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Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing

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PAIN, LOVE, AND VOICE: THE ROLE OF DOMESTIC
VIOLENCE VICTIMS IN SENTENCING

*Hadar Dancig-Rosenberg**
*Dana Pugach**

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INTRODUCTION

Criminal law systems throughout the world have evolved to a stage where they no longer ask, “What is the appropriate role of the victim in a criminal trial?” The questions now relate to the scope of the victim’s rights, in which procedures she has independent standing, and at what stage she should be heard.¹ The process of the “prosecution stepping into the victim’s shoes,” whereby the state controls the entire criminal process, seemingly on behalf of the victim, has been replaced by the recognition that the interests of the prosecution (the State) are not always consistent with those of the victim.² The view that will be developed here as the main thesis of this Article, that victims should be heard at the sentencing stage, irrespective of their views, is far from common. This Article will first establish the theoretical basis for this view by drawing on an expressive theory, discussed in Part I, and will take this theory a step further, into the sphere of the particular victim who asks for leniency.

The friction between the various interests represented in the criminal process frequently comes to the fore at the sentencing stage and is reflected in the sentence itself. The sentencing stage is not just the culmination of a criminal process; it may be viewed as the distillation of the entire criminal process. The harm to the victim is weighed against the assailant’s personal profile as well as the public interest, and the outcome may be a call for retribution, prevention, deterrence or even

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1. For the view that victim involvement in the criminal justice process is becoming the reality and that its opponents should consider methods of incorporating the victims’ views while simultaneously minimizing the violation of defendants’ rights, see Erin Ann O’Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL’Y 229, 235–39 (2005) (analyzing the political power wielded by the coalition of victims’ rights bodies and presenting a comprehensive historical survey of victim involvement in proceedings). For literature on the subject of sentencing as a political statement and the relationship between the legislature and public opinion, see Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999).
 2. For more on the victim’s right to express his position in a federal proceeding, see, e.g., Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2004). For the importance of listening to the victim in crucial stages, see JONATHAN DOAK, VICTIMS’ RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 207–40 (2008).

rehabilitation.³ Further, the sentencing process is usually not subject to the evidentiary rules that govern the entire criminal process in different criminal justice systems.⁴ At the sentencing stage, evidence may be introduced that would otherwise be excluded under statutory evidence law, including an impact statement by the victim.⁵ Moreover, even in those states that have adopted sentencing guidelines, the sentencing stage is often still a function of judicial discretion.⁶ Thus, it is important to consider restrictions that may apply to the victim's statement, following from procedural safeguards, even where strict evidentiary rules do not apply. Can the victim independently initiate a statement of her position, and to what extent may the court take her concerns or status into account as distinct from "damage" that characterizes victims of this nature? Should the victim be restricted to merely describing her damages, or should she also be entitled to express her view regarding the appropriate sentence?

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3. It could be argued that at the trial stage in the criminal process, before the determination of guilt, the central interests are those of the state and the defendant. The principal public interest is in the non-conviction of the innocent and due process of law. As such, even enthusiastic supporters of victims' rights agree that victim involvement at this stage need not be significant, in order to avoid the possibility of false convictions. On the other hand, the victim should be involved at the sentencing stage. See Steven Eisenstat, *Revenge, Justice, and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1165–66 (2005).
 4. For the history and a critical view of this situation on the Federal level, see Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1993–1994). For the UK situation and the importance of discretion, see ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE*, 41 (Cambridge, 5th ed. 2010).
 5. See, e.g., *Williams v. New York*, 337 U.S. 241, 246–51 (1949) (“[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”).
 6. For example, in states that have adopted sentencing guidelines, the sentencing is based on the meta-principle of a commensurate relationship between the severity of the act, the culpability of the defendant, and the severity of the sentence. This apparently indicates acceptance of the retributive theory as the basis of the law. The Model Penal Code incorporates the transition from the rehabilitation approach to the retribution approach. MODEL PENAL CODE: SENTENCING PLAN (2002). Both federal and state law prescribe an independent right for the victim to be heard at different stages of the proceeding, including at the sentence stage. Crime Victims' Rights Act, *supra* note 2 (“The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”) (emphasis added). Even in the jurisdictions that have not adopted the law, a number of states' courts have recognized this right. Military courts have also recognized this right. See, e.g., *United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009), *cert. denied*, 130 S. Ct. 139 (2009).

Traditionally, the victim's point of view is regarded only in the context of pushing for severity in sentencing.⁷ We are accustomed to hearing the protests of crime victims against the lenient punishments of "their" defendants and against plea bargains that appear to be acts of kindness to the defendants.⁸ Different legal systems took one step towards recognition of the relevance of pleadings relating to concrete damage by expanding the avenues for compensation based either upon the criminal proceeding or the criminal injury itself.⁹ The standing of a victim as a proponent for harsher sentencing is a matter which is far from simple, yet we shall focus on a matter which is even tougher: the standing of a victim who requests leniency.¹⁰ Thus, how should the court

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7. Whiteley too notes that the majority of philosophers who deal with the justification of punishment have failed to discuss the justification for hearing the victim with regard to the punishment, insofar as they see the victim as nothing more than "an agent for revenge." Diane Whiteley, *Crime and Punishment*, SIMON FRASER NEWS (Feb. 4, 1999), <http://www.sfu.ca/archive-sfunews/sfnews/1999/feb4/opinion.html>. For just one of the many examples attesting to the almost automatic equation that being a victim is equivalent to a desire for severe and draconian punishment, see Heidi M. Hurd, *Punishment and Crime: Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 408 (2005). For writing that invokes this argument as a basis for opposing the submission of a victim's declaration to the court, given its underlying motive of revenge, see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 177, 198 (1995). While Fletcher believes that the victim's interests should be integrated into the theory of retribution, he stresses that in the absence of procedural rules at the sentencing stage, the judge may allow "everyone" to have their say, something which he opposes. His proposal to hear the victim at the pre-trial stage or during the trial itself ignores the reality that most indictments are closed following a confession or plea bargain. The result is that failure to allow the victim to be heard regarding the punishment means that she will not be heard at all.
 8. Terms such as "pathetic sentence" and "joke justice" for describing lenient sentencing are frequently used. See, e.g., *Family Slam 'Pathetic' Sentence After Drunk Smashes Up Their Home*, THIS IS STAFFORDSHIRE (Dec. 18, 2009), <http://www.thisisstaffordshire.co.uk/leek/news/Family-slam-pathetic-sentence-drunk-smashes-home/article-1610482-detail/article.html>; Tony Koch and Padraic Murphy, *Child Rape Sentence 'Pathetic'*, THE AUSTRALIAN (Dec. 10, 2007), <http://www.theaustralian.com.au/news/child-rape-sentence-pathetic/story-e6frg600-1111115072997>.
 9. In many countries, schemes for compensation have been created. See, e.g., CANADIAN RESOURCE CENTRE FOR VICTIMS OF CRIME, *Compensation*, <http://www.crcvc.ca/en/compensation.php> (last visited Oct. 24, 2011).
 10. Sentencing literature frequently stresses that the reasons for recognizing mitigating and aggravating circumstances may differ in accordance with the varying nature of the sentence. See, e.g., Tatjana Hörnle, *Distribution of Punishment: The Role of a Victim's Perspective*, 3 BUFF. CRIM. L. REV. 175, 196 (1999). In contrast to the standing of a victim who requests leniency, which has not been discussed in the sentencing literature, there is a body of literature concerning the relationship of remorse and apology to punishment. See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004); Jeffrey G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE

act when those belonging to a defined group deemed worthy of special protection, namely, victims of intimate partner violence, seek leniency for their partners?¹¹ The problem highlighted here is the relationship between the public interest and victims' private interest. How should the tension which may result from the conflict between the interests of the individual victim who advocates leniency be reconciled with the interests of the "collective" victims—the sector of women suffering from domestic violence?

Part I establishes a general theoretical framework that supports granting a voice to every victim at the sentencing stage as an obligation of the legal system. We derive this obligation to the victim and society from a sentencing theory that attributes importance to the message transmitted by the criminal trial, the feelings evoked by the injury, and the ensuing punishment. We imbue this expressive theory with a new interpretation and argue that the only feasible conclusion is that any subjective victim's view should be heard and taken into account. We shall also briefly consider alternative proceedings in criminal law that *prima facie* provide a worthy solution that respects the female victim.

Proceeding to the specific offense of spousal violence,¹² Part II presents a synopsis of the psycho-social background required for an understanding of the unique character of crimes of domestic violence. This discussion will offer the background to our proposed comprehensive solution, informed by a feminist analysis of dilemmas posed by domestic violence. These dilemmas arise from a tension between paternalism and the desire to protect women on the one hand, and the recognition of women's autonomy and free choice on the other hand. This tension gives rise to a number of fundamental questions which will be discussed.¹³

PERSPECTIVE 143, 148–51 (Amitai Etzioni & David E. Carney eds., 1997); Austin Sarat, *Remorse, Responsibility and Criminal Punishment: An Analysis of Popular Culture*, in *THE PASSIONS OF LAW* 168, 168–72 (Susan A. Bandes ed., 1999).

11. In our view, intimate violence presents the most complicated situation of all possible violent scenarios, in terms of the respective positions of the victim and the assailant. This Article focuses on the relationship between the victim and the assailant within the spousal relationship only. While there are a number of points of similarity common to familial relationships, the spousal relationship is unique insofar as it is the product of the parties' free choice, which over time becomes an ambivalent and complex connection in which the element of freedom in its most profound sense is occasionally deeply debased.
12. For convenience we will refer to these offenses as "domestic violence offenses," despite the fact that in this Article they cover the complete gamut of situations involved in the spousal relationship.
13. See *infra* Part III.

In Part III we present our own approach, a complex feminist view, which rejects the adoption of a dichotomous perspective found in current literature that recognizes only two diametrically opposed positions for describing a woman's autonomy and her freedom of choice. That perspective fails to explain the complex reality that characterizes life in the shadow of violence; instead, we propose the adoption of a resolution-sensitive model that recognizes a scale of situations that reflect the actions of women functioning in situations of partial autonomy. We argue that in each case there must be an examination of the subjective position of the woman and the underlying motives of her request for leniency in sentencing, having consideration for the nature of the spousal relationship and the woman's inner world. Based on this approach we attempt to derive a solution appropriate for a multi-dimensional model that takes a pluralistic approach to female typology. We propose a practical tool for examining the question—a *modus operandi* for receiving the report on the victim (Victim Report). Familiarity with the woman's inner world through a comprehensive victim report is likely to facilitate an understanding of the motivation behind her request for leniency. Thus, a comprehensive victim report will help the victim herself (a goal in itself, particularly according to principles of therapeutic jurisprudence), improve the criminal justice system, and contribute to socio-legal research.

The importance of this Article's thesis is twofold. First, it will contribute to the developing body of theoretical writing in the area of victims' rights and the idea of therapeutic jurisprudence. Second, this Article will contribute to the practical aspect of victims' rights as it recommends a tool, the Victim Report, to solve the truly difficult dilemma of how best to present the victim's view to the court (once it has been determined that this step is crucial). The proposed solution demonstrates the advantages to be gained by integrating therapeutic tools into the fabric of the legal system.

I. THE ROLE OF THE VICTIM IN THE SENTENCING PROCESS

A. *The Victim's Views Among Other Sentencing Considerations*

Initially, we shall present what we believe to be the appropriate theoretical framework both for justifying punishment and for determining the level of punishment and the victim's role in this determination. This discussion is vital because even those in favor of giving victims standing at the sentencing stage are not united in their approach; significant dif-

ferences exist among the various theories and models designed to safeguard this standing.

In the classical model, criminal law represented the public interest whereas tort law was seen as the appropriate way to recover private damages.¹⁴ Classical theories focused on the conceptual need to punish the wrongdoer for his wrongdoings.¹⁵ Accordingly, it is almost impossible to find separate references to the views of the victim in the voluminous literature dealing with the justification for particular sentences in criminal law; in this context there is no distinction among models offering a theoretical justification for sentences, such as retribution or utilitarianism. In general, no attention is paid to the past or future condition of the specific victim.¹⁶ Another factor routinely rejected by authors writing about sentencing is emotion; they focus on cognition instead.¹⁷ After

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14. See, e.g., *People v. Harvest*, 101 Cal. Rptr. 2d 135, 139 (2000) (“The purposes of the criminal law are protecting society, deterring future criminality, and punishing criminality already committed Compensation is the defining feature of civil law.”) (emphasis added).
 15. There are still those who believe that providing the victim with standing during the sentencing stage, including determining the award of compensation, might lead to a collapse of the criminal law into tort law. See Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 66 (1999).
 16. Thus, the retribution theories focused on the abstract need to counterbalance harm by giving the wrongdoer his due punishment, without reference to the specific victim or the latter’s attitude towards the sentence. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 54 (1999). Particularly interesting is Moore’s article, *supra* note 15, in which he explains why specific victims must be disregarded within the framework of the retributive theory. From his point of view, the victim is only tied to the justification of punishment by supplying the content of the moral norms which, when violated, form a criminal offense. Yet this does not give the victim any procedural rights. Utilitarian theories (or consequentialist theories) concentrate on social utility; however, they too disregard the status of the victim as well as the relationship between society and the victim. This attitude is also evident in complex theories, such as Hart’s, which also ignores the victim. See H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 1–27 (1968). Likewise, theories that emphasize specific wrongdoers, such as the rehabilitative theory and the theory of moral education by means of punishment, refer to the particular wrongdoer but not to the particular victim. See, e.g., Beryl G. Thompson, *The Justification, Purposes and Functions of Punishment in Our Domestic Society*, 26 S.U. L. REV. 265 (1999). One theory that does emphasize the victim is that of corrective justice, or the restorative theory, which often leads to alternative solutions outside of criminal law. One exception in the effort to integrate the victim’s voice (even if not in the context of pre-sentencing arguments) within the retribution theory may be found in Fletcher’s writings.
 17. Removing emotion from the literature dealing with sentencing theories is largely the result of the assumption that emotion and rationality compete with each other and that “objective” judgments must be based on “logical” rational thinking, or at most

many years of searching for the justification for punishment, emotion is treated with contempt and is seen as something to be disregarded unless it can be wrapped under the mantle of “moral concepts,” as in Bentham’s use of the concept of retribution which may include anger.¹⁸ Accordingly, literature dealing with punishment theory often sweepingly dismisses the negative feelings of victims towards their abusers as “vindictiveness” or “vengefulness.” The desire for revenge is portrayed as an ignoble, immoral emotion that should not be included among sentencing considerations.¹⁹

One relevant sentencing theory—the expressive theory—emphasizes the messages conveyed by actions and legal processes. This concept recognizes the offense as conveying a negative message for the victim and society, and the sentence as a means of reflecting the condemnation of the wrongdoer. The sentence also serves as an outlet for feelings such as jealousy, resentment, and anger harbored by society and

upon a reasoned moral response, but never on emotions in view of the fact that they are supposedly biased, subjective, and *prima facie* irrelevant. See Ariel Meirav, *Al Limud Me'toch Sevel [On Learning from Suffering]*, 10 PLILIM 447, 449–50 (2001) (Isr.); Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at Criminal Trial*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 135, 144, 147 (Peter Brooks & Paul Gewirtz eds., 1996).

18. For a discussion of Whiteley’s writing regarding “moral sentiments,” see *infra* note 28. For example, H.L.A. Hart refused to see the condemnation or denouncement of a crime as justification for a punishment, on the ground that the criminal law denounced the act by incriminating it. Hart, *supra* note 16. In taking this position, Hart disregarded the particularist nature of the criminal offense while focusing solely on the broad social and impersonal context of criminal legislation, which addresses society in its entirety, including all abusers and all victims. This is understandable if we recall Hart’s reluctance to recognize the strong ties between the criminal law and morality. For an analysis of Jeremy Bentham’s moral retribution as distancing itself from “anger or another passion and does not seek revenge, but justice,” see Thompson, *supra* note 16, at 270–71.
19. It would seem that the use of alternative words sometimes functions as a type of “word laundromat.” For example, in English we see an unwillingness to identify “retributive” with “vengeance” or “revenge.” Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 441 (2005), (explaining the main principles of the deontological theory, emphasizing that “this duty [to punish the wrongdoer], of course, has nothing to do with vengeance. Retribution as an end of punishment is the restoration of a proper balance – of benefits and burdens and of dignity – between the offender, the victim and society.”). Even the victims’ movement seeks to distance itself from the image of a movement that calls for the statutory entrenchment of the desire for vengeance. Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, in *PHILOSOPHY OF LAW* 685 (Joel Feinberg & Hyman Gross eds., 1995). See also Moore, *supra* note 15, at 67 (providing a critical approach to the writings of Murphy, who turns the criminal legal system into “a moral mechanism for vengeance”).

the victim.²⁰ Nonetheless, even the supporters of this theory have generally failed to discuss the voice of the specific victim or the spectrum of possible emotions potentially stirred up by a crime. Instead, they have seen it as a public catharsis,²¹ a condemnation on behalf of those in whose name the sentence is imposed and the social consequence of the crime.²² As William DeFord notes, importance attaches to the fact that these writers speak of expressivism and not of communication—one aspect of communication is that it entails the transmission of messages between all involved parties, while expressivism is restricted to a one-way message being sent.²³

The lack of reference to the individual victim in the expressive theory is surprising, considering the changing perceptions regarding victims' roles. The increasing acknowledgement of the victim as a person who can no longer be ignored in the criminal process and whose role is not purely that of a witness has given rise to the concomitant question: how much weight should be given to the victim's views, emotions, and wishes in sentencing considerations in the criminal trial?²⁴ Avoiding the question by referring the victim to civil proceedings or even to alternative processes is seen as an improper way of getting rid of the victim without according her the justice she deserves through the criminal process, and perhaps even causing harm to the public, which may expect

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20. JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 649 (1970). Feinberg notes that if these aggressive emotions do not find release through punishment, they will demand satisfaction in a manner that is socially harmful. The expressivists also follow diverse approaches. For an analysis of the different forms of the "vengeance theory" see Thompson, *supra* note 16, at 272. William DeFord argues that the expressivist theories provide political rather than moral justifications for punishment. The punishment must be expressive and reflect the public's feelings regarding the sentence. William DeFord, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843, 845 (2005).
 21. The term "public catharsis" as a goal of punishment is taken from Huigens, *supra* note 19, at 439.
 22. See, e.g., FEINBERG, *supra* note 20, at 104 (mentioning the voice of the victim, albeit not as a vital element). See also R.A. DUFF, *TRIALS AND PUNISHMENTS* (1986). See also Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997)) (discussing punishment having the function of reflecting the repugnance of the community, i.e., the "emotions of the community" and not the emotions of individuals).
 23. DeFord, *supra* note 20, at 846.
 24. For text and literature, see *supra* note 1. In this context, we may mention the argument regarding the use of victim impact statements. See, e.g., Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545; Ian Edwards, *The Place of Victims' Preferences in the Sentencing of "Their" Offenders*, 2002 CRIM. L. REV. 689.

consideration to be given to the victim.²⁵ Indeed, in recent years there has been a developing debate as to whether it is appropriate to give the victim an independent voice during the sentencing stage, and if so, how best to define her status: whether as a witness to the damage (the “soft version”) only, or as one entitled to express her opinion as to the appropriate sentence (the “extreme version”).²⁶ As noted, prevailing sentencing theories that ignore the victim are incompatible with the latter view and a different theory that will allow the victim’s voice to be heard is required.

