

“She hit me too”

Identifying the Primary Aggressor: A Prosecutor’s Perspective

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Introduction

For the last 30 years domestic violence law has been in constant state of flux. One result has been that police response to domestic violence has changed. In the early 1970s, before domestic violence was taken seriously, arrests were infrequent and the preferred police response was “mediation.” By the mid-1980s² legislative agendas were becoming more hard line and police departments were adopting “pro-arrest policies.” These pro-arrest policies resulted in an increase in dual arrests with the proportion of female arrests rising noticeably.³ In response, primary aggressor laws were passed in the mid-1990s.⁴ In California the “primary aggressor” law was passed in 1996. Today, every effort is made to ensure that victims of domestic violence are not being arrested for defending themselves against attack.

But now, despite changes in the law, the proportion of female arrests continues to climb and the experts are baffled.⁵ Recent statistics have emerged that suggest the long-standing statistic—that 95% of batterers are men—is changing. The Report on Arrests for Domestic Violence in California for 1998, published in August 1999 by the Office of the Attorney General, Bureau of Criminal Information and Analysis, indicates that the percentage of women arrested for domestic violence has increased from 6% in 1988 to 16.5% in 1998.

Do the recent arrest figures indicate that in the past men have borne a statistically disproportionate share of domestic violence arrests; that today the system is finally recognizing women commit more domestic violence than was previously thought? Or are these recent arrest statistics indicative of an underlying problem in the way the system is working?

I believe the latter is true and given the changes in the way police have approached domestic violence situations, it should come as no surprise that new problems are emerging. These problems are not the fault of the police. Police departments’ Domestic Violence protocols are a reflection of public and political demand for a more aggressive approach to crime. In retrospect, these problems should have been anticipated given the fast and furious changes in domestic violence laws. Preparations could have been made for the frequent turnover of police officers, prosecutors and judges handling domestic violence cases; and, the recent focus on primary aggressor training should have been implemented sooner and more collaboratively. It is time to step back and re-evaluate our laws and our protocols, to improve our primary aggressor training, and to ensure everyone has received the most current primary aggressor training available. This is another turning point in the evolution of the criminal justice response to domestic violence.

San Diego’s Turning Point:

In 1997, less than a year after Penal Code section 13701(b) was passed to implement policies discouraging dual arrests and promoting the arrest of the primary aggressor, the San Diego City Attorney’s Office received a police report of domestic violence that marked a turning point for us. This case did not involve cross-complaints of violence at the scene, but it did illustrate how sophisticated batterers can manipulate the system, how the wrong person can be arrested and why we need to provide ongoing training in the area of the identification of the primary aggressor.

In this case, Jack calls 911. He requests police assistance and says “she hit me.” He demands that his wife, Ellen, be arrested. When the police arrive, he indicates that while he was standing in the kitchen with his back to Ellen, he “felt” something on his right shoulder. The police report indicates they had an argument about insurance. Jack admits being angry because Ellen was going to leave him and he wants Ellen to pay for the insurance.

The police learn that Jack and Ellen have been married for 8 years. They have a 3-year old daughter, Tabitha. Ellen has a 15-year old son from prior relationship, Chris. Both kids were present during the incident. Ellen is 7-months pregnant. She is interviewed and says since Jack has been on DV probation, he’s been threatening to retaliate against her. Ellen reports that they were having an argument in the kitchen and both were angry. She reached for a towel at the same time Jack was reaching for food. According to Ellen, she accidentally bumped Jack’s elbow. She denied “hitting” Jack.

The police also learn that Chris left for school before the police arrived. They document “no visible injuries to either party” and “both were calm.” Ellen reports at least three prior domestic incidents where Jack is the suspect. Jack is 6’1” weighing 200 lbs. and Ellen is 5’ weighing 120 lbs. at 7 months of her pregnancy. Jack continues to insist that Ellen be arrested and, based on Jack’s representation of the reported contact to the right shoulder, she is arrested.

In reviewing the facts of this case, it does not appear that a battery was committed. It is understandable given Penal Code section 142—which makes it a felony for any peace officer who has the authority to receive or arrest a person charged with a criminal offense to willfully refuse to receive or arrest such person—that the officers may have felt compelled to arrest Ellen. But Penal Code section 849 permits any peace officer “to release from custody . . . any person arrested without a warrant whenever . . . there are insufficient grounds for making a criminal complaint against the person arrested.” It appears the officers were not aware of or clear on how to use Penal Code section 849 under these circumstances.

Fortunately, Ellen was released later that day from custody after the case was reviewed by a San Diego Police Department domestic violence detective and by a prosecutor from the San Diego City Attorney’s Office.

This report caused reflection and a review of San Diego statistics at that time. We learned that although the arrest of females had increased from 5% to 15.7% in San Diego, only 11.5% had been submitted by the detectives for prosecution and only 6% were in fact prosecuted. Learning that the prosecution numbers were consistent with the historical statistics for prosecutions, our attention turned to understanding why the percentage of females arrested for domestic violence was increasing.

Theories for the Increase in Female Arrests:

A variety of theories have been suggested:

- X The increase in female arrests represents a backlash from the domestic violence laws and pro-arrest policies.
- X Officers lack training in identifying the primary aggressor.
- X Officers may be confused about all the domestic violence laws and policies.
- X The new warrantless arrest law for misdemeanor domestic violence for Penal Code section 243(e) and violations of restraining orders under Penal Code section 273.6 have caused more arrests on minor and technical violations of the law, including more female arrests.
- X There are not enough officers to properly handle the numerous 911 calls and thoroughly investigate all the cases given the time constraints and resource limitations.
- X When prosecutors fail to follow through on primary aggressor arrests, officers become frustrated and are less inclined to extend extra efforts to determine whether dual complaints of domestic violence are meritorious.
- X Women are more violent today than in the past.
- X Women are beating women.
- X More men are willing to come forward now and be believed by officers.
- X Men are learning to intimidate women by threatening to report the woman's self-defense as a domestic violence assault on the man. Women are, therefore, increasingly less likely to call the police to report a domestic violence incident out of fear that they will be arrested.
- X Male batterers are manipulating the system to avoid arrest by claiming that "she hit me too."
- X Women do not understand the legal protections afforded by self-defense.
- X Batterers are retaliating against their partners by having their partners arrested as punishment for calling the police in prior domestic violence incidents.
- X Batterers are training each other about domestic violence laws in jail, in the courtroom and at counseling sessions.

X The “father’s rights” movement has engendered an atmosphere of political correctness, muting the debate over the legitimacy of female on male violence.

While there are many theories, and I have struggled mightily with all of them, I have reached the conclusion for now, as have others, that there is no way of knowing which theory or theories are right.

Relying on experience as both a defense attorney and prosecutor, I do not believe women are more violent than in the past. Male batterers have always alleged “she hit me too.” On the other hand, it is my opinion that it is now more difficult than in the past for police officers and prosecutors to sort out who is the primary aggressor. It seems we have trained our male batterers well. As Gail Pincus likes to say “The jail cell is a great classroom.” Batterers, both male and female, are more savvy about the laws. They have learned that calling 911 first to “tell their story” may help them avoid being held accountable.⁶ They have found that it helps to retaliate against the victim for previous police calls because victims naturally become reluctant to make further calls to the police.

In addition to sophisticated batterers, domestic violence laws today are markedly different than they were in the mid-1980s and they continue to change each year. The changes in domestic violence laws have become so frequent that it is practically impossible to digest one before the next one comes along. Further, as soon as police officers are trained and begin to understand the dynamics of domestic violence, they are transferred. The combination of sophisticated batterers, vacillating domestic violence laws, and police turnover have caused confusion. It is becoming apparent that this confusion is making it difficult for officers to identify the primary aggressor. When there is an allegation at the scene that “she hit me too,” officers are unsure how to proceed. These domestic violence cases are messy and understandably hard to sort out.

