

EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE CASES: RETHINKING THE ROLES OF PROSECUTORS, JUDGES, AND THE COURT SYSTEM

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[W]e have become increasingly content—even complacent—to serve as technicians and tinkerers in the law rather than aspiring to the role of transformers, system shakers who risk alienation but seek real substantive change.¹

INTRODUCTION

Despite over two decades of reform, fundamental failures persist in the justice system's response to domestic violence.² Society now widely accepts elimination of intrafamily abuse as a crucial goal, and it has been illegal in most states since the late nineteenth century.³ But the problem remains one of epidemic proportions. As documented in Part I of this Article, battering by husbands, ex-husbands, or lovers is the single largest cause of injury to women⁴ in the United States,⁵ and accounts for approximately thirty percent of all murders of women.⁶ Physical aggression occurs in at least one out of four marriages, and comparable rates exist among couples who are living together, engaged, or dating.⁷ Domestic violence is also a major contributing factor to

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1. Craig Haney, *Psychology and Legal Change: The Impact of a Decade*, 17 LAW & HUM. BEHAV. 371, 384 (1993).

2. No single term can adequately capture an individual's experience of domestic violence; I use the terms "victim," "battered woman," and "survivor" interchangeably.

3. See Elizabeth Pleck, *Wife Beating in Nineteenth-Century America*, 4 VICTIMOLOGY: AN INT'L J. 60, 60-63 (1979).

4. The vast majority of domestic violence cases involve male perpetrators and female targets. Although cases exist in which the gender roles are reversed, or involve same-sex intimate abuse, I will refer to perpetrators primarily as male and targets primarily as female.

5. See Susan A. MacManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269, 269 (1989).

6. See BUREAU OF JUSTICE STATISTICS, VIOLENCE BY INTIMATES v (1998).

7. See Jan E. Stets & Murray A. Straus, *The Marriage License as a Hitting License: A Comparison of Assaults in Dating, Cohabiting and Married Couples*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 227, 234; Irene H. Frieze & Angela Browne, *Violence in Marriage*, in 11 FAMILY VIOLENCE: CRIME AND JUSTICE—A REVIEW OF RESEARCH 163, 179 (Lloyd

other social ills such as child abuse and neglect, female alcoholism, drug abuse, mental illness, attempted suicide, and homelessness.⁸

Yet centuries of strong opposition to—or deep ambivalence about—state intervention in family violence cases has long undermined any meaningful government response. As detailed in Part II, not long ago the law explicitly *endorsed* domestic violence, upholding a husband's right to physically "chastise" his wife. It is only during the last thirty years that public awareness of intimate abuse, the perception that it is unacceptable, and the political will to effect reform have increased, resulting in substantial improvements on the legislative front. During this period, every state has enacted civil laws designed to protect victims of family violence, and Congress has appropriated considerable funding of further efforts to combat the problem. But the state's response to domestic violence remains inadequate. Why?

In contrast to the remarkable progress made by legislators, those responsible for applying and enforcing the law—prosecutors, judges, and the court system—have lagged far behind. It has long been common practice for police to refuse to arrest, for prosecutors to decline to press charges, and for judges to be reluctant to issue civil protection orders or impose meaningful sentences on batterers. Overall, the system's response to domestic violence has been unresponsive and oriented toward non-enforcement.

A law is only as good as the system that delivers on its promises, and the failure of the courts and related institutions to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence. This gap, between the responsive legislative branch and the unresponsive judicial and executive branches, suggests where the next generation of reform must focus—on a fundamental restructuring of the traditional justice system's approach to this age-old social problem.

As discussed in Part III, the criminal justice system still requires substantial improvement, despite the recent enactment of some reforms. Certainly, costly lawsuits and mandatory arrest laws have reduced instances where the police refuse to respond or take effective action in domestic violence situations.⁹ And prosecutorial refusal to press criminal charges in most intrafamily cases has diminished, in a smattering of jurisdictions, with the formation of specialized domestic violence units and the adoption of "no-drop" prosecution policies.¹⁰ These changes have increased general deterrence of domestic violence crimes

Ohlin & Michael Tonry eds., 1989); David B. Sugarman & Gerald T. Hotaling, *Dating Violence: Prevalence, Context, and Risk Markers*, in VIOLENCE IN DATING RELATIONSHIPS 3, 6-7 (Maureen A. Pirog-Good & Jan E. Stets eds., 1989).

8. See RITA THAEMERT, NATIONAL CENTER FOR STATE LEGISLATURES, TIL VIOLENCE DO US PART 26 (Mar. 1993) [hereinafter TIL VIOLENCE DO US PART]; Jane H. Pfouts, *Violent Families: Coping Responses of Abused Wives*, 57 CHILD WELFARE 101, 105 (1978).

9. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 53-65 (1992); DEL MARTIN, BATTERED WIVES 92 (1981); MURRAY A. STRAUS, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 232 (1980).

10. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1852-53, 1861-62 (1996).

and greatly improved the prospects for victim safety. But they also raise new concerns. A survivor may now be forced to assist in the criminal prosecution of an abusive partner, regardless of her physical danger from retaliation assault, her cultural and religious misgivings about breaking up the family, her economic vulnerability to the loss of spousal support, and her individual need for agency and control. These difficult issues underscore the need for further improvements, such as the expansion of specially-tailored prosecution strategies and an increased role for lay victim advocates. An increase in victim advocacy services reduces some survivors' dependency on the criminal justice system and helps them find the strength to escape the cycle of abuse on their own. And for those who need government intervention, a lay advocate can amplify a victim's voice so that a prosecutor can better shape his case to meet the victim's needs.

The piecemeal nature of the traditional court system, explored in Part IV, presents further obstacles for battered women seeking justice. Incidents of domestic violence typically trigger multiple civil and criminal cases, each with distinct and complicated intake processes that occur in different parts of the courthouse or even in different court buildings located miles apart. This fragmented process hopelessly confuses most victims, and few manage to file for all the forms of complementary relief they need. Those who succeed are then faced with a different judge on each case, each of whom proceeds in an informational vacuum, with no awareness of related cases. A typical family can find itself coping with multiple, conflicting orders that simultaneously govern its existence.

One promising solution to these problems has recently been embraced by a handful of jurisdictions: the creation of integrated, specialized domestic violence courts. Dedicated exclusively to cases involving allegations of intimate abuse and to the integration of civil and criminal dockets, such a court can provide the kind of comprehensive, coordinated response to family violence that is the key to effective intervention.¹¹ A unified intake center can assist with the filing of all civil and criminal claims, and one specialized judge can be assigned to deal with all issues confronting a single family or intimate partnership. The success of the District of Columbia's new Domestic Violence Court illustrates the potential benefits of an integrated intake and court calendaring system.

But an increase in information-sharing can create its own problems. For example, it increases the likelihood that battered women who come forward to seek a civil protection order will expose themselves to government charges of "failing to protect" their children from the batterer's abuse. This Article explores

11. Specialized courts created to address a particular subject area are slowly becoming a staple of many jurisdictions around the country. The concept of the "drug court" is a now-familiar alternative approach to handling criminal prosecutions of less serious drug offenders. See generally Jeffrey Tauber, *President's Perspective*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS NEWS 1, 1, Winter, 1997. Several states have implemented or are seriously considering implementing a unified "family court." See NATIONAL CENTER FOR JUVENILE JUSTICE, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, SNAPSHOT: FAMILY COURTS IN THE UNITED STATES (Nov. 1996); THE ILLINOIS SUPREME COURT SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE, FINAL REPORT PART II 38-39 (Dec. 1993) (on file with author).

ways to minimize this disincentive to obtaining assistance, and to maximize the remedial resources available to both women and children who have suffered physical and emotional harm.

Finally, Part V suggests ways to root out the long-standing hostility exhibited by court personnel and judges toward domestic violence complainants. Most judges and clerks have little understanding of domestic violence as a complex web of social and psychological difficulties; instead, they operate from a lifetime of exposure to the myths that have long warped the public's attitude toward the problem. The result is a widely prevalent anti-victim bias. Judges and clerks tend to be easily frustrated with battered women. They perceive victims as "refusing" to leave violent relationships, and misinterpret victim behavior as intentional when in fact it may be symptomatic of the psychological trauma induced by extended abuse. Judicial education, in conjunction with extensive experience with domestic violence cases, can help correct this problem. But any judicial training program must be designed with care to preserve neutrality, and the defense bar concern that judicial education may create an anti-*perpetrator* bias must be taken seriously by the victim advocacy community. A direct relationship exists between perceptions of "procedural justice" and perpetrator compliance with court orders, and issuance of a civil protection order will mean little to a victim if the batterer views the order as illegitimate and therefore feels free to ignore it.

Despite their relatively poor track records, prosecutors, judges, and the courts can play a constructive role in combating family abuse. As the last and sometimes the only resort of victims seeking protection,¹² it is essential that these sectors of the justice system improve their responses.

I. WHY PRIORITIZE DOMESTIC VIOLENCE IN SYSTEM REFORM EFFORTS?

Three years ago, I sat in the D.C. Superior Court courtroom designated for domestic violence cases. As my client and I waited for her case to be heard, we listened to another woman tell her story to the judge.¹³ She described how her husband had punched her repeatedly in the left eye, and showed the judge a photograph of her face, her eye bruised and swollen. Her husband then took the stand and denied everything; he claimed she had walked into a door. At the conclusion of the hearing, the judge turned to the woman and said:

Ma'am, I credit your testimony, and am convinced that your husband assaulted you in violation of the law. As a result, I am authorized to

12. See NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 3 (1990) [hereinafter IMPROVING COURT PRACTICE].

13. This story, and others like it throughout this article, is based on my personal experience in working with hundreds of clients litigating domestic violence cases. The names of all persons have been changed to protect their privacy and, in some instances, attorney-client privilege. Minor details of some stories have also been altered to make the cases less easy to identify and further protect victim privacy.

award you a civil protection order, which could order him to stay away from you and stop hurting you. But I'm not going to do that today. Because you have children together, you're going to have to find some way to cooperate with each other to raise them. So I want you to go home and try to work things out in private. And I suggest that you go see a movie I saw recently, called "Mrs. Doubtfire," where Robin Williams and his wife decide to separate, but still manage to find a creative way to work together when it came to their children.

(In this slapstick comedy, Robin Williams' wife asks him to move out; he gets extra time with the children by dressing up as a woman and hoodwinking his wife into giving him a job as their nanny).

This story is not atypical of the contemporary response of many judges, prosecutors, and police to victims of domestic violence. But doesn't the judge in the "Mrs. Doubtfire" case have a point? After all, a punch in the eye is a low-level, misdemeanor offense, especially when compared to the kind of violence common on our city streets. So many aspects of the justice system cry out for repair; complaints abound about family and juvenile courts, failures to adopt community policing policies, and the need to adopt a crime victims' "bill of rights." Why prioritize domestic violence for special reform efforts?

One reason is that domestic violence is rarely a one-time event, and without effective intervention, it typically increases in frequency and severity over time.¹⁴ A woman who comes to court today with a black eye is likely to return a few months later with a permanent bald spot caused by her husband pulling a handful of hair out of her head, or with a few of her teeth knocked out with a hammer.¹⁵ A batterer who enters the criminal justice system later in the abusive dynamic is more likely to commit a felony than a misdemeanor, or to reach the point where he commits one of the murder-suicides that are relatively common in these cases.¹⁶

A pattern of escalating violence takes a profound toll on women, both physically and psychologically. Women are more likely to be beaten,¹⁷ raped,¹⁸

14. See, e.g., ANGELA BROWNE, WHEN BATTERED WOMEN KILL 68 (1987); LENORE E. WALKER, THE BATTERED WOMAN 43-44 (1979).

15. I have represented numerous domestic violence survivors who have been subjected to these types of injuries.

16. Murder-suicides are not uncommon in domestic violence cases. See Jacquelyn C. Campbell, Methodological Issues in Risk Assessment Research for Family Violence, paper presented at Program Evaluation and Family Violence: An International Conference (July 27, 1998) (stating that 30% of U.S. intimate partner homicides are homicide-suicides); DEPARTMENT OF JUSTICE CANADA, DOMESTIC HOMICIDES INVOLVING THE USE OF FIREARMS 29 (Mar. 1992) (stating that 47% of all domestic homicides involving a firearm resulted in suicide or attempted suicide of the accused and that the same is true for 71% of all firearm-related murders in which husbands killed their wives); Dora Black et al., *Father Kills Mother: Post-Traumatic Stress Disorder in the Children*, 57 PSYCHOTHERAPY & PSYCHOSOMATICS 152 (1992); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 181 (1997).

17. See Angela Browne, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3185 (1992).

18. See DIANA E. H. RUSSELL, RAPE IN MARRIAGE 64 (1982).

or killed¹⁹ by a current or former male partner than by anyone else. Between twenty-two and thirty-five percent of women who visit hospital emergency rooms are there due to injuries sustained as a result of domestic violence.²⁰ More women seek medical attention for harm inflicted by a spouse than for injuries caused by auto accidents, rapes, and muggings combined.²¹

Another reason to prioritize domestic violence is the harm inflicted on children through adult battering relationships. This battering starts early: national surveys report that seventeen percent of obstetrics patients are battered.²² Pregnant victims have an inflated risk of miscarriage and are four times more likely to deliver low birthweight babies.²³ The damage continues after birth. Nearly half of all homeless women and children have been forced to flee violence in their homes.²⁴ And children who witness violence between adults are at risk of physical harm when they are caught in the crossfire, either accidentally or (particularly with adolescent boys) while trying to intervene to protect their mothers.²⁵ Approximately sixty-three percent of young men between the ages of eleven and twenty who are imprisoned for homicide have killed their mothers' batterers.²⁶ These boys also have higher rates of suicide, violent assault, sexual assault, and alcohol and drug use.²⁷

The impact does not stop with the batterer's children. Growing up, we learn life-long patterns dictating how we will respond when our gut-level buttons are pushed: with words or with violence. Children who are raised watching one parent abuse the other tend to take the latter course; boys who witness violence against their mothers are ten times more likely to batter female partners when

19. See Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC'Y REV. 75, 78 (1989).

20. See Teri Randall, *Domestic Violence Intervention Calls for More Than Treating Injuries*, 264 JAMA 939, 939 (1990).

21. TIL VIOLENCE DO US PART, *supra* note 8, at 26.

22. See Judith McFarlane, Barbara Parker, Karen Soeken, & Linda Bullock, *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry Into Prenatal Care*, 267 JAMA 3176, 3177 (1992) (in study of 691 black, Hispanic, and white women in public prenatal clinics in Houston and Baltimore, 17% reported physical and/or sexual abuse during pregnancy).

23. See Judith McFarlane, *Battering During Pregnancy: Tip of an Iceberg Revealed*, 15 WOMEN & HEALTH 69, 71, 73 (Fall 1989).

24. See *Women and Violence: Hearings Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violence Crime Against Women*, 101st Cong., 2d Sess., pt. 2, at 142 (1991) (statement of Susan Kelly-Dreiss, discussing several Pennsylvania studies); TIL VIOLENCE DO US PART, *supra* note 8, at 26.

25. See, e.g., PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 26 (1990); MARIA ROY, CHILDREN IN THE CROSSFIRE: VIOLENCE IN THE HOME—HOW DOES IT AFFECT OUR CHILDREN? 92 (1988) (stating that 62% of sons over age 15 living in families where adult-on-adult abuse occurred were injured in attempts to rescue mothers from beating by male partners). "The younger the children, the more likely injuries would be serious, such as broken shoulders, ribs, concussions." *Id.* at 92. These children also suffer psychological injury. See JAFFE ET AL., *supra*, at 26-30.

26. See *Women and Violence: Hearings Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violence Crime Against Women*, 101st Cong. 131 (1991) (statement of Susan Kelly-Dreiss).

27. See *id.* (statement of Sarah M. Buel, Assistant District Attorney, Mass., and Supervisor, Harvard Law School Battered Women's Advocacy Project).

they reach adulthood.²⁸ Girls exhibit a similar pattern of becoming victims of domestic violence.²⁹ This home-schooling process also forges a link between domestic and stranger violence. A recent national study, for example, showed that juvenile delinquents are four times more likely to have come from violent homes.³⁰

Early and effective intervention in domestic abuse cases could substantially reduce violence in the home, in the streets, and in future generations. But how far has our society progressed toward this goal?

II. THE LEGISLATURE'S RESPONSE TO DOMESTIC VIOLENCE: AN OVERVIEW

Despite the devastating effects of domestic violence, the state has done precious little to alleviate the problem until recently. Indeed, the European and American legal systems have a long history of complicity in—and even approval of—intimate abuse, particularly when perpetrated by men against their wives and children. In medieval Europe, wives were legally considered their husbands' chattel and a disobedient woman risked public chastisement. She might be sentenced to the ducking stool, whipped, or forced to wear an iron muzzle with a padlock and a spike pinning down her tongue.³¹ Husbands were "excused for the injuries they inflicted on their wives. . . . Provided he neither kills nor maims her, it is legal for a man to beat his wife when she wrongs him."³²

By the advent of the seventeenth and eighteenth centuries, lawmakers began to make feeble efforts to reform these laws. For example, French communities restricted a husband's legal right to physically discipline his wife to "blows, thumps, kicks or punches on the back *if they leave no lasting traces*."³³ This limitation was qualified, however, by the adage: "[T]he man who is not master of his wife is not worthy of being a man."³⁴ The nineteenth century witnessed

28. See *id.* at 89 (testimony of Charlotte Fedders); see also Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1055-56 (1991); Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 VIOLENCE & VICTIMS 101, 106 (1986); STRAUS, *supra* note 9.

