

May 1998

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Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 Wm. & Mary L. Rev. 1505 (1998), <https://scholarship.law.wm.edu/wmlr/vol39/iss5/3>

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THE PARADOX OF HOPE: THE CRIME AND PUNISHMENT OF DOMESTIC VIOLENCE

CHERYL HANNA*

INTRODUCTION

In 1995, a Chicago district court judge allowed Samuel Gutierrez to enroll in a batterer treatment program in exchange for pleading guilty to choking his girlfriend Kelly Gonzalez. This was one of nine incidents of abuse documented by Chicago police reports.

Then, in August 1996, after failing to appear for a status hearing, the police again arrested Gutierrez for beating Gonzalez. Five days later, the judge imposed, then stayed, a 120-day sentence, again ordering Gutierrez to enroll in treatment. One month later, in September 1996, the same judge continued the case. For the third time, Gutierrez was told to get counseling or face jail. In February 1997, Kelly Gonzalez's body was found; Gutierrez admitted to killing and hiding her body back in September 1996. If Gutierrez is telling the truth, then he killed Gonzalez when he should have been in treatment.¹

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1. See T. Shawn Taylor, *Domestic Violence Has Fatal End: Crack in Will System Could Take Some Blame*, CHI. TRIB., Apr. 6, 1997, at 1, available in 1997 WL 3536053.

The criminal justice system arguably "did the right thing" in this case. The defendant was arrested, prosecuted, and sentenced to a batterer treatment program intended to aid him in unlearning his violent behavior. A probation officer even followed up to ensure that Gutierrez met his conditions of release. An aggressive state response from arrest to post-disposition was expected to keep Kelly Gonzalez alive. Why did the promise of punishment go unfulfilled in this and other instances?

This case illustrates a challenge to those of us who have argued for aggressive criminal intervention in domestic violence cases.² The criminal justice system has made enormous strides in treating domestic violence as a serious crime.³ We have devel-

2. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996). In this piece, I argue that ultimately the decision to proceed with a criminal domestic violence case should rest with the prosecutor, not the victim. See *id.* Prosecutors should base their decision to pursue a case on the sufficiency of the evidence and the seriousness of the offense. See *id.* at 1908. Mandated participation policies might mean that in some cases a victim would be compelled to testify against her wishes. See *id.* at 1907. In the long term, however, policies that mandate victim participation keep women safer by removing the abuser's incentive to intimidate and harass the victim as well as by reinforcing the idea that domestic violence is a public crime, not a private affair. See *id.*

Some argue that my position suggests that all domestic violence cases ought to be prosecuted. See Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 183 (1997); Joan L. Neisser, *Lessons for the United States: A Greek Cypriot Model for Domestic Violence Law*, 4 MICH. J. GENDER & L. 171, 183-84 (1996). It does not. Rather, I argue that in those cases where the prosecution has enough evidence to go forward, the better, albeit imperfect, solution many times is to proceed with the case rather than dismiss the charges at the victim's request. I do not advocate going forward in cases where the evidence is insufficient to overcome the presumption of innocence. I further acknowledge that aggressive criminalization will have costs, particularly to women's autonomy and decision making. See Hanna, *supra*, at 1871-73. Nevertheless, early evaluation of aggressive prosecution programs show a reduction in recidivism and domestic homicides. See *id.* at 1864-65.

This Article continues to explore how the criminal justice system can better respond to domestic violence via more refined punishment alternatives.

3. See JEFFREY FAGAN, U.S. DEP'T OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 6-10 (1996); Hanna, *supra* note 2, at 1852; Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 176, 189 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); Casey G. Gwinn, *The Path to Effective Intervention: Trends in the Criminal Prosecution of Domestic Violence*, *THE PROSECU-*

veloped a better understanding of the relative costs and benefits of arrest⁴ and prosecution policies in these cases,⁵ but there has been little discussion on sentencing theory and practice.⁶ A critical look at sentencing suggests that many in the criminal justice system operate under faulty assumptions about the effectiveness of treatment and the futility of incarceration. Unless we take a harder look at punishment in domestic violence cases, we fool ourselves into thinking that well-intentioned arrest and prosecution policies alone will sufficiently curb domestic violence.