If I’m right that it’s more difficult now than in the past to determine the offender at the scene, then the domestic violence community needs to focus on improving training on how to identify the primary aggressor. The key to unraveling the mystery, where both parties allege self-defense, is adequate training of all those involved in prosecuting the case and a thorough investigation by those discovering the facts of the case. With adequate training and strong investigative support, a police officer can identify the primary aggressor and the prosecutor can prosecute. In addition, I believe we need a moratorium on further changes in the law. This would give officers and prosecutors an opportunity to effectively implement what is already in place and allow primary aggressor training to become current with the existing legal requirements.

San Diego's Primary Aggressor Training:

Progress is being made on this front. For example, law enforcement agencies in San Diego deserve special recognition. In 1998, at the request of City Attorney Casey Gwinn who was then President of the San Diego Domestic Violence Council, all law enforcement agencies participated in bringing the 1990 San Diego Domestic Violence Law Enforcement Protocol current. This update included, among other things, more information on the identification of the Primary Aggressor.

The San Diego Police Department, in particular, made a significant effort to educate its officers about the Identification of the Primary Aggressor. The department increased its domestic violence training at the Academy, incorporated primary aggressor training at the Regional Officers' Training Program and added a four-hour menu class on the Identification of the Primary Aggressor with the assistance of Sgt. Dan Plein. Additionally, Lt. Jim Barker, mandated that all of his domestic violence detectives attend this class.

Further, the California Commission on Peace Officer Standards Training and the California District Attorney's Association have included specific training on the "Identification of the Primary Aggressor" in all of their domestic violence training programs.

Recommended Training for Identifying the Primary Aggressor:

Police officers and prosecutors must receive the same "primary aggressor" training. It is necessary that the primary aggressor be identified consistently. Training needs to be ongoing and comprehensive. Among other things, primary aggressor training should include the following components: (1) the primary aggressor law, (2) factors to consider in identifying the primary aggressor, (3) defining mutual combat, (4) criteria for making dual arrests, (5) distinguishing defenses from excuses, (6) the consequences of dual arrests and/or arresting the wrong individual, (7) signs and symptoms of attempted strangulation, (8) when women use violence, (9) distinguishing between offensive and defensive injuries, (10) identifying the sophisticated batterer, (11) battered woman syndrome, (12) evidence gathering, (13) report writing, (14) follow-up investigation, (15) case scenarios, (16) issuing considerations for prosecutors, (17) using police officers as primary aggressor experts at trial and (18) advocacy for battered victims who find themselves as defendants.

1. Primary Aggressor Law

When both parties in a domestic violence situation claim that they have been assaulted by the other party, it will be necessary to determine the who is the primary aggressor. To determine the identity of the primary aggressor, officers need to follow state law and department policy.

California Penal Code section [REDACTED] (b) provides:

written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. These policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the primary aggressor in any incident. The primary aggressor is the person determined to be the most significant, rather than the first aggressor. In identifying the primary aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either party acted in self-defense.

Under the policy of the San Diego Police Department, officers are also encouraged to look for the person most likely to inflict injury and the person least likely to be afraid as well as the domestic violence history, both documented and undocumented, to make this determination.

Although documented procedures—whose origins can be traced to state law and well-intentioned department policies—exist, many experienced prosecutors, police officers and instructors recognize that more guidance is needed to overcome some old methods of identifying the primary aggressor. These include:

Myth 1: The Primary aggressor is the person who strikes the first blow.

Myth 2: The Primary aggressor is the person who wins the fight or has no injuries.

Myth 3: The Primary aggressor is the person who is drunk and obnoxious.

While the primary aggressor may be the person who strikes the first blow, wins the fight or may be drunk, the analysis can not end there. Identifying the primary aggressor requires the consideration of many other factors. In 1996, Deputy District Attorney Candace Heisler lead a group of domestic violence experts in a discussion at the California District Attorneys' Domestic Violence Conference. Her goal was to identify additional factors officers and prosecutors could use to determine the primary aggressor. As a result of those efforts and others, many training programs⁷ now include additional factors for consideration.

2. Factors to Consider in Identifying the Primary Aggressor

- X Age, height and weight of the parties
- X Criminal history
- X Domestic violence probation

- X Corroboration
- X Presence of fear
- X Offensive/defensive injuries
- X Seriousness of injuries
- X Motive to lie
- X Strength and skill
- X Use of alcohol or drugs
- X Identity of the 911 reporting party
- X Timing of the cross-complaint
- X Demeanor of the parties
- X Existing protective orders
- X Detail of statement
- X Admissions
- X Evidence of consciousness of guilt
- X Presence of power and control behavior
- X Defenses: Self defense, defense of others, defense of property, ejection of the trespasser

These classes also include questions to ask:

- X Who is fearful of whom?
- X Who in the relationship poses the most danger to the other?
- X Who is seeking to stop the violence?
- X Who is seeking to avoid punishment?
- X Who is at most risk of future harm?
- X Who has motive to lie or retaliate?
- X Who's story makes the most sense?
- X Do the injuries and evidence corroborate the statement?
- X Is there evidence of consciousness of guilt?
- X Is there a history of domestic violence, as a perpetrator or as a victim?

Another good question to ask both parties at the scene is “what will your partner tell me about what you did?” Then confront the female with the male’s version. Find out what she believes. Does she confirm or deny the male’s version? Then ask the same set of questions of the other party .

Always ask “what was the argument about?” This question more than any other question will help identify any motive to lie and/or expose any possible defenses. Finally, document the reasons why one version is more believable than the other and the reasons for the arrest.

3. Defining Mutual Combat

In domestic violence situations it is not uncommon for both parties to assert that the other party

was actively engaged in the violence. This pattern of claims is sometimes grouped under the concept of “mutual combat.” The term “mutual combat” is often misused and misunderstood by police, prosecutors and judges.

Police officers tend to classify a domestic violence case as “mutual combat” when both parties have injuries and they simply don’t have the time to sort out a messy case at the scene, thinking it is the prosecutor’s job to sort it out in court.

Prosecutors tend to use it when both parties have injuries or both parties allege self defense at the scene. Prosecutors think if the police officers can’t figure it out, nor will the judge or the jury.

Judges and juries use the term “mutual combat” to justify their not guilty verdicts.

It is instructive to think of mutual combat in the context of the western shoot-out. Recall the movie “Tombstone” where Doc Holiday and Johnny Ringo engage each other in a duel. The two men are of the same physical stature. They both have a gun. They are equally matched in skill and both agree to “shoot it out.” During the big fight scene, they attempt to stare each other down, each with their hand resting squarely on their gun. The tension builds before Doc Holiday finally says “when” and shoots Johnny Ringo between the eyes. Clearly, this is mutual combat.

But this is not the situation in most homes where domestic violence is present. The parties are rarely evenly matched. Usually, one person is more powerful than the other, not just in size and strength, but in important aspects of their personal relationship. Often, there is no opportunity to “opt out” and the options for domestic violence victims are limited: run, stay or defend yourself.

To date, there are few documented police reports that describe the scene where a wife calmly says over dinner, “Honey, I’ve had enough of your abusive behavior. It’s time to settle our differences. After dinner, let’s go outside and fight it out. Winner keeps the house and kids. Loser leaves and pays attorney’s fees.”

Misunderstanding “mutual combat” can lead to improper dual arrests, arrests without probable cause and police liability for false arrest.

4. Criteria for Dual Arrests

When both parties allege domestic violence against each other, the police officer must evaluate each allegation separately and determine whether probable cause exists to arrest one or both parties.

Probable cause to arrest requires that the facts or circumstances confronting the officer at the time of the arrest would lead a peace officer of ordinary caution or prudence to believe and entertain a strong suspicion that the person arrested had committed the alleged crime. The San

Diego Law Enforcement Protocol on Domestic Violence (updated 1998) lists factors officers should and should not consider when making an arrest for domestic violence.

If the officer determines that one person was the primary aggressor, the officer must arrest the primary aggressor and not the other person who acted in self defense. If the officer determines that probable cause exists that both parties used violence, not in self defense, then California law permits a dual arrest. A reasonable expected rate of dual arrests, according to retired Sgt. Anne O'Dell, would be 3% of all domestic violence arrests. Anne believes "if a jurisdiction or a law enforcement agency has a higher percentage, it indicates a lack of training or a lack of a clear policy to direct officers in how to properly investigate a domestic violence case." To overcome problems with high dual arrest rates, some police agencies have required their officers to submit separate police reports or narratives in support of each arrest. According to Anne, the "two-police report" rule is an excellent way to encourage police officers to identify the primary aggressor and avoid dual arrests.

