

April 2002

## Procedural Justice: Tempering the State's Response to Domestic Violence

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PROCEDURAL JUSTICE: TEMPERING THE STATE'S  
RESPONSE TO DOMESTIC VIOLENCE

DEBORAH EPSTEIN\*

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## INTRODUCTION

When the battered women's movement grew out of the broader feminist movement in the late 1960s and early 1970s,<sup>1</sup> victims of domestic violence faced monumental practical and political obstacles. No term for intimate abuse existed in the national lexicon; virtually no shelters or safe houses devoted to battered women had been established; no civil laws had been enacted to deal with the emergency aftermath of an abusive incident; and the government had a long track record of ignoring the problem or even protecting perpetrators.<sup>2</sup>

Over the past thirty years, movement activists have focused their energies on revolutionizing the terms of the debate, turning domestic violence into a widely condemned practice, and transforming the responses of police, prosecutors, and the courts. Their efforts resulted in major legal reforms that have substantially expanded and improved the justice system's responsiveness to victims.

Given the enormous barriers that once confronted battered women—and still confront them today—it is hardly surprising that most scholars, policymakers, and activists have been relatively unconcerned that most recent reforms have reduced the level of procedural justice accorded to batterers. Although no conscious strategic decision was made to target batterers' sense of fair and respectful treatment by authorities, that is in fact what has happened.

The wisdom of this approach—promoting responsiveness to battered women at the expense of providing fair treatment for perpetrators—must be questioned in light of an emerging body of social science research. Although infrequently raised in discussions of criminological theory, social psychologists have developed a rich

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1. As Elizabeth Schneider explains, "The battered women's movement defined battering within the larger framework of gender subordination. Domestic violence was linked to women's inferior position within the family, discrimination within the workplace, wage inequity, lack of educational opportunities, the absence of social supports for mothering, and the lack of child care." ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 23 (2000).

2. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 9-11 (1999).

understanding of the psychology of authority. Researchers evaluating why people obey the law have found that the *manner* in which an official directive is reached has an independent, and often more powerful, effect than does the *outcome* of the directive itself.<sup>3</sup> The likelihood of a person's compliance with the dictates of police and probation officers, or with court orders issued in civil or criminal cases, is at least as firmly rooted in his perception of fair process as in his satisfaction with the ultimate result.

This idea may seem counterintuitive in a culture steeped in deterrence theory, which holds that compliance with the law is based predominantly on a self-interested analysis of whether the benefits of obedience outweigh the costs.<sup>4</sup> But procedural justice research indicates that the use of fair procedures—allowing a person to state their views, ensuring that their perspective is taken seriously, and demonstrating that officials maintain an open mind about this person and their case—enhances a person's sense that authorities are moral and legitimate.<sup>5</sup> This perception facilitates a person's sense of self-worth and, in turn, his degree of compliance, even when this conflicts with immediate self-interest.<sup>6</sup>

How has this critical loss of procedural justice occurred? In the criminal system, an ever-growing number of jurisdictions have adopted a series of discretionless policies, including: mandatory arrests, which require police to arrest in domestic violence cases; no-drop prosecutions, which require that a criminal case go forward regardless of the victim's wishes; and mandatory stay-away orders, which require perpetrators to stay away from victims during the pendency of a prosecution. These developments, along with other system reforms, create a relatively uniform government response, but also reduce the ability of state actors to tailor their actions in response to individual circumstances. This, in turn, reduces the likelihood that defendants will voice their version of events, perceive they are being treated with respect, and feel that state authorities are attempting to be fair.

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3. See *infra* notes 142-69 and accompanying text.

4. See *infra* notes 140-41 and accompanying text.

5. See *infra* notes 142-69 and accompanying text.

6. See *infra* notes 142-69 and accompanying text.

On the civil side, a recently convened panel of national experts drafted the Model State Code on Domestic and Family Violence, which recommends extensive expansion of judicial power in protection order cases.<sup>7</sup> The Model Code authorizes short-term, emergency protection orders on the basis of second-hand, unsworn accounts provided by police officers over the telephone.<sup>8</sup> It further authorizes permanent protective orders of indefinite duration, in the absence of either prior notice to the perpetrator or an *ex ante* opportunity for the accused<sup>9</sup> to be heard.<sup>10</sup> These provisions would permit a highly unusual end-run around long established notions of due process in civil cases.

To date, reformers have sought to protect victims regardless of the impact on batterers, and have paid little attention to the potentially close connection between victim safety and abusers' sense of fair treatment. But because procedurally flawed policies are likely to undermine abuser compliance with official directives, a new focus is necessary for victims' long-term protection. Of course, treating defendants with neutrality, respect, and consistency is solidly grounded in Anglo-American jurisprudence, morality, and decency. If such treatment also improves compliance, however, it is of special importance to intimate partner abuse cases, where repetitive, escalating violence is a predictable scenario for most victims.<sup>11</sup>

Part I of this Article documents the recent legal reforms implemented on behalf of battered women in the criminal and civil justice systems. These include warrantless arrest, mandatory arrest laws,

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7. See *infra* notes 80-83 and accompanying text.

8. See *infra* notes 84-88 and accompanying text.

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

10. See *infra* notes 97-98 and accompanying text.

11. Primarily because relatively few domestic violence activists, academics, and policymakers appear to be seriously concerned with procedural fairness for accused perpetrators, this Article focuses on the direct impact of such fairness on the *victim*. In my experience of almost twenty years in the movement, I have found that moral and philosophical arguments for fairness to batterers typically receive a less-than-warm reception. If key individuals are to modify their strategies for addressing the problem of intimate partner abuse by increasing procedural justice for batterers, many of them must be convinced that such reforms ultimately will promote victim safety.

and no-drop prosecution policies, as well as civil protection order statutes and statutory modifications recommended by the Model State Code on Domestic and Family Violence. Part II describes the ways in which these reforms have improved the state's responsiveness to victims, yet simultaneously entailed serious costs by diminishing batterers' perceptions of procedural justice. Part III defines the building blocks of procedural justice and reviews the social science data demonstrating its importance for increasing batterers' compliance with legal directives. In addition, Part III argues this research indicates that those concerned with victim safety cannot ignore batterers' perceptions of fairness. The implications of this idea are explored in Part IV, with suggestions for reforms to foster a sense of fair process for perpetrators. Police and prosecutors must provide defendants with expanded opportunities to feel heard and respected, while simultaneously improving advocacy services for victims. Defense attorneys must take advantage of their special position of trust to encourage batterers to comply with legal dictates. Judges must communicate greater respect for and understanding of defendants, particularly in pro se contexts. And in civil protection order cases, defendants must receive more and better information and must have access to a more individually tailored, responsive pretrial negotiation process. Finally, Part V explores two cautionary notes to this analysis. First, the special characteristics of the batterer population—including information-processing deficits that result in misconstrual of social stimuli—may distinguish abusers from the other research groups. Second, victims themselves also may play a crucial role in batterer compliance—a potentially confounding factor to consider in future studies.

Working to improve the conditions abusers face has long been considered taboo in the battered women's movement. As one example, the 1994 and 2000 federal Violence Against Women Acts appropriated millions of dollars for state and local programs to reduce domestic violence.<sup>12</sup> But in response to activist demands,

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12. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000) (codified as amended at 42 U.S.C. §§ 13701, 3789p, 3796gg-2); Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, 42 U.S.C. and FED. R. EVID. 412).

both statutes strictly prohibit the expenditure of any monies on batterer counseling or other preventive services for perpetrators.<sup>13</sup> This approach to protecting battered women is short-sighted. Ultimately, the safety of domestic violence victims is directly linked to the perceptions and experiences of their intimate partners.

# I. IMPROVING THE STATE'S RESPONSE TO BATTERED WOMEN AT THE EXPENSE OF PERPETRATORS' PERCEPTIONS OF PROCEDURAL JUSTICE

As the battered women's movement took shape in the late 1960s and early 1970s, it rapidly became clear that domestic violence was far too serious and widespread to be resolved solely in the private realm through shelters, empowerment groups, and community education workshops.<sup>14</sup> Battering by husbands, ex-husbands, or lovers is the single largest cause of injury to women in the United States,<sup>15</sup> and accounts for thirty-one percent of all murders of women.<sup>16</sup> Physical aggression occurs in at least one out of four marriages, and comparable rates exist among couples who are living together, engaged, or dating.<sup>17</sup> Domestic violence is also a major contributing factor to other social ills such as child abuse and neglect, female alcoholism, drug abuse, mental illness, attempted

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13. *Id.*

14. *E.g.*, SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 29-52 (1982).

15. 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).

16. BUREAU OF JUSTICE, DOMESTIC VIOLENCE STATISTICS (1989).

17. Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, in 11 CRIME AND JUSTICE—A REVIEW OF RESEARCH: FAMILY VIOLENCE 163, 177-80 (Lloyd Ohlin & Michael Tonry eds., 1989); 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 95, 110 (Murray A. Straus & Richard J. Gelles eds., 1990) (stating that 161 out of 1000 couples experienced one or more physical assaults on a partner during 1985 alone); Murray A. Straus & Richard J. Gelles, *How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES, *supra*, at 227, 231-33; David B. Sugarman & Gerald T. Hotaling, *Dating Violence: Prevalence, Context, and Risk Markers*, in VIOLENCE IN DATING RELATIONSHIPS: EMERGING SOCIAL ISSUES 3, 6-7 (Maureen A. Pirog-Good & Jan E. Stets eds., 1989).



suicide, and homelessness.<sup>18</sup> But a history of strong opposition to—or deep ambivalence about—state intervention in family violence cases has long undermined any meaningful government response.

For hundreds of years, the law explicitly endorsed domestic violence, upholding a husband's right to physically "chastise" his wife.<sup>19</sup> Not until the late nineteenth century did most states begin to move away from this position.<sup>20</sup> Even then, many continued to assert that in the absence of "serious" violence, the government

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18. NAT'L CTR. FOR STATE LEGISLATURES, *TILL VIOLENCE DO US PART* 26 (1993); Jane H. Pfouts, *Violent Families: Coping Responses of Abused Wives*, 57 *CHILD WELFARE* 101 (1978).

19. In the words of the Mississippi Supreme Court, this rule allowed a husband to "use salutary restraints in every case of [a wife's] misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned." *Bradley v. State*, 1 Miss. (1 Walker) 156, 157 (1824); see also *State v. Black*, 60 N.C. (1 Win.) 262 (1864) (permitting a 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, or there be an excess of violence, or such a degree of cruelty as shows that it is 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) ("[I]f the husband was at the time . . . provoked to this unmanly [assault] 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. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, in 11 *CRIME AND JUSTICE—A REVIEW OF RESEARCH*, *supra* note 17, at 19, 29, 32. 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. *Id.* at 29.

20. *E.g.*, *Fulgham v. State*, 46 Ala. 143, 146-47 (1871) (stating that the 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 "[b]eating or striking a wife violently . . . is not one of the rights conferred on a husband by the marriage"); *Gorman v. State*, 42 Tex. 221, 223 (1875) (noting that a husband's right of control over his wife does not extend to punishment and correction, but is limited to protection and self-defense).

should not interfere in the private realm of the family.<sup>21</sup> This view predominated in most jurisdictions well into the twentieth century.

Given the long legacy of state protection of and deference to those who abuse their intimate partners, it is hardly surprising that promoting procedural fairness for batterers was of little interest to activists, academics, and policymakers. Instead, these groups focused on improving and expanding the justice system's responsiveness to victims in need of protection. Although there was no conscious strategic decision to target and reduce batterers' sense of fair and respectful treatment by authorities, many of the movement's most successful reforms, both individually and taken as a whole, have had precisely that impact.

### *A. The Move Towards Mandates in the Criminal Justice System*

#### *1. The Police: Expanded Misdemeanor Arrest Powers and Mandatory Arrest Laws*

Until the 1990s, police officers typically ignored domestic violence calls or purposely delayed their response by several hours.<sup>22</sup> When a complainant called 911 to report that "my boyfriend is mad at me and is going to beat me up," she would be told, "Call us again when he does."<sup>23</sup> Victims who called the police after the perpetrator had

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21. 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." *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) (ruling a wife's testimony against her husband incompetent in all cases of assault and battery, except where "lasting injury or great bodily harm" is either threatened or inflicted); *Richards v. Richards*, 1 Grant 389, 392-93 (Pa. 1857) (denying a divorce petition on ground that "[i]t 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").

22. DEL MARTIN, BATTERED WIVES 93 (1976); MURRAY A. STRAUSET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 232-33 (1980).

23. Elaine Cumming et al., *Policeman as Philosopher, Guide and Friend*, 12 SOC. PROB. 276, 281 (1965).

left the scene were commonly advised to "lock the door" or "go stay with mother;" no police car would be dispatched.<sup>24</sup> When officers did respond, they were trained to mediate and to "avoid arrest if possible."<sup>25</sup> As one police training bulletin explained:

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.<sup>26</sup>

Arrests were rare; studies estimate that they occurred in only three to fourteen percent of all intimate partner cases to which officers actually responded.<sup>27</sup> Battered women were left with little or no access to the criminal justice system.

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24. Raymond Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROBS. 539, 546 (1971); Raymond I. Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 922-24.

25. MARTIN, *supra* note 22, at 94 (citing Sue Eisenberg & Patricia Micklow, *The Assaulted Wife: "Catch 22" Revisited* 112 (1974) (unpublished paper, on file with the University of Michigan)). The Michigan Police Training Academy procedures taught recruits to:

- a. Avoid arrest if possible. Appeal to their vanity.
- b. Explain the procedure of obtaining a warrant.
  - (1) Complainant must sign complaint.
  - (2) Must appear in court.
  - (3) Consider loss of time.
  - (4) Cost of court.
- c. State that your only interest is to prevent a breach of the peace.
- d. Explain that attitudes usually change by court time.
- e. Recommend a postponement.
  - (1) Court not in session.
  - (2) No judge available.
- f. Don't be too harsh or critical.

*Id.*

26. *Id.* at 94-95 (quoting CITY OF OAKLAND POLICE SERVS., *Techniques of Dispute Intervention*, in TRAINING BULLETIN III-J, at 2, 3 (1975)).

27. Eve S. Buzawa & Carl G. Buzawa, *Introduction*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE vii, xvi (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (citing numerous studies of domestic violence arrest rates).

In the mid-1970s, improving police responsiveness became a top priority of anti-domestic violence activists.<sup>28</sup> Advocates successfully promoted reforms that improved responsiveness to victims but simultaneously reduced the degree of process previously accorded to suspects at a crime scene.<sup>29</sup>

First, state legislatures changed the standards governing warrantless arrests in domestic violence cases. Traditionally, in the absence of a warrant a police officer could arrest in only two situations: (1) where there was probable cause to believe a felony had occurred; and (2) where a misdemeanor occurred in the officer's presence.<sup>30</sup> Because most domestic violence offenses were charged as misdemeanors and occurred before the police arrived on the scene, timely arrests rarely were possible.<sup>31</sup> By 1983, twenty-eight states had authorized warrantless arrests if there was probable cause to believe a misdemeanor domestic violence offense had occurred.<sup>32</sup>

This reform effort was fueled in large part by a highly publicized study conducted by researchers Lawrence Sherman and Richard Berk in 1984.<sup>33</sup> Dubbed the Minneapolis Domestic Violence Experiment, the study analyzed the impact of arrest on recidivism.<sup>34</sup> Based on a sample of 314 cases, the study indicated

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28. Eve S. Buzawa & Carl G. Buzawa, *The Scientific Evidence Is Not Conclusive: Arrest Is No Panacea*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 337, 341 (Richard J. Gelles & Donileen R. Loseke eds., 1993) (noting that political pressure to increase arrests has come primarily from battered women's activists and feminists).

