



**When is Arrest *Not* an Option?  
The Dilemmas of Predominant Physical Aggressor Language and the  
Regulation of Intimate Partner Violence**

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*Responding to a domestic violence call, the police arrive at a home. They find a woman with a black eye and swollen face – she appears disoriented. She says she was punched in the head approximately ten times. The man has several scratches on his face, some of which are still bleeding. Both parties agree that the woman hit the man first, scratching his face when he called her a “stupid bitch.” The man said he “lost it” after she scratched him and he punched her a “few times.” The woman says her husband has beaten her up many times over the past five years. She told police that tonight she was “sick of taking his abuse.” The couple is new to the area and the police have never been to the home before.*

What are the responding officers to do in this situation? The officers seemingly have probable cause<sup>1</sup> on both parties. Do they arrest the husband *and* the wife? If they do, what are the consequences of this course of action? For the wife, as an ongoing victim of domestic violence? For the state, which has to decide whether to prosecute one or both of the parties? Should the responding officers be concerned with long-term issues—such as future violence and prosecution issues—or only the decision at hand? When is arrest not an option?

These questions, amongst others, are at the center of the debate surrounding mandatory/pro-arrest policies and the predominant physical aggressor language which currently accompanies it in 30 states. The latter arose in response to a large rise in the number of dual

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<sup>1</sup> Probable cause is a reasonable belief that a person accused of a crime actually committed it.

arrests<sup>2</sup> (Hirschel and Buzawa 2002), which followed the implementation of these arrest policies and statutes in most states and jurisdictions in the late 1980s.

The concept of predominant physical aggressor attempts to provide law enforcement officers with a framework to determine – in a situation where both parties have used violence – which party should be subject to state action. In general it does this by encompassing a series of questions which guide the analysis. For example, in the above scenario,

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according to the Model Code on Domestic and Family Violence (NCJFCJ 1994), officers should consider four main factors in determining who is the predominant physical aggressor (hereafter, PPA). First of all, is there a history of prior abuse? In this scenario the wife reports “five years of abuse.” However, there are no prior police calls to the home so the police will have to make a judgment call as to the veracity of her report. Secondly, the officers should consider “the relative severity of injuries inflicted upon each person.” The man has visible and bleeding scratches on his cheek, the woman a black eye and her face is “swollen.” Her report that she has been beaten about the head may indicate there are further “hidden” injuries not visible to the naked eye, and the officers should probably investigate further to determine the full extent of her injuries. In addition, her reported state of “disorientation” due to the beating should be taken into account. All in all, it would appear her injuries are more severe. Thirdly, the responding squad should consider the likelihood of future injury to each party by the other. In this case, if the officers believe that the woman has been abused in the past, and consider the extent of her current injuries, then they should also believe that she is probably more at risk for future harm than the

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<sup>2</sup> For example, in Ohio, the Alliance for Cooperative Justice found a 142% increase in all domestic violence cases – in the year after a preferred arrest policy was implemented – and a 428% increase in the number of women arrested (Bohmer, Brandt, Bronson, and Hartnett 2002).

man. The fourth consideration is whether either party acted in self-defense. In this case scenario, it does not appear either party did so. Given these factors, then, it would appear that the husband is the PPA, and the one who should be subject to arrest. The analysis seems to be pretty straightforward and easy to apply. Unfortunately, it is not.

There are a myriad of confounding philosophical as well as practical issues that make the application of the predominant physical aggressor framework problematic, as well as confusing. For example, does violence mean different things in different contexts? How do we as a society view women's use of violence? How do the short-term and long-term goals of the criminal justice system get reconciled at various points of intervention? More specifically, how does the language of predominant physical aggressor language statutes help or hinder our understandings of this law? For example, when is past history "verifiable"? How and when is self-defense considered? Are police and advocates doing enough to identify "hidden" injuries such as those from strangulation and sexual assault? This paper explores these issues, offering a discussion aimed at illuminating what makes the question of arrest so frustrating for police, prosecutors, and advocates alike.

## Evolution of Language

The language of predominant physical aggressor arose after mandatory or pro-arrest statutes began to be implemented around the country. Many – but not all – jurisdictions found that along with a general increase in all single-offender domestic violence arrests, they also witnessed a large jump in the number of dual offender arrests (Buzawa and Buzawa 1992). Many police officers, who felt that their hands had been tied by "mandatory" arrest statutes, followed the strict letter of the law. In many cases this meant arresting both parties and deciding to "let the

courts figure it out.” This was alarming to battered women’s advocates who subsequently began reporting a large increase in the number of ongoing victims of battering being arrested. In addition, criminal justice practitioners now had to deal with a growing domestic violence caseload, often featuring “defendants” one day and “witnesses” the next.

Turning to the law to solve one problem – the lack of arrests in domestic assault cases – had led directly to a new and unexpected one, the problem of dual arrests. A group of advocates and criminal justice practitioners in Washington state were among the first to identify the problem of dual arrests and to attempt a solution, creating the language of “primary aggressor” to help sort out “who was doing what to whom with what impact?” as long-time advocate Ellen Pence urges interveners to find out.

Unfortunately, the initial terminology – *primary* aggressor – created as well as solved problems. Although the factors to be considered were much the same as those outlined above – past history, severity of injuries, threat of future violence, self-defense – many law enforcement officers focused on the word *primary* and interpreted the framework to mean “who used violence first” or “who started it.” For example, in our introductory scenario, some officers reviewing the case might believe that since the woman scratched the husband before he hit her, she is the primary aggressor and, therefore, the one who should be arrested. Noting these new problems, many states and local police departments have clarified the language; consequently, today there is a general consensus on the use of any one of the following in place of primary aggressor: predominant physical aggressor, principal physical aggressor, or dominant aggressor.

Despite the general consensus on terminology, however, the problems of implementation have not gone away. As with many policy changes, a lack of understanding, skepticism and resistance accompany the adoption of this language. Many police officers still find the language

confusing and, at times, cumbersome when they are at the scene of a domestic violence incident. Some wonder why battered women's advocates have so much influence over how cops do police work. These officers might harbor feelings that the motivation behind refining the law is to ensure that the man is always arrested.

For their part, battered women's advocates are not much happier. Despite more than a decade of mandatory arrest laws, there are still widespread accounts of victims not reporting because they do not think police will do anything as well as officers not making arrests (Tjaden and Thoennes 1998). In addition, there are increasing numbers of ongoing victims of abuse being arrested. Furthermore, advocates themselves must struggle with their position on women who use violence – what kinds of services to offer these women, whether they should qualify for shelter, how to advocate for them with state agencies such as child protection and other issues. Certainly, there are no easy answers for either police or advocates.

## Context of Violence

### Meaning and Function of Violence

One of the most important offerings of predominant physical aggressor language is that it addresses the idea that violence has different meanings and functions in different contexts. In other words, how a particular act is interpreted often depends on a number of factors, such as the socio-legal period within which it occurred or the history of violence and threats between the parties involved. The latter will be discussed in detail in the following section. As to the former, consider the example that domestic violence was not even a concept fifty years ago, even though it existed. A hundred years ago a man's right to beat his wife was not only publicly acknowledged, but also legally regulated. For example, a man could not beat his wife after 9

p.m. (so as not to disturb the neighbors) nor on a Sunday in some states (Balos and Fellows 1994). This so-called private violence, therefore, functioned in a different context. In other words, while *functionally* the violence used still had the purpose of controlling the wife, its *meaning* was different – it was not illegal, but operated within a *context* of laws which regulated how and when it could happen.

Furthermore, the meaning has never changed in that domestic abuse remains a strongly gendered concept – a husband’s right to control *his* wife, not the other way around (Dasgupta 2002; Pence and Paymar 1993). Today, Department of Justice (DOJ) statistics still point to the very gendered nature of this crime, with

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the authors of the most recent National Violence Against Women Survey concluding “Intimate partner violence should be considered first and foremost a crime against women” (Tjaden and Thoennes 1998). The assertion that violence can have different meanings and functions in different contexts can also be considered from another angle, that of policing.

The function and meaning of other forms of force are also impacted by the social, historical and situational context of the force. For example, the nature of police work in some ways requires that there will be confrontations with residents over the mundane (traffic tickets) and the not so mundane (robbery/homicide). Police officers, therefore, are trained in a number of tactics to deal with hostile situations, depending on the threat level they perceive from the resident or suspect with whom they are dealing. Amongst others, these tactics can include verbal calming techniques, having the person sit in the back of a squad car, making the person lie on the ground, physically restraining or cuffing the person, drawing a weapon, or firing a weapon on the suspect. Each action taken depends on a number of factors.

How the actions are subsequently perceived by a suspect depends on the context in which they happened. For example, a rural state trooper responding to a domestic assault may immediately handcuff and put in the patrol car the more volatile of the two parties to safeguard the scene because he or she may not know when or if backup will be available. In a more populated region, two or more officers may be on scene immediately and the need for handcuffs would not arise – or be appropriate – until a determination of probable cause had been made. The point is that in these situations the meaning and function of the force being used by police is justified because of the context.

