

**Standardized Training and Investigatory Protocols
in Domestic Violence**

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Fall 2004

ABSTRACT

A traditional reliance by prosecutors on victim testimony has hindered the successful prosecution of many cases of domestic violence. Because the victims remain vulnerable to manipulation and intimidation by their batterers, they frequently either refuse to testify or disappear altogether, often forcing the prosecutor to drop the charges, perpetuating a cycle in which a cycle in which the victim believes the system has failed to protect her, the police and prosecutors feel betrayed by the person they were trying to protect, and the batterer feels vindicated by the inability of the system to control his behavior.

The City of San Diego responded to the situation in 1986 with an integrated approach to the prosecution of domestic violence. The new approach relies on the gathering and utilization of circumstantial evidence to such a degree that most of their prosecutions no longer require the cooperation or testimony of the victim, removing undue pressure to testify and virtually eliminating any undue influence the batterer may have had on his prosecution. Florida has adopted similar reforms, but used the statutory process rather than administrative reorganization. Other jurisdictions have begun to adopt this approach, but it has not yet been implemented at the national level.

Constitutional restrictions on federal action limit the ability of Congress to act directly, but a uniform national policy could still be established through adoption of model legislation tied to federal appropriations. The Wyoming legislature has taken a few steps toward reform of domestic violence prosecution, most notably by statutes mandating the education of its citizens and improved training of the law enforcement community.

OUTLINE

Traditional Investigation and Prosecution of Domestic Violence

- Low priority of domestic violence prosecution
- Low expectation of successful prosecution
- Unreasonable reliance on victim testimony

San Diego's Experience with Standardization and Integration of Domestic Violence Prosecution

- Increased integration of resources
- Increased reliance on circumstantial evidence
- Decreased reliance on victim testimony
- Increased conviction rate

Florida's Statutory Approach

- Similar to San Diego Model in End Result
- Statewide in Scope

Grayson County's Model Protocol

- Comprehensive Model, Integrating Entire Support System
- Same Emphasis on Circumstantial Evidence

Role of the Federal Government

- Potentially Able to Mandate Uniform System Nationwide
- Constrained Somewhat by Constitution
- Could Exert Influence Through Model Laws and Contingent Funding

Wyoming's Efforts to Standardize

- Legislative Action
- Limited, but a good start

Conclusion

INTRODUCTION

The nation's traditional response to the problem of domestic violence has largely been ineffective. Lack of sufficient expertise, training, and motivation in the collection of circumstantial evidence has placed an unreasonable burden on the victim to carry the case through to conviction with little more than her verbal testimony; it is not surprising that many of these women refuse to testify, either through misplaced loyalty to the batterer, or undue pressure from him, allowing the defendant to control the outcome of his own prosecution through the power and control he continues to exert over his victim. The frequent failure to convict under these circumstances can lead to a feeling of futility on the part of the victim, the police, and the prosecution, which leads in turn to a reluctance to report, investigate, or zealously prosecute further acts of domestic violence, a trend that is especially disturbing in light of the high rate of homicide in households with repeated occurrences of domestic violence.

Some jurisdictions have experimented with integration and standardization of domestic violence investigation and prosecution, with encouraging results. San Diego has used an administrative approach, Florida has passed comprehensive legislation, and Grayson County, Texas has developed a model protocol. Wyoming has responded with limited legislation, focused mainly on introductory training of peace officers and public education focused primarily upon victims of domestic violence. All of these approaches have their respective shortcomings, but what is most encouraging is their common strength; all emphasize on a coordinated approach to prosecution of domestic violence, placing the responsibility squarely in the hands of the prosecutor, preventing

revictimization by eliminating the coercive influence that the batterer can bring to bear by pressuring his victim not to testify.

BACKGROUND

According to the FBI, 28% of all female murder victims in the United States were slain by husbands or boyfriends.¹ Of these fatalities, most had a documented history of domestic violence.² Domestic violence has been treated differently from other violent crimes, both in public perception and in the response of law enforcement.³ Traditionally, police responding to a domestic violence call have been expected to act more as social workers or counselors than as enforcers of the law,⁴ and are often instructed not to arrest the assailant, out of concern that arresting a man in his own home would only aggravate the situation, possibly endangering the officers themselves.⁵ Dispatchers have screened calls from battered women, responding only to those who appeared to be in imminent danger;⁶ successful prosecutions have been rare, even in cases of multiple arrests, and district attorneys have been unwilling to prosecute at all if the victim would not cooperate,⁷ typically due to the lack of any substantial evidence other than the victim's

¹ FBI Report, *Crime in the United States: 1994*, at 17 (1995).

