

# MANDATORY ARREST FOR MISDEMEANOR DOMESTIC VIOLENCE: IS ALASKA'S ARREST STATUTE CONSTITUTIONAL?

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## ABSTRACT

*Alaska defines "domestic violence" in a way that is broader than most of the country. Additionally, it requires arrest for a wide variety of offences classified as domestic violence, including many misdemeanors. This regime violates both the United States and Alaska Constitutions in a number of ways. The statute imposes a penalty prior to a determination of guilt beyond a reasonable doubt, violating due process. It violates equal protection interests by treating individuals who commit similar crimes differently based on whether or not their crimes are classified as "domestic." Finally, it violates Fourth Amendment protections by requiring warrantless arrests absent "exigent circumstances."*

## INTRODUCTION

In the last two decades, states and the federal government have adopted a number of new approaches to deal with "domestic violence." A number of states, including Alaska, now require warrantless arrest for some misdemeanors, which traditionally required officers to obtain an arrest warrant.<sup>1</sup> Proponents of mandatory (warrantless) arrest argue that: (1) it deters individual criminals from assaulting someone again when punishment in the form of arrest is swift and sure; (2) it deters others generally from committing assault because they know that arrest will be the immediate result and this general deterrence also reinforces

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1. See COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), [http://www.abanet.org/domviol/docs/Domestic\\_Violence\\_Arrest\\_Policies\\_by\\_State\\_11\\_07.pdf](http://www.abanet.org/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.pdf).

societal norms against assault; and (3) immediate arrest protects victims from further violence.

Opponents of mandatory arrest argue that: (1) because domestic violence is a crime of passion arrest is unlikely to deter crime; (2) arrest before all the facts are known leads to the arrest of innocent people; (3) mandatory arrest often punishes the alleged victim as well as the suspect since a bread-winner may lose his job after being arrested, or the arrest may cause the suspect to retaliate further against the victim upon release; and (4) fear of these adverse consequences may lead victims to refuse to call police for help out of fear that arrest will be the result.

This Article demonstrates that Alaska's domestic violence statute suffers from a number of different infirmities. Part I sets the stage for the Article by looking at a typical example of domestic violence and by examining the different historical approaches to domestic violence laws. Part II describes how Alaska defines "domestic violence" in an exceptionally broad way compared to other states. This Article then argues that the statute requiring police to arrest domestic violence suspects is subject to at least three constitutional objections. Part III suggests that the statute appears to have been adopted to ensure swift punishment for abusers although punishment of suspects prior to trial is unconstitutional. Part IV contends that subjecting domestic violence suspects to warrantless arrest violates the Equal Protection Clause of the Alaska Constitution in that those suspects are treated differently than are similarly situated individuals who are suspected of otherwise identical, but non-domestic violence. Finally, Part V argues that warrantless arrest probably violates constitutional principles that specifically limit when, where, and how an arrest can be made.

## I. BACKGROUND

### A. A Typical Example

The following is from the police report in a misdemeanor assault case from Ketchikan, Alaska (the last names and the address have been omitted):

On 11-21-07 [the day before Thanksgiving], at 2216 hours a report was received from Russell [a neighbor] of a domestic violence situation occurring in the apartment below them. [Russell] stated he could hear screaming and cussing and at one point the girl screamed as if she were in pain. Upon arrival at the residence, Erica was contacted. Her face was puffy, her eyes swollen as if she had been crying and two scratches were

observed at the back of her left upper arm. She stated she and Tony had been in an argument but everything was fine now. Tony was in bed. When he got up he was belligerent and demanded AST [Alaska State Troopers] leave his residence. Erica started crying and stated she was afraid [Tony] was going to get angry. She said that all she wanted was for [Tony] to be home for Thanksgiving day. . . . [T]he on call District Attorney was contacted. It was decided [Tony] would be arrested for assault in the fourth degree due to the nature of the original complaint, the condition of both [Erica] and [Tony] and the likelihood of a serious assault occurring if [Tony] was left at home.<sup>2</sup>

A few other details should be noted.<sup>3</sup> Erica told the trooper when he showed up at the door that he could not come in and that she wanted to be left alone. He forced his way inside and examined her for injuries. She had two scratches on her left arm, which Erica said she had received earlier when she retrieved her baby's toy from behind a thorn bush. Tony was arrested in his underwear and taken to jail. Erica tried to go to the jail to bail him out, as the next day was Thanksgiving. She was told he was being held on "no bail" and could not be released until he was brought before a judge the next afternoon. Despite these inconveniences and humiliations, the charges were dropped before trial due to insufficient evidence to proceed.

The above example is typical of alleged domestic disputes. Police often find a highly ambiguous situation with the suspected victim uncooperative.<sup>4</sup> Often there is no clear evidence that a crime was in fact committed. How should the state respond?

Now consider what happens when suspects are arrested. They are put in handcuffs, locked in the back of a police car, taken to jail, strip searched then locked in a jail cell for hours waiting to see a judge. Often suspects are locked in a holding cell with suspected criminals who may threaten or physically abuse other prisoners. For most people, a first arrest is a terrifying experience. Even if a person is never convicted of anything, a record of arrest may still be used against a person. Moreover, arrest is humiliating and often carries a number of indirect

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2. Alaska State Trooper report 07-98461 (Nov. 21, 2007) (on file with author).

3. These additional details are Erica's account to the author.

4. See Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 176, 185-86 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (noting about a third of prosecutors surveyed reported that most alleged victims refused to cooperate in the prosecution of their alleged domestic abusers).

costs associated with it.<sup>5</sup> For some workers, missing even a single day of work can mean the loss of a job. Even when a person is released without bail, suspects are still typically subject to significant restrictions on liberty such as travel restrictions and, in domestic violence cases, often prohibited from returning to their own home.<sup>6</sup>

There are times when arrest and incarceration are necessary to stop violence or recover stolen property, for example. But mandatory arrest will unquestionably lead to the arrest of innocent people (even setting aside the principle that every suspect is innocent until proven guilty). A number of studies have concluded that pro-arrest and mandatory arrest laws have led to an increase in innocent people (often the victim of a crime) being arrested.<sup>7</sup> This appears to be particularly true with respect to mandatory arrest.<sup>8</sup> Mandatory arrests are likely to occur at the early stages of an investigation before all of the facts are known. Arrest requires the officer to have probable cause of a crime having been committed, but probable cause is not a high standard.<sup>9</sup> Generally, there

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5. Donna Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse*, 43 DEPAUL L. REV. 1133, 1148 (1994) ("Arrest may also trigger indirect costs for offenders such as humiliation, divorce or separation from their partners, and loss of job.") (quoting MICHAEL STEINMAN, *Coordinated Criminal Justice Interventions and Recidivism Among Batterers, in WOMAN BATTERING: POLICY RESPONSES* 221, 222 (1991)).

6. See ALASKA STAT. § 12.30.027(b) (2009), amended by Act of July 1, 2010, 2010 Alaska Sess. Laws ch. 19, § 8.

7. Eve S. Buzawa & Gerald T. Hotaling, *The Impact of Relationship Status, Gender, and Minor Status in the Police Response to Domestic Assaults*, 1 VICTIMS & OFFENDERS 323 (2006); Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women*, 2 CRIMINOLOGY & PUB. POL'Y 81, 84 (2002); Dana A. Jones & Joanne Belknap, *Police Responses to Battering in a Progressive Pro-Arrest Jurisdiction*, 16 JUST. Q. 249, 265 (1999); Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence*, 10 J. INTERPERSONAL VIOLENCE 147, 148 (1995). According to a study by the Municipality of Anchorage in 2000, thirteen percent of the cases involved dual aggressors. See MUNICIPALITY OF ANCHORAGE, ANALYSIS OF POLICE ACTION AND CHARACTERISTICS OF REPORTED DOMESTIC VIOLENCE IN ANCHORAGE, ALASKA TEN YEAR STUDY 1989-1998 10 (2000), available at [http://www.muni.org/Departments/health/services/Documents/dv\\_study%5B1%5D.pdf](http://www.muni.org/Departments/health/services/Documents/dv_study%5B1%5D.pdf) ("Dual aggressors indicate the officer determined both parties met the statutory definition for principle physical aggressor.").

8. See David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 296 (2007) ("Mandatory arrest laws may lead officers to adopt a legalistic orientation," to "apply the law in a mechanistic style," and to arrest more people than they would if given discretion.).

9. See *Carroll v. United States*, 267 U.S. 132, 161 (1925) (quoting *Commonwealth v. Carey*, 66 Mass. 246, 251 (1853)) (stating that an officer has probable cause "if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony").

is probable cause for arrest when a person says “she slapped me.” Some non-trivial percent of people arrested, taken to jail, strip searched and held for hours in a cell, have done absolutely nothing wrong, morally or legally. It may turn out after further investigation that the person arrested is entirely innocent, or even the victim of a crime. Nevertheless, some writers have argued that arrest is justifiable as a form of punishment.<sup>10</sup>

## B. Legal Responses to Domestic Violence Throughout History

In the early Nineteenth Century it was not a crime for a man to “chastise” his wife, but it was a crime to cause her serious injury.<sup>11</sup> “By the 1870s, however, there was no judge or treatise writer in the United States who recognized a husband’s prerogative to chastise his wife.”<sup>12</sup>

Under American constitutional law, the family and the home are accorded special protection. In 1923, the Supreme Court acknowledged the constitutional rights “to marry, establish a home and bring up children.”<sup>13</sup> Similarly, “[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>14</sup> Spouses generally could not be compelled to testify against each other.<sup>15</sup> Parents have a constitutional right, within limits, to spank or discipline children which would be assault in other contexts.<sup>16</sup> Thus marriage, family, and the home have been accorded a variety of legal privileges.<sup>17</sup>

Prior to the 1980s, arrests for “domestic disputes” were rare. This may have been based partly on theories about the role of government, but was also based on an assessment of the effectiveness of arrest and

10. See *infra* Part III and text accompanying notes 89–92.

11. Reva B. Seigel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2123 (1996).

12. *Id.* at 2129.

13. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

14. *Payton v. New York*, 445 U.S. 573, 590 (1980) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

15. See *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (“The basic reason . . . was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well.”).

16. See, e.g., *L.A.M. v. State*, 547 P.2d 827, 832 n.13 (Alaska 1976).

17. See, e.g., Elizabeth Pleck, *Criminal Approaches to Family Violence 1640–1980*, in 11 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 19 (Lloyd Ohlin & Michael Tonry eds., 1989). Some writers have noted the unusual alliance of pro-law enforcement conservatives who want to expand the power of police with women’s advocates who have typically been against expanding police power. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *WIS. L. REV.* 1657, 1675–81 (2004).

criminal prosecution. An influential 1984 U.S. Attorney General's Report ("Report") described how this early assessment came to be: "During the sixties, police trainers relied on the literature of psychologists and social scientists who believed that arrest was inappropriate because it exacerbated the violence, broke up families, and caused the abuser to lose his job. Consequently, mediation was the preferable solution to family violence incidents."<sup>18</sup>

The Report went on explain:

The original shift by law enforcement to mediation [in the 1960s] was done for the most commendable reasons. They were responding to early assumptions of psychologists and sociologists and to signals from prosecutors and judges. But a recent research experiment is challenging these traditional beliefs that mediation is the appropriate law enforcement response.<sup>19</sup>

The Minneapolis domestic violence research experiment conducted by Lawrence Sherman and Richard Berk<sup>20</sup> was widely lauded and embraced by the Reagan Justice Department. Again to quote the Report:

The results of the research demonstrated that arrest and overnight incarceration are the most effective interventions to reduce the likelihood of subsequent acts of family violence. A victim's chance of future assault was nearly two and a half times greater when officers did not make an arrest. Attempting to counsel both parties or sending the assailant away from home for several hours were found to be considerably less effective in deterring future violence.<sup>21</sup>

The Report recommended that "states should enact laws to permit law enforcement officers to make warrantless arrests for misdemeanor offenses involving family violence, when the officer has probable cause to believe that a crime has occurred *and the safety of the family is in jeopardy.*"<sup>22</sup> The Report also recognized that "the arrest and brief

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18. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASKFORCE ON FAMILY VIOLENCE, FINAL REPORT 22 (1984), available at <http://www.eric.ed.gov/PDFS/ED251762.pdf>.

