

INTIMATE PARTNER VIOLENCE VICTIMS CHARGED WITH CRIMES:

**Justice and Accountability for Victims of Battering
Who Use Violence Against Their Batterers**



ÆQUITAS

THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN



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The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done....

Berger v. United States, 295 U.S. 78, 88 (1935)

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JEFFREY P. GREIPP

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In addition to his prosecutorial experience, Mr. Greipp served as the Vice President of the Association of State Prosecutors and as an executive board member of the Wisconsin District Attorneys Association serving as each Association's legislative spokesperson. Wisconsin's Governor and state legislative leaders appointed him to serve on several legislative council committees where he reviewed Wisconsin's criminal code with other experts, drafting revisions which have since been adopted into law. Mr. Greipp was recognized for his work in revising Wisconsin criminal codes and statutes related to crimes against children, intimidation, sexual assault, and human trafficking; and helping create the Milwaukee Witness Protection Program in 2007.

He has trained with the National District Attorneys Association (NDAA), several state prosecuting attorneys associations, and law enforcement agencies. He served on the Statewide VAWA Advisory Board, the Homicide Review Commission Executive Board, and he co-chaired the Milwaukee Mayoral Commission on Domestic Violence and Sexual Assault. He is also an Adjunct Professor of Law at Marquette University Law School teaching advanced courses in trial advocacy and domestic violence.

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Mr. Miles has developed numerous innovative multidisciplinary programs to better hold domestic violence offenders accountable and enhance victim safety while reducing negative collateral consequences for victims participating in the criminal justice system. He was one of the founding members of the Domestic Violence Enhanced Response Team (DVERT), a multidisciplinary response team focused on high-risk domestic violence offenders. The DVERT program became a model of multidisciplinary response throughout the country. He was also the architect of the Domestic violence Fast Track Court in Colorado Springs. The Fast Track Court resulted in numerous domestic violence offenders being ordered into treatment within 48 hours of their offense. To protect victims participating in the criminal justice system, he implemented a Victim Video Link System whereby victims are able to observe and participate in preliminary court proceedings from a remote and safe location. Mr. Miles also created the Domestic Violence Pilot Project, incorporating contextual analysis into the criminal justice system to account for the dynamics of violence and the differences between batterers and victims who use violence.

Mr. Miles has served as a presenter and facilitator for the National District Attorneys Association and several state prosecuting attorney associations. He has also developed curricula and presented for the Colorado Regional Community Policing Institute, the Colorado Ending Violence Against Women Project and the Colorado Springs Police Academy.

Mr. Miles received his B.A. in Education from the University of Arizona and his JD from the University of Colorado and is a member of the Colorado State Bar.

INTRODUCTION

Any prosecutor who has handled a domestic violence docket understands the complex nature of these challenging cases in which the complainant and the defendant are involved in an intimate, and often continuing, abusive relationship. Even the more typical cases – those that involve prosecuting the ongoing abuser – can be challenging to prosecute for numerous reasons. However, in these investigations and prosecutions, there is usually a sense of confidence that the charged defendant is the person responsible for the abuse and should be held accountable in order to obtain justice and safety for the victim of abuse and the community at large.

Even greater challenges exist when a victim of battering is charged with a crime against the abuser. Not only must prosecutors find ways of identifying such cases, they must then determine whether these cases will be handled just like any other case or whether they deserve special consideration. Prosecutors have been taught to take *all* domestic violence cases seriously, which has historically meant filing charges, obtaining convictions, and achieving uniform sentences for all “domestic violence offenders.” Justice and accountability in domestic violence cases, however, may require prosecutors to treat certain cases and individuals differently based on factors that extend beyond the immediate facts of the crime incident. The practical challenge is for prosecutors to employ this level of analysis with often little guidance, limited information in their case files, and even more limited resources.

This monograph focuses on cases involving victims of battering charged with crimes committed against their abusers. These cases are particularly challenging to prosecutors because they usually involve prosecuting someone who is actually the victim of the complaining witness’s ongoing abuse. While there may be enough evidence to go forward with these cases, it may not always be the most just or safest decision.

As mandatory-, pro-, and preferred-arrest policies have been instituted, an increasing number of victims of battering have been arrested.¹ The comprehensive criminal justice responses to domestic violence developed by state and local communities over the past three decades² are often ill suited for victims of battering who are charged with crimes against their abusers. Mandatory-arrest statutes,³ no-drop policies,⁴ and mandatory offender treatment such as batterers' intervention programs,⁵ were all designed to hold perpetrators of battering more accountable. When these same policies are applied to the arrest, prosecution, and sentencing of victims of battering who present as defendants unjust results can occur because these policies fail to contextualize their use of violence against their abuser.

When systems neglect to distinguish violence used by an ongoing victim of battering from the systematic use of violence and threats used by a batterer, victims end up being treated like – or even more harshly than – batterers. Treating victims of battering as batterers often has devastating consequences for the victims, as well as for their children. Prosecutors are uniquely situated to prevent, or at least minimize, these negative consequences by conducting contextualized assessments. Through these assessments, prosecutors can learn more about both parties, determine if the defendant is a victim of battering, and intervene in a way that takes these contextual factors into consideration.

