

Prosecution Diversion in Domestic Violence: Issues and Context

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Introduction

A wide range of dispositional alternatives should be considered in cases of family violence. In all cases, prior to sentencing, judges should carefully review and consider the consequences of the crime on the victim – U.S. Attorney General's Task Force on Family Violence Final Report, September 1984

Diversion programs for perpetrators of domestic violence, while worthwhile in intention and sometimes effective, are inadequate to address domestic violence as a serious crime. – California Senate Bill 169 (eliminating diversion as an option for domestic violence offenses), October 1995

In 1984 the Attorney General's Task Force encouraged alternatives to incarceration, "when appropriate," and defined appropriate as "no serious injury and no history of repeated abusive behavior." Alternatives were important in order to reduce victim reluctance "to seek the aid of the court" because of fears of incarceration and the loss of economic support. The task force included pretrial and presentence diversion among those alternatives. Ten years later, in 1995, California reversed a law enacted in 1979 that permitted diversion in certain misdemeanor domestic violence cases, following an Auditor General's report that found courts had diverted ineligible defendants.

Nationally, diversion has had a similarly mixed reception. The *Model Code on Domestic and Family Violence* prohibits diversion: "A court shall not approve diversion for a perpetrator of domestic or family violence" (NCJFCJ, 1994, p.15). Funding guidelines under the VAWA Grants to Encourage Arrest Policies discourage diversion as an activity that may compromise victim safety: "Diversion programs and alternative dispositions can send a message to victims and perpetrators that abuse is not a serious crime." Nevertheless, diversion programs remain a common feature of criminal justice system response to domestic violence.

This paper examines the issues surrounding prosecution diversion and the context for reconsidering its role and related cautions in promoting victim safety and offender accountability.

Multiple Meanings

What do we mean by “diversion”? Searching the literature, commentaries, and program descriptions, it is apparent that there is no single meaning and that many disposition and sentencing arrangements are thrown under the *diversion* label. The list includes deferred prosecution, first offenders, pretrial disposition, presentence disposition, continuance for dismissal, alternative to conviction, post-charge diversion, continued without a plea, continued without a finding, and stipulated continuance.

The *Model Code on Domestic and Family Violence*, for example, prohibits “diversion,” but “deferred sentencing” is permitted (NCJFCJ, 1994, p.15). The deferred sentence requires “a plea or judicial admission to the crime.” If the perpetrator successfully completes the sentencing conditions, the case may be dismissed.

“Diversion” in domestic violence cases encompasses a myriad of formal and informal arrangements. Some require an admission of guilt and compliance with specific sanctions, protections, and batterer’s treatment. Others suspend all court proceedings in exchange for a loose promise to attend anger management counseling. In some states and jurisdictions, charges are dismissed upon completion of the court’s directive. In others, the entire record, including the arrest, is expunged.

It is helpful, therefore, to offer a definition of prosecution diversion in the context of domestic violence. Diversion is **any action that suspends criminal justice case processing of a domestic violence related charge, with one or more of the following results: no charges filed, charges dismissed, or charges expunged.** Diversion, in other words, “turns aside” from the usual sequence of events in the criminal justice system, and offers an alternative to a criminal conviction.

Historical Underpinnings

Domestic violence diversion emerged within the broader pretrial release programs that appeared during the 1960s. The more general diversion programs were an effort to intervene in ways that reduced the likelihood of future arrests, with the goal of reducing recidivism through rehabilitation. The National Association of Pretrial Services Agencies describes pretrial diversion as “a strategy designed to offer non-punitive case processing to selected individuals charged with a crime.” It is defined by the following practices:

- alternatives to traditional criminal justice proceedings;
- participation by the accused only on a voluntary basis;
- access to defense counsel prior to the accused’s decision to participate;

- occurring no sooner than filing of formal charges and no later than a final adjudication of guilt;
- service plans developed with the defendant and structured to address the defendant's needs and assist in avoiding behavior likely to lead to future arrests;
- emphasis on personal responsibility via restitution, drug testing, and community services; and,
- dismissal of charges if the defendant successfully completes the process.

The “selected individuals” were typically those charged with drug crimes, shoplifting and retail theft, and juvenile offenders – typically, low-level misdemeanors and property crimes. While the origins of pretrial diversion programs may have emphasized rehabilitation and alternatives to traditional proceedings, they offered a practical appeal as well: reducing demands on court time and space by reducing the number of trials and actions requiring prosecutor and judicial attendance. Pretrial diversion, along with plea negotiation, became a useful tool for managing time and resources (NAPSA, 1998). The goals for Minnesota’s pretrial diversion program (§401.065[2]), for example, illustrate this intent:

- 1) *to provide eligible offenders with an alternative to confinement and a criminal conviction;*
- 2) *to reduce the costs and caseload burdens on district courts and the criminal justice system;*
- 3) *to minimize recidivism among diverted offenders;*
- 4) *to promote the collection of restitution to the victim of the offender’s crime; and,*
- 5) *to develop responsible alternatives to the criminal justice system for eligible offenders.*

National Prosecution Standards published by the National District Attorney’s Association present pre-trial diversion as an example of “the prosecutor’s discretionary authority in screening and charging” (NDAA, 1991, p.135). Among the purposes of diversion are “unburdening court dockets and conserving judicial resources,” along with reducing recidivism via a “more effective and less costly” alternative to incarceration.

