

Stopping the Violence: The Role of the Police Officer and the Prosecutor

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INTRODUCTION

On November 23, 1986 a powerful process of change began in San Diego, California related to the handling of domestic violence cases. It began with the actions of a San Diego Municipal Court judge. His actions, however, did not involve changing policy, creating a task force, or dealing aggressively with abusers. The judge was accused of battering his pregnant girlfriend.

San Diego Municipal Court Judge Joseph Davis stood trial in February 1987 for the alleged beating of his girlfriend. The alleged victim recanted and later disappeared. The case went to trial and the jury deadlocked eleven to one for acquittal before the case was ultimately dismissed. It seemed an ignominious beginning for what would one day be the two largest law enforcement-related Domestic Violence Units in the country within the San Diego Police Department and the San Diego City Attorney's Office. Yet within the Joseph Davis story were the seeds of hope for many battered women in San Diego. Today, the San Diego City Attorney's Domestic Violence Unit with a full-time and volunteer staff of thirty is the largest specialized prosecution unit in America for the handling of misdemeanor domestic violence cases. The San Diego Police Department's Domestic Violence Unit with a full-time staff of twenty detectives, three sergeants, and an additional support/volunteer staff of eight investigates over 1,200 cases every month. This article is intended to briefly describe the San Diego experience and to discuss five major trends which are developing nationally in the investigation and prosecution of misdemeanor and felony domestic violence cases. The trends in criminal prosecution have been dramatically impacted by the battered women's movement over the last twenty years and more directly by legal actions taken against law enforcement agencies across the country for their handling of domestic violence cases. Nevertheless, it is clear that the experience in San Diego is slowly becoming the model approach for the nation and points the way for criminal justice system professionals in search of effective intervention policies in domestic violence cases. First, prosecutors and police officers are joining in coordinated community responses to the handling of domestic violence incidents. Second, a strategy of early intervention at the misdemeanor level before aggravated assaults or homicides occur is clearly becoming more common. Third, policies and protocols are beginning to focus on the abuser rather than on the victim. Fourth, related to a shift in focus, policies and procedures which have a tendency to blame victims or to re-victimize victims within the criminal justice system are being eliminated. Finally,

prosecutors are beginning to focus on long-term accountability for the abuser rather than on quick fixes or counter-productive sentences or diversion programs. Increasing numbers of law enforcement agencies and prosecutors offices are adopting an over-arching theme being taught through trainings of the National College of District Attorneys and other state organizations: Effective intervention in domestic violence cases, provable with or without victim cooperation, coupled with a strong victim advocacy program and a coordinated community response. The theme offers a broad basis for consensus on how to use the criminal justice system to reduce domestic violence, provide more safety for victims, and send out a strong message on violence in the home. Perhaps the best starting point to understand the development of this growing consensus is to look at the experience of one jurisdiction where domestic violence has been a top priority for the last six years.

THE SAN DIEGO EXPERIENCE

The handling of domestic violence cases in San Diego in early 1986 was similar to most of the country. Police officers were required to write reports but little else was mandated or encouraged. Prosecutors regularly dismissed cases if the victim refused to “press charges” or “prosecute”. The familiar question, “Do you want to press charges?” was asked of victims in virtually every case. The answer often dictated what type of action the officer would take and what kind of energy would be expended in the handling of the case. While some states did have mandatory arrest statutes, California was not one of those states. The policies of the City Attorney and the District Attorney in our county in 1986 included a refusal to file charges if the victim was uncooperative and immediate dismissal if the victim became uncooperative during the course of the case. The standard police report was two to three paragraphs and rarely were witness statements or photographs included. Simply put, domestic violence cases required little time or energy because the caseload remained extremely small. Even cases which survived and moved toward trial were generally plea-bargained for a lesser charge of disturbing the peace or creating a public nuisance and a minimal fine. San Diego’s domestic violence homicide rate was near the national average. Thirty percent of all homicides were domestic related. On the average, there were five police contacts before a domestic violence homicide. Officers were spending a great deal of time on domestic violence calls yet little happened after arrest. Most police departments expected officers to act as social workers and counselors rather than enforcers of the law. Even if the abuser was arrested, he would often be back in the home faster than the officers could complete their reports and return to their neighborhood beat. Repeated arrests of the same offender were commonplace but prosecution rarely proceeded. Even when charges were filed, they would later be dismissed or reduced when the victim recanted. The result of the inadequate handling of domestic violence cases was burnout, frustration, and victim blaming. Police officers felt their efforts were wasted and many, throughout the system, saw the victim as the reason for the never-ending cycle of violence, police intervention, and violence again. The time was ripe in San Diego for major substantive changes. Victim service providers and shelter operators had been calling for change at the prosecution level for a number of years. Policy makers in our local prosecutor’s offices often responded by pointing the finger at inadequate investigations and uncooperative victims. Nevertheless, in May of