To digress briefly, consider the more generalized function and meaning of force in situations where police have gone too far, and the force used goes beyond what society will tolerate. The notorious Rodney King (Ricker 1991) case in Los Angeles and the more recent Abner Louima (Beals, Bai, and Murr 1997) case in New York City are two such examples. The meaning and function of the violence used in these two cases was very different than that used in routine police procedures. First of all, the meaning was not that police have to maintain law and order in society; rather, the violence in both cases was racially motivated, perpetrated by white officers against an African-American and a Haitian immigrant, respectively. Furthermore, in neither case was the function of the violence simply to affect an arrest. The force used in the King case was more than enough to subdue him, and in the Louima case, the suspect was already in police custody. Rather, the violence had a more oppressive aim, one of power and subjugation.

Not all uses of force by police are unacceptable; rather, the acceptability is context-dependent. Police have procedures and regulations for the use of force which contextualize its use under the law. Similarly, the use of force or violence in domestic situations also needs to be contextualized: What is each party trying to accomplish? What is the state trying to accomplish

by intervening? What do we already know about men and women's violence? What do we know about how the law works?

### Intimate Partner Violence as a Form of Gender Oppression

As stated earlier, the idea of domestic violence, or battering, is a particularly gendered notion, rooted in the historical, economic, legal and physical power of men to control their wives and many of the women around them (Dobash and Dobash 1979; Pence and Paymar 1993).

In considering women's use of violence in intimate partner relationships and the police response to this violence, it is impossible to simply dismiss what we know and assume a gender-neutral playing field. Rather, when considering the use of the predominant physical aggressor framework, we must immediately acknowledge three things: 1) the language of PPA is gender neutral – past history of violence, severity of injuries, future risk and self-defense; 2) domestic violence is historically, and today, a gendered crime of male violence against their intimate female partners;<sup>3</sup> therefore, 3) the application of PPA language to situations in which both parties have used violence will most likely have a gendered result: more men will be identified as the predominant physical aggressor than women. This is not to say that women do not use force in the intimate partner setting; however, it does support the assertion that the meaning and function of women's uses of violence often contrast starkly with that of men's, and PPA language helps make these distinctions.

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<sup>3</sup> This paper is primarily concerned with heterosexual battering relationships and the application of the PPA analysis, since this has been the site of the most contention. However, same-sex relationships where both parties have used violence can also benefit from a PPA analysis by the responding officers.

## Women's Use of Violence

In the early 1970s when the issue of “wife beating” first began to garner public attention, the scope and brutality of what women had been experiencing seemed horrific. One need only read a few pages from Del Martin’s seminal book *Battered Wives* (Martin 1983) or the Dobash and Dobash classic *Violence Against Wives* (Dobash and Dobash 1979) to get but a small taste of the level of violence endured by countless women. Even these days, however, reports of vicious assaults and stalking against women by their current and former partners, including the murder of many women and children, occur daily (Ohlson 2003).

In the late 1970s (Steinmetz 1978) and early 1980s when the first studies began reporting “equal” levels of violence between men and women (Straus, Gelles, and Steinmetz 1980; Straus and Gelles 1988), battered women’s advocates were outraged and disturbed given what they knew from the women they had been serving for more than two decades. While they acknowledged that women did sometimes use violence in intimate relationships, they did not believe it was in equal proportion, with equal impact or in need of equal state intervention. Furthermore, advocates were worried that if the focus shifted to “violent” women, many of the recent gains of the 1980s would be lost or stymied, with the most vulnerable women – minority, immigrant, poor, rural – still lacking basic protections.

In the meantime, the debate has moved forward and a great deal of scholarly as well as advocacy work has been devoted to understanding women’s use of violence. In general, researchers and practitioners have proposed several different ways of understanding or categorizing women’s use of violence. The following is a brief summary.

According to Shamita Das Dasgupta (2002), there are generally three frameworks that researchers use to study women’s use of violence in intimate, heterosexual relationships: gender

symmetry, self-defense/retaliatory and multi-causal. *Gender symmetry* studies (see, for example, (Straus, Gelles, and Steinmetz 1980; Straus and Gelles 1988; Straus, Hamby, Boney-McCoy, and Sugarman 1996) argue that men and women use similar amounts of violence within intimate relationships. Some of these studies acknowledge that the violence used by participants might mean different things, e.g. to control another versus to defend oneself. However, authors, for the most part, do not foreground this understanding and emphasize that intimate violence is roughly equal between men and women.

The second framework considers that many women engage in *self-defense or retaliatory violence*. Some of this use of force may, therefore, be legal since it is defense of oneself or another. Dasgupta says researchers argue that self-defense/retaliatory violence is sometimes used in response to violence from a prior battering relationship as well as a current one. In other words, a woman who has previously been beaten and left that relationship may not wait for violence to start in a new relationship before striking out herself, as she sees this as protecting herself.

The final category, the *multi-causal*, considers not only a woman's individual experience of violence, but also her other life experiences, such as the impact of institutional racism in her life, a history of violence (i.e. her own childhood abuse), and her social position (i.e. whether she has enough money to live). Dasgupta argues that it is all of these factors together that affect a woman's perception of danger and, therefore, how she herself uses force or violence in return.

Some advocates and long-time activists argue for a more matter-of-fact, and interestingly, gender-neutral approach to understanding women's use of violence. Under this rubric there are three general categories of domestic violence: battering, isolated acts of violence, and self-defense/responsive to battering. Here, *battering* means a pattern of power and control, often

demonstrated by violence, to control one's partner (Pence and Paymar 1993). Non-violent tactics of control include coercion and threats; using the children (e.g. threatening the victim that they'll never see them again), using money or economics; or isolating the victim from family and friends. The majority of these abusive tactics are not illegal, but contribute to the batterer's control over his victim.

An *isolated act* is meant to mean an "act that is highly uncharacteristic" (Frederick 2001), such as one which would occur in a very stressful or unusual circumstance for the couple involved, e.g. illness of a child. While many batterers will allege that an incident is the first or only time, careful interviews with the victim or/and a check of official history usually indicate otherwise. In addition, some victims of ongoing abuse may engage in isolated acts of violence in response to battering.

Finally, some violence is *self-defensive* in nature – to protect oneself against perceived danger—or is *responsive violence*, which may involve a fine line between self-defense and illegal violence. For example, a woman who has been battered and knows the signs of an impending attack may assault her partner first in order to either go toe-to-toe with him or try to head off a more serious attack. This type of assault would not fit a classic definition of self-defense, but should be seen in the context of the overall relationship of violence and battering. Advocates contend that most women fall into the categories of the isolated act or self-defensive/responsive violence.

Interestingly, some police officers' understanding of women's use of violence also seems to reflect the above frameworks, as well as their understanding of the prevalence of the types of women's violence. When informally polled about how frequently they see each type of violence,

officers often report women engaged either in self-defense or responsive violence.<sup>4</sup> Although anecdotal, this seems to indicate that police officers' understanding of women's use of violence is not so different from that of advocates for battered women. Rather, it might be that the law and legal system are confusing, contradictory, and above else, constantly changing. For example, police initially had almost complete discretion as to whether they should make an arrest in domestic assault cases, although the law constrained their arrest powers in several ways, e.g. they had to witness the assault to arrest on a misdemeanor. Then, the laws changed to nearly remove their discretionary powers, saying police *must* or *should* arrest in situations where they had established probable cause,<sup>5</sup> even if they had not witnessed the assaults. This led to the aforementioned leap in arrests.

PPA was the next evolution, directing police to make an arrest, but to use some discretion in determining who was really in danger when intimate partners used violence or force. Understanding theories about women's use of violence allows police to better understand how a PPA analysis can be applied and the relevance of context when responding to a domestic violence incident. While to advocates the changes in the law and its subsequent implementation may seem to have been moving at a glacial pace, this view might not be shared by law enforcement working in the highly regulated and bureaucratic criminal justice system.

Furthermore, seemingly when the law is applied, straightforward changes can have unintended consequences for multiple actors, especially when the changes are made without the guidance and understanding from those who must work within the law on a daily basis. In the

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<sup>4</sup> Similarly, according to a Department of Justice report, female responses to non-lethal intimate violence included the following: 43% tried to escape, call the police or use non-confrontational means of self-defense; 34% confronted the offender by struggling, shouting, chasing or other means – of these, 30% did so without a weapon, 4% did so with a weapon; and 23% offered no active resistance (Chaiken 1998).

<sup>5</sup> There is obviously more nuance to mandatory arrest statutes than is implied here. For example, some require an injury, others fear, etc.

past, errors were made by not creating a foundation of understanding necessary for the successful implementation of PPA language. The subsequent problem is whether criminal justice practitioners and advocates alike understand how and when men and women use violence, what should be done about this, and whether the language of many of the PPA statutes makes the steps officers should take to intervene confusing or unclear.