As pressure on police to arrest for domestic violence-related crimes increased in the 1980s, growing numbers of batterers appeared in pretrial diversion programs. They were often treated as first offenders because of the absence of prior arrests. Advocates in community-based battered women’s programs raised questions early on about the suitability of diversion for domestic violence. Where diversion meant paying a fee to attend a counseling program and little else, it minimized the violence and batterers avoided any significant consequences. First-time police intervention rarely coincided with a first-time act of violence, advocates pointed out. Treating a batterer as a first-offender diminished the seriousness of the violence and the victim’s safety. Nor was it difficult to find examples of diversion programs where offenders ignored the requirements without consequence, or did little more than attend an anger management class. Domestic violence diversion was primarily a calendar management tool with

inadequate guidelines and poor monitoring. It communicated the message that domestic violence is less serious than crimes against strangers (Lemon, 1990, p.165).

Generic diversion programs made no distinction between batterers and other offenders. The *Performance Standards and Goals for Pretrial Release and Diversion*, for example, published by the National Association of Pretrial Services Agencies, contains no references to domestic violence (NAPSA, 1995). The NDAA *National Prosecution Standards* do not specifically address diversion in the context of domestic violence.

The guidelines and limitations that have emerged for domestic violence diversion programs have come primarily via battered women's advocates as they sought to influence prosecution and judicial policy. Their efforts have been primarily in the direction of opposition to diversion.

- *Diversion should only occur in extraordinary cases, and then only after an admission before a judicial officer has been entered . . . Judges should not accept civil compromises, deferred prosecution, reduced charges or dismissals where justice is not served by these devices (NCJFCJ, 1990).*
- *The general consensus of most research findings, experts, and practitioners in the area of domestic violence is that diversion of cases, particularly if a guilty plea is not entered, is ineffective with [domestic violence] offenders. The coercive power of the criminal justice system is needed to enforce the conditions of probation and parole in order to protect victims and compel abusers to change their behaviors (Klein, 1994).*
- *Reject alternative dispositions and diversion options (Little, et al., 1998).*
- *Although diversion and dismissal of charges may be appropriate after successful completion of a drug treatment program, the slate cannot be wiped clean in domestic violence cases. Rehabilitation of the domestic violence offender is desirable, but offender accountability and victim protection are paramount. Because of the seriousness of violent behavior and the repetitive nature of domestic violence, a legal record needs to be maintained (Fritzler & Simon, 2000, p.31).*

Although diversion of domestic violence cases has been widely discouraged in published guidelines for prosecution and court practice, it is nevertheless widespread. Rather than a rare exception in "extraordinary cases," diversion remains a common prosecutorial and judicial response.

Familiar Concerns and Unintended Consequences

In spite of this longstanding opposition to diversion, at least half of the prosecutors in a 1994 survey of large jurisdictions used a domestic violence diversion program (Rebovich in Buzawa & Buzawa, 1996). Examples of diversion across a range of jurisdictions are easy to locate. The following communities, for instance, all have avenues for domestic violence offenders to avoid criminal charges or a conviction record via some type of diversion program: Chelan County, WA; Wichita, KS; Cape Girardeau, MO; Akron, OH; Madison, WI; Milwaukee, WI; East Baton Rouge, LA; Hennepin County, MN; Bellevue, WA; Kootenai County, ID; Pinellas County, FL; Shelby County, TN; Queens County, NY; Santa Fe, NM; Boston, MA; Washtenaw County, MI; Kankakee County, IL; and, Pueblo, CO. Among the states, Michigan, Delaware, Wisconsin, and Connecticut have statutory provisions for some form of diversion in domestic violence cases.

Blanket prohibition of and blanket support for criminal case diversion are both problematic. Domestic violence diversion was discontinued in California because of the variability among batterer treatment programs, the lack of offender accountability for the use of violence, and the absence of monitoring (Bigornia, 1997). That eliminated diversion, however, as an option for women who were arrested for their response to battering. An emphasis on conviction and probation does not necessarily mean that batterers will receive consistent and appropriate supervision. Probation officers with high case loads and little training about domestic violence are poorly equipped to provide a high level of accountability and close attention to victim safety.

Accountability

Offender and system accountability remain at the heart of diversion critiques. Diversion is often an informal and haphazard process, with no criteria or guidelines for eligibility, no admission of guilt, and little supervision or oversight by the court, prosecutor, probation, or other entity (Rebovich, 1996; Martinson, 2003; Martinson, et al., 2002; Hobart, 2002). As such, it becomes an example of case processing without meaning for victim safety or offender accountability. Of the diversion programs reported by Rebovich, for example, nearly two-thirds (63%) allowed an offender to enter the program without a guilty plea. Diversion has been used because it's easier than getting a conviction before a particular judge. In other instances it remains outside of judicial purview and is an informal process between the prosecutor and defense attorney: sign up for a batterers' program and the charge will disappear.

The following description of a deferred sentence from the 2002 Washington State Domestic Violence Fatality Review (Hobart, 2002, p. 39) captures a frequent approach to diversion and the hazards in relying on it as a means of effective offender accountability when there is no clear, consistent monitoring. It describes the experience of "Mike" (a pseudonym) after an arrest for trespassing and malicious mischief for kicking in the door of his girlfriend's home. In a subsequent relationship he killed his partner and himself.

Eventually, Mike received a deferred sentence, a fine payable via work crew and two years with no similar violations . . . Mike did not pay the fine or show up for work crew. He did not show up for the hearings set to review the case. A warrant was issued. However, enough time went by that the court determined that the deferral was complete. Almost three years after the incident, the case was dismissed. Mike had served no time in jail, paid no fines, attended no treatment, avoided work crew, and had not been arrested on his warrant.

