DOMESTIC VIOLENCE
NOT A COOKIE-CUTTER APPROACH

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Domestic violence is a serious and dangerous crime. Spotlighting domestic violence is an incident involving Ross Mirkarimi, who pled guilty to misdemeanor false imprisonment for a domestic violence incident occurring on December 31, 2011, before the newly elected sheriff was sworn into office. Efforts to oust Mirkarimi ended recently when four members of the San Francisco Board of Supervisors rejected Major Ed Lee’s call for permanent removal. Some argue that the board’s decision is wrong; Mirkarimi is a batterer who has no place in public office.

Yet his wife Eliana Lopez, the victim of the alleged abuse, insists he’s innocent. She wrote in a September 17, 2012, San Francisco Chronicle opinion piece, “Ross repeatedly apologized, took responsibility for his actions [which included grabbing her arm hard enough to bruise it] and has been a willing participant in counseling. Neither before nor after the incident has Ross come close to demonstrating violent behavior. Yet, the domestic violence prevention establishment, a potent political force in this city, is having none of it.”

The Mirkarimi case is a high-profile example of the political and legal complexities of domestic violence cases in San Francisco.

Importantly, this story focuses on misdemeanor domestic violence. Misdemeanor cases are tricky and can have lasting consequences in family and criminal court. Yet sometimes domestic violence calls are made in the heat of passion, and when calm is restored, the family just wants to stay together. However, once an individual reports a domestic violence incident, the system takes over. As the Mirkarimi case shows, even if the complaining witness changes his or her mind, the case can continue.

Historically, domestic violence activism grew out of the feminist movement, according to Jim Meyers, a domestic violence clinician who spent thirteen years as a counselor at Men Overcoming Violence (MOVE). Begun in 1981, MOVE was founded by men who realized that the effort to end domestic violence had to include men. Since that time domestic violence has become “a larger social issue,” akin to the Mothers Against Drunk Driving movement. “Today, domestic violence is still very, very prevalent,” Meyers says. “It’s part of our culture to resolve things with force. It’s culturewide—and it’s not just men—there’s domestic violence by both genders.”

When Meyers told people at cocktail parties that he counseled men accused of domestic violence, the response was often, “We oughta string ’em up,” he recalls. But the problem is more nuanced, Meyers explains. Often the batterer’s partner contributed to the violence; other times the man was living out a cycle of abuse that pervaded generations in his family. “It’s important to see the larger picture, the cultural causes, and also the specific picture so each individual can get the help they need.”

When Meyers first started practicing in 1988, “a do-
Domestic violence call was the last situation the police wanted to walk into because it was so dangerous.” Often the cops would instruct the man to take a walk around the block or sober up.

“Then there was a lot of education of judges, district attorneys, and the police department. It became a much more serious, arrestable crime.” But taking the power to press charges away from the victim came with complications, as evidenced by Eliana Lopez’s situation.

“And there’s pressure on women to not have their men in jail, especially if they’re dependent on his income,” Meyers continued.

For that reason, Julie Traun, director of BASF’s court programs and a criminal lawyer, fears an unintentional backlash from the Mirkarimi case. “I’m not sure it’ll inspire women to report their husbands. They see that the sheriff and his family were prohibited from seeing each other for a long time. They’ll also worry, ‘If the sheriff can lose his job . . .’”

Meanwhile, the kind of counseling that Meyers provided has become harder to come by for individuals who want to turn their lives around. Men Overcoming Violence, for example, has folded.

“The availability of preconviction counseling that can lead to dismissal is nonexistent,” adds Elizabeth Hilton, managing attorney of the misdemeanor unit at the San Francisco Public Defender’s Office. “We used to have a civil compromise where the complaining witness could say that he or she would rather the person go to counseling instead of being convicted, which offered more options for a person faced with a first-time offense.”

Specifically, Hilton used to be able to tell clients that if they agreed to get counseling, she could guarantee their cases would go away; otherwise, they’d have to go to trial where acquittals were not guaranteed. “I was essentially advising my client to get counseling. As a result, more people got counseling,” she explains. But the “political charge” of domestic violence cases resulted in changes to that policy. Now, many cases are dismissed because complaining witnesses don’t want to cooperate once they learn that counseling is required only with a conviction or guilty plea.

“We’ve become so rigorous and inflexible. We’re cutting off our nose to spite our face,” Hilton says. “My son is in kindergarten. His teachers focus on restorative practices rather than punishing so the kids learn empathy and learn to see there are two sides to every story. We must stay individual in our perspective on domestic violence, determining what’s best in each situation. And no one knows that better than the parties involved.”
In her practice, BASF’s Traun initially refused to lend her expertise to any case involving crimes against women. But she soon observed what she determined to be a cookie-cutter approach to domestic violence cases. If the victim didn’t cooperate, it always meant this is the result of abuse. At times cases are prosecuted (as was true for one of the cases Traun tried) even when it should be clear from a thorough investigation that the victim was the aggressor.

“It seemed that all domestic violence cases were prosecuted the same. There’s a political agenda to treat all battered women the same. Even for someone like me, a diehard feminist, it informed me—we really must investigate more thoroughly. We cannot assume all cases are identical, for they are not. And we as a society, empowered with the ability to punish, need to consider the facts of each case, the circumstances of each family, and what best protects and empowers victims. Backlash will follow when we do otherwise. I worry about victims. In the name of protecting women, our cookie-cutter approach disempowers them further. This is not an uncomplicated issue.”

