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Sharon Portwood

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When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings

Sharon Portwood, J.D., Ph.D.*

Thank you. I believe this topic is such an important one and one that has, in many respects, been minimized within our society. Jay is going to cover the public health aspects of domes-

* Dr. Sharon G. Portwood currently serves as Associate Professor of Psychology at the University of Missouri-Kansas City. Dr. Portwood received her J.D. from the University of Texas School of Law in 1985, and after more than ten years as a practicing trial attorney, she received her Ph.D. in Psychology from the University of Virginia in 1996. Her research reflects an integration of her training and practice in law, community psychology, and developmental psychology applied to a broad spectrum of issues involving social policy, particularly as it impacts children, youth, and families at the systems level. Dr. Portwood has authored numerous journal articles and book chapters covering a wide range of topics, including the prevention of youth and family violence, child maltreatment, the intersection between child maltreatment and domestic violence, and law and policy responses to crimes committed by and against children. Her work has been presented both nationally and internationally. Dr. Portwood has served as an invited participant in a national working group on the development of a classification and definition system for child abuse and neglect convened by the National Institutes of Health and the U. S. Administration on Children, Youth, and Families, and served in a similar capacity in planning future child abuse prevention activities for the Centers for Disease Control and Prevention. She has consulted with numerous state and not-for-profit agencies in regard to needs assessment and program development, implementation, and evaluation, including the Missouri Area Health Education Centers (MAHEC), the Independence School District, the Olathe District Schools, YouthFriends, the STOP Violence Coalition, the Children's Place, and the State of Missouri, Department of Social Services, Division of Family Services. Dr. Portwood has conducted training sessions on program evaluation and research at the invitation of the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, the Missouri Department of Mental Health, and the American Professional Society on the Abuse of Children. She currently serves as Program Director for the Kansas City Metro Child Traumatic Stress Program, part of the National Child Traumatic Network, which represents a partnership of community experts in child trauma treatment and prevention services and community collaboration working to improve access and provision of quality services to children who experience trauma. In 2000, Dr. Portwood received the University of Missouri-Kansas City Outstanding Community Service Award, as well as the Up and Comers Award, sponsored by Junior Achievement of Middle America, the Kansas City Business Journal, and Mayer Hoffman McCann.

tic violence, but to give you a little bit of context, I would like to share some figures on the prevalence of intimate partner violence.¹ Often, when I'm speaking on the topic of intimate partner violence, I will grab the local newspaper to see how many relevant stories are in that day's paper. Unfortunately, I didn't have the opportunity to do that this morning, but I find that there are typically no fewer than three cases of intimate partner violence a day reflected in the newspaper. Many of these are, however, not actually labeled as domestic violence. In fact, the way in which particular acts are or are not defined can impact the way that many of us, including legal professionals, think about domestic violence. For example, our perspective can be skewed by the cases we see in domestic violence courts, which some would argue are only the most extreme cases. Certainly, those cases can be differentiated from all of the other cases of intimate partner violence that never come to the attention of the legal system.

In thinking about formulating effective responses to intimate partner violence, one useful perspective is therapeutic jurisprudence. While there are actually a number of frameworks that seek to integrate legal and social science scholarship, this is one that my colleagues and I have found to be particularly helpful. At its core, therapeutic jurisprudence simply acknowledges that the law, broadly defined to include laws, policies, procedures, and the roles that individuals play within the legal system, has a psychological impact. Sometimes law causes psychological harm and sometimes it can have a therapeutic effect. The goal of therapeutic justice is to maximize the psychological benefit of the law, as broadly defined, while minimizing psychological harm.

One of the key features of therapeutic jurisprudence is to use scientific data to inform the law. With that in mind, I'll focus today on the relevant research. My expertise is around conducting research and ascertaining what we know from scien-

1. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (estimating that half of all women in the U.S. have experienced violence in their intimate relationships with men); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF No. NCJ 197837, *Intimate Partner Violence, 1993-2001* 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (Intimate partner violence accounted for 20% of all nonfatal violent crime experienced by women in 2001).

tific data. I'll try to give you a balanced look at that data-based knowledge, because it's a very useful tool; but, it's also a flawed tool. So, I hope, too, to educate you on the quality of scientific data and how it can be most useful to you.

