

# Why the Abused Should Not Become the Accused

BY  
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Many domestic violence prosecutors have found themselves struggling with what to do about recanting or uncooperative victims.<sup>2</sup> The primary goal of prosecution is to do justice,<sup>3</sup> by making the best legal case possible based on the admissible evidence; to achieve this goal, prosecutors push as hard as they can within their ethical boundaries to make society safe from domestic violence by convicting and punishing offenders. However, this approach does not always allow for victim autonomy in deciding whether to prosecute a case; this decision is ultimately made by the prosecutor.<sup>4</sup> How can prosecutors acknowledge the victim's voice in her own life while following the no-drop policy in effect in many prosecutors' offices today?<sup>6</sup> One question repeatedly surfaces in domestic violence prosecutions: Why not just arrest the victim for her recantation and failure to cooperate with the prosecution of her case?<sup>7</sup> While arresting the victim might seem to solve the immediate problem of what to do with one domestic violence case, it creates much larger problems for the victim, the defendant, and the prosecutor.<sup>8</sup>

## THE IMPACT OF ARRESTING THE VICTIM

Research helps explain why many domestic violence victims are reluctant to support prosecution of their abusers. "The fact is that after an arrest [of the defendant in a domestic violence case], victims quickly realize that once a case enters the court process, they may lose control to what is perceived as an impersonal and overbearing bureaucracy."<sup>9</sup> A victim's refusal to cooperate with prosecution and fear of what may happen if she cooperates may be justified because

"women's fears of offender dangerousness as a consequence of arrest are often quite accurate."<sup>10</sup> In fact, "increased prosecution rates for domestic assault...were associated with *increased* levels of homicides"<sup>11</sup> in several demographic groups. Furthermore, recent studies have established that victims' lethality assessments may actually underestimate what may happen if they cooperate with the prosecution of their abusers.<sup>12</sup> None of this means that the prosecution of domestic violence should stop, or even slow, but prosecutors must be aware that victims are not unreasonable in fearing their abusers, regardless of the victims' level of cooperation with the prosecution.

For a victim of domestic violence, the consequences of arrest are both obvious and not-so-obvious. Arrest means entry into the criminal justice system: being handcuffed, arraigned, posting bail, pleading guilty or going to trial. In short, the victim becomes a defendant — a frightening and humiliating process for most victims.<sup>13</sup> The same law enforcement officers and prosecutors who promised the victim they would protect her from her abuser have now placed her under arrest and set her abuser free. If convicted, the victim has had her credibility stripped, and is then subject to impeachment on the basis of a crime of dishonesty in any future trial.<sup>14</sup> The victim has been taught that the system is not in her favor, that the prosecutor's office is not a safe place to go for help, and that future abuse should not be reported if she does not want to go to jail.

Arresting the victim also sends a strong message to the abuser by reinforcing his notions of power and

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control. It “proves” that the defendant **does** control the victim, that he successfully scared or intimidated her into not coming to court, and that the State was unsuccessful in overcoming his will and tactics. It teaches him that he can beat or rape the victim with impunity. It teaches him that the State will not protect the victim and will not prosecute him effectively, which may encourage him to continue and even escalate his abusive behavior.<sup>15</sup>

What happens to the victim's children when she is arrested? Are they left in the care of the abuser, taken into protective custody, or just allowed to fall through the cracks of the system? The short- and long-term consequences for those children may be overwhelming. Children who witness abuse in the home are more likely to become abused or abusive in later life.<sup>16</sup> The victim may very well be the only protection in the home against the defendant. The defendant may use the children against the victim, either by threatening to harm or harming the children, or by threatening the victim with social services intervention and removal of the children. If the children are actually removed from the home into foster care as a result of investigating the abuse, the children and the victim are taught that they will be punished for reporting, and are encouraged not to report in the future. A conviction for the victim could negatively impact her in child custody proceedings, interaction with the child welfare system and the obtaining of public benefits, all of which directly affect her children's welfare.