19. *Id.* at 24 (citing U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, COMPENSATING VICTIMS OF CRIME: AN ANALYSES OF AMERICAN PROGRAMS (1983)).

20. For a summary of the Minneapolis study, see LAWRENCE W. SHERMAN & RICHARD A. BERK, POLICE FOUNDATION REPORTS: THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT (1984), available at <http://www.policefoundation.org/pdf/minneapolisdve.pdf>.

21. U.S. DEP'T OF JUSTICE, *supra* note 18, at 24.

22. *Id.* at 103-04 (emphasis added).

detention may increase the abuser's anger and hostility against family members" and so a "cooling-off period" of continued detention was recommended.<sup>23</sup> However, the Report suggested that overnight hold should be required only when the "probability is great" that there would be continued violence.<sup>24</sup> The Report also explained that (when there was a threat to justify continued detention) longer detention is preferable because "a short detainment is merely an aggravating inconvenience rather than a serious sanction deterring future violence."<sup>25</sup> The Report never suggested mandatory arrest whenever there was probable cause of a crime, but recommended arrest "in situations involving serious injury to the victim, use or threatened use of a weapon, violation of a protective order, or other imminent danger to the victim."<sup>26</sup> It cautioned: "Law enforcement ordinarily do not arrest two strangers who have shoved each other; neither ought they arrest two family members engaged in similar behavior."<sup>27</sup>

Armed with the Minneapolis study, the imprimatur of the conservative Reagan administration, and the lure of federal grant money, cities and states around the country adopted pro-arrest policies.<sup>28</sup> However, many states went well beyond the suggestions of the Attorney General's Report and mandated arrest for crimes of domestic violence.

The Minneapolis study was recreated in a number of cities using larger samples and longer surveys.<sup>29</sup> Based on these new studies, Sherman, the main author of the Minneapolis study, came out against mandatory arrest and called for repeal of mandatory arrest laws:

Repeal mandatory arrest laws. The most compelling implication of these findings is to challenge the wisdom of mandatory arrest. States and cities that have enacted such laws should repeal them, especially if they have substantial ghetto poverty populations with high unemployment rates. These are

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23. *Id.* at 105.

24. *Id.*

25. *Id.*

26. *Id.* at 17.

27. *Id.* at 4.

28. In 1994 the federal government began making millions of dollars in grant money available to states which "encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed." Safe Homes for Women Act of 1994, Pub. L. No. 103-322, § 40231(a)(3), 108 Stat. 1796, 1932 (codified at 42 U.S.C. § 3796h(c)(1)(A) (2006)).

29. See, e.g., Joan Zorra, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 *New Eng. L. Rev.* 929 (1994) (detailing six Minneapolis study replication experiments).

the settings in which mandatory arrest policies are most likely to backfire.<sup>30</sup>

In 2001 the Department of Justice published another study synthesizing all the previous studies, and while it found there might be some slight, marginal deterrence effect to mandatory arrest the study ultimately questioned the practicality of mandatory arrest:

[O]ur research showed that a majority of suspects discontinued their aggressive behaviors even without an arrest. This suggests that policies requiring arrest for all suspects may unnecessarily take a community's resources away from identifying and responding to the worst offenders and victims most at risk. Our research has documented the size of the specific deterrent effect of arrest, which, although consistent across sites and time, appeared modest compared with the overall percentage of suspects desisting from intimate partner violence.<sup>31</sup>

Indeed, weight of opinion is against mandatory arrest given that it has not been shown to be effective.<sup>32</sup>

However, once the effectiveness of mandatory arrest was called into doubt a number of writers began to argue that mandatory arrest was proper punishment for batterers. Even the 1984 Attorney General's Report called arrest "a serious sanction deterring future violence."<sup>33</sup> One author argued in 1997 that even if arrest has no deterrent effect it is defensible because "[a]rrest, as part of a community response, will provide just punishment for batterers."<sup>34</sup> A student author of a law review article put it this way:

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30. Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 4, at 43, 51.

31. CHRISTOPHER D. MAXWELL ET AL., U.S. DEP'T OF JUSTICE, *EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 13* (2001), available at [www.ncjrs.gov/pdffiles1/nij/188199.pdf](http://www.ncjrs.gov/pdffiles1/nij/188199.pdf).

32. Recent authors have largely treated it as a settled question that mandatory arrest does not deter domestic violence. Doctor Richard J. Gelles, a leading scholar on domestic violence, regards the deterrence argument as an example of false information spread about domestic violence. Richard J. Gelles, *Perspectives on Family Law and Social Science Research: The Politics of Research: The Use, Abuse, and Misuse of Social Science Data—The Cases of Intimate Partner Violence*, 45 *FAM. CT. REV.* 42, 47 (2007); see also Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 *CRIME & JUST.* 279, 283–87 (2008). This author has not found any article published in the last several years that advocates mandatory arrest.

33. U.S. DEP'T OF JUSTICE, *supra* note 18, at 105.

34. Michael M. Hoyer, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 *CALIF. L. REV.* 643, 647 (1997).

To counter the argument that arresting attackers often does more harm than good for the victims of domestic violence, advocates of the statutes suggest that just because the arrests do not provide a perfect and infallible deterrent is no reason to decide that they do not work.

There's deterrent, but also punishment . . . We don't have people calling for the repeal of burglary laws because they don't have a deterrent effect. Why not arrest someone who has committed a crime? A crime is a crime is a crime. It should be treated the same in a home as it is on the street.<sup>35</sup>

Thus, advocates suggest that the certainty of punishment provided by such laws makes them valuable despite their limited effectiveness in deterring domestic violence.

## II. THE SCOPE OF DOMESTIC VIOLENCE STATUTES IN ALASKA COMPARED TO ELSEWHERE

### A. Scope and Background of the Alaska Mandatory Arrest Statute

In 1996 the Alaska legislature passed the Domestic Violence Prevention and Victim Protection Act, which mandated arrest for a wide variety of offenses designated as domestic violence.<sup>36</sup> Section 18.65.530 of the Alaska Statutes requires police to arrest a suspect any time there is probable cause that a crime involving domestic violence has occurred within the prior twelve hours.<sup>37</sup> However, there is an “escape mechanism” by which police may get the district attorney’s authorization to forego arrest.<sup>38</sup> Section 12.30.027(e) of the Alaska

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35. Toni Harvey, Student Work, *Batterers Beware: West Virginia Responds to Domestic Violence with the Probable Cause Warrantless Arrest Statute*, 97 W. VA. L. REV. 181, 211 (1994) (quoting Jennifer Toth, *New Study of Domestic Violence Finds Mandatory Arrests Backfire*, L.A. TIMES, Dec. 18, 1991, at A5). One article studied the range of options available to police: making suggestions, mediating between disputants, issuing warnings, threatening to arrest if conduct is not stopped, issuing citations, and finally arrest (the most extreme tool in the police arsenal). See Robert E. Worden, *Situational and Attitudinal Explanations of Police Behavior: A Theoretical Assessment*, 23 LAW & SOC'Y REV. 667, 680 (1989). In this article, which studied traffic stops, arrest was the end result in only 11.8% of the cases. *Id.*

36. Domestic Violence Prevention and Protection Act of 1996, 1996 Alaska Sess. Laws, ch. 64, § 29 (codified at ALASKA STAT. § 18.68.530 (2010)).

37. ALASKA STAT. § 18.65.530(a) (2010).

38. *Id.* § 18.65.530(c). It is unclear how often this escape mechanism is employed, but it is almost certainly the exception rather than the rule. Under section 18.65.530(e) of the Alaska Statutes, police are required to file a report explaining why there was no arrest so further research may find statistics on

Statutes requires that the suspect be held without bail until brought before a judicial officer, which typically occurs the following day.<sup>39</sup> This is supposed to prevent the suspect from posting bail and returning quickly to the scene of the alleged crime.<sup>40</sup> Thus mandatory arrest in domestic violence cases always entails holding the suspect until arraigned before a magistrate. For other misdemeanors, a suspect who can post bail will be released.<sup>41</sup>

In Alaska, “domestic violence” includes a variety of crimes.<sup>42</sup> As the Alaska Court of Appeals has noted: “The phrase ‘domestic violence’ is normally understood to mean an assault committed by one domestic partner against another. But under section 18.66.990, this phrase is defined in a wide-ranging way, quite divorced from its everyday meaning . . . .”<sup>43</sup> The list of domestic violence crimes is contained in section 18.66.990 of the Alaska Statutes:

“[D]omestic violence” and “crime involving domestic violence” mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

- (A) a crime against the person under [section 11.41 of the Alaska Statutes, which includes homicide, assault, stalking, reckless endangerment, kidnapping, custodial interference with parental rights, sexual assault, exploitation of minors, indecent exposure, robbery, extortion, and coercion];
- (B) burglary . . . ;
- (C) criminal trespass . . . ;
- (D) arson or criminally negligent burning . . . [which includes negligently damaging the property of another by fire, regardless of the value of the property];
- (E) criminal mischief . . . [which includes tampering with the property of another regardless of the value and intentionally damaging property worth \$50 or more];

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how often this occurs. *See id.* § 18.65.530(e).

39. *See id.* § 12.30.027(e).

40. *See id.* § 12.30.027(a)–(b).

41. *See id.* § 12.30.011.

42. *See id.* § 18.66.990. “Domestic violence” is a designation given to certain types of offenses. *See id.* For example, a defendant charged with criminal mischief in the first degree is charged under section 11.46.475 of the Alaska Statutes whether the offense is alleged to be against a “family member” or not. So “domestic violence” is not a crime; it is a designation given to an offense depending on the relationship of the accused to the alleged victim.

43. *Cooper v. Dist. Court*, 133 P.3d 692, 707 (Alaska Ct. App. 2006).

- (F) terrorist threatening . . . ;
- (G) violating a protective order . . . ; or
- (H) harassment under [sections 11.61.120(a)(2)–(4) of the Alaska Statutes, which include telephoning with intent to impair the ability of the other party to place or receive calls, making repeated phone calls at inconvenient hours, and making an anonymous or obscene telephone call or communication].<sup>44</sup>

Some of the offenses are serious, but many are not the type of offense that normally would result in arrest.

The legislative record is not clear why Alaska adopted such a broad definition of a crime involving domestic violence. The Deputy Attorney General, who testified in favor of the bill before the Judiciary Committee, acknowledged that there was no reason to arrest for misdemeanor criminal mischief “except in domestic violence situations because it is often a precursor to physical violence.”<sup>45</sup> Little else was said about the scope of the listed crimes, and there is no indication that the legislature was aware that it was adopting a more expansive list of domestic violence crimes than any other state had done.

The proponents of the Alaska bill cited the “Model Code on Domestic and Family Violence,” but this document did not specifically call for mandatory arrest.<sup>46</sup> Rather, it suggested that states adopt one of two proposals: one calling for “presumptive arrest”<sup>47</sup> and one calling for mandatory arrest.<sup>48</sup> The Model Code simply said it was “left up to individual states” to determine which procedure was thought to work best.<sup>49</sup> In the Summary, the document explains: “This Code treats domestic and family violence as a crime which requires early, aggressive and thorough intervention.”<sup>50</sup> The Model Code contains a short commentary, which does shed some light on the purposes of the provisions. The Commentary begins by noting that:

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44. ALASKA STAT. § 18.66.990 (2010).

45. Violating Domestic Violence Orders: Senate Judiciary Committee Notes on H.B. 314 Before the S. Comm. on the Judiciary, 19th Leg. (Alaska 1996) [hereinafter Committee Notes on H.B. 314] (statement of Laurie Otto on Tape 96–39A).

46. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (Nat’l Council of Juvenile & Family Court Judges 1994), available at [http://www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode\\_fin\\_printable.pdf](http://www.ncjfcj.org/images/stories/dept/fvd/pdf/modecode_fin_printable.pdf).

47. Under “presumptive arrest,” police are instructed to presume that arrest is the appropriate response but have discretion not to arrest. See *id.* § 205(A). This is also known as “preferred arrest.”

48. See *id.* ch. 2, § 205, introductory cmt.

49. *Id.*

50. *Id.* at intro.

Arrest appears to be an important deterrent to future domestic violence or family violence. The employment of presumptive or mandatory arrest practices may prevent domestic homicide. Arrest also conveys clear messages to victims, perpetrators and the community that domestic or family violence will not be tolerated and that perpetrators will be held accountable.<sup>51</sup>

The paper further explains the rationale for mandatory arrest:

Proponents of mandatory arrest suggest that law enforcement response to domestic violence has improved since the advent of mandatory arrest policies and statutes, providing victims immediate protection from the current violence, affording victims an opportunity to consider legal options, and providing victims a window of time for safe relocation or obtaining civil orders for protection. Victims are more likely to be assaulted immediately after law enforcement response to a call where no arrest was made than where arrests were made.<sup>52</sup>

Finally, the document advocating warrantless arrest also states: "Research suggests that perpetrators are best deterred by swift and certain sanctions."<sup>53</sup>

There was little debate in the Alaska legislature on the Domestic Violence Act in general and on the mandatory arrest provision in particular. The only record of discussion that exists is the hearing on the bill held by the Judiciary Committee. Senator Lyda Green, a member of the committee, expressed concern that people charged with assault would be treated differently whether it was a neighbor or a co-resident.<sup>54</sup> Senator Robin Taylor, chair of the committee, did not comment on the arrest provision but did observe that treating family violence as a criminal matter and getting away from counseling and mediation would "not work well for couples that reconcile [and] by providing more punitive measures, the bill does not provide any incentive for couples to break the cycle of violence."<sup>55</sup> In response, Jayne Andreen of the Council on Domestic Violence and Sexual Assault—the main proponent testifying before the Judiciary Committee—commented:

Most victims commonly say they return to the relationship because the system has not adequately worked for them. This

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51. *Id.* § 205, introductory cmt.

52. *Id.* § 205(B), cmt.

53. *Id.* § 206, cmt.

54. *Committee Notes on HB-314, supra* note 45 (statement of Sen. Green on Tape 96-39A).

55. *Id.* (statement of Chairman Taylor on Tape 96-39B).

bill will not make the problem go away but will make the criminal justice system more responsive to the immediate needs of victims. The system will ensure that immediate response will occur and sends the message that this behavior is a crime, not merely a family problem.<sup>56</sup>

Andreen further explained that there was a real need for intervention:

We have many problems in our criminal justice system that hinder our ability to respond to these crimes. Cultural factors often prohibit the victims from seeking help. The system does not hold offenders accountable and is slow and cumbersome in responding to these crimes. . . . In order to make real changes, the system must respond in a timely fashion and provide immediate consequences for domestic violence.<sup>57</sup>

The only other explanation of the mandatory arrest provision was given by Deputy Attorney General Laurie Otto who commented that: "The Model Code recommends mandatory arrest because it sends the message that violent behavior is no longer a family problem, it is illegal."<sup>58</sup> But as noted above, the Model Code put forward presumptive arrest and mandatory arrest as equal options since research on the benefit of mandatory arrest was "not conclusive."<sup>59</sup> While legislative intent is difficult to discern, taken together the legislature's reliance on the Model Code and the comments made by the bill's backers suggest that the mandatory arrest statute may have been motivated at least in part by a desire to deter domestic violence.

## B. Mandatory Arrest Statutes in Other States

Most states have adopted an exception permitting warrantless arrests in domestic violence misdemeanors.<sup>60</sup> However, mandatory arrest statutes in most other states are limited to actual assault or battery.<sup>61</sup> One scholar has summarized the typical statute:

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56. *Id.* (statement of Jayne Andreen on Tape 96-39B).

57. *Id.*

58. *Id.* (statement of Laurie Otto on Tape 96-39B).

59. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE ch.2, § 205, introductory cmt. (Nat'l Council of Juvenile & Family Court Judges 1994).

60. *See* Harvey, *supra* note 35, at 185. It appears that all American states now permit warrantless arrest in domestic violence assaults. *See id.* This is due in large part to the federal government which has encouraged states to change their statutes by providing millions of dollars in grants to states which permit such arrests. *See id.* at 185-86.

61. In Alaska the crime "assault" covers both situations in which actual contact is made and those in which a victim is put in fear of an attack. ALASKA

Since arrest statutes have been broadened, many jurisdictions have moved toward mandatory and pro-arrest policies. Under these policies, an arrest is either required or preferred if there is probable cause to believe that a domestic battery has taken place. Although these policies have received mixed reviews, the clear trend in police practice is to arrest the batterer at the scene, regardless of the victim's wishes.<sup>62</sup>

Almost every other state with a mandatory arrest statute limits arrest to assault, battery or violating a stalking protective order. Sixteen states, plus the District of Columbia, have mandatory arrest statutes for misdemeanor acts of domestic violence.<sup>63</sup> Connecticut, the District of Columbia, Iowa, Kansas, Louisiana, Mississippi, Nevada, Oregon, Rhode Island, South Dakota, and Washington limit mandatory arrest to assault, battery, or attempted battery.<sup>64</sup> Washington further restricts mandatory arrest to cases where the suspect is still at the scene of the alleged assault.<sup>65</sup> Utah mandates misdemeanor arrest only if "the peace

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STAT. § 11.41.230 (2009). However, other states continue to separate the two. *See, e.g.,* ALA. CODE § 13A-6-23 (defining "menacing" as a situation in which an assailant "intentionally places or attempts to place another person in fear of imminent serious physical injury").

62. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1860 (1996).

63. AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), available at [http://www.abanet.org/domviol/docs/Domestic\\_Violence\\_Arrest\\_Policies\\_by\\_State\\_11\\_07.pdf](http://www.abanet.org/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.pdf) (listing New Jersey, Ohio, and Virginia as "Mandatory Arrest?"). Ohio requires arrest only for aggravated assaults, an assault involving a deadly weapon, or "serious physical harm." OHIO REV. CODE ANN. § 2935.032(A)(1)(a) (LexisNexis 2010). The New Jersey mandatory arrest policy was adopted by regulation and appears to be limited to felonies. *See* Signorile v. City of Perth Amboy, 523 F. Supp. 2d 428, 433 (D.N.J. 2007) (limiting arrest to cases where the victim exhibits signs of injury or where there is probable cause to believe an internal injury exists). Virginia's statute provides that an officer "shall" arrest for a battery "unless there are special circumstances which would dictate a course of action other than an arrest." VA. CODE ANN. § 19.2-81.3 (West 2010). This seems to provide Virginia police with discretion not to arrest. Maine also has a mandatory arrest statute limited to felony assault. ME REV. STAT. ANN. tit. 19-A, § 4012(5) (2009).

64. CONN. GEN. STAT. ANN. § 46b-38b (2010); D.C. CODE § 16-1031 (2010); IOWA CODE § 236.12(2) (2009); *id.* § 804.7(5); KAN. STAT. ANN. § 22-2307 (2009); *id.* § 21-3412(a); LA. REV. STAT. ANN. § 46.2140 (2010); MISS. CODE ANN. § 99-3-7 (2009); NEV. REV. STAT. § 171.137 (2009); OR. REV. STAT. § 133.055 (2010); R.I. GEN. LAWS § 12-29-3 (2010); S.C. CODE ANN. § 16-25-70 (2009); S.D. CODIFIED LAWS § 23A-3-2.1 (2010); UTAH CODE ANN. § 77-36-2.2 (LexisNexis 2010); WASH. REV. CODE § 10.31.100 (2010). Nevada's statute states: "a peace officer shall, *unless mitigating circumstances exist*, arrest a person when [he] has probable cause to believe that the person to be arrested has, within the preceding 24 hours, committed a battery." NEV. REV. STAT. § 171.137 (2009) (emphasis added).

65. WASH. REV. CODE § 10.99.030 (2010).

officer has probable cause to believe that there will be continued violence against the alleged victim.”<sup>66</sup> New York has a unique arrest statute requiring arrest “unless the victim requests otherwise,” only for *felony* domestic violence or violating a restraining order.<sup>67</sup> Arizona, New Jersey, and South Carolina mandate arrest only if there is physical injury.<sup>68</sup> Rhode Island, Washington, and Arizona also classify a variety of crimes as “domestic” but arrest is limited to assault.<sup>69</sup>

Colorado is the only state other than Alaska that mandates arrest for crimes that do not involve physical assault (such as criminal mischief). The Colorado statute provides:

- (1) “Domestic violence” means an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. “Domestic violence” also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.
- (2) “Intimate relationship” means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.<sup>70</sup>

Although the list of crimes includes property crimes, Colorado does not permit arrest for things like harassing phone calls or trespass, as the

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66. UTAH CODE ANN. § 77-36-2.2 (LexisNexis 2010).

67. N.Y. CRIM. PROC. LAW § 140.10 (Consol. 2010).

68. Apparently states with mandatory arrest have almost always required physical injury. See Catherine Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1150-51 (1993).

69. R.I. GEN. LAWS. §§ 12-29-2, 3 (2010). Rhode Island includes vandalism and disorderly conduct. *Id.* In Washington, “‘Domestic violence’ includes but is not limited to” assault, reckless endangerment, coercion, burglary, criminal trespass, malicious mischief, kidnapping and unlawful imprisonment. WASH. REV. CODE § 10.99.020 (2010). However, mandatory arrest only applies to assault. *Id.* § 10.31.100. It might also be noted that in Washington, as in many states, assault requires *intent* to place the other person in fear of injury whereas Alaska’s assault statute includes *reckless* conduct. See, e.g., ARIZ. REV. STAT. ANN. § 13-2904 (2010); *id.* § 13-3601 (demonstrating that intent is required).

70. COLO. REV. STAT. § 18-6-800.3 (2010).

Alaska statute does.<sup>71</sup> In sum, Alaska has a more expansive definition of domestic violence than any other state with mandatory arrest.

### C. Scope of “Family Member”

In addition to defining “domestic violence” more broadly than does any other state, Alaska also classifies more people as “family members” for domestic violence purposes than does any other state. The Colorado statute, cited above, is fairly typical as it limits domestic violence to crimes between “spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child.”<sup>72</sup> The Louisiana and South Carolina statutes are almost identical—limited to current or former intimate partners.<sup>73</sup>

In terms of states with mandatory arrest statutes, most have relatively narrow definitions of family member. The District of Columbia limits domestic violence to “a person to whom the offender is related by blood, adoption, legal custody, marriage, or domestic partnership, or with whom the offender has a child in common.”<sup>74</sup> Iowa limits domestic violence to assault between spouses, separated spouses, parents of a minor child, and people who reside together or have resided together in the previous year.<sup>75</sup> Mississippi limits domestic violence to assault between people who have been in a romantic relationship or blood relatives who have actually resided together.<sup>76</sup> Nevada’s statute extends to those in a romantic relationship, a blood

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71. Coincidentally, the United States Supreme Court commented on the Colorado statute in a case litigating whether the state could be sued for failing to make an arrest after the suspect had left the area. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 763 (2005). Although the arrest policy was not being litigated, the Court suggested that the so-called mandatory arrest policy was not as strict as it might appear. *Id.* The Court explained: “Colorado’s restraining-order statute appears to contemplate . . . that when arrest is impractical—which was likely the case when the whereabouts of respondent’s husband were unknown—the officers’ statutory duty is to seek a warrant rather than arrest.” *Id.* (citations omitted).

It would be hazardous to guess the Supreme Court’s view of mandatory arrest from the case, but the Court seemed to assume that (at least with regard to Colorado law) when a suspect cannot be arrested at the scene of the alleged crime that the normal procedure is to seek an arrest warrant. *See id.*

72. COLO. REV. STAT. § 18-6-800.3 (2010).

73. LA. REV. STAT. ANN. § 46.2132 (2010) (amended by 2010 La. Sess. Law Serv. Act 861 (H.B. 1467) (West)); S.C. CODE ANN. § 16-25-70 (2009).

