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DOMESTIC VIOLENCE: THE CASE FOR AGGRESSIVE PROSECUTION

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I. INTRODUCTION

Prosecutors throughout the country, and especially in the State of California, have begun taking a more aggressive stance towards domestic violence prosecutions by instituting a “no drop” or “no dismissal” policy.¹ Based on my experience as a veteran prosecutor who specializes in these cases, I firmly believe that this policy is the enlightened approach to domestic violence prosecutions. Fundamentally, a “no drop” policy takes the decision of whether or not to prosecute the batterer off the victim’s shoulders and puts it where it belongs: in the discretion of the prosecutors whose job it is to enforce society’s criminal laws and hold offenders accountable for their crimes. The prosecutor’s client is the State, not the victim.² Accordingly, prosecutorial agencies that have opted for aggressive prosecution have concluded that their client’s interest in protecting the safety and well-being of all of its citizens overrides the individual victim’s desire to dictate whether and when criminal charges are filed.

Aggressive prosecution is the appropriate response to domestic violence cases for several reasons. First, domestic violence affects more than just the individual victim; it is a public safety issue that affects all of society. Second, prosecutors cannot rely upon domestic violence victims to appropriately vindicate

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1. See Bettina Boxall & Frederick M. Muir, *Prosecutors Taking a Harder Line Toward Spouse Abuse*, L.A. TIMES, July 11, 1994, at A1 (discussing the City of Los Angeles’ mandatory arrest policies and how domestic violence cases are prosecuted in six California counties).

2. The prosecutor’s actual client is the people of the state, commonwealth, or governmental jurisdiction by whom the prosecutor is employed. Thus, the plaintiff in a criminal case, unlike a civil case, will always be the government, commonly called “The State” or “The People.”

the State's interests in holding batterers responsible for the crimes they commit because victims often decline to press charges. Third, prosecutors must intervene to protect victims and their children and to prevent batterers from further intimidating their victims and manipulating the justice system.

II. DOMESTIC VIOLENCE IS A PUBLIC SAFETY ISSUE

Domestic violence is a societal, not merely an individual, problem; it is not just about two people in a private relationship working out their "family problems." The harm caused by this violence refuses to be neatly confined between the abuser and the victim. Rather, domestic violence impacts everyone: children, neighbors, extended family, the workplace, hospital emergency rooms, good samaritans who are killed while trying to intervene, and the death row inmates who cite it as a reason not to be killed.³ The State has a legitimate interest in maintaining public safety, especially by ensuring that domestic violence offenders are not allowed to flourish unabated.

Domestic violence advocates were correct in supporting laws that codified domestic violence as both a crime against the individual *and* a crime against the State. When prosecutors file charges, we enforce these laws and reinforce the fact that domestic violence is criminal conduct. In California, the Penal Code explains why special attention should be devoted to the prosecution of batterers: "The Legislature hereby finds that spousal abusers present a clear and present danger to the mental and physical well-being of the *citizens* of the State of California."⁴ Besides being "an unacknowledged epidemic in our society,"⁵ domestic violence is the leading cause of injury to women,⁶ a major factor in female homicide,⁷ a contributing factor to female

3. A large percentage of death row inmates report having domestic violence or child abuse in their backgrounds.

4. CAL. PENAL CODE § 273.8 (West 1988) (amended 1994) (emphasis added).

5. Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 20 (quoting United States Department of Health and Human Services Secretary Donna Shalala).

6. See Boxall & Muir, *supra* note 1, at A1 (citing 1992 United States Surgeon General statistics). Domestic violence is the leading cause of injuries to women ages 15 to 44. See Michele Ingrassia & Melinda Beck, *Patterns of Abuse*, NEWSWEEK, July 4, 1994, at 26, 26-28 (citing 1992 United States Surgeon General statistics).

7. According to the Federal Bureau of Investigation's 1992 statistics, 29% of female murder victims were killed by a spouse or boyfriend. See Boxall & Muir, *supra* note 1, at A1. An estimated 1,400 women are killed by domestic violence each year. See Ingrassia & Beck, *supra* note 6, at 26.

suicide,⁸ a major risk for child abuse,⁹ and a major precursor for future batterers¹⁰ and violent youth offenders.¹¹ The State cannot ignore the human tragedies that are caused by domestic violence.

