

**DOMESTIC VIOLENCE AS A MITIGATING FACTOR IN SENTENCING
FOR DRUG RELATED OFFENSES**

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May 15, 2009

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Domestic Violence and the Law

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ABSTRACT: Domestic violence survivors who enter the criminal justice system as low-level participants in their abuser’s drug operations do so as individuals who merit special consideration. A non-violent, low-level offender who has little to no useful information to assist the prosecution of her/his business associates may still be charged with an offense based on the total amount of drugs involved in the operation—and thus becomes a victim of the mandatory minimum sentencing statutes. However, an offender who is a domestic violence survivor comes to the bargaining table already having been victimized by a society that rewards male aggression and fails to take seriously the dynamics of power and control that are present in an abusive relationship. Her entry into the mandatory minimum sentencing scheme may have a devastating, perhaps even permanent, financial and social impact on her family. Because domestic violence survivors are disproportionately harmed by mandatory drug sentencing and the federal sentencing guidelines, the presence or impact of domestic violence on a defendant’s role in a drug offense should be introduced and considered as a mitigating factor.

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INTRODUCTION

The war on drugs has generated unprecedented numbers of women incarcerated for low-level, non-violent offenses. The costs associated with incarceration as opposed to drug treatment of inmates are significant, but the social and financial costs to the families of incarcerated women merit another look at the mandatory minimum sentencing framework that has driven the judicial system since the mid 1980s. Given the high statistical likelihood that a female offender will have a history of family violence or associate some element of her criminal conduct with that of an abusive partner, domestic violence survivors who enter the criminal justice system for

non-violent offenses merit special consideration during the plea bargaining and sentencing phases. Because domestic violence survivors are disproportionately harmed by mandatory drug sentencing and the federal sentencing guidelines, the presence or impact of domestic violence on a defendant's role in a crime should be introduced and considered as a mitigating factor. Part I of this paper explores the effects of incarceration on women, the reasons women use or sell drugs and thus enter into the criminal justice system, and the link between family violence and criminal activity. Part II examines the history and legislative intent of mandatory minimum sentences for drug offenses and the corresponding guidelines. Part III focuses on the considerable control and discretion that prosecutors have over the plea bargaining process, asserts that domestic violence survivors come to the bargaining table at a disadvantage and therefore merit special consideration, and considers the role of the defense attorney. Part IV recommends what both prosecutors and criminal defense attorneys can do to level the playing field for domestic violence survivors who are either low-level, non-violent offenders with little to no useful information for law enforcement or who qualify for a downward departure based on mitigating factors defined in the Federal Sentencing Guidelines.

I. Women, Drugs, and Incarceration

A. The Statistics

With over 1.6 million inmates, the United States has the highest prison population in the world.¹ The last twenty to thirty years have produced in a sharp increase in the percentage of incarcerated women. In 1980, 11 in 100,000 women were sentenced inmates under jurisdiction

¹ New Incarceration Figures: Thirty-three Consecutive Years of Growth (The Sentencing Project Washington, D.C.), December 2006 at 1, *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf (last checked May 11, 2009); Roy Walmsley, World Prison Population List (Seventh E.) at 1, International Centre for Prison Studies, 2006, *available at* <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf> (last checked May 11, 2009).

of state and federal correctional authorities.² By 2007, that number had increased to 67.³ This translates to over 106, 410 sentenced female prisoners under the jurisdiction of state or federal correctional authorities in 2008.⁴ Since 2000, the number of women in prison has been increasing by an average of 3.2% per year and shows no signs of slowing down.⁵ This trend is widely attributed to the so-called war on drugs.

Though women comprise 30% of drug users, they are more likely than men to be the primary caretakers of their children, extended family, and elderly or disabled relatives.⁶ Women who are family caregivers are 2.5 times more likely than non-caregivers to live in poverty and five times more likely to receive Supplemental Security Income (SSI).⁷ Thus, the entry of non-violent female offenders into the federal sentencing system can have significant long term social and financial impact on their families. In fact, the costs associated women in prison compared to the cost of drug treatment are staggering. The cost of incarceration alone is \$26,000 per year, though this cost is at least doubled when children of incarcerated mothers are placed in foster care.⁸ Per inmate, drug treatment would range from approximately \$1,800 annually for outpatient services and \$6,800 for long term residential services.⁹

B. The Disproportionate Impact of Incarceration

Once women are incarcerated, the disparities in treatment according to gender may become even more pronounced. Not only are women in danger of being sexually assaulted by the

² Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online: Incarceration Rates, *available at* <http://www.albany.edu/sourcebook/pdf/t6282007.pdf> (last checked May 9, 2009).

³ *Id.*

⁴ Heather C. West, Ph.D and William J. Sabol, Ph.D., Prison Inmates at Mid-Year 2008 – Statistical Tables, U.S. Department of Justice: Bureau of Justice Statistics, at 9, Rev. April 8, 2008, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf> (last checked May 11, 2009).

⁵ *Id.*

⁶ Caught in the Net: The Impact of Drug Policies on Women and Families (ACLU Drug Law Reform Project et al, Santa Cruz, CA), 2002 at 12, 53, *available at* http://www.aclu.org/images/asset_upload_file393_23513.pdf.

⁷ National Family Caregivers Association, Caregiving Statistics: Economics of Caregiving, *available at* http://thefamilycaregiver.org/who_are_family_caregivers/care_giving_statstics.cfm (last checked May 9, 2009).

⁸ ACLU, *supra* note 6, at 4.