## Implementation Issues

In making changes to any one law, there are often numerous other sections and subsections of laws that are also impacted. In crafting laws that protect victims of domestic violence, attorneys and advocates often find themselves realizing – sometimes belatedly – that the end result is even more draconian for the intended beneficiary. The evolution of arrest laws has been no different, as both mandatory arrest laws and PPA statutes have fallen victim to this conundrum. It is as if the law is a rubric's cube that actually has one odd colored piece which no one knows about. The more you turn it and think you have everything lined up, the more another panel is no longer aligned, and in fact, never will be.

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trying to make the law do what it does not want to do: it is designed to remedy power differentials in the use of violence within intimate relationships, but it is at odds with the goal of the law in providing a neutral legal standard upon which to determine a legal action, e.g.

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probable cause. It is not an end run to “always arrest the guy,” but asks officers to consider – as discussed previously – that violence has different meanings in different contexts. Unfortunately, implementing PPA raises problems for victims, law enforcement and prosecutors alike.

### The Problem with Mandatory Arrest Laws

Predominant physical aggressor language came into being because of the problems arising from the implementation of mandatory arrest laws. They were created to solve one concern particular to domestic situations – that victims were often not in a position to demand the arrest of the suspect. However, removing the discretion from officers, and therefore the burden from victims, actually placed some victims in a more vulnerable position. If a victim used any form of illegal force during the incident, she was subject to the arrest statutes. It did not take long to understand the important implications associated with this.

When a woman who has been beaten for many years uses violence in response to the force being used against her, arresting her can have a number of negative consequences. First of all, her most immediate response may be to never call the police again. In this situation, her violence – as well as his – may escalate. She may feel she has no options but to continue to try and go “toe-to-toe” with him; he may correctly believe she will no longer call the police and feel uninhibited in his use of violence towards her. A neighbor or friend may call instead of her, but this cannot be relied upon. Secondly, if a battered woman is arrested, she may plead guilty to the charge, not understanding the repercussions for her if she does this. Coker (2001) has written about the ramifications of this, such as loss of child custody, not qualifying for affordable housing, loss of immigration status, etc. All of this only exacerbates a victim’s reliance upon the

batterer, increasing his control over her and thus her danger. The end result is that both victim safety and offender accountability are undermined.

Additionally, stringent arrest statutes forced battered women of color into an enhanced relationship with the criminal justice system whenever they called for help. Because the relationship of communities of color in the U.S. to law enforcement is, and has been, problematic at best, tying a woman's call for help to more aggressive criminal justice system intervention, is often not helpful, and can, in fact, be harmful (Bhattacharjee 2001; Erwin and Vidales 2001). While predominant physical aggressor language does not rectify this aspect of aggressive arrest laws, it is a first step in the direction of contextualizing crime.

For law enforcement, the very strictness of the mandatory arrest language and the level of public scrutiny accompanying it made it very difficult to depart from the letter of the law, even when experience and common sense begged the departure. Law enforcement officers were forced to make arrest decisions they often knew were not in the best interests of battered women, their children or society at large. PPA language, therefore, is another statutory attempt to restore some of that discretion back to the field.

### The Practical Limitations of Applying PPA

Even if creating and designing legal remedies to practical life problems were simple and easily understood, there are still practical problems with implementing legal change. First of all, many law enforcement personnel say their time at the scene of a domestic is limited. This complaint is heard both from rural officers – who usually have a larger area to cover with fewer officers – as well as from urban officers with a smaller territory but more calls for service. Being asked to undertake a four-part (or more) PPA analysis can seem over-burdensome and too

complicated. Issues of time can be exacerbated by departmental priorities, which do not place domestic violence calls high on the list of calls meriting officers' greatest attention.

Secondly, although from an outside perspective – and on most television shows – the criminal justice system appears to be seamless with one overriding goal, any peek beneath the surface reveals fissures among police, prosecutors, judges, probation, etc. For police, one of the biggest points of contention is the discrepancy between the numbers of arrests versus the number of prosecutions. Law enforcement cannot work alone in attempting to distinguish forms of intimate partner violence, but need the support of prosecutors and judges, among others, to successfully implement PPA. In too many jurisdictions, they do not appear to get this support.

Notably, however, PPA aids prosecutors who find it difficult, at best, to go forward with a case where the defendant one day may be the main witness in a case the following day. If one of the parties does not plead guilty, it is more than likely that the prosecutor will drop both cases – resulting in frustration for officers who feel that they are making arrests but nothing is happening with the cases. Predominant physical aggressor language can provide the nuance needed by the legal system to meet its goals of deterring dangerous offenders, as well as providing long-term safety for women who are battered.

Thirdly, part of the disjuncture experienced by criminal justice practitioners with the implementation of predominant physical aggressor is that the goals of police and prosecutors are

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generally more immediate, e.g. make an arrest, successfully prosecute, or send someone to jail. PPA proposes a more comprehensive goal - what has happened in the past, what can we head off in the future? Furthermore, although the paradigm regarding domestic violence intervention has shifted slightly toward victim safety, the focus of law enforcement intervention is still on

*criminal* action. Certainly police are there to “protect and serve,” to give victims information about resources and possibly even transportation to a shelter. However, when they take an official “legal” action, it is to arrest a suspect, not to do long-term safety planning with a victim. When faced with an ongoing situation – as many domestic violence situations are – police intervention and analysis of what needs to happen must be different from a typical arrest situation.

Finally, the success or failure of implementation efforts is largely influenced by the wording and structure of PPA laws and policies. The section below details and analyzes the strengths and weaknesses of various statutes.

## Statutory Issues

The language and analysis contained in statutory language can direct practitioners’ understanding and implementation of it. Unfortunately, much statutory language can be confusing, unclear or simply incomplete in guiding police officers on the street. These problems are illustrated through the following examples.

### Sequence of Analysis

One of the main structural problems with the way most predominant aggressor statutes are written is that many statutes seem to put consideration of self-defense *after* a determination of predominant physical aggressor. For example, Maryland statute states the following:

If the police officer has probable cause to believe that *mutual battery* occurred and arrest is necessary under subsection (a), the police officer shall consider

whether one of the parties *acted in self-defense* when determining whether to arrest the person whom the officer believe to be the primary aggressor. (emphasis added)

Mississippi statute states:

If a law enforcement officer has *probable cause to believe that two or more persons committed a misdemeanor* which is an act of domestic violence as defined herein, or if two or more persons make complaints to the officer, the officer shall attempt to determine who was the principal aggressor. . . . The officer shall consider the following factors: . . . (iii) *Whether one of the persons was acting in self-defense* . . . (emphasis added)

A possible problem with the way these statutes read, and what makes them confusing, is that there is a *presumption* at the beginning that there are two assailants, after which officers are directed to consider self-defense. However, if a person was determined to be using self-defense, most likely they should not have been considered an assailant. The Mississippi statute is especially problematic because it suggests that after officers have already found probable cause to arrest both parties, then they are to consider self-defense and subsequently rule out one of the assailants. The language here is similar to that used by Montana, Nevada, New York and Tennessee. Other states make comparable assumptions about two “assailants,” though not necessarily with an explicit reference to self-defense. The language itself, therefore, is misleading. There are ways to overcome this, however, through both legislation and training of law enforcement.

First of all, many other statutes use more precise language in introducing the problem.

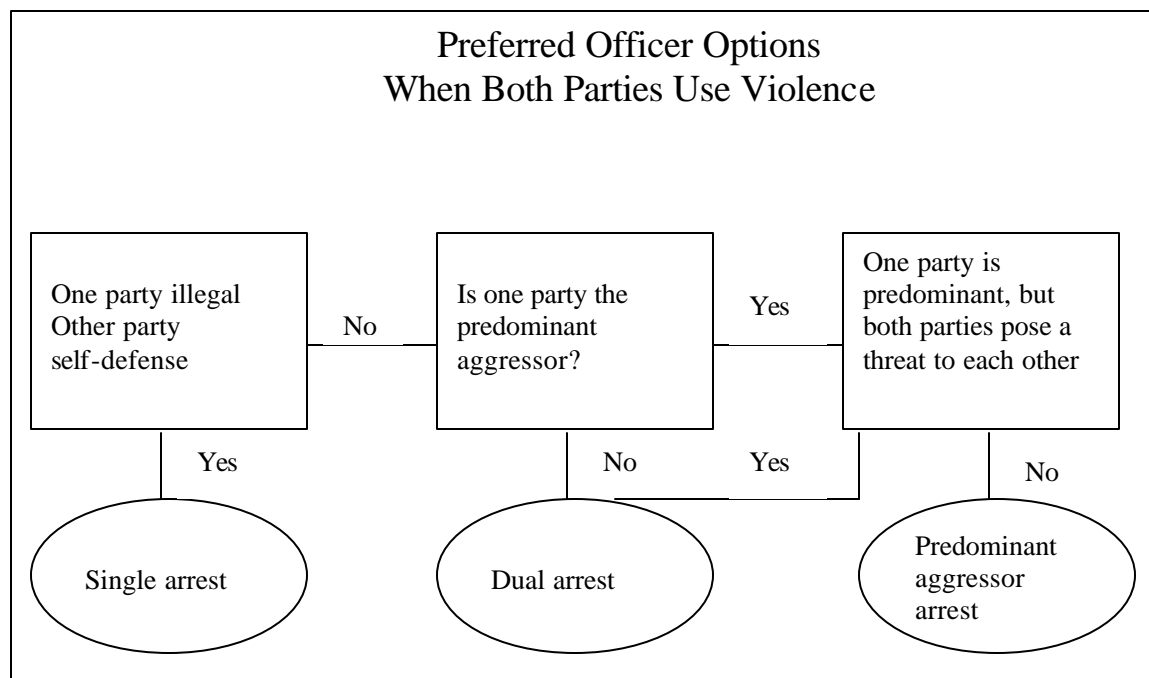
For example, Rhode Island addresses the problem thus:

*When more than one family or household member involved in a domestic violence incident states a complaint, the officer shall investigate each complaint to determine whether there is probable cause to believe a crime has been committed. (emphasis added)*

Similarly, Colorado law says:

*If a peace officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine if a crime has been committed by one or more persons. (emphasis added)*

The statutory language in these states emphasizes that there have been “complaints” from “two or more” parties, after which probable cause should be determined on each complaint. In this framework, self-defense can be considered immediately and either ruled out or be the reason for determining that only one person is actually a suspect. The latter is the approach taken in most training on predominant physical aggressor language as well. For example, the National Training Project of Minnesota Program Development, Inc. has developed a chart to take officers through the PPA analysis (see chart below). The first question the chart asks is: “Did either party act in self-defense?” If the answer is yes, there is only one arrest. If the answer is no, then – and only then – are officers directed to go on to the PPA analysis.



The second important aspect of this approach is it suggests two separate courses of conduct by the parties involved, e.g. two complaints, two separate determinations of probable cause – versus a single determination of probable cause for both parties. This serves to clarify what occurred and can also go to the veracity of each “story,” e.g. whether or not it could actually have occurred the way one party said it did. For example, during an administrative review of domestic violence cases at a U.S. Marine Corps<sup>6</sup> base, the counselor in charge presented the case as a “summary” of the story from the two parties. As part of her presentation, she showed the committee a police photo of the husband’s injury – a deep bite mark to the upper, left side of his chest and no other injuries; according to the police report, the wife had red marks on both of her wrists and some redness around her face and neck. The husband said the wife bit him, so he

<sup>6</sup> The USMC handles domestic violence cases in a two-part process. The first is through an administrative review board known as the Case Review Committee (CRC), which makes a determination as to whether abuse occurred and then recommends a rehabilitation plan to the command. The command has sole discretion over whether or not any charges or sanctions are brought against individual Marines. *See* USMC, “Coordinated Community Response to Spouse Abuse: Intervention Manual” (April 1995).

restrained her to keep her from doing so again. The wife reported her husband had pinned her against his chest, holding her wrists behind her back. She bit him while being pinned against his chest. The committee found “mutual” abuse with the wife as the primary aggressor, due to the severity of the husband’s injury.

In this case scenario, what the committee members in effect did was to conflate the two stories and take the “severity” of injuries as an indication of predominant responsibility. If they had contemplated each party’s actions separately, the two stories would not have seemed equally credible. Consider that the husband says the wife bit him. Did she run across the room and suddenly bite his chest without his noticing what she was going to do? Were they talking or arguing and her first move was to lunge at him teeth first? Biting someone is generally not considered an offensive move. If a person is going to bite someone, they are more likely to target an extremity, such as a hand or arm, which can be brought up to the mouth. The wife’s story that she was pinned face first against the chest, unable to breathe, and then bit her husband, is more credible. Despite the severity of his injury, her actions could potentially be considered self-defense.

It is only by sorting out each story separately, however, and as separate courses of conduct, that each can be properly evaluated, not only for self-defense but also in terms of the predominant physical aggressor analysis. Statutes and training need to take a four-pronged approach to situations in which two parties are alleged to have committed an assault. First of all, the statutory and training language must reflect that until the final analysis has been completed, the two parties are complainants, not yet suspects of a crime. Secondly, the actions by both parties should be considered as two *separate courses of conduct* and evaluated individually, not as mutually constitutive. Thirdly, within these separate evaluations the first consideration should

be whether either party acted in self-defense. Finally, if officers determine neither party acted in self-defense, based on the evaluation of the conduct, the predominant physical aggressor analysis should be employed to determine which party should be subject to state action.

### Considering the PPA Analysis – Past History

Having arrived at the predominant physical aggressor analysis, there are several things to consider statutorily and in practice to further understand why implementation of this provision has been problematic. First of all, at the heart of the analysis is the issue of prior history of domestic violence. In particular, advocates for battered women argue that *ongoing* victims of domestic violence sometimes resort to violence themselves within their relationships. The consideration of past history, therefore, is critical in determining power differentials and who is the predominant physical aggressor. However, seven states have added statutory language indicating that past history must be somehow “verifiable.” For example, Michigan law states:

. . .any history of domestic violence between the individuals, if that history can be *reasonably ascertained by the officers*. (emphasis added)

Montana goes a step further and says prior history of violence between the parties can be considered “if information about the prior history *is available* to the officer.” What is unclear is what steps officers are supposed to take to “ascertain” this information. Should it be a check of prior convictions, arrests, or protection orders on either party? Should these checks come from only the local jurisdiction or statewide databases, if available?

Rather, consider that police are constantly making judgment calls about witness credibility and the information being given to them. The institution of a higher bar in the form of

“verifiable” past history seems an undue burden on both law enforcement and ongoing victims of abuse. In determining probable cause for any type of crime, police analyze the totality of the information before them to determine whether there is a “reasonable belief” a crime occurred and that the person alleged to have committed it, did so. In analyzing for a predominant physical aggressor, the legal standard should be no different. Certainly if information is available, the police should consider it, but to include it statutorily seems, in some ways, to undermine what police and advocates know about domestic violence: in most cases it is a pattern crime, not a one-time event.

Victims and abusers have ongoing relationships – lasting months and years; children, housing and jobs are involved. Having police consider past history is an avenue for them to be able to begin to *contextualize* the violence that is occurring and “who is doing what to whom with what impact.” For example, it is a qualitatively different situation if a woman reports that her partner has slapped her once or twice in the past and this time she decided to use like force versus the woman who reports several hospitalizations due to beatings by her partner and this time she hit him back. Asking about the history of abuse, therefore, is not about verifying the party’s credibility, but rather about gaining insight into the use and context of violence within the relationship in order to determine what the state should do.

***Having police consider past history is an avenue for them to be able to begin to contextualize the violence that is occurring and “who is doing what to whom with what impact.”***

In addition, as a practical matter, having prior history that can be “reasonably ascertained” by local law enforcement usually depends on a person having resided in a particular area for a certain length of time. Requiring that history be officially available can disadvantage victims who may already be more vulnerable, such as recent immigrants, those who have been

homeless or those who may be fleeing their abuser and are – by the very nature of their abuse – new to the area. Prior history should continue to be considered as police officers evaluate most other information given to them when assessing a crime scene: is the person credible, do the details make sense, and is there corroborative evidence?

### Hidden Injuries

Additional information at the scene, such as injuries, can help officers to understand who is doing what to whom. Some injuries may not be easily visible – such as those from strangulation or blows to the head – as well as injuries that result from a sexual assault, a topic area often ignored or brought up only as an afterthought in cases of intimate partner violence. Many serious batterers are very sophisticated about the type of injuries they leave and where they leave them.

Certainly police are better trained than average citizens to note bodily injuries; however, there are still many injuries that may be overlooked because of their location on the body or because police have not had the proper training to ascertain them. For example, until about five years ago most officers, as well as advocates, could not identify the signs of strangulation. After a study in San Diego, police who have been trained now know that there is usually little or no visible injury on a victim's neck after strangulation (McClane, Strack, and Hawley 2001).

Interestingly, only two of the 30 statutes on predominant physical aggressor specifically address circumstances where there are no injuries. With some small amount of variation, almost all of the statutes suggest the PPA determination should consider the “relative severity of the injuries inflicted” or “threats creating the fear of physical injury.” It seems that this is an important statutory omission on the part of most states. Only Iowa and South Carolina directly

address the issue of non-visible injuries. For example, the Iowa law states that the determination of PPA “shall not be based solely upon the absence of visible indications of injury or impairment,” while South Carolina statute says the officer should consider:

the relative severity of injuries inflicted on each person taking into account  
*injuries alleged which may not be easily visible at the time of the investigation.*

(emphasis added)

There are many places that injuries can occur that are not visible to the naked eye. On or about the head is a key one, and while long or thick hair may easily shield these, even bumps on those with short hair can be hard to detect. When someone reports a bump on the head, feeling the head for a bump can reveal much more about the extent of the injury than simply saying, “the victim reported.” This more tactile approach also allows officers to more directly testify to what they observed through touch, rather than what was reported to them, if a case goes to trial. Being sensitive to privacy issues is obviously critical, but officers must be willing to document all likely places of injury and then do their best to document them in whatever manner is the most appropriate.