74. D.C. CODE § 16-1001 (2010) (not applying to unrelated roommates as section 18.66.990 of the Alaska Statutes does). However, there is some question how far blood relation extends.

75. IOWA CODE § 236.2 (2009).

76. MISS. CODE ANN. § 97-3-7 (2010), amended by 2010 Miss. Laws Ch. 536 (S.B. 2923).

relative, or a current roommate (but not people who once resided together).<sup>77</sup> The Oregon statute extends to spouses, former spouses, parents of a child, people who have cohabited and “[a]dult persons related by blood, marriage or adoption.”<sup>78</sup> Rhode Island’s statute extends to spouses, former spouses, adults related by blood or marriage, roommates within the past three years, persons who have a child in common, and people who have dated within the past year.<sup>79</sup> Utah law extends to family and household members but does not appear to define these terms, so presumably “household member” would be taken in its normal meaning and be limited to current members of the household.<sup>80</sup> Finally, Virginia defines family member to include spouses, former spouses, immediate family including grandparents, parents of a common child and anyone who has cohabited in the previous twelve months.<sup>81</sup>

On the other hand, the Alaska statute extends to:

[A]dults or minors who live together or who have lived together . . . adults or minors who are dating or who have dated . . . adults or minors who are engaged in or who have engaged in a sexual relationship, [and] adults or minors who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption.<sup>82</sup>

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77. NEV. REV. STAT. § 171.137 (2009). As noted above, Nevada’s statute does not quite mandate arrest.

78. OR. REV. STAT. § 107.705 (LexisNexis 2010). The blood relation is potentially expansive, but unlike Alaska’s, the Oregon statute does not extend to roommates unless they are cohabiting, which presumably means a sexual relationship. The Oregon statute is also unlike that of Alaska in that it does not appear to extend to couples in a merely romantic or dating relationship unless they actually cohabitate.

79. R.I. GEN. LAWS ANN. § 12-29-3 (West 2010). This statute is narrower than the Alaska statute because of the time limitations on roommates or romantic partners.

80. UTAH CODE ANN. § 77-36-2.1 (West 2010). “Family” is not defined but the phrase used in Utah’s statute—“any family or household member”—may suggest immediate family members actually residing together. There does not appear to be any case law interpreting the extent of family or household member.

81. VA. CODE ANN. § 16.1-228 (2010). “Cohabit” again appears to be limited to those in intimate relationships. As noted above, Virginia should probably not be regarded as mandating arrest. *See supra* note 63. Otherwise, I have limited comparison to states with mandatory arrest.

82. ALASKA STAT. § 18.66.990 (2010).

Such a broad definition of “family” means that it may be difficult even to determine if two people are family members.<sup>83</sup> Similarly, there is no clear definition of what constitutes a dating or sexual relationship.<sup>84</sup>

No other state defines “family member” this broadly for domestic violence purposes. Arizona, which has an expansive statute compared to most states, extends the definition of domestic violence to people who currently or once lived together, or who once had a romantic relationship, as well as many relatives.<sup>85</sup> However, Arizona’s definition is notably unlike that of Alaska in that it does not include aunts, uncles, nephews, and cousins unless they have actually resided together.

Connecticut and Washington have the most expansive definitions of “family member” aside from Alaska. Connecticut law provides:

“Family or household member” means (A) spouses, former spouses; (B) parents and their children; (C) persons eighteen years of age or older related by blood or marriage; (D) persons sixteen years of age or older other than those persons in subparagraph (C) presently residing together or who have resided together; (E) persons who have a child in common regardless of whether they are or have been married or have lived together at any time; and (F) persons in, or have recently been in, a dating relationship.<sup>86</sup>

This is not as broad as Alaska’s definition, although it includes anyone who has ever lived together as an adult. Subsection (C) is potentially broader as it includes all adults related by blood, potentially beyond the fourth degree of consanguinity, but there must be a cutoff point and it seems unlikely the statute is applied to second or third cousins. Moreover, unlike Alaska’s statute, Connecticut’s statute does not apply to minors under age sixteen. So, for example, two minor siblings fighting would be domestic violence in Alaska but not in Connecticut. Subsection (F) is also less expansive than in Alaska as it is limited to those who have “recently” been in a romantic relationship.

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83. Even courts have become confused over the fourth degree of consanguinity. *Jacko v. State*, 981 P.2d 1075, 1077 (Alaska Ct. App. 1999) (erroneously ruling that Jacko and another person were sufficiently related because they were second cousins when in fact they were first cousins once removed). If judges are confused by degrees of consanguinity, how should a law enforcement officer “on the beat” decide whom and when they must arrest?

84. Beth Goldstein Lewis Trimmer, *A Sexual Relationship: Did We Have One? A Review of the Definition of “Sexual Relationship” Within the Context of Alaska’s Domestic Violence Laws*, 24 ALASKA L. REV. 237 (2007).

85. ARIZ. REV. STAT. ANN. § 13-3601 (2010).

86. CONN. GEN. STAT. ANN. § 46b-38a(2) (2010).

Similarly, Washington's definition of "household member" includes:

spouses, former spouses, persons who have a child in common . . . adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, . . . persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship.<sup>87</sup>

Like Connecticut's statute, this definition is almost as expansive as Alaska's, but it excludes alleged crimes between minors such as siblings.

In short, Alaska is out of the mainstream with respect to both the scope of the crimes designated as domestic (and subject to mandatory arrest) as well as to the scope of "family members." Of course, the statute's unique nature does not by itself make it wrong. Perhaps Alaska has found a better way, or perhaps Alaska's unique situation justifies radically different policies. But there are good reasons to take a hard look at the statute. In looking at the expansive definition of domestic violence, the Alaska Court of Appeals has expressed dismay at the breadth of the definition:

The apparently expansive scope of "crime involving domestic violence" leads to some strange results . . . . For example, if an elderly uncle comes to visit his favorite nephew and, while lighting his pipe, recklessly scorches a table cloth or a chair, the old man has seemingly just committed an act of "domestic violence" as defined in [Alaska Statute] 18.66.990(3). That is, the uncle has committed the listed offense of criminally negligent burning under [Alaska Statute] 11.46.430 (negligently damaging the property of another by fire), and the victim is related to the perpetrator within the fourth degree of consanguinity – thus qualifying them as "household members" under [Alaska Statute] 18.66.990(5)(E).

Similarly, if a group of former college roommates decide to hold a twenty-year reunion at one of their homes, and if one of the visiting former roommates gets drunk and recklessly jams his friend's CD player while trying to insert a CD into it, this roommate has seemingly just committed an act of "domestic violence". The intoxicated roommate has committed the listed offense of fourth-degree criminal mischief under [Alaska Statute] 11.46.486(a)(1) (tampering with the property of another

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87. WASH. REV. CODE § 10.99.020(3) (2010).

with reckless disregard for the risk of harm or loss), and all of the former college roommates are “household members” under [Alaska Statute] 18.66.990(5)(B).<sup>88</sup>

The court was concerned that special rules of evidence that apply to domestic violence cases could be misused,<sup>89</sup> but the same concern certainly applies to the mandatory arrest statute. It is one thing to speak of the need for arrest when a husband is beating his wife and she has no other place to go (although even here there is vigorous debate on what the best response is in that situation). But it is hard to see how arrest is necessary in either of the examples suggested by the Alaska Court of Appeals in *Carpentino* and *Bingaman*. Indeed, the remainder of this Article argues that mandatory arrest in such situations is not only unnecessary, it is likely unconstitutional.

### III. MANDATORY ARREST AND DUE PROCESS CONCERNS

One problem with mandatory arrest is that it metes out punishment before a suspect has been adjudicated guilty. Many proponents of mandatory arrest advocate for it because the measure has elements of retribution and deterrence, which are the traditional aims of punishment. Indeed, virtually all advocates of mandatory or preferred arrest argue that it is a deterrent.<sup>90</sup> The seminal Sherman and Berk

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88. *Carpentino v. State*, 42 P.3d 1137, 1141 (Alaska Ct. App. 2002); *see also Bingaman v. State*, 76 P.3d 398, 412 (Alaska Ct. App. 2003) (noting “a person who causes a traffic accident through criminal negligence and, by chance, happens to injure the child of a former high school sweetheart has committed a ‘crime involving domestic violence’ as defined in [section 18.66.990 of the Alaska Statutes]”).

89. *See Carpentino*, 42 P.3d at 1143. For example, Rule 404(b)(4) of the Alaska Rules of Evidence permits evidence of prior crimes of domestic violence to be introduced subject to a judicial determination that the evidence is not more prejudicial than probative. ALASKA R. EVID. 404(b)(4).

90. *See, e.g., Joan Zorza, The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 62 (1992) (“By 1984, the Minneapolis police domestic violence experiment was widely cited as proof that arrests had a deterrent effect on men who beat their wives.”). “[E]ven if arrest may not deter unemployed abusers in ghetto neighborhoods, arrest still deters the vast majority of abusers.” *Id.* at 66. “Even if it turned out that an arrest policy has no effect on either the offender or the victim, if it has a deterrent effect on the sons, the policy might still be worthwhile, because they are at danger of growing up to be abusers themselves.” *Id.* at 71. Also illustrative is Arthur Rizer’s article on mandatory arrest. *See Arthur L. Rizer, III, Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 15 (2005) (“Another argument made is that if punishment is the only objective, mandatory arrest is reasonable.”). Later Rizer summarizes: “While there are concerns over the fairness and efficacy of mandatory arrest policies, the alternative of allowing suspected abusers to go unpunished, with potentially fatal results, is not compelling.” *Id.* at 26.

article was in fact entitled “The Specific Deterrent Effects of Arrest for Domestic Assault.”<sup>91</sup> While not specifically using the words “deterrence,” “retribution,” or “punishment,” other authors leave little doubt about their meaning: “Arrest calls the batterer to account for his wrong doing in compromising community standards. It appries him that continued violent conduct will be met with severe, adverse consequences.”<sup>92</sup>

However, the position that warrantless arrest should be used to punish suspected batterers is unquestionably unconstitutional. The Supreme Court has repeatedly stated that “punishment” may never be imposed except after an adjudication of guilt (that is, either a guilty plea or a conviction).<sup>93</sup> As the Court explained in *Bell v. Wolfish*:

For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a “judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.” . . . . [T]he Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.<sup>94</sup>

The fundamental principle of justice and of due process is clear: no one may ever be punished without first being adjudged guilty through the legal process.

Although mandatory arrest has been widely advocated as a form of punishment, this author has found only one article addressing the constitutional issues implicated by such a rationale. Almost twenty years ago, a group of scholars led by Lawrence Sherman acknowledged the problem:

While the Supreme Court has held that pre-trial detention does not legally constitute punishment, the jurisprudence of arrest

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91. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AMER. SOC. REV. 261 (1984).

92. Barbara J. Hart, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 208 (1997).

93. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535–37 (1979); cf. *State v. Niedermeyer*, 14 P.3d 264, 271 (Alaska 2000) (“[T]he state may not impose criminal punishment without criminal process.”) (citing *Baker v. City of Fairbanks*, 471 P.2d 386, 401 (Alaska 1970)).

94. *Bell*, 441 U.S. at 535–37 (citations omitted).

must nonetheless confront problems of potential conflict among the diverse objectives of arrest as a sanction. Perhaps the most perplexing problem involves empirical evidence of conditions under which arrests *increase*, rather than reduce, the frequency of repeat offending by arrested individuals. This problem is particularly challenging for misdemeanor offenses that rarely result in prosecution and for which arrest may be the only criminal sanction ever applied.

