

# Into the Gray Zone: Examining Mutual Combat as a Defense to Domestic Assault

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## INTO THE GRAY ZONE: EXAMINING MUTUAL COMBAT AS A DEFENSE TO DOMESTIC ASSAULT

### ABSTRACT

For offenses committed under Virginia’s assault and battery against a household or family member statute, the State should prosecute and punish in cases where both parties committed an assault and battery. Punishment, however, should consist of mainly individualized counseling or some other mitigated punishment for cases of mutual fighting.

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### INTRODUCTION

In 2013, the State of Virginia had 21,158 arrests for misdemeanor assault and battery of a family or household member and 1,632 felony arrests.<sup>1</sup> Of those 22,790 arrested, 1,613 were found not

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1. MARK R. HERRING, OFFICE OF THE ATTORNEY GENERAL, DOMESTIC AND SEXUAL VIOLENCE IN VIRGINIA: 2014 ANNUAL REPORT, APPENDIX A P. C (2014), <https://rga.lis.virginia.gov/Published/2015/RD1/PDF> [<https://perma.cc/95KA-XYN3>].

guilty, 6,787 were *nolle prossed*, and 3,721 were dismissed.<sup>2</sup> For the felony and misdemeanor convictions combined, 5,090 of those arrested for this crime were found guilty.<sup>3</sup> “The court, when hearing these [domestic violence] cases, communicates a public message as to how society views intimate partner violence and what is the appropriate societal response.”<sup>4</sup> When culpability is not clear, we enter into the gray area of domestic violence law.<sup>5</sup> The question remains as to how Virginia courts should respond to domestic violence situations when it appears to be a mutual combat situation.

This Note will examine the validity of using mutual combat as a defense to assault and battery of a family or household member in Virginia. I will argue that, where the evidence suggests that both involved parties committed assault and battery, Virginia courts should not recognize mutual combat as a defense but should consider entering a conviction for both parties. Part I will cover Virginia’s statute prohibiting assault and battery of a family or household member. Part II will define mutual combat and discuss how it applies in domestic violence situations. In Part III, I will discuss the State’s current response to reciprocal violence. I will primarily discuss how police respond to reciprocal violence at time of arrest and the court’s answer at time of prosecution. Finally, Part IV will examine alternative solutions to the problem of reciprocal violence in mutual domestic violence situations. I will argue that in cases where either party could be the predominant aggressor, the court should not dismiss the case. Rather, I will argue that the proper response is to convict the defendant. However, courts should consider sentencing the offenders with individualized counseling or some other mitigated punishment for cases of mutual fighting.

## I. ASSAULT AND BATTERY AGAINST A FAMILY OR HOUSEHOLD MEMBER

In Virginia, “[a]ny person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor.”<sup>6</sup> If a person has previously been convicted at least twice of either assault or battery against a family member, various forms of malicious or unlawful wounding, or strangulation, then any later

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2. *Id.* at c, d (noting, however, that this may not include all arrests under VA. CODE ANN. § 18.2-57.2(B). The source lists § 18.2-57.2(B) separately and lists 137 separate felony arrests in 2013. I did not include these arrests in the calculations.).

3. *Id.*

4. Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 559–60 (2006).

5. Margaret E. Martin, *Double Your Trouble: Dual Arrests in Family Violence*, 12 J. FAM. VIOLENCE 139, 141 (1997).

6. VA. CODE ANN. § 18.2-57.2(A) (2014).

conviction for assault and battery of a family member is a felony.<sup>7</sup> The statute does not specifically define assault or battery.<sup>8</sup> When the legislature does not define an element in a statute, Virginia courts must apply the common law definition.<sup>9</sup>

Virginia defines assault in case law.<sup>10</sup> An assault involves either an “overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do physical injury to the person of another.”<sup>11</sup> According to the common law in Virginia, a person commits an assault when she or he “engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm or engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim.”<sup>12</sup>

In addition to assault, the statute also requires a showing of a battery.<sup>13</sup> As defined in Virginia case law, a battery is simply an unwanted and unlawful touching.<sup>14</sup> Battery does not have to actually result in an injury.<sup>15</sup> Virginia does not include an element of physical force.<sup>16</sup> Therefore, the touching does not need to be violent or harmful.<sup>17</sup> The touching must merely be unlawful.<sup>18</sup> In *United States v. White*, the court stated that “[t]he law is so jealous of the sanctity of the person that the slightest touching of another, or of his clothes, or cane, or anything else attached to his person, if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress.”<sup>19</sup> Whether a touch is a battery depends largely on the intent of the actor.<sup>20</sup> A touch is not unlawful if it has been fully and validly consented to or when it is justified or excused.<sup>21</sup>

Unlike the terms assault and battery, the state statute does define “family or household member.”<sup>22</sup> According to the Virginia Code, “a family or household member” includes current or former spouses,

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7. § 18.2-57.2(B) (noting that three or more convictions under the listed categories result in a Class 6 felony).

8. § 18.2-57.2.

9. *Clark v. Commonwealth*, 279 Va. 636, 641 (2010).

10. *See Merritt v. Commonwealth*, 164 Va. 653, 658 (1935).

11. *Id.* (citation omitted).

12. *Clark*, 279 Va. at 641.

13. § 18.27-57.2(A).

14. *E.g.*, *Gnadt v. Commonwealth*, 27 Va. App. 148, 151 (1998).

15. *Id.*

16. *U.S. v. White*, 606 F.3d 144, 153 (4th Cir. 2010).

17. *Id.*

18. *Gnadt*, 27 Va. App. at 151.

19. *White*, 606 F.3d at 148 (quoting *Crosswhite v. Barnes*, 139 Va. 471 (1924)).

20. *Gnadt*, 27 Va. App. at 151.

21. *Id.*

22. VA. CODE ANN. § 18.2-57.2(D) (2014) (directing to the definition of “family or household member” listed in VA. CODE ANN. § 16.1-228).

regardless of whether they are currently living together.<sup>23</sup> It also includes parties with at least one child in common and parties who cohabited within the last twelve months.<sup>24</sup> A couple cohabits when they live together like a married couple would.<sup>25</sup> This means that couples that cohabit must share “familial or financial responsibilities” and “consortium.”<sup>26</sup> An assault and battery must involve at least one of the listed categories to be considered under this code section.<sup>27</sup> This element differentiates domestic assault from a regular assault and battery under Virginia law.<sup>28</sup>

## II. EXAMINING MUTUAL COMBAT

The next part of this Note will discuss the concept of mutual combat. The first section of this Part will examine the definition of mutual combat. Next, I will differentiate mutual combat from self-defense. Finally, I will explain why mutual combat should not be used to argue that the alleged victim consented to the touching.

### A. Defining Mutual Combat

Nationally, mutual combat does not have a set legal definition.<sup>29</sup> In California, state courts recognize that mutual combat does not merely mean that both sides exchanged blows, but rather, that there

23. VA. CODE ANN. § 16.1-228 (2016).

24. *Id.*

25. *See Jones v. Commonwealth*, 80 Va. 18, 20 (1885).

26. *Rickman v. Commonwealth*, 535 S.E.2d 187, 191 (Va. App. 2000) (“Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. Other factors appropriate for consideration include the length and continuity of the relationship.”).

27. VA. CODE ANN. § 18.2-57.2; VA. CODE ANN. § 16.1-228 (defining “family or household member” as “(i) the person’s spouse, whether or not he or she resides in the same home with the person, (ii) the person’s former spouse, whether or not he or she resides in the same home with the person, (iii) the person’s parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home with the person, (iv) the person’s mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v) any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person.”).

