

September 1995

The Mandatory Arrest Law: Police Reaction

Kevin Walsh

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 Pace L. Rev. 97 (1995)

Available at: <https://digitalcommons.pace.edu/plr/vol16/iss1/7>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The Mandatory Arrest Law: Police Reaction

Kevin Walsh*

I. Introduction

The Family Protection and Domestic Violence Intervention Act of 1994¹ amends section 140.10 of the Criminal Procedure Law,² to mandate arrest in certain domestic violence situations. The new law states:

Notwithstanding any other provisions of this section, a police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that:

(a) a felony, other than subdivisions three, four, nine or ten of section 155.30 of the penal law, has been committed by such person against a member of the same family or household, as defined in subdivision one of section 530.11 of this chapter; or

(b) a duly served order of protection is in effect, or an order of which the respondent or defendant has actual knowledge because he was present in court when such order was issued; and

(i) Such order directs that the respondent or defendant stay away from persons on whose behalf the order of protection has been issued and the respondent or defendant committed an act or acts in violation of such 'stay away' provision of such order; or

(ii) The respondent or defendant commits a family offense as defined in subdivision one of section eight hundred twelve of the family court act or section 530.12 of this chapter in violation of such order of protection

(c) a misdemeanor constituting a family offense, as described in subdivision one of section 530.11 of this chapter and section 812 of the Family Court Act, has been committed by such person

* Kevin Walsh is a sergeant with the New York City Police Department, assigned to the office of Management Analysis and Planning. He holds a M.S. degree in Criminal Justice from C.W. Post College. He would like to thank Detective Lydia Martinez for her assistance in preparing this paper.

1. Ch. 222, [1994] N.Y. Laws 786 (McKinney)(revised at ch. 224, § 1, [1994] N.Y. Laws 808).

2. N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1994).

against such family or household member, unless the victim requests otherwise. The officer shall not inquire as to whether the victim seeks an arrest of such person.

Nothing contained in this subdivision shall be deemed to restrict or impair the authority of any municipality, political subdivision or the division of state police from promulgating rules, regulations and policies requiring the arrest of persons in additional circumstances where domestic violence has allegedly occurred³

The mandatory arrest requirement in certain domestic violence situations is unique, due to the fact that no other class of offense requires arrest. The Criminal Procedure Law states that a police officer "may arrest" for all other classes of offenses.⁴ The new subdivision states that a police officer "shall arrest a person, and shall not attempt to reconcile the parties or mediate"⁵ The use of the word "shall," in contrast to "may," indicates obligation or necessity.⁶ Why has this class of offenses been singled out for mandatory arrest? What factors brought this mandatory arrest law about?

II. Background

Traditional police practice in domestic violence cases has been to invoke arrest as a last resort, with preference being given to mediation or separation of the parties involved. In 1967, a training manual of the International Association of Chiefs of Police stated that "in dealing with family disputes, the power of arrest should be exercised as a last resort."⁷ Often overlooked is the fact that other entities also endorsed this position. The American Bar Association stated in 1973 that police "should engage in the resolution of conflict such as that which occurs between husband and wife . . . without reliance upon criminal assault or disorderly conduct statutes."⁸ Moreover,

3. N.Y. CRIM. PROC. LAW § 140.10 (4) (McKinney 1995).

4. N.Y. CRIM. PROC. LAW § 140.10 (1) (McKinney 1995).

5. N.Y. CRIM. PROC. LAW § 140.10 (4) (McKinney Supp. 1995).

6. BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) states that shall, as used in statutes, is "generally imperative or mandatory" language.

7. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY 16: HANDLING DISTURBANCE CALLS (1967).

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

sociologists have recommended avoiding arrest in domestic violence situations, favoring crisis intervention strategies and referrals to counseling. It has been a widely held belief that arrest may aggravate the domestic violence situation, and possibly lead to further violence.

