerning police arrest powers in domestic violence incidents year to year.

⁸² Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 537 (1996).

⁸³ *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1537 (1993).

⁸⁴ See RACHEL LOUISE SNYDER, NO VISIBLE BRUISES: WHAT WE DON’T KNOW ABOUT DOMESTIC VIOLENCE CAN KILL US 13–14 (2019).

⁸⁵ Miccio, *supra* note 11, at 238.

⁸⁶ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 18, & 42 U.S.C.).

⁸⁷ David M. Fine, Note, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 257 (1998) (explaining “how a seemingly local issue can fall under Commerce Clause regulation and how Congress can exercise the commerce power to create the most effective weapon to fight the problem of domestic violence while enhancing public respect for federal law enforcement”).

women's groups.⁸⁸ Led by the NOW (National Organization for Women) Legal Defense and Education Fund, a task force of domestic violence experts, organizations worked closely with congressional staff to pass the legislation.⁸⁹ VAWA awarded millions of dollars to legal services and victims organizations, battered women's shelters, and efforts to strengthen legal assistance for domestic violence victims.⁹⁰ VAWA also required states to adopt either a pro-arrest or a mandatory arrest policy to receive federal funding under the Grants to Encourage Arrests program,⁹¹ which provided \$120 million over three years to state and local police departments, starting in 1996.⁹²

III. CHANGES IN SCHOLARSHIP ON MANDATORY ARREST

Scholarship on mandatory arrest laws has also changed dramatically since the immediate aftermath of the publication of Sherman and Berk's study. Mandatory arrest laws were once widely praised in the academic literature, with voices expressing concerns about them making up a small minority. Gradually, those voices grew louder, culminating in the current consensus that mandatory arrest laws are harmful and inefficient.

A. Widespread Endorsement of Mandatory Arrest Policies

In his book "Policing Domestic Violence," Professor Sherman recalled an "almost euphoric embrace" among women's advocates who saw mandatory arrest laws as much-needed fuel in their efforts to ensure that the plight of victims would finally be taken seriously.⁹³ Women's advocates did not just celebrate mandatory arrest laws; in many cases, they proposed them in the first instance. The Oregon Coalition Against Domestic and Sexual Violence drafted the first-ever mandatory arrest law.⁹⁴ Similar organizations

⁸⁸ *History of VAWA*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/VEL3-MKCK>].

⁸⁹ *Id.*

⁹⁰ U.S. DEP'T OF JUST., THE CLINTON ADMINISTRATION'S CRIME CONTROL STRATEGY: A COMMITMENT TO END VIOLENCE AGAINST WOMEN 2 (1999).

⁹¹ 42 U.S.C. § 3796hh (1994) (transferred and codified as 34 U.S.C. § 10461(c)).

⁹² U.S. GOV'T. ACCOUNTABILITY OFF., GAO-02-309, JUSTICE IMPACT EVALUATIONS: ONE BYRNE EVALUATION WAS RIGOROUS; ALL REVIEWED VIOLENCE AGAINST WOMEN OFFICE EVALUATIONS WERE PROBLEMATIC 26 (2002).

⁹³ LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 75 (1992).

⁹⁴ Andrea D. Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 267 (1999).

were also instrumental in implementing these laws in their respective states and praised their passage across the country.⁹⁵

National organizations also advocated for federal incentives for mandatory arrest policies. In 1990, the NOW Legal Defense and Education Fund's executive director, Helen Neuborne, and staff attorney, Sally Goldbarb, testified before the Senate Judiciary Committee that "encouragement of mandatory arrest policies deserves a prominent place in the federal effort to combat domestic abuse."⁹⁶ Four years later, Joan Zorza, an attorney at the National Center on Women and Family Law (NCWF) and a member of the National Coalition Against Domestic Violence (NCADV) board, testified before Congress in favor of including a provision that would make federal funds contingent on mandatory arrest policies.⁹⁷ On behalf of these organizations, she testified, "[w]e very strongly support mandatory arrest."⁹⁸ She also testified that NCWF had concluded that "arrest is the most effective police response" in domestic violence incidents.⁹⁹

Advocates championed these laws in part because they sent a clear societal message that domestic violence was a serious criminal offense that would not be tolerated.¹⁰⁰ While domestic abuse had been a criminal offense for some time, victim advocates were concerned that the historical acceptance of intimate partner violence meant those laws were not adequately enforced. Advocates sought to expose the violence that occurred in private and make it a public problem that could be addressed.¹⁰¹ By "[m]aking battering the only crime in which police discretion is removed," society could "acknowledge[] a special social interest in redressing the legacy of discriminatory treatment of women by law enforcement."¹⁰²

Advocates believed that state statutory intervention in the form of mandatory arrest laws was necessary. Without state intervention, they claimed, police discretion gave the benefit of the doubt to the batterer, not

⁹⁵ See, e.g., Martin, *supra* note 14, at 1; Armstrong, *supra* note 14; Libov, *supra* note 14, at 3; Horwitz, *supra* note 14; Holland, *supra* note 14, at B1; Goodrich, *supra* note 14; Swift, *supra* note 14.

⁹⁶ *Women and Violence: Hearing Before the S. Comm. on the Judiciary, Part 1*, 101st Cong. 71 (1990) (statement of Helen R. Neuborn, NOW Legal Defense Fund).

⁹⁷ *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Crim. Just. of the Comm. on the Judiciary H.R.*, 103rd Cong. 57–60 (1994) (statement of Joan Zorza, Senior Attorney, Nat'l Battered Women's L. Project of the Nat'l Ctr. on Women and Family Law).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Saccuzzo, *supra* note 13, at 776.

¹⁰¹ See Goodmark, *supra* note 13.

¹⁰² Saccuzzo, *supra* note 13, at 776 (quoting Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in *DO ARREST AND RESTRAINING ORDERS WORK?* 115, 129 (Eve S. Buzawa & Carl G. Buzawa eds., 1996)).

the victim.¹⁰³ Legal feminists similarly wanted to limit police discretion to decline arrest.¹⁰⁴ As Professor Kathleen Waits wrote, “society cannot rely on [officers] to use their discretion wisely in battering cases,” so making “statutory change is the only means likely to achieve our stated goals.”¹⁰⁵ The “charge that police cannot be trusted to handle domestic disputes correctly has such serious policy implications that it calls for further elaboration.”¹⁰⁶ Feminist lawyers relied on this stereotype of sexist male police officers who refused to arrest batterers because they condoned intimate partner violence.¹⁰⁷ In this way, an officer’s non-arrest was in itself sexist because it showed the officer did not take the abuse seriously. In turn, they viewed officers making arrests as participating in a feminist act.¹⁰⁸ Arrests were a signal that the State—through its officers—cared about protecting victims.¹⁰⁹ Mandatory arrest meant that police would protect the victim, no matter the officer’s subjective biases.¹¹⁰

Advocates further contended that these laws would promote racial equity.¹¹¹ Discretionary arrest, they argued, exacerbated the potential for discrimination because permitting discretion by police would result in increased disparate treatment of poor people and communities of color.¹¹² Mandatory arrest laws, on the other hand, were thought to provide more equal treatment toward offenders of all races.¹¹³ According to at least one proponent of these laws, the possibility that a mandatory arrest law “might cause overcrowding of local jails” was a necessary consequence and “easily justifiable to anyone who values the safety of battered women and their children.”¹¹⁴

¹⁰³ This belief was supported by social science studies from the time. See Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN’S L.J. 213, 217 (1988) (“A study in Philadelphia found that police arrested in only 13% of the cases in which they observed injuries on the victim.”).

¹⁰⁴ GRUBER, *supra* note 15, at 68.

¹⁰⁵ Waits, *supra* note 15, at 310.

¹⁰⁶ *Id.*

¹⁰⁷ GRUBER, *supra* note 15, at 70.

¹⁰⁸ *Id.*

¹⁰⁹ See Schneider, *supra* note 15, at 989.

¹¹⁰ See Fedders, *supra* note 15, at 290–91.

¹¹¹ Hirschel et al., *supra* note 15, at 295–96.

¹¹² Miriam H. Rutenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 179, 185 (1994); Fedders, *supra* note 15, at 293; GRUBER, *supra* note 15, at 86 (“Advocates argued that mandatory arrest policies require the police to arrest every suspect and thereby prevent racist police officers from disproportionately arresting [B]lack men.”).

¹¹³ Hirschel et al., *supra* note 15, at 296.

¹¹⁴ Waits, *supra* note 15, at 317–18.

These responses have since been described as “the carceral creep,”¹¹⁵ in which the feminists in the anti-domestic violence movement entered a dependent relationship with law enforcement, championing pro-criminalization strategies to help prevent domestic abuse and protect victims.¹¹⁶ Feminists unwaveringly pushed for carceral expansion, desperate to find ways for the needs of domestic violence victims to be taken seriously.¹¹⁷ This relationship, however, was commensalistic rather than symbiotic, in which one party benefited, not both. Carceral feminism, by its nature, depends on law enforcement.

Advocates also argued that, by imposing a duty on police officers, mandatory arrest laws would leave no room for the perpetrator to avoid arrest by pressuring the victim to tell the officer they would not like to pursue that course of action.¹¹⁸ By removing this onus on victims,¹¹⁹ mandatory arrest laws would also empower them because, with the arm of the State behind them, victims could protect themselves from future violence.¹²⁰ Legal feminists also argued that other reasons officers might have had for declining to make an arrest, such as “the abuser and his family cannot afford the economic impact of time lost from work” or “the spousal relationship may be brought to an end by the intervention of the criminal justice process,” were not justified.¹²¹ “Protecting the battered woman must be the top priority,” they argued, not the familial relationship.¹²² Instead, they contended that arrest was a much-needed wake-up call that prompted either the man to stop abusing his spouse or gave the woman the courage to leave the abusive situation.¹²³ Arrest, they reasoned, was the best way to hold an abusive man accountable for his behavior and send a clear signal that such behavior would not be tolerated. Activists argued that “the law *itself* must take responsibility for deterring the abuser and must relieve the victim of this burden.”¹²⁴ This reasoning was seemingly validated by the Minneapolis Domestic Violence

¹¹⁵ Kim, *supra* note 15, at 253.

¹¹⁶ GRUBER, *supra* note 15, at 66–67; Mimi E. Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973–1986* 22 (Inst. for the Study Societal Issues, Working Paper No. 70, 2015).

¹¹⁷ I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2467 (2021) (reviewing GRUBER, *supra* note 15).

¹¹⁸ Kim, *supra* note 15, at 290.

¹¹⁹ DEL MARTIN, U.S. COMM’N ON C.R., BATTERED WOMEN: ISSUES OF PUBLIC POLICY 7 (1978).

¹²⁰ Buel, *supra* note 103, at 223–24.

¹²¹ Finesmith, *supra* note 15, at 85–86.

¹²² Waits, *supra* note 15, at 304.

¹²³ Buel, *supra* note 103, at 215–16.

¹²⁴ Waits, *supra* note 15, at 304.

Experiment and a 1986 Yale Law Review article describing arrest as “the most effective way for police to protect women from further abuse.”¹²⁵

In addition to deterring perpetrators, advocates championed mandatory arrest laws to protect victims. These laws were thought to advance the goal of short-term safety by separating the couple to prevent violence from continuing after the police left.¹²⁶ Only by making arrests could police interrupt the time during which the victim was under the batterer’s control. Arrests could offer women the opportunity to seek relief free from the uninterrupted influence of their abusers. Activists argued that this period of separation, during which the batterer is arrested, could ultimately save victims’ lives,¹²⁷ allowing the victim the opportunity to leave the situation for good.¹²⁸ Arrests could offer victims the opportunity to seek relief free from the uninterrupted influence of their abusers.¹²⁹

Activists further contended that mandatory arrest laws would promote racial equity. Discretionary arrest, they argued, exacerbated discrimination because permitting discretion by police would result in increased disparate treatment of poor and minority communities. Mandatory arrest laws, on the other hand, were thought to provide more equal treatment toward offenders of all races.¹³⁰

B. *Sporadic Pushback in Academic Literature*

While most feminist scholars and victim advocates strongly pushed for the passage of mandatory arrest laws, their advocacy was not universal. Around the time most advocates were pushing for the federal government to incentivize mandatory arrest laws through VAWA, there were warnings from some advocates, particularly advocates of color, that proposals focusing on

¹²⁵ Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 791 (1986) (citing SHERMAN & BERK, MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT, *supra* note 67).