Diane Whiteley’s scholarship provides a theoretical foundation for this Article. Whiteley’s theory draws on concepts from expressivist literature such as the centrality of communication in the writings of Dan M. Kahan, while also considering the subjective dimension of a particular victim.²⁷ Thus, it is possible to view Whiteley’s position as supplementing existing sentencing theories and not as replacing them. Whiteley bases the need to listen to the victim and consider her views among other sentencing considerations on the “moral sentiments” which the recognized victim and community feel as a result of the crime.²⁸ According to Whiteley, erasing emotion from theoretical thinking about criminal law action and justifications discounts very significant factors.²⁹

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25. For our arguments against alternative processes in the context of domestic violence offenses, see *infra* Part I.B. For the fact that victims cannot obtain recourse from the laws of tort, see Eisenstat, *supra* note 3, at 1121–22. Eisenstat notes that in practice the possibility of instituting a tort action is illusory because of prescription, the wrongdoer’s lack of resources, unwillingness on the part of the victim to receive “blood money,” and other reasons. See generally Eisenstat, *supra* note 3.
 26. For examples of supporters, see Erez, *supra* note 24, at 546. For opponents, who fear turning the victims into “punishment agents,” see Andrew Ashworth, *Victims’ Rights, Defendants’ Rights and Criminal Procedure*, in *INTEGRATING A VICTIM PERSPECTIVES WITHIN CRIMINAL JUSTICE 185–203* (Adam Crawford & Jo Goodey eds., 2000).
 27. For the centrality of the understanding of the crime and punishment as forms of communication in which the wrongdoer expressed his lack of respect for values, see Kahan, *supra* note 22, at 1641.
 28. Diane Whiteley, *The Victim and the Justification of Punishment*, 17 *CRIM. JUS. ETHICS* 42, 46 (1998) (“A moral sentiment . . . is a complex emotion that involves a belief, an evaluation, and a relation to action.”). For the purposes of this Article, we interpret Whiteley’s remarks as supportive of an expressivist non-radical theory, a theory which is also consistent with other punishment theories. Punishment may also embody such values as utilitarian justifications or retribution concurrently with the communicational value.
 29. *Id.* at 46. For the argument that reason and emotion are interdependent and that an attempt to “purge” the legal process of emotional influences is fundamentally mistaken, see Gewirtz, *supra* note 17, at 144–45, and his references to the writings of Martha Nussbaum, who argues that the two cannot be simply separated. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 63–67 (1995). We should further note that in recent years there have been articles drawing

To a degree, Whiteley bases her theory on the influential remarks of Peter Strawson, who asserts that attaching responsibility to another is inextricably tied to expressions of resentment, anger, pain, gratitude, support, and the like.³⁰ As Whiteley asserts, it is arguable that the expression of a view per se carries decisive weight irrespective of whether or not it will lead to a change in the object at which it is directed.³¹ In our context, if a woman is capable of expressing her discontent with the behavior of a spouse, this expression carries weight even without a change in his behavior. In terms of our discussion, we are, of course, referring to the expression of a view through sentencing in a criminal trial.

A crime gives rise to grave moral sentiments for the victim and the community. These are legitimate emotions and must be acknowledged within the framework of the trial. The victim, the community, and the wrongdoer are all interested parties in the sentencing and target audiences for communication. According to Whiteley, sentencing is not only a means of social regulation but also a type of personal communication with the wrongdoer that expresses these moral concepts.³² The punishment may not only reflect the desire for general or personal deterrence, but also provide a way for the victim to cope, wage war, express recognition of her suffering, or express the level of repugnance felt by society for the offense. Thus, it is also possible to link these goals to the theory

attention to such concepts as "motive," "emotion," and "passion" at the earlier stage of determining criminal culpability. See, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992); SAMUEL PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 88–161 (1998).

30. See Peter Strawson, *Freedom and Resentment*, in *PERSPECTIVES ON MORAL RESPONSIBILITY* 45 (John Martin Fischer & Mark Ravizza eds., 1982); *FREE WILL* 59–80 (G. Watson ed., 1982); Andrew Eshleman, *Moral Responsibility*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2004), available at <http://plato.stanford.edu/archives/win2009/entries/moral-responsibility/>.
31. For an analysis of the importance of this in Strawson's theory, see Jonathan Bennett, *Accountability*, in *PHILOSOPHICAL SUBJECTS: ESSAYS PRESENTED TO P.F. STRAWSON* (Zak Van Straaten ed., 1980), available at www.earlymoderntexts.com/jfb/accounta.pdf. It should be emphasized that Bennett makes no mention whatsoever of the victim but only of the wrongdoer and whether he is "accountable" and what conditions have to be satisfied for him to be held culpable. At the same time, Bennett certainly refers to the outcome of the expression as essential to criminal punishment. Bennett starts with the retributivist theory, but he concludes with the statement that even if one takes into account the expression of reactive approaches, this has to be done within a consequentialist (utilitarian) framework, i.e., in no circumstances is a wrongdoer to be punished if no benefit could be gained as a result. *Id.*
32. The legal rituals of imposing criminal liability, conviction, and sentencing are fundamentally ascribing guilt, and in many cases (particularly when the crimes lead to a sentence of imprisonment) of denunciation which tags a person with a negative label.

of the therapeutic ramifications of the criminal process.³³ In contrast to writers holding more extreme views such as Eisenstat, who proposed that vengeance be recognized as a legitimate justification for punishment, Whiteley distances herself from the concept of vengeance, notwithstanding her emphasis on emotion.³⁴ Whiteley distinguishes between resentment—a moral emotion which may be justified—and vindictiveness; while feelings of vengeance should be kept out of the ambit of the law, the law should take into account justified moral sentiments.³⁵ The reason for this lies in the nature of “moral sentiments” and their character as highly complex types of emotion.³⁶ These are not emotions which embody purely corporeal feelings, such as fear, but ones that integrate cognitive and emotional elements and express a worldview, an evaluation of reality, and a response to it. It is this normative base that justifies them. These “moral sentiments” are rational and “justified.”³⁷ Resentment, stirred up by the offense, is justified because it is based on a concept of having been unjustifiably hurt by another person, a wrong that demands rectification.

Upon shifting from an examination of the facts to an examination of emotions and interpersonal communications, it becomes clear that causing harm, such as the harm caused by the abusive spouse, is intended to send messages such as “you do not count to me” and “I am

33. For literature regarding the therapeutic effect of the process, see DAVID B. WEXLER & BRUCE J. WINICK, EDS., *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996); Hadar Dancig-Rosenberg, *Sexual Assault Victims—Empowerment or Re-victimization? The Need for a Therapeutic Jurisprudence Model*, in *TRENDS & ISSUES IN VICTIMOLOGY* 150–74 (Natti Ronel, K. Jaishankar & Moshe Bensimon eds., 2008).

34. See Eisenstat, *supra* note 3, at 1115. According to Eisenstat, vengeance per se is not immoral or unjust. The desire for retribution against someone who has caused injury is moral. If the sentence (which has the effect of causing suffering to the defendant) is proportional to the damage caused, this is a worthy outcome of the criminal offense, as is hearing the voice of the victim regarding the appropriate sentence. According to Eisenstat, the fact that the state has taken over the morality of the criminal trial does not stem from a moral concept but rather from practical considerations (including ending the circle of retribution). Accordingly, there is no inherent principal to impede including the victim’s concerns and wishes in this system. Eisenstat suggests a variety of possibilities for introducing the victim’s voice during the sentencing stage, including transferring the sentencing decision to him—a radical but possible solution in a legal system in which there are serious restrictions in the form of sentencing guidelines, Eisenstat, *supra* note 3, at 1174.

35. Whiteley, *supra* note 28.

36. See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637, 1649 (1998).

37. Whiteley, *supra* note 28. According to Whiteley, “vengeance,” which is “merely a passion,” is recognized by its disproportionate intensity and unwillingness to take facts and circumstances into account.

exploiting you for my own ends.”³⁸ In cases of domestic violence, the messages will usually be very clear. In these cases the acts are usually deliberate.³⁹ Occasionally, violent men state their message explicitly, using such phrases as “teach her a lesson” and “show her what’s what.” Similarly, the woman will analyze the acts of her partner and their significance for her,⁴⁰ a significance which will not be as clear to a bystander as to the woman who is well-versed in the private language of communication between herself and her partner. By listening to the victim, the judge will learn about the messages that she received from the assailant and about their significance for the abuse. When she narrates her suffering, her voice as the victim is heard. The judge, taking her view into consideration, may therefore come to understand which values in her life were compromised, and the judge’s decisions may reflect this understanding. This means that the utility of victim testimony is dependent on a judge’s individual determinations and willingness to understand her story. Nevertheless, this is a satisfactory solution—even if not ideal—and it will require some education and possibly even review. This point is of supreme importance in the model that we propose, as we shall explain below.

As mentioned, the victim’s sentiment should be present in the legal process. From the point of view of the community, even if the public sentiment is weaker than that of the victim herself, the moral repugnance for the acts of the assailant contains a normative element—justification of the sense of repugnance felt by the victim. This is a complex sentiment, which interweaves a cognitive perception of the immorality of the assailant with an evaluation of the response of the victim.⁴¹ In many criminal offenses, the assailant asserts his view that the moral value of the victim is inferior or nonexistent.⁴² The absence of a

38. Whiteley, *supra* note 28.

39. Hurd, *Punishment and Crime*, *supra* note 7, at 420 (arguing that the majority of crimes fail to meet Austin’s criteria for significant communication of illocutionary intention). See also Heidi M. Hurd & Michael S. Moore, *Punishing Hatred & Prejudice*, 56 STAN. L. REV. 1081 (2004) (arguing that with respect to hate crimes, the majority of wrongdoers have no intention whatsoever of sending the alleged message); Hörnle, *supra* note 10, at 196.

40. See, e.g., Lea Kacen, *Ha’Atzmi Ha Moorchav” B’Siporai Chaiim Shel Nashim Mookot V’Gevarim Alimeem* [*The Expanded Self in the Life Stories of Battered Women and Violent Men*], 22 SOC’Y & WELFARE 129 (2000) (Isr.) (reporting a study where repeated motifs of control, materialism, adherence, and unilateralism were sent as messages from the men to the women, and were perceived as such by the women).

41. Whiteley, *supra* note 28.

42. See Hurd & Moore, *supra* 39 (differentiating some crimes, including hate crimes). We argue that domestic abuse will always, or almost always, convey such a message,

public response confirms the diminishment of the victim's dignity. Giving the victim a role in the pre-sentencing arguments displays support that is embodied in the community's moral repugnance for the offense.⁴³ Furthermore, the victim, by playing an active role, will not be forgotten as an audience for the criminal law's condemning message. In our view, the victim has a direct and unequivocal interest in the message that the criminal law sends to the accused. This construct resembles Eisenstat's statement that the advantage of vengeance (which does not exist in the prevailing criminal law) is that it partially restores the power and dignity of the victim.⁴⁴ From the vantage point of the victim and from the perspective of the community that receives the message, the victim must be allowed to state her concerns regarding the appropriate sentence, and the criminal process is the proper forum for this.⁴⁵ The criminal justice system needs to let the victim be heard.

Additional reasons support giving the victim a role during the sentencing stage. The first reason mentioned by Whiteley sees the victim as an information provider. Whiteley makes the statement that in a facts-based criminal justice system, the repugnance felt by the victim and her reasons for it may provide highly significant information about the crime to the assailant and to the community, information which often only the victim possesses.⁴⁶ In the context of retribution theory, the victim is uniquely capable of conveying the impact of the wrongdo-

based on the psycho-social analysis about the place of power explained in the next chapter.

43. Jean Hampton's expressive theory of retribution focuses on the messages that wrongful behavior and sanctions send to victims, offenders, and community. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1677 (1992). The crime, according to Hampton, sends a "false message" that the victim is worth less than the offender and that the latter can use him as a means to an end. Jean Hampton, *An Expressive Theory of Retribution*, in RE-TRIBUTIVISM AND ITS CRITICS 1, 8, 12 (Wesley Cragg ed., 1992).
44. Eisenstat, *supra* note 3, at 1138. Eisenstat does not assert the view that we should return to a private system of vengeance but rather that the voice of the victim should be included during the stages of the criminal trial in which sentences are decided, so long as the supreme sentencing authority remains the state. In this way, his position comes closer to that espoused by Whiteley, *supra* note 28, as it seems that the difference between "vengeance" and "resentment" is largely semantic. For a similar approach in the completely different context of international criminal trials, see Jaime M. Goti, *What's Good and Bad About Blame and Victims*, 9 LEWIS & CLARK L. REV. 629, 643 (2005).
45. According to Eisenstat, in view of the above, civil tort actions or even alternative proceedings in which the victim may state her concerns, are insufficient. Eisenstat regards these alternatives as proceedings that cause the victim to feel that she must forgive. Eisenstat, *supra* note 3.
46. Whiteley, *supra* note 28, at 45-46.

er's acts, hearing from the victim, therefore, will enable the court to devise a sentence in accord with the degree of gravity of the wrongdoer's acts.⁴⁷ In the criminal process, the vantage point of the victim supplements the process of evaluating the guilt of the assailant.⁴⁸ This point may be decisive in cases of domestic violence where the full picture is highly complex and the victim may provide essential information.⁴⁹ At the same time, the victim's role is still surprisingly limited, and this argument only justifies a "soft version" of victim involvement; if we urge giving the victim a voice in the light of the message theory, the victim should also be allowed to express her opinion regarding the appropriate sentence as a participating party and not only as a witness producing evidence.⁵⁰

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47. Issues of how to assess the severity of the offense and how to rank offenses are fundamental to the adherents of the retribution theory, and one can find those who support victim testimony if only as a means of learning about characteristic or objective damage. See, e.g., Andrew Von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1 (1991). For support for the view that the victim provides a more accurate standard for assessing the objective severity of the damage caused and the relevance of particular circumstances, see Hörnle, *supra* note 10, at 176–77. For criticism of the collective point of view, see Hörnle, *supra* note 10, at 180–81. It should be noted that Hörnle allows the damage to be described, but not the personal preferences of the victim regarding the appropriate sentence. According to Hörnle, the function of the victim is only to provide information that will enable the court to make an objective, normative assessment. She refers to "a victim's point of view" and not to "the victim's point of view." This approach is similar to that espoused by Fletcher, who deals with the public dimension of criminal law as an assessment of the concrete loss caused to a general category of victims and not to the specific victim. See Fletcher, *supra* note 16, at 57. Hörnle's approach is an intermediate one and she also sees the positive psychological effect of involvement in the process as a byproduct and not as a goal in itself. Hörnle, *supra* note 10, at 184.
48. Even in states with relatively rigid sentencing structures, the courts have to assess the severity of the offense in order to examine the compatibility of the proposed sentence in the circumstances, as even in this sentencing system, the circumstances of the act are taken into account.
49. Ashworth, *supra* note 26.
50. "Participating party" refers to someone with the right to express her view regarding the sentence to the court, independently of the position taken by the prosecution or the conviction of the court. This is generally done by means of a victim impact statement (VIS). This is a very limited form of participation; however, we are not dealing here with the possibility of reforming the criminal law by making the victim a "civil party" to the criminal process. For the important distinction between the various possible functions of the victim statement (information about the damage, information about the victim herself and her perspective regarding the appropriate sentence) see Moore, *supra* note 15, at 73. For additional background regarding victim's statements, see PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 130 (2000).