In this monograph, we will:

- **Explore overarching considerations in cases involving victims of battering who present as defendants;**
- **Discuss the steps necessary to determine whether a defendant charged with domestic violence is, in fact, a victim of battering and whether the complainant in the case is the batterer;**
- **Consider ways to evaluate if the defendant acted in self-defense and explore the use of a predominant aggressor analysis;**
- **Examine considerations necessary for effective dispositions in cases where victims of battering use illegal violence.**

A NOTE ABOUT LANGUAGE

We will use the term “victim–defendants” to describe victims of prior domestic abuse who enter the criminal justice system as defendants charged with domestic violence crimes against their batterers. Though the complainants in these cases present as victims, they are often batterers with a history of abusing. We will refer to these individuals as “batterer-complainants.”⁶ It is also important to note that the analysis described below is gender neutral and, when applied, will reveal the unique dynamics present in each case. This monograph addresses the importance of a contextual analysis in exposing the dynamics underlying an intimate partner violence victim’s use of violence against a batterer that results in arrest. Other categories of defendants are not addressed in this monograph.

The terms “batter,” “batterer,” or “battering” refer to an ongoing patterned use of intimidation, coercion, and violence as well as other tactics of control to establish and maintain a relationship of dominance over an intimate partner. These terms are, therefore, much broader than, and not limited to, the statutorily defined offense of “battery.”

OVERARCHING CONSIDERATIONS IN VICTIM-DEFENDANT CASES

THE ROLE OF THE PROSECUTOR

Before discussing how a prosecutor might identify a victim-defendant, it is important to establish why this identification is essential to a just disposition of the case. A victim of battering arrested and/or charged as a defendant may face increased risks of physical violence, ongoing control, and intimidation by the abusive partner. These victims may also be reluctant to call police and report incidents of continued violence. As a complainant in a criminal prosecution against the victim, an abusive partner may attempt to manipulate the prosecutor, the court, or other criminal justice agencies in order to exert more power over the victim and use the pending case as a tool to further manipulate and abuse the victim.

Given these realities, the challenge for prosecutors handling victim-defendant cases is to fashion a disposition that balances the victim-defendant's ongoing safety concerns with appropriate levels of accountability for their conduct. In these cases, prosecutors need to be extremely thoughtful and willing to use their discretion to craft safe, appropriate, and just dispositions.

Prosecutors occupy a unique position in the criminal justice system; their role is not simply to convict, but to seek the higher goal of achieving justice.⁷ This duty includes both procedural and substantive considerations. When evaluating a case, the ethical question prosecutors face is not, “*Can* I convict the defendant?” but “*Should* I convict?” Cases that involve victim-defendants present prosecutors with many opportunities to seriously consider and evaluate the meaning of “achieving justice.” Even when there is sufficient evidence to support the filing of criminal charges, justice may be best achieved by the dismissal or withdrawal of charges or consideration of a diversion program or other alternatives to conviction and/or incarceration. Significantly, many states have mandatory batterers' intervention programs that, although inappropriate for a victim-defendant, might be mandatory under the law. Prosecutors should be aware of whether their state statutes

require certain treatment or sentencing conditions following a conviction, and work towards the creation of individualized dispositions which are more consistent with the concerns presented by the individual before the court. While batterers' intervention programs may be appropriate for batterers they are not appropriate for victim-defendants. Alternative treatment programs or individual counseling may be more appropriate and effective in addressing the dangers and issues underlying victims who offend against their batterers.

The goal in cases involving victim-defendants is not to excuse the use of violence against an abusive partner; those who choose to use illegal violence should be held accountable for their conduct. Rather, the goal is to craft a disposition that holds the victim-defendant to an appropriate level of accountability in the context of the abusive relationship they have endured.⁸ In other words, do the interests of justice support the use of prosecutorial discretion to dismiss the case or fashion an alternative disposition? In order to answer this question in cases that involve victim-defendants, a contextualized evaluation and analysis are necessary.

STAYING OPEN TO CONDUCTING A CONTEXTUALIZED ANALYSIS

Ideally, a prosecutor's office would have the resources needed to carry out extensive investigations, conduct rich, contextualized analyses of the parties and the charges, and craft creative dispositions in every case. Given that most offices do not have unlimited resources, prosecutors can at least approach domestic violence cases open to the possibility that the defendant is a victim of ongoing battering despite the initial, and often limited, information that the prosecutor may have received. In doing so, prosecutors are urged to consider conducting a contextual analysis that includes:

- 1. Determining whether the defendant is a victim of battering.**
- 2. Evaluating evidence of self-defense and dismissing the case where self-defense can legitimately be established.**
- 3. Conducting an informed predominant aggressor analysis.**
- 4. Understanding the importance of prosecutorial discretion throughout the process and exploring appropriate and just dispositions, including alternatives to prosecution and withdrawal or dismissal of charges.**

Each of these areas is discussed further in this publication.

IDENTIFYING THE VICTIM-DEFENDANT

CONTEXTUAL DYNAMICS BEYOND THE CURRENT CASE

Effective domestic violence prosecutors do not evaluate cases in a vacuum. To determine the appropriate response, they gather details about a complainant's and a defendant's entire relationship and examine the contextual dynamics present in a case. This "big picture" examination of the relationship assists prosecutors in understanding the significance of each individual's violence. It can also provide prosecutors with insight into a defendant's intent and motives underlying the use of violence. Accordingly, prosecutors, therefore, can better assess whether a defendant acted in self-defense, in reaction to prior violence, out of fear, out of anger, or out of some other motivation. This analysis leads to more accurate charging decisions, plea offers, dispositions, and sentencing recommendations.