¹²⁶ Matthew Litsky, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 173 (1990).

¹²⁷ Buel, *supra* note 103, at 216 (“[A]rresting batterers in less severe cases now may well save many lives later.”).

¹²⁸ See Lisa G. Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 VT. L. REV. 59, 60 (1982).

¹²⁹ See Buel, *supra* note 103, at 216.

¹³⁰ Hirschel et al., *supra* note 15, at 295; see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1033 (2000) (“[B]attered women’s advocates conceived of arrest encouraging policies, and particularly mandatory arrest policies, as a mechanism for diminishing police discretion that frequently operated to deny protection to battered women, especially poor women of color.”); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 564 (1999) (“This response, proponents argue, has the additional benefit of eliminating racial discrimination from the criminal justice system, insofar as it ensures that all perpetrators, regardless of race, are treated similarly.”).

criminalization would not sufficiently protect women and would have a detrimental effect on communities. These scholars warned that mandatory arrest laws would exacerbate racial disparities and would have an especially harmful impact on Black women.

As scholars have since pointed out, almost all the advocates pushing for the passage of mandatory arrest laws were white feminists.¹³¹ And, “[i]n spite of the best intentions” of these activists, “they den[ie]d the complexity of a problem which involve[d] issues of race as well as gender.”¹³² The interests of Black women, scholars have since noted, were not best served by engaging the carceral system because “[t]he criminal justice system has always targeted Black people.”¹³³ Some advocates expanded on the ideas of Professor Kimberlé Crenshaw, who had vocalized concerns about feminists’ failure to incorporate intersectionality in the feminist anti-violence movement.¹³⁴ Melissa Jeltson published an article in *Ms. Magazine* questioning why feminists would rally around a carceral solution to domestic violence.¹³⁵ For similar reasons, Brenda Smith, then Senior Counsel for Economic Security at the National Women’s Law Center (NWLC), dissuaded NWLC from supporting VAWA.¹³⁶ Professor Angela Davis argued that “[t]he major strategy relied on by the women’s anti-violence movement of criminalizing violence against women will not put an end to violence against women.”¹³⁷ Over time, these voices multiplied, and the harmful effects of these laws became more well-known.

¹³¹ See, e.g., Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1231 (2022) (“[A]lternatives to carceral feminism—largely organized by Black women—were subsequently ignored or passed over for carceral programs supported by white women.”); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 796–97 (2007) (“[T]hose lobbying for domestic violence reform were white middle to upper-class women.”).

¹³² Ruttenberg, *supra* note 112, at 172–73.

¹³³ *Id.*

¹³⁴ See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (“Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating ‘women’s experience’ or ‘the Black experience’ into concrete policy demands must be rethought and recast.”).

¹³⁵ Mari J. Matsuda, *Crime and Punishment*, MS. MAG. 86, 86–88 (1994), *quoted in* Melissa Jeltson, *Don’t Use Domestic Violence Victims to Derail Police Reform*, HUFFPOST (June 5, 2020, 6:23 PM EDT), <https://www.domesticshelters.org/articles/in-the-news/don-t-use-domestic-violence-victims-to-derail-police-reform> [https://perma.cc/M65Q-V5DX].

¹³⁶ Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84, 85 (2021).

¹³⁷ LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 18 (2018).

C. Realization that Mandatory Arrest Policies are Not Productive, and Likely Harmful

As the impacts of mandatory arrest laws became known, opposition voices grew, leading to an increasingly widespread belief that these laws are not only ineffective but also harmful. As a policy matter, mandatory arrest laws could make sense if they deter incidents of domestic violence, even if the criminalization of gender-based violence does have harmful side effects.¹³⁸ However, it is unclear whether the deterrent effects outweigh the costs of such an approach. In fact, mandatory arrest laws appear to have no deterrent effect at all. Replication studies of the Minneapolis Domestic Violence Experiment have consistently shown that arrest does not reliably deter intimate partner violence. In six replication studies sponsored by the National Institute of Justice, conducted in Atlanta, Charlotte, Colorado Springs, Metro-Dade, Milwaukee, and Omaha, no clear deterrent effect of arrest was demonstrated. In some cities, arrest had no effect; in others, it had an escalating effect and predicted future violence.¹³⁹ While arrests are associated with short-term benefits, including immediate protection for the victim through separation of the parties, the disadvantages of long-term effects are thought to outweigh these benefits.¹⁴⁰

Even the authors of the Minneapolis Domestic Violence Experiment quickly warned that the study should not be taken as conclusive. They found that mandatory arrest laws caused increased violence among unemployed men.¹⁴¹ They also found that arresting abusers increases victims' death rates resulting from all natural causes.¹⁴² As early as 1991, Professor Sherman concluded that "mandatory arrests in domestic violence cases may

¹³⁸ See Leigh Goodmark, 'Something on Women', INQUEST (May 20, 2022), <https://inquest.org/something-on-women-vava> [https://perma.cc/4XR4-VPFV].

¹³⁹ Richard A. Berk et al., *The Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 AM. SOCIO. REV. 698, 705 (1992) (arguing that arrest has different effects on subsequent violence depending on the offender's background); Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOCIO. REV. 680 (1992) (arguing that arrest increased recidivism among certain groups and had no overall crime reduction effect).

¹⁴⁰ Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?, in DO ARRESTS AND RESTRAINING ORDERS WORK?* 43, 49 (Eve S. Buzawa & Carl G. Buzawa eds., 1996). See also J. David Hirschel et al., *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RSCH. CRIME & DELINQ. 7, 31 (1992) (stating that arrest is no more effective than short-term separation of the parties, or issuance of a citation to the perpetrator); SHERMAN ET AL., *supra* note 93, at 179 (analyzing the findings of a multi-year federal research program looking at the effects of police responses to domestic violence in Milwaukee, Wisconsin, Miami, Florida, Colorado Springs, Colorado, Omaha, Nebraska, and Charlotte, North Carolina, and concluding that mandatory arrest incites violence in some offenders).

¹⁴¹ See Helen V. Tauchen & Ann Dryden Witte, *The Dynamics of Domestic Violence: Does Arrest Matter?* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 4939, 1994).

¹⁴² See Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXPERIMENTAL CRIMINOLOGY 1, 16 (2015).

cause more violence against women in the long run.”¹⁴³ He continued to publicly criticize mandatory arrest laws and lamented the rapid implementation of such laws, which resulted, in part, from publicity surrounding his 1984 study. Sherman said, “[i]magine if doctors were required by law to use surgery, and not allowed to test chemotherapy as an alternative.”¹⁴⁴ By 1992, Sherman was quoted as saying, “mandatory arrest [laws] . . . make as much sense as fighting fire with gasoline.”¹⁴⁵

While it is not clear that mandatory arrest laws have deterrent effects, unsurprisingly, the fact that they lead to increased arrest rates is not debated. Domestic violence arrest rates are exponentially higher in states with mandatory arrest laws compared to states with discretionary arrest laws.¹⁴⁶ At least insofar as one believes criminal laws should serve to achieve a punitive purpose, this increase in arrests resulting from incidents of domestic violence could be a sign that mandatory arrest laws are working. That thinking, however, assumes that the perpetrators are the ones arrested. After the enactment of mandatory arrest laws across the country, arrests of women increased substantially.¹⁴⁷ The results of one study showed that the rate of female arrests rose from a four to twelve percent range to fifteen to thirty percent after the enactment of mandatory arrest laws.¹⁴⁸ According to sociologist Alesha Durfee, this increase in women arrested cannot be due to an increased use of violence by women in intimate relationships.¹⁴⁹ Instead, these arrest rates are “directly attributable to the implementation of mandatory arrest policies.”¹⁵⁰ Arrests of women are especially common in “situationally ambiguous” circumstances in which police officers may not be able to immediately distinguish the perpetrator from the victim.¹⁵¹ Victims are more likely to be arrested in states that do not discourage dual arrests. In

¹⁴³ Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 79 (1994) (quoting Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Nov. 27, 1991, at C8).

¹⁴⁴ Lawrence Sherman, *University of Cambridge—Domestic Violence and Arrests*, ACADEMIC MINUTE (May 1, 2014), <https://academicminute.org/lawrence-sherman-university-of-cambridge-domestic-violence-and-arrests> [https://perma.cc/XKE9-NLSY].

¹⁴⁵ Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2164 (1995) (citing SHERMAN ET AL., *supra* note 93, at 210).

¹⁴⁶ See DAVID HIRSCHSEL, DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES ch. 3 (2008).

¹⁴⁷ See *id.*

¹⁴⁸ Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1218 (2009) (citing Valli Rajah et al., “Aren’t I a Victim?”: Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction, 12 VIOLENCE AGAINST WOMEN 897, 898 (2006)).

¹⁴⁹ Alesha Durfee, *Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence*, 18 VIOLENCE AGAINST WOMEN 64, 75 (2012).

¹⁵⁰ *Id.*

¹⁵¹ Leigh Goodmark, *Stop Treating Domestic Violence Differently from Other Crimes*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/opinion/domestic-violence-criminal-justice-reform-too.html> (on file with the author).

these states, scholars have noted, when police officers are required to make an arrest, they may feel forced to arrest both parties because they are unable to clearly identify the predominant aggressor.¹⁵² For example, after Connecticut enacted its mandatory arrest law, about a third of the 25,000 family violence arrests in 1989 were dual arrests.¹⁵³

Mandatory arrest policies were promoted with the promise that they “ensure[] that all perpetrators, regardless of race, are treated similarly.”¹⁵⁴ But, over the last few decades, scholars have pointed out that the white feminists who pushed for these policies ignored the fact that the criminal justice system has disproportionately impacted communities of color and other communities that have been historically marginalized.¹⁵⁵ They further contend that mandatory arrest laws serve to increase racial oppression. As Professor Goodmark writes, “imperfect victims” are more likely to be arrested.¹⁵⁶ She quotes psychology researchers Kathy A. McCloskey and Mekha Rajan to define “imperfect victims” as “[w]omen who are abrasive and argumentative, who are aggressive towards their abusers for any reason (including self-defense), or who otherwise fail to conform to traditional female gender roles.”¹⁵⁷ She also notes that sex workers, members of the LGBTQ+ community, and women of color, particularly Black women, are also more likely to be arrested because discriminatory attitudes may prevent them from fitting into the category of a stereotypical “victim.”¹⁵⁸ The enactment of mandatory arrest laws has resulted in Black women being arrested at much higher rates than their white peers, even when controlling for the increase in arrests among women overall.¹⁵⁹

Scholars have also noted that the consequences of mandatory arrest laws may be more far-reaching than those resulting directly from arrest. According to Professor Sherman, “[B]lack women are dying at a much higher rate than

¹⁵² *Id.*

¹⁵³ Hirschel et al., *supra* note 15, at 259.

¹⁵⁴ Mills, *supra* note 130, at 564.

¹⁵⁵ Ruttenberg, *supra* note 112, at 172–73; Sarah Deer & Abigail Barefoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence*, 28 KAN. J.L. & PUB. POL’Y, 505, 511 (2019) (“Mandatory arrest policies have resulted in an expanded oppressive police presence in many communities, which has led to higher arrest rates of women of color and lesbians compared to white and heterosexual peers, even when the victims initiate the call for police assistance.”).

¹⁵⁶ Leigh Goodmark, *Criminalizing Survival*, INQUEST (Feb. 2, 2023), <https://inquest.org/criminalizing-survival> [<https://perma.cc/2E6Z-RWYJ>].

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see also Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 195 (1991) (noting that the “[b]attered woman syndrome relies on prevailing gender characterizations of dominant, white society”).