An additional reason offered by Whiteley is more surprising: Whiteley essentially proposes allowing the community to influence the victim to moderate her repugnance and reduce the level of her negative feelings, while examining her motives and the justification for her reaction.⁵¹ Bitter victims, precluded from having their day in court, often turn to the media, which in turn presents each party's perspective and expression of that perspective in the extreme. Thus, not only the wish for vengeance, but also the victim's disappointment with the legal system, is taken to the extreme. As a result, the community, which is targeted by these reports, may receive a negative message about the legal system. On the other hand, involvement in the criminal system at the sentencing stage may lead to victims and the community feeling a greater sense of satisfaction with the handling of the process by the legal system.⁵² Overall, giving victims a voice would contribute to the victim's satisfaction with the legal system, as well as enhancing the public's view of it.

Nonetheless, it seems that the most important factor is the victim's own legitimate interest in punishment and bringing about justice. This leads to recognition of the victim's need to send a message to the assailant and to the community regarding her personal hurt.⁵³ This requires departing from the Kantian view of criminal law that disregards human feelings and emphasizes both the rational alone and the uncompromising public element concerning criminal sentences.⁵⁴ This Kantian approach, which focuses on public aspects and repudiates emotion, not only isolates the victims, but also artificially distances the wrongdoer from the victim, to the extent that often the wrongdoer himself is unaware of the impact of his actions. We find even greater expression of this in a system in which the majority of the criminal files are closed following plea bargains. In these cases, the victim and her suffering stay away from the eyes and the mind of the judge, the community, and the defendant himself.⁵⁵ Unlike the classic expressivist theory, the message

51. Whiteley, *supra* note 28, at 48. This is not surprising if we recall that the state conducts the criminal trial because of its desire to moderate the human responses to crime and stop the circle of vengeance.

52. For the attitude of the press to the frustration expressed by victims, see *supra* note 8.

53. See our proposed model for a pre-sentencing report as a device for transferring messages, *infra* Part IV.

54. Robert Johnson, *Kant's Moral Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/sum2010/entries/kant-moral/> (last visited Sept. 15, 2011).

55. In a system in which the majority of the criminal files are closed following plea bargains, the victim is not a witness at the evidentiary stage and the defendant does not confront her in court. Likewise, the judge in these cases does not gain an independent

theory involves a complex multi-audience system, in which the messages not only pass from the community to the defendant (by means of the court), but also from the victim to the defendant; from the victim to the community and vice versa; and from the legal system to the defendant, the community, and the victim. This is therefore communication and expressivism.

The expressivist theory may also be developed in such a way as to reflect moral sentiment; punishment per se embodies a message to the target community. Condemnation of the particular assailant is therefore an independent goal unrelated to other utilitarian goals. According to Whiteley, a moral agent is not guided solely by logic or common sense but also by sentiment, and this moral sentiment includes a cognitive element.⁵⁶ The negative reaction—the desire for vengeance—is a natural moral sentiment that arises in a man when another harms him, a reaction inseparable from his emotional constitution.⁵⁷ The minimal moral demand that one man makes of another is to show good will or caution.⁵⁸ When the other fails to meet this demand, our emotions are awakened. The need to show reactions to the conduct of others, similar to the complementary ability to be motivated by the attitudes of others towards us, is embedded in the human capacity for empathy.⁵⁹ This approach not only emphasizes cognitive abilities and the capacity to judge or assess moral factors but also the capacity to experience emotions and express them.

impression of the victim, the damage suffered by her, or the interaction between her and the accused in the courtroom. The message received by the community is of a reduced sentence by virtue of hearings held outside the public eye in the offices of the prosecution. This message is not interpreted as support for the victim or as enforcing justice. The above, of course, has ramifications. Accordingly, in our view, even within the framework of the rehabilitative theory relating to the assailant, it is appropriate to enable the victim to explain her concerns to the court. *See also* Whiteley, *supra* note 28, at 51 (noting that allowing the victim to communicate her feelings of retribution to the offender leads to “reconciliation” and “assists in the offender’s reintegration”). For the sake of completeness, we should note that when we refer to hearing the victim during the sentencing stage, we mean any stage that has ramifications for the sentence, including giving an opinion regarding a plea bargain.

56. This is a real innovation in contrast to philosophical theories which emphasized only the rational aspect of the moral elements, led primarily by Emanuel Kant. Whiteley, *supra* note 28, at 47.
57. Whiteley, *supra* note 28, at 47.
58. Whiteley, *supra* note 28, at 47.
59. Whiteley, *supra* note 28, at 47. *See also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85 (2004) (arguing that incorporating remorse and apology into criminal proceedings is important, even if not thoroughly honest).

Here our path separates from that of Whiteley, who did not refer to the possibility that the victim of the offense might call for a lenient sentence as opposed to a harsh one. Whiteley refers exclusively to feelings of resentment, calling them correct and “natural” feelings awoken by the crime.⁶⁰ Moreover, she cites the “battered woman syndrome” in brief and without analysis as an example of a situation in which the woman should feel resentment and act, but is incapable of doing so.⁶¹

Our argument is completely different. As we are not automatically committed to the view that the victim is a “tool for vengeance,” we argue that consideration must also be given to the concerns of a victim who has forgiven the assailant or who, in view of particular circumstances, is not interested in a harsh sentence being imposed on him. In our opinion, there is no *a priori* difference between a victim who seeks a harsh sentence and one who agrees to a more lenient one, and therefore the possibility of hearing the concerns of the latter should not be rejected. We also contend that the reasons in favor of hearing the victim support hearing her own, distinctive voice, when this is an “authentic voice” expressed appropriately. We shall try to show the circumstances in which a victim of domestic violence should be heard and what weight should be accorded to her concerns, and we contend that it may be appropriate to accord more weight to a victim who forgives than to one who demands a harsher sentence.⁶²

We are aware that hearing a victim may also have negative ramifications, both for other victims and for the victim herself. Under the existing system the state is responsible for sentencing the accused. This is a structure that offers considerable advantages; it treats defendants uniformly and promotes due process and public confidence. The system isolates the victim from the accused and this may ease matters for the victim. The main fears arising from giving standing to victims revolve around the impairment of these values, although in practice it would seem that these values are purely theoretical. Thus, the current system already undermines apparent uniformity, public confidence in the system, and easing the path of the victim. The public has a sense that victims are treated with contempt and that there are problems associated

60. Whiteley, *supra* note 28, at 47.

61. Whiteley, *supra* note 28, at 47.

62. For the criticism see Ristroph, *infra* note 79, which quotes comments made by Rubin. Ristroph, for example, calls for a “healthy degree of democratic skepticism—a willingness to think critically about our criminal legal system and some of its fundamental concepts”; this is out of recognition of the fact that all the accepted principles of sentencing, if applied in an inappropriate manner, will lead to excessive punishment. According to Ristroph, even punishment which is less harsh but more efficient is “retributive punishment.” Ristroph, *infra* note 79, at 1352.

with the current form of structured sentencing. Moreover, even if the victim fears that the entire burden of the sentence will fall on her shoulders, that fear will lessen considerably if the ultimate discretion remains in the hands of the judge as in our proposed model, a model which does not suggest that punishment be transformed into private punishment.⁶³

The issue of “moral luck” also arises in this context.⁶⁴ Should an accused be allowed to benefit from the forgiveness of the victim, or should he be required to suffer because of the victim’s “vengeful” character? Should the sensitivities of the victim, transmitted though her comments during sentencing, influence the court’s attitude towards the sentence?⁶⁵ We shall mention briefly the attribution of blame to the victim herself,⁶⁶ but shall not delve into other factors such as discrimination against victims lacking powerful legal representation.⁶⁷

Turning to the concerns of victims of domestic abuse who seek to lighten the sentence of abusive partners, we shall attempt to resolve some of the difficulties indicated here by delineating a model that takes into account the condition of the victim and her wishes, without placing the burden of criminal justice on her shoulders. We reiterate that because of the vagueness of concepts such as the “severity of the offense” and “commensurate retribution,” claims of lack of uniformity, inequality, and non-proportional severity of sentences also arise within the theory of retribution. In our opinion, allowing the victim to state her position will only help elucidate these concepts.⁶⁸ It will also serve to

63. In the majority of countries there is some form of structured sentencing, which guides the judge and leaves scope for the exercise of discretion that is not overly wide.

64. Moore, *supra* note 15, at 77.

65. Uri Yanay, *Cheedoosh B'Mishpat Ha' P'lili: Hagashat Taskir Neegah Abverat Meen Al Yadai Sheroot Hameevchan L'mvoogarim [Innovations in Criminal Law: Submission of Victims of Sex Offences report' by the Adult Probation Services]*, CRIMINOLOGY TRENDS: THEORY, PRACTICES AND IMPLEMENTATION – TRIBUTE TO DR. MENACHEM HOROWITZ 235 (M. Hovev, L. Sebba & M. Amir eds., 2003) (Isr.).

66. Hörnle suggests a possible solution to this problem in the light of German law which only allows a certain level of blame to be attached to the victim where she exceeded the boundaries of her legal rights or where she was required to behave in a particular way or refrain from certain conduct and breached these requirements. Hörnle, *supra* note 10, at 207. For the continental approach, see Manuel C. Melia, *Victim Behaviour and Offender Liability: A European Perspective*, 7 BUFF. CRIM. L. R. 513 (2004).

67. The matter of representation raises complex issues that fall outside the scope of this Article, such as whether it is right for the state to finance victims in the same way as public defenders represent criminal defendants.

68. See, e.g., Ristroph, *infra* note 79, at 1295 (“[I]n legal and political practice, desert has been proven more illimitable than limiting. Democratic conceptions of retribution are first, elastic: desert is hard to quantify and easy to stretch.”). Similar criticism may also be made against such concepts as “dangerousness” or the “rehabilitation ideal.” Ristroph, *infra* note 79, at 1350.

counter objections to victim involvement, particularly the notion that they might prevent the implementation of abstract justice.

B. *Criminal Justice Versus Alternative Proceedings*

Respecting the concerns of the victim may lead to even more radical solutions, such as the use of procedures other than the criminal justice system based on the philosophy of restorative justice.⁶⁹ Briefly, this theory not only refers to alternative models to the criminal justice system but also offers a fundamentally different perspective of crime—not as harm to the state, defined by the law using the terminology of guilt—but as harm to a person within a system of relationships.⁷⁰ Restorative justice suggests that transgressive conduct be viewed as actions that create conflict between the wrongdoer and the victim, leading to injury to the victim of the offense, society, and even the wrongdoer himself, as well as creating a concomitant commitment to restore matters to their previous state (*restitutio in integrum*).⁷¹ The purpose of restorative justice is to rectify the injustice through conflict resolution by identifying the needs brought about by these injuries.⁷² This is achieved when the parties affected by the transgressive act arrive at a resolution regarding the actions which the wrongdoer and society must perform to remedy injuries. Thus, the repair process requires the wrongdoer, the victim, and the community to search for solutions that will promote repair, reconciliation, and security.⁷³ In this way, the theory of restorative justice meets two of the central requirements essential to our model: hearing the voice of the victim and transmitting a message from the victim and the community to the wrongdoer. These modes of response are designed to repair damage when punishment is not conceived as essential. They entail non-adversarial models, grounded in the wrongdoer's acknowledgement of his guilt and repair of the wrong for the benefit of

69. See, e.g., John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

70. *Id.*

71. For one of the fundamental pillars of this multi-faceted perception, see JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (Cambridge, 1989); for a critical reading, see David Dolinko, *Restorative Justice and the Justification of Punishment*, UTAH L. REV. 319 (2003).

72. Braithwaite, *supra* note 69.

73. For the centrality of the concept of repair to the theory of restorative justice, see Braithwaite, *supra* note 69, at 1743. See also Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349.

the victim (by answering her emotional, social, materialistic, and compensatory needs), the community (by entrenching its values and assuring its safety and integrity), and the wrongdoer (by reintegrating him into the community).⁷⁴ Referring cases of domestic violence to alternative processes to resolve disputes without escalating them may be a solution that allows the victim's voice to be heard.⁷⁵ Indeed, Whiteley supports restorative justice solutions that involve personal communications between the assailant and the victim.⁷⁶ By acknowledging the advantages of alternative procedures that reflect the victim's feelings of resentment and anger, Whiteley adds to the traditional literature in this area, with an emphasis on the assailant rectifying the injustice and accepting responsibility.

Nonetheless, the growing use of alternative procedures may give rise to a charge that allowing victims to play a role during the sentencing stage opens the door to under-punishment.⁷⁷ By considering the victim's concerns as merely one of the sentencing factors and according legitimacy only to "justified sentiments," Whiteley answers the claim

74. See, e.g., Jim Dignan, *The Crime and Disorder Act and the Prospects for Restorative Justice*, 1999 CRIM. L. REV. 48.

75. See, e.g., Laura Mirsky, *Family Group Conferencing Worldwide: Part Two in a Series*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES, available at www.restorativepractices.org/library/fgcseries02.html (concerning the practice of "family circles" in the context of solutions to domestic violence). With regard to restorative justice and the family institution, see, for example, John Braithwaite, *Families and the Republic*, XXXI(1) J. OF SOCIOLOGY & SOC. WELFARE, available at www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/Families_Republic_2004.pdf 2004, 199–215. For literature supporting reference to alternative proceedings, such as mediation, in the case of disputes between spouses living in the shadow of violence, see Kathleen O. Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303 (1990). See also Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991); Diannc Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227 (1992); Ann Yellot, *Mediation and Domestic Violence: A Call for Collaboration*, 8(1) 7 MEDIATION Q. 39 (1990); David Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7(4) MEDIATION Q. 331 (1990).

76. Whiteley, *supra* note 28, at 50.

77. For criticisms of this type, also see Hurd, *supra* note 7. Hurd asks whether the theory of restorative justice lacks internal boundaries regarding the level of punishment, making it likely to lead to excessive punishment or extreme under-punishment. If the boundary is placed in such a way that the appropriate sentence is one that removes from the wrongdoer what he unlawfully received, the sentence will not be appropriate in cases of murderers, rapists, kidnappers, and the like. Hurd further argues that it must be shown that the sentence, such as imprisonment, benefits the victim, something that is impossible to do. At the same time, compensation is not enough, as the sentencing theory must offer more than could be achieved by means of tort law alone. Hurd, *supra* note 7, at 406–08.

that vesting the victim with standing during the sentencing stage will open the door to an extreme disproportionality in sentencing, whether in terms of the gravity or the leniency of the outcome.⁷⁸ Reliance on “justified sentiments” limits the range of sentences which might potentially deviate from what is proportional to the “objective” gravity of the act.

Even as we adopt Whiteley’s approach, we do not conceive of it as a restorative approach but rather as a means of including a victim’s concerns among other sentencing considerations, where the justification for the sentence may be either retribution or deterrence.⁷⁹ This is a model in which only the wrongdoer is punished, and restrictions on excessive or under-punishment are imposed.⁸⁰ Other information will be considered. For example, there may be a reference to previous convictions, as indicative of the risk posed by the wrongdoer and as a factor favoring a harsher sentence, even if the victim is completely unaware of that prior record. Moreover, recognition of the complexity of the messages also requires that the message be sent to the community, and not only to the

78. Whiteley, *supra* note 28. It should be noted that the theory of retribution particularly emphasizes the lack of morality of sentences that are harsher than those due and the use of defendants as scapegoats, even when the purpose is to achieve social goals such as deterrence. The basic concept, therefore, is the “gravity of the offence.” See Thompson, *supra* note 16, at 270.

79. Mixed sentencing theories regarding both justice and the level of punishment are not unusual. See, e.g., Alice Ristroph, *Desert, Democracy and Sentencing Reform*, 96 J. CRIME & CRIMINOLOGY 1293 (2006) (noting that the retribution model will only determine the sentencing range and that other sentencing goals—such as deterrence or prevention—may be used to determine a precise sentence).

80. See Hurd, *supra* note 7, at 414. Ristroph, in contrast, believes that only if the sentencing policy is set by the elite and not by politicians, i.e., by a body which seeks to set limits on the severity of the sentence, will the retribution act as a restraining factor. Ristroph, *supra* note 79. See also Fletcher, *supra* note 16, at 58 (attempting to call for the involvement of the victim in the process on the basis of the theory of retribution which integrates the manner in which arrest, trial, and punishment bring about the eradication of the defendant’s dominance over the victim and the re-establishment of equality between them, either on the basis of corrective justice or on the basis of distributive justice). Fletcher’s statement is even more relevant when the acts take the form of persistent domestic offenses, in which the demonstration of the defendant’s dominance and the inferior status of the victim are at the core of the relationship. For doubts regarding the ability of the theory of retribution to curb excessive punishment urged by political forces that seek the imposition of prolonged terms of imprisonment, see Edward Rubin, *Symposium: Model Penal Code: Sentencing: Just Say No to Retribution*, 7 BUFF. CRIM. L. R. 17 (2003). According to Rubin, the contemporary American system contains an equation whereby retribution means harsher punishments, which in turn means prolonged terms of imprisonment. *Id.* at 18. If this argument is accepted, it is difficult to contend that giving the victim a voice during the sentencing stage would make existing punishments harsher.

victim and the perpetrator. This goal would probably not be adequately achieved within an alternative procedure, and is often less visible than the criminal process.⁸¹

It follows that in suitable cases, more creative solutions may be required, such as a combination of alternative proceedings and classic criminal sentencing procedures.⁸² Thus, for example, if a very violent spouse is sent for treatment without a conviction, the deterrence will almost certainly lose its impact as will the element of retribution, whereas the message sent to all of the relevant audiences will be one of contempt. In contrast, if treatment is included as a form of “healing” or “repairing” which supplements the punishment, more than one goal may conceivably be achieved. This would not occur in cases of purely alternative proceedings. However, it would be possible where the alternative methods supplement the criminal process and to some extent change the form of punishment or its scope albeit not the substance of the process.

