

DOMESTIC VIOLENCE: THE EVOLUTION FROM A FAMILY PROBLEM TO LEGAL DISCIPLINE

PETER WELTE*

INTRODUCTION

It is a privilege to introduce this symposium issue of the North Dakota Law Review. The topic—domestic violence—is highly relevant, and the content of this issue is extremely well done. The North Dakota Law Review and the University of North Dakota School of Law, in addition to members of the State Bar Association of North Dakota, are both uniquely and well-suited to present this topic.

Domestic violence, as a topic of study, is far more intricate and sophisticated in 2013 than it was fifteen years ago. If this issue was published in the late 1990s, the subject matter would be basic compared to today's standards. There might be an essay on the ramifications of domestic violence in a divorce action and how the presence of domestic violence would result in a presumption that visitation between the batterer and his child must be a supervised visitation. Or perhaps there would be an article on the success rate of cognitive restructuring vis-à-vis domestic violence offender treatment programs, as opposed to traditional "anger management" programs. Today, attorneys in the field of domestic violence law are presumed to be well-versed in those topics, and symposium issues like this are benefitted with essays and articles studying more sophisticated subjects within the topic of domestic violence.

* Peter D. Welte is the elected State's Attorney in Grand Forks County. He received his undergraduate degree in Agricultural Economics from North Dakota State University in 1989, and his Juris Doctorate, with distinction, from the University of North Dakota School of Law in 1997. While at UND, he was named to the Order of the Barristers and served on the Moot Court Board. Peter was the State's Attorney in Steele County, North Dakota before taking a job as an Assistant State's Attorney in Grand Forks County in 1999. For that position, he was hired pursuant to a VAWA grant promoting the prosecution of crimes involving domestic violence, sexual assault, and stalking. He was first elected Grand Forks County State's Attorney in 2002 and was re-elected in 2006 and 2010. He is presently an Adjunct Instructor of Agricultural Law, and of State and Local Government Law, at the UND School of Law. He is on the Board of Directors for the North Dakota Association of Counties. He is the past-President of the Grand Forks County Bar Association and the past-President of the North Dakota State's Attorney's Association. He serves as Co-Chair of the Attorney General's Drug and Violent Crime Committee. He is on the North Dakota Supreme Court's Caseload Management Committee and is the Chair of the CLE Committee of the State Bar Association of North Dakota.

Fifteen years ago, domestic violence cases were often viewed by the court system as square pegs in a round hole. The civil courts were not equipped to handle the typical civil case involving domestic violence, and criminal prosecution of domestic violence cases was inconsistent at best. The court system is an institution, and institutional change can be both difficult and slow; however, the North Dakota court system has, indeed, evolved over the past fifteen years. North Dakota courts continue to be ahead of the curve in both acknowledging and responding to the issues raised by domestic violence.

For example, when a batterer is arrested for a crime of domestic violence, the State of North Dakota requires—even for low-level misdemeanor cases—that the batterer not be released until he or she has appeared in front of the court for a bond hearing. This is a check that is in place both to permit safety planning for the victim, and to provide the batterer an opportunity to speak to the court about the charged offense. Other non-domestic violence misdemeanors typically require only the posting of a preset bond on a “bond schedule”—for example, \$300 for a DUI—in order to be released from jail; this is not so with domestic violence crimes. This extra requirement of appearing in front of a judge before release is an example of nuances in North Dakota law that reduce lethality in domestic violence cases.

Another such nuance is the requirement of no-contact between batterer and victim as a condition of the batterer’s bond. North Dakota courts routinely order such a condition of bond, whereas fifteen years ago the batterer was simply permitted to return home—usually a home shared with the victim—to “work out” the problem. For decades, these cases had often been viewed as a “family problem” by both law enforcement and the court system. The no-contact order provides safety for both the victim and the victim’s family, and violation of such an order is considered a crime in North Dakota.

The evolution of domestic violence from a “family problem” to a “societal problem” is not unique to North Dakota. In fact, it has only been since the 1970s that domestic violence has been viewed by American courts as a problem justifying intervention by the criminal justice system. That is not to say that the problems inherent to domestic violence did not exist before the 1970s, but that American society—and thus the American legal system—was not ready to acknowledge the transformation of domestic violence from a family-oriented issue to an issue that warranted respect and treatment as a societal problem. In simpler terms: domestic violence finally became a topic worthy of standing as a “legal issue.”

In December 1999, with the assistance of VAWA funding, I was hired as an Assistant State's Attorney in Grand Forks County, exclusively to prosecute crimes involving domestic violence, sexual assault, and stalking. Since my election as Grand Forks County State's Attorney in November 2002, I have continued to expand my office's focus upon these crimes, with a particular emphasis upon two primary criteria while prosecuting domestic violence crimes: (1) victim safety; and (2) offender accountability. In my office, as with prosecution of domestic violence across the United States, we have come a long way, and there is still unfinished work remaining.

