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Stopping the Violence:
*Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*

Caroline Forell†

I had sustained a bruise on my face, a black eye, a bloody lip... and I went to the state police and they said they didn't want to get involved in domestic affairs and they wanted to know what I had done to provoke the man to hit me... I didn't do anything; I am a victim of abuse. Can't someone get involved? And they told me, if it was so bad to just move out. A victim

Last night I heard the screaming
Loud voices behind the wall
Another sleepless night for me
It won't do no good to call
The police
Always come late
If they come at all.

Tracy Chapman

I. INTRODUCTION

Womanbeating is a commonplace occurrence. Each year, as many as 20% of American women are beaten by their husbands, lovers, former

† Associate Professor of Law, University of Oregon School of Law. I want to thank Leslie Harris and Lani Roberts for their advice on earlier drafts and Kim Chaput, Cyndee Haines, Ellen Adler and Mary Duhaime for their excellent research help in preparation of this Article. Finally, I want to thank all the battered women's advocates who provided me with information about what really happens to battered women.


2 Tracy Chapman, "Behind the Wall," from the album *Tracy Chapman* (Elektra/Asylum Records, 1988).


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husbands or former lovers. Battered women suffer more injuries requiring medical treatment than all victims of rape, muggings and auto accidents combined. Battering is both the leading cause of physical injury to women and the most common but least reported crime in the United States. Furthermore, when a man beats a woman, she is often not the only injured party. If children are present they can suffer physical and emotional harm which can impair their own future intimate relationships. In particular, boys often imitate their father’s violent behavior thereby continuing the cycle of violence for another generation.

Since no single response will stop all womanbeating, it is important that the state provide as many opportunities for stopping the violence as possible. This Article proposes mandatory arrest of womanbeaters as one form of state intervention that can protect individual women, reduce the incidence of womanbeating, and send the appropriate societal message to womanbeaters.

4 Deborah L. Rhode, Justice & Gender: Sex Discrimination and the Law 237 (Harv U Press, 1989) (“Justice & Gender”) (“One-fourth to one-half of all women will experience such violence at some point in their lives”).

Physical injury is not the only serious harm battered women suffer. They are also frequently victims of sexual violence and emotional abuse. See also Report on Abused Women Raises Issue for Physicians and Husbands, Boyfriends Seen Biggest Physical Threat to Women, Eugene Register Guard (Aug 22, 1990).

8 One quarter of battered women are pregnant when they are beaten. Erickson, 42 Rutgers L Rev at 329 (cited in note 5).
9 The following description provides chilling evidence of how these patterns recur:

As Larry moves through adolescence and into young adulthood, his relationships with women are crippled by his experiences as a young child. Larry was never a victim of violence or a perpetrator of violence when he was a little boy — he merely witnessed the violent relationship between his father and mother. Yet he hits the women he is now involved with . . . . Larry prides himself on his influence over women and admits he is imitating his father’s behavior.


The authors of The Male Batterer: A Treatment Approach note that the longer the exposure to violent parental behavior, the greater the likelihood that the boy will exhibit violent behavior as an adult. Daniel Sonkin, Del Martin, Lenore E. Walker, The Male Batterer: A Treatment Approach 47 (Springer, 1985) (“The Male Batterer”).

See also Lenore E. Walker, The Battered Woman Syndrome 18-22 (Springer, 1984); Rhode, Justice & Gender at 244 (cited in note 4).

However, mandatory arrest is not a cure-all; in some cases if the woman is not ready to leave the relationship, arrest may further anger the batterer and thereby put the woman at greater immediate risk of repeat violence.

One battered women’s advocate reported:

[A battered woman] contacted our office to let us know she was very upset about him [abusive husband] being arrested. She stated she would never call the Sheriff’s department again. All this did was make him angry and cost her a lot of money.
Mandatory arrest removes the usual discretion from police officers in deciding what they should do when they intervene in domestic violence. As long as there is probable cause that womanbeating has occurred or a protective order has been violated, they must arrest the womanbeater. Mandatory arrest is necessary even when a battered woman does not want her batterer arrested because the price of stopping the violence seems too high. A battered woman may see the world this way because of "learned helplessness" resulting from systematic beating, or because of the importance of the relationship and her (usually) futile hope that it will change for the better. In either case, the price of tolerating the violence is exorbitant, both for the woman herself and for any children that may be present. Society needs to provide battered women with the means either to leave the relationship or to change it. Mandatory arrest, accompanied by adequate support services for the woman and counseling for the man, can sometimes provide these means.

Mandatory arrest of womanbeaters has many positive effects. The most obvious is stopping the immediate abuse of a particular woman. Arrest also gives womanbeaters a chance to cool off, and delivers the clear message that society does not approve of and will not tolerate their violent behavior. The probability of arrest and a resulting criminal record with its accompanying social stigma will make some men think twice.


The possibility that arrest may make the batterer more angry has been used as a justification for avoiding arrest even when the battered woman is seeking arrest. For example, the police gave the following advice to one battered woman who called for help:

There is nothing we can do. Our hands are tied. The police can't act without an order of protection. Even if you had an order of protection, if your husband harassed you and you called the police, he would be arrested and released the next day. This would probably provoke your husband and put you in more danger.

Bruno v Codd, 90 Misc 2d 1047, 396 NYS2d 974, 976 (NY Sup Ct 1977).

11 See, for example, notes 98 and 110 and accompanying text.

12 See Lenore E. Walker, *What Counselors Should Know about Battered Women* in Sonkin, Martin & Walker, *The Male Batterer* at 158 (cited in note 9), in which Walker describes "learned helplessness" as follows:

The inability of a battered woman to predict whether or not her behavior will successfully protect her from further abuse creates a perception of no voluntary control over her life. This lack of contingency between response and outcome has been labeled "learned helplessness" by social scientists. It is not that women think they are helpless all of the time, but rather it is the inability to predict when they will succeed and when they will fail which constitutes learned helplessness.


13 Littleton, 1989 U Chi Legal F at 47 (cited in note 3). Professor Littleton suggests that these women are saying: "I cannot leave without giving up something important," perhaps even "without giving up something I cannot give up . . . ."


14 See notes 8 and 9 and accompanying text.
about beating their wives. It also provides a meaningful opportunity for battered women to consider their options, and gives those women who are ready to end the relationship time to go elsewhere or obtain a protective order. Knowing that police will probably arrest the batterer can empower battered women; they can feel more confident that their actions will make a difference.

In this Article I begin by exploring the impact of mandatory arrest policies on women of color and poor women, since they are differently situated and therefore differently affected by state intervention than are white middle class women. I then review police department policies and legal strategies for holding police liable for failing to protect battered women. And finally, I examine the successes and failures of two states—Oregon and New York—that allow civil liability for failure to arrest womanbeaters. These two states have widely divergent rules regarding arrest of womanbeaters and liability of police officers. These two approaches highlight the urgent need for domestic violence legislation which encourages police both to arrest womanbeaters and to render meaningful assistance to battered women. In jurisdictions such as Oregon, where mandatory arrest and civil liability for failure to arrest have been the law for a number of years, people who work with battered women have described the resulting effect on battered women as overwhelmingly positive.

16 This assumes that there are options. Women must have quick access to both protective orders and battered women's shelters in order for a system of mandatory arrest to be meaningful. See Kathleen Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, 60 Wash L. Rev 267, 309 (1985).
17 Many battered women have a deep-seated mistrust of police because they believe—often accurately—that police officers are not effective in stopping battering. See Ann Marie Boylan and Nadine Taub, Adult Domestic Violence: Constitutional, Legislative and Equitable Issues 207-08 (Legal Services Corporation Research Institute, 1981) ("Adult Domestic Violence"). The prevalence of battering has been attributed in part to police non-responsiveness. See Lisa G. Lerman, A Model State Act: Remedies for Domestic Abuse, 21 Harv J Leg 61, 120-21 (1984). Routine arrest of batterers may change these beliefs and make more battered women willing to call for help.
18 Telephone conversations with Pearl Wolfe, Director, Womanspace, Eugene, Oregon (July 10, 1990); Judith Armatta, Legal Counsel for the Oregon Coalition Against Domestic and Sexual Violence, Portland, Oregon (July 16, 1990); and Joan Griffith, Court Liaison Director, YWCA Battered Women's Program, Spokane, Washington (July 12, 1990).

Judith Armatta indicated that battered women's treatment is "immeasurably better" today than it was prior to the enactment of the mandatory arrest statute and recognition of civil liability. Over time, police and district attorneys' attitudes towards womanbeating and battered women have changed, and many of them now have in-depth knowledge about and sensitivity to battered women's predicament.

See also Utah Task Force Report, 16 J Contemp L at 208 (cited in note 6), (enlightened police policies in Riverdale, a small town in Utah, illustrated the effectiveness of mandatory arrest).

In contrast to these positive reports, a study conducted immediately after a mandatory arrest policy went into effect in April 1989 in Wisconsin showed widespread dissatisfaction among battered women with the impact of mandatory arrest. Wisconsin Project Final Report (cited in note 10). However, it seems likely that much of this dissatisfaction stems from the bugs which remain in the new system, including police resistance and misunderstanding of the
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II. THE EFFECT OF MANDATORY ARREST ON WOMEN OF COLOR AND POOR WOMEN

The effect of mandatory arrest on poor women and women of color deserves special consideration.\(^9\) In our racist and classist society, these women are especially vulnerable when state intervention occurs; they are more likely to be victims of public oppression than are white middle class women.\(^20\) Some poor women and women of color view mandatory arrest as one more instance of the dominant culture using the police power of the state to victimize them.\(^21\)

In America today any form of state intervention will occasionally (or even frequently) result in discrimination based on race, class and/or sex. Mandatory arrest is no exception. Battered women's advocates in states where mandatory arrest is the rule report that such discrimination occurs.\(^22\) However, racist and classist incidents will occur whenever there is systematic state intervention. The crucial question is whether mandatory arrest has a greater discriminatory effect on poor and minority communities than do other forms of police intervention.

A. Does Mandatory Arrest Have a Discriminatory Impact?

At first glance, mandatory arrest would appear to benefit oppressed groups, because it reduces the amount of discretion which individual police officers have to arrest when they should not, or not arrest when they should. The more discretion provided to police officers, the more officers can use that discretion to discriminate against certain groups of women and/or men with whom they interact. Mandatory arrest officially limits the exercise of discretion regarding whether or not there is probable cause to arrest.\(^23\)

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\(^9\) I discuss the problems facing poor women and women of color together. Even though they obviously have different cultural backgrounds and worldviews, both groups historically have been subjected to multiple oppressions. In this way they share a common experience. Compare Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 Stan L Rev 1, 3-4 (1988).

\(^20\) See note 48.


\(^22\) Telephone conversation with Judith Armatta, Legal Counsel for the Oregon Coalition Against Domestic and Sexual Violence (Jan 29, 1990) ("I think that as with most criminal law, it is enforced disproportionately against poor people and people of color"); telephone conversation with Liz Bollihagen, Milwaukee, Wisconsin, Task Force on Battered Women (Jan 29, 1991) ("I know of several experiences where men were arrested or threatened for racist or classist reasons").

\(^23\) One commentator believes that unless police officer discretion is severely limited, police officers will treat white womanbeating more seriously than Black womanbeating. Taunya L.
Mandatory arrest policies result in more arrests of womanbeaters than do policies which give the police discretion to arrest or not. Some are concerned that the increase in arrests will be based on a disproportionate increase in the number of men of color and poor men arrested. That is, the fear of many and the perception of some is that the police will apply a different standard of probable cause to white middle class domestic violence than to violence in minority and poor homes.

There is very little empirical evidence on the impact of mandatory arrest on minority and poor communities. However, one study suggests that mandatory arrest lessens the likelihood of discriminatory enforcement. The Duluth, Minnesota Domestic Abuse Intervention Project compared the effect on men of color of three different methods of dealing with womanbeating: total officer discretion; encouragement to arrest; and mandatory arrest. The number of arrests overall increased dramatically under encouragement to arrest, and increased even further under mandatory arrest. However, the percentage of men of color out of total men arrested fell dramatically under encouragement to arrest, and even further under mandatory arrest "to a level closer to their population in Duluth."

While this study suggests that the actual effect of mandatory arrest is to reduce discrimination, anecdotal evidence suggests that minority

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24 Banks, Discretionary Decision-making in the Criminal Justice System and the Black Offender: Some Alternatives, 5 Black L J 20, 24 (1977). See also Boylan and Taub, Adult Domestic Violence, at 214 (cited in note 17), citing to C. Hill, Director of Casa Myrna Vasquez, Boston.


26 Tension exists between the impact of mandatory arrest on poor women and women of color and its impact on poor men and men of color. In Duluth, mandatory arrest resulted in the arrest of more poor and minority men than did discretionary arrest. Id. However, while mandatory arrest may have a negative effect on poor and minority womanbeaters, it will have a positive effect on their victims, who are usually poor or minority women.

27 See Wisconsin Project Final Report (cited in note 10) which gave the following early assessment of Wisconsin's new mandatory arrest statute's impact on women of color:

Early reports of arrest rates being higher for people of color in communities with pro-arrest or mandatory arrest policies were difficult to ascertain in numbers during the monitoring project. However, reports have indicated that assumptions and biases persist within the criminal justice system regarding people of color. Responses to domestic violence calls in the Hmong community and on Native American reservations are being handled quite differently from other calls within the monitoring project region. See also telephone conversation with Judith Armatta (cited in note 22) (her perception is that men of color and poor men are arrested more often than white middle class men).

26 See Pence, Justice System's Response at 20 (cited in note 24).

27 Id.

28 Id.
and poor communities do not perceive mandatory arrest in this way.\textsuperscript{29} Mandatory arrest results in a greater number of arrests in all communities. Such an increase in the overall number of arrests may be perceived negatively in those communities which have an understandable suspicion of police motives. Furthermore, even if the police are not actually discriminating against poor men and men of color in terms of the number of arrests, the way in which these arrests are made and their impact on both the victim and her assailant may differ dramatically from arrests of white middle class men.