¹⁵⁹ Carolyn M. West, “Sorry, We Have to Take You In:” *Black Battered Women Arrested for Intimate Partner Violence*, 15 J. AGGRESSION, MALTREATMENT & TRAUMA 95, 101–02 (2007).

white women from a policy that was intended to protect all victims of domestic violence, regardless of race.”¹⁶⁰ He says that “[i]t is now clear that a pro-arrest policy has failed to protect all victims, and that a robust review of these policies is urgently needed.”¹⁶¹

Some scholars also now believe that mandatory arrest laws contribute to the escalation of intimate partner violence. Tracey Thurman articulated this fear during her testimony before Congress in 1994.¹⁶² She said that “the only reason why I never had him arrested . . . was . . . [h]e had always threatened me if I had ever called the police on him, that he would kill me.”¹⁶³ Studies have long shown that, while some batterers suffer remorse, many others believe their conduct did not justify an arrest, prompting them to retaliate against victims they believe were responsible for their uncalled-for punishment.¹⁶⁴ And most victims of domestic violence choose not to testify in court if a formal charge is brought.¹⁶⁵ The idea that more arrests necessarily lead to more prosecutions and convictions, and consequently, more frequent long-term separation of perpetrators from victims, is therefore highly unlikely. Studies also indicate that an unintended consequence of mandatory arrest statutes is an increase in domestic violence.¹⁶⁶ At least one study has shown that the rate of these homicides is about fifty percent higher in states with mandatory arrest laws compared to states with discretionary arrest laws.¹⁶⁷

¹⁶⁰ *Mandatory Arrest in Domestic Violence Call-Outs Causes Early Death in Victims*, UNIV. OF CAMBRIDGE (Mar. 3, 2014), <https://www.cam.ac.uk/research/news/mandatory-arrest-in-domestic-violence-call-outs-causes-early-death-in-victims> [<https://perma.cc/DWF7-2JKV>].

¹⁶¹ *Id.*

¹⁶² *Women and Violence, Hearing Before the S. Comm. on Judiciary*, 101st Cong. 107 (1990) (statement from Tracey Motuzick, formerly Tracey Thurman).

¹⁶³ *Id.*

¹⁶⁴ See Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 *LAW & SOC’Y REV.* 169, 174 (2003) (explaining that “the highest homicide risk is during the period when a battered victim leaves the relationship, suggesting a potential ‘retaliation effect’ from exposure reduction associated with domestic violence interventions” and that “[s]uch retaliation effects could occur if the intervention . . . angers or threatens the abusive partner without effectively reducing contact with the victim.”).

¹⁶⁵ See Mordini, *supra* note 44, at 318.

¹⁶⁶ Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 *CRIM. JUST. & BEHAV.* 306, 308 (1998); see also April M. Zeoli et al., *Mandatory, Preferred, or Discretionary: How the Classification of Domestic Violence Warrantless Arrest Laws Impacts Their Estimated Effects on Intimate Partner Homicide*, 35.2 *EVALUATION REV.* 129, 134 (2011); Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 *J. PUB. ECON* 85, 85 (“I find that mandatory arrest laws actually increased intimate partner homicides.”).

¹⁶⁷ Iyengar, *supra* note 166, at 93. *But see* Yoo-Mi Chin & Scott Cunningham, *Revisiting the Effect of Warrantless Domestic Violence Arrest Laws on Intimate Partner Homicides*, 179 *J. PUB. ECON.* 1, 1 (2019) (“[W]e find no evidence that mandatory arrest laws, which remove officer discretion by making arrest a required action, increased intimate partner homicides.”).

Feminist scholars also criticize mandatory arrest laws for “having the unanticipated and unfortunate effect of undermining the victim’s autonomy.”¹⁶⁸ These laws—once celebrated for relieving the victim of decision-making power—have more recently been criticized for this very reason. These laws give police officers complete authority to arrest, irrespective of the victim’s views. They therefore “reinforce[] the view that a woman cannot make her own life decisions and that the state knows what is best for her”¹⁶⁹ and “imply a belief that battered women cannot make rational choices at a time of crisis.”¹⁷⁰ They paternalistically deprive victims of the opportunity to play an active role in decision-making, thereby preventing them from the ability to regain control of their futures. Additionally, in many cases, victims of domestic abuse do not want their abuser arrested for various deeply personal and complex reasons. For a woman trying to minimize violence from within the relationship, the arrest of her partner could be the worst possible outcome. Mandatory arrest laws take away the woman’s ability to make this choice, suggesting that she is incapable of making that choice herself, so it must be made for her.

Some scholars point out that mandatory arrest laws also result in adverse social outcomes that affect not only the individual arrested but also their families, communities, and society generally.¹⁷¹ And the costs can be severe. As Professor Rachel A. Harmon explains:

An arrest can end ongoing violence. It may deter future crime, even if charges are subsequently dropped. It has symbolic value. And it may increase the chances that prosecutors will pursue the case to conviction. . . .

However, arrests in domestic violence cases can also have substantial marginal costs. . . . [A]n arrest can lead to lost wages and lost productivity (including childcare and housework); decreased future income; legal costs; forgone education; humiliation; and a decreased quality of life, including from consequences related to housing, child custody, and immigration status. . . .

Mandatory and preferred arrest policies have the predictable consequence of causing more innocent suspects to be arrested, since the policies reduce officer discretion not to

¹⁶⁸ Teresa Manring, Comment, *Minding the Gap in Domestic Violence Legislation: Should States Adopt Course of Conduct Laws?*, 111 J. CRIM. L. & CRIMINOLOGY 773, 801 (2021).

¹⁶⁹ Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1204 (2009).

¹⁷⁰ Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. FEMINISM 75, 120 (2008).

¹⁷¹ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 913–15 (2015).

arrest suspects who satisfy the legal standard for arrest but are unlikely to be prosecuted or successfully convicted.¹⁷²

And what happens when the victim of domestic abuse is the one arrested? Presumably, the experience is even more harrowing. The victim, having just suffered abuse at the hands of their partner, is suddenly not only blamed for that abuse but forced to suffer the legal consequences. And the tide of these consequences reaches far beyond the individual arrested. The arrest of a mother, or any family member, is likely to traumatize children who may be present for the arrest.¹⁷³ After an arrest, parents—even temporarily—are separated from their children. And the consequences extend far past immediate separation. The immigration and employment consequences impact the entire family's stability.

Of course, these consequences can be applied to almost all crimes, including those involving arrest. An arrest has severe consequences by design. But in situations in which police officers *must* arrest, if they have probable cause to believe a crime has occurred, the consequences are less likely to be mitigated by police exercising their discretion not to make an arrest. Unlike in other situations, mandatory arrest laws prevent officers from choosing not to make an arrest when circumstances are ambiguous or appear non-serious.

D. *A Changed Scholarly Consensus on Mandatory Arrest*

With very limited exceptions,¹⁷⁴ by the turn of the twenty-first century, almost no legal scholar or social scientist actively promoted mandatory arrest laws. To the contrary, scholars now generally agree on the harmful implications of these laws.¹⁷⁵ The words of Professor Linda Mills sum up the views of virtually all academics on mandatory arrest policies: “At worst, the criminal justice system increases violence against women. At best, it has little or no effect.”¹⁷⁶ Professor Goodmark has said that “the criminal justice system isn’t stopping intimate partner violence. And it might even be making it worse.”¹⁷⁷ These opinions offer just a taste of the criticisms of mandatory

¹⁷² *Id.* (citations omitted).

¹⁷³ BUZAWA & BUZAWA, *supra* note 46, at 26.

¹⁷⁴ See Danielle Lynn Lordi, Note, *Police Liability Under State Tort Law for Failure to Enforce Protection Orders: The Last Demand for Accountability*, 85 OR. L. REV. 325, 349 (2006); Corinne L. McCann, Note, *What Can States Do to Maintain Victims' Security, Deter Aggressor's Repeated Abuse, and Motivate Police Departments to Pursue Criminals in the Domestic Violence Context?*, 30 SETON HALL LEGIS. J. 509, 539 (2006); Jenny Woodson, *Sanctioned Indifference: Addressing Domestic Violence in the Courts and Beyond*, 10 GEO. J. GENDER & L. 1037, 1041 (2009).

¹⁷⁵ Kim, *supra* note 15, at 267.

¹⁷⁶ LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 6 (2003).

¹⁷⁷ Goodmark, *supra* note 151.

arrest laws that have dominated academic literature in the area for the last two decades.¹⁷⁸ Studies performed by social scientists also highlight the unintended, perverse consequences of mandatory arrest policies.¹⁷⁹ As one scholar put it, “The critique of criminalization and the admonishment of the feminist anti-violence movement for their complicity is going mainstream.”¹⁸⁰

But this mainstream critique of mandatory arrest laws did not happen overnight. The change in legal scholarship from a strong push for enacting mandatory arrest laws to widespread criticism of them after their implementation has been gradual and subtle. While there has been a dramatic shift in discussions about the efficacy of these laws, feminists once in favor of mandatory arrest laws have not publicly stated that they have changed their minds. Similarly, scholars who now criticize mandatory arrest laws were not writing about these laws in the 1990s, when they were enacted. Rather than a revelation at the individual level, changes in the conversation about mandatory arrest laws happened more gradually.

¹⁷⁸ See, e.g., Ruttenberg, *supra* note 112, at 174; Pamela B. Bracher, *Mandatory Arrest for Domestic Violence: The City of Cincinnati’s Simple Solution to a Complex Problem*, 65 U. CIN. L. REV. 155, 158 (1996); Mills, *supra* note 130, at 558; Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 73 (2000); Ryah Lilith, *Reconsidering the Abuse That Dare Not Speak Its Name: A Criticism of Recent Legal Scholarship Regarding Same-Gender Domestic Violence*, 7 MICH. J. GENDER & L. 181, 215 (2001); Jessica Dayton, Note, *The Silencing of a Woman’s Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN’S L.J. 281, 297 (2003); Sack, *supra* note 27, at 1672; Holly Maguigan, *Wading into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER & SOC. POL’Y & L. 427, 435 (2003); Mordini, *supra* note 44, at 317; Rajah et al., “Aren’t I a Victim?": Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction, 12 VIOLENCE AGAINST WOMEN 897, 909 (2006); Frye et al., *Dual Arrest and Other Unintended Consequences of Mandatory Arrest in New York City: A Brief Report*, 22 J. FAM. VIOLENCE 397, 401–02, 404 (2007); Gruber, *supra* note 131, at 823–24; Pavlidakis, *supra* note 169, at 1204; Thomas L. Hafemeister, *If All You Have Is a Hammer: Society’s Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 978 (2011); Durfee, *supra* note 149, at 75; Zelcer, *supra* note 6, at 546; Mimi E. Kim, *VAWA @ 20: The Mainstreaming of the Criminalization Critique: Reflections on VAWA 20 Years Later*, 18 CUNY L. REV. 52, 55 (2014); Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 71 (2017); Angela de la Garza, *The Re-Victimization of Domestic Violence Victims*, 35 BYU J. PUB. L. 35, 80 (2020); Meghan Boone, *Perverse & Irrational*, 16 HARV. L. & POL’Y REV. 393, 437 (2022); Courtney K. Cross, *Coercive Control and the Limits of Criminal Law*, 56 U.C. DAVIS L. REV. 195, 227 (2022).

¹⁷⁹ See, e.g., Schmidt & Sherman, *supra* note 140, at 43; Carol Bohmer et al., *Domestic Violence Law Reforms: Reactions from the Trenches*, 29 J. SOC. & SOC. WELFARE 71, 78 (2002); Drew Humphries, *No Easy Answers: Public Policy, Criminal Justice, and Domestic Violence*, 2 CRIMINOLOGY & PUB. POL’Y 91, 91 (2006); Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women*, 2 CRIMINOLOGY & PUB. POL’Y, 81, 82 (2006); Rajah et al., *supra* note 178, at 904; Iyengar, *supra* note 166, at 85; Peter S. Hovmand et al., *Victims Arrested for Domestic Violence: Unintended Consequences of Arrest Policies*, 25 SYS. DYNAMICS REVIEW 161, 176–77 (2009); Dennis M. Cullinane, *Offender-Victim Body Mass Ratio and the Decision to Arrest in Cases of Intimate Partner Violence*, 49 MED. SCI. L. 200, 201 (2009).