Once accepted for diversion, it can be weeks or months before an offender gets to a batterer treatment program. Batterer intervention spans a wide range of approaches and requirements, from a few hours to fifty-two weeks. Given the choice of several programs, offenders can “spend two or three months shopping around to find which program is a dollar cheaper or seems to fit their schedule perfectly” (Healey & Smith, 1998, p.86). Once enrolled, monitoring of attendance and participation might be superficial, with infrequent reports back to the court or prosecutor. If an offender fails to show up, it can be weeks before this information reaches the prosecutor or the court. If there was no guilty plea as a condition of entering the diversion program, the prosecutor must decide to take the case to trial, thereby extending the time between the incident and any sanction even further. Or, the case may be quietly dismissed.

In some communities, successful completion of the diversion program leads to conviction on a lesser charge, such as disorderly conduct. More common, however, is complete dismissal of any criminal charge related to the incident. In some jurisdictions diversion is also an avenue to expunging the arrest record.

Problematic Arrests and Poor Case Screening

The proliferation of mandatory and preferred arrest laws and policies has increased the number of domestic violence-related arrests nationwide. The higher numbers alone have made diversion programs more attractive. Arrests can be problematic, however, and lead to dumping large numbers of questionable cases into diversion programs. It becomes a self-sustaining process: where diversion programs exist, they are likely to be used. In another jurisdiction, the same case would be dismissed.

Arrests are problematic when disconnected from the context of the violence. “Carrying on loud arguments, pounding the table, making occasional public insults, threatening to leave and take the children, or having extramarital affairs do not in themselves constitute domestic violence. Such behavior can be found in many relationships and is often emotionally abusive. Domestic violence involves the use of intimidation, coercion, threats, and physical force” (Frederick, 2000, p.3). Loud arguments and pounding the table often lead to arrest, however, particularly under a mandatory arrest or “zero tolerance” response. Disorderly conduct has become a catch-all charge for such behavior and dual arrests a common response. The effect is not to necessarily intervene early in battering behavior, which may be the intent, but to trivialize battering by undermining its complexity and seriousness. The existence of a diversion program can make it more likely that arrest practices go unexamined.

Prosecutors and courts faced with high numbers of domestic abuse related arrests may apply a standard response that does not provide the level of case screening necessary to distinguish when a first arrest involves a truly minor, isolated incident and when it signals an escalation of longstanding coercion, threats, or violence. Channeling all first arrests into a diversion program, or automatically reducing low-level domestic assault to disorderly conduct¹, means that more dangerous cases may become invisible. The following assessment of one community's approach illustrates the problems with this broad approach and limited case screening (Martinson, 2003).

Most first time offenders are given the option of the [Statutory] disposition, which gives the offender an opportunity to successfully complete a period of probation, after which the case is dismissed. There are no criteria or guidelines for eligibility. Many practitioners, including probation officers, gave examples of seeing a wide range of defendants (e.g., a push and shove case to a case where a man put bruises all over his wife's body) receive the same sentence.

Safety and Protection for Battered Women

Diversion is a paradoxical response when considering safety and protection. Lax supervision of offenders and lengthy intervals between the offense, entry to the program, and follow-up on violations increase the vulnerability of and risk to victims. Where offenders are not required to plead guilty in order to participate in the diversion program, they can easily deny accountability for their conduct and further minimize coercive and violent behavior.

At the same time, however, diversion programs offer the kind of system response that many victims want. They want the abuse to stop and to be taken seriously, but they do not want their partners to spend time in jail. Women of color, in particular, are reluctant to see men in their communities incarcerated or further penalized by conviction records. Women want their partners to continue employment and child support, and they want them to "get help." Diversion can support this. Additionally, the option of diversion can make victims more willing to meet with advocates and prosecutors, thereby opening avenues for safety planning and information about legal options and community resources (Buel, 1998).

This does not mean that diversion should be seen as the solution to the problem of "uncooperative victims." Domestic violence victims have many reasons to be reluctant about being caught up in criminal prosecution, including pressure or threats from the offender, invasion of privacy, fears about the impact on immigration status, language differences, past experience with the legal system, and the logistics and costs of child care and time away from work. In their interest to prosecute specific cases and respond to specific offenders, prosecutors are understandably frustrated when victims seem to thwart

¹ In states with penalty enhancers for multiple domestic-violence convictions, reducing assault charges to disorderly conduct is similar in effect to diversion if disorderly conduct convictions do not count toward an enhanced penalty.

their efforts. Diversion cannot be the only response, however, and may not be an appropriate response at all. It is too easy under diversion to lump together a wide range of offenders and apply the same level of intervention without regard to the offender's potential risk to the victim and whether diversion will increase her safety. Diversion can also shift attention away from the need to improve the overall quality of initial response, investigation, and basic advocacy, which may do more to support successful prosecution.

For women who have been arrested because of their response to battering, diversion is also a paradoxical response. Diversion can make it easier to charge women who have acted to defend themselves or otherwise respond to battering. There may be less incentive to sort out self-defense and predominant aggressor and simply proceed with the charges and offers of diversion. Women may readily agree to plead guilty and participate, apart from the merits of the arrest or implications for child custody and placement, because of the promise that the charge will be dismissed or they will be released from jail more quickly. The following scenario, developed as a presentation to county attorneys, illustrates this dynamic (Pendleton, 2000, p. 44).

