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Who's Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs

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WHO'S AFRAID OF JUDICIAL ACTIVISM? RECONCEPTUALIZING A TRADITIONAL PARADIGM IN THE CONTEXT OF SPECIALIZED DOMESTIC VIOLENCE COURT PROGRAMS

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WHO'S AFRAID OF JUDICIAL ACTIVISM? RECONCEPTUALIZING A TRADITIONAL PARADIGM IN THE CONTEXT OF SPECIALIZED DOMESTIC VIOLENCE COURT PROGRAMS

[T]he judge, who decides in view of particular cases, and with reference to problems absolutely concrete, ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.

—Benjamin N. Cardozo, “The Nature of the Judicial Process”¹

I. INTRODUCTION

Sarah is a thirty-two-year-old dental assistant. She has been married to Nathan, a contractor, for six years. They have a four-year-old son, Justin, and share a home in York. One Saturday, Nathan, who had been out of work for three months, spent all day drinking at his favorite bar, something he had begun to do frequently. When he came home that evening, he and Sarah got into an argument over his drinking and their dire financial situation. Their screaming match soon escalated and Nathan pushed Sarah so hard that she tripped over the arm of their couch. When she had righted herself, she was immediately knocked down again by the force of Nathan's fist hitting her in the mouth. Nathan stormed off to the kitchen, and Sarah, who was frightened, her mouth still throbbing from the blow, reached for the phone and dialed the police.

The dispatcher answered and as soon as Sarah began to relay her name and address, the line went dead. Upon returning to the living room, Sarah saw that Nathan had ripped the phone cord out of the wall and was threatening to hit her with the base. He held a kitchen knife in his other hand. When the police arrived at their house ten minutes later, having traced the phone call, they were greeted by a smiling, nonchalant Nathan. Sarah could be seen from the doorway sitting on the couch, her face swollen, comforting her son, Justin.

If this scene had played out prior to July 2002, it may have progressed in the following manner: Because Maine police departments observe mandatory arrest policies, the officers would likely have entered the home and spoken with both Nathan and Sarah in order to determine who was the aggressor in the fight.² Given

1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 120-21 (1921).

2. See EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 126-43 (3d ed. 2003) for a discussion of mandatory arrest policies throughout the United States. According to Buzawa and Buzawa, mandatory arrest policies have arisen out of the increased “preference toward arrest . . . coupled with a growing desire to limit police discretion in the decision of whether to make an arrest.” *Id.* at 126. The desire to mitigate police discretion in domestic violence cases stems, in part, from problems relating to “the inherent ambiguity of the police-citizen encounter in the context of domestic violence.” *Id.* Proponents of mandatory arrest policies argue that “[a]lthough theoretically an independent decision for each intervention, police actions in normal domestic calls will almost inevitably be colored and bounded by the officer’s ‘common knowledge’ of the futility of police intervention.” *Id.*

Sarah's demeanor and injuries, Nathan would likely have been taken into custody. If the arresting officers required more time to process the scene and speak to Sarah about what had transpired in order to better inform their reports, it is possible that Nathan would have been transported to the county jail by an officer who was not directly involved in the arrest and who had not spoken with the parties about the assault.

Upon Nathan's arrival at the jail, a bail hearing would have been scheduled as soon as practicable. Because the arrest would have been made when no judges would have been available for a hearing, Nathan would have likely appeared before a bail commissioner³ or spoken with one over the phone. After speaking with Nathan, the bail commissioner would then have set the conditions of his bail as well as determined whether to release Nathan on personal recognizance or upon execution of an appearance bond.⁴ Were the arresting officer not present, the bail commissioner might have proceeded without the benefit of the officer's observations. Depending on how soon the bail hearing were to occur after Nathan's arrest,⁵ the bail commissioner might have made the bail determination without having first consulted the police report.

In addition, because of a lack of protocol or information storage capabilities within the State prior to July 2002, the bail commissioner would likely have been unable to review Nathan's criminal record or protection from abuse history to determine the existence of any outstanding warrants or protection orders against him. It would not have been unusual for Nathan to be released within several hours of his arrest without being required to appear in court for two months or more.

If Sarah simultaneously, or shortly thereafter, had filed a petition for a civil protection from abuse order,⁶ a judge in granting a temporary protection from abuse order would also have been unable to access files relating to the parties. The judge, therefore, may have been unaware of the conditions of Nathan's release and may have issued conditions that confuse or conflict with his bail conditions.⁷ The

3. Under ME. REV. STAT. ANN. tit. 15, § 1023(2) (West 2003), bail commissioners are appointed by the Chief Judge of the District Court. They have the authority to set preconviction bail for a defendant in a criminal proceeding . . . provided that a bail commissioner may not set preconviction bail for a defendant: a. Who is charged with murder; b. If the attorney for the State requests a Harnish bail proceeding for a defendant charged with any other formerly capital offense; or c. As otherwise provided.

Id. at § 1023(1).

4. *Id.* at § 1026.

5. Initial appearance before a judicial officer for a bail determination typically needs to take place within forty-eight hours of arrest. ME. R. CRIM. P. 5.

6. See ME. REV. STAT. ANN. tit. 19-A, §§ 4001-12 (West 2003) (containing the language of Maine's protection from abuse statute).

7. ME. REV. STAT. ANN. tit. 15, § 1026(3) (West 2003), release on conditions, provides: Conditions that will reasonably ensure the appearance of the defendant and ensure the integrity of the judicial process must be imposed as provided in this subsection. A. If, after consideration of the factors listed in subsection 4, the judicial officer determines that the release described in subsection 2 will not reasonably ensure the appearance of the defendant as required or will not otherwise reasonably ensure the integrity of the judicial process, the judicial officer shall order the pretrial release of the defendant subject to the least restrictive further condition or combination of conditions that the judicial officer determines will reasonably ensure the appearance of the defendant as required and will otherwise reasonably ensure the integrity of the judicial process. These conditions may include that the defendant: (1) Remain in the custody of a

designated person or organization agreeing to supervise the defendant, including a public official, public agency or publicly funded organization, if the designated person or organization is able to reasonably ensure both the appearance of the defendant as required and the integrity of the judicial process. . . . (2) Maintain employment or, if unemployed, actively seek employment; (3) Maintain or commence an educational program; (4) Abide by specified restrictions on personal associations, place of abode or travel; (5) Avoid all contact with a victim of the alleged crime, a potential witness regarding the alleged crime or with any other family or household members of the victim or the defendant or to contact those individuals only at certain times or under certain conditions; (6) Report on a regular basis to a designated law enforcement agency or other governmental agency; (7) Comply with a specified curfew; (8) Refrain from possessing a firearm or other dangerous weapon; (9) Refrain from use or excessive use of alcohol and from any use of drugs; (10) Undergo, as an outpatient, available medical or psychiatric treatment, or enter and remain, as a voluntary patient, in a specified institution when required for that person; (11) Execute an agreement to forfeit, upon failing to appear as required, such designated property, including money, as is reasonably necessary to ensure the appearance of the defendant as required and to ensure the integrity of the judicial process and post with an appropriate court such evidence of ownership of the property or such percentage of the money as the judicial officer specifies; (12) Execute a bail bond with sureties in such amount as is reasonably necessary to ensure the appearance of the defendant as required and to ensure the integrity of the judicial process; (13) Return to custody for specified hours following release for employment, schooling or other limited purposes; (14) Report on a regular basis to the defendant's attorney; (15) Notify the court of any changes of address or employment; (16) Provide to the court the name, address and telephone number of a designated person or organization that will know the defendant's whereabouts at all times; (17) Inform any law enforcement officer of the defendant's condition of release if the defendant is subsequently arrested or summoned for new criminal conduct; and (18) Satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and to otherwise reasonably ensure the integrity of the judicial process.

Section 1026(4) outlines the factors that are to be considered in the release decision. That section states:

In setting bail, the judicial officer shall, on the basis of an interview with the defendant, information provided by the defendant's attorney and information provided by the attorney for the State or an informed law enforcement officer if the attorney for the State is not available and other reliable information that can be obtained, take into account the available information concerning the following: A. The nature and circumstances of the crime charged; B. The nature of the evidence against the defendant; and C. The history and characteristics of the defendant, including, but not limited to: (1) The defendant's character and physical and mental condition; (2) The defendant's family ties in the State; (3) The defendant's employment history in the State; (4) The defendant's financial resources; (5) The defendant's length of residence in the community and the defendant's community ties; (6) *The defendant's past conduct, including any history relating to drug or alcohol abuse*; (7) The defendant's criminal history, if any; (8) The defendant's record concerning appearances at court proceedings; (9) Whether, at the time of the current offense or arrest, the defendant was on probation, parole or other release pending trial, sentencing, appeal or completion of a sentence for an offense in this jurisdiction or another; (10) Any evidence that the defendant has obstructed or attempted to obstruct justice by threatening, injuring or intimidating a victim or prospective witness, juror, attorney for the State, judge, justice or other officer of the court; and (11) *Whether the defendant has previously violated conditions of release, probation or other orders, including, but not limited to, violating protection from abuse orders pursuant to Title 19, section 769 or Title 19-A, section 4011.*

Id. at § 1026(4) (emphasis added).

conflicting orders may have provided enough ambiguity that Nathan would have opted not to follow the provisions of the temporary protection order. In addition, if Sarah had neglected to fully elaborate on the circumstances leading to her request for a protection order, or if the judge reviewing the petition was overloaded with a great number of other cases, her lack of access to information regarding Nathan's criminal history may have caused her to order conditions that are largely ineffectual.⁸

To further complicate matters, it is likely that different judges would have presided over Nathan's criminal and civil matters. Appearing before different judges, who may have had differing levels of commitment or time to dedicate to domestic violence and who were unaware of other pending cases involving the parties, would have increased the likelihood that the outcomes in each of Nathan's cases would be at variance with one another. In addition, due to overcrowded dockets and overworked probation officers, Nathan's compliance with any postconviction probation conditions or conditions of the protection order may have gone unchecked.

The scenario outlined above is demonstrative of some of the problems that can arise out of traditional courts' handling of domestic violence cases. In Maine, prior to July 2002, a widespread lack of information sharing or cooperation among law enforcement and courts often led to disjointed and ineffectual judicial intervention in cases involving domestic violence.⁹

Suppose, however, that Nathan and Sarah's situation played out this way instead: After Nathan's arrest, the bail hearing was postponed until the bail commissioner had an opportunity to speak with the arresting officer or review the police report. The officer informed the bail commissioner that Nathan had wielded a knife during his attack on Sarah. State record systems, having been updated and made widely accessible, were accessed and the bail commissioner was made aware that Nathan had been previously convicted of domestic assault. His probation conditions prohibited him from using drugs or alcohol. The bail commissioner, taking into account the prior conviction, violation of probation conditions, and the use of a weapon, set Nathan's bail at an appropriate amount. Further, if released, Nathan's first court appearance would have been scheduled to take place two weeks from the time of his arrest.

Similarly, in reviewing Sarah's petition for a protection from abuse order, the judge was made aware of the parties' history. As a result, the conditions of the temporary order were consistent with those of Nathan's bail conditions. The district attorney's office, also made aware of the parties' history, took Nathan's prior conviction and violation of his conditions into account when making the charging decision. In addition, rather than having each matter heard by a different judge, both the final protection from abuse hearing and Nathan's court appearance for the criminal assault charge were heard by the same judge. If convicted and placed on probation, the court, through regular judicial reviews, would have monitored Nathan's compliance with his probation conditions.

8. See *infra* text accompanying note 95 for the various conditions a judge may set as part of a protection from abuse order under ME. REV. STAT. ANN. tit. 19-A, § 4007 (West 1998).

9. See Jon Levy, STOP Violence Against Women Grant Application (Sept. 13, 2001) [hereinafter STOP Grant] (on file with *Maine Law Review*).

The second scenario, outlined above, represents the coordinated response envisioned by the recently adopted Specialized Domestic Violence Pilot Project (Pilot Project), implemented in York and Portland in July and August 2002. The Pilot Project is the result of the collaborative efforts of the District Court system, law enforcement, prosecutors, members of the defense bar, and various community agencies offering services to victims and perpetrators. District court judges are largely responsible for overseeing the changes in court procedures and implementing the new protocols in domestic violence cases. The Pilot Project, and the changes it is making to the role that courts play in domestic violence cases, represents a significant departure from the procedures followed by traditional court programs. As a result of newly coordinated efforts and increased communication and training, the Pilot Project has the potential to alter the disposition of domestic violence cases in the State of Maine.

Given the departure from traditional court models that the Pilot Project represents, and the role that the judicial branch has played in effectuating these new changes, the following questions begin to surface: Is the Pilot Project, and other similar specialized domestic violence court programs around the country, in some way representative of unorthodox judicial action? Could the newly-active role undertaken by the judicial branch to reorganize court structures be conceived of as a form of "activism" unlike that seen in conventional court settings? Finally, if such court programs are in fact examples of judicial activism, are they consequently objectionable or their outcomes subject to accusations of partiality in the same way that are other instances of so called "judicial activism"?

This Comment will endeavor to explore some of these questions as they relate to the development and operation of creative judicial programs, particularly within the State of Maine. Specifically, it will focus on the role that Maine's new Pilot Domestic Violence Project plays in adjudicating domestic violence cases and the extent to which the project represents, at the very least a departure from more traditional court programs and is, perhaps, also an example of "judicial activism."