28. *See* § 18.2-57(A) (“Any person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor, and if the person intentionally selects the person against whom a simple assault is committed because of his race, religious conviction, color or national origin, the penalty upon conviction shall include a term of confinement of at least six months, 30 days of which shall be a mandatory minimum term of confinement.”).

29. *People v. Ross*, 66 Cal. Rptr. 3d 438, 445–46 (Cal. Ct. App. 2007).

was a “mutual intention, consent, or agreement preceding the initiation of hostilities.”<sup>30</sup> It can be thought of like a duel, where both participants agree in advance to fight the other.<sup>31</sup> According to the United States Coast Guard, mutual combat means that both participants voluntarily agreed to enter into the fight or that the participation in the fight was voluntary after the fight began.<sup>32</sup> This leaves the possibility that even a fight that was not pre-agreed upon could be considered mutual combat after the fact.<sup>33</sup>

In Virginia, courts have decided that mutual combat needs to be both voluntary and mutually entered into.<sup>34</sup> Mutual combat occurs when, from the beginning to the end of the fray, both parties are given blame.<sup>35</sup> In homicide cases, situations of mutual combat can persuade the court to give leniency.<sup>36</sup> Virginia courts have found, depending on the circumstances, that evidence of mutual combat may be enough to drop a homicide from murder to manslaughter.<sup>37</sup>

Some sources treat any domestic assault situation where both involved parties receive injuries as mutual combat.<sup>38</sup> This characterizes the issue both too widely and too narrowly.<sup>39</sup> It is too wide because both parties may have injuries after an altercation in situations that are not mutual combat.<sup>40</sup> For example, both parties may be injured in cases that involve one party acting in self-defense.<sup>41</sup> Additionally, the definition may be too narrow because not all reciprocal violence situations result in injury to both parties.<sup>42</sup> A person can commit a battery without leaving a detectible injury.<sup>43</sup>

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30. *Id.* at 447 (quoting *People v. Fowler*, 174 P. 892, 897 (Cal. 1918)) (emphasis omitted).

31. *Id.* at 446, 447 (“The ‘combat’ element of this rule is clear enough, at least for present purposes. It suggests two (or more) persons fighting, whether by fencing with swords, having a go at fisticuffs, slashing at one another with switchblades, or facing off with six-guns on the dusty streets of fabled Dodge City.”).

32. *E.g.*, *In re Merchant Mariner’s Document No. Z-1111695*, 1966 USCG LEXIS 14 at \*8 (Sept. 2, 1966).

33. *See id.*

34. *E.g.*, *Harper v. Commonwealth*, 165 Va. 816, 820 (1936).

35. *Bull v. Commonwealth*, 55 Va. 613, 624 (1857).

36. *Read v. Commonwealth*, 63 Va. 924, 937–38 (1872).

37. *Id.*

38. *See THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 204 (David Finklehor et al. eds., 1983) (“Note that in only 4% of the incidents are both parties injured. Thus, if there is any validity to the mutual combat perspective (for given incidents), it is relevant to a tiny fraction of the case . . .”).

39. *See infra* notes 40–43.

40. *See* Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN’S STUD. 251, 284 (1994).

41. *See id.*

42. *See* *Washington v. Commonwealth*, 2006 Va. App. LEXIS 517 at \*4 (Va. Ct. App. 2006).

43. *Gnadt v. Commonwealth*, 27 Va. App. 148, 151 (1998).

As other jurisdictions have noted, mutual combat is actually a slight misnomer.<sup>44</sup> It does not simply apply because both parties are throwing punches.<sup>45</sup> Rather, the “mutual” aspect refers to a common plan or intention.<sup>46</sup> It would not apply to many domestic violence situations unless both parties agreed to the fight.<sup>47</sup> However, laymen use “mutual combat” to describe a situation where both parties are engaged in reciprocal violence, even though the situation may not be truly mutual combat.<sup>48</sup>

### *B. Mutual Combat Differs from Self-Defense*

Self-defense occurs when one party uses force to repel an attack or expected attack from the other.<sup>49</sup> There are many qualifiers on this defense.<sup>50</sup> The amount of force used to repel an attack must be reasonable.<sup>51</sup> Defense counsels are known to confuse the concepts of retaliation and self-defense.<sup>52</sup> To successfully argue self-defense, the accused cannot be at fault in the violent encounter.<sup>53</sup> In an old case involving mutual combat, the United States Supreme Court ruled that neither party could claim self-defense because both parties were “wrongdoers.”<sup>54</sup> The State of Virginia also accepts that self-defense and mutual combat are mutually exclusive concepts.<sup>55</sup>

The case of *Washington v. Commonwealth* demonstrates how defendants have tried and failed to use self-defense arguments in situations with reciprocal violence.<sup>56</sup> In this case, the defendant and

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44. *People v. Ross*, 66 Cal. Rptr. 3d 438, 447 (Cal. Ct. App. 2007).

45. *Id.*

46. *Id.*

47. *See id.*

48. *See id.*

49. *Washington v. Commonwealth*, 2006 Va. App. LEXIS 517 at \*4 (Va. Ct. App. 2006).

50. *Infra* notes 51, 53–55.

51. *Harper v. Commonwealth*, 196 Va. 723, 730 (1955) (“[T]he defendant had the right to do what seemed reasonably to be necessary to protect himself against such apparently threatened attacks, whether the same was real or not, provided he believed it was real, and for any injury done the plaintiff, by the defendant, in using reasonable means to defend himself, the defendant is not liable . . .”) (citation omitted).

52. *See, e.g., Washington*, 2006 Va. App. LEXIS 517.

53. *Smith v. Commonwealth*, 435 S.E.2d 414, 416 (Va. App. 1993) (“Justifiable homicide in self-defense occurs [when] a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself.’ If an accused ‘is even slightly at fault’ at creating the difficulty leading to the necessity to kill, ‘the killing is not justifiable homicide.’”) (citations omitted).

54. *Rowe v. United States*, 164 U.S. 546, 556 (1896) (“Both parties to a mutual combat are wrong-doers, and the law of self-defence [sic] cannot be invoked by either, so long as he continues in the combat.”).

55. *See Carr v. Commonwealth*, 134 Va. 656, 667 (1922).

56. *Washington*, 2006 Va. App. LEXIS 517.

his wife got into a physical altercation.<sup>57</sup> While the exact facts of the incident were debated, the trial court determined that after drinking a few beers, the defendant and his wife got into an argument because the defendant wanted the car keys so that he could retrieve his pack of cigarettes.<sup>58</sup> Tired of the defendant's "haranguing," the wife then slapped defendant in the face.<sup>59</sup> The trial court claimed that defendant then hit her back.<sup>60</sup> The police were called and noticed red marks on the defendant's wife face and neck.<sup>61</sup> The wife claimed at trial that defendant did "hit" her but not in the face.<sup>62</sup> The defendant testified that he never hit his wife, but he did push her against the wall in retaliation to the slap.<sup>63</sup> The court noted that there was no evidence that the wife intended to deliver a second slap or do any other additional aggressive act.<sup>64</sup>

The defense argued that the defendant's physical response was justifiable self-defense to the wife's initial slap.<sup>65</sup> The defense counsel argued, "[i]f I'm at no fault, and somebody comes up and whacks me, I can whack him back."<sup>66</sup> The court rejected the defense's argument of self-defense, stating that there is a difference between retaliation and self-defense.<sup>67</sup> When the defendant is acting in retribution to the initial strike, and when there is no evidence that the wife intended to strike again, he cannot claim self-defense.<sup>68</sup>

### C. *Mutual Combat as Consent to Battery*

Some defense lawyers argue that "[m]utual combat, or an agreement to fight, is a form of consent."<sup>69</sup> Under this theory, mutual combat is therefore a defense to assault and battery because both parties have consented to the touching.<sup>70</sup> By consenting to the touching, the

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57. *Id.* at \*2.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Washington*, 2006 Va. App. LEXIS 517 at \*2.