29. See, e.g., Hotaling & Sugarman, *supra* note 28, at 106.

30. See BUREAU OF JUVENILE JUSTICE, VIOLENCE BY AND AGAINST AMERICA'S CHILDREN, Digest XVII(12), at 6 (on file with author); see also Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?* 43 DEPAUL L. REV. 1133, 1136-37 & n.31 (1994) (noting that husbands who grow up in violent homes commit three times as many serious domestic assaults as those who do not).

31. See R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 59 (1979).

32. *Id.* at 60 (quoting NOT IN GOD'S IMAGE: WOMEN IN HISTORY 356 (Julia O'Faolain & Laura Martinez eds., 1974)).

33. *Id.* at 56 (quoting Nicole Castan, *Divers Aspects de la Contrainte Maritale, D'apres les Documents Judiciaires du XXIII Siecle*, Kath Ryall trans., (1976) at 6) (emphasis added).

34. *Id.* Most cultures have developed similar proverbs. In Russia: "A wife isn't a jug . . . she won't crack if you hit her ten times"; in Africa: "Those whom we marry are those whom we fight"; and in England: "A spaniel, a woman, and a walnut tree, the more they're beaten, the better they be." Carol Bauer & Lawrence Ritt, "A Husband Is a Beating Animal:" Frances Power Cobbe Confronts the Wife-Abuse Problem in Victorian England, 6 INT'L. J. WOMEN'S STUD. 99, 102 (1983). A pre-revolutionary Chinese proverb goes, "A wife married is like a pony bought; I'll ride her and whip her as I like." Lori Heise, *International Dimensions of*

additional Lilliputian steps toward progress. In Britain, one reformer in the House of Commons rose during debate to insist that “the country should treat its married women no worse than it treat[s] its domestic animals.”³⁵

From the early colonial period onward, American courts followed British common law by affirming the husband’s right of domestic chastisement. In the words of the Mississippi Supreme Court, this rule allowed a husband to “use salutary restraints in every case of a wife’s misbehavior, without being subjected to vexatious prosecutions resulting in the mutual discredit and shame of all parties concerned.”³⁶

It was not until the late nineteenth century that states finally began to move away from actually condoning a husband’s use of physical force to discipline his wife.³⁷ But many still clung to the position that in the absence of “serious” violence, the government should not interfere in the private, family realm. As late as 1874, the North Carolina Supreme Court stated: “If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”³⁸ This view predominated in most states well into the

Violence Against Women, 12 RESPONSE 3, 3.

35. DOBASH & DOBASH, *supra* note 31, at 68. Henry Fitzroy requested that Parliament provide women with the same protection “as they already extended to poodle dogs and donkeys, for cruelty to which a person subjected himself, under the Cruelty to Animals Act, to three months imprisonment, with or without hard labor.” *Id.* at 282 n.145 (quoting 124 PARL. DEB. (3d Sec.) 1414 (1853)). During the same period, John Stuart Mill protested that even the “vilest malefactor” had “some wretched woman tied to him, against whom he [could] commit any atrocity except killing her, and, if tolerably cautious, [could] do that without much danger of the legal penalty.” JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 35 (1869) (reprinted 1970).

36. *Bradley v. State*, 1 Miss. 156, 157 (1824); *see also State v. Black*, 60 N.C. (Win.) 162, 163 (1864) (permitting husband “to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain.”); *cf. Robbins v. State*, 20 Ala. 36, 39 (1852) (holding that wife’s provocation can mitigate husband’s fine for assault:

if the husband was at the time . . . provoked to this unmanly act by the bad behaviour and misconduct of his wife, he should not be visited with the same punishment as if he had without provocation wantonly and brutally injured one whom it was his duty to nourish and protect.).

The first law against wife-beating during this period was enacted in Tennessee in 1850, although it is not known whether this statute was enforced. *See Elizabeth Pleck, Criminal Approaches to Family Violence*, 1640-1980, 11 FAM. VIOLENCE 19, 29, 32 (Michael Onry & Norval Morris eds., 1989). In some instances, sporadic periods of social awareness concerning domestic violence led to legislative prohibitions in the early 1600s, but no such laws were passed from 1672 to 1850. *See id.* at 29.

37. *See, e.g., Fulgham v. State*, 46 Ala. 143, 146-47 (1871) (stating that privilege to chastise one’s wife, “ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.”); *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871) (declaring that “Beating or striking a wife violently . . . is not one of the rights conferred on a husband by the marriage.”).

38. *State v. Oliver*, 70 N.C. 60, 61-62 (1874); *see also State v. Buckley*, 2 Del. (2 Harr.) 552, 552 (1838) (“We know of no law that will authorize a husband to strike his pregnant wife a blow with his fist, such as has been inflicted on this woman . . . [A]ny *undue or excessive* battery by a husband of his wife either in degree, or with improper means, [is] indictable.”) (emphasis added); *State v. Hussey*, 44 N.C. (Busb.) 123 (1852) (wife’s testimony against her husband incompetent in all cases of assault and battery, except where *permanent injury or great bodily harm* is either threatened or inflicted); *Richards v. Richards*, 1 Grant 389, 392-93 (1856) (denying divorce petition on ground that “it is a sickly sensibility which holds that a man may not lay hands on his wife, even rudely, if necessary, to prevent the commission of some unlawful or criminal purpose,” a man may be “betrayed” “into the commission of an act, or a harsh expression, for which, in a moment after, he might be repentant and sorrowful.”).

twentieth century.

But by the late 1960s and early 1970s, the domestic violence movement came into full swing and prompted substantial improvements in statutory law. Over the past generation, the United States has moved 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. Every state has enacted a civil protection order statute, and the vast majority of these authorize the essential relief necessary for battered women to leave an abusive relationship.³⁹ For example, every state provides for emergency *ex parte* relief,⁴⁰ so that a victim has court-ordered protection during the potentially volatile period between the time of filing a lawsuit and trial. This is the period when the abusive partner typically is served with court papers spelling out the victim's intent to leave him—a moment that can set off a particularly severe “separation assault.”⁴¹

Modern laws governing civil protection orders also authorize fairly comprehensive post-trial relief. In addition to the basic provisions—to not assault and to stay away—these orders may award temporary child custody, safe visitation arrangements for the non-custodial parent, and child support.⁴² Rapid resolution of these latter issues is critical. One of the primary reasons that victims return to their abusive partners is the pressure created by the loss of economic support;⁴³ for a woman with children, a child support award may be the key to freedom. Similarly, because the potential for renewed violence is greatest during visitation, carefully structured pick up and drop off provisions, designed to eliminate victim-perpetrator contact, also can have a significant prophylactic effect.⁴⁴

39. For an in-depth analysis of state civil protection order statutes, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993); see also *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1515-18, 1535-43 (1993).

40. See Klein & Orloff, *supra* note 39, at 1031-43 (indicating that all jurisdictions authorize some form of emergency *ex parte* relief upon filing a complaint for civil protection).

41. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-71 (1991); see also Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 274 & 274 n.12-13 (1995) (stating that domestic violence escalates when victim leaves or abuser believes she is going to leave).

42. The vast majority of jurisdictions authorize the court to award temporary custody. See Klein & Orloff, *supra* note 39, at 954 n.968 (citing statutes from 42 states, the District of Columbia, and Puerto Rico); see also N.Y. FAMILY COURT ACT § 842(i) (McKinney 1998); VA. CODE ANN. § 16.1-279.1(A)(7) (1998). The same is true for visitation. See Klein & Orloff, *supra* note 39, at 982 n.1141 (citing statutes from 37 states and the District of Columbia); see also ALASKA STAT. § 18.66.100(C)(9) (Michie 1998); VA. CODE ANN. § 16.1-279.1(A)(7) (1998). Thirty-eight states and the District of Columbia expressly authorize the award of child support in a civil protection order case. See Klein & Orloff, *supra* note 39, at 998 n.1254 (citing statutes from 36 states and the District of Columbia); see also N.Y. FAM. COURT ACT § 842 (McKinney 1998); VT. STAT. ANN. tit. 15 § 1103(c)(6) (1997).

43. See Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, in DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 19, 44 (Jacqueline Agtuca et al. eds., 1992); Cris M. Sullivan, et al., *After the Crisis: A Needs Assessment of Women Leaving a Domestic Violence Shelter*, 7 VIOLENCE & VICTIMS 267, 267 (1992); Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1155 (1995).

44. See PETER FINN & SARAH COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION,

Finally, thirty-four states have adopted criminal contempt laws to help enforce protection orders,⁴⁵ and forty-five jurisdictions have made violating a protection order a statutory crime.⁴⁶ Effective enforcement is essential to ensure meaningful compliance; otherwise, civil protection orders become a piece of paper that a batterer can (and often does) ignore with impunity. As one study of the civil protection order process concluded, “[e]nforcement is the Achilles’ heel of the . . . process, because an order without enforcement at best offers scant protection and at worst increases the victim’s danger by creating a false sense of security.”⁴⁷

The federal government has acted as well. In 1994, Congress enacted the Violence Against Women Act (VAWA),⁴⁸ and “daughter of VAWA” has just been introduced in Congress.⁴⁹ Among other things, these laws condition state receipt of sizable federal funding on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states;⁵⁰ (2) provide government assistance with service of process in protection order cases;⁵¹ and (3) criminalize violations of protection orders.⁵²

CURRENT COURT PRACTICE AND ENFORCEMENT 43-44 (1990). State gender bias task force reports have revealed that poorly structured visitation provisions are the source of a substantial portion of contempt motions brought to enforce civil protection orders. *See, e.g.*, DISTRICT OF COLUMBIA COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, App. H at 21 (1992) [hereinafter D.C. GENDER BIAS TASK FORCE REPORT] (indicating that such provisions accounted for 31% of contempt motions in civil protection order cases involving custody).

45. The following jurisdictions enforce civil protection orders through criminal contempt sanctions: ALA. CODE § 30-5A-6 (1998); ALASKA STAT. § 9.50.010(5) (Michie 1997); ARIZ. REV. STAT. ANN. § 13-3602(J) (West 1998); COLO. REV. STAT. § 18-6-803.5(7) (1998); DEL. CODE ANN. tit. 11, § 1271 (1997); D.C. CODE ANN. § 16-1005 (1997); FLA. STAT. ANN. § 741.30(8)(a) (West 1998); GA. CODE ANN. § 19-13-6 (1997); HAW. REV. STAT. § 710-1077(1)(g) (1997); 750 ILL. COMP. STAT. 60/223-2(b) (West 1998); IOWA CODE § 236.8 (1998); KAN. STAT. ANN. § 60-3110 (1996); KY. REV. STAT. ANN. § 403.760(1) (Banks-Baldwin 1998); LA. REV. STAT. ANN. § 46:2137 (West 1998); MD. CODE ANN., Family Law § 4-508 (1997); MICH. COMP. LAWS § 600.2950(23) (1998); MINN. STAT. § 518B.01(14)(f)-(g) (1997); MISS. CODE ANN. § 93-21-21 (1998); N.H. REV. STAT. ANN. § 173-B:8(II) (1997); N.J. STAT. ANN. § 2C:29-9 (West 1998); N.M. STAT. ANN. § 40-13-5(B) (Michie 1996); N.Y. PENAL LAW § 215.51(b) (McKinney 1998); N.C. GEN. STAT. § 50B-4(b) (1997); N.D. CENT. CODE § 14-07.1-06 (1997); OHIO REV. CODE ANN. § 2705.02(A) (Anderson 1998); OR. REV. STAT. § 107.720(4) (1997); PA. STAT. ANN. tit. 23, § 6114 (West 1998); R.I. GEN. LAWS § 15-15-3(c)-(d) (1997); S.C. CODE ANN. § 20-4-60(b) (Law Co-op. 1997); TENN. CODE ANN. § 36-3-610 (1997); VT. STAT. ANN. tit. 15, § 1108(e) (1997); WASH. REV. CODE § 26.50.110(5) (1997) (penalty for third conviction); *Connecticut v. Murray*, 623 A.2d 60 (1993).

46. *See Klein & Orloff, supra* note 39, at 1096 n.1835 (citing statutes in 40 states and Puerto Rico); *see also* D.C. CODE ANN. § 16-1005(g) (1997); IOWA CODE § 236.8 (1998); S.D. CODIFIED LAWS § 25-10-13 (Michie 1997).

47. FINN & COLSON, *supra* note 44, at 49.

48. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in U.S.C. sections 8, 16, 18, 28, 42).

49. *See* H.R. 3514, 105th Cong. (1998); S. 2110, 105th Cong. (1998). *See* Sean Scully, *Scandals May Ease Renewal of Women’s Act*, WASH. TIMES, Mar. 20, 1998, at A9; Carl Weiser, *Biden Introduces Bill to Extend Protection for Battered Women*, GANNETT NEWS SERVICE, May 21, 1998, available in 1998 WL 5627720.

50. *See* Violence Against Women Act, 18 U.S.C. § 2265 (1996).

51. *See* Violence Against Women Act, 42 U.S.C. § 3796hh(c)(4)(1998). Domestic violence victims cite failure to accomplish service of process as one of the primary reasons for their failure to follow through on a civil protection order case. *See* URBAN INSTITUTE, COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS 30-32 (1993).

52. *See* Violence Against Women Act, 42 U.S.C. § 3796hh(c)(1). In order to be eligible for certain

Although the specifics of protection order legislation vary from state to state and gaps in coverage for battered women certainly remain, legislation is no longer an obstacle, but a source of hope. Enormous legal strides have been made in a relatively short period of time.

In contrast to this remarkable legislative progress, those responsible for applying and enforcing the law—the executive and judicial branches of government—have lagged far behind. Only during the last five to ten years have police begun to put effort into achieving timely responses and reasonable arrest rates; in most jurisdictions this occurred only after a legislative mandate. It is even more recently that a small (but growing) number of District Attorneys' offices around the country have begun to experiment with specially tailored strategies to prosecute domestic violence. And the judiciary has shown even less progress; only a handful of jurisdictions have any substantial reform efforts underway. A law is only as good as the system designed to deliver on its promises, and the failure of the courts and related institutions to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence.

What would an improved system for dealing with domestic violence cases look like? Reform must occur in each of three components of the justice system. First, police and prosecutors must continue to improve their historically inadequate practices and to develop specially tailored responses to domestic violence crimes—while paying special attention to questions of individual victim needs and desires. Second, the court system itself must adopt new practices that promote coordination and information-sharing in multiple cases involving the same family. Finally, the judiciary must purge its deep-rooted hostility toward domestic violence victims and adopt an approach that promotes procedural justice for all parties.

III. IMPROVING THE CRIMINAL JUSTICE SYSTEM'S LONG RECORD OF FAILURE IN RESPONSE TO DOMESTIC ABUSE

Since the early 1970s, battered women's advocates have called upon police and prosecutors to treat domestic violence "like any other crime." This plea was voiced in response to a long-standing failure by these officials to recognize a criminal dimension to family abuse. A growing number of jurisdictions have heeded this call, and arrest and prosecution rates are beginning to increase. But these improvements themselves have highlighted additional difficulties that must be remedied.

A. *Historical Overview of the Criminal Justice Response*

VAWA grants, state and local governments must certify that their laws or official policies "encourage or mandate arrest of domestic violence offenders who violate the terms of a valid and outstanding protection order." *Id.*

Until recently, police officers frequently ignored domestic violence calls or delayed their response by several hours.⁵³ When they did respond, they were trained to mediate rather than to arrest. In the words of one police training bulletin:

The police role in a [domestic] dispute situation [is] more often that of a mediator and peacemaker than enforcer of the law. . . . Normally, officers should adhere to the policy that arrests shall be avoided. . . . but when one of the parties demands arrest, you should attempt to explain the ramifications of such action (e.g., loss of wages, bail procedures, court appearances) and encourage the parties to reason with each other.⁵⁴

The experience of the District of Columbia is typical. A study conducted in 1990 showed that police were arresting accused batterers in only five percent of all domestic violence cases.⁵⁵ They failed to arrest in more than eighty-five percent of cases in which the victim had sustained serious injuries that were visible when the police arrived on the scene.⁵⁶ Police were more likely to arrest the perpetrator in situations where he insulted an officer or damaged a vehicle.⁵⁷

Activists have used studies like this one to convince state legislatures to enact mandatory arrest laws.⁵⁸ These statutes terminate police discretion in domestic violence cases; if probable cause exists, the officer must arrest. Looking again at Washington, D.C., soon after the local mandatory arrest law went into effect, police were arresting perpetrators in forty-one percent of domestic violence calls.⁵⁹ This jump, from five to forty-one percent, reflects a sea change for victims of family abuse. Those who seek access to justice are far more likely to succeed with the advent of mandatory arrest.⁶⁰

53. See STRAUS, *supra* note 9, at 232; MARTIN, *supra* note 9, at 92.

54. See OAKLAND, CALIFORNIA, POLICE DEPARTMENT, TRAINING BULLETIN ON TECHNIQUES OF DISPUTE INTERVENTION (1975) *quoted in* MARTIN, *supra* note 9, at 93-94.