While this "big picture" approach is helpful and encouraged in assessing the context and dynamics in all domestic violence cases, it is especially critical to identifying victim-defendants. The more information a prosecutor is able to gather about the defendant, complainant, and history of their relationship, the better able that prosecutor will be in understanding the nature of the violence in a current case and distinguishing victim-defendants from batterers or other violent offenders. Where possible, this information should be obtained before discussing the current case with the batterer-complainant or approaching the victim-defendant and defense attorney and should be relied upon in tailoring a disposition to the unique facts and circumstances of a particular case.

IMPORTANCE OF A CCR IN GATHERING INFORMATION

It is critical that prosecutors work with other allied professionals to obtain additional information necessary to identify victim-defendants. Where there is an established coordinated community response (CCR) to domestic violence cases, prosecutors will ideally already have a working relationship

with the advocates, agencies, and processes in place that can help bring some of this information to light. For example, law enforcement agencies often possess information about other emergency calls for service to the residence or that otherwise involve the victim-defendant and batterer-complainant that may not have resulted in an arrest or filing of charges. Advocates may have detailed information about prior abuse and could share this with prosecutors in circumstances where privilege and confidentiality have been knowingly waived and defense counsel agrees. Probation officers may be aware of prior criminal history and the level of compliance with any current sentencing terms. Civil attorneys may have information regarding prior protection orders or divorce proceedings. Health care professionals working in conjunction with their CCR have improved documentation of domestic violence injuries, medical histories, and other historical information. These are a few examples of the myriad of information sources that could be accessed through a CCR. Prosecutors who collaborate with these and other justice partners can ensure the sharing of information they need to properly identify victim-defendants.

THE VICTIM-DEFENDANT'S PRIOR CRIMINAL HISTORY

Prosecutors should identify a victim-defendant as early in the criminal justice process as possible.⁹ The prosecutor can begin to accomplish this by initially conducting a thorough review of a defendant's prior criminal history, including any police reports, emergency calls for service, arrests, convictions, terms of probation or diversion, successful or unsuccessful completion of sentencing conditions, uncharged police incident reports, and interviews with witnesses. This information may immediately lead a prosecutor to determine that the defendant who has been arrested is actually a victim-defendant.

It is important to pay special attention to a victim-defendant's prior arrests and convictions involving drug- or alcohol-related offenses. While these may, standing alone, suggest problems with addiction, substance abuse often occurs in combination with a history of domestic abuse so it may

actually indicate a victim-defendant's coping behaviors. Further, it is important to carefully review the batterer-complainant's criminal history. A batterer-complainant's arrests and convictions for assaults, distributing drugs, or other crimes may indicate that the batterer-complainant is not only battering but also coercing the victim into criminal activity, such as forcing the victim-defendant to deal drugs or engage in prostitution.

While not all of this criminal history will be available in every case, prosecutors can collaborate with other criminal justice and community agencies to create information-sharing systems. Through the use of technology such as automatically computer-generated requests for information, web-based interfaces, email notification systems, point-of-contact phone messaging, or bar-coded file management systems, information can be transferred quickly with limited impact on strained resources. Additionally, prosecutors should not overlook the value of volunteer workers in this regard. These suggested practices make use of existing technology and can be implemented in jurisdictions with little or no additional expense and result in prosecutors' receipt of and access to information critical to thorough and more accurate evaluations of a case.

Domestic violence is often an unreported crime. It is important, therefore, that prosecutors do not overly rely on criminal records which provide only a partial picture of the violence in a relationship. Criminal history information is of far greater value when considered in the context of the relationship. The relationship history can assist prosecutors in distinguishing among **(1)** individuals who are victims acting in self-defense; **(2)** individuals reacting or responding to a unique situation;¹⁰ **(3)** individuals who are victims reacting or responding to an abusive relationship; **(4)** aggressive and violent individuals; and **(5)** batterers.

THE VICTIM-DEFENDANT'S HISTORY OF VIOLENT BEHAVIOR WITHIN THE RELATIONSHIP

An evaluation of the victim-defendant's history of violence with the current batterer-complainant, including both charged and uncharged incidents of both parties, reveals context about the relationship, and can help to illuminate the nature of the current violent incident. The reported history of violence of both parties can help prosecutors determine whether the victim-defendant's use of violence in a current incident is a reaction to abuse or part of a general violent tendency.¹¹ This is an important step for prosecutors because it will assist them in fashioning an effective disposition and avoid targeting the wrong individual, disproportionately punishing an individual, or missing opportunities to ensure safety and justice with each criminal justice contact.