### THE DECISION- MAKING PROCESS

For many good reasons, prosecutors tend to treat domestic violence cases differently than other cases. However, just like any other case, they must evaluate many factors in judging whether to arrest a witness in the case. This is not to say that prosecutors should never request the arrest of an alleged victim, but that those cases should be **extremely** rare. Prosecutors are obli-

gated to evaluate all of the evidence in a given case. In a case where the typical dynamics of domestic violence recantation or failure to prosecute are *not* in operation, and the evidence indicates that the alleged victim made a false report, prosecution should occur as it normally would in that jurisdiction.<sup>17</sup> In a case where the dynamics of domestic violence *are* operating, prosecutors should consider whether some of the options listed below in this article might work better for the victim and the case than having the victim arrested.

Prosecutors must evaluate the ethical considerations involved in determining whether to arrest a victim. If the prosecutor believes the victim was telling the truth in the initial report to police and has then made a false recantation of those facts, s/he cannot ethically prosecute a false report to law enforcement charge because s/he believes the false report charge is not supported by probable cause.<sup>18</sup> Similarly, if the prosecutor has a reasonable belief that the victim is under duress when lying on the stand (if she testifies to her recantation), prosecuting a perjury charge would be unethical.

The victim in a domestic violence case is ultimately a fact witness, without whom the case may still be proved (granted, frequently with more difficulty after *Crawford v. Washington*<sup>19</sup> and its progeny). For example, if there is an unwilling or unavailable witness in an armed robbery or drug distribution case, even if it is the alleged victim, many times the case can go forward by using the testimony of other witnesses to prove the elements of the crime.<sup>20</sup>

Similarly, prosecutors of domestic violence should try to prove their cases without the victim, since even in the post-*Crawford* age, they are not required to have the victim on the stand to admit 911 calls<sup>21</sup> and evidence of fresh injuries to the victim. There are no confrontation clause issues to a neighbor testifying that she heard arguing (excited utterances), observed that only two people were in the apartment, and saw the victim with injuries while the defendant was

unscathed. As she sees how much evidence is mounting against the defendant, the victim may feel the chances of conviction improving and feel more confident in her own safety. The evidence may be so compelling that it may empower the victim and even convince her to testify by the end of the case-in-chief. “The less coercive the strategy used to gain victim support, the more likely the victim’s sense of empowerment will increase.”<sup>22</sup>

## ALTERNATIVES TO ARREST

What are some alternatives to arresting the victim that might still allow prosecution of the domestic violence committed against her? Some of the following ideas may be helpful:

- *Start with a proactive advocacy plan.* Have in-house advocates make contact with victims as quickly as possible when a case posts to the office. If a victim is supported from the beginning of the case, she may be more willing to testify, partially because she will know she has a safety and support network that was probably lacking before the charges were filed.
- *Provide victims with information on counseling and other sources of support,* especially community-based advocacy, as soon as possible.<sup>23</sup> Prosecutors obviously cannot force a victim to go to counseling, but might convince a hesitant victim by asking her to “try it, just once.”
- *Draw the victim’s family members back into contact* (with her permission, of course). Many abusers “encourage” their victims to cut off contact with the victim’s family, partly to make the victim feel more isolated.<sup>24</sup>
- *Help the victim convince her abuser that she has tried to assist his case.* Several strategies may be effective:
  - Allow the victim to sign a drop-charge form,<sup>25</sup> and let the law enforcement officer and victim advocate know that it will not harm the prosecution of the case. In fact, a drop-charge form can strengthen the case rather than

weakening it, because it serves as further evidence of the victim’s susceptibility to domestic violence dynamics. Give the victim a copy for the defendant or his family, in case they are harassing or threatening the victim.<sup>26</sup>



- Have law enforcement serve the victim with subpoenas for every court appearance if she needs or wants them.<sup>27</sup>
  - Have the law enforcement officer or victim advocate speak with the victim within earshot of the defendant (with the victim’s permission). S/he might tell the victim, “I told the prosecutor you wanted this dropped, but s/he said it was her/his case and s/he will not drop it.”<sup>28</sup>
- If the victim is willing to make a complaint against the family, refer her to