1986, we gathered together a small group of prosecutors and victim advocates to evaluate the policies of the San Diego City Attorney's Office and the San Diego Police Department in the handling of domestic violence cases. Over a period of months we met repeatedly and asked why certain policies were in effect and why other potential responses to these cases were not being used. Our meetings were characterized by humility, transparency, and, at times, heated exchanges. The advocates understood little about the requirements for successful criminal prosecution. And the prosecutors and police officers understood even less about the dynamics of domestic violence. In August, 1986 we prepared a domestic violence policy bulletin for the approval of the elected city attorney. City Attorney John Witt endorsed the changes, put his authority behind the policies, and a new era began. The policies included the decision to file charges being made by the prosecutor rather than by the victim, no dismissals even if the victim was uncooperative and no reduction of the charges in order to facilitate a guilty plea. For the first few months the changes were not even evident. To be sure, we began filing many more cases than we had previously been filing, but little else was noticeable until Joseph Davis was arrested on November 23, 1986. On November 23, 1986 officers responded to a 911 call from a woman who said her boyfriend had hit her at approximately 4:30 p.m. The judge and his girlfriend lived in a condominium in an upper middle-class suburb of San Diego. When the officers arrived the judge was sitting at the kitchen table reading law books. The hysterical girlfriend was at a neighbor's house. The girlfriend's clothing was torn, there were red marks on her neck and arms, and she complained of pain from being kicked in the stomach. The girlfriend was five months pregnant. Officers, after consulting with a supervisor, wrote the judge a citation of arrest and released him at the scene. No photographs were taken of the condominium or of the victim. Neither the victim's daughter nor the neighbors were interviewed. The final police report was less than three pages. Within days, the case was sent to the City Attorney's Office for review. We reviewed the case and immediately called the victim at work. She spoke to us at length about what happened and told us the judge had a terrible temper. She was very frightened and confused. She did not recant in any way but expressed a great deal of concern about the potential consequences to the judge's career. Under our new policies charges were filed on December 16, 1986. The victim was cooperative and the facts appeared straightforward. The victim, however, sent a letter to the City Attorney days later and recanted everything. She denied the violence of the judge and said that she wanted the case dismissed. Unfortunately for Judge Davis, the City Attorney had now implemented a "no dismissal policy." Meanwhile, the media coverage of the story was unrelenting. Television, print, and radio media stories about the case were almost daily for the first week and then continued regularly as the case proceeded. It became common knowledge that the victim was uncooperative and equally well-known that the City Attorney was going to proceed irrespective of the wishes of the victim. The new "aggressive" approach to domestic violence cases in the City Attorney's Office was not popular with judges, criminal defense attorneys, and other criminal justice professionals. It was quickly apparent that few expected us to win the case and that every one wanted to distance themselves from this ill-fated crusade to prosecute a domestic violence case without a cooperative victim. We had a misdemeanor, minimal violence case with, at first appearance, no evidence but the victim's own testimony. We had policies but no background, training, or expertise in how to make such policies effective. Initially, we

conducted a witness check and identified four neighbors who had witnessed the victim's condition after the incident and had talked to her. Second, we obtained the 911 emergency call tape from the call placed by the victim within minutes after the incident. Third, we reinterviewed the officers at the scene and obtained a great deal of detail on the condominium, the judge's demeanor and conduct, and the victim's physical and emotional state. Fourth, we located the victim's family doctor and obtained her medical records through a court order. These records led us to her gynecologist who examined her after a referral from her family doctor due to her pregnancy. Fifth, we learned that the victim had applied for and received a temporary restraining order the day after the incident. Sixth, we reviewed the family court records and learned that domestic violence was alleged in the judge's first marriage. As the criminal prosecution of Judge Davis proceeded toward trial, we began to build a formidable circumstantial evidence case of domestic violence. We had a hysterical woman calling 911 saying she had been beaten by her boyfriend. She had visible injuries as seen by the neighbors and she was five months pregnant. We were able to take photographs of the outside of the condominium and retrace with diagrams the frantic steps she took to the neighbors' house to call the police. While we still felt we would rely on the victim to a great extent, we felt we had identified corroborating evidence. Weeks before the trial we began trying to serve the victim with a subpoena. She and the judge were still living together in the area and we felt service of a subpoena would be simple. After three or four attempts, however, we realized the victim was avoiding us. We let critical days go by as we planned how we might serve her. Finally, days before the trial we learned that the victim had disappeared. We obtained a brief continuance as we searched for her. Days before the new trial date we located her out of the country, in Mexico, and out of the jurisdiction of our subpoena. We were thus forced to trial without a victim or an eyewitness of any kind. We, nevertheless, had built a fairly strong circumstantial evidence case against the judge with a powerful 911 tape, a body diagram depicting the injuries witnessed by the neighbors, and the on-scene testimony of the police officers. The scene was set for an aggressive, well-prepared case-in-chief. We did not anticipate, however, the battle we would face in seeking to have our evidence even admitted at trial. Over two days of pre-trial motions, the judge presiding over the case ruled: (1) The 911 tape was too prejudicial and could not be heard by the jury; (2) the jury could not know that the victim was pregnant; (3) all potential jurors with any knowledge of the case would be excluded; (4) the victim's doctors could not testify; (5) only one of the four neighbors would be allowed to testify; (6) any information about violence in the judge's prior marriage would be excluded; and (7) the existence of a domestic violence restraining order would be kept from the jury. With the pre-trial rulings completed, we went to trial against San Diego Municipal Court Judge Joseph Davis.

The trial lasted four days. The prosecution's case consisted of a transcript of part of the 911 call, a body diagram of the injury observed, one neighbor witness and two police officers. The defense called character witnesses for the judge and then sprung their best surprise: a self-defense theory. The judge testified on his own behalf concerning the violence of the victim toward him. He testified of his great love for her and her inability to control herself. We were dumbfounded and staggered as the trial judge continued to

disallow any evidence that this woman was five months pregnant at the time of the incident. The judge was a compelling witness.

The jury deliberated nearly a day before announcing that they were hopelessly deadlocked: eleven to one for not guilty. The trial judge subsequently dismissed the entire case. We had lost. Our no-drop policy appeared discredited and the criminal defense bar looked forward to other cases set for trial.

The battle, however, was not over. City Attorney John Witt stood behind our policies and called for continued aggressive prosecution. We had learned how to try cases without a victim. We had battled against myth, misconception, bias, and tradition. The immediate loss was devastating but the education was invaluable. Over the next six months, we tried seventeen domestic violence cases without victim cooperation and won all but two. We had learned how to prosecute cases without a cooperative victim, how to change the attitudes of jurors, and how to obtain evidence which had not been obtained in the original investigation. Perhaps even more significantly, the San Diego Police Department responded with strong support to the new aggressive approach from the prosecutor's office.