This Article argues that the preference for treatment as

TOR, Nov./Dec. 1993, at 17; Kerry G. Wangberg, *Reducing Case Attrition in Domestic Violence Cases: A Prosecutor's Perspective*, THE PROSECUTOR, Winter 1991, at 9, 9.

For an overview of domestic violence legal reforms, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993) [hereinafter *Developments*]; Elizabeth M. Schneider, *Legal Reform Efforts to Assist Battered Women: Past Present and Future* (1990) (unpublished report, on file at the Vermont Law School Library).

4. See, e.g., Sarah Mansolf Buel, Recent Development, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215-16 (1988) (arguing that mandatory arrest "substantially reduces the number of domestic assaults and murders"); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 929 (1994) (finding that arrest is the superior method of deterring future violence). Numerous commentators have also criticized mandatory arrest policies. See, e.g., Miriam H. Ruttenberg, Note, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 171-74, 187-94 (1994) (arguing that mandatory arrest supports a white, middle-class woman's model of criminal intervention and fails to take into account the racist effects of such policies); Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1133-34, 1156-64 (1994) (arguing that mandatory arrest laws are "neither feasible nor desirable in Chicago").

5. See, e.g., Hanna, *supra* note 2, at 1865-66; Mills, *supra* note 2, at 187-92; Neisser, *supra* note 2, at 248-51; Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1070-83 (1996); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 873-80 (1994).

6. For a discussion of sentencing, see Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 73-75 (1995); Stephen B. Reed, Note, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 350-69 (1991); Diane E. Reynolds, Note, *The Use of Pretrial Diversion Programs in Spouse Abuse Cases: A New Solution to an Old Problem*, 3 OHIO ST. J. ON DISP. RESOL. 415, 416-18, 426-27 (1988).

punishment for domestic violence offenders is misguided. First, empirical data have not shown that most domestic abusers can be rehabilitated through treatment programs as they are currently designed. Rather, the criminal justice system's reliance on batterer treatment programs is driven by politics, not science. Second, the politics of punishment in these cases are symptomatic of a greater debate among both practitioners and academics as to who can provide the "right answer" to why men abuse women and what the best legal response ought to be. Third, we need better interdisciplinary research that examines the causes of violent behavior, paying closer attention to the differences as well as to the similarities among men who abuse women. Finally, until we have this better and more nuanced understanding, the criminal justice system must explore sentencing alternatives that condemn intimate violence more generally, while at the same time impose sentences that specifically deter the most violent offenders, given the particulars of each case, rather than over-rely on therapeutic sentences, which are currently the trend.

As a former domestic violence prosecutor, I was continually frustrated with the unwillingness of judges to sentence domestic violence offenders to incarceration, opting most often for batterer treatment as a condition of probation. A commitment to gender equality originally brought me to work on women abuse.⁷ To me, the emphasis on treatment over punishment reflected a historically sexist system that treated domestic violence as a private family matter. Low sentences equated to gender bias. I blamed the judge.

Yet, at the same time, I found myself recommending probation with a condition of attending a batterer treatment program in cases that, had they involved a stranger, I would

7. Although male violence against women is the only focus of this Article, the more nuanced understanding of what leads people to be violent might also aid in understanding other forms of abuse, such as elder abuse, abuse between same sex couples, and child abuse. See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 547 (1992) (arguing that examining gay and lesbian battering and elder abuse would allow feminist theorists to explore the themes of power and control in contexts outside of heterosexual relationships).

have recommended a prison term without hesitation. I justified my sentencing recommendations on the wishes of the victim or the likelihood of obtaining a plea if I recommended jail. My commitment to holding abusive men criminally responsible for their behavior often faltered, particularly at sentencing.

In an attempt to make greater sense of sentencing practices in these cases, I found the absence of legal scholarship about punishment puzzling. Popular media abounds with stories like the Gonzalez case.⁸ Pressure mounts on district attorneys and judges to handle domestic violence cases with greater sensitivity and understanding.⁹ Debate continues about domestic violence arrest¹⁰ and prosecution policies.¹¹ Sentencing of other crimes, particularly sex¹² and drug offenses

8. See, e.g., Mareva Brown, *Victims of Abuse Often Left In Danger*, SACRAMENTO BEE, Oct. 26, 1997, at A1, available in LEXIS, News Library, Papers File; Michael A. Fuoco, *Victim Ok'd Freeing Jailed Husband; Accused Rapist, Now Homicide Suspect, Was Released Only After Wife Agreed to Plan*, PITTSBURGH POST-GAZETTE, Sept. 12, 1997, at A1, available in LEXIS, News Library, Papers File; Margaret Ramirez, *Cops: Wife Killer Had Prior Arrests*, NEWSDAY (New York) Nov. 3, 1996, at A26, available in LEXIS, News Library, Papers File.