*law enforcement to report any threats or harassment.*

- To bolster the case for forfeiture by wrongdoing,<sup>29</sup> check for three-way or direct calling from the jail if the defendant remains in custody pending trial.
- If the defendant is not in custody and the victim is willing, file a bond revocation motion on the basis of third-party contact with the victim alleging that the defendant is encouraging his family to contact her (if that is the case). File harassment or intimidation warrants if the defendant attempts to influence the victim’s testimony or threatens her in any way.
- Offer training to law enforcement officers so that they understand just how tough domestic violence cases are, and that prosecutors need more evidence, not less, in these cases. Make sure they understand domestic violence dynamics and do not blame victims for their lack of cooperation.
- Determine a safe way to communicate frequently with the victim, and make sure she knows the lines of communication are open, regardless of whose side she takes in court.
- Make the victim feel like she is believed and believed in, which must be true or the State would not be prosecuting her case.

## CONCLUSION

Ultimately, there is no need to arrest victims of domestic violence, regardless of their level of cooperation with the prosecution. Creative case management and genuine care for victims will help solve these challenging cases.<sup>30</sup> The mere appearance of the victim in the courtroom frequently resolves these cases, since the defendant knows what she will say if placed under oath.<sup>31</sup> The defendant is betting that he is smarter than the prosecution team... **prove him wrong.**



Prosecutors receiving STOP<sup>1</sup> or GTEA<sup>2</sup> funds, both authorized and funded under the auspices of the Violence Against Women Act of 2005 (VAWA),<sup>3</sup> should consider that arresting domestic violence victims may endanger funding, not only for the prosecutor, but for allied professionals in victim advocacy and law enforcement. (While a given prosecutorial agency may not be directly funded under STOP or GTEA, it may benefit indirectly from funds administered under these grants for an in-house victim advocate or for training.)

Agencies funded under STOP grants are “strongly discouraged from proposing projects that include any activities that may compromise victim safety such as the following: ...Requiring victims to report sexual assault, stalking, or domestic violence crimes to law enforcement or forcing victims to participate in criminal proceedings...; and Procedures that would force victims of domestic violence to testify against their abusers or impose other sanctions on them. Rather, procedures that provide victims the opportunity to make an informed choice about whether to testify are *encouraged*.”<sup>4</sup> In addition, in order to receive funding under GTEA, “applicants must: (1) certify that their laws or

official policies – (a) encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed; ... (2) demonstrate that their laws, policies **or** practices **and** their training programs discourage dual arrests of offender and victim....”<sup>5</sup>

Throughout VAWA, the principles of offender accountability and victim safety are paired. By encouraging or requesting the arrest of victims, prosecutors may be endangering their own funding or that of their partner agencies.

<sup>1</sup> FY2006 Services\*Training\*Officers\*Prosecutors (STOP) Violence Against Women Formula Grant Program, available at <http://www.usdoj.gov/ovw/fy2006stopsolicitationfinal.pdf> (last visited November 1, 2006) (hereafter, STOP).

<sup>2</sup> Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program, available at <http://www.usdoj.gov/ovw/fy06arrestsolicitationpostingversion.pdf> (last visited November 1, 2006) (hereafter, GTEA).

<sup>3</sup> Most recently renewed as the Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109<sup>th</sup> Cong (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:h3402enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h3402enr.txt.pdf) (last visited November 1, 2006) (hereafter, VAWA). STOP is reauthorized under §101 of the bill, and GTEA is reauthorized under §102.

<sup>4</sup> STOP, 8-9 (emphasis in original). Similarly, see GTEA, 11.

<sup>5</sup> GTEA, 5 (emphasis in original).



## NCPVAW PROSECUTION TOOLKIT

**A**re you a prosecutor or allied professional involved in the prosecution of violence against women? Request assistance from the Prosecution Toolkit at [http://www.ndaa.org/phpdocs/prosecution\\_toolkit.html](http://www.ndaa.org/phpdocs/prosecution_toolkit.html)

Information available on the following topics, plus many more:

- *Crawford v. Washington* and its progeny
- Lethality factors in domestic violence
- Evidence-based prosecution
- Voir dire
- HIPAA
- Expert witnesses
- Opening and closing arguments
- Pre-trial motions
- Charging decisions
- Strangulation
- Teen victims
- Sexual assault