Mandatory arrest laws for misdemeanor domestic battery have become the leading example of this problem in the jurisprudence of arrest. Enacted by some fifteen state legislatures despite implicit knowledge that few arrests are ever prosecuted, mandatory arrest was widely viewed as a criminal sanction that produced a specific deterrent effect.<sup>95</sup>

The above statement is a credible explanation of the mandatory arrest phenomenon. Sherman was the main author of the Minneapolis study, which is credited with being the impetus for the movement toward mandatory arrest.<sup>96</sup> This makes his opinion that “mandatory arrest was widely viewed as a criminal sanction” rather difficult to question.<sup>97</sup>

While mandatory arrest is generally considered to be a form of punishment, it is a separate question entirely whether or not mandatory arrest is “punishment” *as a legal matter*. If mandatory arrest is punishment, then it is likely unconstitutional. However, the Supreme Court has recognized that there is a distinction between measures that are punitive and measures that are merely remedial. In *Bell*, the Court identified several factors that work to delineate between punitive and remedial sanctions, including:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to

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95. Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 138 (1992).

96. See *supra* note 20.

97. Sherman et al., *supra* note 95, at 138.

the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.<sup>98</sup>

Therefore, much depends on whether the objectives behind a particular measure are retribution and deterrence or something else. The Court went on to say: "Retribution and deterrence are not legitimate nonpunitive governmental objectives."<sup>99</sup> Rather, retribution and deterrence are the "traditional aims of punishment."<sup>100</sup> Accordingly, measures that are essentially retributive or deterrent are inappropriate prior to a judicial determination of guilt.

The Court revealed how this distinction between punishment and regulation plays out in *Austin v. United States*.<sup>101</sup> In that case, the Court was asked to determine if asset forfeiture was a punitive sanction.<sup>102</sup> The Government argued that forfeiture was purely remedial because it was designed merely to take objects out of circulation, but the Court rejected this reasoning.<sup>103</sup> It determined that asset forfeiture was punishment, despite its obvious remedial effect, because of the "historical understanding of forfeiture as punishment" and evidence that Congress intended the forfeiture provisions at issue to serve a punitive purpose.<sup>104</sup> From this case, one can say that if a particular measure is purely remedial, then it is not punishment. If, on the other hand, a measure serves a retributive or deterrent purpose, then that measure is "punishment" even if it also has a remedial thrust.

The Alaska Supreme Court has applied the same standard. In *State v. Niedermeyer*<sup>105</sup> the Alaska Supreme Court was asked to decide whether a driver's license suspension following a citation for underage drinking was punitive or regulatory.<sup>106</sup> Under the statute in effect at the time, the Department of Motor Vehicles was permitted to revoke a person's

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98. *Bell*, 441 U.S. at 537-38 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

99. *Id.* at 539 n.20 (quoting *Kennedy*, 372 U.S. at 168). Similarly, the Supreme Court of Alaska has held that the Alaska constitution requires criminal sentences to address five goals: rehabilitation, isolation, "deterrence of the offender himself after his release from confinement . . . as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender." *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

100. *Bell*, 441 U.S. at 538 (citing *Kennedy*, 372 U.S. at 168).

101. 509 U.S. 602 (1993).

102. *See id.* at 604.

103. *Id.* at 620-21.

104. *Id.* at 621-22.

105. 14 P.3d 264 (Alaska 2000).

106. *See id.* at 268-72.

driver's license if the person was merely *charged* with consuming alcohol under age.<sup>107</sup>

The court ultimately concluded that the statute was unconstitutional, explaining, "To revoke a license under circumstances amounting to criminal punishment, the state must offer appropriate procedural safeguards; as we explained in *Baker*, the state may not impose criminal punishment without criminal process."<sup>108</sup> In reaching this conclusion the court discussed both the *Austin* decision and an Alaska Court of Appeals decision (*State v. Zerkel*<sup>109</sup>) that determined that license suspension for drunk driving was remedial because suspending a license bears a direct relationship to the state's regulatory goal—removing unsafe drivers from the road:

*Zerkel's* direct-relationship test also fits well with the United States Supreme Court's bright-line view of punitive action. . . . The [appeals] court in *Zerkel* acknowledged that despite the direct relationship between drunk driving and the DMV's remedial goal of removing unfit drivers from the road, administrative DWI revocations can have a punitive effect that deters DWI offenders from committing further offenses. But the court deemed this effect to be incidental to the direct, remedial effect of the DMV action. *Zerkel* thus held that administrative license revocation for DWI offenses is in essence solely a remedial measure.<sup>110</sup>

Thus, if a particular measure bears a direct relationship to a regulatory objective, then that measure is remedial even though it may also have a punitive aspect. In contrast, reducing underage drinking did not bear a direct relationship to removing unsafe drivers from the road:

At most, the minor's unlawful conduct reflects a possibility of increased danger: it suggests that the minor belongs to a class of young drivers who generally pose a higher statistical risk than other young drivers. Thus, while the behavioral gap between underage drinking and unfit driving can be bridged by a chain of rational inferences that is strong enough to withstand the minimal test of substantive due process, this roundabout connection is not the direct and necessary link that must exist before an administrative revocation will be considered non-punitive.

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107. *See id.* at 266 n.1.

108. *Id.* at 271 (citing *Baker v. City of Fairbanks*, 471 P.2d 386, 401 (Alaska 1970)).

109. 900 P.2d 744 (Alaska Ct. App. 1995).

110. *Niedermeier*, 14 P.3d at 269–70 (citations omitted).

In the case at hand, for example, former [Alaska Statute] 28.15.183 did nothing to tailor its sanction to the specific facts of Niedermeyer's case. There is no case-specific evidence suggesting that Niedermeyer, who was arrested in a cabin, posed any risk of bad driving—or that he intended to drive at all.<sup>111</sup>

*Niedermeyer* provides a framework for understanding whether mandatory arrest is remedial or punitive. If the policy merely serves to remove dangerous offenders from a position of threatening alleged victims, then it would be simply remedial. That is, the arrest must be essentially remedial and any deterrent effect must be incidental to the remedial aspect. However, Alaska's mandatory arrest statute cannot be justified as simply removing dangerous offenders because "domestic violence" is defined so broadly under Alaska law. Offenses classified as domestic violence do not necessarily bear any direct relationship to an ongoing danger; rather, "domestic violence" includes non-violent crimes.<sup>112</sup> Additionally, the Anchorage study cited above suggests that at least a quarter of cases involve no claimed injury whatsoever.<sup>113</sup> The Hirschel study found that crimes labeled as domestic violence typically are less violent than their non-domestic counterpart.<sup>114</sup> Additionally, Doctor Gelles reports that the extent to which minor acts of domestic violence eventually escalate into major acts has been exaggerated.<sup>115</sup>

Furthermore, arrest is not necessary to effect a removal of the suspect in every case. The same Anchorage study found that only about half of domestic violence occurred between people who actually lived together.<sup>116</sup> Presumably, the suspect in such cases can be removed by measures less drastic than arrest—like simply returning the suspect to his own home. Indeed, under the Alaska statute "domestic violence" need not even involve a physical presence; a harassing phone call can be enough.<sup>117</sup> When a phone call is all that is at issue, arrest is not absolutely necessary to reduce the threat of immediate physical violence.

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111. *Id.* at 270.

112. See *supra* Part II.

113. Municipality of Anchorage, *supra* note 7, at 17.

114. See Hirschel, et al., *supra* note 8, at 272 (finding that domestic violence cases were more likely than non-domestic violence cases to involve simple assault as opposed to aggravated assault and personal weapons as opposed to deadly weapons).

115. See Gelles, *supra* note 32, at 46–47.

116. Municipality of Anchorage, *supra* note 7, at 16.

117. See ALASKA STAT. § 18.66.990(3)(H) (2009).

Thus, to paraphrase *Niedermeyer*, the conduct triggering arrest does not directly relate to the arrested person's need to be separated from the alleged victim. And as in *Neidermeyer*, the arrest statute does "nothing to tailor its sanction to the specific facts" of individual cases. The statute does not require any "case-specific evidence suggesting that" the person arrested "posed any risk." Moreover, arrest and incarceration are closely connected with criminal penalties. Therefore, applying the *Neidermeyer* and *Austin* analysis to the mandatory arrest statute, it appears the statute qualifies as punitive and not remedial.

A mandatory arrest policy for any "domestic violence" crime, including non-violent offenses (such as harassing phone calls) and where there is no realistic possibility of violence, does not appear tailored toward protecting vulnerable victims. It appears much more likely directed at precisely what many advocates of mandatory arrest say it is designed to do—assure quick and severe sanctions to abusers. That makes mandatory arrest unconstitutional because it provides penal sanction without due process.

#### IV. WARRANTLESS ARREST AND EQUAL PROTECTION

A second problem with mandatory arrest for domestic violence suspects is that it violates the requirement for equal protection of the law. Most early advocates of preferred or mandatory arrest simply asked that family violence not be treated as less serious than the same crime committed between strangers.<sup>118</sup> Professor Hanna wrote: "[W]e should be cautious not to treat victims of domestic violence differently than we would treat victims of other crimes."<sup>119</sup> That is a pretty compelling argument as far as it goes. It is a simple demand for equal justice: treat a domestic dispute in the same way that the dispute would be treated if it were between strangers.

But what began as a demand to treat all cases the same has now led to profoundly unequal treatment. A person suspected of committing any of the long list of domestic violence crimes must be arrested, whereas a non-domestic suspect could not be arrested without a warrant—and likely would never be arrested at all. A suspect in a case classified as domestic will be held without bail while an ordinary suspect would be released on bail.<sup>120</sup> If released, a suspect in a domestic case is subject to more onerous conditions of release<sup>121</sup> and if tried, subject to entirely

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118. See, e.g., U.S. DEP'T OF JUSTICE, *supra* note 18, at 4.

119. Hanna, *supra* note 62, at 1890.

120. See ALASKA STAT. § 12.30.027(e) (2009).

121. See, e.g., *id.* § 12.30.027(b).

different rules of evidence which permit the jury to hear about prior crimes.<sup>122</sup> Finally, the defendant may be subject to heightened punishment if convicted and may face a variety of civil penalties.<sup>123</sup>

Sections 12.25.030(b) and 18.65.530 of the Alaska Statutes single out a certain group of people for arrest when similarly situated individuals could not be arrested. For example, if *John Smith* is alleged to have slapped his neighbor and the assault did not occur in the presence of police, *Smith* may not be arrested without the police obtaining a warrant from a neutral and detached magistrate. (In practice few police officers would seek a warrant for a misdemeanor so likely there would be no arrest at all.) However, if *Smith* is alleged to have slapped his former roommate, the statute permits (or if less than twelve hours have elapsed, requires) police to arrest him without a warrant.<sup>124</sup> This divergent treatment of people accused of identical conduct likely violates Alaska's guarantee of "equal rights, opportunities, and protection under the law."<sup>125</sup>

"Equal protection ensures that the State will not treat an individual or group of individuals differently from all other individuals."<sup>126</sup> As the supreme court explained in striking down another provision of the domestic violence statutes in *Williams v. State*:

Article I, section 1 of the Alaska Constitution provides that all persons are "entitled to equal rights, opportunities, and protection under the law." In evaluating whether legislation violates this guarantee, we apply a flexible three-part test that is dependent on the importance of the rights involved:

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122. Compare ALASKA R. EVID. 404(b)(4) (permitting evidence of prior domestic violence crimes to be admitted in prosecution for domestic violence crime) with ALASKA R. EVID. 404(b)(1) (generally not permitting evidence of prior crimes to be admitted).

123. See, e.g., ALASKA STAT. § 25.24.150(g) (stating that parent with history of domestic violence is presumed unfit for sole custody of child).

124. See *id.* § 18.65.530(a).

125. ALASKA CONST. art. I, § 1. The arrest statute is probably unconstitutional under the Fourteenth Amendment of the United States Constitution as well. The Alaska Court of Appeals in *Williams v. State*, 151 P.3d 460 (Alaska Ct. App. 2006), did not need to address the federal constitution because it found a violation of the Alaska Constitution. The argument could be applied to mandatory arrest statutes in other states, but given that those statutes are more narrowly tailored than the Alaska statute, some of them might be more likely to pass constitutional muster. Perhaps the strongest argument that the Alaska statute is not narrowly tailored is that every other state in the union has a narrower statute. Because the statute discriminates against a broad class of suspects and is not narrowly tailored to a compelling state interest, the statute is likely unconstitutional.