55. See Sandra Jean Sands et al., Police Response to Domestic Violence 9 n. 15 (June 1990) (presented at Institute for Women's Policy Research Second Annual Women's Policy Conference) (unpublished manuscript, on file with author).

56. See *id.* at 5.

57. See *id.* at 5-7.

58. For example, the District of Columbia enacted its mandatory arrest law in 1991. See D.C. CODE ANN. § 16-1031 (1991).

59. See NATIONAL CENTER FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 80 (Susan L. Keilitz et al. eds., 1997) [hereinafter NCSC CIVIL PROTECTION ORDER STUDY] (study of women who received civil protection orders in Wilmington, Delaware, Denver, Colorado, and the District of Columbia). This study focused exclusively on police response vis-a-vis male perpetrators. However, this study does not reflect the problematic increase in dual arrests—police arrest of both victim and batterer—that activists have noted across the country. See, e.g., Welch, *supra* note 30, at 1159. A recent General Order issued by the D.C. Metropolitan Police Department attempts to eradicate this practice by directing officers to distinguish between the primary aggressor, who must be arrested, and a person who may have inflicted injury on another, but who did so in self-defense. See D.C. METRO. POLICE DEP'T., General Order 304.11, Intrafamily Offenses 10-12 (Jan. 12, 1998). No data yet exist, however, from which to determine whether the General Order has resulted in a decrease in dual arrests.

60. The issue of victims who do not want their abusers arrested or prosecuted is discussed *infra* text accompanying notes 73-83.

But mandatory arrest alone is not sufficient to ensure that the criminal aspects of domestic violence cases are taken seriously. Even when presented with more domestic violence arrests, prosecutors rarely pressed charges and, when they did, they rarely followed through with the case. In Washington, D.C., for example, the 1995 charging rate was approximately fifteen percent of arrest cases, and very few of these ever proceeded to plea or trial.⁶¹ Why such low numbers? The prosecutor, like district attorneys across the country, had adopted a special intimate abuse policy: Charges would be dropped at the victim's request, at any time, no questions asked. The rationale was the belief that convictions could not be obtained without victim cooperation and testimony. Although some prosecutors recognized that batterers might be pressuring victims into making the request to drop charges, they claimed that they could not distinguish between a battered woman who was communicating her true feelings and one who had a literal or figurative gun to her head.⁶² So they adopted a uniform approach and dropped charges in every case.

This "automatic drop" policy ceded to perpetrators an enormous degree of control over the criminal justice process. All a batterer had to do was coerce his victim—through violence or threats of violence—into asking the prosecutor to drop the charges; once she did so, the risk of incarceration instantly vanished.

During the 1980s and 90s, victim advocates lobbied aggressively to change these policies, and they have finally begun make inroads in a growing number of jurisdictions. For example, still citing the difficulty in distinguishing between those who "really" want to drop charges and those who do not, many prosecutors have adopted "no-drop" policies—once charges are brought, a case proceeds regardless of the victim's wishes, as long as sufficient evidence exists to prove criminal conduct.⁶³

Early data indicate that these no-drop policies yield substantial positive results, including the reduction of homicides. In San Diego, for example, officials found that under the old policy, when abusers learned that a case would be dismissed if the victim refused to cooperate, levels of violence increased.⁶⁴ In 1985, the city implemented a no-drop policy. Domestic homicides fell from thirty in 1985, to twenty in 1990, to seven in 1994.⁶⁵ No-drop policies also appear to

61. See, e.g., Sam Skolnik, *Confronting Domestic Violence: D.C.'s Once Shoddy Record Much Improved*, LEGAL TIMES, Aug. 18, 1997, at 14 (citing 10-30% charging rate).

62. In the District of Columbia, for example, one prosecutor spent every day for six months interviewing victims of intimate abuse who sought to drop charges. Interview with Robert Spagnoletti, Chief, U.S. Attorney's Office Domestic Violence Unit, in Washington, D.C. (Sept. 3, 1997). He found that he was unable to distinguish between those who were responding to a direct threat and those who were not. *Id.* When he refused to honor victims' requests to drop a case, many of them called him later to explain that they had been threatened into making the request against their will and to thank him for pursuing the prosecution. *Id.*

63. In a recent survey, 66% of prosecutor's offices in major urban centers reported that they had adopted no-drop policies. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 176, 182-183 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

64. See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 310 (1993).

65. See Mark Hansen, *New Strategy in Battering Cases*, A.B.A. J. 14 (Aug. 1995).

lower recidivism and strengthen the message that intimate abuse will not be tolerated.⁶⁶

After years of community pressure in the District of Columbia, the U.S. Attorney's Office finally adopted an aggressive approach to prosecution, including a no-drop policy.⁶⁷ Prosecutors assigned to the newly-created Domestic Violence Unit view intimate violence as a crime against the state and seek to vindicate the government's interests regardless of the individual victim's wishes. Perpetrators no longer are able to manipulate the system by coercing the victim into dropping the charges; control has been shifted from the perpetrator to the government.

As in San Diego, Washington, D.C.'s no drop-policy has effected a radical shift in domestic violence prosecutions. In 1989, the office prosecuted fewer than forty misdemeanor cases out of 19,000 family abuse calls to 911.⁶⁸ From 1996-97, during the first year of the new regime, the Domestic Violence Unit filed approximately 6,000 misdemeanor cases.⁶⁹ The statistics for the following year are closer to 8,000.⁷⁰ An even more telling statistic is that the Unit now presses charges in approximately sixty-seven percent of arrest cases—precisely the same rate as in stranger violence arrests.⁷¹ Similarly, the conviction rate in domestic violence cases now closely approximates that in other misdemeanor non-jury trials in the District of Columbia—sixty-nine percent.⁷²

Mandatory arrest laws and no-drop prosecution policies have moved domestic violence criminal prosecutions to a position of rough parity with crimes perpetrated by non-intimates, and have greatly expanded the tools available to battered women seeking to escape abuse. The concept of treating family abuse "like any other crime" is finally within reach. But is this kind of equality really what is best for battered women?

B. Concerns Raised by Recent Criminal Justice Reforms and Modest Proposals for Improvement

66. See Hanna, *supra* note 10, at 1864-65.

67. The Office also adopted a vertical prosecution policy, where a single prosecutor is assigned to a case from beginning to end. Most other misdemeanors are prosecuted "horizontally," with a different prosecutor handling each stage of the litigation. Vertical prosecution encourages the development of a continuing relationship between attorney and complaining witness that can contribute to better victim follow-through.

68. In 1989, the D.C. Metropolitan Police Department completed written reports in 42 of 19,000 domestic violence calls. See Sands et al., *supra* note 55, at 300. No prosecutions occur in the absence of such a report. Interview with Robert Spagnoletti, Chief, U.S. Attorney's Office Domestic Violence Unit in Washington, D.C. (Apr. 8, 1999).

69. See Interview with Robert Spagnoletti, *supra* note 62. This statistic is derived from the fact that the Domestic Violence Unit prosecuted approximately 6,400 cases over the 13-month period from Apr. 1, 1996 to Apr. 30, 1997; the number given is the 12-month average.

70. See *id.*

71. See, e.g., Skolnik, *supra* note 61, at 14.

72. See Letter from Duane B. Delaney, Clerk of the Court, to Andrew P. McGuire, Esq. 2 (June 23, 1997) (on file with author); Interview with Robert Spagnoletti, *supra* note 62. Prior to institution of the new domestic violence court, prosecutors estimate that the conviction rate in domestic violence trials was 20%, less than a third of the current rate. See Skolnik, *supra* note 61, at 14.

Battered women are far better off today, with police and prosecutors who pay attention to crimes between intimates, than they were ten years ago when such crimes were routinely ignored. But as police and prosecutors escalate their response to domestic violence cases, survivors increasingly confront a criminal justice system that can perpetuate the kinds of power and control dynamics that exist in the battering relationship itself. In many cases, prosecutors take complete control over the case, functioning as the sole decision-maker and ignoring the victim's voice. If a victim changes her mind mid-way through the litigation and seeks to drop charges so that the father of her children can continue to work and provide financial support, a prosecutor may refuse to do so, on the ground that this would not serve the interests of the state in punishing violations of the social contract.⁷³ Such re-victimization can thwart the survivor's efforts to regain control over her life and move past the abusive experience.

Thus, where the bulk of control was ceded to the perpetrator under the old automatic drop system, it is now ceded to the prosecutor. Although battered women have a far greater influence over the criminal justice process today than ever before, the system's responsiveness to their individual needs remains limited.

Increased intervention by the criminal justice system has been particularly problematic for many subgroups of victims, in particular immigrant populations⁷⁴ and racial minorities.⁷⁵ For example, recent reforms in U.S. immigration laws create strong disincentives for immigrant women to press criminal charges against their batterers. The new laws dictate that an immigrant convicted of a domestic violence offense, stalking, or a protection order violation becomes deportable, even if he has previously obtained lawful permanent resident status.⁷⁶ Many women are reluctant to expose their partners to the risk of deportation. In addition, they may be ostracized from their communities for doing so, particularly if the perpetrator might be subjected to political persecution if forced to return to his home country. Deportation of a batterer also may adversely affect the victim's own petition for legal residency.⁷⁷

Similarly, African-American women often choose to remain silent about abuse. Kimberle Crenshaw, whose writing explores the "intersectionality" of experiences of racism and sexism on battered women of color, argues:

73. A prosecutor dealing with a reluctant victim in a domestic violence case faces a difficult dilemma. Does a dismissal of an individual case based on the victim's wishes occur at the expense of the public good of punishing criminal conduct and deterring future violence? Does a failure to honor a victim's wishes result in a re-victimization by subjecting her to further coercion at the hands of the state? For an excellent discussion of these issues within a feminist theory framework, see Hanna, *supra* note 10, at 1888-98.

74. See generally Tien-Li Loke, *Trapped in Domestic Violence: The Impact of U.S. Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589 (1997).

75. See, e.g., INSTITUTE ON VIOLENCE, INC., *VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN: A FOCUS GROUP STUDY* (Beth E. Richie ed., 1996) at 18-19 [hereinafter *VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN*].

76. See *Illegal Immigration Reform and Immigrant Responsibility Act*, Pub. L. No. 104-208 § 350 (1996) (amending 8 U.S.C. § 1251(a)(2)).

77. See Tien-Li Loke, *supra* note 74, at 616. Although the Violence Against Women Act has reduced the scope of this problem, it has not been entirely eliminated. See *id.*

Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society.⁷⁸

In an extensive focus-group study in New York, African-American participants expressed the view that reporting batterers to the police was a breach of loyalty.⁷⁹ Reporting could further contribute to the social stereotyping of black men as particularly violent.⁸⁰ In one woman's words: "The ideas behind . . . how Black boys are feared by White people, and how police beat Black men . . . it's a bad time to be Black and it's an even worse time to talk about the problems we face in our community."⁸¹

Another set of concerns arises when the problem is viewed from a traditional feminist perspective, focusing on the particular experience of individual women. A no-drop policy may, in some cases, trigger a physical attack. Although dropping charges in response to a batterer's threat allows him to retain control, forcible prosecution can result in a deadly retaliation assault.

One approach which may partially alleviate this risk is to give survivors the option of not participating in the prosecution, in the hope that the perpetrator will be less likely to blame her for what occurs. To do this, the prosecuting attorney must rely on evidence other than victim testimony, such as recorded 911 calls containing excited utterances, photographs and hospital records that document injuries, and testimony from police officers who responded to the crime scene. This strategy can be quite successful. In Washington, D.C., for example, the U.S. Attorney's Office introduces such evidence in every domestic violence case in which it is available, and relies on it exclusively half of the time, in those cases where the victim declines to testify for the state.⁸² The conviction rate in both types of cases is identical.⁸³

78. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

79. See VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN, *supra* note 75 at 18-19. See also Beth Richie, *Battered Black Women: A Challenge for the Black Community*, THE BLACK SCHOLAR, Mar.-Apr. 1985, at 40, 43-44.

80. See VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN, *supra* note 75, at 18-19.

81. *Id.* at 19.

82. The prosecutor's office does not always respect the victim's desire to refrain from testifying; in a small number of cases, the victim is subpoenaed and forced to testify against her will. For an interesting discussion of this practice and its implications for feminist theory, see Hanna, *supra* note 10, at 1865-66, 1888-94.

83. Interview with Robert Spagnoletti, *supra* note 62. One might expect a higher success rate in cases where a victim actually tells the judge her story. But there is a persistent and pervasive societal view, documented by Carol Gilligan and others, that women's stories generally lack credibility. The result is a deep

Of course, in some cases, this approach only deflects a batterer's anger; it is a far from perfect strategy for protection from retaliatory abuse. It also exacerbates another feminist concern with the no-drop approach: the overriding of the individual victim's autonomy. After all, despite the long-time activist demands that domestic violence crimes be treated the same as those committed by strangers, these cases *can be different* from the victim's perspective. Although a person assaulted during a holdup on the street may have an interest in the precise punishment meted out to the perpetrator, it cannot compare to that of many victims of intimate abuse, whose partners may be sent to jail, families broken up, and sole sources of child support lost. Of course, not every domestic violence victim is financially dependent on the perpetrator or interested in keeping the family together; and some victims of non-intimate assault have a connection to the accused. These cases exist on a spectrum; perhaps the degree of input into the decision of whether to prosecute and how to punish accorded to a victim should be different—and greater—in those cases where she has a connection—financial, familial, or emotional, to the perpetrator.

So the question remains: How can prosecutors find a satisfactory way to enhance deterrence of intimate abuse and, simultaneously, adequately protect the safety and autonomy of individual victims? A growing body of research indicates that civil society has an important role to play here.⁸⁴

A recent study in East Lansing, Michigan,⁸⁵ for example, compared two groups of battered women leaving a domestic violence shelter. One was a control group; in the other, each woman was assigned a college student volunteer who served as her advocate for six hours a week, over ten weeks.⁸⁶ The advocates had no prior experience working in the domestic violence field, but received ten weeks of training before embarking on the project.⁸⁷ Each student worked with a woman to help her assess her personal needs and goals, and then assisted her in obtaining limited or difficult-to-access community resources.⁸⁸ These resources included housing, employment, legal assistance, transportation, child care, health care, counseling for the children, and social support.⁸⁹

undermining of the persuasive impact of a victim's testimony. See Carol Gilligan, *Getting Civilized*, 63 *FORDHAM L. REV.* 17 (1994); Kim L. Scheppelle, *Just The Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. SCH. L. REV.* 123, 126-27 (1992).

84. See, e.g., NATIONAL RESEARCH COUNCIL, *UNDERSTANDING VIOLENCE AGAINST WOMEN* (N.A. Crowell & A.W. Burgess eds., 1996); Denise J. Gamache et al., *Coordinated Police, Judicial and Social Service Response to Woman Battering: A Multi-Baseline Evaluation Across Three Communities*, in *COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES* 193-209 (G.T. Hotaling, et al. eds., 1988), Cris M. Sullivan, *Societal Collusion and Culpability in Intimate Male Violence: The Impact of Community Response Toward Women With Abusive Partners*, in *VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES, AND EFFECTS* (Albert P. Cardarelli ed., 1997) 154-64.

85. See Cris M. Sullivan et al., *Promising Findings of a Community-Based Advocacy Project for Women with Abusive Partners: Two-Year Followup*, *J. CONSULTING AND CLINICAL PSYCHOLOGY* (forthcoming 1999) (on file with author).

86. See *id.* at 7-8.

87. See *id.* at 27.

88. See *id.*

89. See *id.* at 10.

Both groups of women were interviewed every six months for two years.⁹⁰ Women in the advocacy group reported less physical violence—in fact, over twice as many women in the advocacy group experienced *no* violence whatsoever during the two-year period.⁹¹ They also experienced less depression and a higher quality of life. And those in the advocacy group who wished to end their abusive relationships were more effective in doing so.⁹² Of particular importance is the fact that women with advocates perceived themselves as significantly more effective in obtaining community resources and assistance, as well as interpersonal social support.⁹³

Similar results came from a study of the role of social support from family, friends, neighbors, and coworkers in determining victim follow through in domestic violence criminal prosecutions.⁹⁴ Where “follow through” was defined as cooperating in the prosecution of a batterer (after the initial decision to press charges) by providing necessary information to prosecutors and expressing a willingness to testify,⁹⁵ survivors able to access more interpersonal support were approximately twice as likely to voluntarily cooperate with the prosecution.⁹⁶

These results are quite exciting. They indicate that in many cases, an increase in victim support from family, friends, and trained personnel can be enough to empower victims to exit the cycle of violence. Advocacy services apparently reduce some victims’ dependency on the criminal justice system by helping them find the strength to escape on their own. And for those who need prosecutorial intervention, the presence of an advocate or supporter enables them to better assert themselves in gaining the help they need. By amplifying victims’ voices, advocates can help the government better respond to individual concerns. Advocates also help the government to better discern those cases in which the survivor seeks to drop charges because of a considered decision that the course of action is best for herself, her family, and the larger community to which she belongs. Certainly, domestic violence is a crime against the state and generally should be treated as such; but victim advocates could be a key to transforming one-size-fits-all prosecution policies into responses that are also tailored to the concerns of individual women.

