

CRIMINAL PROSECUTION OF DOMESTIC VIOLENCE

by

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The justice system's traditional view of woman battering

Historically, police and prosecutors have viewed battering as a family problem. The criminal justice system created a figurative "curtain of privacy" to shield husbands who beat their wives from public view, in the belief that the parties should be left to work out their "differences" privately. If outside intervention was appropriate, counseling was preferred over prosecution. It was only in the 1970's that the criminal justice system -- at the prodding of battered women and their advocates -- began to treat domestic violence like other assaults. By the 1980's, prosecutors in some jurisdictions had initiated special programs for domestic violence cases.

Why prosecute woman battering?

Even though every state now defines domestic assault as a crime, each chief prosecutor has virtually absolute discretion in setting prosecution priorities and policies for his or her office. Furthermore, each prosecution staff member exercises discretion in the handling of individual cases. Prosecutors are motivated to prosecute woman battering for different reasons.

1. Domestic violence is a crime and prosecutors can take effective steps to end it.

The criminal behavior at the heart of most abusive relationships is not unlike the criminal behavior which generates most of a prosecutor's case load. Domestic abuse takes many forms, but only behavior which is defined as criminal under state law can trigger prosecution. For example, when the batterer uses physical force or threatens to use such force, and it is clear that he can carry out the threats, the abuse is an assault. On the other hand, the emotional or financial abuse frequent in most battering relationships will not be prosecuted because it usually does not rise to the level of an otherwise defined crime. By focusing on assaultive behavior -- the most dangerous type of abuse -- prosecutors can create a safer community for women and save women's lives. It is not possible to guarantee the safety of any one victim, because it may still be necessary for her to maintain contact with her abuser during (and after) the prosecution. But the proper prosecution strategy can have a measurable effect on the community as a whole. Sophisticated approaches by prosecutors and law enforcement have reduced homicide rates in their communities. For example, the domestic homicide rate in San Diego was reduced by 59% from 1991 to 1993. (For an excellent discussion of

these approaches, see the Gwinn and O'Dell article included with this packet.)

2. Prosecutors take public sentiment into account when they set priorities.

Prosecutors are either elected or appointed to office. As public officials, many are responsive to the increasing public awareness of domestic violence and its terrible effects on its victims, including children. Other prosecutors, however, may reflect the negative attitudes about battering that some community members hold, such as blaming the victim for remaining in the abusive relationship. Public education programs which work to change these attitudes can have a positive impact on prosecution policies.

Principles or goals for prosecuting woman battering

A pro-active prosecution policy can make an important contribution to a community's efforts to end domestic violence. Aggressive and consistent prosecution of domestic violence:

1. shifts the burden of ending the violence from the victims to the community. It can serve to protect individual battered women and children who are the victims in specific cases.
2. makes batterers accountable to the community for their actions, not just to their partners or families. Requiring batterers to face consequences for their criminal acts forces them to be accountable. If the consequence is prosecution, the abuser is more likely to perceive the act as a crime against the community than as a "family matter." Batterers must learn that their efforts to pressure or force their victims to drop charges or testify in their favor are useless. This message is communicated only when all parts of the criminal justice system communicate it consistently and persistently.
3. can help restore the power and respect that the victim lost as a result of the battering. Because battered women face different problems from those of other victims of violent crimes, prosecutors must develop a certain sophistication in dealing with these cases. An effective approach ensures early contact with the victim, avoids blaming her for the violence, gives her information about the criminal court process and her role as a witness, and involves her in case decision-making. These actions break the isolation the victim feels and communicate to her that prosecution can help to end the violence in her life.

In sharp contrast, some prosecutor's actions can re-victimize the battered woman. One example is a blanket policy to hold battered women in contempt of court for failing to obey subpoenas to testify against their abusers. A battered woman's non-compliance with a subpoena is likely the product of her judgment that it is better not to aggravate the batterer by testifying. When she is punished for protecting herself, criminal prosecution of the batterer is not a future option for her.

4. sends a clear message to all members of the community that intimate violence is unacceptable. By taking an active interest in the response to these cases, and furthering that concern by allocating resources, the public acknowledges that this is no longer a private family problem.

While the goals achieved by aggressive prosecution are having positive results in many communities, it is equally important to recognize the limitations of this approach. Sometimes, creating this community ethic against domestic violence puts an individual battered woman in more danger despite the system's best efforts to protect her. This typically occurs because the batterer blames her for the prosecution. Therefore, prosecutors must maintain a balance between creating an intolerance for domestic violence in the community and doing what best protects an individual battered woman. Examples of ways in which prosecutors can protect individual victims include:

1. issuing subpoenas to all victims so that it is clear that they or their batterers cannot control the case;
2. imposing "no contact" orders when victims want them;
3. putting the defendant on supervision while the case is pending; and,
4. proving the case by using evidence other than the victim's testimony when she decides it is in her best interests not to participate in the prosecution.