B. Respecting Diversity Among Women

The most troubling issue for me about the effect of mandatory arrest on poor women and women of color is whether the overall benefits of

\begin{table}
\caption{Spouse Battering Arrests in Duluth Under Different Police Policies}
\begin{tabular}{|lcc|cc|cc|}
\hline
 & \multicolumn{2}{c|}{Policy 1} & \multicolumn{2}{c|}{Policy 2} & \multicolumn{2}{c|}{Policy 3} \\
 & Total officer discretion & Officer required to submit a written report on all domestics and encouraged to arrest & Mandatory arrest if: & \\
12 mo. from 1/1/80 & 12 mo. from 8/1/81 & 12 mo. from 10/1/83 & \\
\hline
Total & 22 & 100\% & 107 & 100\% & 175 & 100\% \\
Caucasian male & 15 & 66\% & 83 & 77.5\% & 148 & 84.5\% \\
Minority male & 7 & 33\% & 14 & 13\% & 15 & 8.5\% \\
Female & 0 & 0\% & 10 & 9.3\% & 12 & 6.8\% \\
\hline
\end{tabular}
\end{table}

The only other relevant empirical studies of which I am aware compare reliance on police by different groups of battered women. These studies show that battered women of color and battered poor women rely on the police as much as or more than do battered white middle class women. However, none of these studies focuses on the method the police used when they were called on to intervene. See Richard A. Berk, Sarah Fensternmaker Berk, Phyllis J. Newton, Donileen R. Loseke, Cops on Call: Summoning the Police to the Scene of Spousal Violence, 18 L & Soc Rev 479, 492-93 (1984); Louis Harris and Assoc., Inc., Summary of Survey of Kentucky Women on Domestic Violence 3-4 (1979) (sponsored by KY Comm'n on Women) (cited in Boylan and Taub, Adult Domestic Violence, at 213 (cited in note 17)); Freeman, Domestic Violence: The Limits of Effective Legal Action, 20 Cambrian L Rev 17, 26 (1989) citing to Shân Torgbar, 19 Family Law 195 (1989).

\textsuperscript{29} What may be happening is that police officers, especially those who are both hostile to the idea of mandatory arrest and racist, classist and/or sexist, may in fact be arresting when there is probable cause to arrest in poor or minority communities but still not arresting where there is probable cause to arrest in white middle class communities. Civil liability for failure to arrest when there is probable cause could deter such conduct.
such a policy justify the pain it may inflict in individual cases. In a recent article, Professor Angela Harris gave a powerful critique of gender essentialism in which she urged feminists to be more aware of "the diversity of women's experience," what Professor Mari Matsuda calls the need for "multiple consciousness as jurisprudential method." Just as rape has a different meaning for Black women than for white women, mandatory arrest of womanbeaters has different meanings for different groups of battered women. The root causes of the violence that women of color and poor women suffer and the impact of mandatory arrest's removal of the batterer from the home are likely to be different than for white middle class women. For example, some poor women lose a necessary means of supporting themselves and their children when their assailant is arrested. For new immigrant poor and minority women, the intrusion of the state into their home may be especially terrifying. Concerning the different perspectives of battered Black women, Professor Rosemarie Tong explains:

The battered black woman finds herself in racist binds that do not affect battered white women. Black women are even more prone than white women to excuse their husband's violent behavior. All battered women have a tendency to blame themselves for provoking their husbands, for not being kind, patient, and long-suffering enough, but this tendency is more marked in black women, who know only too well that in this society life is harder for black men than for white men. . . . Black women are more likely than white women to wonder whether a policy of arrest is the best strategy to follow when it comes to woman-battering. Because the law has dealt more harshly with black rapists than white rapists, there is reason to believe that it will deal more severely with black woman-batterers than white woman-batterers.

30 This is an issue for all battered women. See notes 12 and 13 and accompanying text.
31 Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan L Rev 581, 615 (1990).
33 Harris, 42 Stan L Rev at 598-601 (cited in note 31). See also Tong, Women, Sex, and the Law at 171 (cited in note 21).
34 bell hooks notes:

Unlike many feminist activists writing about male violence against women, black women and men emphasize a "cycle of violence" that begins in the workplace because we are aware that systematic abuse is not confined to the domestic sphere, even though violent abuse is more commonly acted out in the home.

bell hooks, Feminist Theory: from margin to center 122 (South End, 1984) ("Feminist Theory"). See generally Austin, 41 Stan L Rev 1 (cited in note 5).
35 Battered women's advocates have reported that mandatory arrest has been especially hard on new Asian immigrants. Telephone conversation with Judith Armatta (cited in note 22). See also Wisconsin Project Final Report at 6 (cited in note 10).
36 See Boylan and Taub, Adult Domestic Violence, at 213-14 (cited in note 17):

Black women who worked on drafting the Massachusetts abuse act were reluctant to expose black men to a biased criminal justice system but felt that there are situations in which the protection of black women requires criminal law action.
37 Tong, Women, Sex, and the Law at 170-71 (cited in note 21). Tong also quotes Kenyari Bellfield of the Harriet Tubman Women's Shelter in Minnesota:
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Another troubling aspect of mandatory arrest is the invidious effect its underlying "false consciousness" assumption may have on poor women and women of color. Whether because of "learned helplessness," the importance of the relationship, fear of the batterer's anger at being arrested or some other cause, when mandatory arrest is not what the battered woman wants, it may feel demeaning. Arrest over the objection of the woman implies that she does not know what's good for her. When the woman is of color or poor this implication may be seen as racist or classist.

C. Weighing the Risks and Benefits

Taking into consideration the different experiences and values of poor women and women of color, I still believe that mandatory arrest does more good than harm. Poor and minority battered women are not likely to view mandatory arrest as a problem when they want their assailants arrested or have obtained protective orders which they are seeking to enforce. If poor men and men of color view mandatory arrest as unfair in those situations, so be it. However, as noted above, when arrest goes against poor or minority battered women's spoken wishes, mandatory arrest becomes problematic. Nevertheless, since mandatory arrest requires probable cause and therefore should only occur when there is evidence of physical injury or when the officer witnessed the battering, I believe it is still the correct approach. In some cases a battered woman's spoken wishes may not be her actual wishes. Even where the battered woman genuinely does not want her assailant to be arrested, I

The effect of racism and sexism seems too great to tackle in the face of being victimized by a loved one. The woman often times feels powerless to change her situation, tending to feel she is being forced to tolerate the situation longer because the very system which has historically served to subjugate and oppress her is the only system which can save her from the immediate abusive system.

Id at 171.

bell hooks also notes the following:

Speaking of why poor women may not leave violent relationships, Schecter says "poor people experience so many different kinds of oppression, violence may be responded to as one of many abuses" [quoting from Susan Schechter, Women and Male Violence (South End, 1982)]. Certainly many black women feel they must confront a degree of abuse wherever they turn in this society. . . . These women often feel that abuse will be an element in most of their personal interactions. They are more inclined to accept abuse in situations where there are some rewards or benefits, where abuse is not the sole characteristic of the interaction. Since this is usually the case in situations where male violence occurs, they may be reluctant, even unwilling to end these relationships. Like other groups of women, they fear the loss of care.


38 All the battered women advocates and former battered women with whom I have talked concerning the effect of mandatory arrest on women of color and poor women either agree that mandatory arrest is the best alternative or do not offer any other alternative that they believe would work better.


40 See notes 211-12 and accompanying text.
believe the physical injury he has inflicted justifies arrest. When society has knowledge that someone has intentionally physically injured another, this should not be tolerated. Furthermore, since stopping the violence should be a societal goal and mandatory arrest aids in achieving this goal, arresting the batterer against the battered woman’s true wishes is appropriate.

A more ambiguous situation occurs when there is no evidence of physical injury. In those cases, as I recommend later in this Article, arrest should occur only if the woman wishes to press charges.

Other ways of making mandatory arrest work better for women of color and poor women include educating police officers about different cultural values and including more people from different communities on police forces. Some of the resistance to mandatory arrest from poor women and women of color may result from a misperception of its purpose. The goal of mandatory arrest is to help all battered women. Greater involvement and leadership by poor and minority women to shape battered women policies to fit their needs could reduce suspicions that mandatory arrest is only a manifestation of white middle class concerns. More publicity both about mandatory arrest’s goal of stopping the violence and about the strong support for mandatory arrest among battered women’s advocates, as well as increasing familiarity with mandatory arrest policies, may improve mandatory arrest’s reputation among poor women and women of color.

III. POLICE RULES AND RESPONSIBILITY

A. Police Department Policies

Until recently, most police departments viewed womanbeating as conduct that should be treated differently from other acts of violence. Arrest of womanbeaters was the exception rather than the rule.

One widely used justification for these policies was that arrest would be an unwarranted invasion of domestic privacy. For a battered woman, such privacy carves out an isolated island of violence. This

41 Men are also subject to domestic violence. However, women are much more likely to suffer serious physical injury. Even when men are seriously injured, it is often the result of the woman acting in self-defense. See Nancy Loving, Responding to Spouse Abuse and Wife Beating: A Guide For Police 10 (Police Executive Research Forum, 1980).
42 See, for example, Bruno v Codd, 90 Misc 2d 1047, 396 NYS2d 974 (NY Sup Ct 1977).
43 US Department of Justice, Final Report at 22-23 (cited in note 1); Note, Domestic Violence: Legislative and Judicial Remedies, 2 Harv Women’s L J 167 (1979).
44 US Department of Justice, Final Report at 19 (cited in note 1).
45 “For women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal.” Catharine A. MacKinnon, Toward a Feminist Theory of the State 168 (Harv U Press, 1989).

“...To treat this relationship as private is to maintain the privilege of the more powerful (man) to rape or batter the less powerful (woman).... To respect privacy in this context is to
public/private dichotomy, based on a family ideal\footnote{66} that the home should be the man’s kinder and gentler refuge from the harshness of the public sphere,\footnote{47} fails to consider that many men treat the other occupants of their refuge harshly, turning their private haven into some women’s private hell.\footnote{48}

Public acknowledgement of domestic violence is a recent phenomenon. The fact that, for many women, man’s refuge is neither kind nor gentle, was first brought to the public’s attention in the mid-1970s through the work of women’s rights activists.\footnote{49} Not until 1974 did newspapers first begin covering womanbeating.\footnote{50}

The public recognition of womanbeating led most states to enact domestic abuse legislation during the late 1970s.\footnote{51} This legislation often included provisions making it easier for battered women to obtain protective orders and for police to arrest batterers.\footnote{52} Nevertheless, most police departments continued to prefer either mediation or a cooling-off

\begin{footnotes}
\item[46] Elizabeth Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present \textit{(Oxford U Press, 1987)} ("Domestic Tyranny"): The single most consistent barrier to reform against domestic violence has been the Family Ideal—that is, [related] but nonetheless distinct ideas about family privacy, conjugal and parental rights, and family stability.

\item[47] "[T]he assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives." Frances Olsen, \textit{The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv L Rev 1497}, 1510 (1983). See also Nadine Taub and Elizabeth Schneider, \textit{Perspectives on Women’s Subordination and the Role of Law,} in David Kairys, ed, \textit{The Politics of Law 117} (Pantheon, 1982).

In the nineteenth and early twentieth centuries, many policymakers believed that the home was a man’s castle, in which he ruled with absolute power. See, for example, \textit{Joyner v Joyner, 6 Jones Equity 322, 326, 59 NC 331, 335} (1862) in which the court held that:

\textquote{there are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground [sic] for a divorce.}

\item[48] A tension exists when the remedy advocated, as here, is state intrusion into the home. This may be viewed as exposing women to public oppression, especially when a battered woman does not wish to press charges. However, the existing widespread private oppression of womanbeating outweighs the risk of occasional public oppression. See Frances Olsen, \textit{Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex L Rev 387, 393} (1982):

The freedom promised by the right of privacy runs up against women’s right to security in the home . . . . Any effort to protect women from private oppression by their husbands may expose them to public oppression by the state; any effort to keep the state out of our personal lives will leave us subject to private domination.

Seeking state intervention to stop womanbeating is one of the many places where “feminism has been caught between giving more power to the state in each attempt to claim it for women and leaving unchecked power in the society to men.” MacKinnon, \textit{Toward a Feminist Theory of the State} at 161 (cited in note 45).

\item[49] Rhode, Gender and Justice at 237 (cited in note 4).

\item[50] Pleck, \textit{Domestic Tyranny} at 182 (cited in note 46). By 1977, the \textit{New York Times} carried 44 articles on womanbeating. Id at 183-84.

\item[51] Id at 192; Lerman, 21 Harv J Leg at 61-62 (cited in note 17).

\item[52] See Boylan and Taub, \textit{Adult Domestic Violence} at 223-67 (cited in note 17). "Protective order" and "restraining order" can be used interchangeably; I opt for "protective order" because it more accurately describes the purpose of the order.

\item[53] Mediation is the most widely followed alternative to arrest as a means of dealing with
\end{footnotes}
period to arrest. Since non-arrest created fewer risks to the personal safety of the officers and was compatible with the claims of some experts and the widely held view that the home is man's private sanctuary, it is not surprising that arrest remained the least popular option.

In the past few years, however, many police departments have been forced to reassess their position on arrest of womanbeaters. One reason for the change is the heavy publicity generated by an empirical study which concluded that arrest is the best means of preventing womanbeating. The Minneapolis Domestic Violence Experiment conducted in 1981-82 found that

arrest was the most effective of three standard methods police use to reduce domestic violence. The other police methods—attempting to counsel both parties or sending the assailants away from home for several hours—were found to be considerably less effective in deterring future violence in the cases examined.

The results of this study were made available to police departments


Mediation is problematic for a number of reasons, most notably because it "fails to protect women from subsequent violence . . . [and] perpetuates their continued victimization." Id. As the United States Commission on Civil Rights has noted:

Mediation and arbitration place the parties on equal footing and ask them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to agree to modify their own behavior in exchange for the assailants' promise not to commit further crimes.

United States Comm'n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice 96 (Jan 1982).

The Draft Report of the California Judicial Council Advisory Committee on Gender Bias in the Courts 40 (Mar 23, 1990) summarized testimony concerning the elimination of mandatory mediation in womanbeating cases as follows:

The committee heard testimony from two mediators who support mandatory mediation because it allows mediators to identify cases in which domestic violence has occurred and because it is preferable to litigation. Domestic violence victims, advocates and other witnesses, however, strongly opposed mandatory face-to-face mediation in cases involving domestic violence. Testimony described the terror felt by victims, their inability to express themselves or assert their rights, concessions made out of fear of the batterer, and their continued victimization by being required to deal with their batterer.


55 The 1960s psychological and sociological literature preferred the mediation option to arrest. This was based, in part, on a now discredited view of abused women as willing participants in their abuse. See Richard Gelles and Murray Straus, Intimate Violence 49-50 (Simon and Schuster, 1988); Sonkin, Martin & Walker, The Male Batterer at 9 (cited in note 9); Waits, 60 Wash L Rev at 315 (cited in note 16). It was also based in part on concern that arrest would break up the family. US Department of Justice, Final Report at 22 (cited in note 1).


The National Institute of Justice has been replicating the Minneapolis Experiment in six other cities. In 1989 Omaha, Nebraska was the first of these cities to complete its "domestic violence experiment." Its findings were inconsistent with those of the Minneapolis experiment. No greater risk of repeated violence was found, regardless of whether the batterer was arrested, separated or counseled. Based on this outcome the Omaha Police Division concluded, however, that arrest was still a viable strategy:
throughout the nation.\textsuperscript{57}

Policy makers and the general public have become increasingly aware of the appropriateness of arresting womanbeaters. Governmental studies have emphasized the importance of arrest\textsuperscript{58} and an increasing number of states have enacted mandatory arrest statutes.\textsuperscript{59} One indication that arresting womanbeaters is now an acceptable part of popular culture is that NBC recently aired a made-for-television Movie of the Week, \textit{A Cry for Help},\textsuperscript{60} based on the events which led up to an important police liability for failure to arrest case.\textsuperscript{61}

In some jurisdictions the final factor leading to a preference for arrest is the financial risk that failure to arrest poses for police officers and municipalities.\textsuperscript{62} A growing number of battered women are bringing lawsuits which are at least surviving dismissal on the pleadings against municipalities, police departments and police officers.\textsuperscript{63} The combination of empirical evidence, public pressure and actual or potential law-

\begin{quote}
Although arrest may not act as a deterrent to continued domestic violence, often, arrest is one necessary first step in a coordinated process to break the cycle of violence. Omaha Police Division Domestic Violence Experiment Press Release (Sept 9, 1989). Since one of the two experiments so far found that arrest reduces the likelihood of future abuse while the other found that arrest does not increase the likelihood of future abuse, arrest should remain the preferred means of dealing with womanbeating.

