REFLECTIONS ON A LEGAL STRATEGY FOR ADDRESSING DOMESTIC VIOLENCE: THE US EXPERIENCE

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Origins of U.S. Legal Strategy on Domestic Violence

Feminists in the United States first became aware that women were experiencing violence in intimate relationships in 1970's consciousness raising groups. It was only after rape crisis telephone hotlines were established, however, that the extent of the problem began to surface. While the hotlines were set up to help women who had been raped, they were soon overwhelmed with calls from women who were being beaten by their husbands and partners. In the United States, a woman is beaten every 9 seconds and it is estimated that 15 million women experience violence in an intimate relationship at some time in their lives.

To address the incredible level of domestic violence, feminists established support groups, shelters and other services. They also undertook to educate professionals and the general public through publicity campaigns, speeches, articles and targeted curricula and training. Early on, feminists recognized that a legal strategy was also necessary, because the legal system was perpetuating the violence rather than providing protection for women victims.

All sectors of the legal system – judges, prosecutors, police, criminal and civil attorneys -- acted as major impediments to battered women since they reflected general societal attitudes about domestic violence: i.e., 'women provoke men to violence and deserve to be hit;' 'domestic violence isn't serious and isn't a matter for the criminal justice system;' 'women enjoy or accept the violence, they don't want anyone to interfere and they won't follow through with prosecution;' 'both parties are at fault in a domestic dispute and both should be arrested.' Battered women found these attitudes by legal authorities helped perpetuate the violence. When a police officer lectured the victim as well as the abuser, the abuser felt justified in his position that she had caused him to hit her (because she burned the dinner, nagged him, was a bad housekeeper, etc.). Her already damaged self esteem was further undermined. Worse, she continued to believe that if she only changed her behaviour, he wouldn't hit her. Abusers, of course, don't need a reason to hit. They do it to establish and maintain control of their partners.

Local Strategy: Law Reform, Education & Litigation

To address these problems in the legal system, feminists designed a three-part strategy. 1. They lobbied the state legislatures for new legal protections. 2. Once new laws were passed, they undertook to educate police about their responsibilities for implementing them. 3. Because police were reluctant to implement the new laws,

battered women's advocates sued police and the local governments that employed them for failure to perform their legal duty.

Oregon, the state with which the author is most familiar, was one of the first states to pass new laws addressing domestic violence. In 1977, battered women's advocates joined with feminist attorneys and legislators to secure passage of The Family Abuse Prevention Act (FAPA). FAPA declares that physical abuse within a family is no less criminal than abuse directed at a stranger. It provides civil and criminal remedies. The civil remedy consists of an emergency, ex parte order of the court prohibiting the abuser from further harassment and intimidation. A battered woman can request the court to prohibit him from coming to specific places such as her place of employment, school or home. In fact, if she has equal legal rights to a shared home or apartment, the court is required to order him to move out at her request, once abuse and fear of further abuse is established. Of greatest importance to many women, a FAPA restraining order can grant them temporary custody of children they have in common with their abuser.

The civil restraining order was designed as an emergency procedure necessary to provide protection in an emergency situation. As such, a battered woman can apply directly to the court for the order and need not hire an attorney. Filing fees are also waived and the court must hear and render a decision on her application within 24 hours. Once the order is granted, police serve it on the abuser who is informed of his right to request a hearing with the court to contest any of its provisions. In Oregon, unless dismissed at the hearing, the order is effective for one year and can be renewed for good cause. While all 50 U.S. states have passed some form of restraining order law, they are typically of much shorter duration (e.g. 2 weeks).

If an abuser violates a restraining order, he is subject to arrest. He need not have committed a crime. It is sufficient if he violated one of the order's prohibitions, such as staying away from her residence or place of employment. In Oregon, police must arrest a person who they have probable cause to believe has violated a restraining order. They have no discretion to decide to warn him and let him go.

This mirrors the criminal provisions of FAPA. In addition to the civil restraining order remedy, Oregon law provides for mandatory arrest in cases of domestic violence. As with a restraining order violation, once police establish that an act of domestic violence has occurred and who has perpetrated it, they must arrest the perpetrator and take him into custody. The majority of U.S. states do not have mandatory arrest laws, though many establish a preference for arrest. It should be mentioned that FAPA's mandatory arrest provision is the only law in Oregon that denies police discretion to decide whether or not to arrest in misdemeanor cases. As such, it was not happily received by all law enforcement personnel. The reason arrest was mandated was that police rarely arrested for an assault in the home, though it often caused more harm than assaults outside of intimate relationships.

Removal of police discretion provided the legal basis for suing police when they failed to arrest. In the U.S. legal system, courts will not review acts where public officials are given discretion by the legislature, except in limited circumstances.

