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Jennice Vilhauer

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Cover Page Footnote

Former Victim Advocate, Los Angeles District Attorney's Victim/Witness Assistance Program, Los Angeles, CA; Ph.D. Candidate, Counseling Psychology Program, Fordham University, 2002; M.S.Ed. Counseling Psychology, Fordham University, 1999; B.A. University of California, Los Angeles, 1993.

UNDERSTANDING THE VICTIM: A GUIDE TO AID IN THE PROSECUTION OF DOMESTIC VIOLENCE

*Jennice Vilhauer**

INTRODUCTION

As one of the most prevalent crimes in the country, domestic violence is one of the most frequently handled cases for prosecutors across the nation. Despite their commonality, however, domestic violence cases can raise the anxiety level of even the most experienced prosecutor. There are several causes of such anxiety. First, domestic violence cases are often plagued by evidentiary problems that occur when a victim does not desire prosecution. Second, even in states where mandatory prosecution laws have been enacted, it can still be difficult to successfully prosecute a case when a victim is hostile, uncooperative and acting in direct opposition to attempts made by the prosecutor to help the victim. Third, most prosecutors receive a basic education on domestic violence and are only familiar with what have now become colloquial terms, such as “battered women’s syndrome” and the “cycle of violence.” Unfortunately, they are often not aware of how to utilize their knowledge to work effectively with the victim. This essay will attempt to provide prosecutors with a better understanding of domestic violence victims from a psychological perspective, in a way that will aid in the comprehension of the underlying dynamics of these difficult cases.

I. CYCLE OF ABUSIVE BEHAVIOR

The nature of domestic violence creates an entangled relationship between victim and perpetrator that is not encountered in most other crimes. The intense psychological dynamics involved in this relationship are often set in place long before any battering incident.¹ The act of violence is only a physical manifestation of this deeply entrenched psychological interplay between the couple.

* Former Victim Advocate, Los Angeles District Attorney’s Victim/Witness Assistance Program, Los Angeles, CA; Ph.D. Candidate, Counseling Psychology Program, Fordham University, 2002; M.S.Ed. Counseling Psychology, Fordham University, 1999; B.A. University of California, Los Angeles, 1993.

1. DAWN BERRY, *THE DOMESTIC VIOLENCE SOURCEBOOK* 36 (1998).

The battery is often the briefest part of the interplay between parties and the most quickly forgotten, both because it is unpleasant and because focusing on the physical violence prevents movement into the next (and most gratifying) stage of the cycle.² Lenora Walker, a pioneer in the study of domestic violence, has described this psychological interplay between couples engaged in abusive behavior as the "cycle of violence."³ The cycle occurs in three stages.⁴

The first stage is known as the tension-building phase.⁵ This is the longest phase of the cycle that can last anywhere from several months to several years. During this stage, the perpetrator, who is usually extremely charming in the beginning of the relationship, becomes critical by verbally insulting his victim in ways that are meant to demean and damage her self-esteem. He also becomes controlling and seeks to isolate her from other people.⁶

During this stage, the victim is trying to understand the changes in her partner's conduct and engages in behavior that is intended to pacify and soothe the perpetrator. However, as a result of the perpetrator's constant verbal attacks, the victim is made to feel that she is the cause of the unusual behavior, and thus becomes more susceptible to his attempts to control her.⁷

The second stage is the violent phase, in which the batterer engages in physical battering.⁸ Often the first violent physical incident is not severe, and may consist of a push or a shove. These early incidents may not be enough to make the victim realize that she is in real danger. The violence usually increases each time this phase occurs and can terminate in death. During this phase, the couple may become involved with the criminal justice system, if the victim, or a third party, contacts the police in an effort to stop an acute battering episode.⁹

2. *See id.*

3. *See* LENORA WALKER, *THE BATTERED WOMAN* 16 (1982).

4. Although there are domestic violence incidents involving male victims and female perpetrators, an overwhelming majority of reports show that women are generally the victims of abuse at the hands of a man. Therefore, this essay refers to the batterer with masculine pronouns, and the victim with female pronouns.

5. *See* BERRY, *supra* note 1, at 36.

6. *See* James Allison & Eric Martineau, *The Secret Formula to Successful Domestic Violence: An Examination of Abuse as a Means to an End and the Options Available to Halt the Violence*, 11 *ADELPHIA L.J.* 1, 4 (1996).