\end{quote}


\textsuperscript{58} See, for example, US Department of Justice, \textit{Final Report} at 17 (cited in note 1); \textit{Utah Task Force Report} at 208 (cited in note 6).

\textsuperscript{59} Or Rev Stat § 133.055(2) (1989) and 133.310(3) (1989); Wash Rev Code § 10.31.100(2) (1990) and 26.50.110(2) (1990); Minn Stat Ann § 518B.01(4) (1990); NC Gen Stat § 50B-4(b) (Michie 1979); Wis Stat § 968.075(2) (1987-88); Iowa Code Ann § 236.12(2)(b) to 236.12(2)(d) (1989); 19 Me Rev Stat Ann § 770(5) (1989); Conn Gen Stat Ann § 46b-38b(a) (West 1986).

\textsuperscript{60} \textit{A Cry For Help} was first aired on NBC's \textit{Movie of the Week} on October 2, 1989.

\textsuperscript{61} \textit{Thurman v City of Torrington}, 595 F Supp 1521 (D Conn, 1984).

\textsuperscript{62} Even in jurisdictions in which civil liability for failure to arrest has yet to become a reality, the possibility that it might can have a significant impact on the behavior of law enforcement officers.

For example, two high-ranking officials in Milwaukee, Wisconsin, where arrest is mandatory but civil liability has never been imposed, both use the specter of civil liability to emphasize to the officers they are training that mandatory arrest must be taken seriously.

Captain Dean Collins of the Milwaukee Police Department has used \textit{Nearing v Weaver}, 295 Or 702, 670 P2d 137 (1983), discussed in notes 127-62 and accompanying text, in which the Oregon Supreme Court allowed strict liability to be applied to police officers who failed to arrest a violator of a protective order where such arrest was mandatory, "to bludgeon his officers into action." Telephone conversation with Captain Dean Collins (Mar 2, 1990). Captain Collins also noted that police officers' awareness of both Section 1983 and tort liability for failure to arrest does make a difference in their behavior. He believes the possibility of liability has a deterrent effect on officers who might not otherwise fully enforce mandatory arrest. Id.

Similarly, Elisa Para-Condola, Assistant District Attorney with Milwaukee County, and Supervisor of the Domestic Violence Unit, uses \textit{Thurman}, 595 F Supp 1521 (D Conn 1984), in which Section 1983 liability was found against the City for failure to arrest a womanbeater, in her training of deputy sheriffs concerning the importance of mandatory arrest. Telephone conversation with Elisa Para-Condola (Jan 29, 1991).

\textsuperscript{63} See notes 67 and 89 and accompanying text.
suits has caused many police departments to change their arrest policies and some to change their practices.64

However, despite some welcome change in police conduct towards womanbeating, many battered women's calls for help still do not result in arrest. These women need some means of both making police departments do the right thing and receiving compensation when they don't. Making it expensive for the police not to arrest remains an effective way of forcing police departments to adopt a policy and practice of routinely arresting womanbeaters.

B. The Bases for Police Liability

There are two bases for holding police officers and municipalities who fail to arrest womanbeaters liable for money damages: state tort actions and 42 U.S.C. Section 1983 actions for violations of federal constitutional rights.65 Both present problems when applied to police. However, by carefully assessing the facts of the particular case and the laws of the particular jurisdiction, it will often be possible to proceed on one or both of these grounds.66

There have been a number of recent cases seeking damages under Section 1983.67 However, the Rehnquist Court recently made it clear, in DeShaney v Winnebago County Dept. of Social Serv.,68 that substantive due process claims for failing to protect people who are at risk (such as battered women) will not succeed.69 The DeShaney decision specifically left open the question of whether a procedural due process entitlement might exist in situations where the state fails to protect people it knows to be at risk.70 The most recent federal district court case, Coffman v Wilson Police Dept.,71 accepted such a procedural due process argument. Relying on the 1972 Supreme Court decision, Board of Regents v Roth,72 the Coffman court held that a protective order obtained under Pennsylvania's domestic violence act creates a constitutionally-protected

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64 See Sherman & Cohn, 29 L & Soc Rev at 125 (cited in note 57).
65 Another possible but as of yet unexplored source of civil liability is state constitutional law.
66 A number of the leading cases were brought under both Section 1983 and state tort law. See note 192 and accompanying text.
67 See Coffman v Wilson Police Dept., 739 F Supp 257 (ED Pa, 1990); McKee v City of Rockwell, 877 F2d 409 (5th Cir, 1989); Hynson v City of Chester, 864 F2d 1026 (3d Cir, 1988); Watson v City of Kansas City, Kansas, 857 F2d 690 (10th Cir, 1988); Balistreri v Pacifica Police Dept., 855 F2d 1421 (9th Cir, 1988); Thurman, 595 F Supp 1521.
69 The DeShaney holding was applied to a case for failure to arrest a batterer in McKee v City of Rockwell, 877 F2d 409, 413 (5th Cir, 1989) (upholding denial of battered woman's claim against police for failure to protect her from an abusive boyfriend, partly because DeShaney bars such claims on due process grounds) and Raucci v Town of Rotterdam, 902 F2d 1050 (2d Cir, 1990) (upholding denial of battered woman's Section 1983 claim based on DeShaney while allowing her tort claim).
"property interest" in police enforcement.\textsuperscript{73} It remains to be seen whether other federal courts will endorse this basis for suing under Section 1983.\textsuperscript{74}

Another constitutional avenue which the Supreme Court has not foreclosed is equal protection claims.\textsuperscript{75} However, success on such claims requires levels of proof which often create insurmountable barriers.\textsuperscript{76}

There are two modes of equal protection analysis when gender discrimination is alleged. If the discrimination claim is based on an express gender classification (which is unlikely in the domestic violence context)\textsuperscript{77}

\textsuperscript{73} 739 F Supp at 263-64.

\textsuperscript{74} The \textit{Coffman} court viewed the state court's action in issuing a protective order to a police department as creating the "property interest." The order required police enforcement against the victim's husband; this was found to be a "legitimate claim of entitlement." \textit{Board of Regents v Roth}, 408 US at 577 (1972).

The \textit{Coffman} court found support for its procedural due process analysis in Pennsylvania's special relationship exception to the public duty doctrine. See note 138 and accompanying text. Although the court acknowledged that \textit{DeShaney} expressly rejected using a special relationship analysis for substantive due process claims, it concluded that such a relationship could create the property interest which would require that procedural due process be provided. \textit{Coffman}, 739 F Supp at 265 n9.

This still leaves open the question of how much process is due. While state law can create a property interest, it cannot in turn determine the procedural standards whereby the interest can be enforced. The Constitution alone provides these guarantees. \textit{Cleveland Bd. of Educ. v Loudermill}, 470 US 532, 541 (1985), discussing \textit{Arnett v Kennedy}, 416 US 134, 167 (1974). To deprive the person protected by the order of her property interest thus requires that the government observe at least the constitutional minimums. Determining how much process is due requires a balancing of the relevant interests at stake. These are:

[first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [citations omitted]]


Applying the \textit{Matthews} test requires balancing the battered woman's safety, welfare, detrimental reliance and physical and emotional well-being; the likely effects of failure to enforce the protective order and the probability such a failure would deprive the victim of due process; and the government's interest, including cost, administrative problems, and the \textit{per se} discretionary nature of police work. Since protective orders leave no room for discretion, and failure to enforce the order may lead to serious injury or even death, perhaps the constitutionally-required process is enforcement of the protective order.

In states such as Oregon, Washington and Wisconsin, which have statutes providing for mandatory arrest of womanbeaters even where no protective order has been issued (see note 59 and accompanying text), the same procedural due process argument can be made if a police officer fails to arrest a womanbeater when probable cause to arrest exists. The key is lack of discretion. If a statute reads "shall arrest," the police officer as decision-maker must do so or risk depriving the battered woman of her due process rights. On the other hand, if the statute says "may arrest," the decision-maker will probably be viewed as having unlimited discretion, so no protectable property interest will result. Therefore, the \textit{Coffman} analysis can be used in Section 1983 claims by battered women who reside in states which have mandatory arrest if police officers do not comply with the mandate, whether or not a protective order has been issued.

\textsuperscript{75} See \textit{DeShaney v Winnebago County Dept. of Social Serv.}, 489 US 189, 197 n3 (1989) (state may not deny services to disfavored groups).

\textsuperscript{76} See \textit{Woods}, 5 Women's Rts L Rptr at 19-20 (cited in note 39).

\textsuperscript{77} Laura S. Harper, \textit{Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues
the Craig v Boren intermediate standard of review requiring that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" is appropriate. If the discrimination claim is based on a facially neutral classification that has a disproportionate impact on women, proof of discriminatory intent is necessary; once that intent is shown, intermediate scrutiny is applied. Application of the intermediate standard, unlike the strict scrutiny standard applied to race and national origin classifications, often results in the challenged classification being found valid.

Any Section 1983 claim faces major hurdles in addition to those attributable to the particular section of the Constitution that is allegedly violated. The requirement of proof of what was on the municipality's "mind" for municipal liability and the immunity of individual officers

After DeShaney v Winnebago County Department of Social Services, 75 Cornell L Rev 1393, 1400 (1990).

An express gender-based policy premised on the stereotype that husbands are allowed to beat their wives was alleged in Thurman, 595 F Supp 1521 (D Conn 1984). Even though the Torrington Police Department never explicitly stated a gender-based classification, and plaintiff never alleged the existence of such a classification, the federal district court allowed the case to go forward based on a pattern and practice of gender discrimination. Id at 1527. Treating a pattern and practice of not arresting womanbeaters as the legal equivalent of an express gender-based policy has not been followed by other courts, and is of questionable precedential value. See Hynson v City of Chester, 864 F2d 1026, 1031 (3d Cir 1988).

It is extremely unlikely that a police domestic violence arrest policy would contain expressly gender-based language. In fact, avoiding gender-based language has been a problem for battered women advocates when drafting legislation that encourages police to arrest womanbeaters but not their victims. A negative side effect of mandatory arrest statutes has been that some police respond by arresting both parties. To discourage this practice, some mandatory arrest statutes include language such as:

When the officer has reasonable grounds to believe that spouses, former spouses or other persons who reside together or formerly resided together are committing or have committed domestic abuse against each other, the officer does not have to arrest both persons, but should arrest the person whom the officer believes to be the primary physical aggressor.


See, for example, Mississippi Univ for Women v Hogan, 458 US 718, 723-24 (1982) (discussing state university nursing school's woman-only policy).


See, for example, Michael M v Superior Court, 450 US 464 (1981) (upholding California's statutory rape statute which only applied to men having sexual intercourse with underage women); Rostker v Goldberg, 453 US 57 (1981) (upholding male-only registration for the draft).


See Monell v Dept. of Social Serv., 436 US 658 (1978), which provided that municipalities could be sued where:

. . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted by that body's officers.

Id at 690. A municipality could also be sued for:
unless it is patently clear that what they were doing was unconstitutional, make Section 1983 claims a gamble at best.

IV. TORT LIABILITY: EXAMPLES FROM TWO STATES

The second basis of liability for failure to arrest womanbeaters is state tort law. Tort law also poses problems. The most problematic of these barriers are two general limitations on tort claims against governmental entities: the public duty doctrine and discretionary/planning immunity. In most states, one or both of these defenses exist. Further modification of many states' domestic abuse legislation would better assure that tort actions for failure to arrest batterers succeed, thereby reducing the incidence of womanbeating while compensating and empowering battered women. Until and unless this happens, the success of lawsuits against the police and municipalities will often be uncertain. Still, the real possibility that these actions and constitutional claims may succeed, in itself, is likely to continue to influence police departments to change their policies to favor arrest.

... deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the body's official decision-making channels. Id at 690-91.


In Monell the Court seemed to be looking for something parallel to an individual's decision to act, some indication of will or intent.

Professor Whitman points out that in later Supreme Court cases, "[t]he search for a mind to evaluate continues." Id at 248.


[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Under this standard, a police officer could be held individually responsible if a mandatory arrest statute or written policy were in effect and a denial of equal protection were established. It is unlikely that both could be shown at the same time. See, for example, Turner v City of North Charleston, 675 F Supp 314, 320 (D SC 1987).

84 The public duty doctrine treats the duty of a governmental entity as one owed to the general public for which no liability to individuals harmed as a result of its breach exists unless there is a special relationship between the governmental entity and the injured individual. See notes 133-40 and accompanying text.

85 Discretionary immunity limits governmental entities' liability for the routine (ministerial) acts of its agents. No liability is available where the conduct which resulted in harm was the result of a policy (discretionary) choice. See Restatement (Second) of Torts § 895D, Comments f-h (American Law Institute, 1982).

Another restriction on governmental liability is the dollar limit on the maximum amount recoverable from a governmental entity or its employees. For example, in Oregon the limit on governmental liability for a single individual's claims is $200,000. Or Rev Stat § 30.370(b) (1989).
A. Background

In the 1989 United States Supreme Court decision, *DeShaney v Winnebago County Department of Social Services*, the Court limited the state's constitutional responsibility to protect people from being harmed by others to situations where the endangered person was in state custody. Chief Justice Rehnquist's majority opinion suggested that state tort law might provide the appropriate remedy against the state in non-custodial cases. In reality, however, most jurisdictions rarely provide any means of suing the state for failure to protect one person from harm by another. This is so even when, as in failure to arrest womanbeater cases, the state is aware of the specific danger.

A few jurisdictions have allowed battered women to sue when police officers fail to arrest their batterers. Not surprisingly, in those jurisdictions arrests of womanbeaters have become routine. The Oregon experience is the clearest success. The work of members of the Oregon Coalition Against Domestic and Sexual Violence (The Coalition) paved the way for both the enactment of strong mandatory arrest statutes and a decision by the highest Oregon appellate court holding that police will

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87 Id at 1005.
88 Id at 1006-07.
90 Barbara Finesmith surveyed the police guidelines concerning womanbeating as of December 1982 in *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 Seton Hall L Rev 74 (cited in note 54). Among the cities she surveyed were Corvallis and Portland, Oregon. At the time of her survey Oregon's mandatory arrest statute had been in effect for five years. Concerning these two cities' arrest policies, Finesmith reported:

> While they do not view arrest as a last resort, they are somewhat short of a strict arrest policy.