Carmen: *No hice nada.* I did not do anything
Attorney: Well, the police took pictures of your injuries and also of your husband's injuries. You need to tell me what happened.
Carmen: What is "injuries"? What do you mean? He has been very bad to me since we married.
Attorney: These are obviously self-defense injuries. I am going to try to talk to the county attorney or try to get the case dismissed.
Attorney: Hi, I am calling to talk to prosecutor B.
I'm sorry, they're in court. Can I have them return your call?
Just tell them Attorney C called again about the XX case.
Attorney: [Finally, after 200 more phone calls the attorney reaches the prosecutor.] On that case we are arraigning tomorrow, I was wondering if you could drop the charges against my client?
Prosecutor: I was considering dropping the charges to a simple domestic abuse assault. What do you think about that? Could I get a plea?
Attorney: How much jail time would she get?
Prosecutor: No additional jail time, but I'd be willing to give her a deferred sentence if she does the BEP program and give her credit for time served.
Attorney: I don't know. I will have to check with her, but she said she scratched him while he was choking her.
Attorney: [To client in jail] I think I got you a pretty good deal. I can get you released with time served if you plead to a simple domestic abuse assault. You will have to go to some classes.
Carmen: But, I didn't do anything wrong; I only scratched him because he was choking me.
Attorney: You told me when I first interviewed you, your main concern was getting out of jail and getting your kids back. If you agree to do this plea, we can get you out this afternoon.

If arrests of battered women are high, however, diversion at least offers a way to avoid a permanent conviction record. The Domestic Abuse Intervention Program in Duluth, for example, developed a diversion program to address the growing number of arrests of domestic violence victims who used violence in response to battering. “Women tend to plead guilty” at their first appearance, particularly if they have not spoken with an advocate. With a new police policy and training specific to understanding and applying self-defense and predominant aggressor factors, arrests of battered women have fallen significantly (Abernathy, 2003).

Diversion was not Duluth’s only response to arrests of battered women for using violence, but one of several strategies: 1) reduce the number of arrests; 2) work with defense attorneys to more aggressively defend women charged with assaulting their abusers; 3) work with prosecutors to defer cases; 4) develop a sentencing matrix that accounts for the severity, frequency, and impact of the violence; and, 5) confront criticism that accounting for the context of battered women’s violence is unfair. Among these strategies, working with defense attorneys was the least developed, partly because battered women tend to be more forthcoming in acknowledging their use of violence. It has been the Duluth City Attorney’s Office that “has shown the most interest in addressing the public safety and social justice issues created by prosecuting battered women who fight back” (McMahon and Pence, 2003, pp.64-71).

Diversion in the Context of Coordinated Community Response

In order to intervene effectively in [domestic violence] cases, it is important to understand the complex issues of violence within intimate relationships, including the intent, meaning and effect of the violence; the context within which the act of violence occurred . . . Intervenors must develop and utilize methods of gathering relevant information about these perpetrators, including from victims, as well as ways to assess the perpetrators’ histories and dangerousness and handle cases in a manner which maximized victim safety and offender accountability in each case (BWJP, 2000, p.1).

Efforts to reform the criminal justice system response to domestic violence have come with unintended consequences, contrary to intervenors’ good intentions to improve safety and protection for victims. For example, in some jurisdictions, mandatory arrest and zero tolerance policies have meant arresting battered women for their response to violence. A poor understanding of the context of violence has contributed greatly to these unintended consequences.

If “context is everything,” intervenors cannot reject prosecution diversion out of hand. It may be the best and safest response in some contexts, such as self-defense or response to battering or as an isolated act. It cannot be used without caution and clear standards, however. **The dynamics of *battering* – control, coercion, intimidation, and violence – require limitations on the use of prosecution diversion.** It may be the appropriate response in some cases, but that decision must be made with the utmost care

and with a clear process that takes into account the intent, meaning, and effect of the violence. One arrest for kicking a hole in the door may warrant diversion; in another instance diversion would be a dangerous response.

The issue is less one of prosecution versus diversion and more one of building safety into any institutional response. Probation without consistent monitoring and accountability is more problematic than well-supervised, carefully determined diversion. Determining whether and when to use prosecution diversion, and standards for its use – or to pursue conviction in all cases – must be grounded in the core principles of intervention (BWJP, 2001). These principles provide a framework for understanding the potential harm and potential benefit of diversion.

1. Respond to the Needs of Victims

Intervention practices must respond to the articulated needs of victims, whose lives are most impacted by the intervenor's actions. Safe housing and free and confidential advocacy services are essential.

One advocate relayed the reasoning behind a new diversion program in her community as “people need guns and we need victim accountability and cooperation.” In her county, the impetus for establishing a prosecution diversion program came from defense attorneys, city prosecutors (private attorneys hired by the city, some of whom also have a family law practice), and probation agents. The decision was not grounded in consultation with victim/survivors or victim advocates and proceeded largely against their objections. Because community-based advocates have the closest and most on-going contact with battered women, they must be involved in designing any diversion program.

2. Focus on Changing the Offender and System

The institution, not the victim, must hold the offender accountable from initial response through restrictions on offender behavior. Focus on changing the offender's behavior or the system's response.

If the focus is on “victim accountability,” diversion programs will be tempted to require some level of participation by victims, such as mandatory safety plans² or attending classes or counseling sessions as a condition of removing a mandatory no-contact order. Requiring victim participation, however, shifts the emphasis away from the offender.