This, of course, leads directly to the issue of sexual assault and how it is, and is not, incorporated into our understanding of, and training in, domestic violence. This issue could be especially significant for the discussion at hand in terms of predominant physical aggressor and the lack of visible injury on one or more party. Police could arrive at a home where a man has visible scratches and/or other injuries and the woman either no or minor injuries, but she has been sexually assaulted or raped by him. Will the officers think to ask about this? Does training on predominant physical aggressor behavior – or just domestic violence – cover these

circumstances? What are best practices for approaching the victim in a case of marital rape (or rape in a long standing intimate partner relationship)? Police receive sexual assault training in general, but it is the overlap between sexual assault and domestic violence that must be considered when determining the predominant physical aggressor. Training in PPA needs to include sexual assault and statutory or policy language must be explicit in noting that visible injuries are not required to make a determination.

### When is Arrest not an Option?

It is at the juncture of arrest where much confusion and another whole host of questions arise. Should an official record be kept of the assault by the person who was not the PPA? Should officers ticket him or her? Can the prosecutor decide later that the police decision was not correct and prefer charges against the second party as well? What if the person determined to be the PPA is also the custodial parent of minor children in the home? Maybe most importantly, what does the law say police should do? State-by-state, the guidelines are very different – ranging from nothing to vague guidance to some form of clarity. For example, several states,<sup>7</sup> including Colorado, Connecticut, New Jersey and Oregon, do not appear to provide any guidance to officers in determining who they should arrest in cases where there is to be a PPA analysis. In several states, the information concerning PPA either conflates PPA with self-defense or appears unclear on what officers should do. For example, Florida statute states:

Arrest is the preferred response only with respect to the primary aggressor and not the preferred response with respect to a person who acts in a reasonable manner to

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<sup>7</sup> The statutory analysis undertaken for this paper was based on a summary of laws compiled by the Battered Women's Justice Project concerning laws pertaining to predominant physical aggressor statutes throughout the country.

protect or defend oneself or another family or household member from domestic violence.

The way this statute is written, there is no secondary aggressor, so to speak, only one assailant and one person using self-defense. In effect, it appears to be simply a pro-arrest statute, providing no other guidance to officers in determining who might be a predominant physical aggressor, and, therefore, officers are given no guidance on what to do if *two* people have been deemed assailants.

Several states “discourage” but do not prohibit dual arrests. For example, California’s statute says, “These policies shall discourage, when appropriate, but not prohibit, dual arrests.” Most states seem to fall somewhere in the middle, stating officers are “not required” to arrest both parties, or as in the case of Mississippi, that “the officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor.” Only Ohio and Arizona address the issue of arresting both parties. Arizona’s law states:

In order to arrest both parties the peace officer shall have probable cause to believe that both parties independently committed an act of domestic violence.

It goes on to state that self-defense is not considered an act of domestic violence, but does not discuss predominant physical aggressor. Ohio’s statute first states there is “no preferred course of action” as to other family or household members who may have committed an offense but are not the PPA. Later, the statute says, the “officer is not required to arrest but may arrest . . . any other person who committed an offense but who is not the primary physical aggressor.”

Only two states specifically prohibit the arrest of the second party – Tennessee and South Carolina. South Carolina law says:

If the officer determines that one person was the primary physical aggressor, the officer must not arrest the other person accused of having committed domestic or family violence.

Within its written code, Tennessee clearly goes the furthest of any state in both affirming the arrest of the PPA and not the other person:

Arrest is the preferred response only with respect to the primary aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the primary aggressor.

In summary, the actual guidance for officers – based on state law – is not specific in most cases as to what they should do with the second party. In some cases, departmental policy may be clearer, but often it is left to the judgment of the officer at the scene. The question to consider is, (as Hirschel and Buzawa query in their article on the subject) “When, if ever, is dual arrest appropriate?” (Hirschel and Buzawa 2002), or conversely, when is arrest *not* an option?

Battered women’s advocates have generally argued that in cases where a determination of predominant physical aggressor has been made, *only* the PPA should be subject to arrest. Dual arrests should be reserved for those cases in which officers truly feel they have exhausted their ability to determine who the PPA is, or where both parties are clearly a continuing danger to each other or others. While many officers have balked at this approach, saying it flies in the face of previous “mandates,” its efficacy lies in the long-range goals of victim safety and the effective use of community resources.

Officers worried about being second-guessed should write a full account of how they came to a predominant physical aggressor determination. This explanation is key to not only

validating one arrest, but also to letting future interveners know how and why the decision was made. All statutes and policies should follow Nevada's example, as follows:

If the peace officer . . . finds that one of the persons involved was the primary physical aggressor, he shall include in his report: (a) The name of the person who was the primary physical aggressor; and (b) A description of the evidence which supports his finding.

Conversely, if police were unable to make a determination and a dual arrest was made, a description of the evidence that supports this finding should be included. This would greatly facilitate the prosecution's ability to move forward with cases, as well as provide a more robust textual (and contextual) history for future interveners to consult when trying to provide safety for ongoing victims.

Once again, predominant physical aggressor language asks that law enforcement and others consider that not all violence is the same, that violence means different things in different contexts. In many domestic violence cases with female defendants, the current victim has previously been convicted of assaulting the defendant. This is not a coincidence. The question is: What safety is being achieved? Who is being held accountable? Domestic violence is not a "simple" assault, a one-time event between two unknowns, such as a mugging where the assailant is a stranger, a burglary where a car window is broken and a stereo or compact disk player is taken, or perhaps a securities fraud where the connection between the perpetrator and the "victim" is so far removed it takes months simply to establish a relationship. In battering, the relationship between intimate partners is what makes the assault possible—today, tomorrow and again next month. It is, most often, an ongoing pattern crime – similar to stalking in its repeat

nature. Police know this. Advocates know this. Predominant physical aggressor language, therefore, asks that officers consider this when determining what the state action should be at the scene when two parties have used violence.

## Where to From Here?

The use of the state to intervene in domestic violence is a powerful tool that can have far reaching consequences – both seen and unseen. The increase in arrests of ongoing victims of abuse following the introduction of mandatory and pro-arrest policies (Hirschel and Buzawa 2002) presented a challenge not only to battered women’s advocates, but to the criminal justice system as well. Predominant physical aggressor language is a result of collaboration between the two to solve the problem of dual arrests, which deter from victim safety and unnecessarily swamp the criminal justice system. That there have been problems with the implementation of this language throughout the country is not a surprise to anyone who has ever tried to effect legislative or policy change. These problems arise from a number of areas, including confusing statutory language, lack of training and questions of motivation. Several concrete recommendations can be made to overcome these issues.

First of all, in training and in policy or statutory language, the predominant physical aggressor analysis must be clarified to distinguish the self-defense analysis. All policies should use language that articulates two “complaints” of domestic violence, and as stated in the Colorado statute, to “evaluate each complaint separately.” Secondly, the initial decision a police officer should make when there are two complaints of violence is whether one of the parties used self-defense – separate from his/her determination of PPA. This recommendation is consistent with a strategy currently being employed in Duluth, Minnesota, where after a review of 75 police

reports of women arrested, it was determined that one third to one half of the women had a self-defense claim (McMahon and Pence 2003). Thirdly, if self-defense has been ruled out, officers should move to establish probable cause on each party *separately*, in determining whom the predominant physical aggressor is. Officers should be directed – by policy or statute – to report how and why they determine which party is the PPA and what their action is in regard to the second party and the reasons for this action. Finally, police should continue to consider past history of domestic violence based on their own judgments of credibility and other information that can be gathered. Statutes and policy should not direct that this information be “verifiable,” since ostensibly it is to provide officers with a context of the violence in the relationship.

There are similar challenges for battered women’s advocates in considering women’s use of violence and predominant physical aggressor language. First of all, and most importantly, advocates from all communities must come to an understanding of how and when women use violence within their intimate partner relationships and how the advocacy community should respond to this. McMahon and Pence report some groups advocating for a so-called “zero-tolerance” policy, that if women are arrested for assault they are “simply” not eligible for services or support. Unfortunately, given the high number of ongoing victims of abuse who do use force, this is a dangerous approach. Ignoring the problem is antithetical to an anti-violence movement that seeks long-term solutions to stop violence in the home. Advocates need to actively respond to women who are being arrested. Secondly, as has been called for elsewhere (Coker 2001; McMahon and Pence 2003), advocacy programs should consider other ways of working with the criminal justice system – ways that respect institutional limitations, but also challenge the criminal justice system to perform up to best practices. This is in relation to all aspects of the criminal justice system response to domestic violence, but in terms of this paper,

particularly for the application of predominant physical aggressor. Critiques of the systems that manage domestic violence cases served as the catalyst for the bulk of reforms over the last 30 years. Advocates need to continue in this role in order to ensure the responsiveness of the system to all women who are battered, including those who sometimes respond to their intimate partners with violence.