29. *Id.*

30. *E.g.*, ALA. CODE § 15-10-3 (1988); N.D. CENT. CODE § 29-06-15 (1989); *see also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(b) (3d ed. 1996); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 61 (1992) (stating that this rule applied in most, but not all jurisdictions in the mid-1970s); *cf.* D.C. CODE ANN. § 16-1031 (1991) (authorizing arrest if the officer has probable cause to believe that an interfamily offense resulted in physical injury, or caused, or was intended to cause, reasonable fear of imminent serious physical injury or death); UTAH CODE ANN. § 77-36-2 (1983) (authorizing arrest when an officer has reasonable cause to believe that a crime has been committed).

31. Arrests are far less likely to be made after law enforcement officials leave the scene of a crime. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE, 42, 93-94 (2d ed. 1996).

32. Zorza, *supra* note 30, at 62 (citing Lisa Lerman & Franci Livingston, *State Legislation on Domestic Violence*, 6 RESPONSE 4, 5 (1983)).

33. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

34. *Id.*

that arrest dramatically reduced the risk of re-assault against the same victim over a six month follow-up period, as compared with alternative police responses of either separating the parties for a brief period or "advising" them (a process ranging from doing nothing to mediating).<sup>35</sup> Sherman and Berk concluded that arrest was the most effective means of reducing recidivist intimate partner violence.<sup>36</sup>

The Minneapolis Domestic Violence Experiment had a profound influence on public policy.<sup>37</sup> In 1984, the same year the study's results were publicized, the U.S. Attorney General's Task Force on Family Violence issued a report recommending arrest as the standard response to all cases of misdemeanor domestic assault.<sup>38</sup> By 1988, a survey conducted by the Victim Services Agency showed that only two states, Alabama and West Virginia, continued to prohibit warrantless arrest in misdemeanor domestic violence cases.<sup>39</sup>

Second, in addition to broadening police officers' discretionary arrest powers, jurisdictions began to enact laws *requiring* arrest in domestic abuse cases where an officer has probable cause to believe the offender has committed an assault, or has placed a victim to whom a protection order had been issued in fear of imminent serious physical injury. Oregon passed the first mandatory arrest statute in 1977,<sup>40</sup> and other jurisdictions soon followed suit. By

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35. Six months after the initial police response, official records showed that domestic abuse recurred in 10% of arrest cases, 24% of separation cases, and 19% of advice cases. *Id.* at 267. Victim interviews offered a slightly different picture; they reported recidivist abuse in 19% of arrest cases, 33% of separation cases, and 37% of advice cases. *Id.* at 267-68.

36. *Id.* at 270 (stating that "an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive"). Because researchers were unable to replicate the results of this study in six subsequent trials, policy decisions based on these data are now subject to significant controversy. See *infra* text accompanying notes 174-84.

37. *Domestic Violence: Terrorism in the Home: Hearing before the Sen. Subcomm. on Children, Family, Drugs, and Alcoholism of the Comm. on Labor and Human Resources*, 101st Cong. 88-92 (1990) (statement of Eli J. Miletich, Chief of Police, Duluth, Minnesota); U.S. ATTY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REP. 24 & n.17, 104 & n.21 (1984).

38. U.S. ATTY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REP. 17 (1984).

39. Zorza, *supra* note 30, at 63 (citing VICTIM SERVICES AGENCY, THE LAW ENFORCEMENT RESPONSE TO FAMILY VIOLENCE: A STATE BY STATE GUIDE TO FAMILY VIOLENCE LEGISLATION (1988)). Both of these states now permit warrantless arrest. ALA. CODE § 15-10-3 (1995); W. VA. CODE ANN. § 48-27-1002 (Michie 2001).

40. OR. REV. STAT. §§ 133.055(2), 133.310(3) (1999).

1982, five states had enacted mandatory arrest laws;<sup>41</sup> by 1994, twenty-one states and the District of Columbia had done the same.<sup>42</sup>

These reforms created an astonishing reversal in law enforcement policy. The long-standing nonintervention protocol was replaced with greater arrest powers than in any other category of crime, coupled with a strict duty to use that power.<sup>43</sup> In the process, perpetrators moved from a position of privilege to one in which their

41. Zorza, *supra* note 30, at 64 (citing LISA LERMAN, CTR. FOR WOMEN POLICY STUDIES, COURT DECISIONS ON WIFE ABUSE LAW: RECENT DEVELOPMENTS 21 (1982)).

42. Presently, the following states mandate arrest when there is probable cause to believe that a violation of a protection order has occurred: ALASKA STAT. § 18.65.530(a)(2) (Michie 2000); CAL. PENAL CODE § 836(d) (West Supp. 2001); COLO. REV. STAT. § 14-4-104 (2000); KY. REV. STAT. ANN. § 403.760(2) (Michie 1999); LA. REV. STAT. ANN. § 14:79(E) (West Supp. 2001); MD. CODE ANN., FAM. LAW § 4-509 (1999); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1998); MICH. COMP. LAWS ANN. § 764.15b (West 2000 & Supp. 2001); MINN. STAT. ANN. § 518B.01, subd. 14 (West 1990 & Supp. 2001); MO. REV. STAT. § 455.085(2) (West 1997); NEV. REV. STAT. ANN. § 33.070(1) (Michie 1996 & Supp. 1999); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 1995); N.M. STAT. ANN. § 40-13-6(C) (Michie 1999); N.D. CENT. CODE § 14-07.1-11(1) (1997 & Supp. 2001); OHIO REV. CODE ANN. § 2935.03 (West 1997 & Supp. 2001); OR. REV. STAT. § 133.310(3) (1999); 23 PA. CONS. STAT. ANN. § 6113 (West 1991 & Supp. 2001); S.D. CODIFIED LAWS § 23A-3-2.1(1) (Michie 1998 & Supp. 2001); TENN. CODE ANN. § 36-3-611(a)(2) (1996); TEX. CRIM. PROC. CODE ANN. § 14.03(b) (Vernon Supp. 2001); UTAH CODE ANN. § 30-6-8 (1998); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West 1990 & Supp. 2001); W. VA. CODE ANN. § 48-5-508 (Michie 2001); WIS. STAT. ANN. § 813.12(7)(b) (West 1994 & Supp. 2000).

The following states currently mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated: ALASKA STAT. § 18.65.530(a)(1) (Michie 2000); ARIZ. REV. STAT. ANN. § 13-3601(B) (West 2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 1995 & Supp. 2001); D.C. CODE ANN. § 16-1031 (2001); IOWA CODE ANN. § 236.12(2) (West 2000); LA. REV. STAT. ANN. § 46:2140(1) (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 4012 (West 1998); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1998); N.J. STAT. ANN. § 2C:25-21(a)(1) (West 1995); OHIO REV. CODE ANN. § 2935.03 (West 1997 & Supp. 2001); OR. REV. STAT. § 133.310(6) (1999); S.D. CODIFIED LAWS § 23A-3-2.1(2) (Michie 1998 & Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 14.03(a) (Vernon Supp. 2001); UTAH CODE ANN. § 30-6-8 (1998); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West Supp. 2001); W. VA. CODE ANN. § 48-27-1002 (Michie 2001).

43. Of course, changes in policy do not always translate into changes in practice. Many officers resented their loss of discretion through mandatory arrest laws. One common law enforcement response to this loss was "dual arrest." Officers responding to a scene where both parties have sustained injuries fail to discriminate between those inflicted offensively and those inflicted defensively. Although the latter typically constitute evidence of self-defense, rather than a criminal act, the officers simply arrest both parties. This tactic directly undermines the intent of the mandatory arrest statutes. Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1159 (1994).

procedural protections were more constricted than those who committed crimes against strangers. Those subjected to the new arrest policies, in conjunction with their lawyers, denounced the reforms as an unfair infringement on their civil liberties.<sup>44</sup>

Although some activists and scholars oppose legislative mandates on a variety of grounds,<sup>45</sup> broad support for expanded police powers remains strong today. In 1994, the federal Violence Against Women Act (VAWA)<sup>46</sup> included a provision requiring mandatory arrest or pro-arrest policies as a condition for receipt of funding by state and local governments.<sup>47</sup> This provision remained unchanged in 2000 as part of VAWA II.<sup>48</sup> Experts in the field continue to cite mandatory arrest policies as evidence of the success of the battered women's movement.<sup>49</sup>

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44. See *infra* text accompanying notes 123-25.

45. A handful of scholars and activists have voiced opposition to legislative mandates, particularly in the criminal justice system, on the ground that they inhibit the system's ability to respond to a survivor in the particular context of her individual life. A cookie-cutter, one-size-fits-all response to such complex and dangerous situations places a subgroup of battered women in substantial psychological and physical danger. *E.g.*, Epstein, *supra* note 2, at 18-19; Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999). Similarly, a persistent minority of battered women's activists have opposed mandatory arrest and/or prosecution on victim-safety grounds. *E.g.*, CHICAGO METRO. BATTERED WOMEN'S NETWORK, POSITION PAPER OPPOSING ENACTMENT OF MANDATORY ARREST LAW IN DOMESTIC VIOLENCE CASES 1 (1995) (on file with author).

46. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, 42 U.S.C. and FED. R. EVID. 412).

47. 42 U.S.C. § 3796hh(c)(1)(A) (1994) (requiring eligible grantees to certify that their laws or official policies "encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed"). Battered women's advocates offered strong support for this provision. See *Domestic Violence: Terrorism In the Home: Hearing Before the Sen. Subcomm. on Children, Family, Drugs, and Alcoholism of the Comm. on Labor and Human Res.*, 101st Cong. 12-26 (1990); *id.* at 32-44 (statement of Mary Pat Brygger, Nat'l Woman Abuse Prevention Project) (statement of Sarah M. Buel, Harvard Legal Aid Bureau).

48. Violence Against Women Act of 2000, Pub. L. 106-386, 114 Stat. 1491 (2000) (codified as amended at 42 U.S.C. §§ 13701, 3789p, 3796gg-2).

49. See generally Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 976-77 (1995); Machaela M. Hctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643 (1997); Marion Davis, *The Rhode Island Coalition Against Domestic Violence Celebrates Its 20th Anniversary*, PROVIDENCE J.-BULL., Oct. 10, 1999, at 1A, available at LEXIS, News Library, Prvnl File.; Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, § 6, at 23.

## 2. *The Prosecution: No-Drop Policies and Mandatory Criminal Stay-Away Legislation*

Increasing arrest rates did not prove to be, by itself, a sufficient criminal justice system response. Across the country, prosecutors rarely pressed charges in domestic violence cases and, when they did, they rarely followed through by bringing the case to trial.<sup>50</sup> Indeed, they often actively discouraged victims from pursuing relief in the criminal justice system.<sup>51</sup> District Attorneys explained that "because victims simply do not follow through in domestic violence cases, there is no need to waste precious prosecutorial resources on them."<sup>52</sup> In addition, domestic violence crimes were notoriously undercharged; a National Crime Survey found that over one-third of misdemeanor partner abuse cases would have been charged as felony rapes, robberies, or aggravated assaults if they had been committed by strangers.<sup>53</sup>

During the 1980s and 1990s, victim advocates lobbied aggressively and successfully to change these policies in many jurisdictions.<sup>54</sup> Today, many prosecutor's offices in major urban centers have adopted aggressive "no-drop" prosecution policies:<sup>55</sup> cases proceed even when a victim recants her original story and testifies for the defense.<sup>56</sup> In cases where the victim does not wish

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50. Epstein, *supra* note 2, at 15-16; David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 129-30 (N. Zoe Hilton ed., 1993).

51. Ford & Regoli, *supra* note 50, at 130, 141.

52. Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161, 163 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); *see also* Ford & Regoli, *supra* note 50, at 141. One study of domestic abuse cases found that in forty-five percent of the cases the primary reason for the failure to go forward was the victim's wishes. *Id.* at 151. This traditional approach is fundamentally flawed, because it is virtually impossible for the prosecutor to discern whether the victim is dropping charges of her own free will or with a literal or figurative gun to her head.

53. BUZAWA & BUZAWA, *supra* note 31, at 56.

54. In a recent survey, sixty-six percent of prosecutor's offices in major urban centers reported that they had adopted such policies. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 182-83 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

55. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520 n.52 (1998).

56. For an insightful discussion of no-drop prosecution policies, within the framework of feminist theory, see Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in*



to cooperate, prosecuting attorneys pursue alternative litigation strategies, treating domestic violence cases as they would homicides, where the victim is, by definition, unavailable at trial.<sup>57</sup> The government relies on evidence such as recorded 911 calls containing excited utterances, photographs and hospital records documenting injuries, and testimony from police officers who responded to the crime scene.<sup>58</sup> These strategies have proven 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 cases where the victim declines to testify for the state.<sup>59</sup> The conviction rate in both types of cases is identical.<sup>60</sup>

Other mandates are becoming popular in domestic violence prosecutions as well. For example, several state legislatures now require the issuance of a no-contact order as a condition of pretrial release in intimate partner abuse cases.<sup>61</sup> This requirement is triggered regardless of the individual victim's preference or the prosecutor's request, and can last for several months or more.<sup>62</sup>

### *B. Proposed Due Process Reductions in the Civil Justice System*

The battered women's movement has accomplished substantial reforms in the civil justice system as well. A mere thirty years ago, virtually no legislation existed to protect battered women from their abusive partners. Today, every state has a civil protection order statute, and the vast majority of these authorize the essential relief

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*Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

57. *E.g.*, 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, 300-03 (1993) (describing steps taken to prosecute a domestic violence case without the participation of the victim).

58. *Id.* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 139-49 (1991); Cahn, *supra* note 52, at 174.

59. Telephone Interview with Robert Spagnoletti, Chief, U.S. Attorney's Office, Domestic Violence Unit (Sept. 3, 1997).

60. *Id.*

61. *E.g.*, ALASKA STAT. § 12.30.027 (Michie 2000); COLO. REV. STAT. ANN. § 18-1-1001 (West 2000); R.I. GEN. LAWS § 12-29-4(a)(1) (2000); S.D. CODIFIED LAWS § 25-10-23 (Michie 1999); UTAH CODE ANN. § 77-36-2.5(1) (1999). *But see* WIS. STAT. §§ 968.075(5)(c), (6) (1998) (building in some victim discretion by allowing her to waive the "stay away" requirement within seventy-two hours of an arrest).

62. *See supra* note 61 (citing statutes).

necessary for battered women to leave an abusive relationship.<sup>63</sup> These statutes provide for emergency ex parte relief,<sup>64</sup> no-assault and stay-away provisions, temporary child custody, safe visitation arrangements for the noncustodial parent, and child support.<sup>65</sup> In most jurisdictions, these orders remain in effect for one to three years<sup>66</sup> and may be extended upon a demonstration of continued

63. 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, 810, 910-11 (1993); see also *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1509-14, 1530-33 (1993).

64. Klein & Orloff, *supra* note 63, at 1031-43 (stating that all jurisdictions authorize some form of emergency ex parte relief upon filing a complaint for civil protection). Emergency ex parte relief provides a victim with court-ordered protection during the potentially volatile period between the time of filing a lawsuit and trial. *Id.* at 1031-34. 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." 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, 274-75 (1995) (stating that domestic violence escalates when a victim leaves or an abuser believes she is going to leave).

65. The vast majority of jurisdictions authorize the court to award temporary custody. Klein & Orloff, *supra* note 63, at 954 n.968 (citing statutes from forty-two states, the District of Columbia, and Puerto Rico); see also N.Y. FAM. CT. ACT § 842 (Consol. 1999); VA. CODE ANN. § 16.1-279.1(A)(7) (Michie Supp. 2001). The same is true for visitation. Klein & Orloff, *supra* note 63, at 982 n.1141 (citing statutes from thirty-seven states and the District of Columbia); see also ALASKA STAT. § 18.66.100(c)(9) (Michie 2000); VA. CODE ANN. § 16.1-279.1(A)(7) (Michie Supp. 2001). Thirty-seven states and Puerto Rico expressly authorize the award of child support in a civil protection order case. Klein & Orloff, *supra* note 63, at 998 n.1254 (citing statutes from thirty-five states and Puerto Rico); see also N.Y. FAM. CT. ACT § 842 (Consol. 1999); VT. STAT. ANN. tit. 15, § 1103(c)(6) (Supp. 2000).

