The Feminist War on Crime

THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION

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THREE

The Battle Plan

ARREST IS BEST

In the late 1960s and early 1970s, the police were the frequent targets of leftist reprobation—the war-mongering state personified. Their violence toward protesters, enforcement of racial codes in the South, and retrograde militarization provoked vocal protest in the peacenik era. As one text on policing recounts, "Civil rights and antiwar movements challenged police. This challenge took several forms. The legitimacy of police was questioned: students resisted police, minorities rioted against them, and the public, observing police via live television for the first time, questioned their tactics."[1] Facing a crisis of legitimacy, police departments began to rethink the role of the officers as exclusive crime control enforcers, moving to more "holistic" approaches like community policing. The late 1970s is often called the "Community Problem Solving" era of policing.[2]

In an influential 1979 article, "Improving Policing: A Problem Oriented Approach," law professor Herman Goldstein urged police departments to abandon their myopic focus on interdicting crimes and to recategorize crimes as "problems."[3] In turn, the police could begin "identifying these problems in more precise terms, researching each problem, documenting the nature of the current police response, assessing its adequacy and the adequacy of existing authority and resources, engaging in a broad exploration of alternatives to present responses, weighing the merits of these alternatives, and choosing from among them."[4] The article gives the reader a sense that change was already in the air. "Police in many jurisdictions, in a commendable effort to employ alternatives to the criminal justice system, have arranged to make referrals to various social, health, and legal agencies," Goldstein observed. "By tying into the services provided by the whole range of other helping agencies

in the community, the police in these cities have taken a giant step toward improving the quality of their response."[5]

Given the larger focus on improving policing, it is not surprising that feminist and other experts in the 1970s scrutinized police responses to DV calls. Experts across the political and philosophical spectrum recognized the problems of officers failing to respond to DV calls, responding but doing nothing, or intervening in a way that made the situation worse. These experts, however, held diverse and conflicting views on what constituted "effective" police intervention and whether it needed to involve forcible arrest.

In 1976, when feminist lawyers in New York filed *Bruno v. Codd,* which articulated a battered woman's right to her abuser's arrest, many departments favored mediation as the initial response to domestic disturbances.[6] At that time, there was little empirical evidence on whether arrest (as opposed to nonarrest intervention) better prevented injuries, deterred reoffense, or satisfied victims. The legal aid lawyers and constitutional scholars behind the *Bruno* litigation were well aware of the serious burdens arrest imposed, especially on marginalized individuals. They nevertheless presumed that arrest, with all its costs and dysfunctions, was preferable to the current system in which police exercised excessive restraint.[7] *Bruno* attorney Laurie Woods argued that "the best protection for both a woman and her husband [is] to have a police officer armed with a mandatory duty to arrest, intervene."[8] Arrest became the official feminist position, relegating mediation to the province of retrograde sexists.[9]

This chapter examines feminists' persistent belief that arrest was the best way to address DV, despite increasing sociological evidence and scholarly commentary in the 1980s and 1990s to the contrary. I contend that, in addition to the general orientation of legal feminists toward law enforcement, there were two main ideological drivers of their proarrest stance. First, feminists presumed that police reluctance to arrest derived exclusively from officers' antediluvian ideas about marital privacy and husbands' right to physically "chastise" wives. Second, feminists were highly critical of the "neutral" family violence research school championing mediation. Those researchers, feminists maintained, were inattentive to patriarchy, blamed women and men equally for DV, and supported ineffective psychosocial interventions.

I also postulate that feminist DV advocacy shored up the coercive arrest model of policing in an era of declining faith in the model's legitimacy. In pushing for arrest, feminists made sweeping arguments about the appropriate role of the police, such as the claim that police had a duty to arrest when-

ever there is probable cause. In the face of evidence that arrest could have an "escalation effect" on violence, many feminists did not rethink the proarrest program.[10] Instead, they articulated a series of authoritarian arguments to downplay the evidence, including that mandatory arrest was not harsh *enough* and had to trigger serious carceral consequences. One feminist commentator in 1983 made the remarkable claim that to address DV, law professors should back off from teaching students about civil liberties. The problem of police restraint in DV, she wrote, would be "solved only by a change in the attitudes of legal educators who traditionally have focused on constitutional and other legal limitations on enforcement authority."[11]