9. Judge Robert E. Cahill, a Baltimore County district judge, came under fire in 1994 for comments made during the sentencing trial for Kenneth Peacock. See Karl Vick, *Md. Judge Taking Heat in Cuckolded Killer Case*, WASH. POST, Oct. 30, 1994, at A1. In February, 1994, Kenneth Peacock returned home unexpectedly to find his wife in bed with another man. See *id.* Four hours later, he shot her in the head with a shotgun. See *id.* On October 17, 1994, Judge Cahill sentenced Mr. Peacock to eighteen months in jail for murdering his spouse. See *id.* The judge condoned his violent outburst and said, "I seriously wonder how many married men, married five years or four years, would have the strength to walk away . . . without inflicting some corporal punishment." *Id.* Judge Cahill sentenced Peacock to three years, half of it suspended. See *id.*

In 1987 a Chinese man in California received five years probation for beating his wife to death with a claw hammer. See Tamar Lewin, *Why Courts See Passion as an Excuse For Murder*, MONTREAL GAZETTE, Oct. 30, 1994, at B1, available in 1994 WL 7616079. He received this sentence because, given his cultural background, he had to kill her once she confessed to adultery. See *id.*

10. See *supra* note 4 and accompanying text.

11. See *supra* note 5 and accompanying text.

12. See Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 25 (1989) (suggesting that sex offenders continue to offend even after incarceration or clinical treatment); Cheryl Hanna, *Living With Risk: The American Experience with Sex Offender Legislation*, 46 U.N.B. L.J. 153, 153-58 (1997); Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws*

es,¹³ receives enormous attention. Why then have legal scholars written so little about the merger of punishment and domestic violence?

One might assume that the field of domestic violence and crime is too new for meaningful scholarship on punishment to yet evolve. Upon closer examination, however, I conclude that the silence subverts a more difficult issue of control—not control of the victim by the abuser—but control over the solution to domestic violence.

A deep and growing schism exists between feminist lawyers and advocates, who are largely responsible for legal reform in this area, and social scientists who continue to research this phenomenon.¹⁴ Debate centers around the causes and cures of domestic violence. Feminist theory continues to be rich, dynamic, and often contradictory in its conclusions;¹⁵ yet, the unequal

of the 1990s, 90 NW. U. L. REV. 788, 789-90 (1996); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1712-13 (1996) (describing typical sex offender statutes); G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy and Due Process*, 44 EMORY L.J. 1633, 1636-43 (1995); Joel B. Rudin, *Megan's Law: Can It Stop Sexual Predators—and at What Cost to Constitutional Rights?*, CRIM. JUST., Fall 1996, at 3, 3-4.

13. See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283-85 (1995); Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 343-56, 372-81 (1995); Karen Lutjen, Note, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 395-402 (1996); Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, The Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851-55 (1995); Book Note, *Determinate Sentencing and Judicial Participation in Democratic Punishment*, 108 HARV. L. REV. 947, 949-50 (1995).

14. I do not suggest that feminism and social science are mutually exclusive disciplines. There are many feminist social scientists. I use this rough distinction to refer to nonfeminist-oriented social science.

15. For example, the formal equality approach proposes that individuals who are alike should be treated alike according to their actual characteristics rather than stereotypes. See Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303, 303 (1993). In contrast, substantive equality theory requires that rules take into account the significant differences in the characteristics and circumstances of women and men in order to avoid gender-based outcomes and relies on the idea that neutral rules do not account adequately for the extent to which the realities of women's lives differ from men's. See Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 26 (1985); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy:*

power relationship between men and women is the common thread that runs through feminist discourse on domestic violence.¹⁶ Feminism is the primary paradigm that explains why women constitute the vast majority of domestic violence victims. In contrast, the social science community traces domestic violence to a violent culture that manifests itself in family conflict and violence.¹⁷ Social scientists respond that the feminist primary emphasis on gender does not explain why so few, as opposed to so many, men batter, nor does it account for why women also engage in violence against family members.¹⁸ Some psy-

Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 GOLDEN GATE U. L. REV. 513, 537 (1983).