Rapid resolution of child support 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; for a woman with children, a child support award may be the key to freedom. See Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1155 (1995); Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, in THE FAMILY VIOLENCE PREVENTION FUND, 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, 267-68 (1992); see also Epstein, *supra* note 2, at 11 ("[S]imilarly, 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.").

66. ALA. CODE § 30-5-7(E)(1), (2) (1998); ALASKA STAT. § 18.66.100 (Michie 2001); ARIZ. REV. STAT. § 13-3602(K) (2000); ARK. CODE ANN. § 9-15-205(7)(b) (Michie Supp. 2001); CAL. FAM. CODE § 6345 (West Supp. 2001); DEL. CODE ANN. tit. 10, § 1045(11)(b) (1999); D.C. CODE ANN. § 16-1005(d) (2001); HAW. REV. STAT. § 586-5.5(a) (Supp. 2000); IDAHO CODE § 39-6311(4) (Michie Supp. 2001); 750 ILL. COMP. STAT. 60/220(b) (1999); IND. CODE ANN. § 34-26-

need. In addition, most states have adopted enforcement mechanisms for protection orders: thirty-eight (and the District of Columbia) through criminal contempt laws<sup>67</sup> and all fifty through statutes criminalizing protection order violations.<sup>68</sup>

Despite these successes, serious impediments to judicial implementation of these laws persist. A lack of information about the

2-13(2) (Michie 2000); IOWA CODE ANN. § 236.5(2)(e) (West 2000); KAN. STAT. ANN. § 60-3107(d) (Supp. 2000); KY. REV. STAT. ANN. § 403.750(2) (Michie 1999); LA. REV. STAT. ANN. § 46:2136(F) (West Supp. 2001); ME. REV. STAT. ANN. tit. 19-A, § 4007(2) (West 1998); MD. CODE ANN., FAM. LAW § 4-506(2)(iii) (Supp. 2001); MASS. GEN. LAWS ANN. ch. 209A, § 3(i) (West 1998); MINN. STAT. ANN. § 518B.01, Subd. 6(a), (b) (West Supp. 2001); MO. ANN. STAT. § 455.040(1) (West Supp. 2001); NEB. REV. STAT. ANN. § 42-924(3) (1998); NEV. REV. STAT. § 33-080 (Michie 1996 & Supp. 1999); N.H. REV. STAT. ANN. § 173-B:5(VI) (Supp. 2001); N.Y. FAM. CT. ACT § 842 (Gould 2001); N.C. GEN. STAT. § 50B-3(13)(b) (1999); OKLA. STAT. ANN. tit. 22, § 60.4(H) (Supp. 2001); OR. REV. STAT. § 107.718(1) (1999); 23 PA. CONS. STAT. ANN. § 6108(d) (West Supp. 2001); R.I. GEN. LAWS § 15-15-3(c)(2) (2000); S.C. CODE ANN. § 20-4-70(A) (Law. Co-op Supp. 2000); S.D. CODIFIED LAWS § 25-10-5 (Michie 1999); TENN. CODE ANN. § 36-3-608(a) (1996); TEX. FAM. CODE ANN. § 6.506 85.025(a) (Vernon Supp. 2001); VA. CODE ANN. § 16.1-279.1(B) (Michie Supp. 2001); WASH. REV. CODE ANN. § 26.50.060(2) (West Supp. 2001); WIS. STAT. ANN. § 813.12(4)(3)(c)(1) (West Supp. 2000).

67. ALA. CODE § 30-5A-6 (1998); ALASKA STAT. § 9.50.010(5) (Michie 2000); ARIZ. REV. STAT. § 13-3602(J) (2000); ARK. CODE ANN. § 9-15-210 (Michie 1998); CAL. PENAL CODE § 166(c)(1) (West Supp. 2001); COLO. REV. STAT. § 18-6-803.5(7) (2000); DEL. CODE ANN. tit. 11, § 1271A (Supp. 2000); D.C. CODE ANN. § 16-1005(g) (2001); FLA. STAT. ANN. § 741.30(8)(a) (West Supp. 2001); GA. CODE ANN. § 19-13-6(a) (1999); HAW. REV. STAT. § 710-1077(1)(g) (1993); IDAHO CODE § 39-6312 (Michie Supp. 2001); 750 ILL. COMP. STAT. 60/223(a) (West Supp. 2001); IOWA CODE ANN. § 236.8 (West 2000); KAN. STAT. ANN. § 60-3110 (1994); KY. REV. STAT. ANN. § 403.760(1) (Michie 1999); LA. REV. STAT. ANN. § 46:2137 (West Supp. 2001); ME. REV. STAT. ANN. tit. 19, § 4011(2) (West 1998); MD. CODE ANN., FAM. LAW § 4-508(1) (1999); MICH. COMP. LAWS ANN. § 600.2950(23) (West 2000); MINN. STAT. ANN. § 518B.01, subd. 14(f), (g) (Supp. 2001); MISS. CODE ANN. § 93-21-21 (1999); NEV. CT. R. ANN., E.D.C.R. 5.22(g)(2) (Michie 2001); N.H. REV. STAT. ANN. § 173-B:9(II) (Supp. 2001); N.J. STAT. ANN. § 2C:29-9 (West 1995); N.M. STAT. ANN. § 40-13-5(B) (Michie Supp. 2001); N.Y. PENAL LAW § 215.51(b) (Consol. 2000); N.C. GEN. STAT. § 50B-4(a) (1999); N.D. CENT. CODE § 14-07.1-06 (Supp. 2001); OHIO REV. CODE ANN. § 2705.02(A) (West Supp. 2000); OR. REV. STAT. § 107.720(4) (1999); 23 PA. CONS. STAT. ANN. § 6114 (West Supp. 2001); R.I. GEN. LAWS § 15-15-3(c) (2000); S.C. CODE ANN. § 20-4-60(b) (Law. Co-op. 1985); TENN. CODE ANN. § 36-3-610(a) (1996); TEX. FAM. CODE ANN. § 6.506 (Vernon Supp. 2001); VT. STAT. ANN. tit. 15, § 1108(e) (Supp. 2000); WASH. REV. CODE ANN. § 26.50.110(6) (West Supp. 2001); WYO. STAT. ANN. § 1-28-107 (Michie 2001); *Connecticut v. Murray*, 623 A.2d 60 (Conn. 1993).

68. Klein & Orloff, *supra* note 63, at 1096 n.1835 (citing statutes in forty states and Puerto Rico); *see also* LA. REV. STAT. ANN. § 14:79 (West Supp. 2001); ME. REV. STAT. ANN. tit. 19-A, § 4011(1) (West Supp. 2000); MICH. COMP. LAWS § 600.2950(22) (West 2000); MISS. CODE ANN. § 99-3-7(3) (Supp. 2000); N.H. REV. STAT. ANN. § 173-B:5(VII) (Supp. 2001); N.J. STAT. ANN. § 2C:25-30 (West 1995); N.Y. CRIM. PROC. § 140.10(4) (Consol. 1996 & Supp. 2001); OR. REV. STAT. § 133.310(3) (1999); S.D. CODIFIED LAWS § 25-10-13 (Michie 1999); TENN. CODE ANN. § 36-3-611(a) (1996).

social and psychological dynamics of domestic violence causes many judges to become frustrated with petitioners whom they perceive as "refusing" to leave the abusive relationship. Operating under this misperception, they often find the victim's behavior puzzling and enormously frustrating.<sup>69</sup> When a woman files a civil protection order suit after dropping previous cases, judges have made comments such as: "Oh, it's you again;" "How long are you going to stay away this time;" or "You want to go back and get beat up again?"<sup>70</sup> Others have gone so far as to threaten victims with sanctions for repeated use of the court system.<sup>71</sup>

Judges also may 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).<sup>72</sup> This disorder can result in a courtroom presentation that is substantially different from the behavior and demeanor that a judge encounters in his normal experience; these differences may be misinterpreted as indications of a lack of credibility.<sup>73</sup>

These complexities can lead judges to identify with the batterer, distance themselves from the victim,<sup>74</sup> and apply artificially heightened standards of proof.<sup>75</sup> A judge may refuse to issue civil

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69. The following discussion of judicial 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 ten years. It is possible that some improvements have occurred since the reports were issued. In my own experience in litigating cases and training judges, however, such reactions remain common.

70. MARYLAND SPEC. J. COMM. ON GENDER BIAS IN THE CTS., REPORT ON GENDER BIAS IN THE COURTS, 7-8 (1989) [hereinafter MARYLAND GENDER BIAS TASK FORCE REPORT].

71. *Id.* at 8. 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." N.D. COMM'N ON GENDER FAIRNESS, A DIFFERENCE IN PERCEPTIONS: THE FINAL REPORT ON THE NORTH DAKOTA COMMISSION ON GENDER FAIRNESS IN THE COURTS, reprinted in 72 N.D. L. REV. 1113, 1208 (1996).

72. Epstein, *supra* note 2, at 40.

73. For a detailed discussion of PTSD symptoms and their impact on judges see *id.* at 40-43.

74. Hanna, *supra* note 56, at 1878.

75. 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, 199-205 (1993).

protection orders when documentary or other physical evidence is absent;<sup>76</sup> when unbiased eyewitnesses are not available;<sup>77</sup> when the only witnesses are the parties and, therefore, a credibility determination is required;<sup>78</sup> or when the victim has failed to follow through with a protection order case on a prior occasion.<sup>79</sup> These kinds of standards have no basis in law and are not applied in other family law cases.

In 1994, in an effort to address these and other concerns, the National Council of Juvenile and Family Court Judges convened an expert advisory committee to draft the Model Code on Domestic and Family Violence.<sup>80</sup> The purpose of the Code is to "help protect victims in a fair, prompt and comprehensive fashion. It will help prevent future violence in every family where such violence has been discovered."<sup>81</sup>

But in pursuit of this goal, the Model Code recommends numerous modifications of existing state protection order legislation, some of which would substantially reduce the process accorded to batterers. Its drafters urge states to adopt its provisions,<sup>82</sup> and

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76. See *id.* at 200-01; see also CONN. TASK FORCE ON GENDER, JUSTICE & THE CTS., REPORT TO THE CHIEF JUSTICE 103-04 (1991) (reporting that half of Connecticut judges require evidence of physical injury before issuing a protection order and describing an incident in which a judge observed the petitioner's injuries, told her he had received worse bruises playing golf, and denied her petition); MARYLAND GENDER BIAS TASK FORCE REPORT, *supra* note 70, at 4 (reporting an instance in which judge told petitioner to "go back and get beaten up and have bruises" to qualify for court protection). The Minnesota Supreme Court 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 make sure her case was strong enough to support" a protection order. MINN. SUP. CT. TASK FORCE FOR GENDER FAIRNESS IN THE CTS., FINAL REPORT (1989), reprinted in 15 WM. MITCHELL L. REV. 825, 875 (1989). 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."

77. Kinports & Fischer, *supra* note 75, at 201-02.

78. *Id.* at 202.

79. *Id.*

80. MODEL CODE ON DOMESTIC AND FAM. VIOLENCE (Nat'l Council of Juv. & Fam. Ct. Judges 1994) [hereinafter MODEL CODE]. The Introduction to the Model Code states that the Committee was comprised of leaders in the domestic violence field, including judges, prosecutors, defense attorneys, matrimonial lawyers, battered women's advocates, medical and health care professionals, law enforcement personnel, legislators, educators, and others. *Id.* at v.

81. *Id.* at vi.

82. *Id.*

although some of its proposals have had a primarily symbolic impact, several jurisdictions have enacted some Code-inspired legislation and others are considering doing the same.<sup>83</sup> Two major Code provisions are discussed below: first, the authorization of short-term, emergency protection orders issued on the basis of second-hand, unsworn telephonic accounts provided by police officers; second, permanent protection orders, of indefinite duration, issued in the absence of either prior notice to the perpetrator or an *ex ante* opportunity to be heard.

*1. Emergency Protection Orders Issued Solely on the Basis of Police Statements*

In an effort to maximize victim safety in the immediate aftermath of a violent incident, the Model Code gives a judge authority to grant a seventy-two hour, *ex parte* emergency protection order on the basis of a law enforcement officer's statements, given over the telephone or in person.<sup>84</sup> The judge must determine that there are "reasonable grounds to believe" that the victim is in immediate danger based on a recent incident of violence or threats.<sup>85</sup> That assessment may be based on an officer's unsworn comments made out of the judge's presence, so there is no opportunity for the court to assess the officer's demeanor and degree of credibility.<sup>86</sup> Nor is there an opportunity for the judge to make any assessment about the petitioner's credibility; she is not required to testify, either in person or on the telephone.<sup>87</sup> The resulting order may direct the accused perpetrator to temporarily do any of the following: stay away from and not contact the petitioner; vacate the petitioner's residence, even if the accused is the sole owner of the property; give the petitioner possession and use of an automobile—again, regardless of ownership; and

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83. For example, the author sits on the District of Columbia Domestic Violence Coordinating Council's Legislation Subcommittee, which has conducted an extensive review of the Model Code to assess whether to propose an adapted version for enactment by the D.C. City Council.

84. MODEL CODE §§ 305(1), (5).

85. *Id.* §§ 305(1), 102(1).

86. *See id.* § 305(1).

87. *Id.*

surrender custody of any minor children to the petitioner.<sup>88</sup> Provisions similar to these have been enacted in Alaska,<sup>89</sup> Arizona,<sup>90</sup> California,<sup>91</sup> Massachusetts,<sup>92</sup> and Virginia.<sup>93</sup>

## 2. *Permanent Ex Parte Protection Orders*

Traditionally, courts have authority to issue long-term injunctions only after a trial or documented defense default. The Model Code, however, sacrifices these procedural conventions in deference to victim safety. Pursuant to the Code, "[i]f it appears from a petition" that domestic violence has occurred, a judge may, "[w]ithout notice or hearing, immediately issue an order for protection" on an *ex parte* basis.<sup>94</sup> Not only would the respondent be denied an opportunity to state his case, but the petitioner could rely on the strength of her written pleading and would not need to convince the judge of her credibility in person.

In addition, the Model Code would further alter the laws of most states by making protection orders permanent. Where in most jurisdictions protection orders may last from one to three years,<sup>95</sup> pursuant to the Code a protection order is effective indefinitely, or "until further order of the court."<sup>96</sup> A protection order issued pursuant to this system of reduced procedural guarantees also could contain fairly comprehensive relief. For example, such an order may direct a perpetrator to vacate a shared residence, turn over possession of an automobile, lose custody of his children, and anything additional that a judge "deems necessary to protect and provide for the safety of the petitioner."<sup>97</sup> Although the Model Code

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88. *Id.* § 305(3)(a)-(f).

89. ALASKA STAT. § 18.66.110 (Michie 2000).

90. ARIZ. REV. STAT. §§ 13-3624(C)-(E) (2000) (such an order may last only until following business day).

91. CAL. FAM. CODE §§ 6250, 6256 (West 1994 & Supp. 2001) (such an order may last only seven calendar days or five business days, whichever is less).

92. MASS. GEN. LAWS ANN. ch. 209A, §§ 4, 5 (West 1998) (such an order may last up to ten business days).

93. VA. CODE ANN. §§ 16-1-253.4(B), (C) (Michie Supp. 2001). The law enforcement officer's assertions must be made under oath. *Id.* § 16.1-253.4(B).

94. MODEL CODE § 306(1)(a).

95. *See supra* note 66 and accompanying text.

96. MODEL CODE § 306(5).

97. *Id.* § 305(3).

does provide an *ex post* avenue through which a defendant may access traditional procedural guarantees,<sup>98</sup> such a safeguard pales in comparison to a hearing scheduled *prior* to the issuance of an order.

In sum, the impressive reforms proposed and executed in the criminal and civil justice systems have dramatically increased the state's responsiveness to victims of domestic violence. But, as argued in Part II, these changes have carried with them a substantial downward shift in the degree of process offered to batterers during arrest, charging, and civil or criminal trials.