² Florida Governor's Task Force on Domestic and Sexual Violence, *Florida Mortality Review Project*, at 46-48 (1997).

³ ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT, 3-13 (1987).

⁴ Casey G. Gwinn and Sgt. Anne O'Dell, *Symposium: Domestic Violence and Child Abuse: Stopping the Violence: The Role of the Police Officer and Prosecutor*, 20 W. ST. U.L. REV. 297, 298-99 (1993).

⁵ Joan Zorza, *The Criminal Law of Misdemeanor Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 48-50 (1992).

⁶ Id.

⁷ Casey G. Gwinn and Sgt. Anne O'Dell, *Symposium: Domestic Violence and Child Abuse: Stopping the Violence: The Role of the Police Officer and Prosecutor*, W. ST. U.L. REV. 297, 298-99 (1993).

own testimony.⁸ Because organizational imperatives drive officers to expend their greatest efforts toward those cases that are most likely to lead to conviction, police officers have traditionally placed a low priority on domestic violence incidents.⁹ Because charges were routinely dropped if the victim recanted, prosecution has typically been presented to the victim as an option under her personal control, leading police to believe that their efforts were wasted, and frequently blaming the victim for her circumstances.¹⁰

This environment has made domestic violence profoundly different from that of other crimes. The decision to prosecute has been left to the victim, who in turn is vulnerable to the threats and manipulations of her assailant, essentially placing the decision to prosecute in the hands of the perpetrator, rather than the state. Under these circumstances, a conviction can become so unlikely that many prosecutors decide that their efforts would bring greater benefits elsewhere.¹¹ The situation has been difficult to change because prosecutors are reluctant to pursue cases that are so lacking in evidence, and the police tend not to collect evidence or otherwise investigate a case when they believe that the district attorney is unlikely to prosecute.¹²

An increasing public concern over domestic violence, combined with an increasing frustration among prosecutors, has begun to move domestic violence away from its traditional low-priority status, but the fact remains that most prosecutors have continued to rely on the testimony of victims whose cooperation is unreliable, either through fear or

⁸ Id.

⁹ EVE S. BUZAWA, THOMAS L. AUSTIN, AND CARL G. BUZAWA, THE ROLE OF ARREST IN DOMESTIC VERSUS STRANGER ASSAULT: IS THERE A DIFFERENCE?; DO ARRESTS AND RESTRAINING ORDERS WORK? 150, 153-154 (E.S. Buzawa & C.G. Buzawa, eds. 1996).

¹⁰ Casey G. Gwinn and Sgt. Anne O'Dell, *Symposium: Domestic Violence and Child Abuse: Stopping the Violence: The Role of the Police Officer and Prosecutor*, 20 W. ST. U.L. REV. 297, 298-99 (1993).

¹¹ Id.

¹² Id.

misplaced loyalty to their batterers.¹³ A growing number of district attorneys have begun to shift their efforts from reliance on victim testimony toward gathering of circumstantial evidence, making the prosecution much less reliant on the testimony of a single witness. However, adopting this strategy may shift the prosecution's reliance to a police department that is poorly trained in the investigation of domestic violence.¹⁴ The answer in a growing number of jurisdictions has been to the adoption of interagency training and investigation protocols.

SAN DIEGO

In 1986, San Diego's homicide rate was near the national average, with about a third of these resulting from domestic violence. As in most of the United States, the San Diego District Attorney spent very little time or effort on domestic violence cases.¹⁵ Because charges were not filed if the victim failed to cooperate, very few cases remained for prosecution, and most were plea-bargained to a misdemeanor charge, such as disturbing the peace or creating a public nuisance.¹⁶ That summer, following a high-profile domestic violence case involving a local judge, the City Attorney's office and the Police Department evaluated and revised their existing policies, shifting the decision to file charges from the victim to the prosecutor and eliminating plea bargaining.¹⁷

Under the previous system it was common for a batterer to continue to wield a great deal of power over his victim, even after arrest. Batterers would frequently become

¹³ Id. at 310-11.

¹⁴ Id. at 298-99.

¹⁵ Id. at 299.

¹⁶ Id.

¹⁷ Id.

more violent and aggressive toward their victims in an effort to force the victim to drop the charges, so the city attorney made the decision to shift all responsibility for the case away from the victim, virtually eliminating any coercive control the defendant may have had over the case.¹⁸ Placing control of the case in the hands of professionals also made it more likely for a judge or jury to focus on the defendant's actions, rather than those of the victim.¹⁹ Also, a victim is generally less hostile toward the prosecution when she understands that her input is valued at every step of the process, but she is not responsible for the ultimate decision to prosecute.