San Diego judges who had followed the prosecution of Judge Davis with interest were now confronted with similar legal and evidentiary issues in virtually every case brought before them. The two prosecutors assigned to domestic violence in those early months after the Davis case filed trial briefs in every case with case law authority for the admissibility of every conceivable type of evidence to prove the charge against the abuser. 911 tapes were played regularly for judges and the true emotion of the crime started to be felt in the courtrooms of San Diego as never before. The process of change and growth has been constant since those early months in 1987. We established, refined, and revised policies and procedures as we worked to create an effective intervention approach. We organized a county-wide task force and implemented protocols for law enforcement, medical service providers, prosecutors, therapists, and military professionals. Specialized training for all those throughout the system who deal with victims and perpetrators led to sophisticated and enhanced services at every level. The early media involvement taught us how valuable the media can be in impacting public awareness and we launched an on-going campaign to work with the media to change the way every one in San Diego thinks about domestic violence cases.

We still have our problems in San Diego and many issues yet need to be addressed. We lack funding, a completely coordinated community response, and we still face obstacles with policy makers. But the changes have been dramatic and lasting and offer hope for communities who have yet to move down the road of change. The San Diego City Attorney's Domestic Violence Unit has grown from one part-time prosecutor to twenty-one full-time staff and nine part-time and volunteer staff. Nearly 60% of our filed cases involve uncooperative or absent victims and yet we obtain convictions in 88% of our cases. The San Diego Police Department's Domestic Violence Unit has grown from one coordinating sergeant to over twenty-seven full-time staff members. While statistics must be used carefully, we have seen major reductions in our domestic violence homicide rates

and in our re-arrest and re-prosecution rates for those abusers held accountable in our long-term batterers' programs. Our strategies are working to reduce violence in intimate relationships in San Diego.

TRENDS IN LAW ENFORCEMENT'S RESPONSE

Many influences have played a role in the dramatic changes sweeping the country over the last twenty years in relation to violence against women. The women's movement, the shelter community, and victims of domestic violence have worked tirelessly in the legislative, judicial, and social arenas to cause change. Lawsuits against law enforcement agencies by battered women or their surviving family members clearly have begun the process of change. The television and print media have also played a powerful role. As awareness has increased, proactive policies and protocols have been implemented in a wide variety of professions that deal with victims and perpetrators of domestic violence. Nevertheless, a great deal remains to be done and the evolution of society's response to domestic violence proceeds with fits and starts. Increasingly, multi-disciplinary research and networking has identified a growing consensus on what constitutes effective intervention in the handling of domestic violence cases.

It has become evident over the last few years that there are clearly identifiable trends beginning to emerge as we move forward across the country toward proactive, aggressive intervention strategies throughout the criminal justice system. The prosecutor and the police officer play an increasingly important role in domestic violence issues as society identifies the conduct as a serious crime which cannot be condoned, ignored, or minimized. The trends that are emerging form the basis for creating policy and promoting legislative changes in the years to come.

Establishing Coordinated Community Responses

The most obvious trend is the increasingly important role that prosecutors and police officers are playing in the use of task forces, coordinating councils, and working groups within the communities they serve. While the usefulness of task forces is of little question, historically, prosecutors and police officers have been reluctant to take a leadership role in community efforts to deal with domestic violence. The reasons for this reluctance are related to the process of change over the past few years. Many law enforcement agencies have not been on the "cutting edge" of domestic violence intervention efforts. Indeed, political, legal, and social change have been exerting pressure from the outside rather than from the inside. As a result, there has been a tendency to view shelters as the enemy and advocacy groups as bent on controlling a district attorney or county prosecutor's office. Any level of mistrust or contention has been easily multiplied when disputes spill out into the media or other public forums.

Recently, however, there appears to be a growing recognition by prosecutors and police officers that involvement and leadership within organized community efforts is beneficial both politically and practically. Two approaches to task forces seem to be emerging: (1) policy makers gathered from the "top down"; and (2) grass roots task forces from the

bottom up. In San Diego, we have evolved from our initial grass roots task force to an institutionalized Domestic Violence Council. Our Council is a blend of direct service providers and policy makers. “Top-down approaches” have been appealing to some because policy issues can be attacked immediately and many of the necessary decision-makers are present. Unfortunately, some have used the “top-down approach” to give the appearance of interest and involvement when little more than political posturing has taken place.

The grass roots task force can often be a powerful agent for change simply because of the networking which takes place between direct service providers throughout a geographical area. The problem with bringing together only the trench workers is that policies within agencies and within the system are often difficult to address because no one has the power to change them. A blending of both approaches appears to be the most profitable, with leadership that has the commitment and the ability to implement change. In Dane County, Wisconsin, a blended task force has been extremely effective in causing policy changes and bringing together those actually providing the services. The involvement of the county prosecutor has been critical to this effectiveness.

In the arena of criminal prosecution, prosecutors who have benefited most from task forces have been those who have been willing to involve shelter staff and other advocates in creating policies and procedures that do not re-victimize domestic violence victims. In King County, Washington, advocates have been behind the design of the criminal justice response. Their role has been central, in part, because of their involvement in passing a special sales tax to fund domestic violence services. It may be threatening to bureaucratic agencies to bring in “outsiders” to the task of domestic violence policy development but it also fosters trust, partnership, and a sense of ownership.

Beyond criminal prosecution, task forces have had a powerful role in coordinating the work of shelters, law enforcement, therapists, medical service providers, advocates, family and criminal court staff and judges, educators, military, social services, and probation officers. The broader the net cast when creating a task force the more systems will be affected. Often it is helpful to involve churches, youth groups, child abuse professionals, the local bar association, and any other groups who have direct dealings with victims or perpetrators of domestic violence.