Laws, policies or practices for domestic violence cases

Special laws and policies have been developed throughout the country in an attempt to effectively respond to criminal domestic assaults, including:

Prosecution. Victim/witness support and information services, whether provided by an outside agency or within the prosecutor's office or police department; "no drop" policies; prosecution by an experienced and specialized staff who handles a case from beginning to end; training for police on how to investigate cases so they can be proven without the victim's testimony. (The Mickish and Schoen article contained in the packet, is an excellent resource for

developing a comprehensive domestic violence prosecution unit.)

Police. Mandatory or pro-arrest laws or policies; a protocol which requires that police call an outreach worker from a battered women's program, or make some other referral to services for the victim immediately after arrest; investigative and report-writing protocols which streamline evidence collection and make convictions more probable even when the victim is unavailable to testify. (For further information about police response, see BWJP's packet by Jane Sandusky.)

Judges. Use of sentencing options which include educational programming for batterers; probation with conditions, including alcohol treatment, no further violence, or other protective conditions; enhanced penalties for repeat domestic violence offenses; and, jail time.

However, there are concerns about enhanced penalties and jail time. While appropriate in some cases, "more punishment equals more justice" is not necessarily true, either. Some battered women's advocates believe that laws which mandate jail time are problematic because batterers are less likely to plead guilty and because some battered women do not want their abusers to go to jail and are less likely to participate in the prosecution if a conviction means the batterer must go to jail.

Probation. Post-arrest interviews with the victim and others in order to gather information which the judge can use to issue no-contact orders or otherwise protect the victim during pendency of the case; various forms of diversion programs, whereby a batterer can avoid conviction if he successfully completes a batterers program and complies with conditions for the woman's safety, such as no further threats or violence.

However, some advocates oppose any form of diversion, and most advocates and prosecutors believe that diverting batterers before they enter guilty pleas is not advisable. Some are willing to consider post-plea diversion where the batterer's progress while on probation is closely monitored, and where the plea alone is sufficient to convict and sentence the batterer if he does not follow the conditions of the diversion program. The Family Violence Project (California) prosecution manual, "Domestic Violence: The Law and Criminal Prosecution," 2d ed, is particularly helpful in its analysis of diversion programs.)

What criminal justice reform is helpful?

In the past fifteen or twenty years battered women and their advocates have generated unprecedented reform of the justice system's treatment of domestic violence. During this period some important lessons have been learned about justice system reform and advocacy.

1. New laws and policies are not always the best or only solution to problems with the justice system.

Many battered women's advocates are disappointed when police or prosecutors disregard

laws requiring mandatory arrests or trainings which advocates believe would improve battered women's experience with the justice system. Two warnings are in order about legislative or public policy initiatives such as these.

First, for laws or public policies to have their intended effect, important groundwork must be completed. A good example of this is the experience with mandatory arrest policies. In Duluth, Minnesota, a mandatory arrest policy was implemented by the Duluth Police Department after careful planning and training. Before implementation, a coordinating group of police, prosecutors, the court, probation, and advocates determined how, under the new approach, each would respond in a manner that held batterers accountable and protected battered women. By contrast, in some states, a mandatory arrest policy was adopted as law before such a coordinated approach was developed. The criminal justice system was unprepared for it and the response to the new law was counterproductive. For example, the implementation of a mandatory arrest law, without the simultaneous requirement and funding of police training, resulted in arrests being made without adequate investigation by officers, creating cases that prosecutors could not take to trial. In other jurisdictions, mandatory arrest laws have resulted in an unwarranted number of dual arrests, that is, arrest of both parties without regard for whether one party acted in self-defense. The lesson from this experience is to make sure that, whenever possible, the implementation of laws and policies is a part of the strategy for criminal justice system reform.

Secondly, the passage of laws does not guarantee their active application or enforcement. Doing the groundwork discussed above helps to avoid this problem, but advocates must still remember that the legislative victory is not the final step. All prosecutors must be informed about the law, and some may have to be convinced that the new approach is necessary and that the changes it imposes are worth the investment of limited staff and resources. They may be unaware of the policies and practices of other prosecutors' offices which would assist them in developing their own response to domestic assaults. (The resource list which comes with this packet identifies successful programs and approaches.) Advocates can be an important source for such information. They can also insist that monitoring and evaluation of the reforms occur.

In conclusion, advocates must use their system advocacy skills in three ways so that law reform will be implemented:

- a. educating public officials about the new laws and their usefulness,
- b. providing training, background information and resources which can ease the transition, and
- c. following up to see if the new policy or law is achieving its desired effect, and

particularly if it is serving the goal of protecting battered women and their children. (*Seeking Justice: Legal Advocacy Principles and Practice*, a publication by the Pennsylvania Coalition Against Domestic Violence, is an excellent resource for advocates who want to do legal system reform work.)

2. For a domestic violence prosecution program to succeed, all participants in the system -- police, judges, victim advocacy services, and probation -- must play a role.

A prosecutor with the most aggressive domestic violence policy will not succeed without the support of the other justice system components. Each participant must understand their role and its importance. When police make good arrests and conduct good investigations, prosecutors are more likely to win a case. When a victim advocate provides a battered woman with information about prosecution and her role, the victim is more likely to participate as a witness. When judges give strong messages that domestic violence is unacceptable, both by their sentences and by their words from the bench, they reinforce the efforts of police and prosecutors. By contrast, when batterers "slip through the cracks" created by lack of follow-through or consistency by each component of the system, they become emboldened; they may now have reason to believe that even the vast power of the criminal justice system cannot stop them.

