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COMMENTARY

Judicial Procedures in Misdemeanor Domestic Assault Cases—A Model Policy

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I. INTRODUCTION

According to estimates of the Minnesota Department of Corrections, over 63,000 women are battered in Minnesota each year.[1] Approximately sixty-five percent of the women, many with children, seeking help in shelters are turned away due to lack of space.[2] Nationwide, researchers estimate that over 1.7 million Americans have, at some time, faced a spouse wielding a knife or gun and well over 2 million have experienced a beating at the hands of their spouse.[3] While these statistics give some indication of the enormity of the problem of domestic violence, it should be noted that, due to inconsistencies and gaps in reporting and record-keeping methods, domestic violence is one of the most underreported classes of crimes.[4] Increasingly, victims are looking to the criminal justice system for protection and relief. As the shroud of secrecy and shame surrounding family violence slowly unravels, it is the court system which becomes the forum for dealing with this problem.

With the recognition that assault within the family is as criminal an act as stranger-to-stranger assault, courts have experienced a

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1. MINNESOTA DEP'T OF CORRECTIONS, MINN. PROGRAM FOR BATTERED WOMEN, SUMMARY DATA PRESENTATION ON INFORMATION OBTAINED FROM LAW ENFORCEMENT AGENCIES 1984-1985 (1987).

2. MINNESOTA DEP'T OF CORRECTIONS, MINN. PROGRAM FOR BATTERED WOMEN, ADVOCACY PROGRAM DATA SUMMARY REPORT (THROUGH 1986) (1987).

3. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies*, in UNITED STATES DEP'T OF JUST., NAT'L INST. OF JUST. (1986).

4. *Id.*

dramatic increase in the number of cases involving domestic violence. Stringent arrest policies have contributed to this increase. In fact, some jurisdictions have instituted a policy of mandatory arrest in domestic violence cases.[5] Such a policy is supported by the conclusions of a study in Minneapolis, Minnesota which compared three methods of police intervention in domestic assault cases. The findings of this study indicate that arrest resulted in the lowest level of recurring violence.[6] Therefore, jurisdictions that do not now have a mandatory arrest policy, and that wish to improve the effectiveness of their intervention and decrease the likelihood of recurring violence, should consider adopting such a policy.

As these cases increase in the court system, it is our view that a model policy suggesting procedures to be used in the handling of domestic assault cases would prove beneficial to both the court system, the victim[7] and, ultimately, the defendant. It should be noted that this model policy uses Minnesota law and misdemeanor criminal procedure as its bases. Criminal procedure in this country is not uniform. Particular procedures may vary from state to state and from jurisdiction to jurisdiction within a state.[8] However, the basic pattern of arrest, first appearance or arraignment, pre-trial or preliminary conference, trial, and sentencing is the same. Therefore, the suggested procedures and the underlying policy reasons for implementing those procedures are applicable in any jurisdiction or state.[9]

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5. Six states make arrest mandatory in some domestic violence situations without a prior order restraining violence: Connecticut, Louisiana, Maine, Nevada, Oregon and Washington. Nevada, Oregon, Washington, Delaware, Minnesota, North Carolina and Wisconsin require arrest if a court order restraining violence has been issued. *See* NATIONAL CENTER ON WOMEN & FAM. L., INC., ARREST IN DOMESTIC VIOLENCE CASES: A STATE BY STATE SUMMARY (1987). In addition, police departments in some cities such as Concord, New Hampshire; Newport News, Virginia; Duluth, Minnesota; Pittsburgh, Pennsylvania; and Charleston, South Carolina have implemented mandatory arrest policies. Recent Developments, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213 (1988).

6. Sherman & Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

7. In this article victims are identified as women and defendants as men. In the vast majority of cases, domestic violence is perpetrated by men against women. Data from the National Crime Survey found that 95% of all assaults on spouses or ex-spouses during 1973-77 were committed by men. UNITED STATES DEP'T OF JUST., BUREAU OF JUST. STATISTICS, REP. TO THE NATION ON CRIME AND JUST.: THE DATA 21 (1983). *See also* Recent Developments, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213 (1988).

8. *See generally* J. COOK & P. MARCUS, CRIMINAL PROCEDURE (2d ed. 1986).