For example, a lack of prior violence toward the batterer-complainant may indicate that the current incident is a reaction to prior, current, or ongoing abuse by the batterer-complainant. Multiple incidents of violence, however, do not necessarily indicate that a victim-defendant has a more generally violent tendency. In such cases, a victim-defendant may be responding to abuse in ways that have been historically effective in preventing or minimizing the abuse, at least in the short-term, even though the use of violence may not fall within the definition of self-defense. In some cases, the batterer-complainant may have self-inflicted injuries or otherwise manipulated the system to get the victim-defendant arrested repeatedly. The longer the history of an abusive relationship, the more detailed or complex the analysis may become.

In addition to prior alleged violent or assaultive behavior by both parties, other criminal activity within the relationship can provide prosecutors with important insights. For example, isolated crimes involving damage to personal property may indicate anger or frustration, especially where there is a verified history of abuse of the victim-defendant. This is distinguishable from multiple prior incidents involving property damage, harassment, abuse of pets, child abuse, theft, or other conduct demonstrating a pattern of activity directed at coercing, controlling, or retaliating against an intimate partner.

THE VICTIM-DEFENDANT'S HISTORY OF VICTIMIZATION BY THE BATTERER-COMPLAINANT

A key component in identifying victim-defendants is an evaluation of the current batterer-complainant's use of violence. As previously noted, incidents of violence within the home are often underreported to law enforcement. Therefore, further investigation and reliance upon an established CCR may be necessary to discover the nature and frequency of prior victimization that may have been disclosed to CCR partners but not the formal criminal justice system. In addition to the batterer-complainant's criminal history and law enforcement records, such as emergency calls or police reports, interviews with extended family members, adult siblings, parents, close friends, coworkers, neighbors, and any additional individuals who may provide emotional support to the victim-defendant may uncover previously unreported violent incidents. Other sources of information may include documentation in civil proceedings such as affidavits in support of protection order requests, evidence in divorce proceedings,¹² eviction proceedings, medical records and counseling records (upon a written release of such records), and victim advocacy services including shelters to name just a few. It is important for prosecutors to recognize that this history might have occurred in another jurisdiction. Corroboration that the victim-defendant has been the victim of violence in a previous domestic violence relationship may also be relevant to this fuller picture surrounding a new act of violence.

SELF-DEFENSE AND PREDOMINANT AGGRESSOR ANALYSIS IN VICTIM-DEFENDANT CASES

If, after a thorough investigation and evaluation of the factors listed above, an individual is identified as a victim-defendant reacting to prior abuse by a batterer-complainant, it is important for prosecutors to confirm that the victim-defendant was not acting in self defense or that law enforcement did not misapply the predominant aggressor analysis. Additional training may be necessary to assist law enforcement and prosecutors in assessing whether self-defense or predominant aggressor factors are present.

EVALUATING SELF-DEFENSE

While it is the victim-defendant's burden to raise self-defense at trial, prosecutors must become aware of any evidence that suggests that a victim-defendant may have acted in self-defense when determining whether to file criminal charges. In some cases, the victim-defendant's or batterer-complainant's statements, emergency call, witness' statements, pictures of physical injuries, or other evidence collected at the scene may easily establish that the victim-defendant's actions were defensive in nature. These cases should be dismissed. In most cases, however, evidence of self-defense is ambiguous. Accurately evaluating and charging these cases, therefore, requires prosecutors to understand each person's use of violence within the context of their relationship. By evaluating the contextual significance of all of the conduct surrounding the charged crime, law enforcement and prosecutors can help ensure that a victim-defendant's behavior is not misinterpreted and erroneously punished when using reasonable means to defend themselves in the context of the abusive relationships they have endured.

To establish self-defense, any defendant must demonstrate a reasonable belief that the actions were necessary to prevent imminent harm.¹³ In cases involving a long history of domestic violence, patterns of violence often emerge and victims become adept at identifying “red flags” that indicate imminent violence. Specifically, conduct that initially appears benign to law enforcement or prosecutors, may, as a result of history and experience, signal imminent danger to a victim-defendant. There also may be more subtle behaviors that the victim-defendant recognizes as precursors to violence by an abuser.¹⁴ Common indicators of pending violence include gestures, tone of voice, or facial expression (“the look”).¹⁵ Some batterers use certain objectifying language before resorting to violence or may remove rings or jewelry before striking a victim to avoid leaving obvious marks. Victims immediately recognize the significance and danger of these historic precursors to their abuse. Unfortunately, these precursors may be overlooked or disregarded by law enforcement or first responders who lack the historical information and perspective to properly assess the importance of such conduct.

The level of justifiable force increases when used in response to imminent danger of unlawful deadly force and is addressed in many state statutes.¹⁶ Significantly, these statutes do not prevent victim-defendants from using a weapon against an unarmed batterer-complainant.¹⁷ Determining whether the use of a weapon for self-defense is reasonable requires consideration of the level of past violence; the severity of past or current threats; level of fear; and size, weight, and strength differences.¹⁸ Such conduct may be justified based upon the existence of these factors. It is critical, therefore, to investigate both the current incident as well as the history of violence in the relationship in order to accurately assess a victim-defendant’s self-defense claim.