OF NEANDERTHAL COPS

In the late 1970s, feminist lawyers, drawing on their experience with a subset of battered clients, concluded that arrest was the optimal way to intervene in DV, as well as what victims wanted. In pursuing impact litigation for proarrest policies, activists moved from speaking for individual clients to speaking for all women. No one can escape the limits of their own perspective, and I have little doubt that the *Bruno* attorneys felt confident that their picture of DV victims' interests was generalizable. Nevertheless, it seems curious that the lawyers did not set out to systematically determine whether and which victims wanted or benefited from arrest. Moreover, they did not care to rely on the sociological evidence that family violence researchers had already produced. Instead, the *Bruno* lawyers collected and presented to the courts affidavits from victims whose cases had specific characteristics: there was extreme violence; the victim wanted the police to arrest the abuser; and the officers told the victim they had no authority to arrest, or worse, defended the abuser.[12] The affidavits painted a picture of total police indifference and nonfeasance, "not because of the merits of the particular case, but apparently as a matter of policy," as the *Bruno* trial court put it.[13] It is unsurprising then that the court described the litigation's ambition as modest—"merely . . . to compel the police to exercise their discretion in each 'particular situation,' and not to automatically decline to make an arrest."[14]

However, granting individual officers "discretion in each 'particular situation'" was not the *Bruno* litigation's ambition. Legal feminists wanted to *limit* officer discretion to decline arrest, which they believed officers were overusing because of sexism. Professor Kathleen Waits put the sentiment

bluntly in 1985: "Society cannot rely on [officers] to use their discretion wisely in battering cases."[15] Thus *Bruno* culminated with the New York Police Department signing a consent decree with a written, legally binding, proarrest policy. The decree limited officers' discretion to decline misdemeanor arrests and mandated arrest for felonies and restraining-order violations.[16] In the decades after *Bruno,* activists, lawmakers, and police departments moved to even stricter policies, requiring police to "automatically" arrest in felony and misdemeanor cases alike, regardless of the "particular situation."

To be sure, the *Bruno* plaintiffs and affiants interviewed in connection with the case did, in fact, desire arrest. It makes sense that *they* would regard arrest as best. But such would not necessarily be true of the many antiarrest and arrest-ambivalent victims whom feminist lawyers simply omitted when they formulated the agenda of the entire class of battered women. Yet today, even die-hard policing critics who recognize that proarrest DV policies are harmful and criminogenic regard the current punitive regime as preferable to the "bad old days" of police tolerance. How were feminist lawyers so successful at making the remarkably broad claim that *every* woman benefited from arrest?

Feminist lawyers adopted, or perhaps strategically deployed, an exceedingly narrow account of officers' motivation for, victims' attitudes toward, and the effects of nonarrest. They publicized a one-dimensional story involving sexist male officers influenced by chauvinist law and culture, who refused to arrest abusers because they believed that abuse was acceptable, the woman deserved it, or the matter was personal. Police empathy for abusers, the story went, remained unmitigated even when the woman was beaten and bloodied. This narrative *defined* nonarrest as an exercise of sexism, so that every arrest was an instance of gender justice, regardless of the consequences. In turn, violent male police officers using violent arrest to control violent men was not a pathology of a "fascist" state. It was feminist.

Feminists drew a direct line between 1970s cops' attitudes and the bygone practice of "chastisement," meaning husband's corrective disciplining of wives. In early DV activism, scholars and lawyers regularly referenced English jurist William Blackstone's 1769 commentaries on the husband's right to "give his wife moderate correction" as proof of legal tolerance of wife-beating in eighteenth- and nineteenth-century England and the US.[17] In fact, however, Blackstone characterized chastisement as "old law" that had been superseded and as an "ancient privilege" exercised rarely and only among the "lower ranks" in the Charles I era.[18] Blackstone further noted that by the later era of "the politer reign of Charles the Second, . . . a wife [had] security

of the peace against her husband."[19] Further, there is little evidence that US courts and legislatures widely adopted the ancient English rule. In an 1871 Alabama criminal case, for example, the Alabama Supreme Court addressed a domestic violence incident between two "high tempered" married "emancipated slaves."[20] The defense moved to dismiss the charge, citing the right of chastisement, but the court upheld the man's indictment. Noting that Blackstone "confines this brutal and unchristian 'privilege' wholly to the 'lower rank of the people,'" the court ruled that in Alabama "the law for one rank is the law for all ranks of the people."[21] It elaborated, "This distinguished author [Blackstone] published his commentaries above one hundred years ago, when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here."[22]