Need information on State Domestic Violence Reporting Requirements?  
[http://www.ndaa.org/apri/programs/vawa/dv\\_reporting\\_requirements.html](http://www.ndaa.org/apri/programs/vawa/dv_reporting_requirements.html)

Want to learn about State Rape Reporting Requirements?  
[http://www.ndaa.org/apri/programs/vawa/state\\_rape\\_reportings\\_requirements.html](http://www.ndaa.org/apri/programs/vawa/state_rape_reportings_requirements.html)

Looking for state statutes relating to violence against women? <http://www.ndaa.org/apri/programs/vawa/statutes.html>

Have a prosecution question relating to violence against women cases? <http://www.ndaa.org/apri/programs/vawa/contact.html>

## FOOTNOTES

- 1 Ms. Gaddy is a senior attorney with the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute, the research and development division of the National District Attorneys Association.
- 2 See, e.g., Jennifer A. Brobst, *The Legal Impact on Victims Reluctant to Testify in North Carolina*, 1 SWORD & SHIELD 2, 1-2, March 2006.
- 3 “The primary responsibility of prosecution is to see that justice is accomplished.” NDAA NATIONAL PROSECUTION STANDARDS §1.1, (2nd Ed., 1991).
- 4 In most jurisdictions, whether through operation of a victims’ rights statute or by the common law principle of prosecutorial discretion, prosecutors make the decision on whether or how to proceed in a given case. Most states require victims to be allowed input into the decision, but none allow victims to control prosecutors’ ultimate decisions. See, e.g., 18 U.S.C. § 3771, the Crime Victims’ Rights Act.
- 5 “Recent results of the national victimization survey indicate that about 85% [of] victims of intimate partner violence are women.” Mary A. Finn, *Effects of Victims’ Experiences with Prosecutors on Victim Empowerment and Re-Occurrence of Intimate Partner Violence, Final Report* (February 2004), unpublished Federally-funded grant final report, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/202983.pdf> (last visited August 29, 2006), 3. For this reason, the author will use “she” when referring to the victim, and “he” when referring to the perpetrator or defendant.
- 6 For a more complete analysis of this interaction and conflict, see *id.* at 9-12.
- 7 Possible charges in most states include filing a false police report, contempt of court, failure to appear, obstruction of justice, or perjury, among others.
- 8 Once a victim is arrested, Fifth and Sixth Amendment rights to counsel attach, creating a situation where the victim is highly unlikely to testify. In cases involving failure to appear by the victim, prosecutors must be cautious to ascertain the victim’s safety before taking any action. Taking a guilty plea from the defendant, and especially dismissing the case, should involve consultation with the victim to assure that she is safe, regardless of whether she appears in court.