PREDOMINANT AGGRESSOR ANALYSIS¹⁹

Even in jurisdictions that do not have statutes that include predominant or primary aggressor language, prosecutors are encouraged to utilize this sort of analysis when conducting their contextual evaluation of the current case and the parties. The first step in determining the predominant or primary aggressor in most jurisdictions is to first consider the history between the parties. It is important that any predominant aggressor analysis include more than an inventory of aggressive *physical* acts. As previously discussed, because of a history of abuse, a victim-defendant may be aware of – and react to – subtle behavioral indicators of the batterer-complainant’s pending violence. The challenge in evaluating these precursors to violence is that they often do not rise to the level of physical “aggression” as that term is normally defined. If a victim-defendant reacts physically in response to such precursors, these actions may easily be misinterpreted as predominant aggression and result in an arrest. For example, the batterer-complainant’s “less aggressive” assault or even “legal” behavior may cause a victim-defendant to feel fearful because the behavior is known to be a precursor to more serious violence. The victim-defendant may react with more aggressive assaultive conduct against the batterer-complainant in an effort to prevent an impending assault. Though the victim-defendant’s behavior may not cause the batterer-complainant any fear, such actions may result in an arrest. It is, therefore, essential that prosecutors evaluate the victim-defendant’s actions within the context of the relationship with the batterer-complainant in order to accurately identify the predominant aggressor.

DISPOSITIONS IN VICTIM-DEFENDANT CASES

Once the prosecutor has thoroughly analyzed the case, the prosecutor has to decide what to do with it. What is the appropriate disposition? Why? As discussed earlier, cases in which it was determined that the defendant acted in self-defense should be dismissed. What, however, should a prosecutor do with the rest of the cases?

A comprehensive self-defense and predominant aggressor analysis will assist prosecutors in determining whether the decision to prosecute a victim-defendant is just. In many cases, neither self-defense nor any other legal justification exists; victim-defendants have engaged in what appears to be illegal conduct. These are often difficult cases for prosecutors: the conduct is illegal, yet it is not clear how prosecuting the case will advance justice or safety. What are appropriate and just dispositions in these situations?

Many of these cases involve conduct that, if done by a batterer-defendant, would be prosecuted. Why then might a prosecutor consider a different disposition when the conduct is done by a victim-defendant? Ethical rules, case law, and state statutes do not pose a barrier to adapting case dispositions to the unique facts and circumstances of each case, and each individual, even where defendants are charged with the same crime. Because domestic violence statutes are written in broad categorical terms, they do not account for the contextual differences underlying the crimes charged. Justice, therefore, requires prosecutors to distinguish various forms of intimate partner violence. Treating victim-defendants in the same way as batterers does not effectively account for the differing intent, effects, and dynamics underlying the use of violence. More importantly, it may well place victim-defendants at greater risk of increased danger and a host of other negative consequences.

If prosecutors treat victim-defendants differently, they may face accusations of selective prosecution and gender bias. They may also be accused of circumventing legislatively crafted definitions of criminal acts and statutorily mandated consequences such as batterer treatment. Despite, and because of, these possible accusations, it is important for prosecutors to work hard to fashion just and appropriate dispositions for the individuals before the court rather than the type of offense before the court. When creating a court record, it is also critical that prosecutors clearly document the justification for their decisions – including seeking a just, individualized outcome where the description of the treatment needed and treatment program are specifically provided.

PROSECUTORIAL DISCRETION IN CASES INVOLVING VICTIM-DEFENDANTS

A prosecutor's authority to weigh the factors discussed above in determining which cases to charge and prosecute, as well as considerations of *how* to prosecute criminal acts, lies in the well-recognized province of prosecutorial discretion.²⁰ The exercise of this discretion allows prosecutors to adapt a response to the individual facts and circumstances of each case, increasing the likelihood of an appropriate and just disposition.²¹ In other words, prosecutorial discretion is grounded in the very principles we are encouraging prosecutors to utilize in cases involving victim-defendants: a thoughtful reliance on an individualized, contextual analysis. By relying on these principles to guide their decisions and actions, prosecutors can fashion safe, appropriate, and just dispositions for victim-defendants.

SHOULD CHARGES BE FILED?

A prosecutor's considerations in determining whether the filing of criminal charges is in the interest of justice goes far beyond a simple probable cause determination.²² In addition to addressing *how* cases should be prosecuted, ethical rules for prosecutors also address *whether* cases should be prosecuted. Prosecutors are more than ministers of process; they are ministers of justice, a role they are often called upon to play in cases involving victim-defendants.

Initially prosecutors decide whether to charge or prosecute a case investigated by police. In weighing this decision, prosecutors consider numerous factors particularly relevant to victim-defendants such as the harm caused by the offense, consideration of the punishment in relationship to offense and particular defendant, and possible improper motives of a complainant.²³

CONSIDERING CONSEQUENCES TO THE VICTIM-DEFENDANT

In fashioning dispositions for victim-defendants, prosecutors must also remain mindful of – and minimize – any negative collateral consequences. Every defendant suffers collateral consequences as a result of an arrest or conviction. For victims of battering however, these collateral consequences are unique and may have disproportionately negative impacts on future safety and autonomy. For example, criminal convictions may support attacks on the victim-defendant’s credibility when testifying as the victim in any future domestic violence case, which impacts victim safety. Further, difficulties in obtaining employment may perpetuate the victim-defendant’s economic reliance on the batterer. An inappropriate criminal conviction could also cause a court to improperly conclude that the victim-defendant poses a danger to any children, which could result in restrictions on custody or visitation rights. To avoid placing the victim-defendant in greater risk of harm, it is important for prosecutors to consider that the collateral consequences for victim-defendants are unique. Overlooking or ignoring these consequences may result in subsequent and far more serious violence. Prosecutors have a responsibility to ensure that dispositions and sentences are just, safe, and proportionate to all criminal defendants.