For many prosecutors, diversion is a way of increasing offender accountability. It is a way of providing oversight when prosecution is unlikely to be successful. It may also enable prosecutors to focus more attention on higher risk battering behavior by using

² This is not to say that safety planning is not important, but how it happens and with whom are critical to whether it is a genuinely useful process for victims or a pro forma exercise that provides more security to intervenors than to victims. Many safety plans emphasize leaving the relationship, for example, which might not be the safest path, or at all possible because of the risks or limitations of income, children, disabilities, or immigration status.

it more selectively with non-intimate partner domestic violence cases, such as those involving siblings or extended family members, and isolated, one-time incidents or reactive violence by victims. When applied to battering, however, without consistent supervision and consequences for non-compliance, diversion functions as a free pass.

3. Recognize Differential Impacts on Different Communities

All intervention policy/practice development must recognize how the impact of intervention differs, depending on the economic, cultural, ethnic, immigration, sexual orientation, and other circumstances of the victim and offender. Non-majority-culture community members must review and monitor the practice.

Prosecution diversion has the potential of addressing the skewed impact of criminal justice system intervention on communities of color. It is an avenue for addressing violence without incarceration and a criminal conviction record. At the same time, however, it has the potential for diminishing the severity of violence against women of color. It may also encourage victims who have used violence in reaction to battering to agree to diversion rather than challenge an inappropriate arrest. In addition, many diversion programs are unavailable to offenders with prior, non-domestic violence criminal records, who would otherwise qualify. Under these circumstances, batterers from communities of color can receive more severe sentences than their white counterparts.

4. Address the Context of Violence

Most incidents of violence are part of a larger pattern and history of violence. The need for protection from further harm and the need to create a deterrent for the assailant should determine the intensity of the intervention.

Most diversion programs focus on first offense or first arrest as the primary criterion for entry. A first arrest, however, is not necessarily an accurate measure of the history of violence and the degree of risk that a victim may face. Some diversion programs permit participants with prior domestic violence convictions and, in a few instances, felony convictions, particularly when diversion is primarily a case management tool, without a clear focus on victim safety. In this circumstance, offenders may receive more than one free pass.

Diversion may be the appropriate response, however, when the illegal behavior does not involve intimidation, coercion, threats, and physical force. This can include offenders who are responding to violence, those who commit a one-time, uncharacteristic act, or those who are acting from a mental incapacitation.

5. Avoid Responses That Further Endanger Victims

Intervention practices should balance the need for standardized institutional responses with the need for individualized responses which recognize potential victim consequences for confronting the offender, validate victim input, encourage victim autonomy, and support victims' relationships with their children.

The paradox of diversion, as noted earlier, is that it can provide the flexibility that supports victim input and autonomy, yet its use historically has been to diminish the significance and impact of battering. It makes a difference whether it develops as a victim-centered response or an offender-centered response. How diversion gets constructed, ordered and communicated by the court is significant in maximizing offender accountability and minimizing victim-blaming.

Examples from the experiences of older battered women illustrate the significance, and challenge, of balancing institutional and individual responses, and determining when diversion is appropriate. Where the abuser is an adult child, the victim is particularly concerned with seeing her child get help for drug or alcohol addiction, mental illness, or chronic economic dependency (or, typically, a combination of these factors). Mothers are adamant about not wanting to see their children, usually adult sons, incarcerated (Sadusky, 2001). A well-structured and supervised diversion program, with mandatory treatment, may provide more incentive for them to report the abuse.

With intimate partner violence, “there is a lot of non-belief about the dangerousness of an older male, especially if he uses a walker or cane . . . Older men are seen as harmless” (Raymond, 2003). While it is unusual for an older battered woman to contact law enforcement, if an arrest is made the most likely response is to dismiss or drop the charges, particularly if the offender has any health or physical limitations that would put special demands on the jail. In this case, again, a well-structured diversion program could contribute to victim safety and well being.

Diversion appeals to our very human compulsion to “do something,” which can be particularly strong when we have very little in place to respond. As one advocate described it, however, diversion can be “worse than useless” if it gives victims a false sense of security that something will happen.

6. **Link with Others**

The intervention response must be built on cooperative relationships with other intervenors and on communication linkages and procedures to ensure consistency between the civil/criminal responses.

Effective monitoring of batterers placed in any type of diversion program rests on the links and communication among intervening agencies: prosecution, probation, courts, law enforcement, and victim advocacy. An offender sent away with an admonition to ‘stay out of trouble’ for six months, is likely to be an offender like Mike (page 6), who slips out of sight with few consequences for his behavior. In the context of battering, diversion must be implemented with the level of attention, supervision, and communication expected under probation. This is less likely when diversion is imposed by a prosecutor or judge as a case management tool that promises fewer trials and other court appearances, less supervision, and faster case processing.

7. **Involve Battered Women in Monitoring Changes**

A group of advocates and battered women, outside the system, should continually monitor intervention policies/procedures to evaluate their effectiveness in protecting victims and to identify training needs.

There is no single response that fits the complexities of every victim's life. Weaving an understanding of this complexity throughout any intervention, including diversion, helps ensure that it is grounded in the articulated needs of victims, focused on the offender's behavior, responsive to different communities, anchored in the context of violence, centered on victim safety, and supported across agencies and systems. Understanding that complexity means involving victims/survivors in developing and monitoring intervention policies and procedures. There is no single technique to accomplish this, but might include periodic focus groups, interviews, regular consultation with community advocates, and a standing or ad-hoc advisory group.