For the purposes of this article, the author will assume that the case against the defendant must be dismissed for lack of proof if the victim is arrested. “Prosecutors estimate that almost 60% of all decisions not to prosecute were due to victim’s non-cooperation, including refusal to testify, recanting, or retracting testimony or failing to appear in court” (internal citations removed). Gerald T. Hotaling & Eve S. Buzawa, *Victim Satisfaction With Criminal Justice Case Processing in a Model Court Setting* (April 2003), unpublished Federally-funded grant final report, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/195668.pdf> (last visited August 29, 2006), 7.
- 9 *Id.* at 7.
- 10 *Id.* (internal citations removed).
- 11 *Id.* (emphasis in original).
- 12 “The study also found that almost half the murdered women studied did not recognize the high level of their risk.” Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT’L INST. OF JUST. J. 250, 16 (2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250e.pdf> (last visited August 29, 2006). Separation from the defendant can be an incredibly dangerous time for the victim. “Of 57 domestic homicides occurring in New York State between 1990 and 1997, 75% of the victims had ended the relationship or stated an intention to end it at the time of their death. (New York State Commission on Domestic Violence Fatalities, Report to the Governor; (Albany, NY: 1997), 8)”, cited at Corporate Alliance to End Partner Violence, *Facts and Statistics*, available at [http://www.caepv.org/membercenter/fact\\_display.asp?fs\\_id=8](http://www.caepv.org/membercenter/fact_display.asp?fs_id=8) (last visited August 29, 2006).
- 13 “Use of coercive actions has the effect of lowering victims’ empowerment, and this should not be an acceptable outcome for prosecutors.” Finn, *supra*, at 104.
- 14 For information on the likelihood of re-occurrence of domestic violence, see Finn, *supra*, at 15-20. See generally Nat’l Inst. of Just., Research in Brief, Violence Against Women: Identifying Risk Factors (November 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/197019.pdf> (last visited August 29, 2006).
- 15 “Most abusive relationships follow a pattern called the cycle of violence, a repeating cycle with three phases: tension building, explosive incident, and honeymoon stage...In [the tension] phase, the warning signs of abuse start to appear...In [the explosive incident] phase, all the tension built up in the first phase is released through an outburst of violence that can include intense emotional, verbal, sexual and/or physical abuse...In [the honeymoon] phase, the abuser tries to get the victim to stay with him by apologizing for the explosion, trying to make up with the victim, and trying to shift the blame for the explosion off himself...Generally, over time, the honeymoon stage gets shorter and shorter and may even disappear, and the explosive incidents become more and more violent and dangerous.” <http://www.breakthecycle.org/>: follow links to “Home > Learn more about domestic violence > The cycle of violence” (last visited August 29, 2006).
- 16 See H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence* (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/foundation/index.cfm> (last visited August 29, 2006).
- 17 In this respect, domestic violence cases should be treated the same as a drug or armed robbery case. Prosecutors rarely recommend arrest of victims who have lied in these cases, but do sometimes request investigations or charges, especially in cases involving particularly egregious abuses of the criminal justice system.
- 18 MODEL RULES OF PROF’L CONDUCT R. 3.8 (2004). “The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause....”
- 19 See *Crawford v. Washington*, 541 U.S. 36 (2004).
- 20 It frequently becomes a more circumstantial case, but many states have jury instructions which give circumstantial and direct evidence the same weight.
- 21 See *Davis v. Washington*, 547 U.S. \_\_\_\_, 126 S.Ct. 2266 (2006).
- 22 Finn, *supra*, at 26.
- 23 Counseling is certainly a demonstration of support to the victim, but prosecutors should not rely on counseling to be a cure-all for anything and everything that bothers the victim about the case. A community-based advocate can provide support through the court process and for many of the victim’s day-to-day needs, allowing the prosecutor to focus on proving the elements of the crime.
- 24 See, e.g., Domestic Abuse Intervention Project, *Power and Control Wheel*, available at <http://www.duluth-model.org/documents/PhyVio.pdf> (last visited August 29, 2006).
- 25 A drop-charge form is available in most prosecutor offices, whether or not it is specifically designated for domestic violence cases. The victim’s signature on the form does not mean that the prosecutor must in fact drop the case. (A copy of the form should be provided to defense counsel in most cases, because it may be interpreted as exculpatory information, and therefore subject to discovery regulations.)
- 26 Just having a signed form in hand may provide the victim with enough strength to show the defendant that she has tried to assist his case, and the fact that the prosecutor still will not drop the case may force the defendant into a guilty plea. See Finn, *supra*, at 10 (“when batterers realize that the victim is not in control of the process, they stop attempts to intimidate her...Further, once batterers realize the charges will not be dropped, they are more likely to plead guilty” (internal citations removed)).
- 27 Again, this allows the victim to tell the defendant she has done all she can, but the State will not drop the case. See Finn, *supra*, at 10.
- 28 See *id.*
- 29 *Davis*, *supra*, at 18.
- 30 “Ensuring that victim service programs work in conjunction with the legal system and community agencies and that staff address victims’ needs in a positive manner will encourage victims to turn to the criminal justice system for assistance and may maximize the potential to break the cycle of violence.” National Institute of Justice, *Victim Satisfaction With the Criminal Justice System*, NAT’L INST. OF JUST. J., 253 (2006), available at <http://www.ojp.usdoj.gov/nij/journals/253/victim.html> (last visited August 29, 2006).
- 31 See Finn, *supra*, at 10.

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Get quick advice from professionals in the field through the listserv.

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