Id at 99, n152. See also notes 118-19 and accompanying text.

In a written survey of ten Oregon police departments, including Corvallis and Portland, which I conducted in early 1990, the responses were as follows. All ten departments said that they do not allow a high degree of officer discretion in determining whether arrest is appropriate. Six out of ten said probable cause to arrest was the only basis for exercise of discretion whether or not to arrest. Seven out of the ten departments surveyed said that awareness of police civil liability for failure to arrest has resulted in strict application of the Domestic Abuse Act, with less discretion among officers as to action taken. Caroline Forell, *Domestic Violence Policy Questionnaire* (1990) (on file in the University of Oregon Law School Library).

The responses to surveys conducted before and after *Nearing* was decided suggest that police attitudes towards routinely arresting womanbeaters have changed, at least in part because civil liability is available for failure to arrest womanbeaters.

be strictly liable for failure to carry out the statutes’ mandate. In contrast, New York has no specific legislation concerning the arrest of womanbeaters. Nevertheless, New York courts have allowed suits for failure to arrest womanbeaters, but only if certain restrictive conditions are met.

B. The Oregon Experience

Close examination of Oregon’s treatment of battered women highlights what legislation and case law can accomplish. It illustrates why, without similar legislation and case law, police may be able to continue to ignore the plight of battered women.

1. Mandatory Arrest Statutes

Oregon enacted the Abuse Prevention Act in 1977, making it the first state to expressly require that police arrest womanbeaters. Mandatory arrest is required in two situations: where police “at the scene” have probable cause to believe womanbeating has occurred, and where police know or should know that a protective order has been violated.

The “at the scene” provision says:
When a peace officer is at the scene of a domestic disturbance and has probable cause to believe that an assault has occurred between spouses, former spouses or adult persons related by blood or marriage or persons of the opposite sex residing together or who formerly resided together, or to believe that one such person has placed the other in fear of imminent serious physical injury, the officer shall arrest and take into custody the

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92 Id at 262-63 (cited in note 91) (referring to Nearing v Weaver, 295 Or 702, 670 P2d 137 (1983)).
95 Or Rev Stat § 133.055(2) (1977).
   Many police in fact routinely arrest perpetrators of single-sex domestic violence, despite the fact that such violence is not covered by the statute. Interview with former police officer Mary Duhaime (Mar 21, 1989).
   The exclusion of express protection against homosexual and lesbian domestic violence is not surprising. Protective legislation has rarely expressly covered lesbians and gay men. But see Wis Stat § 968.075(1)(a) (1987-88):
   “Domestic abuse” means any of the following engaged in by an adult person against his or her spouse, former spouse or adult relative or against an adult with whom the person resides or formerly resided . . . (emphasis added).
   Most legislation concerning gay men and lesbians is punitive rather than protective. See, for example, Bowers v Hardwick, 478 US 186 (1986). See also Or Rev Stat § 236.380(2) (1989):
   No state official shall forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.
alleged assailant or potential assailant.\footnote{98} This provision is aimed at heterosexual domestic batterers whether they be male or female, married or unmarried.\footnote{99} It gives the police no discretion where probable cause exists that battering occurred or was just about to occur. Of course, the question of what constitutes probable cause remains,\footnote{100} but the statute expressly provides that the officer does not have to witness the assault in order to make a warrantless arrest.

When first enacted, the “at the scene” provision included an exception to mandatory arrest “if the victim objects.”\footnote{101} Four years later this exception was deleted because police were asking battered women \textit{in front of their attackers} whether they objected to the arrest.\footnote{102} Many battered women’s advocates believe that it is essential that the onus of deciding whether to take the womanbeater into custody be removed from the victim. One obvious reason for this is the coercive environment in which the decision to arrest must be made.\footnote{103} Instead of empowering the victim, being responsible for the decision to arrest may often make her more vulnerable to retaliation by her assailant. The decision is therefore better left to the police.\footnote{104} Another reason not to allow the battered woman to prevent the arrest of her assailant is to emphasize to all parties that the

\footnotesize
\textsuperscript{98} Or Rev Stat § 133.055(2) (1989) (emphasis added).
\textsuperscript{99} Police officers are far more likely to be asked to respond to womanbeating than husband-beating. (This is probably due in part to the more serious nature of the harm inflicted on women.) The National Crime Survey found that men were responsible for 95% of all spousebeating during 1973-77. Bureau of Justice Statistics, US Department of Justice, \textit{Report to the Nation on Crime and Justice, The Data} 21 (1983).
\textsuperscript{100} See Lerman, 21 Harv J Leg at 128-29 (cited in note 17) for a model provision concerning the determination of probable cause in womanbeating cases. This model provision is based on Ohio Rev Code Ann § 2935.03(B) (Page 1987) which is set out and discussed in note 211 and accompanying text.
\textsuperscript{101} 1977 Or Laws 845 § 1.
\textsuperscript{102} Senate Committee on Justice, Public Hearing 5 (Cassette Tapes 44-47) (Mar 3, 1981) (summary of statement of Peter Sandrock, District Attorney, Benton County, Oregon). See Or Gov’s Comm’n for Women, \textit{Domestic Violence in Oregon} 13 (Exec Dept, State of Oregon 1979) where it was reported:

\textsuperscript{103} Telephone conversation with Judith Armatta (cited in note 18).
\textsuperscript{104} Walker, \textit{The Battered Woman} at 209 (cited in note 12).
crime is one against the public. "This relieves the battered woman from feeling that she sent her husband to jail, and properly bases the arrest decision on the batterer's criminal conduct."\textsuperscript{103}

One possible problem resulting from mandatory arrest policies is that the number of suits against the police for false arrest may increase. A 1986 national survey of police departments showed that men sued them more often for false arrest than women sued them for failure to arrest.\textsuperscript{106} Police officers are often acutely aware of this risk and may even exaggerate it to justify a policy of non-arrest.\textsuperscript{107} To remove this incentive not to arrest, Oregon and a number of other jurisdictions expressly provide police with immunity from civil liability for arresting womanbeaters.\textsuperscript{108} Police immunity for arresting womanbeaters may both encourage police compliance with the mandatory arrest statute and positively affect police attitudes towards progressive domestic violence legislation.

On the other hand, police immunity for failure to arrest womanbeaters where arrest is mandatory may be counterproductive. A few jurisdictions have enacted mandatory arrest statutes but have also expressly provided that police officers are immune from liability to either the batterer or his victim so long as they act in "good faith."\textsuperscript{109} Lack of "good faith" is extremely difficult to prove. Immunity can therefore turn "shall arrest" back into "may arrest." In such situations there may be no effective means of making police obey the statute's mandate absent a finding that the Constitution was violated. The police have nothing to lose by ignoring the statute. In jurisdictions which provide such immunity, effective enforcement of a mandatory arrest statute will depend on police support for mandatory arrest or on a successful civil rights (Section 1983) action, neither of which can be counted on.

Oregon's second mandatory arrest statute applies to situations where the batterer has violated a protective order. It provides:

\textsuperscript{103} Eppler, 95 Yale L J at 807, n 79 (cited in note 103). See also Beck, 15 Fordham Urban L J at 1030-31 (cited in note 93).

\textsuperscript{106} Sherman and Cohn, 23 L & Soc Rev at 127 (cited in note 57) (only five percent of the 176 departments were sued for failure to arrest while fifteen percent were sued for false arrest).

\textsuperscript{107} Or Gov's Comm'n for Women, Domestic Violence in Oregon at 13 (cited in note 102): Police often express fear of civil liability for false arrest under the mandatory arrest provisions ... despite the fact that the law makes an officer immune from liability providing the officer acted in good faith and without malice in making the arrest. Because of the fear of liability for false arrest, the police often place pressure on the victim to make a citizen's arrest or to voice an objection to the arrest of the assailant.

\textsuperscript{108} Or Rev Stat § 133.315 (1989). See also, for example, Wash Rev Code § 26.50.140 (1990); Minn Stat § 629.341(2) (1990); § 518B.01(14)(b) (1990). See also Boylan and Taub, Adult Domestic Violence at 270-72 (cited in note 17).

\textsuperscript{109} See, for example, Conn Gen Stat Ann § 46b.38b (1986); Wis Stat § 968.075(6m) (1987-88). The Wisconsin statute was amended in 1990 to grant immunity to the police from criminal or civil liability; the police said that they felt compelled to arrest both parties in domestic disputes in order to avoid such liability. Telephone conversation with Kathleen Krenek, Administrator, Wisconsin Coalition Against Domestic Violence (Jul 24, 1990).
A peace officer shall arrest and take into custody a person without a warrant when the police officer has probable cause to believe that:

(a) There exists an order . . . restraining the person; and

(b) a true copy of the order and proof of service on the person has been filed as required . . . ; and

(c) the peace officer has probable cause to believe that the person to be arrested has violated the terms of that order.110

This statute requires police to arrest even if no violence has occurred or is imminent, so long as the terms of the protective order have been violated. A protective order can be obtained by anyone who has been “the victim of abuse within the preceding 180 days . . . if the person [is] in immediate and present danger of further abuse from the abuser.”111 Unlike many other states, Oregon requires that police departments receive notice and keep track of protective orders.112 This is essential if a mandatory arrest statute for violation of protective orders is to be meaningful.

Protective orders similar to Oregon’s are available in most states.113 However, without the enforcement mechanism of civil liability for failure to arrest, protective orders—violation of which may only be civil contempt offenses114—are not worth the paper they are written on.115 Protective orders give battered women false hope in jurisdictions where police do not have authority to arrest for violation of such orders.116 Furthermore, the orders are all too often simply ignored by both batterers and police.117 Mandatory arrest, backed by the threat of liability for failure to arrest, results in police enforcement and thus sends a message to potential violators that violation will have serious consequences.

Many jurisdictions have permissive or mandatory arrest statutes applicable to either “at the scene” situations or violation of protective order situations. Battered women need police protection in both situations. In “at the scene” cases, the women may not have had the opportu-
nity to obtain protective orders or may not wish to live separately at this stage of their lives. In the protective order violation cases, the women have acted affirmatively to separate themselves from their batterers, and their decision must be enforced.

2. Civil Liability

Even in jurisdictions such as Oregon, where statutory provisions clearly provide for mandatory arrest of womanbeaters in both “at the scene” and protective order violation situations, some police officers will not follow the statutory requirements unless they are subject to civil liability for failure to do so. As a result, some battered women will have the abstract right to have their batterers arrested, but no recourse when this right is not enforced.

Soon after the mandatory arrest statutes were enacted in Oregon, the Oregon Coalition Against Domestic and Sexual Violence, which had originally drafted the legislation, sent detailed explanations of the statutes to all Oregon police departments. Nevertheless, a study two years after the enactment revealed that

implementation . . . was inconsistent and piecemeal throughout the state [and that] almost one-third of the responding law enforcement agencies indicated that they had not changed their policies regarding response to domestic violence complaints since [mandatory arrest] became law.

If so many police departments were willing to admit they had not changed their policies, it is quite likely that many more had not changed their practices. Furthermore, the study showed that many police departments took a dim view of the mandatory arrest statutes. One police chief wrote a letter in which he said:

I wish to share with you a general police opinion on this domestic violence disturbance law; and simply stated, it is probably the worst written law in the history of the Oregon legislature.

If routine mandatory arrest was going to become a reality instead of just “the law,” something further would have to be done.

Once again, the Coalition took the initiative. They debated the relative merits of a class action suit on behalf of battered women, which had been undertaken with limited success in a few jurisdictions, and, alter-
natively, an individual test case seeking a tort remedy. They opted for the latter because of the limited applicability and burdensome court supervision which class actions involve.\textsuperscript{122}

The Coalition looked for a battered woman who had obtained a protective order which the police had refused to enforce and who would be willing to sue the police.\textsuperscript{123} Two stepped forward.\textsuperscript{124} One woman's tort suit against the police resulted in a summary judgment on her behalf and an eventual settlement under which she received financial compensation.\textsuperscript{125} In the case of another woman, Henrietta Nearing, summary judgment for the defendants was granted and affirmed on intermediate appeal.\textsuperscript{126} However, in 1983 the Oregon Supreme Court reversed the lower courts and held, in \textit{Nearing v Weaver}, that Henrietta had a valid cause of action and therefore could proceed to trial.\textsuperscript{127}

Henrietta Nearing sued because of events which occurred after she had separated from her husband. First, Henrietta's husband entered her home without permission and struck her. She had him arrested, and obtained a protective order the next day. The police department was given a copy of the order and proof of service on her husband. Less than a month later, her husband again entered her home on two successive days. Henrietta asked the police to arrest him but they refused. That same month her husband tried to enter her home on three further occasions and still the police refused her renewed request to arrest him. On a sixth occasion her husband physically attacked her friend in front of Henrietta's home.\textsuperscript{128}

Two of the common roadblocks to imposing tort liability on police for failure to arrest—discretionary immunity and the public duty doctrine—did not pose problems in the Oregon suits. First, since the action was against a governmental body and its employees, it was brought under Oregon's Tort Claims Act.\textsuperscript{129} Like many such statutes, this act

\textsuperscript{122} Gundel, \textit{9 Women's Rs L Rptr} at 262 (cited in note 91).
\textsuperscript{123} Id. Most likely the Coalition wanted a case which involved the protective order statute instead of the "at the scene" statute because the combined effect of the mandatory arrest statute and the protective order made it more likely the court would allow a cause of action.
\textsuperscript{124} Telephone interview with attorney Ruth Gundel, who represented one of two women, Henrietta Nearing, for Oregon Legal Services (Feb 2, 1990).
\textsuperscript{125} \textit{Kubitcheck v Winnett} (Or Cir Ct Hood River County, filed Nov 13, 1980). This was the easier case because the plaintiff, unlike Henrietta Nearing, had suffered obvious physical injuries. Id.
\textsuperscript{126} 61 Or App 297, 656 P2d 137 (1983).
\textsuperscript{127} 295 Or 702, 670 P2d 137 (1983). At the time of the \textit{Nearing} decision, Henrietta Nearing worked as a bartender in a small town on the Columbia River. Her reaction to her victory: "When men come in the bar right from jail and complain to me about being arrested for beating up their girlfriends, I tell them they have me to thank for that." Gundel, \textit{9 Women's Rs L Rptr} at 265 (cited in note 91).
\textsuperscript{128} \textit{Nearing}, 295 Or at 704-05.
provides immunity for discretionary acts of governmental employees.\textsuperscript{130} If the arrest statutes had used "may arrest" instead of "shall arrest," discretionary immunity may well have barred this suit.\textsuperscript{131} Here, however, the court rejected this defense because the language of the statute mandated arrest. The court said:

Discretion . . . exists only insofar as an officer has been delegated responsibility for value judgments and policy choices among competing goals and priorities. Patently the purpose of [this statute] was to negate any discretion of that kind in enforcing restraining orders.\textsuperscript{132}