In order to unpack these issues, this Comment will progress as follows: Section II will undertake a brief historical discussion of domestic violence adjudication within traditional court systems operating, ostensibly, within the confines of conventional, "objective" judicial frameworks. This background will provide a point of departure for an analysis of the shortcomings of traditional courts' treatment of domestic violence and the subsequent development of alternative approaches to adjudicating these difficult cases. Section III will then explore the development of specialized domestic violence courts around the country and discuss the philosophies and objectives embodied by them. Section IV will discuss an ideological framework, proffered by the Chief Judge of New York, Judith Kaye, that domestic violence courts, rather than being representative of "judicial activism," are, instead, examples of "judicial problem-solving," which, according to her, are entirely consistent with the usual function of American courts.¹⁰ Through an analysis of this idea of "judicial problem solving," as contrasted with more controversial notions of "judicial activism," this Comment will discuss whether

10. Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 10-12 (1999-2000) [hereinafter Kaye & Knipps].

the two concepts are entirely divergent or are, instead, reconcilable with one another. This discussion will explore instances of arguably proper judicial activism and propose that, in some circumstances, court policies and programmatic changes resulting in changed applications of the substantive law represent instances where courts are appropriately and necessarily empowered to practice judicial activism.

Section V will then delve into the recent development of a specialized domestic violence court program in Maine and discuss new approaches to domestic violence adjudication in the State. Through a discussion of the streamlining and reorganization of court resources and procedures, this Comment will explore whether Maine's court represents an example of Kaye's "problem solving" efforts or whether it, instead, represents a more significant transformation capable of achieving more far-reaching, substantive change. Finally, in Section VI, this Comment will draw several conclusions based on the foregoing discussion and argue that, in addition to affecting procedural changes and solving structural problems within the court system itself, the pilot project in Maine (and similar court programs around the country) also has the potential to change the way the substantive laws are applied in domestic violence cases.

II. TRADITIONAL COURT MODELS AND A HISTORY OF DOMESTIC VIOLENCE ADJUDICATION IN THE UNITED STATES

Domestic violence, as that term is widely understood and as it will be used in this Comment, has been broadly defined as any violence that "involves individuals in intimate relationships who use their power to physically, emotionally, sexually, or verbally abuse their partners."¹¹ So defined, domestic violence has proven to be a widespread problem throughout the United States both contemporarily and historically.¹² The prevalence of domestic violence and the impacts it has on social service agencies, the healthcare field, and the legal system indicate the need for concerted efforts to address the ongoing problem and, ultimately, to stop the

11. Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285, 1288 (2000) (citing The Family Violence Prevention Fund, *It's Your Business: Community Action Kit*); but see U.S. Department of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey*, 5 (2000) (available at <http://www.ncjrs.org/pdffiles1/nij/181867.pdf> (last visited Apr. 21, 2003)) [hereinafter *NVAW Survey*] (explaining "[t]here is currently little consensus among researchers on exactly how to define the term 'intimate partner violence'" for the purposes of quantitative research methodology. According to the *NVAW Survey*'s authors, data collected through studies that employ differing definitions of domestic violence are consequently difficult to compare. Some definitions are limited to "acts carried out with the intention of, or perceived intention of, causing physical pain or injury to another person." Others, however, perceive a need to account for "the myriad behaviors that persons may use to control, intimidate, and otherwise dominate another person in the context of an intimate relationship"). *NVAW Survey*, at 5.

12. See, e.g., *NVAW Survey*, *supra* note 11, at iii ("Intimate partner violence is pervasive in U.S. society."); BUZAWA & BUZAWA, *supra* note 2, at 57-64 (outlining various reasons why "[d]omestic violence has long been both a feature and a concern of society").

violence.¹³ Effective intervention in domestic violence cases has, however, proven particularly difficult for the legal system.¹⁴

Despite the crucial role that the legal system must necessarily play in sanctioning the criminal behavior of abusers and protecting the rights and safety of victims, several factors have hindered the ability of courts to mitigate the impacts of domestic violence on victims and society.¹⁵ Some examples of the factors impeding courts' progress include crowded dockets and a consequent lack of time and resources available to judges when dealing with individual cases.¹⁶ A pervasive judicial culture that has historically regarded, and to some degree continues to regard, domestic violence cases as less important than other, less complex matters, has also served to undermine the legal system's ability to meaningfully redress the problem.¹⁷

Through a discussion of these and other issues, this section will explore the magnitude and prevalence of domestic violence and its sometimes uneasy interface with the judicial system. In doing so, this discussion will track the history of domestic violence jurisprudence in American courts and illustrate the ongoing challenges these cases pose.

A. *Tracking the History of Domestic Violence Adjudication in the United States*

Domestic violence cases have historically occupied an uneasy place in American jurisprudence. Dating back to English common law, upon which the American legal system is based, courts have a long tradition of regarding domestic violence

13. See NVAW Survey, *supra* note 11, at 57. The Survey reports the prevalence of domestic violence, the demographic makeup of victims, and the impact of domestic violence on the health care field and U.S. justice system. According to the NVAW Survey, "[b]ecause many female and male victims of intimate partner rape and physical assault receive multiple forms of care for the same injury victimization, medical personnel in the United States treat millions of intimate partner injury victims annually." *Id.* Additionally, the authors of the Survey argue that "criminal justice practitioners should receive comprehensive training about the safety needs of victims" in order to improve the rate at which domestic abuse is reported and the efficacy of the criminal justice response. *Id.*

14. See, e.g., JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 170 (1999) (discussing the widely held belief that civil restraining orders in domestic violence cases are ineffectual). See also Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 3 (1999) ("Despite over two decades of reform, fundamental failures persist in the justice system's response to domestic violence."); and Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and The Truly Local,"* 42 *B.C. L. REV.* 1081, 1111 (2001) ("The historic belief that domestic violence matters have no legitimate place in the courts is centrally implicated in the failure of the legal system to address them.").

15. For a discussion of the role that courts play in effectuating societal change, see Judith S. Kaye, *Rethinking Traditional Approaches*, Speech at the American Bar Association Symposium, *Public Perception and Understanding of the Justice System* (Feb. 25-26, 1999), in 62 *ALB. L. REV.* 1491 (1999); Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 *HOFSTRA L. REV.* 1243, 1247-53 (1993); Richard C. Wesley, *Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now*, 65 *ALB. L. REV.* 1123, 1132-35 (2002).

16. Tsai, *supra* note 11, at 1293-94; Weissman, *supra* note 14, at 1113-14.

17. See Weissman, *supra* note 14, at 1111 ("[D]eeper structural problems . . . provide the ingredients for the subordinated treatment of gender-based violence claims. The legacy of past indifference to domestic violence claims, whereby wife beating found countenance in doctrinal law, continues to insinuate itself in modern jurisprudence.").

as a private family matter—one that implicates issues and conflicts beyond the scope of proper judicial intervention.¹⁸ This complacency by courts is both the result and the cause of judicial customs that have historically accepted, at least implicitly, wife-beating as a husband's right.¹⁹

The North Carolina Supreme Court expressed the view held by most early American courts rather tellingly in 1864. *State v. Black*,²⁰ involved the prosecution of a husband for assaulting his wife when he “seized her by her hair,”²¹ and threw her to the floor. The North Carolina court stated the general rule regarding a husband's “right” to “discipline” his wife as follows: “A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself.”²² Indeed, according to the criminal law as it existed in 1864, and as perceived by the court in *Black*, “[a] husband cannot be convicted of a battery on his wife unless he inflicts permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness.”²³

The belief held by early American courts that husbands acted within their rights when they beat and abused their wives in response to “misbehavior” stemmed from a larger body of law and social custom that denied women a viable legal identity of their own.²⁴ Some of the legal doctrines dating back to English common law and the inception of the American legal system, which effectively “consigned women to the domestic sphere in which the law then refused to intervene,”²⁵ were the old laws of coverture.²⁶ That doctrine, “premised on the theory of marital unity,”²⁷ provided that “a woman who enters marriage surrenders her legal identity to her husband and enters into the state of coverture, during which ‘the husband and wife are one person in law.’”²⁸

Early common law, based on this model of coverture, “prohibited married women from making contracts, keeping their wages, entering professions, establishing a separate domicile, and buying, selling or owning property.”²⁹ The practical effect of these laws was that women were largely prevented “from participating as individuals in the economic world outside the home.”³⁰ As stated previously, part of the reason for courts' traditional refusal or reluctance to sanction domestic violence stemmed from a belief that the law ought not “invade the domestic forum or go behind the curtain”³¹ of home and family. Some scholars have argued that this reluctance or refusal by courts to delve into issues implicating

18. Tsai, *supra* note 11, at 1288-89.

19. See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 22 (2000).

20. 1864 WL 1041 (N.C.).

21. *Id.* at *1.

22. *Id.*

23. *Id.*

24. See Goldfarb, *supra* note 19, at 22.

25. *Id.*

26. *Id.* at 21. See also Epstein, *supra* note 14, at 9-11.

27. Goldfarb, *supra* note 19, at 21.

28. *Id.* (quoting WILLIAM BLACKSTONE, 1 WILLIAM BLACKSTONE, COMMENTARIES 430).

29. *Id.* at 22.

30. *Id.* (footnote omitted).

31. *State v. Black*, 1864 WL 1041, at *1 (N.C.).

family dynamics is the result of a more general and influential "market-family dichotomy" pervading social attitudes and practices in the nineteenth century.³² According to this theory, courts were reluctant to delve into issues that they deemed "private" and consequently refused to sanction a husband's abuse of his wife because women were largely consigned to the family and the home and were precluded from participating in the marketplace.³³ Indeed, the statements made by the Supreme Court of North Carolina in *Black* are illustrative. According to Chief Justice Pearson, the law

prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should. Certainly the exposure of a scene like that set out in this case can do no good. In respect to the parties, a public exhibition in the Court House of such quarrels and fights between man and wife, widens the breach, makes a reconciliation almost impossible, and encourages insubordination.³⁴

The result of this judicial attitude, which regarded family matters and, more specifically, domestic violence, as largely undeserving of judicial time and attention was a widespread denial of "criminal and tort remedies for violence committed within" intimate family relationships.³⁵ Indeed, because of similar attitudes held by other state and federal courts around the country, domestic violence was not widely criminalized until the late nineteenth century.³⁶ Significantly, it was not until 1871 that a state court, the Supreme Court of Alabama in *Fulgham v. State*,³⁷ determined for the first time "that a husband did not have the right to beat his wife, and that a 'wife is entitled to the same protection of the law that the husband can invoke for himself.'"³⁸

In the years following the Alabama court's decision in *Fulgham*, several states began adopting "laws against domestic violence that made wife-beating a punish-

32. See Goldfarb, *supra* note 19, at 18-34. See also BUZAWA & BUZAWA, *supra* note 2, at 57-68 (discussing the role religion and social customs played in forming and reinforcing social attitudes regarding domestic abuse).

33. Goldfarb, *supra* note 19, at 22-32. The "market-family dichotomy," as discussed by feminist and legal scholars, refers to the "demarcation between market and family," both within the legal system as well as in the larger social order, that accompanied "industrialization and the resulting movement of work away from the home." *Id.* at 19-20. The ideology that resulted tended to view men as "naturally suited to the public world of labor and commerce, while women" were seen as "destined for the private sphere of home and hearth." *Id.* at 20. In turn, according to some, "the marketplace was viewed as public and therefore an appropriate subject for legal intervention, [while] the domestic sphere was idealized as a private realm in which affection, not law, would rule." *Id.* at 20-21. The result, "therefore, [was that] the law adopted a policy of refusing to intrude in the family." *Id.* at 21.

34. *State v. Black*, 1864 WL 1041, at *1-2. The court went on to observe the perceived consequences that court intervention in "private" matters has on the public at large. The court said that "in respect to the public," court involvement in private matters "has a pernicious tendency," so much so that "such matters are excluded from the Courts, unless there is a permanent injury or excessive violence or cruelty indicating malignity and vindictiveness." *Id.* at *2. *State v. Rhodes*, also decided by the Supreme Court of North Carolina, further illustrates the manner in which early American courts tended to undervalue issues raised by domestic violence crimes. 61 N.C. 453 (1868). See also Epstein, *supra* note 14, at 10-11.

35. Goldfarb, *supra* note 19, at 23.

36. Tsai, *supra* note 11, at 1289.

37. 46 Ala. 143 (1871).

38. Tsai, *supra* note 11, at 1289. (quoting *Fulgham v. State*, 46 Ala. at 147).

able offense."³⁹ Important shifts, at least in the official positions of legislatures and state courts, occurred toward the end of the nineteenth century when "three states, Maryland, Delaware, and Oregon, adopted laws against wife-beating."⁴⁰ At the same time, "nine other states were also considering stronger laws against wife-beating, and chastisement was no longer considered a defense to assault on one's wife in most states."⁴¹

Despite explicit statutory directives proscribing domestic abuse, individual opinions held by judges and/or prosecutors regarding the appropriate role of the law in "private" family matters frustrated legislative efforts to ameliorate the rights of abused women under the law.⁴² The demarcation between the stated rule of law and the application of those laws is, according to feminist legal scholars, indicative of the persistent and powerful influence of the "market-family dichotomy" on judicial attitudes.⁴³

The influence of distinctions made between ostensibly "public" and "private" issues did, however, eventually begin to break down in the 1970s and 1980s with the introduction of new, more sophisticated, legislative schemes addressing domestic violence.⁴⁴ Largely as a result of the feminist movement in the 1970s, "efforts to increase the strength of the criminal justice response to domestic violence"⁴⁵ led to "substantial improvements in statutory law"⁴⁶ and a shift in the way the legal system dealt with domestic violence cases. In stark contrast to the law as stated in 1864 by the court in *Black*, every state has now "enacted a civil protection order statute, and the vast majority of these authorize the essential relief

39. *Id.*

40. *Id.* at 1289 n.34 (citing BUZAWA & BUZAWA, *supra* note 2, at 31-32).