The primary duty of government is to protect its citizens from assault as vigorously in the home as on the streets. The victims subject to domestic abuse are often not the only people who suffer. Most notably, children are secondary victims of violence in the home. The link between domestic violence and child abuse, both emotional and physical, cannot be ignored.¹² Each year, between three and ten million children are forced to witness the emotional devastation of one parent abusing or killing the other.¹³ Many are injured in the "crossfire" while trying to protect the assaulted parent, or are used as pawns or shields and are harmed by blows intended for someone else. Some are born with birth defects because their mothers were battered during pregnancy.¹⁴ Children of domestic violence are silent victims who suffer without the options available to adults. Thus, aggressive prosecution furthers the State's goal of protecting not only the victim, but also the children in homes where domestic violence occurs.

Researchers have yet to determine the extent to which aggressive prosecution actually combats the problem of domestic violence. Although some recent studies have questioned

8. CALIFORNIA COMM'N ON THE STATUS OF WOMEN, STATE OF CAL. NO. 3, A PROFILE OF CALIFORNIA WOMEN 11 (1993) (citing statistics from The National Clearing House for the Defense of Battered Women).

9. See HOWARD DAVIDSON, The A.B.A. Young Lawyers Division, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association*, 18 (1994).

10. See *id.* at 1.

11. "[V]iolent youths are four times more likely than nonviolent youths to come from homes where mothers were beaten by fathers." *Violence Begins at Home*, N.Y. TIMES, July 5, 1994, at A16.

12. See Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20 CHILD ABUSE & NEGLECT 589 (1996) (discussing a study finding that marital violence is a statistically significant predictor of physical child abuse. The greater the amount of violence against a spouse, the greater the probability of physical child abuse by the aggressive spouse).

13. See Davidson, *supra* note 9, at 1 (citing Bonnie E. Carlson, *Children's Observations of Interpersonal Violence*, in BATTERED WOMEN AND THEIR FAMILIES 160 (Albert R. Roberts ed., 1984); Murray A. Straus, *Children As Witnesses to Marital Violence: A Risk Factor for Life Long Problems Among a Nationally Representative Sample of American Men and Women*, Paper presented at the Ross Roundtable on "Children and Violence" (Sept. 1991)).

14. *Id.* at 1.

whether mandatory arrest of batterers is beneficial in deterring domestic violence, such studies are misleading.¹⁵ No studies have focused on the incremental effects that aggressive prosecution has had on controlling, if not eliminating, recidivism.¹⁶ Nor has current research addressed the role of aggressive prosecution in decreasing the public's tolerance of domestic violence.¹⁷ Prosecutors realize all too well that criminal intervention alone may not be the ultimate "cure" for domestic violence any more than it is a complete solution to gang violence, carjackings, sexual assaults, child abuse, or any other kind of anti-social violence perpetrated by one human being against another.¹⁸ Indeed, criminal intervention does not guarantee that a batterer will forever refrain from further violence. However, failure to try to achieve this goal is not an acceptable alternative. Research notwithstanding, aggressive prosecution of batterers is a criminal justice decision predicated on what is best for the common good, not a scientifically formulated antidote guaranteed to transform batterers into peaceful spouses or model partners.

III. DOMESTIC VIOLENCE VICTIMS ROUTINELY "REFUSE TO PROSECUTE"

Domestic violence is not confined to any one segment of the population; it crosses race,¹⁹ social class,²⁰ gender,²¹ and voca-

15. See Richard A. Berk, *What the Scientific Evidence Shows: On the Average We Can Do No Better Than Arrest*, DOMESTIC ABUSE PROJECT RES. UPDATE, Summer 1994, at 1 (discussing recent study results ranging from "no difference" when arrested to differential effects depending on the offender's employment and marital status).

16. See JEFFREY FAGAN, U.S. DEP'T OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 31 (1995) (explaining that few empirical studies use research or evaluation designs that can detect deterrent effects of legal sanctions).

17. See *id.* at 5 (explaining that "with few exceptions, research and evaluation on legal reforms and innovations focused on their operational goals and on their outcomes but almost never on their effects").