## II. MANDATED INTERVENTIONS AND EXPANDED JUDICIAL AUTHORITY: CAUSE FOR CONCERN

As discussed above, the battered women's movement has substantially improved the state's responsiveness to victims of domestic violence. Warrantless arrests and mandatory criminal justice interventions have resulted in increased application of criminal sanctions. Civil protection order statutes provide injunctive relief tailored to survivors' safety and family law needs. And the proposed Model Code certainly would facilitate victims' ability to obtain protection orders. But all of this progress has come with serious costs, both in the criminal and civil justice systems.

### A. *Mandatory Criminal Justice Interventions*

In the criminal justice system, mandatory policies represent an important symbolic shift; a declaration that the state no longer condones violence against women.<sup>99</sup> Such policies force officials to take domestic violence seriously and protect victims, something they had failed to do for centuries. In addition, supporters argue that mandatory arrest is the most effective way to protect women

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98. If, within thirty days after the protection order is served, either party requests a hearing, the court must hold one. *Id.* § 307(1). In addition, the court must hold a hearing subsequent to the order taking effect, if the order contains relief in the form of an award of custody, a directive that respondent not contact petitioner, or a directive that respondent vacate petitioner's residence. *Id.* § 307(2).

99. Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences: Battered Women, Police, and the Law*, in *LEGAL RESPONSES TO WIFE ASSAULT*, *supra* note 50, at 96, 98; Ford & Regoli, *supra* note 50, at 128.



from recidivist violence,<sup>100</sup> and no-drop prosecution is the most effective way to eliminate a perpetrator's ability to escape punishment by threatening victims into dropping charges.<sup>101</sup>

Those who support criminal justice mandates further believe that they will have a general deterrent effect. In the words of activist Lisa Lerman:

Even if a law enforcement approach fails to result in specific deterrence in some cases, enforcement of the law ... sends an appropriate message to the community—that domestic violence is not acceptable. Specific deterrence of a particular offender is not the only goal. When an arrest is made ... other men and women in the community may judge their own situations and conduct differently ...<sup>102</sup>

Mandatory arrest and prosecution also operate as tools for victim empowerment. Eliminating police and prosecutorial discretion relieves the victim of responsibility for decisions to arrest and bring charges. Such relief is described as particularly important because it occurs at a time when the victim may be too afraid of the perpetrator's physical or psychological retaliation to make an appropriate decision.<sup>103</sup>

Advocates of no-drop prosecution argue that early data indicate that such policies yield substantial positive results. In San Diego, for example, officials found that under a traditional policy, levels of violence increased when abusers learned that a case would be dismissed if the victim refused to cooperate.<sup>104</sup> In 1985, the city

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100. E.g., Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 54, at 115, 128-29. This argument stands on shaky ground, given the conflicting results of various arrest experiments in the field. See *infra* text accompanying note 114.

101. Hanna, *supra* note 56, at 1864-65, 1892. But see Gena L. Durham, Note, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 650-54 (1998) (arguing that no-drop jurisdictions that compel victims to testify deter victims from pressing charges and validate jurors' biases against them).

102. Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 224-25 (1992); see also Hanna, *supra* note 56, at 1864-65.

103. Sarah Mausolf Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 211, 222-23 (1988); Hanna, *supra* note 56, at 1865.

104. Gwinn & O'Dell, *supra* note 57, at 310.

implemented a no-drop policy. Domestic homicides fell from thirty in 1985 to twenty in 1990, and to seven in 1994.<sup>105</sup>

A growing number of critics, however, have identified problems with the invocation of an increasingly potent state response to intimate abuse. By failing to honor a victim's individual preferences, mandatory policies patronize her and may undermine her efforts to exert control over her life by disrupting her intimate relationship, economic security, and family stability.<sup>106</sup> These reforms also are particularly problematic for many victim subgroups, in particular racial minorities,<sup>107</sup> immigrant populations,<sup>108</sup> and those of lower socio-economic status.<sup>109</sup> As Kimberlé Crenshaw explains:

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.<sup>110</sup>

Women in immigrant communities face laws that make a batterer deportable if he is convicted of a domestic violence offense, stalking, or a protection order violation, even if he has previously

105. Mark Hansen, *New Strategy in Battering Cases*, A.B.A. J., Aug. 1995, at 14.

106. *E.g.*, Buzawa & Buzawa, *supra* note 28, at 349-50; Epstein, *supra* note 2, at 17-18; Durham, *supra* note 101, at 653-54.

107. *E.g.*, INST. ON VIOLENCE, INC., VIOLENCE IN THE LIVES OF AFRICAN AMERICAN WOMEN: A FOCUS GROUP STUDY 18-19 (Beth E. Richie ed., 1996); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER SOC. POL'Y & L. 171 (1994).

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

109. Susan L. Miller, *Unintended Side Effects of Pro-Arrest Policies and Their Race and Class Implications for Battered Women: A Cautionary Note*, 3 CRIM. JUST. POL'Y REV. 299 (1989).

110. Crenshaw, *supra* note 107, at 1257.

obtained lawful permanent resident status.<sup>111</sup> Many victims are reluctant to expose their partners to the risk of deportation and further fear being 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.<sup>112</sup>

Mandatory responses also may place victims in danger. As researcher David Regoli puts it, "Notwithstanding 'enormous reforms in policies and attitudes that reflect a growing consensus on how best to handle family violence,' we know little with certainty about what best protects victims."<sup>113</sup> The effectiveness of arrest, for example, is far from clear. Several replication studies cast serious doubt on the results of the original *Minneapolis Domestic Violence Experiment*, and one of its original authors currently supports the repeal of mandatory arrest laws.<sup>114</sup> These studies, known as the Spousal Assault Replication Project (SARP), produced mixed results, with findings ranging from arrest having no effect, to having a deterrent effect, to having an *escalation* effect.<sup>115</sup> Further

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111. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-639 (amending 8 U.S.C. § 1251(a)(2)).

112. Loke, *supra* note 108, at 591-92.

113. Ford & Regoli, *supra* note 50, at 149 (quoting Lucy N. Friedman & Minna Shulman, *Domestic Violence: The Criminal Justice Response*, in VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS 87, 90 (Arthur J. Lurigio et al. eds., 1990)).

114. Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 54, at 43, 50-52.

115. Richard A. Berk et al., *The Differential Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 AM. SOC. REV. 698 (1992) (arguing that arrest has different effects on subsequent violence depending on the offender's background); Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Extralegal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992) (arguing that arrest increased recidivism among certain groups and had no overall crime reduction effect). For a useful debate about how these results should be interpreted see Richard A. Berk, *What the Scientific Evidence Shows: On the Average, We Can Do No Better Than Arrest*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 28, at 330-32; Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994).

The replication experiments were conducted in Colorado Springs, Omaha, Charlotte, Miami, Milwaukee, and Atlanta. Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170 (1992); Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990); J. David Hirschel & Ira W. Hutchinson, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73 (1992); Antony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC.

data suggest that although arrest may reduce recidivist violence in the short term, it may increase it in the long term.<sup>116</sup> And virtually no scientific data exist from which to assess whether arrest has a general, as opposed to specific, deterrent effect.<sup>117</sup>

A similarly mixed picture exists on the no-drop prosecution front. One study showed that twenty-five percent of men arrested pursuant to a victim complaint committed repeat violence against their partner even before the criminal case was resolved in court;<sup>118</sup> another showed a twenty-two percent reassault rate within three months of arrest.<sup>119</sup> The only study to directly compare "no-drop" and "drop permitted" policies found that recidivist violence was least likely in cases where women were permitted to drop but chose not to do so.<sup>120</sup> Those victims who did exercise their option to drop the case, however, were subjected to higher levels of violence than were those in the no-drop condition.<sup>121</sup>

Mandatory prosecution also may harm some battered women by depriving them of a powerful negotiation tool. One study showed that some victims are able to strike a bargain with the perpetrator; she will drop the charges if he will stay away from her, pay child support, or give her custody of the children.<sup>122</sup>

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REV. 691 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992). The sixth National Institute of Justice funded study took place in Atlanta, Georgia; no results have been published. For an insightful analysis of the myriad weaknesses of the Minneapolis Experiment as a basis for national police policy, see Arnold Binder & James W. Meeker, *Experiments As Reforms*, 16 J. CRIM. JUST. 347 (1988).

116. Schmidt & Sherman, *supra* note 114, at 49; see also J. David Hirschel et al., *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RES. CRIME & DELINQ. 7 (1992) (stating that arrest is no more effective than short-term separation of the parties, or issuance of a citation to the perpetrator).

117. Berk, *What the Scientific Evidence Shows*, *supra* note 115, at 324.

118. David A. Ford, *Preventing and Provoking Wife Battery through Criminal Sanctioning: A Look at the Risks*, in ABUSED AND BATTERED 191, 198 (Dean D. Knudsen & JoAnn L. Miller eds., 1991).

119. Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERS. VIOLENCE 63, 69-70 (2000).

120. Ford & Regoli, *supra* note 50, at 156.

121. *Id.*

122. David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 FAM. REL. 463, 469 (1983). Other researchers have studied the impact of coordinated community interventions on recidivism of abusers. For example, one study found that the combined effects of prosecution, probation, and court-ordered counseling were

But there is yet another danger for battered women arising from these mandates that has gone virtually unnoticed in the advocacy community. As these reforms were enacted and enforced, offenders suddenly were held accountable for behavior that long had been routinely ignored. The perpetrator population reacted with disbelief, quickly followed by claims of unfair, discriminatory treatment.<sup>123</sup> During arrests, pretrial settlement conferences, and trials, perpetrators and their counsel frequently voiced their belief that the new system had created an anti-male, pro-victim bias, as well as a deprivation of their civil liberties.<sup>124</sup> This perception, accurate or not, may be harmful to victims.

Defendants in civil protection order and criminal cases frequently complain that the "system is against men," and that in responding to a "family matter," the police "always arrest the man" and "judges always believe the woman."<sup>125</sup> Perpetrators who agree to settle civil protection order cases often angrily exclaim that "no one believes the man in these cases anyway." Once an order is entered by the judge, many of these same men barely wait to exit the courtroom doors before crumpling their copy into a ball and slamming it into the nearest trash can, grumbling, "It's just a piece of paper, it's not going to change anything." At conferences and training sessions, defense attorneys frequently echo these sentiments.<sup>126</sup> Given states'

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associated with a significant reduction in recidivism. Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263, 278 (1998).

123. This observation is based on numerous interviews with police officers, prosecutors, and defense attorneys conducted after the enactment of a mandatory arrest law and the implementation of a no-drop prosecution policy in Washington, D.C.

124. These observations are based on my personal experience, both before and after implementation of mandatory arrest and no-drop prosecution, negotiating and litigating hundreds of domestic violence cases, observing many more civil and criminal cases, and directing D.C.'s Emergency Domestic Relations Project, which until November 1996 was responsible for handling all pretrial protection order cases for pro se victims in the District of Columbia.

125. *Id.*

126. *E.g.*, Sam Skolnik, *Domestic Breakdown*, LEGAL TIMES, June 17, 1996, at 14 (quoting Colin Dunham, President, D.C. Superior Court Trial Lawyers Association). This perspective is occasionally voiced in the media as well. Cathy Young, *Domestic Violations*, 29 REASON 24 (1998); Robyn E. Blumner, *Domestic Abuse Law Treats Men Unfairly*, ST. PETERSBURG TIMES (Fla.), Dec. 5, 1999, at 1d; Kathleen Parker, *Fathers' Protests Deserve Airing*, USA TODAY, Nov. 4, 1999, at 19A; Andrew P. McGuire, Esq., Remarks at the D.C. Bar Association Conference: The New Rules Governing Proceedings in the D.C. Domestic Violence Unit (Mar. 21, 2001); Jonathan Rapping, D.C. Public Defender Service Domestic Violence Coordinator,

long history of discriminatory refusal to assist victims of family abuse,<sup>127</sup> however, it is difficult to believe that these new policies could have an impact so fundamental as to not only level the playing field, but to regrade it in the opposite direction.

But whether unfair treatment of batterers occurs, or is simply perceived to occur, the issue must be taken seriously. Although many victim advocates and tough-on-crime policymakers are perfectly comfortable with—or at least not particularly troubled by—the idea of an antidefense bias, this possibility should be of equal concern to victims as it is to perpetrators. As discussed *infra*, recent social science data demonstrate that even unrealistic perceptions of unfair treatment undermine subsequent compliance with the law. Given the likelihood that a victim will resume some form of contact with her abusive partner in the aftermath of official intervention,<sup>128</sup> factors affecting future compliance assume major significance for victim safety.

### *B. Expanded Judicial Authority in Awarding Civil Protection Orders*

A similar set of concerns arises on examination of recent reform proposals in the civil protection order system. Although the Model Code proposals address real problems and would certainly improve victims' access to justice, they are accompanied by a dramatic erosion of traditional due process guarantees for defendants.

The measures proposed in the Model Code are designed, in part, to maximize victims' ability to obtain protection orders.<sup>129</sup> Studies have shown that many battered women come to court for a

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Remarks at the D.C. Criminal and Appellate Practice Institute (Nov. 20, 1999).

Attorneys who represent accused perpetrators also see mandatory arrest as a serious threat to their clients' civil liberties. *Mandatory Arrest Policies in Domestic Violence Cases: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. (1994) (statement of the American Civil Liberties Union), available at <http://www.aclu.org/congress/lg071494z.html>.

127. See *supra* notes 19-21 and accompanying text.

128. Kristin Littel et al., *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998) (information provided in section regarding the response of law enforcement to violence against women), available at <http://www.vaw.umn.edu/Promise/pplaw.htm>.

129. MODEL CODE § 306 cmt.

temporary, ex parte protection order, but then never return to obtain longer-term protection.<sup>130</sup> Judicial bias, frustration, and the tendency to discredit victims,<sup>131</sup> as well as fear of batterer reprisals, create serious obstacles to victims' ability to safely and productively access the civil justice system. Petitioners in civil protection order cases are frequently frustrated when the police are unable to offer them immediate protection at the scene of an abusive incident, and they routinely express surprise and dismay when they learn that they must notify their abusive partner about the civil protection order suit and testify in his presence.<sup>132</sup>

The Model Code's emergency process certainly goes a long way toward ensuring a victim's access to legal protection until she realistically can have time to appear before a judge and provide a more formal presentation of her case. At the same time, this process may well feel unfair to an accused batterer. It is unlikely that a person under arrest will perceive as fair and unbiased a finder of fact who relies exclusively on a police officer's version of events, and who provides the accused with no opportunity to present his own story. The police, perhaps more than any other government actors, are not viewed as neutral arbiters by either those in the criminal justice system or the general public.<sup>133</sup>

Similarly, the Model Code's ex post procedural safeguards pale in comparison to a hearing that occurs *prior* to the issuance of an order. Few respondents in any jurisdiction are represented by counsel in civil protection order cases,<sup>134</sup> so they are unlikely to be

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130. NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 47 (Susan L. Keilitz et al. eds., 1997) (battered women obtained a temporary protection order but did not return for a permanent order in forty-four percent of District of Columbia cases studied, sixty-one percent of Denver cases studied, and seventy-five percent of Delaware cases studied); Adele Harrell & Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in THE URBAN INST., LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 49, 50 (1998).

131. See *supra* notes 69-79 and accompanying text.

132. Even when police conscientiously adhere to mandatory arrest policies, they are of little use when the batterer flees the scene before the arrival of law enforcement.

133. FRANK J. VANDALL, POLICE TRAINING FOR TOUGH CALLS: DISCRETIONARY SITUATIONS 1 & nn.4-6, 2 & n.29 (1976).

134. District of Columbia study found that approximately seventy percent of petitioners and respondents are unrepresented in civil protection order cases. D.C. COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 143 (1992). In general, up to ninety percent of defendants in civil courts

advised of their right to request a hearing in the month following the receipt of what, on its face, appears to be a final court order. Even in those instances where a hearing is scheduled and held, this only provides the respondent with an opportunity to undo the order long after it has gone into effect. He is likely to spend at least thirty days, and most likely far longer, ordered out of his home, forced to stay away from a range of persons and places, with no access to his children, and without the use of his car.<sup>135</sup>

The Code's authors justify their proposals by explaining that: "[t]here is evidence that the safety, if not the lives, of victims would be jeopardized if they were required to give notice and participate in a full hearing before any legal protection is issued."<sup>136</sup> This may be true,<sup>137</sup> but these suggested reforms also most certainly deprive respondents of their traditional due process rights.