In order for the strategy to succeed, the city needed to do a more thorough job of investigation than it had done in the past. By 1993 the City Attorney's Domestic Violence Unit had expanded from a single part-time prosecutor to 21 full time staff members, and the SDPD Domestic Violence Unit grew from one sergeant in 1986 to over 27 officers.²⁰ Specialized training and investigation protocols were implemented for police, health care workers, and behavioral therapists.²¹ A full-time sergeant now serves as Domestic Violence Coordinator, and is responsible for training patrol officers in the new techniques.²² After the initial contact, detectives follow up within 48 hours of the incident, and ask leading questions which focus on the attacker's actions rather than those of the victim. If the victim is not cooperative, the detectives focus their investigation on proving the case without her testimony.²³ Finally, because early, aggressive prosecution at the first sign of conflict has proven effective at preventing escalation, a greater

¹⁸ Id. at 310-11.

¹⁹ Id.

²⁰ Id. at 304.

²¹ Id. at 303.

²² Id. at 309-10.

²³ Id.

emphasis has been placed on the prosecution of misdemeanor assaults as a means of early intervention.²⁴ The number of active cases has increased dramatically while the rates of domestic homicide, along with re-arrests for domestic assault, have fallen.²⁵ Nearly 60% of the unit's cases involve uncooperative witnesses, but the overall conviction rate is 88%.²⁶

The reduced reliance on the victim's willingness to cooperate has also led to changes in the city attorney's policies toward victims who fail to testify. Blanket policies in which the prosecution refuses to proceed in the event that the victim fails to testify have been shown to do little more than encourage batterers to pressure the victim not to appear, again ceding ultimate control of the case to the batterer.²⁷ The city attorney addressed the problem in several ways. San Diego's official and well publicized policy is that arrest warrants are requested whenever a subpoenaed witness fails to appear, but the policy is rarely enforced. If the case can be proven without the victim's testimony, no warrant is issued and the trial continues without her. If the case cannot be proven otherwise, the prosecutor may either request a bench warrant, or simply wait to proceed until the victim has been located. In the event that a warrant is requested, the Domestic Violence Unit first attempts to locate the victim directly, rather than simply putting the warrant into the system. Once the person has been located and notified of impending arrest, she usually contacts the victim assistance staff, and appears voluntarily. In six

²⁴ Id. at 307.

²⁵ Id. at 304.

²⁶ Id.

²⁷ Id. at 313.

years, only two victims have been jailed overnight, in a unit that secures over 2000 convictions per year.²⁸

Two remaining sources of revictimization are mutual arrest of parties, and abuse of the system by the perpetrator. Even though San Diego does not have a policy of mutual arrest, it is still possible for the investigating officer to arrest both parties in an incident of domestic violence, although the need for this is rare.²⁹ The city attorney has significantly reduced the problem by taking a strong policy stance against mutual arrest, making it clear that any case of repeated and indefensible mutual arrests in cases of domestic violence will be referred to the SDPD internal affairs division for investigation and possible disciplinary action.³⁰ The policy, combined with proactive training at the police academy, has reduced mutual arrests to less than 3 percent, a reasonably expected level of justifiable mutual arrests.³¹ In other jurisdictions, batterers sometimes volunteer for diversion programs as a delaying tactic, remaining in the program only as long as it takes to make a conviction difficult at trial.³² This can be avoided by requiring a guilty plea prior to entry, but such a plea is not required under California law.³³ On a case-by-case basis, the Domestic Violence Unit has been successful in preventing offenders who do not plead guilty from gaining admission to the diversion program, leaving them the choice of entering a guilty plea or proceeding to trial; once guilt has been established, any noncompliance with the diversion program results in immediate sentencing, rather than initiating a trial long after the incident.³⁴

²⁸ Id. at 313-14.

²⁹ Id. at 314

³⁰ Id.

³¹ Id.

³² Id. at 316.

³³ Id.

³⁴ Id. at 316-17.