Still, for decades, commentators made much of the so-called rule of thumb,[23] citing the 1868 North Carolina case *State v. Rhodes,* where the trial judge was said to be "of opinion that the defendant had a right to whip his wife with a switch no larger than his thumb."[24] This case was by all respects an outlier in American jurisprudence and was quickly reversed and repudiated by the North Carolina Supreme Court. In fact, the smattering of US chastisement cases were "wholly rejected after the Civil War."[25] Nevertheless, second-wave feminists made *Rhodes* and related cases so infamous that they spawned the etymological myth that the phrase *rule of thumb* originated from domestic violence law (it was an agricultural measure). After the landmark 1978 Commission on Civil Rights (CCR) hearings discussed in the previous chapter, CCR chairman Arthur Flemming issued his final report on wife abuse in 1982. It was entitled *Under the Rule of Thumb.*[26]

This is not to say that seventeenth- and eighteenth-century America was "good" on domestic violence. The complicated history of DV in America is recounted in extraordinary detail—better than I ever could—by historians like Elizabeth Pleck and Reva Seigel.[27] What is clear is that the history is not simply one of law and society celebrating men who beat women. Wifebeaters were regularly regarded as dissolute, unmanly drunkards, deserving of condemnation. The legal cases tolerant of DV reflected "a larger cultural tension in nineteenth-century America, one between sympathy for the victims of abuse, especially innocent women, and the perpetuation of traditional hierarchical relationships within the family," writes historian Ruth Bloch.[28] While some state actors turned a blind eye to abuse to preserve the marital order, others called for nothing less than abusers' flagellation. Southern

politicians, in particular, welcomed corporal punishment for DV, which they considered a "negro crime."[29] There is accordingly little support for the opening sentence of the *Bruno* opinion: "For too long, Anglo-American law treated a man's physical abuse of his wife . . . as an acceptable practice."[30]

Legal feminists presumed that contemporary cops' leniency stemmed from "rule of thumb," pro-wife-beating sentiments. The sexist-cops story stuck. Today, even critics who lament the many costs of DV policing policies, such as financial burdens, family separation, and exacerbation of violence, speak as though these are new discoveries that could not have factored into the motivations of the Neanderthal officers of the 1970s. To be sure, many of those officers were—and many still are—raging sexists, sympathetic toward battering, or abusers themselves. However, the nonarrest story has always been significantly more complicated than the narrow activist account admits. The CCR collected police testimony between 1978 and 1980 in preparation for the *Rule of Thumb* report. The sentiments expressed by the police are illuminating, and surprising.

Officers did not opine that abuse was legitimate, no big deal, or a private matter inappropriate for government intervention. Rather, they articulated somewhat unexpected explanations for why the "traditional" police functions of crime investigation and bad-guy apprehension worked poorly in domestic violence situations.[31] Police cautioned that the very intrusion into an emotional conflict could escalate the violence, pointing to evidence that DV calls were particularly lethal to first responders. Researchers agreed: "The police officer, if he is unprepared for his function and left to draw upon his own often biased notions of family dynamics and upon his skills as a law enforcer, may actually behave in ways to induce a tragic outcome."[32] Relatedly, the police asserted that arrest could increase the severity of subsequent battering. Moreover, the continuing connection between the DV defendant and victim made the police more concerned than usual about the harsh collateral consequences of arrest. Like first-wave feminists, they worried that arrest caused batterers to lose employment, thereby financially harming victims and putting greater strains on dysfunctional relationships. But the most straightforward and frequent explanation for nonarrest was that *victims* objected. One former police chief explained to the CCR: "Blood is thicker than water is a true thing out here, and it's hard to get the woman to come forward and sign complaints and follow through on it because in many instances it is her source of revenue to keep the family together. And in many instances she loves him. She still does love him."[33]