A dual arrest made without establishing probable cause against both parties can result in the victim being falsely arrested. False arrests places law enforcement agencies in civil jeopardy.⁸ Consequently, it is important to emphasize that if an officer cannot determine the identity of the primary aggressor at the conclusion of his/her investigation and there is no probable cause to arrest either party, then no one should be arrested.

5. Defenses and Excuses

The most common legal defense in a domestic violence case is self defense, followed by defense of others, defense of property and ejection of a trespasser. All these legal defenses should be considered by officers and prosecutors in determining the identity of the primary aggressor.

There are also non-legal defenses commonly raised by defendants through their defense attorneys such as "self-inflicted" injuries, "some other dude did it," "defense of self," "nothing happened, officer" or the "culture" defense. Despite a prosecutor's objection, these defense arguments sometimes make their way into the trial but are rarely given credence by the jury or the judge. More often than not, they are considered as mitigating evidence at time of sentencing. Nevertheless, both police and prosecutors need to anticipate them.

The "self-inflicted injury" argument tends to come up in attempted strangulation cases. At trial, the defendant attempts to argue the victim is making up the whole thing and scratched herself to get him in trouble. In actuality, what tends to happen is that the defendant was manually strangling the victim with both hands. In an effort to protect herself, the victim violently pulls the defendant's firm grip from around her neck in an effort to survive. During the prying and pulling, the victim may scratch herself.

The "some other dude did it" argument comes up when the defendant is "GOA" (gone on arrival) and the victim does not identify the defendant through a photograph. At trial, with the victim

recanting or testifying for the defense, the defendant attempts to argue the victim had another lover and he abused her, not him.

The “defense of self” argument comes up when the victim is very upset at the scene or may be attending counseling or has a history of counseling. At trial, the defendant attempts to argue that the victim was “out of control” or “crazy” and all he was trying to do was protect her from herself by “lovingly restraining her.”

The “nothing happened, officer” comes up in an effort by the batterer to get the police out of the house. This argument is rarely successful because of the evidence to the contrary. According to Fresno Police Detective Mike Agnew, the key is simply to get the suspect committed to this story or “locked in” and let the evidence collected by the officers and detectives speak for themselves.

The “culture defense” comes up most often with immigrant defendants who believe that they should be able to discipline their wives in the same manner as their own country—according to their version—permits. They believe that their “ignorance” of the customs and laws of this country is a legitimate defense. Fortunately, ignorance of the law is no defense in this country. For an excellent discussion on culture defense see “Cultural Considerations in Domestic Violence Cases,” a National Judges Benchbook by Maria Ramos and Edited by Michael Runner and produced by the Family Violence Prevention Fund in 1999.

These arguments are not legally recognized defenses. While at times they may have merit, these arguments (mostly excuses) should be documented by police officers and considered by prosecutors, but they should not interfere in the officer’s evaluation of probable cause to arrest or the identity of the primary aggressor nor keep a prosecutor from prosecuting the case.

a. Self Defense

Under California Jury Instruction 5.30, it is lawful for a person who is being assaulted to defend him/herself from attack if, as a reasonable person, s/he has grounds for believing and does believe that bodily injury is about to be inflicted upon him/her. In doing so, that person may use all force and means which s/he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent. *See also* Penal Code section 693.

In evaluating self defense, officers should also consider whether: (1) the force was reasonably necessary to prevent harm, (2) the harm itself was actual or imminent; and (3) the victim’s belief of harm was reasonable.⁹

Rhonda Martinson, Staff attorney for Battered Women’s Justice Project, suggests asking the following questions:

1. To determine whether “the force was reasonably necessary to prevent harm”:

- X What kind of injury is it? A bite or scratch are commonly inflicted in self defense.
- X Where are the injuries? A bite to the chest may occur from being restrained. Scratches to the face, hands or arms may occur from someone trying to escape from strangulation.
- X What amount of force appears to been used in inflicting the injury?
- X What is the level of force used by each party?
- X Whose version of events is corroborated by the evidence?

2. To determine whether the harm itself was actual or imminent:

- X Is there a history of domestic violence?
- X Is there a history of prior threats?
- X Have those threats been carried out before?
- X Has the suspect hurt other partners in the past?
- X Has the suspect engaged in other violent activities?
- X Was the suspect handling a weapon in such a way to imply a threat? Maybe twirling a knife? Cleaning a gun? Loading or unloading a gun?
- X Was the suspect acting in such a way to imply a threat? Demeanor, voice, tone, looks?

3. To determine whether the victim’s belief of harm is reasonable:

- X Is there a history of domestic violence? Documented or undocumented?
- X Were injuries inflicted in the past? How serious?
- X Is there corroboration to prior violence?
- X Was the suspect intoxicated during prior incident(s)?
- X Does the suspect have a history of mental problems?
- X Does the violence appear to be escalating? If so, her perception of danger may also be escalating.
- X Were children previously assaulted, being assaulted or threatened?
- X Were the threats specific or vague? Any special meaning to the victim?
- X Was the suspect appearing to be carrying out a threat? Like sharpening a knife, purchasing bullets?
- X Any incidents in public?

b. Use of Weapons

When a woman uses a weapon to defend herself, such as a frying pan, a knife or any other household object, self defense still applies. Remember, California law states a “person may use all force and means which she believes to be reasonably necessary . . . to prevent the injury which appears to be imminent.” If the male is bigger and stronger, the defending female is entitled to use a weapon to make things fair or “equalize the power differential.” However, if circumstances are reversed such that the male is smaller and the victim is bigger and stronger,

then using a weapon to defend oneself may not be appropriate.¹⁰

Let's review the following two scenarios frequently used by Retired Sgt. Anne O'Dell in her primary aggressor training:

- X Husband comes home drunk. The woman has a history of being battered in her home especially after he has been out drinking and comes home drunk. He becomes argumentative with her and is trying to "pick a fight." She retreats to the kitchen and he follows her. He begins to raise his voice and threaten her with his body language and piercing eyes. She backs up to a drawer, pulls out a knife and tells him to stay away from her.

- X Husband comes home drunk. The woman has no history of being battered. She berates him for drinking. She is angry he went out drinking with his friends, leaving her alone with the kids. He ignores her. She continues to berate him. When he snaps back and calls her a "bitch" she pulls a knife from the kitchen drawer and threatens him.

Clearly, the woman in the first scenario is acting in self defense. Furthermore she has no duty to retreat¹¹ and has the right to defend herself when she is confronted by the appearance of danger.¹² The woman in the second scenario is the primary aggressor. She is responding to being called an insulting name and is not afraid. The law does not permit the use of "self-defense" under this scenario since "a provocative act which does not amount to a threat or an attempt to inflict physical injury, nor words, regardless how offensive or exasperating, is sufficient to justify a battery."¹³

c. Defense of Others

In domestic violence cases, children, family members and/or friends may intervene during a domestic dispute. When they do, the batterer may strike out at them and the victim may then use violence to protect her child, family member, friend or neighbor. When determining the identity of the primary aggressor, officers should also consider defense of others.

California Jury Instruction 5.32 provides:

It is lawful for a person who, as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another to protect that individual from attack. In doing so, s/he may use all force and means which such person believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

See also Penal Code section 693.

d. Defense of Property

In domestic violence cases, batterers will use power and control tactics to control the victim. They will attempt to take and control the personal property of the victim such as car keys, purses, money, special momentos, photos, remote control units and computer files. The victim may use violence to retrieve her personal property. When determining the identity of the primary aggressor, officers should also consider defense of property.

California Jury Instruction 5.43 provides:

When conditions are present which, under the law, justify a person in using force in defense of property, that person may use that degree and extent of force as would appear to a reasonable person, placed in the same position, and seeing and knowing what the resisting person then sees and knows, to be reasonably necessary to prevent imminent injury threatened to the property. Any use of force beyond that limit is excessive and unjustified, and anyone using excessive force is legally responsible for the consequence thereof.