9. In order to study the scope of family violence throughout the country, the

The following policy was devised with a number of goals in mind. First, it is imperative that the court process itself, through its various stages, results in the effective intervention in the cycle of violence.[10] The judiciary should encourage responsible behavior by the defendant and make decisions throughout this process which will stop the violence from recurring. Concurrent with the need for effective intervention in the cycle of violence is the responsibility of the system to protect the victim. The policy also strives to emphasize, by the judicial actions it suggests, that these cases are extremely serious and should be treated by the court and the prosecutor as crimes. It is also our hope that the suggested procedure, if adopted, will result in some consistency in the handling of these cases by the court system, while, at the same time, recognizing there is the unique aspect to the cases of an ongoing intimate relationship between the defendant and the victim which affects the victim's actions and sentencing issues. Finally,

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United States Attorney General established a Task Force on Family Violence to make suggestions for a national approach to the problem. In 1984 the United States Attorney General's Task Force on Family Violence issued its final report. After the Task Force conducted hearings around the country, it made a number of recommendations including:

> Family violence should be recognized and responded to as a criminal activity.
> [T]he chief executive of every law enforcement agency should establish arrest as the preferred response in cases of family violence.
> If the defendant does not remain in custody and when it is consistent with the needs of the victim, the prosecutor should request the judge to issue an order restricting the defendant's access to the victim as a condition of setting bail or releasing the assailant on his own recognizance. If the condition is violated, swift and sure enforcement of the order and revocation of release are required.
> A wide range of dispositional alternatives should be considered in cases of family violence. In all cases, prior to sentencing, the judge should carefully review and consider the consequences of the crime on the victim.
> In granting bail or releasing the assailant on his own recognizance, the judge should impose conditions that restrict the defendant's access to the victim and strictly enforce the order.restrict the defendant's access to the victim and strictly enforce the order.

ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, UNITED STATES DEP'T OF JUST., FINAL REPORT (1984).

10. Some commentators have analyzed domestic violence in terms of a recurring cycle of behavior, *e.g.*, tension building, battering incident, honeymoon or reconciliation phase. This cycle is then repeated. *See generally* L. WALKER, THE BATTERED WOMAN (1979). This cycle has important implications for the criminal justice system. For example, while the police may be called during the battering incident, prosecution may not occur until the reconciliation phase, making it much more difficult for the victim of the violence to proceed with prosecution.

for some victims of domestic violence, the nature of the relationship with the defendant is such that, due to emotional, psychological, economic, and safety factors, a sentence which includes actual jail time to be served may not be desired. However, as we indicate in Section VI, it is our belief that due to the serious nature of domestic violence, a sentencing policy should include the requirement that the convicted defendant spend some actual time in jail.

II. PRE-ARRAIGNMENT RELEASE

Minnesota law provides that an arrested person must be brought to the police station or county jail.[11] "The officer . . . or . . . sheriff in charge . . . shall issue a citation in lieu of continued detention unless it reasonably appears to the officer or sheriff that detention is necessary to prevent bodily harm to the arrested person or another . . . ."[12] In order to make a reasonable determination of whether detention is necessary to prevent bodily harm to another, it is our view that the officer or sheriff in charge must contact the victim in order to obtain additional and critical information regarding the possibility of future harm. Unless the victim is contacted for her input, a reasonable determination cannot be made. If the sheriff or officer is unable to contact the victim, there is no basis for making the statutorily required determination regarding prevention of harm, and therefore the arrested person must await judicial review prior to release. While we recognize that release is a decision being made by the sheriff or police officer at this stage in the process, the judiciary can have an important influence even at this juncture of the case. The judiciary can impose conditions of release, such as no contact with the victim. Unless such a conditional release prior to arraignment can be effectuated at the jail, release at this stage, without conditions, may have a significant effect on the remaining proceeding as well as undermine the important goal of protecting the victim. The following is the suggested policy to be adopted by the judiciary:

> POLICY: A person arrested for domestic assault should not be released prior to arraignment unless the victim is contacted to obtain her view of the possibility of future bodily harm. If the victim cannot be contacted, the arrested person should be detained until judicial review.

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11. MINN. STAT. ANN. § 629.72 (West Supp. 1990).
12. *Id.*

III. ARRAIGNMENT

The factors that are significant for pre-arraignment release decisions are also present at arraignment. The primary consideration should be protection of the victim. Again, serious efforts should be made to contact the victim to obtain her input. In order to effectuate the goal of protecting the victim, emphasis should be placed on conditional release. In addition, the arraignment should take place as soon as possible after the arrest. Domestic assault cases should be calendared in such a way as to facilitate the process. No longer than one week should elapse between arraignment and arrest when the defendant has been released prior to arraignment. When no contact with the victim is a condition of release, the no-contact order should be in writing and communicated to the victim as soon as possible by telephone and/or mail.[13] The order loses its effectiveness when the person it is designed to protect is unaware of its existence. The victim should also be informed of a person to contact if the order is violated. Again, the order will be more effective if a means to facilitate the enforcement process is communicated to the victim.