⁹ *Id.*

very prison staff who are responsible for their safety,¹⁰ but they also have far fewer opportunities for vocational training than male offenders:

It is not uncommon for penal institutions to offer male inmates vocational training, such as an air conditioning mechanic or construction worker, that will allow them to earn up to twenty-six dollars an hour after they are released. Women's institution's however, rarely offer anything more substantive than cosmetology, food services and low level secretarial skills, such as data input. The average hourly income a woman can derive from such employment is rarely above five dollars an hour, which is certainly not enough for her to support herself and her family after she is released from prison.¹¹

Because women still earn less on average than men, they are more likely to be uninsured and thus have fewer resources to access drug treatment—and women with children who can afford drug treatment may nevertheless be turned away because so few residential treatment programs accommodate families.¹² This may be due, in part, to the fact that many treatment options, if available to women, are generally modeled on men's programs.¹³ One study found that women who participated in co-ed drug treatment programs did not experience the bonding or sense of community that participants in gender-based treatment reported: "Women in co-ed programs . . . described instances in which male clients challenged their female dignity, for example by calling them a prostitute, making negative comments about their body, and joking with each other about one of them. Some also mentioned such behavior by male staff members."¹⁴ This gender disparity is also apparent in the system's application of defenses that are "unofficially" gender-

¹⁰ See generally, Amnesty International, Not Part of My Sentence: Violations of the Human Rights of Women in Custody, March 1, 1999, available at <http://www.amnesty.org/en/library/asset/AMR51/019/1999/en/685257e6-e33d-11dd-808b-bfd8d459a3de/amr510191999en.html>.

¹¹ Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. Crim. L. & Criminology 795, 813 (Spring 2004).

¹² *Id.* at 2.

¹³ *Id.* at 2.

¹⁴ Claire Sterk, et al. *Women and Drug Treatment Experiences: A Generational Comparison of Mothers and Daughters*, 2000 WLNR 4522847; 12/31/00 J. Drug Issues 839 (December 31, 2001).

based—women who kill their abusers are likely to receive much harsher sentences than men who kill their partners and invoke the “heat of passion” defense.¹⁵

Furthermore, women of color who participate in certain counseling programs sometimes encounter cultural differences that make it more difficult for them to succeed. According to Professor Linda L. Ammons, “African American women do not feel comfortable discussing their problems in integrated settings. The fear is that disclosure in some way may hurt the community. Therefore the prohibition against airing dirty laundry becomes more important than healing.”¹⁶ A lack of cooperation in confrontational group treatment may result in a participant being categorized as “noncompliant or resistant to treatment.”¹⁷

C. Women’s Use of Drugs

Current drug policies fail to consider that women enter into the use and sale of drugs for different reasons than men—and thus the path women take to enter into the criminal justice system in general is unlike that of men. Though women are less likely to have opportunities to use drugs, women are equally likely as men to become addicted to or dependent on cocaine, heroin, hallucinogens, tobacco, or inhalants—but are more likely to become addicted to or dependent on sedatives and drugs designed to treat anxiety or sleeplessness, more likely to abuse

¹⁵ Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. Cal. Rev. L. & Women's Stud. 153, 171 (Fall 2001).

¹⁶ Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1024 (1995).

¹⁷ ACLU, *supra* note 6, at 13; *But see* Maureen Hillhouse, *Twelve-Step Program Participation and Effectiveness: Do Gender and Ethnic Differences Exist?*, 2001 WLNR 4497389; 9/30/01 J. Drug Issues 767 (September 30, 2001)(concluding that women and ethnic minorities are equally likely to utilize and succeed under twelve-step programs).

prescription drugs, and less likely than men to abuse alcohol or marijuana.¹⁸ Women are less likely to consume drugs using invasive methods, such as intranasally or intravenously.¹⁹

Women may use drugs for different reasons than men—notably to support their families. Drugs may enable women to work long hours at second jobs, tolerate certain work conditions, such as sexual harassment, and just get through the day.²⁰ Furthermore, the stigma associated with drug use takes on a different meaning for women—women’s use of drugs can be framed as a more deviant habit because of gender stereotypes about pregnant and parenting women that still persist today.²¹ In Texas, where conservative legislators passed a fetal personhood bill in 2003—purportedly to allow women to recover for the loss of a pregnancy through negligent or criminal acts of a third party, the Potter County District Attorney used this new law as a basis to arrest over a dozen pregnant women who reported drug use to their physicians.²²

Women also enter into the criminal justice system for different reasons than men. For example, poverty may have a direct impact on the reasons pregnant and parenting women enter into the criminal justice system as a result of drug use: low-income pregnant or parenting women are more likely to be dependent on government programs and thus are subject to government surveillance.²³ In general, women are more likely to become incarcerated for conduct they undertake feed themselves and their children, supplement their incomes, sustain a drug addiction, or escape violent situations and relationships.²⁴

¹⁸ National Institutes of Health/National Institute on Drug Abuse, NIDA Notes: Gender Differences in Drug Abuse Risks and Treatment (Vol. 15, No. 4, September 2000), *available at* http://www.drugabuse.gov/NIDA_Notes/NNVol15N4/tearoff.html (last checked May 11, 2009).

¹⁹ ACLU, *supra* note 6, at 7.

²⁰ ACLU, *supra* note 6, at 11.

²¹ Sterk, *supra* note 14, at 2.

²² Jim McBride, *Coalition Lobbies District Attorney: Groups Call for Halt to Prosecution of Drug-Abusing Pregnant Women*, Amarillo Globe-News, March 2, 2005, *available at* http://www.amarillo.com/stories/030205/new_1384114.shtml.

²³ ACLU, *supra* note 6, at 8.

²⁴ *Id.* at 18.