7. *See* BERRY, *supra* note 1, at 36.

8. *See id.*

9. *See* LINDA MILLS, *CRIMINAL JUSTICE AND BEHAVIOR* 306-07 (1998).

The third stage is the honeymoon phase.¹⁰ During this phase, the perpetrator calms down, realizes that the victim is hurt and angry and recognizes the possibility that she may leave him. He then engages in loving contrition. It is a period of relief for both partners: the batterer is apologetic and loving, and the victim believes that he has once again become the charming man with whom she fell in love. The perpetrator will usually beg for forgiveness and swear that it will never happen again.¹¹

It is during this phase that prosecutors become involved in a domestic violence case, which makes it extremely difficult for them to conduct an investigation. Essentially, by the time the police have taken a report of the battering incident, filed charges and brought the case to the prosecutor's office, the couple has reunited and the victim no longer feels that she is in any threat of danger. She may therefore refuse to testify as a witness to the incident and may recant any incriminating statements made to the police.¹² She may also feel responsible for the incident and even offer a made-up version of the events that make her out to be the wrongdoer.¹³

When this cycle of violence repeats itself over time, the victim can develop what is known as Battered Woman Syndrome ("BWS"). BWS can be divided into three parts: 1) the traumatic effects of victimization; 2) learned helplessness; and 3) self-destructive coping responses to the violence.¹⁴ BWS is similar to Post Traumatic Stress Disorder, but includes the added element of repeat abuse. One feature of this disorder can be poor memory recall of the traumatic events.¹⁵ This symptom is important for prosecutors to understand because when some victims claim that they cannot remember an event, it may not be a lie. Women who suffer from BWS are less likely to respond to the violence against them, and consequently, become more deeply entrenched in the violent relationship.¹⁶ Women experiencing BWS are likely to be

10. See WALKER, *supra* note 3, at 32.

11. See BERRY, *supra* note 1, at 36.

12. See GAIL GOOLKASIAN, *CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES* 35 (1986).

13. See Leonore Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 *PSYCHOL., PUB. POL'Y, & L.* 43, 69 (1995).

14. See Mary Ann Douglas, *The Battered Woman Syndrome*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 40 (D. Sonkin ed., 1987).

15. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 424 (4th ed. 1994).

16. See Douglas, *supra* note 14, at 40.

more reluctant to cooperate with prosecutors, even though they are in great need of advocacy.

II. SUGGESTIONS FOR PROSECUTORS WHO HANDLE DOMESTIC VIOLENCE CASES

Many prosecutors are tempted to rely on expert witnesses to explain a victim's reluctant behavior to the jury. While this can be a useful tactic in a case where a witness absolutely refuses to cooperate, and may actually be better than putting a hostile witness on the stand, it is almost never as effective as getting the victim to corroborate her own evidence.¹⁷

Moreover, the traditional prosecutorial approach to domestic violence cases may increase a victim's reluctance to cooperate.¹⁸ The probability of victim cooperation has been better predicted by the conduct of the prosecutor than by the conduct of the victim or defendant.¹⁹ If prosecutors make an effort to know the individual victim and use adversarial prosecution strategies, they will develop a better working alliance with the victim, and may be more empowered to effectively handle cases of domestic violence. There are several techniques a prosecutor might utilize in order to make a difference.

A. Prosecutors Must Know the Victim

It is important that a prosecutor get to know a victim, taking time to learn the personalities involved in the case and discovering potential concerns the victim may have that prevent her from leaving an abusive relationship and increasing her resistance to cooperating with the case. Prosecutors can play a large role in helping the victim to access resources that can alleviate some of the environmental stresses that are keeping her trapped. They can work closely with victim advocates and lend their leverage when needed. Educating the victim about options and providing her with a sense of empowerment is one of the greatest tools a prosecutor has in gaining a victim's cooperation.²⁰ There are a number of issues that

17. See Roberta Thyfault et al., *Battered Women in Court: Jury and Trial Consultants and Expert Witnesses*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 58 (D. Sorokin ed., 1987).

18. See GOOLKASIAN, *supra* note 12, at 56.

19. See LISA LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATION IN CRIMINAL JUSTICE RESPONSE 13 (1981).

20. See GOOLKASIAN, *supra* note 12, at 68.

a prosecutor should seek to discover in order to fully understand the psychological study of an abused victim.