63. *Id.*

64. *Id.*

65. *Id.* at \*3.

66. *Id.* at \*5 n.3.

67. *Id.* at \*5, \*6.

68. *Washington*, 2006 Va. App. LEXIS 517 at \*5, \*6.

69. *The difference between assault and battery in Virginia*, COPENHAVER, ELLETT & DERRICO: ROANOKE CRIMINAL ATTORNEYS, <http://www.roanokecriminalattorney.com/practice-areas/violent-crimes/assault-battery> [<https://perma.cc/NAQ3-S4SN>].

70. *E.g., id.* ("This defense would claim that the alleged victim gave consent to some form of physical contact. Mutual combat, or an agreement to fight, is a form of consent.").

battery element of the charge would fail, and therefore, the court could not convict the defendant.<sup>71</sup>

The law does allow people to consent to acts that technically cause harm to a person's own body.<sup>72</sup> For example, the rule allows people to consent to surgery, which may involve physically cutting into a person.<sup>73</sup> Also, a person can consent to get their nose broken by agreeing to fight in a boxing match.<sup>74</sup> Most domestic violence situations differ from a boxing match because the parties in a boxing match entered the ring with the understanding that both parties planned on striking and potentially injuring the other.<sup>75</sup> In a sense, the boxers want or accept the possibility of injury. In most domestic violence situations, even when both parties are causing injury, it is hard to argue that either or both parties consented to be injured.<sup>76</sup> Further, in a boxing match, any consent that is present only lasts for as long as both parties want or intend to remain a part of the fight.<sup>77</sup> Parties who are looking for a fight differ from parties who become entangled in a physical altercation.

### III. THE STATE'S RESPONSE TO RECIPROCAL VIOLENCE BETWEEN FAMILY OR HOUSEHOLD MEMBERS

#### A. *The Role of Police and Arrests*

When a police officer responds to a reported domestic assault, Virginia state law states the officer's course of action.<sup>78</sup> Under the law, the officer must make efforts to determine and arrest the predominant aggressor if the officer has probable cause to believe an assault and battery has occurred.<sup>79</sup> After looking at the totality of the circumstances, the officer is to arrest "the predominant physical

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71. See *Gnadt v. Commonwealth*, 27 Va. App. 148, 151 (1998).

72. Luis E. Chiesa, *Consent is Not a Defense to Battery: A Reply to Professor Bergelson*, 9 OHIO ST. J. CRIM. L. 195, 203–05 (2011).

73. *Id.* at 205.

74. *Id.*

75. See *id.*

76. See Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbians and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 283 (1993) ("This myth—that 's/he likes it' or 'it's a two-way street'—is also common in heterosexual battering relationships. But the myth of mutual battering is particularly invidious for same-sex couples . . .").

77. See, e.g., *Washington v. Commonwealth*, No. 0822-05-1, 2006 Va. App. LEXIS 517 at \*5–6 (Va. Ct. App. 2006).

78. See VA. CODE ANN. § 19.2-81.3(B) (2014).

79. *Id.*

aggressor unless there are special circumstances which would dictate a course of action other than an arrest.”<sup>80</sup> The officer determines the primary physical aggressor by considering:

- (i) who was the first aggressor, (ii) the protection of the health and safety of family and household members, (iii) prior complaints of family abuse by the allegedly abusing person involving the family or household members, (iv) the relative severity of the injuries inflicted on persons involved in the incident, (v) whether any injuries were inflicted in self-defense, (vi) witness statements, and (vii) other observations.<sup>81</sup>

Often, the predominant aggressor is the party who is most likely to cause an injury or who is least likely to feel fear.<sup>82</sup> Virginia police may make a warrantless arrest under Virginia Code Section 18.2-57.2 if based on probable cause or the officer’s personal observations.<sup>83</sup> The statute does not require the officer to personally observe the violation.<sup>84</sup>

The American Bar Association recognizes three main types of domestic violence arrest policies: officer’s discretion, mandatory arrests, and pro-arrests.<sup>85</sup> A mandatory arrest policy generally means an officer must make an arrest in certain circumstances.<sup>86</sup> Officer’s discretion policies, as the name suggests, leaves the final decision on whether to arrest to the officer’s judgment.<sup>87</sup> Pro-arrest policies, also referred to as “preferred arrest provisions,” strongly encourage an arrest in certain situations, but do not require it.<sup>88</sup> These policies are not always going to affect each state or jurisdiction within the state equally.<sup>89</sup> “For example, a state law may say that an arrest is preferred in domestic violence cases, but a jurisdiction may choose

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80. *Id.*

81. *Id.*

82. Raquel Lazar-Paley, *Domestic Violence: The San Diego Police Department’s Domestic Violence Unit*, 11 J. CONTEMP. LEGAL ISSUES 69, 72 n.17 (1997).

83. VA. CODE ANN. § 19.2-81.3(A) (2014).

84. *Id.*

85. A.B.A. COMM’N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), [https://www.cga.ct.gov/jud/tfs/20110701\\_Task%20Force%20on%20Law%20Enforcement%20Response%20to%20Family%20violence/20110928/Domestic%20Violence%20Arrest%20Policies%20by%20State.pdf](https://www.cga.ct.gov/jud/tfs/20110701_Task%20Force%20on%20Law%20Enforcement%20Response%20to%20Family%20violence/20110928/Domestic%20Violence%20Arrest%20Policies%20by%20State.pdf) [<https://perma.cc/FGZ3-7PYX>].

86. DAVID HIRSCHL, DOMESTIC VIOLENCE CASES: WHAT RESEARCH SHOWS ABOUT ARRESTS AND DUAL ARRESTS RATES 4, 20 (2008), <https://www.ncjrs.gov/pdffiles1/nij/222679.pdf> [<https://perma.cc/WA5T-QLL9>].

87. *See id.* at 4, 22 (noting, however, that often the state will usually still give guidelines about when an arrest is proper).

88. *See id.* at 4, 21.

89. *Id.* at 4.

to make an arrest mandatory.”<sup>90</sup> The American Bar Association tentatively considers Virginia’s arrest policy to be a mandatory arrest policy.<sup>91</sup>

In all reports of “intimidation, simple assault and aggravated assault incidents” that are reported to the police, police arrested a party about thirty-seven percent of the time.<sup>92</sup> The arrest rates increased from 44.5 to fifty percent in cases involving domestic violence.<sup>93</sup> Dual arrests, referring to when police arrest both parties involved in an assault and battery, accounted for one percent of all assault and intimidation arrests but were even higher (between 1.5 and two percent) when the incident involved domestic violence.<sup>94</sup> Studies show that dual arrests occur more frequently in mandatory arrest jurisdictions versus jurisdictions with preferred or discretionary policies.<sup>95</sup> Dual arrests may be higher in mandatory arrest states because the police officers may be more likely to arrest in cases of doubt and let the court determine the party’s guilt.<sup>96</sup>

While Virginia has a mandatory arrest policy,<sup>97</sup> the law does require the arresting officer to determine the predominant aggressor.<sup>98</sup> The question remains about what a police officer should do if there is no clear predominant aggressor, but the situation shows that both parties were possible victims of assault and battery. In an unpublished opinion, the Court of Appeals for Virginia suggested that an officer could not arrest any party if it is unclear what party was the predominant physical aggressor.<sup>99</sup> However, given the case is unpublished, therefore not binding, it does not necessarily set a mandatory standard for other cases.<sup>100</sup>

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90. *Id.*

91. A.B.A. COMM’N ON DOMESTIC VIOLENCE, *supra* note 85 (labeling Virginia’s arrest policy as “Mandatory Arrest?” and noting that the officer has discretion to determine if “special circumstances” exist that call for solutions other than arrest).