Second, in most jurisdictions the public duty doctrine would have applied to Henrietta's situation.\textsuperscript{133} This doctrine, which may be statutory\textsuperscript{134} or created by common law,\textsuperscript{135} provides that if, as in the case of police officers, "the duty imposed on state agencies and public officials is one owed to the public generally, . . . breach of this duty does not provide an individual with a cause of action."\textsuperscript{136} Simply put, if a duty is owed to all, it is owed to none.\textsuperscript{137} An exception to the public duty doctrine is provided, however, if a special relationship exists between the governmental entity (through its agents) and the particular individual.\textsuperscript{138} Establishing a special relationship requires, at a minimum, that persons such as police officers must have assumed a greater duty of protection toward plaintiff than toward the general public.\textsuperscript{139} Many jurisdictions also impose additional requirements for establishing a special relationship.\textsuperscript{140}

\begin{footnotes}
\textsuperscript{130} Or Rev Stat § 30.265(3)(c) (1988). See also Mass Gen Laws Ann ch 258, § 10(b) (West 1988).
\textsuperscript{131} See, for example, Riss v City of New York, 22 NY2d 579, 240 NE2d 860, 293 NYS2d 897 (1968) (city not liable to woman assaulted by former suitor when police failed to provide protection upon request). However, a number of courts have interpreted "may arrest" as meaning "shall arrest."
\textsuperscript{132} Nearing, 295 Or at 710 (footnote omitted) (cited in note 89).
\textsuperscript{133} Many states have retained the public duty doctrine as an integral part of their common law. W. Page Keeton et al, Prosser and Keeton on the Law of Torts 1049-50 (West, 5th ed 1984) ("Prosser and Keeton").
\textsuperscript{134} See, for example, NJ Stat Ann § 59-5(4)(5); Cal Gov't Code § 818.2 (West 1980).
\textsuperscript{135} See, for example, Dinske v Town of Framington, 386 Mass 801, 438 NE2d 51 (1982); Taylor v Stevens County, 111 Wash 2d 159, 759 P2d 447 (1988); Yearwood v Town of Brighton, 101 AD2d 498, 475 NYS2d 958 (Supreme Ct App Div 1984), aff'd, 64 NY2d 667, 474 NE2d 612, 485 NYS2d 255.
\textsuperscript{136} State v Court of Maricopa County, 123 Ariz 324, 332, 599 P2d 777, 785 (1979) (overruled on other grounds in State v Gunnison, 127 Ariz 110, 618 P2d 604 (1980)).
\textsuperscript{137} See also Thomas M. Cooley, 2 A Treatise on the Law of Torts or the Wrongs which Arise Independently of Contract 385 (Callaghan, 4th ed 1932) ("On Torts"), in discussing the duty of insurance officials:

The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes on an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury and must be redressed, if at all, in some form of public prosecution.

\textsuperscript{138} Adams v State, 555 P2d 235, 241 (Alaska 1976) (superseded by statute, as stated in Wilson v Anchorage, 669 P2d 569).
\textsuperscript{139} See Court of Maricopa County, 559 P2d at 785 (cited in note 136); Cooley, On Torts at 385 (cited in note 136).
\textsuperscript{141} See, for example, Honcoop v State, 111 Wash 2d 182, 191-92, 759 P2d 1188, 1194 (1988)
In 1979, Oregon became one of the few states to abolish the public duty doctrine. The court's justification for abolishing the doctrine was that the Oregon Tort Claims Act was intended to make governmental bodies and their employees liable for the same kinds of harms as private persons. Many other state tort claims acts also provide that governmental entities are to be found liable for their torts "to the same extent as if they were a private person." In jurisdictions which have such provisions, the argument that such language precludes the court's application of a public duty doctrine can and ought to be made if the doctrine is likely to otherwise preclude battered women's tort actions against police officers.

If the public duty doctrine had still been in effect at the time of Henrietta's case, she would have had to convince the court that a special relationship between the police and herself existed. She would have had to argue that a special relationship was created by the mandatory arrest statute, the protective order, or both.

(plaintiff must be in privity with governmental entity and have justifiably relied on its express assurances); Galuszynski v City of Chicago, 131 Ill App 3d 505, 508, 475 NE2d 960, 962 (1985) (plaintiff must be "under the direct and immediate control of... police personnel") [disagreed with by Barth v Board of Education 141 Ill App 3d 266, 95 Ill Dec 604, 490 NE2d 77 (1st Dist 1986)]; Freitas v County of Honolulu, 58 Haw 587, 590, 574 P2d 529, 532 (1978) (police must have in some way acted to increase plaintiff's risk).


Among the other cases which have limited or abolished the doctrine are Ransom v City of Garden City, 113 Idaho 202, 743 P2d 70 (1987); Ryan v State, 134 Ariz 308, 656 P2d 597 (1982); Adam v State, 380 NW2d 716 (Iowa 1986).


See also Nearing, where the court said:

If a private defendant would be liable for harm caused by failure to carry out a mandatory duty for the benefit of a specific person protected by a court order, ... the Tort Claims Act makes a public defendant liable in the same manner. That policy decision was made by the legislature; it is not a new policy choice to be made in this case.

295 Or at 714.

See, for example, Wash Rev Code § 4.96.010 (1990); Mass Ann Laws ch 258, § 2 (Lawyers Cooperative 1990).

The Federal Tort Claims Act, 28 USC § 2674 (1988), states:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .

Federal courts have concluded that the Act allows for claims against the United States based on violations of statutes or regulations as long as the state's law would allow an analogous action against a private person. See, for example, Schindler v United States, 661 F2d 552 (6th Cir, 1981); Doe v United States, 520 F Supp 1200 (SDNY, 1981); Clark v United States, 660 F Supp 1164 (WD Wash, 1987).

Mandatory statutes have not usually been found sufficient bases for finding special relationships. See, for example, Namauu v City and County of Honolulu, 62 Haw 358, 614 F2d 943 (1980); Nelson v Freeman, 537 F Supp 602 (WD Mo, 1982). However, typically the statutes are not as specifically focused on a particular class of persons as are the statutes mandating arrest of womanbeaters. Thus, if the special purpose and focus of the mandatory arrest statutes are highlighted, courts may be willing to find that they create special relationships.

The existence of a protective order may provide a stronger basis for finding a special relationship. In New York, which does not provide for mandatory arrest, protective orders have been found to create special relationship exceptions to the public duty doctrine and have thereby enabled some battered women to sue the police. Baker v City of New York, 25 AD2d
Where the public duty doctrine is still in effect, courts are most likely to find a special relationship when, as in Nearing, mandatory arrest for violation of a protective order is provided. In such a situation, there are two reasons to treat the relationship between the state and the battered woman as special: the police officers' specific duty to arrest the womanbeater, and the specific court order designed to protect the battered woman from exactly the kind of harm which occurred.

Battered women who want to sue police in Oregon are fortunate that they do not have to be concerned with the public duty doctrine. In Oregon, if the police are found to owe a general duty, then liability for negligence will result as long as the ensuing injury was foreseeable and a result of unreasonable conduct. Nearing, however, was not held to be a case of common law negligence. Instead, the court found that the source of the cause of action was the combination of the protective order and the mandatory arrest statute.

Henrietta Nearing was fortunate that ordinary negligence was not the only theory available to her, because negligence actions usually require physical injury. Even though the protective order was repeatedly violated, she was not physically injured. Her husband damaged her home, tried to remove her children, threatened to kill her friend and actually assaulted her friend. However, she herself was not beaten, only "terrified by these incidents." If the harm suffered is purely emotional, major barriers exist to bringing a claim based on common law negligence. If Henrietta had been required to rely on ordinary negligence, she would have had to establish her claim under the theory of direct negligent infliction of emotional distress. She would have had to show "accompanying physical injury, illness or other physical consequences, . . . [or] some other independent basis for tort liability." In fact, she may have been able to show both physical consequences and an independent basis for tort liabil-

770, 269 NYS2d 515 (1966); Sorichetti v City of New York, 65 NY2d 461, 482 NE2d 70, 492 NYS2d 591 (1985). The New York experience is discussed in detail in a later section of this Article.

147 Nearing, 295 Or at 709 (1983).
148 Id at 705-06.
149 Brief for Appellant at 4, Nearing v Weaver, 61 Or App 297 ("Appellant's Brief").
150 See Prosser and Keeton at 360-61 (cited in note 133). See also Martha Chamallas and Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich L Rev 814 (1990), where the authors state:

The law of torts values physical security and property more highly than emotional security and human relationships. This apparently gender-neutral hierarchy of values has privileged men, as traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned. The law has often failed to compensate women for recurring harms—serious though they may be in the lives of women—for which there is no precise masculine analogue.

151 Prosser and Keeton at 361 (cited in note 133).
ity. But the court's rejection of ordinary negligence spared her the trouble and uncertainty.

The *Nearing* majority found an implied statutory tort action, similar to the implied right of action for civil liability that the United States Supreme Court has occasionally found to be available for violation of acts of Congress. A court that finds an implied statutory tort is asserting that the legislature considered civil liability and intended that a tort action be allowed, but somehow failed to expressly provide for one. This is a somewhat dubious proposition in most cases.

In *Nearing*, however, there were a number of plausible justifications for finding a statutory tort. First, the Oregon Legislature at least considered civil liability in relationship to police officers' responsibility in the domestic violence setting when it expressly provided police immunity from false arrest. By negative implication, the failure to provide similar immunity from civil liability for non-arrest may be evidence that it considered and intended to allow such actions. Of course, a counter-argument can also be made: since the legislature expressly addressed civil liability in the immunity provision, failure to provide civil liability for failure to arrest is evidence that they did not intend to provide for such liability. Most likely, neither of these arguments accurately describes the legislature's attitude toward civil liability. In the hurlyburly give-and-take involved in enacting legislation, the legislature as a whole probably did not put its legislative "mind" to this issue. Instead it left this issue for the courts to resolve.

In her brief, Henrietta alleged that "a stomach ulcer previously thought cured flared up; she became unable to sleep." Appellant's Brief at 6 (cited in note 149). The trespass and damage to her home may have been a sufficient independent basis for her claim of negligent infliction of emotional distress. See *Nearing*, 295 Or at 707, n4 (citing to examples of independent bases, including "trespass to a home").

The term "statutory tort" was used to describe the action in *Nearing* in *Chartrand v Coos Bay Tavern*, 298 Or 689, 695, 696 P2d 513, 517 (1985). See also Caroline Forell, *The Interrelationship of Statutes and Tort Actions*, 66 Or L Rev 219, 255 (1987).


In recent years the Supreme Court has shown great reluctance to imply a right of action from a federal statute. See, for example, *Cort v Ash*, 422 US 66 (1975); *Transamerica Mortgage Advisors, Inc. v Lewis*, 444 US 11 (1979).


See, for example, *Chartrand v Coos Bay Tavern*, 298 Or at 696. See also Forell, 23 Ind L Rev at 785 (cited in note 155).

See, for example, Respondents' Brief at 18, *Nearing v Weaver*, 61 Or App 297, 656 P2d 137 (1983) where it was argued:

In any event, it is absurd to argue that the legislature would go to great lengths in insuring that police officers could act without fear of civil liability, by enacting ORS [Or Rev Stat] § 133.315 as part of House Bill 2438, and then refuse to apply those same defenses to alleged liability for not making an arrest.

Second, in justifying its finding of an implied statutory tort, the court noted that the statutes involved here were unusual:

The statutes in this case, ORS [Or Rev Stat § 133.310(3) [ protective order statute], and its companion, ORS [Or Rev Stat § 133.055 are unique among statutory arrest provisions because the legislature chose mandatory arrest as the best means to reduce recurring domestic violence. They identify with precision when, to whom, and under what circumstances police protection must be afforded.\(^\text{159}\)

The uniqueness of these statutes was the main reason the court gave for finding an implied statutory tort action. This justification applies equally to both “at the scene” and “protective order” statutes. Thus, even though \textit{Nearing} involved the protective order statute, it would appear that the Oregon Supreme Court would also find a cause of action for violation of the “at the scene” statute.

Although not addressed explicitly by the court, another factor supporting the finding of a statutory tort might have been that the mandatory arrest statutes expressly created an important right—the right to have the police arrest and remove the batterer—without providing any remedy if that right is not enforced. Because no common law remedy existed, the \textit{Nearing} court had to either find an implied statutory remedy or create a new common law remedy.\(^\text{160}\) \textit{Nearing} was a controversial case, as is evidenced by a lengthy dissent.\(^\text{161}\) The court therefore may have found it expedient to conclude that the legislature, not the court, created this action.\(^\text{162}\)

3. \textbf{Lessons for Other States}

Advocating a new tort action based on either a protective order and statutory duty or solely on a statutory duty may succeed in other jurisdictions which have mandatory (or even permissive) arrest statutes. There are two ways the statute may prove useful: to create an implied statutory tort or to provide the basis for a new common law tort action.

\(^{159}\) \textit{Nearing}, 295 Or at 712.

\(^{160}\) A state constitutional argument can be made in the 37 states which have “no right without a remedy” clauses. See Patrick E. Sullivan, \textit{Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts}, 63 Neb L Rev 150, 170 (1984). However, a theory of constitutional duty actions analogous to statutory duty actions has, so far, not been developed. See David Schuman, \textit{Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution}, 65 Or L Rev 35, 70 (1986).

\(^{161}\) \textit{Nearing}, 295 Or at 717 (Chief Justice Peterson dissenting).

\(^{162}\) See Forell, 23 Ind L Rev at 790 (cited in note 155).


See also Forell, 66 Or L Rev at 227, 230-31 (cited in note 153).
In either case, there is a strong argument that actual physical injury need not be shown because the claim, unlike ordinary negligence, is statute-based.

The uniqueness rationale could be used in jurisdictions which have mandatory arrest statutes specifically addressed to womanbeating. Advocates might want to use this rationale to urge the court to allow a new common law action instead of focusing on the less familiar implied statutory tort action found by the Nearing court. A decision to provide civil liability could be justified as effecting the legislature’s purpose of protecting battered women through mandatory arrest.

Other state courts might be willing to openly create a new common law tort action for failure to arrest, akin to negligence *per se*, based on the statutory duty. Even if the public duty doctrine was in effect, the statutory duty and protective order together could be used to find a special relationship and thereby justify a new action.

It will be easier to make the case for either a statutory tort or a common law statutory duty action where the statute uses the mandatory “shall.” In a number of jurisdictions, “may” arrest has previously been interpreted to mean “shall” arrest. In such jurisdictions, the courts might also be amenable to creating an action.

In states where “may” is interpreted literally, discretionary immunity may bar the action, even if a protective order creates a special relationship. Without a mandatory arrest statute, courts may conclude that a police officer’s decision not to arrest a womanbeater involves a policy choice as to the best means of resolving the particular dispute, and is therefore a discretionary act for which the officer enjoys immunity.

The discretionary immunity defense can be overcome if the police department had a policy favoring arrest which the officer did not follow. Many police departments have written policies which are not always followed. Violation of such policies can be used as the basis for allowing tort liability, even if the state has not enacted a mandatory arrest statute.