FLORIDA

As was the case in San Diego, failure of a victim to cooperate with the prosecution was generally fatal to the case,³⁵ but unlike San Diego, Florida used the legislative process to standardize its investigatory procedures statewide to build cases that could provide convictions independent of the victim's cooperation.³⁶ In 1992, citing a need to provide better protection to victims of domestic violence, combined with a concern that public tolerance of domestic violence endorsed a preference for brute force over reason and law,³⁷ the Florida Legislature mandated uniform statewide policies for investigation and prosecution of domestic violence, increasing the responsibilities of the police, prosecutors, and state courts.³⁸ New protocols were established for law enforcement, requiring that notice be given to victims of domestic violence, informing them of their rights and remedies under the law, including any legal obligations of the batterer to provide financial support to the victim or her children.³⁹ Officers are now required to file a written report of all incidents of domestic violence, regardless of whether an arrest was made, describing any injuries the officer observed, and documenting that the victim received notice of her rights.⁴⁰ The law requires arrest of the batterer upon probable cause that an act of domestic violence was perpetrated, independent of victim's consent or relationship of the parties, and if no arrest is made, the investigating officer is required

³⁵ Jay B. Rosman, *Survey of Florida Law: Domestic Violence: Recent Amendments to the Florida Statutes*, 20 NOVA L. REV. 117, 139 (1995).

³⁶ *Id.* at 119.

³⁷ *Id.*

³⁸ *Id.*

³⁹ FLA. STAT. ANN. § 741.29 (2004).

⁴⁰ *Id.*

to document why it was not.⁴¹ The officer is also required to obtain statements from the victim and any witnesses, and the investigating agency must provide copies of the initial report to the domestic violence center within 24 hours.⁴²

The Florida statutes share key organizational features with San Diego’s program. Each state attorney is required to assign special units or prosecutors specialized in domestic violence cases, and these units receive extensive training in domestic violence issues.⁴³ The unit is also required to conduct a full background investigation of every defendant, searching especially for past criminal conduct. These findings are reported at first appearance, when setting bond, and at sentencing,⁴⁴ and the court is required to “consider the safety of the victim, the victim’s children, and any other person who may be in danger if the defendant is released,” in any decision to release the defendant.⁴⁵ The statutes also require uniform training for law enforcement officers; this includes the causes, extent, and effects of domestic violence, the effective documentation, reporting, and collection of evidence, guidelines for ensuring the safety of the officer and the public, and skills important in working with uncooperative victims when the officer becomes the complainant.⁴⁶ The statutory approach adopted by Florida is clearly a “one size fits all” plan. It provides little room for individual tailoring, but it does provide a framework for uniform enforcement throughout the state.

⁴¹ Id.

⁴² Id.

⁴³ FLA. STAT. ANN. § 741.2901 (2004).

⁴⁴ Id.

⁴⁵ FLA. STAT. ANN. § 741.2902 (2004).

⁴⁶ FLA. STAT. ANN. § 943.1701 (2004).

TEXAS

The district attorney for Grayson County, Texas developed and implemented a model protocol for domestic violence cases,⁴⁷ in which responding officers are trained to gather as much evidence at the scene as possible, including any physical evidence such as broken furniture or telephones, which can be especially important to jurors. A standard protocol for the collection and cataloguing of evidence is used, because a lack of standardization at the initial stage of investigation can make it especially difficult for the prosecutor's office to develop a standard protocol of its own.⁴⁸ Cameras and tape recorders are used extensively. Photographs and recorded interviews of the victim, defendant, children, and other witnesses are encouraged, because any or all of these individuals may be unavailable or uncooperative at trial.⁴⁹ If the defendant is present, a written statement is taken if he is willing to do so. If the defendant is not present, a documented, good-faith effort is made to locate and interview him, because any failure to provide the defendant with an opportunity to present his side of the story can put the prosecution in a bad light at trial.⁵⁰ The following day, investigators return for a more extensive interview. Questioning the witnesses a second time can reveal details that were missed or forgotten the previous day, and new pictures can be taken of any injuries that have worsened. Multiple contacts, such as friends and family may be established, making it easier to locate any witnesses that relocate before trial.⁵¹ Histories of the

⁴⁷ Robert T. Jarvis, *A Proposal for a Model Domestic Violence Protocol*, 47 LOY. L. REV. 513 (2001).

⁴⁸ Id. at 515.

⁴⁹ Id. at 515-16.

⁵⁰ Id. at 516.