92. HIRSCHER, *supra* note 86, at 7.

93. *Id.* (“Arrest rates were higher when cases involved intimate partners (about 50 percent) and other situations of domestic violence (44.5 percent).”).

94. *Id.* (“Dual arrest rates were higher when cases involved intimate partners (about 2 percent) and other situations of domestic violence (1.5 percent).”).

95. *Id.* at 13 (noting, however, that the percentage of incidents that result in dual arrests is still very low).

96. *Id.*

97. A.B.A. COMM’N ON DOMESTIC VIOLENCE, *supra* note 85.

98. VA. CODE ANN. § 19.2-81.3(B) (2014).

99. *Roberts v. Cty. of Loudoun*, No. 1575-13-4, 2014 Va. App. LEXIS 248 at \*2 (Va. Ct. App. 2014) (“Based on his conversation with appellant’s father, Deputy Van Brocklin determined ‘that a domestic assault occurred’ among the parties present in the home; however, he was unable to determine which party was ‘the predominant physical aggressor.’ Accordingly, he was unable to place any party under arrest for committing domestic assault.”).

100. *Id.*

### B. The Courts' and Prosecutions' Options in Deciding the Case

At trial, the court will either (1) enter a conviction, (2) dismiss the case, (3) *nolle pros* the case, (4) enter a finding of not guilty, or (5) defer the proceeding.<sup>101</sup> Many Virginia jurisdictions have no-drop policies for domestic abuse cases, meaning that the victim cannot drop the charges against the defendant and stop the prosecution.<sup>102</sup> As already discussed above, in order to be found guilty under Virginia Code Section 18.2-57.2, the court must have enough evidence to prove the defendant committed an assault and battery on a family or household member without proper justification.<sup>103</sup> A deferral means that the court placed the defendant on probation without currently being found guilty.<sup>104</sup> The court may, depending on availability, require the defendant to apply for and complete a community-based treatment program.<sup>105</sup> I will discuss treatment programs in more detail later in the Note.<sup>106</sup> If the defendant successfully completes and complies with the terms of the probation, the charges are formally dropped.<sup>107</sup>

According to a national study, forty-three percent of all intimidation and assault and battery cases result in a conviction.<sup>108</sup> A person was sixty percent less likely to be convicted in a mandatory arrest state than in a discretionary state.<sup>109</sup> Compared to other domestic violence cases, intimate partner violence cases were seventy percent more likely to result in a conviction.<sup>110</sup> Finally, the study notes that gender did not influence whether the defendant would be convicted at trial.<sup>111</sup>

### C. Critics' Arguments Against Dual Arrests and Convictions

There are good arguments against dual arrests.<sup>112</sup> First, critics are concerned that abusers will use the system to further harass or

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101. VA. CODE ANN. § 18.2-57.3 (2016); HERRING, *supra* note 1, at c.

102. *E.g.*, *Frequently Asked Questions: Domestic Violence Topics*, NEWPORT NEWS, VA., OFFICE OF THE COMMONWEALTH'S ATTORNEY, <http://www.nncwa.com/faqs/faqs.htm> [<https://perma.cc/M93T-AWJE>]; *Frequently Asked Questions*, SUFFOLK, VA., COMMONWEALTH'S ATTORNEY'S OFFICE, <https://www.suffolkva.us/FAQ.aspx?TID=20> [<http://perma.cc/6Z8L-JF4S>].

103. VA. CODE ANN. § 18.2-57.2 (2014).

104. VA. CODE ANN. § 18.2-57.3 (2016).

105. *Id.*

106. *See infra* Section IV.D.

107. VA. CODE ANN. § 18.2-57.3 (2016).

108. HIRSCHER, *supra* note 86, at 11.

109. *Id.*

110. *Id.* ("Other domestic relationships include, for example, brother-sister, father-son.")

111. *Id.*

112. *See infra* notes 113–16.

intimidate their victims.<sup>113</sup> The abuser may try to preempt and diminish the true victim's accusation by calling the police first to report the victim injuring the abuser.<sup>114</sup> Further, victims may be afraid to report abuse because they believe that they may be arrested.<sup>115</sup> Also, an arrested victim may have to unfairly deal with immigration or child custody consequences as a result of the arrest.<sup>116</sup>

Some fear that dual arrests are unfairly harsh on females.<sup>117</sup> They insist that mandatory arrest policies encourage police to arrest females who are actually the victims in the incidents.<sup>118</sup> Critics respond that this argument is based on studies with small sample sizes.<sup>119</sup> Often the research only involves a small section of a state or jurisdiction.<sup>120</sup> Further, other studies noted that as long as the circumstances were similar, men and women were equally likely to be arrested in cases of intimate partner violence.<sup>121</sup> However, certain situations are more likely to trigger a dual arrest; police were three times more likely to arrest both parties when the main perpetrator was female and the main victim was male.<sup>122</sup> This suggests that males, not females, are at a disadvantage with the police in incidents of reciprocal violence.<sup>123</sup> Police officers were also more likely to make a dual arrest when the incident involved homosexual couples versus heterosexual couples.<sup>124</sup> This implies that police stereotype when making arrests in these situations, which could be partially addressed through increased police training.<sup>125</sup>

The movement to prevent domestic abuse has a strange disconnect.<sup>126</sup> Victim advocates often want to have domestic violence treated as a crime, but they are wary of arrests as a solution.<sup>127</sup> However, if police do not arrest anyone because they cannot determine

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113. See Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 178 (2009).

114. *Id.* at 178 n.23.

115. Ken Armstrong & T. Christian Miller, *When Sexual Assault Victims Are Charged With Lying*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/opinion/sunday/sexual-assault-victims-lying.html> [<https://perma.cc/KN5B-GW4T>].

116. Rutledge, *supra* note 113, at 178 n.234.

117. *See id.*

118. *Id.*

119. *See, e.g.*, HIRSCHER, *supra* note 86, at 5.

120. *Id.*

121. *Id.* at 8, 11.

122. *Id.* at 8, 11, 13.

123. *Id.*

124. *Id.* at 13.

125. HIRSCHER, *supra* note 86, at 13.

126. Barbara J. Hart, *Arrest: What's the Big Deal?*, 3 WM. & MARY J. WOMEN & L. 207, 207 (1997).

127. *Id.*

the predominant aggressor, other problems may occur.<sup>128</sup> For example, policies against dual arrests may encourage police to do nothing.<sup>129</sup> If the police fail to arrest either party because he or she cannot determine the predominant aggressor, the party in the victim role in the next incident may feel helpless and cynical with the system.<sup>130</sup> In fact, two-thirds of women who suffer from domestic abuse are hesitant to call the police because they fear that the police either will not believe them or that the police will do nothing.<sup>131</sup> If both parties see that the police will not do anything when both parties commit acts of violence, then there may be little incentive to ask for help if it became necessary in the future.<sup>132</sup> However, the opposite could also be true. If a victim believes that no one will be arrested, he or she may be more likely to call the police just to stop the violence.<sup>133</sup> Yet, this could create other problems where victims and abusers are using police resources to arbitrate minor domestic disputes.<sup>134</sup>

#### IV. LOOKING FOR ALTERNATE SOLUTIONS TO RECIPROCAL VIOLENCE IN DOMESTIC VIOLENCE SITUATIONS

State action to prevent domestic violence is still relatively recent.<sup>135</sup> Legislatures began to pass major reform measures for domestic violence punishment and prevention in the 1970s.<sup>136</sup> The initial reforms sought to make it easier for police to arrest abusers and protect victims.<sup>137</sup> Over the past fifty years, state legislatures and researchers have continually sought to find a solution to domestic abuse issues.<sup>138</sup> Early legislation sought to increase criminal sanctions

128. See *infra* notes 129–32.

129. See Mary Beth D. Collins, *Same-Sex Domestic Violence: Addressing the Issues for the Proper Protection of Victims*, 4 J.L. SOC'Y 99, 104 (2002).