Litigation against police departments throughout the country has significantly changed the traditional approach to resolving domestic violence cases. The case most often cited is *Thurman v. Torrington*.⁹ In *Thurman*, the plaintiff brought a civil rights action against the City of Torrington and the police officers of that city, alleging that her civil rights, and those of her son, were violated when police officers failed to perform their duties.¹⁰ The plaintiff's estranged husband had repeatedly threatened the lives of the plaintiff and her child, and the plaintiff alleged that police officers had ignored her attempts to file complaints against her estranged husband.¹¹ The estranged husband, despite a restraining order, continued to approach the plaintiff.¹² Eventually, the estranged husband's threats escalated to a physical assault, resulting in the plaintiff's being stabbed repeatedly.¹³

The plaintiff in *Thurman* claimed that her constitutional right to equal protection of the laws was violated because police officers afforded less protection to persons abused in domestic situations, than to persons abused outside of a domestic relationship.¹⁴ The court stated that police officers "are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community."¹⁵ The court further held that this affirmative duty required a police officer to protect the personal safety of all persons in the community, and failure to do so was a denial of the victim's constitutional right to equal protection of the laws.¹⁶

9. 595 F. Supp. 1521 (D. Conn. 1984).

10. *Id.* at 1521.

11. *Id.* at 1524.

12. *Id.* at 1525.

13. *Id.* at 1525-26.

14. *Thurman*, 595 F. Supp. at 1526-27.

15. *Id.* at 1527 (citing *Huey v. Barloga*, 277 F. Supp. 864, 872-73 (N.D. Ill. 1967)).

16. *Id.*

In New York, *Sorichetti v. City of New York*¹⁷ led to major changes in the policy of the New York City Police Department. In *Sorichetti*, the plaintiff's infant daughter had been injured by her father, and the plaintiff brought an action alleging that the New York City Police Department had "negligently failed to take [the father] into custody or otherwise prevent his assault upon his daughter after [the police had been] informed that [the father] may have violated . . . a[n] order of protection and . . . had threatened to do harm to the infant."¹⁸ The facts of the case indicated that the plaintiff had obtained three separate orders of protection, ordering the father to stay away from the plaintiff's home, and providing for the father's visitation of the infant daughter.¹⁹ The order allowing visitation included a provision stating that the order was governed by the Family Court Act section 168.²⁰ That section states that:

The presentation of a copy of an order . . . to any peace officer . . . shall constitute authority for him to arrest a person charged with violating the terms of such order of protection . . . and bring such person before the court and, otherwise, so far as lies within his power, to aid in securing the protection such order was intended to afford²¹

The court held that an order such as the one presented created a special relationship between the municipality and the individual, which imposed a duty on the police department to protect the individual.²² The court further stated that the purpose of the Family Court Act section 168 was to "encourage police involvement in domestic matters, an area in which the police traditionally have exhibited a reluctance to intervene."²³ However, the changes in police arrest policies were not driven solely by litigation.

In the early 1980's, a Minneapolis study of misdemeanor assault cases in Minneapolis indicated that arrest, as compared to separation of the parties or mediation of the parties, acted as

17. 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985).

18. *Id.* at 463, 482 N.E.2d at 71, 492 N.Y.S.2d at 592.

19. *Id.* at 464-65, 482 N.E.2d at 72-73, 492 N.Y.S.2d at 593-94.

20. *Id.* at 465, 482 N.E.2d at 73, 492 N.Y.S.2d at 594.

21. N.Y. FAM. CT. ACT § 168 (McKINNEY 1995).

22. *Sorichetti*, 65 N.Y.2d at 468-69, 482 N.E.2d at 75, 492 N.Y.S.2d at 595-96.

23. *Id.* at 469, 482 N.E.2d at 75, 492 N.Y.S.2d at 596.

a deterrent to future violence in the household.²⁴ In terms of its impact on police policy throughout the nation, this study was considered the most influential criminal justice research ever compiled, impacting mandatory arrest laws and other policies throughout the states. In 1984, the year the Minneapolis report was initially released, only ten percent of police agencies in cities with a population greater than 100,000 utilized arrest as the preferred policy for misdemeanor domestic violence.²⁵ "By 1988, [ninety percent] of police agencies either 'encouraged' or 'required' arrest in such cases."²⁶

The effects of the Minneapolis study have also been seen in state laws. To date, fourteen states and the District of Columbia have some form of a law mandating arrest in domestic violence situations.²⁷ Specifically, New York has replicated the Minneapolis experiment on a large scale by introducing mandatory arrest provisions to the Criminal Procedure Law.²⁸ The New York State Office for the Prevention of Domestic Violence and the State Division of Criminal Justice Services will analyze the impact of the mandatory arrest law on the incidence of family offenses and submit a final analysis to the governor and the legislature by January 1, 2001. A determination will be made at that time whether to continue the mandatory arrest provisions.