I'll begin with a look at what we know about violent families. To date, much of the social science research has focused on individual characteristics of victims and perpetrators. In regard to victim characteristics, some studies have produced data that have been harmful to women. One good example of this is the work suggesting that learned helplessness, latent masochism, and/or inappropriate attachment to their father figure leads women to place themselves in abusive relationships.² Those of you who took introductory psychology may recall that learned helplessness is a concept that was initially used to describe the behavior of dogs that received electric shocks.³ Not only feminists, but also scientists take issue with attempts to generalize the behavior of dogs under laboratory conditions to the behavior of women in their intimate relationships.

The work on perpetrator characteristics has gone a little broader than the individual level to look at some of the cultural influences that contribute to intimate partner violence. Clinical studies on male perpetrators suggest that these men have an idealized concept of a rigid patriarchal family unit, along with restricted and stereotypical views of their masculine role.⁴ These studies represent two schools of thought. One body of work primarily contends that violence is used as a tool when the perpetrator lacks other interpersonal skills.⁵ Another body of literature points to the deliberate nature of oppression through

2. See ELIZABETH K. CARLL, *VIOLENCE IN OUR LIVES: IMPACT ON WORKPLACE, HOME AND COMMUNITY* (1999); see also LENORE D. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

3. See MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* (2d ed. 1991).

4. See Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283 (1995); see Jennifer P. Maxwell, *The Effects of Interpersonal Oppressive Violence on Women and Children: Implications for Conflict Management and Violence Prevention Training*, 4 J. PEACE PSYCHOL. 155 (1998); see also Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVICES, 97 (1988).

5. See Johnson, *supra* note 4; Maxwell, *supra* note 4; Stark & Flintcraft, *supra* note 4.

violence.⁶ The common thread between both groups of studies is the need to control on the part of the perpetrator—and you’ve already heard that reflected in some of the comments earlier today. Not only is there a need to control, but there’s also a need to display that control. And perpetrators appear to be quite adept at using a number of strategies to satisfy these needs including, but certainly not limited to, coercion and threats, intimidation, emotional abuse, isolation, bringing children into the mix, male privilege, economic abuse, and minimizing, denying and blaming. It is the denying and minimization by perpetrators that perhaps have been best documented. Another concern among feminist commentators is that we see denying and minimization extending beyond individual batterers to broader levels of analysis or, more specifically, to legal systems and to our society as a whole.

We have not yet seen a lot of work around the multi-systemic, multi-level nature of intimate violence. We know that intimate violence is a problem of great magnitude. We know it’s very complex, but in looking for solutions at the individual level, we have implied that if we “fix” individuals, then we won’t have this problem. But, that seems to be a very poorly founded assumption given how vast the nature of intimate violence is. When we design research studies to look for individual characteristics, lo and behold, we’re going to find individual characteristics. What we’re not going to find, because we’re not even looking for them, are the broader level factors that can have such a profound influence on the occurrence of intimate violence. This failure to look at all the levels of analysis may, in part, account for the current state of research, which is quite contradictory in some regards.

I’d like to share with you a two-level framework of intimate violence that may explain some of these inconsistencies. This two-level model was proposed by Johnson in 1995.⁷ Interestingly, relatively few people have picked up on this. But, notably, the U.S. Department of Justice has found it interesting. In

6. Oliver J. Williams et al., *Fatherhood and Domestic Violence: Exploring the Role of Men Who Batter in the Lives of Their Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 157-88 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

7. See Johnson, *supra* note 4.

fact, the Department of Justice has put out calls for research grant applications to try to develop these concepts more fully.⁸ So, hopefully, we'll see more researchers at least beginning to explore this framework and whether it has some validity and some usefulness in our efforts to respond more effectively to intimate violence. What Johnson's two-form model does is set out, as you can see here in the overhead, two forms of violence. The first is common couple violence and the second patriarchal terrorism.⁹ Common couple violence is usually viewed as occasional and fleeting in nature.¹⁰ Note that there is a somewhat politically difficult wire to walk here. But, the sad truth is that most of us believe there is a certain degree of violence in all intimate relationships. That is not in any way, shape, or form to condone that violence. But most of us in this room, if not all of us, if we were honest with ourselves would say that there have been times with our partner when things have escalated to the point that hopefully we were able to say, "Whoa, step back from this," whether it's pushing, whether it's grabbing roughly, or whether it's throwing something. One good example that Murray Strauss, author of the *Conflict Tactics Scale*,¹¹ has used in his research on violence is getting angry at the dinner table and pushing the plate across the table. I remember, and I'm going to tell on myself here for a minute, an incredibly embarrassing incident where my son asked me for something . . . and asked me for something . . . and asked me for something . . . and I finally said, "Here it is," tossed it, and it hit him in the eye. I otherwise couldn't have hit him in the eye if I had practiced for ten years! Probably all of us has one of these stories. Is that intimate violence? Well, perhaps one facet of it. But, when you begin to look at these incidents, they are isolated. The injuries usually aren't serious. But, most importantly, this is where gender doesn't seem to impact who the perpetrator is. When we begin to look closely at statistics showing that women are just as violent as men, we find that these figures include instances