¹⁸⁰ Kim, *supra* note 15, at 55.

E. Gradual Changes in Federal Incentives

Over the years, the DOJ's position has undergone a similar change to those of advocates and scholars. Without expressly withdrawing support for mandatory arrest policies, the Department has signaled its position through action. A 1998 press release from DOJ's Office of Violence Against Women titled "Justice Department Funds Community Initiatives to Treat Domestic Violence as a Crime" celebrated mandatory arrest laws, saying that new grants to help communities "implement policies that mandate or encourage the arrest of batterers," mark another step forward in the fight against domestic violence.¹⁸¹ A 2001 DOJ press release celebrated New York's enactment of a "stronger mandatory arrest law."¹⁸² It announced additional funding for the state to "promote partnerships among law enforcement" to combat domestic violence.¹⁸³ But by 2016, then-Attorney General Loretta Lynch publicly acknowledged the unintended impacts of mandatory arrest policies on women and girls of color.¹⁸⁴ The Office on Violence Against Women and the Office of Juvenile Justice and Delinquency Prevention held a roundtable to discuss these consequences.¹⁸⁵ And since then, the executive branch has been silent on the issue, despite a revolving door of presidential administrations.

Congress has also subtly backed away from its initial endorsement of mandatory arrest policies. The initial version of VAWA provided that states, tribal governments, or units of local government "certify that their laws or official policies encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed."¹⁸⁶ Then, in 2006, with no formal debate on the subject, Congress removed the word "mandate" when it reauthorized VAWA.¹⁸⁷ A 2016 change in the grant program's name also signaled a shift in Department priorities. Once called the Grants to Encourage Arrest Policies and Enforcement of Protection

¹⁸¹ Press Release, U.S. Dep't of Just., Justice Department Funds Community Initiatives to Treat Domestic Violence as a Crime (Sept. 15, 1998), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/pressreleases/1998/VAW98204.htm> [https://perma.cc/EL7H-C5BD].

¹⁸² Press Release, U.S. Dep't of Just., Off. Just. Programs, Justice Department Awards New York \$5.8 Million To Combat Violence Against Women (Sept. 27, 2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/pressreleases/2001/VAWO1148.html> [https://perma.cc/CE3D-7YXZ].

¹⁸³ *Id.*

¹⁸⁴ Loretta E. Lynch, Attorney General, U.S. Dep't of Just., Remarks at the White House Women and the Criminal Justice System Convening (March 30, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-women-and-criminal-justice> [https://perma.cc/YW28-Z3XK].

¹⁸⁵ *Id.*

¹⁸⁶ 42 U.S.C. § 3796hh (1994) (transferred and codified as 34 U.S.C. § 10461(c)).

¹⁸⁷ 42 U.S.C. § 3796hh (2006) (transferred and codified as 34 U.S.C. § 10461(c)).

Orders Program¹⁸⁸ and colloquially known as the “Arrest Program,” it is now titled the Improving Criminal Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program.¹⁸⁹

Through the enactment of mandatory arrest policies, domestic violence has become one of the most prominent examples of criminalization being used to accomplish social justice goals.¹⁹⁰ And, in the time that scholars have questioned a criminalization approach to preventing domestic violence, society has continued to question criminalization in general. The roles of law enforcement and police officers’ ability to protect the public have always been debated. But after the death of George Floyd and nationwide “Black Lives Matter” protests, debates about the role of law enforcement and its contribution to—or its detractor from—social justice initiatives were given the spotlight. “Defund the police” became a rallying cry for some. Since then, public trust in law enforcement has fluctuated. A 2022 Gallup poll found that only forty-five percent of surveyed Americans were confident in the police, down three percentage points from the previous low of forty-eight percent in 2020.¹⁹¹ As of 2024, a Gallup poll found that confidence had rebounded, with the percentage of Americans who say they have confidence in police rising to fifty-one percent.¹⁹² But signs show that public confidence may be slipping again. Police leaders have expressed concerns that the Trump Administration’s immigration enforcement efforts have eroded trust in local law enforcement.¹⁹³ Civilian crime reporting has experienced a significant decline, and high-profile acts of police violence may be the cause.¹⁹⁴

Many have also called to end “mass incarceration,” citing its immense social and fiscal costs.¹⁹⁵ Over the last decade, activists have mobilized to end

¹⁸⁸ OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUST. GRANTS TO ENCOURAGE ARREST POLICIES AND ENFORCEMENT OF PROTECTION ORDERS PROGRAM 3 (2006).

¹⁸⁹ See Nadine M. Neufville, *Funds Available to Improve the Criminal Justice Response to Sexual Assault, Domestic Violence, Dating Violence, and Stalking*, U.S. DEP’T OF JUST. (Feb. 22, 2021), <https://www.justice.gov/ovw/blog/funds-available-improve-criminal-justice-response-sexual-assault-domestic-violence-dating> [https://perma.cc/AXT5-NVF3].

¹⁹⁰ See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 180 (2007).

¹⁹¹ Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, but Police Up*, GALLUP (July 15, 2024), <https://news.gallup.com/poll/647303/confidence-institutions-mostly-flat-police.aspx> [https://perma.cc/V3MN-JJZ9].

¹⁹² *Id.*

¹⁹³ Meg Anderson, *Police Say ICE Tactics Are Eroding Public Trust in Local Law Enforcement*, NPR (Mar. 30, 5:00 AM ET), <https://www.npr.org/2025/03/30/nx-s1-5304236/police-say-ice-tactics-are-eroding-public-trust-in-local-law-enforcement> [https://perma.cc/8T7X-JWXV].

¹⁹⁴ *The Impact of Police Violence on Community Engagement and Public Trust*, BROWN UNIVERSITY (Feb. 28, 2025), <https://pstc.brown.edu/news/2025-02-28/police-violence-and-public-trust> [https://perma.cc/G4CX-7P74].

¹⁹⁵ See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1282 (2004) (“Locking up someone places an immediate

the era of mass incarceration, pushing states to legalize marijuana and other drugs, lobbying for the repeal of “draconian” mandatory sentencing laws, and supporting legislation that allows judges the option to release prisoners early.¹⁹⁶ This advocacy, alongside the federal government’s backpedaling from a previous endorsement of mandatory arrest policies and the chorus of scholars highlighting the perverse incentives of mandatory arrest laws, might suggest that efforts to repeal them would be common. But they are not.

IV. PERSISTENCE OF MANDATORY ARREST POLICIES DESPITE HARM INEFFICIENCY

Despite the apparent consensus that mandatory arrest laws are harm inefficient, they remain on the books. And even proposals to repeal these laws are nowhere to be found. While legislators have amended the statutory language, they have stopped short of repealing these laws altogether.

A. Endurance of Mandatory Arrest Laws

Most states still have some form of mandatory arrest laws. Today, twelve states and the District of Columbia have laws requiring that an officer make an arrest if they have probable cause to believe that a domestic violence incident has occurred.¹⁹⁷ These statutes require an arrest regardless of

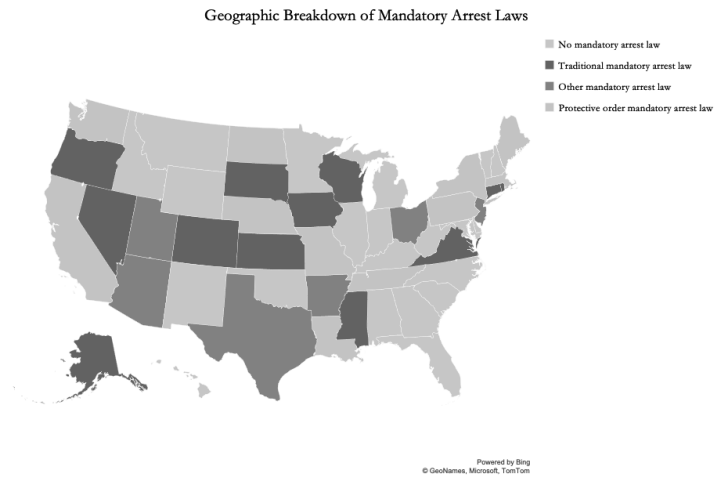
financial and social strain on the rest of the family.”); Andrew D. Leipold, *Is Mass Incarceration Inevitable*, 56 AM. CRIM. L. REV. 1579, 1579 (2019) (“The claim that American justice system engages in ‘mass incarceration’ is now a cliché, albeit one that seems entirely justified by both the number and rate of people who are behind bars.”); Tasseli McKay & William A. Darity Jr., *Who Benefits from Mass Incarceration? A Stratification Economics Approach to the “Collateral Consequences” of Punishment*, 20 ANN. REV. L. & SOC. SCI. 309, 310 (2024) (“Social scientists continue to declare that mass incarceration, a defining social force of the last half century, is on its way out.”).

¹⁹⁶ Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 316 (2012) (“A dozen states have already decriminalized marijuana to some extent, and state legislators from across the country cite the potential savings in law enforcement, court, and jail costs.”); Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 379 (2020) (“The last decade has seen the beginning of a new era in United States criminal justice policy, one characterized by a waning commitment to overcriminalization, mass incarceration, and a punitive War on Drugs as well as a growing regret for the consequences of our prior policies.”); Clifton Barnes, *ABA Kennedy Commission Recommends Criminal Justice Reform, Seeks State Support*, 29 BAR LEADER 6, 20 (2005) (“The ABA, which has opposed mandatory minimums since 1974, has applied for grants to help with the implementation program for model states, which will include hiring staff for communication and lobbying efforts and flying experts into states to discuss the issue.”); Melissa Johnson, *Reversing the Evils of Federal Mandatory Minimum Sentences: Is Clemency the Only Answer?*, 33 J. C.R. ECON. DEV. 385, 388 (2020) (“Rather, the Trump Administration understood legislative sentencing reform was the better solution to provide lasting relief to first-time, low-level, and nonviolent drug offenders serving draconian mandatory minimum sentences.”); Harold J. Krent & Robert Rucker, *The First Step Act - Constitutionalizing Prison Release Policies*, 74 RUTGERS U. L. REV. 631, 633 (2022).

¹⁹⁷ ALASKA STAT. § 18.65.530 (2025); COLO. REV. STAT. § 18-6-803.6 (2025); CONN. GEN. STAT. ANN. § 46b-38b (West 2023); D.C. CODE ANN. § 16-1031 (2021); IOWA CODE ANN. § 236.12 (West 2018); KAN. STAT. ANN. § 22-2307 (2019); MISS. CODE. ANN. § 99-3-7 (2025);

whether the alleged crime constitutes a misdemeanor or felony (“traditional mandatory arrest laws”). Twelve states require arrest if there is probable cause to believe abuse occurred and a protective order has been violated.¹⁹⁸ Still, six more states prescribe certain circumstances under which police shall make a warrantless arrest.¹⁹⁹

Figure A: Geographic Breakdown of Mandatory Arrest Laws



Except for North Carolina, every state that enacted a traditional mandatory arrest law in the 1990s or earlier still has that law.²⁰⁰ Only two states that once enacted protective order mandatory arrest laws have repealed

NEV. REV. STAT. § 171.137 (2023); OR. REV. STAT. ANN. § 133.055 (2025); 12 R.I. GEN. LAWS ANN. § 29-3 (2014); S.D. CODIFIED LAWS § 25-10-35 (2015); VA. CODE ANN. § 19.2-81.3 (2025); WIS. STAT. ANN. § 968.075 (West 2016).