Another way that law advocates can enhance victim participation in and impact on the process is through the development of victim impact statements. These statements, which can be written or oral, are submitted to the court at sentencing. They tell the story of the effect of the perpetrator’s actions on the victim’s life and detail her wishes regarding appropriate punishment. When developed with care, these compelling stories can have substantial impact on the

90. *See id.* at 7.

91. *See id.* at 26-27.

92. *See id.* at 19.

93. *See id.* at 21. All of these differences were found to be statistically significant. *See id.*

94. *See generally*, Lisa A. Goodman et al., *Obstacles Women Face in Prosecuting Their Batterers: The Role of Social Support*, VIOLENCE & VICTIMS (forthcoming 1998) (on file with author).

95. *See id.* at 1.

96. *See id.* at 20.

ultimate punishment imposed on the batterer.⁹⁷

Currently, the majority of domestic violence service providers nationwide report that victim demand for advocates far exceeds their availability.⁹⁸ And only a few jurisdictions permit victim advocate offices inside the courthouse, so that women must seek them elsewhere—a hurdle that many trauma victims are unable to surmount. Recent prosecutorial responsiveness to domestic violence cases must be accompanied by an equivalent increase in the provision of easily accessible victim advocacy services.

IV. INTEGRATED DOMESTIC VIOLENCE COURTS: REMEDYING FAILURES IN INFORMATION-SHARING AND COORDINATION

The piecemeal nature of the traditional court system presents further obstacles for battered women seeking justice. Domestic violence incidents typically trigger multiple civil and criminal cases, each with distinct and complicated intake processes that occur in different parts of a courthouse, or even in different court buildings located miles apart. This fragmented process hopelessly confuses most victims, and few manage to file for all the forms of complementary relief they need. Those who succeed are then faced with a different judge on each case, each of whom proceeds in an informational vacuum, with no awareness of related cases. A typical family can find itself coping with multiple, conflicting orders that simultaneously govern its existence.

The convoluted story of Karen and Robert Graves' interactions with the Jefferson County, Kentucky justice system over the course of a year graphically depicts ways in which the traditional court system's failures in information sharing and coordination contribute to the tragedy of domestic abuse. From February 1995 to March 1996, Karen and Richard attended sixteen hearings in the local criminal and family courts.⁹⁹ The criminal cases were heard by ten different judges, each unaware of the others' cases and rulings. Each of the six warrants issued for Richard's arrest during that period were set aside—often by another judge.¹⁰⁰ Two different police departments responded to twenty-two calls for help from Karen's and Richard's residences that year; no responding officer was aware of any previous calls when he arrived at the scene.¹⁰¹

97. Interview with Charlotte Clarke, Coordinator, District of Columbia United States Attorney's Office Domestic Violence Advocacy Program, Victim Witness Assistance Unit, Washington, D.C. (Sept. 21, 1998).

98. See Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 173 (1993).

99. See JEFFERSON COUNTY, OFFICE FOR WOMEN MORTALITY REVIEW COMMITTEE, CASE OF KAREN GRAVES: REPORT TO COUNTRY JUDGE/EXECUTIVE DAVID L. ARMSTRONG AND DOMESTIC VIOLENCE PREVENTION COORDINATION COUNCIL 11 (1996) [hereinafter CASE OF KAREN GRAVES].

100. See *id.*

101. See *id.* at 12. A multi-city study of spousal homicide found that in 85% of the cases, the police had intervened on at least one occasion in the preceding two years; in 54% of the cases, they had intervened on five or more occasions. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 263 (1984) (citing 1976 Police Foundation study of domestic violence in Detroit and Kansas City).

Both Karen and Richard filed Domestic Violence Petitions against each other, seeking protection from physical abuse. Karen's Petition alleged that Richard had pulled the phone cord out of the wall when she attempted to call 911 and that he had recently threatened to kill her if she left him. She described Richard's past abuse, which included hitting Karen in the back with their son's car seat so hard that she had trouble walking; "stomping" on her ear; and striking her when she refused to have sex. Karen also filed for divorce, custody, and child support.¹⁰² These family law cases were heard by three different judicial officers and involved eight separate hearings.¹⁰³

Richard Graves was enrolled in three separate court-ordered counseling programs during this year, two for alcohol and drug abuse. A sixteen-session anger management program reported his "successful" completion.¹⁰⁴ Advocates from the Center for Women and Families, Adult Protective Services, Child Protective Services, and the County Attorney's Office all worked on aspects of the couple's lives, but there is no evidence of any communication among the agencies.¹⁰⁵

The violence in the Graves' relationship escalated rapidly during this period. In May 1995, Richard fired a nine-millimeter handgun into the ground near Karen's new boyfriend, who was accompanying her as she came to the marital home to pick up her personal belongings.¹⁰⁶ Over the next several weeks, Richard made repeated death threats.¹⁰⁷ In September 1995, Karen submitted a letter to the court in which she pleaded:

I beg this court and all other courts involved to please put this case to rest. . . . I beg the courts to make Richard follow your orders, and when he doesn't, give consequences for his actions. I beg the courts to read the entire file from beginning to end before making a decision. I beg the courts to protect me, and my children.¹⁰⁸

Six months later, in March 1996, Richard took a shotgun to Karen's home, murdered her, and then committed suicide.¹⁰⁹

A. *How the Traditional Court System Has Failed Domestic Violence Victims*

The conventional court system's response to domestic violence cases can be woefully ineffective. The problem is attributable, at least in part, to fundamental failures of information-sharing and coordination within and among each of the

102. See CASE OF KAREN GRAVES, *supra* note 99, at Summary of System Contacts, 2-4.

103. See *id.* at Summary of System Contacts, 4-18.

104. See *id.* at Summary of System Contacts, 16.

105. See CASE OF KAREN GRAVES, *supra* note 99, at 12.

106. See *id.*

107. See *id.* at Summary of System Contacts, 10-17.

108. *Id.* at 11 (quoting letter from Karen Graves, dated Sept. 19, 1995).

109. See *id.* at Summary of System Contacts, 18.

agencies involved, from the point of intake to the time of trial.

1. *Failure to Coordinate the Intake Process*

The fragmentation of the traditional court intake process prevents many battered women from discovering the multiple and complementary options available to them. This information barrier deprives victims of the comprehensive protection they need and the relief to which they are legally entitled.

Although these failures in coordination may have a detrimental impact on all kinds of cases, they are particularly harmful in the family abuse arena, where a single incident of domestic violence frequently spawns numerous, diverse cases. Most other human interactions that wind up in court are resolved in a single litigation, so the procedure is relatively straightforward. For example, a contest over a decedent's will leads to a probate case; a physician's dubious decision to operate leads to a medical malpractice suit; an assault by a stranger is likely to lead to a criminal case and perhaps, if the perpetrator is a deep pocket, to a civil tort suit.

But a victim who wishes to safely end the relationship has no simple way to proceed. Besides wanting to prosecute criminally, she probably needs a civil protection order. If she is married to the abuser, she must file for divorce; married or not, if they have children in common she needs a determination of custody, child support, and possibly protection for her children from the perpetrator's abuse. It is impossible to resolve all of the issues involved in one law suit; in each case the judge is authorized to award quite different forms of relief.

A criminal prosecution culminating in a conviction sends a powerful message—to the individual batterer and to the larger community—that the civil justice system cannot replicate.¹¹⁰ And in cases where the violence is severe and the perpetrator persistent, incarceration may be the best-or only-way to ensure the victim's safety.¹¹¹

But victims who pursue criminal prosecution¹¹² typically must rely on the

110. See Hanna, *supra* note 10, at 1889-90. Criminal enforcement encourages the "educational function of law—to teach members of society that certain behavior is morally wrong or socially intolerable." Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L.REV. 263, 277 (1987).

Although civil protection orders have their own deterrent effect, they appear to be less effective than criminal sanctions. A recent multi-jurisdiction civil protection order study showed that 8.4% of victims experienced at least one incident of physical abuse within the first six months of the order's duration, and 12.6% experienced at least one incident of psychological abuse. See NCSC CIVIL PROTECTION ORDER STUDY, *supra* note 59, at 49.

111. Of course, criminal prosecution can result in more than incarceration. A batterer may be placed on probation and required to complete counseling or substance abuse treatment or to reimburse the victim for property damage or medical bills.

112. Many victims do not wish to pursue the arrest and prosecution of a batterer, due to fear of retaliation, desire to save the relationship, or concern that conviction will cut off child support. See Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 44 (1989). In addition, battered women in the immigrant community may have concerns about

civil justice system as well. Rapid resolution of a volatile situation is crucial in these cases. While civil protection order suits typically are scheduled for trial within ten to thirty days after the complaint is filed,¹¹³ criminal prosecutions typically proceed far more slowly.¹¹⁴ In addition, a civil protection order can include a spectrum of relief far broader than that available in a criminal prosecution. The protection order may direct the abuser to stay away from the victim, stop threatening her and vacate the parties' residence.¹¹⁵ It may award the victim temporary use and possession of jointly owned property¹¹⁶ and can resemble a short-term divorce decree in cases where the parties have children together.¹¹⁷ The breadth of the civil protection order remedy makes it both a necessary alternative and an important supplement to criminal prosecution.

Although a civil protection order can resolve a survivor's family-law problems swiftly, it only provides temporary relief. The order will expire six to twelve months later,¹¹⁸ leaving the couple back at square one. Both parents will once again have equal rights to the children—a particular problem in domestic violence cases due to the high incidence of parental kidnapping used to abuse a victim psychologically.¹¹⁹ The biweekly child support checks suddenly cease, imposing on most victims serious financial difficulties that may force them back into the arms of their abusers.¹²⁰ Many victims will spend several months with

exposing the perpetrator to deportation; women from minority communities may have concerns about betrayal and ostracization. *See supra* text accompanying notes 74-81.

113. *See* BARBARA J. HART, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, STATE CODES ON DOMESTIC VIOLENCE: ANALYSIS, COMMENTARY AND RECOMMENDATIONS 8 (1992).

114. In the District of Columbia, for example, criminal prosecutions for domestic violence misdemeanors typically are scheduled more than six months after arraignment. *See* Interview with Robert Spagnoletti, *supra* note 62. Although a temporary order directing the defendant to stay away from the complaining witness may be entered during the pendency of a criminal case, the scope of such an order is limited and its enforceability lies within the sole discretion of the prosecutor.

115. Almost all jurisdictions authorize the court to award these forms of relief in a civil protection order case. *See* Klein & Orloff, *supra* note 39, at 914-28.

116. At least 17 jurisdictions authorize the court to award this form of relief in a civil protection order case. *See id.* at 937.

117. *See supra* text accompanying notes 43-44 (discussing the importance of these forms of relief for a battered woman's safety). It is worth noting that these forms of relief are available *in theory*; the infrequency with which judges actually include custody and child support awards in civil protection orders is a serious problem. *See infra* text accompanying note 228.

118. A 1990 survey reports that 28 states set the maximum duration between six and 12 months, three states permit more than one year, seven states set no upper limit, and eight states limit the duration to less than 180 days. *See* FINN & COLSON, *supra* note 44, at 16-17. Due to increasing evidence of the frequent recurrence of abuse following the expiration of year-long orders, the legislative trend is to increase their duration. In its influential Model Code on Domestic and Family Violence, the National Council of Juvenile and Family Court Judges proposed that civil protection orders should remain in effect until further order of the court. *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 306(5) (1994).

119. *See* Klein & Orloff, *supra* note 39, at 972 (explaining that over one-half of child abductions occur in the context of domestic violence and 77% of abductors abduct a child out of a desire to hurt the other parent).

120. *See supra* text accompanying note 43. This problem becomes increasingly acute as economic resources available to low-income battered women continue to diminish. Over the past decade in the United States, the rich have been getting richer and the poor, poorer. Income for families in the bottom 40% of the economy declined in real dollars, income for the top 20% rose by 28.9%, and income for the top one percent rose by 74%. *See* James Garbarino, *The Meaning of Poverty in the World of Children*, 35 AM. BEHAV. SCIENTIST 220, 223 (1992). Poverty also has become more sustained: in the 1970s, 37 of 100 people moved out

neither protection for their children nor financial assistance. This gap in legal protection could be eliminated if a battered woman filed for permanent relief (through divorce, paternity and support, or custody actions) early in the life of her civil protection order. But because so few domestic violence petitioners are represented by counsel,¹²¹ only a tiny percentage understand the need to do so.

It is difficult to overestimate the obstacles battered women face pursuing complementary relief through multiple cases. To initiate each case the victim must master an unfamiliar set of court procedures and wait in line for hours. Each case must be filed in a separate clerk's office and, in many jurisdictions, a different courthouse in another part of town. If she is employed, or has difficulty obtaining child care, she often cannot spare the hours and sometimes days it takes to get into several court systems, let alone pursue multiple cases through to trial. For a person in crisis, who may be recovering from a beating the night before, these obstacles can prove insurmountable.¹²² An added complication is that a criminal case is brought by a prosecutor, whom the victim may perceive as "her" lawyer, but who actually represents the government's sometimes divergent interests;¹²³ civil cases may involve a different attorney for each litigation or, more typically, no legal assistance at all.

This artificially fragmented system reinforces a larger tendency to direct most battered women toward a single avenue in the multi-track court system, leaving few able to gain access to the manifold resources they need. For example, when the police respond to a domestic violence call and find probable cause to believe a crime has occurred, they direct the victim toward the criminal justice intake process, typically informing her that she must report to the prosecutor if she wishes to press charges.¹²⁴ But, in twenty-two to forty percent of cases, police

of poverty; in the 1980s, it was 23 of 100. *See id.* at 225. Divorce reform also has resulted in a disproportionate impoverishment of women. *See, e.g.,* LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985).

121. The District of Columbia is fairly typical in this regard. Approximately 65% of petitioners and 70% of respondents are unrepresented in civil protection order cases. *See* D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 143.

122. In the District of Columbia, prior to 1995, victims who wished to file civil protection order cases were required to go to two offices, the D.C. Citizen's Complaint Center and the D.C. Superior Court. Although the buildings were only three blocks apart, many victims never made it to the second stop. Interview with Meshall Thomas, Project Manager, Emergency Domestic Relations Project, in Washington, D.C. (July 15, 1998) (detailing the experiences of Ms. Thomas during her 19 years of working with victims at the Complaint Center and the courthouse).

123. The prosecutor represents the government, whose interests in pursuing or dropping charges or in seeking a particular sentence, often differ from those of the individual victim. *See supra* text accompanying note 73.

124. This example presents a best-case scenario of police response. In many cases that meet the probable cause standard, the police do not even assist the victim to initiate the *criminal* justice process. For example, in a study based on data collected in 1994-95, prior to the existence of D.C.'s domestic violence court, petitioners who filed Civil Protection Order (CPO) cases in the District of Columbia reported that although the police responded to their calls 93.8% of the time, they took notes in only 64.8% of cases, interviewed witnesses in 37.5% of cases, and arrested respondents in 41.2% of cases. *See* NCSC CIVIL PROTECTION ORDER STUDY, *supra* note 59, at 62 tbl.VII.1. Only 43.8% of victims reported that they believed the police were helpful. *See id.* at 80. An earlier study, conducted in 1987-88, found that police responded to calls in 92% of cases, but arrested the abuser in only five percent of cases. *See* Sands et al., *supra* note 55, at 3, 6. This study also found that there was no correlation between the infliction of serious injury on the victim and likelihood of arrest;

failed to let victims know about the additional possibility of a civil protection order remedy,¹²⁵ and even more frequently failed to inform them about the basic procedures for obtaining such an order.¹²⁶ And because most prosecutors know little about the civil protection order process, they are unlikely to assist the victim in deciphering the civil system.¹²⁷

Likewise, when a shelter worker, advocate, or friend refers a victim to the appropriate clerk's office to file a civil protection order case, it is highly unlikely that she will receive any information about the possibility of pressing criminal charges. National surveys reveal that court clerks offer victims very limited assistance,¹²⁸ and that a substantial number actually discourage petitioners from filing for protective orders,¹²⁹ much less inform them of additional remedies to pursue.¹³⁰

A few victims manage to navigate both the criminal and civil systems. But the lack of coordination and information-sharing at intake confuses many battered women about the fundamental differences between the two kinds of cases. As one researcher put it, "If I had two words to describe what I see as the general experience of victims in the [justice] system, [they are] 'mass confusion.'"¹³¹ And the factor that "does the most damage in terms of follow through is that [victims] don't differentiate at all, or if they do, they differentiate incorrectly, between the civil and criminal systems."¹³²

The results can be devastating. In a recent study conducted in the District of Columbia,¹³³ for example, a woman was asked why she had failed to appear as a witness in the criminal prosecution of her batterer, which seriously jeopardized the likelihood of his conviction. She explained that during her civil protection order trial, she had pleaded with the judge to imprison the perpetrator. The judge responded that he had no power to do so. So when she received notification of the criminal trial date, she threw it away. Why, she thought, would the criminal

instead, the two factors most likely to lead to an arrest were whether the batterer was verbally abusive to the police officer and whether he had damaged a vehicle. *See id.* at 4, 6-7.