3. Each justice system component must work cooperatively with, not in isolation from, the others.

When legislation or policy has changed the criminal justice system response, innovations have occurred independently of one another. Changing one part of the system in this manner will not work. For example:

Mandatory arrest results in more cases on the prosecutor's desk, but does not affect what the prosecutor will do with the cases.

Police become frustrated when prosecutors dismiss their cases for lack of evidence, yet could be very receptive to suggestions from prosecutors on how to do a better investigation.

Judges or prosecutors may not act on notices from probation officers or batterers program administrators that batterers are not attending groups, because they may not understand the importance of imposing sanctions for even "minor" violations of protective orders or batterer group rules. Professionals who work with batterers and battered women can provide these important insights.

The most effective way to address this lack of communication and consistency is through a coordinated community effort in which all aspects of the criminal justice system agree to be accountable to carry out their agreed-upon roles. (The prosecution manual from Iowa, Domestic Abuse in Iowa, A Prosecution Manual, chapter 3, discusses ways in which this coordinated effort might be started. The article in this packet by Asmus, et al, contains an excellent overview of their community's approach, including prosecution and police guidelines. For further information, see the resource list at the end of this packet.)

4. The coordinated criminal justice system needs leadership.

Experience has demonstrated that the coordinated community approach does not happen on its own, and that some leadership must be provided. As the lead law enforcement officer in the jurisdiction, prosecutors can provide the impetus to get such a coordinating effort started. The involvement of prosecutors and judges in the coordinating effort helps to legitimize it.

Ideally, however, an agency which is not directly part of, or invested in, the criminal justice system should play the administrative leadership role. This is important for several reasons. Regardless of everyone's good will, it is difficult for court personnel who are subordinate to other personnel to address existing problems directly. How direct can a prosecutor be in identifying problems with a specific judge's rulings when s/he must appear before that judge repeatedly? Having an outside agency to serve as an intermediary in negotiating policy changes can often solve these problems more effectively. An outside agency which has as its mission the protection of victims can be the key to keeping the court system's focus on victim safety, a critical issue in domestic cases. Advocates have found that in coordinating efforts that lack this leadership, attention subtly shifts to the court system's needs or priorities, which may not always coincide with those of victims. The Domestic Abuse Intervention Program in Duluth, Minnesota, uses this model with great success. (The Asmus, et al., article in this packet describes how this model works.) Members of a coordinating group led by such an agency might include representatives of probation/pretrial release programs, battered women's service agencies, criminal court judges, public defenders, law enforcement, and batterers' program administrators.

Why is domestic abuse prosecution so challenging?

While domestic abuse is similar to other violent crimes, prosecutors find that these cases differ in a number of respects which make them especially challenging. Anticipating the difficulties can reduce the frustration of handling this case load.

1. Battered women may not behave like victims of other violent crimes.

Many attorneys are drawn to prosecution as a "helping profession." Vigorously prosecuting violent crime usually coincides with what the victims want -- justice, vindication, and restitution. While some battered women will also want prosecution to the fullest extent of the law, many do not. Because of the existing or past relationship, the victim knows that the batterer will see the prosecution as a hostile act by the victim; he will retaliate against her in some fashion. And despite the best intentions of police and prosecutors, in the battered woman's eyes, the system will not be able to protect her from this retaliation. Prosecution may also threaten the battered woman's financial security if she is dependent on the batterer. Therefore, many battered women are unwilling to participate in the prosecution, and may even take steps to obstruct it.

Various steps in the criminal process can generate victim hostility. Arrest of a batterer is not necessarily what the victim wants; she may simply want the police to remove her batterer from the home for the night. Mandatory arrest is the appropriate societal response, but it may create a class of unwilling or absent victim/witnesses. This is why knowing how to successfully prosecute a case without the victim's testimony is so important.

The slow pace of the criminal process exacerbates the problem.

By the time the case gets to pre-trial conference, usually months after the arrest, the battered woman likely has put the arrest behind her and has gone on with her life. A trial and possible imprisonment of the batterer seems to the battered woman to risk her personal resolution of the incident, however fragile or temporary.

The differences between a criminal domestic violence prosecution and the process of obtaining a protection order in civil court further illustrates how the justice system itself can affect a victim's attitude toward the case. Victims often have less trouble testifying about an abusive incident in civil court than in criminal court for two reasons. First, the victim, not the state, decides whether or not to file for a civil protection order and the best time to do so. Second, her testimony about the abuse is heard within days of her filing for the civil protection order, while in criminal court it may be months later.

The different purposes of criminal prosecution and civil protection orders can cause battered women to view each very differently. Criminal court looks to punish for a prior

incident, but civil protection orders, by contrast, focus more on preventing further abuse, with jail only if the batterer abuses again. The victim most likely does not want the abuser to be punished; she just wants the abuse to stop. The civil protection order warns him that there will be consequences if he does not end the abuse.