The *goal* of intervention and reform efforts is to stop the assailant's violence. The *focus* is to protect the victim from further harm. Whatever the action, whether diversion or prosecution, it must be grounded in these core principles of intervention and a continuous process of questioning. What is the goal of this policy or practice? What is it intended to achieve? What are the implications? What are the unintended consequences, and how do we prevent them?

Diversion in Three Communities

The experience of the three Judicial Oversight Demonstration Initiative (JODI) sites illustrates the widespread use of diversion and ways of maximizing offender accountability. Again, diversion in this discussion refers to any action that suspends criminal justice case processing of a domestic violence related charge and offers an alternative to a criminal conviction.

The Judicial Oversight Initiative “tests the idea that a coordinated community response to domestic violence that ensures a focused judicial response and a systematic criminal justice response can improve victim safety and service provision, as well as increase offender accountability.”³ The three demonstration sites are the City of Boston/Dorchester District Court, MA; Washtenaw County/Ann Arbor, MI; and, Milwaukee County/Milwaukee, WI. The JODI model includes uniform and consistent initial law enforcement response, coordinated victim advocacy and services, and strong offender accountability and oversight, plus extensive technical assistance and an evaluation component to gauge the initiative's effects on victims, offenders, the criminal justice system, and the community.

The three communities have a dedicated domestic violence court or specialized docket. Offender accountability features include intensive, court-based supervision, pre-

³ An overview and fact sheet for each JODI site can be found at www.vaw.umn.edu

trial bail monitoring, expanded or dedicated probation units, post-conviction court reviews, regular contact with and offender progress reports from batterer intervention programs, and probation outreach to victims. None of the three sites offers diversion that allows an offender to avoid acknowledging the crime or postpones filing the charges.

Washtenaw County does not have a formalized diversion program and the prosecutor's policy is to not offer diversion as an option. Nevertheless, there's "always an exception." The most likely exception is a victim who has been arrested for defensive or reactive violence that does not qualify for dismissal. To minimize victim arrests, law enforcement agencies receive training on predominant aggressor and self-defense, and policies discourage dual arrest. Diversion is used selectively in other circumstances when the prosecutor determines that it is an appropriate response to balancing victim safety and offender accountability. Diversion is "just like a plea of guilty" and if the offender does not comply with its provisions, the case proceeds as a conviction. Offenders who agree to diversion receive a level of intensive supervision similar to those on probation, including periodic judicial review. If successful, the plea is expunged, but not the arrest record (Israel, 2003).

In Boston, approximately half of all pleas come under a process known as Continued Without a Finding (CWAFF). This case management tool differs from court to court within Massachusetts. Historically, CWAFF was offered for a first offense or to someone without a significant record, or in cases that were likely to be difficult to prove before a jury. In Dorchester District Court it is processed as a regular probation case. Offenders must complete batterer treatment program and other standard probationary conditions, such as no alcohol or drug use. Judicial review occurs at thirty, sixty, and ninety days. Upon successful completion, the charge appears on the individual's record as dismissed. The Dorchester District has a large immigrant population, which has influenced some judicial interest in reconsidering pretrial diversion that would avoid entering a plea, as required by the CWAFF process, because of the possible negative impact on immigration status. While successful completion of CWAFF requirements enables an individual to say that he or she has never been convicted of a crime, the process itself may spark INS attention that could lead to deportation (Kennedy, 2003).

In Milwaukee, a defense attorney can request a Deferred Prosecution Agreement (DPA), although its use is discouraged in domestic violence cases involving crimes to persons. The District Attorney's Office makes "occasional use of deferred prosecution agreements," primarily involving minor property crimes. The DPA must have prosecutor and judicial approval. The decision to accept or reject a DPA request is based on several factors: of the nature of any prior criminal record; defendant's character, employment history, and life circumstance; type of charge (person or property crime); level of violence and threat of danger; injury to victim; alcohol and drug abuse; prior history of domestic violence (isolated versus ongoing pattern); victim's wishes; victim circumstances at the time of the offense (i.e., disability or pregnancy); use or threat of weapons; general facts of the case; likelihood of success in batterer treatment; probability of recidivism; and, presence of children. Defendants must sign a written agreement that sets for the terms and conditions, which include no further law violations, compliance

with bail conditions (including a standard no-contact order), payment of the domestic abuse assessment, and completion of batterer treatment. Other provisions might include alcohol and drug assessment and treatment, restitution, and parenting classes. The DPA requires that defendants waive their rights to a jury trial and stipulate to the facts of the criminal complaint. A Domestic Violence Social Worker in the DA's Office monitors DPA compliance. Public defenders are reluctant to advise their clients to give up their right to a jury trial and more likely to take their chances on dismissal. Private attorneys representing suburban white male defendants are most likely to request deferred prosecution (Basil Long, 2003).

Diversion in One State

Connecticut has over sixteen years of experience with pre-trial diversion in domestic violence cases, via the Family Violence Education Program (FVEP). The diversion program was established as part of the Family Violence Prevention and Response Act (1986), which made broad changes in state law following Tracy Thurman's lawsuit against the Torrington Police Department. Mandatory arrest and creation of the FVEP were among the act's key provisions.