D. The Special Case of Domestic Violence Survivors As Defendants

The link between domestic violence, economics, gender disparities, and the resulting drug sentences is a substantial one and it merits special consideration for domestic violence survivors who are non-violent, low-level participants in drug operations. For survivors of domestic violence, Professor Beth Richie identifies six “theoretical pathways” into the criminal justice system: sexual exploitation by partners; defending oneself against violence; being held hostage by an abuser; retaliation against non-abusers for violence experienced in the past; living in poverty because their abuser does not support their family; and drug addiction.²⁵ Many women offenders report a link between their criminal history and experience with abuse: Eighty to eighty-five percent of women imprisoned in the United States attribute their incarceration to their association with a batterer.²⁶ Six out of ten women incarcerated in state prisons are survivors of abuse, and more than a third have been abused by an intimate partner.²⁷ Women arrested not only for drug offenses but also for theft and prostitution are “overwhelmingly victimized” by intimate partners.²⁸

Women in the drug trade who are in business with their abusers may simply have different motives for their involvement—not the least of which is survival. Prof. Alafair Burke describes the difference as follows:

When a battered woman engages in unlawful conduct not because she faces an imminent threat of unlawful force, but because of remote circumstances surrounding a violent relationship, her claim becomes less about the coercion exerted by a bad actor and more about the poor circumstances of her life. What she seeks to avoid by engaging in the criminal activity is not imminent

²⁵ Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 Harv. Women’s L.J. 217, 254 (Spring, 2003)(citing BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN*, 1996).

²⁶ Buel, *supra* note 25, at 219.

²⁷ *Id.*

²⁸ *Id.* at 254.

punishment from her batterer, but the difficult circumstances she would encounter if she left the battering relationship.²⁹

Professor Peter Margulies boils it down to two main paths that domestic violence survivors travel into the criminal justice system: either acts of desperation or self-defense (i.e. killing one's abuser) or the fear of violence that results in coerced participation in drug trafficking, robbery, or homicide.³⁰

To ignore the link between family violence and women drug offenders overlooks the special circumstances of battered women who, for various reasons cannot "just leave" their abusers and it further victimizes an entire group of offenders who have already been silenced in their own homes by their own partners. Lawmakers, judges, and prosecutors are not the only stakeholders to blame for overlooking this when faced with a defendant accused of drug offenses, theft or prostitution. According to Professor Sarah Buel, "most feminist scholarship ignores this group of victims in favor of focusing on those who kill their abusers in self-defense."³¹

II. Mandatory Minimums and Federal Sentencing Guidelines for Drug Offenses

A. Legislative History

Though the traditional role of Congress in setting sentencing policy is limited to establishing statutory maximum sentences for federal crimes, Congress may also establish mandatory minimum sentences, compelling courts to impose specific criminal penalties for certain criminal conduct. In the 1950s, Congress passed new mandatory minimums for drug

²⁹ Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. Rev. 211, 311-12 (December, 2002).

³⁰ Margulies, *supra* note 15, at 154.

³¹ Buel, *supra* note 25, at 253.

related crimes to deter the importation and distribution of drugs.³² Most of these measures were repealed in 1970, but revisited again in the 1980s. In 1982, President Ronald Reagan launched the so-called “war on drugs,” a campaign initially directed largely at marijuana and organized by conservative parents’ organizations.³³ The federal government began to allocate significant resources to prevent the sale and use of marijuana and stiffer sentences followed.³⁴ In 1984, a bipartisan Congress passed the Sentencing Reform Act (SRA), which created a new independent agency—the U.S. Sentencing Commission—under the umbrella of the Comprehensive Crime Control Act.³⁵ Eighteen months later the commission created new guidelines, which assigned sentences varying in severity for approximately 2,000 federal crimes.³⁶

B. Legislative Intent

The U.S. Federal Sentencing Commission is “charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modification of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.”³⁷ The primary reasons for introducing the Sentencing Reform Act were: to create more certainty in sentencing and to eliminate disparity and inconsistency in criminal sentences—which, according to the commission was caused by “unfettered sentencing discretion.”³⁸

Before the SRA, judges had no obligation to explain the rationale for their sentencing, which resulted in sentences reflecting individual judicial philosophies, rather than a national

³² Boggs Act ch. 666, 65 Stat. 767 (1951)(codified at 21 U.S.C. § 174)(repealed 1970); Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651.

³³ ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 15 (Houghton Mifflin Company 2003).

³⁴ *Id.*

³⁵ 18 U.S.C. § 3551-86, 3621-25, 3742 (1988) and 28 U.S.C. § 991-98 (1988).

³⁶ Schlosser, *supra* note 33, at 44.

³⁷ An Overview of the United States Sentencing Commission, 2 *available at* http://www.ussc.gov/general/USSC_Overview_200806.pdf (last checked May 9, 2009).

³⁸ *Id.* at 1.

consensus on drug sentencing.³⁹ One commentator notes why the Sentencing Reform Act garnered bipartisan support: “Both conservatives who were tired of lenient judges and liberals who were concerned about race disparity in sentencing endorsed the SRA.”⁴⁰ A quarter of a century later, the SRA still attracts bipartisan commentary, but it is largely critical—Justices Kennedy, Breyer, and Rehnquist have all spoken out against the mandatory minimum sentencing guidelines.⁴¹

This new chapter in drug sentencing represented a conscious choice to shift the focus away from consideration of offender characteristics, such as one’s family life, community ties, education and employment—and toward a focus on characteristics of the offense itself.⁴² The Commission deemed such offender characteristics “not ordinarily relevant.”⁴³ Though the intent of mandatory minimum statutes was to target high and mid-level drug offenses—when tied to the quantity of drugs involved, they eliminate a judge’s ability to apply mitigating factors that, in another setting, might reduce a defendant’s sentence.⁴⁴ That discretion is now in the hands of federal prosecutors.

III. The Problem of Prosecutors

A. Accountability

In 2007, 95.6% of convicted drug offenders’ sentences were the result of guilty pleas.⁴⁵ In the larger context, plea bargaining serves legitimate and compelling purposes: it preserves

³⁹ Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U.L. Rev. 1471, 1473 (Summer 2000).

⁴⁰ Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. Cin. L. Rev. 1851, 1852-53 (Summer 1995).

⁴¹ Shimica Gaskins, Note, *Women of Circumstance: The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 Am. Crim. L. Rev. 1533, 1549-50 (Fall 2004).

⁴² Froyd, *supra* note 39, at 1478.

⁴³ *Id.*

⁴⁴ *Id.* at 1471.

