consideration of the social, economic and international politics of the drug trade along the Mexican border for downward departure); United States v. Swapp, 719 F. Supp. 1015 (D. Utah 1989) (unique cultural history of religious extremist group allows departure).


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27 See Jennifer L. Bradfield, Anti-Stalking Laws: Do They Adequately Protect Stalking Victims, 21 HAW. WOMEN’S L.J. 229 n. 80 (1998). In 1993, only Alabama, Arkansas, Delaware, Illinois, and Massachusetts classified a first offense of stalking as a felony. See Salame, supra note 11, at 76. Many states classify aggravated forms of stalking, such as second offenses or stalking in violation of a protection in order, as felonies. See, e.g., Cal. Penal Code § 646.9.

28 United States Attorney’s Manual 9-60.1100; 18 U.S.C. § 2263. The other factors to be considered are (1) if the interstate nature of the offense makes it difficult for law enforcement to investigate, and (2) the potential release of the defendant on bond in States without pretrial detention status.


STATE AND FEDERAL PROSECUTIONS OF DOMESTIC VIOLENCE

In the face of public concern about crime, particularly violent crime, Congress in recent years has expanded federal criminal jurisdiction to include crimes traditionally prosecuted by local governments. Examples of this development are the Violence Against Women Act of 1994 (VAWA) and the Interstate Stalking Punishment and Prevention Act of 1996, which together create three categories of federal domestic violence crimes: interstate domestic violence, interstate stalking, and interstate violation of a protection order. These crimes can also be prosecuted by the states.

This article examines the prosecution and sentencing of these new federal domestic violence crimes and evaluates their role in the prosecution of domestic violence in general.

I. Domestic Violence and VAWA

By enacting VAWA, Congress signaled that it doubted whether the states could solve the domestic violence problem on their own, and that it viewed federal intervention as necessary. The concern might not have been unfounded in light of the enormity of the problem:

- Over two-thirds of violent crimes against women are committed by someone known to the victim. About 28% of the offenders are intimates, such as husbands or boyfriends; 35% are acquaintances; and 35% are other relatives.² Twenty-eight percent of female murder victims in 1994 were killed by husbands or boyfriends.²
- In 1996, women experienced an estimated 840,000 rapes, sexual assaults, robberies, aggravated assaults, and simple assaults at the hands of intimates, down from 1.1 million in 1993. Intimate violence against men, however, did not vary significantly from 1992 to 1996, and has been estimated annually at 48,953.³ Each year, medical expenses from domestic violence total at least $3 to $5 billion.⁴
- Intimate violence is a crime committed primarily against women: In 1996, females were 75% of the victims of intimate murder and about 85% of the victims of nonlethal intimate violence.³

Faced with statistics like these, Congress responded by passing VAWA. It intended the Act as a comprehensive statute to fight gender-motivated violence, and to deter, punish and rehabilitate batterers in order to prevent abuse.⁶ Among other things, the bill increased federal funding for battered women's shelters and related programs; it created a federal civil rights cause of action for gender-motivated violence; it provided that certain battered immigrant spouses and children could self-petition for legal residency; and it created incentives for local laws mandating or strongly encouraging warrantless misdemeanor arrests for domestic violence.⁷

VAWA also created federal jurisdiction for domestic violence. Specifically, it outlawed spousal abuse and stalking committed during interstate travel, and it made it illegal for batterers to cross state lines to violate a protection order. It also required states to give full faith and credit to out-of-state protection orders.⁸ In 1996, Congress expanded the stalking provisions to include cases in which the victim is not related to the stalker.⁹ Penalties for spousal abuse under VAWA depend on the extent of the injury, but maximum terms of imprisonment range from five years for bodily injury to life imprisonment for a crime resulting in the victim's death.

