

SPECIAL REPORT

Unequal Justice in the Criminal Justice System



P.O. Box 1221
Rockville, MD 20849
www.saveservices.org

“It is better that ten guilty persons escape than one innocent suffer.”
-- Sir William Blackstone¹

Each year about one in seven American couples experience some form of intimate partner aggression.² Over 250 scholarly studies show domestic violence is initiated equally by males and females, with half of all abuse being mutual in nature.^{3,4,5,6} And self-defense accounts for less than one-fifth of female-initiated partner aggression.^{7,8}

About two-thirds of cases represent minor incidents such as a shove or a slap. The remaining one-third involve severe incidents such as being kicked, hit with a fist, threatened or attacked with a gun or knife, or beat up.⁹

As a result of such incidents, about one million persons are arrested each year under criminal law for intimate partner violence,* of whom 77% are male.¹⁰ For these persons, it falls to the criminal justice system to assure justice is served.

This Special Report examines the processes and procedures of the nation’s criminal justice system in adjudicating claims of domestic violence.

Judges and prosecutors are the lead performers on the grand stage of the American criminal justice system. For low-income defendants, public defenders also play a critical function. The roles of these persons are discussed below.

Judges

Judges are the most influential players in the criminal justice system. They preside over courtroom proceedings, decide what evidence can be admitted for consideration, and ultimately signal to the world what kinds of cases are worthy of judicial attention.

But what if judicial objectivity in the adjudication of domestic violence cases became compromised?

Many worry that one-sided judicial education programs are tainting the even-handed administration of justice. Instead of being provided the findings from research studies detailed in the opening paragraphs of this report, judges are being told about crime survey results, which provide a distorted depiction of the landscape of partner aggression.¹¹

* 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.

In some cases, judges have been urged to set aside constitutional protections. At one New Jersey training program, the judges were lectured: “Your job is not to become concerned about all the constitutional rights of the man that you’re violating as you grant a restraining order. Throw him out on the street, give him the clothes on his back, and tell him, ‘See ya’ around.’”¹²

Judges were also advised:¹³

- “If you’ve got any hint whatsoever there’s a problem, sign the TRO. Don’t take the chance.”
- “Quite frankly, the standard really is by a preponderance of credible evidence. That’s what the law is. But what he’s saying to ya, ‘Don’t make that mistake at three o’clock in the morning.’ You may be a little tired. Err on the side of being cautious.”
- “So don’t get callous about the fact that these people are pestering you again. You know, grant the restraining order.”

In Rhode Island, the Judiciary’s web page explains, “Domestic violence is not just a shame ... It’s a crime.” The page then lists several criteria for partner aggression, including: “Are you concerned about your relationship?” and “Does your partner tell you what to do?”¹⁴ These criteria blur essential distinctions between normal human discord and outright partner assault that warrants criminal justice intervention.

*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.*¹⁵

When the video was shown to the judge, a restraining order was issued...against Mr. Fleming. Mrs. Fleming was never criminally charged.

Prosecutors

Prosecutors have come to play an increasingly important role in the criminal justice system in recent years. Prosecutors decide which cases to pursue and what charges to file, oversee investigations, and negotiate plea bargains. As representatives of the state, prosecutors are bound to balance their roles as a minister of justice and as an advocate for the alleged victim.

Domestic violence prosecutors encounter a daunting problem because an estimated 80% of claimants later decide to recant, or simply refuse to cooperate.¹⁶ There are a number of reasons why accusers experience this change of heart:

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1. The victim called the police to stabilize the situation, but did not want the abuser to be arrested or prosecuted.
2. The accuser is fearful of retribution.
3. The claimant wants to maintain a relationship with the abuser, and believes prosecuting the case would end the relationship.
4. The allegation is non-meritorious.

No-Drop Prosecution

To address the problem of uncooperative accusers, about two-thirds of prosecutors' offices around the country now endorse a policy known as no-drop prosecution.¹⁷ No-drop policies (sometimes referred to as "evidence-based prosecution") require prosecutors to pursue the case, regardless of the quality of the evidence or the accuser's stated wishes.