⁴⁵ U.S. Sentencing Commission, 2007 Sourcebook of Federal Sentencing Statistics, *available at* <http://www.albany.edu/sourcebook/pdf/t5392007.pdf>.

valuable trial resources for genuine questions of guilt or innocence, and ideally it allows both a defendant and the government some control over the process. Each side takes a risk during plea bargaining: the prosecutor assumes the risk formerly borne by the defendant (that a trial could have resulted in conviction of a more serious offense) and the defendant risks the certainty that a lesser conviction will result.⁴⁶

The decision to enter a guilty plea belongs to the client.⁴⁷ It is an “extremely significant event for a criminal defendant in that, with a few exceptions, it ‘waives all non-jurisdictional defects in the prosecution’—meaning the vast majority of constitutional challenges to the conviction (e.g. Fourth Amendment search and seizure issues) are forever waived.”⁴⁸ However, an absolute requirement of a plea negotiation is that it be knowing, voluntary, and intelligent.⁴⁹ Much of the case law around involuntary plea bargaining focuses either on prosecutorial misconduct or the defendant being provided erroneous information about sentencing—with little attention paid to the question of whether a plea can be entered into voluntarily when a defendant possesses a reasonable fear of her co-defendant or is made to think she has no option but to plead in the absence of any useful information she can offer to the prosecution. Thus, the core principles of autonomy, equality, and sharing in the risk may not be at play when a low-level, non-violent domestic violence survivor enters into a plea agreement for an offense related to her participation in a drug operation.

Realistically, many other issues are on the table during plea negotiations: the prosecutor’s crowded docket and the pressure from judges to resolve cases efficiently, the defense attorney’s need to be judicious in negotiations with prosecutors s/he works with frequently, and the

⁴⁶ Margulies, *supra* note 15, at 157.

⁴⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴⁸ BRENT E. NEWTON, PRACTICAL CRIMINAL PROCEDURE: A CONSTITUTIONAL MANUAL 219 (2005)(citing *Tollett v. Henderson*, 411 U.S. 258, 261-67 (1973)).

⁴⁹ *Brady v. United States*, 397 U.S. 742 (1970); *Bousley v. United States*, 523 U.S. 614 (1998).

interests of third party defendants who may be in another room down the hall striking more advantageous deals with the same team of prosecutors in exchange for better sentences.⁵⁰

Mandatory minimums aside, there are not many ways investigate or document the plea bargaining process, except to study final outcomes. There is no court reporter present for the process that results in a plea agreement and there are only so many ways to hold a prosecutor accountable for misconduct—the “hammers” of the failure to provide a defendant with exculpatory evidence under the *Brady* doctrine, the failure to preserve a defendant’s Sixth Amendment right to counsel or the requirement that a defendant’s plea be knowing, voluntary, and intelligent may not necessarily address the complicated ethical balancing that may accompany negotiations with a defendant who not only has little valuable information to share with a prosecutor, but who also possesses a reasonable fear of her co-defendant who is her domestic partner and her abuser. According to the National Criminal Justice Commission, outcomes are better for Anglo defendants on the whole: “all else being equal, whites did better than African Americans and Hispanics at getting charges dropped, getting cases dismissed, avoiding harsher punishment, avoiding extra charges, and having their criminal records wiped clean.”⁵¹

B. Defendants at a Disadvantage

A domestic violence survivor comes to the plea bargaining table with a special set of circumstances. Though domestic violence survivors may have regular interaction with law enforcement, this does not guarantee protection. The Supreme Court has held that, even in states that have implemented mandatory arrest laws, eliminating police discretion in violent situations where a victim already has a protective order against her abuser—that the failure to comply with

⁵⁰ Margulies, *supra* note 15, at 160-62.

⁵¹ ACLU, *supra* note 6, at 31 (citing STEVEN R. DONZIGER ED., NATIONAL CRIMINAL JUSTICE COMMISSION: THE REAL WAR ON CRIME 112 (1996)).

such mandates is not a due process violation for the victim.⁵² Thus, women who have had a negative experience with law enforcement may enter into the process reluctant to cooperate with a system that has let them down as victims.⁵³ In fact, domestic violence survivors still have difficulty getting police to respond to them at all:

Police often believe that violence is an unremarkable event in the households of poor people of color and that police intervention is therefore likely to be ineffective or unnecessary. This may be explained, in part, by a police culture that constructs categories of “normal” and “deviant” people, with poor people of color more likely to be placed in the latter category.⁵⁴

The situation is further complicated by having an intimate relationship with the “bigger fish” that law enforcement is likely to be focused on to begin with. Professor Margulies offers a hypothetical situation to illustrate the tension and the special circumstances of the domestic violence survivor who finds herself as a defendant:

A confirmed criminal who has repeatedly battered the woman with whom he is having an intimate relationship recruits the woman into his drug ring. While all confederates in a criminal enterprise face fear breaking with the boss, the survivor faces the substantial additional fear generated by an abusive relationship. The woman, under her abusive partner’s watchful eye, performs various functions for the ring, from the relatively ministerial, such as being a look-out or a “mule,” to a somewhat higher level, such as deciding on routes and safehouses, and taking on aliases.⁵⁵

Once caught in the net, Margulies notes the defendant may be advised that “the ship is sailing” for her to cooperate and provide useful information to the prosecution—with no regard for the reality that a survivor is under “constant surveillance” of her abuser.⁵⁶ Cooperation on her part does not have the same consequences as cooperation on the part of his business associates—for

⁵² *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

⁵³ Margulies, *supra* note 15, at 165; Buel *supra* note 25, at 224.

⁵⁴ Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. Davis L. Rev. 1009, 1033 (Summer 2000).

⁵⁵ *Id.* at 166-67.