2. Prosecutors often feel thwarted in their goal to hold the batterer accountable for his actions when the battered woman is unavailable as a witness.

One goal of prosecution is to make the defendant accountable to the community for his crime; getting a conviction and administering punishment accomplish this goal. Most violent crime victims are eager to cooperate with the prosecution of the case, and prosecutors come to expect the same of battered women. A battered woman's reluctance is often misunderstood by prosecutors, judges, and juries who come to believe that the victim doesn't care and that they shouldn't bother to proceed or convict. (Ironically, battered women who are eager witnesses are sometimes disbelieved and suspected of being vindictive or of seeking an edge in a divorce or custody battle.) When a battered woman does not want the case to go forward, for reasons discussed above, the prosecutor feels that the main (or sole) proof of the case is lost. No prosecutor likes to dismiss cases, yet they may feel that is their only option.

Three measures can be taken to avoid problems related to victim unavailability. First, although prosecutors must always anticipate that a victim will become unavailable, some victims will cooperate with prosecution, and prosecutors should try to gain victim's support of the process. One key to battered women's participation is early contact with victim advocates who provide her with information and support about domestic abuse, the criminal court process, and her role in it.

Second, it is important for all system personnel to understand victim reluctance; it is not intuitive. To accomplish this, system personnel (police, prosecutors, and judges) can receive training. Similarly, expert witnesses can explain victim reluctance for juries when the battered woman does not testify or recants. The prosecution manuals from Iowa and California each contain a good discussion of how prosecutors can use expert witnesses to explain why victims recant or are reluctant to testify, and the Schroeder article is an excellent collection of case law on the subject and contains a careful analysis of the limits on the prosecution's use of such experts.

Thirdly, working together, police and prosecutors can develop proof of the cases so that they can proceed to conviction without the witness's testimony. Other serious crime is

regularly prosecuted without eyewitness testimony: murder and burglary cases, for example. Law enforcement's investigative protocol should require that officers take statements from the defendant and the victim. Both may be admissible over hearsay objections. Emergency communications, such as 911 tapes, are effective pieces of evidence, as are photos of the victim, the defendant, and the scene of the crime. (The Gwinn and O'Dell article explains how police and prosecutors can work together to get convictions without the victim's testimony; and the article by Asmus, et al, discusses other evidentiary issues which are likely to arise in domestic abuse prosecutions.)

3. Prosecutors must be more sophisticated in their work with domestic violence victims.

Understandably, prosecutors get frustrated when their good intentions are rebuffed by battered women. Through experience and understanding, prosecutors can learn to expect such a reaction and make accommodations for it. Prosecutors should be prepared to take a variety of approaches in their dealings with victims, and all of these actions should be taken for the purposes of helping to restore some of what she has lost by being battered, and letting her know that prosecution can help to end the battering. Three such approaches are:

Approach 1. Try to establish a "partnership" with the battered woman. For example, it is not uncommon for battered women to appear in court the morning after the assault, asking that the charge be dropped. Rather than be annoyed, the prosecutor can view this as an excellent opportunity to make early contact with the battered woman and to establish a good rapport. We know from our experience that meeting with a battered woman early in the criminal court process can result in more women participating in the process. (The Kerry Wangberg article in Prosecutor, included with this packet, suggests this approach as a way to reduce case attrition.) The "unwilling witness" problem can be avoided by taking the time to explain the steps of the criminal system process to her. She should also be provided with information about community resources which can provide her with support or protection: such as shelter, public assistance, or seeing a victim advocate; and the office should facilitate her contact and use of these services. The prosecutor, ideally with a victim advocate, should always work to find common ground with the victim at this early stage of the proceedings. A battered woman may think that the prosecutor expects her to "leave the batterer," as so many others have probably expected of her. The prosecutor can make it clear that the decision about the relationship is her business, not the prosecutor's. The message to convey is that both she and the prosecutor share the goal of ending the violence in her life. The criminal process gives the batterer the opportunity to admit his guilt.

The court can assume the responsibility that she has shouldered alone of holding him accountable for changing his behavior. Court-ordered programs for batterers can provide him the opportunity for "counseling" which she likely has hoped he would pursue. As the battered woman and prosecutor explore common ground, the goal should be to "agree to disagree" when necessary. For instance, if a prosecutor believes that jail time is appropriate and the battered woman disagrees, the prosecutor can tell the victim that she can provide independent input about case disposition to the judge at time of sentencing by means of victim allocution or a victim impact statement.

Approach 2. Subpoena the victim to testify in every domestic abuse case. Subpoenas are useful because they shield the victim from pressure from the batterer; she can tell him that it is not her decision to testify. Some battered women will testify truthfully after they get a subpoena and receive support and information that it is the state, not they, who "press charges." Subpoenas absolve her of the burden of deciding whether or not the case should proceed. Many battered women express relief when told that they cannot have the charges dropped and that the decision to testify is not theirs to make. But not all battered women will testify; many decide that it is best for their safety or situation not to testify, or to lie under oath. These women would rather face contempt of court or a perjury charge than the wrath of their batterer. For this reason, forcing a battered women to comply with a subpoena is not advisable as a general rule. When she is sanctioned for disobeying a subpoena, the prosecutor fails to meet the purpose of criminal justice intervention in three respects. First, the batterer will likely not be held accountable because the prosecutor's actions foreclose future arrest or conviction. Second, battered women are neither protected nor is their sense of power and control over their lives strengthened. Lastly, no situation is as ironic as when a batterer is freed because the victim refuses to testify, and the victim ends up in jail for disobeying a subpoena. The public response to this "justice" only results in ridicule and greater disrespect for the system.