41. *Id.* Despite these additions to the legal terrain and the seeming shift in the regard that courts and legislatures had for domestic violence cases, however, the practical application of the new laws proved to be less than ideal. For many years, indeed for decades, after states began to create formal legal remedies for victims of domestic violence, perpetrators of abuse tended to be sanctioned only in the most extreme circumstances. *Id.* at 1289. Studies of state courts' compliance with enacted domestic violence legislation reveal that despite explicit statutory directives, "the sentencing of convicted domestic violence offenders," continued to be "quite lenient, with few offenders sentenced to serve any jail time." BUZAWA & BUZAWA, *supra* note 2, at 214 (citing LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* (New York Free Press 1992)). In Ohio, for example, one study revealed that while most domestic violence cases were dismissed (81 percent), "even in the rare circumstance that a domestic violence defendant was convicted and received a prison sentence, sentence terms were shorter than they were for other types of offenders." *Id.* at 215 (citing Daisy Quarm & Martin D. Schwartz, *Legal Reform and the Criminal Court: The Case of Domestic Violence*, 10 N. KY. L. REV. 199 (1983) and Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentencing Outcomes*, 28 CRIMINOLOGY 451 (1990)).

42. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 20-24 (2000). See also Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and The Truly Local,"* 42 B.C. L. REV. 1081, 1110 (2001) (suggesting that there continues to be a disconnect between legislative enactments and application of those laws by state courts: "Although progress has been made through state legislative enactments, there is a critical disjuncture between formal law on the one hand, and the implementation of statutes by the courts in matters involving domestic violence on the other").

43. Goldfarb, *supra* note 19, at 22-23.

44. Epstein, *supra* note 14, at 11.

45. Tsai, *supra* note 11, at 1290.

46. Epstein, *supra* note 14, at 11.

necessary for battered women to leave an abusive relationship."⁴⁷ Further, a great many states have "adopted criminal contempt laws to help enforce protection orders," with most states making the violation of "a protection order a statutory crime."⁴⁸

Such legislative efforts, which have endeavored to create viable legal remedies for domestic violence victims, coincided with other similarly important efforts being made at about the same time by various community agencies around

47. *Id.* Maine's protection from abuse statute, ME. REV. STAT. ANN. tit. 19-A, § 4001 (West 1998 & Supp. 2003), identifies the purposes of the law as follows:

The court shall liberally construe and apply this chapter to promote the following underlying purposes: (1) Recognition. To recognize domestic abuse as a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development; (2) Protection. To allow family and household members who are victims of domestic abuse to obtain expeditious and effective protection against further abuse so that the lives of the nonabusing family or household members are as secure and uninterrupted as possible; (3) Enforcement. To provide protection by promptly entering and diligently enforcing court orders that prohibit abuse and, when necessary, by reducing the abuser's access to the victim and addressing related issues of parental rights and responsibilities and economic support so that victims are not trapped in abusive situations by fear of retaliation, loss of a child or financial dependence; (4) Prevention. To expand the power of the justice system to respond effectively to situations of domestic abuse, to clarify the responsibilities and support the efforts of law enforcement officers, prosecutors and judicial officers to provide immediate, effective assistance and protection for victims of abuse and to recognize the crucial role of law enforcement officers in preventing further incidents of abuse and in assisting the victims of abuse; (5) Data collection. To provide for the collection of data concerning domestic abuse in an effort to develop a comprehensive analysis of the incidence and causes of that abuse; and (6) Mutual order. To declare that a mutual order of protection or restraint undermines the purposes of this chapter.

48. Epstein, *supra* note 14, at 12. In Maine, ME. REV. STAT. ANN. tit. 19-A, § 4011 (West 1998 & Supp. 2003), governs violation of a protection order as follows:

1. Crime committed. Except as provided in subsections 2 and 4, violation of the following is a Class D crime when the defendant has actual prior notice by means other than service in hand, of the order or agreement: (A) A temporary, emergency, interim or final protective order, an order of the tribal court of the Passamaquoddy Tribe or the Penobscot Nation or a similar order issued by a court of the United States or of another state, territory, commonwealth or tribe; or (B) A court-approved consent agreement.

2. Exception. When the only provision that is violated concerns relief authorized under section 4007, subsection 1, paragraphs H to M, the violation must be treated as contempt and punished in accordance with law.

3. Warrantless arrest. Notwithstanding any statutory provision to the contrary, an arrest for criminal violation of an order or consent agreement may be without warrant upon probable cause whether or not the violation is committed in the presence of the law enforcement officer. The law enforcement officer may verify, if necessary, the existence of a protective order by telephone or radio communication with a law enforcement agency with knowledge of the order.

4. Reckless conduct; assault. A defendant who violates a protective order issued pursuant to section 4007 through conduct that is reckless and that creates a substantial risk of death or serious bodily injury to the plaintiff named in the protective order or who assaults the plaintiff named in the protective order commits a Class C crime.

the country, many of which were state funded. While state legislatures began passing statutes criminalizing domestic violence in the 1970s and 1980s, "[n]umerous government programs directed at what was once considered a 'private matter' began to appear, including state-funded shelters, batterer intervention programs,⁴⁹ specialized prosecution teams, and published studies containing data on domestic violence."⁵⁰ These types of programs, when coupled with the work being done by state governments, resulted in an evolution of sorts, where the "United States [began moving] from an era when no term for intimate abuse existed in the national lexicon to one of substantial public awareness of the problem, a growing perception that it is unacceptable, and increasing political will to intervene."⁵¹

Despite these important changes in the statutory law and in social customs and attitudes regarding domestic violence, however, the legal system and the culture of traditional courts have continued to lag behind.⁵² In some areas, the traditional tendency by the judicial system to relegate domestic violence cases to a "private" sphere and treat them with less judicial regard than other, seemingly more "public" cases, has persisted.⁵³ This tendency by traditional courts to undervalue domestic violence cases has resulted in a failure by the legal system to adequately redress the crime of domestic abuse⁵⁴ and is most clearly demonstrated by its continued "inability to stem the tide of domestic violence itself."⁵⁵ The continued failure of the judicial system to generate marked changes in domestic violence rates and to effectuate the objectives embodied in criminal and civil do-

49. See Tsai, *supra* note 11, at 1318-24 for a general discussion of the benefits and challenges associated with batterer intervention programs and the association of these programs with specialized domestic violence courts. In Maine, ME. REV. STAT. ANN. tit. 19-A § 4014 governs the role of batterer intervention programs (BIPs) in court mandated treatment of abusers. According to the Maine Department of Corrections (which, under section 4014, oversees the adoption of BIP standards), BIPs for men are defined as follows:

The purposes of programs for batterers, as part of a coordinated community response to domestic abuse, are to: (a) promote the safety of victims and their children from the crimes of domestic abuse in an effort to support [victims]; and (b) within an educational framework, to hold batterers accountable both in the group and in conjunction with the criminal justice system.

03-201 Department of Corrections Ch. 15, *Certification and Monitoring of Batterer Intervention Programs*, available at <ftp://ftp.state.me.us/pub/sos/cec/rcn/apa/03/201/201c015.doc> (on file with *Maine Law Review*).

50. Tsai, *supra* note 11, at 1290.

51. Epstein, *supra* note 14, at 11.

52. Tsai, *supra* note 11, at 1291-94.

53. See *id.* at 1294 (discussing a number of more contemporary policies and judicial attitudes which "reinforce traditional approaches to domestic violence by implying a legal condonation of family violence"). See also Weissman, *supra* note 14, at 1110-39. "Although progress has been made through state legislative enactments, there is a critical disjuncture between formal law on the one hand, and the implementation of the statutes by the courts in matters involving domestic violence on the other." *Id.* at 1110.

54. See Kaye & Knipps, *supra* note 10, at 5-6.

55. Tsai, *supra* note 11, at 1291-92.

mestic violence statutes has placed increasing pressure on the judicial system to adjust and improve its approach.⁵⁶

B. Current Domestic Violence Rates in the United States

The consequences of judicial attitudes that undervalue domestic violence cases and fall short of achieving lasting, effective solutions for litigants and society at large cannot be fully appreciated without an understanding of the magnitude of the problem. Domestic violence rates in the United States are, at least to the uninitiated, shocking. Some general estimates place the incidence of domestic abuse suffered by women at "anywhere between one million and four million women a year."⁵⁷ Indeed, an examination of the statistical data concerning domestic violence rates around the country reveals that the vast number of cases are, themselves, problematic in terms of courts' ability to dedicate the resources and judicial attention necessary to properly address these cases. In addition to the entrenched, outdated attitudes of some judges which undermine the rights of victims, systemic procedural shortcomings render courts ill-equipped to handle the vast number of domestic violence cases appearing on their dockets.⁵⁸

Overloaded dockets, when coupled with inefficient court procedures for dealing with domestic violence and judges who are reticent to change their approaches, have resulted in ineffective judicial responses to domestic abuse in the United States.⁵⁹ Yet it is precisely because of the prevalence of domestic abuse in the United States, that courts, as integral members of community response systems, must operate effectively and consistently.

Over the past thirty years, numerous studies have attempted to measure the prevalence of domestic violence with an eye toward identifying ways to end the violence.⁶⁰ Much of the data arising from these studies, while all indicative of a widespread problem, "vary widely from study to study."⁶¹ As mentioned above, surveys conducted in 1995 and 1996, for example, "estimated that anywhere be-

56. See Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 854 (1997). Judge Kaye argues:

[W]e have to take a good, hard look at what sort of cases are in the state courts today. Changing social realities have brought courts not only more cases but also more social issues that are frustrating the other branches of government: cases involving drug addiction, homelessness, juvenile crime, and family violence. Each case has its legal issues, but it may also involve social issues that challenge the effectiveness of our traditional adjudicative models.

Id. See also Jane C. Murphy, *Lawyering for Social Change: The Power of Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1268 (1993); Paul Michael Hassett, *Expanding the Role of Courts*, 73 N.Y. ST. B.J. 5, 5-6 (2001).

57. Tsai, *supra* note 11, at 1292 (citing statistics compiled by The Commission on Domestic Violence, *Statistics*, at <http://www.abanet.org/domviol/stats.html>).

58. See *id.* at 1293-94.

59. See *id.*

60. See, e.g., RONET BACHMAN, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT (1994); Claire M. Renzetti, *Violence and Abuse Among Same-Sex Couples*, in VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES, AND EFFECTS 70 (A.P. Cardarelli ed., 1997); Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465 (1986).

61. NVAW Survey, *supra* note 11, at 1.

tween one million and four million women a year experience violence at the hands of their partners."⁶² Such significant gaps in the estimated prevalence of domestic violence are problematic when trying to gauge the severity of the problem and the impact that domestic violence has on communities.⁶³

One recent study, however, sponsored by the National Institute of Justice and the Centers for Disease Control, attempted to alleviate the discrepancies with a national survey conducted through "telephone interviews with a representative sample of 8,000 U.S. women and 8,000 U.S. men queried about their experiences as victims of various forms of violence, including . . . stalking by intimate partners."⁶⁴ That study, entitled the National Violence Against Women Survey (NVAW survey), led researchers to estimate that "approximately 4.8 million intimate partner rapes and physical assaults are perpetrated against U.S. women annually."⁶⁵

In addition to helping track the prevalence of domestic violence around the country, the NVAW survey also demonstrates the impact that domestic violence has on victims and communities. Because the injuries sustained by many victims of domestic violence are severe and may require ongoing medical treatment, such as multiple physical therapy sessions or inpatient treatment in hospitals, the impact of domestic violence on health care providers is substantial.⁶⁶ According to the NVAW survey, "the annual number of medical treatments provided to intimate partner rape and physical assault victims exceeds the annual number of intimate partner victimizations that resulted in treatment."⁶⁷ The number of domestic violence victims who are injured annually and who require medical attention illustrates the fact that "intimate partner violence is . . . a serious public health concern."⁶⁸

The impact of domestic violence on other community members is similarly great. According to a report published by the Bureau of National Affairs, "domestic abuse is costing businesses between 3 and 5 billion dollars annually in lost productivity in the forms of higher health care costs, lost wages, sick leave, absenteeism and higher turnover rates."⁶⁹ In addition, social service providers are frequently overwhelmed by the vast numbers of victims seeking assistance and are regularly faced with insufficient resources.⁷⁰ For example, the number of shelters

62. Tsai, *supra* note 11, at 1292 (citing statistics compiled by The Commission on Domestic Violence, *Statistics*, at <http://www.abanet.org/domviol/stats.html>).

63. See NVAW Survey, *supra* note 11, at iv.

64. *Id.* at 1.

65. *Id.* at iii. The study also led researchers to estimate that "approximately 2.9 million intimate partner physical assaults are committed against [U.S.] men annually." *Id.* Although the number of estimated domestic assaults perpetrated against men are certainly significant and of concern to those advocating for an end to domestic violence, this Comment focuses primarily on abuse rates relating to women. The decision to focus on female victims of intimate partner violence is in no way meant to discount the experiences of men. Rather, in the interests of clarity and conciseness, and recognizing that the vast majority of domestic abuse victims are, in fact, women, the author has opted to defer to generalities.