Because there is a lack of complete information and often no input from the victim at this stage of the proceedings, judges should strongly discourage prosecutors from agreeing to a dismissal of a domestic assault charge at arraignment. If the prosecutor insists on dismissing at arraignment, the judge should indicate his/her disapproval of that course of action and state that disapproval on the record.[14] Concomitant with disapproving dismissals at arraignment, judges should take responsibility for not accepting inappropriate pleas. Reduction of the assault charge should not be accepted at arraignment, especially in those states like Minnesota that have enacted enhancement statutes making it a gross misdemeanor to commit a second assault against the same victim within a certain time period of a previous conviction for assault.[15] Finally, the conditions of release should be monitored, and violations should be dealt with swiftly.

POLICY: The primary consideration in determining release at arraignment is protection of the victim. The court shall impose

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13. In Minnesota, if conditions of release are imposed, there must be a written order. The agency having custody of the defendant must make a reasonable effort to orally inform the victim of the conditions of release, if any, and as soon as practicable after a release order is entered, to mail a copy of the written order. *Id.*

14. Minnesota law requires a prosecutor to "make every reasonable effort to notify a domestic assault victim . . . ." of a dismissal or a refusal to prosecute. MINN. STAT. ANN. § 611A.0315 (West Supp. 1990).

15. MINN. STAT. ANN. § 609.224 (West Supp. 1990).

conditions of release which effectuate this goal of assuring the safety of the victim. Information from the victim of the alleged domestic assault shall be obtained and communicated to the judge. It shall be the general practice of this court to issue a no-contact order as a condition of release in all domestic assault cases. When a no-contact order is a condition of release, it shall be in writing and communicated to the victim as soon as possible. The no-contact order sent to the victim shall include a notice informing the victim of a number to call if violations of the conditions of release occur. Additional conditions of release may include, but are not limited to: sobriety, out-patient chemical dependency treatment, domestic violence treatment, and/or monitoring of the conditions of release by probation. Arraignments shall be held as soon as possible after arrest, and the calendar will be arranged to accommodate a speedy arraignment. In those cases where the arrested person has been released prior to arraignment, the arraignment shall take place within one week of the arrest. Domestic assault charges shall not be dismissed at arraignment. A plea to an inappropriate reduced charge shall not be accepted at arraignment. In those cases where the prosecutor insists on dismissing, the judge shall state his/her disapproval of the dismissal on the record. Upon probable cause to believe that the condition(s) of release have been violated, an arrest and detain order shall be issued. The sheriff, upon receipt of the arrest and detain order, shall take affirmative steps to seek out and find the defendant. Hearings held pursuant to violations of conditions of release shall be conducted in a manner similar to parole or probation-violation hearings. The standard of proof shall be clear and convincing evidence.

IV. Preliminary Conference

One of the goals evident throughout this policy is the desire to accelerate the various stages in the process so that these cases can be resolved as quickly as possible. Given the dynamics of family violence and the existence of an ongoing intimate relationship between the defendant and the victim, speedy resolution of the case will serve to better protect the victim as well as increase the efficiency of the entire process. Therefore, the preliminary conference should take place within two weeks of arraignment.

Dismissals and pleas to reduced charges are also significant issues at the preliminary conference.[16] A case of domestic assault should not

16. Minnesota law requires that, "[p]rior to the entry of the factual basis for

be dismissed at the preliminary conference if the only reason for dismissal is the victim's reluctance to testify. The judge must be sensitive to the great potential for coercion of the victim in these situations. The victim should be subpoenaed to appear at the trial. Language should be added to the subpoena or included along with the subpoena informing the victim of the option of being escorted to the courtroom on the day of trial by a sheriff or police officer. If the victim is present at the preliminary conference and indicates that she does not want to testify at the trial, the judge may wish to speak to the victim regarding this apparent reluctance. This discussion should be held informally in chambers with both attorneys present but without the intimidating presence of the defendant. As was indicated previously, if the prosecutor insists on dismissal, the judge should put on the record that the dismissal is without judicial approval. Similarly, judges should not accept inappropriate pleas to reduced charges.

