

Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?

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I. INTRODUCTION

Domestic violence is a serious societal problem, and many civil and criminal legal reforms to address it have been enacted in recent decades. In some jurisdictions, one such reform has been the creation of therapeutic domestic violence courts. This Article will address the apparent need for, and the potential benefits of, such courts.

Part II of this Article will explore the history of state intervention to confront domestic violence, along with some of the attitudes that contribute to the lack of adequate enforcement of recent legislative reforms. Part III of this Article will discuss the costs of domestic violence and the impact of superficial court treatment in reducing those costs. Part IV will outline the historical development, philosophy, and potential development of therapeutic courts, and in particular will examine the proven effectiveness of the drug court model and the potential benefits that are unique to domestic violence courts. Part V suggests further creation of domestic violence courts as a means to efficiently and effectively address the problems associated with enforcing domestic violence legislation and provide services for families dealing with domestic abuse.

II. HISTORY OF STATE INTERVENTION

Historically, police and prosecutors declined to pursue domestic violence cases. The refusal to arrest or prosecute in such cases reflected the belief that domestic violence was a "private" matter or

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that wife beating was acceptable behavior.¹ That a wife was entitled to the same protection from the law as her husband, including the right not to be beaten by him, was first recognized in 1871 in Alabama.²

Even after some states adopted laws criminalizing wife battering around the turn of the 20th century, domestic abuse cases were generally routed into family court.³ As recently as 1968, only married women could obtain injunctions, and violation of the injunction would not result in criminal penalties.⁴ In some jurisdictions, victims had to pay prosecutors a fee to pursue their cases.⁵

In the 1970s, due largely to the feminist movement, the topic of domestic violence began to move into the public consciousness and programs such as shelters, specialized prosecution, and studies on the incidence of domestic violence began to emerge.⁶ In the past twenty-five years, domestic abuse has increasingly been recognized as criminal behavior that should be met with arrest and prosecution.⁷ Every state now provides for arrest for misdemeanor domestic violence, and in more than half the states arrest is required for some domestic violence crimes.⁸ The federal Violence Against Women Act (VAWA) now requires mandatory arrest or pro-arrest policies by state and local governments as a condition to receive federal funding.⁹

Changes in the handling of domestic violence cases were implemented in the 1980s and 1990s, including the creation of specialized domestic violence prosecution units, the emergence of

1. Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 35 (2000); Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 CRIM. JUST. AND BEHAVIOR 306, 307 (1998); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1288–89 (2000).

2. Tsai, *supra* note 1, at 1289.

3. *Id.* at 1290.

4. Mills, *supra* note 1, at 307.

5. *Id.* See also Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington: Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 139, n.2 (2000) (discussing the lack of effective legal protection for domestic abuse victims through the late 1970s and early 1980s); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002) (also discussing the lack of effective legal protection for domestic abuse victims through the late 1970s and early 1980s).

6. Tsai, *supra* note 1, at 1290.

7. See generally Bruce G. Taylor et al., *The Effects of a Group Batterer Treatment Program: A Randomized Experiment in Brooklyn*, 18 JUSTICE Q. 171, 172 (2001) (pointing to state and national policies promoting increased arrest and prosecution to control domestic abuse); Winick, *supra* note 1, at 36.

8. John Q. La Fond & Sharon G. Portwood, *Preventing Intimate Violence: Have Law and Public Policy Failed?*, 69 UMKC L. REV. 3 (2000); Epstein, *supra* note 5, at 1854–55.

9. Epstein, *supra* note 5, at 1856.

more batterer treatment programs, and adoption of protection order system reforms to improve emergency access and widen the options available to victims for legal relief.¹⁰ Many reforms were based on the theory that holding batterers criminally accountable would reduce future violence.¹¹ It is also possible that such legal reforms may efficiently signal societal indignation and promote further, greater social reforms.¹²

Research indicates that the mere existence of a state intervention, such as calling the police, may indeed be effective in reducing battering, possibly stopping as many as one-third of batterers from committing another assault for a period of about six months.¹³ There also appears to be a correlation between the effectiveness of arrest and employment.¹⁴ Interestingly, it further appears that the length of male employment correlates negatively to the level of violence in a romantic heterosexual relationship.¹⁵

However, police officers may prefer not to arrest. Some view domestic abuse victims as undependable, and think that domestic violence arrests are unproductive because they are unlikely to result in conviction.¹⁶ Similarly, some prosecutors are reluctant to pursue domestic abuse cases because victims tend not to participate in the process.¹⁷ Such prosecutors apparently lack training on how to successfully prosecute a domestic violence case without the victim. Unfortunately, their inaction reinforces negative police attitudes.¹⁸

10. Tsai, *supra* note 1, at 1290–91.

11. *Id.* This premise has not been fully tested, and likely will not be until more time has passed to allow for assessment. *Id.* at 1314–15.

12. Edna Ullmann-Margalit & Cass R. Sunstein, *Inequality and Indignation* (Preliminary Draft), at 4, 28–30, (The Chicago Working Paper Series Index, John M. Olin Law & Econ. Working Paper No. 141, Preliminary Draft, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=30110 (last visited May 1, 2004) (discussing such reforms as “transformative law”).

13. Taylor et al., *supra* note 7, at 174. It is not as clear that arrest is always effective. Compare Winick, *supra* note 1, at 71 (asserting that the methodology of a study that found lower recidivism among arrested batterers was flawed) and LaFond & Portwood, *supra* note 8, at 5 (indicating that “some data” suggests that arrest reduces battering in the short run but increases violence in the long term).