125. *See* NCSC CIVIL PROTECTION ORDER STUDY, *supra* note 59, at 79-80 (Delaware: 40%; Denver: 39%; District of Columbia: 22%).

126. *See* NCSC CIVIL PROTECTION ORDER STUDY, *supra* note 59, at 79-80 (Delaware: 43%; Denver: 46%; District of Columbia: 29%).

127. *See* Meeting Minutes, D.C. Domestic Violence Coordinating Council Civil Process Subcommittee (indicating that the widespread nature of this problem was noted by panel of long-time local practitioners in domestic violence law) (on file with author).

128. *See infra* text accompanying notes 197-201.

129. *See infra* text accompanying note 198.

130. Many clerks refuse to provide victims with any assistance on the ground that court employees should not dispense "legal advice," and in some jurisdictions legislation actually bars them from doing so. *See* FINN & COLSON, *supra* note 44, at 26-27. Other reasons for court personnel's apparent hostility toward victims are explored *infra*, text accompanying notes 188-197.

131. Videotape: Domestic Violence Training (U.S. Attorney's Office 1996) (remarks of Lauren Bennett, Ph.D. candidate) (on file with author) [hereinafter Domestic Violence Training].

132. *Id.*

133. *See* Lauren Bennett, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, J. INTERPERSONAL VIOLENCE (forthcoming 1999) (on file with author). The study was conducted prior to the institution of Washington's integrated domestic violence court.

case be any different?¹³⁴

2. *Failure to Coordinate Orders Entered in Multiple Cases Involving a Single Family*

Another major source of the traditional court system's failure is a deeply ingrained judicial tradition—the creation of an information vacuum around the finder of fact. A judge presiding over a case considers only the information formally submitted into evidence by the parties appearing before him—nothing more. Two predictable consequences flow from this tight restriction. First, a judge who is unaware of other related cases cannot possibly assess the most appropriate course of action. Second, different judges hearing parallel cases arising from the same incident frequently enter conflicting orders. The story that follows illustrates these problems.

Robin¹³⁵ filed a civil protection order case after her long-time boyfriend, Jim, high on PCP, tied her to a chair and beat her in the head and face with a thick electrical cord. After trial, Judge Jones held that Jim had committed an intrafamily offense and ordered him to stay away from Robin, her home, and her workplace. He awarded custody of the parties' two young children to Robin and gave Jim limited visitation rights, to commence only after Jim completed a drug treatment program and parenting classes. To eliminate potential sources of contact and conflict between the parties once visitation began, Judge Jones carefully specified the dates and times that visits would occur and designated Larry, who was Robin's uncle and got along fairly well with Jim, to transfer the children between parents. The civil protection order containing these provisions was to remain in effect for twelve months.

Soon afterward, the prosecutor decided to press charges against Jim for aggravated assault. So ten days after the civil protection order trial, in a different courtroom on a different floor, Judge Smith presided over Jim's arraignment. The case file in front of Judge Smith contained no cross-referenced data informing her that the defendant and complaining witness were involved in a civil case arising out of the same incident, or that a civil protection order was already in effect. And no one appearing before Judge Smith volunteered this information. Robin was not asked to appear in court at this early stage of the criminal process; even if she had been present, she was not a party to the criminal case and therefore probably would not have been given an opportunity to speak.¹³⁶ Because the court had no integrated intake process, the prosecutor had no

134. See Domestic Violence Training, *supra* note 131. See also Bennett, *supra* note 133 at 8.

135. See *supra* note 13.

136. The parties to a criminal prosecution are the defendant and the state. The victim's role is limited to that of a "complaining witness."

In the absence of an advocate, a victim also is likely to be too intimidated by the court process and the immediate presence of her abuser to speak. See Kinports & Fischer, *supra* note 98, at 216-18. And most victims would not understand the need to raise the issue, because they would assume that the judge already is informed about all pending cases.

information about any related civil case. And even if Jim told his defense attorney about the protection order, the lawyer might well have concluded that it would be against his client's interests to inform the judge of other lawsuits pending against him.

Left in the dark, Judge Smith ordered Jim released pending trial. She issued a typical criminal stay away order, directing Jim to stay away from Robin and her home, "except for reasonable rights of visitation with the children." The order was to remain in effect until trial, set in six months.

The family was then left to sort out two entirely inconsistent court orders. With which should they comply? Both orders were issued by trial court judges; neither had legal precedence over the other. If Jim now comes to Robin's apartment claiming he wants to exercise his "reasonable" visitation rights, he is in violation of the civil protection order. But what will the police do when Robin calls? Can they arrest Jim when he shows them Judge Smith's order, which gives him the right to be on the premises to see his children? And if Robin seeks to enforce her protection order by asking the court to hold Jim in contempt, she is unlikely to succeed. Jim has a strong argument that his violation was not knowing and "willful,"¹³⁷ because he thought he was complying with the terms of the criminal stay-away directive. Entry of the criminal stay-away order thus deeply undermined the effectiveness of Robin's civil protection order.

These failures of coordination and information sharing at intake and at trial preclude domestic violence victims from obtaining comprehensive justice. How can these problems be remedied?

B. *Integrated Domestic Violence Courts: A Modest Proposal for Reform*

The creation of specialized, integrated domestic violence courts affects increased case coordination from the point of intake through trial. Several jurisdictions have taken initial steps in this direction, either by consolidating all civil protection order cases into a single docket,¹³⁸ or by creating a dedicated calendar for domestic violence criminal prosecutions.¹³⁹ But until intake and case processing of civil and criminal cases are integrated into a single, coordinated system, the problems inherent in today's justice system cannot be resolved effectively. Only three jurisdictions—the District of Columbia, Florida, and Hawaii¹⁴⁰—have created such unified courts.

137. In most jurisdictions, the elements of criminal contempt include "willful" violation of a court order. See, e.g., *In re Thompson*, 454 A.2d 1324, 1327 (D.C. 1982).

138. See Mithra Merryman, *Specialized Domestic Violence Courts: A New Means to Address an Age Old Problem* 32 n.5 (1994) (unpublished manuscript, on file with author).

139. Examples of specialized criminal misdemeanor domestic violence dockets can be found in Chicago, Illinois; Winnipeg, Ontario; and Quincy, Massachusetts. See Jilian Mincer, *Victims of Abuse Seek Help in Experimental Court*, N.Y. TIMES, Aug. 11, 1985, at A28; Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U.L.REV. 329, 335 (1994); E. Jane Ursel, *The Family Violence Court of Winnipeg*, MANITOBA L. J. 100, 100-102 (1994).

140. The Dade County court was the first Florida court to integrate the civil and criminal domestic violence justice systems. See Cindy S. Lederman, *Dade County Domestic Violence Court: A Plan for the*

Integrated domestic violence courts typically aim to achieve at least three fundamental goals. First, they try to provide victims with a “one-stop shopping” intake center that provides comprehensive assistance with the full range of intimate violence litigation and related social services. Second, they try to coordinate civil protection order, family law, and criminal dockets so that the court can handle cases, to the greatest extent possible, on a “one family, one judge” basis.¹⁴¹ Finally, they ensure that the court itself is located in a place that provides victims with security and protection from physical assault.

1. A “One-Stop Shopping” Intake Center

An effective domestic violence intake center must serve as the point of entry for all domestic violence complainants in civil and criminal cases. It should be designed to provide comprehensive services through a coordinated effort of staff members from organizations and agencies with complementary areas of expertise and responsibility. A description of the District of Columbia’s Domestic Violence Intake Center illustrates some of the possibilities,¹⁴² although some aspects of this relatively new work-in-progress still work better in theory than in practice.

The Domestic Violence Intake Center, located in D.C.’s central courthouse, assists petitioners in “intrafamily” cases, which local law defines as those where the parties are related by blood, legal custody, marriage, cohabitation, a child in common, or a romantic relationship.¹⁴³ Victims are referred to the Intake Center by police officers, shelters, hotlines, and advocacy organizations.¹⁴⁴

Future, CT REV., Spring 1993, at 22-23. The state’s original Dade County model has been followed in Broward, Hillsborough, Jacksonville, and St. Petersburg counties. See Mertyman, *supra* note 138, at 3 n.4. In 1965, Hawaii established its unified family court, which includes all domestic violence cases. See Barbara A. Babb, *Where We Stand: An Analysis of America’s Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31, 38 (1998).

Of these three, the District goes furthest. First, the Dade County domestic violence court lacks jurisdiction to consider child custody, visitation, or support issues—even in civil protection order cases—a major drawback in providing comprehensive, effective relief to victims. Interview with Linda Dakis, Administrative Judge, Miami Domestic Violence Department, in Miami, Fla. (Nov. 1996). Second, the Dade County court does not incorporate any family law cases that can provide longer-term relief than that available in a civil protection order. See *id.* Hawaii’s family court’s have comprehensive jurisdiction, Babb, *supra*, at 42, but resource limitations prevent them from hearing criminal cases in some parts of the state. See LAUDAN Y. ARON & KRISTA K. OLSON, URBAN INSTITUTE, EFFORTS BY CHILD WELFARE AGENCIES TO ADDRESS DOMESTIC VIOLENCE: THE EXPERIENCES OF FIVE COMMUNITIES 33 (1997).

141. Other important features of integrated domestic violence courts that are beyond the scope of this Article are the provisions of meaningful intervention, counseling, and monitoring of abusers and the maximization of the provision of needed resources to the entire family.

142. The Domestic Violence Intake Center is jointly administered by the author, as Director of the Georgetown University Emergency Domestic Relations Project, and the Chief of the Office of Corporation Counsel’s Domestic Violence Unit. See DISTRICT OF COLUMBIA SUPERIOR COURT, DISTRICT OF COLUMBIA DOMESTIC VIOLENCE PLAN 63 (1995) (on file with author) [hereinafter D.C. DOMESTIC VIOLENCE PLAN]. Where no other citation is provided, the discussion below is based on the author’s personal knowledge as Co-Director of the Intake Center.

143. D.C. Intrafamily Offenses Act, D.C. CODE ANN. § 16-1001(5)(A)-(B) (1998).

144. Glitches remain in the attempt to centralize the intake process. In particular, some criminal cases are initiated directly through the prosecutor’s office with no Intake Center involvement. Efforts are being made to

When a victim enters the Intake Center, she first meets with a Civil Intake Counselor to discuss the protection order process.¹⁴⁵ Some Intake Counselors are employed by a private, outside advocacy organization;¹⁴⁶ others by a government agency.¹⁴⁷ The Intake Counselor conducts an intensive interview with each victim, explaining the protection order process and describing the potential relief. She assists the petitioner in filling out requisite pleadings and other court forms, and takes photographs of any visible injuries. The counselor describes what the petitioner can expect at the court hearing and helps her prepare for trial and identify potential witnesses and exhibits. The counselor discusses the option of obtaining an immediate, *ex parte* temporary protection order to cover the two-week period from intake to hearing, and assists the petitioner in developing a practical plan to keep herself safe.¹⁴⁸ If the victim is in particular need of legal assistance,¹⁴⁹ either because she is not sufficiently articulate to present her case to the court, or because her case involves complex legal issues or especially severe physical abuse, the counselor will assist her in obtaining representation by a government attorney, a local legal service provider, a volunteer member of the private bar, or a law school clinical program.¹⁵⁰

If the victim and batterer have minor children in common, the Intake Counselor explains the short-term nature of the relief available through a civil protection order. If the petitioner is interested in pursuing an additional action for permanent child support, she next sees a representative from the D.C. Office of Paternity and Child Support Enforcement, who assists her in filing a paternity and support petition. The civil protection order and paternity and support cases are scheduled for trial on the same day, so that any child support award can be entered in the long-term paternity and support case. This way, the payment obligation will continue until the children reach the age of majority, rather than

remedy this problem.

145. Four full-time counselors are on staff, all of whom have bachelors degrees or law degrees as well as substantial experience in the domestic violence field. One of the civil intake counselors is bilingual in English and Spanish, which is the language spoken by the largest minority language population in the District of Columbia.

146. This organization, the Emergency Domestic Relations Project, is a part of the Georgetown University Law Center's Domestic Violence Clinic. The author serves as Director of the Project, which has been providing legal information and referral services to victims of domestic violence for 20 years.

147. The Office of Corporation Counsel, the legal arm of the D.C. Mayor's Office, is statutorily designated to assist victims of domestic violence. See D.C. CODE ANN. § 16-1003(a) (1991). Until 1982, this office was the sole route to obtaining a protection order—no private right of action existed. See D.C. CODE ANN. § 16-1003(a) (1970) (amended 1982). Despite this fact, the Corporation Counsel failed to designate even a single full-time attorney to this caseload until 1990, 20 years after the statute was first enacted.

148. These services are provided to an average of over 20 petitioners every business day.

149. The overwhelming number of civil protection order cases filed each year—close to 4,000—preclude adequate legal representation of victims. As is true in virtually every other jurisdiction, only 30% of petitioners have counsel in Washington, D.C. See D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 143.

150. The Emergency Domestic Relations Project regularly trains private attorneys who are interested in representing victims of domestic violence in civil protection order cases, and the D.C. Bar Public Service Activities Corporation sponsors an annual family law training seminar that focuses on how to represent domestic violence victims. Law school clinical programs devoted to student representation of domestic violence victims exist at American, Catholic, Georgetown, and George Washington universities.

ceasing upon expiration of the one-year protection order. Although the Intake Center hopes to provide assistance with other family law cases in the future, such as divorce and custody suits, insufficient resources have precluded such activity to date.¹⁵¹

After meeting with a Civil Intake Counselor, the petitioner has an opportunity to meet with a U.S. Attorney's Office Victim Advocate to discuss the possibility of pursuing a criminal prosecution. The Victim Advocate explains the difference between, and complementary nature of, the civil and criminal justice systems and clarifies that both kinds of cases may be pursued simultaneously.¹⁵² If the accused perpetrator already has been arrested, the Victim Advocate collects information necessary to the decision of whether to press charges, including the victim's wishes, potential sources of proof, the severity of the offense, and the history of violence. The Advocate communicates this information to a prosecutor, who decides whether and how to charge the case.

If the batterer has not been arrested and the criminal justice process has not yet been initiated, the Victim Advocate makes a preliminary assessment of whether the case might merit prosecution. In such cases, if the victim is interested in pursuing a criminal action, the Advocate takes her to the police officer on staff at the Intake Center. The officer conducts an interview and initiates an investigation. If this leads to the issuance of an arrest warrant, a criminal prosecution may begin.¹⁵³

Representatives from the D.C. Coalition Against Domestic Violence, a grassroots victim service organization, also are on staff at the Intake Center. The Coalition advocates are available to provide interested victims with non-legal assistance, including referrals to emergency shelters, social service agencies, battered women's support groups, and counseling services.¹⁵⁴

After a petitioner completes the intake process, she goes next door to the central domestic violence clerk's office.¹⁵⁵ Specially trained clerks open the necessary case files and schedule hearing dates. They check the court's computer systems to discover other cases involving the same family members and attempt to bring the court files together so that the judge assigned the new case will have

151. The Chief Judge has committed to including all family law cases, other than child abuse and neglect, in the Domestic Violence Court. See Administrative Order No. 96-25, Re Domestic Violence Unit of the Court (Oct. 31, 1996) (on file with author); cf. DISTRICT OF COLUMBIA DOMESTIC VIOLENCE PLAN, *supra* note 142, at 38.

152. This information also is provided in written form, in CHARLOTTE CLARKE & DEBORAH EPSTEIN, U.S. DEP'T OF JUSTICE, KNOW YOUR RIGHTS: A VICTIM'S GUIDE TO THE DOMESTIC VIOLENCE JUSTICE SYSTEM (1997).

153. This facet of the intake system sounds better in theory than it is in practice. The Metropolitan Police Department has failed to assign a sufficiently well-trained and committed officer to the Intake Center; the result has been the presentation of a paucity of arrest warrant applications for approval from the prosecutor's office. Interview with Robert Spagnoletti, Chief, U.S. Attorney's Office Domestic Violence Unit, in Washington, D.C. (June 1, 1998).

154. Interview with Stephanie Snowden, Director, Victim Advocacy Program, D.C. Coalition Against Domestic Violence, in Washington, D.C. (Mar. 18, 1998).

155. This office bears the unwieldy title of Domestic Violence Coordination Unit. See DISTRICT OF COLUMBIA DOMESTIC VIOLENCE PLAN, *supra* note 142, at 55-58.

a complete case history.¹⁵⁶

The number of petitioners assisted at the Domestic Violence Intake Center is climbing steadily and currently averages twenty two per day,¹⁵⁷ in a city of 550,000.¹⁵⁸ Initial data indicate that increased coordination and advocacy services have opened up new options for victims. The number of civil protection order suits has increased substantially¹⁵⁹ and the number of criminal prosecutions has skyrocketed.¹⁶⁰

In addition, the Intake Center has facilitated a substantial increase in the entry of child support awards in domestic violence cases. Previously, such awards were entered in only 2.6% of civil protection order cases involving a custody order.¹⁶¹ Initial data indicate that child support is now being entered routinely in civil protection order cases in which the parties have children in common.¹⁶² In addition, petitioners who obtain child support orders now gain an enforceable obligation that lasts until the child reaches adulthood, instead of only one year; they also receive an average monthly payment of over three hundred dollars,¹⁶³ far above the previous fifty dollar average.¹⁶⁴

2. *Coordinated Judicial Calendars*

An effective court scheduling system must promote long-term judicial responsibility for cases and must maximize the information available to each judge about every case. A description of the Washington, D.C. Domestic Violence Court system provides a starting place for thinking about how to best accomplish these goals.