The inherent cycle of violence explains only some of the general psychological dynamics that occur in abusive relationships. It does not account for the many complexities surrounding each individual case. The most important thing for prosecutors to keep in mind is that all victims are not the same. While BWS and the cycle of violence are models that have provided a tremendous advance toward helping professionals understand the plight of the battered woman, they may have also contributed to creating a stereotype that many professionals use as a cognitive heuristic to understand the victim. Prosecutors sometimes presume that they know more than they do, which limits their own instinct to continue investigating the situation. Many prosecutors working on domestic violence cases assume that they already know the "how's and why's" of the victim's behavior. This preconceived notion may be limiting their ability to process the case in the most effective manner. There may be many factors that the prosecutor is unaware of, which contribute to the victim's resistance to cooperate with the prosecution of the case. In order to gain a full understanding of the case, it is crucial that prosecutors ask certain questions about the victim's history and current situation.

It is also important to gain the best possible understanding of the victim's psychological involvement in the relationship. Not all victims of domestic abuse suffer from BWS.²¹ Those that suffer from BWS are more psychologically trapped in the abusive relationship and less likely to engage in efforts that will help their situation.²² BWS victims are also more fearful of the perpetrator and susceptible to threats. There are certain factors that may indicate a victim's psychological enmeshment in the relationship that prosecutors may detect by asking a few simple questions.

Knowledge about the current relationship will be most useful in understanding whether or not a victim will cooperate.²³ By the time most cases of domestic abuse reach a prosecutor's desk, a history and pattern of abuse has been well established by the couple. The prosecutor should attempt to assess the length of the relation-

21. See Douglas, *supra* note 14, at 40.

22. See *id.*

23. See Mary Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 *HAMLIN L. REV.* 115, 129 (1991) (citing American Bar Association Standards for Prosecution 3-1.1 (b) (1980)).

ship, the extent of abuse and a pattern of coercive control. These factors will provide the prosecutor with a greater understanding of the victim's behavior and will help clarify the psychological obstacles the victim must overcome in order to take the stand and testify against her abuser. For example:

One woman's husband inserted a loaded pistol with one bullet into her vagina and pulled the trigger four times — for her it only took one time to learn to respond to his slightest threat of violence. There were bruises from his punches and kicks, but no visible evidence of his near lethal behavior. In this case, an astute observer need not require evidence of multiple episodes of physical abuse to understand the scope of his control over her and her terror associated with it.²⁴

Perpetrators in domestic violence cases control their victims through fear and intimidation.²⁵ Often, the fear of threats cause as much psychological trauma as physical abuse, although in a court of law, physical injuries may be given much more consideration than psychological ones. Many victims are terrorized not only by what they think will happen to them, but by what the perpetrator threatens to do to their families and loved ones if they stand up to the abuse.²⁶ In one exemplary case, a woman was told by her batterer that, if she testified against him, he would burn down her mother's house.²⁷ Because he was in custody, the victim agreed to be cooperative.²⁸ However, without her knowledge, he was released on bail before the trial, and her mother's house burned to the ground the next day.²⁹ The woman recanted her statements and "disappeared" until after the trial was over because she felt she could not expose her relatives to that kind of danger.³⁰ After he was released from jail, she returned to her relationship with him, stating, "sometimes I feel safer when I live with him, because then I know where he is. Otherwise I'm always afraid he'll show up when I'm not expecting him."³¹

24. *Id.* at 44.

25. See BERRY, *supra* note 1, at 36.

26. See Lynne Rosewater, *The Clinical and Courtroom Applications of Battered Women's Personality Assessments* (1987), in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 92 (D. Sonkin ed., 1987).

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *Id.*

It is also important for prosecutors to realize that the fear of harm does not end when a woman is separated from her batterer. Statistically, a woman is at the greatest risk of severe injury or death at the hands of the abuser within the first year after she decides to leave the relationship.³² This danger arises because the perpetrator is angry at the victim for questioning his authority and seemingly no longer under his control. Leaving the relationship, therefore, does not reduce or eliminate the danger she is in.³³

Other factors that have been shown to increase a woman's susceptibility to psychological entrapment within a relationship include: 1) previous experiences with violence, such as child abuse or witnessing the abuse of a parent; and 2) cultural attitudes.³⁴ Victims that have been exposed to family violence prior to their current relationships are less likely to see the violent behavior within their relationship as deviant, and less likely to view the efforts of the prosecutor and the criminal justice system as helpful.³⁵

Also, a woman's cultural attitudes about her role in the relationship may have a large impact on her willingness to cooperate.³⁶ A woman who holds the traditional idea that her primary responsibility in the relationship is to respect her male partner may value loyalty and commitment to him above her right not to be abused.³⁷

External factors also play a role in whether a victim chooses to cooperate. While prosecutors have little control over the psychological dynamics that trap a woman in a relationship, they may be more able to assist the victim with environmental factors that prevent her from wishing to press charges.