Batterers and victim-defendants have different motives for their use of violence. Batterers’ intervention programs address issues of ongoing, patterned use of privilege, dominance, and coercive control over an intimate partner and, therefore, do not effectively address the issues unique to victim-defendants. If a victim-defendant is convicted of certain offenses, state statutes may mandate batterers’ intervention programs, however, placing victims in with abusers for group batterer intervention counseling

is inappropriate and ineffective from a treatment standpoint, compromising both the treatment of the batterers and the victims who have offended. It may be necessary, therefore, for prosecutors to work with their communities to improve both the access and the diversity of treatment programs for different offenders that will improve prosecution considerations for pretrial diversion, probationary treatment options, or other tailored alternatives that may be more effective for victim-defendants.

Effective treatments for victim-defendants provide options and resources to enable victim-defendants to abandon violence as a response to their abuse. They may even incorporate individual counseling, substance abuse counseling (if applicable), job training, child care assistance, housing issues, and victim support groups, providing a more tailored response to victim-defendants.

Prosecutors tailoring a disposition in victim-defendant cases must also recognize that because of the prior victimization at the hands of the batterer-complainant, the victim-defendant is often at greater risk of future victimization. Therefore, prosecutors should avoid imposing conditions, such as marital counseling or restorative justice practices requiring confrontation, which force the victim-defendant to interact with the batterer-complainant.

Batterer-complainants often use the criminal justice system to further control and manipulate their victims by lodging exaggerated or false reports of non-compliance to probation officers, treatment providers, police, or prosecutors. In addition to being aware of, and thereby less susceptible to such manipulation, prosecutors can proactively prevent or limit this manipulation; by working closely with law enforcement and other system professionals, those involved can identify batterer-complainants' misuse of the system. If law enforcement or other allied professionals encounter a situation involving potential manipulation, they should consult with the prosecutor's office before filing charges or revocation motions based solely upon a batterer-complainant's allegation.

PRE-PLEA DISPOSITIONS

Pre-plea dispositions allow prosecutors to minimize the negative collateral consequences of a conviction and still hold victim-defendants appropriately accountable for their illegal conduct. Pre-plea dispositions are statutory alternatives to trial in which victim-defendants agree to complete several conditions in exchange for the prosecution's decision not to proceed with a criminal case. Through pre-plea dispositions, prosecutors can monitor victim-defendants' compliance with the terms of an agreement in order to assure successful completion of an appropriate program, counseling, or community service.

STATUTORY ALTERNATIVES TO CONVICTION

In recognition of the prosecutor's discretion to fashion dispositions in criminal cases that do not result in convictions, most states have provided statutory mechanisms for prosecutors to utilize.²⁴ The most common of these mechanisms are diversion programs such as deferred prosecutions,²⁵ deferred adjudications,²⁶ or deferred sentences.²⁷ Except where specifically prohibited by statute,²⁸ these alternatives to conviction afford prosecutors a high degree of control over the terms and conditions the victim-defendant is required to successfully complete as a precondition to dismissal of the criminal charges. Eligibility for such dispositions varies from state to state, but may include first time offenders,²⁹ low probability of re-offense,³⁰ and restrictions based on the level of criminal charge.³¹ The advantage of deferred prosecution and deferred adjudication dispositions is that victim-defendants are held accountable for their criminal conduct and are, through the imposition of terms and conditions, required to address the rehabilitative needs that contributed to the criminal conduct. Victim-defendants can also be monitored to ensure compliance with conditions and the discovery of any new criminal offenses. Prosecutors retain the ability to revoke the agreement and proceed with prosecution of the original charges upon a showing that the victim-defendant violated any of the required terms and conditions of

the agreement.³² Victim-defendants are motivated to successfully complete the required conditions, which will result in dismissal of the criminal charges, allowing them to avoid the negative consequences of a conviction as discussed earlier.

Prosecutors are not only permitted to consider the unique factors of each case and defendant in informing their exercise of prosecutorial discretion to achieve justice, they are expected to do so. Further, the states have provided them with the mechanisms in the form of deferred prosecution, deferred adjudication, and deferred sentence statutes to implement their discretion. Thus, prosecutors are ethically permitted and expected to utilize informed and nuanced application of discretion in fashioning a just result in complex domestic violence cases involving victim-defendants.

CONCLUSION

A thorough evaluation of the context within which the violence occurred allows prosecutors to make improved decisions for all offenders, simultaneously identify victim-defendants, and tailor a criminal justice responses that are appropriate to the circumstances of each incident and each individual. In this way, prosecutors can: **1)** determine whether the defendant acted in self-defense, **2)** hold the victim-defendant appropriately accountable, **3)** assess the need to provide for the safety of the complainant, **4)** minimize or eliminate the unintended negative collateral consequences for the victim-defendant, **5)** provide for the ongoing safety of the victim-defendant, and **6)** ensure that violence is not tolerated and laws are enforced.