8. U.S. DEPT OF JUSTICE, GRANTS TO COMBAT VIOLENT CRIMES AGAINST WOMEN ON CAMPUSES 6 (1999), available at <http://www.ojp.usdoj.gov/vawo/grants/cv-cawc.pdf>.

9. See Johnson, *supra* note 4.

10. See *id.*

11. See MURRAY A. STRAUSS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (1990).

involving what is probably best characterized as common couple violence.

The picture is very different for patriarchal terrorism, which I believe is what most of us have in mind when we think of domestic violence or intimate violence, certainly when we think of the types of things that we're seeing within the legal system. This is systemic and persistent. It is severe. In fact, it tends to escalate in severity. This is also where we see that characteristic of male control. This control isn't limited to the individual level. You do have an individual personality that needs to control, but the need to control is also broader in the sense that it encompasses the patriarchal nature of our social system, which, at some level, still relegates women to a subservient position. Now, to think about that a little more carefully, I want to give just a very quick, historical overview of the law. I won't go through all of these bullet points, because I'm sure all of you are familiar with the basics and how the law began by viewing women very similarly to chattel property. Women were under the legal control of a male. The father had authority over the daughter in her original home. If she married, that authority transferred to her husband. In the American legal system, as late as the 1980's, half the states still limited law enforcement officers' ability to make an arrest in a case of domestic violence.¹² The courts also went so far as to condone certain acts as justifying violence by a husband against his wife; in fact, in one early case I found, the court deemed it sufficient justification for her husband's beating her that a woman continued to receive a visitor whom her husband found objectionable.¹³ Certainly, history bears out that for centuries, women were not viewed as inappropriate targets for male violence.

Arguably, the most profound legal advance around violence against women was the passage of the Violence Against Women Act in 1994 (VAWA).¹⁴ As some of you are aware, we were al-

12. Roberta L. Valente et al., *The Violence Against Women Act of 1994*, in *THE SOURCEBOOK ON VIOLENCE AGAINST WOMEN*, 279-301 (Claire M. Renzetti et al. eds., 2001).

13. Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575 (1996).

14. Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, 108 Stat. 1941 (1994), *invalidated by* United States v. Morrison, 529 U.S.

ready starting to see some good reforms at the state level before VAWA, but the thinking among many feminists is that by establishing these federal standards, we were taking the first step towards changing traditional patriarchal culture by trying to shift the way people think about violence against women, not only as a society at large, but also, more specifically, within the legal system.

What you see on this slide is a summary of how the law has viewed violence against women and some of the harmful practices that have been perpetuated. What I would like to propose, and what others have proposed as well, is to begin to think about the implications that a dichotomy of common couple violence vs. patriarchal terrorism has for the law. Clearly, if a law enforcement officer responds to an incident with a view of common couple violence, that officer's response may be completely inappropriate for more serious forms of violence—what Johnson has called patriarchal terrorism.¹⁵ Unfortunately, there's only a little bit of research that has explored how actors within the legal system view intimate violence. Most notable is a study by Erez and King which looked at prosecuting and defense attorneys.¹⁶ These findings suggested that attorneys were more likely to portray intimate violence as common couple violence than as patriarchal terrorism.¹⁷ Again, even though these attorneys dealt with the most serious cases of intimate violence, that is, those cases that actually reached the court system, their perceptions of intimate violence comported more closely with those of male batterers than with those of reform advocates. More specifically, attorneys tended to view male violence against women as a male prerogative and/or an accepted way of handling family matters, to trivialize the violence and its consequences, to externalize blame, and to attribute a major causal role to provocation by the victim.¹⁸ Further, attorneys viewed

598 (2000). Legislation to restore the Act is currently pending. See Violence Against Women Civil Rights Restoration Act of 2003, H.R. 394, 180th Cong. (2003).