⁵⁶ *Id.* at 167-68.

her, cooperation is a “more serious act of betrayal.”⁵⁷ Furthermore, she may be unaware that her abuser is already in custody, cooperating with authorities and offering far more valuable information—perhaps qualifying for a downward departure by offering substantial assistance, with no qualms about betraying her confidence.⁵⁸

C. The Tools of the Prosecutor

A defendant who is a low-level player in her abuser’s drug operation must cope not only with the complicated dynamics of domestic violence but also with an array of tools that ease the burden on prosecutors to establish intent, such as the laws of conspiracy, accomplice liability, and constructive possession.

Dubbed the “darling of prosecutors,” a conspiracy is defined under federal law as an agreement by at least two people to commit a criminal act or arrive at legal ends through illegal means.⁵⁹ Though the definitions may vary in different jurisdictions, most require a showing that at least one of the co-conspirators committed an overt act in the furtherance of the conspiracy in order for one to exist.⁶⁰ This lessens the government’s burden of proof considerably and allows prosecutors to cast a wide net, which may result a low-level offenders facing charges based on the total amount of the drugs involved, regardless of whether she had any participation in or knowledge of the larger picture. It requires only that the prosecutor show the essential nature of the plan and the defendant’s connection to it, and this can be accomplished using circumstantial evidence.⁶¹

For a defendant who lives with her abuser, the consequences can be devastating. A prosecutor can attribute mere presence in the home to participation in a conspiracy—and, as one

⁵⁷ *Id.* at 168.

⁵⁸ *Id.* at 168-69.

⁵⁹ 18 U.S.C § 371 (2000); Gaskins, *supra* note 41, at 1536.

⁶⁰ *Id.* at 1536-37.

⁶¹ *Id.* at 1537.

commentator observes, conspiracy laws do not consider the context of the relationship.⁶² For a battered woman, this context is likely to include economic dependence on her abuser—which is a primary reason women cannot leave or end up returning to their abusers.⁶³ According to Professor Raeder, the application of conspiracy law to the partners of drug kingpins implicates a class issue as well:

While the mate of a white collar criminal may be shielded from his crime in the suites, the living companion of a drug dealer who sells his wares on the streets or at home is not equally sheltered Thus, indigent women become active participants in crime by permitting drugs in the home, answering the door or the phone, and by giving or bringing contraband to buyers.⁶⁴

Thus, women who are manipulated by an abuser into supporting his drug business may be emotionally and economically coerced into participation, but face harsher consequences than their white collar counterparts who never had to mix their living space with their partner's headquarters for criminal activity.

The doctrine of accomplice liability sets a similarly low bar for the prosecution and, as a result of their living situation, battered women are easy targets for this charge as well. Under federal law, a prosecutor can prove accomplice liability by showing that a defendant rented a car for interstate travel, allowed her partner to keep drug paraphernalia in the home, or merely took phone messages.⁶⁵ Similarly, constructive possession requires no affirmative act on the part of

⁶² *Id.* at 1538.

⁶³ Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, 29 *Colo. Law.* 19, 21 (1999)(citing Estroff Marano, "Why They Stay: A Saga of Spouse Abuse," *Psychology Today* (May-June 1996) at 56, 59); Coker, *supra* note 54, at 1020-21.

⁶⁴ Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 *McGeorge L. Rev.* 691, 727 (2006).

⁶⁵ ACLU, *supra* note 6, at 36; 18 U.S.C.A. § 2 defines an accomplice as follows: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

an individual for criminal liability to attach.⁶⁶ Possession of contraband may be presumed based on the defendant's proximity to it as well as the degree of control over the area in which the substance is found.⁶⁷

D. Tools for the Defense Attorney

Even in the face of a prosecutor's broad discretion, significant control over the plea bargaining process, and a set of laws that lower the bar for the prosecutor's burden of proof, defense attorneys have their own arsenal—which, if used creatively, may afford low-level offenders who are domestic violence survivors some options to avoid a mandatory minimum sentence. Defense attorneys may take utilize the safety valve option and new interpretations of the Federal Sentencing Guidelines (FSG) as advisory.

To prevent unnecessarily harsh treatment of low-level first time offenders, Congress enacted a “safety valve” provision, in 1994.⁶⁸ The safety valve provision allows a court to depart from a mandatory sentence if the defendant: 1) has no more than one criminal history point; 2) was unarmed and nonviolent during the offense; 3) did not cause death or serious injury to any person; 4) was not a leader of others or engaged in a continuing criminal enterprise; and 5) provided the prosecution with all information that he or she had relating to the offense.⁶⁹ Critics of the safety valve provision note that nearly any prior offense, regardless of its severity or whether it was violent, disqualifies a defendant from taking advantage of it.⁷⁰ In practice, it creates the odd situation where a judge, rather than a prosecutor, decides whether the defendant

⁶⁶ 21 U.S.C.A. § 841(a) creates an offense to: (1) manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or (2) create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

⁶⁷ See 87 A.L.R. Fed. 309 § 2(a)(2008).

⁶⁸ 18 U.S.C. § 3553. The Federal Sentencing Commission incorporated this provision into its guidelines as well at § 5C1.2 of the Federal Sentencing Guidelines.

⁶⁹ *Id.* at § 3553(f).

⁷⁰ Oliss, *supra* note 40, at 1885-86.

has provided information sufficient enough to assist in the prosecution of other defendants—when in reality, the prosecutor is in the best position to judge the quality of the information.

Critics of the safety valve provision also note that a low-level offender whose participation in the operation was minor at best, may have little to no information about her abuser’s drug operation. She may not qualify for protection, whereas a drug kingpin who provides substantial assistance to the government will qualify a downward departure, available only upon the motion of the government.⁷¹ However, one federal prosecutor disputes the likelihood of such a situation and asserts “There is no such thing as a defendant with no information. Cocaine doesn’t just fall out of the sky and into a person’s lap. Everybody has something if they are willing to provide it.”⁷²

The passage of the SRA, followed by the implementation of the guidelines, ushered in a new era of stricter guidelines with little room for judicial discretion and prosecutors acting as gatekeepers. Following a series of cases related to sentencing, the Supreme Court held in *United States v. Booker* that any fact other than a defendant’s prior criminal conviction that increases the maximum punishment that a defendant otherwise faces is the functional equivalent of an element of an offense that must be found guilty by a jury beyond reasonable doubt or admitted by a defendant at a guilty plea.⁷³ The Court also held that the guidelines are no longer mandatory but are now “effectively advisory” and emphasized that, though the sentencing court is required to consider the guideline ranges, it may “tailor the sentence in light of other statutory concerns as

⁷¹ 18 U.S.C.A. § 3553(e); FED. SENTENCING GUIDELINES § 5K1.1.