Instead of always seeking punishment, Traun wants policymakers to reconsider the importance of changing behavior when it can be changed. “We need to ask whether we can reunite families, especially when it’s a misdemeanor. We sometimes patronize these women. But there’s complexity. I appreciate that it’s hard for prosecutors and cops, who have to evaluate whether counseling will work or whether the guy will go back and kill her. Yet the answer can’t [always] be just to lock him up. We know from the work of our collaborative courts that we can do much to monitor and change behavior while protecting victims before we employ the hammer of a criminal conviction. While the message of conviction is a powerful one for those who abuse, the message of healing families is equally important.”

Mairi McKeever, managing attorney of BASF’s Volunteer Legal Services Program (VLSP), is similarly troubled by what may result from the Mirkarimi case—but for different reasons. “What’s most surprising is there’s still the old-school thought of, ‘Oh, he just pushed her around a little—that’s not domestic violence,’” she says. “To me, it’s frightening to read the papers and see who is quoted as saying that.”

About twenty-two misdemeanor domestic violence cases are charged every month and Hilton’s office represents about 80 percent of those. Most domestic violence cases are referred to as “wobblers”—cases that can be charged as either a misdemeanor or a felony. The district attorney assigns the charge based on the facts (such as the extent of injuries and whether it’s the accused’s first reported incident), and the judge can always adjust the characterization. Felonies are punishable by time in state prison and are considered a strike offense; misdemeanors are punishable by time in the county jail. The cross section of domestic violence defendants is “as diverse as San Francisco,” Hilton notes, and includes older couples who’ve been together for decades, gay couples, immigrants, men and women.

In fact, another wrinkle in these cases is that it’s often difficult to know who the actual aggressor is. Sometimes women defending themselves are arrested and the true aggressor will use the system to punish the other person, saying, ‘She attacked me first.’ But overwhelmingly, women will tell us, ‘I pushed him off me and he had me arrested, but he’s been abusing me for years,’” explains Stephanie Bilinski, supervising attorney at VLSP’s Family Law Project, which provides volunteer attorneys to low-income clients who need assistance with custody, spousal and child support, and dissolution matters. About 45 percent of the Family Law Project’s cases involve domestic violence.

“...and the cross section of domestic violence defendants...”

“A lot of survivors of domestic violence are in financially touchy spots, especially if the abuse happened over a long period. I hear from many clients that they don’t contact the police until the abuse becomes unbearable. They are made to feel by their abuser and others that they ‘earned’ this abuse and contributed to it happening. They have no jobs, they’ve been isolated from family,” Bilinski explains. “They have no money but they still need an attorney. Otherwise, they have a harder time speaking up and advocating for themselves.”

When children are involved, domestic violence survivors often have to maintain an ongoing relationship with the abuser if visitations or joint custody is awarded. “There’s a presumption that an abuser in a domestic violence case shouldn’t have sole legal and physical custody. But even if a dad hit, there’s also still a presumption that the child needs to spend time with the parent, even if the parent isn’t perfect,” Bilinski adds. “It depends on the feelings the court...”
About 45 percent of individuals going through intake for placement with VLSP volunteer attorneys are victims of domestic violence. “Volunteers don’t just help with the law but also help break the cycle of violence,” McKeever says. “One of our clients explained that having an attorney prevented her from having to communicate with the batterer. Because of us, she had someone to serve as a buffer and the batterer had no opportunity to lure her back in.”

VLSP is also the fiscal sponsor of the Cooperative Restraining Order Clinic (CROC), which assists survivors of domestic violence in obtaining restraining orders through family court. Last year, CROC assisted 971 people, 937 of which were women.

“The levels of abuse we see vary greatly,” says Emberly Cross, director of CROC, which has two staff attorneys and thirty lawyer volunteers. “We have the Farrah Fawcett Burning Bed variety, which is classic domestic violence. We also see incidents of physical violence that don’t rise to the level of injury that requires an ER visit. But the person is still a domestic violence victim and afraid.”

In her seventeen years at the clinic, Cross has developed her own definition of domestic violence: “When one person uses a wide variety of tactics to obtain and maintain control over a partner, even if they do it without putting their hands on the other person: threatening, tearing down self-esteem, controlling money, threatening to take away kids.”

Restraining orders, which can only be granted for hands-on domestic violence or threats, come in many varieties, Cross explains. An emergency protective order, which is obtained through the police, lasts five to seven days, prevents contact, and awards temporary custody. A longer-term criminal protective order is automatic in criminal cases and remains in effect as long as the case is ongoing.

CROC handles family court Domestic Violence Prevention Act orders. They can cover no contact, stay away, move out, child custody, visitation, child/spousal support, property, and restitution orders. They can be effective for as many as five years and, in some cases, can become permanent. If CROC can’t get a restraining order because the behavior doesn’t meet the standard, attorneys can refer victims to a host of organizations for necessary services and support, including VLSP, Bay Area Legal Aid, Asian Pacific Islander Legal Outreach, WOMEN, Inc., and domestic violence shelters.

CROC’s goal is not to obtain a certain number of restraining orders a year, Cross notes. Rather, the goal is to serve as a place where domestic violence survivors can make the best choices for themselves without being judged. One client evaluation of CROC said: “I felt and still feel that I have support and can be protected. I have a place to go. I’m seventy years old and never knew such help was available. Your program is stellar when you feel as desperate as I was.”

Sometimes people in the assistance community become frustrated when domestic violence survivors return to the relationship, Cross says. “But our philosophy is she knows what’s best and safest for her, which changes day to day. The most dangerous thing a victim can do is leave the batterer,” so much so that there’s a special category of homicide dubbed separation violence. “It’s incredibly brave for a victim to leave. But if a survivor starts the process and drops it and then comes back again to us, it shows she felt safe coming back. I’m working with the most courageous people, and it’s a privilege to help them through that process.”