14. See Mills, *supra* note 1, at 308 (indicating that arrest and prosecution may not always deter future violence, particularly if the batterer is unemployed); Tsai, *supra* note 1, at 1321 n.258 (surmising that employed perpetrators face the greater social cost of losing their jobs, compared to unemployed perpetrators).

15. Helen V. Tauchen et al., *Domestic Violence: A Non-Random Affair*, at 2, (Nat’l Bureau of Econ. Research, Working Paper No. 1665, 1985), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=227186#PaperDownload (last visited Apr. 25, 2004).

16. Tsai, *supra* note 1, at 1294.

17. *Id.*

18. *Cf. id.* at 1294. See also Epstein, *supra* note 5, at 1857 (discussing prosecutor reluctance to pursue criminal charges in domestic violence cases).

Legal reforms addressing domestic violence have also been enacted in the civil justice system. Every state now has a civil protection order statute. Most authorize such relief as emergency procedures to obtain an order, provisions forbidding assault and contact, temporary child custody, supervised visitation with children, and child support.¹⁹ However, unenthusiastic or hostile enforcement of such statutes by uninformed judges greatly undermines the statutes' effectiveness.²⁰ Moreover, studies of the effectiveness of civil protection orders strongly encourage courts to link victims with services, including counseling and safety planning.²¹

III. SCOPE OF THE PROBLEM

A. *Costs of Domestic Violence*

It is critically important that domestic violence be efficiently and appropriately addressed because the physical, emotional and financial costs of domestic violence are high. Current or former intimate partners annually assault approximately 840,000 to one million women.²² This statistic contributes to the fact that by 1996, about one-quarter of the adult female population reported some sort of physical victimization during their lifetime at the hands of a family member or intimate partner.²³ Some studies suggest that one-third to one-half of marriages are violent.²⁴ A recent survey by the National Institute of Justice reported that fifty-two percent of respondents said they had been physically assaulted during their lives.²⁵ Seventy-six percent of those who reported rape or physical assault in adulthood

19. Epstein, *supra* note 5, at 1858–60.

20. *See id.* at 1861 (pointing out that some judges may refuse to issue orders or even threaten sanctions on a return visit because they believe a victim is “refusing” to leave the relationship, or may misinterpret behavior by victims suffering from post traumatic stress disorder, and then express their hostility toward the victim and sympathy for the batterer by demanding unusually high levels of proof to issue a protection order).

21. Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma'am: What We Know and Don't Know about Problem Solving Courts*, 30 *FORDHAM URB. L. J.* 1027, 1045 (2003).

22. Taylor et al., *supra* note 7, at 172 (indicating that although the number of female victims of intimate violence declined in the 1990s, an estimated 840,000 women annually were assaulted by their current or former partners); Winick, *supra* note 1, at 70. Some studies indicate that as many as four million women a year undergo severe assaults at the hands of their intimate partners. Tsai, *supra* note 1, at 1291, 1292.

23. Taylor et al., *supra* note 7, at 172.

24. Robert A. Pollak, *An Intergenerational Model of Domestic Violence*, at 3, (Nat'l Bureau of Econ. Research, Working Paper No. 9099, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=324042 (last visited May 1, 2004).

25. LaFond & Portwood, *supra* note 8, at 4.

indicated that a current or former intimate partner had perpetrated the assault.²⁶

Domestic violence also requires considerable use of societal resources, including public services such as police, fire, schools and the criminal justice system. In one jurisdiction, approximately one-third of the emergency calls were related to partner abuse.²⁷ School staff members in the same jurisdiction estimated that one-quarter to one-third of students live with family violence.²⁸ Additionally, more than one-third of criminal case filings in the same jurisdiction in a five-month period concerned domestic violence.²⁹

Battering is a type of domestic violence that has particularly costly consequences. Battering is ongoing behavior within a relationship which victimizes the intimate partner repeatedly.³⁰ Physical abuse results in serious injury. Battering is thought to account for one-fifth to one-half of all female emergency room patients.³¹ Battering may also account for as much as twenty-eight percent of all violence perpetrated against women.³² It is the leading cause of injury to women between the ages of fifteen and forty-four.³³ Moreover, domestic violence victims can develop serious psychological injuries and mental illness as a result of repeated abuse.³⁴ Spousal abuse is also a major contributing factor to child abuse and neglect, female alcoholism, drug abuse, homelessness, and attempted suicide.³⁵ The clear implication of these figures is an enormous drain on American productivity due to battering of the female workforce.

Moreover, domestic abuse is often lethal. It is estimated that an average of four to five women die daily in the United States as a result of battering.³⁶ Approximately one-third of all female homicides are

26. *Id.*

27. Fritzler & Simon, *supra* note 5, at 141 (referring to emergency calls in Clark County, Washington).

28. *Id.*

29. *Id.*

30. Winick, *supra* note 1, at 37–38.

31. *Id.* at 70.

32. Tsai, *supra* note 1, at 1292.

33. Mills, *supra* note 1, at 306.

34. Winick, *supra* note 1, at 39, 62; Amy E. Street et al., *The Associations Among Male-Perpetrated Partner Violence, Wives' Psychological Distress and Children's Behavior Problems: A Structural Equation Modeling Analysis*, 34 J. OF COMP. FAM. STUD. 23, 24 (2003); see Rita Thaumert, *Till Violence Do Us Part*, 19 STATE LEGISLATURES 26 (1993).