But mandatory prosecution is controversial, for a number of reasons:

1. Unconstitutional. The confrontation clause of the Constitution requires that "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This right was upheld by the U.S. Supreme Court in *Crawford v. Washington*, which addressed the admissibility of hearsay statements by an unavailable witness.¹⁸
2. Unethical. Many believe mandatory prosecution is unethical because it requires the district attorney to ignore probable-cause requirements.¹⁹ The New Hampshire Prosecution Protocol for domestic violence states, "A case should not be declined solely on the basis of reluctance expressed by the victim."²⁰ Nowhere in the Protocol is the word "offender" qualified by the word "alleged," and the phrase "due process" is never used.
3. Coercive. One study found 19% of putative victims had been threatened with incarceration or otherwise coerced by the prosecutor as a result of mandatory prosecution policies.²¹ In one California case, a prosecutor incarcerated a woman for 8 days after she refused to testify.²² (She later won a \$125,000 settlement for false imprisonment.) Other cases have been reported in which the prosecutor threatened the accuser with charges of child abuse and loss of child custody. Subsequently, California legislators enacted a law designed to rein in over-zealous prosecutors.²³
4. Harmful. There is no evidence that no-drop policies are effective.²⁴ And two studies concluded mandatory prosecution *increases* subsequent violence:
 - Allowing victims to "drop charges significantly reduces their risk of further violence after a suspect has been arrested on a victim-initiated warrant, when compared with usual [mandatory prosecution] policies."²⁵

- “The results for prosecutor willingness [to prosecute restraining order violations] suggest that simply being willing to prosecute cases of protection order violation may aggravate already tumultuous relationships... As the willingness [to prosecute] increases by one, the expected number of white wives killed nearly doubles.”²⁶

5. Other reasons:

- The policy may “deter victims from reporting the crimes committed against them.”²⁷
- It may discourage law enforcement personnel from making arrests because of low conviction rates.²⁸
- No-drop cases are far more expensive to investigate and prosecute, thus diverting scarce criminal justice resources away from other cases.²⁹

In one case, no-drop prosecution resulted 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.*³⁰

Public Defenders

Public defenders are the mainstay of legal defense services for indigent defendants. According to the federal Census of Public Defender Offices, public defender offices employed more than 15,000 full-time equivalent attorneys, received more than 5.5 million cases, and had operating expenditures of \$2.3 billion in 2007.³¹

A key principle for the provision of indigent defense states, “There is parity between defense counsel and the prosecution with respect to resources.”³² In practice, this rule that may not apply in the face of growing caseloads and unrelenting pressures to settle the case without resorting to a trial.

One New York public defender offers this sobering perspective:³³

Like many veteran public defenders, I hate domestic violence cases. They are highly charged, emotionally complicated, and very hard to defend. They’re hard to defend because these courts dispense a rather specialized kind of justice. In these cases, specially trained prosecutors plead cases before judges who’ve been specially trained to be “especially sensitive” to a particular kind of crime.

Processing and Disposition of Criminal Justice Cases

Domestic violence cases pass through a number of steps from the initial arrest³⁴ until final disposition, as shown in Figure I on page 6. The person-counts are based on information derived from the data sources listed in the footnote.

The diagram offers revealing insights about the workings of the domestic violence criminal justice system:

1. In only 58% of arrests does the prosecutor decide to pursue the case.
2. Of the cases that are prosecuted, about 60% are dropped by the prosecutor or dismissed by the judge.
3. Only 30% of arrestees are convicted of the offense – conviction rates for other types of crimes tend to be much higher.

These numbers suggest that the majority of arrests for domestic violence are made without probable cause.

The following sections delineate the steps through which the domestic violence suspect passes until final disposition of the case. At every step along the way, gender bias has been documented.

Case Filing and Arraignment

At the outset, a prosecutor must make the decision whether to pursue a case, referred to as case “filing.” As shown in Figure I, 42% of domestic violence arrestees do not have any charges filed. Part of the reason is female arrestees may be beneficiaries of a double-standard. In Iowa, the Attorney General’s Crime Victim Assistance Division has openly acknowledged, “The prosecutors we fund are prohibited from prosecuting female cases.”³⁵

At the arraignment, where the defendant is officially informed of the offense, some attorneys have observed that compared to other crimes, domestic violence defendants are more likely to be jailed rather than released on bond. This may impede the defense attorney’s negotiating ability, since some persons will acquiesce to a disadvantageous plea in order to be released from jail.³⁶