We have had tremendous success prosecuting crimes of domestic violence in the Grand Forks County State's Attorney's office. Along the way, we have learned some valuable lessons. For example, just as with a murder, domestic violence crimes are often prosecuted without the benefit of testimony from one of the two principals in the crime: the victim. Domestic violence dynamics are such that few victims are ready, willing, and able to testify at the trial of the criminal defendant.

Accordingly, we have learned that it is absolutely crucial to assist law enforcement with training that will enable our prosecutors to move forward with an "evidence based prosecution." In other words, law enforcement gathers specific evidence of the crime that will allow prosecution to proceed, even without the victim's participation. Law enforcement is also trained to document the crime in specific detail so the memories of the crime do not fade with time once the case actually gets to court. Preservation and documentation of items as simple as the originating 911 call is crucial to an evidence-based prosecution.

We have also learned that the dynamic between victim and batterer is a dynamic that must be explained to the jury. To neglect that explanation is to present a painting of a picture that simply cannot be interpreted by the typical "jury of your peers." Jurors must be taught about the power and control wheel, and how domestic violence starts with the batterer's need for control over uncontrollable situations. Jurors need to understand why women only report one-fourth to one-half of battering instances to law enforcement. They need education on why domestic violence accounts for nearly twenty percent of nonfatal violent crime experienced by female victims. Without these tools, solving the domestic violence puzzle is too difficult for most juries.

We have learned that batterers do not often stop with one crime of domestic violence. Despite our best efforts, victims do return to batterers, or batterers find new victims. This explains the need for lethality assessment of each criminal case and also for safety planning and provision of safe house shelter, if feasible. We have learned that a prosecution focused

upon victim safety and offender accountability is an approach that is easy in theory but very difficult in application and practice. Accounting for time spent by prosecutors, support staff, law enforcement, 911 personnel, emergency medical providers, courtroom personnel, and crime victim specialists, the typical B misdemeanor domestic violence crime is far more time-intensive and labor-intensive than multiple felony non-domestic violence cases. Most importantly, we have learned that it truly takes a team to prosecute crimes of domestic violence. The State's Attorney and Assistant State's Attorney are vital; just as vital to the prosecution are the law enforcement and the crime victim specialists, or "victims advocate." Coordination of these multi-disciplinary teams takes both time and effort. In my office, and in prosecutor's offices all over America, we simply cannot do it alone.

We are blessed in Grand Forks County to have the local Community Violence Intervention Center (CVIC), which provides crime victim specialist services to my office. Additionally, they are responsible for the Coordinated Community Response team (CCR), which has transformed from an idea hatched during the 1990s into a national model for other communities to follow in 2013. It is impossible to overstate how important the CVIC is to the safety of the Grand Forks community. They provide more services and programs than can be mentioned in this volume, but these services and programs are very important to the peace, safety, and future of the Grand Forks community.

All of this teamwork takes resources. As an example of such resources, on March 7, 2013, President Obama signed into law an updated version of the Violence Against Women Act (VAWA). The VAWA was first authorized in 1994, and nearly twenty years later, it continues to be one of the most significant federal laws promoting state and local efforts to combat domestic violence, sexual assault, and stalking. The 2013 version of VAWA was co-sponsored by none other than North Dakota Senator Heidi Heitkamp, former North Dakota Attorney General, a member of the State Bar of North Dakota, and a proponent of VAWA since the mid-1990s. The 2013 version of the VAWA provides \$660 million over the next five years for programs providing a variety of services: legal assistance, transitional housing, and counseling and support to victims of domestic violence and sexual assault.

According to the United States Department of Justice, there has been a fifty-eight percent decrease in the incidences of sexual assault against females over the past fifteen years. However, the accuracy of statistical compilations is questionable given that sexual assault is underreported by up to sixty percent according to some estimates. Statistical enumeration of

domestic violence and sexual assault is particularly difficult in rural areas and on Indian reservations, two demographics with heightened relevance in North Dakota. This means that despite our past successes in fighting domestic violence, we must continue to forge ahead. We must continue the good work we have done so far. We must improve on this good work.

In reading the articles and essays in this symposium issue, it is helpful to the reader to remember the two primary prosecution criteria for domestic violence crimes—victim safety and offender accountability—since each article and essay illustrates, in a way particularly suited to its specific topic, how difficult it is to effectively combat domestic violence while simultaneously maximizing these two primary criteria. Given how domestic violence has evolved from family problem to recognized legal discipline, it is fitting that the lead article to this symposium is from Professor Robin Runge, comparing civil protection orders in China to civil protection orders in the United States. A faculty member at the University of North Dakota School of Law, Professor Runge is uniquely qualified and supremely suited to publishing a scholarly work on this topic. She is a Fulbright Senior Research Fellow who recently returned from Beijing, China, where she conducted her fellowship from September 2012 to April 2013.

