

## **SPECIAL REPORT**

### **Bias in the Judiciary: The Case of Domestic Violence**



P.O. Box 1221  
Rockville, MD 20849  
[www.saveservices.org](http://www.saveservices.org)



Could this happen in America?

*John Fleming of New Brunswick, NJ was repeatedly assaulted by his wife. When restraining orders proved to be ineffective in stopping the attacks, Mr. Fleming initiated lawful video surveillance of their home. One 4-minute clip revealed the mother caught in an abusive rage, physically assaulting both Mr. Fleming and their children.<sup>1</sup> John Fleming did not retaliate.*

*Even though the video was shown to the police and judge, a restraining order was issued against Mr. Fleming. Mrs. Fleming was never criminally charged.*

### *Profile of Domestic Violence*

Each year about 16% of American couples experience some form of intimate partner aggression.<sup>2</sup> Over 200 studies show that domestic violence is an equal opportunity problem. Studies typically reveal that half of all abuse is mutual and is initiated equally by males and females.<sup>3,4,5</sup> This holds true for couples who are married, co-habiting, or dating; for all racial and ethnic categories; and across all economic strata.<sup>6</sup>

About one-third of those cases involve severe incidents such as being kicked, hit with a fist, threatened or attacked with a gun or knife, or beat up.<sup>7</sup> The remaining two-thirds of cases represent minor incidents such as a shove or a slap.

### *The Role of the Judiciary*

And each year about one million persons are arrested under criminal law for intimate partner violence,<sup>1</sup> of whom 77% are male.<sup>8</sup> It falls to the judiciary system to assure that justice is served. But many are wondering whether this goal is being achieved.

To some, the judiciary has embraced conceptions of sexual assault and domestic violence that are vague, overly-broad, and one-sided. For example, the web page of the Judiciary of Rhode Island explains, “Domestic violence is not just a shame . . . It’s a crime.” The page then lists several criteria for DV, including: “Are you concerned about your relationship?” and “Does your partner tell you what to do?”<sup>9</sup> These criteria blur the distinction between normal partner discord and true physical violence.

Others believe the prosecution of domestic violence cases has become tainted by the presumption of guilt. In **New York**, Chief Judge Judith Kaye explained that the purpose of its integrated domestic violence courts is to “make batterers and abusers take

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<sup>1</sup> According to the FBI National Incident-Based Reporting System, 106,962 persons (58,113 spouses and 48,849 boyfriends/girlfriends) were arrested for violent crimes in 2000 (as reported by Durose et al, 2005, Table 5.8). This number is an underestimate for two reasons:

1. It does not include divorced couples, which account for about 18% all intimate partner violence (as reported by Catalano S, 2006).  
2. The NIBRS receives data from only one-quarter of law enforcement agencies in the United States, which collectively have jurisdiction over 13% of the crime.

Therefore it is calculated that 1,003,392 persons are arrested each year for intimate partner violence:  $106,962/0.82 = 130,441$  persons from areas covered by reporting agencies;  $130,441/0.13 = 1,003,392$  total.

responsibility for their actions,” omitting any mention of meting out impartial justice or protecting the falsely accused from frivolous claims.

This Special Report examines these concerns. Previous SAVE reports have examined the abuse of restraining orders<sup>10</sup> and sex bias in domestic violence arrest policies.<sup>11</sup> This report examines judicial bias in the domestic violence criminal justice system.

## **Steps in the Judicial Process**

As the following discussion reveals, bias plagues every step of the judicial process.

### *Initial Prosecutorial Actions*

At the outset, the prosecutor must decide whether to pursue a case. Sex bias has been detected at this stage. In **Iowa**, the Attorney General’s Crime Victim Assistance Division has openly admitted, “The prosecutors we fund are prohibited from prosecuting female cases.”<sup>12</sup>

At the arraignment, defense attorneys have noticed that compared to other crimes, domestic violence defendants are more likely to be jailed rather than released on bond. This impedes the attorney’s negotiating leverage, since some persons will agree to a disadvantageous plea bargain in order to get out of jail.<sup>13</sup>

In one **Massachusetts** case, a man accused of partner assault requested an evidentiary hearing. The judge responded, “I don’t need a full-scale hearing...I don’t care about that.” Why? Because, as the judge stated, the issue was not “who’s telling the truth.”<sup>14</sup>

### *No-Drop Prosecution*

Domestic violence is probably the only area of criminal law where the majority of claimants later decide to recant or refuse to cooperate with the prosecutor, occurring in about 80% of cases.<sup>15</sup>

There are a number of reasons for this:

1. The claimant called the police to stabilize the situation, but did not want the abuser to be arrested.
2. The claimant wants to maintain a relationship with the abuser, believing the aggression was a one-time event and expecting the situation will improve.
3. The claimant was equally involved in (or even instigated) the violence, and does not want this fact to come out in court. One survey of dating couples in the United States found that 70% of all physical abuse was mutual.<sup>16</sup>
4. The allegation is non-meritorious.