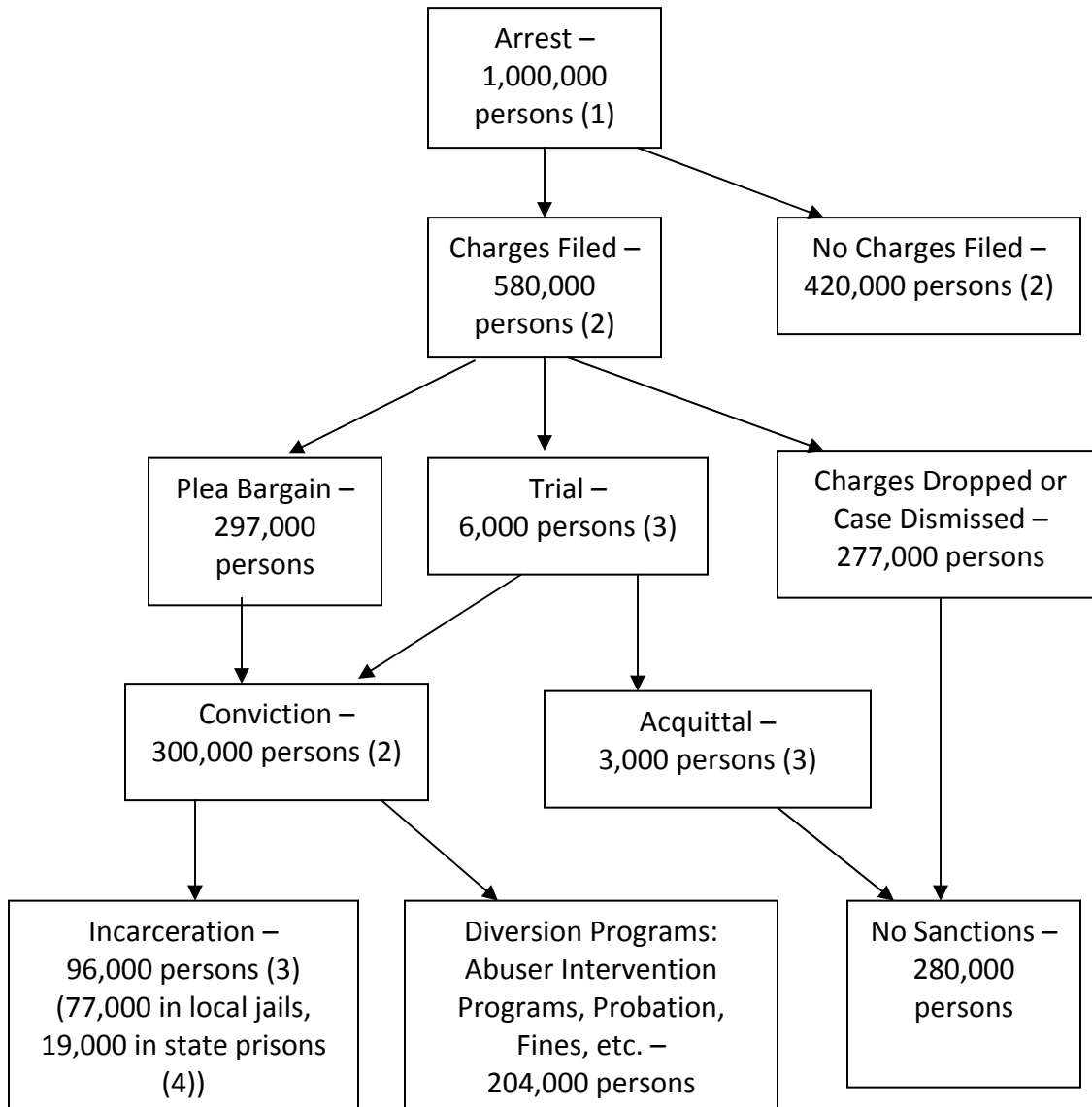
Plea-Bargains

In many jurisdictions, no-drop prosecution policies, coupled with mandatory arrest, have triggered an influx of cases that can overwhelm court dockets.

Plea-bargaining is a widely-used method to expedite case processing. Typically, the defendant agrees to plead guilty to a lesser charge—often a misdemeanor instead of a felony—in order to avoid the uncertainty and expense of a trial. In New York City, for example, only 2% of domestic violence criminal cases go to a full trial.³⁷

Figure I

**Processing and Disposition of
Persons Arrested for Domestic Violence[†]**



[†] Sources: (1) See footnote on page 1. (2) Garner JH, Maxwell CD. Prosecution and conviction rates for intimate partner violence. *Criminal Justice Review* Vol. 34, No. 1, 2009, Table 2; (3) Gavin C, Puffett NK : Criminal Domestic Violence Case Processing: A Case Study of the Five Boroughs of New York City. Center for Court Innovation. 2005. Table 2; (4) Greenfeld LA et al. Violence by Intimates. NCJ-167237. 1998. p. vi.

But in one jurisdiction, plea-bargain arrangements lack essential elements of due process. In Colorado Springs, prosecutors devised a “Fast Track” system in which accused persons were routinely incarcerated, charged with third-degree assault, and then offered a plea bargain. Most controversial is the fact that defendants were not allowed to seek legal representation.