66. See *id.* at 45.

67. *Id.*

68. *Id.* at iii.

69. CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 910 (2001).

70. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982) *reprinted in* DALTON & SCHNEIDER, *supra* note 69, at 41-42.

available to victims of domestic violence have historically been notoriously insufficient due to a lack of resources.⁷¹ While the number and quality of services available to victims of domestic violence have drastically improved over the last twenty years, the demand for and impact on community resources remains high.

Domestic violence is not only a significant and troubling problem for social service agencies and the healthcare field, however. It also, necessarily, has profound implications for the criminal justice system. The sheer number of domestic violence assaults is indicative of a "crime wave of tsunamic proportions."⁷²

According to the findings from the National Violence Against Women Survey, 26.7 percent of "women who were physically assaulted," 17.2 percent of "the women raped by an intimate," and 51.9 percent of victims of intimate partner stalking had reported their most recent victimization to police.⁷³ These findings indicate that approximately 1,188,365 victims of physical assault, 55,424 victims of intimate rape, and 261,309 victims of stalking reported the abuse to police.⁷⁴ Of the women who reported domestic violence to law enforcement, only a small number (approximately 29.4 percent combined) reported that the perpetrator had been criminally prosecuted.⁷⁵ Although the percentages of domestic violence cases that were criminally prosecuted is seemingly low, the number of cases is nevertheless quite large and indicative of a substantial demand on the criminal justice system.

Cases being brought before courts for civil relief are also substantial in number. According to the NVWA survey, of the estimated 5,276,522 women who are raped, physically assaulted, or stalked by an intimate annually, approximately 1,131,999 "obtain protective or restraining orders against their attackers."⁷⁶ Again, the sheer number of domestic violence cases coming before state courts, although not representative of all domestic assaults due to underreporting, indicate the significant demand being placed on courts and the importance of there being effective judicial responses.

Despite the critical role that courts and the legal system must necessarily play in confronting domestic violence, there is statistical evidence to suggest that efforts made by traditional court programs have largely been inadequate. Recent research indicates that the remedies provided by traditional courts often prove to be ineffective. One 1996 study found that sixty percent of protection orders issued to protect victims from battering partners were violated.⁷⁷ Another found that "more than 17 [percent] of victims killed in domestic incidents had obtained orders of protection."⁷⁸ These numbers make it difficult for the legal system to

71. In the late 1970s and early 1980s, one study revealed that "in the State of Minnesota, 70 percent of the women requesting shelter had to be turned away because of a lack of space." SCHECHTER, *supra* note 70, reprinted in DALTON & SCHNEIDER, *supra* note 69, at 42.

72. Kaye & Knipps, *supra* note 10, at 3.

73. NVAW Survey, *supra* note 11, at 49-50.

74. *Id.* at 53.

75. *Id.* at 52. According to the survey, "only 7.5 percent of the women who were raped by an intimate, 7.3 percent of the women who were physically assaulted by an intimate, and 14.6 percent who were stalked by an intimate said their attacker was criminally prosecuted." *Id.* However, "[t]hese figures increase to 31.1 percent, 24.7 percent, and 25.4 percent, respectively, . . . when only victims whose stalking was reported to the police are considered." *Id.*

76. *Id.* at 54.

77. Tsai, *supra* note 11, at 1292.

78. *Id.*

claim that its response to domestic violence and its efforts to stop the abuse have been adequate. While it is perhaps unfair to place the onus for these tragic numbers on the legal system alone, it is also difficult to reconcile the continued prevalence of domestic violence with a justice system that is functioning effectively.

C. Contemporary Responses to Domestic Violence by Traditional Court Programs

In addition to the explanations for the legal system's inability to effectively redress domestic violence crimes which relate to private/public distinctions and pervasive ideological paradigms, there are a number of more practical, readily identifiable problems relating to the way traditional courts operate that also shed light on the legal system's struggle in this area.⁷⁹ While judicial traditions that inform the reluctance by courts to tackle issues surrounding domestic violence stymie effective intervention, other largely procedural problems also impede effective judicial responses. Some issues relating to courts' role in domestic violence cases that have proven particularly problematic relate to court administration and the fragmentation that exists between various departments of traditional court systems.⁸⁰

In their article, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*,⁸¹ Judith S. Kaye, Chief Judge of New York State, and Susan K. Knipps, broadly identify some of the administrative problems facing the New York State criminal justice system in the handling of domestic violence crimes.⁸² Although their observations are concerned primarily with courts in New York, they are more broadly applicable to courts throughout the United States. According to Kaye and Knipps, the unique and complex issues implicated by domestic violence cases and an alleged lack of training or sensitivity on the part of court personnel are often at the center of the tension between domestic violence and traditional court programs.⁸³ In many ways, "[d]omestic violence cases are more volatile, more dangerous, [and] harder to prosecute."⁸⁴ In criminal prosecutions, the relationship between the victim and the batterer "makes domestic violence different from prototypical 'stranger' crimes. Unlike participants in a bar-room brawl or street skirmish, perpetrators of domestic violence present a particularly high risk for continuing . . . violence."⁸⁵ Further, "[u]nlike victims of random attacks, battered women often have compelling reasons—like fear, economic dependence or affection—to feel ambivalent about cooperating with the legal process."⁸⁶

According to Kaye and Knipps, "[t]he fragmented nature of the criminal justice system exacerbates" the risk that "traditional case processing methods will

79. I am not suggesting that these practical, administrative disconnects within the judicial system are not inherently informed by, or the result of, systemic gender bias and the traditional public/private dichotomy. Rather, I am suggesting that the concrete, tangible and everyday workings of the courts, which flow from the traditional paradigms, are similarly flawed.

80. Kaye & Knipps, *supra* note 10, at 5.

81. Kaye & Knipps, *supra* note 10.

82. *Id.* at 3-5.

83. *Id.*

84. *Id.* at 5.

85. *Id.* at 4.

86. *Id.* (footnotes omitted).

fail to sanction or deter” domestic violence.⁸⁷ Because “[t]he basic outlines of our criminal justice system—including what we expect courts to do and how we expect them to do it—were formed long before domestic violence was recognized as an act deserving criminal sanction,” it is not surprising that “a system built on the model of offenses against strangers may falter when applied to crimes that occur in the context of intimate human relationships.”⁸⁸ They argue that inadequate “coordination or communication between police, prosecutors, the defense bar, victim advocates, probation, corrections and the courts,” increases the likelihood that domestic violence cases will “slip between the cracks.”⁸⁹

Betsy Tsai, in *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*,⁹⁰ enumerates a number of more specific criticisms of the way traditional courts address domestic violence.⁹¹ Tsai cites four primary problems with the manner in which courts have traditionally processed domestic violence cases, one of which relates to the way the civil side of the legal system operates.⁹² As domestic violence surveys demonstrate, one major problem facing courts when dealing with civil relief is “the general inadequacy of protection orders to prevent further abuse.”⁹³ A protection order, obtained through the civil process, is an injunctive order “impos[ing] restrictions on a person’s future behavior.”⁹⁴ Requested by a victim of domestic violence, a protection order may: require no contact between the parties, order an abuser to relinquish any firearms, grant possession of a shared residence to the victim, and “address issues such as . . . child custody, visitation, and support.”⁹⁵

Protection orders represent a critical legal remedy available to women attempting to escape domestic violence and prevent future abuse. They may not, however, always be “the most effective remedy for preventing future violence in all cases.”⁹⁶ Because protection orders are only as effective as the conditions they impose on a batterer, and because a court’s ability to assess the needs of individual victims is dependent upon the depth of its understanding of the particular issues incident to each case, cursory treatment of protection order petitions can lead to inadequate remedies for victims. As mentioned above, several studies have been conducted that demonstrate the frequency with which civil protection orders are violated, often with tragic results.⁹⁷ The issuance by courts of orders that are ineffective or that impose orders that are not complied with by batterers due to a lack of informa-

87. *Id.* at 5.

88. *Id.* at 4.

89. *Id.* at 5.

90. Tsai, *supra* note 11.

91. *Id.* at 1291-94.

92. *Id.* at 1292.

93. *Id.*

94. *Id.*

95. *Id.* A court, using its discretion in applying protection from abuse statutes and granting protection orders, may grant some or all of these remedies, depending on what the facts of each case call for. A court may also, of course, opt not to grant any of the available remedies and deny petitions for protection orders as it sees fit. See ME. REV. STAT. ANN. tit. 19-A, § 4007 (West 1988 & Supp. 2003).

96. *Id.*

97. *Id.* (citing a 1996 study which found that “60% of orders of protection were violated within one year [and] another study which found that almost 50% of court-issued protection orders were violated within two years”).

tion or adequate attention on the part of judges, undermines the ability of courts to put a stop to domestic violence.

Another significant and frequent criticism made regarding the way courts have traditionally addressed domestic violence relates to the tension that often exists between the inherent complexity of domestic violence cases and the limited time and resources available to most state courts.⁹⁸ As Tsai observes, "[l]arge numbers of crimes . . . overwhelm the criminal courts in urban centers."⁹⁹ Civil dockets in state courts are similarly crowded, creating an environment in which "judges must review a great number of cases in a very limited amount of time."¹⁰⁰ Because of the complex issues implicated by domestic violence cases, which involve "issues of family dynamics and emotional relationships between the parties that are uncharacteristic of other crimes," domestic violence cases often require additional judicial time and attention.¹⁰¹ Judicial interests in efficiency, however, and the need for judges to be able to dispose of cases as quickly as possible, often leads to cursory treatment of these complex and important cases.

Civil protection orders, in particular, demonstrate the complexities and challenges domestic violence cases often present to the parties and to the courts. Because of the expedited nature of the hearings, and the minimal discovery conducted, the issues underlying protection order hearings are often not as well developed as those underlying other types of cases.¹⁰² In addition, "[v]ictims often appear pro se and may have a difficult time navigating the legal system, particularly in light of the fear they may experience of facing the batterer in court."¹⁰³ [Many] judges express concern over their inability to dedicate sufficient time to fashion comprehensive protection orders."¹⁰⁴ The result may be a "lack of support and resources for victims as well as decreased accountability for perpetrators, ultimately culminating in insufficient methods of confronting the incidence of domestic violence."¹⁰⁵ It is these problems that lie at the heart of the recent charge to change the ways that courts approach domestic violence cases through the implementation of specialized judicial programs.¹⁰⁶

Finally, because of the fragmented nature of the criminal justice system, as discussed by both the Tsai and the Kaye & Knipps articles, domestic violence cases are often at risk of "falling through the cracks."¹⁰⁷ The criminal justice

98. *Id.* at 1293.

99. *Id.*

100. *Id.*

101. *Id.*

102. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1109 (2001).

103. *Id.*

104. *Id.* at 1109-10.

105. Tsai, *supra* note 11, at 1294.

106. *See id.* at 1296-97. According to Tsai, specialized domestic violence court programs deviate . . . from the traditional approach to domestic violence by representing a more comprehensive and integrated approach that coordinates a greater variety of community resources. The interdisciplinary response is critical to addressing the many mental health and social issues, such as the effects on family, children, finances, and psychological functioning, that are an integral part of domestic violence. The domestic violence programs developed in Quincy, Massachusetts, New York City, Dade County, Florida, and the District of Columbia exemplify this approach.

Id. at 1297.

107. *See id.* at 1293-94. *See also* Kaye & Knipps, *supra* note 10, at 5.

system necessarily depends upon the effective coordination of efforts made by law enforcement officers, prosecutors, court personnel and judges. When the various players' levels of motivation, training, and sensitivity to issues surrounding domestic violence are in conflict or are otherwise different, it can lead to ineffective treatment of domestic violence cases.¹⁰⁸

Although there have been vast improvements in police response to domestic violence in recent years, efforts made by law enforcement to intervene in reported cases of domestic violence have historically been characterized as largely indifferent and ineffective.¹⁰⁹ Up until the late 1980s, police, like judges in traditional courts, often viewed domestic violence as a private family matter and tended to assign women's calls low priority.¹¹⁰ Further, "[w]hen police officers did show up at the homes of women seeking protection, frequently the police would do little other than sending a man away to 'cool off' and perhaps take a walk around the block."¹¹¹ Similar attitudes by prosecutors, who were often reluctant or unwilling to criminally prosecute perpetrators due either to unwillingness by the victim to cooperate or because of a "strongly [held belief] that society should not intervene in domestic disputes,"¹¹² often compounded the problem.

Even when law enforcement, prosecutors, and judges cooperatively acknowledge the importance of intervention and make concerted efforts to consistently arrest and prosecute abusers, incompatible measures taken by each department can undermine the efficacy of these efforts. When, for example, large numbers of crimes overwhelm law enforcement offices and criminal courts, and communication may break down between various departments of the criminal justice system. This may result in conflicting bail conditions set by courts, or arrests that are made and not followed through to prosecution. These prosecutorial and law enforcement outcomes can undermine official policies put in place to criminalize domestic violence.¹¹³ When coupled with a still persistent bias among some police, prosecutors, and judges, there is the potential that the criminal justice system and traditional court programs will "reinforce traditional approaches to domestic violence by implying a legal condonation of family violence."¹¹⁴

The solution adopted by some courts in New York, and in an increasing number of jurisdictions around the country, has been the development of specialized domestic violence courts. These courts unify the adjudication of cases involving domestic violence and streamline judicial administration and procedures in ways they hope will improve the quality and effectiveness of the legal system's response to domestic violence. Judge Kaye has referred to these courts, and the methods they employ, as "problem solving courts."¹¹⁵ According to Kaye, the development of domestic violence courts, and other similarly innovative judicial programs, is based upon the recognition that "[a] legal system remains viable only if it re-

108. See Tsai, *supra* note 11, at 1294; Kaye & Knipps, *supra* note 10, at 5.

109. See PTACEK, *supra* note 14, at 46-47.

110. *Id.* at 46.