Prior to the formation of D.C.'s new court, judges were assigned to hear civil protection order cases on a monthly rotation, returning only after a several year hiatus. This exposure was far too short to gain any real expertise in the area, and many judges openly stated their disdain for the assignment. Several judges failed to take responsibility for even this short-term caseload, routinely continuing cases that appeared complex or time-consuming until the first business day of the next

156. Again, this component of the process is problematic in practice. Different sectors of the court utilize separate, and often incompatible, computer systems, making it inordinately burdensome to identify all relevant cases.

157. See Domestic Violence Intake Center Sign-In Sheets (Jan. 1, 1998-June 30, 1998) (copies on file with author).

158. See U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 28 (1998).

159. See Memoranda from Paul Roddy, Director, Domestic Violence Unit, to Eugene Hamilton, Chief Judge, D.C. Superior Court (Jan. 1996-June 1997) (on file with author) (Jan. 1997: 259 new Civil Protection Order (CPO) cases filed; Feb. 1997: 215; Mar. 1997: 298; Apr. 1997: 295; May 1997: 289; June 1997: 315) [hereinafter Roddy Memoranda.]

160. See *id.* (Jan. 1997: 193 new domestic violence criminal misdemeanors filed; Feb. 1997: 160; Mar. 1997: 232; Apr. 1997: 285; May 1997: 283; June 1997: 288).

161. See D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 148.

162. See Roddy Memoranda, *supra* note 159.

163. See OFFICE OF CORPORATION COUNSEL CUMULATIVE REPORT, DOMESTIC VIOLENCE PATERNITY AND SUPPORT CASES (1997).

164. See EMERGENCY DOMESTIC RELATIONS PROJECT ANNUAL REPORT (1995).

month, when another judge would rotate onto the calendar and perform the same ritual.

Today, three judges and one hearing commissioner are assigned to the court on a full-time basis for a year at a time. The judicial officers and their clerks now receive training¹⁶⁵ on domestic violence issues before commencing the assignment. Training sessions and written materials challenge commonly-held myths about domestic violence victims and perpetrators, and include discussions about applicable law and procedure, as well as special issues that may arise, such as cases involving immigrant and non-English-speaking parties, or special considerations applicable where parties appear *pro se*.¹⁶⁶ The assigned judges meet on a bi-weekly basis with a group of representatives from agencies and organizations involved with the court, including the prosecutor, public defender, victim advocates, the clerk's office, pretrial services, probation, and court administration. The meetings focus on efforts to identify and resolve existing procedural problems with the court and on strategies for continuing improvement.

Each judge presiding over a domestic violence case typically receives information about the other pending and resolved suits involving the same family.¹⁶⁷ By reading through the accumulated case files, he can obtain a more complete story about the parties' history together. This allows for a better-considered ruling and prevents the entry of multiple, conflicting orders.

3. Physical Location of the Court

Another important aspect of an improved court system involves the physical location and layout of a domestic violence court. A long-term failure to examine this issue has created physical hazards for domestic violence victims nationwide.¹⁶⁸

In Washington, D.C., civil protection orders previously were heard in a single courtroom, located on a dimly-lit, basement level of the courthouse—the only level that was excluded from hallway patrols by marshals and security officers. Although all cases were scheduled for 8:30 A.M., the courtroom did not open until 9:00 and the judge typically did not take the bench until 10:30 or later. Victims were forced to wait for hours alongside their batterers in the overcrowded courtroom or in the adjacent hallway. On numerous occasions lawyers were forced, by default, to intervene during verbal and physical attacks

165. Although the very existence of judicial training constitutes an improvement over the past, the training currently permitted by the court is still quite limited.

166. See, e.g., DEBORAH EPSTEIN, DISTRICT OF COLUMBIA DOMESTIC VIOLENCE BENCHBOOK: CIVIL PROTECTION ORDER CASES 42-44 (1997).

167. As mentioned, *supra* note 156, this coordination still works far better in theory than in practice. Improvement should occur when the court obtains a fully unified data processing system.

168. In response to the numerous gender bias task force reports highlighting this concern, a number of jurisdictions are beginning to make improvements. See, e.g., NEW YORK JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, FIVE YEAR REPORT 1 (1991).

by batterers.¹⁶⁹ Many jurisdictions have reported that victims are at risk of abuse in the courthouse itself due to the lack of separate waiting rooms and security services.¹⁷⁰

Today, Washington's Domestic Violence Court is housed on the first floor of the court building, in four adjacent courtrooms that are close to both the main entrance, staffed by a high concentration of U.S. Marshals and court security officers, and the child care center. Although scheduling cases and lack of separate waiting rooms for victims and perpetrators remain problematic, the improvements in lighting and security have reduced the incidents of hallway assault.

C. *Concerns Raised by An Integrated Intake and Calendaring Process*

There are several drawbacks to moving domestic violence cases into a specialized court. Insufficient physical space and personnel can result in a lack of privacy for victim interviews and lengthy intake waiting periods.¹⁷¹ Incompatible data processing systems can obstruct case coordination.¹⁷² Judicial training may be insufficient¹⁷³ and overburdened judges may become subject to burnout. Inadequate resources can prevent the provision of comprehensive services for batterers, survivors, and their children.

In addition, several policy concerns loom large. Perhaps the foremost of these is that an integrated domestic violence court may exacerbate a deeply-ingrained tension between those communities primarily concerned about domestic violence and those primarily concerned about child abuse and neglect.

An integrated court system creates an environment in which victims with children are more likely to have extensive contact with government attorneys and paralegals. This, in turn, means that government workers are more likely to hear about abuse that occurred in the presence of children or where children themselves actually were harmed. In the District of Columbia, this has led to an increase (albeit a small one) in the rate of government reports to Child Protective

169. From 1990 to 1996, I personally intervened in many such situations. For a description of one batterer's attempts to physically and verbally attack a petitioner as she waited to testify against him, see Transcript of Proceedings at 20, *Stephens v. Kelly*, No. 1490-91 (D.C. Sup. Ct. Nov. 26, 1991) (on file with author).

170. See D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 157; ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS: THE DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS (CALIFORNIA) tab 6, 23-24 (1990) [hereinafter CALIFORNIA GENDER BIAS TASK FORCE REPORT]; MASSACHUSETTS GENDER BIAS TASK FORCE REPORT, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS (Ruth I. Abrams & John. M. Grezney eds., 1989), at 91 [hereinafter MASSACHUSETTS GENDER BIAS TASK FORCE REPORT]; *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 516 (1993) [hereinafter MISSOURI GENDER BIAS TASK FORCE REPORT]; *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 1, 37 (1986-87) [hereinafter N.Y. GENDER BIAS TASK FORCE REPORT].

171. Sometimes the D.C. intake process is so lengthy that petitioners leave in frustration before they are provided with essential services.

172. See *supra* note 156.

173. See *supra* note 165.

Services.

These reports can result in two scenarios which may undermine the effective enforcement of domestic violence laws. In one, the victim herself is charged with child abuse. In the second, the perpetrator is charged with child abuse and the victim is charged with “failure to protect” the children. In either case, there is a substantial possibility that the children will be removed from the home and separated from both parents. These cases point to a long-standing historical conflict between the domestic violence community and the children’s rights community—a largely unnecessary one, given how much common ground they actually share.

Child advocates have focused primarily on the rapid removal of children from the violent home. But this approach underestimates the influence of adult-on-adult domestic abuse on the family dynamic. If battered women learn that seeking protection from their abusive partner increases the risk that their children may be taken away, they will be greatly deterred from coming forward. As more women become reluctant to pursue legal assistance, both they and their children, who are dependent on them to escape, ultimately will remain trapped in violent families.

Moreover, in many “failure to protect” cases, the victim stays with the perpetrator not because she does not care about the children, but because she believes that staying is the best way to do so. Statistically, the moment of leaving is frequently the most dangerous and the most likely to result in death—of both the victim and her children.¹⁷⁴ Adult victims are acutely aware of this possibility and, in addition, frequently report that the batterer threatens that if she leaves, he will take the children and she will never see them again. To stay and offer the children what protection she can may at times be a better option than to allow the perpetrator to abduct and mistreat the children.¹⁷⁵

I recently represented Phyllis Ojokolo,¹⁷⁶ a West African woman who came to the court’s Domestic Violence Intake Center seeking a civil protection order. Her husband Tom had slapped and punched her repeatedly all over her body; bitten her arms and back, leaving permanent scars; raped her repeatedly; kicked her in the head; broken a fishing rod across her back; thrown her down a staircase; choked her with a telephone cord; pulled handfuls of hair out of her head; pinned her to the floor and forced her two youngest children to beat her; and repeatedly threatened to kill her. He also frequently hit the children in the face and on their heads, and whipped them with belts, sometimes until they bled. Tom worked for the court, and Phyllis knew little about the American system of justice. So she believed him when he repeatedly told her that if she ever tried to leave him or take him to court, he would bring court employees to testify on his behalf and would convince the judge that she was insane and that the children

174. See Mahoney, *supra* note 41, at 65-71.

175. A woman’s fear that an abuser may abduct her children is well-founded: a strong connection exists between domestic violence and parental kidnapping. See Klein & Orloff, *supra* note 39, at 972.

176. See *supra* note 13.

should be taken away from her. Terrified of what might happen to her children, this threat kept Phyllis hostage to Tom's abuse for nine years.

But one night, Tom woke their five year-old daughter at 3:00 A.M. and dragged her into the bathroom, despite the girl's attempts to resist. A few hours later, Phyllis managed to get into the bathroom, where she saw blood on the tile floor. She later found her daughter's underwear in the washing machine, with remnants of blood stains still visible on the crotch. The little girl told her mother that she had been raped.¹⁷⁷ Phyllis had never before believed Tom was capable of sexually abusing the children; she decided—right then and there—that no matter what the risks were, she had to seek help.

She went to the Domestic Violence Intake Center and told her story to a government attorney, explaining that she wanted to get Tom out of the house and to terminate his contact with her and the children. The attorney immediately filed child abuse charges against Tom, but then informed Phyllis that failure to protect charges would be filed against her as well, on the ground that no one who had remained in an abusive environment for so long could be relied upon to protect the children from Tom in the future. The lawyer called the charges a "carrot," telling Phyllis that if she followed through on her civil protection order case, the failure to protect charges would be dropped.

Phyllis left court that day with an emergency order that terminated Tom's rights to see the children until the matter could be resolved at trial. A few weeks later, the court held a four-day hearing and issued a civil protection order barring Tom from contacting Phyllis or the children for a year and requiring him to go to counseling. He was denied any visitation rights and ordered to leave the family home. In the months that followed, Tom brought Phyllis back to court five times, attempting to regain contact with the children and obtain control over the family. Phyllis fought every motion and won each time. She took every form of legal action available to her to protect her children, and repeatedly proved that she was capable of doing so. She informed government prosecutors of each successful outcome, but they refused to drop the failure to protect charges. Trial in the abuse and neglect case against Phyllis and Tom was repeatedly delayed, and is now scheduled almost a year after Phyllis received her protection order. She has been forced to spend this entire period living with these charges hanging over her head, constantly terrified that the government will take her children away—just as Tom had always threatened.

In communities and cities like Washington D.C.,¹⁷⁸ stories like this one spread rapidly. Several clients have subsequently shared similar stories with me and have asked whether they can seek protection without risking their relationships with their children. In light of my experience with Phyllis, it is a difficult question to answer.

As Phyllis' case demonstrates, children right's advocates, in their fight to

177. She said, "Daddy put his pee pee place in me."

178. The District of Columbia has a population of 543,000. *See supra*, note 158.

protect young children from injury and death, too often fail to consider the dynamics of spousal abuse. However, domestic violence activists, desperate to bring the problem of woman abuse into public awareness and engender concern, have felt compelled to insist that all battered women are completely innocent victims. They have resisted recognizing that some victims belong to families where each member relates to one another through violence and threats of violence. I have repeatedly had experiences where a battered woman is seated in my office, telling me in detail about her husband's brutal assaults and her terror when he threatened to kill her. When her child gets too noisy playing in the waiting room outside, she pokes her head out of my door and yells, "If you don't quiet down, I'm going to kill you!" On some occasions I have seen a client hit her child or twist his arm, in a way that in my view exceeded acceptable disciplinary action. These moments are chilling.

It is time for domestic violence and children's rights advocates to take a more honest look at the relationship between woman abuse and child abuse, and to come up with more sophisticated solutions than automatic removal. These groups need to share their different areas of expertise so that everyone can do a better job of reducing violence in the family, in all its forms.¹⁷⁹

A handful of jurisdictions have brought domestic violence advocates and child welfare workers together to create long-term strategies to empower women to protect their children. Specialists in both fields exchange information, provide cross-training, and develop protocols for case handling and service provision.¹⁸⁰ In some places, in-house domestic violence experts are placed at each child protective service office, to provide ongoing training and consultation.¹⁸¹ Child advocates provide services to the non-violent parent that are not contingent on the filing of failure to protect charges. Domestic violence advocates incorporate services for abused children into their programs, recognizing that a child may have needs independent of those of the non-violent parent.¹⁸² Where these multi-faceted services are provided on a long-term, continuous basis, there appears to be a reduction of out-of-home placements for abused children whose mothers have also been abused.¹⁸³ Such programs are beginning to build the bridges

179. As an example of the type of information that should be shared and discussed in reformulating advocacy positions, it is worth noting that even in the worst cases, in which adult victims are also committing acts of violence against the children, studies indicate that such abuse typically decreases sharply when the main perpetrator of adult-on-adult violence is removed from the household. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 60-61 (1984) (eight times as many women report using physical discipline on their children while with the batterer than when living alone or in a non-abusive relationship); Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, 34 *FAM. REL.* 205, 208, 210 (1985) (noting that child abuse by both mothers and fathers decreased sharply when mothers stopped living with abusive men).

180. See ARON & OLSON, *supra* note 140.

181. See *id.* at 52-61, 79-80 (describing programs in Massachusetts and Oregon); Kevin Concannon, "Other Maine:" *The Way Life Shouldn't Be*, BANGOR DAILY NEWS, Oct. 23, 1997 (describing program in Maine).

182. See ARON & OLSON, *supra* note 140, at 131-33.

183. See ARON & OLSON, *supra* note 140, at 67-68 (describing coordinated approach used in parts of Massachusetts, where "the out-of-home placement rate was less than the statewide rate in the two area offices that piloted the Domestic Violence Teams.") (citation omitted).

needed to protect and support women and their children.

Another source of hope is this: When survivors learn about the intergenerational effects of domestic violence, they frequently react with a sense of epiphany about what has happened in their own lives and what may now be happening to their children. They often decide to seek counseling both for themselves and their children, to stop the injury inflicted by intimate abuse once and for all.¹⁸⁴ Advocacy groups would do well to identify ways to encourage and extend this impulse because of its potential to improve the lives of all of those victimized by domestic abuse.

The creation of an integrated court raises a fundamental and related policy concern that the court may become overly systematized.¹⁸⁵ Although integration and coordination can maximize battered women's access to services, it also can reduce their ability to decline such services if they wish to do so. For example, a woman who enters a comprehensive Intake Center seeking only a civil protection order is likely to also be automatically routed to a prosecution advocate to initiate criminal charges without being asked whether she wishes to do so. As discussed in Part III.B, *supra*, a battered woman may have many reasons to decline participation in a criminal case, but the coordinated intake process may push her into that arena without analysis of her personal concerns.

The more systematized a domestic violence court becomes, the more likely it is that a shift will occur away from woman-centered advocacy, in which each battered woman works with an advocate to define the assistance she needs,¹⁸⁶ and toward service-defined advocacy, where advocates focus on providing available services regardless of whether they fit into a particular woman's risk analysis or safety plan.¹⁸⁷ As in the domestic violence/child abuse and neglect context, it is crucial that expansion of the options available in intimate abuse cases occurs within a broader context of responsiveness to the particular needs of individual victims.

V. FAILURES OF NEUTRALITY: THE HOSTILITY OF JUDGES AND COURT PERSONNEL

The problems caused by ineffective or overzealous prosecutorial policies and the information-sharing failures of the conventional courts are not the only systemic obstacles victims of domestic violence must surmount. In addition, intimate abuse complainants must face a deeply-ingrained hostility often exhibited by court clerks and judges.