126. *State v. Murtagh*, 169 P.3d 602, 607 (Alaska 2007) (quoting *Weidner v. State, Dep't of Transp. & Pub. Facilities*, 860 P.2d 1205, 1211 (Alaska 1993)).

First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. . . .

Second, an examination must be undertaken of the purposes served by the challenged statute. . . .

Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.<sup>127</sup>

When the classification affects fundamental rights, it is subject to strict scrutiny.<sup>128</sup>

*Williams v. State* held that another provision of the Domestic Violence Prevention and Victim Protection Act of 1996 violated equal protection.<sup>129</sup> Williams was charged with misdemeanor assault for allegedly throwing his wife to the ground.<sup>130</sup> As a condition of his release, the court ordered that he not reside in the family home.<sup>131</sup> Weeks later, the defendant and his wife then asked the judge to permit him to move back by dropping the condition of release; although the State did not oppose the request, the trial court refused, citing the statute's requirements.<sup>132</sup> Williams appealed, contending that the statute violated equal protection guarantees by "infringing [upon] the liberty interests of persons who pose no threat of future violence."<sup>133</sup> Prosecutors countered that there was no equal protection problem

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127. *Williams*, 151 P.3d at 464 (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984)).

128. *Pub. Emp. Ret. Sys. v. Gallant*, 153 P.3d 346, 349-50 (Alaska 2007) ("[W]hen a classification is based on a suspect factor . . . or infringes on fundamental rights . . . a classification will be upheld only when the enactment furthers a 'compelling state interest' and the enactment is 'necessary' to the achievement of that interest."); see also *Pelozo v. Freas*, 871 P.2d 687, 690 & n.6 (Alaska 1994) (citing *State v. Cosio*, 858 P.2d 621, 626 (Alaska 1993) (noting that under federal law legal classifications affecting fundamental rights are subject to strict scrutiny)).

129. *Williams*, 151 P.3d at 468.

130. *Id.*

131. *Id.*

132. *Id.* at 462-63.

133. *Id.* at 464 (citations omitted).

because the statute treated all persons on release for charges of domestic violence the same.<sup>134</sup> The court rejected the State's argument.<sup>135</sup>

It began by recognizing that there was a fundamental liberty interest at play in the case and held that: "Williams has an important, if not fundamental, right to live in his home with his wife and family while on pre-trial release, and that any state infringement of that right must be carefully scrutinized."<sup>136</sup>

While the State had argued that a blanket prohibition on returning to the alleged victim's residence was necessary because of "the peculiar dynamics of domestic violence—in particular, the well-documented tendency of victims to remain with their abusers,"<sup>137</sup> the court found this interest insufficient to justify the statute's rigid requirements.<sup>138</sup> It explained:

[B]ecause of the broad definition of "a crime involving domestic violence," there is a substantial risk that the statute will burden the liberty interests of persons who pose no appreciable risk of future violence. . . .

[U]nder Alaska's far-reaching definition of domestic violence, probable cause to believe a person has committed a domestic violence offense cannot necessarily be equated with probable cause to believe that the person poses an ongoing risk to the alleged victim's safety.<sup>139</sup>

Similarly, the court further criticized the State's argument that such measures were necessary by pointing out that no other state had such a far reaching statute.<sup>140</sup>

Ultimately, the court concluded that the statute did violate the state's equal protection provision because it covered those arrested for domestic violence who posed "no appreciable risk of assaulting the victim or tampering with the victim's testimony."<sup>141</sup>

Virtually everything the court said about the statute in the context of the "do not return to residence" provision is directly applicable to the mandatory arrest provision. First, *Williams* established that those subject to the domestic violence statutes and those who are not, sets up an equal protection problem because it treats similarly situated persons

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134. *Id.*

135. *Id.*

136. *Id.* at 465.

137. *Id.* at 466.

138. *See id.* at 467–68.

139. *Id.* (citations omitted).

140. *Id.* at 468–69 (citations omitted).

141. *Id.* at 469–70.

differently. Second, there is little doubt that the right to be free from unreasonable seizure of one's person through warrantless arrest is at least as fundamental as the right to choose one's living accommodations. Third, because the arrest statute requires the arrest of "all persons charged with crimes that meet the broad definition of domestic violence . . . even persons who pose no appreciable risk of assaulting the victim or tampering with the victim's testimony" it too is "impermissibly overinclusive." No other state requires mandatory arrest as broadly as does Alaska; indeed, Alaska's statute goes even further than the Model Code on which it was supposedly based.

Moreover, as in *Williams*, the arrest statute is not narrowly tailored to any existing dangers. The arrest statute applies to people who do not live together and to people who may not even reside in the same city. A person in Nome could make a harassing phone call to a family member in Ketchikan and be subject to warrantless arrest. *Williams* cautioned that "because of the broad definition of 'a crime involving domestic violence,' there is a substantial risk that the statute will burden the liberty interests of persons who pose no appreciable risk of future violence."<sup>142</sup> That warning applies with no less force to Alaska's mandatory arrest statute; that statute also requires the warrantless arrest of people who pose no appreciable risk of future violence.

Furthermore, the coverage of the "arrest and hold" statute is even broader than the coverage of the "do not return to residence" requirement. At least that statute was limited to those who reside together, but the mandatory-arrest-and-hold-overnight provision applies to everyone charged with a domestic violence offense—even those who do not reside with the alleged victim. Thus, the arrest statute appears to be even harder to justify than the no-return statute.

## V. CONSTITUTIONAL LIMITATIONS ON ARREST

In the sections above it was argued that Alaska's mandatory arrest statute was facially unconstitutional because it violates due process and equal protection. The following section will discuss ways in which the arrest statute may be unconstitutional as applied in specific circumstances.<sup>143</sup> That is, a particular mandatory arrest is likely to be

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142. *Id.* at 467.

143. Courts typically distinguish two ways a statute may be unconstitutional. The entire statute may be "facially unconstitutional" because it can never be applied in a constitutional way, or a statute may be unconstitutional as applied in particular cases. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that a statute is facially unconstitutional when there are no circumstances under which it would be valid); *see also* *Wash. State Grange v. Wash. State Republican*

unconstitutional in two common situations: when the warrantless arrest occurs in the suspect's home and when the domestic violence incident has not occurred in the presence of police.

### A. Warrantless Arrest in the Suspect's Home

#### 1. Arrest Following Nonconsensual Entry

The Fourth Amendment protects individuals from unreasonable searches and seizures.<sup>144</sup> These protections against unreasonable searches and seizures are strongest in a person's own home, and searches inside the home are presumptively unreasonable.<sup>145</sup> In *Kirk v. Louisiana*,<sup>146</sup> for example, police observed what appeared to be several drug purchases occurring in a home; fearing potential loss of evidence, they entered the home without a warrant and arrested the defendant.<sup>147</sup> The Court held that this arrest and seizure of evidence was unconstitutional.<sup>148</sup> Relying on *Payton v. New York*, the Court held that the special Fourth Amendment protections for one's home mandated that "exigent circumstances" were prerequisites for a warrantless arrest in the home; the Court found such circumstances lacking in *Kirk*.<sup>149</sup>

Similarly, in *Welsh v. Wisconsin*<sup>150</sup> the Supreme Court held that arresting the suspect in his home for a traffic infraction was unconstitutional absent a warrant or exigent circumstances.<sup>151</sup> In that case, witnesses had observed the suspect driving erratically, and when the police later found him in bed at home, they arrested him for driving under the influence.<sup>152</sup> Noting that warrantless seizures inside the home were presumptively unreasonable, the Court held that this arrest was unconstitutional because the "exigent circumstances" bar was almost impossible to meet when the resulting arrest was for only a minor offense.<sup>153</sup>

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Party, 552 U.S. 442, 449 (2008) ("[A] facial challenge must fail where the statute has a plainly legitimate sweep.") (Internal quotation marks omitted).

144. U.S. CONST. amend. IV.

145. *Payton v. New York*, 445 U.S. 573, 590 (1980).

146. 536 U.S. 635 (2002).

147. *Id.* at 636.

148. See *id.* at 637.

149. *Id.* at 637-638.

150. 466 U.S. 740 (1984).

151. *Id.* at 753.

152. *Id.* at 742-43.

153. *Id.* at 749-50 (quoting *Payton*, 445 U.S. at 586). Interestingly, in a pair of footnotes the Court suggested that the constitution may require "an absolute ban on warrantless home arrests for certain minor offenses" but left the question undecided. See *id.* at 750, nn. 11-12.

The *Welsh* Court also in dicta rejected the converse of its holding, stating that “no exigency is created simply because there is probable cause to believe that a serious crime has been committed.”<sup>154</sup> That is, exigent circumstances do not exist merely because the crime is a serious one. Thus, the fact that domestic violence may be a more serious crime than the violation in *Welsh* does not suggest that exigent circumstances should more readily be found. Some commentators have urged a different view, however. For example, Professors Klein and Orloff argue:

Warrantless arrests are proper when the arrest needs to be made immediately due to the seriousness of the crime, or the presence of danger to the victim or the police officers. In domestic violence cases, warrantless arrests are appropriate because requiring the police to leave the abuse victim with the batterer in order to go and obtain a warrant would likely subject the victim to further violence.<sup>155</sup>

It is true that when there is an emergency requiring an immediate response, a warrantless arrest can be made. However, as a legal matter, Klein and Orloff’s statement is problematic as applied to Alaska’s statute in a few ways. In the first place, as noted above, the Supreme Court has said that “no exigency is created simply because there is probable cause to believe that a serious crime has been committed.”<sup>156</sup> Whether exigent circumstances exist depends not on whether the offence is serious but rather on whether there is an ongoing danger requiring an immediate response, rising to the level of “exigent circumstances.”<sup>157</sup> Secondly, Klein and Orloff assume that domestic violence means assault because that is how almost all states classify domestic violence. In Alaska, however, the statute includes non-violent crimes; accordingly, exigent circumstances must be justified on a case by case basis. Neither courts nor police can simply assume that every domestic violence crime creates an exigency requiring warrantless arrest.<sup>158</sup>

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154. *Id.* at 753.

155. Klein & Orloff, *supra* note 68, at 1148 (citations omitted).

156. *Welsh*, 466 U.S. at 753.

157. Of course, it is a false dichotomy that the only two options are immediate arrest or leaving the alleged victim alone with the alleged batterer. Police have numerous other options, such as taking the alleged victim to the station, transporting her to a family member’s or friend’s house, leaving an officer at the scene while a second applies for the warrant, asking the suspect to voluntarily leave the home, and so forth. And obviously in many cases the alleged victim and the suspect will not reside together at all.

158. *See* *Beltz v. State*, 221 P.3d 328, 336 n.42 (Alaska 2009) (“Determining

Occasionally commentators suggest that warrantless arrest may be needed in domestic violence cases because such cases are particularly dangerous to the alleged victims as well as to investigating officers.<sup>159</sup> Klein and Orloff seem to suggest as much, and courts occasionally embrace the theory that domestic disputes are more dangerous than non-domestic ones.<sup>160</sup> But statistics simply do not bear out this argument. As one writer noted in surveying police arrest statistics: “while domestic violence incidents account for 30% of all police calls, they are responsible for only 5.7% of police deaths. Thus, making domestic disturbances one of the least dangerous of police activities.”<sup>161</sup> More analysis comparing domestic versus non-domestic crimes of the same nature would undoubtedly be helpful, but such an analysis is beyond the scope of this Article. Of course, domestic assaults can be very serious, and domestic violence is a real problem. Nevertheless, any attempt to justify mandatory arrest based on the theory that domestic incidents are more violent than the same offense committed between strangers is not supported by the current statistical evidence.