¹⁹⁸ CAL. PENAL CODE § 13701 (West 2022); KY. REV. STAT. ANN. § 431.005 (West 2019); LA. STAT. ANN. § 46:2140 (2015); ME. REV. STAT. ANN. tit. 19-A, § 4114 (West 2025); MASS. GEN. LAWS ANN. ch. 209A, § 6 (2023); MO. REV. STAT. § 455.085 (2022); NEB. REV. STAT. § 26-119 (2025); N.Y. CRIM. PROC. LAW § 140.10 (McKinney 2025); N.D. CENT. CODE ANN. § 14-07.1-11 (2026); 23 PA. STAT. AND CONS. STAT. ANN. § 6113 (West 2025); TENN. CODE ANN. § 36-3-611 (2025); WASH. REV. CODE ANN. § 10.31.100 (2023). Four traditional mandatory arrest laws also explicitly require that police officers arrest if there is probable cause to believe abuse occurred and a protection order has been violated. ALASKA STAT. § 18.65.530 (2022); COLO. REV. STAT. § 18-6-803.5 (2025); KAN. STAT. ANN. § 22-2307 (2025); MISS. CODE ANN. § 99-3-7 (2025). The rest of the traditional mandatory arrest laws encapsulate those circumstances.

¹⁹⁹ ARIZ. REV. STAT. ANN. § 13-3601 (2014); ARK. CODE ANN. § 16-81-113 (2025); N.J. STAT. ANN. § 2C:25-21 (2022); OHIO REV. CODE ANN. § 2935.032 (LexisNexis 2025); TEX. CODE CRIM. PROC. ANN. art. 14.03 (West 2025); UTAH CODE ANN. § 77-36-2.2 (LexisNexis 2023).

²⁰⁰ North Carolina’s traditional mandatory arrest law was repealed in 1998, after which a protective order mandatory arrest law was in effect until 2002. N.C. GEN. STAT. § 50B-4(b) (2025). It is unclear why these changes were made, in part because no legislative history is available.

those statutory provisions.²⁰¹ In the last decade, no state has enacted a mandatory arrest law. Instead, states continue to have them as holdovers from a time when their harms were not fully recognized.

Figure B: Endurance of Mandatory Arrest Laws Over the Years (Alabama – Missouri)

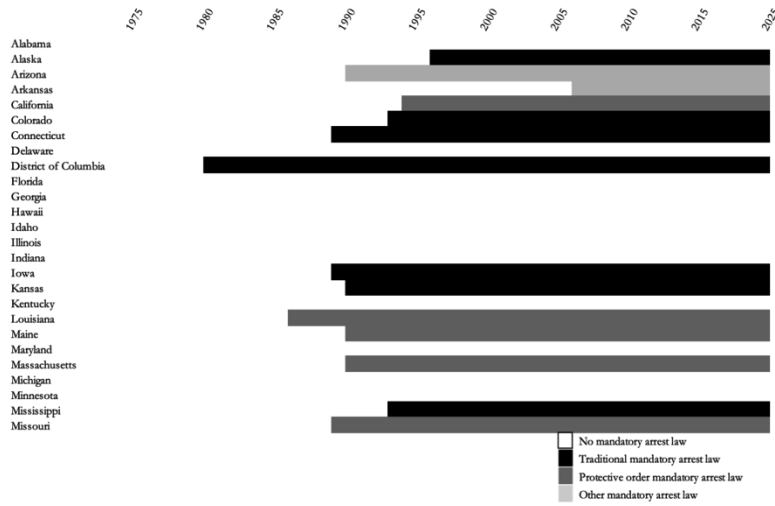
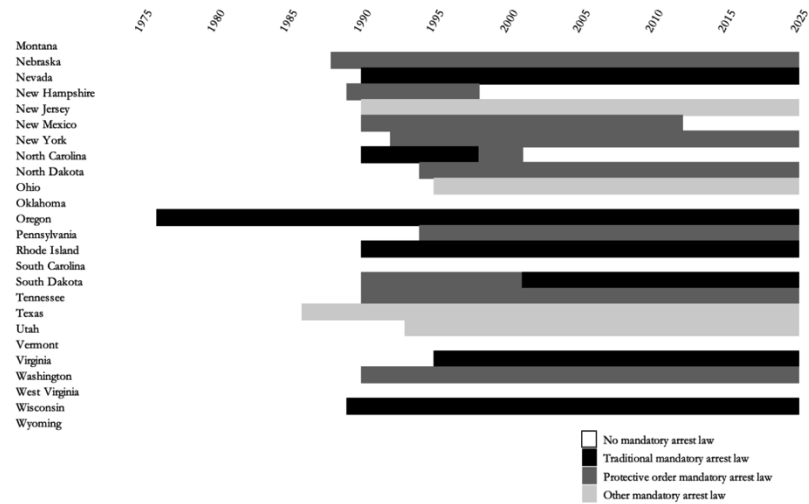


Figure C: Endurance of Mandatory Arrest Laws Over the Years (Montana – Wyoming)



²⁰¹ New Hampshire’s protective order mandatory arrest law was in effect from 1990 to 1998. N.H. REV. STAT. ANN. §§ 173-B:8 I(a), 173-B:10 (2025). New Mexico’s protective order mandatory arrest law was in effect from 1991 to 2012. N.M. STAT. ANN. § 40-13-7 (2025).

B. Amendments to, But Not Repeal of, Mandatory Arrest Laws

Legislators did not forget about mandatory arrest laws. Over the years, legislatures nationwide have amended these laws but kept the mandatory arrest language in place. Some states have added “dual arrest” language discouraging police from arresting both persons involved in an incident. For example, in Connecticut, the 2018 legislature added language specifying that mandatory arrest provisions “shall be construed to discourage, when appropriate, but not prohibit, dual arrests.”²⁰² This change came after growing attention to the “dual arrest problem” in Connecticut, where dual arrests were made in about twenty percent of domestic disturbance cases in which at least one arrest was made, compared to the seven-percent national average.²⁰³

Some states have also added statutory provisions with “predominant-aggressor” language requiring police to first identify the predominant aggressor and arrest that individual.²⁰⁴ Laws in New Hampshire, Massachusetts, and Virginia specifically instruct police officers to identify a predominant aggressor.²⁰⁵ Other states, including South Dakota, instruct officers to evaluate several factors in determining whether a person is a “predominant physical aggressor.”²⁰⁶ Factors that officers must consider that weigh in favor of considering someone a “predominant physical aggressor” include: “[t]he intent to protect victims of domestic abuse,” “[t]he comparative extent of injuries inflicted or serious threats creating fear of physical injury,” and “[t]he history of domestic abuse between the persons involved.”²⁰⁷ And if the officer determines, based on these factors, that someone is the predominant physical aggressor, these states’ laws require the officer to arrest that person. In Iowa, officers “shall consider the need to protect victims of domestic abuse, the relative degree of injury or fear inflicted on the persons involved, and any history of domestic abuse between the persons involved” in identifying the predominant aggressor.²⁰⁸

²⁰² CONN. GEN. STAT. § 46b-38b (2018).

²⁰³ CONN. COAL. AGAINST DOMESTIC VIOLENCE, DOMINANT AGGRESSOR: REDUCING DECADES OF DUAL ARREST IN CONNECTICUT 1 (2018).

²⁰⁴ N.H. REV. STAT. ANN. § 173-B:10 (2025); MASS. GEN. LAWS ANN. ch. 209A, § 6 (2010); ARK. CODE ANN. § 16-81-113 (2025); IOWA CODE ANN. § 236.12 (West 2018); CONN. GEN. STAT. ANN. § 46b-38b (West 2025).

²⁰⁵ N.H. REV. STAT. ANN. § 173-B:10 (2025); MASS. GEN. LAWS ANN. ch. 209A, § 6 (2010); VA. CODE ANN. § 19.2-81.3 (2025).

²⁰⁶ Some state statutes also use the language “dominant aggressor,” “predominant aggressor,” or “principal aggressor,” but these terms have the same meaning. *See, e.g.*, S.D. CODIFIED LAWS § 25-10-35 (2025); WASH. REV. CODE § 10.31.100 (2023).

²⁰⁷ ARK. CODE ANN. § 16-81-113 (2025).

²⁰⁸ IOWA CODE ANN. § 236.12 (West 2018).

Interestingly, states with mandatory arrest laws lack predominant-aggressor language, whereas states without mandatory arrest statutes have predominant-aggressor provisions. Of the thirty-five jurisdictions with statutory provisions requiring law enforcement officers to determine the predominant aggressor prior to arrest,²⁰⁹ only eleven are mandatory arrest states. Furthermore, a few mandatory arrest states do not have predominant-aggressor language.²¹⁰

Some scholars point to dual-arrest and predominant-aggressor language as a solution to at least some of the problems associated with mandatory arrest laws.²¹¹ They argue that recent legislative action has ameliorated concerns about mandatory arrest statutes. They conclude that adding dual-arrest and predominant-aggressor language has lessened the harmful effects of mandatory arrest laws, obviating the need to repeal these laws altogether. Interestingly, however, in more than half of the states with both mandatory arrest statutes and dual-arrest or predominant-aggressor language, the language was not added later; it was part of the mandatory arrest provisions initially enacted.²¹² There also does not appear to have been a large push by states to resolve the problems associated with mandatory arrest laws by using dual-arrest or predominant-aggressor language, as states that did add such language did so sporadically.²¹³

²⁰⁹ ALA. CODE § 13A-6-134 (2019); ALASKA STAT. § 18.65.530 (2022); ARK. CODE ANN. § 16-81-113 (2025); CAL. PEN. CODE § 13701 (West 2022); COLO. REV. STAT. § 18-6-803.6 (2025); CONN. GEN. STAT. ANN. § 46b-38b (West 2023); FLA. STAT. § 784.046 (2025); GA. CODE ANN. § 17-4-20.1 (2024); IOWA CODE § 236.12 (West 2018); LA. STAT. ANN. § 46:2140 (2015); MD. CODE ANN. CRIM. PROC. § 2-204 (LexisNexis 2025); MICH. COMP. LAWS § 776.22 (2025); MINN. STAT. § 629.342 (2014); MISS. CODE ANN. § 99-3-7 (2025); MO. REV. STAT. § 455.085 (2022); MONT. CODE ANN. 46-6-311 (2025); NEB. REV. STAT. § 29-439 (2025); NEV. REV. STAT. ANN. § 171.137 (West 2023); N.H. REV. STAT. ANN. § 173-B:10 (2025); N.J. STAT. ANN. § 2C:25-21 (2022); N.M. STAT. ANN. § 40-13-7 (West 2008); N.Y. CRIM. PROC. LAW § 140.10 (McKinney 2025); N.D. CENT. CODE § 14-07.1-10 (2025); OHIO REV. CODE ANN. 2935.03 (LexisNexis 2025); OKLA. STAT. ANN. tit. 22, § 60.16 (West 2025); OR. REV. STAT. § 133.055 (2025); 12 R.I. GEN. LAWS § 29-3 (2014); S.C. CODE ANN. § 16-25-70 (2015); S.D. CODIFIED LAWS § 25-10-35 (2015); TENN. CODE ANN. § 36-3-619 (2017); TEX. OCC. CODE ANN. § 1701.253 (West 2025); UTAH CODE ANN. § 77-36-2.2 (LexisNexis 2023); VA. CODE ANN. § 19.2-81.3 (2025); WASH. REV. CODE § 10.31.100 (2023); WIS. STAT. ANN. § 968.075 (West 2016).

²¹⁰ ARIZ. REV. STAT. ANN. § 13-3601 (2014); D.C. CODE § 16-1031 (2021); KAN. STAT. ANN. § 22-2307 (2019); ME. REV. STAT. ANN. tit. 19-A, § 4012 (West 2023).

²¹¹ *Arrests Can Be an Effective Intervention for Intimate Partner (Domestic) Violence*, NAT'L INST. OF JUST. (May 17, 2009), <https://nij.ojp.gov/topics/articles/arrests-can-be-effective-intervention-intimate-partner-domestic-violence> [<https://perma.cc/PF8Y-BZPW>].

²¹² See ALASKA STAT. § 18.65.530 (2022); COLO. REV. STAT. § 18-6-803.6 (2025); CONN. GEN. STAT. ANN. § 46b-38b (West 2025); IOWA CODE ANN. § 236.12 (2018); MISS. CODE ANN. § 99-3-7 (2025); NEV. REV. STAT. ANN. § 171.137 (West 2023); OR. REV. STAT. ANN. § 133.055 (2025); 12 R.I. GEN. LAWS ANN. § 29-3 (2014); S.D. CODIFIED LAWS § 25-10-35 (2025); VA. CODE ANN. § 19.2-81.3 (LexisNexis 2025).