⁷² Telephone Interview with Ms. Elizabeth Cottingham, Assistant United States District Attorney, April 29, 2009.

⁷³ *United States v. Booker*, 543 U.S. 220, 245 (2005).

well.”⁷⁴ The Court announced an “unreasonableness” standard for reviewing sentencing decisions.⁷⁵

A year later, the Administrative Office of the United States Courts announced that sentencing practices had not changed substantially: perhaps because, despite outcry from the judicial bench over the rigidity of the guidelines, U.S. District Judge Paul Cassell, Chair of the Judicial Conference Committee on Criminal Law suggested that “trial judges around the country have grown used to operating in a guidelines system We’ve had almost 20 years of experience with the guidelines.”⁷⁶ The office noted that downward departures were “on the table” more frequently as a result of *Booker*, but made no mention of significant changes in sentencing for lower-level offenders.⁷⁷ Evidence of changes in sentencing is largely anecdotal and it may still be early to identify any noticeable trends, but to some judges it is a welcome change. U.S. District Judge Lynn Adelman credits *Booker* with providing “rules moderated by mercy. Judges are now better able to consider the offense, the offender, and the needs of crime victims in determining the appropriate sentences. At the same time, the burden on judges to explain their sentencing decisions is significant, and that’s fair, too.”⁷⁸

IV. Recommendations

It goes without saying that all of the stakeholders in the criminal justice system require proper education, training, and resources to identify and accommodate domestic violence survivors as defendants—including police departments, prosecutors, criminal defense attorneys, lawmakers, social workers, parole officers, judges, and the legal scholars who write about them.

⁷⁴ *Id.* at 245-46.

⁷⁵ *Id.* at 261.

⁷⁶ *A Year After Booker: Most Sentences Still Within Guidelines*, NEWSLETTER OF THE FEDERAL COURTS (Administrative Office of the United States Courts, Washington, D.C.), Vol. 38, Number 2 (February 2006), available at <http://www.uscourts.gov/ttb/02-06/indepth/index.html>.

⁷⁷ *Id.*

⁷⁸ *Id.*

In the interest of brevity, this section will focus on the two categories of stakeholders most likely to have a direct impact on a defendant's circumstances—the prosecutor and the criminal defense attorney.

A. Prosecutors as Gatekeepers

The ABA's Model Rules of Professional Conduct contemplate that a prosecutor has ethical duties not only to the state or to the victim on whose behalf s/he may be advocating, but to the broader purpose of justice.⁷⁹ When a prosecutor is made aware of mitigating circumstances, the criminal defense attorney has the luxury of zealous advocacy and an undivided duty of loyalty on behalf of the accused, while the ethical prosecutor engages in a balancing act: on one side is the adversarial process, on the other is the administration of justice. In a perfect world, a prosecutor would have access to all of the relevant information to make a fair offer at the moment the plea bargaining process begins. In reality, dockets are crowded, defendants come from complicated circumstances, and police officers sometimes make mistakes.

In a post-*Booker* world, perhaps the discretion and control afforded to prosecutors will be partially shifted back to judges. Though every federal judge arrives at decisions considering not only her/his personal experience and judicial philosophy, but also the political process that resulted in an appointment to the federal bench—they only hear the cases a prosecutor is willing to pursue. When a prosecutor is faced with a low-level drug offender who is in business with an abusive partner, there are simple things s/he can do to minimize further abuse or damage.

To begin with, a prosecutor who understands domestic violence understands that many battered women leave their partner five, seven, or even a dozen times before they leave for good

⁷⁹ Model Rules of Prof'l Conduct R.3.8 comt.(1)(2008): "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

or before they are killed by their batterer and they do not stay out of “stupidity, masochism, or codependence.”⁸⁰ An educated prosecutor understands that a defendant who is a domestic violence survivor comes from an environment of power and control—and while she may be culpable for her own participation in a drug operation or other offense, her cooperation has special consequences unlike those of other defendants.

Though a defendant’s own attorney is primarily responsible for initiating safety planning with her, a prosecutor can also participate in the process by instructing her on the importance of keeping her cooperation completely confidential.⁸¹ As women enter into the criminal justice system with increasing frequency, prosecutors must understand not only that women get involved in the use and sale of drugs for different reasons, but also the stark reality that one in four women has experienced some kind of physical violence or physical assault in an intimate relationship with one partner.⁸² Though many offenders have experienced abuse or family violence at the hands of a family member, battered women have been subjected to “an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children and friends; and work.”⁸³

Professor Randall notes that a domestic violence victim who presses criminal charges against her offender is three times more likely to testify and aid the prosecution if she is afforded the option to meet with a representative from a victim witness program.⁸⁴ It follows that a battered woman would be more inclined to cooperate with prosecutors in her own defense if she is offered protection from her abuser. Once a prosecutor knows that a defendant is in business

⁸⁰ Buel, *supra* note 63, at 19.

⁸¹ Cottingham, *supra* note 72.

⁸² See Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law*, 23 St. Louis U. Pub. L. Rev. 107, fn 18 (2004).

⁸³ *Id.* at 122 (quoting Evan Stark, *Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 979 (1995)).