Ethical rules, case law, and state statutes require prosecutors to fashion case dispositions to the unique facts and circumstances of each case, even where defendants are charged with the same crime. Justice requires prosecutors to distinguish various forms of intimate partner violence. They must take into account the differing intent, effects, and dynamics underlying the use of violence by victim-defendants than that of batterers.

Justice is not the sole responsibility of prosecutors and does not exist in the isolated vacuum of their offices and courtrooms. A fair and just exercise of the criminal justice system requires the full collaborative involvement of a coordinated community response to ensure safety and accountability in every case. Prosecution partnerships with law enforcement, advocates, health workers, probation officials, defense lawyers, community advocates, and others are the best safety mechanisms for victims of domestic abuse in every case, courtroom, and community.

ENDNOTES

- 1 See e.g. Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 684 (1997); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 236 (1993).
- 2 See The Domestic Violence Enhanced Response Team, Colorado Springs, Colorado available at www.dvert.org/overview; The Family Justice Center Alliance available at www.familyjusticecenter.com; The National Center on Domestic and Sexual Violence available at www.ncdv.org/publications_ccr.html.
- 3 See e.g. REV. CODE OF WASH. ANN. §10.99.03(6)(a) (2009); NY CRIM. PROC. LAW §140.10(4) (2009); UTAH CODE ANN §77-36-2.2(2)(a) (2009).
- 4 See e.g. FLA. STAT. ANN. §741.2901(2) (2009); MINN. STAT. ANN. §611A.0311(2)(5) (2009); UTAH CODE ANN. §77-36-2.7(1)(e) (2009); WIS. STAT. ANN. §968.075(7)(a)(2) (2009).
- 5 See e.g. CAL. PENAL CODE ANN. §1203.097(6) (2009); COLO. STAT. ANN. §18-6-801(1)(b) (2009).
- 6 The terms “victim-defendant” and “batterer-complainant” will be used through out this monograph to avoid confusion. The use of these terms, however, prior to an evaluation and determination that an individual accused of a domestic violence crime is, in fact, a victim of prior abuse by the complainant does not imply a presumption of such a determination. It is only through the evaluation process that an accurate determination of a victim-defendant or batterer-complainant can be established.
- 7 *United States v. Darui*, 614 F.Supp.2d 25, 37 (D.D.C. 2009); *D’Ambrosio v. Bagley*, 619 F.Supp.2d 428, 452 (N.D. Ohio, 2009); *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 at 386, 124 S.Ct. 2576 (U.S. Dist.Col., 2004).
- 8 While the victim-defendant subcategory of domestic violence may not be specified in statutory language, the unique dynamics present in these cases are conceptually contained within the factors enumerated in the *ABA Standards for Criminal Justice: Prosecution and Defense Function (ABA Standards for Criminal Justice)*, the *ABA Model Rules of Professional Conduct (ABA Model Rules)*, and the various state versions of these rules. Prosecutors are ethically permitted to consider the distinctions and differences in the nature of violence present in victim-defendant cases when fashioning different responses to differing forms of domestic violence.

ENDNOTES

- 9 See Ellen Pence, *The Saint Paul Blueprint for Safety: An Interagency Response to Domestic Violence Crimes*, PRAXIS INTERNATIONAL (2009).
- 10 See Mary Asmus, *At A Crossroads: Developing Duluth's Prosecution Response to Battered Women Who Fight Back*, 65-74 apps.7-1 – 7-5 (2007), available at <http://www.bwjp.org/articles/article-list.aspx?id=4>.
- 11 *Id.*
- 12 See, e.g., COLO. REV. STAT. §13-22-311(1) (2009) (Many states waive mandatory mediation requirements in divorce proceedings upon an assertion of prior domestic violence).
- 13 Richard A. Rosen, *On Self-Defense, Imminence and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 378 (1993).
- 14 Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National, VIOLENCE AGAINST WOMEN SURVEY, III* (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.
- 15 Alafair S. Burke, *Rational Actors, Self-Defense and Duress, Making Sense Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 268 (2002); Valli Rajah et al., “Aren't I a Victim?": *Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction*, 12 VIOLENCE AGAINST WOMEN 897, 898 (2006); Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201, 1219 (2009).
- 16 See e.g., MINN. STAT. ANN. §609.06 (2009); 11 DEL. CODE ANN. §464(c) (West 2009); IND. CODE ANN. §35-41-3-2(2)(a) (West 2009).
- 17 See *State v. Wanrow*, 559 P.2d 548 (Wash. 1977); See also, Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*. 140 U. PA. L. REV. 379, 417, n. 135 (1991).
- 18 Melissa Hooper, *When Domestic Violence Diversion Is No Longer An Option: What To Do With The Female Offender*, 11 BERKELEY WOMEN'S L.J. 168, 178 (1996).
- 19 See e.g. Ark. Code Ann. §16-81-113(a)(2)(B) (2007); Mont. Code Ann. §46-6-311(2) (b) (2005); Wis. Stat. Ann. §968.075(2)(2)(am) (2005) (Predominant aggressor analysis factors commonly include: (1) the past history of violence; (2) self-defense; (3) relative severity of the injuries; and (4) risk of future harm).