²¹³ ALASKA STAT. § 18.65.530 (2007); ARK. CODE ANN. § 16-81-113 (2025); COLO. REV. STAT. § 18-6-803.6 (2025); CONN. GEN. STAT. ANN. § 46b-38b (West 2025); IOWA CODE § 236.12 (2018); LA. STAT. ANN. § 46:2140 (2025); MINN. STAT. § 629.342 (2025); MISS. CODE ANN. §

Regardless of the time dual-arrest and predominant-aggressor language was included, it remains unclear to what degree such language mitigates problems associated with mandatory arrest laws. While states adding this language have been successful in lowering the number of dual arrests and arrests of women,²¹⁴ such language does not mitigate all the problems associated with mandatory arrest laws. No study has demonstrated that adding dual-arrest or predominant-aggressor language deters potential perpetrators from committing crimes of domestic violence. And nothing suggests that such language mitigates the escalation of future violence resulting from an arrest. It also appears unlikely that this language eliminates the disparate racial impact of mandatory arrest laws or ameliorates other problems associated with them, including preventing arrests from escalating future violence, restoring women's autonomy, and positively influencing social outcomes.

It is also notable that, in the states that added dual-arrest or predominant-aggressor statutory language, legislatures chose to insert such language but stopped short of repealing the mandatory arrest language entirely.²¹⁵ The decision to amend these statutes rather than repeal them demonstrates—at a minimum—that legislators were aware that a mandatory arrest law was on the books. Legislators were also likely aware of the controversy surrounding mandatory arrest laws and of the harms they could cause if they decided to add dual-arrest or predominant-aggressor language. In Connecticut, for example, the legislature passed a bill in 2020 mandating that police officers evaluate the situation, attempt to interview the parties, and decide which individual is the “dominant aggressor.”²¹⁶ Media reports and advocacy groups celebrated the law's passage as the state legislature was finally addressing dual

99-3-7 (2025); NEV. REV. STAT. ANN. § 171.137 (West 2023); N.Y. CRIM. PROC. LAW § 140.10 (McKinney 2025); N.D. CENT. CODE § 14-07.1-01 (2022); OR. REV. STAT. § 133.055 (2025); 12 R.I. GEN. LAWS § 29-3 (2014); S.D. CODIFIED LAWS § 25-10-35 (2015); VA. CODE ANN. § 19.2-81.3 (LexisNexis 2025).

²¹⁴ David Hirschel et al., *A 10-Year Study of the Impact of Intimate Partner Violence Primary Aggressor Laws on Single and Dual Arrest*, 2017 J. INTERPERSONAL VIOLENCE 1, 26 (2017); Cheryl Fraehlich & Jane Ursel, *Arresting Women: Pro-Arrest Policies, Debates, and Developments*, 29 J. FAM. VIOLENCE 507, 511 (2014).

²¹⁵ ARK. CODE ANN. § 16-81-113 (2007); CONN. GEN. STAT. ANN. § 46b-38b (West 2023); LA. STAT. ANN. § 46:2140 (2015); MISS. CODE ANN. § 99-3-7 (2025); N.Y. CRIM. PROC. LAW § 140.10 (2025); N.D. CENT. CODE § 14-07.1-01 (2022); VA. CODE ANN. § 19.2-81.3 (2025); MINN. STAT. § 629.342 (2014).

²¹⁶ S. 466, Gen. Assemb., Reg. Sess. (Conn. 2018).

arrests.²¹⁷ But, notably, under the new Connecticut law, “officers still have authority to make dual arrests.”²¹⁸

C. *Lack of Proposals*

Except for the two states (New Hampshire and North Carolina) that removed mandatory arrest requirements, proposals to repeal them altogether are nonexistent. It is not that proposals to repeal these laws have failed to pass; they were never introduced in the first place. Indeed, in jurisdictions with mandatory arrest laws, there has been no proposed legislation to repeal them.

V. WHY MANDATORY ARREST LAWS HAVE NOT CHANGED

Given the plethora of academic articles discussing the harmful effects of mandatory arrest laws and calling for their repeal, why do these laws remain? And why is there no movement to change them? How exactly this issue—which previously received so much attention—has largely flown under the radar after an imperfect solution was imposed is perplexing. Over the last three decades, controversy has surrounded mandatory arrest laws in the academic literature.²¹⁹ In the policymaking sphere, however, there is silence.

This silence may be at least partially explained by the fact that the stakeholder groups that once promoted mandatory arrest laws have perverse incentives to advocate for their repeal, or at least incentives are lacking. Mandatory arrest laws have turned out to be a liability safety net for law enforcement. Activists who might otherwise advocate for the repeal of these laws appear to have divergent priorities. And groups and individuals with a strong interest in repealing mandatory arrest laws have little sway in the legislative process.

A. *Liability Safety Net for Law Enforcement*

Groups representing law enforcement were once among the only groups criticizing the push for mandatory arrest legislation.²²⁰ After all, one of the

²¹⁷ See Karen Jarmoc, *Opinion: Senate-Approved Bill Increases Victim Safety in Dual Arrests*, CT MIRROR (May 1, 2019, 11:00 AM), <https://ctmirror.org/2019/05/01/senate-approved-bill-increases-victim-safety-in-dual-arrests> [https://perma.cc/HB2K-ZKWJ]; Sammy Westfall, *State Law Changes Address Domestic Violence Dual Arrests*, YALE DAILY NEWS (Jan. 25, 2019, 4:00 AM), <https://yaledailynews.com/blog/2019/01/25/state-law-changes-address-domestic-violence-dual-arrests> [https://perma.cc/FN9Z-RXJD].

²¹⁸ Westfall, *supra* note 217.

²¹⁹ See sources cited *supra* notes 178–79.

²²⁰ See James Heaney & Jon R. Sorenson, *Domestic Violence Bill Requires Police to Arrest Abusive Spouses*, BUFF. NEWS (June 24, 1994), https://buffalonews.com/news/article_2dfa9a29-4c24-583a-995d-d0a266950074.html [https://perma.cc/H8C2-V4P7]; Wanless, *supra* note 82, at 535 (citing Telephone Interview with Laurie Schipper, Executive Director, Iowa Coalition Against Domestic Violence (Feb. 14, 1995)); *Domestic Violence: Let's Not Back Away From Reform*,

primary reasons mandatory arrest laws were introduced was to curtail police discretion.²²¹ Now, these organizations are mostly silent on the issue.²²²

In the 1990s, law enforcement organizations pushed back against mandatory arrest laws, arguing that they eliminated police control and discretion.²²³ They asserted that mandatory arrest laws stripped police officers of their ability to use discretion and rely on their experience to handle domestic violence incidents appropriately.²²⁴ However, with mandatory arrest laws came some advantages for police departments that might have helped fade opposition. Or at least these laws were not as bad for the police as they initially thought. Police groups have dropped their initial opposition, and no police organization has openly advocated for their repeal. These laws were not as much of a hit to policing priorities as originally feared. It is plausible that, in requiring that an arrest be made when police are called to the scene of a domestic violence incident, particularly when there is probable cause to make an arrest, mandatory arrest laws provide “cover” for police departments. An officer’s duty at the scene of a dispute in a mandatory arrest state is straightforward—the officer must make an arrest. In so doing, officers are not vulnerable to liability for inaction.

The possibility of police liability may have additional influence on law enforcement conduct in situations involving allegations of domestic violence because of the common law “public duty” doctrine. This doctrine states that police officers and departments are not liable to individual citizens for failure to provide adequate police protection.²²⁵ The duty normally extends to the public at large rather than individuals.²²⁶ But a notable exception to this immunity is when a police officer or department has a “special relationship” with the injured party.²²⁷ A “special relationship” has four elements: (1) an

L.A. TIMES (Apr. 30, 1996, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1996-04-30-me-64327-story.html> [<https://perma.cc/JFL8-87JU>].

²²¹ See Crystal Nix, *For Police, Domestic Violence is No Longer a Low Priority*, N.Y. TIMES, Dec. 31, 1986, at B1; James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1191 (1995); Chrissy Cada, *Goalie’s Case Stirs Debate on Statute Mandating Arrest*, BOS. GLOBE, Dec. 3, 2000, at A33.

²²² See, e.g., NAT’L ASS’N OF POLICE ORGS., LEGISLATIVE PRIORITIES (2023) (noting no mention of curtailing police discretion); *Legislation We Support*, FRATERNAL ORDER OF POLICE, <https://fop.net/government-and-media-affairs/legislation-we-support> [<https://perma.cc/4JRG-7ZCA>] (supporting a variety of potential legislation, none of which focus on domestic violence or police discretion in such situations).

²²³ See Karen J. Kruger, *Mandatory Arrest Statutes – Are They Really Mandatory?*, POLICE CHIEF MAG., 2009, at 12.

²²⁴ See *id.*; Bruno v. Codd, 396 N.Y.S.2d 974, 1049 (N.Y. Sup. Ct. Special Term 1977), *rev’d*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978).

²²⁵ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196–97 (1989).

²²⁶ Gregory M. Hazard, *Law Enforcement Liability for Failure to Protect Victims of Domestic Violence*, 4 VICTIM ADVOC. 19, 19 (2004).

²²⁷ *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (1987).

assumption by the municipality of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.²²⁸ Such a relationship may be formed in the domestic violence context when a victim contacts the police, and either the police officer makes a promise of protection that goes unfulfilled, or the police officer fails to comply with a mandatory arrest law by not arresting the perpetrator.²²⁹ In mandatory arrest states, therefore, a police officer's obligations are straightforward: arrest the perpetrator to escape liability. Police officers are not left wondering whether to make an arrest because the law requires them to do so.

The benefits of this type of statutory directive are evident when considering the police liability lawsuits that helped garner attention around and spur the enactment of mandatory arrest laws. Before the proliferation of these laws throughout the country, cities and police departments faced substantial judgments for failing to provide adequate protection to domestic violence victims.²³⁰ In *Sorichetti v. City of New York*, for example, the court found that there was a special relationship between the city, a minor child and her mother, holding the city liable for the police's negligent failure to respond to the mother's requests for protective measures.²³¹ After the father threatened both the mother's and the child's lives and left with the child, the mother reported the father's threats to the police and requested that he be taken into custody under a protective order.²³² Police told the mother to wait for the father to return with the child.²³³ When responding to a 911 call, police later discovered the father had repeatedly attacked the child with a fork, knife, and screwdriver and attempted to saw off her leg.²³⁴ The court noted that a "critical factor" in its decision was the "special relationship" created when the mother was told to wait for the father to return with the child.²³⁵ The court upheld a damages award of \$2 million for the child and

²²⁸ *Id.*

²²⁹ Morgan Leigh Manning, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 60 (2010).

²³⁰ *See, e.g.*, *Watson v. City of Kansas City*, 857 F.2d 690, 698 (10th Cir. 1988); *Losinski v. Cnty. of Trempealeau*, 946 F.2d 544, 554 (7th Cir. 1991); *Didzerekis v. Stewart*, 41 F. Supp. 2d 840, 850 (N.D. Ill. 1999).

²³¹ *Sorichetti by Sorichetti v. City of New York*, 482 N.E.2d 70, 76–77 (N.Y. 1985).

²³² *Id.* at 73.

²³³ *Id.*

²³⁴ *Id.* at 74.

²³⁵ *Id.* at 76.

\$40,000 for the mother.²³⁶ This judgment was announced less than a year after the \$2.3 million judgment in *Thurman v. City of Torrington*.