⁸⁴ *Id.* at 137 (citing Myrna Dawson & Ronit Dinovitzer, *Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court*, 18 Just. Q. 594 (2001)).

with her abuser and her abuser is in custody, it is incumbent on the prosecution to consider the tendency of abusers to minimize their own wrongdoing, blame his victim, and frame his own story to his advantage—thus while the battered woman protects her abuser, he protects himself.⁸⁵

Finally, when a battered woman offers information for the prosecution that implicates her abuser, she requires protection from her abuser until his trial that the prosecution can offer—just as they would offer to a gang member who cooperates with law enforcement to turn in his leaders. When it is time for the prosecutor to turn over witness lists and other information to the abuser’s attorney—regardless of whether the abuser is incarcerated or out on bail—the battered woman informant requires special protection.⁸⁶ If her cooperation poses a grave danger and there is a likelihood that he will discover the nature of her cooperation, the prosecution can and should offer her participation in a witness security program.⁸⁷

B. Defense Attorneys as Gatekeepers

Just as prosecutors play a gatekeeper role for defendants entering into the plea bargaining process, a battered woman’s defense attorney also has a gatekeeper role. Though prosecutors play a special role in controlling the process and administering justice, the information a prosecutor receives from a defendant is only as reliable as the attorney who represents her. Defense attorneys can address the special circumstances of battered women as defendants in two important areas: 1) client relations and safety planning; and 2) use of the FSG to introduce evidence of abuse.

1. Client Relations and Safety Planning

Because the number of women who are incarcerated has increased so dramatically in recent years, it follows that the client base for criminal defense attorneys is increasingly likely to

⁸⁵ See Margulies, *supra* note 15, at 161-62.

⁸⁶ Cottingham, *supra* note 72.

⁸⁷ *Id.*.

include more women. An occupation that traditionally serves male clients may not be equipped to detect domestic violence or have effective methods for soliciting this type of sensitive information during a social history. The American Bar Association recommends that *all* attorneys screen for domestic violence not only to avoid malpractice, but to ensure ethical representation—and offers materials to assist attorneys with this process.⁸⁸

Access to legal services is the “single highest predictor of long-term reduction in domestic violence.”⁸⁹ However, building trust with a client requires more than asking a series of canned questions. Low income women especially who have had negative experiences with law enforcement, other attorneys, or government agents in positions of authority may be hesitant to trust their own attorneys—to the point where they do not return phone calls or emails, are less than forthcoming with sensitive information, and do not assist the attorney in the process of assembling all of the facts and information necessary to provide adequate representation.⁹⁰ The process of building trust requires persistence, time, energy, and honesty on the part of the attorney. It also requires the attorney to consider that screening for a history of violence may not produce the intended results if one’s client does not consider her partner’s treatment abusive—this may be due to cultural differences, low self-esteem, or her own family history.

Once a criminal defense attorney learns of her/his client’s experience with domestic violence—and determines the abuse is ongoing—the importance of nonjudgmental safety planning cannot be overstated. The attorney has to be prepared to hear that the client has no intention of leaving her batterer, for reasons that may be unfathomable to the attorney. The attorney must understand that separation from an abuser does not always equal safety—

⁸⁸ Tool for Attorneys to Screen for Domestic Violence (American Bar Association for Domestic Violence)(2005), available at <http://www.abanet.org/domviol/screeningtoolcdv.pdf> (last checked May 10, 2009).

⁸⁹ Buel, *supra* note 25, at 225.

⁹⁰ Personal experience of the author, clerking in family law division at Texas RioGrande Legal Aid (May – July 2007).

therefore, safety planning has no “one size fits all” application.⁹¹ Safety planning becomes especially important when the client is released on bail or released early from prison and likewise when her abuser is released.⁹² But the attorney should not overlook the need for safety planning even when the client’s abuser is in custody—it is not unusual for an abuser to make threats over the phone from jail or prison, send messages to his partner through friends or business associates, or attempt to coerce a victim out of testifying against him.⁹³

2. Use of Federal Sentencing Guidelines to Introduce Evidence of Abuse

Whether a defendant’s charges resolve by a plea agreement or a trial, a history of family violence may be relevant not only to explain her actions, but also as a mitigating factor in sentencing—the presence of intimate partner violence in her life at the time the offense was committed should be introduced if applicable to demonstrate the reason for her involvement, the level of control she has over the situation (or lack thereof), and that she possessed a reasonable fear of her abuser.

The introduction of domestic violence either as a defense or as a mitigating factor in cases that involve drug offenses, theft, or prostitution has been met with mixed results. For example, in well-known case of *United States v. Smith*, defendant and college student Kemba Smith introduced duress and coercion as defenses to her involvement in a crack and powder cocaine ring operated by her boyfriend Wainsworth Hall.⁹⁴ Two expert witnesses testified to evidence of Battered Women’s Syndrome.⁹⁵ The court rejected Smith’s claim that her guilty plea was not entered knowingly and voluntarily and suggested that college-educated women from

⁹¹ See Coker, *supra* note 54, at 1017-18.

⁹² Buel, *supra* note 25, at 225.

⁹³ Class Lecture of Travis County Assistant District Attorney Dana Nelson, University of Texas School of Law, February 26, 2009.