In any event, because we are not concerned here with circumventing the criminal process but with addressing our question from within the existing criminal justice system, we shall not elaborate further on the general criticism of this system.⁸³ Instead, in the remainder of this Article we shall examine how our theoretical framework will affect the

81. See, e.g., Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 366 (1999).

82. See Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 259 (1993) (presenting a view of restorative justice as a supplement to the traditional criminal justice system).

83. Even though we shall not elaborate further on the criticisms directed at alternative proceedings, we should emphasize the relevance of these criticisms to offenses involving violence and relationships between unequal parties. See Eisenstat, *supra* note 3, at 1115. See also Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40(2) BUFF. L. REV. 441 (1992) (arguing that within the context of alternative proceedings in domestic disputes there is a tinge of violence); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). Another relevant criticism is that alternative proceedings undermine the sense of justice, by creating a lack of uniformity (a criticism with which we do not agree, as we believe that justice reflects broad values apart from uniformity between defendants), as they lead to extremity in personal statements during the sentencing stage, and in cases of serious offenses they undermine the principle of proportionality. In the language of the expressivist theory, it may be said that an alternative process sends an unclear and ambiguous message. DeFord, *supra* note 20, at 849. As we believe that the public aspect also has an important role to play in cases of domestic violence, this cannot be the only solution. Whiteley herself suggests a combination of traditional sentencing and alternative solutions, such as mediation between victim and the assailant, in the case of serious violent offenses. Whiteley, *supra* note 28, text accompanying n.44ff.

participation of victims who ask for more lenient sentences without abandoning the system founded on the public model.

II. WOMEN LIVING IN THE SHADOW OF VIOLENCE:
SHOULD THE CONCERNS OF VICTIMS SEEKING MORE LENIENT
SENTENCES FOR WRONGDOERS BE CONSIDERED—
A TEST CASE OF THE DILEMMA

The question of whether to take into account an abused woman's request for her violent abuser's sentence to be lightened raises three separate difficulties.

The first ensues from the nature of the sentencing stage, which focuses on both the transgressional act and the wrongdoer. This is a stage that requires all the classic sentencing considerations to be balanced. The problems are not confined to domestic violence offenses. In the prevailing system, the court is vested with broad sentencing discretion. In domestic violence offenses, the problem is more acute because of the unique disposition of violent men within the category of wrongdoers, characterized by a complex emotional world and inflexible modes of thought that are explained extensively in the therapy literature.⁸⁴ These characteristics typically create tension between classic sentencing considerations in these types of cases.⁸⁵

The second difficulty relates to the introduction of the perspective of the victim as an independent factor among a series of sentencing considerations. Here we are no longer observing the wrongdoer, but rather the private interest of the victim and the manner in which the sentencing policy will serve her, recognize her needs, and take her choices into account. In the past it was almost impossible to find judicial references to the private interest of the victim as a consideration separate from the general public interest during the sentencing stage, beyond general as-

84. See, e.g., Amy Holtzworth-Munroe et al., *A Brief Review of the Research on Husband Violence: Part I: Maritally Violent Versus Nonviolent Men*, 2 *AGGRESSION & VIOLENT BEHAVIOR* 65 (1997) [hereinafter Holtzworth-Munroe et al., *Review of Husband Violence: Part I*]; Amy Holtzworth-Munroe, *A Typology of Men Who Are Violent Toward Their Female Partners: Making Sense of the Heterogeneity in Husband Violence*, 9 *CURRENT DIRECTIONS PSYCHOL. SCI.*, 140 (2000) (outlining subgroups of violent men: family-only, dysphoric-borderline, and generally violent-antisocial).

85. A typical example of a dispute that arises in relation to these offenses refers to the tension between the deterrence-retribution approach and the treatment-rehabilitation approach which casts doubt about the effectiveness of punishment for violent men that is unaccompanied by a treatment process. The dispute raises questions regarding the suitability of classic sentencing for this class of offenders.

sumptions regarding the nature of the harm caused by a particular form of abuse, such as sexual abuse. The interests of the victim were engulfed by what the court termed “the gravity of the offense,” and rarely was evidence used regarding specific damage.⁸⁶ The trend towards changing the role of victims was accompanied by a developing recognition of their status as an independent factor to be taken into account during sentencing.⁸⁷ With the broadening knowledge of the harm caused to victims of various offenses came a developing recognition of categories of crime victims, as well as calls for consideration to be given to the special characteristics of particular offenses and for the ultimate sentence to reflect the unique harm caused to the victims.⁸⁸

The third difficulty relates to the psycho-social dynamics of a violent relationship. The world of women living in the shadow of violence is rife with complexities which often lead the particular victim to deviate from the model of the classic “victim” and call for a lenient sentence.

A discussion of each of the three difficulties gives rise to thorny problems. In this chapter we shall focus on the third point described above. At the outset it should be noted that this complex matter has not been clearly settled. Accordingly, our primary purpose is to offer directions of thought for possible, even if limited, solutions. We open the discussion by considering the unique nature of domestic violence offenses and the psycho-social background characterizing them. Subsequently, we will describe theories taken from feminist legal literature that propose a variety of approaches to analyzing the conduct of battered women. Based on this we shall apply the conclusions emerging from the sociological and legal discussion to the issue at hand and offer a possible solution.

A. On the Unique Nature of Domestic Violence Offenses

“I love him and hate him, so confused
It is difficult for me with him and difficult without him,

86. Erez, *supra* note 24, at 546.

87. Erez, *supra* note 24, at 546.

88. Erez, *supra* note 24, at 546. See also Michael P. Vidmar, *A Crime Victim's Right to Be "Reasonably Heard"*: *Kenna v. United States District Court*, 37(3) GOLDEN GATE U. L. REV. 695 (2007) (discussing *Kenna v. United States*, 435 F.3d 1011, 1015 (9th Cir. 2006) and the federal right for victims to be “reasonably heard” in court during sentencing).

It is all like a dream,
But this has my life already for 15 years . . .”⁸⁹

In domestic violence offenses, the female victim meets the threat to her safety, which is simultaneously the source of love and trust, in her home. Someone who has not experienced this paradox finds it difficult to understand and conceptualize in legal terms. Unlike typical offenses in which two individuals who are unconnected in any union confront each other, and where the hostility generally focuses on an isolated act, in domestic violence cases the victim and her assailant are bound by complex, emotional human ties, replete with internal contradictions. Generally, the event is not a solitary act but rather a series of abusive acts scattered over a continuing relationship; the concrete violent act, which is the subject of the specific charge, is but one link in a chain of violence.

Traditionally, criminal law does not examine the dynamics of spousal relations, which by their nature are multidimensional and include powerful positive emotions such as love, longing, warmth, safety, and trust. Martha Mahoney explains that the criminal law concentrates on the defined criminal act which occurs at a clear point in time and space, and thus dissociates the understanding of the event from its unique complexity, the ambivalence within the spousal relationship, and the special psychological and emotional situations that attend an intimate continuous relationship.⁹⁰ The typical process of testifying in a criminal trial enables the voice of the woman to be heard; following evidentiary rules, she constructs her story in a question-and-answer format. However, this process also interrupts the continuity of the experience and impairs her ability to absorb the full events as a body of occurrences within the reality of daily life subject to the dynamics of a violent relationship.⁹¹

Feminist writers point to the difficulty of mediating between the dichotomous criminal law, which is based on an adversarial perspective, and images of “assailants” and “victims” that deviate from their typical images. For example, the criminal justice system finds it difficult to embrace complex messages such as “suffers but loves,” “hurts but does not

89. Letter by L., a married woman, who has lived under the shadow of violence throughout her marriage (on file with the authors).

90. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 16 (1991).

91. Leora Bilsky, *Nashim Mookor: MeHagana Atzmit Le'Hagana Atzmit [Battered Women: From 'Self-defense' to 'Defense of the Self']*, 6 PLILIM 5, 36, n. 97 (1998) (Isr.).

leave”—concurrent feelings that are seen as paradoxical,⁹² notwithstanding that they are described as “natural” experiences among women living under the shadow of violence. These messages, which are foreign to the conventional perspective of criminal law, provide a basis for understanding the emotional and psychological world of women who are victims of violence. Accordingly, the inability of criminal law to identify complex emotional situations and grant them a worthy place and interpretation leads to negative ramifications, particularly in gender-related areas.⁹³ The difficulty in mediating between the two worlds creates confusion and establishes an obstacle at a time when the criminal law encounters a situation such as that which is at the focus of our discussion. Yet, in the area of sentencing, the criminal law applies a less dichotomous

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92. As Baker explained, “[a] battered woman often does not experience just one feeling of helplessness; she is likely to experience an extensive range of emotions, including anger, love, hope, attachment, frustration, fear and pain.” Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 460 (2005).
93. Baker expresses this difficulty well: “What the law is fairly inept at appreciating is the more complicated, multifaceted emotional situations in which people often find themselves, situations in which they feel competing and diverse emotions—fear and desire, love and hate—at the same time . . . [T]he failure to appreciate or accommodate complex emotion and willingness to recognize simplistic emotion has gendered effects.” *Id.* at 447 n. 1. See also David L. Faigman & Amy J. Wright, *The Battered Women Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 112 (1997) (discussing the American feminist struggle to obtain recognition of the defense of “battered women syndrome” as qualifying the criminal liability of battered women who kill their abusers. Faigman and Wright explain that placing the emphasis on the hopelessness of battered women, as follows from the theory of the syndrome, leaves no room for active defensive measures on their part and deters those women who kill their abusive partners in self-defense from asserting the syndrome defense); Mahoney, *supra* note 90, at 38–43; Baker, *supra* note 92, at 460 & n. 79. Baker attributes these results to the inability of the criminal law to identify emotional complexity; so long as the activities of women are not categorized in one of the “simplistic” emotional classes—leaving or completely surrendering—the criminal law is left unable to supply an appropriate legal response to the life experiences of women suffering from violence. This outcome emphasizes the negative gender bias accompanying the criminal law’s difficulty in identifying complex emotional situations. This phenomenon occurs more often in view of doctrines negating or reducing the criminal liability of men for the commission of violent acts as a result of a “simple” emotional response (an immediate response, devoid of an internal-emotional struggle, which is committed instantaneously without premeditation). “Simple” emotional responses are easily identified in the adversarial criminal discourse and are set out naturally, thereby causing the persons concerned, who statistically are most often men, to be treated with consideration and leniency. Baker points to self-defense and the heat of passion excuse as examples of the doctrine which patently provides a gender-biased defense. See Baker, *supra* note 92. For the argument that “cultural defense,” such as defense in cases of “family honor killings,” also discriminates between men and women and leads to the acquittal of men, see Doriane Coleman, *Individualizing Justice through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1094 (1996).

approach. The discussion regarding the degree of punishment is complex and generally attempts to balance a variety of sentencing factors.

We shall attempt to present the essential guidelines for an understanding of the emotional world of women who have been harmed by spousal abuse and the dynamics characterizing violent relationships as the background for the legal analysis that will follow below.⁹⁴

B. A Psycho-Social Perspective of the Dynamics of a Violent Relationship

Clinical studies in sociological literature regarding the structure of the family describe the cyclical dynamics that characterize a violent relationship as well as the relationship of control between the partners that strengthens as time passes. These studies explain how violence is sustained and why each of the spouses preserves his or her functions within this destructive trap. In the clinical literature, violence against a spouse is defined as all acts in a chain of behavior that create a continuing pattern of control in the victim's experience.⁹⁵ Judith Lewis-Herman, a psychologist who researches trauma, explains that systems of control over another person are based on repeated modes of conduct that cause psychological trauma.⁹⁶ These systems are intended to deprive the person

94. In view of the limited space available here, we shall not expand on the emotional world of violent men and on the psychological processes that take place in this emotional world, even though familiarity with this issue is relevant to a full picture of the dynamic of a violent relationship. For a more comprehensive discussion, see Holtzworth-Munroe et al., *Review of Husband Violence: Part I*, *supra* note 84; Louise Dixon & Kevin Browne, *The Heterogeneity of Spouse Abuse: A Review*, 8 *AGGRESSION & VIOLENT BEHAVIOR* 107–130 (2003); DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 63–96, 121–60 (1995).

95. Sharon Portwood, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings*, 24 *PACE L. REV.* 221, 224 (2003); Lisae C. Jordan, *Introduction: Special Issues on Domestic Violence*, 39 *FAM. L.Q.* 1, 4 (2005–2006); Kersti A. Yllo, *Through a Feminist Lens, Gender, Power and Violence, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE* 48–58 (R.J. Gelles & D.R. Loseke eds., 1993). This definition per se sharpens the narrow boundaries of the legal definitions determining the criminality of acts of violence (the criminal law only recognizes physical acts of violence, sexual injury, and threats of criminal acts), in contrast to the social-clinical definition that recognizes a broad spectrum of acts which entail “violence” (such as psychological violence, mental abuse, financial violence, destruction of objects, and the like). The common denominator of the series of acts equivalent to “violence” on the clinical plane is the destructive psychological impact on the inner world of the victim, whereas sometimes acts that do not fall within the ambit of the criminal law—such as emotional abuse—can cause enormous mental damage.

96. JUDITH LEWIS-HERMAN, *TRAUMA AND RECOVERY* 100 (1995).

being controlled of her power and isolate her from the environment.⁹⁷ Indeed, the central experience which women describe in violent relationships is the control exercised over every aspect of their lives: the feeling that the man is dictating how to behave, what to think, what to say, and what to do.⁹⁸ This feeling causes women to lose their "self" and perceive themselves as an inseparable part of the personality of the man. This phenomenon is known in the psychological literature as "adherence," a situation in which violent men "swallow" women by negating their independent identity and trampling their personal autonomy.⁹⁹ Men experience themselves as the subject and women as the object, and as the relationship develops, women begin to feel the same.

Battered women commonly state that their sensitive psychological state caused them to misjudge their partners in the beginning of the relationship.¹⁰⁰ Statements that could be interpreted as expressions of control and jealousy are interpreted as expressions of love and courtship. The need for support at the early stages of the relationship leads to great willingness to compromise, show restraint, and give a positive and optimistic interpretation to abusive behavior.¹⁰¹ This is the beginning of the trap.

In response to the first violent incident, women engage in the psychological defense mechanisms¹⁰² of "minimalization" and "rationalization," i.e., they attempt to trivialize and justify the event.¹⁰³ These mechanisms cause women to overlook the event or take it in stride. After the first incident, women enter into a state of readiness in an attempt to prevent the next outburst. As they feel that they have contributed to causing the outburst, they take responsibility for eradicating the violence.¹⁰⁴ Here the paradox of the trap becomes evident: as women's attempts to prevent the next outburst prove unsuccessful, they try even harder to prevent them on successive occasions, again without

97. *Id.*

98. For the testimony of abused women regarding their experiences in the shadow of violence, see Kacen, *supra* note 40, at 140–49; Yllo, *supra* note 95, at 56.

99. See Kacen, *supra* note 40, at 146.

100. LEWIS-HERMAN, *supra* note 96, at 103–04.

101. LEWIS-HERMAN, *supra* note 96, at 104, 106.

102. According to Freud's psychoanalytic theory, defensive mechanisms are used by a person to distance him from the feeling of fear and to protect the "self." The defense mechanisms operate on the unconscious plane and distort or twist reality to some extent. These activities consume mental energy. Just as fear is vital to every healthy organism by providing a warning signal of danger so too are defensive mechanisms against fear vital to all organisms. "Rationalization" and "minimalization" are types of defensive mechanisms.

103. LEWIS-HERMAN, *supra* note 96, at 104.

104. Kacen, *supra* note 40, at 132.

success. The more they defend the violence in their mind and assume responsibility for “weaning” the man from his behavior, the more often they repeat their efforts and refuse to give up. They regard giving up as a personal failure. Likewise, violent men expect women to succeed in weaning them from their destructive violent behavior. When women fail to do so, men blame them for their conduct, and women, in response, internalize the blame and try again.¹⁰⁵ The greater the number of failed attempts the more powerful the sense of blame, which becomes a central motif in the life of women. This blame causes women to try harder and the cycle repeats. The clinical literature emphasizes that women’s acceptance of responsibility for the violence of men increases the likelihood of women turning into victims. The failed efforts to stop the violence cause a psychological process known as “loss of the observing-self.”¹⁰⁶ Life in the shadow of violence completely undermines the existential experience and sense of well-being of women.¹⁰⁷ Social isolation, which in many cases characterizes families suffering from violence, makes the man the central figure in their lives.¹⁰⁸ Many women living in the shadow of violence are left without supportive social or family connections, and the social isolation only strengthens their need to grasp the one powerful connection left to them.¹⁰⁹

Clinical studies show that emotional intensity in violent relationships is much stronger than in normative relationships, and they are characterized by significant emotional ambivalence,¹¹⁰ which creates emotional confusion and instability in the relationship.¹¹¹ Psychologist

105. Kacen, *supra* note 40, at 143.

106. Kacen, *supra* note 40, at 133, 150–52.

107. Clinical studies show high rates of post-traumatic stress disorder (PTSD) among women suffering from violence. In contrast to victims of serious but one-time traumas, battered women develop repeated and persistent trauma that pervades and grinds down their personality. If victims of serious one-time traumatic events often feel “that they are not themselves,” victims of chronic trauma feel that they do not have a self at all. See LEWIS-HERMAN, *supra* note 96, at 110. See also RAQUEL K. BERGEN, *WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS* (1996). Studies further show a high compatibility between the appearance of various psychological, mental, and functional symptoms, such as depression, high levels of anxiety, low self-image, faulty life skills, and spousal abuse. See Amy Holtzworth-Munroe et al., *A Brief Review of the Research on Husband Violence: Part II: The Psychological Effects of Husband Violence on Battered Women and Their Children*, 2 *AGGRESSION & VIOLENT BEHAVIOR* 179 (1997) [hereinafter Holtzworth-Munroe et al., *Review of Husband Violence: Part II*].