> POLICY: Preliminary conferences shall be held within two weeks of arraignment. Cases of domestic assault shall not be dismissed at the preliminary conference stage if the sole reason for dismissal is the victim's unwillingness or reluctance to testify. The victim shall be subpoenaed to appear at trial. The victim shall be informed that a sheriff or police officer will be available to escort her to the trial. If the prosecutor insists on dismissing the charge solely on the basis of the victim's reluctance to testify, judicial disapproval of the dismissal shall be stated on the record. Inappropriate pleas to reduced charges will not be accepted. Judicial inquiry of the victim regarding her reluctance to testify shall be done in chambers with both counsel present but without the presence of the defendant.

V. TRIAL

If the victim has been subpoenaed and appears but indicates a continuing reluctance to testify, the judge should order the victim to testify. It is again important to be cognizant of the great potential for the defendant to intimidate the victim who is likely to be the only witness in these cases. Ordering the victim to testify, along with subpoenaing her, relieves her of the burden of appearing to "voluntarily" cause her husband or partner to be subject to the sanctions of the criminal law.

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a plea . . . [the] prosecuting attorney [must] make a reasonable . . . effort to inform the victim of the content[] of the plea agreement . . . [as well as her] right to be present at the sentencing . . . and to express . . . any objection to the agreement or . . . proposed disposition." MINN. STAT. ANN. § 611A.03 (West Supp. 1990).

It is also important for the victim to realize, throughout this process, that there is a public dimension present in domestic assault cases. The criminal justice system must make clear at the outset that it is the state, not the victim, who determines whether prosecution is pursued and that the decision to proceed is not in the hands of the victim. If, after being ordered to testify, the victim indicates that the previous information regarding the assault was untrue and she was mistaken, the judge should point out the facts as they were sworn to in the complaint. The prosecutor should also, at this point, confront the victim with other evidence previously gathered regarding the assault. If, after being confronted in this manner, the victim insists that the previous statements made were untrue, the matter should end. However, if there is independent evidence of the assault, even if the victim refuses to testify or does not appear at the trial, the prosecutor should proceed with the case. If the prosecutor refuses to proceed, even though there is independent evidence, and agrees to dismiss, judicial disapproval of the dismissal should be noted in the record.

> POLICY: If necessary, the judge shall order a victim to testify. If necessary, the judge shall point out to the victim the previous statements made by the victim in the complaint. Even if the victim does not appear at trial, or appears but refuses to testify or indicates her previous statements were untrue, if there is independent evidence of the assault, the trial should proceed. If the prosecutor refuses to proceed, even when there is independent evidence, and dismisses, judicial disapproval of the dismissal shall be stated on the record.

VI. SENTENCING

Without question, sentencing is an extremely critical stage in the process. It is perhaps the key in accomplishing the goal of an effective intervention in the cycle of violence. As was stated previously, a major principle underlying this policy is the belief that domestic assaults, though most often charged as misdemeanors, are extremely serious crimes. Therefore, it is our view that the maximum time should be imposed. Along with imposition of the full time allowed, with very few exceptions, some actual time should be served. The amount of time to be served will vary considerably given the circumstances of the individual case.

In addition to some actual time served, conditions should be imposed. These conditions may include chemical dependency treatment, counseling the defendant regarding domestic abuse, no contact

with the victim, no assaultive and/or disorderly conduct, and/or no additional charges.[17] A pre-sentence investigation should be done in every case, and probation should monitor the defendant's compliance with the conditions. If there is an alleged violation of the conditions, the revocation hearing should be scheduled separately from the new charge and occur as soon as possible.

> POLICY: When there is a plea or finding of guilty in a case of domestic assault, the maximum sentence shall be imposed. With rare exceptions, some actual time to be served in jail shall be ordered. The actual time ordered to be served shall vary with the factual circumstances in each case. Additional conditions set by the court shall be devised in order to provide protection to the victim and to most effectively intervene in the cycle of violence so that the violence does not recur. A pre-sentence investigation shall be done in every case. Probation shall monitor the conditions. When there is an alleged violation of conditions, the revocation hearing shall be scheduled separately from the new charge and held as soon as possible.

VII. CONCLUSION

The suggested policies outlined in this article are a first step in attempting to make the criminal justice system more efficient and effective in intervening in these cases. We do not assume that each suggestion will necessarily be appropriate in every jurisdiction. It is critical, however, for the bench and bar to take a leadership role in formulating policies which will further not only protection of the victim and judicial consistency, but justice as well.

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17. In Minnesota, the "victim has the right to submit [a victim-]impact statement to the court at the time of sentencing . . . ." MINN. STAT. ANN. § 611A.038 (West Supp. 1990).