⁹⁴ *United States v. Smith*, 113 F.Supp.2d 879 (E.D. Va. 1999)

⁹⁵ *Id.* at 896.

middle class backgrounds cannot be victims of domestic violence: “In the context of her family background and education, there can be no doubt but that Smith understood the ramifications of her decision.”⁹⁶ At trial, Smith’s attorney’s introduced evidence that Hall “had a violent streak and was known to be physically and emotionally abusive,” that their relationship was “marked by episodes of brutal rage” and that he “slapped, beat, or choked Smith on many instances,” verbally abused her, and refused to allow the use of birth control.⁹⁷ As if to suggest Smith should have known better or could have just left him, the court noted it “could not accept such a defense when Smith had dated Hall for such a long time and had witnessed Hall’s violent actions.”⁹⁸

Though President Clinton granted clemency to Smith in 2000, her case illustrates the reluctance of the courts to accept duress as a defense of battered women. In fact, courts are more willing to accept battered women’s syndrome as a defense when a woman kills her abuser than when she cooperates with him to commit other offenses—even though the theory serves to explain why a victim who is familiar with her abuser’s cycle of violence possesses a reasonable fear of imminent harm if she opposes or interferes with his criminal activity.⁹⁹ Though some trial courts allow battered women to claim duress and present evidence of battered women’s syndrome, appellate courts may be reluctant to reverse a defendant’s conviction on the failure to introduce such evidence.¹⁰⁰ Nevertheless, the Ninth Circuit has allowed domestic violence as a mitigating factor for a downward departure in drug offenses under Section 5K2.12 of the Federal Sentencing Guidelines, noting in *U.S. v. Ramos-Oseguera* that the injury threatened “need not be imminent”¹⁰¹ The *Ramos-Oseguera* court also held that battered women’s syndrome may be

⁹⁶ *Id.* at 908.

⁹⁷ *Id.*

⁹⁸ *Id.* at 896.

⁹⁹ Burke, *supra* note 29, at 254-55.

¹⁰⁰ *Id.*

¹⁰¹ *U.S. v. Ramos-Oseguera*, 120 F.3d 1028, 1041 (9th Cir. 1997)(overruled on other grounds).

introduced as the basis for a downward departure based on diminished capacity under Section 5K2.13 for the Federal Sentencing Guidelines.¹⁰² In *U.S. v. Johnson*, the Ninth Circuit allowed a downward departure, also under Section 5K2.12 based on the defendant’s “sad and savage treatment by male abusers and given the court’s recognition that Johnson had been involved with a manipulative, violent, brutal drug lord, the court did have the discretion to depart downward if the court found that Johnson had been subject to coercion, even though with effort she could have escaped.”¹⁰³

Professor Myrna Raeder—who advocates for gender-based applications of sentencing factors that affirm the family as a fundamental liberty interest—argues that post-*Booker*, the Federal Sentencing Guidelines offer numerous options for a defense attorney to request downward departures using domestic violence as a mitigating factor, so long as they are selected strategically.¹⁰⁴ However, Raeder cautions against body of “bad departure case law that can be expected to continue to play a dominant role in sentencing,” creating an uphill battle for defense attorneys.¹⁰⁵ Nevertheless, as an alternative to the Safety Valve Provision or the 5K2.12 exception for coercion or duress, the defense attorney may make use of the following sections, where applicable to her/his client: 5H1.3: Mental and Emotional Condition (where a history or pattern of abuse may be introduced to show its impact on the defendant’s mental state);¹⁰⁶ 5K2.13: Diminished Capacity (which may allow the introduction of post-traumatic stress disorder caused by battering);¹⁰⁷ 5K2.20 Abberant Behavior (if the defendant committed a single

¹⁰² *Id.*

¹⁰³ *U.S. v. Johnson*, 956 F.2d 894 (9th Cir. 1992)

¹⁰⁴ See generally Raeder, *supra* note 64.

¹⁰⁵ *Id.* at 710. (citing *United States v. Palma*, 376 F. Supp. 2d 1203 (D. N.M. 2005)).

¹⁰⁶ *Id.* at 731-32.

¹⁰⁷ *Id.*

criminal occurrence or transaction);¹⁰⁸ and 3B1.2(b) Mitigating Role Adjustment (if the client’s participation was indeed minimal).¹⁰⁹

The *Booker* decision did not reverse decades of case law overnight and application of the tactics suggested above—even with a model client—may require creative strategizing on the part of a defense attorney. Additionally, it begs the question of what the consequences are for an attorney who fails to introduce domestic violence as a mitigating factor in drug sentencing. The test for ineffective assistance of counsel under *Strickland v. Washington* is extremely deferential to the judgment and strategic decisions of the defense attorney¹¹⁰—which makes it an unlikely remedy for the domestic violence survivor whose attorney does not make use of these options. Nevertheless, when defense attorneys regularly screen for family violence, participate in safety planning with their clients, and introduce a history of abuse as a mitigating factor when applicable to the client’s case, it becomes the baseline standard by which strategic decision making can be measured.

CONCLUSION

In the United States, incarceration rather than rehabilitation is the preferred punishment for the use and sale of drugs. As a general approach, this is unlikely to change in the near future. When women who are domestic violence survivors become involved in their abuser’s drug business, the negative outcomes can be devastating for their families, their relationship, and their autonomy. A society that cannot understand why battered women don’t “just leave” their abusers is one that fails to acknowledge the environment of power and control that so many women in violent relationships not only endure, but may perceive as normal. While all women who are

¹⁰⁸ *Id.* at 737-39. The defendant must show the act was: 1) without significant planning; 2) of limited duration; and 3) represents a marked deviation by the defendant from an otherwise law-abiding life.

¹⁰⁹ *Id.* at 738-39. The commentary to 3B1.2 implies that this departure is to be used “infrequently and in situations indicating a lack of knowledge or understanding of the scope and structure of the conspiracy.”

¹¹⁰ *Strickland v. Washington*, 466 U.S. 668 (1984).

conscious of their actions and culpable for their involvement in criminal conduct may not qualify for downward departures or special consideration in sentencing, a criminal justice system that allows domestic violence survivors who operate under constant surveillance of their batter to fall through the cracks is one that is not based in justice at all. Battered women who enter the criminal justice system are more likely to have experienced a history or pattern of abuse in their relationships and thus come to the bargaining table at a disadvantage. The prosecutor who does not consider this context of a defendant's behavior is not living up to the prosecutor's code of ethics. A defense attorney who does not screen clients for domestic violence, participate in safety planning with clients who are domestic violence survivors, or advocate zealously for his client in plea bargaining and sentencing is operating below the standard of care. Case law is created by the attorneys who propose novel legal theories—and when attorneys on both sides understand domestic violence and address it in their practice—change will follow.