35. Thaumert, *supra* note 34, at 26.

36. Linda K. Meier & Brian K. Zoeller, *Taking Abusers to Court: Civil Remedies for Domestic Violence Victims*, 30 TRIAL 60 (1995).

attributed to domestic violence.³⁷ Departure from the relationship is not safe: women who leave the batterer are at a seventy-five percent greater risk of being killed by the batterer than those who stay.³⁸

Battering also takes a serious toll on children, including those still in the womb. Fifteen to twenty-five percent of pregnant women are battered.³⁹ Prenatal battering has been listed as the leading cause of birth defects and infant mortality.⁴⁰

Domestic violence exacts large costs when witnessed by children, and child witnessing of battering is common. More than half of domestic violence victims live in homes with children who are younger than twelve years old.⁴¹ Disturbingly, at least one study suggests that relationships tend to be more violent if the couple has parented multiple children together.⁴²

An estimated 3.3 million children annually witness domestic violence incidents.⁴³ Such children may grow up to become domestic violence victims, and are ten times more likely than other children to engage in domestic violence as adults.⁴⁴ Children who observe domestic violence experience psychological damage and problems in school.⁴⁵ Children's exposure to domestic violence also correlates with an increased risk that they will subsequently attempt suicide.⁴⁶

B. Superficial Court Treatment and its Impact

Although current laws reflect recognition that domestic violence is a serious and a criminal matter, court handling of the actual cases may not. In some jurisdictions, large numbers of domestic abuse cases can overwhelm the court docket and result in cursory judicial treatment.⁴⁷

37. Mills, *supra* note 1, at 306; cf. Tsai, *supra* note 1, at 1293 (reporting that "31% of homicides in which the victim and perpetrator knew each other involved women killed by their partners").

38. Thaemert, *supra* note 34, at 26.

39. *Id.*

40. Meier & Zoeller, *supra* note 36, at 60 (citing March of Dimes study).

41. Winick, *supra* note 1, at 65.

42. Tauchen et al., *supra* note 15, at 22.

43. Winick, *supra* note 1, at 65; Street et al., *supra* note 34, at 24.

44. Winick, *supra* note 1, at 65.

45. *Id.* at 65-66; Street et al., *supra* note 34, at 24. Street et al., point out that these maternal stresses and mental health problems in turn apparently make battered mothers poorer parents, resulting in child behavioral problems. *Id.* at 24-25, 33-36.

46. Winick, *supra* note 1, at 65-66. The Massachusetts Department of Youth Services reports that such children are six times more likely to attempt suicide, twenty-four percent more likely to commit sexual assaults, seventy-four percent more likely to commit personal crimes, and fifty percent more likely to engage in substance abuse. Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L. Q. 719, 734 n.51 (1999).

47. Tsai, *supra* note 1, at 1293.

Opportunity costs of such superficial court treatment can be high. Victims referred to a large, urban criminal court may never learn about resources such as shelters, long-term housing, counseling and employment opportunities. Perpetrators may not be held accountable or monitored for compliance with court conditions.⁴⁸ This treatment may reinforce both police bias against arrest in domestic violence cases and reluctance of prosecutors who lack specialized skills in this area to bring batterers to court.⁴⁹ The end result, as one commentator points out, is “legal condonation of family violence.”⁵⁰ Moreover, victims who have observed domestic violence cases fail to receive high priority for competitive judicial system resources have been reluctant to seek relief from the court system.⁵¹

In the community, failure to coordinate the various groups addressing domestic violence also results in wasted resources. Such lack of coordination means that courts, victim advocacy groups, social service agencies, and the medical community deal with domestic abuse in a fragmented and haphazard manner.⁵²

IV. THERAPEUTIC COURTS AND THERAPEUTIC JURISPRUDENCE

An arguably more productive approach to domestic violence stems from the creation of domestic violence courts.⁵³ There are now more than two hundred domestic violence courts.⁵⁴ Such courts are just one example of a recent and dramatic change in the way courts approach criminal justice issues.

Traditionally, courts have acted as a governmental mechanism to resolve disputes, including disputes revolving around government accusations of criminal wrongdoing. The role of judges is to serve as neutral arbiters who determine the facts in a case or supervise juries engaging in a fact-finding process.⁵⁵

48. *Id.* at 1293–94.

49. *See id.* at 1294.

50. *Id.* Such legal tolerance seems especially inappropriate because of the serious consequences of domestic violence. It would seem more appropriate to devote resources to reduction of the incidence of domestic abuse. *See* Fritzler & Simon, *supra* note 5, at 146–47.

51. *See* Fritzler & Simon, *supra* note 5, at 143.

52. *Id.* at 142 (quoting local newspaper referring to spousal abuse “system” as “more of a hasty compilation of bad habits, like a haphazard patch job on a roof not built for rain”).

53. Tsai, *supra* note 1, at 1296–97 n.91 (noting that San Diego, California, and Quincy, Massachusetts, along with New York, Connecticut, Maryland, Florida and Tennessee are among the jurisdictions that have begun to implement domestic violence courts).

54. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L. J. 1055, 1058 (2003).