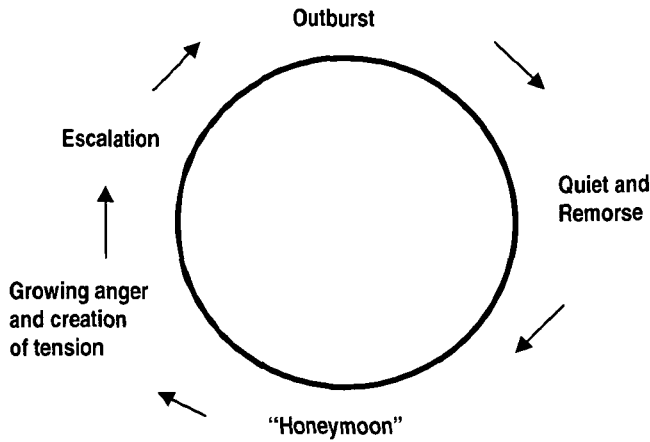
108. Cf. LEWIS-HERMAN, *supra* note 96, at 104–05 (articulating a theory regarding the dependence created between a captor and prisoner).

109. Kacen, *supra* note 40, at 133, 148.

110. Kacen, *supra* note 40, at 132–33.

111. Kacen, *supra* note 40, at 132–33.

Lenore E.A. Walker's famous model depicts the dynamics of a violent relationship as a "circle of violence" composed of a number of cyclical stages:¹¹²



In brief, the anger-building stage describes the creation of tension in the relationship.¹¹³ The men's anger, which may originate from many factors, including factors unconnected to their relationship with the women, becomes more powerful. The more men feel that women do not meet their expectations, the greater the anger.¹¹⁴ Women try to soften and calm abusive men in an attempt to prevent the next outburst, but the more the tension builds, the more they feel that they are incapable of quelling it.¹¹⁵ Eventually when women are exhausted, they broadcast despair and loss of motivation to please the abusers. The latter feel that the women are giving up on them and they begin to experience a fear of abandonment. Their level of frustration rises and the tension increases.¹¹⁶ Eventually, an event occurs which triggers a new violent outburst, and the tension that has gathered is released.¹¹⁷ The outburst causes the couple to feel panic and this is followed by quiet,

112. See LENORE E.A. WALKER, *THE BATTERED WOMAN SYNDROME* 91–105 (3d ed. 2009). These stages are purely schematic, and as such they only provide a general sketch of the dynamic characterizing a violent relationship.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Mahoney emphasizes that this is not "coincidental" violence, as is implied by the Walker model. The actions of the abuser are superficial and may be explained rationally as part of a power struggle between the couple that has the purpose of increasing the man's control over the woman and obtaining real advantages as a result. Mahoney, *supra* note 90, at 53–60.

accompanied by remorse. Abusive men feel cruel and fear that their women will leave them. In order to make them stay, men attempt to compensate women victims. They make promises, try to pacify the women, and swear that they will never commit these acts again. During the “honeymoon period” there is no violence; there is hope for the future. Women wish to believe that they will not suffer anymore. The men’s behavior gives them hope that something has genuinely changed. During the “honeymoon period” a new process of growing anger commences, however, and the circle of violence repeats. According to Walker, during the “honeymoon” stage, the victimization of women is completed;¹¹⁸ this period creates a circle of violence as it leaves women believing and hoping in the relationship.

As the years pass, women develop “learned hopelessness”:¹¹⁹ their failures to control the outbursts of men teach them that they cannot change the situation and that it is pointless to try; all they can do is try to survive in the existing circumstances. Hopelessness becomes the central experience in the life of abused women and it is translated into a single-minded pursuit of survival.

Walker explains that the longer the couple lives under the shadow of violence, the longer the periods in which tension mounts and outbursts occur, and the shorter the stage of remorse.¹²⁰ The men’s motivation to create the “honeymoon” stage lessens because their fear of being abandoned decreases. The dynamic of a violent relationship creates a traumatic proximity.¹²¹ The obsessive dynamic of the relationship

118. Walker, *supra* note 112, 91–98.

119. This concept originates in the field of psychobiology and was coined by the researcher Martin Seligman, who carried out the famous experiment on dogs. As part of the experiment, two groups of dogs were put into two separate cages and given electric shocks. In one cage the shocks were given at a fixed frequency and intensity; in the second cage the shocks were given at a random and unexpected frequency and intensity. The findings of the experiment were astonishing: in the cage where the shocks were set and expected, the dogs learned to avoid them. In the second cage, the dogs developed depression, loss of vitality, and at a certain stage, when Seligman opened the door of the cage—the dogs refused to escape. They had learned to be “hopeless.” The experiment taught the dogs that taking precautions would not necessarily prevent the next shock and therefore their behavior was of no significance; their efforts were useless. MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* 23–25 (2nd ed. 1991).

120. Walker, *supra* note 112, 91–98.

121. This concept, which is taken from captor-captive relations (“Stockholm syndrome”) describes the mutual psychological dependence and strong bond that unite the violent man and the battered woman regarding the trauma experienced in the relationship. The “Stockholm syndrome” is the term given to the phenomenon in which a person held against his will by strangers identifies psychologically with the narrative and acts of his captors. This phenomenon is an expression of a psychological

against a backdrop of social isolation creates the sense for partners that they alone can provide warmth, safety, and comfort.

William L.F. Felstiner, Richard L. Abel, and Austin Sarat use a three-stage model to describe the difficulties a person who has been harmed faces when seeking to enforce his rights in court.¹²² The three stages are (1) awareness of the harm and the ability to name it (naming); (2) the victim's ability to attribute responsibility for the harm to the person who abused him or her (blaming); (3) the victim's petition to the court for a remedy for his or her injury (claiming).¹²³ This model explains the existence of the phenomenon of under-reporting in domestic violence cases. Women living under the shadow of violence find it difficult to jump over each of the three hurdles, and their close relationships with their abusers exacerbates their difficulties. During the naming stage they sometimes find it difficult to understand that there is something wrong with the abusive behavior of their partner, in light of the tendency of battered women to believe that such behavior is normal in spousal relationships and that violence is a natural tool for determining the balance of power in the family. Even after women have identified the violence as a cause of their suffering, during the blaming stage they tend to attribute responsibility for the situation to themselves and internalize the blame. The claiming stage is characterized by difficulty in telling their stories for various reasons, including shame, fear, fear of harm to their children, social isolation which makes it difficult to ask for help, a sense of powerlessness, suspicion, lack of belief in the authorities, and emotional ambivalence.

*C. Women Living Under the Shadow of Violence from a Feminist
One-Dimensional Perspective—Between Choice and Trap*

The psycho-social background discussed above is a necessary basis for understanding two approaches which have been developed in the

defense mechanism developed by the prisoner as part of his attempt to survive in the difficult circumstances forced upon him. Lewis-Herman explains that like relationships which develop in captivity between the captor and the prisoner and which are based on mutual dependence, a paradoxical dynamic develops between the violent man and the battered woman: the relationship of adherence is propelled by constant conflict between dependence (weakness) and power (control)—*prima facie*, the woman (the prisoner) is "weak" and the man (the captor) "controls" her, but in practice the two are dependent upon each. LEWIS-HERMAN, *supra* note 96, at 116–17.

122. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1980).

123. *Id.* at 634–36.

feminist literature dealing with domestic violence against women. Each of these approaches offers a different perspective of the conduct of abused women. The central question that these theories seek to explain is why many women, including those who suffer from prolonged, serious and extreme violence, remain in the violent relationship and do not leave the abusive partner. This analysis may also be used as a tool to explain the conduct of battered women in the context of their subsequent requests for leniency for their abusers.

One approach seeks to explain the conduct of women who remain in a violent relationship through the narrative of a lack of options that keeps them in the violent relationship.¹²⁴ We shall term this approach the "trap" theory. This theory asserts that the reality of these women's lives does not leave them any practical alternatives. It places them in a dead-end situation because of the fear that the threatening spouse will leave, the ambivalence characterizing the "traumatic proximity" of the couple and the external obstacles mentioned above. It denudes women of their ability to start a new life and precludes realistic and genuine options of conduct. Furthermore, today it is known that women who consider separation face a particularly high risk to their lives.¹²⁵ Many murders of women by their partners are committed because the man fears that the woman will leave. The issue of separation in a violent relationship therefore poses a real physical risk to women.

In the legal literature, the trap theory reflects the radical feminist school of thought, which observes the victimization of women through the prism of the power balance between men and women in society, a relationship that perpetuates the inferiority and dependence of women and seeks to emphasize the social context of personal violence ("the personal is political").¹²⁶ The radical feminist stance asserts that the frequent use of the private/public dichotomy (when the criminal law has no foothold in the "private" sphere) is intended to enforce biased views and not to regulate various masculine activities, including domestic violence.¹²⁷ This analysis exposes the range of social, economic, and legal factors obstructing battered women's path to effective protection. It also condemns attempts to privatize the phenomenon of domestic violence against women, which leads to an emphasis on the functions of profes-

124. Bilsky, *supra* note 91, at 23.

125. Baker, *supra* note 92, at 459; Mahoney, *supra* note 90, at 83-92.

126. For extensive development of this perspective, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

127. See generally CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989); CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE, AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* xii, 27 (1984).

sionals, whose dialogue sometimes normalizes the violence and portrays female victims as both responsible and pathological.¹²⁸ In lieu of this, the feminist analysis seeks to clarify that this is not the sporadic problem of “abnormal” or “strange” women who extraordinarily choose not to report the abuse and not to leave.¹²⁹ Rather, the social reality makes these women victims of the system and contributes to the fact that responsibility is imposed on the bodies which are supposed to supply women with genuine protection. This radical school of thought therefore calls for the politicization of social wrongs that historically were perceived as private and demands increased state involvement in private lives. This approach seeks to place responsibility upon the state, society, and the community.

The second approach reflects a point-of-view based on the ideas of cultural feminism taken from psychologist Carol Gilligan and on conclusions drawn in studies on gender socialization.¹³⁰ We shall refer to this approach as the choice theory. The choice theory asserts that abused women choose to remain in the violent relationship not because they lack options, but because they actually choose to maintain their relationship, as explained by the central position given by women to the “self-in-relations.”¹³¹ Katharine Baker states:

Women remain in relationships not only because they may be financially dependent on their partners or because they face a greater risk of violence if they leave; these women are often emotionally bound to their partners. Many battered woman do not want to go. They want the violence to stop, and they want to feel safe, but they do not want to leave. Rather, they want to stay in a relationship with men whom they often continue to love, and with whom they share a life, a family, and a community. The legal presumption that one should walk away from a relationship because one gets hit reflects a remarkably

128. Erella Shadmi, *Likrat Tfisa Acheret Shel Alimoot Guarim Neged Nashim: Achriyoot HaChevra VHaMedina [Towards a Different Perception of Men's Violence Against Women: Responsibility of Society and the State]*, 64 SOC. SECURITY (2003) (Isr.).

129. For a criticism of the focus placed on the question, “why didn't the woman leave?” see Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992).

130. Bilsky, *supra* note 91, at 27.

131. Baker, *supra* note 92, at 457–58; see also Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L. J. 1459, 1477 (2001).

anemic understanding of the emotional complexity of relationships.¹³²

The choice theory relies on the existence of gender differences between men and women in modes of thought and moral-ethical perceptions. Theoretical and empirical studies in psychology and sociology, such as those conducted by Gilligan, Chodorow, Miller, and Dinnerstein, show that whereas male thinking appears to be detached from the environment, places personal autonomy as the top priority, and evaluates situations analytically and binarily as part of the “ethic of justice,” female thinking is compromising, less dichotomous, and admires the “ethic of concern.”¹³³ The psychoanalyst Chodorow argues that one of the primary expressions of this difference is the manner in which the role of the individual is perceived in this relationship.¹³⁴ Thus, for example, women perceive themselves as focusing on the other; they tend to attribute existential importance to the central relationship in their lives

132. Baker, *supra* note 92, at 457–58.

133. See generally NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* (1978); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); J. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976). The research of psychologist Carol Gilligan is the most recent of the studies listed. Her research is based on the developmental theory of the psychoanalyst Chodorow, whereby the female experience is largely based on relationships, actuality, and caring, whereas the male experience is based on boundaries, principles, and excessive distancing. Gilligan analyzes the different manner in which boys and girls observe complex situations that give rise to moral quandaries and expose the “other voice” of women. Gilligan concludes that men and women’s moral judgment is based on different worldviews regarding the relationship between the self and the environment. See Currie Menkel-Meadow, *Portia in a Difference Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 42 (1985). The cultural theory is primarily implemented in contexts focusing on unique life experiences of women (motherhood, birth, pregnancy, relationships) in which their power to choose and responsibility are emphasized as sources of positive power. Nonetheless, feminist writers also apply cultural analysis in the context of domestic violence; analyzing the conduct of battered women through the prism of female modes of thinking and ethics that attribute enormous value to the continuity of the relationship and its place in women’s lives. This analysis seeks to replace the image of the “victim” with that of the “survivor,” thereby emphasizing women’s courage and power notwithstanding their passivity and weakness. For general studies that point to the differences in cognitive thinking and emotional perception between the genders, see Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 20–21 (1988). See generally DIANE HALPERN, *SEX DIFFERENCES IN COGNITIVE ABILITIES* (3d ed. 2000); DOREEN KIMURA, *SEX AND COGNITION* (1999); LINDA MEALEY, *SEX DIFFERENCES, DEVELOPMENT, AND EVOLUTIONARY STRATEGIES* (2000).

134. CHODOROW, *supra* note 133.

and see it as a factor shaping their identity.¹³⁵ In contrast, men are educated from birth to perceive themselves as separate, autonomous, and independent. Men tend to define their self-identity as dependent on the maintenance of boundaries and distance between the self and the other.¹³⁶ This difference may explain why women choose romantic relationships, even when they involve violence: they see these relationships with the significant other in their lives as supremely valuable, part of their self-identity, and the essence of their existence.¹³⁷ Concern for the integrity of the family and the welfare of the children may also influence their conduct.¹³⁸

Feminist writers show that the majority of solutions offered by various interventional authorities, including the legal system, law enforcement agencies, and welfare bodies, are shaped by male perspectives and take the view that if women are suffering because of their partners, the best way forward is to for the women to separate from them.¹³⁹ The various solutions are sequential and uniform and are therefore shaped in the spirit of this premise, i.e., removing men from the home, women escaping to a battered women's asylum, imposing a harsh sentence of imprisonment, or similar solutions that seek to separate the couple. In some of the treatment frameworks that offer help to battered women the success of the treatment is measured by the percentage of women who leave their partners.¹⁴⁰ The criminal justice system also works on the premise that women's decision to leave abusive partners ought to be easy.¹⁴¹ The entire system is recruited to favor separation—a binary solution that reflects a point of view perceived as characterizing the male ethic of thinking. The statement that battered women choose

135. CHODOROW, *supra* note 133.

136. CHODOROW, *supra* note 133.

137. See Baker, *supra* note 131, at 1477. For a discussion of long-term psychoanalytical studies that show to what extent relationships are essential to mental health, see STEPHEN A. MITCHELL, *RELATIONAL CONCEPTS IN PSYCHOANALYSIS* 30 (1988).

138. Mahoney, *supra* note 90, at 17. The vital role played by the familial unit in the lives of battered women is reflected in the words of one of the women interviewed in Mahoney's study: "My husband is an alcoholic. Things have been really bad these past few years. But we've been married thirteen years. And I have three children. For nine of those years, he was the best husband and father anyone could have asked for . . . I may have to leave. But if I do, I'm giving up on a father for the children, and I'm giving up on him. And I can't just throw away those nine years . . . I may have to decide to go. But I'm not going to do it lightly." Mahoney, *supra* note 90, at 21.

139. Einat Peled et al., *Choice and Empowerment for Battered Women Who Stay: Towards a Constructivist Model*, 45 *SOC. WORK* 9 (2000).

140. *Id.*

141. Baker, *supra* note 92, at 459.

to stay in the relationship out of their own free will and that this choice reflects what is good for them is difficult for us to accept.