In San Diego, one example of a task force sub-committee comprised of “trench workers” is the Law Enforcement Committee. The committee’s efforts resulted in regular training bulletins and a videotape used to direct officers countywide in the proper response to domestic violence incidents. The committee continues to meet monthly and addresses problems common to all law enforcement agencies in San Diego County. The leadership of the committee members has pushed other parts of the criminal justice system to respond more vigorously to domestic violence issues as well.

Designing Early Intervention Strategies

The trend toward early intervention has also been apparent throughout the country. Traditionally, police and prosecutors do not consider a crime “serious until there is a felony, a dead body, or blood and guts”. Domestic violence, however, often defies such stereotyping. Sophisticated abusers can inflict incredible violence without leaving any physical marks and yet the vast majority of domestic violence cases end up being categorized as misdemeanors. It is a tragic mistake to assume these cases are therefore insignificant.

Criminal justice system professionals are quickly discovering that the involvement of advocates at the first sign of conflict in the home can be crucial to preventing future injury. Effective, aggressive misdemeanor prosecution can prevent the violence from escalating to felonies and homicides. A growing number of large cities including Seattle, Honolulu, Baltimore, Indianapolis, Phoenix, Denver, and San Diego have created “vertical prosecution units” for misdemeanor domestic violence cases. When the system treats a single slap or punch as serious, an extended beating with repeated blows becomes even more significant in terms of criminal justice system response. Smaller jurisdictions such as Quincy, Massachusetts, Duluth, Minnesota, and Jefferson County, Kentucky, have also created misdemeanor domestic violence units to focus on early intervention. Spending money at the misdemeanor level may indeed be the best prevention strategy. Indeed, this approach must be adopted not only by the prosecutor but by the police department responsible for investigating misdemeanor offenses.

To be sure, education in the schools and other prevention programs play a role; but if the violence is not being stopped in the home, no amount of education can counter what children are learning after school hours. In fact, many are finding that education programs in the schools may allow us to identify more violence as children learn to report what they are witnessing. In some jurisdictions, simple trainings on the use of 911 for emergencies have resulted in increased calls from children who live under the terror of domestic violence.

Early intervention at the misdemeanor level is still hampered by the simple reality of criminal prosecution. The prosecutor must be able to prove the case beyond a reasonable doubt in order to convict an abuser and hold him accountable in counseling. The standard of proof is not lessened simply because the case is a misdemeanor. Prosecutors still must rely on police agencies to prepare complete investigations.

Law enforcement protocols which address the need for comprehensive guidelines covering initial police response, preliminary investigation, evidence gathering, follow-up investigation, training, and advocacy are slowly emerging. The most effective approach appears to focus on two questions: (1) Can We Prove this Case without the Participation of the Victim? and (2) If Not, Will the Victim Participate with Law Enforcement by Testifying Truthfully? This approach allows officers to focus on how to create a case even if the victim is too frightened and confused to cooperate, while not forgetting the importance of victim advocacy. The minimum investigation must include interviewing all children and adult witnesses, recording all statements of the victim, documenting all prior

incidents, and taking photographs in order to allow prosecution to proceed even if the victim later becomes uncooperative.

The aforementioned “Law Enforcement Protocol” created by workers on the Domestic Violence Task Force was used most effectively by the San Diego Police Department, one of nine law enforcement agencies in San Diego County. To insure adherence to the protocol, this department took a bold, innovative step into the future. The Department created the position of Domestic Violence Coordinator in 1990 and staffed it with a full-time sergeant. This step proved to be the critical difference in how patrol officers responded to domestic violence incidents in the field. After painstaking research into the examination of the patrol response (much of it traditional and ineffective), training needs were identified and the Domestic Violence Coordinator was designated as the trainer. In one year (1991), preliminary domestic violence reports increased by 59% citywide. Officers were taught how to properly investigate the incident and how to avoid “re-victimizing” victims. Strong efforts were made to “sensitize” patrol officers. The issue of the patrol officer’s own biases and prejudices was acknowledged and openly discussed. Most important, accountability in the area of response to domestic violence became a reality and everyone knew where the buck stopped. Individual agendas on the subject were no longer important.

The position of Domestic Violence Coordinator was expanded in 1992 when the Department’s first “specialized” Domestic Violence Investigations Unit was begun. The San Diego Police Department’s Domestic Violence Investigations Unit has taken the philosophy of “working gently with victims to encourage their participation in the legal process.” Victims are contacted by detectives within forty-eight hours of the incident. Leading questions are commonly employed which focus on the violence and do not put unnecessary pressure on the victim to be the “accuser.” For example, detectives will often ask “Did he hit you with a closed fist or an open hand?” rather than asking “Did he hit you?” The distinction is more than semantics. It dramatically affects the response of a victim. Similarly, rather than asking a victim whether she will “testify in court”, the detective is more likely to ask if she will “tell the truth”. The victims also receive feedback from the specially-trained detectives that helps them understand that the focus of the prosecution is on the abuser’s conduct, not the victim’s. Finally, the detectives take the time to explain the counseling programs that are used for abusers. Victims of domestic violence often want their partners to receive counseling and this tends to facilitate their participation. In those cases where victim participation is not forthcoming, the emphasis is on attempting to prove the case without the victim.

Developing a Focus on the Abuser

Another trend emerging throughout the criminal justice system is a focus on the abuser rather than on the victim. The age old question of “Why does she stay with him?” is being replaced with “Why does he hit her?” or “How can we stop him from hitting her?” Historically, it has been common to put the focus on the victim – both in positive and negative ways. It has been positive to invest resources in helping the victim and emphasizing her needs. But the negative result has been a criminal justice system that

asks “Why won’t she press charges?” or “Is she willing to prosecute?” By putting the responsibility on the victim during the investigation and the criminal prosecution, prosecutors and police officers have unwittingly further endangered victims and have been rendered unable to proceed when so many victims choose not to participate.