## Conclusion

In writing about the limits of law to definitively solve social problems, Renee Romken notes: “If we appeal to law, we sometimes call upon a Trojan horse: when we invite law in, law re-invites itself time and again, but on its own terms and with its own agenda” (Romken 2001). The creation of the concept of predominant physical aggressor followed directly from the “arrival” of mandatory and pro-arrest policies on domestic violence cases. The initial use of the term “primary” aggressor led to a different set of problems. Today, the conception of the predominant physical aggressor seems to be fairly well understood, but statutory and implementation issues persist.

However, the PPA framework for understanding violence is promising on at least two fronts. First of all, it asks law enforcement officers to understand the scope and context of domestic violence from an alternative perspective, to understand that violence has different meanings in different contexts. Secondly, it begins to revision the criminal justice response from a focus on a singular incident with an immediate response to a consideration of long-term victim and community safety and community goals. Conducting a thorough predominant physical aggressor analysis when there are two complaints of domestic violence – and after self-defense has been ruled out – is one path towards lessening domestic violence in the long term. Policy-

makers, law enforcement officers and battered women's advocates should all work to ensure that laws and policies are well-written and clear, training is provided, and oversight and accountability are institutionalized at all levels of our communities.

## APPENDIX A

### PRIMARY AGGRESSOR STATUTES

This is a compilation of all states statutes that use “primary” or “predominant” or “principal” aggressor language. Only the portion of the statute that applies to primary aggressor or mutual or dual arrest is cited in this chart.

STATE	STATUTES
Alabama	§ 13A-6-134(a) (2002) – If a law enforcement officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine who was the primary aggressor. If the officer determines that one person was the primary aggressor, the officer need not arrest the other person alleged to have committed domestic violence. In determining whether a person is the primary aggressor, the officer shall consider all of the following: (1) Prior complaints of domestic violence. (2) The relative severity of the injuries inflicted on each person. (3) The likelihood of future injury to each person. (4) Whether one of the persons acted in self-defense.
Alaska	§ 18.65.530 (b) (2002) - – If a peace officer receives complaints of domestic violence from more than one person arising from the same incident, the officer shall evaluate the conduct of each person to determine who was the principal physical aggressor. If the officer determines that one person was the principal physical aggressor, the other person or persons need not be arrested. In determining whether a person is the principal physical aggressor, the officer shall consider (1) prior complaints of domestic violence; (2) the relative severity of the injuries inflicted on each person; (3) the likelihood of future injury from domestic violence to each person; and (4) whether one of the persons acted in defense of self or others.
Arizona	§ 13-3601.B (2002) – In order to arrest both parties, the peace officer shall have probable cause to believe that both parties independently committed an act of domestic violence. An act of self-defense that is justified under chapter 4 of this title is not deemed to be an act of domestic violence.
California	§ 13701 (b) (2002) - These policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the dominant aggressor in any incident. The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either person acted in self-defense.

	<p>§ 836 (c) (3) (2002) - In situations where mutual protective orders have been issued under Division 10 (commencing with Section 6200) of the Family Code, liability for arrest under this subdivision applies only to those persons who are reasonably believed to have been the primary aggressor. In those situations, prior to making an arrest under this subdivision, the peace officer shall make reasonable efforts to identify, and may arrest, the primary aggressor involved in the incident. The primary aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the primary aggressor, an officer shall consider (A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self-defense.</p>
Colorado	<p>§ 18-6-803.6 (2) (2002) – If a peace officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine if a crime has been committed by one or more persons. In determining whether a crime has been committed by one or more persons, the officer shall consider the following: (a) any prior complaints of domestic violence; (b) the relative severity of the injuries inflicted on each person; (c) the likelihood of future injury to each person; and (d) the possibility that one of the persons acted in self-defense.</p>
Connecticut	<p>§ 46b-38b (b) (2003) - Where complaints are received from two or more opposing parties, the officer shall evaluate each complaint separately to determine whether he should seek a warrant for an arrest.</p>
Florida	<p>§ 741.29 (4) (a) &amp; (b) (2002) – (a) When complaints are received from two or more parties, the officers shall evaluate each complaint separately to determine whether there is probable cause for arrest. (b) If a law enforcement officer has probable cause to believe that two or more persons have committed a misdemeanor or felony, or if two or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor and not the preferred response with respect to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence.</p> <p>§ 943.171 (1) (2002) - The commission shall establish standards for instruction of law enforcement officers in the subject of domestic violence. Every basic skills course required in order for law enforcement officers to obtain initial certification shall, after January 1, 1986, include a minimum of 6 hours of training in handling domestic violence cases. Such training must include training in the recognition and determination of the primary aggressor in domestic violence cases.</p>
	<p>§17-4-20.1 (2002) – Where complaints of family violence are received from two or more opposing parties, the officer shall evaluate each</p>

Georgia	complaint separately to attempt to determine who was the primary aggressor. If the officer determines that one of the parties was the primary physical aggressor, the officer shall not be required to arrest any other person believed to have committed an act of family violence during the incident. In determining whether a person is a primary physical aggressor, an officer shall consider: (1) Prior family violence involving either party; (2) The relative severity of the injuries inflicted on each person; (3) The potential for future injury; and (4) whether one of the parties acted in self-defense.
Iowa	§ 236.12, Subd. 3 (2003) - As described in subsection 2, paragraph "b", "c", or "d", the peace officer shall arrest the person whom the peace officer believes to be the primary physical aggressor. The duty of the officer to arrest extends only to those persons involved who are believed to have committed an assault. Persons acting with justification, as defined in section 704.3, are not subject to mandatory arrest. In identifying the primary physical aggressor, a peace officer shall consider the need to protect victims of domestic abuse, the relative degree of injury or fear inflicted on the persons involved, and any history of domestic abuse between the persons involved. A peace officer's identification of the primary physical aggressor shall not be based on the consent of the victim to any subsequent prosecution or on the relationship of the persons involved in the incident, and shall not be based solely upon the absence of visible indications of injury or impairment.
Maryland	Crim. Law § 2-204(b) (2002) - If the police officer has probable cause to believe that mutual battery occurred and arrest is necessary under subsection (a), the police officer shall consider whether one of the parties acted in self-defense when determining whether to arrest the person whom the officer believes to be the primary aggressor.
Michigan	§ 776.22 (3)(b)(ii) (2002) – When the officer has probable cause to believe spouses, former spouses, individuals who have had a child in common, or other individuals who reside together or formerly resided together are committing or have committed crimes against each other, the officer, when determining whether to make an arrest of 1 or both individuals, should consider the intent of this section to protect victims of domestic violence, the degree of injury inflicted on the individuals involved, the extent to which the individuals have been put in fear of physical injury to themselves or other members of the household, and any history of domestic violence between the individuals, if that history can reasonably be ascertained by the officer. In addition, the officer should not arrest an individual if the officer has reasonable cause to believe the individual was acting in lawful self-defense or in lawful defense of another individual.
Minnesota	§629.342, subd. 2(a) (2002) – The policy shall discourage dual arrests, include consideration of whether one of the parties acted in self-defense, and provide guidance to officers concerning instances in which officers should remain at the scene of a domestic abuse incident until the

	likelihood of further imminent violence has been eliminated.
Mississippi	<p>§99-3-7(3)(b) &amp; (c) (2002) – (b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor which is an act of domestic violence as defined herein, or if two (2) or more persons make complaints to the officer, the officer shall attempt to determine who was the principal aggressor. The term the principal aggressor is defined as the most significant, rather than the first, aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer believes that all parties are equally responsible, the officer shall exercise such officer’s best judgment in determining probable cause. (c) To determine who is the principal aggressor , the officer shall consider the following factors, although consideration is not limited to these factors: (i) Evidence from the persons involved in the domestic abuse; (ii) The history of domestic abuse between the parties, the likelihood of future injury to each person and the intent of the law to protect victims of domestic violence from continuing abuse; (iii) Whether one (1) of the persons was acting in self-defense and (iv) Evidence from witnesses of the domestic violence.</p>
Missouri	<p>§ 455.085, Subd. 3 (2002) - When an officer makes an arrest he is not required to arrest two parties involved in an assault when both parties claim to have been assaulted. The arresting officer shall attempt to identify and shall arrest the party he believes is the primary physical aggressor. The term "primary physical aggressor" is defined as the most significant, rather than the first, aggressor. The law enforcement officer shall consider any or all of the following in determining the primary physical aggressor: (1) The intent of the law to protect victims of domestic violence from continuing abuse; (2) The comparative extent of injuries inflicted or serious threats creating fear of physical injury; (3) The history of domestic violence between the persons involved.</p> <p>No law enforcement officer investigating an incident of family violence shall threaten the arrest of all parties for the purpose of discouraging requests or law enforcement intervention by any party. Where complaints are received from two or more opposing parties, the officer shall evaluate each complaint separately to determine whether he should seek a warrant for an arrest.</p>
Montana	<p>§ 46-6-311 (2)(b) (2001) - When a peace officer responds to a partner or family member assault complaint and if it appears that the parties were involved in mutual aggression, the officer shall evaluate the situation to determine who is the primary aggressor. If, based on the officer's evaluation, the officer determines that one person is the primary aggressor, the officer may arrest only the primary aggressor. A determination of who the primary aggressor is must be based on but is not limited to the following considerations, regardless of who was the first aggressor: (i) the prior history of violence between the partners or</p>