II. State Prosecution of Domestic Violence

Despite the federalization of domestic violence, well over ninety-five percent of domestic violence prosecutions take place in state courts.¹⁰ In the last two decades, state prosecutors, state courts and state legislatures have worked to improve the criminal justice system's response to domestic violence. Beginning in the late 1970s, the states have instituted a variety of reforms and initiatives designed to reduce domestic violence. Among these measures are the development of domestic violence training for police officers, prosecutors and judges: the formation of special domestic violence units in police departments, prosecutor's offices, probation departments and local courts; the institution of mandatory arrest policies in domestic violence cases; the availability of emergency ex parte restraining orders; the creation of criminal sanctions for violating restraining orders; the establishment of domestic violence crimes such as stalking; the legislating of stiffer sentences in some domestic violence cases; and the implementation of prosecution “no drop” policies in domestic violence cases.¹¹

Today, the states prosecute tens of thousands of domestic violence cases annually. With so many prosecutions and convictions, conclusions about types of convictions (felony or misdemeanor) and lengths of sentences (probation or prison) are difficult to draw, but some generalizations are possible. Statistical and
anecdotal evidence suggests that, absent significant injury, many domestic violence cases are resolved with pleas to misdemeanor offenses and sentences of probation with the condition that the offender attend a batterer’s treatment program.  

For example, in Marin County, California, a suburban and rural county of approximately 250,000, the county district attorney’s office reviews approximately 245 to 460 domestic violence cases annually. Charges are filed in approximately 50% of these, and of the cases charged, convictions are obtained 75% of the time. Approximately 1/3 of the convictions are felony convictions, and the average overall sentence is about 6 months. The average sentence is relatively high because “three-strike” defendants are included in these calculations. The misdemeanor convictions, however, generally result in a sentence of probation with the condition that the offender attend a batterer’s treatment program. 

The resolution of domestic violence cases in the states often is based on a compromise. These compromise solutions are a product of what has been called the victim attrition problem in domestic violence prosecutions. Whether out of emotional attachment, economic dependence, or fear of reprisal, many domestic violence victims are reluctant to testify. When it passed VAWA, Congress explicitly recognized that there are “legitimate reasons why the victims of domestic violence may refuse to testify against a defendant.” Prosecutors are often reluctant to compel a domestic violence victim to testify since those who testify truthfully may face hardships, such as economic adversity or physical violence, which the state cannot always prevent. Therefore, when forced to testify, some of these reluctant witnesses lie. Occasionally, domestic violence victims can avoid testifying by asserting their spousal privilege not to testify. 

Many victims who are unwilling to testify when their abusive partner faces a prison sentence, however, are willing to testify to ensure that their abusive partner receives treatment. Thus, many scholars, prosecutors and judges believe that the best resolution for domestic violence cases with reluctant witnesses is a compromise disposition in which the batterer receives a sentence of probation with the condition that he attend a batterer’s treatment program. Endorsing a variation of this approach, the Supreme Court of Ohio remarked that “[c]ertainly a court’s resources in domestic violence cases are better used by encouraging a couple to receive counseling and ultimately issuing a dismissal than by going forward with a trial and impaneling a jury where the only witness refuses to testify.” 

III. Federal Prosecutions Under VAWA

Only a handful of domestic violence cases are prosecuted federally. From the enactment of VAWA through July 1998, federal indictments were returned in 108 cases: 10 in 1995, 14 in 1996, 50 in 1997, and 34 in the first seven months of 1998. These 108 indictments resulted in 70 convictions (6 of which were on other charges), 1 acquittal, and 1 reversal on appeal.

Federal prosecutions rarely result in the compromise resolutions prevalent in the states. Regardless of which VAWA statute is used, federal prosecutions tend to yield higher sentences than state prosecutions. 

For example, in United States v. Bailey, defendant Bailey beat his wife severely at their home in West Virginia, locked her in the trunk of their car, and drove to Kentucky. Several days later, he brought her to a hospital in Kentucky. Because of the delay in treatment, the victim is in a permanent vegetative state. Bailey was convicted of kidnapping and interstate domestic violence in violation of 18 U.S.C. § 2261(a)(2) and is serving a life sentence for the kidnapping and a concurrent 20-year sentence for interstate domestic violence. According to one commentator, if he had been prosecuted and convicted in the state of West Virginia, he would have been sentenced to between two and ten years in prison for malicious assault.