In San Diego, we learned a number of years ago that abusers would become more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution. By definition, most batterers have the power in violent relationships. Thus, when the system demanded that the victim act in the role of prosecutor, in reality the batterer was being given control of the criminal case. The batterer’s control over the victim is generally so complete that he was able to dictate whether she talked to the prosecutor, what she said, and whether she appeared in court.

The solution to this vexing issue was to take the responsibility out of the hands of the victim and place it with the State where it belongs. The police officer is paid to be the police officer. The prosecutor is paid to be the prosecutor. The victim of a crime is neither trained nor emotionally able to act in the role of cop or prosecutor. Once prosecutors and police officers stop asking victims whether they want to press charges, they quickly find that victims stop asking to press charges or drop charges. The victim is able to be the victim and address her pressing issues of safety for herself and her children and the system is able to focus on the one who broke the law.

Jurisdictions throughout the country, both urban and rural, are now finding much greater success in obtaining convictions and in working with victims once they remove the responsibility for the criminal case from the victim. Judges have less of a tendency to focus on the actions of the victim when it is clear that she is not the one who decided that the prosecution is going forward. Others throughout the intervention process stop asking about the victim’s willingness to “press charges” or “prosecute” once they understand that the criminal justice system is no longer asking these questions.

Victims become less hostile when they are told at every stage of the criminal justice system that they are not responsible for the decision to prosecute the abuser. While their input should be valued, the control should not be surrendered. Once the system takes responsibility for the prosecution, it becomes clear that other avenues must be explored to prove the case if the victim is not going to be the centerpiece of the prosecution.

A recent training book for prosecutors and defense attorneys (written by a defense attorney) included this statement: “In domestic violence cases, the abused spouse is the main source of the evidence.” This is exactly what the defense bar wants prosecutors to believe and this is how prosecutors have functioned for too long. As long as the investigation and the prosecution focus on the victim, cases will be inadequately investigated and prosecutors will fail to win convictions in large numbers of cases. Fortunately, the trend toward a focus on the abuser appears to be gaining strength and coherent policies are being developed across the country.

Eliminating Victim Blaming Policies

Related to the trend toward a focus on the abuser, many criminal justice system professionals are assessing policies that tend to re-victimize the victims. To be sure, aggressive prosecution policies in recent years have, at times, leaned in favor of paternalism and have had a tendency to re-victimize victims of domestic violence. Some prosecutors have tried to force victims to testify against their will. Other prosecutors have attempted to arrest victims across the board for failing to show up in court after being ordered to appear. Yet others have attempted to prosecute victims for perjury or conspiracy to violate restraining orders when they act in concert with the abuser to avoid consequences for his criminal wrongdoing. Victims have felt the criminal justice system is designed to treat them harshly through the pendency of any criminal prosecution including their appearances at any arraignments, bail hearings, other pre-trial hearings, and the trial itself. Prosecutors, however, are beginning to look closer at these issues and enunciated protocols are making substantive changes.

Law enforcement, as well, has been involved in processing domestic violence cases in ways that do not acknowledge the depth of victimization and crisis that many victims are facing. Issues such as delays in contacting victims and failures to record complete histories of prior violence have played a major role in this process. While some of the harm has been caused by intentional, malicious attitudes toward domestic violence victims, most of the problems have arisen out of naiveté or ignorance.

The trend to eliminate victim blaming policies and procedures, however, is gaining steam. One of the most obvious areas of concern is the issue of whether to arrest or incarcerate a victim for failing to appear in court to testify against her abuser. If the criminal justice system is going to have any credibility with abusers, prosecutors' offices must have policies on the handling of domestic violence victims who refuse to appear in court to testify or refuse to produce children witnesses to the violence. These issues have generated controversy over the past ten years and have led some offices to refuse to proceed if the victim fails to appear. Unfortunately, such a policy sends a message to the abuser that he need only keep the victim away from court with threats or promises and the criminal case will be dismissed. The net result is to once again place control for the criminal case in the hands of the abuser.

The extreme response to this thorny problem has been for a district attorney or a city prosecutor to lay down a blanket policy that any victim who fails to come to court will be jailed on a contempt warrant. This has resulted in significant numbers of victims being arrested and incarcerated while their abusers have avoided jail time altogether. Certainly such an uninformed hard-line is the purest form of re-victimization.

In San Diego, we have struggled with this complex issue and have come to a position that appears to be gaining ground across the country. Our official policy is that we will request arrest warrants for victims who are subpoenaed and fail to appear in court. This is widely publicized in our community. The actual enforcement of the policy, however, is much more complicated. If a victim fails to appear on the day of trial for which she has been subpoenaed, a specially trained Domestic Violence Unit prosecutor will decide how

to proceed. The initiative does not come from the judge or from a prosecutor insensitive to domestic violence issues. The prosecutor's decision will be impacted by whether we can prove the case without the victim's cooperation. About 60% of our cases are provable without the victim based on 911 tapes, photographs, medical records, spontaneous declarations by the victim to the officers, admissions by the defendant, neighbors' testimony, relatives' testimony, and general police officer testimony related to the case and the subsequent investigation. If the case can be proved without the victim, we will proceed to trial without requesting a warrant for the victim's arrest.

For cases that cannot be proven without the victim, the prosecutor may request a continuance and a bench warrant. This, however, is not always the case. The prosecutor may conclude the case does not merit the risk of jailing the victim. We now have legislation in California that allows us to refile the case after we locate the victim. If the prosecutor does ask for a continuance and a bench warrant, we do not let the warrant simply go into the system. We attempt to locate the victim immediately and bring her to court in some cases, we may ask the judge to hold the warrant and continue the case for a week while we notify the victim of the pending risk of arrest. This often results in the victim contacting our victim assistance staff and agreeing to come to court.