## 2. Arrest Following Consensual Entry

One other issue to note is consensual entry by police. Some courts and commentators interpret the *Payton, Welsh*, and *Kirk* cases as making only the *entry* into the home illegal. In other words, if police were to enter the home legally (for example, if they knock on the door and ask, “May we come inside to talk?”), then they may constitutionally arrest a person in his own home without a warrant. The Illinois Court of Appeals has apparently adopted this position. In a recent case, that court held that “once the officers were granted access by voluntary consent to the apartment, no warrant of any type was required to arrest the defendant on the probable cause the police clearly had amassed up to that point.”<sup>162</sup>

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whether exigent circumstances exist is a fact-specific inquiry.”).

159. See Klein & Orloff, *supra* note 68, at 1148 (“Warrantless arrests are proper . . . due to . . . the presence of danger to the victim or the police officers.”).

160. See, e.g., *People v. Castillo*, No. H023874, 2003 WL 193448, at \*7 & n.2 (Cal. Ct. App. Jan. 29, 2003) (“[T]he escalating pattern of violence present in many cases of domestic violence suggests to us that such an offense should be perceived as more dangerous than the same crime in other situations.”).

161. Jessica Dayton, *The Silencing of a Woman’s Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN’S L.J. 281, 284 (2003).

162. *People v. Adams*, 914 N.E.2d 490, 498–99 (Ill. App. Ct. 2009). Unfortunately, the decision provides almost no argument explaining this position. It cites an earlier Illinois case *People v. Williams*, 891 N.E.2d 904, 926, (Ill.

The position that “once inside” no arrest warrant is needed is incompatible with Supreme Court precedent. Part of the confusion seems to stem from *Steagald v. United States*,<sup>163</sup> which stated that “absent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant.”<sup>164</sup> In this statement, the Court was merely noting that an owner of a residence may ask the police to come inside his residence and arrest a visitor – this was the consent the case discussed.<sup>165</sup>

In explaining the law in *Welsh* the United States Supreme Court noted explicitly that the Constitution protects against both warrantless entry and warrantless arrest in the home:

It is axiomatic that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” . . . It is not surprising, therefore, that the Court has recognized, as “a ‘basic principle of Fourth Amendment law[,]’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”

Consistently with these long-recognized principles, the Court decided in *Payton v. New York*, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.<sup>166</sup>

While it is true that the Court speaks of physical entry as “the chief evil,” the language leaves no question that “warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.”<sup>167</sup> These statements plainly indicate that warrantless arrest is unconstitutional whether or not preceded by a warrantless entry.

Additionally, it makes sense to think that authorization to enter is different than authorization to make an arrest. Of course, residents can allow police to enter to arrest a non-resident, and suspects may voluntarily surrender. But normally, when police are admitted they

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App. Ct. 2008), which in turn cites *Payton v. New York*, 445 U.S. 573 (1980). *Williams* apparently interpreted *Payton* to prohibit warrantless entry only. See *Williams*, 891 N.E.2d at 926.

163. 451 U.S. 204 (1981).

164. *Id.* at 214 n.7.

165. This is also how lower courts have interpreted *Steagald*. See, e.g., *Guerrero v. Deane*, No. 1:09cv1313, 2010 WL 670089, at \*6 (E.D. Va. Feb. 19, 2010) (“Thus, the Court finds the Supreme Court’s holding in *Steagald v. United States* – that a law enforcement officer may not enter a *third-party* residence to effectuate a subject’s arrest without a search warrant, consent of the owner of the residence, or exigent circumstances – to be more fitting here.” (internal citations omitted)).

166. *Welsh v. Wisconsin*, 466 U.S. 740, 748–49 (1984) (citations omitted).

167. *Id.*

must adhere to the scope of the consent.<sup>168</sup> And as the Court reasoned in *Florida v. Jimeno*, “[t]he standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”<sup>169</sup> A reasonable person would not think that permitting an officer inside the door to talk was an agreement to search or seize his own person.

The Alaska Court of Appeals dealt with the scope-of-consent issue similarly in *Haskins v. Municipality of Anchorage*.<sup>170</sup> Police went to Mr. Haskins’s residence to investigate a recent hit-and-run accident.<sup>171</sup> Officers asked Ms. Haskins if they could speak to her husband, and Ms. Haskins told the officers to come into the entryway of her home.<sup>172</sup> But when Ms. Haskins went downstairs to get her husband, the police followed her and discovered Mr. Haskins in a downstairs bedroom.<sup>173</sup> Holding that the search and seizure of Mr. Haskins was unconstitutional, the court explained that “even though Ms. Haskins knew that the police had come to speak to her husband, she only gave the officers permission to come in and wait while she fetched him. That limited consent constituted the boundary of the officers’ freedom within the house.”<sup>174</sup>

*Haskins* did not address whether police could have seized Mr. Haskins if he had allowed police into the entry to talk to him. Nevertheless, the statement that the “limited consent constituted the boundary of the officers’ freedom” suggests that the court was thinking not just in terms of the officers’ physical location but also in terms of their freedom of action. If the consent was “to talk” then that is all they were free to do. As the California Court of Appeal has explained:

It is established law that the police may not justify a warrantless arrest if the limits of the consent to enter a home have been exceeded. A police officer’s right to enter is limited to the scope of the consent. A consent to enter for the purpose

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168. *Florida v. Jimeno*, 500 U.S. 248, 251–52 (1991) (“The scope of a search is generally defined by its expressed object. . . . A suspect may of course delimit as he chooses the scope of the search to which he consents.”); see also 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 8.1(c), at 32–33 (4th ed. 2004) (“[I]t goes without saying that a consent to search a vehicle does not also constitute a consent to search the person of the individual giving the consent[.]”).

169. *Jimeno*, 500 U.S. at 251 (citations omitted).

170. 22 P.3d 31 (Alaska Ct. App. 2001).

171. *Id.* at 32.

172. *Id.*

173. *Id.*

174. *Id.* at 32–33.

of talking with a suspect is not a consent to enter for the purpose of making an arrest of the suspect.<sup>175</sup>

This reasoning is compelling. It is hard to see how a person could be stripped of his right to be free from warrantless seizure simply by agreeing to let police step inside his door.

This issue is particularly important in the context of domestic violence because such cases will often involve co-tenants—who may have very different ideas at the moment about the extent to which police should be admitted into the home. With respect to whether a co-tenant can consent to have another tenant arrested, the Court has long held that co-tenants only have authority over common areas or common property. The Supreme Court recently summarized the law in *Georgia v. Randolph*<sup>176</sup>:

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. . . . [A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.<sup>177</sup>

In short, *Randolph* primarily addressed what happens when one resident says, "You may come in," but the second resident says, "No, you may not." *Randolph* held that consent of one resident to entry does not permit police to enter a residence over the objection of a co-tenant (at least when the co-tenant is present at the scene).<sup>178</sup> Obviously this has direct application when one spouse says, "Come in and arrest my spouse" and the other spouse objects to being arrested. But what happens if the non-consenting spouse does not actively object, or does not object until he or she sees the police come inside?

The reasoning of *Randolph* indicates that the non-consenting resident may object at any time. The Court looked to social expectations and concluded that when one co-tenant does not want visitors, the objecting tenant's wishes normally would be respected:

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter

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175. *In re Johnny V.*, 149 Cal. Rptr. 180, 186 (Ct. App. 1978).

176. 547 U.S. 103 (2006).

177. *Id.* at 106.

178. *Id.* at 122–23.

when a fellow tenant stood there saying, “stay out.” Without some very good reason, no sensible person would go inside under those conditions.<sup>179</sup>

The Court went on to explain:

[T]he “right” to admit the police . . . is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances.<sup>180</sup>

Take a slightly different scenario: suppose one tenant says to a police officer “come in” and three seconds later another tenant walks into the room and says “get out.” Can the police at that point say, “Too late, I’m already inside”? In other words, can a co-tenant say “stay out” but not “get out”? It is hard to see much logical or legal distinction between “get out” and “stay out.” A visitor who refuses to leave when asked is a trespasser just as much as a person who came in uninvited.<sup>181</sup> To illustrate this further suppose *both* residents ask the police to leave. The Alaska Court of Appeals has noted, “[o]f course, an individual may withdraw or limit their [sic] consent to a search at any time before the search is completed, by either a verbal or physical act indicating that the consent has been withdrawn.”<sup>182</sup> Police have no right to continue searching when the person who initially gave consent also withdraws that consent. So there really is no difference between “stay out” and “get out”; a resident who has a legal right to say “stay out” has the same legal right to say “get out.” Unless there are exigent circumstances to justify staying (at which point the presence is no longer based on consent), police would need to leave.<sup>183</sup>

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179. *Id.* at 113.

180. *Id.* at 120–21.

181. Trespassing occurs when people unlawfully enter or remain on a premise, ALASKA STAT. § 11.46.330 (2010), which is defined as “enter[ing] or remain[ing] in or upon premises . . . when the premises . . . at the time of the entry or remaining, is not open to the public,” ALASKA STAT. § 11.46.350 (2010). There is one sentence in *Randolph* which suggests that the moment of entry into the residence is all that matters: “if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.” *Randolph*, 547 U.S. at 105. It seems unlikely the Court meant that police may continue to rely on consent of a resident when the other specifically says “get out.”

182. *Baxter v. State*, 77 P.3d 19, 25 (Alaska Ct. App. 2003) (citations omitted).

183. Before leaving *Randolph* there is one other interesting colloquy in the opinion involving the application to domestic violence investigations. The dissent suggested that the decision meant police cannot enter a residence if they

In short, the sort of warrantless arrest that is required by Alaska's domestic violence statute appears unconstitutional if that arrest is effected in the suspect's home. Although a few courts have held that the Constitution protects only against involuntary entry and that once inside police may arrest without a warrant, that position seems contrary to well-established Supreme Court precedent and a common sense understanding of the limits of consent.

## **B. Domestic Violence Incidents Not Occurring in the Presence of Police**

### *1. Warrantless Arrest and the Fourth Amendment*

It remains an open question whether it is ever constitutional for police to arrest a person for a minor offense that was not witnessed by police.<sup>184</sup> Under English law as far back as 1710 the rule was that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest."<sup>185</sup> This law was based on the recognition that arrest is a significant interference in the liberty of citizens and that unless an immediate danger required intervention, an arrest warrant should be obtained.<sup>186</sup>

In recent years, the United States Supreme Court has held that warrantless arrest for misdemeanor is not limited to breaches of the peace, but the Court has suggested (without actually deciding the issue) that the "in the presence" requirement is a constitutional necessity. In *Atwater v. City of Lago Vista*,<sup>187</sup> the Court by a five to four majority held that: "If an officer has probable cause to believe that an individual has

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receive a report of domestic violence and one of the residents refuses to let the police enter. *Randolph*, 547 U.S. at 139-40. But the majority opinion explained that *Randolph* was about the limits of consent, and that police are permitted to enter, without anyone's consent, when there are exigent circumstances that demand immediate response. *Id.* at 117-19.

184. The argument in this section is not particularly original, as numerous scholars have argued that misdemeanor arrest without exigent circumstances is unconstitutional. See, e.g., Thomas R. Folk, *The Case for Constitutional Constraints upon the Power to Make Full Custody Arrests*, 48 U. CIN. L. REV. 321 (1979); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

185. See William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 788 (1993) (quoting *Regina v. Tooley*, 92 Eng. Rep. 349, 352 (1710)).

186. *Id.* at 788-89.