Approach 3. Proceed with the case without the victim's testimony if she becomes an unavailable or hostile witness. Many battered women will testify when they have information and support throughout the process. However, since not all do, the prosecutor must be prepared to proceed with every case without victim testimony. If the police and prosecutor know the reasons why victims do not testify, they should be prepared -- in every case -- for the eventuality that she may become absent or hostile at any time. Therefore, police and prosecutors should build their cases so that they can be proved without the testimony of the battered woman. When

necessary, expert testimony can be used to explain the victim's absence or hostility. (The Gwinn and O'Dell article is an excellent resource for police and prosecutors who wish to develop this approach. The Iowa Prosecution Manual, chapter 5, contains an in-depth discussion of the complexity of victim issues in domestic violence cases.)

4. Prosecutors must use new measures of "success."

If prosecutors cling to conviction or dismissal rates, or the gratitude of a cooperative witness as measures of success in domestic abuse work, they may set themselves up for failure. Prosecutors can get convictions in these cases if they use special techniques for working with victims or investigating and developing evidence. But another measure is more indicative of the success of prosecutorial intervention into domestic violence -- that battered women feel that the criminal justice system is available to them if and when they need to use it in the future. This is accomplished, whether or not there is a conviction, when battered women receive support and information throughout the process and when they are not punished for being absent from the process or for being hostile toward it.

How battered women's advocates and prosecutors can work together successfully.

Battered women's advocates and prosecutors are relatively new colleagues. What has brought them together are their shared beliefs that battering must be treated as a serious crime and that the appropriate response by the criminal justice system can make an effective contribution to its eradication. Any new association, however, has its potential pitfalls. Learning about and respecting each other and seeing the world from each other's viewpoint are keys to developing a productive working relationship.

Developing an understanding of each other's views on the following points may assist in accomplishing this goal:

1. Motivation

While many battered women's advocates have professional training, the work that the advocates do arises from a grassroots movement that has effectively led the social effort to confront violence against women. Holding a degree is less important than peer training and a philosophy of empowerment.

Individual advocates may be motivated by their feminism or by their own experiences with violence. On the other hand, prosecutors are lawyers who may or may not view prosecution as a "helping profession." As long as prosecutors take domestic abuse seriously, getting agreement on the reason to do so is not critical.

2. Respect for each other's distinct role

Advocates and prosecutors, eager to capitalize on their commonalities, may try to get each other to do the other's job. Prosecutors may want advocates to act like paralegals in domestic violence cases, by doing factual investigations or communicating with the victims. On the other hand, battered women's advocates may expect prosecutors to be advocates for battered women. Expecting that each will adopt the other's role can be self-defeating. For one thing, it is unlikely to occur, but more importantly, it should **not** occur. While they may share goals, the two groups of professionals have very different purposes and duties, which they must come to understand and respect. In addition to protecting crime victims, prosecutors must also protect the constitutional rights of those accused of crime. Prosecutors cannot go forward with a case which lacks sufficient evidence to prove that the defendant is guilty; belief in the case or cause, or a desire to help, is not enough.

Since advocates may not understand legal concepts like "exculpatory evidence" or "due process," it is important for prosecutors to explain them. Informed advocates are much more effective in their roles. Advocates who do criminal justice work should become familiar with how the system works. They can ride with police or watch dispatchers at work to observe their jobs and learn the language. Prosecutors must remember that victim advocates have confidentiality obligations and are not free to share information about victims with prosecutors without the permission of the victims. They must come to respect the complexity of advocacy for battered women: on the same day, a victim advocate may aggressively urge the criminal justice system to be more responsive to a battered woman, while on the very next case, work with and support a battered woman who does not want her case to be prosecuted.

3. Priorities

Advocates are specialists who focus on one area of crime. Prosecutors, by contrast, are usually generalists and are under public pressure to deal with other important crime problems -- drugs, sexual assault, child abuse, guns, gangs. Prosecutors who do not place domestic abuse at the top of their priority list can still accomplish much to make battered women in the community safer.

4. Measurements of success

Consistent with their philosophy of empowering battered women, advocates want the criminal justice system to be part of the entire community's response to domestic abuse, available to battered women as one means of making her safe.

Furthermore, advocates want the system not to further punish a battered woman, even if she does not want to participate in the criminal process. For advocates, the outcome of the case is not always as important as how the battered woman experienced the process. Prosecutors, on the other hand, look to traditional outcomes to measure success -- victims who help get convictions, batterers who stop using violence. Prosecutors and advocates should be open to discovering new success measures in this special class of cases.