In *Hynson v. City of Chester Legal Department*, after a woman was killed by her boyfriend, the deceased's family brought suit against police officers for failing to arrest the boyfriend.²³⁷ According to the court, the lawsuit reflected a growing trend of lawsuits "to force police departments to provide women with the protection from domestic violence that police agencies are allegedly reluctant to give."²³⁸ The court predicted that "lawsuits requesting injunctions and monetary awards for damages resulting from such policies will cause . . . police agencies to reconsider their policies towards domestic violence."²³⁹

The *Hynson* court's prediction in 1988 became reality, and mandatory arrest laws did motivate changes to police policies. These high-profile suits in which police were held liable for failing to protect victims of domestic violence occurred right before the wave of states enacting mandatory arrest laws. "Statutes that require police officers to provide affirmative protection to victims of domestic violence and to make arrests when arriving at the scene of the violence" was "[t]he best solution to remedy the uncertainty."²⁴⁰ By design, mandatory arrest laws were a response to the problem posed by these lawsuits. Since police were not taking necessary action to protect domestic violence victims, statutes were enacted to force them to provide protection. But this statutory scheme also cured police departments of their vulnerability to this type of liability.

Moreover, mandatory arrest laws did not constrain police officers by eliminating their discretion in the ways that police departments initially feared. It turned out that, even if an officer does not make an arrest, he is not necessarily liable for failing to protect the victim. As the United States Supreme Court held in *Town of Castle Rock v. Gonzales*, "[e]ven if the statute could be said to make enforcement 'mandatory,' that would not necessarily mean that [state law gave] . . . entitlement to enforcement [of the mandate]."²⁴¹ The Court reasoned that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."²⁴² In this way, mandatory arrest statutes are not really "mandatory." They do not strip law enforcement of the discretion historically bestowed on them

²³⁶ *Id.* at 72.

²³⁷ *Hynson ex rel. Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1027 (3d Cir. 1988).

²³⁸ *Id.* at 1030.

²³⁹ *Id.*

²⁴⁰ Gary M. Bishop, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357, 1389 (1989).

²⁴¹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 749 (2005).

²⁴² *Id.* at 760.

when making an arrest. Instead, an officer would have “discretion to determine that—despite probable cause to believe a restraining order has been violated—the violation’s circumstances or competing duties counsel decisively against enforcement in a particular instance.”²⁴³ Accordingly, “a true mandate of police action would require some stronger indication” from the legislature than language such as “shall use every reasonable means to enforce a restraining order,” or even “shall arrest.”²⁴⁴

Therefore, mandatory arrest laws appear to insulate officers from liability when they arrest because the statute requires them to do so. They also insulate officers when they choose not to make an arrest, since even a mandatory arrest law is not considered *mandatory*. An officer can justify a decision not to make an arrest in the presence of “competing duties” that “counsel decisively against enforcement.”²⁴⁵ Even with mandatory arrest laws, police officers have discretion in deciding whether to make an arrest, while victims do not.²⁴⁶

Of course, reasons why police officers may not actively oppose mandatory arrest laws do not fully explain why these laws have persisted despite scholars’ agreement that they are harmful. Indeed, if potential liability fully controlled behavior at the police department and individual officer levels, there would have been no reason to enact mandatory arrest laws in the first place. If departments fully internalized the threat of potential liability, they would have adopted mandatory arrest policies without statewide statutory requirements requiring that arrest practices change. Mandatory arrest policies only protect police departments from public outcry if officers are arresting only victims, not perpetrators: it is not clear that they are in all circumstances.

B. *Divergent Priorities of Activist Groups*

Two groups that one might think would advocate for the repeal of mandatory arrest laws—domestic violence victim advocates and decriminalization advocates—have also remained largely silent on the issue. It could be that these groups are consumed with other priorities. It’s also possible that these groups are not advocating for their repeal because of the role they have played in changing public perceptions toward taking domestic violence seriously. They may also believe that advocating for the repeal of these laws would distract from and possibly hinder the actualization of other goals. These groups have largely avoided discussing mandatory arrest laws altogether.

²⁴³ *Id.* at 749.

²⁴⁴ *Id.* at 761.

²⁴⁵ *Id.*

²⁴⁶ See Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1498–99 (2017).

1. Domestic Violence Victim Advocates

Groups advocating for domestic violence victims staunchly supported the initial passage of mandatory arrest laws, often facing pushback from law enforcement organizations.²⁴⁷ Curiously, while some of these groups have expressed apprehension about these laws in recent years, they are not outspoken on the issue. Unlike feminist scholars, these advocacy groups have been reluctant to condemn these laws outright.²⁴⁸

When advocacy groups have voiced concerns about mandatory arrest, they have done so only sporadically. In 2020, for example, a coalition of state anti-domestic violence organizations signed a “Moment of Truth” letter stating, “We have invested significantly in the criminal legal system, despite knowing the vast majority of survivors choose not to engage with it and that those who do are often re-traumatized by it.”²⁴⁹ The letter further expressed support for “address[ing] mandatory arrest” and “[d]ecriminaliz[ing] survival,” specifically.²⁵⁰ However, this letter appears to be the extent of these organizations’ public criticism of the laws. None of the organizations that signed the letter in states with mandatory arrest laws have separately called for their repeal.²⁵¹

²⁴⁷ See *Sexual Assault and Domestic Violence: Common Goals, Distinct Differences*, RESHAPE 2006, at 5, <https://vawnet.org/sites/default/files/assets/files/2016-09/Reshape17.pdf> [<https://perma.cc/HML2-WSAG>].

²⁴⁸ See, e.g., NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org> [<https://perma.cc/V7WP-7VYY>], NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnev.org> [<https://perma.cc/J2E8-F95F>], NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org> [<https://perma.cc/4SKW-T3FZ>], NAT’L RES. CTR. ON DOMESTIC VIOLENCE, <https://nrcdv.org/resources> [<https://perma.cc/X56D-VA82>].

²⁴⁹ *Moment of Truth: A Movement Reckoning and Renewal*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE (June 2020), <https://vawnet.org/events/moment-truth-movement-reckoning-and-renewal> [<https://perma.cc/57YB-UHEL>].

²⁵⁰ *Id.*

²⁵¹ The Nevada Coalition to End Domestic Violence and Sexual Violence has criticized mandatory arrest laws but stopped short of calling for their repeal. NEV. COAL. TO END DOMESTIC VIOLENCE AND SEXUAL VIOLENCE, NEVADA ARREST AND PROTECTION ADVOCACY PROJECT 26–28 (2019). See, e.g., Alabama Coalition Against Rape; Alaska Network on Domestic Violence and Sexual Assault; Arkansas Coalition Against Sexual Assault; California Coalition Against Sexual Assault; California Partnership to End Domestic Violence; North Dakota Domestic & Sexual Violence Coalition; Colorado Coalition Against Sexual Assault; End Domestic Abuse Wisconsin; Florida Council Against Sexual Violence; Georgia Coalition Against Domestic Violence; Georgia Network to End Sexual Assault; Idaho Coalition Against Sexual & Domestic Violence; Illinois Coalition Against Domestic Violence; Indiana Coalition Against Domestic Violence; Iowa Coalition Against Domestic Violence; Iowa Coalition Against Sexual Assault; Jane Doe Inc. (Massachusetts Coalition Against Sexual and Domestic Violence); Kentucky Association of Sexual Assault Programs, Inc.; Kentucky Coalition Against Domestic Violence; Maine Coalition Against Sexual Assault; Maine Coalition to End Domestic Violence; Maryland Network Against Domestic Violence; Mississippi Coalition Against Sexual Assault; Montana Coalition Against Domestic and Sexual Violence; Nebraska Coalition to End Sexual and Domestic Violence; Nevada Coalition to End Domestic and Sexual Violence; New Jersey Coalition Against Sexual Assault; New Jersey

Legal Momentum (previously known as NOW Women’s Defense and Education Fund) has not issued a recent opinion on mandatory arrest laws, mentioning them only in a historical section of an amicus brief in 2011.²⁵² The National Center on Women and Family Law (NCWF) and the National Coalition Against Domestic Violence (NCADV) have similarly been silent, along with dozens of other victim advocacy organizations.²⁵³ On the whole, national organizations have been reluctant to discuss the issue at all.²⁵⁴

Interestingly, some anti-domestic violence organizations continue to support mandatory arrest policies. In 2014, End Domestic Abuse Wisconsin dismissed a report by Professor Lawrence Sherman, in which he stated his 2015 study “may support repeal and judicial invalidation of state-level mandatory arrest laws.”²⁵⁵ The organization doubled down on its support for mandatory arrest policies, saying, “[t]hankfully . . . we don’t live in the 1980s anymore.”²⁵⁶ The Connecticut Coalition Against Domestic Violence

Coalition to End Domestic Violence; New Mexico Coalition of Sexual Assault Programs, Inc.; New York State Coalition Against Domestic Violence; New York State Coalition Against Sexual Assault; North Carolina Coalition Against Domestic Violence; North Carolina Coalition Against Sexual Assault; Ohio Alliance to End Sexual Violence; Ohio Domestic Violence Network; Pennsylvania Coalition Against Domestic Violence; Pennsylvania Coalition Against Rape; Tennessee Coalition to End Domestic and Sexual Violence; Utah Coalition Against Sexual Assault; Vermont Network Against Domestic and Sexual Violence; Violence Free Colorado; Virginia Sexual & Domestic Violence Action Alliance; Washington Coalition of Sexual Assault Programs; Washington State Coalition Against Domestic Violence; West Virginia Coalition Against Domestic Violence; Wisconsin Coalition Against Sexual Assault.

²⁵² Brief for Legal Momentum et al. as Amici Curiae Supporting Petitioner at 43, *Jessica Lenahan (Gonzales) v. United States*, No. 12-626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

²⁵³ *See, e.g.*, Alliance for Hope International; American Bar Association Commission on Domestic and Sexual Violence; Asian Pacific Institute on Gender-Based Violence; Break the Silence Against Domestic Violence; Childhood Domestic Violence Association; Coalition to Stop Violence Against Native Women; End Violence Against Women International; FUTURES Without Violence; Joyful Heart Foundation; Love is Respect; Male Survivor; National Alliance to End Sexual Violence; National Center on Domestic Violence, Trauma & Mental Health; National Defense Center for Criminalized Survivors; National Domestic Violence Hotline; National Network to End Domestic Violence; National Resource Center on Domestic Violence; National Task Force to End Sexual and Domestic Violence; RAINN; RESPOND Against Violence; Stop Abuse for Everyone; The National Family Violence Law Center; The Network Advocating Against Domestic Violence; The Women of Color Network.

²⁵⁴ *But see* FREEFROM, BEFORE AND BEYOND CRISIS: WHAT EACH OF US CAN DO TO CREATE A LONG-TERM ECOSYSTEM OF SUPPORT FOR ALL SURVIVORS (2022) (explaining that “[w]e must build an expanded ecosystem of support both before and after the moment of peak crisis” and advocating for the “repeal of mandatory arrest laws”).

²⁵⁵ Sherman & Harris, *supra* note 142, at 1; Belinda Luscombe, *When Not to Arrest an Abuser in a Domestic Violence Case*, TIME (Mar. 5, 2014, 5:45 AM EST), <http://time.com/12682/when-not-to-arrest-an-abuser-in-a-domestic-violence-case> [<https://perma.cc/HA5Y-B8XH>].

²⁵⁶ Luscombe, *supra* note 255.

“caution[s] against removing the mandatory arrest mandate altogether,” describing the laws as “important” and “necessary.”²⁵⁷

It is possible that these groups are not fighting for the repeal of mandatory arrest laws because these laws were expressly intended not only to deter domestic violence but also to change how people *perceive* domestic violence. Even if the laws did not achieve the first goal of deterring domestic violence and had perverse, unintended consequences, these laws did achieve the second goal. American society does take domestic violence seriously in a way that it did not before they were enacted. According to Professor Richard Johnson, “As American society began to change its attitude toward family violence, so did the criminal justice system.”²⁵⁸ But the opposite is also true; studies have suggested that enacting criminal justice policies may lead to behavioral transformations at the community level through “the emergence of new social norms.”²⁵⁹ As the criminal justice system began changing, so too did attitudes toward family violence. Public attitudes on domestic violence look much different from those in the early 1980s. Today, domestic violence is taken seriously, and mandatory arrest laws may be in part responsible for that development.