111. *Id.*

112. Tsai, *supra* note 11, at 1294.

113. See *id.*

114. *Id.*

115. See *id.* at 1293-95. See also Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1494 (1999).

sponds to the present-day needs and concerns of the public.”¹¹⁶ In order for “our legal system to remain vital and strong,” says Kaye, “we need advocates of change to think seriously not only about the exquisite nuances of the law but also about the hard reality of how our courts are functioning.”¹¹⁷ According to Kaye, specialized domestic violence courts, by altering court administration and procedures, enable courts to better identify and solve many of the problems underlying the judicial system’s historically insufficient response to family violence.

III. SPECIALIZED DOMESTIC VIOLENCE COURT PROGRAMS: IMPROVEMENTS TO THE TRADITIONAL MODEL

Several state courts around the country have adopted specialized domestic violence court programs in order to more effectively address the sensitive and complex issues domestic violence cases often involve.¹¹⁸ The means that these court programs utilize to improve judicial responses to domestic violence represent a significant departure from the approach taken by traditional courts. Through an examination and discussion of existing specialized domestic violence courts around the country, the precise nature of the judicial action taken in implementing these programs can be fleshed out and serve as a point of departure for exploring the applicability of the term “judicial activism” to creative court programs.

Specialized domestic violence court programs currently exist in Quincy, Massachusetts; New York City; Dade County, Florida; the District of Columbia; Duluth, Minnesota; and many other jurisdictions.¹¹⁹ Although the approaches and individual procedures of each of these domestic violence courts differ to some degree, they all have similar objectives and are uniquely positioned to solve the many problems domestic violence cases have historically presented to more traditional courts.¹²⁰

Many of the courts listed above employ a “comprehensive interdisciplinary system of handling domestic violence cases.”¹²¹ The courts in New York, Massachusetts, and Washington, D.C., as well as others, have joined the criminal and civil sides of the court docket in order to provide a more integrated approach to the cases and the litigants that come before them.¹²² In the Quincy program, for example, in an effort to address the fragmentation problems experienced by many traditional courts, not only do “[j]udges, clerks, district attorneys, police and probation officers,” work closely with one another, they also work collaboratively with “social service providers, and community agencies,” that provide services to both the victim and the batterer.¹²³

116. Kaye, *supra* note 56, at 853.

117. *Id.*

118. See Betsy Tsai, *supra* note 11, at 1296-1309 for a comprehensive treatment of a number of these programs nationwide.

119. *See id.* This is not a complete list of all of the domestic violence court programs around the country. Tsai’s article discusses a number of other important programs. Since her article was published, there have also been additional court programs implemented around the country, including the pilot project recently implemented in Maine.

120. *See Kaye, supra* note 56, at 851.

121. Tsai, *supra* note 11, at 1302.

122. *Id.*

123. *Id.* at 1298.

In addition, by making "domestic violence cases a top priority," many of these specialized court programs are able to "afford the victim a supportive and rapid procedural response to her complaint."¹²⁴ Through the use of trained court personnel and cooperating victim advocates, these specialized domestic violence courts are able to inform a victim about the court process, both in criminal and in civil protection order cases.¹²⁵ This assistance in negotiating the legal system is particularly helpful for pro se civil litigants who, without such help, may have previously been at risk of failing to recognize available remedies or social services available to them in the community.¹²⁶ This educational role, played by courts when either individual judges or court-recognized victims' advocates act in an advisory capacity to assist victims, potentially alters and improves the remedial responses. The shift that this new court participation represents from that comprising traditional court models suggests a certain degree of activism not typically engaged in by courts.

Specialized domestic violence court programs have also been able to address the responses of law enforcement officers and establish protocols whereby perpetrators are more regularly arrested and monitored by courts in both civil and criminal cases. In some jurisdictions that have implemented domestic violence court programs, police cooperate with prosecutors' offices regarding arrests and offender compliance with probation and bail conditions.¹²⁷ In Massachusetts, for example, "[t]he police department uses a 'tracking system' in which they report domestic violence incidents directly to the District Attorney's Office."¹²⁸ This coordination between different components of the criminal justice system and the efforts made to share information not only coordinates the efforts of police and prosecutors, it also allows victim advocates "to adopt a pro-active approach by reaching out and contacting the women involved"¹²⁹ in order to provide them with information on both the prosecutorial process and the availability of civil protection orders.¹³⁰

Yet another improvement to judicial approaches to domestic violence cases made possible by specialized court programs is the added training and sensitivity of courts to the unique issues implicated by these cases. In the Dade County, Florida court program, "family violence training is mandatory, not only for judges, but also for prosecutors and select public defenders."¹³¹ Training judges to become sensitive and respectful of the complex issues involved in domestic violence cases enables courts to respond to the needs of both victims and batterers in ways that are ultimately more productive and empowering.¹³² Interviews conducted of women following the disposition of their cases in specialized domestic violence court programs indicate the positive effects of the kind of training these programs mandate.¹³³ When judges and court personnel are familiar with the dynamics of

124. *Id.*

125. *Id.*

126. *See id.* at 1302; Weisman, *supra* note 14, at 1109.

127. *See* Tsai, *supra* note 11, at 1299-1300 (2000).

128. *Id.* at 1299.

129. *Id.*

130. *Id.* at 1299-1300.

131. *Id.* at 1303.

132. *See id.* at 1302-04.

133. JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 175 (1999).

abuse, and the remedies that they ultimately employ in the disposition of cases reflect that familiarity, women feel supported and positive about the legal process.¹³⁴ In addition, the substantive laws created by statute are more uniformly and productively applied. For example, when judges undergo training mandated by domestic violence court programs and are made aware, for instance, that "isolation [is] a key tactic that men use to undermine women's resistance,"¹³⁵ they are consequently better equipped to help connect her to community resources to combat that isolation. Further, when judges are informed about the importance of services available to perpetrators they can impose conditions requiring batterers to undergo court-mandated counseling in order to help combat continued abuse and recidivism.¹³⁶

The approaches taken by specialized domestic violence courts around the country to try to improve the manner in which domestic violence cases are handled has, in many ways, addressed many of the problems that Judge Kaye and Betsy Tsai enumerate in their articles. Through the cooperation of law enforcement, prosecutors, judges, court personnel, and social service providers, the legal system as a whole is better able to meet the needs of victims, oversee the prosecution and accountability of batterers, and, to some degree, prevent the possibility that these cases will fall between the cracks in courts overwhelmed by a large number of cases.¹³⁷ The implementation of specialized domestic violence courts and their emphasis on community involvement and education suggests a new level of judicial involvement.¹³⁸

134. *Id.*

135. *Id.*

136. See BUZAWA & BUZAWA, *supra* note 2, at 228. "There are several distinct advantages of court-sponsored treatment interventions, especially as a diversion from the criminal justice system or as part of a split sentence." *Id.* For example,

[t]hey finesse the greatest weakness of the criminal justice system its inability to prevent victims or prosecutors from dismissing charges. By selective use of counseling as a diversion, the finite resources available in the system may also be more effectively focused on recidivist batterers or cases in which the potential for serious continued violence appears greatest based on past or current attitudes and behaviors.

Id. In addition,

[p]retrial diversion to counseling is also appropriate in the many instances in which the judicial sentence would undoubtedly be probation, perhaps coupled with counseling. In these cases, the ideal is to accomplish behavioral change quickly without incurring the heavy transactional costs to the judicial system or the necessity of labeling the offender as a convicted miscreant risking secondary deviance or costing the victim and her family.

Id. But see *id.* at 228-29; Tsai, *supra* note 11, at 1312-14.

137. Cf. Tsai, *supra* note 11, at 1309-16 (discussing criticisms of model domestic violence court programs including the observation that "in the prosecution context, the contrast between the policy of punishing and reforming abusers and that of supporting and empowering victims tends to result in mixed messages and contradictory procedures"). *Id.* at 1311.

138. Betsy Tsai's article gives a comprehensive overview of the courts discussed above and other specialized domestic violence court programs around the country. She argues that these courts represent "therapeutic jurisprudence," meaning that domestic violence courts embody objectives relating to the law's effect on the psychological, physical, and emotional health of litigants. *Id.* at 1295. This Comment will not attempt to recreate Tsai's discussion or treatment of these programs. Instead, this Comment utilizes her research to briefly address efforts being made by contemporary courts around the country in order to help focus a discussion of current efforts being made in Maine. It is through a discussion of Maine's domestic violence pilot

IV. JUDICIAL PROBLEM SOLVING V. JUDICIAL ACTIVISM

Given the changes that these specialized courts make to traditional judicial approaches, the question arises whether specialized courts effectuate a departure so significant that they may be subject to criticisms of inappropriate judicial action or policymaking.¹³⁹ The role of courts in American jurisprudence has historically been that of a neutral arbiter bound by *stare decisis* and objective rules of law.¹⁴⁰ On the surface, the emphasis that domestic violence courts place on judicial training and monitoring of offender accountability appears to conflict with conventional views of proper adjudicatory practices.¹⁴¹ Whether these new practices rise to the level of conduct that, in other areas of decisional law, have been subject to accusations of “judicial activism,” or whether they simply represent “problem solving” is an issue that this section will explore.

A. *Judicial Problem Solving*

Critics of specialized domestic violence courts have argued that these programs do indeed represent inappropriate policymaking on the part of courts.¹⁴² The accusation is, perhaps, not all that surprising if one looks critically at the practices and procedures adopted by these court models. As discussed in the previous section, domestic violence courts incorporate a level of involvement and insight into the circumstances surrounding abuse that are notably lacking in more traditional, transactional litigation.¹⁴³ Unlike cases involving contracts or tort claims,

project, as compared with other programs, that this Comment will address the questions of whether Maine’s program is solely an example of judicial problem solving, or whether it may also represent some form of judicial advocacy. This Comment will not discuss the theory of “therapeutic jurisprudence,” proffered by Tsai in her article. Rather, it will discuss the ability of domestic violence programs to identify and remedy procedural problems within the legal system, as well as the potential of innovative court programs to substantively affect the legal remedies available to victims of abuse.

139. See Kaye & Knipps, *supra* note 10, at 10 (“Not everyone, of course, agrees that courts should take a problem solving approach to their caseloads. Some object that it interferes with courts’ core value of neutrality or turns judges into social workers. Others assert that problem solving is inappropriate ‘policymaking’ by the judiciary.”).

140. Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 *HOFSTRA L. REV.* 1243, 1253-54 (1993). Murphy observes:

Classical legal thought views the law as a science in which legal judgments are made by applying objective rules to facts and reaching consistent and predictable results. We are a “government of laws, not men” and adhere to a system of “neutral” laws which are supposed to ensure fairness and impartiality in the application of the law. Historically, therefore, legal theorists have viewed any discussion of the reality of pain and suffering that results from oppressive laws—or the absence of laws—as a corruption of the lawmaking process. Injection of such emotion, they claim, would produce chaos and irrationality in the rule of law.

Id.

141. See Kaye & Knipps, *supra* note 10, at 10.

142. *Id.*

143. See Paul Michael Hassett, *Expanding the Role of the Courts*, N.Y. St. B.J., March/April 2001, at 5. Hassett observes: “Besides deciding cases of daunting complexity, the justice system has, in recent times, been asked to assume jurisdiction over problems that are not readily resolvable in a system originally designed to handle relatively straightforward matters such as basic contracts and torts.” *Id.* at 5. He goes on to say that “[t]he inability of the traditional system to deal with many of these problems has, at least in New York State, led to . . . ‘problem-solving courts.’” *Id.* at 6.

domestic violence cases implicate issues relating to the dynamics of the parties' relationships with one another.¹⁴⁴ Judges, by adapting the ways in which courts handle these sensitive cases, have undertaken to acknowledge the complexity of domestic violence cases and to alter their approaches with a new emphasis on education and counseling of offenders and on victim safety.¹⁴⁵

The practice of some courts, for example, of informing victims of available sources of judicial intervention represents a more active role than that typically played by judges.¹⁴⁶ In many cases not involving domestic violence, the responsibility for providing information on which legal avenues to pursue falls on the legal representative for each party. Because many domestic violence litigants, both victims and batterers (at least in civil cases), appear *pro se*,¹⁴⁷ the potential for missed opportunities is increased. Having judges take on the task of educating parties in a domestic violence case about the mechanics of the judicial process helps mitigate the confusion that otherwise might arise. It also, however, suggests a level of engagement with the process and the litigants that might potentially be viewed as being outside the purview of traditional judicial action.

In addition, the extensive training undertaken by many judges who are assigned to specialized domestic violence courts facilitates increased analysis and consideration of the issues underlying these kinds of cases.¹⁴⁸ By informing judges, through training, about the power dynamics at play in many domestic violence cases,¹⁴⁹ specialized court models enable judges to alter the disposition of cases to address the underlying needs and vulnerabilities of the parties.¹⁵⁰ Again, this sort of judicial involvement is unlike that seen in less volatile cases such as those involving contracts or tort claims.