5. Approach to a "case" and management of case loads

For advocates, helping battered women to be self-determining and to engage in critical decision making is more important than agreeing with the decision the woman makes. While an advocate may not agree that a battered woman should return to an abuser, that decision is not viewed as a "failure". The advocate may feel heartened that the woman is stronger and more clear about what to do if battering occurs again. Because of the nature of their work, prosecutors have a more narrow focus -- for instance, they look at incidents, not relationships. Going back to an abuser may mean the prosecutor cannot "win" the case and feels disheartened knowing that the deterrent possibility of prosecution may be lost. Holding a woman in contempt for not testifying against her batterer is consistent with what the prosecutor may believe must be done -- prove the case. For advocates, this action closes prosecution as a future option for the woman.

6. Loyalties

Prosecutors take an oath to uphold the laws of the state, and represent the "people" of the state in court, not individual victims. Prosecutors are not the individual attorneys for battered women and do not necessarily follow the victim's wishes in deciding how to handle the case. On the surface, advocates' loyalties can appear divided. On one hand, as part of a "system's advocacy" initiative, they may urge the prosecutor to adopt an aggressive domestic abuse prosecution policy. However, consistent with that position and with their philosophy that battered women must be self-determining, in doing "individual advocacy" on a particular case, they may forcefully represent the interests of a woman who does not want her case to proceed.

7. Language/vocabulary

The feminist vocabulary of advocates, such as "empowerment," "power and control," "male privilege," may alienate some prosecutors. Advocates need not give up the concepts behind these words, but might consider using vocabulary which will not create automatic barriers to meaningful dialogue.

Prosecutors, police and judges may not be aware of their own use of jargon ("vertical prosecution," "allocution") or they may make fun of therapist or social worker language -- "sharing feelings," for example. Prosecutors should be sensitive to using a language which carries meaning both for victims and advocates, and which demonstrates respect for their positions.

8. Approaches to the work.

In their work with battered women, advocates use conversation, images, and groups. Prosecutors are not necessarily trained in active listening or counseling skills, and rarely have time (or the need) to develop that kind of relationship with victims. Prosecutors are much more concrete -- their need to focus on "proof" means that they will work primarily with written reports or witness statements, pictures, or other documents.

What have we learned from research about criminal justice system responses to battering?

Prosecutorial and law enforcement policies are often influenced by social science research. Yet, efforts to evaluate police or prosecutor response to domestic violence have not always reflected how battered women experience the criminal justice system. Furthermore, the research may have contributed to a fragmented response by the system.

A good example is the Minneapolis study conducted by the Police Foundation which focused on arrest as a preferred response to domestic abuse. The study found a lower recidivism rate when police arrested the batterer compared to when they mediated or ordered a cooling off period, which led many legislators and other policy makers to adopt mandatory or pro-arrest practices. When the same researchers replicated the study in Milwaukee 8 years later, they found a recidivist rate of up to 44% among those batterers who were arrested, which led them to urge repeal of mandatory arrest policies.

Such research provides unsuitable guidance to policy decisions because it fails to evaluate the whole system response. Isolating one intervention and attempting to link it to future battering fails to take into account that the observed results may have been caused, not by the studied intervention, but by the rest of the system's actions or lack of actions. For example, the Minneapolis research focused solely on arrest as a deterrent without considering whether the prosecutor's or judge's subsequent handling of the case had any impact on the batterer's behavior. Similarly, in the Milwaukee study, only 37 of the 807 men arrested were even charged with assault. Contrary to the Milwaukee researchers' conclusion that arrest encouraged assault, perhaps the prosecutor's

and court's failure to follow through on the arrests contributed to the recidivism rate because batterers felt that they had "beat the system."

Perhaps the greatest shortfall of this research is its reliance on a numerical counting of certain observable and quantifiable factors to explain the complex and diverse dynamics of battering, to the exclusion of battered women's lived experiences. To be most useful to the development of public policy, research design and interpretation should involve significant numbers of battered women. Neither the Minneapolis nor the Milwaukee study did so. (For an excellent discussion of the public policy implications of domestic violence criminology research, see the Lisa Lerman article, "The Decontextualization of Domestic Violence," from the Journal of Criminal Law and Criminology, included with this packet.)

Review of the Literature on Prosecution of Domestic Violence

by

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Published articles about prosecution response to domestic violence are found in both legal and social science journals. The pieces can be grouped into five general topics: proper prosecution policies, use of prosecutorial discretion, coordinated criminal justice system response, research used to develop policies, and evidence or other trial issues. In addition, at least four manuals for prosecutors have been written which combine background information about domestic violence, proper prosecution policy, evidence and trial considerations, and other practical advice.

Prosecution policies. The articles propose or discuss innovative policies for prosecuting domestic violence cases. Most policies are designed to reduce case attrition; these include vertical prosecution, victim/witness support programs, no-drop policies, the issuance of subpoenas to every victim, and protection of the victim from batterer pressure (Lerman 1982; Balos and Gomez 1990; McGillivray 1987; U.S. Dept. of Justice 1980; Waits 1985). Some of the most recent pieces go further by making practical proposals for innovative techniques and policies, such as early intervention by prosecutor/advocate teams (Wangberg 1991), and proving the case without the victim's testimony (Gwinn and O'Dell 1993; Wangberg 1991). The articles also identify the difficulties which these cases present. One of the earliest pieces, which reports on special programs developed with the support of the U.S. Department of Justice Law Enforcement Assistance Administration best describes the obstacles to prosecution. These obstacles include the belief by some prosecutors that domestic violence is not a serious crime, and belief that prosecution is a waste of time because most victims request that charges be dropped (Lerman 1982). These difficulties are almost universally recognized in the literature, and the specialized prosecution policies suggested are designed to alleviate them.