- 20 *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, *supra* at 386; *United States v. Armstrong*, 517 U.S. 456, 463-65, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996); *Wayte v. United States*, 470 U.S. 598, 607-08, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *State v. Altgilbers*, 109 N.M. 453 at 467, 786 P.2d 680, 694 (N.M.App. 1990); *People v. Chamblis*, 395 Mich. 408 at 427 n. 9, 236 N.W.2d 473, 482 n.9 (Mich. 1975).
- 21 *See e.g.*, *State v. Herme*, 298 N.W.2d 454, 455 (Minn. 1980)(The latitude afforded to prosecutors in the exercise of their discretion is very broad and is allowed a great deal of deference by the courts); *United States v. Nealy*, 232 F.3d 825, 831 (11th Cir. 2000); *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *People v. Keenan*, 46 Cal.3d 478 at 506, 758 P.2d 1081 (1988); *see e.g.*, *State v. Lynch*, 314 Wis.2d 746, 760 N.W.2d 184 (Wis.App., 2008)(The exercise of prosecutorial discretion is so integral to achieving justice it has been referred to as a “quasi-judicial” function); *State v. Hooper*, 101 Wis.2d 517 at 536, 305 N.W.2d 110 (Wis., 1981); *see also*, *People v. Gephart*, 93 Cal.App.3d 989 at 999, 156 Cal.Rptr. 489, 496 (Cal.App. 1979); *see*, *Abuelhawa v. U.S.*, 129 S.Ct. 2102, 2107 (U.S. 2009) (Within the broad statutory classifications defining criminal conduct created through the legislative process, prosecutors can use their discretion to tailor the consequences to fit the act. The Supreme Court has, in fact, recognized that Congress, and state legislatures, “legislate against a background assumption of prosecutorial discretion.” It is precisely *because* criminal statutes are necessarily written in broad categorical terms that American jurisprudence has long recognized the importance of prosecutorial discretion).
- 22 Although not binding on prosecutors, the MODEL RULES OF PROFESSIONAL CONDUCT are instructive and helpful when discussing the prosecutor’s role. In fact, many states’ rules of professional conduct adopt or closely parallel the language of the MODEL RULES OF PROFESSIONAL CONDUCT. *See e.g.*, N.J. RULES OF PROF’L CONDUCT, R. 3.8 (2009); WIS. S,CT. RULES, R. 20:38 (2009); TENN. RULES OF PROF’L CONDUCT, R. 3.8 (2008) (Rule 3.8 of the MODEL RULES OF PROFESSIONAL CONDUCT directs prosecutors to refrain from prosecuting cases unsupported by probable cause, assure a defendant’s right to counsel, honor the rights of unrepresented defendants, disclose exculpatory information, limit extra-judicial statements, and remedy improper convictions); *see*, MODEL RULES OF PROF’L CONDUCT, R, 3.8 (2006) (These rules are designed to protect the integrity of the criminal justice process in order to ensure fair and reliable results and promote and encourage society’s trust in and acceptance of the results of the criminal justice process, *supra* note 9).

ENDNOTES

- 23 *See*, ABA STANDARDS FOR CRIMINAL JUSTICE, Section 3-3.9(b) (Reiterates the probable cause charging standard, but also recognizes the authority of prosecutors to decline the prosecution of charges supported by probable cause when good cause exists and the decision is consistent with the public interest. Factors a prosecutor should consider in making the decision include: (i) the prosecutor’s reasonable doubt that the accused is in fact guilty; (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender; (iv) possible improper motives of a complainant; (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; and (vii) availability and likelihood of prosecution by another jurisdiction. (*supra* at note. 9) (emphasis added).
- 24 *See e.g.*, CRIMINAL JUSTICE SECTION STANDARDS: PROSECUTION FUNCTION, R. 3-3.8(a) (2006) (While a judgment of conviction and sentence may be a just outcome in the majority of criminal cases, prosecutors are not limited to conviction as the sole objective in every case where probable cause exists. The *ABA Standards for Criminal Justice* recognizes the appropriateness and utility of diverting appropriate cases from the criminal justice system through “non-criminal dispositions” and encourages prosecutors to utilize social agencies in evaluating such cases, *supra* at note 9).).
- 25 *See e.g.*, ALA. CODE ANN. §45-8-82.40 (2009); KY RULE V (2008); ILL. CODE ANN. §33-39-1-8 (2009).
- 26 *See e.g.*, TEXAS STAT. ANN. ART. §42.12 (2009); WASH, REV. CODE ANN. §13.40.127 (2009).
- 27 *See e.g.*, VT STAT. ANN. §7041 (2009); OKLA. STAT. ANN. §28-123 (2009); NM STAT. ANN. §31-21-5 (2009).
- 28 *See e.g.*, COLO. REV STAT. §18-1.3-104 (2009); FLA. STAT. ANN. §379.337 (2009); KAN. STAT. ANN. §12-4415 (2009).
- 29 10 DEL CODE ANN. §1024 (2009); FLA. STAT. ANN. §948.08 (2009).
- 30 *See e.g.*, MISS. CODE ANN. §99-15-109 (2009).
- 31 *See e.g.*, CAL. PENAL CODE §1000 (2009).
- 32 WASH. R.APP.PRO, R 7.2 (2002); OKL.ST.ANN. §644 (2009).



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