In response, Chief Judge Judith Kaye of New York has defended domestic violence courts as representative of problem-solving rather than inappropriate judicial activism.¹⁵¹ By way of establishing her "judicial problem solving" argu-

144. See PTACEK, *supra* note 14, at 168-84; Murphy, *supra* note 15, at 1263-64.

145. See Murphy, *supra* note 15, at 263-65.

146. See Weissman, *supra* note 14, at 1109-11.

147. *Id.* at 1109.

148. See PTACEK, *supra* note 14, at 168-84.

149. See *id.* for a discussion of the psychology underlying domestic abuse. Ptacek discusses "'The Power and Control Wheel' designed by the Domestic Abuse Intervention Project in Duluth, Minnesota." *Id.* The Wheel illustrates how "power and control, rather than physical injury, is made the central element of battering. Violence, which includes sexual violence, serves to hold together these tactics of control, which occur in battering relationships more often than physical assaults, draw their power from violence and the threat of violence." *Id.* at 172. He goes on to discuss the ways that judges, ignorant of the underlying dynamics of abuse, "intentionally and unintentionally, may be reinforcing the power of men who batter, and thus furthering women's entrapment." *Id.* at 173.

150. Based on an understanding of the dynamics of abusive relationships, specialized court programs in Quincy strive

to make domestic violence cases a top priority by using an approach that accomplishes the goals of controlling the abuser and empowering the victim. The abuser is thus subject to a number of increased sanctions, including aggressive prosecutorial tactics, greater monitoring of defendant behavior, and a general emphasis on enhanced enforcement strategies, while the victim enjoys a process made easier by various victim/witness advocates and greater availability of support resources.

Tsai, *supra* note 11, at 1298.

151. Kaye & Knipps, *supra* note 10, at 2.

ment, Kaye poses the following series of questions: "What is the responsibility of a court in dealing with a case of domestic violence? Is it to serve as a passive adjudicator of the issues presented by the parties, concerned only that the case is legally resolved? Or is there a larger role for a court to play in crafting a meaningful intervention that may change future behavior?"¹⁵² Before answering these questions she probes still further and asks, "what is the responsibility of a court system with respect to the subject of domestic violence? Should it view domestic violence as a serious social problem that courts can and should help solve?"¹⁵³

By way of an answer to these questions, Kaye argues that the role of courts is to "provide more complete justice" by "taking a more active approach, by working to foster communication among all the players [and] . . . help[ing] to build a justice system that better responds to the needs of all citizens."¹⁵⁴ Rather than overreaching and entering into inappropriate policymaking, Kaye argues that specialized domestic violence courts operate "within a sphere that is unquestionably within the purview of the courts: how to put the resources that have been allocated to [them] to their best and most effective use."¹⁵⁵ Problem solving courts, in her mind, are effectuating "nothing more than sound court administration."¹⁵⁶

According to Kaye, therefore, the procedures by which courts and individual judges become involved more fully in domestic violence cases are nothing more than examples of proper streamlining of court time and resources. Yet, given the potential for these newly adopted court procedures to affect the substantive outcomes of domestic violence cases when, for example, more complete support orders are made in a divorce involving an abusive marriage, it becomes possible to argue that these procedures represent more than simply "court administration." Indeed, in some ways specialized court programs suggest conduct that has taken on a role so "activist" in nature that it may appropriately be labeled judicial activism. In light of the controversy and suspicion that often surrounds the term judicial activism, however, it is perhaps not surprising that many proponents of domestic violence courts shy away from such a connection.

The next section will explore popular notions of judicial activism and the ways that it may be a more appropriate way to conceive of the work being done to stop domestic violence across the country through the implementation of specialized domestic violence courts. In doing so, this discussion starts with a recognition of the typically negative connotations accompanying the term judicial activism. By attempting to unpack the controversy surrounding the term and trying to understand how it has conventionally been applied to judicial conduct, however, this section will ultimately argue that judicial activism is not an inherently evil practice. Instead, it sometimes represents appropriate judicial action which facilitates the proper application of substantive laws to complex, shifting social problems.

But what, exactly, is judicial activism? What do we mean when we reference a particular brand of judicial conduct or decision making and identify it as an example of judicial activism? The term, characterizing various forms of judicial action, is one that is, in many ways, difficult to pin down. References to judicial

152. *Id.* at 1.

153. *Id.*

154. *Id.* at 11-12.

155. *Id.* at 11.

156. *Id.*

activism abound and are regularly invoked not only by members of the bench and bar, but also by legal commentators, scholars, and members of the popular media.¹⁵⁷ The motivations for, and tone of these references, however, are largely inconsistent.

Moments of judicial activism may be praised on one hand and denounced on the other. Judicial activism may garner accusations of improper partiality or unauthorized policymaking on the part of a judge.¹⁵⁸ In contrast, judicial activism may invite praise for a judge's having affected a just result or furthered a necessary change in the application of the law. In other words, cries of judicial activism and an understanding of the meaning behind them are often dependent upon context, upon exactly what is being criticized and, more important, who is offering the criticism. Therefore, the precise meaning of the phrase, and any definitive understanding or consensus about whether judicial activism is inherently good or inherently evil, seems to be lacking.

B. *Judicial Activism: A Framework*

Definitions of judicial activism abound, yet the term, characterizing various forms of judicial action, defies precise, definitive characterization. For some, the term judicial activism may be invoked to denounce "a court's willingness to strike down laws, to depart from the authority of text, history, and/or precedent, [or] to announce sweeping rules."¹⁵⁹ It may be seen as a tool improperly utilized by courts to "reach out to decide issues not properly before the [c]ourt, or to impose intrusive remedial orders on political actors."¹⁶⁰ For others, judicial activism may not hold negative connotations and may, instead, be used to reference an important judicial function, the exercise of which is not only positive but, in some circum-

157. See, e.g., Jessica Reaves, *They Who Must Decide: The Florida Supreme Court*, TIME ONLINE EDITION, at <http://www.time.com/time/nation/article/0,8599,88402,00.html> (Nov. 15, 2000). This article discusses the makeup of the Florida Supreme Court and its involvement in the 2000 presidential election ballot controversy. *Id.* According to Reaves, the Florida court, which is almost entirely made up of Democratic appointees, has a "reputation for what conservatives call 'judicial activism.'" *Id.* See also, Ed Magnuson, *Right Turn Ahead?*, TIME MAGAZINE, July 30, 1990, at 16 (discussing the retirement of Justice Brennan from the Supreme Court in 1990, Magnuson states that "[w]ith the abrupt resignation of Justice William Brennan, the court that Chief Justice Earl Warren led into an age of liberal judicial activism passed into history.").

158. See Thomas Jipping, *Judicial Activism Run Amok*, WORLD NET DAILY, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=28120 (June 28, 2002). In this article, Jipping discusses the June 26, 2002 decision by the U.S. Court of Appeals for the Ninth Circuit in which it "concluded that 'the statement that the United States is a nation "under God," in the Pledge of Allegiance as recited by public school students is an endorsement of religion.'" *Id.* (quoting *Newdow v. United States Congress*, 292 F.3d 597, 607 (9th Cir. 2002)). In observing that the "Ninth Circuit [has] struck again," Jipping states: "these judicial extremists have ruled that the Pledge of Allegiance is unconstitutional. Not surprising for that court, but it is an inevitable result of the judicial activism rampant throughout the federal bench." *Id.*

159. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002).

160. *Id.*

stances, proper.¹⁶¹ Those who have recognized the propriety of some forms of judicial activism typically limit their approval to judicial action which “polic[es] the boundaries of power between the jurisdictional government entities within our system,”¹⁶² and mitigates the consequences that might otherwise flow from “an act of one of the other branches of government [that] goes beyond the power granted to that branch by the Constitution, or is in conflict with some provision of the Constitution.”¹⁶³

One definition, provided by *Black's Law Dictionary*, which may be useful in a general discussion of judicial activism, is that it denotes a “philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu[ally] with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.”¹⁶⁴ This definition emphasizes the application, or perhaps misapplication, of substantive law in a manner befitting an individual court or judge’s personal predilections. According to this definition, judicial activism does not seem to relate most often to procedural matters, but rather to distinct decisions made on the merits. The meaning and scope of this definition is largely in line with other definitions proffered by various legal scholars who similarly point to substantive decision making in judicial activism analysis.¹⁶⁵

The sort of judicial conduct most frequently attracting accusations of judicial activism, whether positive or negative, tends to be that involving constitutional analysis conducted by appellate courts. The United States Supreme Court, above

161. *See id.* at 1172. Young argues that “‘activism’—broadly conceived as an important role for courts in relation to the other branches in the interpretation and enforcement of constitutional norms—is consistent with a particular form of conservative political theory.” *Id.* Young later goes on to say that for some conservatives, who, according to him, typically decry judicial activism when it disregards precedent, “an ‘active’ judicial role in reviewing and checking the actions of the political branches and the state governments,” may well be favored. *Id.* at 1207. He argues that so long as courts, in taking an “active” role, “act in small steps so as to disrupt as little of the status quo as they can,” judicial activism can be consistent with productive and proper judicial conduct. *Id.* at 1206-07. For example, a court may take small steps when it is narrowly interpreting a “highly ambitious and rationalistic legislative scheme,” in order to temper its ambition.

162. Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 144-45 (2001-2002).

163. *Id.* at 144.

164. BLACK’S LAW DICTIONARY 850 (7th ed. 1999). There are countless other definitions that seek to provide a general framework for a discussion of judicial activism. *See, e.g.*, Lino A. Graglia, *It’s Not Constitutionalism, It’s Judicial Activism*, 19 HARV. J.L. & PUB. POL’Y 293, 296 (1996) (stating that judicial activism is “the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit”).

165. *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144-1161 (2002). In this article, Young surveys “six broad categories of judicial behavior that probably strike most of us as ‘activist’ in some ways.” *Id.* at 1144. They are: “(1) second-guessing the federal political branches or state governments; (2) departing from text and/or history; (3) departing from judicial precedent; (4) issuing broad or ‘maximalist’ holdings rather than narrow or ‘minimalist’ ones; (5) exercising broad remedial powers; and (6) deciding cases according to the partisan political preferences of the judges.” *Id.* Young’s discussion of each of these “activist” categories illustrates the substantive nature of much of the judicial behavior he discusses. With the exception, perhaps, of the use of “broad remedial powers,” all of the categories highlight judicial decisions made on the merits. There is almost no mention made of judicial activism arising out of procedural processes.

all others, seems to be the penultimate target of such accusations.¹⁶⁶ As such, the term judicial activism has become widely, if not exclusively, associated with substantive decisions on issues relating to the edicts of the Constitution and the Bill of Rights.¹⁶⁷ Substantive decisions by the Supreme Court garnering accusations of judicial activism date back even to *Marbury v. Madison*,¹⁶⁸ which involved the Court's decision in 1803 "striking down legislation passed at the federal and state levels."¹⁶⁹ That decision, which endured labeling as improperly activist, "met with varying degrees of acceptance and criticism."¹⁷⁰ More recently, the Court's substantive due process decisions during the *Lochner* Era,¹⁷¹ its subsequent reversal of those decisions,¹⁷² and its decisions dealing with access to contraception¹⁷³ and abortion,¹⁷⁴ have also been attacked as judicial activism.¹⁷⁵

The emphasis on judicial conduct relating to substantive matters in discussions of judicial activism has not, however, entirely precluded an application of the term to procedures utilized by courts or judges. Indeed, the United States Supreme Court has itself delivered opinions containing internal accusations traded

166. See, e.g., *id.* at 1139. Young stated that "[i]t is very much in vogue these days to accuse the current Rehnquist Court of 'conservative judicial activism.'" *Id.* Young then goes on to quote several legal scholars who have asserted that "[w]e are now in the midst of a remarkable period of right-wing judicial activism," and "[f]or nearly a decade, . . . 'the court's five conservative justices have steadily usurped the power to govern by striking down or weakening federal and state laws regulating issues as varied as gun sales, the environment, and patents—as well as laws protecting women and now the disabled.'" *Id.* at 1139-40 (quoting first, Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001 at A23; and second, Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A23).

167. See, e.g., Young, *supra* note 165, at 1139; Jones, *supra* note 162.

168. 5 U.S. (1 Cranch) 137 (1803).

169. Jones, *supra* note 162, at 141.

170. *Id.*

171. The "*Lochner* Era," comprised the string of Supreme Court decisions beginning with *Lochner v. New York*, 198 U.S. 45 (1905) and continuing through the mid-1930s when the Court reversed its position and began to repeatedly insist "that it has turned its back on the *Lochner* philosophy," and the substantial judicial intervention that era embodied. KATHLEEN M. SULLIVAN & GERALD GUNTER, *CONSTITUTIONAL LAW* 466 (14th ed. 2001).

172. Beginning with *Nebbia v. New York*, the Court began to change course on its economic substantive due process jurisprudence. *Id.* at 473. In that case, contrary to the analysis comprising the *Lochner* Era decisions, the Court upheld a New York State law allowing fixed "minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold." 291 U.S. 502, 515 (1934). In rejecting a due process challenge, the Court observed that "[w]ith the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." *Id.* at 537.

173. E.g., *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (striking down a Connecticut criminal statute which provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned . . . or both," on the ground that the statute violates the substantive due process right to privacy implied in the 14th Amendment to the United States Constitution). *Id.* at 480.