United States v. Stewart, an unreported case tried in the Western District of Texas, also resulted in a high sentence. The defendant was convicted of four stalking counts in violation of 18 U.S.C. § 2261A based on evidence that he had terrorized his family for years, thereby creating a reasonable fear in his victims that he would injure them. The Court departed upward from the sentencing guidelines and sentenced Stewart to the maximum of 5 years per count for a total of 20 years.

In United States v. Casciano, the defendant was convicted and sentenced to 37 months for interstate violation of a Massachusetts protection order in violation of 18 U.S.C. § 226a(t) based on his following his former girlfriend, who moved to New York, and continuing to stalk and harass her on the telephone. In United States v. Romines, the defendant also violated 18 U.S.C. § 226a(t) by forcing an intimate partner to cross state lines resulting in injury in violation of a protection order. Romines traveled from Virginia to his estranged wife’s home in Tennessee, made death threats against her, and dragged her and their 2-year-old son into a car, all in violation of a protection order. He was captured after a high speed chase in Virginia, and was convicted and sentenced to 151 months.

Many of the federal domestic violence cases could have been prosecuted by the states. For example, the
defendants in Bailey and Romines could have been prosecuted locally for assault and kidnaping. Similarly, some of these cases would have achieved the same results without the use of domestic-violence specific federal laws. For example, in Bailey and Romines, the defendants were convicted of kidnaping and a federal domestic violence crime. Because kidnaping penalties are so severe, the domestic violence charge did not influence the sentence in either of these cases. Hence, from the penalty perspective, the domestic violence charges were irrelevant.

IV. A Comparison of Federal and State Domestic Sentences
This quick review of federal and state prosecutions reveals a contrast between state and federal sentences for similar crimes. Federal domestic violence offenders receive stiffer sentences than their seemingly similar state counterparts.

Moreover, the predominance of incarceration in federal sentences means that batterer treatment programs play a reduced role in federal sentences. Currently, the federal prisons do not provide inmates with specific batterer’s treatment programs, though they do offer several programs, such as drug and parenting programs, that include segments on anger management. Therefore, the earliest a batterer who is convicted federally and sentenced to prison will participate in a batterer’s treatment program is after he finishes his prison sentence and is placed on supervised release.23

The disparity in federal and state sentences for domestic violence offenses seems at odds with the policies of the Sentencing Reform Act of 1984 and VAWA. In passing the Sentencing Reform Act, Congress intended that judges would impose similar sentences for similar offenses committed by similarly situated offenders.24 VAWA requires the U.S. Sentencing Commission to “review and promulgate amendments to the guidelines to enhance penalties, if appropriate, to render Federal penalties on Federal territory commensurate with penalties for similar offenses in the States.”25 In addition, Congress recognized the importance of batterer treatment programs because, together with VAWA, it also passed legislation requiring that domestic violence offenders placed on probation or supervised release attend an “offender rehabilitation program.”26 Despite these policy goals, federal domestic violence sentences emphasize prison while the disposition of state domestic violence cases stresses treatment.

Four reasons account for the disparity between state and federal sentences: (1) the federal statutes allow for greater penalties than comparable state statutes; (2) federal prosecutors are more selective than state prosecutors in the cases they prosecute; (3) because of the Federal Sentencing Guidelines, federal prosecutors have fewer sentencing options than state prosecutors; and (4) federal prosecutors tend to prosecute cases in which the victims are willing to testify.