55. Winick, *supra* note 54, at 1055.

A. The Problem Solving Approach

The traditional role of courts has changed within the past fifteen years, with the increasing realization that criminal behavior is frequently linked to other issues, such as substance abuse, mental health problems, and family problems. In an effort to deal with these issues, many judges have moved toward assuming a role beyond adjudication. The aim is “problem solving” through therapeutic intervention and ongoing court review. Among the types of “specialty courts” that have emerged as a result are drug and alcohol courts, mental health courts, and family courts, along with domestic violence courts.⁵⁶

Problem-solving courts typically focus on a defined population of offenders and use the court process in non-traditional ways to motivate behavior changes through treatment.⁵⁷ Such courts recognize that it is pointless and an inefficient use of resources to simply send addicts, the mentally ill, and others with ongoing behavioral issues through a revolving door of incarceration and release.⁵⁸ Because of their rejection of this approach and focus on monitored treatment, problem-solving courts are often referred to as therapeutic courts.⁵⁹ Unlike traditional courts, which focus on adjudicating and determining the facts in a case, therapeutic courts also seek to rehabilitate offenders, provide access to services, and monitor treatment.⁶⁰

56. Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1197–98 (2001); John A. Bozza, “*The Devil Made Me Do It*”: *Legal Implications of the New Treatment Imperative*, 12 S. CAL. INTERDISC. L. J. 55, 63 (2002); Winick, *supra* note 54, at 1056 (noting that the juvenile court, which began in 1899 in Chicago to rehabilitate juvenile delinquency, was the forerunner of this approach). Other types of therapeutic courts include reentry courts, which assist offenders released from prison in reentry, teen courts, which allow adolescents to adjudicate each other’s minor offenses, and dependency courts, which adjudicate whether child abuse or neglect has occurred, attempt to provide services if it has, and terminate parental rights if services are not effective. *Id.* at 1058–60.

57. Gilbert et al., *supra* note 56, at 1198. These new approaches are the result of both local innovation and new understandings about the impact of treatment on problems like addiction. Michael C. Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 841–42 (2000).

58. Winick, *supra* note 54, at 1056; Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 955–56 (2003) (quoting Chief Justice Kathleen Blatz of the Minnesota Supreme Court, characterizing this revolving door approach as “McJustice: we sure aren’t good for you, but we are fast”).

59. See Gilbert et al., *supra* note 56, at 1198 (noting that by determining the therapeutic consequences of the law, therapeutic jurisprudence can assist in reducing negative results and in enhancing positive results). However, the approach has its critics. See generally Bozza, *supra* note 56.

60. See Winick, *supra* note 54, at 1066–67. Although therapeutic courts have arisen from necessity, there are arguably other institutional advantages to such courts. See, e.g., Jeffrey

Therapeutic jurisprudence began in the late 1980s, coincidentally with the emergence of therapeutic courts. Arising originally from mental health law, it is a scholarly, interdisciplinary movement toward legal reform.⁶¹ This field of study aims to assess the costs and benefits of enforcing laws by evaluating the overall consequences on individuals in society.⁶² The assessment can reveal whether or not enacted laws are accomplishing their public policy goals. Therapeutic jurisprudence advocates also seek to incorporate knowledge of other, non-legal disciplines into the legal system, and to consider alternative legal outcomes such as treatment programs.⁶³ Their aims are related to those of therapeutic courts, and it can be said that therapeutic courts take a therapeutic jurisprudence approach to case processing.⁶⁴

In domestic violence cases, a therapeutic approach would appear efficient, as it avoids the transaction costs exacted when separate services to domestic violence victims are not coordinated. It also evades the opportunity costs of expending greater resources to later assist or heal victims who could have been helped more cheaply earlier, if alerted to appropriate services.⁶⁵

In fact, an even broader argument can be made that when a system relies on increasing coercion without reducing levels of crime, it has become inefficient. A legitimate system—that is to say, one that is perceived to be fair, effective and rightful—is necessary to induce order and stability. A legitimate system is hence cost effective and efficient in the long run.⁶⁶ Thus, to the extent that domestic violence courts and other therapeutic courts increase legitimacy, they produce greater efficiency.

Significant economic forces support the rise in the general use of therapeutic courts. Imprisonment is expensive. Starting in 1986,

Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 897–98, 902–03 (2003). Courts have the convening power to coerce various actors to come together, the reputation of neutrality that allows them to function as honest brokers, the prestige to command respect, and the ability to declare a course of conduct to be unlawful. *Id.* at 898. See also Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 945–46 (2003).

61. Winick, *supra* note 54, at 1062–63.

62. Tsai, *supra* note 1, at 1295.

63. *Id.* at 1295–96; see also Philip D. Gould & Patricia H. Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 FORDHAM URB. L. J. 2117, 2120–22 (2002).

64. See generally Winick, *supra* note 54, at 1064–66 (noting that therapeutic jurisprudence utilizes insights from psychology and behavioral sciences to critique legal and judicial practices. It is an approach aimed at integrating treatment services with judicial case processing; providing ongoing judicial intervention; and facilitating collaboration with community-based and governmental organizations).

65. See Tsai, *supra* note 1, at 1316–18.

66. See Fagan & Malkin, *supra* note 60, at 903–05.

spending to build new correctional institutions increased by more than fifty percent, and has remained at all time high levels.⁶⁷ The number of imprisoned persons doubled between 1985 and 1999 to 1.8 million.⁶⁸ The amount expended on correctional institutions rose from about four billion dollars in 1980 to over twenty-five billion dollars in 1996.⁶⁹ The annual cost of incarceration ballooned by more than 600 percent between 1980 and 1997.⁷⁰

B. Successful Therapeutic Court Models: Drug Courts and Mental Health Courts

Drug courts are one of the most significant and early examples of therapeutic jurisprudence. They are clearly, in part, a response to the skyrocketing rates of incarceration of offenders on drug-related offenses, the relative ineffectiveness of substance abuse treatment through the prison system, and the high recidivism rate among drug offenders.⁷¹ They are also a response to the fact that annual state and local expenditures on drug law enforcement have risen from some 10 billion dollars in the mid 1980's to 35 billion dollars in 2001.⁷²

There are now more than 785 operating drug courts, and more than 450 more are in the planning stage in the United States.⁷³ They are in operation in all fifty states, and are supported by authorizing legislation in thirty-two states.⁷⁴ Such courts have attracted over 125

67. Bozza, *supra* note 56, at 61.

68. *Id.*

69. *Id.* Crime rates have declined as well since 1991. *Id.* The overall crime rate remains, however, some eighty percent higher than it was in 1965. *Id.* at 71.