Movement activists, policymakers, and scholars have debated the relative merits of criminal and civil justice system reforms almost exclusively in terms of expanding victims' access to justice and increasing perpetrators' accountability. Little or no concern has been expressed about the accompanying reduction in procedural protections for perpetrators. Even more significantly, virtually no attention has been paid to the data demonstrating a close connection between batterers' sense of unfair treatment and victim safety.

Of course, providing defendants with due process is a concept firmly rooted in the U.S. Constitution.<sup>138</sup> Ensuring that an accused person is treated with fairness, respect, and neutrality enhances

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dealing with issues such as landlord-tenant cases are not represented by counsel. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 79, 107 (1997).

135. This proposal represents a dramatic deviation from traditional notions of due process. I am aware of no area of civil litigation in which a party's right to be heard arises only after an order is issued.

136. MODEL CODE § 306 cmt.

137. This claim, however, seems exaggerated. Presumably, a judge could issue a short-term, two- to three-week ex parte order that would extend from the time of filing the claim to the time of a contested trial. This would provide the petitioner with the same protection as a permanent order, but also would ensure an opportunity for a traditional hearing with routine procedural guarantees. Indeed, this is the process in place in numerous jurisdictions. *E.g.*, D.C. CODE ANN. § 16-1004(d) (2000) (two-week temporary order available on ex parte basis).

138. U.S. CONST. amends. V, XIV, § 1.



the morality and decency of our justice system. But if such treatment has the additional benefit of increasing compliance with the law, it is of particular importance in domestic violence cases. For victims of intimate partner abuse, recidivist violence, increasing both in frequency and severity, is a highly predictable fact of life.<sup>139</sup> To effectively break this cycle of violence, the justice system is forced to ensure compliance with its directives. The research demonstrating the impact of procedural justice on future compliance is explored in the following section.

### III. THE IMPACT OF PROCEDURAL JUSTICE DEPRIVATIONS: RETHINKING STRATEGIC APPROACHES TO PROTECTING BATTERED WOMEN

Over the past thirty years, activists in the battered women's movement have focused on improving the justice system's response to domestic violence and encouraging victims to seek help from police, prosecutors, and judges. These responses, however, can only be effective if batterers actually *comply* with police directives, with judicial orders setting conditions for pretrial release, sentencing, probation, and parole, and with court-issued civil protection orders. If government power is expanded in a way that instills a sense of unfair treatment among perpetrators, it will undermine the likelihood of such compliance, and victims of abuse will have gained little.

Recent social science research has shed new light on the factors that influence individual compliance with the dictates of government authorities. This research represents a significant break with traditional criminological theory about why people obey the law.

Much of the existing research on the effectiveness of justice system intervention is rooted in deterrence theory. This theory rests on the instrumental view that compliance with the law is primarily determined by self-interest. Simply put, a person obeys the law when the benefits of compliance outweigh the costs.<sup>140</sup> The preoccupation of legal scholars with deterrence theory has led to a

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139. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 68-69 (1987); LENORE E. WALKER, THE BATTERED WOMAN 43-44 (1979).

140. *E.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (1990).

research emphasis on comparing the degree of social control imposed through different outcomes of legal proceedings. The expectation is that as a negative outcome, or sanction, increases in severity or certainty, so does its effectiveness in inhibiting future illegal behavior. In essence, "what people care about when they have contact with legal authorities is securing a favorable outcome for themselves."<sup>141</sup>

But research in the field of social psychology now casts doubt on this theory. A growing body of data indicates that compliance with official directives depends as much on the *manner* in which an outcome is reached as the ultimate *outcome* itself.<sup>142</sup> Because deterrence theory has become so culturally ingrained, this idea may seem counterintuitive. Why would a person be more likely to comply with an order that he believes is decided wrongly, simply because the process that led to it appears fair?

Some researchers have posited that fair procedures foster compliance because of a link to traditional deterrence theory. Fair procedures promote fair outcomes; the favorable outcomes, in turn, increase compliance.<sup>143</sup>

The data, however, support an alternative concept: fair treatment affects compliance regardless of whether the ultimate result is viewed as right or wrong. If people feel unfairly treated by a government official or a court proceeding, they will perceive the source as less legitimate and, as a consequence, obey its orders less frequently.<sup>144</sup> As researcher Tom Tyler explains:

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141. Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 167 (1997).

142. TYLER, *supra* note 140.

143. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978).

144. TYLER, *supra* note 140, at 108; Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115 (1992). In Tyler's words:

[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

[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.<sup>145</sup>

Accordingly, the procedural justice theory holds that allowing a person to state his case, taking his opinions seriously, communicating that officials maintain an open mind about him and his case, and treating him with respect, all enhance his perceptions that authorities are moral and legitimate. Compliance, even if it is counter to one's immediate self-interest, then stems from a sense of duty or morality.

Researchers have identified several building blocks of procedural justice. The first is trust: To what extent does a defendant perceive that he has had a genuine opportunity to state his case and that his needs are being treated as a matter of concern?<sup>146</sup> This factor is referred to in the literature as "process control,"<sup>147</sup> or

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authorities need to be especially concerned with maintaining fair procedures for making allocations and resolving disputes.

TYLER, *supra* note 140, at 109 (citations omitted).

145. TYLER, *supra* note 140, at 165.

146. TYLER, *supra* note 140, at 136-38, 163. The importance of this concept has long been recognized by authorities. An Egyptian judge's manual written around 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  
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.

*Id.* at 148 (quoting Ptahhotep, *The Instruction of Ptahhotep* (Egypt 2300-2150 B.C.), quoted in JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* at vii (1985)).

147. Tom R. Tyler et al., *Influence of Voice on Satisfaction With Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCH. 72, 72 (1985). "Process

"voice."<sup>148</sup> Another building block is neutrality: Is the relevant legal authority honest, engaged in fact-based decision making, and functioning in the absence of bias or prejudice?<sup>149</sup> A third element is consistency: Are authorities treating similarly situated persons in a similar manner?<sup>150</sup> Can an individual expect to receive similar treatment over time, in different encounters with the justice system?<sup>151</sup> The final element can be expressed as standing, or dignity: Are authorities engaging in respectful and ethical treatment of individuals?<sup>152</sup>

The procedural justice hypothesis—that fair treatment by authorities improves compliance with their directives—is supported by several strands of criminological theory. John Braithwaite's shaming theory holds that sanctions imposed in a manner that harms a person's dignity may result in an increase in future offending.<sup>153</sup> Conversely, sanctions imposed in a respectful manner that honors human dignity may increase compliance with authority.<sup>154</sup> Robert Agnew's "strain" theory rests on the concept that fair and respectful treatment by legal authorities, which entails the opportunity for meaningful participation in the decision-making process, may reduce the negative feelings that can result in strain and rule-breaking.<sup>155</sup> Social control theory posits that bonds to conventional institutions and individuals curb illegal actions.<sup>156</sup>

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control," or the opportunity to express one's views about how a decision should be made, is distinguished from "decision control," or actual influence over the nature of a decision. *Id.*

148. ALBERT D. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

149. Paternoster et al., *supra* note 141, at 168.

150. TYLER, *supra* note 140, at 118-19, 135.

151. *Id.*

152. *Id.* at 138-39, 152.

153. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 98-107 (1989); *see also* Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. IN CRIME & DELINQ. 445 (1993) (articulating similar "defiance" theory of fair treatment and deterrence). For an introduction to recent debates on the appropriateness of shaming *see* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

154. *E.g.*, BRAITHWAITE, *supra* note 153, at 55.

155. Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, 30 CRIMINOLOGY 47 (1992).

156. *E.g.*, TRAVIS HIRSCHI, *CAUSES OF DELINQUENCY* 10-11 (1969); ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 139-78

Perceptions of unfair treatment could weaken one's stake in conformity; fair treatment could strengthen it.

In addition to this theoretical grounding, extensive data, obtained in a wide variety of contexts, supports one essential component of the procedural justice theory. A strong link exists between one's perceptions of fair treatment and one's attitude toward authority. Perceptions of fairness affect both one's degree of satisfaction with the ultimate outcome of a legal proceeding and one's sense of the overall legitimacy of governmental authority.

Particular attention has been paid to the importance of providing a litigant with the opportunity to state his case.<sup>157</sup> The data indicate that the simple opportunity to express oneself has value and impact—regardless of any influence on decisional outcomes.<sup>158</sup> One study demonstrated that even when litigants were permitted to speak only *after* a decision was made (without any possible influence on outcome), this opportunity increased perceptions that the *ex ante* decision was a fair one.<sup>159</sup>

Other aspects of fair treatment also affect citizens' satisfaction with their justice system encounters. In an extensive study of interactions with the police and courts, people reported viewing their experience more favorably, and viewing police and court officials as more legitimate, when they were permitted to present their case, perceived that authority figures were attempting to be fair, and believed authority figures were treating them with

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(1993); Daniel S. Nagin & Raymond Paternoster, *On the Relationship of Past to Future Participation in Delinquency*, 29 CRIMINOLOGY 163 (1991).

157. Thibaut and Walker call this "process control;" Hirschman and Folger call it "giving voice." HIRSCHMAN, *supra* note 148; THIBAUT & WALKER, *supra* note 143; Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCH. 108 (1977); see also Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in LAW IN A THERAPEUTIC KEY 3, 10 (David B. Wexler & Bruce J. Winick eds., 1996) (discussing the value in presenting arguments to a third party).

158. Tyler et al., *supra* note 147, at 79 (explaining that perceived control over opportunity to speak heightened judgments of procedural justice regardless of perceived control over decisional outcome).

159. E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 952-53 (1990). Another study found that the amount of time spent with an attorney (and thus the degree of voice in the process) was positively related to felony defendants' reports of procedural fairness. Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 498 (1988).

respect.<sup>160</sup> In another study, the way police officers treated a person during an arrest—whether they acted in a businesslike manner, tried to be helpful, used disrespectful language, pushed the person around unnecessarily, or embarrassed him in front of others—affected felony defendants' sense of procedural fairness. The quality of police treatment also had a spillover effect onto defendant evaluations of their experience with courtroom personnel and their general sense of fair treatment by the government.<sup>161</sup>

These findings are equally applicable to the civil justice system. A survey of parties involved in mediated and litigated custody disputes revealed that, overall, perceived procedural justice had an equally strong impact on outcome satisfaction as did a favorable substantive resolution.<sup>162</sup> And for those in "high conflict" parenting relationships,<sup>163</sup> procedural fairness was more important than outcome in determining outcome satisfaction.<sup>164</sup> Similarly, fair process led to outcome satisfaction in two studies of litigants in federal civil arbitration programs.<sup>165</sup>

Several studies also have shown that procedural fairness can have an impact that is not only independent of, but greater than, case outcome. For example, a study of defendants in misdemeanor and traffic courts found that perceptions of judicial fairness directly influenced participants' self-reported support for the legitimacy of the individual judge, the particular case result, and the court system in general.<sup>166</sup> The actual case outcome—guilty or not

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160. TYLER, *supra* note 140, at 85-93.

161. Casper et al., *supra* note 159, at 498, 506. Voice matters to victims, as well. Women's satisfaction with police response to domestic violence incidents is highest when the officers comply with the woman's preference, whether that is to arrest, or to refrain from arresting, the perpetrator. Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251 (1998).

162. Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553, 558-59 (1993).

163. Parents were asked to rate the degree of conflict they experience in twenty-five potential problem areas, such as visitation, gifts, and discipline, on a scale of one to four. *Id.* at 558.

164. *Id.* at 559-60.

165. E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).

166. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 67 (1984) (explaining that perceptions of

guilty—had far less impact on this sense of support.<sup>167</sup> The empirical evidence further indicates that people generalize from their sense of procedural fairness in a particular justice system encounter to broader attitudes about the law, courts, and the political system.<sup>168</sup>

A small but growing body of research has begun to make an additional, crucial connection: perceptions of procedural justice not only increase outcome satisfaction and support for the justice system, but actually may translate into future compliance with authority. The handful of studies in this area have shown a compliance effect in criminal, civil, and family law contexts.

A telephone survey of people who previously had contact with police or courts found that only those who believed they were treated unfairly subsequently self-reported reduced compliance with laws prohibiting shoplifting, speeding, drunk driving, littering, illegal parking, and noise violations.<sup>169</sup> Another study analyzed factors predictive of long-term compliance with mediated agreements in civil cases.<sup>170</sup> Where respondents believed that the

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procedural fairness are linked to defendants' beliefs that a judge takes sufficient time to carefully consider a case and that the judge appears unbiased).

167. *Id.*; see also Kitzmann & Emery, *supra* note 162, at 558-60.

168. Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 629-52 (1989). Procedural fairness has been shown to have a positive effect on participant satisfaction not only in formal courtroom settings, but also in the context of alternative dispute resolution. *E.g.*, Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 36-37 (1984) (demonstrating that compliance with a mediated resolution of a small claims complaint is more likely where defendant feels that the procedures were fair).

169. TYLER, *supra* note 140, at 40-42. A similar survey found that those who reported hearing stories of unfair treatment by the Internal Revenue Service officials in tax audits assessed themselves as less likely to comply with tax laws than those who did not report hearing such stories. Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES 259, 267-82 (Joel Slemrod ed., 1992).

170. Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 324-28 (1993) (explaining that perceptions of procedural fairness were linked to participants' beliefs that they were given an opportunity to state their case, that the full spectrum of relevant issues were aired, and that the mediators had listened to and made genuine efforts to understand concerns raised). Complainant reports of improvements in their personal relationships with respondents also were linked to cases involving perceived procedural fairness. *Id.* at 326-27.

Like many others cited in this Article, this study suffers from a weakness common in social science research. Researchers were unable to locate approximately half of the original participants to obtain long-term follow-up data. Out of a total of seventy-three cases, forty-six

mediation process was fair, complainants reported better compliance over the following four to eight months, even in cases where respondents were dissatisfied with the substance of the agreement.<sup>171</sup> A study of litigants in small claims court found that participants were more likely to comply with both favorable and unfavorable judgments when they believed the trial process was fair.<sup>172</sup>

This research has particularly important implications for domestic violence cases. Advocates for battered women frequently express concern that batterers will not comply with court orders, particularly in the civil protection context. Many victims report that their intimate partners have declared that a protection order is "just a piece of paper" that will not prevent them from continuing their abusive behavior.<sup>173</sup> Enhancing the likelihood of a batterer's compliance with police directives and court orders could substantially increase victim safety.

Only one study has tested the procedural justice compliance theory in the domestic violence context. In that study, researchers considered the extent to which a batterer's perception of police officers' procedural fairness at the scene of a reported intimate partner crime affected recidivism rates.<sup>174</sup> The pre-existing literature on this subject focused exclusively on the impact of different police-imposed *sanctions* on recidivism (i.e., warning, mediation, and arrest); as discussed in Part II.A, *supra*, the results were equivocal.

The principal investigators in the original police arrest experiment concluded that their study "strongly suggest[ed] that the police should use arrest in most domestic violence cases,"

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complainants and thirty-four respondents were reached and agreed to participate in a second interview. *Id.* at 317. It is quite conceivable that parties who were not satisfied with the mediation, or where subsequent compliance was poor, would be disproportionately represented in the group that was more difficult to contact.

171. *Id.* at 327. This study's applicability to domestic violence disputes is heightened by the fact that virtually all of the cases involved disputes arising out of personal relationships and most of those relationships were severely strained when mediation took place. *Id.* at 316-17.

172. McEwen & Maiman, *supra* note 168.

173. *E.g.*, JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 170 (1999); see also *supra* text accompanying notes 125-26.