⁵¹ Id. at 517.

victim and suspect are also gathered, including 911 calls and prior police reports, and these are added to the investigator's report.⁵²

At every step of the investigation, county personnel treat the case with the utmost attention and diligence. Dispatchers are required to give domestic violence calls the same priority as any other life-threatening emergency, to focus their questions on the relevant facts of the case, and to dispatch at least two officers to the scene whenever possible.⁵³ Law officers are required to arrest all batterers whenever probable cause exists, and all cases are assigned to an assistant county prosecutor whose caseload consists solely of domestic violence cases. Victims are treated with dignity and respect, are given information concerning shelters and other available support services, and both victim and suspect are informed that ultimate control over the decision to prosecute rests with the county prosecutor.⁵⁴ The local magistrate may issue an emergency protective order at the request of the victim, victim's guardian, peace officer, or prosecutor, but if the defendant inflicted serious bodily injury, or used or displayed a deadly weapon in the course of the assault, the order is mandatory.⁵⁵

CONGRESSIONAL ACTION

Portions of the Violence Against Women Act (VAWA) encourage state and local governments to adopt uniform standards for training and enforcement in domestic

⁵² Id. at 525.

⁵³ Id. at 520-21.

⁵⁴ Id. at 518.

⁵⁵ Id. at 525.

violence cases,⁵⁶ but a mandated standard raises separation of powers issues because prosecution of violent crimes has traditionally been left to the states.⁵⁷ The Supreme Court reversed a long tradition of upholding federal criminal statutes adopted under the commerce power in 1995 when it invalidated the Gun-Free Schools Act,⁵⁸ holding that the law’s relationship to interstate commerce was “too tangential and uncertain” to be a valid exercise of congressional power, stating that the regulated activity must “substantially affect” interstate commerce.⁵⁹ This was followed in 2000 by the invalidation of the civil damages provision of the Violence Against Women Act (VAWA)⁶⁰, holding that Commerce Clause regulation of intrastate activity applies only to activities that are economic in nature, and that “gender-motivated crimes of violence are not...economic activity.”⁶¹ However, the Court has upheld a broad congressional power to set conditions for federal funds, even in areas where Congress may otherwise have no power to regulate.⁶² Congress would be well within its power to draft a model code for investigation and prosecution of domestic violence, with federal law enforcement funding made conditional upon adoption of the model code by the recipient state.⁶³

⁵⁶ 42 U.S.C. § 3796hh (2004).

⁵⁷ Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, HASTINGS L.J. 1135, 1166-73 (1995).

⁵⁸ 18 U.S.C. §§ 922(q)(2)(a), 921(a)(25) (2004).

⁵⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶⁰ 42 U.S.C. § 13981 (2004).

⁶¹ *United States v. Morrison*, 529 U.S. 598 (2000).

⁶² *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947),
New York v. United States, 505 U.S. 144, 166-167 (1992).

⁶³ HASTINGS L.J. at 1166-73.

WYOMING

The Wyoming legislature has enacted two statutes that address standardized responses to domestic violence. Upon arrest of a batterer, the victim is advised by the arresting officer as to the availability of community assistance programs, legal rights and remedies, the right under Wyoming law to ask that a criminal complaint and/or protection order be filed, and the right to sue for damages.⁶⁴ Another statute requires uniform training of law enforcement officers, providing 8 hours of domestic violence training for officers already on the job, and 12 hours of training for enrollees at the Wyoming law enforcement academy as part of the basic skills course.⁶⁵ Although these statutes are not as comprehensive as the programs described previously, they are a step in the right direction, and provide at least some level of standardization.

CONCLUSION

Implementation of standard protocols for the investigation and prosecution of domestic violence would accomplish several goals. Investigating officers would know what is expected of them, would have the training to conduct a thorough investigation, and the evidence would be collected when it is most available. Victims would be made aware of their rights, and of the availability of community resources. Increased reliance on physical evidence would take the burden of sustaining charge away from the victim, placing it with the prosecutor, who is less vulnerable to outside pressure to drop the

⁶⁴ WYO. STAT. ANN. § 7-20-104 (Lexis 2004).

⁶⁵ WYO. STAT. ANN. § 7-20-105 (Lexis 2004).

charges; as the public becomes aware of the new policy, pressure by the batterer to prevent his victim from cooperating should diminish, as this pressure would be unlikely to work in his favor, and simply anger a prosecutor who already has a strong circumstantial case. Basing the prosecution on physical evidence would also add reliability to the process, and treating domestic violence similarly to other serious crimes should encourage both the police and the general public to take the problem more seriously.

Model protocols can be established at the local, state, or (to some degree) federal levels, each with its respective strengths and weaknesses. Standardization and permanence are strongest at the state and federal levels, but optimization and flexibility are strongest at the local level of organization. Overall, standard protocols would probably work best by combining the strengths of the three systems by promulgating a uniform code at the national level, adopted by the state legislatures, and administered by the district attorneys' offices.