130. *Id.*

131. TK Logan & Rob Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses*, NAT'L DOMESTIC VIOLENCE HOTLINE 2 (2015), <http://www.thehotline.org/wp-content/uploads/sites/3/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf> [<https://perma.cc/RU7A-FA9L>].

132. See Collins, *supra* note 129, at 4.

133. See Logan & Valente, *supra* note 131, at 6, 9 (noting that one out of seven women are “extremely likely” to call the police in the future. Also, “[a] large number of survivors do call the police. Studies show that survivors are more likely to consider calling law enforcement for help after multiple prior victimizations.”).

134. See *id.* at 6 (“Depending on the study, researchers find that calls relating to domestic violence constitute up to 50% of all calls to police.”).

135. See HIRSCHER, *supra* note 86, at 4.

136. *Id.*

137. *Id.*

138. JEFFREY FAGAN, NAT'L INST. OF JUST., *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 1 (1996), <https://www.ncjrs.gov/pdffiles/crimdom.pdf> [<https://perma.cc/LW8F-23NM>].

against offenders and correct societal stereotypes.<sup>139</sup> The results of these efforts are mixed.<sup>140</sup> The treatment of domestic violence cases does not have one perfect solution.<sup>141</sup> No single theory solves all the aspects and nuances of this complex issue.<sup>142</sup> While women are shown to commit a considerable number of violent acts in relationships, “women’s rates of violence are considerably lower and their acts are less severe than those perpetrated by males.”<sup>143</sup> Yet, that does not mean that the government should take female acts of violence less seriously when they do occur. A goal of the legal system should be to hold perpetrators accountable for their actions.<sup>144</sup>

#### A. Encouraging Arrests and Convictions as a Solution

When both parties physically batter one another and when there is no evidence of self-defense, the violent party violates the liberty of the other and upsets the community’s ideas of justice.<sup>145</sup> Generally, the community does not accept violent acts that are not in self-defense.<sup>146</sup> Those who commit unjustifiable violent acts should be arrested and punished for the good of society.<sup>147</sup> A party should not be able to shield his or her actions merely because the other party used violence as well.

Research suggests that arrests act as a deterrent to domestic violence to some degree.<sup>148</sup> Even the National Domestic Violence Hotline suggests that one of most beneficial actions a police officer can take in a domestic violence situation is to arrest or charge the abuser.<sup>149</sup> In Virginia, the total arrest rate for domestic violence cases

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139. *Id.* at 1–2.

140. *Id.* (“Thus far, however, research and evaluation on arrest and prosecution, civil or criminal protection orders, batterer treatment, and community interventions have generated weak or inconsistent evidence of deterrent effects on either repeat victimization or repeat offending. For every study that shows promising results, one or more show either no effect or even negative results that increase the risks to victims.”).

141. See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1512–13 (1998).

142. *Id.*

143. David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent do they Influence Police Arrest Decisions*, 98 J. CRIM. L. & CRIMINOLOGY 255, 260 (2007).

144. Hart, *supra* note 126, at 208.

145. *Id.* at 207–08.

146. *Id.*

147. See *id.*

148. FAGAN, *supra* note 138.

149. Logan & Valente, *supra* note 131, at 11–12 (noting, however, that “[w]e must continue building strong, collaborative relationships between law enforcement agencies and victim service programs that ensure that survivors’ safety and dignity are enhanced—not harmed—by law enforcement responses.”).

is 55.8 percent.<sup>150</sup> The police could potentially arrest both parties in 5.1 percent of the domestic violence cases.<sup>151</sup> The actual dual arrest rate in Virginia's domestic violence cases is two percent.<sup>152</sup> This suggests two things. First, the fact that police arrest both parties in less than half of the cases where they could potentially arrest both suggests that police still use individual discretion, even though Virginia is a mandatory arrest state.<sup>153</sup> Second, if those statistics hold true, roughly 423 defendants, or two percent, of the 21,158 people charged under Virginia's misdemeanor offense of assault and battery against a family or household member, were arrested in a dual arrest circumstance in 2013.<sup>154</sup> While dual arrests are not a popular solution for mutual violence, critics should feel some relief that they are only occurring in a small fraction of cases.<sup>155</sup>

While arrest may act as a deterrent, lack of prosecution may undermine its effectiveness.<sup>156</sup> Historically, the prosecution and conviction rates of those charged with domestic violence were low.<sup>157</sup> In modern times, the rate of prosecution for intimate partner violence varies depending on the jurisdiction.<sup>158</sup> In Virginia, courts found about 19.6 percent of defendants guilty of misdemeanor assault and battery against a household or family member in 2013.<sup>159</sup> Assuming that dual arrests resulted in 423 people charged, and assuming that the dual arrests have the same conviction rate as the total arrests, then Virginia courts likely found almost eighty-three dual-arrest defendants guilty of the misdemeanor offense in 2013.<sup>160</sup>

In addition, Virginia courts' findings of guilt for the misdemeanor assault and battery of a household or family member cases has declined since 2003.<sup>161</sup> While I do not speculate the reason for the

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150. DAVID HIRSCHTEL ET AL., U.S. DEP'T OF JUSTICE, EXPLAINING THE PREVALENCE, CONTEXT, AND CONSEQUENCES OF DUAL ARREST IN INTIMATE PARTNER CASES 114 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf> [<https://perma.cc/TE4V-LXAP>].

151. *Id.*

152. *Id.*

153. *See id.* But see HIRSCHTEL, *supra* note 86, at 20.

154. *See* HERRING, *supra* note 1, at c; HIRSCHTEL ET AL., *supra* note 150, at 114.

155. *See supra* Section III.C.

156. FAGAN, *supra* note 138, at 15.

157. Joel H. Garner & Christopher D. Maxwell, *Prosecution and Conviction Rates for Intimate Partner Violence*, 34 GA. ST. U. CRIM. JUST. REV. 44, 45–46 (2009) (noting, however, that terms like “low” do not have any set meaning. People do not know what would constitute a sufficient number of arrests.).

158. *Id.* at 53.

159. *See* HERRING, *supra* note 1, at c.

160. *See id.* But see HIRSCHTEL, *supra* note 86, at 11 (noting domestic violence, specifically intimate partner violence, was more likely to result in a conviction).

161. *See* HERRING, *supra* note 1, at c (calculating that 31.3 percent of misdemeanor assault and battery against a household or family member charges resulted in guilty finds

decline, it does imply that Virginia courts are becoming less willing to prosecute people for more minor domestic violence. Whatever the reason for the decline, it is important for the dignity of the wronged party, even in mutual violence contexts, that judges are not indifferent to crimes that occur and that prosecutors are sensitive to parties' needs.<sup>162</sup> The prosecutor's job is to serve the state's and society's interests by ensuring the punishment of wrongdoers.<sup>163</sup> I argue that if both parties in a domestic violence case are properly considered wrongdoers, then it is in society's interest to punish both.