174. Paternoster et al., *supra* note 141, at 163.



because arrest was most highly correlated with low recidivism rates.<sup>175</sup> But when six replication studies were conducted in different jurisdictions, the findings ranged all over the map; in some studies arrest had no effect, in others it had a deterrent effect, and in others it escalated subsequent violence.<sup>176</sup> Even within the same jurisdiction, the impact of arrest often varied based on the length of detention subsequent to arrest, as well as certain offender characteristics, such as employment status and other ties to the community.<sup>177</sup>

What these studies failed to consider, however, was the possibility that these seemingly inconsistent results could be explained through the impact of differing police procedures. In 1997, researchers re-examined the data from one of the original study sites, 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."<sup>178</sup>

The researchers analyzed a wide range of data reflective of perceptions of procedural justice. For example, arrestees were asked whether police officers took the time to listen to their side of the story (relevant to voice); whether they expected to be arrested when the police arrived (relevant to consistency); whether the police listened to both their story and the victim's story (relevant to neutrality); and whether they were handcuffed and, in particular, whether this occurred in front of the victim (relevant to dignity).<sup>179</sup>

The results of this re-analysis demonstrate that a batterer's perceptions of fair treatment have a statistically significant effect on his future recidivism.<sup>180</sup> Arrestees showed lower recidivism rates

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175. LAWRENCE W. SHERMAN & RICHARD A. BERK, *THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 2* (1984).

176. LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 125-53 (1992).

177. *Id.*

178. Paternoster et al., *supra* note 141, at 165.

179. *Id.* at 175-79. Other variables also were considered, including the arrestee's stake in the community (including whether he was a member of a church or community organization) and his beliefs about the appropriateness of using physical violence against a partner. *Id.* at 178. Because this study was based on an after-the-fact analysis, researchers were limited to procedural justice data points collected in the original study. *Id.* at 175-79. Further research that includes a more comprehensive range of data points specifically designed to test procedural justice hypotheses clearly is needed.

180. *Id.* at 194. Because this study was a re-analysis of the data collected in the original

when they perceived that they were treated fairly.<sup>181</sup> Indeed, fair treatment during arrest had the same recidivism-inhibiting effect as did a favorable outcome—being warned. When coupled with perceived unfair treatment, in contrast, arrest had a significantly reduced effect on future compliance.<sup>182</sup>

Researchers further found that neither an arrestee's stake in conformity (as measured by marital and employment status), nor the length of his post-arrest detention were statistically related to future compliance.<sup>183</sup> Moreover, the "effect of perceived procedural justice is comparable in magnitude to the various effects of arrest and stakes in conformity—the two variables which have been the subject of much research and speculation in the SARP spouse assault experiments."<sup>184</sup>

One other study lends some indirect support to this finding that the manner in which batterers feel they are treated affects victim safety in domestic violence cases. Researchers asked perpetrators to report whether they felt angry ("definitely," "somewhat," or "not at all") in reaction to their entry into the criminal justice system.<sup>185</sup> Those arrested on the basis of a warrant, who rated themselves as "definitely" angry, were three times more likely than those who felt less anger to commit repeat violence against their partner before the criminal case was resolved in court.<sup>186</sup>

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Minneapolis Experiment, however, the authors concede that it suffers from many of the same research weaknesses as did that study. *Id.* For a review of these problems, see Zorza, *supra* note 115.

181. Paternoster et al., *supra* note 141, at 186.

182. *Id.* at 192.

183. *Id.* at 191-92. As the authors note, however,

it is entirely possible that our measures of one's "stake in conformity" (marital and employment status) are poor proxies for one's commitment to the community or group. Future research should employ more subjective assessments of the extent to which individuals feel themselves to be integrated into and members of the group whose rules are being enforced.

*Id.* at 192 n.20.

184. *Id.* at 194.

185. David A. Ford, *Preventing and Provoking Wife Battery through Criminal Sanctioning: A Look at the Risks*, in *ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE* 191, 194 (Dean D. Knudsen & JoAnn L. Miller eds., 1991).

186. *Id.* at 197. In addition, batterers who strongly protest the entry of a protection order in the courtroom are three to four times more likely to subsequently violate the order. Harrell & Smith, *supra* note 130, at 49, 50.

These studies, in conjunction with the general procedural justice literature described above, contain an important lesson for architects of the state's response to domestic violence. Even for those whose sole concern is victim safety, the impact of reform policies on batterer compliance must be taken into account.

#### IV. WHERE DO WE GO FROM HERE?

The idea that fair treatment has an independent, substantial effect on batterers' compliance with authority is a simple but powerful one. Although the justice system's treatment of victims has been far worse than its treatment of their abusive partners, the perceptions and experiences of abusers can no longer be ignored. A strong possibility exists that many well-intentioned reforms have undermined victim safety by eroding procedural justice for perpetrators. In the criminal justice system, police and prosecutors must provide defendants with expanded opportunities for voice, while simultaneously improving the advocacy services available to victims. Defense attorneys must take advantage of their special position of trust to assist in the effort to promote compliance. Judges must learn to be more respectful of and attentive to defendants, particularly when they appear *pro se* in civil protection order suits. In the civil system, more and better information must be provided to accused batterers and pretrial negotiation processes must be made more responsive to defendants' individual needs.

##### *A. The Criminal Justice System*

###### *1. Increasing Perpetrators' Opportunities for Voice*

Many batterers' first encounter with the justice system is the moment when police respond to the scene of an abusive incident. Perhaps for that reason, perceptions about an officer's actions leave a lasting impression and can influence a perpetrator's view of his entire criminal justice experience. By creating an atmosphere of receptiveness, respect, and impartiality, law enforcement officers could greatly enhance batterers' compliance with court directives designed to protect victims.

To do so, officers must learn to communicate a willingness to understand and consider a suspect's version of events. A person is most likely to feel "heard" when a listener conveys that he is focused and present in the moment; that he is attending to and reflecting back what the suspect says without being distracted or focused on his own agenda.<sup>187</sup> The listener also needs to make clear that he has suspended judgment and is open to different versions of events.<sup>188</sup> Clinical psychologists routinely employ such skills, and could develop training programs to help police officers develop similar expertise in interpersonal communication.

Officers also could convey a sense of neutrality and respect by clearly explaining their actions, refraining from disrespectful or derogatory language, and avoiding the use of unnecessary physical force.<sup>189</sup> Handcuffing suspects should be avoided unless truly necessary and then should be accomplished as privately as possible, to avoid humiliating the perpetrator in front of his intimate partner, family, or community.<sup>190</sup>

These recommendations are in no way meant to suggest a return to police practices of an earlier era. The gains that have been made in sending a clear message of disapproval to batterers and of responsiveness and support to victims must be preserved. Police must not treat perpetrators more preferentially than victims; equally respectful treatment is not only appropriate to the situation, it also is the only way to prevent victims from reverting to a position of discouragement and distrust. In addition, officers must communicate clearly that intimate partner violence is illegal and responsibility lies squarely with the perpetrator—but they must do so while treating an individual suspect with dignity.

On the surface, these reforms might appear to require only minor adjustments in the investigation and arrest process. But their implementation presents a serious challenge to the entrenched

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187. *E.g.*, CLARA E. HILL & KAREN M. O'BRIEN, *HELPING SKILLS: FACILITATING EXPLORATION, INSIGHT, AND ACTION* 81-93, 99-101 (1999).

188. *E.g.*, WILLIAM R. MILLER & STEPHEN ROLLNICK, *MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE TO CHANGE ADDICTIVE BEHAVIOR* 55-56 (1991).

189. *See* Casper et al., *supra* note 159, at 498 (describing research results indicating that treatment by police affects a defendant's sense of fair process); Paternoster et al., *supra* note 141, at 194 (describing research results suggesting that an individual's perception of procedural justice reduces his likelihood of recidivism).

190. *See supra* note 179.

culture of policing. Officers are trained to employ a style of "command and control—they try to dominate people and situations by displays of force or the potential for the use of force."<sup>191</sup> Most officers see their role as apprehending the perpetrator and adducing sufficient evidence against him to support a conviction, not creating an environment in which a suspect feels heard and understood.<sup>192</sup> They are unlikely to view the task of fostering an accused's sense of fair treatment as part of their job.

The challenge here is lessened, however, by the fact that the police need not *actually* feel impartial, they need only appear to be doing so.<sup>193</sup> Because compliance depends solely on enhanced *perceptions* of fairness,<sup>194</sup> it would be sufficient for officers to make stylistic changes without actually adopting an impartial approach, disavowing their adversarial position, or decreasing their legitimate efforts to investigate a case. Of course, even such surface-level behavioral reforms may be difficult to implement.

How can police officers be persuaded to create a new culture of investigation and arrest? Training programs need to emphasize that, in the long run, these reforms should facilitate the task of law enforcement, by increasing future compliance with court orders that require appearance at trial, set conditions of pretrial release and post-conviction probation, and regulate family law issues through a protection order. Providing procedural justice reduces "repeat customers"—every order complied with, rather than violated, means one fewer arrest to be made and in many cases one fewer victim re-abused.

One way to reinforce such training messages is to provide law enforcement officers with feedback on the success of their efforts. In

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191. Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 364-65 (2001).

192. David Lester, *Officer Attitudes Toward Police Use of Force*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 180 (William A. Geller & Hans Toch eds., 1996); Stephen D. Mastrofski et al., *Compliance on Demand: The Public's Response to Specific Police Requests*, 33 J. RES. CRIME & DELINQ. 269, 274 (1996); Robert Sgambelluri, *Police Culture, Police Training, and Police Administration: Their Impact on Violence in Police Families*, in FEDERAL BUREAU OF INVESTIGATION, DOMESTIC VIOLENCE BY POLICE OFFICERS 309, 314 (Donald D. Sheehan ed., 2000).

193. Tyler & Lind, *supra* note 144, at 162. Of course, both form and substance must cohere if any claim of system integrity is to be made.

194. *Id.*

the Manhattan Community Court, the prosecutor's office records convictions in a police-accessible database.<sup>195</sup> Officers—who previously had no routine access to such information—report that they are encouraged to make arrests when they see that their work results in a successful prosecution.<sup>196</sup> An analogous system should be implemented here: as officers learn that suspects they arrested have successfully completed probation, or complied with the terms of a civil protection order, they may become convinced that it is worthwhile to conduct arrests in a procedurally fair manner.

Another obstacle to reform is that potential suspects may not be particularly receptive to police efforts to appear fair. Some citizens, particularly those from communities whose members have long been discriminated against and otherwise mistreated by the system, may see fair treatment by the police as an inherent contradiction in terms.<sup>197</sup>

This obstacle may be particularly acute within the framework of mandatory arrest and no-drop prosecution policies. For example, it seems likely that a suspect's sense of dignity would be undermined, rather than enhanced, when faced with a uniform government response that cannot be tailored to individual variations in circumstances. This problem might arise when a suspect is told that he must be arrested, regardless of the circumstances surrounding his actions, or, similarly, when a defendant learns that an Assistant District Attorney "cannot" dismiss the case against him so long as it can be proven in court, regardless of the relative merits of pursuing the particular prosecution.

Similarly, when an officer is required to arrest, it may be particularly difficult for him to communicate credibly that he is willing to listen to the participants' stories and take them seriously.<sup>198</sup> Under a "should arrest" policy, in contrast, this kind of

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195. Julius Lang, *Building Partnerships Between Law Enforcement and the Courts*, Address to the New York Midtown Community Court Community Policing Focus Group (Mar. 14, 1997).

196. *Id.*

197. Most people believe that, "in addition to performing . . . varied and valuable social functions, [police officers] sometimes abuse their authority: they can enforce law in a discriminatory fashion; they can harass and be unduly brutal; they can be corrupted and become confederates of criminals rather than upholders of law." JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 37 (1972).

198. While the simple act of giving voice to one's view—regardless of impact—might

listening would be more consistent with the officer's job of deciding whether a case is one in which arrest may not be appropriate. A shift to a should arrest policy would increase incentives for police to truly listen, rather than to do so merely as a hollow gesture made in the hope of increasing future compliance.

The adoption of more flexible, responsive criminal justice policies makes sense from the victim's psychological perspective as well. Many victims feel deeply ambivalent about their abusive partners. A woman may love her partner but also be afraid of him. She may want to stop the violence but not want him to go to jail. This "fluctuating readiness to consider change" makes an ambivalent person extremely sensitive to the way in which she is approached by a government official.<sup>199</sup> In the mandatory arrest and prosecution context, state officials necessarily emphasize one side of this internal conflict. By insisting that she prosecute her partner, they frequently push her to focus on the other side of her ambivalence,<sup>200</sup> with the unintended effect of encouraging her connection with the batterer. Pro-arrest and pro-prosecution policies, in contrast, build in somewhat greater flexibility for holding the victim's ambivalence by recognizing the complexity of her situation and thus evoking less resistance from her.

Far more data must be accumulated before one could definitively conclude that the procedural justice literature alone supports a shift from criminal justice mandates to preferences.<sup>201</sup> And the risks inherent in basing social policy on insufficient data are well-illustrated by the rapid law reform efforts that followed the Minneapolis Domestic Violence Experiment and were implemented before the replication studies cast doubt on its results. But given

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enhance satisfaction when the audience is a judge, whose function is to maintain an unbiased neutrality, Lind et al., *supra* note 159, at 952-53, it might be far less satisfying when the audience is a police officer or prosecutor, whose interests are commonly viewed as directly contrary to those of the accused.

199. MILLER & ROLLNICK, *supra* note 188, at 36.

200. The role played by ambivalence in a person's motivation to change is explored in detail in *id.* at 157-67.

201. Indeed, the only study to focus specifically on domestic violence considered only the police response. See *supra* text accompanying notes 174-84. Data obtained in other contexts, however, strongly suggests that similar results will arise when researchers investigate the impact of prosecutors, judges, and other system actors. See *supra* text accompanying notes 151-54.

that the advantages gained through obligatory arrest and prosecution also may be gleaned from other approaches, which are less likely to have a dampening effect on procedural justice for perpetrators,<sup>202</sup> it is appropriate to begin a dialogue about moving away from mandates.

## *2. Enhancing Victim Safety by Shifting from Mandates to Preferences*

What might be lost in a shift away from mandates? As described above, victim advocates have articulated two particularly strong arguments in support of mandatory arrest and no-drop prosecution. First, these policies empower the victim, alleviating her of responsibility for criminal justice system intervention. In the abuser's presence, the victim lacks the emotional space and physical and psychological safety to make a well-considered, self-protective decision.<sup>203</sup> Second, these policies send a strong symbolic message that the state condemns intimate abuse and will protect its victims.<sup>204</sup>

It may well be possible to provide these advantages to victims and simultaneously facilitate the compliance-generating elements of procedural justice. A number of recent studies indicate that mandating state usurpation of the victim's role is not the only answer.<sup>205</sup> By offering assistance aimed specifically at the difficulties battered women face, police and prosecutors could help victims reach a place where their ability to decide for themselves would no longer be comprised. In so doing, the state would reinforce the symbolic message sent to the community: we will protect victims of domestic violence, both by prosecuting batterers and by providing victims with the resources they need to meaningfully participate in the journey to safety.

How can the criminal justice system maximize battered women's ability to engage in optimal decision making? Recent research

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202. See *infra* text accompanying notes 203-16.

203. See *supra* text accompanying note 103.

204. See *supra* text accompanying note 99. The other argument for mandates—that they effectively reduce domestic violence—has received only mixed support from the research data. See *supra* text accompanying notes 114-17.

