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Domestic Violence: possible policy changes to help close the revolving door of arrest and
bail and instead to provide both aggressors and victims treatment options

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Bus 590: Policy Analysis

December 15, 2017

Adams State University

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Preface

Colorado is one of the 23 states in the US with a mandatory arrest law in the case of domestic violence calls to law enforcement. What this means is that if an officer is called out and finds that there is probable cause to suspect that someone has committed an act of domestic violence, then an arrest has to be made. Not all states follow this policy. Some states require physical assault before an arrest can be made, and some states leave the arrest question to the officer's discretion (American Bar Association, 2014). In 1994, the Colorado Assembly changed state statute to include behaviors like stalking, threatening and intimidating as domestic violence. Colorado's statutes are unique in the nation, (Colorado Revised Statutes, Title 18, Criminal Code 18-6-800-3) but they have not served as a model for other states. Most other states have not specifically codified stalking, threatening, and intimidation as domestic violence offenses quite as specifically.

In Colorado, requiring arrest in the case of probable cause to suspect domestic violence may seem straightforward once the ink has dried at the legislature, but implementing the policy has proven to be anything but clear. And depending on what state one lives in, what will happen after a call to 911 can vary: domestic violence policies in each state might require an assessment of whether there was direct physical harm, or whether the officer believes that danger exists. It is important to note the word "believes" in this assessment criteria. Most states do have some language concerning officer discretion to make an arrest. Examples include Colorado's verbiage: "in the event the officer believes or suspects that there is probable cause," or New York's statute which

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refers to “reasonable cause.” A stark outlier was New Hampshire’s statute, which dictated at one time very recently that only in the case that the defendant violates a previous temporary or permanent protective order shall an arrest be made: which lead one to wonder how the defendant got the protective order served upon his or her person in the first place if NOT for a domestic violence offense. New Hampshire has gone through many recent machinations concerning domestic violence law, including attempts to require corroboration or knowledge on the part of the responding officer on the one extreme, and finally adopting a definition of abuse which incorporates harassment and threatening, not unlike the Colorado statute (New Hampshire State Statutes, 2017).

While most states include language in their statutes concerning probable cause, Colorado is somewhat more unique in the use of the term “mandatory arrest.” Remembering that “probable cause is the criteria for mandatory arrest, the next most logical question might be: how does one determine probable cause? How is probable cause defined? In addition, putting the term “probable cause” in the same sentence with the term “mandatory arrest” presents a variety of complex considerations, not the least of which is that any assessment of probable cause will be done by a person who will by default come to the task with his or her own set of views and perceptions. In which case, defining “probable cause” by some set of metrics becomes imperative. Probable cause is defined in Colorado statute: but in several cases that were observed prior to writing this recommendation, the definitions for probable cause: “indications of coercion, control, punishment, intimidation, or revenge” (CRS. 18-6-801.1) were not sufficient to precipitate arrest. In one case, an officer stated that “no crime had been committed,”

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despite threats and intimidation, simply because the officer had not seen or witnessed the threats or intimidation.

Archuleta County is a geographic region spanning 1,356 square miles, located in the southwest corner of Colorado and inhabited by 12,352 souls as of 2015 (US Census Bureau, 2016). According to a Domestic Violence Awareness Month Proclamation (Archuleta County Commissioners, 2017) issued by the County Commission on October 3, 2017, 302 victims of domestic violence were served in the previous year and 292 hotline calls were answered by Rise Above Violence (2017), a private nonprofit organization in Archuleta County whose primary mission is to assist victims of Domestic Violence and Sexual Assault. The proclamation continues by stating that Rise Above Violence knows that many more who were in violent relationships did not reach out for help.

Two Problems

One: Reluctance to Call Law Enforcement Due to Fear of Arrest

It is the case of not reaching out for help that is a focus of this policy brief, in light of Colorado's mandatory arrest and no-drop laws for domestic violence cases. According to Carmen Hubbs, Director of Rise Above Violence, many who would call for help might not do so because of a reluctance to cause an arrest, because law enforcement is required to arrest the perpetrator in a domestic violence case using the criteria of probable cause. If it is unclear who the perpetrator is, law enforcement may take both parties.

