

# What Do Primary Aggressor Laws Achieve? A 10-Year National Study of Their Efficacy

by David Hirschel & Philip D. McCormack\*

In the past 40 years, we have seen a massive change in the police response to incidents of intimate partner violence. Once regarded as essentially a family matter not requiring police action unless the incident was very serious, with most states enacting mandatory or pro-arrest laws, arrest is now a routine response. Consequently, arrest rates in intimate partner violence cases have increased considerably. In the 1970s and 1980s, they were generally in the 7% to 15% range.<sup>1</sup> After the passage of these laws, rates were observed to be 30% or more.<sup>2</sup> More recently these rates have hovered around the 50% mark.<sup>3</sup>

Though the adoption of arrest as the preferred response has generally been welcomed, it has not come without unintended consequences. Foremost among these has been an increase in dual arrest, the situation where both parties to an incident are arrested. The concern with this outcome is that the police, facing pressure to arrest and uncertain what has actually occurred, arrest both parties, unjustly arresting victims in the process. To address this concern, states have enacted primary aggressor laws mandating officers to determine who was the primary aggressor in the incident. This article examines the question of whether these laws have been effective in reducing the prevalence of dual arrest.

## Primary Aggressor Laws

The first primary aggressor law was enacted by the Washington State. A total

of 35 states now have such laws.<sup>4</sup> These laws vary in the discretion afforded officers. This discretion is manifested in two ways.

First, the laws state that responding officers either “shall” or “should” or “shall attempt to” determine the primary aggressor. As with the distinction between mandatory and pro-arrest laws, the terms “should” or “shall attempt to” indicate a preference for arresting only the primary aggressor, while the term “shall” is more of a mandatory nature. While some 20 states<sup>5</sup> are very clear that they are mandating the determination of a primary aggressor, three states<sup>6</sup> use the word “should,” and nine states<sup>7</sup> water down the mandate by using words such as “shall attempt” or “shall make reasonable efforts” to determine the primary aggressor. Meanwhile, Minnesota instructs law enforcement agencies to adopt policies that “discourage dual arrests,”<sup>8</sup> while Texas simply indicates that training “shall include instruction in preventing dual arrest whenever possible and conducting a thorough investigation to determine which person is the predominant aggressor.”<sup>9</sup>

Second, the laws vary in the criteria to be considered and whether the listed criteria “shall” or “should” be considered. Some states, such as Florida, Rhode Island, and Texas, do not list any criteria. The criteria that are included by most of the states are all of, or a combination of, the following: comparative extent of injuries; prior domestic violence history; self-defensive actions; and likelihood of future injury. Other factors mentioned by states include “welfare of any minors present at the scene,” “size and strength of each person,” and “evidence from witnesses.” Arizona, Connecticut, Maryland, and Minnesota specifically mention only the criterion of self-defense. All but two of the states mandate that the officers “shall” consider the listed criteria, with Michigan and New Jersey stating that the officers “should consider” the listed criteria. Three states, California,

Mississippi, and Missouri, stress that that the primary aggressor is not necessarily the first aggressor.

## Prior Research

To date, there has not been much research that has examined the impact of primary aggressor laws. The research that has been conducted provides some evidence that these laws are having their desired effect. In a process that took almost three years to successfully implement and required the support of highly regarded officers, McMahon and Pence (2003)<sup>10</sup> reported that in Duluth, Minnesota, the female arrest rate decreased after a primary aggressor policy was enacted, while Fraelich and Ursel (2014)<sup>11</sup> reported that the implementation of a primary aggressor policy resulted in a decline of the dual arrest rate in Winnipeg, Canada. Likewise, in a national study of 2003 NIBRS data, Dichter, Marcus, Morabito and Rhodes (2011)<sup>12</sup> found that dual arrests were slightly less likely to be made in jurisdictions with primary aggressor policies. In a study of 282 agencies in five states, Hirschel, Buzawa, Pattavina, Faggiani and Reuland (2007)<sup>13</sup> reported that agencies operating with primary aggressor laws and/or policies had a dual arrest rate of two percent, less than a quarter of the nine percent dual arrest rate found in jurisdictions without a primary aggressor law or policy. Finally, in an examination of 3,078 incidents of intimate partner violence reported to the police in 25 jurisdictions in four states in calendar year 2000, Hirschel and Deveau (2016)<sup>14</sup> found that, controlling for variables such as infliction of injury and presence of weapon, dual arrests were more than twice as likely to be made in a state without a primary arrest statute. However, they also found that police officers were one-third less likely to make any arrest in a state with a primary aggressor law, suggesting that primary aggressor laws may have a chilling effect.