184. This conclusion is based on my 15 years of experience working with victims of domestic violence.

185. A third major policy concern, centered on the neutrality of judges, is discussed in Part IV, *infra*.

186. See Jill Davies et al., SAFETY PLANNING WITH BATTERED WOMEN 3 (1998) (defining the term "woman-defined advocacy").

187. See *id.* at 6 (defining the term "service-defined advocacy").

A. *Explanations for Judicial and Clerical Hostility toward Battered Women*

Most judges come to the bench with little understanding of the social and psychological dynamics of domestic violence and, instead, bring with them a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem. The most persistent of these myths is the belief that battered women could leave their relationships if they simply chose to do so. But this belief ignores the real-life obstacles facing women who wish to end their relationships.¹⁸⁸ These may include fear of retaliation;¹⁸⁹ lack of economic resources;¹⁹⁰ concern for children; emotional attachment to the perpetrator;¹⁹¹ perceptions of the availability of social support;¹⁹² and religious and culturally-based values and norms.¹⁹³ In addition, this belief ignores the fact that many women make numerous unsuccessful attempts to leave before they actually are able to do so,¹⁹⁴ and are punished with a more severe beating or even homicide.¹⁹⁵

Lack of knowledge about this basic aspect of domestic violence causes many judges and clerks to become frustrated with petitioners whom they perceive as "refusing" to leave the abusive relationship. Operating under this erroneous perception, they find the victim's behavior enormously frustrating.¹⁹⁶ Clerks across the country complain bitterly about domestic violence cases, claiming that they require too much work and that too often the victims drop their suits anyway.¹⁹⁷ This view results in clerks regularly refusing to provide assistance to petitioners and often actively discouraging them from filing for civil protection orders.¹⁹⁸ Some clerks refuse to tell battered women about the availability of such

188. This belief further assumes that leaving is the sole acceptable option for battered women, ignoring individual women's agency in making decisions about their own lives, as well as the religious and cultural norms that contribute to such decisions.

189. See Part III.B, *supra*.

190. See *supra* text accompanying note 43.

191. See, e.g., Herb Goldberg, *The Dynamics of Rage Between the Sexes in a Bonded Relationship*, in CLINICAL APPROACHES TO FAMILY VIOLENCE 59, 60-66 (James C. Hansen & Laurence R. Barnhill eds., 1982).

192. See *supra* text accompanying notes 94-96.

193. See *supra* text accompanying notes 74-81. For example, cultural norms may pressure women to remain in and attempt to preserve a marriage, despite physical abuse; they may pressure her to avoid seeking assistance from those outside the minority community. See also Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1319-20 (1991); RICHARD J. GELLES & CLAIRE P. CORNELL, INTERNATIONAL PERSPECTIVES ON FAMILY VIOLENCE (1983); DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE 52-66 (1980).

194. A study of more than 6,000 women in 50 different shelters showed that, on average, the women had made five prior help-seeking attempts before successfully leaving. See EDWARD W. GONDOLF, BATTERED WOMEN AS SURVIVORS 29 (1988).

195. See Mahoney, *supra* note 41, at 65-71; ANNA JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT (1994); see generally E.A. Stark & A. Flitcraft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE (V.B. Van Hasselt et al. eds., 1988).

196. The following discussion of judicial and clerical attitudes is based in large part on the findings of gender bias task force reports published during the period from the late 1980s to the mid-1990s. These reports typically discuss incidents and behavior patterns observed during the preceding five to 10 years. As a result, it is possible that some improvements have been implemented since the reports were issued.

197. See MISSOURI GENDER BIAS TASK FORCE REPORT, *supra* note 170, at 502-03.

198. See Kinports & Fischer, *supra* note 98, at 172-73 (stating that 56% of respondents reported such behavior in national survey of domestic violence service providers). See also *Minnesota Supreme Court Task*

orders; others refuse to assist victims in completing the necessary forms or refuse to make the forms available.¹⁹⁹ Others will inform a petitioner (incorrectly) that she can only get one protection order in a lifetime, "so she had better be sure this [is] the time she really need[s] it."²⁰⁰ Some clerks arrogate to themselves the right to screen cases to determine which will be presented to a judge.²⁰¹

Judges similarly mistreat domestic violence victims. When cases are brought by women who have dropped charges on previous occasions, judges have made such comments as: "'oh, it's you again,' or 'how long are you going to stay this time,' or 'you want to go back and get beat up again.'"²⁰² Others have gone so far as to threaten victims with sanctions for repeated use of the court system.²⁰³ A particularly egregious example occurred in North Dakota, where a judge is reported to have told a domestic violence petitioner, "If you go back [to the perpetrator] one more time, I'll hit you myself."²⁰⁴

In addition to their failure to understand the complexities of leaving abusive relationships,²⁰⁵ untrained court personnel and judges can and do misinterpret victim behavior that is symptomatic of the psychological trauma induced by extended abuse. Survivors of prolonged or severe domestic violence often exhibit some symptoms or meet the full diagnostic criteria for post-traumatic stress disorder (PTSD). This diagnosis, first constructed to explain the long-term psychological impact of traumatic combat on war veterans,²⁰⁶ produces three

Force for Gender Fairness in the Courts: Final Report, 15 WM. MITCH. L. REV. 871, 877 (1989) [hereinafter MINNESOTA GENDER BIAS TASK FORCE REPORT]; ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS: EXECUTIVE SUMMARY WITH STATUS OF RECOMMENDATIONS 11 (1990) [hereinafter ILLINOIS GENDER BIAS TASK FORCE REPORT].

199. See GENDER BIAS IN THE COURTS: REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 12 (1989) [hereinafter MARYLAND GENDER BIAS TASK FORCE REPORT]; ILLINOIS GENDER BIAS TASK FORCE REPORT, *supra* note 198, at 11. Such behavior occurs even in jurisdictions where clerical assistance is mandated by statute. See ILLINOIS GENDER BIAS TASK FORCE REPORT, *supra* note 198, at 11.

200. *Report on Gender and Justice*, 16 J. CONTEMP. L. 135, 211 (1990). The hostility of court clerical workers has become legendary in the domestic violence advocacy community. As one victim service provider from a rural southern community put it, "Court personnel will avoid helping [battered] women in any way they can." Kinports & Fischer, *supra* note 98, at 173.

201. See MINNESOTA GENDER BIAS TASK FORCE, *supra* note 198, at 877.

202. MARYLAND GENDER BIAS TASK FORCE REPORT, *supra* note 199 at 8.

203. See *id.*

204. North Dakota Commission on Gender Fairness in the Courts, *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N. DAK. L. REV. 1113, 1208 (1996).

205. While much of judicial hostility stems from a failure to understand domestic violence issues, some of it may occur because the judge himself is a batterer. In 1995, a New York judge was tried for assaulting his girlfriend. The girlfriend called 911 twice, saying, "I have a maniac over here attacking me. . . I want to keep this quiet because he's a judge." Daniel Wise, *Bronx Judge Is Acquitted After Assault Bench Trial*, N.Y.L.J., Feb. 17, 1995, at 1, 8. Although the girlfriend did not wish to press charges, the government proceeded and subpoenaed her to testify. Two police officers testified that when they arrived upon the scene, they looked into the window of the ground floor apartment and saw a man punching a half-naked woman in the head and chest. Two assistant District Attorneys testified that they saw the girlfriend in the complaint room with a black eye and bruises. She testified that the judge had not hit her and that her facial swelling was caused by menopause. She stated that her only injury was a split lip, which was self-inflicted when she lost her balance and fell into a door. The judge who conducted the bench trial ruled without opinion and found his colleague not guilty. See *id.*

206. See Judith L. Herman, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 27 (1992). Poet and historian Robert Graves describes how, as a civilian, he continued to react as though he were again in the trenches of World War I:

major categories of symptoms: “hyperarousal” (being in a constant state of alertness for and expectation of danger); “intrusion” (reliving the violent experience as if it were continually recurring in the present, through flashbacks and nightmares); and “dissociation” (a numbing response that includes repressing memories of violent incidents).²⁰⁷

These symptoms can profoundly affect the way a battered woman appears in court and, in turn, how she is perceived by a judge. Dissociation may cause many survivors to testify about emotionally charged incidents with an entirely flat affect, or to be unable to remember dates or details of violent incidents.²⁰⁸ Hyperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents.²⁰⁹ The psychological phenomenon of intrusion may cause a witness to have vivid flashbacks on the witness stand that interfere with her ability to testify.²¹⁰ But these explanations of battered women’s behavior are not intuitively obvious, and because they differ greatly from the behavior and demeanor that a judge encounters in his normal experience, they often are incorrectly interpreted as indications of her lack of credibility. As former prosecutor Cheryl Hanna puts it, in court, “batterers can appear charming, respectful, and persuasive; by contrast, abused women can appear hysterical, vindictive, or prone to exaggeration.”²¹¹

This can lead judges to identify with the batterer, distance themselves from the victim,²¹² and apply artificially heightened standards of proof.²¹³ A judge may refuse to issue civil protection orders when documentary or other physical evidence is absent,²¹⁴ when unbiased eyewitnesses are not available,²¹⁵ when the

I was still mentally and nervously organized for War. Shells used to come bursting on my bed at midnight, even though [my wife] shared it with me; strangers in the daytime would assume the faces of friends who had been killed. When strong enough to climb the hill behind Harlech and visit my favorite country, I could not help seeing it as a prospective battlefield.

Id. at 35 (quoting ROBERT GRAVES, *GOODBYE TO ALL THAT* 257 (1929)).

207. *Id.* at 35-47. Herman uses the term “constriction” rather than “dissociation.” I chose the latter because it may be somewhat more familiar to lay readers.

208. See Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, *HOFSTRA L. REV.* 1191, 1221 (1993); see. Herman, *supra* note 206, at 45.

209. See Herman, *supra* note 206, at 120.

210. Recently, one of my clinic’s clients was describing an incident in which her husband’s assault brought on a severe asthma attack, for which she required hospitalization. As she testified about the incident at trial, she began to have trouble breathing. Within moments she was hyperventilating; the trial had to be suspended while an ambulance took her from the courtroom to the hospital.

211. Hanna, *supra* note 10, at 1878. For an explanation of why battered women may appear this way in court, see *supra* text accompanying note 207.

212. See Hanna, *supra* note 10, at 1878.

213. See Kinports & Fischer, *supra* note 98, at 200-05.

214. See Kinports & Fischer, *supra* note 98, at 200-01; CONN. TASK FORCE, GENDER, JUSTICE, AND THE COURT 103-104 (1991) [hereinafter CONNECTICUT GENDER BIAS TASK FORCE REPORT] (reporting that 50% of Connecticut judges require evidence of physical injury before issuing a protection order and describing incident in which judge observed petitioner’s injuries, told her he had received worse bruises playing golf, and denied her petition); MARYLAND GENDER BIAS TASK FORCE REPORT, *supra* note 199, at 4 (reporting an instance in which judge told petitioner to “go back and get beaten up and have bruises” in order to get court protection). The Minnesota Task Force for Gender Fairness in the Courts reported an incident in which a judge told a petitioner to provoke a more serious incident in order to support a protection order. When the petitioner said, “I guess I need a knife in my back or at least to be bleeding profusely from the head and shoulders to get [a protection order],” the judge responded, “That’s just about it.” MINNESOTA GENDER BIAS TASK FORCE REPORT,

only witnesses are the parties and, therefore, a credibility determination is required;²¹⁶ or when the petitioner has failed to follow through with a protection order case on a prior occasion.²¹⁷ These kinds of standards have no basis in law and are not applied in other family law cases.

Judges and court personnel, like many laypeople, also frequently underestimate the seriousness and potential danger inherent in family abuse cases. A National Institute of Justice survey found that many judges report the belief that domestic violence consists of “verbal harassment, or a rare shove” and approach the issue as a “‘relationship problem’ amenable to marital counseling.”²¹⁸ Virtually every study of gender bias in the courts corroborates this finding. A widespread attitude exists that cases involving large financial interests and crimes perpetrated on non-intimates are the “real” cases, while domestic violence is an inferior assignment or even a hazing ritual for junior judges.²¹⁹ Too many judges call these cases “unimportant work”²²⁰ and make it known that they do not want them in their courtrooms.²²¹ They view criminal prosecutions of intimate abuse as “family matters” that do not belong in criminal court.²²²

A few examples illustrate the problem. In 1994, Kenneth Peacock found his wife in bed with another man. Several hours later, he shot her in the head with a hunting rifle.²²³ When Peacock pleaded guilty to voluntary manslaughter, the Maryland judge who presided over his case commented: “[T]he most difficult thing that a judge is called upon to do . . . is sentencing noncriminals as criminals.”²²⁴ He imposed an eighteen-month sentence, to be served on a work release program which allowed Peacock to reenter the community within two weeks of sentencing.²²⁵ In another case, a Florida judge took testimony that a

supra note 198, at 875.

215. See Kinports & Fischer, *supra* note 98, at 201-02.

216. See *id.* at 202.

217. See *id.*

218. See FINN & COLSON, *supra* note 44, at 4. See also Kinports & Fischer, *supra* note 98, at 207-10 (reporting results of national survey indicating that judges do not take civil protection order cases seriously and often treat petitioners in insensitive and disrespectful ways).

219. See Lynne Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1077-78 (1995).

220. MARYLAND GENDER BIAS TASK FORCE REPORT, *supra* note 199, at 4.

221. See *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 571 (1992) [hereinafter GEORGIA GENDER BIAS TASK FORCE REPORT].

222. See, e.g., *id.* at 571; EQUAL JUSTICE FOR WOMEN AND MEN: KENTUCKY TASK FORCE ON GENDER FAIRNESS IN THE COURTS 29 (1992) [hereinafter KENTUCKY GENDER BIAS TASK FORCE REPORT]; MARYLAND GENDER BIAS TASK FORCE REPORT, *supra* note 199, at 4; NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS: REPORT OF THE FIRST YEAR 20-21 (1984) [hereinafter NEW JERSEY GENDER BIAS TASK FORCE REPORT].

223. See Karl Vick, *Maryland Judge Taking Heat in Cuckolded Killer Case*, WASH. POST, Oct. 30, 1994, at A1, A28.

224. Schafran, *supra*, note 219, at 1063 (citing REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS (SENTENCING) at 13-14, *State v. Peacock* (Md. Cir. Ct. Oct. 17, 1994) (No. 94-CR-0943)). The judge added, “I seriously wonder how many married men, married five years or four years would have the strength to walk away, but without inflicting some corporal punishment. . . . I shudder to think what I would do.” *Id.* at 1064.

225. See *id.* at 1063. The judge further ordered Peacock to perform 50 hours of community service in a domestic violence program. See *id.* As Schafran points out:

man had doused his wife with lighter fluid and set her on fire. The judge burst into song in open court, crooning, "You light up my wife," to the tune of "You Light Up My Life."²²⁶ Similarly, a New York judge began a hearing with the comment, "Well, well, well, we had a little domestic squabble, did we? Naughty, naughty. Let's kiss and make up and get out of my court."²²⁷ These are just a few, particularly egregious examples culled from the studies and reports cited in this article. Although they may be somewhat atypical in terms of the extent of the insensitivity exhibited, they show how deeply ingrained the problem is.

Judges who do not understand the seriousness of family abuse often issue civil protection orders that fail to include the comprehensive relief necessary to stop future violence. Forty-three percent of domestic violence service providers across the country report that judges are unwilling to consider awarding remedies clearly authorized by statute, especially custody, child support, and other forms of financial relief.²²⁸ Similarly, gender bias task force reports indicate that judges impose lighter sentences on defendants convicted of domestic violence crimes than those involving violence against strangers.²²⁹

Finally, many judges find it frustrating to deal with *pro se* litigants. Because the vast majority of domestic violence petitioners appear without counsel, this problem is pervasive. Examples of this problem include a California judge who denied a petition in which a woman had stated that the batterer hit her "upside the head," claiming that he did not understand the allegation.²³⁰ A Connecticut judge is reported to yell at *pro se* battered women for filing their court papers incorrectly and to actually throw the papers at them.²³¹

Judicial hostility toward domestic violence petitioners is particularly disturbing given the positive impact a judge can have. Studies have shown that

Sentencing in domestic violence and sexual assault cases often includes highly misguided requirements that defendants work in battered women's shelters or rape crisis centers, which are the least appropriate placements for these type[s] of offenders. Victim empathy does not come from proximity to victims but from long, intensive, painful treatment in specialized batterers' and sex offenders' programs.

Id. at 1064.

226. SUPREME COURT OF THE STATE OF FLORIDA, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 121 (1990) (citing Debbie Boone, *You Light Up My Life*, on BEST OF DEBBIE BOONE (Curb Records 1990)).

227. N.Y. GENDER BIAS TASK FORCE REPORT, *supra* note 170, at 36.

228. See Kinports & Fischer, *supra* note 98, at 205-07; see also D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 148 (1992) (reporting child support awarded in only 2.6% of civil protection order cases involving a custody order).

229. See MISSOURI GENDER BIAS TASK FORCE REPORT, *supra* note 170, at 510; D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 126 (noting that 70% of respondents reported generally shorter sentences in criminal prosecutions where perpetrator and victim are married; 50% of respondents report same problem in domestic violence prosecutions involving unmarried intimates); *Vermont Task Force Report on Gender Bias in the Legal System: Introduction and Executive Summary*, 15 VT. L. REV. 395, 428 (1990-91); KENTUCKY GENDER BIAS TASK FORCE REPORT, *supra* note 222, at 29-31; ILLINOIS GENDER BIAS TASK FORCE REPORT, *supra* note 198, at 151-154; MASSACHUSETTS GENDER BIAS TASK FORCE REPORT, *supra* note 170, at 93 (64% of public defenders and district attorneys report sentences in domestic violence cases lower than other serious crime cases).