Before delving into a discussion of how probable cause is determined or the reasons why a domestic violence victim would be afraid to cause an arrest, mandatory

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arrest and no-drop laws must be discussed. When the Colorado Assembly enacted the definition of Domestic Violence found in Title 18 in 1994, the code was also re-written to include a requirement that an arrest had to be made when law enforcement arrived on the scene of a domestic violence case, whereas before the laws were changed, officers had more discretion over how to handle the case when they arrived on the scene. Once written up as a domestic violence incident and the domestic violence was proven, the district attorney has no choice but to prosecute the case as a domestic violence.

Some feel that the mandatory arrest and no-drop laws have had unintended consequences that can adversely affect the victim, or cause an arrest in a situation that was perhaps not as serious as perceived (Weaver, 2016). According to Mary West-Smith, professor in the University of Northern Colorado Criminal Justice department, lives are being ruined because people don't understand the long-term ramifications of arrest, such as inability to retain employment due to a tainted background check. West-Smith uses an example of an arrest made simply because a bouquet of flowers was thrown across a room when a partner discovered infidelity (Weaver, 2016). However, it is not clear how many domestic violence arrests are made in Colorado due to minor arguments vs. clear situations of bodily danger.

Two: Criteria of "Probable Cause" for Arrest in Domestic Violence Cases

The uniqueness of the law in Colorado is that it is possible to make an arrest based on threatening or intimidation: Colorado Statute 18-6-801 defines domestic

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violence as “an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. ‘Domestic violence’ also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship”

(Colorado Revised Statutes, 2017). Mandatory arrest for domestic violence is required in CRS 18-6-803.6, duties of peace officers and prosecuting agencies - preservation of evidence: (1) When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in section 18-6-800.3 (1), has been committed, the officer shall, without undue delay, arrest the person suspected of its commission pursuant to the provisions in subsection (2) of this section, if applicable, and charge the person with the appropriate crime or offense.

However, in Archuleta County, in a conversation with a deputy, it was stated that he would not make an arrest unless “a crime has been committed.,” and the criteria for determination of a crime presented by the deputy was physical contact. (Anonymous, 2017). Deputies *have the authority* as granted in 18-6-800.3(1) to make an arrest based on threats or actions *other* than direct physical contact: however, according to Assistant District Attorney Alex Lowe (Lowe, 2017) probable cause then becomes the criteria to make the arrest. The exact verbiage of 18-6-803.6 Subsection (1) reads: When a peace officer determines that there is *probable cause* to believe that a crime or offense involving domestic violence.

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I asked Assistant DA Lowe if probable cause as a term is defined in the Colorado Revised Statutes, and he stated that it was not, however, as defined in 18-6-801.1, the criteria for a determination of domestic violence are indications of coercion, control, punishment, intimidation, or revenge (CRS. 18-6-801.1, 2017).

Against this backdrop, the issue presented refers back to the statement by the deputy, who will remain anonymous, that arrest will not be made “unless a crime is committed.” Clearly, in CRS. 18-6-801.1, domestic violence is defined as a crime, and the criteria of the crime do not require direct physical contact. However, in a conversation with a second deputy who will also remain anonymous (2017) it was stated that unless direct physical contact has occurred, he would not make the arrest. This statement could be viewed in two ways: first, the deputy retains some authority in making a judgment call due to the probable cause language contained in the statute. However, despite the fact that “probable cause” may not be specifically defined in an isolated state in the Colorado Revised Statutes generally, as pertains to domestic violence, probable cause is most certainly defined as “indications of coercion, control, punishment, intimidation, or revenge” in CRS. 18-6-801.1, and the word “indications” would most certainly give an officer the ability to make the arrest *without* direct physical contact. The question then presented becomes: why, in Archuleta County, would two deputies state that they are reluctant to make an arrest unless there is direct physical violence when meanwhile, in the city of Greeley, in northern Colorado, Police Chief Jerry Garner stated in a November 2016 article that he felt that officers did not have enough discretion and had to make an arrest? Despite his support of strengthening consequences for perpetrators, he stated that

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"Police sometimes feel pressured to make an arrest because of the law when their common sense is telling them arrest isn't the best solution. But the police officer has to follow the state law" (Weaver, 2016).