III. Changes for the Police

As a result of lawsuits, pressure from advocate's groups, and other external factors, many police departments have begun adopting mandatory arrest policies. The existing New York City Police Department policy, patrol guide section 110-38,²⁹ exceeds the requirements of the new mandatory arrest law. This

24. LAWRENCE W. SHERMAN, ET AL., *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 12 (1992).

25. *Id.* at 14.

26. *Id.*

27. JOAN ZORZA & LAURIE WOODS, *MANDATORY ARREST: PROBLEMS AND POSSIBILITIES* 11 (1994).

28. N.Y. CRIM. PROC. LAW § 140.10 (4) (McKinney Supp. 1995).

29. CITY OF NEW YORK POLICE DEPARTMENT, INTERIM ORDER NO. 10 (1995)(amending NEW YORK CITY PATROL GUIDE PROC. (1988))(hereinafter referred to as INTERIM ORDER NO. 10)(the patrol guide is the domestic violence arrest policy of the New York City Police Department).

policy requires arrest for all felonies, all violations of orders of protection, and at the victim's request.³⁰ In 1994, New York City Mayor Rudolph W. Giuliani and Police Commissioner William J. Bratton, introduced one in a series of strategies for combating crime and disorder.³¹ This strategy includes a revision of the Police Department's policy, and dedication of personnel specifically trained in domestic violence issues.³² The provisions of the Family Intervention and Domestic Violence Prevention Act of 1994 were incorporated into Department policies. The new procedure reinforces the Police Department's pro-arrest stance, especially in misdemeanor cases.³³ A future revision will include a provision requiring that police officers not ask the victim's arrest preference. As a result of the strategy and the Department's renewed emphasis on domestic violence, preliminary statistics indicate that arrests in which the offender and the victim are related to one another are on the rise.

Mandatory arrest, as law or policy, simplifies the work of police officers who are often confronted with situations that are considered "gray areas." Much of the police frustration surrounding domestic violence is caused by the absence of clear policies and procedures for handling these cases.³⁴ The mandatory arrest approach greatly simplifies a police officer's process of decision-making in the field. Discretionary guidelines are often vague, and require police officers to make assessments of the potential for future violence, a challenge that has eluded even the best-trained psychologists.³⁵ A blanket policy of mandatory arrest also offers some protection from civil liability for the police officer.³⁶

In contrast to prior methods, such as mediation or crisis intervention, arrest is a tool familiar to police officers. Arrest has the advantage of being "police work," as opposed to "social

30. *Id.* at 5-7.

31. RUDOLPH W. GIULIANI & WILLIAM J. BRATTON, POLICE STRATEGY No. 4: BREAKING THE CYCLE OF DOMESTIC VIOLENCE (1994).

32. *Id.* at 19-24.

33. INTERIM ORDER No. 10, *supra* note 29.

34. DELBERT S. ELLIOT, *Criminal Justice Procedures in Family Violence Crimes*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH (Lloyd Ohlin & Michael Toury, eds., 1989).

35. Jeremy Travis (1993). Testimony before the State Legislature.

36. ZORZA, *supra* note 27, at 33.

work," a role that most police officers are untrained for and uncomfortable with. Police officers are trained in law enforcement, and mandatory arrest is in line with this training. However, mandatory arrest presents problems for the criminal justice system, as discussed below.

IV. Statutory Limitations on the Power of Arrest

The adoption of a mandatory arrest policy does not change the need for probable cause or reasonable belief that a person committed a crime, as required by New York law.³⁷ As with any other offense, probable cause must exist before an arrest can be made. Some well-intentioned police officers may misinterpret the intent of a mandatory arrest policy as requiring an arrest every time the police respond to a reported domestic dispute. Police are required to safeguard the rights of all persons because all persons are presumed innocent until proven guilty in a court of law.