15. Johnson, *supra* note 4.

16. Edna Erez & Tammy A. King, *Patriarchal Terrorism or Common Couple Violence: Attorneys' Views of Prosecuting and Defending Woman Batterers*, 7 INT'L REV. VICTIMOLOGY 207 (2000).

17. See *id.* at 224.

18. *Id.* at 221-22.

their primary role as distinguishing between real cases of domestic violence and the false cases that women were presumed to fabricate.¹⁹ The research shows that these attitudes are persistent, not only among defense attorneys, but also among prosecutors.²⁰

The National Coalition Against Domestic Violence, in 1993, reported that despite the fact that injuries inflicted on women by their male partners were as serious as those sustained in 90% of violent felonies, they were charged as misdemeanors.²¹ Today, in ten states, a woman cannot bring assault charges against her spouse.²² When I found that statement in a law article,²³ I didn't believe it was still true, but I had one of my students track the references down, and it is still accurate. Ten states *still* do not allow a woman to bring assault charges against her spouse.

Looking back at the idea of therapeutic jurisprudence, it's clear that the law can have a therapeutic impact on female victims of violence if it's responsive to their needs. I'm hoping that some of my points have highlighted the need to look more closely at the assumptions underlying legal processes and to use the available scientific research to inform those processes. One thing we know from current data is that many laws actually have unintended adverse consequences. For example, many of you are probably aware of the debate around mandatory arrest laws. There is some data indicating that mandatory arrest laws actually increase the level of threat to women and children in the home.²⁴ Also, many states are beginning to adopt laws that provide for additional charges against a perpetrator when children witness the violence.²⁵ However, Edelson has noted that these laws may unnecessarily involve child victims in the crimi-

19. *Id.*

20. *See id.* at 212.

21. *See* Taylor, *supra* note 13.

22. *See id.*

23. *See id.*

24. *See* LeeAnn Iovanni & Susan L. Miller, *Criminal Justice System Responses to Domestic Violence: Law Enforcement and the Courts*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 12, at 303-27.

25. *See, e.g.*, UTAH CODE ANN. § 76-5-109.1 (1953); OKLA. STAT. tit. 21, § 644 (1986).

nal justice system for a second time.²⁶ They can devalue the original underlying domestic violence offense or they can result in the state incurring the costs of an essentially unnecessary trial when a domestic violence case is adjudicated well.²⁷

I'm going to defer to Jay on issues of child custody and visitation, but I would like, at least, to note that simply because a case is adjudicated does not mean that the threat to the mother and her children is gone. In fact, there's a good bit of data indicating that the threat may even be elevated once a case reaches the legal system.²⁸ Of course, when parents have a child, that child continues to link them, and that link may continue to give the batterer opportunities to abuse.

The existing research does point us in some promising directions for addressing the very common problem of intimate partner violence. One difficulty in finding a solution to inadequate legal responses is the fundamental choice we make in the criminal justice system (one that I don't necessarily dispute)—the presumption of innocence. Once an accusation of battering is made, there is a presumption of innocence. Another problem in these cases is the basic inability of actors within the legal system to ascertain who is telling the truth.

There are some wonderful ideas for ways in which appropriate and therapeutic services can be provided through the court system. I think you've heard some good ones this morning from Judge Martin. There have been additional ideas implemented around the country that have integrated social services, medical services and mental health services with law enforcement and legal services. One key to the success of these models is coordination and information sharing. But we also need to improve research on these programs, as well as their sensitivity to victims' needs. I'm sorry that I can't elaborate more on some of these approaches, but I do hope that my comments have per-

26. Jeffery L. Edleson, *Studying the Co-Occurrence of Child Maltreatment and Domestic Violence in Families*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY, *supra* note 6, at 91-110.

27. *See id.*

28. *See id.*; *see also* BARRY LEIGHTON, SPOUSAL ABUSE IN METROPOLITAN TORONTO: RESEARCH REPORT ON THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM (1989).

suaded you of the need to take a broader approach to addressing intimate partner violence. Thank you.