205. See *infra* text accompanying notes 207-19.



indicates that one important strategy is to offer victims extensive legal and nonlegal advocacy services. Such advocacy includes: providing information about and access to a wide range of social services; strengthening victims' emotional support network; providing information about the civil and criminal justice systems; and safety planning.<sup>206</sup>

Advocacy services can increase a victim's perceptions of social support, improve her mental health, and increase her physical and psychological safety. In a recent study, college students were trained to provide intensive, nonlegal advocacy services<sup>207</sup> to battered women leaving a shelter. Advocates helped women access community resources such as housing, employment, legal assistance, transportation, child care, health care, and counseling for their children.<sup>208</sup> After ten weeks, women in the advocacy group reported improvements in social support, greater effectiveness in obtaining necessary resources, less depression, fear and anxiety, and a better quality of life than those in the comparison group.<sup>209</sup> Most importantly, these women experienced less physical and psychological abuse, and those who wished to end their abusive relationships were significantly more effective in doing so.<sup>210</sup>

Such advocacy services can, in turn, increase the degree to which victims are willing to cooperate with the criminal justice system. In one study, survivors with better access to tangible support were approximately twice as likely to voluntarily participate in the prosecutions of their intimate partners.<sup>211</sup>

Advocates also can reverse a victim's sense of social isolation and improve her sense of emotional well-being. Such assistance is particularly important for battered women, whose support

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206. *Id.*

207. Each woman was assigned a college student volunteer who served as her advocate for six hours a week, over ten weeks. Cris M. Sullivan & Deborah I. Bybee, *Reducing Violence Using Community-Based Advocacy for Women With Abusive Partners*, 67 J. CONSULTING & CLINICAL PSYCHOL. 43, 45 (1999).

208. *Id.*

209. *Id.* at 48-50.

210. *Id.*

211. Lisa A. Goodman et al., *Obstacles to Victims' Cooperation With the Criminal Prosecution of Their Abusers: The Role of Social Support*, 14 VIOLENCE & VICTIMS 427, 437 (1999). In this study, victim cooperation was defined as providing necessary information to prosecutors and expressing a willingness to testify. *Id.* at 433.

networks often are methodically undermined during an abusive relationship.<sup>212</sup> In a recent evaluation of law school domestic violence clinics, battered women reported that their student advocates actively worked on their behalf to repair such relationships as they talked to family and friends during pretrial investigation.<sup>213</sup> The victims reported an increased sense of emotional support that was significantly greater than that among women who did not receive similar intensive advocacy services.<sup>214</sup> In addition, women in the advocacy group reported substantially lower levels of physical and psychological re-abuse, despite the fact that they had similar amounts of contact with their abusive partners during the study period.<sup>215</sup>

These results indicate that in many cases, facilitating victim access to resources and support from family, friends, and trained personnel may more than compensate for any disempowerment caused by a move from mandatory to preferred arrest and prosecution. In particular, advocacy services create similar benefits as do mandatory arrests: an increase in physical safety and the emotional space and empowerment necessary to engage in high-quality decision making.

An emphasis on advocacy has additional victim-centered procedural justice benefits. Research has shown that a woman who experiences government officials as listening to her story and responding to her individual needs is more likely to feel treated fairly, and therefore to cooperate with prosecutors' requests, than is a woman who feels forced into a mandatory model dismissive of her input.<sup>216</sup> In contrast, limited communication opportunities lead victims to bypass the criminal justice system altogether. A study of victims who were re-assaulted in the aftermath of a prosecution found that sixty-seven percent of those victims who wished to speak

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212. Sullivan & Bybee, *supra* note 207, at 43-44.

213. Margret E. Bell & Lisa A. Goodman, *Supporting Battered Women Involved with the Court System: An Evaluation of a Law School-Based Advocacy Intervention*, in VIOLENCE AGAINST WOMEN (forthcoming 2002) (on file with author) (study focused on advocacy work provided by the Georgetown University Law Center's Domestic Violence Clinic, which the author directs, and the Catholic University's Families and the Law Clinic).

214. *Id.*

215. *Id.*

216. Erez & Belknap, *supra* note 161, at 264; Ford & Regoli, *supra* note 50, at 157-60.

to prosecutors about the original case but were unable to do so failed to report the subsequent assault.<sup>217</sup>

To appropriately encourage victim participation in criminal litigation, prosecutors' offices should provide comprehensive advocacy services and referrals from the moment a case is filed, either within their own office or through referrals to private advocacy groups.<sup>218</sup> These services should include drug and alcohol counseling, psychological assistance, support groups, child care services, referrals to shelters, and economic assistance through state crime victims' compensation funds.<sup>219</sup> Advocates also could convene a victim's friends and family members to assist in strengthening damaged relationships and weakened bonds of support.

### 3. *Expanding the Defense Attorney Role*

Defense attorneys play a critical role in the provision of procedural justice. Increased opportunity to speak to an attorney improves defendant perceptions that the trial process is a fair one.<sup>220</sup> These lawyers therefore are in a special position to assist in the effort to promote their clients' compliance with court orders.

A defense attorney can promote procedural justice by spending sufficient time with a client to allow for a full articulation of his point of view, thus promoting his "voice"; by communicating respect for the client's dignity; and by providing a detailed overview, in advance, of the justice system process, promoting consistency. These ideas may sound like simply good lawyering, but many court-

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217. Gerald T. Hotaling & Eve Buzawa, *The Response to Victim Preferences by the Criminal Justice System and the Reporting of Re-victimization* (July 25, 2001) (paper presented at the 7th International Family Violence Research Conference).

218. Most of the research on the impact of advocacy services has focused on nongovernmental advocacy groups. It is unclear whether victim advocates, employed by the government and working in tandem with the prosecution, would be able to produce similar results. If not, prosecutors would have to form close relationships with, and assist with funding for, private providers of intensive advocacy services.

219. Linda Mills has suggested some similar reforms in arguing that state actors should adopt a clinically based "survivor-centered model" of intervention that promotes a more respectful relationship with battered women. Mills, *supra* note 45, at 597-609. Mills also suggests important additional resources needed by victims who face particular religious, cultural, or other obstacles. *Id.* at 598-600.

220. Casper et al., *supra* note 159, at 498.

appointed defense attorneys, who are paid too little and, accordingly, take on far too many cases, fail to make the time to do this work.<sup>221</sup>

Defense attorneys can protect their own clients' interests by increasing the chances that they will not run afoul of the law in the future. So although it must be tempting for defense counsel to share with clients their sense that the justice system is operating in an unfair manner, it is at least as important to let clients know when they believe a judge has acted fairly, a prosecutor is being reasonable, or a sentence is not overly harsh. Whether these moments are few or frequent, discussing them with a defendant could promote his future compliance with the court's directives and thus ultimately reduce the chances that he will recidivate and face additional criminal charges.

Defense counsel can further assist their clients beyond the particular case at bar by taking on the role of advisor as well as defender. To fill this role, defense attorneys must educate themselves about the dynamics of intimate partner abuse, particularly findings that domestic violence typically increases in both severity and frequency over time.<sup>222</sup> Defense attorneys' special position of trust allows them to effectively communicate this information to their clients, along with advice about preventive measures to help clients avoid reabuse and subsequent, more serious criminal charges. Defendants need to fully comprehend the advantages of complying with a civil protection order, as well as participating in counseling programs designed to deal with the violence, or with drug and alcohol abuse. Multidisciplinary public defender offices might be a valuable model for this approach.<sup>223</sup>

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221. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); Ronald W. Schneider, Jr., *A Measure of Our Justice System: A Look at Maine's Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335 (1996); Jane Fritsch & David Rohde, *Two-Tier Justice: Facing Life in Prison*, N.Y. TIMES, Apr. 8, 2001, at 1.

222. See *supra* note 139.

223. Attorneys at Neighborhood Defender of Harlem, for example, regularly refer defendant-clients to staff social workers who screen clients for social service needs by gathering information on the client's family background, substance abuse, and mental health history. Social workers write presentencing and prepleading reports for the clients. Social workers continue to follow up with clients post-adjudication. For example, a social worker would refer a domestic violence offender to a batterer treatment program, whether or not attendance is court ordered. Telephone Interview with Alexis Carrero, Staff Social Worker, Neighborhood Defender of Harlem (Aug. 3, 2001).

Such conversations may be particularly difficult with batterer clients, because of their tendency to deny, minimize, and externalize blame for their actions.<sup>224</sup> Specialized training from mental health professionals about how to engage in productive discussions about these issues might be useful.

### *B. The Judiciary*

Procedural justice research leads to valuable lessons for judges in civil and criminal domestic violence cases. Issuance of civil protection orders or orders setting conditions of pretrial release or probation mean little if batterers view them as illegitimate and therefore feel free to ignore them. Judges who recognize and respond to defendants' normative concerns can exercise their authority more effectively; their rules and decisions are more likely to be voluntarily accepted and inspire compliance. As a result, judicial training must be targeted toward promoting a sense of fair process among defendants.

Domestic violence training programs for judges focus almost exclusively on how to better understand and respond to victims; virtually no information is provided on how to better communicate neutrality and respect for defendants.<sup>225</sup> Even discussions of how judges should respond to the special needs of pro se parties—an issue that is particularly significant in protection order cases—typically is limited to ways in which the court can best assist unrepresented victims.<sup>226</sup>

This disparity in emphasis stems in large part from the fact that bias against and mistreatment of victims, not batterers, is a far more serious and well-documented problem among members of the judiciary.<sup>227</sup> This problem persists in the courts today.<sup>228</sup> But to

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224. See *infra* text accompanying notes 258-60.

225. E.g., THE FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION (Jacqueline Agtuca et al. eds., 1992).

226. *Id.* at 149-52. The topic of "unrepresented parties" in this model curriculum includes thoughtful information about how court clerks can assist petitioners to fill out forms and accomplish service of process, and how judges can encourage local attorneys to represent victims. *Id.* The only mention of unrepresented respondents, however, is a paragraph asserting that generally they have no right to appointed counsel in protection order cases. *Id.* at 151.

227. See *supra* text accompanying notes 69-79. Given that bias in favor of batterers has

maximize victim safety through batterer compliance with no-contact and no-assault directives, with custody and visitation awards, with counseling requirements, and with other conditions of release, judges also must be trained to promote perceptions of procedural justice among accused perpetrators.

One way that judges can accomplish this goal is to take the time to describe the trial process, as well as the applicable substantive law, at the outset of a hearing. As discussed *infra*, increased information can be important to a litigant's sense of fairness.<sup>229</sup> Concerns for judicial economy and the overwhelming number of cases on most protection order and criminal misdemeanor calendars may dictate that such information cannot be provided in every individual case. Instead, a judge may choose to begin each court session with a general description of case procedures, addressed to all of the litigants assigned to trial that day.

Judges also must provide sufficient time for each defendant to tell his story. Providing perpetrators with a sense of voice can have a profound impact on compliance.<sup>230</sup> As with police officers, judges must learn to communicate a willingness to understand and an openness to considering a defendant's version of the case. As discussed *supra*, this requires a demonstration that the judge is present in the moment and is attending to the defendant without distraction.<sup>231</sup> This may be particularly challenging in civil protection order cases involving unrepresented parties. Pro se litigants often have trouble remaining focused on legally relevant details; this can be quite frustrating for a judge with a crowded docket. Clear instructions from the court, however, about the kinds of facts that may be presented, communicated with patience and sensitivity, can help to alleviate this problem. Finally, by clearly

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long been the norm, this may be a relatively limited problem. My own observations indicate that the issue arises primarily among judges who generally treat pro se litigants in a disrespectful manner. Another potential source is well-meaning judges who have undergone extensive domestic violence training, taken the lessons to heart, and are now working hard to increase victims' sense of comfort in the courtroom. Occasionally, one of these judges bends over backwards to encourage victims to feel comfortable and, in so doing, creates an atmosphere of unfair disparity.

228. See *supra* note 131.

229. See *infra* text accompanying notes 237-44.

230. See *supra* text accompanying notes 146-48.

231. See *supra* text accompanying notes 187-88.

communicating the court's rulings and the findings that support them, a judge may improve the sense of dignity and respect that defendants take away from the courthouse.

Another procedural justice problem area for judges is the trend to rely on "dangerousness assessments" to determine an appropriate sentence or to set the terms of civil protection orders.<sup>232</sup> These research tools were developed to assist victims in predicting the likelihood that the violence in a relationship will recur and escalate. Victims whose intimate partners have a high dangerousness score are encouraged to engage in particularly extensive safety planning.<sup>233</sup>

Over the past ten years, however, courts across the country have begun to use these instruments to increase terms of imprisonment, deny probation and parole, and require supervision of visitation sessions with children.<sup>234</sup> Defense attorneys and others have raised significant concerns with this practice. Most troubling is the fact that no empirical data currently are available to demonstrate the predictive validity of dangerousness assessments.<sup>235</sup> In addition, the instruments typically are administered by untrained personnel on faulty and incomplete sources of information.<sup>236</sup> Judicial decision making on the basis of such a problematic information source is likely to create a perception among defendants that they have not been provided consistent treatment in the justice system—a fundamental component of procedural justice. Judges must refrain from utilizing these instruments for purposes other than victim safety planning.

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232. STATE JUSTICE INST., CURRENT USE OF DANGEROUSNESS ASSESSMENTS IN SENTENCING DOMESTIC VIOLENCE OFFENDERS: FINAL REPORT 12 (Jan Roehl & Kristin Guertin eds., 1998). Dangerousness assessments are also used, with similarly problematic results, by prosecutors making charging decisions. *Id.*

233. *Id.* at 1.

234. *Id.*

235. *Id.* at 14.

236. *Id.*

### C. *The Civil Justice System*

#### 1. *Expanding the Information Provided to Perpetrators*

Batterer education could help increase compliance with civil protection orders. The vast majority of accused abusers in these cases are not represented by counsel<sup>237</sup> and they have little or no access to advocacy services. Courthouse personnel typically will not answer their questions on the grounds that they are prohibited from giving legal advice. Further, although “know your rights” guides, informational videos, and community education workshops targeted at assisting victims have proliferated across the country, few if any exist for the perpetrator community.

Many unrepresented parties do not comprehend the way the legal system operates, the roles of various system players, or the nature of their own obligations.<sup>238</sup> Defendants in civil protection order cases who have any background understanding of the justice system typically have experience only with criminal procedure; very few have even a vague sense of what to expect in a civil case. Like victims, they “don’t differentiate at all—or if they do, they differentiate incorrectly—between the civil and criminal systems.”<sup>239</sup> On the morning of a civil protection order trial, most respondents expect to receive appointed counsel; they are concerned that a protection order will add to their criminal record; and some mistakenly believe that the judge may incarcerate them if an order is issued.<sup>240</sup> Moreover, they rarely understand in advance that the court appearance to which they have been summoned will be a trial, so they typically are unprepared and lack witnesses or other forms of supporting evidence.

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237. See *supra* note 134.

238. Engler, *supra* note 134, at 103-04, 112, 127-28. As one example, Professor Engler recounts a story about an unrepresented defendant in an eviction action who concluded a discussion with the landlord’s lawyer by saying, “Thank you, Your Honor.” *Id.* at 110.

239. Ph.D. candidate, Lauren Bennett, Remarks to District of Columbia U.S. Attorney’s Office, Domestic Violence Training (Dec. 12, 1996) (transcript on file with author).

240. This observation, and the others in this paragraph, are based on my experience in negotiating protection orders in hundreds of civil protection order cases and several years of directing D.C.’s Emergency Domestic Relations Project, which until November 1996 was responsible for handling all pretrial protection order cases for pro se victims in the District of Columbia.



This dearth of information affects several procedural justice factors. First, it is difficult to believe that one is receiving consistent treatment from the court without understanding what to expect or how the system functions. A defendant who confuses civil and criminal procedure is particularly likely to feel that he is the victim of inconsistent treatment when he learns that he has no right to appointed counsel and the standard of proof is far lower than beyond a reasonable doubt. To correct these problems, defendants must be informed about the appropriate legal basis of a claim, applicable legal defenses, available relief, pretrial settlement negotiation options (and their advisability), the kinds of witnesses and other sources of evidence that would be useful to present at trial, and referral sources for low-cost or free legal advice.<sup>241</sup>

Second, if speaking to an attorney gives a litigant an increased sense of "voice,"<sup>242</sup> then so might the receipt of other, less resource-intensive forms of information and legal advice, such as lay advocacy, educational pamphlets, and community education workshops.<sup>243</sup> Third, in jurisdictions where victims have access to some (even if limited) lay advocacy services,<sup>244</sup> perpetrators might perceive the existence of analogous, defense-oriented assistance as evidence of the court's neutrality as well as the justice system's respect for the accused. Finally, better-informed defendants might find it easier to maintain a sense of dignity and fairness as they navigate the civil protection order process.