See also Penal Code section 693.

e. Ejection of the Trespasser

A common scenario is when a former boyfriend or girlfriend goes to his/her ex's apartment or house. An argument ensues and s/he is asked to leave. When s/he refuses to leave, the lawful tenant attempts to eject the trespasser. Under California law, it is legal to use reasonable force to eject a trespasser.

California Jury Instruction 5.40 provides:

The lawful . . . occupant has the right to request a trespasser to leave the premises. If the trespasser does not do so within a reasonable time, the . . . occupant may use reasonable force to eject the trespasser. The amount of force which may be used to eject the trespasser is limited by what would appear to a reasonable person under the existing circumstances, to be necessary to prevent damage to the property or physical injury or death to the occupant and/or his/her family members or guests.

6 Consequences for Dual Arrests or Bad Arrests

Arresting both parties or the wrong individual, sends the wrong message to offenders, victims and children and should be cause for concern.

- X Offenders who cause the other party to be arrested are being rewarded for manipulating the system. They feel invincible.
- X Victims think twice before calling the police. As a result they continue to live in fear.
- X Children are learning to distrust the police. In cases where both parents are arrested, children associate the presence of police with the breakup of the family.
- X Police officer frustration is growing.
- X Batterers are not being held accountable.
- X Victims are not being protected and as a result are increasingly unwilling to seek help.
- X Issues concerning dependency, child custody, housing, immigration and other consequences are emerging.

Clearly, it is important to have a clear understanding of what is and what is not mutual combat in order to avoid dual arrests and arresting the wrong person.

7. The Signs and Symptoms of Attempted Strangulation Cases¹⁴

Because a victim of an attempted strangulation may not have any visible injury from the attack, police officers need to be particularly diligent in determining the primary aggressor. It is quite possible they may find the male assailant with visible injuries and the female victim with no visible injuries.

Strangulation has only been identified in recent years as one of the most lethal forms of domestic violence: unconsciousness may occur within seconds and death within minutes. Today, we know that victims may have no visible injuries whatsoever —yet because of underlying brain damage by lack of oxygen during the strangling — victims may have may serious internal injuries or die days or several weeks later.

In a study conducted by the San Diego City Attorney’s Office of 300 domestic violence cases, visible injuries such as tiny red spots on the face, bloody red eyes, red marks, scratches and bruising on the neck, were only visible 16% of the time. Often, when visible injuries were present, the injuries were subtle and hard to find. Consequently, it is important for officers to take special care in looking for injuries around the eyes, under the eyelids, nose, behind the ears, inside the mouth, neck, shoulders, and upper chest area. Even more critical in the investigation of a strangulation case, is the documentation of symptoms such as:

- X Hoarse or raspy voice
- X Loss of voice
- X Pain and/or difficulty swallowing
- X Coughing
- X Nausea and/or vomiting
- X Internal neck injury

- X Difficulty or inability to breathe
- X Mental changes
- X Lightheadedness
- X Involuntary urination or defecation

According to Dr. George McClane, a nationally recognized expert on strangulation, a victim who is strangled may first feel severe pain, followed by unconsciousness and even death. The victim will lose consciousness by any one or all of the following methods: blocking of the carotid arteries (depriving the brain of oxygen), blocking of the jugular veins (preventing deoxygenated blood from exiting the brain), and closing off the airway, causing the victim to be unable to breathe. Only eleven pounds per square inch of pressure placed on both carotid arteries for ten seconds is necessary to cause unconsciousness. However, if pressure is released immediately, consciousness will be regained within ten seconds. To completely close off the trachea, three times as much pressure (33 lbs./square inch) is required. Brain death will occur in 4 to 5 minutes, if strangulation persists.

8. When women use violence.

It's important to acknowledge that women use violence. It is a crime for a male or a female to use to violence which is not in self defense. Domestic violence is a crime and domestic violence laws apply equally to men and women. Police and prosecutors are duty bound to apply the laws of California uniformly and fairly. With the increase in the number females being arrested, it is inevitable that some females will be arrested who also have a history of being abused themselves. When this happens, police officers and prosecutors must evaluate each case independently, including the facts of the instant offense and prior domestic violence history. These difficult cases can be more effectively evaluated if it is understood why women use violence. In *Women Who Abuse in Intimate Relationships* (Hamlett 1998), violent women were grouped into three categories:

- X One group includes women who use violence in self-defense to escape or protect themselves from their partner's violence. Saunders (1986) found that this was the most frequently reported motivation for women's use of violence.
- X In a second group are women who have a long history of victimization at the hands of previous partners as well as during childhood. These women are described as taking a stance in life that "no one is ever going to hurt me that way again" and their violence is interpreted as an effort to decrease their own chances of victimization.
- X Violent women in a third group are identified as primary physical aggressors who use their greater physical power to control partners.

Several years ago in a Santa Barbara study based on an analysis of police reports, it was found that in 90% of the cases (in instances where injuries were noted) the injuries were to women

only. In the remaining 10%, both parties had injuries. In all cases where both parties had injuries, the woman's injuries were more severe than the man's injuries.

9. Distinguishing Between Offensive and Defensive Injuries

The head, face and neck are the most frequent places injury is received during domestic violence.¹⁵ Also, common are injuries to the torso such as the chest, breast or abdomen.¹⁶ Battered women are more likely to have abrasions or contusions from being punched (67.5%), pushed (51.3%), kicked (35.1%), slapped (33.8%) or hit with an object (29.9%).¹⁷ Dr. Salber and Dr. Taliaferro have identified the following injuries as characteristic of domestic violence:

- X Bilateral injuries, especially to the extremities
- X Injuries at multiple sites
- X Fingernail scratches, cigarette burns and rope burns
- X Abrasions, minor lacerations or welts
- X Pattern injuries such as bite marks; marks from jewelry, belts or keys; or designs or patterns stamped or imprinted on or immediately below the epithelium by weapons
- X Injuries that are inconsistent with the victim's explanation
- X Multiple injuries in various stages of healing
- X Injuries during pregnancy

The typical bite mark, according to Dr. Sperber, is a "round or oval, ring-shaped injury consisting of two facing arches, each made up a series of aligned contusions, abrasions and/or lacerations. The entire injury measures 3-4 cm. The individual markings comprising the arches represent the biting surfaces of front teeth distributed around the upper and lower jaws." There are also variations in the pattern:¹⁸

1. Central ecchymosis - contusion within the center of the bite mark caused by capillary bleeding. It occurs as a result of compression of tissue by the teeth with or without suction.
2. Drag marks - radiating, linear contusions or abrasions at the periphery of the mark indication of scraping of teeth along the skin as the bite occurred.
3. Avulsed bite mark - when the bitten tissue is torn off, leaving a central lacerated defect.
4. One arched bite mark - rare, but may occur.
5. Half bite mark - when only the right or left side of a bite mark shows up.
6. Double bite mark - bite mark within a bite mark. Occurs when skin is bitten, then starts to slip out between teeth and is bitten again.
7. Overlapping bite marks - multiple, separate bite marks made repeatedly in the same general location.
8. Toothless bite mark - shows a contused ring of compatible size and curvature but without well defined, individual tooth marks. Occurs in healing bite marks and bite marks on soft or fatty skin.

Typical domestic violence injuries that may be detected by a dentist¹⁹ are:

- X Intraoral (inside the mouth) bruises from slaps, hits and soft tissue pressed on hard structures like teeth and bones.
- X Soft and hard palate bruises and abrasions from implements of penetration could indicate force from a sexual act.
- X Fractured teeth, nose, mandible and/or maxilla. Signs of healing fractures may be detected in panoramic radiographs.
- X Abscessed teeth could be from tooth fractures or repeated hitting to one area of the face.
- X Torn frenum (a fold of membrane which checks or restrains the motion of a part, such as the fold on the underside of the tongue or upper lip) from assault or forced trauma to the mouth.
- X Hair loss from pulling, black eyes, ear bruises, other trauma and lacerations to the head.