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### Current Study

The study reported in this article is the first multi-year national study to examine the impact of primary aggressor laws on police arrest practices. The dataset comprises 10 years of NIBRS data (2000 through 2009) of intimate partner violence cases reported to the police in 5,481 jurisdictions in 36 states and the District of Columbia. Multi-level logistic regression models were used to measure the impact of primary aggressor laws to arrest either one party or both parties involved in the incident. Nearly half (49.7%) of the incidents resulted in the arrest of one or both of the parties.<sup>15</sup> A total of 2.4% of the incidents resulted in the arrest of both parties for offenses committed against the other party.

With regard to arresting one of the parties, the seriousness of the offense and the existence of a mandatory arrest law were both positively associated with the likelihood of arrest. Compared to intimidation, incidents of simple assault were 4.1 times as likely, and incidents of aggravated assault 6.1 times as likely, to result in an arrest. Meanwhile, arrests were 39.7% less likely to be made in preferred arrest states, and 33.4% less likely in discretionary arrest states, than incidents occurring in a mandatory arrest state. However, incidents occurring in a state which had enacted a primary aggressor law were 24.8% less likely to result in an arrest than those occurring in a state without such a law. While incidents occurring at a residence and age of the offender were to a minor extent positively associated with the likelihood of arrest, the racial dyad of the victim and offender and the sex of the couple showed greater impact. Compared to incidents involving white intraracial dyads, those involving both a black victim and black offender were 40.6% less likely, and those involving any other victim/offender racial dyad were 15.6% less likely, to result in an arrest. Finally, female couples were 31.9% less likely, and male couples 30.7% less likely, than heterosexual couples to have the incident result in at least one arrest.

With regard to dual arrest, though incidents occurring in a state with a

primary aggressor law were less likely to result in the arrest of both parties, this effect was not statistically significant. Likewise, the type of warrantless arrest law enacted in a state had no significant effect on the likelihood of dual arrest. Incidents of simple assault were 2.5 times more likely, and incidents of aggravated assault 2.1 times more likely, than incidents of intimidation to result in a dual arrest. Incidents occurring in a residence and age of offender were negatively associated with the likelihood of dual arrest. Compared to incidents involving white intraracial dyads, those involving both a black victim and black offender were 4.4% less likely, and those with any other victim/offender racial dyad 45.4% less likely, to result in dual arrest. The strongest effects were found when examining the impact of the sex of the couple. Female couples were 39.1 times more likely, and male couples 52.8 times more likely, to be dually arrested.

### Discussion

The finding that states with primary aggressor laws do not significantly impact the likelihood of dual arrest is disappointing. It is important to note that when using the fixed-effects logistic model we found that incidents occurring in states that had enacted a primary aggressor law were 37.3% less likely to result in dual arrest than incidents in other states, where such a law had not been enacted, a result that is consistent with the prior studies by Dichter,<sup>16</sup> Fraelich and Ursel,<sup>17</sup> Hirschel et al.,<sup>18</sup> and Hirschel and Deveau.<sup>19</sup> The problem with using the fixed-effects logistic model is that data from one state can unduly affect the outcome. For example, when the data were examined for regional differences, an extremely high dual arrest rate (9.1%) was observed for the Northeast. However, when the state of Connecticut was omitted from the analysis that rate dropped to 1.8%, less than the overall dual arrest rate of 2.4%.

One of the reasons for the finding of lack of statistical significance in the effect of primary aggressor laws is because there is variation among the states, with some states with primary aggressor laws having dual arrest rates that are higher than the overall average of 2.4% and some states with no

primary aggressor law having dual arrest rates lower than 2.4%. A total of six of the 19 states with primary aggressor laws in effect during the 10 year study period had dual arrest rates in excess of 2.4% (Arizona, Colorado, Iowa, Missouri, Utah, and Virginia) and three of the seven states that implemented primary aggressor laws during the study period still had dual arrest rates in excess of 2.4% after the passage of those laws (Louisiana, Nebraska, and North Dakota). Interestingly, all of these states had mandatory warrantless arrest laws except for North Dakota, which had a preferred arrest law, and Nebraska, which had a discretionary warrantless arrest law. In addition, all of them except for Arizona had detailed primary aggressor laws. Conversely, four of the 10 states without primary aggressor laws had dual arrest rates lower than 2.4% (Illinois, Maine, Massachusetts, and West Virginia). Of note, two of these states had discretionary arrest laws (Illinois and West Virginia), one (Massachusetts) a preferred arrest law, and only one (Maine) a mandatory arrest law.