Possible Solutions

In a conversation with Tanya Hamilton, Undersheriff of Archuleta County, the topic of police discretion to make an arrest was broached. She stated that she felt that officers do have discretion, unlike the statement made by the Greeley police chief, and that Archuleta County deputies look for indications of a "primary aggressor" (Hamilton, 2017) before making an arrest. She described the circumstances of domestic violence calls as extremely confusing, and said that no two calls are alike. She said that deputies often get involved with the cases emotionally, and sometimes come back to the station confused, worried that they may have not made the right decision, or overwhelmed by the circumstances that were presented to them at the scene. She described the behaviors of domestic violence victims particularly as being very unlike what one might expect from a victim: for example, sometimes victims "let loose" on the aggressor once law enforcement is present, simply because it is now safe to express anger. Another troubling trend with victims is that sometimes they might have picked the fight, according to Hamilton, simply to get it over with and "to the honeymoon stage again." This trend is a cyclical indicator of violent relationships, in which the victim knows that the aggressor will eventually cause harm, or perhaps the aggressor is holding out emotional availability. After a fight in which bodily harm or emotional harm has occurred, the aggressor might feel some remorse, which would then precipitate a "make-up" period longed for by the

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victim. Therefore, the victim could well have started the fight, making the situation very confusing for the responding law enforcement officials, in which case, sometimes they arrest both persons involved.

Undersherriff Hamilton also stated that there is a revolving door of people in Archuleta County who are arrested on a regular basis for domestic violence. She said that one of the problems is that a recent legislative statute (citation needed) has made it possible for perpetrators to be released on Personal Recognizance (PR) Bonds. Bail has to be set by a judge, but the judge can decide to release an arrested person if they agree to stay in the local community, have family and/or friends in the community who can vouch for them. If any of the conditions of PR are not met, then the bail that the judge had previously set would need to be paid.

According to Undersherriff Hamilton, good intentions may have been at the heart of allowing persons arrested for domestic violence to be released via PR Bonds, because the court systems are over-burdened with cases. She said that she felt that the legislature must have been trying to do something to lighten up case loads in a helpful way, however, the practice has lead to a lack of substantive consequences to deter further violent actions. One possible course of action would be to review these statutes and determine more robust means to add consequences to violent behavior.

When a person is arrested for domestic violence, a judge can, after a certain number of arrests or at the judge's discretion, mandate that the violator attends domestic violence prevention classes. This program is managed by the State of Colorado Criminal Justice Department. I asked Undersherriff Hamilton if she knew the effect of these

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classes and whether she thought they helped, and she said that at least they didn't hurt.

More research is planned to determine what the effect of these programs is locally.

Undersheriff Hamilton also discussed the need to continue to educate victims. She said that domestic violence will touch all of us at some point in our lives, no matter our income or profession, and the difficulty is getting victims to ask for and accept help. Often, victims fear retaliation or the stigma of community perception. Recently, the Colorado Assembly passed a new law taking away mandatory reporting at the hospitals, stating that by requiring hospitals to report domestic violence when victims come in for treatment with visible injuries, victims lose their right to determine what the best course of action would be in their case: to report or not, based on the potential for retaliation (Wolfe, 2017). The new law started out as House Bill 1322, and was supported by the Colorado Coalition Against Domestic Violence. The reasoning behind the support is that many victims might not be ready to have their partner arrested, and as a result, retaliation can occur.

It is a little easier to understand this conundrum with an example. In the case of arrest for domestic violence, a temporary protection order is immediately issued. But if there is no arrest, then the victim has to get to the court and obtain a temporary protection order from the judge, which in this case will be a civil, not a criminal, protection order. The perpetrator can still be arrested on the spot if the order is violated, but the charges involved could be lessened due to the fact that no arrest had previously occurred. In Archuleta County, if no arrest occurs, an additional problem exists in that the county courts and jail have been closed for months due to black mold. Therefore, anyone

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wishing to obtain a protection order must travel to Durango, an hour to the west, and all arrested persons are transported to the La Plata County Jail in Durango, with the transporting town paying a day fee to La Plata.