Nonsubordination theory, initially developed by Catharine MacKinnon as a way to understand sexual harassment in the work place, shifts the focus of attention from gender-based differences to the power imbalances between men and women. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 40-45 (1987).

Different voice theory views women's differences not as problematic, but as potentially valuable resources that might serve as an alternative to "male" models of social organization and law. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 18-19 (1988). These female characteristics could be incorporated into legal concepts so that, for example, tort law would begin with a "premise of responsibility rather than rights." *Id.* at 31.

Finally, some feminist theory is critical of the tendency to produce universalisms instead of accounting for differences among women. See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 56, 59-60 (1988).

16. For example, the Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C.), controversial because of its feminist origins, relies on the view that "crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender." S. REP. NO. 102-197, at 27 (1991); see 42 U.S.C. § 13981(b) (1994); Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications and Litigation Strategy*, 4 J.L. & POL'Y 391, 391-93 (1996) (panel discussion); Reva B. Siegal, "The Rule of Love: Wife Beating As Prerogative and Privacy," 105 YALE L.J. 2117, 2197 (1996). To restructure society and reduce violence against women, feminist legal reforms have focused on providing women with greater access to the legal system. These reforms have included the greater availability of orders of protection, the passage of stalking laws, divorce and custody legislation that recognizes the existence of domestic violence, and tort and civil rights remedies under the Violence Against Women Act. See, e.g., *infra* notes 28-38 and accompanying text.

17. See, e.g., Richard J. Gelles, *Through a Sociological Lens: Social Structure and Family Violence*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 31, 34-36, 43 (Richard J. Gelles & Donileen R. Loseke eds., 1993) [hereinafter CURRENT CONTROVERSIES].

18. See, e.g., DONALD G. DUTTON WITH SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 120-22 (1995); RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 40-41, 49 (1988) (discussing exaggeration of battering estimates and

chologists locate the causes of domestic violence in individual pathologies, rather than in larger social structures.¹⁹ Behavioral biologists and evolutionary psychologists argue that male violence against women is deeply rooted in reproductive strategies particularly aimed at controlling women's sexuality, and thus we need to understand the biological, as well as social, causes of intimate violence.²⁰

When neither empirical data nor individual experience supports theoretical arguments, a tendency exists for each discipline to reject outright the arguments of the other.²¹ As Kersti Yllö argues: "Feminist scholars and activists with strong convictions are labeled ideologues At the same time, feminists deepen the chasm by dismissing nonfeminist insights too quickly and hastily deciding who 'gets it' and who doesn't."²² What is happening in the domestic violence field is analogous to the parable of the blind men touching the elephant. Each discipline not only feels something different, but also claims to possess what it touches. We blindly hold on to our own piece of the elephant without fully appreciating how difficult a creature it is to grasp.

No single theoretical construct can account for the violence that afflicts women in their intimate relationships. Nor can any single course of punishment provide a perfect solution. In fact, our search for a perfect solution may have become counterpro-

the fact that not all abused persons abuse); see also RICHARD J. GELLES, *THE VIOLENT HOME* (1972) (arguing that violence in the family is a significant phenomenon and that women, as well as men, engage in family violence).

19. See, e.g., DUTTON WITH GOLANT, *supra* note 18, at 120-22; LENORE E. WALKER, *THE BATTERED WOMAN* 42-43 (1979); Carolie J. Coates & Deborah J. Leong, *A Psychosocial Approach to Family Violence: Application of Conceptual Systems Theory*, in *VIOLENCE IN INTIMATE RELATIONSHIPS* 177, 179-80, 197-98 (Gordon W. Russell ed., 1988).

20. See, e.g., Cheryl Hanna, *Can a Biological Inquiry Help Reduce Male Violence Against Females?*, 22 VT. L. REV. (forthcoming 1998); Barbara Smuts, *Male Aggression Against Women: An Evolutionary Perspective*, in *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES* 231 (David M. Buss & Neil M. Malamuth eds., 1996).