Defense attorney Kevin Donovan asserts 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 system stated simply, “It ain’t about justice, that’s for sure.”³⁸

Jury Selection

For the small number of cases that go to a jury trial, bias is introduced if the prosecutor uses jury selection procedures (known as “voir dire”) that are unorthodox. The National Center on Domestic Violence and Sexual Assault has published a list of questions to ask potential jury members:³⁹

- All of the questions refer to the defendant using the “he” pronoun, e.g., “Do you think you can tell an abuser by how he looks or acts?”
- Some questions are inflammatory in nature, 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...”

But the claim that domestic violence is the leading cause of injury to women is “a fact from nowhere,” recounts researcher Richard Gelles. “The FBI has published no data that support this claim.”⁴⁰ Such questions serve to prime jury members to presume the defendant’s guilt.

Presumption of Innocence

“Innocent until proven guilty” is a bedrock principle of the American criminal justice system. But many believe this tenet has become compromised, if not negated in domestic violence courtrooms across America.

One article in the *William and Mary Law Review* highlights the fact that “evidentiary standards for proving abuse have been so relaxed that any man who stands accused is considered guilty.”⁴¹ These concerns are heightened in specialized domestic violence courts.⁴²

One New York City attorney commented, “My client is guilty the minute he walks in the door.” Other attorneys have complained about the widespread practice of referring to

accusers as “victims,” a term that pre-empts the notion of “innocent until proven guilty,” and can prejudice the outcome of the case.⁴³

Conviction or Acquittal

In most areas, the great majority of persons charged and prosecuted are eventually convicted of the crime. But the story is very different for domestic violence cases. With mandatory arrest and no-drop policies in place, cases of questionable merit are brought into the judicial pipeline. As a result, court dockets become backlogged, prosecution becomes more daunting, and conviction rates fall.

One comprehensive review of 135 studies found on average, only one-third of persons arrested for domestic violence were eventually convicted of the crime.⁴⁴ Some prosecutors justify these low conviction rates with the explanation that prosecution of doubtful cases provides the assumed victim with “opportunities and services that would advance their safety.”⁴⁵ Such statements serve to legitimize accusers’ actions that in any other context would be termed perjury.

To reverse these low conviction rates, some jurisdictions have resorted to Soviet-style procedures designed to remove even the possibility of innocence.

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.⁴⁶ There is no legal option that allows a person arrested for a domestic violence offense to be found innocent of the allegations.

In Warren County, Pennsylvania, a person who is arrested on a charge of domestic violence can choose between two Orwellian 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.” Some say these procedures are tantamount to extracting a forced confession.⁴⁷

Sentencing

After a guilty verdict follows the sentence. The sentencing of persons found guilty of domestic violence appears to be fraught with 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 murdered their husbands.⁴⁸

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 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.”⁴⁹

Donna LeClerc, director of a Florida-based domestic abuse treatment program, has 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.”⁵⁰

Other Examples of Partiality

The failure to prosecute perjury and the widespread invocation of the battered woman syndrome provide further evidence of systematic bias.

Prosecution of Perjurers

Many allegations of partner violence are non-meritorious.⁵¹ One former domestic violence prosecutor 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.⁵²

But few district attorneys prosecute these false allegations. Casey Gwinn, a well-known San Diego prosecutor, has acknowledged:⁵³

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

Failure to prosecute perjurers serves as an easy invitation to future false allegations.

Battered Woman Syndrome

The battered woman syndrome (BWS) provides further evidence of a judicial double-standard. Originally formulated by Lenore Walker,⁵⁴ the term refers to persons who are subjected to severe domestic violence, yet are disinclined to leave the relationship.

But psychologists disagree on the syndrome’s diagnostic criteria, and some believe it is more a product of political advocacy than of sound science. 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.”⁵⁵ 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.”⁵⁶

In California, state law has long recognized the concept of battered woman syndrome as grounds for commutation of a prison sentence. So when California socialite Betty Broderick went on trial for the 1989 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 was unswayed.⁵⁷

More recently, the California statute was broadened 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.”⁵⁸

In 1990, Ohio Governor Richard F. Celeste granted clemency to 25 women who were serving time in prison for murdering their husbands.⁵⁹ Governor Celeste’s explanation? They were all suffering from battered woman syndrome.⁶⁰

Erin Pizzey, founder of the world’s first battered women’s shelter, once discussed BWS with Lenore Walker. In her memoirs, Pizzey writes:⁶¹

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.

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 side-steps honored due process protections, prosecutes domestic violence cases against the wishes of the putative victim, 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.”⁶²

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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 foundations that under-gird the American criminal justice system.

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 a favored subset of the guilty.

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

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