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SUPPRESSING DOMESTIC VIOLENCE WITH LAW REFORMS

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The timely message of these papers is that specific deterrence is not so simple an idea as it seems. One of the purposes of criminal punishment is to change the behavior of the offender by associating negative reinforcements, such as fines and detention, with misbehavior. Arrest also counts as a negative reinforcement. For any criminal contemplating a crime, prison time is the most disagreeable but also least probable foreseeable consequence of his anticipated transgression. Fear of arrest, less obnoxious but far more probable than serving time, may actually loom larger in the criminal's calculations than fear of what may happen if the criminal process plays through to its classical conclusion.

The idea of specific deterrence is the most instinctive of penal policies. One need not be a rat psychologist to appreciate that associating a negative reinforcement with a given behavior makes that behavior less likely to recur; even small children have this intuition. So if it is obvious that getting oneself arrested is tallied as a "negative" experience, it follows that arresting someone for a given offense will make that individual less likely to commit that offense in the future. The process is just the same as that in the psychology laboratory, where white rats are taught to avoid a certain behavior by repeated electric shocks. Would that life were so simple.

It is useful, every so often, for those who have wandered far into the wilderness of theory to take a breather with empirical materials, if only as a reminder of how untidy the real world is compared with the laboratory. The traditional law of most jurisdictions allowed police officers to arrest persons suspected of committing misdemeanors (such as unarmed assault) only where a warrant had been issued or where the misdemeanor was committed in the officer's presence. Spousal quarrels usually occur in private; and officers called to the scene of domestic quarrels have traditionally

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limited themselves to curbstone social work, conciliating and mollifying as best they could before leaving the scene.

By the mid-1980's, almost all jurisdictions had enacted legislation that *allowed* officers to make warrantless misdemeanor arrests if there was probable cause to believe that a spousal assault had occurred. Indeed, a number of jurisdictions adopted the questionable policy of *requiring* officers to arrest in such circumstances. This represented a significant broadening of law enforcement powers which one would expect to lead to a noticeable decline, if not in the overall rate of complaints, then at least in the recidivism of offenders, whose infractions could now be sanctioned far more cheaply than previously. The early returns from Minneapolis seemed to support this prediction. Men who were arrested for misdemeanor spouse assault were found significantly less likely in that study to return to the attention of police than were members of control groups who received less coercive treatment.

Ten years and many replications later, researchers are no longer confident that mandatory arrest is a panacea for domestic violence; in fact it may make matters worse. How can this be? There are fairly dramatic differences between offenders in how they respond to the prospect of arrest. Respectable middle class folks, with much valuable reputational capital at stake, are clearly more averse to arrest—in this context as in most others—than are the more socially marginal individuals who have less to lose and who form the traditional clientele of police courts and uniformed peace officers. The new research suggests that the sort of man who is undeterred by the prospect of arrest may actually be provoked into further acts of aggression against family members who are perceived as having been the cause of trouble with the police.

If the problem of intrafamilial violence does not yield to simple changes in law enforcement policy, no one should be amazed. The problem is almost by definition hard to deal with, rooted as it usually is in the subtle nuances and private complexities of familial relationships, about which law enforcement authorities—and for that matter close friends and family members—typically lack much crucial information. It is proverbial how difficult it is for even friendly outsiders—much less police officers—to intervene constructively in the affairs of a given family. And even if this were not true one should recognize that a budget-constrained legal system will never devote significant post-arrest resources to the prosecution, incarceration and rehabilitation of offenders who have, after all, usually been guilty only of a simple misdemeanor.

What, then, should be done? Is there nothing worthwhile that

law can do to protect women and children from assaults by male family members? Perhaps not. It is not necessarily the case that well-intended legal interventions make things better, and the rate of intraspousal assault may be an equilibrium-distributed event, like dog bites and drownings, that will persistently occur with a certain statistical frequency in a given cohort of people regardless of what social policies are in force. On the other hand, it may be that subjecting intra-family violence to policing tactics that are more aggressive than those used with other forms of assault, and perhaps separately criminalizing it, may over some longer period have a *general* deterrent effect.

It would not be surprising if it took a generation or more for a change in a general deterrent mechanism to work its way into a lowered rate of spouse abuse. Unlike specific deterrence, general deterrence works vicariously: people alter their behavior because of what they see has happened to other people. That sort of information gets around by word of mouth, as opposed to specific deterrence, where one learns the lesson personally or not at all. In principle, then, one would like to have twenty or thirty years to test the hypothesis that aggressive police intervention in domestic violence incidents will depress the rate of intrafamilial assault. Unfortunately, over that period of time so many other variables in the equation will have changed so much that measuring the general deterrent effect of the law may not be possible. That is nothing new: general deterrence is notoriously hard to measure in any situation.