*B. Applying Non-Domestic Assault Solutions to Assault and Battery Against a Family or Household Member Cases*

Imagine that two people, A and B, are in a bar's parking lot. A and B start to verbally argue. A is enraged and pushes B away. B, also angry, responds by punching A in the face. A tackles B and a wrestling match ensues. By the time the police arrive, both A and B have physical, but non-serious injuries. A and B did not cause any property damage or harm any third parties. When A and B are strangers, their actions are both deemed criminal even though they are only harming each other.<sup>164</sup> As other courts have argued, "[i]n cases of mutual 'fighting' . . . there is no primary offender or victim; this conduct is punished only because the turmoil of the fight could breach or threaten the public peace."<sup>165</sup> If A and B are a married couple instead of strangers, does this change anything? The answer may depend on the state where the fight occurs.

Some jurisdictions consider mutual violence to be a lesser offense than assault and battery in non-domestic abuse cases. In New Hampshire, simple assault occurs when one person causes non-serious bodily harm or unwanted physical contact against another.<sup>166</sup> Normally, New Hampshire considers simple assault a misdemeanor offense.<sup>167</sup> When the evidence shows that the fight was mutually

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in 2003; 30.6 percent in 2004; 29.7 percent in 2005; 30.9 percent in 2006; 29.1 percent in 2007; 26.9 percent in 2008; 23.4 percent in 2009; 25.9 percent in 2010; 21.4 percent in 2011; and 22.9 percent in 2012).

162. See Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 698 (2007).

163. *Id.* at 697.

164. See *Dawson v. State*, 264 P.3d 851, 859 (Alaska Ct. App. 2011).

165. *Id.*

166. N.H. REV. STAT. ANN. § 631:2-a(I) (1979) ("A person is guilty of simple assault if he: (a) Purposely or knowingly causes bodily injury or unprivileged physical contact to another; or (b) Recklessly causes bodily injury to another; or (c) Negligently causes bodily injury to another by means of a deadly weapon.").

167. *Id.*

entered into, the offense becomes a violation rather than a more severely punishable misdemeanor.<sup>168</sup> New Hampshire punishes misdemeanors with up to a year in prison and a fine up to two thousand dollars.<sup>169</sup> A violation for fighting with mutual consent is punishable by only a maximum one-thousand-dollar fine.<sup>170</sup>

In non-domestic cases, Vermont also punishes assault cases that consist of mutual fighting less severely than other non-domestic assault incidents.<sup>171</sup> Simple assault can be punished up to a year in prison and a fine up to one thousand dollars.<sup>172</sup> If combatants enter into a mutual fight, the maximum punishment is a five-hundred-dollar fine and sixty days in jail.<sup>173</sup>

Nebraska also has a less severe punishment if a non-domestic fight is mutually entered into.<sup>174</sup> In Nebraska, a normal assault and battery is punishable by a maximum of “not more than one year imprisonment, or one thousand dollars fine, or both.”<sup>175</sup> Mutually entered into fights, on the other hand, are punishable by a maximum of “six months imprisonment, or one thousand dollars fine, or both.”<sup>176</sup>

Similarly, under Alaska law, the State considers a mutually entered into or agreed upon non-domestic fight a lesser crime of disorderly conduct, rather than assault and battery.<sup>177</sup> As a Class B misdemeanor, disorderly conduct can be punished for up to ten days in jail or a two-thousand-dollar fine or both.<sup>178</sup> Alaska state law punishes

168. *Id.*

169. N.H. REV. STAT. ANN. § 651:2(II)(c) (2016); N.H. REV. STAT. ANN. 651:2(IV)(A) (2016).

170. § 651:2(IV)(A).

171. VT. STAT. ANN. tit. 13, § 1023 (2015).

172. *Id.*

173. *Id.*; see § 1026 (noting that disorderly conduct may also involve engaging in a fight, but must be done in a public setting. The punishment for disorderly conduct is the same as punishment for simple assault with mutual consent.).

174. NEB. REV. STAT. § 28-310(2) (1977) (“Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.”).

175. NEB. REV. STAT. § 28-106 (2016).

176. *Id.*

177. ALASKA STAT. § 11.61.110(a) (2016) (“A person commits the crime of disorderly conduct if, . . . in a public or private place, the person challenges another to fight or engages in fighting other than in self-defense.”); *Dawson v. State*, 264 P.3d 851, 858 (Alaska Ct. App. 2011) (“The fact that a person who is found guilty of disorderly conduct for ‘engaging in fighting other than in self-defense’ faces such a minimal penalty compared to the sentences that can be imposed for assault or even harassment suggests to us that the legislature viewed disorderly conduct as a significantly lesser offense.”).

178. ALASKA STAT. § 11.61.110(c) (2016) (stating that disorderly conduct is a class B misdemeanor); ALASKA STAT. § 12.55.035(b)(6) (2016) (stating that the fine for a class B misdemeanor is two thousand dollars); ALASKA STAT. § 12.55.135 (2016) (“A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than (1) 10 days unless otherwise specified in the provision of law defining the offense or in this section; (2) 90 days if the conviction is for a violation of (A) AS 11.61.116(c)(1) and

mutually entered into non-domestic fights the same whether participants fought in public or private.<sup>179</sup> Compared with Alaska's assault in the fourth degree, which is a Class A misdemeanor, disorderly conduct is not too harshly punished.<sup>180</sup> Even as the least serious of Alaska's assault charges, assault of the fourth degree is still punished to up to a year in prison<sup>181</sup> or a twenty-five-thousand-dollar fine or both.<sup>182</sup>

In contrast, Virginia's non-domestic assault and battery law does not expressly mitigate the sentence or severity of the offense if it involves mutually entered into fighting.<sup>183</sup> This suggests that the Virginia legislature did not intend those who engaged in mutual fighting to receive a lesser punishment than others who commit an assault and battery.<sup>184</sup> Officially, Virginia punishes assault and battery of nonfamily or household members the same as assault and battery of family or household members.<sup>185</sup> Therefore, if the legislature did not wish to lessen the punishment due to mutually entered into fights in non-domestic assault and battery, then the courts should not allow it to mitigate under assault and battery of a family or household member either. If the legislature worries that the current punishment in cases of mutual violence is too harsh, they could change the law to encourage mitigated punishment in cases of mutual domestic violence.

### *C. Mutual Violence in Virginia Homicide Cases*

In Virginia, courts generally discuss mutual combat in homicide cases.<sup>186</sup> Some of the rationales in those cases may be applied in domestic violence contexts too. In the homicide case, *Carr v. Commonwealth*, the Virginia Supreme Court determined that evidence

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the person is 21 years of age or older; or (B) AS 11.61.120(a)(6) and the person is 21 years of age or older.”).

179. ALASKA STAT. § 11.61.110(a)(5).

180. ALASKA STAT. § 11.41.230 (2016) (“A person commits the crime of assault in the fourth degree if (1) that person recklessly causes physical injury to another person; (2) with criminal negligence that person causes physical injury to another person by means of a dangerous instrument; or (3) by words or other conduct that person recklessly places another person in fear of imminent physical injury.”).

181. ALASKA STAT. § 12.55.135(a).

182. ALASKA STAT. § 12.55.035(b)(5).

183. *See* VA. CODE ANN. § 18.2-57 (2016).

184. *See id.*

185. *Compare* VA. CODE ANN. § 18.2-57 (2016) *with* VA. CODE ANN. § 18.2-57.2 (2016).