Providing more information to respondents could be done in a fairly simple, low-cost manner. When the court provides a copy of the civil protection order complaint for service of process, clerks could attach a form containing essential information and referrals.

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241. These topics frequently are among those included in victim advocacy guides. *See, e.g.*, KNOW YOUR RIGHTS: A GUIDE TO LEGAL REMEDIES FOR DOMESTIC VIOLENCE IN THE DISTRICT OF COLUMBIA (Deborah Epstein ed., 2001).

242. *See supra* text accompanying notes 146-48.

243. Of course, the best way to educate and inform respondents about the civil protection order system is to ensure that they are all represented by counsel. A system in which both victims and respondents have access to attorneys would constitute an enormous improvement over the current, predominantly pro se procedure. But given the enormous costs of such a solution, it is unlikely that this will occur in the near future.

244. Such assistance for victims is still far too limited and under-funded. The majority of domestic violence service providers nationwide report that victim demand far exceeds the number of advocates. Kinports & Fischer, *supra* note 75, at 173. Still, a greater number of victims than respondents have access to such services. *Id.*

Receiving such information directly from the court may be particularly beneficial in improving defendants' impressions of the court's neutrality in these cases. More in-depth information guides about how to put on a defense in a protection order case should be drafted and widely distributed, as have analogous materials geared toward the legal rights of battered women. Defense attorneys could accept pro bono referrals for particularly complex cases, train lay advocates to staff a telephone information line to answer questions, or accompany defendants to court.

Of course, a better-informed respondent community may mean an increase in the percentage of contested protection order cases, making this emergency process a greater ordeal for some battered women. But if perpetrators will be more likely to abide by these orders, the victim community will be far better off.

## 2. *Expanding the Pretrial Negotiation Process*

In most jurisdictions, parties in civil protection order cases have the opportunity to participate in settlement negotiations immediately prior to trial.<sup>245</sup> Designed primarily to alleviate the court's trial docket, this process tends to be conducted under tight time restrictions and with institutional pressure on negotiators to produce the maximum possible number of settled cases.<sup>246</sup> The overwhelming majority of participants are pro se, and lay advocates are rarely, if ever, available.<sup>247</sup>

These limitations minimize the procedural justice benefits of a negotiation. Alternative dispute resolution research shows that perceptions of fair treatment are linked to a participant's belief that he was given an opportunity to state his case, the full spectrum of relevant issues was aired, and the officiant listened to and made genuine efforts to understand the concerns raised.<sup>248</sup> In a rushed, understaffed<sup>249</sup> procedure that occurs just moments or hours before

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245. Telephone Interview with Juley Fulcher, Public Policy Director, National Coalition Against Domestic Violence (July 23, 2001).

246. Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 578-80 (1988).

247. Epstein, *supra* note 2, at 25-26.

248. See *supra* text accompanying notes 157-59.

249. In the District of Columbia, for example, two court negotiators attempt to resolve an average of thirty cases per day. Telephone Interview with Paul Roddy, Director, Domestic

trial, there is little chance that these goals will be accomplished. If spending additional time allowing defendants to air their views and responding to their concerns would improve future compliance, the court should provide the resources needed to support such program expansion.<sup>250</sup>

The negotiation process could be further improved from a procedural justice vantage point through the participation of trained advocates who could offer litigants strategic advice and emotional support. An expansion of the current, inadequate advocacy pool<sup>251</sup> would be valuable for both sides. For defendants, it would increase the opportunity to feel heard, understood, and respected. For victims, it would reduce the power disparity that makes it so difficult to remain firm in their bargaining positions.<sup>252</sup>

## V. CAUTIONARY NOTES

Refocusing the battered women's movement strategy to incorporate notions of procedural justice appears to be a promising avenue for increasing victim safety. But two special issues must be carefully considered before generalizing from the existing literature to the family abuse context.

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Violence Unit, D.C. Superior Court (July 24, 2001).

250. Negotiators in domestic violence cases must be careful to avoid shifting into a mediation paradigm, which experts agree is inappropriate in intimate abuse cases. *E.g.*, Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993). It is too dangerous to assume a level playing field and roughly equal power balance between two parties when one has been the victim of violence or threats perpetrated by the other. *Id.* at 2161-62. To avoid this problem, court-sponsored civil protection order negotiations typically are conducted in relay fashion, with the primary focus on the relief available to the petitioner at trial and whether the two parties can agree to her requests. *See id.* at 2168-69. For an excellent discussion of this issue see Trina Grillo, *The Mediation Alternative: Process Damages for Women*, 100 YALE L.J. 1545 (1991).

251. Kinports & Fischer, *supra* note 75, at 173 (noting that the majority of domestic violence service providers nationwide report that victim demand for advocates far exceeds their availability).

252. Given the current dearth of victim advocates, any expansion would have to occur on behalf of both parties. An increase in advocacy for perpetrators alone would further tip the power imbalance between abuser and victim and greatly harm victim access to justice and safety.

*A. Special Characteristics of the Batterer Population: The Potential Effect on Procedural Justice*

Because most existing procedural justice data have been collected outside of the domestic violence context, a question must be raised: Can we generalize from these studies to predict the future compliance of those who abuse their intimate partners? Batterers may differ from other groups examined in the procedural justice literature, which includes misdemeanants, traffic offenders, and participants in custody disputes, in myriad ways. They may have different expectations about case procedures and outcomes, especially given the justice system's long record of failing to hold abusers accountable<sup>253</sup> and the defense bar's perceptions that the newly reformed system is fundamentally biased against their clients.<sup>254</sup> They may have different levels of attachment to the governmental system of which police, prosecutors, and judges are a part, arising out of their own childhood experiences, either of being victimized themselves by an adult family member,<sup>255</sup> or of watching one parent abused by the other with no effective official intervention.<sup>256</sup> Finally, they may have different values, such as disproportionately favoring the use of aggression in marriage.<sup>257</sup> Each of these potential variances could affect the way in which

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253. See *supra* text accompanying notes 19-21, 50-53.

254. See *supra* text accompanying note 124.

255. Although the relationship between experiences of maltreatment as a child and adult domestic violence is relatively unexplored, the data suggest that children who experience maltreatment have an increased risk of committing a violent crime. Cathy Spatz Widom, *Child Abuse and Alcohol Use and Abuse, in ALCOHOL AND INTERPERSONAL VIOLENCE: FOSTERING MULTIDISCIPLINARY PERSPECTIVES* 291 (S.E. Martin ed., 1992).

256. See *supra* text accompanying notes 19-21, 50-53 for a brief history of the state's failure to respond to domestic violence situations.

257. Studies have found that batterers are more likely to articulate favorable views of aggression in marriage. Although some data indicate that men who feel strongly about traditional sex role stereotypes have higher levels of marital aggression, other data do not. Compare Donald G. Saunders et al., *The Inventory of Beliefs about Wife Beating: The Construction and Initial Validation of a Measure of Beliefs and Attitudes*, 2 *VIOLENCE & VICTIMS* 39 (1987) (concluding that negative attitudes toward battered women are linked with traditional views of women's roles), with Peter H. Neidig et al., *Attitudinal Characteristics of Males Who Have Engaged in Spouse Abuse*, 1 *J. FAM. VIOLENCE* 223 (1986) (concluding that abusive males are not more likely to hold traditional views of women's roles).

perpetrators evaluate their contacts with justice system officials and, in turn, their future compliance.

A growing literature on the cognitive psychological processes of batterers further supports the need to proceed with caution here. For example, in a recent series of studies, cognitive psychologists examined whether deficits in information processing cause batterers to misconstrue social stimuli.<sup>258</sup> The data indicate that violent male spouses are more likely than others<sup>259</sup> to offer external, shifting attributions for their behavior. Rather than accepting responsibility themselves, batterers tend to minimize, deny, rationalize, or blame the victim for their violence.<sup>260</sup> Batterers also are more likely to have unrealistic expectations and irrational beliefs that increase the likelihood of marital anger and aggression. For example, they tend to think in rigid, dichotomous categories of acceptable and unacceptable behavior; articulate absolutist demands that others act "appropriately"; magnify the importance of negative situations; and make arbitrary inferences in the absence of confirming evidence.<sup>261</sup>

Because cognitive psychologists believe that such emotionally influenced thought distortions are instinctual, they may occur across a wide variety of provocative situations,<sup>262</sup> including arrests and courtroom proceedings. If maritally violent men actively misconstrue or otherwise distort situations in ways that cause them

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258. Amy Holtzworth-Munroe, *Social Skill Deficits in Maritally Violent Men: Interpreting the Data Using a Social Information Processing Model*, 12 CLINICAL PSYCH. REV. 605, 607 (1992).

259. Several of these studies compared abusers to two different control groups: maritally distressed, nonviolent men and maritally satisfied, nonviolent men. *E.g.*, *id.*

260. DANIEL J. SONKIN ET AL., *THE MALE BATTERER: A TREATMENT APPROACH* 42 (1985); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 96-98 (1984) (finding that forty-two to sixty-nine percent of women report that their partners justified, rationalized, explained, or apologized after violent incident; percentages decreased with length of abusive behavior); Christopher I. Eckhardt et al., *Articulated Thoughts of Maritally Violent and Nonviolent Men During Anger Arousal*, 66 J. CONSULTING & CLINICAL PSYCH. 259 (1998); Nancy M. Shields & Christine R. Hanneke, *Attribution Processes in Violent Relationships: Perceptions of Violent Husbands and Their Wives*, 13 J. APPLIED SOC. PSYCH. 515 (1983) (violent husbands were less likely than their wives to see their violence as attributable to themselves). Abusers' tendency to excuse behavior appears to apply equally to both violent and nonviolent behavior. Amy Holtzworth-Munroe et al., *Violent Married Couples' Attributions for Violent and Nonviolent Self and Partner Behaviors*, in BEHAVIORAL ASSESSMENT 53, 59 (1992).

261. Holtzworth-Munroe, *supra* note 258, at 605.

262. Eckhardt et al., *supra* note 260, at 260, 266.

to experience a higher frequency of anger arousal and threat provocation,<sup>263</sup> their perceptions regarding the provisions of procedural justice may be different than those of the population groups studied in the existing literature.<sup>264</sup>

It is also possible that batterers' cognitive distortions, when applied to the legal system, are exacerbated by interactions with defense counsel. Predictably, attorneys representing accused perpetrators in criminal and civil protection order cases have opposed reforms designed to improve the system's response to battered women.<sup>265</sup> Perpetrators' tendencies to attribute responsibility externally, make arbitrary inferences, and exaggerate negativity may be encouraged when their attorneys—correctly or incorrectly—articulate the position that the court system is biased and unfair.

The recent domestic violence arrest reevaluation study forms a solid basis for concluding that procedural justice does affect batterer compliance. But future research efforts should focus further on this particular population group to identify potential applicability hurdles from general population studies.

### *B. The Victim's Perspective: A Potential Determinant of the Impact of Procedural Justice*

Accurate analysis of procedural justice effects on abusive intimate partners must entail consideration of the perspective and role of the victim. Unlike research focusing on stranger, or "victimless" crimes, any study of batterer compliance may be confounded by variables in victim behavior.<sup>266</sup> When an arrest

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263. *Id.* at 266.

264. This theory is bolstered somewhat by a study of long-term compliance with mediated divorce agreements, in which researchers found that escalation of a dispute prior to mediation was inversely related to long-term compliance. Pruitt et al., *supra* note 170, at 322. Prior escalation was measured on the basis of two factors: an observer's rating of the worst incident mentioned during mediation and the participants' self-assessments of their hostility levels at the outset of mediation. *Id.* at 320. But see Harrell & Smith, *supra* note 130, at 50 (finding that severity of most recent incident of physical violence prior to victim's filing for civil protection order did not predict the batterer's failure to comply).

265. See *supra* text accompanying note 124.

266. Professor Cynthia Grant Bowman has criticized the domestic violence arrest experiments of the late 1980s on similar grounds. Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 204 (1992).

occurs in which the police use derogatory language and embarrass the accused in front of friends and neighbors, the victim might experience a sense of shame within her community for failing to keep her marriage strong or be accused of "causing" another member of a minority group to enter the criminal justice system.<sup>267</sup> Or it might be that police officers who subject a suspect to unfair and disrespectful treatment also are responding similarly to the victim. Either scenario could decrease the victim's incentive to report subsequent abuse, thus artificially lowering the reported recidivism rate. The police behavior described above also could push the victim to remain with her abusive partner; this proximity alone could result in a higher rate of future noncompliance.<sup>268</sup> Data documenting recidivism therefore could reflect the *victim's* alienation from, or satisfaction with, the procedural fairness of the justice system, rather than, or in addition to, any impact on the perpetrator. Future studies must take the victim's crucial role into account so that it is possible to determine whether efforts to improve procedural justice for perpetrators can be implemented in tandem with efforts to promote victim empowerment and safety. Such studies could shed important additional light on the factors affecting batterer compliance.<sup>269</sup>

### CONCLUSION

The legal achievements of the battered women's movement—including mandatory arrest, no-drop prosecution, and the Model Code on Domestic and Family Violence—have dramatically

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267. Epstein, *supra* note 2, at 17-18.

268. David A. Ford & Mary Jean Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, in DOMESTIC VIOLENCE, *supra* note 52, at 181, 200, 202-03 (finding that during the six months following criminal charges, women who continued to live with their abusive partners for any period of time were more likely to be battered anew).

269. Similarly, one must consider whether the victim was living with the perpetrator at the outset of the justice system intervention and, if so, whether she managed to find alternative, safe housing before he returned. Professor Bowman raises this point in the context of a critique of the mandatory arrest studies. Bowman, *supra* note 266, at 205. If a victim is able to escape to a safe and secret location, recidivism is less likely than if she remains trapped in a shared residence with her abusive partner. This factor is complicated by evidence that when a battered woman attempts to leave the relationship, she is at greatest risk of serious reabuse or homicide, a concept that Martha Mahoney has termed "separation assault." Mahoney, *supra* note 64, at 64-79.

improved victims' access to justice and the likelihood that perpetrators will be held accountable. At the same time, however, each of these reforms has contributed to a substantial reduction in the procedural justice accorded to batterers.

Procedural justice demands that a defendant feel that he has an opportunity to voice his side of the story, perceive that the relevant authorities are neutral and unbiased, believe that the legal system is consistent in its treatment of individuals and cases, and see that officials are treating him with dignity and respect. Social science studies show that these factors have a significant, independent effect on the likelihood that an individual will comply with an official directive. If a person feels fairly treated by state officials, he will perceive them as more legitimate and, as a consequence, will be more likely to obey their orders. This is true regardless of whether he perceives an order to be right or wrong, and even if compliance is counter to his immediate self-interest.

The procedural justice data indicate the existence of a close connection between batterers' sense of fair treatment and victim safety. If government power is exercised in a way that instills a sense of procedural unfairness, it undermines the likelihood of perpetrator compliance, putting victims of abuse at risk.

This conclusion necessitates a reassessment of current domestic violence policies. The civil and criminal justice systems must better communicate fundamental fairness and respect to batterers without losing the enormous gains for victims that the past thirty years have witnessed. Police officers are finally beginning to arrest batterers, prosecutors are finally following through with criminal cases, and judges are slowly becoming sensitized to the special dynamics of intimate partner abuse. But now it is time to address perpetrators' prevalent perceptions that "the system is against them." This Article seeks to begin a dialogue about how to strike this new balance: supporting battered women and encouraging them in their efforts to obtain safety, while simultaneously enhancing abusers' perceptions that justice system authorities are sufficiently moral and legitimate to inspire compliance.