The New York City Patrol Guide states that probable cause is:

A combination of facts, viewed through the eyes of a police officer, which would lead a person of reasonable caution to believe that an offense is being or has been committed. The 'probable cause' standard applied in family offense/domestic violence offenses is *no different* from the standard applied in other offenses and may be met by evidence other than the statement of the complainant/victim.³⁸

The issue of determining probable cause must be explored through enhanced training for police officers as the mandatory arrest law takes effect. The public also needs to be educated on this vital subject in regard to the realistic limits of police officers' duties and responsibilities.

37. See N.Y. CRIM. PROC. LAW § 70.10 (2) (McKinney 1994). The Criminal Procedure Law states:

Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.

38. INTERIM ORDER No. 10, *supra* note 29, at 2 (emphasis in original).

Limitations with respect to the power of arrest also exist for violations. Police officers in New York City may arrest only when violations are committed in their presence. Disorderly conduct and harassment are violations under the penal law that commonly arise in domestic situations. In order for a police officer to arrest for these offenses, the act must be committed in the officer's presence.³⁹ These offenses encompass a broad range of behavior including: slapping, punching, and kicking, and account for the vast majority of reported domestic violence cases. In most cases, however, the offense has already been committed by the time the police officer(s) has arrived, and the officer's role is limited to taking a report, and, possibly, referring the complainant to court. These situations will remain unaffected by the mandatory arrest law.

V. The Dual Arrest problem

One potential problem, frequently found in jurisdictions with mandatory arrest laws, is the dilemma of dual arrests or the arrest of both parties involved in a domestic dispute. Frequently, upon arrival at the scene of a domestic dispute, the police find that both parties may have committed offenses. The private nature of domestic violence means that there may be no witnesses to the crime. In the past, police could use discretion in these circumstances and arrest only one of the parties. Now, however, mandate requires that police arrest both parties.

Other jurisdictions⁴⁰ have written "primary physical aggressor" or "self defense" language into their mandatory arrest laws, allowing officers to arrest only the individual determined to be the primary aggressor and disallowing arrest of an individual who is determined to be acting in self-defense. New York law did not incorporate primary physical aggressor language into its mandatory arrest law.⁴¹ As a result of this omission,

39. N.Y. CRIM. PROC. LAW § 140.10 (1)(a) (McKinney 1994).

40. ARIZ. REV. STAT. ANN. § 13-3601B (1989); 1994 IOWA ACTS 2160; NEV. REV. STAT. § 171.137 (2) (1991); OR. REV. STAT. § 133.055 (2) (1993); R.I. GEN. LAWS § 12-29-3(c) (Michie 1994); S.D. CODIFIED LAWS ANN. § 23A-3-2.2 (Michie 1995); WASH. REV. CODE ANN. § 10.31.10 0(2)(B) (West 1990); WIS. STAT. ANN. § 968.075 (3)(a) (West 1985).

41. N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1994); *see also* INTERIM ORDER No. 10, *supra* note 29.

dual arrest rates may increase. The law provides protection from liability for police officers who make good faith arrests for domestic violence offenses, but fails to address the situation where both parties commit offenses that trigger the mandatory arrest law.⁴²

VI. The Response of the Criminal Justice System to Mandatory Arrest

In order to be effective, a mandatory arrest law needs to involve the entire criminal justice system. Many laws focus only on the role of law enforcement, and neglect the remainder of the system. Prosecutors, courts, jails, probation officers, and treatment programs need more resources for the ever-increasing case load that mandatory arrest will bring. For mandatory arrest to succeed, all areas of the criminal justice system must be reinforced and redesigned to compliment one another. The police departments, the most visible and familiar part of the criminal justice system, are often blamed for the deficiencies of the entire system.

A police officer's primary contact within the criminal justice system is through the prosecutor. Interaction between the police officer and the prosecutor often determines the effectiveness of the criminal justice system in a particular case. "Prosecutors have the greatest discretion in the criminal justice system. The character, quality, and efficiency of the whole system is heavily influenced by the way prosecutors exercise their discretionary power."⁴³ When the prosecutor reduces or drops the charges after a domestic violence arrest has been made, the police officer is in a difficult position when approaching the batterer and the victim. When an arrest is effected, but the charges are dropped or reduced, the police officer's ability to provide safety to the victim is reduced. Batterers also receive the message that their offenses are not taken seriously by the system and that arrest results in few, if any, sanctions.