Over the past six years, we have only had to request arrest warrants on eight cases using the policy described above. We have maintained credibility with the defense bar and we have had only two incidents where a victim has actually been jailed overnight. Our unit obtains convictions over 2,000 cases every year leading us to believe the policy is successful. To be sure, re-victimization issues still arise but we work closely with advocates and shelters to minimize problems in particular cases.

Victim blaming issues also arise in other settings within the criminal justice system. Mandatory arrest policies have, at times, resulted in substantial numbers of arrests of victims. While primary aggressor rules have helped in this area, it has also been necessary to aggressively call on law enforcement to refuse to take victims of domestic violence to jail unless there is a clear and uncontradicted violation of the law without justification or excuse. Prosecutors play a powerful role in this regard by taking a policy stance on mutual arrest cases which makes it clear that police officers who invest their time in repeated and indefensible mutual arrests will see no criminal prosecution and will be held accountable within the community response task force or police agency's internal affairs division. In San Diego, proactive trainings in our police academies have reduced mutual arrests to less than 3% of all arrests in domestic violence incidents.

Effective domestic violence prosecutors around the country take an active role in every part of the criminal justice system when it comes to procedures which re-victimize or "blame the victim" for the abuser's conduct. Often these issues must be identified by the community coordinating council or task force and then addressed head-on by those policy makers who can impact the counter-productive policies.

Long-Term Accountability for the Abuser

The final trend to be discussed here relates to the vision of the criminal justice system as to its purpose in intervening in domestic violence situations. Early in the development of society's response to domestic violence it was tempting for law enforcement and prosecutors to hope that the cases would "go away". There was a tendency to send the abuser around the block or to scold the victim and the abuser for "airing the dirty laundry" of their lives. Perhaps ignorantly, there was a hope that these people would work out their problems and police officers would not have to return to their home.

As it became clear that minimal intervention would not work, the hope arose that arresting the abuser would be the solution to the escalating violence in homes across the country. Early studies tended to indicate that arrest alone had a powerful impact on the psyche of the abuser and could somehow change both the abuser and the victim. Certainly arrest plays a crucial role, but it is now becoming clear that one or two days of jail time will not alter permanently the power and control dynamics of an abusive relationship. If it took a lifetime for the abuser to learn the use of violence to control another human being, it will not be undone with a few hours in jail.

The trend is clearly toward creating long-term accountability and treatment. Treatment programs of six months to a year are becoming commonplace and the initial results are encouraging. In California and Colorado, for example, one year treatment programs have been mandated through state legislation. In other states, local policies and protocols have had to mandate the length and content of treatment. The treatment model out of Duluth, Minnesota, the Pence-Paymar model, is the prevailing approach being utilized by a growing number of jurisdictions.

Domestic violence offenders are rarely held accountable without being placed on probation or monitored by a system of review dates through a court or probation office. In San Diego, abusers are typically placed on three years probation for misdemeanors and five years for felonies. Most misdemeanor probationers do not answer to a probation officer but are monitored by the counseling program they are ordered to enroll in. If an abuser fails to enroll in counseling or drops out of counseling, the program notifies the court directly and a warrant is issued for his arrest. A copy of the notification comes to the City Attorney's Domestic Violence Unit so that we can work with local law enforcement agencies to have the abuser arrested and returned to court.

It is becoming very evident that fines serve little purpose in domestic violence cases other than to punish the victim. If an abuser controls the money in a relationship, a court order to pay a fine as part of a sentence in a domestic violence case simply takes money away from the relationship and most commonly from the victim. In essence, fines punish the victim without providing any benefit to the victim or to the relationship. The more effective approach is to utilize public work service, work furlough facilities, and jail time. Public work service places the defendant into a work detail on weekends or other available days but does not extract scarce funds from the community assets. While counseling often involves a charge to the abuser, the money expended on counseling clearly benefits the victim and the abuser irrespective of the future of the relationship. To the extent that counseling reduces future violence, the victim is directly benefited.

Diversion programs which allow the abuser to avoid a criminal conviction by enrolling in a counseling program are still being used in many jurisdictions around the country but many prosecutors and other criminal justice professionals are beginning to oppose such approaches. Diversion programs fail the abuser by not demanding that he acknowledge any wrongdoing for his violence and by providing scant follow-up if he drops out of the program. It is common in such programs for the abuser to drop out of treatment six months to a year after the original criminal incident. The prosecutor is then left in the position of attempting to locate the victim and prosecute an extremely stale case. Convictions in these cases are rare.

One model which appears to be more effective is a post-plea diversion program which requires a guilty plea before the abuser can enter the treatment program. In some states, such as Michigan, this approach is part of state law. When an abuser drops out of counseling in this type of program, he faces immediate sentencing and the prosecutor is not expected to take a case to trial long after the original violence which initiated the intervention effort.

In states where a guilty plea is not required for diversion, prosecutors can still fight to oppose the use of diversion either by policy or through legislative change. In California, the state diversion statute does not require a guilty plea but many prosecutors argue against applications for diversion before the judge and successfully keep a substantial number of abusers from getting into the toothless program. The result is that the abuser must then plead guilty or face trial. The vast majority of cases, when properly investigated and prosecuted result in a guilty plea and a court order to a one year treatment program as a condition of the defendant's probation. While we continue to pursue legislative change, forceful advocacy continues to result in long-term, meaningful accountability for the abuser.