21. See, e.g., Zorza, *supra* note 4, at 929-32. Feminists are willing to accept social science research when it supports a politically useful proposition, as in the case of the battered women's syndrome. See *id.* at 932-33. For a general discussion of this phenomenon, see CURRENT CONTROVERSIES, *supra* note 17, at xiv-xvii.

22. Kersti A. Yllö, *Through a Feminist Lens: Power, Gender and Violence*, in CURRENT CONTROVERSIES, *supra* note 17, at 47, 59.

ductive. Those of us who work in this field must base sentencing policy and decisions on both empirical data and descriptive information provided by those who "do law."²³ Our propositions must be tested by their consequences.²⁴ A discussion of punishment in domestic violence criminal cases presents an opportunity for feminists, social scientists, and researchers from other fields to develop interdisciplinary insights into the phenomenon of battering. To do so, however, we each have to relinquish ownership of the problem. In turn, it is my hope that sentencing practices will emerge that actually deliver the promise of punishment.

Part I of this Article reviews current sentencing practices in domestic violence cases.²⁵ Despite increased attention to domestic violence, there is still a deep reluctance to incarcerate domestic violence offenders. Rather, most receive probation with mandated treatment regardless of the severity of the offense or their past violent histories. This trend continues despite empirical research

23. I have found much inspiration from pragmatist theory. One joy of being a pragmatist means never having to say that you have a theory. See J.M. Balkin, *The Top Ten Reasons to Be a Legal Pragmatist*, 8 CONST. COMMENTARY 351, 351 (1991). Balkin points out that a legal pragmatist "can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything else." *Id.*

Professor Margaret Jane Radin's article, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990), continues to be one of the most influential pieces that I have read in the course of my scholarship on domestic violence. Her merger of feminism and pragmatism has assisted me greatly in addressing the dilemmas posed by criminal domestic violence practice. I strongly urge those interested in the benefits of pragmatism for feminists to read this piece. Also, I recommend Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990); Schneider, *supra* note 7.

24. See Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1660 (1990).

25. I use the term "domestic violence" to refer to acts of violence perpetrated by men against their girlfriends, wives, or intimate partners. This definition reflects the fact that women are about six times more likely than men to experience violence committed by an intimate. See RONE T. BACHMAN & LINDA E. SALZMAN, U.S. DEPT OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1* (1995). Furthermore, I tend to use the term "victim" most frequently to describe women who have been battered by their partners. Although I am sensitive to terms like "survivor" and "battered woman," I use victim here because I do not want to obscure the reality that women are harmed by intimate violence.

that questions whether there is any direct causal link between participation in a batterer treatment program and recidivism.

Part II explores both the theoretical and practical reasons that have led to the emphasis on treatment over other forms of punishment. Many argue that sexist attitudes on the part of prosecutors and judges have led to disproportionately low sentences. This is partly true, but feminists are also responsible for the overemphasis on treatment. Furthermore, I explore the practical difficulties that often prevent even the most enlightened from imposing severe, yet appropriate sanctions.

Part III argues that there is no such thing as a "batterer profile." I draw from the emerging social science literature that suggests that men who abuse women do not have uniform characteristics or motivations. This research can help us better decide who is most likely to benefit from treatment and who is most deserving of long-term incapacitation. I then suggest practical measures for the criminal justice system to develop better, although imperfect, sentencing practices.

Part IV concludes with an optimistic but cautionary note that the most effective way to reduce violence against women is to continue to study male battering and base our sentencing decisions on both theory and experience. Finally, we need to accept the limitations of any criminal justice strategy. This is, perhaps, the greatest challenge of all.

I. A CRITICAL LOOK AT SENTENCING PRACTICES: THE DISCONNECTION BETWEEN PERCEPTION AND REALITY

A. *The Criminalization of Domestic Violence*

The criminalization of domestic violence²⁶ has made for some strange bedfellows, albeit with different long-term expectations. Feminists argue that criminalization of domestic violence is one way to correct the historical, legal, and moral disparities in legal protections afforded to women, making public what traditionally has been thought of as a private crime.²⁷ Victims' advocates focus

26. See, e.g., Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C.).

27. See Seymore, *supra* note 5, at 1035-36, 1080-83; Zorza, *supra* note 4, at 984-

primarily on individual victim safety, supporting criminalization generally but arguing against any policies that might increase danger to the victim or "disempower" her.²⁸ Criminologists²⁹ and some legal scholars³⁰ evaluate current policies almost exclusively on their specific deterrent effects, often ignoring changes in social and legal institutions that feminists have sought to achieve.³¹ Finally, social conservatives, not normally supportive of feminist legal reform, advocate using the law to enforce public morality and further the goals of retribution.³² They too have been supportive of criminal justice reforms in this area.