With well-meaning intentions to protect victims from additional retaliation, it is not clear that this new law, despite being supported by many domestic violence advocates, is not going to perpetrate a dysfunctional system. Victims may indeed not be ready to have their partners arrested, but at which point do we wait too long to step in and intervene? At which point does someone die because they weren't ready to face the inevitable?

Domestic violence is a cyclical form of dysfunction: sometimes, times are good and sometimes, times are bad. The ups and downs of an abusive relationship make it very difficult to find clarity of judgment. The levels of denial that creep up over time make for a very dangerous set of factors that can lead in an instant to either an unintended or intended death. One day, everything can be rosy, and the next day, the victim can be lying on the floor in a pool of blood. A fairy-tale like life of lies and delusions builds up, and getting a victim out of a life-threatening situation can be problematic at best and excruciatingly frustrating at worst, as many victims of domestic violence can't see the facts of their situation due to the thick walls of denial with which they protect themselves. For example, one might try to coax a woman out of a situation in which her life is in danger, and she might not leave the home for the safety of a friend's car because dinner is in the oven, or she cannot get past the aggressor to retrieve her dog. While these situations may seem a demeaning example, they are drawn from experience. With the

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loosening of mandatory reporting, retaliation for reporting may indeed be prevented, but circumstances are being prolonged that could lead to even more injuries and possible death.

Mandatory arrest will most likely come up in the Colorado legislature for repeal at some point as well, as will no-drop laws. Possible places to look for policy changes to protect victims would be to revise personal recognizance bond laws once again, to reinstate mandatory reporting, and to require more domestic violence treatment options for all involved. However, in Southwest Colorado, mental health services are spread very thin. For example, in one situation in Archuleta County in which a victim reluctant to call law enforcement decided to seek help (Anonymous, 2017), she called Axis Mental Health, in hopes that they might send a crisis team, given that her partner has a mental illness. However, the crisis team would not respond because he also had a history of violent behavior, and they told her that the only option was to call law enforcement. Unfortunately, because she was very concerned about the effects of arrest on her partner, she opted to simply have him escorted off the premises by the sheriff but not arrested. Had mental health services been available, it very well could be that treatment could have occurred, and had that treatment had a positive effect, a life might be saved further down the road. If treatment services had been available, perhaps another outcome could be that a person with a violent tendency could have found help so that he was able to enjoy his life and engage in healthy relationships.

Violent behavior doesn't just go away: some treatment option is needed, such as counseling, or in the case of mental illness, medical care. The needed statistic to convince

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policy makers to invest in mental health services and rigorous sentencing however remains a comparison of the number of people arrested for domestic violence and the cost incurred for incarceration vs. the cost of mental health services and the resultant lessening of pressure on the criminal justice system. Given that services provided to victims of domestic violence can be costly, and that court costs associated with a domestic violence case can run into the thousands of dollars, it could be argued that providing up-front mental health and rehabilitative services could make financial sense, when also coupled with the addition of contributing members to a community. In addition, many communities find themselves gripped in the dilemma of how to maintain or rebuild failing judicial structures, and the only way available to raise revenue is to raise court fees. Court fees are not charged to the victim of a domestic violence case, in order to prevent barriers to reporting. But, given the example of Archuleta County, which currently has to hire an officer specifically to drive inmates back and forth to LaPlata County due to the Archuleta County jail being closed due to black mold, and the people of Archuleta County who refuse to pass a bond for a new jail: certainly, any rehabilitative services that can reduce recidivism would have the potential to save money tenfold.

To close, recommendations would be:

1. A clear state policy identifying for law enforcement the criteria for arrest under the lens of probable cause
2. Reinstatement of mandatory reporting
3. Disallowing domestic violence perpetrators to be released from jail on Personal Recognizance (PR) bonds.

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