However, where a statute provides a clear duty to act, the official refuses to do so and harm results, courts will hear lawsuits and, if warranted, award damages. That is precisely what happened in Oregon under FAPA. A woman who had been battered repeatedly by her boyfriend obtained a restraining order against him. He violated the order numerous times by coming to her residence, threatening and abusing her. Each time she called the police, they failed to respond. With assistance from feminist attorneys, she filed suit against the police agency and the local government that employed them. The police argued that their traditional discretion had not been abrogated by FAPA, and, therefore, they could not be sued. However, Oregon's highest court ruled otherwise and firmly established the duty of mandatory arrest and a citizen's right to sue when police fail in that duty.

The third part of Oregon's legal strategy to address domestic violence was education of police, prosecutors, judges and court personnel. While the above-described court decision should have provided impetus for police to attend trainings, in fact, they were little more eager and open to doing so. It took another 10 to 15 years of effort by battered women's advocates for police education about domestic violence and their duties under FAPA to become generally accepted and included in course work at the Police Academy (though battered women's advocates believe it is not sufficient). Several factors contributed to eventual police acceptance of their duty with regard to domestic violence. Battered women's advocates contacted police in their local communities. Where possible, they made alliances with supportive officers. Often, their role was to challenge and confront. On the state level, attorneys and advocates addressed policy makers, professional associations, and the legislature. They designed training programs for police, prosecutors and judges, advocated for their adoption, and participated in panels, roundtables and conferences. Much was accomplished through persistence and networking.

A few highly publicized cases also increased awareness of domestic violence in the population generally, and among legal professionals in particular. The most well-known, of course, was the prosecution of O.J. Simpson for the murder of his ex-wife Nicole and her friend, Ronald Goldman. While media sensationalism eventually caused professionals to avoid news accounts, the case generated new interest in domestic violence and an openness to discussion. Police agencies and prosecutors from around the country couldn't help but wonder whether Nicole might still be alive had law enforcement intervened appropriately (by arresting, prosecuting and holding Mr. Simpson accountable) on the numerous occasions when she had called for police assistance.

All of this contributed to an atmosphere where police agencies were more open to training. It was assisted further when the Violence Against Women Act was passed by the U.S. Congress, which included funding for police training, improved law enforcement practices and data gathering equipment (see discussion below).

A National Strategy: Civil Rights Protections

Advocates also worked on the national level. Building on the network of state coalitions representing grassroots domestic violence programs, an ad hoc legislative group was formed which drafted and proposed major new federal legislation called "The Violence Against Women Act" (VAWA). In addition to providing substantial federal funding for grassroots programs, VAWA declared that violence motivated by animosity toward one's gender was a violation of civil rights for which an individual could sue in federal court. While federal statutes have recognized the special nature of violence motivated by racial, ethnic and religious animosity, there was no similar recognition of the overwhelming amount of violence directed at women, its genesis in sexism and a patriarchal system, and the restrictions it imposes on women's lives. VAWA also made certain criminal acts federal crimes (e.g. crossing state lines to commit domestic violence) and included provisions for restricting access to firearms by individuals subject to restraining orders.

After 5 years of intense lobbying by a network of local and national advocates, VAWA was passed and became law in August 1995. Because the law was essentially written by battered women's advocates, it reflected, to a large extent, their analysis of how violence against women should be addressed. For example, federal funds were offered to prosecutors and police agencies for domestic violence work on the condition that they collaborate with local battered women's programs. The downside of this requirement is that some battered women's programs have been faulted for appearing too hostile or confrontational to police. This is only one illustration of how efforts to influence police behavior have been turned against battered women's advocates. Indeed, the ability of the patriarchal system to use legal reforms against battered women was an initial reason that battered women's advocates were reluctant to pursue a legal reform strategy at all.

Motivating and Educating Professionals for Local Action

In addition to the passage of major federal legislation, national leaders of the battered women's movement designed a strategy to catalyze action at the state level. For 20 years, battered women's advocates had attempted to educate state and local authorities and professionals, with minimal success. For the most part, advocates were marginalized. Domestic violence was considered a "women's issue" and, therefore, not worthy of the time and attention of professionals, such as judges, prosecutors, civil and criminal attorneys, physicians and politicians.

National advocates established contacts with influential national legal groups, including a judicial training center and an agency that funds projects to improve the judiciary. With their cosponsorship, an invitational national training was organized. The chief justice of every state supreme court was asked to appoint a 5-person team to attend the national training. The team was to include 3 judges, a battered women's advocate and either a prosecutor or legislator. In fact, all 50 states and U.S. territories were represented at the training conference held in San Francisco in 1993.

The week-long training was designed to educate judges, legislators and prosecutors (each workshop was co-chaired by a judge and a battered women's advocate) and to have each state begin to develop a plan for addressing domestic violence. The judiciary was selected to lead this effort, rather than politicians or other professionals, because of their prestige and the key role they play in the U.S. legal system.