Self-defense injuries, as described by Dr. Dully (a practicing clinical forensic physician at Camp Pendleton) are injuries often found on the aggressor, such as scratch marks and bite marks on the aggressor's body, especially on the chest and face.

- X Scratch marks to the face, hands and/or arms are common when a victim is defending herself from an attempted frontal manual strangulation.
- X Bite marks on the chest are common when the victim is forcibly confined into a bear hug, face pressed into the assailant's torso.
- X Bite marks on the arms are common when the victim is defending herself from an attempted manual strangulation by use of a "carotid restraint" or "chokehold."

Defensive injuries are injuries frequently found on the victim in an effort to defend herself such as the back of the arms or palms (which may be used to block blows), the bottom of the feet (which may be used to kick away the assailant) or injuries to the back, legs, buttocks or back of the head (from being curled in the fetal position).²⁰

Hidden injuries are those injuries that are hard to see because of the location of the injury or because victims may be reluctant to report or show her injuries to a police officer. It is important for officers to carefully examine the scalp for cuts and/or bumps which may easily be concealed by hair. Likewise, officers should look for injuries to the face which may be concealed by heavy makeup or glasses; injuries to the neck that may be concealed by a turtleneck sweater, a scarf or jewelry; and injuries to the arms and legs which may be concealed by a long-sleeved blouse or pants.

Dr. Dully has also described "suspicious" injuries, likely caused from an assault, as follows:

- X Wrinkle injuries to the back of the ear from ear pulling, pinching, punching or slapping
- X Pattern injuries to the neck from jewelry being pulled or pressed or abraded into the skin when the victim is being grabbed

- X A cut to the face from a ring during a back-handed slap
- X Lip injury from being punched or slapped
- X Friction injury under the arms from pulling of clothes, also at the collar area
- X Wrist injuries from being held down or grabbed
- X Inner thigh injuries from being sexually assaulted
- X Car injuries resulting from vehicle pursuits, rapid escapes, attempts to run over or crush to prevent vehicle escape, and
- X Skin injuries from being slammed up against walls or down to the floor including carpet burns from being dragged across surfaces.

X
Sgt. Dan Plein from the San Diego Police Department frequently instructs officers to look for offensive injuries on the aggressor's hands and to take pictures of, and note, any cuts and abrasions on the aggressor's knuckles.

10. Identifying the Sophisticated Batterer

Batterers, like any criminal, do not want to be caught. They do not want to go to jail. To avoid accountability, batterers will do almost anything to outsmart the police officer who responds to a 911 call. Officers need to know that batterers can be very sophisticated, charming and manipulative. The "Profile of an Assailant" produced by Duluth is a great training video for police officers and prosecutors. It will help you understand the sophisticated batterers and assist with interrogation or cross-examination. Below are some common strategies sophisticated batterers will use to avoid being arrested and prosecuted:

- X Hide the evidence.
- X Provide first aid to the victim or make her clean-up before police arrive.
- X Instruct the victim and the children to lie.²¹
- X Hit the victim in places that will leave no marks or will be hard to see.
- X Blame the victim.
- X Lie by claiming to be the victim or acting in self defense.
- X Manipulate the police officer by painting themselves as being "reasonable" and the victim as "crazy."
- X Use "power and control" tactics.

11. Understanding the dynamics of Domestic Violence

By understanding the battered woman, police officers and prosecutors will be better equipped to assist victims of domestic violence from the initial 911 call through prosecution. All people have an image of what victims should look like and how they should act. Often that image conflicts with the way battered victims present themselves in their attitude and/or demeanor. The victims presentation is perceived as "unvictim-like" behavior. Battered women have many different reactions to violence and abuse. They may be emotionally upset or emotionally numb. They may be fearful, angry, sad, ashamed, distrustful or in shock. Their cultural background may

influence the way their emotions are expressed. They may be intoxicated and/or under the influence of drugs.

By understanding the battered woman syndrome,²² post traumatic stress disorder, the cycle of violence²³ and power and control, domestic violence professionals can conduct a better investigation, understand why battered victims may display “unvictim-like” behaviors and avoid becoming frustrated when the victim recants, stays with her abuser or refuses to testify.

X Small Window of Opportunity

When a domestic violence incident is reported, the victim is most likely in the “acute battering” phase. During this phase, she is usually willing to tell the truth and be amenable to intervention. This is the time officers need to take detailed statements about the current incident as well as prior incidents. The window of opportunity to intervene is short. Depending on the victim, her willingness to tell the truth may last only minutes and usually no more than a few days. She may also be experiencing guilt, one of four characteristics of the Battered Woman Syndrome— guilt, denial, enlightenment or responsibility.

X Beware when she says “It’s all my fault”

At the time a police officer responds to a domestic violence call, the victim may be blaming herself for the violence in which case she might tell the responding police officer that “it was her fault” when asked what happened. When officers hear “it’s all my fault,” do not stop your investigation there but follow-up by asking “what do you mean it’s all your fault.” Generally, what you will hear from a battered woman is something like “Well, he told me not to call my mother. I did. He got angry and he slapped me. I then pushed him back. It’s all my fault because I didn’t do what he told me to do.” Taking a few extra minutes to find out what she means by “it’s all my fault” will make for a better case. You will know the reason for her use of violence. If she used violence in self-defense, then you won’t arrest the wrong person. If she did not use violence in self defense, then you know you arrested the right person.

X The Recanting Victim

Gail Pincus emphasizes “that about 80% of the time a woman who has been initially assaulted by a boyfriend, husband or lover will recant, change or minimize her story.” This recanting does not happen only after there has been a continuing pattern of abuse. Depending on the severity of the incident, it is more likely to occur after a first incident.²⁴ Victims may recant for many reasons and at any time.

It can happen at the scene when the victim sees a certain “look” or hears a certain “tone.” For this reason, officers have been encouraged to separate the parties at the scene. It can happen when the batterer calls the victims from jail and tries to win the victim over through affection, promises or intimidation. For this reason, domestic violence detectives need to work fast and

contact the victim as quickly as possible. When detectives contact victims, they need to consider that the victim may be experiencing one of the four characteristics of the Battered Women Syndrome.²⁵ She may also have had contact with the batterer and already entering the “honeymoon phase.” When the victim recants, officers, detectives and/or advocates should reassure the victim that they are there to help her, provide her with important numbers and discuss a safety plan. After addressing the victim’s safety concerns, detectives can help prosecutors by trying to determine why she is recanting:

- X Has she had contact with the batterer?
- X Is he out of jail?
- X Has she had contact with the batterer’s family members?
- X Has he apologized?
- X Is she afraid of retaliation?
- X Is she afraid he will take the children?
- X Is she afraid he is going to kill her?
- X Is she dependent on the batterer for money?
- X Do they have children together?
- X Is she still in love with him?
- X Are there any cultural issues?

Additionally, Fresno Police Detective Mike Agnew takes this opportunity to ask the victim if she believes it’s okay for him to abuse her. He finds that even if the victim is recanting, her response is usually: “No, it’s not okay for him to treat me this way.” He then follows up with questions like, “What would you like to see done?” or “How can we stop his behavior?” This discussion, Mike believes, helps the victim understand why prosecution must go forward in order to stop his behavior even if she continues to recant or does not to participate in the criminal proceedings. It also helps her understand that police and prosecutors are trying to help.

By understanding why victims recant, domestic violence professionals can focus more on the batterer’s behavior as opposed to the victim’s behavior. Instead of becoming frustrated and losing patience with the victim, domestic violence professionals will be able see through the victim’s “protection mechanism,” and develop interviewing skills which will illicit truthful information as opposed to “shutting” her down.

12. Evidence Gathering

After the responding officer conducts his/her investigation and determines the identify of the primary aggressor, it is important for the officer to document and photograph all the evidence that supports that conclusion. Do not leave any holes open for the defense to attack. Do not leave any room for lies. In domestic violence cases, documenting and gathering the evidence is the key to a successful prosecution because frequently victims will recant or be unavailable for trial making it easier for defendants to come up with some sort of cockamamy story. However, prosecutors can still proceed with prosecution provided officers collect sufficient evidence of the

crime.