The FVEP is available to offenders charged with misdemeanor crimes who have not previously participated in the program and who cannot have been convicted of a family violence crime. Following screening by a Family Relations Officer, eligible offenders can accept an offer to participate in the FVEP. The offender does not enter a guilty plea, however. A prosecutor can recommend that the court reject the application, although the degree of screening makes it unlikely. Upon completion of the FVEP and compliance with other conditions, the defendant can apply for dismissal of the charges. If the court is satisfied that all conditions have been met, the charges are dismissed and "all police and court records and records of any state's attorney pertaining to [the] charge shall be erased."⁴

Connecticut has twenty Family Violence Response and Intervention Units attached to courts throughout the state, comprised of advocates from community agencies and family relations officers. Following an arrest, the offender is arraigned within the next day and typically receives a four to six-week continuance, during which "Family" interviews the offender, attempts to contact the victim, and prepares a recommendation for the court which could include FVEP participation.

The Family units "prepare written or oral reports on each case for the court by the next court date" and "provide or arrange for services to victims and offenders" (CGS § 46b-38c). To be eligible for pre-trial diversion, a family relations officer must complete a case assessment and determine if the offender is eligible and appropriate for diversion. Advocates assigned to the unit attempt to contact victims prior to arraignment to answer

⁴ § 46b-38c (Family violence response and intervention units) and § 54-142a (Erasure of criminal records), General Statutes of Connecticut.

questions, discuss safety plans, and determine whether they support or oppose the defendant's participation in pre-trial diversion, as required by state law.

At the point of arraignment, the Family unit submits any protective order for the judge's signature and the offender receives a copy. Most FVEP agreements include an order for protection that prohibits no further threats or use of violence. Some may also include no-contact provisions. Courts are encouraged to take their direction from the victim in determining whether to issue a "residential stay-away" order. Victim disclosures to intervention unit advocates are confidential and advocates are responsible only for reporting back her desires, though the court may consider other factors in determining sanctions.⁵

A typical pre-trial diversion order includes successful attendance and completion of a nine-week (13.5 hours) education group and compliance with any order for protection. Male and female participants are always separated into different groups, which are currently available in English and Spanish. Around 20% of those arrested on domestic violence charges each year (approximately 6,000 of 30,000) enter FVEP pre-trial diversion. At any one time, 600 individuals statewide may be on a waiting list to enter a group. The waiting list ranges from about two months for English-speaking men to four months for Spanish-speaking women. Twelve community-based providers in 17 locations conduct the education groups and must follow a standard curriculum outline developed and approved by the state Judicial Department. The providers are the focal point for monitoring offender compliance and reporting back to the court, via the Family Violence Intervention Unit.

The program's statewide manager from 1999 to April 2003 notes that for those who are not in the pattern of violence and control characteristic of battering, the pre-trial diversion program offers an opportunity to stop behavior that could become more severe. For batterers, however, "I'm not sure it does much good," and there is always the concern that participation in any such group might "make a better batterer" (Wilson, 2003). The program also meets the expressed desire of many victims who want their partners to get help.

FVEP participants are split almost evenly between incidents involving intimate partners and those involving other family members (i.e., parent-child, siblings, cousins). While Connecticut has not been able to do this consistently, their experience suggests that it is important to separate those participants into two different groups. They present "different dynamics" and require different approaches (Wilson, 2003).

Approximately 83% of offenders in the pre-trial diversion program complete it. Prosecution data is not readily available for the 17% who do not complete the FVEP as directed (Grant, 2003). It is unclear how many noncompliant offenders are prosecuted, or how many of those cases result in conviction. The experience of other jurisdictions

⁵ Connecticut's experience is the basis for "woman-defined advocacy," as presented by Jill Davies, Eleanor Lyon, and Diane Monti-Catania in *Safety Planning with Battered Women: Complex Lives/Difficult Choices*, Sage Publications, 1998.

suggests that successful prosecution is unlikely, however, on a misdemeanor arrest that occurred six months or more prior, when a guilty plea has not been required as a condition of entry to diversion.

Pre-trial diversion in Connecticut proceeds with a level of monitoring and accountability uncharacteristic of most approaches to domestic violence prosecution diversion. As one advocate put it, if arrested on a family violence charge, “you don’t have a place to fall through a crack . . . you’re going to be monitored from beginning to end” (Terry, 2003). This includes quick arraignment, review and intervention by the Family Violence Response and Intervention Unit, and ongoing compliance monitoring and reporting by FVEP providers. The Family Violence Education Program is a first-level response, applied within the context of the incident; it is not an automatic response to a first arrest. Additional work underway includes expanded domestic violence court dockets and vertical prosecution, plus an extended sanctions program that includes a 26-week (52 sessions) education group and probation monitoring.

Connecticut reports that in the sixteen years following the legislation that established the Family Violence Education Program, 69% of those who completed it have not been re-arrested on a domestic violence-related charge. The state is concerned that among the 31% who have been re-arrested, however, there may be a higher level of violence (Grant, 2003). This raises the question of how the uncertain consequences of noncompliance with pre-trial diversion might reinforce the violent behavior of some batterers. In addition, Family Violence Response and Intervention does not have any contact with about a third of the victims (Terry, 2003), either because victims say they do not want it or they do not respond to in-person or telephone contacts. Exploring the intersection of FVEP non-compliance, re-arrest, and victim reluctance for Intervention Unit contact might reveal more extreme cases of battering and more dangerous offenders.