186. *See, e.g.,* Rhodes v. Commonwealth, 583 S.E.2d 773, 780 (Va. Ct. App. 2003); Smith v. Commonwealth, 435 S.E.2d 414 (Va. Ct. App. 1993); Carr v. Commonwealth, 114 S.E. 791 (Va. 1922); Jackson v. Commonwealth, 36 S.E. 487, 488 (Va. 1900).

of mutual combat precludes the possibility of using a self-defense claim.<sup>187</sup> The case did not state what grade of homicide the offense was if mutual combat occurred.<sup>188</sup> Other cases suggest, however, that circumstances of mutual combat could mitigate a homicide to manslaughter, versus a murder conviction, depending on the circumstances.<sup>189</sup> I conclude from this that the presence of mutual violence, rather than being a defense to the crime, should be at most a mitigating factor.

In *Smith v. Commonwealth*, the trial court and the appellate court disagreed whether circumstances of the homicide involved mutual combat.<sup>190</sup> In this case, the accused, Jermaine Jerome Smith, shot and killed Donnell Skinner.<sup>191</sup> Skinner and one of his friends, James Thompson, accused Smith of stealing some of their cocaine.<sup>192</sup> Skinner and Thompson confronted Smith at Smith's girlfriend Crystal White's apartment.<sup>193</sup> Essentially, Skinner and Thompson held Smith and White hostage and made threats against their lives.<sup>194</sup> Despite Smith's efforts to pay off Skinner and forego violence, Skinner told Thompson, "just go ahead and do what we said we were going to do."<sup>195</sup> Thompson then cocked his gun and Skinner, gun in hand, began to turn towards Smith.<sup>196</sup> Smith, pulling out his own gun, then shot Skinner and continued to fire randomly until he used all his ammunition.<sup>197</sup> Thompson returned fire after Smith's initial shot and shot Smith in the arm after Smith finished firing.<sup>198</sup>

The trial court determined that mutual combat occurred because Smith instigated the encounter by taking the drugs in the first place and denied Smith's self-defense claim.<sup>199</sup> However, the Virginia

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187. *Carry*, 114 S.E. at 794–95 (upholding the jury instruction stating that "[t]he court instructs the jury that if they shall believe from the evidence in this cause [sic] beyond a reasonable doubt that both the accused and the deceased made threats one against the other, and that because of said threats each armed himself against the other, and that when they met on the public highway each began to shoot at such other just as soon as he was able, resulting in the deceased being killed by the accused, that then the accused cannot rely upon the law of self-defense as a complete defense, and must be found guilty of some degree of homicide.").

188. *Id.* at 795.

189. *Rhodes*, 583 S.E.2d at 779.

190. *Smith*, 435 S.E.2d at 416–17.

191. *Id.* at 415.

192. *Id.*

193. *Id.*

194. *Id.* at 416.

195. *Id.*

196. *Smith*, 435 S.E.2d at 416.

197. *Id.*

198. *Id.*

199. *Id.*

Court of Appeals determined that “[n]o credible evidence supports the trial judge’s finding that Smith shot Skinner while they were engaged in mutual combat.”<sup>200</sup> The appeals court determined that Smith did not voluntarily enter into the shootout, which precludes a finding of mutual combat.<sup>201</sup> This case demonstrates that, in homicide cases, instead of being a defense to a manslaughter charge, evidence of mutual combat only precludes a self-defense claim.<sup>202</sup> It also demonstrates that prior provocation, such as previously stealing someone else’s drugs, is not enough to call a situation mutual combat.<sup>203</sup>

In an old Virginia case, *Jackson v. Commonwealth*, the court determined that Jackson and the deceased engaged in mutual combat.<sup>204</sup> The men first began fighting with their hands, but both then reached for rocks.<sup>205</sup> Jackson threw his rock at the deceased, killing him, as the deceased was attempting to back away.<sup>206</sup> Jackson did not attempt to leave or stop the fight after it began.<sup>207</sup> The court determined that Jackson did not act in self-defense because at no point did Jackson attempt to retreat.<sup>208</sup> Furthermore, the court determined that Jackson had a duty to retreat.<sup>209</sup>

Cases of mutual combat are those in which this duty of retreating to the wall oftenest appears. Two men being in the wrong, neither can right himself except by retreating to the wall. So that, when one unexpectedly finds himself so hotly pursued by the other that he can save himself only by taking the other’s life, if he does it he is guilty of felonious homicide, unless he first withdraws from the place.<sup>210</sup>

This case suggests that once a mutually entered fray occurs, both parties have a duty to retreat.<sup>211</sup> The parties only stop being liable for harm they inflict on the other once they attempt to retreat or exit the fight.<sup>212</sup> Applying this logic to domestic violence cases, when parties are both actively engaged in fighting, they both should be liable for punishment until they attempt to exit the fray.<sup>213</sup>

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200. *Id.* at 417.

201. *Id.*

202. *Smith*, 435 S.E.2d at 417.

203. *Id.*

204. *Jackson v. Commonwealth*, 36 S.E. 487, 488 (Va. 1900).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 489.

209. *Id.*

210. *Jackson*, 36 S.E. at 489 (citation omitted).

211. *Id.*

212. *Id.*

213. *See id.*

*D. Encouraging Treatment for Both Parties in Domestic Violence Cases*

As noted above, Virginia allows some defendants, who are charged with assault and battery of a family member, to defer the proceeding in favor of completing a treatment program or probation.<sup>214</sup> If the person charged successfully completes the program and the terms of probation, the court may drop the charges.<sup>215</sup> I argue that courts should utilize these programs for both parties, in cases of mutual violence, when one party was not acting in self-defense.

One controversial solution to help combat cases involving mutual violence is to encourage couples counseling.<sup>216</sup> Proponents of couples therapy believe that the root of the couple's problem is poor conflict and anger management, which causes domestic disputes.<sup>217</sup> According to proponents, couples therapy could be useful in domestic assault situations, especially in cases of mutual violence, because it requires both parties to look at their actions and address any mutual culpability.<sup>218</sup> It could be healthy for both parties to work through their anger and communication problems, especially if the couple plans to stay together.<sup>219</sup>

However, there are concerns with using couples therapy in situations of domestic abuse. A good number of states expressly ban couples counseling in violent domestic abuse cases.<sup>220</sup> Many organizations also condemn the use of couples therapy in violent situations.<sup>221</sup> Some opponents of couples counseling in abuse situations reject it because they view the party using violence as entirely at fault for their actions.<sup>222</sup> The critics argue that couples counseling risks normalizing and legitimizing criminal behavior and puts the victim in more

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214. VA. CODE ANN. § 18.2-57.3 (2017).

215. *Id.*

216. STOP ABUSIVE & VIOLENT ENV'TS, HOW EFFECTIVE ARE DOMESTIC VIOLENCE PROGRAMS IN STOPPING PARTNER ABUSE? (2010), <http://www.saveservices.org/downloads/Why-DV-Programs-Fail-to-Stop-Abuse> [<https://perma.cc/6EZX-UDQF>] [hereinafter STOP ABUSIVE & VIOLENT ENV'TS].

217. Hanna, *supra* note 141, at 1527.

218. *See id.*

219. *See id.*

220. STOP ABUSIVE & VIOLENT ENV'TS, *supra* note 216, at 4.

221. *See, e.g.,* Phyllis B. Frank & Beverly D. Houghton, *A Policy Statement on Domestic Violence Couples Counseling*, FAITH TRUST INST., <http://www.faithtrustinstitute.org/resources/articles/Policy-Statement-on-DV-Couples-Counseling.pdf> [<https://perma.cc/T98N-TNUN>]; *Why We Don't Recommend Couples Counseling for Abusive Relationships*, NAT'L DOMESTIC VIOLENCE HOTLINE (Aug. 1, 2014), <http://www.thehotline.org/2014/08/01/why-we-don't-recommend-couples-counseling-for-abusive-relationships> [<https://perma.cc/9BF2-EXXH>].