If activists credit mandatory arrest laws with changing how the public perceived the seriousness of domestic violence crimes, it is conceivable that victim advocates have not actively fought for the repeal of mandatory arrest laws because of their symbolic consequences. The shift toward taking domestic violence more seriously that resulted from mandatory arrest laws may not be completely reversed by repealing these laws, but advocates may not be willing to risk any backtracking. As a 1993 *Time* magazine cover story read, “[i]n a sense, a society’s priorities can be measured by whom it punishes,”²⁶⁰ and mandatory arrests for domestic violence have long demonstrated that deterring such violence is one of society’s priorities. It is also true that the repeal of mandatory arrest laws does not automatically signal that society does not take domestic violence seriously, but the fact that mandatory arrest laws were so successful in swaying public perceptions of domestic violence might make it more difficult for advocates to risk a backslide. Even if these laws’ unintended consequences are more harmful to victims than helpful, no one wants to appear soft on crime—especially not those advocating for victims.

²⁵⁷ CONN. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 203, at 5.

²⁵⁸ Richard Johnson, *Changing Attitudes About Domestic Violence*, 50 *LAW & ORDER* 60, 62 (2002).

²⁵⁹ Laura F. Salazar et al., *Moving Beyond the Individual: Examining the Effects of Domestic Violence Policies on Social Norms*, 32 *AM. J. CMTY. PSYCH.* 253, 261 (2003).

²⁶⁰ Nancy Gibbs, *Til Death Do Us Part*, *TIME* (Jan. 18, 1993, 12:00 AM EST), <https://time.com/archive/6722123/til-death-do-us-part-2> [https://perma.cc/MUG9-TZ4C].

2. Decriminalization Advocates

The “Defund the Police” movement has garnered growing support over the last decade, reaching its height in 2020 during nationwide protests after the killing of George Floyd.²⁶¹ Those who support “defunding the police” advocate for reallocating and redirecting federal and state funding away from police departments.²⁶² They argue that diverting funds to social services and non-policing community support would be more effective in deterring crime than traditional policing methods because police are ineffective in promoting public safety, and police intervention is more harmful than helpful.²⁶³ Activists also argue that the system of policing in the United States is rooted in a history of racism, dating back to slave patrols, and has since been used to disproportionately arrest—and kill—members of minority communities, Black Americans in particular.²⁶⁴

Advocates of the “Defund the Police” movement have called for scaling up community-based alternatives to policing.²⁶⁵ Several organizations offer non-police alternatives, such as teams of people trained to administer various forms of aid and intervention in response to emergency calls.²⁶⁶ They contend that domestic violence victims do not want to report to the police for various reasons. They argue that fear of police involvement²⁶⁷ prevents victims from accessing otherwise available emergency services and that police involvement is yet another example of the system perpetuating harm in the name of state “protection.” These organizations have generally stressed making resources available to help victims without police involvement. They argue that victims’ needs go unaddressed by the criminal justice system, and because there are

²⁶¹ See Sam Levin, *Movement to Defund the Police Gains ‘Unprecedented’ Support Across US*, GUARDIAN (June 4, 2020, 6:00 EDT), <https://www.theguardian.com/us-news/2020/jun/04/defund-the-police-us-george-floyd-budgets> [https://perma.cc/G5VJ-NMFP].

²⁶² *Id.*

²⁶³ See Rashawn Ray, *What Does ‘Defund the Police’ Mean and Does it Have Merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/articles/what-does-defund-the-police-mean-and-does-it-have-merit> [https://perma.cc/JK58-DZNF].

²⁶⁴ See *The Origins of Modern Day Policing*, NAACP, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> [https://perma.cc/E2TX-WRCV].

²⁶⁵ See Eleanor J. Bader, *The Push to Remove Police from Domestic Violence Situations*, PROGRESSIVE (Nov. 17, 2022, 9:40 AM), <https://progressive.org/latest/push-to-remove-police-domestic-violence-bader-171122> [https://perma.cc/8GKH-NBA2].

²⁶⁶ See Sravya Tadepalli, *These Organizations Want to Help Survivors of Domestic Violence—Without Calling the Police*, WASH. POST (Oct. 29, 2021), <https://www.washingtonpost.com/gender-identity/these-organizations-want-to-help-survivors-of-domestic-violence-without-calling-the-police> (on file with the author).

²⁶⁷ TK LOGAN & ROB VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 3–5, 9 (2015) (finding that only fourteen percent of domestic violence victims who called the police in the past said they were “extremely likely” to call the police again).

legitimate reasons victims may not want to report incidents to the police, they should be able to “choose when [to] call the police and when not to.”²⁶⁸

For “Defund the Police” advocates, community-based alternatives to policing and the development of non-carceral programs are the solution. They seek to eliminate—or at least reduce—police interaction with domestic violence victims, not modify the procedure by which officers are required to abide once they arrive at the scene. In advocating for the reallocation of resources away from police departments, these advocates argue that problems associated with policing domestic violence extend beyond arrest procedures.²⁶⁹ They argue instead that these harms are inherent in police involvement.²⁷⁰ The result is that, while these organizations have tried to prevent people from calling the police and therefore triggering their involvement, they have not called for the repeal of mandatory arrest laws specifically.²⁷¹

Those focused on ending mass incarceration have similarly neglected to discuss mandatory arrest laws in their advocacy. The push to end mass incarceration has gained significant momentum in recent years, with advocacy organizations citing its social and economic costs. But, in this context, domestic violence is largely left out of the conversation. Efforts to reduce the prison population have primarily focused on releasing nonviolent criminals, primarily those convicted of drug-related offenses.²⁷² In light of the surge in incarceration for nonviolent drug offenses resulting from the “War on Drugs,” activists have questioned the efficacy of mandatory minimums, sentencing disparities, and laws criminalizing certain drugs.²⁷³ When people talk about mass incarceration, they are talking about nonviolent offenders, not batterers. Batterers do not draw sympathy in the ways low-level drug offenders might. So, bringing up domestic violence in their advocacy might have consequences contrary to their goals.

²⁶⁸ See Tadepalli, *supra* note 266.

²⁶⁹ See Anna North, *What to Do Instead of Calling the Police*, VOX (Apr. 14, 2021, 10:10 AM CDT), <https://www.vox.com/2021/4/14/22374196/calling-the-police-violence-alternatives> (on file with the author).

²⁷⁰ *Id.*

²⁷¹ The advocacy organization, 8toAbolition, appears to be one of the only groups advocating for alternatives to incarceration and repeal of mandatory arrest laws. Leila Raven et al., *8 to Abolition is Advocating to Abolish Police to Keep Us All Safe*, TRANSFORMHARM (June 26, 2020), https://transformharm.org/ab_resource/8-to-abolition-is-advocating-to-abolish-police-to-keep-us-all-safe [<https://perma.cc/88BU-S3BC>].

²⁷² See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/factsheets/pic2023_allimages.pdf [<https://perma.cc/LR6C-L3BB>].

²⁷³ *Id.*

C. Political Challenges

For similar reasons, elected officials may be reluctant to support repealing mandatory arrest laws, even if they support other criminal justice reforms. The political difficulty may at least partially stem from the fact that the anti-domestic violence movement has embraced certain political strategies and stereotypes for so long that it is difficult to change them. According to Professor Deborah Weissman, “the anti-domestic violence movement has constrained the development of a collective political consciousness that considers alternative—and perhaps improved—responses to domestic violence.”²⁷⁴

Furthermore, the fact that early advocacy in the domestic violence movement relied on identity politics has made a more nuanced approach to initiatives to protect victims challenging.²⁷⁵ The movement’s embrace of a law-and-order approach as the only means to protect all victims from abuse urged dependency on the carceral system.²⁷⁶ The anti-domestic violence movement’s early calls for criminal responses are thus woven into its very fabric. It has proven difficult to find alternatives outside these carceral inclinations. The challenge of separating the domestic violence movement from the criminal justice system is, therefore, nuanced. It requires disassembling a unified movement into various parts with the recognition that police intervention was not a one-size-fits-all intervention for preventing and deterring domestic violence. But political dialogue often ignores nuance.²⁷⁷

Calling for the repeal of mandatory arrest laws may also be politically difficult to stomach. One can easily imagine the headline, “State senator introduces bill to reduce arrests of domestic abusers.” Introducing, or even supporting, a bill to repeal a mandatory arrest statute could result in backlash from constituents if not carefully framed. The fear of political backlash has likely prevented legislators from advocating for their repeal.

D. Shortcomings of the Legislative Process

The quick adoption of mandatory arrest laws and their longevity, despite what scholars identify as unintended and harmful consequences, may also result from shortcomings in the legislative process. States swiftly enacted these laws despite clear warnings from experts that replication studies should

²⁷⁴ Weissman, *supra* note 246, at 1500.

²⁷⁵ *See id.* at 1512.

²⁷⁶ *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 163 (2006).

²⁷⁷ *See* Darren Walker, *In Defense of Nuance*, FORD FOUND. (Sept. 19, 2019), <https://www.fordfoundation.org/news-and-stories/stories/in-defense-of-nuance> [https://perma.cc/BE8E-E696].

be conducted before the widespread adoption of mandatory arrest policies.²⁷⁸ This rush to action was prompted by various factors that often spur legislation, including emotional pull, data seemingly supporting a straightforward solution, and desperation to fix a problem. This kind of jump to judgment is relatively rare in the legislative process, where structures are specifically designed to promote deliberation. Given the immense hurdles a bill must overcome to be signed into law, legislation is rarely characterized by spur-of-the-moment decisions or whims. To borrow from Newton's laws of motion, laws enacted will remain enacted. Mandatory arrest laws have stayed at rest since they were initially enacted. Not only are there no concerted efforts to change them, but there is barely any discussion of them outside academic circles. The disconnect between scholarship and the legislative process creates a divide between well-researched, empirically sound solutions and legislative change.

The nature of the legislative process also prioritizes certain inputs, namely, well-funded advocacy organizations and stakeholder groups. Police organizations, anti-domestic violence groups, abolitionist groups, and groups committed to ending mass incarceration are not lobbying for the repeal of these laws. The people most affected by these laws—victims of domestic violence—do not have the platform to garner legislative support for their repeal.

The disconnect between domestic violence victims and the legislative process is further exacerbated by the fact that anti-domestic violence organizations have conflicting priorities, knowing that mandatory arrest laws create perverse incentives for individual victims, while also clinging to the ways in which these laws have pressured society into taking domestic violence seriously. It is plausible that, forced to choose between the interests of individual victims and the interest in influencing society's perception of domestic violence generally, these organizations have chosen the latter. That is not meant to suggest that these organizations do not care about advancing policies that best protect individual victims of domestic violence. Rather, it is meant to suggest that the coalition structure that defines the legislative process incentivizes political stakeholders to advocate for policies in the best interests of the highest number of individuals they represent. The harms of mandatory arrest laws are specific to the individual. It is therefore difficult to organize around their repeal.

VI. CONCLUSION

Since the initial passage of mandatory arrest laws, there have been dramatic shifts in society's perceptions of domestic violence and more empirical research on the effectiveness of arrest. Today, a consensus exists among scholars and advocates that these laws are harm inefficient. And the

²⁷⁸ Goodmark, *supra* note 151.

same groups that pushed for the passage of these laws, including law enforcement groups, victim rights organizations, and domestic violence prevention advocates, are now silent. Yet these laws persist.

Perhaps the problems scholars associate with mandatory arrest laws could be mitigated in ways other than by outright repeal. More information about the precise contours of the effects of mandatory arrest laws is essential in identifying possible pathways. For example, future research could examine whether police department policies on arrest in permissive arrest states have changed in recent decades. More could also be known about the precise legal, political, and social levers affecting citizen interactions with police related to domestic violence incidents. More information on the circumstances in which mandatory arrests are more likely to result in perverse consequences could also be examined. Additional research is needed to reveal whether mandatory arrest laws have net positive impacts that scholars might fail to fully appreciate. If that were the case, the stability of these laws might be justified. But ultimately, these laws existing simply because they have for so long is not in the public interest.