Evidence-based prosecution²⁶ means documenting the demeanor, description and physical condition of both parties, the use of drugs and/or alcohol, the crime scene (diagram and photo), parties' injuries or lack of injuries, the presence of weapons (as well as impounding all the weapons used in the commission of the crime), the presence and identity of witnesses, history of domestic violence, existence of protective orders, identity of the reporting party, location of the parties, the party's medical treatment, obtaining a medical release from the victim to later corroborate her injuries, and detailed statements from all witnesses. Many agencies use a domestic violence supplemental reporting form²⁷ for investigating domestic violence cases.

X Demeanor of the Parties

With respect to the parties' demeanor, officers should document if the victim and suspect appeared to be angry, apologetic, afraid, upset, crying, hysterical, calm, irrational, nervous, threatening, complaining of pain, or injured. If the victim or the suspect appeared to be under the influence of alcohol or drugs, evaluate them for charges related to being drunk in public or under the influence of drugs. While California law only requires officers to document the suspect's use of alcohol or drugs, officers are encouraged to evaluate both parties. Their level of intoxication and/or drug use at the time of the incident is relevant and admissible evidence at trial. When no mention is made in the officer's report about the victim's level of intoxication or lack of any alcoholic intake, amazing things happen and mounds of lies get told. For example, a defendant may claim that the victim was falling-down drunk and her injuries were caused when she fell down from being drunk. Or, maybe that the victim came home drunk and locked herself out of the house. She injured herself when she forced entry. He wasn't even there. She made the whole thing up because she was mad he wasn't home. Defense attorneys are good at exploiting holes in an officer's report to the advantage of the defendant.

X Location of the Parties

The location of the parties can be very illuminating. Sometimes officers have located a naked female hiding behind the bushes, crying, fearful and injured, within minutes after running out of the house to escape abuse. Sometimes officers have found male suspects hiding in the closet, underneath cars or at a local 7/11 waiting for the police to leave. At other times, suspects are walking or running away from the scene which prosecutors can use to show conscience of guilt at trial. The demeanor of the parties is an important factor in determining the identify of the primary aggressor.

X Terminology ("fighting" and "hitting")

With respect to taking statements, officers should be sensitive to terminology while interviewing witnesses. Seek clarification when in doubt and always verify the accuracy of witness statements before concluding your investigation. Terminology may direct the course of an

investigation and ultimately cloud the identification of the primary aggressor. For example, children may say “Mommy and Daddy are fighting” which may suggest to the officer that the case may be mutual combat but in actuality the children mean their parents were only raising their voices, that one parent hit the other and/or the other parent was defending him or herself. Neighbors may make 911 calls and report that the neighbors are “fighting” but mean something different.

Another term to watch out for is “hitting.” For example, the victim may say, her husband “hit” her. But if the officer asks the suspect if he “hit” his wife, he may say no, although he would admit to pushing or slapping her.

X Interviewing children

The way the child is interviewed can affect the child’s disclosure of information. The approach of the interviewer, the wording of the questions and the interviewer’s verbal and nonverbal communication can impact how the child interprets and responds to questions.²⁸ The golden rule when interviewing children in domestic violence cases is to interview them separately from the parents. Just like the statements of domestic violence victims are influenced by the batterer, the statements of children are influenced by the parent. If the abused victim recants, it is likely the child or children will later recant. If the child feels intimidated by one of the parents (the batterer), s/he will likely feel compelled to tell the officer whatever the parent told him or her to say.

For example, in a recent case received by San Diego Police Department the children were taken to the police station by the male batterer. He instructed his children to “tell a lie” about what had occurred in the home. The officer took the children’s initial statement and noted in his report:

I interviewed both children separately and they gave me a statement that was almost identical to their fathers. The only difference was that both kids were very nervous and they recited what had occurred very slowly and were thinking about the story as they told it. Both children told me that their mother was acting strangely due to her having menopause. I asked both children about their mothers bruises and both said, “my mother bruises like a peach.”

Later it was discovered that a domestic violence incident had just occurred and the father had left the scene with the children, taking them to the police station where he reported he was a victim of domestic violence. When the officer later re-interviewed the children away from the father, he was told a different story. The officer wrote the following:

After I brought the kids homes, they confessed they had lied to me at the station. Alexis said “my Dad told us to tell the officers his

story because he didn't want to go to jail. I know it wasn't right, but we were afraid. Christian and I were really in the car waiting while mom and dad were in the house. We never saw what happened. They have been arguing and fighting a lot. My Dad's moods always change. He'll be happy then mad and angry the next minute"

To avoid having a child's statement be influenced by one of the parents, it is critical for officers to interview the children away from the parents. A friendly approach to the child can build rapport and the information provided by the child may be more accurate. Interviewers who use rapport building approaches such as smiling, making brief eye contact and conducting the interview at the child's level (rather than from above them) have been found to obtain more accurate information than from "unfriendly" interviewers who do not smile, who make constant eye contact or who do not ask rapport building questions about the child (Goodman, Bottoms & Schartz-Kenny 1991).

X Take Pictures of Both Parties

The number one defense in a domestic violence case is self-defense. If the suspect does not allege self-defense at the scene, s/he will allege it later at trial. At trial, the prosecutor will then need to prove to the jury that the defendant was, in fact, the primary aggressor. The more evidence collected at the scene, the less likely a contrived "self-defense" claim will arise or survive at trial. When photographs are only taken of the victim and not the suspect, the suspect can easily claim "she hit me too and his injuries were not photographed because the officers were biased against me." By taking photographs of both parties as well the children, the broken furniture, the disabled phone, weapons, etc., the officer is perceived as conducting a careful and complete investigation.

13. Report Writing

Police officers are encouraged to include their experience and training in their domestic violence reports. I would like to see officers include something like: "I have received domestic violence training at the academy and received 4-hours of primary aggressor training at a menu class. Over the last four years as a patrol officer, I have responded to hundreds of domestic violence cases"

With respect to the identity of the primary aggressor, the officer's reasons for arresting the primary aggressor is critical. Below are some examples from reports in San Diego which are helpful: "After conducting my investigation, I determined the primary aggressor to be Jack and the scratch marks sustained by Jack to be the result of Jill's effort to break away from his hold."

Based on the statements of the two subjects, I believed that Wilson was the primary aggressor in this incident and lost his temper when

Gardner refused to go along with his plan. I arrested Wilson for spousal abuse due to the visible injuries to Gardner and booked him into county jail.

Good example of the parties' demeanor but bad analysis of the primary aggressor:

Gloria was extremely intoxicated. She had a strong odor of alcohol, slurred speech, loud, obnoxious, unsteady gait, . . . etc. She told me Jacobs pushed and punched her in the face. . . . Jacobs was even more intoxicated than Gloria. He was unable to stand or walk by himself. Jacobs told me that Gloria was upset that he accused her of stealing \$6,000 from him. Gloria punched him in the face when he demanded the money back. Neither Jacobs or Gloria was credible. But per policy that we have to arrest one of them, we decided to arrest Jacobs.

14. Follow-up investigation

The purpose of the follow-up investigation is to continue the investigation where the patrol officers' leave off and fill in all the missing pieces. Given the likelihood that domestic violence victims will recant, the domestic violence detective must continue to gather evidence by obtaining copies of prior domestic violence reports, documenting the details of prior undocumented domestic violence, identifying additional witnesses, eliminating possible defenses, taking follow-up photographs, checking the criminal history of the parties, obtaining a copy of the 911 printout or tape, obtaining medical or dental records, obtaining releases for medical or dental records, obtaining copies of protective orders and supporting declarations and taking statements from the suspect who may have fled the scene. This additional investigation helps to ensure that the right person was arrested as the primary aggressor, assist the prosecutor in overcoming any contrived claims of self-defense at trial and put any recanting statements into context. In the event the victim does recant to the detective, the detective must document the new statement in his follow-up report. Recanting statements are discoverable and must be disclosed by prosecutors to the defense. Detective Mike Agnew finds that most victims do not completely recant their initial statement, but only portions of their initial statement. They will also confirm many portions of their initial statement which is important to document.