In response to claimants' refusal to cooperate, many jurisdictions have implemented so-called "no-drop" programs (sometimes referred to as "evidence-based prosecution") in which prosecutors decide whether to pursue the case, regardless of the claimant's wishes. One survey found that about two-thirds of prosecutors' offices around the country have implemented such no-drop policies.<sup>17</sup>

The **New Hampshire** Prosecution Protocol for domestic violence provides a revealing example of the mindset that no-drop prosecution can instill. The Protocol reminds the prosecutor, "A case should not be declined solely on the basis of reluctance expressed by the victim." Driving home the point, the Protocol further advises, "During every phase of the prosecution of a domestic violence case the focus must remain on the offender's criminal behavior."<sup>18</sup>

Nowhere in the Prosecution Protocol is the word "offender" qualified by the word "alleged." The phrase "due process" is never mentioned. There is no hint that a person may falsely file a claim. So, not surprisingly, the document contains no reference to the notion of "innocent until proven guilty."

Despite the widespread adoption of no-drop policies, there is no evidence that such policies work, and they may deter victims from seeking police assistance in the future. One research team concluded, "We do not know whether no-drop increases victim safety or places the victims in greater jeopardy."<sup>19</sup> The value of no-drop policies is further discussed in the SAVE Special Report, "Why Have Domestic Violence Programs Failed to Stop Partner Abuse?"<sup>20</sup>

Instances have been reported in which the prosecutor has threatened the woman with child abuse for failure to cooperate.<sup>21</sup> In one **California** case, the county prosecutor put a woman in jail for 8 days after she refused to testify against her boyfriend. She later won a \$125,000 settlement for false imprisonment.<sup>22</sup>

In some cases, no-drop prosecution results in the wrong party being charged with the crime:

*Former NFL quarterback Warren Moon got into an argument with his wife, Felicia. Against her wishes, the case went to trial. Placed on the witness stand, she testified that she had started the fight by throwing a candlestick at her husband. Mr. Moon was acquitted.*<sup>23</sup>

### *Jury Selection*

For cases that go to a jury trial, additional bias is introduced if the prosecutor uses unorthodox jury selection procedures. The National Center on Domestic Violence and Sexual Assault has published a list of questions to ask potential jury members. Many of the questions are phrased in a way to prime potential jury members to presume the defendant's guilt.<sup>24</sup>

- All of the questions refer to the alleged perpetrator using the male “he” pronoun, e.g., “Do you think you can tell an abuser by how he looks or acts?”
- Some questions are inflammatory, e.g., “How many of you understand that nobody is allowed to commit murder, even if they believe their wife is getting too modern?”
- Most disturbing is the question that begins with this claim: “With domestic violence as the number one cause of injury to women in this country...”

That last statement is flatly false. According to researcher Richard Gelles, the claim that domestic violence is the leading cause of injury to women “appears to be a fact from nowhere. The FBI has published no data that support this claim.”<sup>25</sup>

### *Evidentiary Standards*

“Innocent until proven guilty” is a bedrock principle of the American criminal justice system. But many attorneys say that tenet has become compromised.

Now, court procedures have been devised to “save the few complainants who are in imminent physical danger, at the expense of many defendants who are wrongly accused.” Referring to his experience in a domestic violence court, one **New York City** attorney commented, “My client is guilty the minute he walks in the door.” Other attorneys have noticed a tendency to refer to complainants as “victims,” a term that can prejudice the outcome of the case.<sup>26</sup>

One article in the *William and Mary Law Review* highlighted the fact that “evidentiary standards for proving abuse have been so relaxed that any man who stands accused is considered guilty.”<sup>27</sup> These concerns are heightened in specialized domestic violence courts that appear to care more about conviction counts than due process.<sup>28</sup>

### *Conviction or Acquittal*

In criminal cases other than domestic violence, about 90% of persons charged are eventually convicted. But when mandatory arrest and no-drop policies are implemented, cases of questionable merit are brought into the judicial pipeline. As a result, court dockets become backlogged, prosecution becomes more difficult, and conviction rates fall.