Prosecutor discretion. The considerable prosecutor discretion that is exercised in domestic violence cases is described in several articles (Lerman 1982; Rafter and Stanko 1982; Schmidt and Steury 1989; Adams 1990). While having goals or policies can alleviate improper use of discretion, prosecutorial goals for domestic violence cases often conflict with one another, which further complicates decision-making. For example, in one case, victim safety may be best served by prosecuting, even against the victim's wishes; while in another case, prosecuting may place the victim in further jeopardy (Ellis 1984). When a prosecutor proceeds with a case against a victim's wishes, the important goal of not revictimizing a battered woman may be violated in the attempt to set a clear community standard that domestic violence is unacceptable. This complexity can be dealt with if prosecutors take steps to involve victims in decision-making and if they change their measure of success in domestic violence cases from higher conviction rates to greater openness of the system to victims, when and if they need it in the future (DAIP 1989).

Research. Social science research has guided criminal justice policy development for domestic violence cases. As a result of the widely cited Police Foundation study in Minneapolis, many jurisdictions adopted mandatory or pro-arrest policies. Yet, in replication studies the finding that

arrest served as a deterrent was less conclusive, leading some to decide that mandatory arrest was an ill-advised public policy (Sherman 1992). Other research supports giving victims limited control over prosecution decision making (Ford 1991). The methodology and use of social science research to inform domestic violence public policy has come under sharp criticism by scholars and battered women's advocates alike. This critique focuses on the quantifiable methodology used by the researchers, the failure to deal with the whole system response, that is, whether the prosecutor's failure to proceed with the case caused increased recidivism, (Lerman 1992) and on its failure to involve battered women's lived experiences in designing the study or interpreting the data (Ritmeester and Pence 1992; Bowman 1992).

Coordinated community response. According to some studies, criminal justice reform directed at domestic abuse cases is most successful when each component of the system works in concert with others -- police, pretrial, prosecution, victim services, judges, probation (Mickish and Schoen 1988; Gwinn and O'Dell 1993; Asmus, et al. 1991; DAIP 1989). It is also suggested that the larger community beyond the criminal and civil justice system must take a role in addressing domestic violence, such as by providing shelter and counseling services for victims (Jaffe 1986).

Evidence and trial considerations. Much has been written about battered women's syndrome as a defense used by women who kill their abusers (Schuller 1992). However, some prosecutors are beginning to use expert testimony to explain perplexing behaviors of some battered women, such as recanting statements to police on which charges were based (Schroeder 1991; Sonkin and Fazio 1987). In addition, unique evidence and trial issues include: having formerly battered women on juries (Jung Chang 1988); conduct and character evidence (Mele 1984); use of hearsay (Asmus et al 1991); and building a solid case without victim testimony (Gwinn and O'Dell 1993).

REFERENCES

- David Adams, Identifying the Assaultive Husband in Court: You Be the Judge, 13, Response to Victimization Women & Children, March 1990.
- Mary E. Asmus, Tineke Ritmeester, & Ellen L. Pence, Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships, 15 Hamline L. Rev. 115 (1991).
- Beverly Balos & The Honorable Isabel Gomez, Judicial Procedures in Misdemeanor Domestic Assault Cases- A Model Policy, 10 N. Ill. U. L. Rev. 259 (1990).
- Cynthia Grant Bowman, "The Arrest Experiments: A Feminist Critique," 83 Journal of Criminal Law and Criminology 201 (1992).
- Te Jung Chang, Battered Women are Not an Identifiable Group Whose Representation is Essential to a Fair Jury Trial (Survey: Women and California Law) 18 Golden Gate U.L. Rev. 600 (1988).
- Domestic Abuse Intervention Project, The Justice's System's Response to Domestic Assault Cases: A Guide for Policy Development, Duluth, MN (1985).
- Jane W. Ellis, Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue, 75 J. Crim. L & Criminology 56 (1984).
- David A. Ford, Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships, 25 Law & Soc'y Rev. 313 (1991).
- Casey G. Gwinn, & Sgt. Anne O'Dell, Stopping the Violence: The Role of the Police Officer and the Prosecutor, 20 W. St. U. L. Rev. 297 (1993).
- Peter Jaffe, et al., The Impact of Police Charges in Incidents of Wife Abuse, 1 J. Fam. Violence 37 (1986).
- Lisa G. Lerman, Prosecution of Spouse Abuse, Center for Women's Policy Studies, (1982).
- Lisa G. Lerman, The Decontextualization of Domestic Violence, 83 J. Crim. L. & Criminology 217 (1992).
- Anne McGillivray, Battered Women: Definition, Models and Prosecutorial Policy, 6 Can. J. Fam. L. 15 (1987).
- Susan P. Mele, Major Evidentiary Issues in Prosecutions of Family Abuse Cases, 11 Ohio N. U. L. Rev. (1984).
- Jan Mickish & Kathy Schoen, Domestic Violence: Developing and Maintaining an Effective Policy,

21 Prosecutor Winter (1988).

Nicole H. Rafter & Elizabeth A. Stanko, Judge Lawyer Victim Thief, (1982).