The end result of the failure to prosecute after a domestic violence arrest may be to reduce the use of arrest in the domestic violence situation:

42. See N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney Supp. 1995).

43. ELLIOT, *supra* note 34, at 458.

From the police perspective, there is little reason to make an arrest if the prosecutor will foreseeably dismiss the case If prosecutors pursued family violence cases aggressively, there would be more incentive for police to make arrests. Prosecutors have their own organizational objectives that may justify this action, but it nevertheless communicates to the police that their use of arrest in domestic violence cases is not supported by the court⁴⁴

Failure of the criminal justice system in this manner undermines the mandatory arrest law. Officers who make arrests only to see the offender released within a matter of hours often feel that their efforts are wasted and that the system does not consider the offense a serious one.

VII. Conclusion

Victims who find that the criminal justice system does not protect them may hesitate to go to the police in the future for help. Batterers who are quickly processed through the system and released, learn that their offenses are not taken seriously, and that arrest is merely an inconvenience. Additionally, batterers may not be deterred by the threat of arrest in the future. If arrests lose their deterrent value, then the purpose of the mandatory arrest law is seriously impaired.⁴⁵

Mandatory arrest is not an automatic quick-fix or cure-all solution to the problems of domestic violence. A mandatory arrest law should be adopted only as part of a coordinated response in communities that handle domestic violence cases. As part of a well thought-out community response with sufficient resources and planning and monitoring, mandatory arrest can improve protection for battered women and their children.⁴⁶

44. ELLIOT, *supra* note 34, at 459.

45. J. DAVID HIRSCHER & IRA HUTCHISON, *Police-Preferred Arrest Policies, in WOMAN BATTERING: POLICY RESPONSES* 49, 67 (Michael Steinman ed., 1991).

46. ZORZA, *supra* note 27, at 43.

**A COMPARISON OF THE MANDATORY ARREST LAW
AND EXISTING NYPD POLICY**

Type of Offense	Criminal Procedure Law Section 140.10 (1994)	Patrol Guide section 110-38 (1988)
Felonies	Mandatory arrest for all Felonies except sections of PL 155.30 (Grand Larceny)	Mandatory arrest for all Felonies
Violations of orders of protection	Mandatory arrest when: 1. A stay away order is violated. 2. The violation is a family offense: Assault 2nd or 3rd degree, Attempted Assault, Harassment, Disorderly Conduct, Reckless Endangerment, Menacing 2nd or 3rd degree.	Mandatory arrest for ALL violations of orders of protection.
Misdemeanors	Family Offense misdemeanors, unless the victim requests otherwise.	Mandatory arrest for all misdemeanors when: 1. The victim requests an arrest be made; or 2. The officer determines an arrest is warranted.
Violations in the presence of the officer	No mandatory arrest.	Mandatory arrest when: 1. The victim requests an arrest be made; or 2. The officer determines an arrest is warranted.

RELATIONS INCLUDED FOR MANDATORY ARREST PURPOSES	<p>Family Court defined relations:</p> <ol style="list-style-type: none"> 1. persons related by consanguinity or affinity; 2. legally married; 3. formerly married; 4. persons who have a child in common 	<p>Family Court defined relations AND Living together or formerly lived together in a family type relationship, including same sex couples</p>
Felonies	<p>Mandatory arrest for all Felonies</p>	<p>Mandatory arrest for all Felonies except sections of PL 155.30 (Grand Larceny)</p>
Violations of orders of protection	<p>Mandatory arrest when:</p> <ol style="list-style-type: none"> 1. A stay away order is violated. 2. The violation is a family offense: Assault 2nd or 3rd degree, Attempted Assault, Harassment, Disorderly Conduct, Reckless Endangerment, Menacing 2nd or 3rd degree. 	<p>Mandatory arrest for ALL violations of orders of protection.</p>
Misdemeanors	<p>Family Offense misdemeanors, unless the victim requests otherwise.</p>	<p>Mandatory arrest for all misdemeanors when:</p> <ol style="list-style-type: none"> 1. The victim rerquests an arrest be made; or 2. The officer determines an arrest is warranted.