One review of 88 studies found that on average, only 47% of prosecuted cases resulted in a conviction.<sup>29</sup> Likewise an analysis of adjudication outcomes in **New York City** found that on average, 58.7% of all cases were dismissed or adjourned in contemplation of dismissal.<sup>30</sup>

Prosecutors justify these dismissal rates with the explanation that prosecution of questionable cases nonetheless provides the assumed victim with “opportunities and services that would advance their safety.”<sup>31</sup> In other words, it’s acceptable for an accuser with an unsubstantiated claim to be rewarded with services that he or she would not

otherwise be entitled to—not to mention the pernicious effects of the false allegation on the person wrongly accused.

### *Sentencing*

There is evidence that the sentencing of persons found guilty of domestic violence is gender-biased, as well. Donna LeClerc, director of a Florida-based domestic abuse treatment program, once observed, “I think there’s a lack of equality in the justice system. Women serve half of the sentence a man does for the same crime, if she serves time in jail at all.”<sup>32</sup>

That assertion actually understates the true extent of bias. According to the Department of Justice, the average prison sentence for men who have killed their wives is 17.5 years, compared to 6.2 years for women who have killed their husbands.<sup>33</sup>

### **Alternative Adjudication Procedures**

In many jurisdictions, mandatory arrest and no-drop policies have triggered an influx of cases that threaten to overwhelm court dockets. In some jurisdictions, alternative adjudication procedures are being implemented.

### *Bench Trials*

As an alternative to using the criminal courts, some jurisdictions have created programs that issue restraining orders issued following bench trials in family courts. The practice of depriving a defendant of a jury trial and the other protections typically afforded a criminal defendant short-circuits due process. One attorney complained:

“From the perspective of job security, a judge has much to lose and little to gain from ruling in favor of the defendant. If he rules against the defendant, and the defendant is really innocent, so what? The defendant’s life might be ruined for something he did not do, but who cares? There will be no headlines, no angry activists protesting on the courthouse steps.”<sup>34</sup>

### *Court Diversion Programs*

Court diversion programs have been established in which the alleged abuser agrees to admit to a lesser charge and, in return, participate in a rehabilitation program in order to avoid a jail sentence. But these procedures are deficient in their respect for due process.

In **Colorado**, prosecutors devised a “Fast Track” system in which accused persons were incarcerated, charged with third-degree assault, and then offered a plea bargain involving a lesser domestic violence charge. Most troubling, the defendants were not allowed legal representation; hence many did not understand the consequences of admitting guilt to a crime that some did not commit.

Defense attorney Kevin Donovan asserts that the Fast Track system violates the right to counsel guaranteed by the Sixth Amendment, and is “just butchering the Bill of Rights.” One female defendant who went through the kangaroo-court system stated simply, “It ain’t about justice, that’s for sure.”<sup>35</sup>

In Portland, **Oregon**, the deferred sentencing program has developed literature explaining the program procedures. The literature always refers to the perpetrator as “he” and the victim is denoted as “she.” An administrator for the Portland program defends this bias with the dubious claim that “Using gender-neutral language would devalue the fight against domestic violence in the overwhelming majority of cases.”<sup>36</sup>

In Warren County, **Pennsylvania**, a person who is arrested on a charge of domestic violence can choose between two possibilities: Go to jail, or sign a pre-printed admission of guilt that reads, “I have physically and emotionally battered my partner...I am responsible for the violence I used. My behavior was not provoked.” Observers suggest that these procedures are tantamount to extracting a forced confession.<sup>37</sup>

In Lexington County, **South Carolina**, a diagram outlining program procedures reveals that all persons who are arrested for non-felony battery cases of domestic violence are meted some sort of punishment: treatment, fine, and/or jail.<sup>38</sup> There is no legal option that allows a person arrested for a domestic violence offense to be found innocent of the allegations.

### **Further Evidence of Bias**

Gender ideology views domestic violence as a tool of patriarchal domination over women. Thus it is sometimes asserted that women never commit domestic violence, or if they do, they are acting solely in self-defense—even though research reveals that self-defense accounts for less than one-fifth of female partner aggression.<sup>39,40</sup>

Nonetheless, that belief has inured itself into legal thinking, creating a double standard. One prosecutor admitted, “If I were the defense lawyer that [judge’s attitude toward domestic violence] would be my concern.”<sup>41</sup>

In one case a woman had a lengthy history of violence, including punching her husband in the nose and chasing him with a baseball bat, and later threatening to burn his house down. But when the man sought protection from the court, the judge ordered, “You must be 225 pounds, don’t tell me you’re afraid of that little thing, get out of my court.”<sup>42</sup>

### *Prosecution of False Allegations*

Some allegations of partner violence are non-meritorious. One former DV prosecutor in Georgia revealed:

As politically incorrect as it is to say, many women file charges against boyfriends/spouses on a routine basis, and then recant the charges when the cases come to trial. Some of the alleged perpetrators are really guilty, and [a] very large percentage (though not majority) are not guilty of anything except making the woman in their life angry.<sup>43</sup>

But few district attorneys prosecute false allegations. Casey Gwinn, a well-known San Diego prosecutor, has acknowledged:<sup>44</sup>

“If we prosecuted everybody for perjury that gets on a witness stand and changes their story, everybody would go to jail...I would say its in the thousands of people who take the witness stand and somewhat modify the truth.”