CONCLUSION

There are no simple answers to the complex issue of domestic violence in this country. Many committed men and women have been working on these issues for many years both inside and outside of the criminal justice system. But we are slowly seeing a consensus emerge within the criminal justice system as to what constitutes effective intervention in the handling of domestic violence cases. The trends discussed in this article embody the framework for this consensus: establishing coordinated community responses; designing early intervention strategies; developing a focus on the abuser rather than the victim; eliminating victim blaming policies; and creating long-term accountability for the abuser within the system. Criminal justice system professionals that embrace this framework and develop pro-active strategies to implement compatible policies and procedures are making a dramatic contribution to breaking the cycle of domestic violence and to protecting the women and children who live with the terror of this insidious crime.

Footnotes

*Casey G. Gwinn supervises the San Diego City Attorney's Domestic Violence Unit which handles 500-600 misdemeanor domestic violence cases each month. He also chairs the San Diego Domestic Violence Council. Sgt. Anne O'Dell co-supervises the San Diego Police Department's Domestic Violence Unity. Both have been active with domestic violence issues nationally for many years.

1. Municipal Court Judge Cited in Attack on Pregnant Woman, THE TRIBUNE (San Diego), Dec 3, 1986 at B2
2. Id.
3. Mike Konon, Judge Testifies in Battery Trial, THE TRIBUNE (San Diego), Feb 25, 1987, at B4
4. Jim Schachter, Innocent Plea Entered on Behalf of Judge, L.A. TIMES, Dec 25, 1987 at B4
5. Judge's Two Motions Denied, SAN DIEGO UNION, Feb 28, 1987 at B1
6. Mitch Himaka, Judge Davies is Cleared of Attack on His Girlfriend, SAN DIEGO UNION, Feb 28, 1987 at B1
7. Municipal Court Judge Cited in Attack on Pregnant Woman, supra note 1, at B2
8. Id.
9. Id.
10. Judge Ordered to Appear in Battery Case, THE TRIBUNE (San Diego), Dec 4, 1986, at B2
11. Id.
12. Id.
13. Battery Complaint Filed Against Judge, SAN DIEGO UNION, Dec 17, 1986 at B1
14. Mike Konon, Judge Davis' Trial is Delayed, THE TRIBUNE (San Diego), Feb 5, 1987 at B4
15. Id.
16. Jenifer Warren, Key Ruling Expected in Case Against Judge Davis, L.A. TIMES, Feb 20, 1987 at II-3
17. Id.
18. Id.
19. See Judge Barred From Seeing Girlfriend, SAN DIEGO UNION, Dec 4, 1986 at B12
20. See Judge's Two Motions Denied, supra note 5 at B2
21. See Armando Acuna, Count Dropped Against Judge in Battery Trial, L.A. TIMES, Feb 28, 1987 at II-5
22. The purpose of this article is to focus on trends which are evident in 1993 in the criminal justice response. See Eve S. Buzawa & Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE (1990) for a more historical and comprehensive discussion of developments in the criminal justice system.
23. See Family Violence: Improving Court Practice, Report of the National Council of Juvenile and Family Court Judges (1990). The National Council's Family Violence Project has been working aggressively on the multi-disciplinary aspects of domestic violence intervention for a number of years. Their forthcoming book on state of the art in domestic violence intervention efforts will even further develop the importance of addressing every professional which deals with victims and perpetrators.

24. Task forces within the family court system have been in existence for a number of years with great success. Jurisdictions such as Multnomah County, Oregon, Indianapolis, Indiana, and Chicago, Illinois are examples of this approach. The focus here is on criminal justice-based or at least criminal justice-related task forces.
25. Lawsuits such as *Thurman v. City of Torrington* 595 F. Supp. 1521 (D. Conn. 1984) and *Nearing v. Weaver*, 670 P.2d 137 (Or.1983) have played a powerful role in changing public policy and attitudes within the criminal justice system. *Thurman* involved a civil rights action in which the plaintiff was assaulted by her estranged husband after the defendant police officer failed to respond to her calls. *Nearing* recognized a right of action for damages based on a statute imposing a specific duty on police for the benefit of persons previously indentified by court order.
26. See e.g. Duff Wilson, Panel Seeks More Jail for Batterers, More Aid for Victims, SEATTLE TIMES, July 19, 1991, at A1; Duff Wilson, Abusers Hide, Victims Recant, Law Can't Cope, SEATTLE TIMES, May 8, 1991 at A1
27. See e.g. Jan Hoffman, When Men Hit Women, N.Y. TIMES, Feb 16, 1992 6 at 23; Sandra Terry, D.C. Targets Domestic Violence, Law Requires Arrest if Abuse Suspected, WASHINGTON POST, Nov 11, 1991, at C1; Karlyn Barker, Domestic Abuse Arrests Expected to Soar Under New D.C. Law, WASHINGTON POST, August 27, 1990 at B1
28. UPI, October 19, 1984, available in LEXIS, Nexis Library, WIRES File
29. See e.g. Warren, supra note 16, at II-3
30. See e.g., Patricia Nealon, With Mass Domestic Violence Up, DAs Launch a Raft of New Programs, BOSTON GLOBE, Nov 2, 1992 at 23
31. Hoffman, supra note 27 at 23
32. Marvin Greene, Prosecutors Unhappy with Test of KY Stalking Law, GANNET NEWS SERVICE, Sept 2, 1992 available in LEXIS, Nexis Library, WIRES File.
33. An alternate approach to the traditional criminal court versus family court dichotomy has been the development of unified family courts which address the criminal nature of the conduct within the family court system. The Family Court of Hawaii is a model of this type of approach. Many jurisdictions are not anywhere near a social or political consensus on this issue and must address it through specialized prosecution in the criminal court which must then interface with the family court system.
34. Gaining access to children in domestic violence homes raises major resource, treatment, and training issues. Numerous authors have looked carefully at this issue and at the related legal issues. See e.g., G. Goodman & M. Rosenberg. *The Child Witness to Family Violence: Clinical and Legal Considerations in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* (D.J. Sonkin ed., 1987)
35. In San Diego, we saw significant increases in 911 calls from children witnessing violence as education efforts on the availability of the emergency call system expanded in the schools. In 1988, 31% of the 911 tapes received in the City Attorney's Domestic Violence Unit were calls from children.
36. Some law enforcement agencies have proactively taken the initiative to change their response to family violence with little direct outside pressure. Troy, Michigan and Newport News, Virginia are both excellent examples of cities that have produced law

enforcement protocols without pressure from the criminal prosecutors or the threat of legal action. See e.g., Barker, *supra* note 27 at B1