Many victims who wish to leave an abusive relationship, especially one that they have endured for many years, are faced with the very real possibility that they will not be able to support themselves financially. It is not uncommon for a perpetrator to manipulate the situation to gain control of her financial assets, as well as important papers like a victim's driver's license, passport, birth certificate and/or immigration papers, so that it is almost impossible for her to get a job.³⁸ Victims are often unaware of how to access public aid, and would not qualify for such assistance if still married to the abuser. Many victims have been socially isolated for years

32. See Allison & Martineau, *supra* note 6, at 11.

33. See *id.*

34. See Douglas, *supra* note 14, at 44.

35. See *id.* at 45.

36. See Allison & Martineau, *supra* note 6, at 11.

37. See *id.*

38. See *id.* at 9.

and do not have the education or skills to secure employment in the marketplace.³⁹ These victims feel completely dependent on the abuser and are terrified of what will happen if the perpetrator goes to jail. The average sentence for a first time domestic abuser prosecuted on a misdemeanor charge is no more than thirty days,⁴⁰ which is just long enough for him to lose his job, but not long enough for him to get over his anger towards the victim. Many women are more willing to endure physical abuse rather than face the prospect of having to support themselves and a family with little or no resources.⁴¹

While having children at home raises an economic concern, there are other considerations surrounding children that pressure a woman to stay in an abusive relationship. Often victims fear that they will not receive custody of their children if they leave their relationship.⁴² The woman may also be afraid that if she leaves without the children, the husband may turn his abuse against them.⁴³ In some states, a report is made to the Department of Child Services when children are reported to be present during an incident of domestic violence, and women fear the state will take custody of their children.⁴⁴

Social or religious pressure may also be a factor contributing to a victim's reluctance to testify.⁴⁵ A family's cultural beliefs can be stronger than the victim's own, and if a victim's family strongly believes in supporting one's spouse and working out one's "problems," it can place incredible pressure on the victim to stay in the relationship. The pressures arises because divorce or separation violates a number of religious creeds that may exert a powerful influence over the victim.⁴⁶

B. Prosecutors Should Utilize Adversarial Strategies

The prosecutor should keep in mind that the primary goal of prosecution in a domestic abuse case is to protect the victim from additional acts of violence committed by the defendant. According to the American Bar Association Standards for Prosecutors, "The prosecutor is both an administrator of justice and advocate. The

39. *See id.* at 10.

40. *See BERRY, supra* note 1, at 143.

41. *See Allison & Martineau, supra* note 6, at 10.

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.* at 11.

46. *See id.*

prosecutor must exercise sound discretion in the performance of his or her functions. The duty of the prosecutor is to seek justice, not merely to convict."⁴⁷ Domestic abuse cases present problems for prosecutors that make it difficult to balance the administration of justice and advocacy. Because of the fact that, unlike other crime victims, domestic abuse victims often remain in imminent danger of serious physical harm from the perpetrator,⁴⁸ victim safety must be the foremost concern. This issue requires prosecutors to be sensitive to utilizing the options they have within their power to guide the victim through the criminal justice system in a way that will expose them to the least possible threat of harm. Additionally, prosecutors must recognize the limits of the system's ability to protect the victim.

After the abusing spouse has been arrested, the victim is usually encouraged to obtain a protective order from the court. While such a judicial decree makes it unlawful for a defendant to go within a certain distance of a victim, and provides additional material to aid the prosecution if the order is violated, it does not guarantee a victim's safety.⁴⁹ Serving a defendant with a restraining order may fuel his anger with the victim. A protective order cannot prevent another attack, it can only address the incident after the fact. A prosecutor whose primary concern is the victim's safety should therefore warn the victim about the limitations of the order and evaluate the circumstances of each individual case to determine whether a protective order is necessary and appropriate.