Setting Standards

Having failed to eliminate or significantly discourage domestic violence diversion programs, can the content and quality be influenced by setting standards for their design and operation? Commentators have offered different examples of diversion programs that maximize safety and accountability (Lemon, 1991; Buel, 1998; NCJFCJ, 1992; Healey & Smith, 1998; Gustaf, 2001; Rauma, 1984; Wilson, 2003; Basil Long, 2003). They share common features that together articulate possible standards for diversion programs.

- The offense must be charged as a misdemeanor, not an ordinance violation.
- Felonies must be ineligible for diversion.
- The arrest incident cannot involve use of a weapon or serious injury.
- The offender cannot have any previous convictions involving violence or domestic abuse related charges, including orders for protection violations.
- The offender cannot have a record of revoked probation.
- The offender cannot have participated in a previous domestic violence diversion program.

- The court must consider the following factors in determining eligibility for diversion: the nature and extent of injuries, prior incidents of domestic violence (whether resulting in arrest or not), any factors that would adversely influence the likelihood of successful completion, and the offender's suitability for diversion.
- Suitability for diversion must include such factors as the offender's history of violence and coercion toward this victim or in prior relationships, the victim's fear of further violence, the nature of the crime, accepting responsibility for the violence, motivation to change, history of orders for protection, violence toward other individuals, termination from batterers' treatment for noncompliance, alcohol and drug abuse, and agreement with the terms of diversion.
- The diversion agreement must be in writing.
- The victim must receive a copy of the agreement.
- The victim must agree to diversion.
- Victims cannot be required to participate in any aspect of the diversion program.
- The defendant must choose within a short span of time (two to five days) whether or not to participate in the program.
- The offender must plead guilty in order to enter the diversion program.⁶
- Diversion will not result in expunging the arrest record.
- The offender must be under supervision for a minimum of twelve months.
- Diversion must include an injunction prohibiting the defendant from annoying, molesting, attacking, striking, threatening, harassing, sexually assaulting, battering, or disturbing the peace of the victim. Where appropriate, a no-contact order should be included.
- The prosecutor and the court must promptly intervene upon learning that there are new offenses, new incidents of violence, or failure to comply with program requirements.
- Diversion must include regular, ongoing monitoring of offenders' compliance by probation officers or designated program staff.
- Standard mental health counseling and family counseling are generally inappropriate for domestic violence diversion programs.
- The batterers' treatment component must see domestic violence as criminal conduct, not a disease or mental disorder. It must focus on violence as learned behavior, emphasize the offender's responsibility for his behavior, and challenge tactics of coercion, control, and violence.
- Treatment and education groups must address the differences between battering and intimate partner violence and violence involving other family members (i.e., siblings, cousins, parents and adolescent or adult children). Offenders should be in separate groups.
- Where diversion is considered as a response to domestic violence victims who use extra-legal or illegal violence to defend themselves, assessment procedures, policies,

⁶ Some commentators disagree, arguing that keeping a clean criminal record is a strong motivation for many offenders. "Requiring a judicial admission only increases the likelihood that he will want an attorney who will tell him she won't show up or the jury won't convict" (NCJVCJ, 1992, 74). Similarly, expunging the arrest record is offered as an incentive for offenders to participate. McMahon and Pence note that "for many advocates, the premise that a battered woman must first admit to the facts of the case before being deferred for prosecution is problematic." (2003, p.69)

and practitioner training must be revised to address predominant aggressor and self-defense factors. The first strategy should be to reduce the number of arrests. Standard batterer treatment programs are inappropriate.

The purpose of any standards is to set clear parameters to domestic violence diversion programs. Such standards can be implemented by individual communities, states, or funding authorities as a condition of continued support. Standards alone, however, will not necessarily improve diversion programs. Many of the requirements listed above, after all, were in place under the California law governing domestic violence diversion. In the absence of an overriding monitoring and accountability process, prosecutors were free to ignore them on a wide scale. **Implementation of any domestic violence criminal case diversion requires ongoing monitoring and review.** Diversion has been a tempting response to “do something,” but too often statutes and policies authorize some form of diversion without any criteria or resources for monitoring. Continuous accountability requires a high degree of communication and information exchange among community institutions. Police, prosecutors, courts, probation and parole, diversion staff, and batterer intervention agencies must coordinate and share information about prior arrests and convictions, past and current protection orders, and compliance with sanctions. This means daily communication and monitoring, plus immediate response to violations of the diversion agreement. Without this in place a diversion program diminishes victim safety and provides only the illusion of offender accountability.⁷

Conclusion

As long as prosecutorial discretion exists, diversion will be one response to domestic violence case processing. It may appear under other labels – first offenders, alternatives to conviction, stipulated continuance – but there will be some avenue for prosecutors to offer an alternative to criminal conviction. It can also be an avenue that offers the kind of response that many battered women want, and one that addresses inequities in the consequences of criminal justice intervention.

Many communities are poised to reconsider the role of prosecution diversion. Over two decades of experience with domestic violence diversion programs make it clear that it cannot be a haphazard undertaking. The challenge to advocates and other intervenors is to hold prosecution diversion accountable and insist that it be grounded in an understanding of the context and complexities of intimate partner violence, in careful attention to safety and victims’ needs, and in clear standards of practice.

⁷ The Domestic Violence Safety and Accountability Audit is a tool that can support continuous accountability. It is a systematic way of examining institutional response to domestic violence, looking at whether safety and accountability are present or absent in daily work routines, policies, and practices of community agencies. See Ellen Pence and Kristine Lizdas, *The Duluth Safety and Accountability Audit: A Guide to Assessing Institutional Responses to Domestic Violence*, 1998. www.praxisinternational.org

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