222. Hanna, *supra* note 141, at 1528.

danger of abuse.<sup>223</sup> Still, even anti-couples counseling groups suggest that both parties could benefit from separate counseling.<sup>224</sup> Any party who commits acts of violence, which is not self-defense, could use help to address the source of his or her violent actions.<sup>225</sup> This remains true even in situations where both parties commit acts of violence against the other.

Treatment programs are not a perfect solution.<sup>226</sup> For one, there is not a clear consensus about the cause of domestic violence, or best treatment for domestic violence in general.<sup>227</sup> Some domestic violence is rooted in substance abuse, some in psychological issues, some in anger and aggressive control problems, and some in a power dynamic struggle.<sup>228</sup> Many jurisdictions use a one-size-fits-all approach that may prove ineffective for some offenders.<sup>229</sup> These programs are often gender-biased towards men and do not take into account substances abuse or psychological problems.<sup>230</sup> The effectiveness of treatment programs in general is debatable, especially because it is difficult to measure realistic results due to a lack of a control group.<sup>231</sup>

In Virginia, whether a person can get treatment as a part of probation depends on whether the community has the resources.<sup>232</sup> Virginia, as of October 2016, has eighteen certified batterer intervention programs.<sup>233</sup> Most of these programs service multiple cities.<sup>234</sup>

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223. Frank & Houghton, *supra* note 221.

224. *Id.* (“The batterer and the battered woman have two different problems. His problem is his violent behavior. Hers is that she is coupled with a batterer. These two distinct issues are safely and effectively dealt with in separate counseling.”).

225. *See id.*

226. Megan Twohey, *How can Domestic Abuse be Stopped?*, CHI. TRIBUNE (Jan. 2, 2009), <http://www.chicagotribune.com/news/chi-abusers-02-jan02-story.html> [<https://perma.cc/NK6D-AQDF>].

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Hanna, *supra* note 141, at 1533.

232. VA. CODE ANN. § 18.2-57.3(C) (2017) (“The court shall (i) where a local community-based probation services agency established pursuant to Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1 is available, order that the eligible person be placed with such agency and require, as a condition of local community-based probation, the person to successfully complete all treatment, education programs or services, or any combination thereof indicated by an assessment or evaluation obtained by the local community-based probation services agency if such assessment, treatment or education services are available; or (ii) require successful completion of treatment, education programs or services, or any combination thereof, such as, in the opinion of the court, may be best suited to the needs of the person.”).

233. *Virginia Certified Batterer Intervention Programs*, VA. BATTERER INTERVENTION PROGRAM CERTIFICATION BD. (last updated Oct. 6, 2017), <http://www.vabipboard.org/assets/certifiedprogs.pdf> [<https://perma.cc/35CJ-8YQM>] [hereinafter CERTIFICATION BD.].

234. *Id.* (noting, for example, that Anger & Domestic Abuse Prevention & Treatment (“ADAPT”) out of Fairfax, Virginia provides services for those in the County of Fairfax, Cities of Falls Church, Towns of Vienna, Herndon, and Clifton).

Virginia's Attorney General lists the qualifications for certifying batterer intervention programs.<sup>235</sup> Virginia's batterer intervention program's goals include (1) "[s]top[ping] the violence and prevent[ing] the reoccurrence of future violence, while ensuring victim safety," (2) "[i]dentify[ing] abusive behaviors," (3) "[t]each[ing] alternatives to violence," (4) "[e]xplor[ing] the impact of violent and abusive behavior on intimate partners, children, and others," and (5) "[a]ssist[ing] individuals in examining the beliefs they hold about violence."<sup>236</sup> Certified programs require those enrolled to complete at least thirty-six hours of group therapy over eighteen weeks.<sup>237</sup> If an individual is referred to a program, the program also assesses the individual for drug and alcohol dependencies and severe mental issues.<sup>238</sup> Programs may also provide services to victims of abuse or provide information about other services available.<sup>239</sup> While the programs do charge fees, they also provide services to indigent clients.<sup>240</sup> Moreover, while the number of programs specifically designed for batterers may be limited, Virginia still has the resources available for many people.<sup>241</sup>

As an example of treatment in Virginia, Staunton, Virginia has three treatment groups for domestic violence offenders.<sup>242</sup> The treatment groups focus on "anger management, batterer prevention or domestic violence issues."<sup>243</sup> Judges refer the offender to community corrections programs for assessment and evaluation to determine the appropriate treatment.<sup>244</sup> The offender's score on the assessment, combined with the offender's prior records, determine the appropriate level of treatment.<sup>245</sup>

It should also be noted that under the current Virginia law, a judge is only allowed to defer findings of guilt when it is the first time the offender is charged with assault and battery of a family member.<sup>246</sup> If a person was previously convicted of assault and battery of a family member or even if they had their case dismissed after successfully completing their deferral probation, the person is

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235. *Domestic Violence—Batterer Intervention Programs*, VA. BATTERER INTERVENTION PROGRAM CERTIFICATION BD., <http://www.oag.state.va.us/14-initiatives/217-domestic-violence-batterer-intervention-programs> [<https://perma.cc/QL3V-ENDM>].

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. CERTIFICATION BD., *supra* note 233.

242. *Programs*, CITY OF STAUNTON, VA., <https://www.ci.staunton.va.us/departments/court-services/programs> [<https://perma.cc/L6Z5-A2QG>].

243. *Id.*

244. *Id.*

245. *Id.*

246. VA. CODE ANN. § 18.2-57.3 (2016).

now ineligible for deferral in future cases.<sup>247</sup> Still, for those who are worried about those who are generally victims being prosecuted under a pro-dual arrest policy, the deferral for first time offenders may be a good way to ensure that both parties get the treatment they need without actually entering a conviction.<sup>248</sup>

### CONCLUSION

Mutual combat in domestic violence situations remains very much a gray zone. At this time, there is no perfect solution. Virginia courts do not have a one-size-fits-all remedy for handling reciprocal violence cases of assault and battery of a household or family member. In the case of domestic mutual violence, society has conflicting interests.<sup>249</sup> While there may be a visceral reaction against arresting and convicting someone who may be a victim of ongoing domestic violence, society has an interest in punishing those who commit violent acts outside of self-defense.<sup>250</sup> The real issue is how to go about doing so.

While arrest and prosecution of both people involved in a mutual domestic violence situation is far from the ideal solution, there currently is no better solution available.<sup>251</sup> Automatically dismissing the case is not in society's best interest. To limit the harm to potential real victims in mutual combat situations, the state and court could mitigate the punishment.<sup>252</sup> The mitigation could help ensure that harm is recognized and possibly deterred and prevent future incidents. Further, a mitigated conviction could be used to encourage both parties to seek counseling programs to help their situations. In mutual domestic violence situations, the government has the choice to either dismiss the case and hope the situation goes away, or to offer some sort of punishment or rehabilitation to the parties in order to hopefully prevent the harm in the future. The latter has the greater likelihood of helping until we can find a better solution in the future.

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247. *Id.*

248. *See id.*

249. Hart, *supra* note 126, at 207, 208.

250. *Id.*

251. *See supra* Section III.C.

252. *See supra* Sections IV.B–C.

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