18. Domestic violence victims need special consideration because, unlike victims of stranger violence, they are susceptible to continuing influence and contact with their abuser. The best approach is to use criminal intervention in a coordinated effort to provide services for the victims and their children. It is particularly important to provide them with easy access to protective orders, witness protection and relocation, shelters, and counseling/financial/job training assistance from government, health, social and community service providers.

19. The purple, green, and black bruises show up as evidence of violence on all colors of skin.

tional lines.²² However, no matter how heinous the assault, the great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible.²³

Prosecutors and the courts have taken a long time to accept that a domestic violence victim's "refusal to press charges" is the norm in domestic violence prosecutions. Indeed, prosecutors traditionally are reluctant to charge batterers because victims frequently change their minds and later drop the charges.²⁴ Faced with having to testify in court, domestic violence victims, especially battered women, routinely either recant, minimize the abuse, or fail to appear.

A domestic homicide case I prosecuted in 1987, *People v. Houston*,²⁵ illustrates the battered woman's dilemma. Donna Houston, a twenty-nine year old mother of two, was shotgunned to death at her place of employment by the defendant, her thirty year old estranged husband. During their brief one year marriage, Donna reported escalating attacks by her jealous husband on three separate occasions. Early in the marriage, Donna's ten year old son witnessed the defendant push his mother into a bookshelf, causing a heavy statue to fall and lacerate her head. Donna later "minimized" this incident by telling police that her injury was an accident and no charges were filed. Months later, after another argument, Donna's husband stabbed her in the face with scissors, causing a serious jagged laceration. Only after she pleaded with him for medical help and promised not to report his behavior to authorities did he take her to the emergency room

20. Reports of domestic violence come from the poor and disenfranchised underclass, from the protected sanctuary of the respected middle-class, and, every now and then, from the rarified ranks of the privileged upper class.

21. Over 90% of the time, the victim is female. CRIME & VIOLENCE PREVENTION CTR. CAL. ATT'Y GEN. OFF., VIOLENCE PREVENTION: A VISION OF HOPE 163 (1995) [hereinafter VISION OF HOPE].

22. The victims are anyone — substance abusers, lawyers, teen mothers, teachers, housewives, preachers' wives, law enforcement officials, secretaries, factory workers, hairdressers, actresses, and T.V. broadcasters.

23. The reasons why women find themselves unable to hold their abusers responsible are as varied and significant as those which compel victims to stay in an abusive relationship, as fundamental as financial dependency and fear, as ethereal as love and loyalty, and as confused as low self-esteem, outright denial, and self-blame.

24. See FAGAN, *supra* note 16, at 4 (noting that "[p]rosecutors failed to actively pursue cases where victims and offenders had intimate relationships, fearing that women might drop charges") (citation omitted).

25. No. A569469 (Cal. Super. Ct. 1987).

for sutures to close the gaping wound. When Donna told the hospital staff what had happened, they called the police who arrested the defendant when he returned to the hospital to pick her up. The defendant had no prior record, but due to the seriousness of Donna's injury, the stabbing incident was filed as a felony spousal assault. A few days before the preliminary hearing, Donna came to the District Attorney's Office and insisted that she wanted to drop the charges. She had reconciled once again with the defendant and wanted to give their marriage another chance. When told that the prosecution would not be dismissed, Donna made herself "unavailable" to testify by going to New Jersey for an unscheduled "family visit." The case was dismissed for insufficient evidence to proceed.

Donna's girlfriend later testified that the parties subsequently separated and that when Donna refused to talk to him, the defendant tried to run Donna and the girlfriend off the road. Donna did not report this incident. Later, the defendant went to the baby-sitter's residence, grabbed their five month old daughter from Donna's arms, and then led the police on a high speed chase, with the baby unrestrained in his van. He was apprehended and arrested and the child was safely returned to her terrified mother. Despite Donna's pleas, the defendant's wealthy family promptly posted his bail. On the same day he was released, the defendant bought a 12-gauge shotgun and ammunition from the local gun store. The next morning, he waited in the parking lot where Donna worked. As she walked out the back door, she saw him emerge from his hiding place and tried to run back into the building, but it was too late. The defendant shot Donna, delivering a fatal wound to her neck, in broad daylight, at close range, in front of six horrified co-workers. The defendant was convicted of first degree murder while lying in wait and is currently serving a sentence of life without possibility of parole. Donna's two minor children, now orphaned, are being raised by their maternal grandparents.