As a result of the conference, a number of states formed state-level multi-disciplinary coordinating councils to address domestic violence. In Oregon, the state council consisted of 33 members representing professions with some responsibility for addressing domestic violence, including judges, prosecutors, defense attorneys, educators, physicians, psychologists and social workers, and law enforcement. The Oregon council drafted and adopted protocols for police, educators, mediators, mental health workers, judges and batterer intervention programs. The protocols established the standard for what was expected of every professional with respect to domestic violence.

Coordinated Multi-disciplinary Responses

At the same time, local communities were forming local multi-disciplinary coordinating councils. In most jurisdictions, the councils were concerned with policy, not with coordination of action on individual cases. However, regular meetings on policy issues provided the opportunity for different groups (e.g. prosecutors and battered women's advocates) to work together on domestic violence. When individual case problems arose, it was much easier for battered women's advocates to get the system to correct them.

Battered Women Who Kill in Self-Defense

Those ignorant of the dynamics of domestic violence often wonder why a battered woman does not simply leave her abuser. In addition to economic deprivation, battered women risk loss of their children and their very lives if they leave the abuser. Studies in the United States reveal that the risk of being killed by an abusive partner increases by 50% and when a woman attempts to leave. Seventy-five percent of the most serious injuries also occur after a woman leaves. Realizing this, a minority of battered women find themselves facing the dilemma of killing their abuser or losing their own lives. In the vast majority of cases where battered women have killed in self-defense, the legal system has prosecuted and imprisoned them – despite the fact that it was the legal system's failure to intervene and provide protection that forced the women to defend themselves to stay alive.

Attorneys and battered women's advocates organized defense teams and offered expert testimony on the dynamics of domestic violence to explain why a woman sometimes has no option but to kill her abuser. Initially, courts were reluctant to accept such expert testimony, especially from battered women's advocates whose expertise was not recognized by courts which are biased towards academic training. As a result, juries were not allowed to hear evidence of the years of abuse which supported a woman's conclusion that she had to kill to stay alive. Many women were convicted and given lengthy prison sentences (in Missouri, for example, a 50-year sentence was common).

In response, a national nonprofit NGO was started by battered women's advocates. The Clearinghouse for the Defense of Battered Women began collecting data, case histories and appellate court decisions. They provided expert assistance to defense attorneys representing battered women accused of killing their abusers, assisted women in prison to get new trials and to have their cases publicized, and helped organize clemency projects in a number of states.

In the U.S., when no more appeals are possible, a convicted person may apply to the governor (elected head of state) for clemency usually on the basis that justice was not done in the case. Governor Celeste of Ohio was the first governor to grant clemency to a group of battered women incarcerated for killing their abusers. His action was a national sensation because of the number of women granted clemency at one time. The Governor based his decision on the fact that the women had been tried when the law did not allow the introduction of expert testimony on battering. Subsequently, the legislature passed a law requiring courts to consider such testimony. These women had not had the benefit of trial under the new law and, as a result, had not received justice.

A few other states followed Ohio's lead before the backlash stopped group releases, in reaction to the fear that the end result would give women a license to kill. Today, clemency is generally sought on an individual, case by case basis, depending on the political situation in each state. Moreover, because evidence of domestic violence and expert testimony about it is more frequently allowed in court today, clemency is harder to justify.

Battered women's advocates also directed their efforts at educating prosecutors, defense attorneys and judges. While prosecutors have been supportive of battered women when they are clearly the victim of domestic violence, they have been less than sympathetic when women kill abusers in self-defense. Only recently has this begun to change. In Oregon within the last two years, several prosecutors have refused, for the first time, to indict battered women who killed in self-defense.

Summary

It is apparent that U.S. battered women's advocates put a significant effort into developing and carrying out a legal reform strategy. Indeed, because of the law's dominant social role, battered women's advocates were forced to address it to at least lessen its negative impact on victims. (E.g., where police arrested battered women as well as abusers, protection of battered women made it necessary to educate police and pass laws that clarified domestic violence is not a mutual combat situation.)

It was not long, however, before advocates also saw legal reform as a way to create societal change. How effective law reform is in creating social change remains to be seen. Certainly, it has a role, since law both reflects and helps form social norms. However, because law is part of an encompassing patriarchal system, all parts of that system and the system as a whole must be addressed – woman's economic position, her political participation and leadership, her autonomy in all areas of her life, etc.

The danger of any law reform strategy is that the extraordinary and sustained effort required to effect change will lead to myopia, focusing solely on law reform without seeing the broader context. The same can be said for focusing only on violence against women by intimate partners, rather than the range of violence, discrimination and violation women experience throughout the life cycle and in all areas of their lives (sexual harassment at school and work, employment and wage discrimination, prostitution, rape and child sexual abuse, loss of custody of children, etc.).

In the end, from a U.S. perspective, a legal strategy is necessary but not sufficient. And it must be continually re-evaluated in light of identifiable accomplishments and social responses.

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