230. CALIFORNIA GENDER BIAS TASK FORCE REPORT, *supra* note 170, at tab 6, 20.

231. See CONNECTICUT GENDER BIAS TASK FORCE REPORT, *supra* note 214, at 104.

judicial warnings or lectures to defendants about the inappropriateness and seriousness of their violent behavior can improve some defendants' future conduct.²³² And victims report that receiving official affirmation from judges that they do not deserve to be abused helps them gain the strength to separate from their batterers.²³³

B. *Judicial Education as a Force of Change*

As the stories above illustrate, judges often do not understand either the psychological dynamics of relationships involving domestic violence or the obstacles facing battered women who seek legal protection. To remedy this deficit, judges need to receive the education necessary to adequately perform their jobs.²³⁴ Education can be a highly effective tool for reclaiming judicial neutrality. For example, after attending a national interdisciplinary conference on domestic violence sponsored by the State Justice Institute, Nevada District Court Judge Terrance P. Marren disclosed that he had grown up in a family where his father abused his mother, and that "although he once perceived that he was dealing fairly with the abuse cases that came before him, his experience with judicial education showed him that he had a great deal to learn. . . ."²³⁵ He has since persuaded the Nevada Supreme Court to require every judge to attend a two-day local conference on family violence.²³⁶

In Washington, D.C., judges assigned to the new Domestic Violence Court are required to undergo formal training on intimate abuse and accept a long-term (one-year) assignment, to allow them to build a reservoir of experience. Although the training opportunities have been limited,²³⁷ the community already has witnessed substantial differences in judicial treatment of these cases.

A telling example lies in the change in judicial response to requests for custody and child support in civil protection order cases. As discussed in Part II, *supra*,²³⁸ rapid resolution of these issues is of extreme importance in domestic violence cases, where perpetrators commonly use financial leverage and threats of child kidnapping to manipulate and control their victims.

Prior to the Court's formation, D.C. judges awarded temporary custody in less than half of the civil protection order cases, despite clear statutory authorization to grant such relief.²³⁹ They awarded child support in only 2.6% of

232. See NATIONAL INSTITUTE OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 96 (1983) [hereinafter NIJ: NON-STRANGER VIOLENCE]; U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 36 (1984) [hereinafter AG'S FINAL REPORT].

233. See NIJ: NON-STRANGER VIOLENCE, *supra* note 232, at 96.

234. Virtually every study of court response to domestic violence has recommended judicial training as a necessary remedy to existing systemic problems. See, e.g., Kinports & Fischer, *supra* note 98, at 210-12.

235. Schafran, *supra* note 219, at 1073.

236. See *id.*

237. The training for incoming judges has been limited to one to two days.

238. See *supra* text accompanying notes 42-43.

239. See D.C. CODE ANN. § 16-1005(c)(6)(1998); D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 147.

civil protection order cases where the parties had a child together, and 4.9% of those cases involving a custody order,²⁴⁰ although such an award also is authorized by statute and case law.²⁴¹ This kind of track record is typical nationwide; forty-three percent of domestic violence service providers report that judges are unwilling to consider awarding these kinds of remedies.²⁴²

In the new Court, however, judges now routinely award custody based on the best interest of the child standard as well as child support based on D.C.'s financial guidelines. They even occasionally take the time to talk to perpetrators about the harmful impact that witnessing adult-on-adult abuse can have on children and the intergenerational nature of domestic violence.²⁴³

C. *Maintaining Judicial Neutrality*

In those few jurisdictions that have implemented domestic violence courts, the defense bar consistently has complained that judicial education about family abuse and extended tenure on a calendar devoted to such cases creates a pro-victim, anti-defense bias.²⁴⁴ Although this criticism is based solely on anecdotal

240. See D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 148.

241. See D.C. CODE ANN. § 16-1005(c)(10); Powell v. Powell, 547 A.2d 973, 974-75 (D.C. App. 1988).

242. See Kinports & Fischer, *supra* note 98, at 205.

243. Because the D.C. Domestic Violence Court was implemented so recently, only the author's observational data currently exist to support this point. More systematic, quantitative data should be forthcoming over the next two years based on a comprehensive study being launched by the National Center for State Courts.

244. See Opposition to Government's Motion to Transfer and Motion to Dismiss, *filed in United States v. Castro*, Case No. M-3987-97 (D.C. Super. Ct. 1997) at 6 [hereinafter Opposition] (on file with author); Response of the Public Defender for the Eleventh Judicial Circuit to the Proposed Local Rule, *filed in In Re: Local Rule to Establish a Domestic Violence Court in the Eleventh Judicial Circuit*, Case No. 84,051 (Fla. 1994) at 10 (on file with author). I have heard this issue raised by numerous defense attorneys in Washington, D.C., both from the Public Defender Service and the private bar.

Another constitutional challenge raised by the defense bar is that a specialized domestic violence court involves the discriminatory exercise of prosecutorial discretion against male defendants. See Opposition, *supra*, at 5-9. The trial court found no constitutional violation; the issue is still pending on appeal. Citing statistics indicating that more than 75% of those accused of domestic violence crimes are male, the District of Columbia Public Defender Service argues that the prosecution has violated defendants' equal protection rights. See *id.* at 7-8.

This issue was addressed 20 years ago by the Supreme Court, in *Personnel Administrator of Massachusetts v. Feeney*. 442 U.S. 256 (1979). There, a woman filed an equal protection challenge to a Massachusetts statute creating a selection preference for all veterans who applied for state civil service positions. See *id.* at 259. Although the law was gender-neutral on its face, over 98% of veterans in the state were male at that time. Accordingly, the law operated overwhelmingly to the advantage of male applicants. See *id.* at 270. The Court found no constitutional violation in this differential, adverse impact on women. It held that when a statutory classification is gender-neutral on its face, no equal protection violation occurs unless the plaintiff is able to demonstrate that "a gender-based discriminatory purpose has, at least in some measure, shaped [the classification]." *Id.* at 276.

In the District of Columbia, no evidence of an anti-male discriminatory purpose exists in the U.S. Attorney's Office policy of aggressive prosecution in domestic violence cases. Indeed, the indictment of men in 75% of domestic violence case is hardly surprising, given the overwhelming evidence that over 90% of domestic violence victims are women. See Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 75 (1992) (refuting the claim that violence against husbands is about as prevalent as violence against wives). The predominance of female complainants and male perpetrators does not reflect discriminatory purpose, but simply a fact repeatedly demonstrated by social science researchers: the vast majority of family abuse perpetrators are men.

evidence, most litigants and attorneys agree that these courts create a substantial change in judicial attitudes toward domestic violence cases.²⁴⁵ Given the extensive history of anti-*victim* bias among judges,²⁴⁶ however, it is difficult to believe that a newly-organized court could have an impact so fundamental as to not only level the playing field, but to regrade it in the opposite direction—against perpetrators.

The existence of a judicial bias created by domestic violence training can be empirically detected, and initial data from the District of Columbia experiment indicate that no such bias exists. Since the inception of the new domestic violence court, the percentage of civil protection orders issued in contested cases has actually decreased, from 86% in 1989 to 78.6% today.²⁴⁷ If the newly-trained judges have developed a bias in favor of victims, why has the overall victim success rate decreased?²⁴⁸

Similarly, judges' extended exposure to and experience with a domestic violence calendar does not appear to erode their impartiality. The percentage of civil protection order trials in which domestic violence judges grant the petitioner's request for relief remained fairly constant during the first six months of the D.C. Domestic Violence Court's operation, with cyclical fluctuations between seventy-one percent and eighty-three percent.²⁴⁹ No trend of increased sympathy for alleged victims is apparent. The same is true for non-jury trials in criminal misdemeanor prosecutions, where the government success rates fluctuated between sixty-nine percent and seventy-six percent.²⁵⁰

Of course, any judicial bias that is created—or simply perceived to exist—must be taken seriously. Although some victim advocates are perfectly comfortable with the idea of an anti-defense bias, it is in fact an issue that should be of equal concern to victims as it is to perpetrators.

Recent social science research demonstrates that defendant compliance with

This case is therefore distinguishable from the selective prosecution claim pursued in *United States v. Armstrong*, 517 U.S. 456 (1996). In *Armstrong*, defense attorneys requested discovery in support of a charge that the federal government was selectively prosecuting blacks in cases involving distribution of crack cocaine. Although the Supreme Court held that defendants had failed to meet the requisite threshold to obtain discovery, in dissent Justice Stevens expressed concern that:

[I]t is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only four percent of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black.

Id. at 479-80 (Stevens, J., dissenting). Here the evidence is quite different: the vast majority of those committing *and* being prosecuted for crimes of intimate abuse are men.

245. See Skolnick, *supra* note 61.

246. See *supra* text accompanying notes 191-222.

247. See D.C. GENDER BIAS TASK FORCE REPORT, *supra* note 44, at 145 (noting that orders were granted in 86% of contested cases in 1989); Roddy Memoranda, *supra* note 159 (noting that orders were granted in 79.1% of contested cases in the first six months of the new Domestic Violence Court).

248. It should be noted that one possible explanation for the decrease in victim success rates is the overall increase in the number of civil protection order cases filed since the court began operation.

249. See Roddy Memoranda, *supra* note 159. The monthly petitioner success rates for 1997 are as follows: Jan.: 83%; Feb.: 81%; Mar.: 71%; Apr.: 81%; May: 75%; and June: 81%. See *id.*

250. See *id.* The government success rate during the first six months of 1997 is as follows: Jan.: 74%; Feb.: 74%; Mar.: N/A; Apr.: N/A; May: 69%; and June: 76%. See *id.*

court orders depends more on the “procedural justice” with which the sanction is delivered than on the certainty and severity of the sanction itself. Unlike deterrence theory, which dictates that people obey the law when the benefits of compliance outweigh the costs, the procedural justice model recognizes that in many instances compliance occurs out of a sense of duty or morality, rather than self-interest. The obligation to comply arises when the courts imposing orders are viewed as moral and legitimate—when they treat people fairly. The perceived fairness of court proceedings has a direct impact on the likelihood that a person will comply with the court’s ultimate decision—regardless of whether he considers that decision to be right or wrong.²⁵¹

If people feel unfairly treated by a court, they will perceive it as less legitimate and as a consequence obey its orders less frequently.²⁵² A crucial element of this body of research, according to one of its pioneers, Tom Tyler, is that:

[P]eople want to be treated fairly by authorities independent of any effect on favorable outcomes. [A]dhering to fair procedures will cement persons’ ties to the social order because it treats them with dignity and worth and certifies their full and valued membership in the group. [B]eing treated fairly by authorities, even while being sanctioned by them, influences both a person’s view of the legitimacy of group authority and ultimately that person’s obedience to group norms.²⁵³

Researchers have identified several building blocks of procedural justice. One is the extent to which a person has the opportunity to state his case and be heard.²⁵⁴ Another is the impartiality of the relevant legal authority.²⁵⁵ Finally,

251. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 108 (1990).

252. See *id.*

[P]rocedure reflects the diverse values of distributive justice found in such a pluralistic society as the United States. Because there is no single, commonly accepted set of moral values against which to judge the fairness of outcomes or policies, such evaluations are difficult to make. People can however agree on the fairness of procedures for decision making. [Individuals’] [e]valuations of authorities, institutions, and policies therefore focus on the procedures by which they function, rather than on evaluations of their decisions or policies. If the consensus that binds together society is in fact a procedural consensus, then authorities need to be especially concerned with maintaining fair procedures for making allocations and resolving disputes.

Id. at 109 (citations omitted).

253. *Id.* at 165.

254. See *id.* at 136, 137-38, 163. In fact, even giving individuals the opportunity to speak after a decision has been made (and therefore after it can have any direct influence on outcome) has been proven to be related to perceptions of fair judgments. See Allen E. Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

The importance of this concept has long been recognized by authorities. An Egyptian judge’s manual written in 2300-2150 B.C. advises:

If you are a man who leads
Listen calmly to the speech of one who pleads;
Don’t stop him from purging his body
Of that which he planned to tell.
A man in distress wants to pour out his heart

respectful, ethical treatment by legal authorities is “directly related to perceptions that authorities are moral, legitimate, and [] deserving of compliance.”²⁵⁶

The provision of procedural justice has a demonstrable impact on compliance in the domestic violence arena. In a recent study, researchers considered the effect of a batterer’s perception of police fairness on intimate abuse recidivism rates.²⁵⁷ The pre-existing literature on this subject had focused exclusively on the impact of different police-imposed *sanctions* (warning, mediation, and arrest) on recidivism; the results were equivocal.

The principal investigators in the original police arrest experiment concluded that their study “strongly suggest[ed] that police should use arrest in domestic violence cases,” because arrest was most highly correlated with low recidivism rates.²⁵⁸ But when six replication studies were conducted in different jurisdictions, the findings ranged from arrest having no effect, to a deterrent effect, to an escalation effect.²⁵⁹ And even within the same jurisdiction, the effect of arrest often varied based on the length of detention and certain offender characteristics, such as employment and other ties to the community.²⁶⁰

What these studies ignored was the possibility that the procedures employed by the police might have affected the results. In 1997, researchers revisited the data from all seven studies to determine whether “the *manner* in which sanctions are imposed has an independent and more powerful effect on spouse assault than the sanction outcome itself.”²⁶¹ They found that perceptions of procedural justice have a statistically significant impact. The frequency of recidivist domestic abuse was lower for those perpetrators given only a warning than for those who were arrested, in cases where the arrested offenders perceived that they had been treated in a procedurally unfair manner.²⁶² The frequency of subsequent abuse was far lower, however, when arrestees believed they had been treated fairly.²⁶³

This study (and others like it) has substantial implications for judicial proceedings. Issuance of a civil protection order means little if the batterer views the order as illegitimate and therefore feels free to ignore it. By ensuring that all

More than that his case be won.
About him who stops a plea
One asks “Why does he reject it?”
Not all one pleads for can be granted,
But a good hearing soothes the heart.

TYLER, *supra* note 251, at 148 (quoting J.L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1981)).

255. See Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 *LAW & SOC’Y REV.* 163, 168 (1997).

256. *Id.* at 168. Other identified components of procedural justice include consistency in decision-making and accuracy and correctability of procedures. See *id.* at 167-68.

257. See *id.* at 166.

258. LAWRENCE W. SHERMAN & RICHARD A. BERK, *THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 6* (1984).

259. See Paternoster et al., *supra* note 255, at 164.

260. See *id.* at 165.

261. *Id.* (emphasis in original).

262. See *id.* at 184.

263. See *id.*

parties are provided with procedural justice, judges can influence responsiveness to their orders. Judges who recognize and respond to people's normative concerns can exercise their authority more effectively; their rules and decisions are more likely to be voluntarily accepted and complied with. As a result, judicial training must be targeted toward the eradication of existing anti-victim biases within a larger framework of promoting procedural justice.

VI. CONCLUSION

The impact of impressive legislative innovations in the domestic violence field have been thwarted by a relatively stagnant justice system. To ensure that victims obtain the full relief to which they are now entitled, prosecutors, judges, and the court system must implement extensive reforms.

Such reforms are beginning to emerge in the criminal justice field, where in an increasing number of jurisdictions police are operating under mandatory arrest laws and prosecutors are adopting no-drop prosecution policies. But as these officials move toward the laudatory goal of treating domestic violence with the seriousness paid to stranger crimes, it is time to re-examine whether precise parity is the appropriate goal. Victims of intimate violence have a particularly strong interest in the way their criminal prosecutions are handled; perhaps they should be given a stronger voice in and control over the process than exists in the context of stranger assaults.

The court system also must respond to the special needs of families afflicted by domestic abuse. Long-standing failures in information-sharing and coordination must be remedied so that victims may access the wide range of complementary relief necessary to accomplish a safe termination of the battering relationship. Fully integrated domestic violence courts like the one recently created in Washington, D.C. provide an illustration of the substantial potential inherent in this approach.

But these integrated courts can create problems of their own, including an increased likelihood that battered women will be deterred from coming forward out of fear that failure to protect charges will be filed against them. Domestic violence and children's rights groups need to begin an honest dialogue about this problem and implement creative solutions that maximize the remedial resources available to both women and children who have suffered physical and psychological harm.

Finally, judicial failure to understand either the psychological dynamics of relationships involving domestic violence or the obstacles facing battered women seeking legal protection has led to a pronounced anti-victim bias in the courts. Judicial education about the realities of intimate abuse, along with increased exposure to the issue through extended assignments to a domestic violence calendar, can begin to alleviate this problem. But such judicial training programs must be developed within a larger context of concern for the delivery of procedural justice to both victims and perpetrators to maximize the likelihood of

perpetrator compliance with court directives.

Prosecutors, judges, and the courts often serve as the last resort of victims of domestic violence. If the legislative improvements of the past thirty years are to have real impact, these components of the justice system must undergo substantial self-reflection and corresponding reform.