The Oregon experience provides strong evidence that mandatory arrest statutes and civil liability for failure to arrest are feasible and make a difference. When mandatory arrest was first enacted, police depart-

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164 The statutory duty alone might be enough if an “at the scene” statute were involved.

165 See also Boylan and Taub, *Adult Domestic Violence* at 235 (cited in note 17).

166 However, this conclusion is not inevitable. See *Lowrimore v Dimmitt*, 310 Or 291, 296, 797 P2d 1027, 1030 (1990) (immunity not applicable to routine day-to-day decisions even if they involve a choice among courses of action).

167 See also *McBrine v Magnuson*, 282 Or 433, 436-38, 578 P2d 1259, 1260-61 (1978), discussed in Appellant’s brief in Nearing.

ments were highly critical of the concept and slow to comply. Similar alarms were sounded when *Nearing v Weaver* was first decided. The dissent in *Nearing* warned that "imposition of personal liability upon officers and upon their employers for failure to arrest could result in an inefficient use of scarce police resources in a period of social crisis or high crime." There is no evidence that these fears have materialized, although police departments have been more likely to comply with the mandatory arrest statute. Today mandatory arrest is routine and accepted.

The Oregon experience demonstrates the effectiveness of a system where both mandatory arrest and police liability for failure to arrest are in place. However, Oregon is by no means the norm. What then is the experience in the vast majority of jurisdictions which have no such statutes or case law?

**B. The New York Experience**

New York law is more representative of the law in most states. Arrest is not statutorily mandated, and a strong version of the public duty doctrine is in effect. Furthermore, although New York is somewhat unusual in not having statutory immunity for discretionary acts of public officials, its courts have found that such immunity exists at common law.

In New York, civil liability for failure to arrest womanbeaters is available only in certain limited circumstances. The leading New York cases where liability has and has not been allowed illustrate the need for legislative or judicial reform to enable more battered women to sue the police for failure to arrest their assailants.

1. **Arrest of Womanbeaters in New York**

There are no special arrest statutes in New York concerning womanbeating, other than a specific grant of discretionary authority to arrest violators of protection orders. The general criminal assault stat-

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167 See text accompanying note 120. See also Or Gov's Comm'n for Women, *Domestic Violence in Oregon* at 39 (cited in note 102).

168 *Nearing*, 295 Or at 726 (Peterson, C.J., dissenting).

169 See note 90.

170 As one police department official, responding to a questionnaire concerning the impact of mandatory arrest and police liability, concluded: "It is my opinion that the... statute and the *Nearing* decision are valuable to the Citizen and to the Police." Response to Forell, *Domestic Violence Policy Questionnaire* (cited in note 90).

171 See *Tango by Tango v Tulevech*, 61 NY2d 34, 459 NE2d 182, 185-86, 471 NYS2d 73, 76-77 (Ct of App, 1983).

utes\textsuperscript{173} are the bases for those arrests of womanbeaters which do occur.\textsuperscript{174} In womanbeating cases, therefore, police officers have their usual broad discretion regarding arrest.\textsuperscript{175}

Until 1978, the New York City Police Department's policy was \textit{not} to arrest womanbeaters where there was probable cause to believe a felony had been committed. Its policy regarding all other felonies was to arrest if there was probable cause.\textsuperscript{176}

Since the majority of people in New York state live in New York City, most battered women in this state were subject to a police policy \textit{not} to arrest womanbeaters who had committed felonies against women.\textsuperscript{177} Thus, even when a womanbeater had caused serious physical injury to the woman, the policy was not to arrest him. In essence, the societal message conveyed to womanbeaters and battered women was as

\textsuperscript{173} NY Pen Code § 120.05(1) (McKinney 1987) defines assault in the second degree as requiring "intent to cause serious physical injury." Assault in the second degree is a felony. NY Pen Code § 120.05 (McKinney 1987).

NY Pen Code § 120.00(1) (McKinney 1987) defines assault in the third degree as requiring "intent to cause physical injury." Assault in the third degree is a misdemeanor. NY Pen Code § 120.00 (McKinney 1987).


Assaults come within NY Pen Code § 10.00(6)'s definition of a "crime" as a misdemeanor or a felony. NY Pen Code § 10.00(6) (McKinney 1987).

\textsuperscript{174} Although there are no special arrest statutes, there is a special statute addressed to "family offense matters" that applies to womanbeating situations. NY Crim Pro § 530.11(1) (McKinney 1984) gives the family court and criminal courts concurrent jurisdiction over proceedings involving family offenses. The statute also provides:

Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, family court act and the domestic relations law. . . . No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

NY Crim Pro § 530.11(6) (McKinney 1986).

\textsuperscript{175} Woods, 5 Women's Rts Law Rptr at 22 (cited in note 39). This article notes that when the New York Police Department moved to dismiss the complaint in \textit{Bruno v Codd}, 90 Misc2d 1047, 396 NYS2d 974 (1977), rev'd, 64 AD2d 582, 407 NYS2d 165 (1978), aff'd, 47 NY2d 582, 393 NE2d 976, 419 NYS2d 901 (1979), it "argued that an officer has broad discretion to decide whether or not to make an arrest in any given case, and that therefore it was impossible for plaintiffs to obtain relief on the basis of failure to arrest."

See also Kenneth Culp Davis, \textit{Police Discretion} 1, 139-63 (West, 1975) (although police claim to enforce all laws, they apply a system of selective enforcement).

\textsuperscript{176} This policy was only changed because of litigation brought by and on behalf of battered women in \textit{Bruno}, 396 NYS2d 974, which resulted in a consent decree. See Woods, 5 Women's Rts Law Rptr at 28 (cited in note 39):

At the time negotiations [in \textit{Bruno}] began, the admitted policy of the New York City Police Department was to make arrests in all cases, except as between husbands and wives, where the officer has reasonable cause to believe that a felony was committed.

\textsuperscript{177} Id at 29.
follows: it's okay to break her bones as long as she's your wife.\textsuperscript{178}

In 1978, as the result of litigation brought by and on behalf of battered women, the New York City Police Department was forced to change its written policy concerning the arrest of womanbeaters by expressly providing that its officers would arrest womanbeaters "[w]here there is a reasonable cause to believe that a husband has committed a felony against his wife and/or has violated an Order of Protection. . . ."\textsuperscript{179} This written policy may provide an avenue for suing the department if it fails to follow its own rules regarding arrest of womanbeaters.\textsuperscript{180}

New York's strong version of the public duty doctrine shields police officers' broad discretion from scrutiny except in the most egregious of cases. In order to come within the special relationship exception to New York's public duty doctrine, a battered woman must show the following:

\begin{enumerate}
\item an assumption by the municipality, through its promises or actions, of an affirmative duty to act on behalf of the party who was injured;
\item knowledge on the part of the municipality's agents that inaction could lead to harm;
\item some form of direct contact between the municipality's agents and the injured party; and
\item that party's justifiable reliance on the municipality's affirmative undertaking.\textsuperscript{181}
\end{enumerate}

The second and third requirements can usually be satisfied in cases where the police came to the scene of the womanbeating. However, the first and fourth requirements, that there already be governmental conduct which created an affirmative duty upon which the injured party has justifiably relied, preclude liability in many cases of failure to arrest a womanbeater.\textsuperscript{182}

\textsuperscript{178} Compare the similar societal message conveyed by the marital exemption to rape statutes: it is okay to rape a woman if she is your wife. See \textit{People v Liberta}, 64 NY2d 152, 474 NE2d 567, 485 NYS2d 207 (1984).


\textsuperscript{180} Basing liability on violation of a police department's own written policies is discussed in notes 197-220 and accompanying text.

\textsuperscript{181} \textit{Cuffy v City of New York}, 69 NY2d 255, 505 NE2d 937, 940, 513 NYS2d 372, 375 (Ct of App 1987).

\textsuperscript{182} These two requirements track the classic liberal limitation on what rights the Constitution creates. In describing the limits of the due process clause in \textit{DeShaney v Winnebago County DSS}, 489 US 189, 193 (1989), Chief Justice Rehnquist says the clause does "not require a state or local governmental entity to protect its citizens from 'private violence.' " He also says that the due process clause's "purpose was to protect the people from the State, not to ensure that the State protected them from each other." Id at 196.

The public duty doctrine is the common law analogue to the United State Supreme Court's view that the Constitution protects only negative liberties. Like the Supreme Court's view of the Constitution, the public duty doctrine has "an impressive lineage." Susan Bandes, \textit{The Negative Constitution: A Critique}, 88 Mich L Rev 2271, 2313 (1990). It reflects a view of justice, "articulated by Aristotle, and accepted by Hobbes and Kant, which condemns only 'active injustice' and [which] 'ignores the ills that we cause by simply letting matters take their course.' " Id at 2312 (quoting from Judith Shklar, \textit{Giving Injustice Its Due}, 98 Yale L J 1135, 1146 and 1142 (1989)). Under the public duty doctrine, state inaction cannot be the basis of tort liability, regardless of how morally culpable state actors may be. Thus, failure to arrest a
If a battered woman is able to establish that a special relationship existed, moral and legal responsibility may coincide. In New York, protective orders existed in all of the appellate cases which have found a special relationship. It is unclear whether police failure to act when they have knowledge of a violation of a protective order is in itself enough to create a special relationship. New York's highest court, the Court of Appeals, has said that "when the police are made aware of a possible violation [of a protective order], they are obligated to respond and investigate, and their actions will be subject to a 'reasonableness' review in a negligence action." However, the cases have involved much more than mere knowledge, as the Court of Appeals acknowledged in the same case:

[T]he jury was properly instructed that the special duty was not to be based on the order of protection in isolation, but rather, in combination with the police's knowledge of [the womanbeater's] violent propensity and their response to the claimed violation of the order in this particular factual situation.  

2. Civil Liability

The two leading cases in which tort liability was found are the 1985 New York Court of Appeals case, Sorichetti v City of New York and the 1990 Second Circuit case, Raucci v Town of Rotterdam. Both these cases and Yearwood v Town of Brighton, in which liability was

Catherine MacKinnon describes this as "the negative state, the view that government best promotes freedom when it stays out of existing social arrangements." MacKinnon, Toward a Feminist Theory of the State at 164 (cited in note 45). See also Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate, 86 Colum L Rev 1118, 1160-61 (1986). ("The rights that we have are largely negative and inward looking, in the sense that they are designed to keep us apart in our isolated selves by proscribing certain activity and setting out protected zones of noninterference.")

But the question must be posed, freedom for whom? In the battered woman context, laissez-faire limitations on government responsibility give womanbeaters the freedom to terrorize women. Again, MacKinnon asks the question: "[W]hy are legislation and adjudication regarded as exercises of state power, but passivity in the face of social inequality ... is not?" MacKinnon, Toward a Feminist Theory of the State at 166 (cited in note 45). Her answer is patriarchy. "No law gives husbands the right to batter their wives. This has not been necessary, since there is nothing to stop them." Id at 239. See also Deborah L. Rhode, Feminist Critical Theories, 42 Stan L Rev 617, 631 (1990):

Contrary to liberal legalist assumptions, the state's refusal to intervene in private matters has not necessarily expanded individual autonomy; it has often simply substituted private for public power.

183 Sorichetti v City of New York, 65 NY2d 461, 482 NE2d 70, 76 (1985).
184 482 NE2d at 77 n2.
185 Id.
186 902 F2d 1050 (2d Cir 1990).
not imposed, involve severe injury or death of children. These cases highlight the fact that severe injury to children all too frequently accompanies womanbeating. These cases also highlight the extreme circumstances and egregious types of police inaction that are necessary to invoke a tort action in New York. Josephine Sorichetti and Kathie Raucci’s stories need to be heard. I therefore set out substantial portions of the lengthy and tragic facts of the Sorichetti and Raucci cases, as written by the courts. These facts demonstrate the level of police involvement and irresponsibility required before recovery will be allowed.

A. Josephine Sorichetti’s Story

In January 1975, Josephine obtained an order of protection in Family Court following a particularly violent incident in which her husband had threatened her and punched her in the chest so forcefully as to send her “flying across the room.” . . . By June 1975, Frank’s drinking and abuse had intensified. Consequently, Josephine moved out of their residence and took her own apartment. Upon her return in early July to obtain her personal belongings, Frank attacked her with a butcher knife, cutting her hand which required suturing, and threatened to kill her and the children. The police were summoned from the 43rd precinct, but Frank had fled by the time they arrived. A second order of protection was issued by Family Court and a complaint filed in Criminal Court by Josephine. Frank was arrested by detectives from the 43rd precinct, but Josephine subsequently dropped both Family Court and criminal charges based on Frank’s promise to reform.188

Frank’s drinking and violent behavior continued, however, and in September 1975, Josephine served divorce papers on him. Frank became enraged and proceeded to destroy the contents of their apartment. He broke every piece of furniture, cut up clothes belonging to his wife and (daughter) Dina, threw the food out of the refrigerator and bent every knife and fork. The police from the 43rd precinct were summoned, but they refused to arrest Frank because “he lived there.”

Family Court entered a third order of protection that also ordered

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188 When battered women do as Josephine did here, they reinforce the beliefs of many police officers and others that these women get what they deserve if they return to the batterer. Often, there is little understanding or even willingness to understand why many battered women believe their assailants’ promises to reform. See notes 12-14 and accompanying text. See also Robin West, Jurisprudence and Gender, 55 U Chi L Rev 1, 19 (1988), which describes the cultural feminist argument that women are more concerned with “[i]ntimacy, the capacity for nurturance and the ethic of care” than individual rights. West points out the negative side of this:

Separation, then, might be regarded as the official harm of cultural feminism. When a separate self must be asserted, women have trouble asserting it. Women’s separation from the other in adult life, and the tension between that separation and our fundamental state of connection, is felt most acutely when a woman must make choices . . . .

Id.
Frank Sorichetti to stay away from Josephine's home. During the ensuing months, Frank continued to harass his wife and daughter, following them in the mornings as they walked to Dina's school and threatening that they "were Sorichettis" and were going to "die Sorichettis," and that he was going to "bury them." Josephine reported these incidents to the 43rd precinct.

On November 6, 1975, Josephine and Frank appeared in Family Court where the order of protection was made final for one year. Included in the order was a provision granting Frank visitation privileges with his daughter each weekend from 10:00 a.m. Saturday until 6:00 p.m. Sunday.\textsuperscript{189} It was agreed that Dina would be picked up and dropped off at the 43rd precinct.

On the following weekend, Josephine delivered Dina to her husband in front of the 43rd precinct at the appointed time. As he walked away with the child, Frank turned to Josephine and shouted, "You, I'm going to kill you." Pointing to his daughter, he said, "You see Dina; you better do the sign of the cross before this weekend is up." He then made the sign of the cross on himself. Josephine understood her husband's statements and actions to be a death threat, and she immediately entered the police station and reported the incident to the officer at the desk. She showed him the order of protection and reported that her husband had just threatened her and her child. She requested that the officer "pick up Dina and arrest Frank." She also reported the past history of violence inflicted by Frank. The officer told Josephine that because her husband had not "hurt her bodily—did not touch her" there was nothing the police could do. Josephine then returned home.