	<p>family members, if information about the prior history is available to the officer; (ii) the relative severity of injuries received by each person; (iii) whether an act of or threat of violence was taken in self-defense; (iv) the relative sizes and apparent strength of each person; (v) the apparent fear or lack of fear between the partners or family members; and (vi) statements made by witnesses.</p>
Nevada	<p>§ 171.137, Subd. 2 (2001) - If the peace officer has probable cause to believe that a battery described in subsection 1 was a mutual battery, he shall attempt to determine which person was the primary physical aggressor. If the peace officer determines that one of the persons who allegedly committed a battery was the primary physical aggressor involved in the incident, the peace officer is not required to arrest any other person believed to have committed a battery during the incident. In determining whether a person is a primary physical aggressor for the purposes of this subsection, the peace officer shall consider: (a) Prior domestic violence involving either person; (b) The relative severity of the injuries inflicted upon the persons involved; (c) The potential for future injury; (d) Whether one of the alleged batteries was committed in self-defense; and (e) Any other factor that may help the peace officer decide which person was the primary physical aggressor.</p> <p>§ 171.1227 (2001) - If the peace officer investigates a mutual battery that constitutes domestic violence pursuant to NRS 33.018 and finds that one of the persons involved was the primary physical aggressor, he shall include in his report: (a) The name of the person who was the primary physical aggressor; and (b) A description of the evidence which supports his finding.</p>
New Hampshire	<p>§ 173-B:10, II (2002) - Pursuant to RSA 594:10, an arrest for abuse may be made without a warrant upon probable cause, whether or not the abuse is committed in the presence of the peace officer. When the peace officer has probable cause to believe that the persons are committing or have committed abuse against each other, the officer need not arrest both persons, but should arrest the person the officer believes to be the primary physical aggressor. In determining who is the primary physical aggressor, an officer shall consider the intent of this chapter to protect the victims of domestic violence, the relative degree of injury or fear inflicted on the persons involved, and any history of domestic abuse between these persons if that history can reasonably be obtained by the officer.</p>
New Jersey	<p>Title 2C:25-21.5.c.(2) &amp; (3) (2002) – (2) In determining which party in a domestic violence incident is the victim where both parties exhibit signs of injury, the officer should consider the comparative extent of the injuries, the history of domestic violence between the parties, if any, and any other relevant factors. (3) No victim shall be denied relief or arrested</p>

	or charged under this act with an offense because the victim used reasonable force in self defense against domestic violence by an attacker.
New York	Crim. Proc. § 140.10 (4)(c) (2001) – A misdemeanor constituting a family offense, as described in subdivision one of section 530.11 of this chapter and section eight hundred twelve of the family court act, has been committed by such person against such family or household member, unless the victim requests otherwise. The officer shall neither inquire as to whether the victim seeks an arrest of such person nor threaten the arrest of any person for the purpose of discouraging requests for police intervention. Notwithstanding the foregoing, when an officer has reasonable cause to believe that more than one family or household member has committed such a misdemeanor, the officer is not required to arrest each such person. In such circumstances, the officer shall attempt to identify and arrest the primary physical aggressor after considering: (i) the comparative extent of any injuries inflicted by and between the parties; (ii) whether any such person is threatening or has threatened future harm against another party or another family or household member; (iii) whether any such person has a prior history of domestic violence that the officer can reasonably ascertain; and (iv) whether any such person acted defensively to protect himself or herself from injury. The officer shall evaluate each complaint separately to determine who is the primary physical aggressor and shall not base the decision to arrest or not to arrest on the willingness of a person to testify or otherwise participate in a judicial proceeding.
North Dakota	§ 14-07.1-10 (2001) – When complaints are received from two or more family or household members, the officer shall evaluate each complaint separately, including the comparative severity of injuries involved, to determine whether to seek an arrest warrant.
Ohio	§ 2935.03 (B)(3)(b) & (d) (2003) - If pursuant to division (B)(3)(a) of this section a peace officer has reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that family or household members have committed the offense against each other, it is the preferred course of action in this state that the officer, pursuant to division (B)(1) of this section, arrest and detain until a warrant can be obtained the family or household member who committed the offense and whom the officer has reasonable cause to believe is the primary physical aggressor. There is no preferred course of action in this state regarding any other family or household member who committed the offense and whom the officer does not have reasonable cause to believe is the primary physical aggressor, but, pursuant to division (B)(1) of this section, the peace officer may arrest and detain until a warrant can be obtained any other family or household member who committed the offense and whom the officer does not have reasonable cause to believe

	<p>is the primary physical aggressor.</p> <p>(d) In determining for purposes of division (B)(3)(b) of this section which family or household member is the primary physical aggressor in a situation in which family or household members have committed the offense of domestic violence or the offense of violating a protection order against each other, a peace officer described in division (A) of this section, in addition to any other relevant circumstances, should consider all of the following: (i) Any history of domestic violence or of any other violent acts by either person involved in the alleged offense that the officer reasonably can ascertain; (ii) If violence is alleged, whether the alleged violence was caused by a person acting in self-defense; (iii) Each person's fear of physical harm, if any, resulting from the other person's threatened use of force against any person or resulting from the other person's use or history of the use of force against any person, and the reasonableness of that fear; (iv) The comparative severity of any injuries suffered by the persons involved in the alleged offense.</p> <p>§ 2935.03.2 (A)(1)(b)(ii) (2003)- If the officer has reasonable cause to believe that, during the incident, the offender who committed the aggravated assault and one or more other persons committed offenses against each other, the officer shall determine in accordance with division (B)(3)(d) of section 2935.03 of the Revised Code which of those persons is the primary physical aggressor. If the offender who committed the aggravated assault is the primary physical aggressor, the officer shall arrest that offender for aggravated assault pursuant to section 2935.03 of the Revised Code and shall detain that offender pursuant to that section until a warrant can be obtained, and the officer is not required to arrest but may arrest pursuant to section 2935.03 of the Revised Code any other person who committed an offense but who is not the primary physical aggressor. If the offender who committed the aggravated assault is not the primary physical aggressor, the officer is not required to arrest that offender or any other person who committed an offense during the incident but may arrest any of them pursuant to section 2935.03 of the Revised Code and detain them pursuant to that section until a warrant can be obtained.</p>
Oregon	<p>§ 133.055(2)(c) (2002) – When a peace officer makes an arrest under paragraph (a) of this subsection, the peace officer shall make every effort to determine who is the assailant or potential assailant by considering, among other factors: (A) The comparative extent of the injuries inflicted or the seriousness of threats creating a fear of physical injury; (B) If reasonably ascertainable, the history of domestic violence between the persons involved; (C) Whether any alleged crime was committed in self-defense; and (D) The potential for future assaults.</p>
	<p>§ 12-29-3 (c)(2) (2002) - (c) When more than one family or household member involved in a domestic violence incident states a complaint, the</p>

Rhode Island	officer shall investigate each complaint to determine whether there is probable cause to believe a crime has been committed. The officer shall not dismiss the incident by presuming two (2) party guilt. (2) When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor.
South Carolina	§ 16-25-70 (D) (2002) - If a law enforcement officer receives conflicting complaints of domestic or family violence from two or more household members involving an incident of domestic or family violence, the officer shall evaluate each complaint separately to determine who was the primary aggressor. If the officer determines that one person was the primary physical aggressor, the officer must not arrest the other person accused of having committed domestic or family violence. In determining whether a person is the primary aggressor, the officer must consider: (1) prior complaints of domestic or family violence; (2) the relative severity of the injuries inflicted on each person taking into account injuries alleged which may not be easily visible at the time of the investigation; (3) the likelihood of future injury to each person; (4) whether one of the persons acted in self-defense; and (5) household member accounts regarding the history of domestic violence.
South Dakota	§25-10-35 (2002) - If the officer has probable cause to believe that spouses, former spouses, or other persons who reside together or formerly resided together have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (1) The intent to protect victims of domestic abuse under this chapter; (2) The comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (3) The history of domestic abuse between the persons involved.
Tennessee	§ 36-3-619 (b) & (c) (2002) - If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor or felony, or if two (2) or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the primary aggressor. If the officer believes that all parties are equally responsible, the officer shall exercise such officer's best judgment in determining whether to arrest all, any or none of the parties. To determine who is the primary aggressor, the officer shall consider: (1) The history of domestic abuse between the parties; (2) The relative severity of the injuries inflicted on each person; (3) Evidence from the persons involved in the domestic abuse; (4) The likelihood of future injury to each person; (5) Whether one (1) of the persons acted in self-defense; and (6) Evidence from witnesses of the