174. E.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (striking down a Texas law forbidding the procurement of an abortion except "for the purpose of saving the life of the mother," on the ground that the right of personal privacy, implied by the Due Process clause of the 14th Amendment, though not explicitly mentioned anywhere in the Constitution, prohibits such state regulation of abortion). See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

175. *Id.* at 528-29.

between individual justices of judicial activism in relation to procedural, rather than substantive, analysis.

In *Harper v. Virginia Department of Taxation*,¹⁷⁶ decided by the Supreme Court in 1993, Justice Scalia, in his concurring opinion, took Justice O'Connor to task for proposing an alternative disposition in her dissenting opinion (joined by Chief Justice Rehnquist) which Justice Scalia regarded as improper judicial activism.¹⁷⁷ In *Harper*, federal employees appealed the Supreme Court of Virginia's decision denying their requests for refunds of taxes paid on retirement benefits.¹⁷⁸ The employees argued that an earlier case decided by the Court, authorizing similar tax refunds,¹⁷⁹ applied retroactively to their claims and as such, their requests should be granted.¹⁸⁰ The Supreme Court of Virginia had denied the employees' requests, saying that the rule of law relied on by the employees applied prospectively only.¹⁸¹ In rejecting that analysis, the majority and concurring opinions in *Harper* averred that "[b]oth common law and our own decisions [have] recognized a general rule of retrospective effect for the constitutional decisions of this court."¹⁸²

In vacating and remanding the state court's decision, the majority held that the Supreme Court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision."¹⁸³ Justice O'Connor, in her dissent, argued that the Court's decision "applie[d] a new rule of retroactivity,"¹⁸⁴ that controverts stare decisis and that "[w]hen the Court changes its mind, the law changes with it."¹⁸⁵

In rebutting O'Connor's point, Justice Scalia argued that the assertion that the law changes with the decisions of the Court is "quite foreign to American legal and constitutional tradition."¹⁸⁶ According to Scalia, it is "'the province and duty of the judicial department to say what the law is,' not what the law shall be."¹⁸⁷ In Scalia's mind, "prospective decisionmaking,"¹⁸⁸ of the sort recommended by O'Connor in her dissent and exercised by the Supreme Court of Virginia, has historically been "known to foe and friend alike as a practical tool of judicial activism, born out of disregard for stare decisis."¹⁸⁹

Although the Supreme Court seems to be particularly prone to association with the term judicial activism, just as the term is not solely reserved for criticism of substantive decisional law, it is likewise not solely reserved for discussions

176. 509 U.S. 86 (1993).

177. *Id.* at 105-09.

178. *Id.* at 91.

179. *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803 (1989).

180. *Harper v. Va. Dept. of Taxation*, 509 U.S. at 91.

181. *Id.* at 91-92.

182. *Harper v. Va. Dept. of Taxation*, 509 U.S. at 94 (quoting *Robinson v. Neil*, 409 U.S. 505, 507 (1973)).

183. *Id.* at 90.

184. *Id.* at 113.

185. *Id.* at 115 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550 (1991)).

186. *Harper v. Va. Dept. of Taxation*, 509 U.S. at 106-07.

187. *Id.* at 107 (quoting Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

188. *Id.* at 107.

189. *Id.* at 107-08.

relating to the Court. Indeed, depending on the context and character of other judges' decisions, their conduct that is either outside the scope of their immediate adjudicatory roles, or within the context of procedural applications in particular cases, might also be appropriately labeled "activist." It is in these contexts that the term judicial activism is most easily applied to judicial establishment of, specialized domestic violence court programs, or to judicial conduct within them.

For example, judges involved in the Dade County Domestic Violence Court in Florida have adopted both an adjudicatory and a pedagogical role in the courtroom and in the greater community with respect to issues relating to domestic violence.¹⁹⁰ Through that court program, "the role of 'judge as teacher' in the courtroom is tested, and judges have a responsibility to make public appearances at community meetings and in the popular media and to educate the public about the court and about domestic violence."¹⁹¹

At least one scholar has referred to Dade County judges' behavior as being representative of judicial activism.¹⁹² In doing so, no distinction was made between the substantive judicial decision-making central to conventional notions of judicial activism and the more explicit activism engaged in through extra-judicial community education.¹⁹³ Similarly, as mentioned above, Judge Kaye, in a discussion of New York's domestic violence courts, acknowledged that the streamlining and specialization of court procedures relating to domestic violence cases have been regarded by some critics as examples of "inappropriate 'policymaking' by the judiciary."¹⁹⁴ Such references to policymaking are typically synonymous with cries of inappropriate judicial activism.¹⁹⁵

The suggestion that creative court programs, such as specialized domestic violence courts or drug treatment courts,¹⁹⁶ which to some degree alter the proce-

190. See JEFFREY FAGAN, U.S. DEP'T OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 22 (1996).

191. *Id.*

192. See, Tsai, *supra* note 11, at 1303.

193. See *id.* (citing FAGAN, *supra* note 190, at 21). Tsai observes that the Dade County Domestic Violence Court, "in an attempt to create a more effective response to domestic violence, was designed with three main areas of focus: judicial activism in the community, batterer treatment and victim services." *Id.*

194. Kaye & Knipps, *supra* note 10, at 10.

195. See, e.g., Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996).

196. Drug treatment courts have been implemented around the country. Maine's drug court program is, in many ways, representative of the general framework of these kinds of programs. According to the State of Maine Judicial Branch website, Maine's Adult Drug Court is:

a special court given the responsibility to handle cases involving drug-using offenders through comprehensive supervision, drug testing, treatment services and immediate sanctions and incentives. Drug court programs bring the full weight of all interveners (judges, prosecutors, defense counsel, substance abuse treatment specialists, probation officers, law enforcement and correctional personnel, educational and vocational experts, mental health workers and many others) to bear, forcing the offender to deal with his or her substance abuse problem. Drug courts work similar to a court diversion program in that, in exchange for a guilty plea a client may enter the drug court and following drug court graduation expect a greatly reduced sentence. While in drug court clients are allowed to remain in the community while being supervised by various drug court staff.

at <http://www.courts.state.me.us/mainecourts/drugcourt/index.html> (last visited Jan. 19, 2004).

dural and organizational formulas utilized by more traditional courts, may represent some form of judicial activism is provocative. To classify court programs such as drug courts or specialized domestic violence courts as examples of judicial activism, given the controversy and suspicion that term engenders, is to suggest, at least implicitly, that those programs and the role of the judges who preside over them are notably different from more traditional courts. The distinction raises interesting questions about the comparative role of judges in these different kinds of courts, about the manner in which procedural and substantive law is applied, and about the quality and efficacy of the respective results. If one regards drug courts or specialized domestic violence courts as involving something other than traditional, objective judging—namely, some form of advocacy—does it necessarily follow that the judicial work that is being done in these courts is somehow not as valuable or solid as that done in traditional courts? Is the application of law and precedent somehow different?

As was seen in the above discussion of existing domestic violence court programs around the country and the analysis proffered by Judge Kaye, it is possible to regard these courts as representative only of procedural streamlining and efficient court administration. If however, the term judicial activism is removed from the controversy along with the suspicion that has historically surrounded it, these court programs can be regarded as representative of appropriate judicial advocacy. Judges, through increased training, community involvement and education, and more sensitive application of existing laws effectuate different, more meaningful remedies for victims of domestic violence.

Through their role as “active case manager[s], creative administrator[s], and community leader[s],”¹⁹⁷ judges are able to affirm the experience of victims, hold batterers accountable, and “restore a sense of justice to women who have been brutalized and terrorized.”¹⁹⁸ While it has been traditionally considered inappropriate for courts to act with an eye toward affecting social change through judicial activism, in domestic violence cases, activism has remedied long-standing short-falls in the way that the legal system addresses these important cases. As the following discussion of Maine’s new court will show, judicial activism, as practiced by specialized domestic violence courts, effectuates important changes in the ways that courts operate and in the ways that judges apply substantive laws.

V. SPECIALIZED COURT PROGRAMS IN MAINE: MAINE’S PILOT DOMESTIC VIOLENCE PROJECT

In July and August of 2002 the State of Maine District Court system launched a Pilot Domestic Violence Project in the district courts in York and Portland. That opening day marked the culmination of years of research and planning conducted by a state-sponsored, multi-agency committee created to study the prevalence and impact of domestic abuse in Maine. The induction of the pilot project, which is funded in part through federal grants obtained by the district court system, also marked the beginning of an ambitious and proactive collaborative journey undertaken by a coalition of community and government agencies to improve Maine’s

197. Kaye & Knipps, *supra* note 10, at 12.

198. PTACEK, *supra* note 14, at 160.

response to family violence. The pilot project, and the objectives it embodies, was conceived of and developed in response to findings by the committee and other cooperating agencies that domestic violence is a widespread problem facing Maine courts,¹⁹⁹ one that the district courts²⁰⁰ have largely been unable to meaningfully redress.

The Pilot Project is the result of funding obtained through a STOP Violence Against Women Fund Grant (STOP Grant) Application,²⁰¹ submitted by former Chief District Court Judge Jon Levy.²⁰² The grant application was supported by letters from several representatives of the various arms of the State's criminal justice system including the Cumberland and York County District Attorneys²⁰³ and

199. The number of civil protection from abuse petitions has increased substantially over the last several years. STOP Grant, *supra* note 9, at 4. In 1982, the first year for which filing data is available, 1574 PFA petitions were filed. *Id.* That number went up to 3978 in 1990 and in the year 2000 the District Court system saw 6545 complaints filed. *Id.* These numbers reflect a 400% increase in PFA complaints over an 18-year period. *Id.* According to the grant application, "[t]he dramatic increase in the civil domestic violence docket . . . has not been met with a corresponding increase in resources." *Id.*

200. "The Maine District Court has jurisdiction over criminal complaints involving domestic assaults and violations of protective orders, as well [as] jurisdiction over civil complaints seeking protection from abuse." *Id.* at 1.

201. The U.S. Department of Justice, Office of Justice Programs, which oversees the program and funding describes the STOP Violence Against Women Formula Grant program as follows:

The STOP (Services • Training • Officers • Prosecutors) Violence Against Women Formula Grant Program (STOP Programs) promotes a coordinated, multidisciplinary approach to improving the criminal justice system's response to violent crimes against women. The STOP Program encourages the development and strengthening of effective law enforcement and prosecution strategies to address violent crimes against women and the development and strengthening of victim services in cases involving violent crimes against women. The STOP Program was authorized under the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000). The STOP Program is administered by the Office on Violence Against Women (OVW). . . .

U.S. Department of Justice, Office of Justice Programs, Office on Violence Against Women, *STOP Violence Against Women Formula Grant Program*, available at http://www.ojp.usdoj.gov/vawo/stop_grant_desc.htm (last visited Oct. 23, 2003).

202. Jon D. Levy "was confirmed as an Associate Justice of the Maine Supreme Judicial Court in 2002. [He] previously served as the Chief Judge of the District Court." Maine Judicial Branch, *Supreme Court Justice Biographies*, at http://www.courts.state.me.us/mainecourts/supreme/justices_bios.html (last visited Oct. 23, 2003).

203. The letter from Michael P. Cantara, District Attorney for York County, appended to the grant application states that "[f]or York County, the implementation of a domestic violence case management pilot project would help fill a void." He goes on to say that "Southern York County traditionally has been underserved in terms of resources for victims of domestic violence," and that the implementation of "an all-inclusive approach is thought to be the best way of keeping victims safe, and offenders accountable." STOP Grant, letter from Michael P. Cantara, *supra* note 9, at 21. Stephanie Anderson, District Attorney for Cumberland County similarly writes: "[b]etter coordination of information will lead to more effective prosecution of domestic violence offenders, increased safety for victims, and more informed sentencing of offenders." STOP Grant, letter from Stephanie Anderson, *supra* note 9, at 26. She further observes that "[p]ost-conviction monitoring by the court of domestic violence offenders will serve to hold these offenders more accountable, and strengthen our community's coordinated response to domestic violence." *Id.*

the Director of Caring Unlimited, a victims' advocacy organization.²⁰⁴ According to the grant application, one of the primary concerns necessitating a coordinated domestic violence project is an often disjointed approach to case management within the court system.²⁰⁵ The application states:

The effectiveness of the Judiciary's response to domestic violence is hampered by insufficient coordination in the scheduling and sharing of information between the District Court's criminal domestic violence docket on the one hand, and the civil protection from abuse docket on the other. It is apparent that the Judiciary's response to domestic violence cases can be substantially enhanced by a coordinated effort to manage the cases in a unified manner.²⁰⁶

Appended to the grant application is a report, authored by Emily Sack, an attorney hired to advise the Violence Intervention Project, which identifies and suggests means of addressing gaps within Maine's judicial system.²⁰⁷ The report was the result of Ms. Sack's observations of court proceedings in the Portland district court and her discussions with various participants in Maine's judicial system, including judges, district attorneys, bail commissioners, defense bar, clerks, and law enforcement.²⁰⁸

Sack's report identifies a number of problem areas that are consistent with problems identified earlier in this Comment and that have been found in other state courts around the country. Some of those problem areas are identified below, along with a discussion of the ways in which the Pilot Project intends to address them.²⁰⁹ Several areas requiring improvement were included in Sack's report.²¹⁰ This discussion, however, will focus on three broad categories: information systems, law enforcement, and offender monitoring. These three areas of concern, and the methods undertaken by the Pilot Project to address them, are particularly demonstrative of the departure the domestic violence project makes from traditional court programs in Maine. As such, they serve as a good point of departure for exploring whether these examples of proactive procedural remedies represent a manifestation of judicial activism.