Although the Chinese Constitution was adopted only three decades ago, China has recently experienced growth in the recognition of domestic violence as a crime and not as just a family issue. This is a similar evolution to the one that has occurred in the United States in the past forty years. Professor Runge also gives treatment to the idea that some Chinese laws specifically address domestic violence as a violation of human rights. The comparison of civil protection orders in the United States and in China, which had its first civil protection order issued in 2008, is a continually evolving, fascinating, and relevant study.

Kristine Paronica is nationally recognized as a Certified Transformative Mediator. Fittingly, mediation practice, and the accompanying ethical issues pertaining to mediation practice, has been a transformative topic for at least the past two decades. The study and use of mediation is a growing area of relevance in multiple practice areas, and domestic violence is no exception. In the second essay of this symposium issue, Kristine Paronica studies the affects and implications of intimate partner violence on ethical mediation practice. Since the parties' ability to exercise self-determination is a precursor to ethical mediation practice, it stands to reason that the ability of domestic violence victims to exercise self-determination is a primary area of concern for attorneys who work with domestic violence victims.

Ms. Paronica discusses the affects that domestic violence can have on the victims' ability to make decisions, and she also gives a thorough treatment of current best practices in the field and in North Dakota. The dynamics of victim self-determination have serious implications for both mediation participants and mediation practitioners. Beginning with a basic definition of mediation, and working through the ethical obligations of mediation practitioners, Ms. Paronica's essay is a terrific resource for attorneys who want to know the relevant ethical issues vis-à-vis mediation and domestic violence. These issues and their implications are thoroughly discussed in Ms. Paronica's essay.

Professor Cheryl Terrance and Professor Karyn Plumm, with Katlin Rhyner, follow up with an examination of the use of expert testimony based on battered woman syndrome (BWS) in cases of abused women charged criminally for the murder of their abusive male partners. The authors have a volume of scholarly experience in this area and are distinctively suited to render a treatment to the complex topic of BWS. Their article examines the self-defense law in North Dakota and addresses the challenges battered women face when interposing the BWS defense. The article studies a balancing of expert testimony as a valuable instrument for juries, versus the complicated nature of the BWS defense. There is a thorough treatment of the ND self-defense law and also relevant ND case law. The topic is highly relevant, as both prosecutors and defense attorneys have wrestled with this topic for years and will continue to do so in years to come.

In the recent renewal of the VAWA, one of the most controversial aspects pertained to expanded authority granted to tribal courts in dealing with non-Native Americans who are accused of crimes on the reservation. Even after President Obama signed the renewal of the VAWA into law on March 7, 2013, the debate continues over the propriety of tribal jurisdiction extending to non-Native Americans for domestic violence crimes committed on the reservation. This debate is only one small example of the complicated nature of dealing with domestic violence in tribal communities. The United States Attorney for the District of North Dakota has an anti-violence strategy for tribal communities, and there is no one attorney better suited to tackle this subject than Tim Purdon.

Addressing the challenge of public safety on Indian reservations in North Dakota is a complicated and controversial topic. Mr. Purdon does a fine job of giving a brief history of this challenge, and then applying the specific components of this challenge to the four reservations contained within the State of North Dakota. In presenting the detailed anti-violence strategy, he shows how enforcement, crime prevention, and offender reentry programs can provide the foundation upon which this strategy can

succeed over time. It should be noted that there is a clear emphasis within this strategy of maximizing the two factors that are crucial to any effective model to reduce domestic violence: (1) victim safety; and (2) offender accountability.

Denise Finlay is a 2012 graduate of the University of North Dakota School of Law, where she worked as a student attorney in UND's Clinical Education Program. While at UND, she worked with a team conducting legal research for the North Dakota Council on Abused Women's Services. The third article in this symposium is her in-depth study of the disparate impact theory. The disparate impact theory has been used for years in interpreting sex discrimination under Title VII. Finlay argues for an extension of this theory into the workplace, in order to provide protections for survivors of domestic violence who experience discrimination in the workplace. Beginning with an examination of how domestic violence affects a survivor's work experience, Finlay applies that study to traditional sex discrimination under Title VII. She extends and applies the disparate impact theory in a demonstration of how Title VII might be used to provide similar discrimination protection to domestic violence survivors. This article demonstrates how far the legal profession has evolved in addressing the rights of domestic violence survivors in the past forty years. It is instructive to remember that Title VII of the Civil Rights Act is less than fifty years old, and Finlay does a tremendous job weaving facts and law together to persuasively argue that the sex discrimination protections provided by the disparate impact theory can also be used to provide similar protections to survivors of domestic violence in the workplace.

So much of what we do as attorneys is not shown in terms of immediately quantifiable outcome measures, but rather in retrospect, and in subtle gradations, marking our scorecard only after we look back over time and see how today compares to the past. The subject matter in this volume is highly relevant, and the treatment of the subject matter is superb. But the evolution of this topic is far from complete. If we, as a society, are to eventually win the conflict against domestic violence, the legal profession must continue to lead the evolution of this topic. May this volume be one more step toward an eventual victory.