In the event new information comes to the attention of the detective that suggests the patrol officer may have improperly identified the primary aggressor, it is the detective's duty to set the record straight by identifying the primary aggressor.

15. Illustrations and or case scenarios

Identifying the primary aggressor is not easy. There are many factors for officers and prosecutors to consider. Each case is different and often there are no clearly right or wrong

answers. Things can get pretty murky. As such, “training on policies should focus on case examples so that practitioners can apply the guidelines or rules.” This can be accomplished in a primary aggressor class by having the students role-play, review real cases or review video vignettes. Sgt. Dan Plein, in our San Diego Primary Aggressor Class, will generally pick three recent real police reports involving cross-complaints of violence for the students to analyze. Because the class is usually made up of patrol officers, detectives and prosecutors, we can usually expect an animated exchange of discussion among the three sets of professionals and the ultimate discovery that each other’s job is not as easy as initially perceived. (Then again, Dan likes to pick cases that ignite debate.) Listed below under resources are several excellent training videos on the subject of primary aggressor that offer video vignettes for training purposes.

16. Issuing Considerations for Prosecutors when Evaluating the Primary Aggressor

Probable cause to arrest the primary aggressor is much different than convicting the primary aggressor. In order for prosecutors to issue a complaint against a suspect, s/he must believe there is a reasonable likelihood of conviction. When both parties allege self defense at the scene, the prosecutor needs to analyze the case similar to the police officer, weigh the credibility of the witnesses, and evaluate the corroborating evidence that supports one version over the other.

X Two credible versions

If both versions are credible, the defendant will receive the benefit of the doubt and the likelihood of conviction is unlikely. Under these circumstances, issuing a complaint may not be appropriate.

X One credible version

If the victim’s version is supported by corroborating evidence and is more credible than the suspect’s version, then prosecution is likely appropriate. Corroborating evidence includes, but is not limited to: spontaneous statements on 911 tape, injuries, a good photograph of the injury, medical records from the current incident or prior incidents of domestic violence, evidence of documented and/or undocumented history of domestic violence, prior or existing protective orders, sustained fear, independent or corroborating witnesses, evidence of the suspect’s consciousness of guilt and the suspect’s criminal history.

X Injuries to Both Parties

When both parties allege self defense and have visible injuries, prosecutors will need to work harder to show that one party is the primary aggressor; that victim’s version is more credible than the defendant’s and there is corroborating evidence to support the victim’s version. When both parties are injured, Jurors tend to see the victim’s violence (self-defense) as “washing out” the defendant’s violence. Consequently, prosecutors need to be ready for an uphill battle in court. They should anticipate all possible defenses: self-defense, defense of others, defense of property,

ejection of the trespasser, accidental injuries and/or self inflicted injuries. Prosecutors should consult with experts prior to issuing a complaint or prior to trial and evaluate the injuries to determine if they are offensive or defensive, consistent with blunt force trauma as opposed to accidental, and/or eliminate any claim of self-infliction.

X Evidence of victim's prior use of violence

When self defense is alleged at trial, evidence of the victim's prior use of violence will be admissible. Prior to issuing domestic violence cases, prosecutors should review the criminal history of both parties, police reports from prior domestic violence incident(s) and declarations in support of protective orders. If the victim has previously been identified or arrested as a suspect in a domestic violence case or is on domestic violence probation, the victim's credibility will be at issue and conviction is unlikely. It will be difficult to prosecute under these circumstances unless there is an admission, an independent witness or substantial independent corroborating evidence to support the victim's version.

X Evidence of the female defendant being a battered victim.

Given the increase in the number of females that are being arrested, it is unavoidable that prosecutors will be reviewing cases where the female defendant may also have a history of being abused by the male victim. As uncomfortable as it may be, the prosecutor must apply the law equally and follow standard guidelines. If the evidence shows that on that particular incident the female suspect was the primary aggressor and there is a reasonable likelihood of conviction, then the case must be prosecuted irrespective of the prior abuse. In California, neither diversion nor civil compromise is an option for prosecutors. The case is either issued or it is not. However, when a case is issued against a female defendant who has a history of being abused by the male victim, prosecutors should consider the prior abuse as a factor in "mitigation" at sentencing.

17. Using Police Officers as Primary Aggressor Experts at Trial

At trial, officers will be permitted to explain the factors they considered in identifying the primary aggressor and arresting the suspect. During cross-examination and possibly during the defense's case, the officer's investigation and credibility as a witness may be attacked. Prosecutors may rehabilitate the officer's testimony and/or rebut the defense's case by calling an expert witness on the identification of the primary aggressor to assist the jury in sorting through primary aggressor issues. Under Evidence Code section 801, expert witnesses can be used for various reasons to assist jurors, including teaching the jurors about medical, technical, scientific principles or expressing an opinion after evaluating the significance of the facts of the case. It is within the judge's discretion to decide whether a witness is qualified as an expert to express an opinion on a particular subject. In *People v. McAlpin*, 53 Cal. 1289 (1991), the McAlpin court articulated the standard (a case involving the admission of testimony concerning the battered women syndrome) as follows:

First, the decision of a trial court to admit expert testimony “will not be disturbed on appeal unless a manifest abuse of discretion is shown” (People v. Kelly (1976) 17 Cal.3d 24, 39 and cases cited.) Second, “the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would ‘assist’ the jury. It will be excluded only when it would add nothing at all to the jury’s common knowledge that men of ordinary education would reach a conclusion as intelligently as the witness.”

Given the complexities of identifying the primary aggressor, in appropriate cases, prosecutors should consider seeking the testimony of experienced detectives to educate jurors on how to identify the primary aggressor.

18. Advocacy for Battered Victims Who Find Themselves as Defendants

Of concern is the lack of advocacy services for female defendants who may also be victims of domestic violence. In Minneapolis, Minnesota the Domestic Abuse Project has developed a program for battered victims who find themselves as defendants. For more information about this program, call Mary Jo at 612-673-3526 or dap@mndap.org. Unfortunately, prosecutors may not be in the best position to make such referrals. However, it is time to initiate work with the Public Defender’s Office and the domestic violence community and to begin the discussion about how advocacy services can be provided to this limited population of women.

Implementing and Evaluating Primary Aggressor Training

As discussed above, California’s primary aggressor law was passed to ensure that victims of domestic violence are not being arrested for defending themselves against attack. Law enforcement agencies have incorporated the identification of the primary aggressor into their protocols and added primary aggressor training. But are these efforts enough?

My observation is that the domestic violence communities in many states, not just California, did not do a particularly good job of planning and training on the primary aggressor before the primary aggressor laws were implemented: usually new legal mandates do not come with funds for planning and training. The Duluth Audit offers guidance and an opportunity for jurisdictions to evaluate the puzzling trend of skyrocketing female arrests.

In Duluth, Minnesota, a mandatory arrest policy was implemented by the Duluth Police Department after careful planning and training. Before implementation, a coordinating group of police, prosecutors, the court, probation and advocates determined how under the new approach

each would respond in a manner that would hold batterers accountable and protect battered women.²⁹

Given the number of females being arrested for domestic violence, it is time that each jurisdiction re-evaluate its current practices, procedures, protocols and training on identifying the primary aggressor to ensure that California's primary aggressor law has been implemented in the intended manner.

Fortunately, there's no need to re-invent the wheel. In 1998, Duluth developed a step-by-step audit procedure which is fully explained in the "Domestic Violence Safety and Accountability Audit" written by Ellen Pence and Kristine Lizdas. The Duluth Audit process "involves an interagency team that includes staff from the police department, probation, prosecutor's office, court administrator's office and a victim advocate. The team observes each processing point and interviews the practitioners involved. Such an audit provides a community a full picture of where changes need to be made in the rules that guide practitioner's work and the daily routines used to carry out institutional objectives."³⁰

Conclusion:

Identification of the primary aggressor is not an easy task. Today more than ever police officers and prosecutors are finding it a challenge to identify the true offender and hold that person accountable. The solution is to "continue to learn," to take advantage of the most recent courses on how to identify the primary aggressor and to reflect on current practices. As City Attorney Casey Gwinn says, train everyone and then train them again. Through education, awareness and teamwork, we can hold the offender accountable, make the victim safer and end domestic violence. Prevention, not intervention, is the key to changing the world.