First, federal domestic violence offenders generally receive greater sentences than their state counterparts because federal domestic violence statutes tend to carry stricter penalties than comparable state statutes. For example, the federal crime of simple stalking is punishable by up to five years in prison, while the same crime is a misdemeanor in California and most other states.27

The availability of higher sentences has often led federal prosecutors to seek out cases in which they deem higher sentences appropriate. This is the second reason for the contrast in federal and state domestic violence dispositions. The U.S. Department of Justice implicitly recommends that federal prosecutors primarily prosecute those cases in which the state penalties are “inadequate.” The United States Attorney’s Manual suggests that before taking a domestic violence case, federal prosecutors should consider, among other factors, “[w]hether state penalties for domestic violence are adequate. For example, out-dated statutes or early parole may provide inadequate penalties.”28 Thus, federal prosecutors primarily prosecute defendants who they believe deserve higher sentences than those available in the state.

In contrast to the federal prosecutors, state prosecutors, for the most part, do not choose their cases. Typically state prosecutors handle any domestic violence case reported to the police.29 Either because of the level of abuse or the difficulty of proving the abuse, a lengthy jail sentence is not appropriate or available for most of these cases.

The third reason for the variation between federal and state sentences is the Federal Sentencing Guidelines. The Guidelines rarely allow a domestic violence offender to receive probation. Under the Guidelines, a defendant with no criminal history would receive at least a five-month prison sentence for a domestic violence offense without aggravating factors. The same defendant with a small criminal history faces a minimum sentence of a year imprisonment. A defendant with no criminal history who violated a protective order or possessed or threatened the use of a dangerous weapon faces a minimum sentence of fifteen months imprisonment.30 Thus, when faced with a reluctant witness, federal prosecutors do not have the option of resolving their case with a compromise probationary sentence. They must either dismiss the case or force the witness to testify. Occasionally federal prosecutors can work out a compromise resolution. However, unless the crime
happened on federal lands, a compromise is difficult to achieve because (1) the federal government does not have the option of charging misdemeanor threats or assaults for crimes that did not occur on federal lands, and (2) with the exception of minor misdemeanors, if the crime involves domestic violence, the sentence would probably be calculated under the sentencing guideline for domestic violence. Federal prosecutors do have the option of placing the defendant on pre-trial diversion with a condition that he attend a batterer’s treatment program. However, this option is rarely used for violent crimes, such as domestic violence.

The fourth reason that federal sentences tend to be higher may be that federal prosecutors have had fewer reluctant witnesses than state prosecutors. Most federal domestic violence cases involve perpetrators who have chased their victims across state lines. In these cases the victims usually have fled out of state to escape their batterer. Typically, a woman who has left her home and community to flee her batterer has enough emotional and economic fortitude to testify against him. Thus, the nature of federal domestic violence victims frees federal prosecutors from resorting to a compromise resolution to save their cases.

V. Conclusion

Of the thousands of annual domestic violence prosecutions only a handful are federal prosecutions. The few domestic violence cases that are prosecuted federally often result in higher penalties than similar state prosecutions. Moreover, the penalties are usually not affected by the domestic violence specific charge. Depending on one’s perspective, these higher penalties could have a positive impact because of their deterrent value or a negative effect because of their potential for unfairness.

Notes


5 Bureau of Justice Statistics 1996.


8 See 18 U.S.C. §§ 2261, 2262 (a), 2265. In addition, The Gun Control Act prohibited the possession of a gun by and the transfer of a gun to a person subject to a restraining order or convicted of a domestic violence offense.


14 Section 40412(17).


16 State v. Bush, 669 N.E.2d 1125, 1228 (Ohio 1996). Though many state domestic violence offenders are required to participate in a batterer’s treatment programs, the effectiveness of these programs is a subject of scholarly debate.


18 See cases discussed in id.


23 For a few federal domestic violence defendants, participation in a batterer’s treatment program is a condition of their pretrial release.

24 See generally U.S.S.G. § 1A (Nov. 1998). Possibly, the Sentencing Reform Act was only concerned with like penalties for similarly situated federal offenders.

25 Section 40112(a)(3).


Notes continued on page 158