It has been demonstrated in jurisdictions where there are "no-drop" policies,⁵⁰ that proceeding with prosecution, despite the victim's initial unwillingness to cooperate, is beneficial to the victim psychologically and may increase her helpfulness later in the case. When the victim takes an active role in the prosecution of the offender, it can result in feelings of empowerment for her that can alter the balance of power in the battering relationship and lower rates of future violence.⁵¹ By taking control of the criminal process, the prosecutor sends a clear message that the batterer cannot use control over the victim to avoid criminal sanctions.⁵² Whether

47. See Asmus, *supra* note 23, at 134 (quoting the ABA Standards).

48. See Allison & Martineau, *supra* note 6, at 11.

49. See *id.*

50. See MILLS, *supra* note 9, at 307 (stating that mandatory prosecution requires government attorneys to bring charges against batterers whether or not the victim desires prosecution).

51. See Simon, *supra* note 13, at 69.

52. See *id.* at 53.

the victim is testifying of her own accord or because of mandatory prosecution laws, it is important for prosecutor's to always send a subpoena in order to protect the victim from pressure of the abuser or other parties who do not want the victim to participate in the case as a witness. This will diffuse the anger of the batterer towards the victim and will reduce the likelihood of continued threats.⁵³

Because violence in intimate relationships occurs in cycles and stages, it is important to prosecute a domestic abuse case in a timely manner, avoiding as many continuances as possible.⁵⁴ Expedient prosecution will increase the likelihood of conviction and decrease the abuser's opportunity to pressure the victim and/or engage in violent acts against the victim. It is also beneficial for prosecutors to keep the time period it takes to complete the case as short as possible if they wish to increase their chance of getting the victim to cooperate. The time frame in which the victim is most likely to be receptive to help and desirous of prosecution is shortly after an acute battering incident.⁵⁵ This is known as the window of opportunity in the cycle of violence.⁵⁶ The longer the case continues, the more likely she is to minimize the battering incident and return to the relationship.

The way the prosecutor treats a victim will also have a large impact on the victim's desire to cooperate. The relationship between a prosecutor and a victim often parallels that of the batterer and the victim.⁵⁷ If prosecutors are controlling and behave as if they know what is best for the victim, it is likely to elicit undesirable responses. The rage that is felt towards the batterer may be directed towards the prosecutor through negative transference, as the prosecutor is seen as a safe object that cannot physically harm the victim.⁵⁸ This may encourage the prosecutor to engage in a power struggle with the victim, which will only be frustrating and unproductive for both parties. Intimidation tactics, such as warning victims that filing a false report is a crime for which they will be prosecuted, or using statements such as, "You were either lying then or you are lying now," to get a victim to admit that she is recanting, are also not recommended. Such statements presume

53. See Asmus, *supra* note 23, at 116.

54. See *id.* at 115.

55. See Simon, *supra* note 13, at 69

56. See WALKER, *supra* note 3, at 37

57. See Douglas, *supra* note 14, at 52.

58. See NANCY McWILLIAMS, *PSYCHOANALYTIC DIAGNOSIS: UNDERSTANDING PERSONALITY STRUCTURE IN THE CLINICAL PROCESS* 32 (1994).

that the victim has a certain element of self-preservation that does not exist in a woman who is actively engaged in the intense dynamics of an abusive relationship. A sincere, empathetic, though straightforward, matter-of-fact attitude is usually the best approach.

CONCLUSION

Domestic violence cases provide unique challenges to prosecutors because of the intimate relationship that exists between victim and batterer. These cases can be fraught with evidentiary problems as a result of a victim's refusal to cooperate with the prosecution. While theoretical constructs, such as the cycle of violence and BWS, begin to explain the psychological reasons behind why some women do not cooperate, prosecutors should be aware that there are things they can do to increase a victim's desire and ability to cooperate with the case. An effort should be made to understand a victim's individual experience both internally and externally. By doing this, prosecutors can ensure that they are not making assumptions about the case based on stereotyped information, and are not overlooking circumstances that could be easily amended to gain a victim's cooperation. Victims should be educated about the process and should be assured that prosecutors will make every effort to employ strategies that will minimize the victim's exposure to harm. Understanding the fundamental dynamics of an abusive domestic relationships is a beginning, but in order to use this information to aid in prosecution and advocate on behalf of the victim, a concerted effort must be made to overcome the unique obstacles presented by these relationships.