Epilogue:

I would like to thank a number of individuals who asked me to write this article: Kiran Malhotra from the Statewide California Coalition for Battered Women, Retired San Diego Police Department Sergeant Anne O'Dell, Mike Pope from Law Enforcement Television Network and Rhonda Martinson from the Battered Women's Justice Project. Their request and words of encouragement have caused me to once again reflect on San Diego's response to domestic violence and take inventory of our policies, procedures and practices as it relates to the identification of the primary aggressor.

Resources:

Los Angeles:

Primary Aggressor Training Video developed in conjunction with the Office of the L.A. City Attorney, the L.A. Police Department and the California Alliance Against Domestic Violence.

To obtain a copy call 1-800-524-4765. Also contact Sgt. Bernice Abrams from the Los Angeles Sheriff's Department to learn more about the training videos they have developed for police officers on the Primary Aggressor.

San Diego:

In a partnership with the San Diego City Attorney's Office, the San Diego Police Department and the Navy, developed a 4-hour primary aggressor class for the San Diego Regional Academy. This class is taught by Dr. Kathleen Dully, Sgt. Dan Plein and Assistant City Attorney Gael B. Strack or Senior Deputy City Attorney Brian Erickson. Call 619-533-5620 for more information or to schedule training for your agency.

POST:

Post has developed two domestic violence courses which include training on the identification of the primary aggressor: The First Responder's Course on Domestic Violence and the 40-hour Investigator's Course on Domestic Violence taught by many instructors throughout the state, including Inspector Tom Walsh and Candace Heisler from San Francisco and Sgt. Mike Agnew from Fresno. Call the San Diego Regional Training Center at 619-792-6501 or the San Francisco Police Department at 415-695-6900.

STOPDV

Retired San Diego Police Department Sgt. Anne O'Dell offers classes and training videos on the Identification of the Primary Aggressor. To contact Anne, visit her web site at www.stopdv.com

LETN

Law Enforcement Television Network has prepared a 30-minute training tape on the Identification of the Primary Aggressor featuring City Attorney Casey Gwinn, San Diego Police Sgt. Dan Plein and Assistant City Attorney Gael B. Strack. To obtain a copy of this tape, please email Marta Overly at mbo@sdcity.sannet.gov.

Additional Resources:

- X San Diego Domestic Violence Council's, Domestic Violence Protocol for Law Enforcement, 1990 and updated 1998, www.sandiegodvcouncil.org.
- X Coordinating Community Responses to Domestic Violence, Lessons from Duluth and Beyond, Melanie F. Shepard and Ellen Pence Editors, Chapter 10, "Just Like Men? A Critical View of Violence by Women by Shamita Das Dasgupta."
- X Domestic Violence Training package (four video tapes and an instructor's manual) for police produced by the Law Enforcement Resource Center (LERC) and developed by the

Duluth National Training Project in Minneapolis, Minnesota, call 612-872-8284 or 218-7222-2781.

- X Recognition and Evaluation of Injuries in Victims of Domestic Violence (72 slide presentation, instructor test and 26-page manual) developed by Dr. William Smock and Dr. Sandleback. Slide Program is \$159. CD rom is \$79.50. Combo package is \$185.50. For more information, send an email to domestic@kacep.org.

Endnotes:

1. "How to Improve your Investigation and Prosecution of Strangulation Cases" by Dr. George McClane and Assistant City Attorney Gael B. Strack, October 1998.
2. The Police Response to Spouse Abuse: An Annotated Bibliography by Nancy Egan.
3. Between 1991 and 1996, arrests of women in California climbed 156 percent -- from 3,359 to 8,609 while the arrests of men rose 21 percent -- from 42, 318 to 51, 219, reported in "Arrests of Women Soar in Domestic Abuse Cases" by Mareva Brown, Bee Staff Writer, published December 7, 1997.
4. Guidelines for Law Enforcement Response to Domestic Violence, published 1996 by the Commission on Peace Officer Standards and Training.
5. "Spouse Abuse Crackdown, Surprisingly, Nets Many Women" by Carey Goldberg, The New York Times, November 23, 1999.
6. Male victim reported to a City Attorney Advocate in February 1999 that he "called 911 because that's what they tell you to do in DV class when you get into a fight with your spouse". Male victim was also on domestic violence probation involving another female partner.
7. California District Attorney's Association, Advanced Domestic Violence Conference, San Diego, California, March 1996, Handout on Primary Aggressor prepared by DDA Candace Heisler, Sgt. Anne O'Dell, DCA Gael B. Strack and Inspector Tom Walsh.
8. "Mandatory Arrest and Eliminating Dual Arrests" lecture by Lt. Mark Wynn, Nashville Police Department at the National College of District Attorneys' Domestic Violence Conference.
9. "Self Defense" by Rhonda Martinson, Staff Attorney for Battered Women's Justice Project in Minneapolis, Minnesota.
10. California Jury Instruction 5.31 provides "an assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him or her."

11. CALJIC 5.50 states “a person threatened with an attack that justifies the exercise of the right of self defense need not retreat. In the exercise of his/her right of self defense a person may stand his/her ground and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue his/her assailant until s/he has secured himself/herself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.”

12. CALJIC 5.51 states “actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his/her mind, as a reasonable person, an actual belief and fear that s/he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing him/herself in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person’s right of self-defense is the same whether the danger is real or merely apparent.”

13. CALJIC 16.142.

14. “How to Improve your Investigation and Prosecution of Strangulation Cases” by Dr. George McClane and Assistant City Attorney Gael B. Strack, October 1998.

15. “Intimate Violence Targets the Brain” by Mary Car, PhD OTDS/OTR/L, Prevention Matters, Spring 2000.

16. “The Physician’s Guide to Domestic Violence” by Dr. Patricia Salber and Dr. Ellen Taliaferro, 1995.

17. “Battered women: injury locations and types” by Dr. Muelleman, Patricia Lenaghan, RN, MS, CEN and Ruth Pakieser, RN, PhD, published in the Annals of Emergency Medicine November 1996..

18. “Bite Mark Evidence in Crimes Against Prsons” by Dr. Noman Sperber, DDS, published in FBI Law Enforcement Bulletin.

19. “Dentistry as a Collaborative partner in Domestic Violence Recognition” by Kathleen A. Shanel-Hogan, D.D.S. and Julie A. Jarrett, RDA, B.S. published in Home Front published by the California District Attorneys’ Association, Winter 2000.

20. “Domestic Violence” by Lynn Barkley Burnett, EdD, MS, LLB(c), and Dr. Jonathan Adler.

21. Excerpt from a 1994 police report involving domestic violence: “She told me that she has reported several acts of domestic violence with James before. Every time the

investigator calls for follow-up, James is there. He makes her tell them that everything is fine. She was very afraid to talk with me at the start for fear of James beating her up again.”

22. “Validity of Battered Woman Syndrome in Criminal Cases involving Battered Woman” by Mary Ann Dutton and M. Gordon (1996).

23. “The Battered Woman Syndrome” by Lenore Walker (1984).

24. *People v. Gomez*, 72 Cal. App. 4th 405, 594 (1999).

25. The relevance of battered women’s syndrome evidence and the common experiences of battered women was initially defined by the criteria set out in *People v. Bledsoe*, 36 Cal. 3d 236, 249-51 (1984).

26. “San Diego City Attorney Domestic Violence Prosecution Protocol” prepared by Casey Gwinn (1989) and “Prosecuting Domestic Violence Cases without Victim Participation” by City Attorney Casey Gwinn.

27. To obtain a copy of the San Diego Domestic Violence Supplemental visit the San Diego City Attorney’s Domestic Violence Unit’s website under “Library” at www.sandiegodvunit.org.

28. “The Differences Between Forensic Interviews and Clinical Interviews” produced by the Office for Victims of Crime.

29. “Criminal Prosecution of Domestic Violence” by Linda A. McGuire.

30. “Coordinating Community Responses to Domestic Violence, Lessons from Duluth and Beyond” by Melanie F. Shepard and Ellen Pence.