Increasing the availability of self help to discourage spousal assault is an avenue that the legal system seems not to have considered. The rules of common law governing the privilege of self defense (legislatively enacted in most states) are exceptionally stingy about when a person may use a weapon in self defense. It is always required that the threat be "imminent," and a weapon may not be used unless the defender reasonably fears death, great bodily harm, or a forcible felony from her attacker. These rules have considerable validity for governing the encounters of strangers, but one may question whether it makes sense to apply them in the same way to family situations. Between strangers, requiring that a threat be *imminent* before it can be responded to is the best way to minimize violence in casual encounters. No one can read the mind or motives of another person with certainty, but once someone poses an *imminent* threat to another, much ambiguity and uncertainty about his reasonably expectable behavior, at least in the very short-run future, will surely be gone.

Domestic partners cannot read one another's minds either, but

it is reasonable to believe they can do a far better job of it than can complete strangers. The predicament of a chronically abused wife is that she lives with a standing threat rather than an imminent one; but she has far more information and far less uncertainty than a stranger about the identity and probable behavior of her expected attacker. A modest relaxation in the requirement that a threat be "imminent" before a weapon could be resorted to would be justifiable in the domestic setting—especially since, once the threat had become imminent as one would understand the term to apply between strangers, it would often be too late as a practical matter for her to get a weapon to defend herself with. Similarly, the law might deem repeated unarmed assaults as "forcible felonies" for purposes of invoking the right of self-protection, notwithstanding the fact that unarmed assault, even between mismatched combatants, is usually considered a misdemeanor (not giving rise to a right of armed self defense).

If one's objective is to reduce the amount of intrafamilial violence, easing the rules for invoking self-defense—that is, reducing the expected cost of self-help for victims—seems at least as promising as the orthodox approach. But of course one must recognize the possibility that neither change would have much measurable effect.

Nonetheless, one can defend such reforms. It may not be "effective" but it is certainly *proper* for police officers to arrest where there is probable cause to believe that a certain person has beaten another. It may not affect the crime statistics but it is certainly *fair* to allow a woman to defend herself from repeated attack by her husband. Recognizing these as legitimate values of the community may not be "useful" in the sense of doing much for the crime rate. But it may do *justice*, which is itself a pretty useful attribute for a legal system to possess.

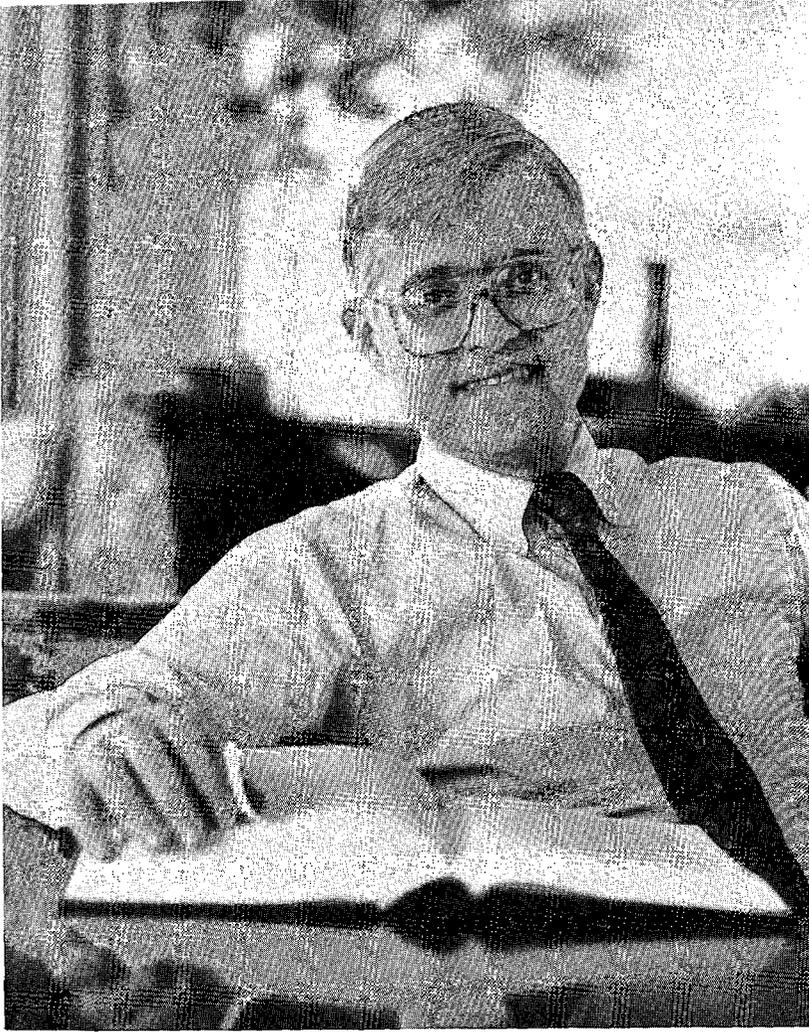


photo: Jim Ziv

JAMES BRIAN HADDAD
1942-1992

Professor James B. Haddad brought great depth and knowledge to Northwestern University School of Law, as a scholar, a teacher, a faculty member and most importantly, as an individual. His varied experiences as a state prosecutor and defense attorney added to the breadth of his knowledge, and he had a unique ability to impart this knowledge to his students. The following tributes, written by close friends, colleagues and former students, memorialize James Haddad. His absence at Northwestern University will be felt by faculty and students alike, but his spirit will live on as a lasting inspiration.