Indeed, women who face violence in their daily lives feel that the solutions offered to them by the establishment ignore their needs. Studies show that until battered women leave the home permanently, they return to it an average of five times.¹⁴² Beyond the material difficulties leaving entails, many women understand that leaving involves giving up a strong emotional tie that they need.¹⁴³ Moreover, the persistent and cyclical nature of the cycle of violence makes it difficult for women to free themselves from the relationship in view of the “honeymoon periods” interwoven between the outbursts of violence. Adoption of a norm that encourages leaving—as the solitary response on the part of women to episodes of violence in a continuing relationship—reflects the elevation of autonomy and individualism to the status of “sacred” values.¹⁴⁴ Feminist writers seek to expose the patriarchal nature of these solutions and assert that they adopt “another cultural language.”¹⁴⁵

On the practical level, a negative correlation therefore exists between battered women’s typical patterns of response and norms of autonomy that the law and other systems seek to encourage through their recognition of leaving as the “proper” response.¹⁴⁶ Considerable doubts also arise on the normative level: is it appropriate to encourage a uniform response as the “legitimate” or “proper” response to the wide spectrum of violent episodes erupting in relationships? Portwood distinguishes between a continuing relationship, which is accompanied by severe violence (“patriarchal terrorism”), and relationships in which the

142. Holtzworth-Munroe, et al., *supra* note 107, at 194 (citing L.E. OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* (1986)).

143. Baker, *supra* note 92.

144. Baker, *supra* note 92, at 465.

145. See Peled, *supra* note 139, at 16–17, 19 (proposing the adoption of a tolerant interventionist model that recognizes the need to expand women’s freedom of choice as an act of empowerment).

146. For a discussion of how practical experience showed that in reality legal rights had only limited impact, see Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 *LAW & SOC’Y REV.* 11, 21 (1995). Battered women may value the spousal tie and life within the relationship much more than security and protection. Schneider attempts to analyze the lessons of the Hawaiian model: rights may give women relief from violence, but they fail to supply them with a framework to which they feel that they can belong. For a wider discussion of the Hawaiian model, see ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 52 (2000). Baker adds that if the law identifies this preference as a pathology or deviance it is because the law has failed to assess how vital relationships are to our lives. See Baker, *supra* note 131, at 1463–64, 1477.

violence is less frequent and severe ("common couple violence").¹⁴⁷ Notwithstanding that in relationships of the first type, leaving may be perceived as the "right" step which women must be encouraged to take, it is doubtful whether it will always be the ultimate measure.¹⁴⁸ As Baker notes, adoption of a norm of connection instead of a norm of autonomy may explain why many women choose, and even prefer, not to leave as the response to sporadic violence.¹⁴⁹

A comparative look at each of the approaches shows that in the limited context of domestic violence, at the heart of the dispute between the radical and the cultural streams in feminist thinking is the positioning of women on one end of the victim-free agent dichotomous scale. A significant body of feminist literature deals with the observation of the conduct of women in difficult situations unique to them (such as prostitution, pornography, violence) through two-dimensional lenses that cannot encompass intermediate shades formed of partial choices or limited autonomy. Instead, they recognize only two opposing situations: helplessness and victimization, or autonomy and free choice. While the radical school of thought emphasizes the factors frustrating the autonomous conduct of women and establishes the image of helpless victims, the cultural school of thought exposes the voluntary-independent elements in the conduct of battered women and portrays them as "survivors"—an image associated with courage and power and not necessarily with victimization.¹⁵⁰ The difference between the two approaches is based on the diverging significance each accords to abstract concepts such as "rationality" and "free choice." The radical stream accepts the customary meaning given by liberal thinkers to the concepts of "choice" and "autonomy" and attempts to portray women as victims who have been deprived of the capacity to choose by society. In contrast, the cultural stream challenges the liberal presumptions regarding the nature of "choice" and "rationality" and attempts to instill meaning in these concepts that will reflect insights from the life experiences of women. Instead of recognizing activities designed to maximize personal benefit as the exclusive valid expression of "rationality," the cultural stream seeks to add a legitimate aspect to the interpretation of this term, namely,

147. Portwood, *supra* note 95, at 225–26.

148. Baker, *supra* note 92, at 465.

149. Baker, *supra* note 92, at 465.

150. See generally EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HOPELESSNESS (1988); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 141 (1993) (discussing the internal dispute among feminists regarding the use of the "victim" discourse versus "survivor" discourse).

activities designed to preserve the relationship with preference given to cooperation and compromise.¹⁵¹ Acknowledging these activities as “rational” is necessary as part of the respect due to the differences between the genders, and it is necessary in view of the moral and ethical views of women that reflect their life experiences and unique needs.

An expression of the different point of view of the two streams is reflected in the meaning that each ascribes to the metaphor of the voice. Radical feminism uses this metaphor to emphasize how women are silenced in society: comments made by women are sometimes treated with scorn, women are portrayed as tale-tellers who create a negative psychological incentive to hear them, and interested parties exert pressure on women, thereby inspiring a false voice which does not express their selfhood and authentic desires. Often, the “voice” is more than a mere metaphor. It has been claimed that the law itself does not recognize the unique voice of women, for example, by refusing to admit hearsay evidence—which is evidence that reflects female patterns of communication, such as when women share the secret of their arduous experiences with other women.¹⁵² A central motif borrowed from Marxist theory and developed in radical writing is that of the “false consciousness,”¹⁵³ where women themselves are incapable of recognizing that they are victims. In a symposium held in 1984, Catharine A. MacKinnon coined a famous metaphorical phrase to describe the inherent inferiority of women who cannot identify their own true wishes:

151. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78. VA. L. REV. 421, 449 (1992).

152. Fiona E. Raitt, *Feminist Perspectives on Evidence*, in GENDER BIAS IN HEARSAY RULE 59 (M. Childs & L. Ellison eds., 2000) (criticizing the rule prohibiting hearsay evidence). See also LIZ HALL & SIOBHAN LLOYD, *SURVIVING CHILD SEXUAL ABUSE* (1989).

153. The term “false consciousness” is central to Marxist philosophy, and reflects the lack of compatibility between people’s perceptions, values, worldviews, and ideologies and their position in the social class system. Radical feminism borrowed the concept from Marxist theory and developed its application in the context of gender inferiority and inequality suffered by women in patriarchal society. The term seeks to challenge the attempt by cultural feminism to revise the insights of traditional liberalism regarding the significance of rationality, choice, and autonomy. The radical criticism holds that the efforts to enrich the liberal theory with insights reflecting the life experiences of women is destined to fail, because the feminist values represented by cultural feminism are a modern reflection of the negative stereotypes of women which were exploited for years to keep them inferior. The “false consciousness” reflects the internalization of the patriarchal values of women as victims to the extent that they themselves are incapable of identifying their place as victims. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 39 (1987); MACKINNON, *supra* note 126, at 83–105 (discussing the development of “raising consciousness” as a remedy against the problem of false consciousness).

"[h]is foot is on her throat."¹⁵⁴ The metaphor clarifies why women cannot have an authentic voice: the system is so sophisticated that it is capable of blinding the eyes of women to their true wishes and causes them to perceive the wishes of men as their own.

In contrast, cultural feminism uses the metaphor of the "voice" to indicate the existence of a feminine voice which is insufficiently heard, but which would benefit society if recognized alongside the masculine voice. In the context of domestic violence against women, Carol M. Rose attempts to show that women's choices to remain with their partners is not necessarily irrational from their point of view.¹⁵⁵ On the contrary, if the term "rational" is given meaning from a feminine perspective, we learn that this choice reflects the high subjective value they accord the relationship in terms of their identity.¹⁵⁶ This choice is the "other voice," and it reflects important values such as loyalty, cooperation, concern, care, giving, sacrifice, persistence, and willingness to compromise.

The one-dimensional perspective taken by each of the approaches on the conduct of battered women has attracted criticism by scholars, who have identified two general problems emerging from this theoretical analysis. One problem is referred to by the literature as the "double bind effect," which reflects the tension between the need to find a practical solution in the short run, which prefers a paternalistic and protective policy at the cost of denying the victim the autonomy of choice, and a symbolic solution in the long run, which will improve the status and image of the private victim and the category of victims to which she belongs. On the legal level, the tension between the paternalistic approach and the empowering approach has a practical relevance in determining the policy for treating domestic violence offenses at various crossroads in the criminal process.¹⁵⁷ A second problem that has

154. Symposium, *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 *BUFF. L. REV.* 11, 74–75 (1985).

155. Rose, *supra* note 151, at 449.

156. Rose, *supra* note 151, at 449.

157. Thus, for example, the setting of policy that deals with complaints made to the police by victims who later withdraw their complaints is influenced by whether battered women are perceived as "victims" or as "free agents." In contrast to Israel's "no drop" policy which reflects a paternalistic point of view, in Minnesota (U.S.) the women's requests are honored out of respect for, or at least as an acknowledgement of, the practical disadvantages of disregarding their request, such as deterring abused women from approaching and complaining to the authorities. A study of 480 cases of domestic violence in Indiana (U.S.) found that a policy of mandatory prosecution, which does not enable women to withdraw their complaint or refuse to testify, placed women in danger in certain cases. David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects*, in *LEGAL RESPONSES TO*

attracted criticism for providing a one-dimensional perspective of the conduct of women suffering from domestic violence is known in the literature as the problem of essentialization.¹⁵⁸ This problem is common in feminist writing, and is expressed by a sweeping characterization of groups of women on the basis of a single common trait while disregarding differences between them, reducing the individual woman to a one-dimensional monolithic entity, and disregarding the multiple facets of the individual.¹⁵⁹ In the context of domestic violence, feminist writers have sought to uncover the rich heterogeneity in the life stories of battered women.¹⁶⁰ It is not surprising that battered women would choose to act in different ways according to varying priorities.¹⁶¹ The ethnic, cultural, socioeconomic, and individual differences make the life stories of each battered woman unique and necessitate a particular perception in order to understand her world, wishes, and the meaning of her conduct.¹⁶²

WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 150 (N. Zoe Hilton ed., 1993). An additional practical expression of the tension between paternalism and autonomy is seen in the determination of the proper policy regarding the imposition of a duty to report to the police when a person has reasonable grounds for believing that a woman suffering from violence is at risk and that woman refuses to turn to the authorities for help. See generally Sandra Kopels & Jill D. Kagle, *Do Social Workers Have a Duty to Warn?*, 67 SOC. SERV. REV. 101 (1993). The question of whether it is worthwhile to adduce expert evidence on the battered wife syndrome has also raised the double bind dilemma in the United States in criminal cases concerning battered women who have killed their abusive husbands. See Mahoney, *supra* note 90, at 49.

158. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in CRITICAL RACE THEORY: THE CUTTING EDGE 261 (Richard Delgado ed., 2000); Heather Nancarrow, *Restorative Justice for Domestic and Family Violence: Hopes and Fears of Indigenous and Non-Indigenous Australian Women*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 123, 129 (James Ptacek ed., 2010).
159. See Baker, *supra* note 131, at 1464; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (offering critiques of the problem of feminist essentialism).
160. Baker, *supra* note 131; Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281 (2003).
161. Baker, *supra* note 131.
162. Baker, *supra* note 131 (describing how ethnic and cultural differences influence the modes of conduct of battered women coming from different ethnic or cultural backgrounds); Dayton, *supra* note 160, at 290–91 (describing her experiences dealing with battered women and noting that immigrant women fear reporting abuse because they fear being deported by the enforcement agencies). In Israel, women from collectivist societies, such as Arab society or the ultra-Orthodox society, also fear to turn to authorities outside their closed communities and *a fortiori* to the enforcement agencies in which they have no confidence or trust. These communities have a need to overcome cultural gaps and difficulties in accessing institutions and services, *inter alia*, because of the existence of other beliefs and perceptions regarding the family unit and

III. SHOULD CONSIDERATION BE GIVEN TO THE REQUEST OF WOMEN
LIVING UNDER THE SHADOW OF VIOLENCE TO IMPOSE LIGHTER
SENTENCES: THE DILEMMA FROM THE PERSPECTIVE OF A
ONE-DIMENSIONAL ANALYSIS

If we return to the question whether consideration should be given to the request of victims of domestic violence to impose more lenient sentences on the violent assailants, we can conclude that both problems related to the binary perception of the conduct of battered women are also relevant. Each approach supports an unequivocal, binary policy (considering or not considering the request), which places the abused women within an inflexible category. This placement fails to recognize the pluralistic nature of the women themselves, and equally fails to recognize intermediate solutions that reflect a flexible policy such as partial consideration, based on an understanding of the motives of the individual woman in the context of her unique life story.

The radical school of thought would represent the prevailing unequivocal position denying consideration of the individual woman's request to lighten her abuser's sentence. There are a number of reasons for this. According to the radical approach, the patriarchal system silences the true voice of women and, as noted, creates a "false consciousness." The specific woman, seeking to lighten the punishment of her abusive partner, is seen as blind to her true interests, as her consciousness is false. Her unique psycho-social condition frustrates her ability to escape the trap in which she finds herself and necessitates paternalistic intervention that will save her from the danger which she may bring upon herself. Domestic violence victims who call for mercy for abusive men are not using their true voice, but rather that of men. Considering a request for leniency in these circumstances would mean silencing women's true hidden voice and subjecting them again to the experience of loss of self, only this time under the auspices of the legal system. Radical feminism would prefer in such a case to adopt a paternalistic approach, seeking to deny the false voice and uncover the "true" voice of women—a voice calling for a harsher sentence and tougher attitude towards their partners. The legal system, as part of the

women's role in that unit. *See generally* Muhammad M. Haj-Yahia & Elisheva Sadan, *Issues in Intervention with Battered Women in Collectivist Societies*, 34 J. MARITAL & FAM. THERAPY 1 (2008).

institutionalized social mechanism, bears the primary social responsibility for supplying women with maximum protection.¹⁶³

Another fear is that allowing consideration to be given to a request for mercy on the part of women might spur violent men to pressure women during the legal process, so that the legal system would find itself collaborating in perpetuating the inferiority of women as well as maintaining the social power gaps within the family, and perhaps even escalating the level of violence. Donna Wills asserts, on the basis of experience gathered as a prosecutor of domestic violence cases in Los Angeles, that it is the norm for battered women to withdraw charges or refuse to cooperate with the law enforcement authorities in domestic violence cases.¹⁶⁴ This is caused by the tendency of violent men to engage in manipulations intended to pressure and persuade women to refrain from cooperating with the prosecution.¹⁶⁵ The combination of these two tendencies creates the risk that the criminal process will be exploited and taken over by men if women's opinion is honored at the various stages of the process. Countering the arguments calling for consideration to be given to the victims' request as a means of empowering them, Wills responds that in practice not only does this approach empower abusers, but it also gives them an incentive to engage in

163. For a comprehensive discussion regarding the responsibility of society to supply women with protection, safety, and welfare, see Shadmi, *supra* note 128, 21–37. Shadmi points to a change in the traditional perception of the state as responsible for acts which it performed either directly or through its agents, but not for acts performed by individuals, such as violence directed by men at women. In recent times, this perception has shifted, and today the state is also regarded as responsible in cases where it has systematically failed to bring parastatal agents or private individuals to trial. Michele E. Beasley & Dorothy Q. Thomas, *Domestic Violence as a Human Rights Issue*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 326–27 (M.A. Fineman & R. Roxanne eds., 1994). Shadmi explains that in order for the state to be regarded as responsible for the actions of private individuals, its failure to enforce the law in these cases must ensue from prohibited discrimination. See Shadmi, *supra* note 128 and accompanying text. With regard to our discussion, we are not referring to failure to enforce the law on violent men; our assumption is that the man has been tried and convicted. However, it is arguable that the state's responsibility to supply safety and protection to women also applies to the implementation of the law at the sentencing stage, which encapsulates the practical essence of the concept of giving protection to women. For further discussion regarding the state's duty to create conditions which will enable women, like men, to realize their right to personal security, see Uri Yanay, *Personal Security and the 'Right' to Protection*, 40 *SOC. POL'Y & ADMIN.* 509 (2006).

164. Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 *UCLA WOMEN'S L.J.* 173, 177 (1997).

165. *Id.* at 179–80.

manipulative measures which endanger women, children, and the stability and safety of society as a whole.¹⁶⁶ In contrast:

By proceeding with the prosecution with or without victim's cooperation, the prosecutor minimizes the victim's value to the batterer as an ally to defeat criminal prosecution. A "no drop" policy means prosecutors will not allow batterers to control the system of justice through their victims.¹⁶⁷

Even though Wills focuses on the "no drop" policy as a tool for preventing the abuser from engaging in manipulative measures during the trial, these arguments are also applicable at the sentencing stage. Thus, refusing to consider the apparently "irrational" request by women to lighten the sentence of their violent partners is actually a device for protecting them, preserving their dignity and creating a "protective space" for them in which the dynamic of men controlling them will not succeed.

Another factor that supports rejecting a request for leniency is expressed in the well-known statement propounded by the radical school of thought: "the personal is the political." This statement represents the aspiration to transform the struggle against domestic violence from one which is "private" into one that is public and advocates harsher sentences without taking into account the wish of a specific private victim to deviate from the appropriate policy. As Schneider emphasizes, the use of rhetoric which "privatizes" the phenomenon is one of the important ideological obstacles threatening to frustrate reform in this area.¹⁶⁸ By characterizing the problem as a private one, the law makes it difficult to shape the phenomenon as one for which every member of society bears responsibility.¹⁶⁹ According to this view, it is necessary to adopt an approach that goes beyond the private story of the specific couple and relies on a collective social perspective: the inferior position of women in society, including within the family. Thus, the only solution is to uncover the "real" voice which has been silenced—one that seeks protection from the violent man and a stern approach towards him.

This thinking reflects a preference for a policy that advances the collective public interest of victims of domestic abuse over the individual interests of private victims. The radical approach seeks to blur the individual traits distinguishing one woman from another—traits that might lead to differing preferences on the part of individual

166. *Id.*

167. *Id.* at 180.