### *Battered Woman Syndrome*

The controversial “battered woman syndrome” (BWS) provides further evidence of a judicial double-standard. The term “battered woman syndrome” is used to describe women who are subjected to repeated domestic violence, yet are disinclined to leave the relationship.

Battered woman syndrome was initially proposed by psychologist Lenore Walker.<sup>45</sup> Erin Pizzey, founder of the world’s first battered women’s shelter, visited with Lenore Walker in 1977 during Pizzey’s tour of the U.S. In her memoirs, Pizzey writes:<sup>46</sup>

“I spent many hours with Lenore explaining my theories about domestic violence. I explained to her that after six years of taking in women and children and seeing many of their partners, I knew that domestic violence was not a gender issue. ... she [Lenore] was avid to hear of my experiences. It was only later on that I discovered that she took much of what I had to say and recreated her own version of violence towards women which did not allow for the fact that both men and women can be violent. ... She knew and even then agreed with me that women could be violent. She knew that the cycle I explained to her was used by both men and women but she preferred to create her career based on false information.”

Given that history, it’s not surprising that psychologists disagree on how to diagnose the syndrome, and many believe it is more a product of political advocacy than of sound science. Thus, BWS fails to meet the minimum legal requirements for admissibility as evidence into a criminal trial.

Nonetheless, one review found that the “vast majority of jurisdictions admit both expert and opinion evidence on the effects of domestic violence on victims of battering as part of a self-defense.”<sup>47</sup> Psychologists Joe and Kim Dixon conclude, “The discrepancy between the low level of scientific support and the high level of admissibility suggests the courts may be attending to factors other than a valid scientific basis in reaching their decisions to admit BWS testimony.”<sup>48</sup>

In **California**, state law has long recognized the existence of battered woman syndrome as grounds for commutation of a sentence. So when California socialite Betty Broderick went on trial for the double-murder of her ex-husband and his new wife, she claimed that as an abused woman, the law should protect her from a prison sentence. In this case, however, the jury disagreed with that line of reasoning.

More recently, the California statute was modified to encompass “the effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence where it appears the criminal behavior was the result.”<sup>49</sup> In short, a person can get out of prison for any crime if she can convincingly claim that she was subjected to emotional or mental abuse.

In 1990, **Ohio** Governor Richard F. Celeste granted clemency to 25 women who were serving time in prison for murdering their husbands.<sup>50</sup> Governor Celeste’s official explanation for the pardon? They were all suffering from battered woman syndrome.<sup>51</sup>

Each year many men are accused of domestic violence, some of whom no doubt were acting in self-defense. But no man so charged has been known to qualify for “battered man syndrome.”

### **Justice Unblinded**

The King of England’s Council once met in a room in the Westminster Palace where a star was painted on the ceiling. Intended to be a fast-track alternative to the criminal courts, the phrase “star chamber” eventually became a byword for judicial proceedings lacking due process.

A new star chamber has emerged in the United States, one that is designed to make alleged abusers “take responsibility for their actions,” rather than meting out impartial justice. As documented in this report, the modern-day star chamber prosecutes domestic violence cases against the wishes of the victim, side-steps recognized due process protections, and acquiesces to a gender-based double-standard.

Attorney Mace Greenfield writes, “As an officer of the Court sworn to seek the truth, I am offended and appalled at the truth being ignored in favor of the media-sexy political correctness. It only erodes the integrity of our justice system.”<sup>52</sup>

In front of many courthouses around America, a statue stands guard. Lady Justice, as she is known, is depicted as a blind-folded woman holding scales in her left hand and a sword in the right. The scales stand for the need to balance competing interests, the blindfold represents objectivity, and the sword reminds of us punishment. These are the moral principles that under gird the American legal system.

## SAVE: STOP ABUSIVE AND VIOLENT ENVIRONMENTS

In recent years, Lady Justice's image has become tarnished. Her blindfold and scales have been removed, leaving only a sword to wield. That sword has rent families asunder, while unfairly punishing the innocent and excusing the criminal conduct of the guilty. What's more, that heavy-handed approach has turned out to be ineffective in stopping partner victimization.<sup>53</sup>

It's time to restore the luster to Lady Justice.

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