187. 532 U.S. 318 (2001).

committed even a very minor criminal offense *in his presence*, he may, without violating the Fourth Amendment, arrest the offender.”<sup>188</sup>

In *Atwater*, the petitioner argued that her arrest for not wearing a seatbelt was an “unreasonable seizure” because traditionally arrests for misdemeanors were only permitted if committed in the presence of the officer and constituted a “breach of the peace.”<sup>189</sup> Although the seatbelt violation was witnessed by the officer, *Atwater* argued that she should not have been arrested unless the offense constituted a “breach of the peace.”<sup>190</sup> The Court, however, held that a “breach of the peace” was not constitutionally required for the arrest.<sup>191</sup>

But would arrest for a minor offense not committed in the presence of an officer be constitutional? *Atwater* noted this issue but explicitly refused to resolve it: “We need not, and thus do not, speculate whether the Fourth Amendment entails an ‘in the presence’ requirement for purposes of misdemeanor arrests.”<sup>192</sup> It should be noted, however, that the Court’s authorities all incorporated the “in the presence” requirement:

Although the Court has not had much to say about warrantless misdemeanor arrest authority, what little we have said tends to cut against *Atwater*’s argument. In discussing this authority, we have focused on the circumstance that an offense was committed in an officer’s presence, to the omission of any reference to a breach-of-the-peace limitation.<sup>193</sup>

Thus, even though *Atwater* declined to address whether the “in the presence” requirement was of constitutional dimension, the Court has repeatedly emphasized that misdemeanor arrest is permitted when there is probable cause of a felony or of a misdemeanor committed in

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188. *Id.* at 354 (emphasis added). In *Virginia v. Moore* the Supreme Court confirmed that “[w]hen officers have probable cause to believe that a person has committed a crime *in their presence*, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.” *Virginia v. Moore*, 553 U.S. 164, 178 (2008) (emphasis added). *Moore* does not seem to have added much to the law in this area although the decision did note three justifications for arrest: “arrest will still ensure a suspect’s appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly.” *Id.* at 174.

189. *Atwater*, 532 U.S. at 325–26.

190. *See id.*

191. *Id.* at 329 (“In *Carroll* . . . we conspicuously omitted any reference to a breach-of-the-peace limitation in stating that the ‘usual rule’ at common law was that “a police officer [could] arrest without warrant . . . one guilty of a misdemeanor if committed in his presence.”).

192. *Id.* at 341 n.11.

193. *Id.* at 340–41 (citations omitted).

the presence of police. For example, to quote *Carroll*, the case relied on by the Court in *Atwater*: “The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.”<sup>194</sup> While the Court dispenses with the “breach of the peace” language in *Carroll*, it retains the “presence” requirement; although the Court did not specifically consider the issue in *Atwater*, the distinction suggests the “presence” requirement is necessary in a way that the “breach of the peace” requirement is not.

Moreover, *Atwater* attached an Appendix to the decision that lists the arrest statutes from all fifty states. The Appendix indicated that almost every state, at the time, permitted warrantless misdemeanor arrest so long as the misdemeanor occurred in the presence of police.<sup>195</sup> According to the *Atwater* Appendix, every state had an “in the presence” requirement but Hawaii, Illinois, Louisiana, Massachusetts, Montana, and Wisconsin.<sup>196</sup> In addition Rhode Island appears to permit arrest not in the presence of an officer, but the Rhode Island statute reads (according to the *Atwater* Appendix) “for misdemeanors and petty misdemeanors where ‘[t]he officer has reasonable grounds to believe that [the] person cannot be arrested later, or [m]ay cause injury to himself or herself or others or loss or damage to property unless immediately arrested.’”<sup>197</sup> So although the Supreme Court refused to address this issue, both Supreme Court precedent and the vast majority of state laws have historically permitted arrest for misdemeanor offenses only when committed in the presence of police. Under the analysis applied in *Atwater*, the logical conclusion is that misdemeanors not committed in the presence of police are not arrestable offenses under the constitution, because “in the presence” has a much longer and stronger pedigree than the “breach of the peace” requirement.

Furthermore, the Court in *Atwater* was concerned that it would be impossible to draw a clear line between minor offenses, which would not justify arrest, and serious ones, which would. However, this rationale does not apply as strongly in the context of the “presence” requirement because the line between offenses that are committed in the presence of an officer and those that are not is an easier line to draw.

In the end *Atwater* was upheld by a bare majority in a five to four vote with a strong dissent written by Justice O’Connor:

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194. *Carroll v. United States*, 267 U.S. 132, 156–57 (1997).

195. *Atwater v. City of Lago Vista*, 532 U.S. 318, 355–60 (2001).

196. *Id.*

197. *Id.* at 359.

The Fourth Amendment guarantees the right to be free from “unreasonable searches and seizures.” The Court recognizes that the arrest of Gail Atwater was a “pointless indignity” that served no discernible state interest, *ante*, at 1553, and yet holds that her arrest was constitutionally permissible. Because the Court’s position is inconsistent with the explicit guarantee of the Fourth Amendment, I dissent.<sup>198</sup>

Indeed, the majority opinion itself conceded: “Atwater might well prevail under a rule derived exclusively to address the uncontested facts of her case, since her claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her.”<sup>199</sup> Given the strong dissent and close vote, it seems unlikely that the Supreme Court would permit warrantless arrest for a misdemeanor not committed in the presence of officers—particularly since it appears that a stronger case can be made that the “presence” requirement has more to recommend it. Indeed, in his article *Warrantless Misdemeanor Arrests and the Fourth Amendment*, William Schroeder argues: “The justifications that the Supreme Court has given for dispensing with the warrant requirement suggest that absent exigent circumstances, the Constitution requires a warrant when an arrest is made for a misdemeanor committed outside the arresting officer’s presence.”<sup>200</sup>

While proponents of mandatory arrest suggest that the “in the presence” requirement is inappropriate for domestic cases because few domestic crimes will happen in the presence of police,<sup>201</sup> there is an obvious rejoinder. Few crimes take place in the presence of police, and the fact that police are rarely present for crimes that are alleged to have taken place in the home is not unique. If the “in the presence” requirement is constitutionally required, the fact that domestic crimes usually are alleged to have taken place in private cannot overcome a constitutional requirement. The United States Supreme Court precedent suggests that warrantless arrest for a domestic violence misdemeanor not committed in the presence of police is unconstitutional.

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198. *Id.* at 360 (O’Connor, J., dissenting). When justices strongly disagree they write “I dissent” as opposed to “I respectfully dissent.” The dissent is important because a number of state courts have chosen to follow Justice O’Connor’s analysis as a matter of state constitutional interpretation. *See, e.g., State v. Bauer*, 36 P.3d 892, 897 (Mont. 2001); *State v. Rodarte*, 125 P.3d 647, 671 (N.M. 2005).

199. *Id.* at 321.

200. Schroeder, *supra* note 185, at 853.

201. *See Crystal Cunningham, Domestic Violence: I Don't Need to Have Bruises to Feel Pain—A Worthy Exception to the Warrant Requirement*, 28 PAC. L.J. 731, 734 (1997).

## 2. Warrantless Arrest and Alaska Law

In addition to the federal precedents cited above, warrantless arrest for a misdemeanor not occurring in the presence of police may violate the Alaska Constitution even if permitted by the federal constitution. As the *Atwater* Appendix showed, almost every state, as a general rule, forbids warrantless arrests for offenses not committed in the presence of police or in the presence of a citizen making an arrest.<sup>202</sup> However, most states in the last thirty years have enacted statutes permitting warrantless arrests not committed in the presence of police under special circumstances, notably in domestic violence situations and for driving under the influence. In *Proctor v. State*,<sup>203</sup> the Alaska Court of Appeals upheld the DUI arrest statute:

[T]he fourth amendment is not offended by warrantless searches or arrests *based upon exigent circumstances*. See [*United States v.*] *Watson*, 423 U.S. at 437 (Marshall, J., dissenting). We conclude that the legislature has determined that exigent circumstances exist where there is probable cause to believe a suspect is driving while intoxicated. We are not able to say that that legislative determination violates due process. Consequently, we find no violation of either the state or federal Constitution.<sup>204</sup>

The Alaska court's citation of Marshall's dissent merits comment. *Watson* was a case in which postal inspectors performed a warrantless arrest in a felony, where *Watson* was known to be in possession of stolen credit cards.<sup>205</sup> Although federal agents had time to apply for a search warrant or arrest warrant, they did not.<sup>206</sup> The majority held that because this was a felony no arrest warrant was needed.<sup>207</sup>

Marshall, however, disagreed with this reasoning and would have upheld the arrest on the ground that there were valid "exigent circumstances" to justify immediate arrest without a warrant: "*Watson's* warrantless arrest was valid under the recognized exigent-circumstances exception to the warrant requirement, and the Court has no occasion to

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202. See *Atwater*, 532 U.S. at 355–60.

203. 643 P.2d 5 (Alaska Ct. App. 1982).

204. *Id.* at 7 (emphasis added).

205. *United States v. Watson*, 423 U.S. 411, 413 (1976).

206. *Id.* at 414.

207. *Id.* at 418 ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.").

consider whether a warrant would otherwise be necessary.”<sup>208</sup> By citing Marshall specifically, the Alaska Court of Appeals seemed to embrace Marshall’s reasoning. The court permitted warrantless arrest for DUI not committed in the presence of officers, but it specifically noted that the on-going danger posed by DUI was an exigent circumstance.<sup>209</sup> Of course, this will not be true in every single DUI. The *Welsh* case (which was decided after *Proctor*) provides an excellent example: when the suspect had returned to his own home, the exigency had dissipated. Therefore, although *Proctor* upheld a warrantless misdemeanor arrest, the statement that “the fourth amendment is not offended by warrantless searches or arrests based upon exigent circumstances” suggests that exigent circumstances are required to dispense with the warrant requirement.

The circumstances for many domestic assaults will amount to an exigency demanding immediate arrest, but many situations, perhaps even the vast majority of domestic violence investigations, do not involve such circumstances. This is at least suggested by the Anchorage ten year study which found that in 24.1% of cases, no physical injury was claimed; in 18.5% of cases an injury was claimed but there was none or none visible; in 34.9% of cases, injuries were “minor” and in only 22.6% injuries were described as moderate or major.<sup>210</sup> More statistical analysis in this area is needed. Just because there is no injury or a minor injury does not necessarily mean there is not serious, imminent danger; and conversely, a serious injury does not necessarily mean there was a crime or is any ongoing danger. Nevertheless, the numbers suggest that mandatory arrest may be applied overwhelmingly in circumstances with very minor offenses that do not occur in the presence of officers. “[P]laintiffs seeking facial invalidation of a law must establish at least

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208. *Id.* at 435 (Marshall, J., dissenting).

209. *See Proctor*, 643 P.2d at 7.

210. *See* MUNICIPALITY OF ANCHORAGE, *supra* note 7, at 17. These statistics do not include non-violent offenses classified as domestic violence. One further note from the Alaska Public Defender database: The Public Defender has a computer database called Practice Manager into which every criminal case is entered. This includes information on charges and whether the offense is categorized as domestic violence or not. This author ran a computer search of that database in September of 2010 and found 6,861 misdemeanor assaults and 3,584 felony assaults charged. Of these assaults, 2,348 misdemeanor assaults were classified as domestic, and 323 felony assaults were classified as domestic. So 12% of domestic violence assaults were charged as felonies, as compared to 42% felony for non-domestic assaults. Thus a relatively small percent of domestic violence assaults involve a weapon or serious injury (making it a felony), and non-domestic assaults are three-and-a-half times more likely to involve a weapon or serious injury.

that the law does not have a ‘plainly legitimate sweep.’”<sup>211</sup> Further research may be able to demonstrate that the mandatory arrest statute does not have a plainly legitimate sweep.

### CONCLUSION

This Article has argued that Alaska’s statute requiring arrest for misdemeanors classified (somewhat arbitrarily) as “domestic violence” is unconstitutional for at least three reasons. To some extent all three arguments can be boiled down to the following: arrest is appropriate only when needed to protect the community or apprehend criminals who might otherwise escape detection, but it is not appropriate to punish a particular group of alleged offenders who are politically unpopular. Because warrantless arrest must be based upon exigent circumstances, mandatory warrantless arrest is never appropriate unless there is a threat of continued violence. While there is a justifiable concern that police will misuse their discretion, there is probably no way to eliminate police discretion. Given the appeals court’s frequent criticisms of the scope of Alaska’s domestic violence statutes, a re-evaluation of the statute is long overdue.

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211. *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004).