168. SCHNEIDER, *supra* note 146, at 87.

169. Baker, *supra* note 131, at 1466.

women—and instead, emphasize the aspect common to all: their victimization. Likewise, conceiving the phenomenon of domestic violence as one that endangers the peace and security of society as a whole is consistent with the desire to follow an uncompromising policy that does not take into account the wishes of the individual woman.¹⁷⁰

Opposing the radical approach, cultural feminism seeks to examine the wishes of individual women through the prism of the choice theory, by giving due respect to their wishes, according weight to the life experience of the women and to the ethical concepts characterizing female thinking, and accepting the huge importance attributed by women to their relationships with their significant partners. This thinking prefers solutions that take into account the needs and wishes of the individual women, even if they seem hard to understand from the perspective of a “bystander”, and even if they clash with the collective interest. The cultural approach relies on a non-judgmental perspective. Instead of regarding the request as a means of silencing women, it seeks to recognize the rationality and validity of the request from the ethical and moral standpoint of the individual women. These women possess a scale of values different from the liberal hierarchy of values which reflects the one-dimensional, male viewpoint and is perhaps even different from the hierarchy of values of other women whose life experiences has given them different needs.

Feminist writers explain that if it is desired to supply battered women with a solution adapted to their real life situation, it is necessary to respect their choices, out of consideration for their needs, preferences, and the individual cultural background of each woman.¹⁷¹ Ziv explains that

170. Wills writes extensively about the reasons why domestic violence is seen as a phenomenon that affects the security of the public as a whole. This phenomenon not only causes injury to the victim, but also affects a very broad range of persons and bodies who suffer from the ramifications of the acts, including “children, neighbors, extended family, the workplace, hospital emergency rooms, [and] good Samaritans who are killed while trying to intervene.” Wills, *supra* note 164, at 174. Accordingly, the state has a legitimate and primary interest in conducting a strict and harsh policy to treat this phenomenon. Wills, *supra* note 164, at 173–76. To show one state that has determined that it is appropriate to give special attention to the trials of offenders charged with domestic violence, Wills also cites section 273.8 of the California Penal Code (“The Legislature hereby finds that spousal abusers present a clear and present danger to the mental and physical well-being of the *citizens* of the State of California.”) Wills, *supra* note 164, at 174 (alteration in original) (citing CAL. PENAL CODE § 273.8 (West 1988) (amended 1994)).

171. See, e.g., Dayton, *supra* note 160, at 286; Ephy Ziv, *Politika Shel Alimoot Neged Nashim [Politics of Violence Against Women]*, 22 SOC'Y & WELFARE 417, 428–29 (2003) (Isr.).

the temptation and yearning to exclude our private and daily confrontation with the patriarchal from our consciousness often leads us to define the people we are treating as different, lacking in power, ignorant victims and incapable. In order to allow the woman before us to identify and give voice [to her wishes], we must assume, first, that she has a voice, and second that her voice is admissible, valid and no less creative than our voice. We must assume that before us is a woman (subject) with powers and knowledge of her wishes, even if these were temporarily removed and denied her in a swathe of violence . . .¹⁷²

Disregarding the voice of women means imitating the policy followed by the law towards child victims of abuse. If paternalism raises difficulties regarding children, it does so even more acutely in the case of adult autonomous women.¹⁷³

Respecting women's requests for leniency is an empowering mechanism that is adapted to female ethical thinking. Giving voice is an act of empowerment particularly where the experience of victimization entails repression and control.¹⁷⁴ The legal process, including sentencing, has a psychological impact and accordingly can be a tool to empower the victim and lessen the sense of repression.¹⁷⁵ The psychologist and jurist Sharon Portwood eloquently describes the beneficial psychological potential of the legal process:

172. See Ziv, *supra* note 171, at 428 (translated by the authors).

173. Feminist writing has often dealt with the rights of children out of a recognition of the basic structural inequality and inferiority of both groups in the face of male power. See CAROL SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE* 89 (1976).

174. Dayton describes a study carried out in Indiana based on 480 cases of domestic violence in which a "no drop" policy was employed by the prosecution. The study found that in some of these cases this policy harmed the woman. The woman felt empowered when she was actively allowed to take action for herself. Giving the woman the power to decide whether or not to withdraw the complaint was possibly her first opportunity to exert control over a relationship in which from the outset she was at a great disadvantage. Dayton, *supra* note 160, at 289–90.

175. For further discussion regarding the therapeutic potential of the criminal process as a healing device for battered women in general, and for women who have suffered sexual abuse in particular, see Dancig-Rosenberg, *supra* note 33. For a general discussion regarding the theory of the law as a healing device within the framework of therapeutic jurisprudence and the implementation of this approach in cases of domestic violence, see Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 14 (2006).

In thinking about formulating effective response to intimate partner violence, one useful perspective is therapeutic jurisprudence. . . . 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.¹⁷⁶

Elsewhere she adds: “[i]t’s clear that the law can have a therapeutic impact on female victims of violence if it’s responsive to their needs.”¹⁷⁷

In the spirit of Portwood’s comments, the cultural approach seeks to warn the court against committing the same wrong towards the woman as the man—erasing the “self” and denying her subjective will—out of a patronizing and condescending outlook that purports to know it all. Instead, this approach advocates that women be made responsible for their own choices out of a sense of empathy and respect,¹⁷⁸ while being offered solutions which fall outside accepted conventional thinking.¹⁷⁹ Linda G. Mills takes the view that it would now be appropriate to prefer an approach that recognizes the intimate and “private” characteristics of domestic spousal violence.¹⁸⁰ Mills explains that it is the identification of the unique aspects of the phenomenon that enables conceptualization of more creative solutions that may be adapted to the individual voices involved in each story.¹⁸¹

176. Portwood, *supra* note 95, at 222.

177. Portwood, *supra* note 95, at 228.

178. Dayton, *supra* note 160, at 282–83 (describing how her experiences with battered women strengthened her belief in the importance of respecting the woman’s autonomy to make decisions affecting her own life). In Dayton’s opinion, the woman’s decision at any given point in time is the best decision for her at that point in time. Dayton, *supra* note 160, at 283. A paternalistic decision that does not take into account the specific circumstances of the woman ignores her needs and sends her the crushing message that she does not know what is good for her and for her children, and, even worse, could place her in real danger. Dayton, *supra* note 160, at 283.

179. See Ziv, *supra* note 171, at 428–29 (describing the manner in which she chose to treat a religious woman who had suffered years of abuse from her husband as an example of empathic aid, which is culturally sensitive and challenges paternalistic thinking).

180. Linda G. Mills, *Intimate Violence as Intimate: The Journey and a Path*, 9 CARDOZO WOMEN’S L.J. 462, 462–63 (2003).

181. *Id.*

In this context it should briefly be noted that although considerations of retribution stemming from public condemnation and commensurateness between the gravity of the offense and the severity of the sentence apparently support rejection of the victim's request to lighten the sentence of the offender, considerations of deterrence create a dilemma. On the one hand, a harsher sentence contributes to the effect of deterrence by creating a "balance of fear" in respect of the specific defendant as well as potential defendants, and of course also sends an educational message of deterrence in its positive sense to the general public. Wills takes the view that a sentence of imprisonment is a legitimate tool to persuade a man to fully consider in advance whether it is worth his while to act violently towards his spouse.¹⁸² It therefore follows that no consideration should be given to the victim's request for leniency.

On the other hand, the deterrence interest is also influenced by the efficacy of the sentence and by the certainty of enforcement, i.e., by the tendency of women to complain to the authorities. Accordingly, particularly with regard to offenses that suffer from under-reporting, giving consideration to the victim's request for leniency may contribute to the deterrence effect by acting as a positive incentive to battered women to turn to the enforcement agencies. This is therefore an interesting utilitarian analysis of incentives, where the final outcome is increased deterrence although the manner of achieving this involves the dilemma of how best to act in cases where requests for leniency are advanced by women.

Likewise, from the classical perspective of sentencing considerations of prevention and protection of the victim, the dilemma is not simple. On the one hand, harsher sentencing is intended to provide immediate protection for women by removing violent men from their proximity in order to enable women to rehabilitate. Indeed, Wills explains that a strict policy is essential to the protection of women:

Sentencing batterers to jail does not endanger victims; batterers who believe there is no higher authority than themselves endanger victims. . . . Even if jail doesn't guarantee rehabilitation, we would certainly rather incarcerate batterers than continue to "intern" their victims by forcing them into shelters to be safe.¹⁸³

182. Wills, *supra* note 164, at 181.

183. Wills, *supra* note 164, at 180. Hanna notes that there is no empirical support for the assumption that more severe sentencing poses a greater risk to women. Cheryl Hanna,

On the other hand, there have been cases where there is a real fear that harsher sentences, and in particular custodial sentences, might increase the anger of violent men and consequently cause them to harm women at the first available opportunity.¹⁸⁴ Dayton emphasizes that as long as the state is not able to guarantee the safety of women, women cannot be made subject to a paternalistic regime that forces them to cooperate with the policy chosen by the prosecution,¹⁸⁵ thereby exposing them to a real risk upon the men returning home after being acquitted or following completion of their sentence.¹⁸⁶ What should be done, therefore, in this paradoxical situation, when the sentence—which is intended to protect women—actually puts them at risk?

IV. TOWARDS A MULTIDIMENSIONAL MODEL THAT RECOGNIZES FEMALE DIVERSITY—A VICTIM REPORT

How should we try and resolve the dilemma of whether to consider a victim's request for leniency without applying a solution that falls within the inflexible victim-free agent dichotomy, but instead adapts to specific women and their unique life stories?

Initially, it is necessary to contemplate the distinction between a request for leniency during pre-conviction stages, i.e., a request to withdraw a complaint made to the police, and a request for leniency during the sentencing stage, such as a request for leniency upon conviction, or a request for a charge to be dropped or replaced with a more moderate one.

Arguably, at the conviction and earlier stages there is justification for not giving consideration to women's requests for leniency, as the conviction entails moral condemnation and stigmatization of the acts attributed to the defendant.¹⁸⁷ Adopting a "no drop" policy at the indictment stage not only guarantees that a stern condemnatory message is sent to the defendant about the manner in which his conduct is perceived by society, but also sends a message to society itself. As noted,

The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 WM. & MARY L. REV. 1505, 1557 (1998).

184. Wills, *supra* note 164, at 179.

185. Dayton, *supra* note 160, at 289.

186. See Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 191 (1997).

187. This statement is not obvious. In other offenses we find that the forgiveness of the victims is sometimes taken into account versus the public interest in charging the offender.

these messages underpin our view regarding the activity of the criminal law and the justification for sentencing. The very use of the criminal process has an ancillary value in the form of deterring violent men, who typically do not acknowledge the criminality of their acts and tend to activate defensive psychological mechanisms of rationalization, minimalization, and casting responsibility onto external factors.¹⁸⁸ If it was not for the pursuit of an “aggressive” policy that refused to take into account the clear tendency of battered women to withdraw complaints made to the police, the phenomenon would often remain completely outside the coercive external handling of society. Considering women’s requests to withdraw a charge at such an early stage of the criminal process would inevitably thwart the possibility of sending the message of condemnation and repugnance that accompanies the indictment of an offender. Unlike the sentencing stage, the indictment stage symbolizes the beginning of the criminal process. If the process were not to begin at all, the state’s intervention would not be seen as sending a sufficiently assertive and condemnatory social message.¹⁸⁹

The difference between the sentencing stage and the preceding stages may justify an approach that actually supports giving substantive and influential weight to the judgment and needs of the victim at the sentencing stage.¹⁹⁰ First, unlike the position at the indictment stage, which is based on a binary decision to accept the victim’s wishes and not try the offender, or to disregard her wishes and try the offender, the sentencing stage is completely within the discretion of the court, regarding

188. See Wills, *supra* note 164 (describing a range of factors supporting the adoption of a “no drop” policy when charging an offender with domestic violence). Hanna supports a policy whereby charges are brought against defendants against whom there is solid evidence, irrespective of the victim’s wishes. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 ILL. L. REV. 1849, 1867–68 (1996). An advantage of indictments that do not take into account the woman’s wishes lies in the ability to testify about the public aspect of domestic violence offenses. *Id.* at 1907–08. Hanna is aware that the price of an aggressive prosecution policy is reduced female autonomy. *Id.* at 1856. Hanna states that in certain cases, a woman must be compelled to testify against her will in order to remove any incentive for the man to threaten her.

189. See Eisenstat, *supra* note 3 (supporting the presumption that the state has a greater interest at the indictment and determination of guilt stages, and that it would not be appropriate for the victim to have independent standing during these stages).

190. Comments made by Wills, who vehemently supports the adoption of a “no drop” policy at the pre-conviction stages, indicate that she too does not reject the possibility of compromise with respect to giving consideration to victim’s needs or wishes at the sentencing stage. Wills, *supra* note 164, at 179 (“[P]rosecutors have learned from the carnage and despair we have witnessed in domestic violence cases that victims cannot afford to forgive and forget and that the only thing worth negotiating is how much incarceration and how much mandated counseling is necessary to stop the batterer.”).

both the preliminary question as to whether to take the victim's wishes into account, and the extent to which her request should be considered and the manner in which this consideration should influence the structure of the sentence. The court could adopt an intermediate path of partial or qualified consideration for the wishes of the victim. The judge has the choice of placing the offender on probation, and if he breaches his probation he can be subjected to imprisonment. Likewise, the judge could hand down a suspended sentence of imprisonment.

Second, once retribution and deterrence are achieved in accordance with the system described here—a system that rejects a request for leniency at pre-sentencing stages—the factors favoring giving consideration to the wishes of the victim at the sentencing stage take over, because women will then suffer the practical consequences and impact of the sentence directly and immediately. This is unlike the situation with other types of offenses, where the victim and the assailant are strangers, or at least do not maintain an intimate and intensive relationship, where it has sometimes been argued that in order to justify hearing the victim, proof must first be adduced regarding the benefit which the victim might gain by punishing the defendant.¹⁹¹

Third, it is arguable that the substantive impact of the criminal process on the life and needs of women is expressed in practical terms at the sentencing stage, as the ignominy accompanying the conviction is essentially symbolic and it is only sentencing which gives it concrete expression within the framework of a material sanction. This argument turns the policy of considering the wishes of the victim at the sentencing stage into a tool that provides women with an incentive to turn to the legal system, including in a system that adopts a “no drop” policy at pre-sentencing stages. Refusing to consider the wishes of female victims at the most critical and meaningful stage of their life—the sentencing stage—might sway them from launching criminal proceedings in the first place, and thereby prevent the coercive intervention of the criminal law at the early stages of the indictment process and subsequently—conviction. As noted, these stages are of a symbolic and deterrent value that cannot be denied, and may also, of course, be accompanied by a very important rehabilitative element. Upon sentencing the courts will frequently ponder whether to adopt recommendations for rehabilitation or treatment or pursue harsher sentences.¹⁹²

From this point of view, we offer a solution that breaks out of the dichotomous thinking customarily adopted by feminist literature re-

191. Hurd, *supra* note 7, at 407–08.

192. It should be emphasized that we are not concerned here with the empirical question regarding the best way to prevent future acts of domestic violence.

garding the perception of women living under the shadow of violence as either victims or free agents. This dichotomy disguises the difference among the life experiences of individual battered women. It relies on the uncritical acceptance of the concept of a person's personal identity as being a stable and permanent matter which could be distilled into a single, central trait: victimization or autonomy.¹⁹³ In practice, as we have tried to show, the attempt to portray women as always meeting one of the two alternative descriptions—victim or free agent—fails to accurately explain the complex realities of women's life experiences.¹⁹⁴ As Baker notes: "The reality lies somewhere in between."¹⁹⁵ In view of this insight, scholars have suggested replacing the binary approach to autonomy and repression with a resolution-sensitive approach that would recognize the scale of situations and integrate the concurrent differing limitations and levels of autonomy in the lives of women.¹⁹⁶

Based on Hannah Arendt's approach, Leora Bilsky suggests the development of a new theory of independence designed to replace the atomistic concept of "the liberal me" with a concept of independent identity which is largely shaped within the public sphere of discourse and interpersonal activity.¹⁹⁷ Erella Shadmi also adopts an interpretive framework that rejects both the presumption of women's autonomy and the concept of their powerlessness as an inevitable outcome of being terrorized. Shadmi presents a number of solutions for rejecting

193. Minow, *supra* note 150, at 1432–33.

194. SCHNEIDER, *supra* note 146, at 82.

195. Baker, *supra* note 131, at 1465 (emphasis added).

196. Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 389 (1993). Abrams joins the call to replace the simplistic binary approach with one that recognizes that the actions of a woman are an outcome resulting from partial autonomy. Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1556–57 (1994) (reviewing KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS* (1993)).