70. *Id.* at 71. In Connecticut, incarceration is estimated to cost the state \$25,000 per year, per offender. This figure excludes fixed costs such as debt service and depreciation. Fred V. Carstensen et al., *A Dynamic Economic Impact Analysis of Alternatives to Incarceration in Connecticut as Proposed by SB 1083 and SB 1428*, at 2, (Connecticut Ctr. for Econ. Analysis, 2001), available at http://ccea.uconn.edu/studies/Incarceration%20_Analysis.pdf (last visited: May 1, 2004).

71. Lisa Strauss, *U.S. Drug Court: A Building Block for Canada*, 8 ILSA J. INT'L & COMP. L. 685, 688–90 (2002); Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1220, 1230–32 (2002); Douglas B. Marlowe et al., *Amenability to Treatment of Drug Offenders*, 67-SEP FED. PROBATION 40 (Sept. 2003) (observing that more than two-thirds of drug offenders are re-arrested within three years of release, and it is estimated that as many as 95% return to drug use within that time).

72. *Drug Policy in America—A Continuing Debate: Report of the Task Force on the Use of Criminal Sanctions to the King County Bar Association Board of Trustees*, 30 FORDHAM URB. L. J. 499, 502, 530 (2003) [hereinafter *Report of the Task Force*].

73. *Id.* at 555.

74. *Id.* at 555–56; Bozza, *supra* note 56, at 63; See also LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373, 398 (2000); see also Winick, *supra* note 54, at 1057; Strauss, *supra* note 71, at 686, 692.

million dollars from the federal treasury.⁷⁵ They appear to be cost-effective in reducing recidivism. The completion rate is about forty-seven percent, accompanied by lower re-arrest rates.⁷⁶ Some drug courts have found that eighty-five to ninety percent of participants remained arrest-free.⁷⁷ Recent research indicates that reduced recidivism correlates primarily with greater participation in drug treatment services, and cautions that drug courts may not always be successful in providing needed access to treatment services.⁷⁸ Nonetheless, they seem to provide more comprehensive supervision and monitoring than any other community-based form of oversight.⁷⁹

Similarly, preliminary results indicate that mental health courts are more effective in reducing criminal recidivism among offenders.⁸⁰ The key appears to be that therapeutic courts are more likely to cause offenders, who are coerced or mandated into treatment, to complete it.⁸¹

75. *Report of the Task Force*, *supra* note 72, at 555–56; Strauss, *supra* note 71, at 692; Bozza, *supra* note 56, at 63; see also *Alternatives to Incarceration for Drug-Abusing Offenders*, 111 HARV. L. REV. 1898, 1916 (1998) (quoting estimate by United States General Accounting Office that since 1989 over \$125 million has been provided to plan and develop drug courts) [hereinafter *Alternatives to Incarceration*].

76. Bozza, *supra* note 56, at 64 n.45. Drug court completion rates are comparable to or greater than typical outpatient drug treatment program results. Faye S. Taxman & Jeffrey A. Bouffard, *Drug Treatment in the Community—A Case Study of System Integration Issues*, 57 FED. PROBATION 4, 4–5 (Sept. 2003).

77. Kondo, *supra* note 74, at 435–36; see also Daniel T. Eismann, *Drug Courts: Changing People's Lives*, 46 ADVOC. (Idaho) 16, 17–18 (Sept. 2003) (drug court participants, when compared to non-participants, showed lower recidivism rates and re-arrest: 38% compared to 63%, and 18% compared to 42%, respectively); Rosenblum, *supra* note 71, at 1226–27 (asserting that recidivism among drug court participants ranges between 5% and 28%, and less than 4% for graduates); *Report of the Task Force*, *supra* note 72, at 556–57.

78. Taxman & Bouffard, *supra* note 76, at 4–5.

79. See Dorf & Sabel, *supra* note 57, at 850.

80. *Alternatives to Incarceration*, *supra* note 75, at 1921 (positing that “the impact of drug use on the criminal justice system, coupled with the recent increase in the use of mandatory sentences and sentencing guidelines, is so great that successful treatment-based programs could have a profound effect on recidivism and overcrowding”); Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 28–29 (2002) (noting that an evaluation for Alaska's mental illness court indicated that participants in the program experienced fewer and shorter mental health facility admissions, and experienced fewer arrests with shorter jail stays, along with a marked improvement in housing situations). At least one program also reduces the number of initial arrests and bookings, by routing mentally ill persons directly into treatment for medical attention. Kondo, *supra* note 74, at 437. Other programs report high retention rates in treatment of more than two thirds of all participants, and cost savings from moving clients from jail to community treatment. Berman & Gulick, *supra* note 21, at 1036.