37. Numerous jurisdictions have produced excellent investigative checklists or standardized domestic violence reporting forms for officers to utilize in the handling of domestic violence cases. The Denver Police Department was one of the first to create a standardized reporting form that has been widely circulated and revised for differing jurisdictions. The San Diego Police Department began with a checklist approach. We have now gone to a standardized reporting form for use in all non-homicide domestic violence cases and we are attempting to implement the form in all county law enforcement agencies.
38. It must be acknowledged that it has been easier to let victims “drop charges” than to create a resource intensive system which takes over responsibility for the criminal prosecution. Effective criminal prosecution without the victim’s involvement costs money. The San Diego City Attorney’s Domestic Violence Unit budget is approximately \$825,000/year. While this has grown slowly through resource reallocation, it still represents a large amount of money that must be raised or taken from other existing services within a prosecutor’s office.
39. Los Angeles, Seattle, and Westchester County, N.Y. were probably three of the first large jurisdictions to pursue this approach on misdemeanor domestic violence cases. See e.g. Maia Davis County Confronts Domestic Abuse with New Laws, Tough Approach, L.A. TIMES, Feb 14, 1993, at B1; Wilson *supra* note 26 at A1, Hoffman *supra* note 27 at 23; Vicki Stein Dies at 67, Social Reform Leader., N.Y. TIMES, July 5, 1990 B at 5. San Francisco has had one of the longest standing policies in this regard but generally only felonies are handled under a “no drop” policy. See Hoffman, *supra* note 27, at 23. Some jurisdictions like Philadelphia and Minneapolis are implementing such approaches for felonies, which is important, but the volume of the cases are misdemeanors and the classification of a case as a misdemeanor or a felony has little relation to the level of violence. See e.g. *id*; Barker *supra* note 27, at B1. Traditionally, a case is treated as a felony in most of the country if there are broken bones or major medical treatment is required. A single blow may break a jaw and yet represent far less violence and abuse than repeated punching, kicking, grabbing, slapping, and shaking which may leave only minimal bruising. In San Diego, we now have a specialized Domestic Violence Unit in the City Attorney’s Office and in the District Attorney’s Office. We both function under similar protocols that take the responsibility for the prosecution away from the victim. The District Attorney’s Unit handles felonies throughout San Diego County and misdemeanors outside the city limits. The City Attorney’s Unit handles all misdemeanor domestic violence cases within the City of San Diego as well as misdemeanors in one outlying area of the county.
40. Steven A. Morley, Prosecution and Defense of Spouse Abuse and Marital Rape, in PROSECUTION AND DEFENSE OF SEX CRIMES 125
41. This process has been developing over the last ten years. While numerous jurisdictions have proceeded in this direction, it is fair to say that only a small percentage of domestic violence cases are yet being handled by specialized domestic violence prosecutors across the country.

42. In San Diego, we are continually updating our protocols to address these issues. Most recently we have had to reassess our policies on warrants for victims who fail to appear, our policies on victim notification regarding a defendant's potential release date from custody, and our position on victims speaking in open court. The process of judges asking women at pre-trial hearings to stand up in front of a courtroom full of people to talk about bail, new offenses, or disposition policies surely re-victimizes women when not done with appropriate safeguards and sensitivities. It must be the prosecutor's responsibility to protect the victim from these types of situations. Only the prosecutor is in a position to ask for a private chambers conference or ask that the victim be allowed to approach the bench in order to speak privately.
43. Cal Civ. Proc. Code 1219 (West 1993) now bars a judge from sentencing a domestic violence victim to jail for contempt the first time she fails to respond to a court order to appear in court and testify. The judge may order her to a support group but cannot sentence her to jail until a second contempt finding. This does not prohibit an arrest warrant from being issued which may result in the victim's incarceration prior to a contempt finding but it does send out a strong public policy message regarding re-victimization of victims.
44. Larry Sherman's ground breaking work in Minneapolis, Minnesota was the beginning of this process. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). Subsequently, Frank Dunford of the University of Colorado at Boulder and others have attempted to replicate the study in other jurisdictions. Their findings have not led to the same results. See Franklin W. Dunford et al., *The Role of Arrest in Domestic Assault Cases: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990)
45. See Lawrence W. Sherman et al., *From Initial Deterrence to Long-Term Escalation: Short Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821 (1991). Sherman's work has raised questions about the effectiveness of arrest in domestic violence cases where the abuser is chronically unemployed or underemployed. The research however, does not go beyond arrest to look at the need for prosecution and long-term treatment. Milwaukee, Wisconsin has one of the lowest publicized filing rates on domestic violence anywhere in the country at 13% of felonies. If the abusers are not being prosecuted and held accountable in long-term treatment it should not be surprising to find that violence continues or escalates after arrest and release.
46. See CAL. PENAL CODE 1000.6-8 (West 1993)
47. See COLO. REV. STAT. 18-6-801 to 803 (1992)
48. See Fawn Vrazo, *Aiming to Stop Domestic Abuse, Reform Programs Now Often Ordered For Men*, PHILADELPHIA INQUIRER, August 27, 1991 at A1, Victoria Sackett, *Treatment can Help, But It's Not a Cure All*, USA TODAY, June 19, 1990 at 11A.
49. See MICH. COMP. LAWS 769.4a (1992). See CAL. PENAL CODE 1000.6 (West 1993)