The interaction between the coexistence of mandatory arrest and primary aggressor laws is noticeable. The inherent conflict between these laws appears to have resulted in many officers opting to arrest both parties when there was any uncertainty about who was the primary aggressor. In Connecticut, the concern has been raised that since “statute and case law are equivocal whether self-defense is an affirmative defense against arrest, police and prosecutors contend that strict adherence to the mandatory aspect of the domestic violence law requires arrest when any probable cause of crime is evident.”<sup>20</sup> This tension between primary aggressor laws and mandatory arrest laws may also partially explain the finding that an intimate partner violence incident was 24.8% less likely to result in arrest in a state with a primary aggressor law. Afraid of wrongly arresting a second party, the responding officers may opt to arrest neither party.

The variation among states with similar laws suggests that there may be implementation issues. It is naïve to assume that enactment of a law will

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automatically ensure that it will be implemented as intended. A major concern about implementation of primary aggressor laws is that officers may not be able to distinguish between injuries inflicted by defensive as opposed to offensive actions. The need for “specialized training in making self-defense determinations at the scene” is well documented by McMahon and Pence in their analysis of the implementation of a primary aggressor policy in Duluth, Minnesota where it took three years before the intended impact of the policy was realized.<sup>21</sup> As the Australian Law Reform Commission noted, the issue of identifying primary aggressors “can be difficult and nuanced and better addressed through education, training, and police codes of practice,” than through legislation.<sup>22</sup> Consequently, it is recommended that close attention be paid to the manner in which the laws have been implemented and intensive training be provided in assessing the primary aggressor.

The findings that same-sex couples are significantly less likely to have an offender arrested (31.9% less likely for female, and 30.7% less likely for male, same-sex couples) and significantly more likely to have both parties arrested (39 times more likely for female, and 53 times more likely for male, same-sex couples) are disconcerting. This strongly suggests that officers are not adequately trained to identify primary aggressor roles in same-sex relationships, and/or that a degree of prejudice still exists in responding to incidents involving these couples. Again, appropriate training could help remedy the situation. Finally, it is noteworthy that intimate partner violence

cases involving black couples were 40.6% less likely to result in arrest than those involving white couples. This could be because police perceive that such violence is more normalized in the black community or, in a more positive vein, are concerned about their relationship with the black community and the high arrest rates of black offenders in general and are therefore more likely to seek alternative strategies for resolution.

### Conclusion

This research constitutes the first multi-year national study to examine the impact of primary aggressor laws on arrest. Clearly, more attention needs to be paid to the manner in which these laws are implemented and intensive training provided to officers in determining the primary aggressor. In addition, the interaction between primary aggressor and mandatory arrest laws needs to be closely examined and the disparate effect they have both on white and non-white and heterosexual and same-sex couples addressed.

### End Notes

1. See, e.g., David H. Bayley, The Tactical Choices of Police Patrol Officers, 14 J. of Crim. Just. 329 (1986); Donald Dutton, The Criminal Justice Response to Wife Assault, 11 L. & Human Behavior 189 (1984); Robert E. Worden & Alissa A. Pollitz, Police Arrests in Domestic Disturbances: A Further Look, 18 Law & Soc. Rev. 383 (1984).
2. See, e.g., Sherrie Bourg & Harley Stock, A Review of Domestic Violence Arrest Statistics in a Police Department Using a Pro-Arrest Policy: Are Pro-Arrest Policies Enough? 9 J. Fam. Viol. 177 (1994); Truc-Nhu Ho, The Influence of Suspect Gender in Domestic Violence Arrests, 27 Am. J. of Crim. Justice 183 (2003); Dana Jones & Joanne Belknap, Police Responses to Battering in a Progressive Pro-Arrest Jurisdiction, 15 Justice Q. 249 (1999); Amanda L.

Robinson & Meghan S. Chandek, Philosophy into Practice? Community Policing Units and Domestic Violence Victim Participation, 23 Policing: An Internat'l J. of Police Strategies and Mgmt. 280 (2000); Sally S. Simpson, Leanna A. Bouffard, Joel Garner & Laura Hickman, The Influence of Legal Reform on the Probability of Arrest in Domestic Violence Cases, 23 Just. Q. 297 (2006).

3. See, e.g., Alesha Durfee, Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence, 18 Violence Against Women 64 (2012); David Eitle, The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases, 51 Crime & Delinquency 573 (2005); Donna Hall, Domestic Violence Arrest Decision Making: The Role of Suspect Availability in the Arrest Decision, 32 Crim. Just. & Behavior 390 (2005); David Hirschel, Eve Buzawa, April Pattavina, Don Faggiani & Melissa Reuland, Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Violence Cases: Final Report (2007). Available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>.