The defendant's escalating attacks on his wife and her initial refusal to cooperate with his prosecution demonstrate a classic scenario in domestic violence cases. Regrettably, many battered women fail to see that criminal intervention can assist in the shared goal of getting their abuser to stop the violence. Too often, they will seek to jettison prosecution of their batterer in favor of concerns inconsistent with their safety and the safety of their children. Too frequently, they are desperate to forgive and

forget and to placate the abuser. Instead of criminal intervention, they dare hope to ease the violence by well-learned methods of coping. However, prosecutors have learned from the carnage and despair we have witnessed in domestic violence cases that victims cannot afford to forgive and forget and that the only thing worth negotiating is how much incarceration and how much mandated counseling is necessary to stop the batterer.

Cases like Donna Houston's remind prosecutors that while we wait for the battered woman to garner her "inner strength" to decide whether to press charges, harm continues to occur. Children are psychologically damaged from witnessing the battering, a child is placed in danger of physical injury or death, hospital emergency rooms are filled by injured women,²⁶ and innocent third parties are endangered by assaults intended for someone else. Domestic violence prosecutors are haunted by tragedies like Donna Houston's. We need to be able to say that despite a battered woman's ambivalence, we did everything within our discretion to reign in the batterer, to protect the victim and her children, and to stop the abuser before it was too late.

IV. BATTERERS MUST NOT BE ALLOWED TO CONTROL JUSTICE

Batterers are "master manipulators."²⁷ They will do anything to convince their victims to get the prosecution to drop the charges. They call from jail threatening retaliation. They cajole their victim with promises of reform. They remind her that they may lose their jobs and, hence, the family income. They send love letters, pledging future bliss and happiness. They have their family members turn off the victim's electricity and threaten to kick the victim and her children out into the street. They pay for the victim to leave town so that she will not be subpoenaed. They use community property to pay for an expensive lawyer to try to convince the jury that the whole thing was the victim's fault and that she attacked him. They prey on the victim's personal weaknesses, especially drug and alcohol abuse, physical and mental disabilities, and her love for their children. They negotiate financial and property incentives that cause acute memories

26. "[O]ne study showed that 30% of injuries of women seen in emergency rooms have been caused by battering." *VISION OF HOPE*, *supra* note 21, at 164.

27. Marlene Sanchez, *Which Way L.A.* (KCRW radio broadcast, Nov. 9, 1995). Marlene Sanchez is the Assistant Head Deputy of the Family Violence Division, Los Angeles County District Attorney's Office.

of terror and pain to fade dramatically. Prosecutors watch with practiced patience as these vulnerable victims succumb to their batterers' intimidation and manipulation. Then, "no drop" prosecutors try to hold the batterers responsible regardless of the victims' lack of cooperation by using creative legal maneuvering.²⁸

Supporters of "no drop" domestic violence policies realize that empowering victims by giving them the discretion to prosecute, or even to threaten to prosecute, in actuality only empowers batterers to further manipulate and endanger their victims' lives, the children's lives, and the safety and well-being of the entire community.²⁹ By proceeding with the prosecution with or without victim cooperation, the prosecutor minimizes the victim's value to the batterer as an ally to defeat criminal prosecution. A "no drop" policy means prosecutors will not allow batterers to control the system of justice through their victims.

Some critics of aggressive prosecution worry that "no drop" policies endanger victims by angering already volatile batterers. They argue that "jail doesn't do the batterer any good." However, arrest and prosecution of batterers does not endanger victims; batterers who attempt to control their mates through threats and violence endanger victims. Sentencing batterers to jail does not endanger victims; batterers who believe there is no higher authority than themselves endanger victims. Truly, it is the batterer who is responsible for the violent acts he chooses to commit, *with or without criminal justice intervention*. Even if jail does not guarantee rehabilitation, we would certainly rather incarcerate batterers than continue to "intern" their victims by forcing them into shelters to be safe.