Of course, sexism played an important, if nuanced, role in the police's distaste for DV calls. The recurring, relational nature of domestic violence put in stark relief the ineffectiveness of their busting-bad-guys model of policing. Officers indoctrinated toward coercive enforcement were reluctant to face the reality that the best response to crisis, even violent crisis, was not always force. When it came to DV, police could not just play their masculine cops-versus-robbers games, and they felt impotent to serve and protect women in the manner they were accustomed to. Accordingly, officers detested taking domestic violence calls because they did "not believe that arresting assailants [would] have any positive results."[34]

The conventional feminist narrative thus misdiagnoses *how* masculinity norms affected officers responding to DV calls. It was not so much that most officers were club-dragging cavemen who high-fived rather than arrested suspects. Instead, officers lamented that the complicated nature of DV prevented them from capturing the criminal in simple superhero style—and from receiving the gratitude of the rescued damsel. Officers came to feel incompetent, out of place, and personally endangered in the face of complex, emotionally explosive, dysfunctional relationships. One explained that the responding officer saw only "an outcropping of a much more deep-seated problem."[35] "It's a police problem when we deal with it, but the cause is not a police problem."[36]

Police ambivalence toward DV arrest, so denigrated by feminists, presented an opportunity for a larger transformation in police self-identity. Instead of functioning exclusively as an us-versus-them roving band of head-busters, police could see themselves as something else—something less authoritarian, less black-versus-white, and more communal. Psychologist and policing expert Morton Bard, channeling the problem-solving sentiments in vogue at the time, testified at the 1978 CCR hearings:

> There are two ways of viewing the role of the police in relation to domestic disturbances: They can be seen as "enforcers of the law" or they can be seen as "managers of human crisis and conflict." If we take the first point of view, the objective of police intervention in a family dispute is simple and clear: to determine whether a law has been broken. If so, arrest and prosecute; if not, do nothing. Although this role definition certainly simplifies things for the officer, it does very little to help the majority of families who call the police.[37]

Bard, a professor at City University of New York (CUNY), had conducted a large-scale "family violence" policing experiment in the late 1960s. It

involved creating a special "Family Crisis Intervention Unit" composed of nine black and nine white officers within the Upper West Side police precinct, which at that time served a community of eighty-five thousand mostly working-class African Americans.[38] The officers in the unit attended an intensive four-week training in de-escalation and mediation, involving simulations, reflection, and group sessions with CUNY psychology graduate students. The inception of the project coincided with a wave of popular antipolice activism. A high-profile clash between police and Columbia University students nearly derailed the project, as the CUNY graduate students "could not face" their police consultees.[39] Later, the CUNY chapter of Students for a Democratic Society (SDS) picketed the project, chanting "Pigs Off Campus." But the project forged ahead.[40]

In many ways the training, which aimed to reorient officers away from reverence for violence and binary views of right and wrong, was distinctly *feminist*. Its demasculinizing goals were explicit. Bard explained, "The group sessions restructured the value system of the officers [so they could] deal with the 'masculine mystique' which has helped make police so malleable at the hands of those who have been interested in provoking violence."[41] Bard intended the training to break the cycle of masculine violence and retrospective justification identified by Hans Toch: "Violent men play violent games because their nonviolent repertoire is restricted. This role, which emphasizes physical and social distance, minimal communication, and a we-versus-they attitude, makes it all too easy . . . to view [an officer] in terms of preconceived stereotypes, and to justify his behavior in terms of the stereotype."[42] The training was precisely the reformation of "sexist attitudes" that many feminists identified as the root of DV.[43]

After the DV unit operated for two years, Bard set out to assess the practical effects of the pilot project. The NYPD forbade him to follow up with the 952 families that had interacted with the unit, citing privacy concerns. Nevertheless, Bard found several indications of success. None of the officers were hurt during interventions, and there were no homicides within the families they had contacted. Arrests decreased by 2.5 percent, and there were fewer overall incidents of family assault in the Upper West Side than in a similar precinct. The few follow-up interviews showed that the police and community enjoyed improved relations.[44]