204. Caring Unlimited is a community agency based in York County which provides counseling, safety planning services and legal aid to victims of domestic violence. In her letter of support for the grant application, Mary S. Marsters, Legal Services Coordinator states: "As a legal advocate at Caring Unlimited . . . I frequently see women thrust into a complex and confusing legal system as a result of the violence of a partner. Consequently they are sometimes left homeless, many with young children, and nearly all in financial difficulty." She goes on to say that "[d]omestic violence cases, civil or criminal, are generally complex and difficult. They require special handling and expediency in order to ensure victim safety and participation. A protocol that is attentive to these issues will greatly enhance victim safety, advance the success of prosecution and increase the accountability of the perpetrator." STOP Grant, letter from Mary S. Marsters, *supra* note 9.

205. STOP Grant, *supra* note 9, at 1.

206. *Id.*

207. Emily J. Sack, Esq., Report on Cumberland County Domestic Violence Coordinated Response, 3 (2001) [hereinafter Sack Report] (on file with *Maine Law Review*).

208. *Id.*

209. *Id.* at 102.

210. *Id.* at 2.

*A. Information Systems**1. Problems*

One significant problem area identified by Sack's report is the "lack of comprehensive information systems, both providing computerized data for individual courts and agencies and providing linkages among key agencies."²¹¹ According to her report, the lack of a comprehensive system for storing and sharing information "is impacting the ability to make informed decisions regarding bail, pleas, sentences, conditions, and protection from abuse orders."²¹²

The State of Maine has only recently begun to develop a computerized database of protection from abuse orders.²¹³ This database, when fully functional, will contain a catalog of all protection from abuse orders issued by courts, indicating the parties involved, the issuing court, and the individual conditions attached to them.²¹⁴ At the time of Ms. Sack's report, however, the database only contained protection orders dating back one year.²¹⁵ While court personnel had been entering data into the system, they did not yet have access to the database in order to review the information contained within it.²¹⁶ This significantly increases the likelihood that a judge, unaware that a criminal defendant has a protection order against him, will set a conflicting probation condition or fail to include a strict condition in a protection order because she is unaware that the defendant has a history of battering the petitioner.

The database, when fully operational, will allow those with access to determine, for example, whether an individual with a protection order issued against him is prohibited from having contact with a victim, whether he is permitted to possess firearms, or whether he is permitted to live at a shared residence. This information, if contained in a comprehensive, widely accessible database, has the potential to make "an enormous impact, by providing law enforcement, prosecutors, and judges with at least part of the domestic violence history between the parties" and "is a great step in development of an effective [domestic violence] response."²¹⁷

Another problem identified in Sack's report that related to the sharing of information was the limited "ability of the court or the district attorney to get prior criminal history or 'rap' sheets."²¹⁸ While individual courts are able to "produce a history of convictions from the county," they are currently unable to access "state-wide or national data" regarding an individual's prior convictions.²¹⁹ Courts are therefore largely unable to determine whether an individual has been previously convicted of domestic abuse in another county or state. This information might impact decisions relating to bail or sentencing.

211. *Id.* at 3.

212. *Id.*

213. *Id.*

214. See STOP Grant, *supra* note 9, at 5; Sack Report, *supra* note 207, at 1-2.

215. See Sack Report, *supra* note 207, at 3.

216. *Id.* at 4.

217. *Id.* at 3.

218. *Id.* at 4.

219. *Id.*

2. Solutions

The problems relating to the storage and sharing of protection order and criminal histories are primarily the result of limited judicial resources.²²⁰ The completion of the database and expansion of access to all major players within the legal system is largely dependent upon available time and money. Despite Sack's urging, without additional resources, the Pilot Project is largely incapable of expediting the time when the database becomes fully operational. The Pilot Project, since its inauguration in July, has, however, attempted to draft protocols that address the problem to the extent possible without new resources.²²¹

Under the proposed protocols, specialized domestic violence clerks are asked to inquire into the background and protection order history of petitioners and defendants, "and to the extent possible, the court and location of other proceedings," both in Maine and in other states.²²² This will allow the domestic violence clerk or other court personnel to contact those offices when necessary to obtain further information.²²³ In addition, procedures are being implemented which require clerks to identify criminal domestic violence cases prior to transfer to the superior court upon a defendant's request for a jury trial.²²⁴ Clerks are instructed to stamp a file with a "DV" label prior to transfer in order to identify it as part of the Pilot Project so that the hearing may be expedited and returned to the district court for monitoring with as little delay as possible.²²⁵ Also, law enforcement officers are being asked to conduct criminal and protection order checks on all domestic violence defendants upon arrest and to provide that information directly to bail commissioners when delivering the defendant to the jail.²²⁶

B. Law Enforcement

1. Problems

In addition to the difficulties presented by the lack of any comprehensive, widely accessible database, Ms. Sack also identified several problems relating to the manner in which law enforcement agencies respond to domestic violence.²²⁷ According to Sack, and many of those whom she interviewed, one point of particular concern is the existing bail process and procedures: "The initial bail hearing is one of the most significant stages in the handling of a domestic violence

220. See STOP Grant, *supra* note 9, at 2.

221. See generally Domestic Violence Pilot Project Draft Protocol (Aug. 2002) (on file with *Maine Law Review*). The protocols cited throughout this section relate primarily to the response drafted and implemented by the York County Division of the Pilot Project. The protocols implemented in Cumberland County differ somewhat but are similarly geared toward addressing the concerns raised by Sack in her report. The differences in the approach and methods of the York and Cumberland Counties reflect the unique challenges faced by courts serving larger areas (Cumberland) and those serving smaller communities (York).

222. *Id.* at 3.

223. *Id.*

224. See *Id.* at 2.

225. *Id.*

226. *Id.* at 5.

227. Sack Report, *supra* note 207, at 5-7.

case. A defendant's release after arrest is one of the most dangerous periods for the victim. It is[, therefore,] crucial that, while protecting defendant's due process rights, bail decisions are made in as informed a manner as possible."²²⁸ At the time of Sack's report, it appears as though there were significant gaps in the information being relayed to bail commissioners prior to the making of decisions regarding preconviction release.²²⁹ Because of the problems with accessing criminal and protection from abuse histories, "one of the few sources of information available to the commissioners is information regarding the immediate incident leading to the arrest. It is therefore crucial that law enforcement communicate this information either personally or in the form of an arrest report to the commissioners immediately."²³⁰

According to Sack, and those she interviewed, little communication between police and bail commissioners was consistently taking place for several reasons:

First, in some departments police reports are not written up immediately, and so are not ready at the time of the bail hearing. Second, due to logistics, the police officers transporting the defendant to jail (and therefore the officers in contact with the bail commissioner) are not necessarily the officers making the arrest, and therefore may not have adequate information regarding the incident. . . . Third, in some instances, officers transporting the defendant, whether or not they are the arresting officers, may not be present when the commissioner appears, so there is not information transmitted about the incident. Fourth, in some instances the bail commissioners themselves are not present, but are making decisions by telephone, and apparently do not view paperwork that is [available to them].²³¹

2. Solutions

The Pilot Project has, through continued cooperation and collaboration between law enforcement, prosecutors, the defense bar, victims advocates, and the court, been able to address some of the problems highlighted in Sack's report. Under the new protocol, and pursuant to an amendment to the Maine Bail Code adopted by the legislature,²³² bail commissioners must make a "good faith" inquiry into the circumstances surrounding an alleged abuser's arrest prior to admitting them to bail.²³³ In order to aid an arresting officer's ability to conduct a

228. *Id.* at 6.

229. *Id.* at 5-6.

230. *Id.* at 5.

231. *Id.* at 5-6.

232. See ME. REV. STAT. ANN. tit. 15 § 1023(4) (West 2003). This new section amends the responsibilities of bail commissioners and law enforcement in cases involving domestic violence. Pursuant to section 1023(4)(C), a bail commissioner may not:

In a case involving domestic violence, set preconviction bail for a defendant before making a good faith effort to obtain from the arresting officer, the district attorney, a jail employee or other law enforcement officer: (1) A brief history of the alleged abuser; (2) The relationship of the parties; (3) The name, address, phone number and date of birth of the victim; and (4) Existing conditions of protection from abuse orders, conditions of bail and conditions of probation.

ME. REV. STAT. ANN. tit. 15 § 1023(4)(C) (West 2003). Additionally, under the new amendment, law enforcement officers are to implement new policies, no later than June 1, 2003, that, among other things, contain procedures for conducting a risk assessment of the defendant and protocol for relaying that "information to a bail commissioner before a bail determination is made." *Id.*

233. *Id.*

thorough background check after making an arrest, law enforcement officers are now to inquire into whether the parties have “lived in another part of Maine or any other state so . . . that checks may be run for any domestic violence cases.”²³⁴ Further, arresting officers, under the new protocol, are to fax or deliver domestic violence worksheets (produced through the police department) and record checks to the jail when delivering a prisoner.²³⁵ This will expedite information sharing between law enforcement and bail commissioners so that bail decisions are made in as informed a manner as is possible. Finally, the guidelines provided by the Pilot Project protocol call for heightened involvement by law enforcement in victim safety. Under the new procedures, law enforcement is to notify the victim of a domestic assault if her batterer is being released on preconviction bail and notify her of any conditions of release.²³⁶ This notification requirement is designed to ensure that a victim has time to take steps to ensure her safety when a defendant is entitled to release on preconviction bail.

C. Offender Monitoring

1. Problems

One point of particular concern mentioned in Sack’s report was the lack of any judicial monitoring of offenders’ compliance with conditions of pre-trial release or post-conviction probation.²³⁷ Prior to the Pilot Project, pre-disposition conditions such as attendance at batterer’s intervention programs were rarely imposed.²³⁸ Sack attributed this to the fact that several judges rotated the court’s handling of domestic violence cases.²³⁹ As a result, there was little opportunity for a single judge to become familiar with individual cases and keep track of whether defendants were in compliance with court orders.²⁴⁰ Due to a lack of resources, defendants who were able to make bail were not subject to monitoring to any significant degree and had “virtually no conditions placed on them.”²⁴¹ Similarly, post-conviction conditions were routinely overseen by probation officers with little or no involvement of the court after final disposition.²⁴² With regard to the issue of offender monitoring, Sack revisited the lack of information sharing and the frequent lack of knowledge on the part of judges regarding protection orders and criminal histories of parties in domestic violence cases.²⁴³ She suggested that unifying the process and assigning a single judge to domestic violence cases might assist the court system in better tracking defendant compliance with court orders.²⁴⁴

234. Domestic Violence Pilot Project Draft Protocol at 5 (Aug. 2002) (on file with *Maine Law Review*).

235. *Id.*

236. *Id.* at 6.

237. Sack Report, *supra* note 207, at 9.

238. *See id.* at 13.

239. *Id.*

240. *See id.* at 11, 15.

241. *Id.* at 13.

242. *See id.* at 9-10.

243. *Id.* at 15.

244. *Id.* at 22.

2. Solutions

The grant application submitted by the district court cites research that "indicates that [there is] a substantial increase in compliance with batterers' program requirements when mandatory court monitoring is in place."²⁴⁵ Therefore, in an effort to increase the frequency with which offenders meet court ordered conditions of release, the Pilot Project has instituted a judicial monitoring process.²⁴⁶ This process involves a court calendar, set by judges and clerks cooperatively, whereby offenders who are ordered to attend batterer education programs or comply with other conditions return to court and provide proof of their compliance to the judge. According to the protocol, having one judge to oversee domestic violence cases and monitor offenders through periodic judicial reviews facilitates consistent compliance and immediate sanctioning in the event of noncompliance. Batterer education programs and probation officers collaborate with judges by submitting reports regarding offender compliance with court orders. An offender's failure to comply may result, when appropriate, in revocation by a court of probation or bail conditions.²⁴⁷

VI. CONCLUSIONS

Judicial activism has long been suspected of being representative of judicial overreaching or inappropriate policymaking. In some circumstances, however, activism on the part of the judiciary is necessary in order to overcome larger social structures or biases that preclude meaningful legal action. With regard to cases involving domestic violence, an area of law that has historically been plagued by a judicial culture that undervalues the experiences and rights of victims, activism on the part of courts and judges has played a critical role in improving the application of laws that are meant to sanction domestic abuse.

Specialized domestic violence courts, through the reorganization of court resources, increased training and sensitivity of judges, and cooperation among community agencies, are examples of appropriate and necessary advocacy being done by the judicial system. Maine's new pilot domestic violence project and the changes it has effectuated within the State for victims and perpetrators of domestic violence demonstrates the critical role that the legal system, and individual judges, must play in stopping the violence. These court programs, in Maine and throughout the country, represent a new framework for understanding judicial activism. Through increased involvement, understanding, and active attention to the complexities surrounding domestic violence cases, domestic violence courts and "activist" judges will ensure that the legal system remains viable and consistently able to deliver "complete justice" to those it serves.

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245. STOP Grant, *supra* note 9, at 6 (citing Webber, *Domestic Violence Courts*, JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN AND THE COURTS at 32 (2000)).

246. See Domestic Violence Pilot Project Draft Protocol at 4 (Aug. 2002) (on file with *Maine Law Review*).

247. *Id.* at 7-8.

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