Victims who shield their batterers from criminal sanctions naively accept responsibility to stop the batterer on their own, primarily by verbal persuasion. This approach is risky because

28. To overcome victim reluctance to cooperate, prosecutors rely upon other corroborating evidence such as other witnesses, "911" tapes, medical records, crime scene and injury photos, weapon recovery, and suspect statements. Prosecutors may also use a battered woman expert to explain why domestic violence victims recant. The Los Angeles County District Attorney's Family Violence Division relies on vertical prosecution of domestic violence cases by specially trained attorneys, investigators, and victim advocates. Vertical prosecution is the preferred method where one attorney is specially assigned to handle the case from beginning to end. As a result of vertical prosecution and a "no drop" policy, the Division enjoys an 88% conviction rate for its domestic violence cases.

29. See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 1501, 1514-16 (1993) (discussing strategies that develop a focus on the abuser).

the victim may be less objective in recognizing the lethal potential of everyday batterers. The criminal justice system, on the other hand, sees a wide spectrum of batterers. It also has more resources to assist in evaluating the danger a batterer poses to the victim. In addition, the criminal justice system can back up its intervention with incarceration to make the batterer understand that there is a price to pay for hurting a spouse or intimate partner and an “I’m sorry, I didn’t mean it” may not suffice. Incarceration is a legitimate “therapy” to persuade the abuser to reconsider before resorting to violence. In addition to incarceration, *mandatory* rehabilitative counseling can be imposed, because very few batterers would voluntarily submit to counseling without the threat of jail.

When the 911 call is made to law enforcement, the criminal justice system is triggered. When the report of violence is made, that moment signifies that the victim is *without the power to get the batterer to stop the violence*. However, the criminal justice system is not without power to encourage the batterer to cease and desist. Arrest and prosecution, however temporary, serve notice on the batterer that what he did was wrong and warrants his immediate removal from the community. It also gives the victim a breather — time and opportunity to access counseling services, to investigate alternatives to life with a violent partner, to form a plan for safety, and to have authority focused on the batterer to stop the violence.

Prosecutors are aware of complaints that “no drop” policies make battered women feel “powerless” to keep the government, specifically the courts, from “interfering” in their lives. Some object to the court “dictating” what will happen to the case and the abuser in the aftermath of reporting the abuse. However, prosecutors must seize the “window of opportunity” given to us by the report of violence to get the batterer’s attention. Working closely with victim advocates, prosecutors try to convince battered women to see the wisdom of criminal justice intervention. We tell the victims that we proceed with the prosecution because we cannot allow the batterer to believe that physical abuse is acceptable. We tell them that left without intervention, the violence may increase both in frequency of occurrence and severity of injury, often leading to the tragic scenario where he kills her³⁰

30. “[I]n 1993, female homicide victims in California were 15 times more likely than male victims to be killed by their spouse/partner (35% vs. 2.3%).” VISION OF HOPE, *supra* note 21, at 43.

or she kills him while defending herself against his aggression.³¹ We tell victims that the children suffer when they see their mother hurt and that the children need their mother to stay alive and well. We try to help them form a safety plan and deal with their fear, financial concerns, and future uncertainties, *with or without the batterer*.

V. CONCLUSION

Aggressive prosecution of domestic violence offenders rejects the notion that victims should be given the choice of whether to press or drop charges. No humane society can allow any citizen, battered woman or otherwise, to be beaten and terrorized while being held emotionally hostage to love and fear or blackmailed by financial dependence and cultural mores. As guardians of public safety, prosecutors must proceed against domestic violence offenders *with or without victim cooperation* as long as there is legally sufficient evidence. This policy of aggressive prosecution adopts the wisdom that “[t]here is no excuse for domestic violence.”³² It tells batterers that violence against intimate partners is *criminal*, that offenders can and will go to jail, and that their victim’s refusal to press charges is not a “get out of jail free” card.

31. “Nationwide about one third of the women in prison for homicide have killed an intimate” Ingrassia & Beck, *supra* note 6, at 33 (citing Bureau of Justice Statistics).

32. National Campaign Slogan, Family Violence Prevention Fund (1993).