	domestic abuse.
Utah	<p>§ 77-36-2.2 (3) (2002) - If a law enforcement officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine who the predominant aggressor was. If the officer determines that one person was the predominant physical aggressor, the officer need not arrest the other person alleged to have committed domestic violence. In determining who the predominant aggressor was, the officer shall consider: (a) any prior complaints of domestic violence; (b) the relative severity of injuries inflicted on each person; (c) the likelihood of future injury to each of the parties; and (d) whether one of the parties acted in self defense.</p>
Virginia	<p>§ 19.2-81.3.B (2002) - A law-enforcement officer having probable cause to believe that a violation of § <a href="#">18.2-57.2</a> or § <a href="#">16.1-253.2</a> has occurred shall arrest and take into custody the person he has probable cause to believe, based on the totality of the circumstances, was the primary physical aggressor unless there are special circumstances which would dictate a course of action other than an arrest.</p> <p>§ 19.2-81.4 (2) (2002) - The Virginia State Police and each local police and sheriff's department shall establish an arrest policy and procedures to implement this section. Any local police or sheriff's department is authorized to adopt an arrest policy that prescribes additional requirements under this section. Any policies and procedures established under this section shall at a minimum provide guidance to law-enforcement officers on the following: . . .</p> <p>2. The standards for determining who is the primary physical aggressor including (i) the intent of the law to protect the health and safety of family and household members, (ii) prior complaints of family abuse by the allegedly abusing person involving the family or household members and (iii) the relative severity of the injuries inflicted on persons involved in the incident and whether any injuries were inflicted in self-defense.</p>
Washington	<p>§ 10.31.100 (2)(c) (2003) - When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.</p>
	<p style="text-align: right;"><i>Created by Eve Zumora, Esq., BWJP Updated by Carolyn Ham</i></p>

## APPENDIX B

### PREDOMINANT PHYSICAL AGGRESSOR CASE ANALYSIS

Officers who go through the full predominant physical aggressor analysis in order to determine which of the two parties is the PPA should make a full, written account of how they came to that decision.<sup>8</sup> A narrative that records how an officer determines the PPA is important for future interveners to be able to understand why the police did what they did and helps to dispel the notion that PPA means “always arrest the man.” It also forces the officers to take the steps to analyze the actions of each party separately. Consider the following case scenario, based on an actual police<sup>9</sup> report. The report was generated from a state that has mandatory arrest as well as predominant aggressor statutes.

#### Case Scenario

##### Synopsis:

Shelia McPeck assaulted Sean Cavanaugh when she hit him in the face with a glass bottle.

##### Background:

Police have been to the residence before for fights between the couple; no one has ever gone to jail. McPeck has a 16-year old daughter, Naomi McPeck, who lives with her and Cavanaugh.

##### Observations/Injuries:

CAVANAUGH:	Male	Height: 6'	Weight: 210
	Angry – Nervous		
	Bruises, cuts and abrasions on his face		
MCPECK.	Female	Height 5'4"	Weight: 180
	Nervous – Talkative		
	Minor cuts on palm of both hands from breaking the glass bottle		
	Reddish bruising around her neck		
McPeck, N.	Female	Height 5'6"	Weight: 126
	Nervous		
	Reddish bruising around her neck		

##### Statements of parties:

CAVANAUGH stated he asked Naomi to clean up the living room because she and her friends had been watching movies and eating snacks all night and the room was a mess. He said MCPECK did not like the way he was talking to her daughter and “got in

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<sup>8</sup> Nonetheless, only one state, Nevada, directs officers to provide a “description of the evidence which supports [the officer’s] finding” of one person as the predominant physical aggressor (though there may be departmental policies which cover this).

<sup>9</sup> Names and facts not relevant to the arrest decision have been changed to ensure confidentiality.

his face” and started pushing him. He started pushing back at her when Naomi jumped into the middle of the fight. CAVANAUGH said he grabbed both MCPECK and Naomi by the throat to push them away. MCPECK is currently disabled and walks with crutches. She struck CAVANAUGH with one of the crutches and then picked up a beer bottle and hit him in the face with it. CAVANAUGH then called the police. Naomi McPeck also called the police. CAVANAUGH said he’d had about four beers.

MCPECK stated that her daughter had had friends over for most of the night, watching movies and being “good kids.” She said CAVANAUGH started harassing her daughter right after her friends left and told her to “clean up the mess you and your fucking friends made.” She told him not to talk to her daughter like that and went over to where he stood because she didn’t want him yelling directly at her daughter. MCPECK said she and CAVANAUGH began pushing each other. She said her daughter Naomi intervened because she, MCPECK, was on crutches, and couldn’t “hold her own.” MCPECK said at that point CAVANAUGH grabbed both her and her daughter by the ir throats. She hit him with one of her crutches and then grabbed a bottle and hit him with that. MCPECK said she’d had about three beers.

Naomi McPeck stated she had had about six friends over to watch movies and hang out for the night. Right after they left, she said CAVANAUGH started yelling at her to get the living room cleaned up. She said she didn’t like the way he was talking to her and she told him she’d do it in the morning. Naomi McPeck said her mother told CAVANAUGH to leave her alone and then got into it with him, and they started pushing each other. She went to help her mother and CAVANAUGH grabbed both her and her mother by the ir throats Her mother picked up a beer bottle and hit CAVANAUGH in the face with it.

## **Case Interpretation**

The incident resulted in the police arresting MCPECK for domestic assault, apparently making a determination that she was the predominant physical aggressor. There was no explanation of how the officers came to this conclusion. As a reader of this report, it appeared that the officers judged the broken beer bottle as a more serious weapon and, therefore, Sheila McPeck the more dangerous assailant. Consider the following interpretation when the PPA analysis is applied to this case scenario:

### *1. Was either party acting in self-defense?*

MCPECK initially approached CAVANAUGH and according to everyone involved, the two “got into it.” The daughter intervened, at which point CAVANAUGH grabbed both MCPECK and Naomi by the throat, hard enough to leave reddish bruising around each of their necks. Given the injuries which resulted and recognizing that most strangulations cause little visible injuries, Cavanaugh must have been exerting a good amount of pressure on both mother and daughter. MCPECK then hit him with her crutch. We do not know if CAVANAUGH let go of either one or both of the McPeck’s when MCPECK hit him with the crutch. The implication from the statements seems to be that he did. MCPECK then

picked up a beer bottle and hit him in the face with it. In determining whether MCPECK was striking out in self-defense, one must consider whether she “was in fear for herself or someone else” (in this instance, her daughter) and whether a reasonable person would believe the force used was necessary to stop or repel the attack. In this case, most people would probably agree hitting CAVANAUGH with a crutch was more than justified; the beer bottle to the face becomes less clear because we do not know if he had already released the McPecks. However, we do know the attack stopped when MCPECK hit him with the bottle. In addition, there is MCPECK’S diminished physical capacity to consider – she was on crutches. We do not know any more about her disability: whether it was permanent or temporary, involving a cast or not, or what caused it. In this case, it appears a strong argument could be made that MCPECK was using self-defense – both she and her daughter were being strangled by CAVANAUGH, hard enough to leave bruising on both of their throats. She did what she had to do to get him to both stop strangling them and, more importantly, stop his attack altogether. Although we do not know from the narrative, it appears the police may have reacted to MCPECK hitting CAVANAUGH with a beer bottle in the face, possibly considering it a “weapon” at that point and so going beyond the scope of self-defense.

2. *Is there a history of prior domestic violence?*

This is unclear from the report. The police stated there had been previous fights, but no one had been arrested. This is a very ambiguous statement, and it is hard to determine anything about the context of violence in this relationship from that information.

3. *What is the relative severity of the injuries to each party?*

Both sets of injuries were fairly significant – CAVANAUGH had cuts and bruising to his face, while MCPECK and her daughter had bruising around their necks. It might be argued that a broken beer bottle slashed at the face is a particularly dangerous weapon, but according to Strack and McLane it only takes 11 pounds of pressure for ten seconds, to render a person unconscious by strangulation. This may be a toss-up, though CAVANAUGH did injure *two* people, whereas MCPECK only injured one.

4. *What is the likelihood of future injury to either party?*

MCPECK was temporarily disabled, putting her in a more vulnerable position at least in the short term. CAVANAUGH inflicted serious injury upon both MCPECK and her daughter without any sort of weapon; however, it could be that MCPECK had a history of using a weapon/sharp object in conflicts, making CAVANAUGH more vulnerable.

In the above scenario, the officers arrested MCPECK and CAVANAUGH willingly left the home; no citations were issued to CAVANAUGH. Without more information on the past history of violence in order to understand the context of violence in their relationship, it would be difficult to make a determination of predominant physical aggressor in this case – notwithstanding that a finding of self-defense by MCPECK may have been the most accurate appraisal of the situation.

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