81. Carns et al., *supra* note 80, at 12; Strauss, *supra* note 71, at 692–94. Retention rates in drug courts average sixty percent, compared with only thirty to sixty percent in voluntary treatment programs. Berman & Gulick, *supra* note 21, at 1031. However, the intensive court monitoring and graduated sanctions characteristic of drug courts also appear to help offenders avoid recidivism, independently of treatment. *Id.* at 1032. See also Dorf & Sabel, *supra* note 57,

C. Other Therapeutic Court Benefits

Therapeutic courts are considerably less costly than traditional incarceration.⁸² Requiring participants to pay some or most of the treatment and monitoring costs can defray court costs further, and may be an appropriate economic sanction for participants' criminal behavior as well.⁸³

One critical aspect of therapeutic courts is attention to public safety. Public safety is assured through ongoing oversight of the offender, an effort to appropriately address minor noncompliance, and a swift judicial response to violation of court conditions.⁸⁴ Other significant components of a therapeutic court include protection of due process rights, ongoing collaboration between the court and all court participants, regular court hearings, and stressing incentives toward positive behavior as well as accountability for misbehavior.⁸⁵ Additional criteria for assessing such courts include their efficiency in processing cases and consistency of decision-making in similar cases.⁸⁶ Judges in therapeutic courts are actively involved. They typically use their authority to motivate individuals to accept services, to monitor offender compliance and progress, and to engage in close working relationships with community agencies, treatment providers, and other court participants.⁸⁷

at 850 (summarizing findings that drug courts reduce drug use and criminal conduct during time in the court and afterward).

82. Bozza, *supra* note 56, at 64 n.45; see also Kondo, *supra* note 74, at 401; Strauss, *supra* note 71, at 694–95; Rosenblum, *supra* note 71, at 1235; Dorf & Sabel, *supra* note 57, at 850. It is estimated that cost savings for drug court mandated drug treatment programs are about \$5,000 per jailed inmate. In King County, Washington, it is estimated that taxpayers saved \$522,000 for the first three years of drug court operation. *Report of the Task Force*, *supra* note 72, at 556 n.271. In Alaska, the cost for a felony drug court participant is estimated at \$16,950 annually, compared with \$40,000 per year for incarceration. Carns et al., *supra* note 80, at 18 (using statistics gathered in 2001). Drug courts across the nation have been estimated to cost \$2,562 per participant and to produce \$4,691 in net benefits per participant, or \$2.83 of benefits per dollar of cost. Steve Aos et al., *Comparative Costs and Benefits of Programs to Reduce Crime*, Washington State Inst. for Pub. Policy, at 3 (2001). Some studies suggest the savings in jail bed days is as high as \$5,000 per defendant or more. *Alternatives to Incarceration*, *supra* note 75, at 1917; Strauss, *supra* note 71, at 695. In 1998 in Connecticut, various methods to avoid incarceration of substance abusing offenders, including drug court, were estimated to have saved the cost of 3,500 prison and jail beds, or capital costs of \$525 million and \$94 million per year in operating costs. Carstensen et al., *supra* note 70, at 25.

83. Carns et al., *supra* note 80, at 18–19.

84. Gilbert et al., *supra* note 56, at 1204–05; Eismann, *supra* note 77, at 17.

85. Gilbert et al., *supra* note 56, at 1205–11; Eismann, *supra* note 77, at 17; *Alternatives to Incarceration*, *supra* note 75, at 1914. See also Dorf & Sabel, *supra* note 57, at 844–49 (providing detailed overview of drug court characteristics).

86. Kondo, *supra* note 74, at 405.

87. Winick, *supra* note 54, at 1060–61.

Notably, initial studies indicate that use of therapeutic courts may result in long term cost savings.⁸⁸ This is a result of greater judicial efficiency and consistent decision-making, as well as smoother coordination among judicial, criminal justice, and treatment providers.⁸⁹ In short, such courts appear to be more efficient and thus reduce transaction costs.⁹⁰

D. Domestic Violence Courts

Like other therapeutic courts, domestic violence courts take an integrated approach.⁹¹ Judges, prosecutors, court personnel, and other domestic violence actors such as advocates and representatives of community programs are brought into one court to provide a more effective, efficient response to domestic violence cases.⁹² For example, in the Quincy, Massachusetts, court, the cooperating parties include judges, clerks, prosecutors, police, probation officers, social service providers, and community agencies.⁹³ In the New York court, courtrooms are staffed by specially trained judges, prosecution teams, and domestic violence personnel including a resource coordinator, victim advocate, and defendant monitor.⁹⁴

88. See, e.g., Kondo, *supra* note 74, at 434.

89. *Id.* (discussing merits of family courts).

90. In some courts, however, especially those that discourage plea-bargaining, more jury trials may result. Fritzler & Simon, *supra* note 5, at 148. Nonetheless, therapeutic courts, because of their stress on performance and outcome, appear overall to be the most efficient compared to other court structures. The principles on which they rest are strikingly similar to the court performance standards developed by the National Center for State Courts project. See *id.* at 151. See Berman & Gulick, *supra* note 21, at 1033 (noting reduced costs of adjudication associated with drug courts).

91. Courts differ on the level of integration. Some courts only provide for separate pretrial domestic violence calendars, and otherwise are not integrated. Other courts integrate all non-evidentiary court appearances before a single judge. Some courts consolidate all court appearances in criminal domestic violence cases before a single judge. The integrated approach is to combine all court appearances regarding a particular offender and victim, whether civil or criminal, before a single judge or group of judges. This latter structure provides for the greatest possible efficiency and reduction in transaction costs by coordinating all available services, maximizing court oversight of offenders, and eliminating conflicting judicial orders. See Fritzler & Simon, *supra* note 5, at 147.

92. Tsai, *supra* note 1, at 1287; See also Lane, *supra* note 58, at 980 (citing the example of the resource coordinator position located within the courtroom of the West Jackson, Florida, domestic violence court system). There are tensions that are inherent to this approach. An individualized, treatment-based approach to domestic violence cases may create a perception that these offenders are receiving more lenient treatment than others. Victim wishes disfavoring prosecution are not always followed in a court that stresses aggressive domestic violence prosecution. Tsai, *supra* note 1, at 1310–12.