At 5:30 p.m. the following day, Sunday, Josephine returned to the station house. She was distraught, agitated and crying. She approached the officer at the front desk and demanded that the police pick up Dina and arrest her husband who was then living with his sister some five minutes from the precinct. She showed the officer the order of protection and related the threats made the previous morning as well as the prior incidents and Frank's history of drinking and abusive behavior. The officer testified that he told Josephine that if "he didn't drop her off in a reasonable time, we would send a radio car out."

The officer referred Josephine to Lieutenant Leon Granello, to whom she detailed the prior events. He dismissed the protective order as "only a

\textsuperscript{189} "[M]ost courts will not admit testimony on spousal violence when custody or visitation issues are being determined." Sonkin, Martin & Walker, \textit{The Male Batterer} at 30 (cited in note 55). See also \textit{Achieving Equal Justice for Victims of Domestic Violence} in Judicial Council of California, \textit{Draft Report on Achieving Equal Justice for Women and Men in the Courts} 47 (table 6) (Mar 23, 1990): No California statute contains an express statement that spousal abuse is an issue to consider in determining custody or visitation arrangements in a child's best interest. While domestic violence is sometimes considered, as the judges survey clearly shows, too many times it is not.
piece of paper" that "means nothing" and told Josephine to wait outside until 6:00. At 6:00 p.m., Josephine returned to the Lieutenant who told her "why don't you wait a few minutes . . . Maybe he took her to a movie. He'll be back. Don't worry about it." Josephine made several similar requests, but each time was told "to just wait. We'll just wait." In the meantime, at about 5:20 or 5:30, Officer John Hobbie arrived at the station house. He recognized Josephine, who by then was hysterical, from prior incidents involving the Sorichettis.

After speaking with Josephine, . . . Officer Hobbie informed Lieutenant Granello of his prior experiences with Frank. He told the Lieutenant that Sorichetti was a "very violent man" and that Dina was "petrified" of him. Officer Hobbie recommended that a patrol car be sent to Sorichetti's home. Lieutenant Granello rejected this suggestion, contending initially that no patrol cars were available and later that "not enough time has gone by."

At 6:30, Lieutenant Granello suggested that Josephine call home to see if Dina had been dropped off there. She did so and was informed that the child was not there. She continued to plead that the officer take immediate action. The Lieutenant again told Josephine "Let's just wait." At 7:00, the Lieutenant told Josephine to leave her phone number and to go home, and that he would call her if Sorichetti showed up. She did as suggested.

At about the same time, Frank Sorichetti's sister entered her apartment and found him passed out on the floor with an empty whiskey bottle and pill bottle nearby. The woman also found Dina, who was severely injured. Between 6:55 and 7:00 p.m., Sorichetti had attacked the infant repeatedly with a fork, a knife and a screwdriver and had attempted to saw off her leg. Police from the 43rd precinct, responding to a 911 call, arrived within five minutes and rushed the child, who was in a coma, to the hospital. The infant plaintiff was hospitalized for 40 days and remains permanently disabled.\footnote{Sorichetti v City of New York, 482 NE2d at 72-74. Frank Sorichetti was convicted of attempted murder and sent to prison.}

Although it was the child, Dina, who suffered terrible injuries, this followed years of repeated physical violence against her mother. Josephine Sorichetti begged the police officers to enforce her protective order and arrest her husband, but to no avail. The police had numerous contacts with Josephine concerning her husband's violence and on the night of the tragedy, they "repeatedly told Josephine to 'wait a while longer,' never dispelling the (false) notion that they would provide assistance at some reasonable time."\footnote{Id at 76.} In such a case, the New York Court of Appeals said the special relationship exception to the public duty doctrine had been satisfied.
B. Kathie Raucci's Story

Similarly, the federal Court of Appeals, while denying liability under Section 1983, retained pendent jurisdiction of the state negligence claim and applied New York law in affirming tort liability under the following facts in Raucci v Town of Rotterdam.\textsuperscript{192}

On March 12, 1985, the Rauccis entered into a separation agreement which granted custody of the couple's two children, Pamela and Chad, to Ms. Raucci. On May 13, Ms. Raucci appeared with Chad at the Rotterdam Police Department station and reported that Mr. Raucci earlier that evening had punched her and threatened to kill her. She pointed to a neck injury that resulted from the assault and sought the arrest of Mr. Raucci. She told the officer on duty, Sergeant David Bethmann, that she was legally separated from her husband. Bethmann suggested that she could either have Mr. Raucci arrested or get an order of protection. Shortly thereafter, Ms. Raucci notified the Rotterdam Police Department that she had the permanent order of protection and that her husband was persisting in his threats to kill her.

Ms. Raucci returned to the Rotterdam Police on June 1 to report that Mr. Raucci had attempted to run her car off the road while she was driving with Chad earlier that day. She also reported that Mr. Raucci had been demanding that she let him have Chad. She requested, and received, a police patrol at her home that night. On June 10, she telephoned the police and told Deputy Chief Alfred DeCarlo that Mr. Raucci once again had threatened to kill her and had recently purchased a gun. She reminded DeCarlo that she had an order of protection and requested that her husband be arrested. According to Ms. Raucci, DeCarlo suggested that the police could “do more for [her] than . . . arrest [her] husband” and could train her to record her telephone conversations with Mr. Raucci to develop evidence against him. At DeCarlo's direction, she went to the Rotterdam Police station that evening, picked up the tape recorder, and received instruction on its use from Officer Wayne Calder, who was aware of her situation. Thereafter, Ms. Raucci was able to tape telephone conversations that included threats to kill her as well as admissions of ownership

\textsuperscript{192} Raucci, 902 F2d 1050 (2d Cir 1990).

The trial court was held to have properly retained the case even though it dismissed the federal claim. The court of appeals reasoned as follows:

The Supreme Court recognized . . . that “in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.” We find only that the case before us is not “the usual case,” and that denial of pendent jurisdiction here would be a waste of judicial resources, given the extensive proceedings involving the pendent claims prior to the dismissal of the federal claim.

Id at 1055 (internal citations omitted).

Battered women have achieved mixed results when bringing pendent state tort claims in federal Section 1983 actions. Compare Watson v City of Kansas City, Kansas, 857 F2d 90 (10th Cir 1988) (allowed pendent tort claim) to Thurman v City of Torrington, 595 F Supp 1521 (D Conn 1984) (denied pendent tort claim).
of a gun. On June 18, Ms. Raucci delivered the tapes to Calder, who played them in the absence of DeCarlo. Ms. Raucci testified that Calder told her that there was "plenty on the tape," but that he was not going to proceed until DeCarlo returned. Ms. Raucci telephoned the Rotterdam Police over the next two days in an attempt to locate DeCarlo, who was unavailable.

Ms. Raucci went to the Rotterdam Police station on Sunday, June 23, because Mr. Raucci had attempted to break into her apartment earlier that morning and threatened "to blow her head off." She signed an information charging Mr. Raucci with aggravated harassment by reason of his conduct of that day. . . . DeCarlo told her that the police would arrest Raucci on Monday when a judge would be available for arraignment. When Ms. Raucci returned to her apartment, Mr. Raucci appeared in her parking lot and continued to threaten her. She called the police, and they arrested Mr. Raucci on the basis of the information signed earlier that day. . . . He was arraigned the next day and released on bail of $500. . . .

On June 28, DeCarlo called Ms. Raucci to tell her that Mr. Raucci had come to the police station with Chad earlier that day to deliver her car keys. She replied that she was continuing to receive telephone calls from her husband, who also had appeared and startled her in public places on two separate occasions during that week. When she asked him what he was doing with the tapes, DeCarlo said that "he was working on it." DeCarlo assured her that Mr. Raucci was only trying to break her psychologically and "in most cases like this what happened was the person usually turns the gun on themselves." DeCarlo told her that Mr. Raucci had been badgering Chad at the police station to tell the police about her male companion.

Two days later, Ms. Raucci was leaving for a trip to Lake George with Chad when she stopped to pick up her male companion, Mark Ference, at his home in Schenectady. Mr. Raucci, who had been following Ms. Raucci, stopped his car and waited as she proceeded to park her car. He then retrieved his rifle from his trunk. Mr. Raucci walked toward Ms. Raucci's car with the rifle and shot and wounded Ference as Ference approached Ms. Raucci's car. Chad screamed and jumped into Ms. Raucci's arms. Ms. Raucci pleaded with her estranged husband not to shoot because Chad was in the car. Nevertheless, Mr. Raucci shot inside the car, wounding Ms. Raucci and killing Chad.193

Again, although the batterer's rage was focused on his wife, it was a child who suffered the ultimate consequences of the officers' failure to take Kathie Raucci's fears seriously. The officers' assurance that they were still working on the tapes and that Joseph Raucci was "only trying to break her psychologically" gave her a false sense of security. If

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193 Raucci, 902 F2d at 1052-53 (cited in note 192).
instead they had told her that they were concerned for her safety and that she needed to proceed with caution, she probably would have sought their assistance when she discovered Joseph was following her in violation of her protective order. This was another case where arrest may have prevented the tragedy.

One response to the claim that arrest would have prevented the injuries in Sorichetti and Raucci is that, while arrest would have prevented the exact sequence of events that transpired, arrest probably would not have stopped the violence against these two women. Based on their long history of womanbeating, these men were likely to continue their reigns of terror whenever they were released from jail. This response rings true in many cases. But it also rings of hopelessness. It assumes that some women are just unlucky to have gotten involved with men with uncontrollable tempers, and that society simply cannot protect women who use bad judgment in picking a partner. Nor can it protect their children.

Such a response is unacceptable. If police take womanbeating and escalating violence seriously, at least some of the men are likely to change their ways. If the police had treated Frank Sorichetti and Joseph Raucci as thugs and repeatedly arrested them; if both men had been required to spend a substantial amount of time in jail; if both men had been part of a diversion program which required them to enter and successfully complete a therapy treatment program; if the police had taken Josephine Sorichetti and Kathie Raucci's fears more seriously; if the police had done the right things, the violence may have stopped.

c. Liability for Failure to Enforce Protective Orders

The common law of New York, where police can be found liable for injuries that result from failure to enforce protective orders (at least where other incriminating factors are also present), would likely be followed in other jurisdictions which retain the public duty doctrine. Failure to enforce a protective order, if warrantless arrest for violation of such an order is allowed, should also overcome any discretionary

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194 See, for example, Bianco v State of Indiana (settled before filing, Jul 5, 1989), which is described in an article by Isabel Wilkerson, Inmate on Leave Held in Death of His Ex-Wife, NY Times 22 (Mar 12, 1989). In this case Bianco's ex-husband, Matheney, was imprisoned as a result of kidnapping, raping and beating Bianco. The prison promised to warn Bianco if it released Matheney under its furlough program. Despite this promise, it released Matheney without warning Bianco. Matheney broke into Bianco's house, chased her down the street and beat her to death with the butt of a shotgun in front of her two young children and horrified neighbors.


197 See Finn, 23 Family L Q at 55-57 (cited in note 113). See also Lerman, 21 Harv J Leg at 117-18 (cited in note 17).
immunity defense in jurisdictions which have immunity for discretionary acts. This is fine as far as it goes. But it does not go far enough. It means that a battered woman will, at a minimum, have to get a protective order before she can realistically rely on police protection. Furthermore, she will need to be in a jurisdiction, like New York, which uses arrest to enforce protective orders. In situations where no such order is yet in effect, or arrest is not the recognized means of enforcing such an order, the police cannot be sanctioned for failing to arrest womanbeaters. Furthermore, statutory limitations on warrantless arrest severely limit police authority to arrest where no order is in effect.

3. **Warrantless Arrest and Public Duty Doctrine Limitations**

Another New York decision, *Yearwood v Town of Brighton*, illustrates the restrictions of both the public duty doctrine and the limits on arrest without a warrant.

Two police officers came to Ingrid Yearwood’s home to investigate “a report of domestic difficulties” on a Saturday evening. Ingrid, who had gone to a neighbor’s house because her husband, John, had beaten her and threatened to kill her and burn their house down, told an officer that she feared for the safety of her children, aged 3 and 7. Ingrid and her attorney, who talked to an officer by phone, both requested that the police arrest John, but an officer said he could not arrest John “because he did not witness the assault and there were no visible injuries.”

After the officer in *Yearwood* told Ingrid he would not arrest John, he also told her that she could swear out a complaint for John’s arrest, but not until Monday. The officers then accompanied Ingrid back to her home, but John yelled at them and refused to let them in, threatening a “showdown.” He eventually let them in. When Ingrid went to get some belongings so she could spend the night at a neighbor’s home, she

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198 In enacting Family Court Act § 168, the New York Legislature intended to encourage police involvement in domestic matters, an area in which the police traditionally have exhibited a reluctance to intervene. By its terms, § 168 provides that a certificate of protection “shall constitute authority” for a peace officer to take into custody one who reasonably appears to have violated the order. As such, “it broadens the circumstances under which a peace officer may take a person into custody beyond those enumerated in Article 140 of the Criminal Procedure Law.” *Sorichetti v City of New York*, 65 NY2d 461, 482 NE2d 70, 75 (1985).

199 101 AD2d 498, 475 NYS2d 958 (S Ct App Div 1984), aff’d, 64 NY2d 667, 474 NE2d 612, 485 NYS2d 252.

200 475 NYS2d at 959.

201 Id.

202 It appears that the officer had no obligation to take John into custody even if Ingrid had attempted a citizen’s arrest. New York provides that a private citizen may arrest another person “for any offense when the latter in fact committed such offense in his presence.” NY Crim Pro § 140.30(1)(b) (Law Co-op 1990). In such a case, an available police officer must assist by taking the accused into custody unless there is no court available to process him “with reasonable promptness.” NY Crim Pro § 140.40(2) (Law Co-op 1990). Where, as here, no court is available, an officer cannot take that person into custody. NY Crim Pro § 140.20(3) (Law Co-op 1990).
found that John had slashed her clothes. He had also smashed her car windshield. Ingrid asked that the children accompany her to the neighbor's home, but John refused and the children remained. After Ingrid and the police left, John set fire to the house in which he and the children died.

Why didn't the police officer arrest John? The officer's claim that he was powerless to make such an arrest may have been correct. A police officer's authority to arrest without a warrant in New York is limited to: (a) any offense when he has reasonable cause to believe that a person has committed such an offense in his presence; and (b) a crime when he has reasonable cause to believe that a person has committed such crime, whether in his presence or otherwise. All degrees of assault are classified as "crimes" and require intent to cause "physical injury." New York courts have concluded that kicking, slapping and shoving, without more, is not "physical injury." "More" appears to mean observable physical injury. Harassment which covers hitting, shoving and kicking may frequently be the only charge police officers can bring against a womanbeater. However, harassment is classified as an "offense," not a "crime." Therefore, in order for a police officer to arrest for harassment, the officer has to witness the hitting or kicking.