4. Alabama: Ala. Code § 13A-6-134. Alaska: Alaska Stat. § 18.65.530(b). Arizona: A.R.S § 13-3601-B. Arkansas: A.C.A. § 16-81-113(2). California: Cal. Penal. Code § 13701(b). Colorado: Colo. Rev. Stat. § 18-6-803.6(2). Connecticut: Conn. Gen. Stat. § 46b-386. Florida: Fla. Stat. Ch. 741.29 (4)(b). Georgia: Ga. Code Ann. § 17-4-20.1 (b). Iowa: Code: Iowa § 236.12(3). Louisiana: La. R.S. § 46.2140. Maryland: Md. Ann. Code art. 27 § 594B(d)(2). Michigan: Mich. Comp. Laws § 776.22(3)(b)(ii). Minnesota: Minn. Stat. § 629.342. Mississippi: Miss. Code Ann. § 99-3-7. Missouri: Mo. Rev. Stat. § 455.085(3). Montana: Mont. Code Ann. § 46-6-311(2)(b). Nebraska: R.R.S. Neb. § 29-439(1). Nevada: Nev. Rev. Stat. Ann. § 171.137.2. New Hampshire: N.H. Rev. Stat. Ann. § 173-B:10(II). New Jersey: N.J. Rev. Stat. § 2C:25-21 (c)(2). New York: N.Y. Crim. Proc. Law § 140.10 (4)(c). North Dakota: N.D. Cent. Code § 14-07.1-10. Ohio: Ohio Rev. Code Ann. §§ 2935.032(A)(1)(a)(ii) & 2935.03(B)(3)(d).

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Oklahoma: 22 Okl. St. § 60.16.B.2. Oregon: Or. Rev. Stat. § 133.055(2)(c). Rhode Island: R.I. Gen. Laws § 12-29-3 (C)(2). South Carolina: S.C. Code Ann. § 16-25-70 (D). South Dakota: S.D. Codified Laws § 25-10-35. Tennessee: Tenn. Code Ann. § 36-3-619 (b) & (c). Texas: Tex. Occ. Code § 1701.253. Utah: Utah Code Ann. § 77-36-2.2. Virginia: Va. Code Ann. § 19.2-81.3 (B). Washington: Wash. Rev. Code § 10.31.100(2)(c). Wisconsin: Wis. Stat. §§ 968.075(1)4c and 968.075(3)(2)(c).

5. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Iowa, Louisiana, Maryland, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Virginia, and Washington.  
6. Michigan, New Hampshire, and New Jersey.  
7. California, Florida, Georgia, Mississippi, Missouri, Nevada, New York, Oregon, and Tennessee.

8. Minn. Stat. § 629.342.

9. Tex. Occ. Code § 1701.253.

10. Martha McMahon & Ellen Pence, Making Social Change, 9 Violence Against Women 47 (2003).

11. Cheryl Fraehlich, & Jane Ursel, Arresting Women: Pro-arrest Policies, Debates, and Developments, 29 J. Fam. Violence 507 (2014).

12. Melissa Dichter, Steven Marcus, Melissa Morabito & Karin Rhodes, Explaining the IPV Arrest Decision: Incident, Agency, and Community Factors, 26 Criminal Just. Rev. 22 (2011).

13. Hirschel et al., *supra* note 3, Ch. 8.

14. David Hirschel & Lindsay Deveau, The Impact of Primary Aggressor Laws on Single Versus Dual Arrest in Incidents of Intimate Partner Violence, 23 Violence Against Women 1155 (2017).

15. For a more detailed description of the variables, analytic procedures, and results see David Hirschel, Philip McCormack & Eve

Buzawa, A 10-Year Study of the Impact of Intimate Partner Violence Primary Aggressor Laws on Single and Dual Arrest, J. Interpersonal Violence. Available at <http://journals.sagepub.com/doi/10.1177/0886260517739290>.

16. Dichter et al., *supra* note 12.

17. Fraehlich & Ursel, *supra* note 11.

18. Hirschel et al., *supra* note 3.

19. Hirschel & Deveau, *supra* note 14.

20. Connecticut Coalition Against Domestic Violence, Collective Opportunity for Change: Decades of Dual Arrest in Connecticut (2018). Available at [www.ctcadv.org/files/5615/1847/1671/DualArrestReport2.18.pdf](http://www.ctcadv.org/files/5615/1847/1671/DualArrestReport2.18.pdf).

21. McMahon & Pence, *supra* note 10 at p. 64.

22. Australian Law Reform Commission. *Family Violence – A National Legal Response: Final Report*, vol. 1 at p. 409 (2010). Available at <https://www.alrc.gov.au/publications/9.%20Police%20and%20Family%20Violence/identifying-%E2%80%98primary-aggressor%E2%80%99>. ■



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