93. *Id.* at 1298.

94. *Id.* at 1300–01. A similar integrated approach is taken in Clark County, Washington. Fritzler & Simon, *supra* note 5, at 159–164.

Both civil protection orders and criminal prosecutions fall under the domestic violence court's jurisdiction, and the court may also handle important linked matters such as divorce, child support, and paternity.⁹⁵ Additionally, the court works with and refers batterers, victims, and their families to a variety of programs, including victim counseling, batterer treatment, and substance abuse treatment.⁹⁶ In Dade County, Florida, the domestic violence court also provides counseling for children who have witnessed domestic violence.⁹⁷ The court's ability to refer victims to needed services and resources reduces transaction costs.⁹⁸

All cases involving the offender and victim are linked so that they are not managed on a piecemeal basis.⁹⁹ The judges in these courts develop expertise in handling domestic violence issues.¹⁰⁰ Further, compliance with court conditions is monitored on an ongoing basis.¹⁰¹ The domestic violence court is also able to act more quickly than a general criminal court.¹⁰² The court can encourage offenders to

95. Winick, *supra* note 1, at 39–40. It is important that protection orders be enforced. As many as thirty-four percent of victims who obtain a protection order find that the order is violated within six months. Tsai, *supra* note 1, at 1291. Some studies indicate that more than half of protection orders are violated within a year or two, and that more than seventeen percent of domestic violence homicide victims had obtained a protection order. *Id.* at 1292.

96. Winick, *supra* note 1, at 39. For example, in the Quincy, Massachusetts court, victims work with advocates who accompany victims to court, give emotional support and advice, and provide information about available resources. The advocates also train police officers and track domestic violence incidents reported by the police. Tsai, *supra* note 1, at 1298–99. Advocate roles are similar in the New York City domestic violence court and the Dade County, Florida domestic violence court. *Id.* at 1300–01, 1303.

97. Tsai, *supra* note 1, at 1304.

98. Winick, *supra* note 1, at 41. For example, in the District of Columbia court system, a Domestic Violence Intake Center explains the system to the victim, assists her in filling out paperwork, can assist with making specific issues such as child support, custody or visitation part of the protection order remedy, and is able to refer her to counseling programs, shelters, and other social service agencies, as well as an advocate if a criminal case is pending. Tsai, *supra* note 1, at 1305. See also Berman & Gulick, *supra* note 21, at 1047 (noting apparent significant improvements in coordination and efficiency after formation of a specialized felony domestic violence court in Brooklyn, New York).

99. Winick, *supra* note 1, at 40. In the District of Columbia Domestic Violence Coordination Unit, a clerk searches the computer for prior or additional cases involving the same parties and compiles a case history. Tsai, *supra* note 1, at 1305.

100. Winick, *supra* note 1, at 40. The District of Columbia domestic violence court, as is typical for such courts, is staffed by specially trained judges who serve at least for a year before rotating out of the court. Tsai, *supra* note 1, at 1305–06. Ongoing training and education of judges and court personnel, as Tsai points out, tends to enhance application and enforcement of domestic violence laws. *Id.* at 1326.

101. Winick, *supra* note 1, at 40. This monitoring has been characterized as the “key to the success” of the West Jackson, Florida domestic violence court. Lane, *supra* note 58, at 980.

102. Winick, *supra* note 1, at 40. Restraining orders in the Quincy, Massachusetts court are handled through an expedited hearings process. Defendants are monitored closely by probation. Tsai, *supra* note 1, at 1298–99. In the New York City domestic violence court, the

enter and remain in treatment by offering diversion, probation, or a reduced sentence as an incentive.¹⁰³ In some courts, it may be possible to assess and manage offender risk, possibly based on an actuarial assessment.¹⁰⁴

A significant aspect of a domestic violence court is use of batterer treatment programs.¹⁰⁵ Courts began ordering defendants into such programs in the early 1980's.¹⁰⁶ By the late 1990's, batterer treatment programs estimated that court referral accounted for nearly eighty percent of their clients.¹⁰⁷ Such programs, if successful in reducing the likelihood of future domestic violence, are clearly cost effective in improving public safety generally by reducing the number of future victims.¹⁰⁸ Because many victims stay with their abusive partners, they may also be cost effective in reducing or eliminating future violence toward existing victims.¹⁰⁹ Effective batterer treatment programs may also have a useful "ripple effect," by increasing police willingness to make arrests and by encouraging prosecutors to effectively pursue cases of domestic violence.¹¹⁰

Although there is little reliable research on whether treating batterers is effective, the majority of methodologically sound studies indicate that treatment tends to reduce later violence, and some preliminary evidence suggests that court-mandated treatment is more effective in reducing future violence.¹¹¹ If true, this would be a Pareto superior transaction for each batterer and victim, by improving the victim's situation without worsening the batterer's.¹¹² Interestingly, a 1992 study indicated that recidivism rates of those who are treated are

resource coordinator, defendant monitor and victim advocate work closely together and promptly notify the judge of violations of court conditions such as protection orders, to facilitate a quick response and imposition of sanctions. All participants in the court keep information accurate and up to date through ongoing electronic communication. *Id.* at 1301-02.

103. Winick, *supra* note 1, at 42.

104. *Id.* at 50-58.

105. See Tsai, *supra* note 1, at 1296-97. The Dade County domestic violence court in Florida focuses primarily on batterer treatment, which may include participation in domestic violence, substance abuse, and mental health treatment. *Id.* at 1302-03.