This limit on the kinds of conduct for which an officer can make a warrantless arrest makes it much harder for battered women to obtain the protection they need. Even if the police want to do the right thing, by arresting the womanbeater, they may be subject to false arrest liability if they do so. New York's warrantless arrest law is typical of those of other jurisdictions, including some mandatory arrest jurisdictions. These limits on warrantless arrests discourage police from arresting in many cases where womanbeating has in fact occurred. A few states which do allow warrantless arrests even if there is no evidence of visible physical injury require a high probability that the woman will suffer

\[203\] NY Crim Pro § 140.25(1) (McKinney).
\[204\] See note 173.
\[205\] People v Facey, 115 AD2d 11, 499 NYS2d 517, 522 (AD 4th Dept. 1986), aff'd, 69 NY2d 836, 506 NE2d 536, 513 NYS2d 965 (Ct of App 1987).
\[206\] NY Pen Law § 240.25(1) (Law Co-op 1990) defines "harassment"—in part—as follows:
A person is guilty of harassment when, with intent to harass, annoy or alarm another person:
(1) He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same.

\[207\] NY Penal § 240.25(5) (Law Co-op 1990) (defines harassment as a "violation"); NY Penal Code § 10.00(3) (Law Co-op 1990) (defines a violation as an "offense . . . for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed").

imminent serious physical injury if the police do not intervene. Subsection a statute would not have aided Ingrid Yearwood, since she had already escaped to a neighbor's house.

A better warrantless arrest rule is the one in effect in Washington. The statute says:

A police officer shall arrest and take into custody . . . a person without a warrant when the officer has probable cause to believe that:

(b) The person . . . within the preceding four hours has assaulted that person's spouse, former spouse, or a person . . . with whom the person resides or has formerly resided and the officer believes:

(i) a felonious assault has occurred;

(ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or

(iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition.

Under Washington's warrantless arrest rule, the officers in Yearwood would have had the power to arrest the womanbeater as long as they believed Ingrid's claim that she had been beaten, even if there was neither observable injury nor a risk of imminent serious physical harm. Defining physical harm to include injuries that are not visible enables police to arrest womanbeaters without a showing of bloodshed or broken bones.

A rule such as Washington's, when coupled with mandatory arrest, becomes problematic when the woman does not want the alleged batterer arrested. The rights of the alleged assailant need to be considered: the risk of an arrest without probable cause may be too great where there are no visible signs of injury and the woman does not want to prosecute. If there are no visible signs of injury, it is appropriate to require the battered woman to sign a written statement that her assailant physically attacked her as a prerequisite to warrantless arrest of the batterer.

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209 Or Rev Stat § 133.055(2) (1989); Wis Stat § 968.075(2) (1987-88).

Where there is a mandatory arrest rule and immunity for false arrest as is the case in both Oregon and Washington, the police may feel more free to err on the side of arresting the womanbeater if they believe the woman was beaten, even if there is no evidence of physical injury.


See also Lerman, 21 Harv J Leg at 128-29 (cited in note 17).

211 For example, Ohio provides that:

[T]he execution of a written statement by a person alleging that an alleged offender has committed the offense of domestic violence against the person or against a child of the person, constitutes reasonable ground to believe that the offense was committed and reasonable cause to believe that the person alleged to have committed the offense is guilty of the violation.

Ohio Rev Code § 2935.03(B) (Page 1987).

Note, however, that Ohio provides for discretionary rather than mandatory arrest of womanbeaters. Thus, even if the victim signs such a statement, the officer can still decide not to arrest.
Arrest should still be mandatory as long as the signed statement along with other indicia create a reasonable likelihood that she was beaten.\textsuperscript{212} This should be the only situation where the battered woman herself has to actively seek to have her assailant arrested.\textsuperscript{213} It seems likely that Ingrid Yearwood would have been willing to sign such a statement.

Despite the uncertainty as to whether the police officer had the power to arrest John, Ingrid won at trial. However, the appellate court reversed the wrongful death verdict against the municipality.\textsuperscript{214} The court in so doing did not reach the question of whether the officers in Yearwood could or could not have arrested John under the warrantless arrest statute. Instead, its sole focus was on the public duty doctrine. It found that the special relationship exception had not been satisfied, because the police had not taken affirmative action or made reassurances of safety upon which Ingrid had relied. The court said:

Tragically, the police did not act to reduce the danger. But they did nothing to enhance it. Police officers in exercising their judgment, as they frequently must, in dealing with domestic quarrels cannot be expected to predict and prevent irrational behavior, and the law does not impose such a responsibility. . . . [T]he failure of the police here to perceive the danger is, without more, not enough.\textsuperscript{215}

Yearwood, which the New York Court of Appeals affirmed per curiam,\textsuperscript{216} illustrates both the limits which warrantless arrest rules place on the ability of the police to arrest womanbeaters and the limits the public duty doctrine places on the battered women's ability to sue police officers for failure to arrest batterers. In most states, there is no protection for women in Ingrid's position or their children. Unless, at a minimum, Ingrid had a protective order she could wave at the police, they could legitimately claim they were powerless to arrest the womanbeater. The messages Yearwood conveys to police officers in many womanbeating cases are that the public duty doctrine practically guarantees that there is no risk of police liability for non-arrest, and that the warrantless arrest rules create a risk of liability for false arrest if the womanbeater is arrested.

\textsuperscript{212} Boylan and Taub point out that the victim's signed statement that she has been beaten is not always sufficient, by itself, to allow arrest. The ultimate requirement—that the circumstances amount to probable cause as seen by the arresting officer—always remains in effect. Boylan and Taub, \textit{Adult Domestic Violence} at 245-46 (cited in note 17). This point is illustrated in their comments on the constitutionality of Ohio's statute:

That statute must be interpreted constitutionally. Its direction to accept the victim's statement as probable cause, as indeed will often be constitutionally appropriate, must be conditioned upon that statement seeming 'reasonably trustworthy information' in light of any 'facts and circumstances' known as a whole to 'the arresting officers.' (Citing \textit{Draper v United States}, 358 US 307 (1959)).

\textsuperscript{213} Id.

\textsuperscript{214} Yearwood, 475 NYS2d at 958.

\textsuperscript{215} Id at 961.

\textsuperscript{216} 64 NY2d 667, 474 NE2d 612, 485 NYS2d 252 (1984).
4. Police Liability for Violating Their Own Rules

Is there anything that might enable battered women like Ingrid to prevail even when they don’t have protective orders? There may be one avenue available in cases where officers have the authority to make a warrantless arrest. In New York, and quite likely in other jurisdictions which have no mandatory arrest statutes and which retain the public duty doctrine, an action may be based on violation of the police department’s own written policies. Although New York has no precedent directly on point, in Florence v Goldberg, the New York Court of Appeals approved of liability imposed upon a municipality for the injuries to a child hit by a car at an unsupervised school crossing. The basis for allowing liability was that “the police department voluntarily assumed a particular duty to supervise school crossings,” and the child’s parents relied on this supervision. The source of their duty was departmental rules and regulations.

The court in Goldberg emphasized that the rules involved created a limited duty, “a duty intended to benefit a special class of persons” and “[t]hus, the duty assumed constituted more than a general duty to provide police protection to the public at large.” A similar specific limited duty may be created by police rules and regulations concerning womanbeating. The Court of Appeals referred to such a duty in Bruno v Codd, an action brought by twelve battered women for declaratory and injunctive relief against officials and employees of the New York Police Department and the Department of Probation of the New York City Family Court. In Bruno, the police department had already entered into a consent judgment by which “the police have agreed . . . to respond swiftly to every request for protection and, . . . to arrest the husband whenever there is reasonable cause to believe that a felony has been committed against the wife or that an order of protection . . . has been violated.” Furthermore, “[t]o assure that these undertakings are fulfilled, supervisory police officers are to make all necessary revisions in their disciplinary and other regulations.” And in fact the New York Police Department did change its written policy concerning

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217 44 NY2d 189, 375 NE2d 763, 404 NYS2d 583 (1978).
218 404 NYS2d at 587.
219 Id.
220 Id at 585, 587.
221 Id at 587.
222 47 NY2d 582, 393 NE2d 976 (1979).
223 See Nancy Loving, Responding to Spouse Abuse and Wife Beating at 36-37 (cited in note 41). For a detailed account of this case, also see Woods, 5 Women’s Rts L Rptr at 7 (cited in note 39).
224 A felony is any crime punishable by more than a year’s imprisonment. NY Penal Law § 10.00 (McKinney 1987). Second Degree Assault, which includes the intentional infliction of serious physical injury, is a felony. NY Penal Law § 120.05 (McKinney 1987).
225 Bruno, 393 NE2d at 980.
226 Id.
womanbeaters from a preference for mediation\textsuperscript{227} to an obligation to arrest if there was probable cause to believe a felony had been committed.\textsuperscript{228}

Based on the present New York City Police Department's written policy concerning womanbeating, if police officers refuse to arrest womanbeaters, battered women may be able to sue New York City for injuries suffered as a result of this failure to arrest. However, since the regulations limit mandatory arrest to situations where there is probable cause to believe a felony has been committed, and a felony requires a showing of serious physical injury, the majority of battered women would still have no recourse against the police for failure to arrest.

Battered women who are injured further because of police officers' failure to arrest their assailants should investigate whether written policies were in effect at the time of the assault. If there are written policies which specifically address womanbeating and which at least in some situations require that police arrest womanbeaters, failure to arrest in those situations should fall within the special relationship exception and permit a civil action.

As the New York experience illustrates, in most jurisdictions—unless a woman has at least a protective order which the police knew or should have known about and for which they have authority to arrest without a warrant—the jurisdiction's public duty and discretionary immunity doctrines and warrantless arrest rules will most likely preclude a tort action for failure to arrest a womanbeater. Even if a woman was seriously injured before the police arrived and suffered further serious injury or death because the police chose not to arrest the womanbeater, most likely no liability will be allowed. That there are no consequences or compensation even where such callous inaction occurs is grievously wrong.

V. CONCLUSION

In most jurisdictions, a battered woman's options for successfully suing police officers are limited. She can argue that the police conduct was unconstitutional because it denied her equal protection or procedural due process. However, the legal and factual burdens of proving these violations are often insurmountable. She and others similarly situated can bring an action for declaratory and injunctive relief as was done in \textit{Bruno v Codd}.\textsuperscript{229} This will not, however, compensate her for her inju-

\begin{itemize}
  \item \textsuperscript{227} See Woods, 5 Women's Rts L Rptr at 9 n15, and sources cited therein (cited in note 39).
  \item \textsuperscript{228} See Woods, 5 Women's Rts L Rptr at 28 (cited in note 39) ("the police department obligated its officers to make arrests whenever the officer has reasonable cause to believe that the husband committed a felony against his wife") (citation omitted).
  \item \textsuperscript{229} 47 NY2d 582, 393 NE2d 976 (1979).
\end{itemize}
STOPPING THE VIOLENCE

ries. Furthermore, such actions have had mixed success: even when they have succeeded, duties are imposed on police only in the most egregious cases where felonies have been committed. Finally, a battered woman can investigate whether the police violated their own written policies by failing to arrest; if so, she can probably sue based on this violation.

Without a mandatory arrest statute, most battered women will have no means of forcing police officers to assist them in stopping the violence, and will probably not be compensated for injuries that result when police do not assist them. Oregon provides a model for other jurisdictions that protects battered women through mandatory arrest and civil liability for failure to arrest.

The complexity and intractability of womanbeating requires that additional policies and services be put into effect in order to stop the violence. First, there should be intensive training and education of police departments and officers regarding the importance of mandatory arrest and its purpose of protecting battered women. This training and education should include close coordination with people who care about battered women, most notably those involved with battered women’s shelters. Second, battered women’s shelters need to be available, and the police need to inform battered women of the existence of shelters at the time the police first intervene. The police should also inform battered women of the availability and the means of obtaining protective orders. Those orders should be easily obtainable and enforceable by warrantless arrests; violation of a protective order should be punishable as a misdemeanor. Copies of these orders should be routinely sent to police departments.

A warrantless arrest provision—like the one in Washington, which requires police to arrest as long as they believe the woman has been

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230 For example, the police department in Eugene, Oregon invited the local battered women’s shelter, Womenpace, to give the police a training session on dealing with battered women. Pearl Wolfe, the Volunteer Coordinator of Womenpace, views this as strong evidence of the good intentions of the Eugene Police Department. She also believes that the police officers will be more sensitive to the fears and needs of battered women as a result of this training. Telephone conversation with Pearl Wolfe (May 22, 1990).

Other battered women’s advocates agree that education and training of police officers are essential in order to make mandatory arrest work as it should. Telephone conversations with Judith Armatta (cited in note 18) and Liz Bollhagen (cited in note 22).

231 See, for example, NY Crim Pro Law § 530.11(b) (McKinney 1991) (requiring police and district attorneys to advise victims of the availability of shelters and other services).

232 Finn discusses the present policies of states regarding the violation of protective orders: 29 states treat violation of a protective order as a misdemeanor; 24 states allow police to arrest without a warrant, if there is probable cause to believe that a protective order has been violated; and 13 states require warrantless arrest in these circumstances. Finn, 23 Family L Q at 55-56 (cited in note 113).

233 See, for example, Or Rev Stat § 107.720(1) (1989) (requiring that copy of restraining order and proof of its service be sent to county sheriff, who must enter the order into the Law Enforcement Data System. Such entry “constitutes notice to all law enforcement agencies of the existence of such order”).
beaten even if there are no visible signs of the beating—should be in effect. In addition, a provision requiring the officer to arrest the “primary physical aggressor” must be included to reduce the likelihood that police will avoid their responsibilities to battered women by routinely arresting both parties. Once the police have arrested a womanbeater, there should be a minimum time limit before he is allowed to return to the home, unless the victim signs a written waiver of this requirement.

Finally, prosecution of batterers should be swift and certain. The battered woman should be encouraged but not forced to participate in the prosecution. Upon conviction or in exchange for a guilty plea, it may be appropriate to waive a jail sentence as long as the womanbeater enters and satisfactorily completes a counseling program.

Each of these policies and services is in effect in at least one jurisdiction; they must all be put into effect in all jurisdictions. Mandatory arrest and civil liability for failure to arrest, accompanied by these policies and services, will help stop the violence inflicted on women in many American homes.


Dual arrest is a common side-effect of a mandatory arrest law or policy. Battered women's advocates see it as a means for those police officers who do not like mandatory arrest to subvert its goals. Telephone conversations with Liz Bollhagen (cited in note 22) and Liesl Slabaugh, Acting Volunteer Coordinator, Womenspace Shelter for Women and Children, Eugene, Oregon (Jan 28, 1991). See also note 18.

235 For example, Wis Stat Ann § 968.075(5)(a)(1) (West Supp, 1990) requires that:

Unless there is a waiver under par.(c), during the 24 hours immediately following arrest for a domestic abuse incident, the arrested person shall avoid the residence of the alleged victim of the domestic abuse incident . . . .