Tineke Ritmeester and Ellen Pence, A Cynical Twist of Fate: How Processes of Ruling in the Criminal Justice System and The Social Sciences Impede Justice for Battered Women, 2, Review of Law and Women's Studies, 255 (1992).

Janell Schmidt & Ellen H. Steury, Prosecutorial Discretion in Filing Charges in Domestic Violence Cases, 27 Criminology 487 (1989).

Lawrence Sherman, et al., The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment, 83 Journal of Criminal Law and Criminology, 137 (1992).

Joan M. Schroeder, Note, Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer, 76 Iowa L. J. 553 (1991).

Regina A. Schuller & Neil Vidmar, Battered Woman Syndrome Evidence in the Courtroom, 16 Law & Hum. Behav. 273 (1992).

Daniel Sonkin and William Fazio, "Domestic Violence Expert Testimony in the Prosecution of Male Batterers," in Domestic Violence on Trial, 218-236 (Daniel J Sonkin ed. 1987).

Kathleen Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, 60 Wash. L. Rev. 267 (1985).

U.S. Department of Justice, Law Enforcement Assistance Administration, Prosecutor's Responsibility in Spouse Abuse Cases, (1980).

Kerry G. Wangberg, Reducing Case Attrition in Domestic Violence Cases: A Prosecutor's Perspective, 24 Prosecutor Winter, at 8, (1991).

Review of Prosecution Manuals

by

Linda A. McGuire, Esq.

Linda A. McGuire, *Prosecution of Domestic Violence in Iowa: A Prosecution Manual*, 2nd ed., Prosecuting Attorneys Training Coordinator Council, Des Moines, IA, 1994.

This manual is structured much like the Family Violence Project's manual, with emphasis on Iowa statutory and case law. Chapters of general applicability include how to develop a specialized prosecution and policies using the coordinated community approach developed by the Domestic Abuse Intervention Project in Duluth, Minnesota. Sample prosecutorial standards for case screening, dismissal, sentencing, continuances, and other steps at which prosecutors exercise discretion are included. Two chapters on the investigation and trial of domestic violence cases contain practical information and checklists, including "body maps" for officers to use in recording injuries, and a chart illustrating how law enforcement officers should investigate a case where a "primary physical aggressor" concept is part of the mandatory arrest law of the state. Helpful appendices include sample prosecution policies and police protocols, standardized forms for pleadings and orders, and background articles on mandatory arrest and batterers programs.

Order from: Prosecuting Attorneys Training Coordinator Office, Hoover State Office Bldg., Des Moines, IA 50319, Ph) 515-281-5428, \$30.00

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Domestic Violence: A Manual for Pennsylvania Prosecutors, Joint Task Force: Pennsylvania District Attorneys Institute and the Pennsylvania Coalition against Domestic Violence, 1992.

An excellent discussion of relevant topics: case law and statutes (Pennsylvania), the prosecution process, victim issues, and background information on domestic abuse. The manual contains a model prosecution protocol which can be adapted for use in district attorneys' offices. The manual stresses victim safety as an integral goal of prosecution and encourages cooperative working relationships with battered women's advocates. Appendices include articles on lethality assessment and model domestic violence intervention systems.

Order from: The Pennsylvania District Attorneys Institute, 2001 North Front St., Building #1, Suite 210, Harrisburg, PA 17102, (717) 238-5416

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Nancy K.D. Lemon, Theresa Marks, Minouche Kandel, Domestic Violence: The Law and Criminal Prosecution, 2nd Ed., Family Violence Project, San Francisco, CA, 1991.

Case law and statutory references are to California law, but this manual's treatment of policies and practices is excellent and would be a good guide to those prosecution or victim advocacy programs who want guidance on setting up special prosecution programs. The manual contains checklists on such matters as jury selection, victim interviews, investigation, and evaluation of diversion programs and batterers' programs. One chapter covers special issues which arise in dealing with victims of domestic violence, such as how to handle victim's requests to drop charges, subpoenaing victims and how to respond when the victim disobeys the subpoena, and provides background information about the dynamics of battering and its contribution to the way in which victims approach prosecution. Special evidence issues which arise are treated in separate chapters on expert testimony, character and conduct evidence, and hearsay testimony. Helpful appendices include articles by Anne Ganley and Geraldine Stahley on perpetrators and victims, respectively; and by Agtuca on dynamics commonly displayed by the defendant and the victim-witness in criminal domestic violence cases.

Order from: This manual is out-of-print and the statutory information needs updating. However, if you wish to order some of the more general chapters, you can order them for the cost of copying from BWJP, 800-903-0111, ext. 1.

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