197. Bilsky, *supra* note 91, at 51–52. The author relies on an analysis offered by Arendt in order to explain human action as comprised of three elements: plurality, which is expressed by multiple perspectives with respect to every human action; natality, which is expressed by freedom of human action that enables us to act in an unexpected and original manner; and narrativity, which is expressed in a continuous process of creating relationships, traditions, and stories that make up human society. This complex view of human action contradicts the dichotomous framework that perceives autonomy and victimization as being mutually exclusive and instead enables an understanding of the establishment of the "self" as a continuing process where the identity of the "self" is not stable, but contemporaneously contains elements of autonomy and victimization.

the binary opposition between victimization and power,¹⁹⁸ and examines the mutual relations between limitations and freedom in the lives of terrorized women, while shifting the focal point to the public sphere, i.e., to the responsibilities of society, its institutions, and its members.¹⁹⁹

The solution we propose seeks to pursue this critical trend and offers a practical tool for dealing with the question at the heart of this Article. We propose using the device known as a “victim report” as a means of informing the court of the victim’s suffering and her wishes, explaining the concrete reasons for the specific woman’s request for a more lenient sentence to be imposed on her assailant.²⁰⁰ Our practical experience gained from meeting women living in the shadow of violence has shown that a variety of factors may motivate women to ask for leniency. These factors range from internal-subjective issues stemming from deep and genuine feelings of love for the man,²⁰¹ to practical constraints such as the woman’s financial situation and concern for her children and for the unity of the family,²⁰² to emotions of fear or a sense of being

198. Shadmi, *supra* note 128, at 21–22. One solution is Mahoney’s suggestion that domestic violence be viewed as a struggle for “power and control.” Shadmi, *supra* note 128, at 21 (citing Mahoney, *supra* note 90, at 28, 60). Within this framework, women are portrayed as active agents when they express confidence in the future of their relationships and decide to continue with their marriages. A second solution relies on a new understanding of autonomy. As the objective is to transform the mutual dependence between the citizen and the state to support for autonomy, she calls for women to be genuinely involved in making decisions about their future. Shadmi, *supra* note 128, at 21. A third solution relies on a new understanding of victimization: “the recognition of victimization enables women to know what we are facing,” i.e., recognition of victimization enables feminist handling of male control and violence. Shadmi, *supra* note 128, at 22 (translated by the authors).

199. Shadmi, *supra* note 128, at 30.

200. This idea is also consistent with Eisenstat’s writings and the view that in order to examine the morality behind the victim’s desire for revenge, it is necessary to consider her motives. See Eisenstat, *supra* note 3, at 1123.

201. Many women speak of feelings of love, dependence, and nostalgia for the man in their lives. Love has the power to hurt, while simultaneously creating the strength to suffer through pain. A well-known study by J.J. Gayford of 100 battered women in England showed that among the common reasons for their staying in a violent relationship were feelings of love and loyalty to the man. Twenty-one percent of the women reported that they had feelings of love or affection towards their violent partners. J.J. Gayford, *Wife Battering: A Preliminary Survey of 100 Cases*, 25 BRIT. MED. J. 194 (1975). This reason is often doubted by the courts, which find it difficult to comprehend ambivalent messages such as “can’t live with him, can’t live without him” and instead wonder, “how can a woman really love someone who causes her suffering?”

202. There are women who fear that their family will fall apart in the absence of the man and seek to give the children a father figure in the home, particularly in cases where the man does not direct his violence towards the children, but only towards the woman. Economic factors may also sway the woman to ask for a more lenient sen-

threatened or pressured by the man as part of the dynamic of control which do not reflect the genuine and sincere internal will of the woman.²⁰³ Identifying a woman's motives for her request for leniency and describing them in a thorough victim report may therefore help to determine what weight should be accorded to her requests in her particular case. For example, a request ensuing from a genuine internal subjective wish stemming from love for the man and based on the hope of improving the family situation may justify greater consideration than a request ensuing from feelings of fear stemming from threats and pressure exerted by the man on the woman. These factors do not, of course, eliminate the separate difficulty mentioned earlier, relating to the high risk possibly posed by the man that may create a fear that harsher punishment would endanger the woman. To this one must add the importance of the victim report as a therapeutic legal device, by providing the victim with a sense that the legal system recognizes her as a person and listens to her wishes. An additional ancillary benefit may be gained from the cumulative lessons taught by these reports in an area which is still largely shrouded in uncertainty.²⁰⁴

The great value of the solution offered here lies, therefore, in the fact that it is not positioned at one of the extremes of the dichotomy of autonomy-paternalism, but rather integrates the advantages of each approach while adapting them to the circumstances of the specific case and the possible variations in the life stories of the different women. This solution recognizes the limitations of a sweeping concept of the needs of women and their life experiences, a concept which purports to place all women in one category, and instead suggests that recognition be given to a wide spectrum of needs and female life experiences, based on which modes of intervention and levels of consideration will be chosen in the

tence. In many cases the man is the sole breadwinner and the woman fears that the family's living standards will worsen if the man is incarcerated and forced to stop working.

203. In some (rare) cases of a "forgiving victim," we can say that the victim believes that forgiveness is a more exalted value than revenge, and in forgiving the abuser the victim displays moral superiority in the face of his lack of morality.
204. For the statement that there is insufficient information regarding the range of reasons and range of sentences, and that the system often acts on the basis of mistaken assumptions regarding the efficiency of therapy versus the lack of benefit from incarceration, see Hanna, *supra* note 183, at 1507. Hanna criticizes the fact that in certain places in the United States, there is a tendency to refer cases of domestic violence to therapy instead of sentencing within the framework of the criminal system, when it is not empirically clear that this course of action is effective in terms of preventing future violence. Hanna sees this as a response to the sexist perception of domestic violence as a private matter and therefore outside the ambit of the criminal justice system. Hanna, *supra* note 183, at 1508.

concrete case. Likewise, the solution recognizes the complexity of situations of domestic violence, which is not resolved at a given moment or even limited to a particular defendant and victim. Thus, the solution proposed here seeks to limit the problem of essentialism: it may be that it would be appropriate to strongly consider the request of one woman yet reach the opposite conclusion in other cases. Moreover, even in the specific case, the court would not inevitably have to adopt a paternalistic approach of complete consideration versus no consideration whatsoever.

A victim report explaining the situation of the specific woman and the nature of her unique relationship with her partner could lead to the conclusion that it would be appropriate to consider her request but subject to qualifications (for example, when practical constraints are at the root of her request to lighten the sentence). It is also possible that if women are given the opportunity to freely explain their situation and their wishes (which is not the situation on the witness stand), the judge would find that this wish is not one-dimensional. Similarly in respect of victims seeking a harsher sentence, a victim report may sometimes reveal that in fact the victim's aspiration is different. This is the case, for example, when a victim asks a defendant to take responsibility for his acts, or when she particularly wants the court to confirm her status as a victim.²⁰⁵

A number of practical methods are recognized globally for conveying the victim's wishes to the court during the sentencing stage: one

205. For testimony that shows that sometimes victims are not interested in harsher sentences per se but rather in the court's recognition of their injuries and that the defendants take responsibility, see Yanay's study on "victim reports" in sex offenses, Yanay, *supra* note 65. The study examined the use of the report and its impact on various relevant bodies and it included 52 cases of sex offenses in which a victim report was submitted. The findings of the report show that there are victims who regard the portrayal of their pain in court, otherwise than as witnesses, as an important stage that is designed to enable them to feel that justice has been done in their case. Yanay, *supra* note 65, at 256. A number of victims stated that it was important to them for the court to define them as victims and charge their assailants. Using this distinction the court helped them to acquit themselves of the confusion that had characterized them—the fear that perhaps they had caused the offenses committed on them. Some regarded this determination as legitimization of their suffering. The victim testimony is informative regarding the validity and importance of the message theory in a multi-dimensional framework, which enables recognition of the needs of the victim, on one hand, by sending a message to the defendant and to the community (by means of the court), and on the other hand, receiving back an important message from the community (by means of the court) regarding recognition of the injury. Here the study emphasizes the value of the report as a therapeutic tool within the legal system.

method is the submission of a victim's impact statement,²⁰⁶ a second method is to call the victim as a witness upon sentencing, a third method is the submission of a victim report.²⁰⁷ In our view, the third method is the most appropriate.

Our remarks might lead to the conclusion that we support the direct testimony of the victim, but we believe that a victim report offers a better solution, because direct testimony at the sentencing stage has a number of disadvantages. First, the testimony of the victim at the presentencing stage will not always inform the court of the real wishes of the victim; these wishes are often only uncovered following thorough inquiry by a professional who investigates her motives and the background circumstances surrounding the relationship of the couple. Second, the direct testimony of the victim is dependent on the discretion of the party summoning her. Third, the testimony of the victim in court may lead to a confrontation between her and the defendant. The knowledge that she must testify, while facing her assailant, may impair her willingness and ability to speak openly, sincerely, and starkly. Likewise, a victim's impact statement is undermined by the fact that the court is not in a position to inquire into the background to the statement and the sincerity of her request. Moreover, not only is the impact statement made in writing, but if defense counsel chooses not to cross-examine the victim, the court will not be able to gain a personal impression of the victim.

Unlike the other options described above, there are many advantages to a victim report. First and foremost, the report sets out the victim's statement and her story on the basis of her willingness to cooperate, and thereby enables the court to comprehensively examine the injury and its circumstances, hear the story of her suffering, and find a solution which will be more realistic and compatible with her needs.²⁰⁸

206. For a survey of the position around the world regarding victim impact statements, as well as criticism and support for this approach, see Edna Erez, *Victim Participation in Sentencing: And the Debate Goes on*, 3 INT'L REV. OF VICTIMOLOGY 17 (1994); Erez, *supra* note 24, at 545-56; Leslie Sebba, *Will the "Victim Revolution" Trigger a Reorientation of the Criminal Justice System?*, 31 ISRAEL L. REV. 379 (1997).

207. The purpose of the submission of a victim report is to inform the court of objective data regarding the condition of the victim, in order to allow the court to weigh this data among the other factors to be considered upon sentencing. For a description of the "victim report" around the world, see Yanay, *supra* note 65, at 240-44.

208. We should recall our earlier remarks regarding the importance of recognizing suffering that makes it vital to hear the victim. In this context, Meirav proposed an interesting theory to the effect that learning gained from human suffering and emotion is a tool for understanding the power and importance of a lost value for that person. Meirav explains how suffering regarding the loss of something of value for a victim (for abused women this may be, for example, the self, dignity, a sense of

At the same time, being prepared by a professional, a report would allow the court a more objective, penetrating look at the injury and its circumstances.²⁰⁹ The writer of the report is a professional social worker with an understanding and experience of the complexity of the material, and he or she must be trained to identify the motives of the woman in the concrete case.²¹⁰ Furthermore, the report is prepared outside the court and the victim need not confront the defendant inside the courtroom. Alongside the factual description which must be scrutinized by the probation service, the victim may express her view regarding the appropriate sentence, while the professional may inquire into the factors leading her to this conclusion, including her environment and similar relevant circumstances. Thus, a victim report will best and most suitably express the sentencing theory advocated in the first part of this Article,

well-being, or personal safety) is the manner in which that value is perceived. It follows that suffering is a tool for understanding the meaning of the lost value—a person listening to the story of one who has experienced loss imagines how feelings of loss are experienced, but only if he listens sympathetically and allows his emotions to be awakened. Meirav, *supra* note 17, at 452–53. According to Meirav, when listening to a story that expresses suffering regarding a violation of values (for example, when listening to the story of the suffering of battered women or their impact statements during sentencing), the listener (in our case—the court) may achieve a deeper understanding and empathy for the lost value, an understanding which would not have come about through “cold” (emotionless) thinking, however focused and intense. Meirav, *supra* note 17, at 452. These emotions may, for example, sway the judge to be more attentive and invest greater intellectual effort in untangling the problematic knot before him (instead of choosing the “easy” route of dryly implementing the law, without attempting to adapt or at least bend it, by applying it in a sensitive manner to the specific case). The job of narrating the victim’s story entails highlighting the values violated from her point of view, and for the judge—understanding the dimensions and quality of the loss. In contrast, the function of the defendant’s statement is to highlight those same values from a different perspective by describing the values that were violated from the point of view of the defendant himself. Meirav, *supra* note 17, at 483. The theory enables us to explain how these declarations may allow each party to perceive the sentence as more just. If it is clear both to the victim and to the defendant that the sentence is given out of a clear understanding of the meaning of the values which were harmed in the life of the victim, and despite them, and out of a clear assessment of the values which were or will be harmed in the life of the defendant, and despite them—it is likely that neither would regard the sentence as unjust. Meirav, *supra* note 17, at 480.

209. Thus, provision of a victim report precludes the serious criticisms raised against victim impact statements, to the effect that victims may report about their injuries and emotions without any verification. Whiteley herself rejected the idea of a victim’s impact statement. Whiteley, *supra* note 28, at 50–52.
210. In our view, the combination of legal bodies and social workers is critical in these types of cases. See Hanna, *supra* note 183, at 1553 (regarding prosecutors who are incensed when they fear that they will also be given therapeutic functions in cases of domestic violence).

i.e., transfer messages between the victim, the community and the defendant, regarding the injury and the wishes of the victim.²¹¹ Moreover, hearing the voice of the victim through the submission of materials will help the victim to cope with this painful process. Thus, accepting a report, in contrast to the adoption of the model of direct testimony, reflects a moderate balance between safeguarding the victim's rights and those of the defendant. Accordingly, we believe that the report should be the default option in cases of domestic violence, and that the court should order the preparation of such a report in all cases prior to sentencing (of course, only with the agreement of the victim).

Naturally, we are aware of the fact that even this proposed model is not completely free of difficulties. A certain problem may ensue from the fact that the court is entitled to order the (sudden) preparation of a report. If we recall that the report may contain contentions based on facts, it is possible that the victim will not be summoned to testify to them. In addition, if the model is adopted it would require trust to be placed in the writers of the report, their professionalism and evaluative skills. These professionals may give expression to their own views within the framework of their activities and take a paternalistic approach, or have a stereotypical or biased worldview. Nonetheless, the latter problem is not confined to this context, and it may be seen in every

211. In addition to the many advantages offered by the report as a legal tool, Yanay identifies non-legal benefits; including among these benefits are contact between the victim and the professional social worker, as well as the opportunity to bring to the forefront the details of the serious event, but in an environment which is protected and empathic and helps the victim examine the facts through the appropriate perspective and with professional counseling. Yanay, *supra* note 65, at 265. The writers of the report are trained not only to receive the data so as to allow them to write the report for the court, but also—and more particularly—to help the victim cope with the issues arising during the writing of the report. This important aspect is clearly reflected in the comments of one of the writers of reports: “In my opinion, the help to the victim lies not only in the preparation of the report as a final product, but in the process itself: the ability of the writer of the report to be there for the victim, to listen, to be connected without withdrawing, becoming detached, defensive or defending—forms part of the process itself, which in my view, makes a significant contribution to the victims, well before the report reaches the court and irrespective of its implications for the sentence.” Yanay, *supra* note 65, at 265–66. In domestic violence offenses the value of these benefits is huge. There are those who fear the possible negative impact which the preparation of the report and its submission in court may have on the victim. This fear stems from the fact that preparation of the report sometimes leads to a loss of the equilibrium that the victim has managed to achieve. Additionally, occasionally it is better for the victim that the court is seen to sentence the convicted defendant without the victim “interfering” in its deliberations. The victim's possible impact on the sentence may ultimately place her under a heavy emotional burden. *See id.* at 267.

situation involving a professional mediator who reports to the court. One way of dealing with this problem is, for example, to devote part of the report to quoting the victim in her own words, and separating this section from the evaluation section written by the writer of the report. Likewise, emphasis should be placed on the professional training of the writers of the reports. Comprehensive training, including increased alertness to the flaws that may be uncovered within the context of the document as a result of personal bias, prejudices, or inclinations, may also help to alleviate this fear.

V. INSTEAD OF A CONCLUSION

We have no doubt that giving standing to the victim at the sentencing stage poses a problem for the legal system as it introduces a new human element into the picture. This is a system in which the judges and juries are accustomed to focus on the defendant while the arguments set forth by the prosecution are usually abstract and do not include the testimony of the victim or a victim impact statement. In our opinion, this increased pressure is not only justified by the concepts which we have sought to advocate in this Article, but is also essential at this stage of the development of the criminal justice system and in view of the fear of the loss of public confidence in this system. Moreover, the advantage of such pressure is that it can exert leverage to ensure a deeper study of the issue of domestic violence. Recognition of the sentencing stage as “the individual justice stage,” in contrast to the structured determination of culpability stage, is imbued with real meaning when the justice targets not only the defendant but also the victim. The tension between victimization and autonomy that is uncovered by the analysis of issues affecting women suffering from violence may actually have a positive outcome as it is capable of reminding us of the complexity of human actions: instead of adapting the stories of battered women to existing legal checkboxes, it may be necessary to adjust the checkboxes to the complex stories of partial autonomy.

Our proposal seeks to adapt the checkboxes to the complex stories of partial autonomy and variations existing between different women, using a theoretical format that gives a role to victims of crime during the sentencing stage and recognizing the unique aspects of victims of domestic violence. Our proposal offers a resolution mechanism that is sensitive to the balance between the different considerations and diverts the focus from the contents of the request per se (to lighten the sentence) towards a spectrum of various motives for the request, such as

fear, love, the desire not to harm children and family, and practical considerations such as economic dependence. These motives vary among different women depending on their personal stories. Transferring attention from the issue of the content of the request to the motive underlying the request that the assailant be given a more lenient sentence may allow the proper weight to be assigned to each request in any given case, by taking into account the entire spectrum of considerations on either side of the double-edged sword. Sharpening the resolution so as to allow the motive for the request to be identified may bring to light and prioritize considerations that would benefit women and be adjusted to their concrete case, and will contribute, on a macro-level, to the criminal justice system. Our proposal should be also considered in the context of other types of offenses taking place within the domestic relationship. ❀