106. Taylor et al., *supra* note 7, at 172.

107. *Id.*

108. See *id.*

109. See *id.*

110. *Id.* at 172-73.

111. Tsai, *supra* note 1, at 1318-19; Berman & Gulick, *supra* note 21, at 1042-43. Some experienced domestic violence court participants, however, do seriously question the effectiveness of domestic violence treatment programs, at least in a "one size fits all" format. However, they still support such programs when combined with support programs for victims and, when appropriate, with substance abuse treatment. Fritzler & Simon, *supra* note 5, at 165-69.

112. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12-14 (Aspen 2002).

one-third of those who are not treated.¹¹³ A recently published study of domestic violence cases handled in Kings County, New York between 1995 and 1996 similarly indicated that batterer treatment was effective in reducing the prevalence and frequency of recidivism, to as much as one half of what would otherwise have been expected.¹¹⁴

One significant and unanswered question is the opportunity cost of the resources expended on batterer treatment. On the one hand, there are those who argue persuasively that these resources should go to women's services, not to assist abusive men.¹¹⁵ On the other hand, if batterer treatment is effective in reducing violence, it is an appropriate use of money to prevent the need for ongoing expenditure for medical and ameliorative services to victims.

There is also contradictory information about the effectiveness of legal sanctions to stop or reduce domestic violence. From the point of view of a rational batterer, however, it would seem most likely that awareness of a responsive court system would tend to reduce the batterer's interest in engaging in the conduct. The greater the certainty and level of punishment, the less likely it is that a criminal will engage in the prohibited conduct.¹¹⁶ By contrast, less coordinated provision of services and less reliable enforcement of court conditions would likely tend to increase the probability of further violence.¹¹⁷ It is not surprising that studies do indeed show significant differences in domestic abuser behavior, and increased compliance with court orders, as a consequence of more severe sanctions.¹¹⁸ Preliminary studies also

113. Taylor et al., *supra* note 7, at 175.

114. *Id.* at 193. *But see* Tsai, *supra* note 1, at 1313-14 (noting conflicting reports about effectiveness of batterer treatment).

115. *See* Tsai, *supra* note 1, at 1314 (noting that battered women advocates oppose spending money on batterer treatment programs when doing so diverts limited funds from battered women programs).

116. *See* POSNER, *supra* note 112, at 219-20 (pointing out that there seems to be substance to a model postulating that crimes are committed because the expected benefit of the crime exceed the expected costs, and that in general cost will be calculated by multiplying the amount of punishment by the probability of its imposition); *see also* Epstein, *supra* note 5, at 1966-67 (stating that mandatory arrest and aggressive prosecution policies have been asserted to correlate with substantial positive results, including decreases in domestic homicides). The possible downside of harsh sanctions—and a principle argument against the application of mere deterrence theory—is that if batterers perceive themselves as being treated unfairly, their compliance with court conditions and domestic violence laws may decrease. *Id.* at 1871, 1875-83. Clearly it is vital that a therapeutic domestic violence court provide due process protections to defendants, including a meaningful opportunity to be heard. *Id.* at 1895-99. It is interesting to note that in one community court where the defendants were surveyed they commented on the court's better facilities and faster processing time, and indicated they preferred it because personnel in the court treated them better. Berman & Gulick, *supra* note 21, at 1049.

117. *See* Tsai, *supra* note 1, at 1324.

118. *Id.* at 1320-21 n.252. Interestingly, the certainty and severity of sanctions also appear to be the most effective aspect of drug courts. Berman & Gulick, *supra* note 21, at 1032-33.

indicate that the rigorous court monitoring that is characteristic of domestic violence courts is effective in reducing recidivism.¹¹⁹

Moreover, research indicates that improvement in a victim's opportunities outside the relationship significantly reduce the level of domestic violence.¹²⁰ This reduction is partly because such improvement makes violence a less effective means of winning compliance: threats are less likely to induce obedience, and the "optimal level" of threatened violence for the batterer falls. Also, if the victim's opportunities improve, it is less probable that she will remain in the relationship.¹²¹ These observations suggest that to the extent therapeutic domestic violence courts can provide victims with comprehensive access to services, they can directly increase opportunities and reduce overall violence.¹²²

V. CONCLUSION

Domestic violence exacts huge economic costs because of the physical and psychological injuries it inflicts on workers, and the further damage it inflicts on child witnesses. Although there are now stricter domestic violence laws prompted by greater awareness of domestic abuse, these laws are not reliably enforced in traditional courts, and victims and offenders are not efficiently directed to services. Therapeutic domestic violence courts appear to be an efficient approach to address these problems. They seem likely to reduce transaction costs by increasing coordination of services. Such courts also appear to be a promising vehicle for reducing the high cost of incarceration. Finally, to the extent that they are effective in monitoring and compelling compliance with treatment requirements, therapeutic domestic violence courts are a means to reduce recidivism and future violence.

119. *Id.* at 1043–44.

120. *See generally* Tauchen et al., *supra* note 15.

121. *Id.* at 11. It is disquieting to note that this also means that the probability that the relationship remains intact and that the batterer will bear the costs of inflicting violence falls and this fact drives up the optimal level of violence. This study seems to succinctly demonstrate that helping domestic violence victims leave relationships is productive if they are successful and hence freed from violence, but is also dangerous because batterers have less to lose and may become more violent when victims seek or have the means to flee.

122. For example, it appears that the existence of immediately available housing alternatives to battered victims provides protection and reduced violence because they have the ability promptly to avoid threatened violence. *See id.* at 22.