After Bard's work touting the benefits of nonviolent intervention, several police departments incorporated conflict resolution training. Perhaps this could have been a watershed moment in orienting police identity away from

aggressive enforcer toward peacemaker. Alas, it was not. As early as 1976, the International Association of Chiefs of Police declared unequivocally that a "policy of arrest [for DV], when the elements of the offense are present, promotes the well-being of the victim."[45] It turns out that the purportedly abuser-loving police officers were all too eager to adopt feminists' proarrest program. Although departments had defended against lawsuits to protect their financial interests, many officers ultimately welcomed the respite from exercising discretion in DV situations. By the 1980s, police chiefs joined feminists in championing proarrest policies. Bard predicted as much at the CCR hearings: "Many police officers long for the very thing that I have heard recommended here today [by feminist activists]. They long for the simple solution that arrest offers. Because of their action orientation and their intolerance for delay in 'doing something,' the intangible quality of negotiation or mediation can be disturbing to some of them. These officers prefer simple and direct action . . . which they see as getting them out of the 'social work business.'"[46]

One is left to wonder whether, in the absence of feminist proarrest litigation and activism, Bard's program to transform officers from hypermasculine authoritarians to calm crisis interveners would have taken off or translated to non-DV policing. It is true that factors from rising crime rates to policing initiatives aimed at maintaining order undermined police departments' institutionalization of mediation, nonarrest, and de-escalation policies. But the influence of feminist theory and practice cannot be ruled out. At the time of *Bruno,* most states' criminal procedure codes prohibited police from making warrantless misdemeanor arrests for crimes not occurring in their presence.[47] The idea was that, in the absence of exigency, misdemeanors were not serious enough to relieve the police of the obligation to obtain permission from a judge to use coercive force. This liberal rule was intended to protect citizens from government overreach. Feminist lawyers, however, regarded it as a technicality that gave cover to sexist police. Today, forty-nine states and the District of Columbia exempt DV misdemeanors from that rule.[48]

Feminist lawyers specifically targeted police departments' novel dispute resolution policies. The Oakland Police Department's 1975 training policy on "dispute intervention" stated, "The police role in a dispute situation is more often that of a mediator and peacemaker than enforcer of the law."[49] It went on, "[When] one of the parties demands arrest, you should attempt to explain the ramifications of such action (e.g., loss of wages, bail procedures, court appearances) and encourage the parties to reason with each other."[50] This policy formed the basis for *Bruno*'s companion class action suit, *Scott v. Hart.*

The plaintiffs argued that the policy violated domestic violence victims' right to equal protection. The police chief responded that the policy applied to *all* misdemeanor assaults. Unfazed, the plaintiffs rejoined that the department's embrace of peacemaking was sexist and discriminatory because it was formulated with DV victims in mind and disparately affected them.[51]

The 1970s police officers' arguments against arrest—safety, the relationship, the high rate of attrition, financial issues, victims' wishes—are currently articulated by *feminist* critics of mandatory DV policies. Yet legal feminists like *Scott* attorney Pauline Gee characterized such arguments as lacking "any rational factual basis" and "not legitimate."[52] Such arguments were mere pretexts to cover Neanderthal cops' intent to "condone wife beating," as another advocate put it.[53] One legal scholar, writing in 1983, catalogued police reasons for nonarrest, which included sexist beliefs but also factors like "the abuser and his family cannot afford the economic impact of time lost from work" and "the spousal relationship may be brought to an end by the intervention of the criminal justice process."[54] The reasons were *all* illegitimate, she opined, because they would not "be acceptable reasons . . . if the complaint was of assault by a stranger."[55]

I cannot help but be nostalgic for that early police reluctance to use force in family dispute situations. We hear case after case where families in crisis or those worried about mentally ill loved ones call the police for help, only to face drug raid–style deadly force. The home remains an acute site of danger for suspects and officers. Sadly, it is hard to imagine a contemporary police trainer making the statement that Phoenix training officer Glenn Sparks made in 1980: "Obviously if we can avoid putting somebody in jail and still solve the situation that is exactly what we want to do in most cases."[56]

FEMINISTS VERSUS FAMILY VIOLENCE RESEARCHERS

Feminists dismissed the many nonsexist reasons police were reluctant to arrest and, at the same time, admitted that "information about the effectiveness of more stringent arrest policies is scant."[57] Feminist lawyers relied on their clients' accounts of how arrest would have helped them and reasoned that other women would similarly benefit. In the feminist (and increasingly police) narrative, arrest would be the wake-up call that finally made the man come to his senses and stop abusing or the woman come to her senses and