86; see also Demie Kurtz, *Battering and the Criminal Justice System: A Feminist View*, in DOMESTIC VIOLENCE 21 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (describing a feminist view of criminalization).

28. See 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, 136 (1991) (discussing victims' advocates' views that compelling victims to testify has the effect of punishing the victim for the abuse); David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 157 (N. Zoe Hilton ed., 1993) (finding that mandatory prosecution policies may cause more harm than good); Mills, *supra* note 2, at 184 (spurning mandatory prosecution policies and advocating a flexible prosecution strategy in order to "facilitate the battered woman's ability to recapture her identity"); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1207-13 (1995) (arguing that overcriminalization of domestic violence disempowers victims).

29. See Richard A. Berk et al., *The Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 AM. SOC. REV. 698 (1992) (discussing the results of experiments evaluating the deterrent effect of arrest in domestic assault cases); Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP., Apr. 1984, at 1 (same); Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) [hereinafter Sherman & Berk, *Specific Deterrent Effects*] (studying the deterrent effect of arrest in domestic assault cases); Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992) (studying the effect of arrest on recidivism in domestic violence cases); cf. Peter K. Manning, *The Preventive Conceit: The Black Box in Market Context*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 3, at 83, 83-84 (arguing that a belief in the deterrent effects of arrest is a "conceit" because it is a mental activity organized by a misguided metaphor that animates policy and research).

30. See Zlotnick, *supra* note 28, at 1171-76, 1212-13.

31. See, e.g., Sherman & Berk, *Specific Deterrent Effects*, *supra* note 29, at 268-70.

32. See FAGAN, *supra* note 3, at 8-9.

The federal government also endorses the criminalization of domestic violence. The Violence Against Women Act (VAWA)³³ advocates mandatory arrest and pro-prosecution policies,³⁴ training for court personnel and judges,³⁵ better record keeping of statistics,³⁶ and an increased commitment to victims' services and rehabilitation.³⁷ VAWA also makes certain domestic violence offenses federal crimes, such as interstate stalking and violation of a protection order.³⁸

One major concern with the criminalization movement is that evidentiary standards for proving abuse have been so relaxed that any man who stands accused is considered guilty. For example, in Florida, Judges Margaret Waller and Carol Draper require treatment for domestic violence as a condition of bail for almost everyone accused of the crime.³⁹ The Florida ACLU is concerned that such pretrial conditions assume guilt without further proof, thus violating the presumption of innocence.⁴⁰

Both battered women's advocates and opponents of legal reform have been criticized for exaggerating or misrepresenting

33. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C.).

34. See 42 U.S.C. § 3796hh to hh-4 (1994).

35. See *id.* §§ 13992, 14001, 14036.

36. See *id.* §§ 13962, 14015, 14031, 14038.

37. See *id.* §§ 3796gg to gg-5, 13941, 13943, 14012, 14013, 14014.

38. See 18 U.S.C. § 2261 (1994). The VAWA criminal provisions are part of a larger trend to federalize the criminal law, including sex, drug, and gun violations. I applaud the funds that VAWA currently provides states to combat domestic violence at the local level, see Cheryl Hanna, *Making Hard Decisions After the Violence Against Women Act Grants*, VT. B.J., Nov./Dec. 1996, at 33, but I share Sanford Kadish's concerns about the overfederalization of these offenses. See Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995). In particular, I am less optimistic about the ability of federal law enforcement to do "the kind of on-site policing that the federal criminal system has never been any good at." *Id.* at 1249. Federalizing domestic violence crimes caters to public sentiment to "get tougher"; it is likely to distract attention away from local law enforcement, duplicating and wasting resources and not much else.

This Article addresses only sentencing in criminal cases. For a discussion of civil protection orders, no-contact provisions, and other civil remedies available to women, see PETER FINN & SARAH COLSON, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT* 33-47 (1990).

39. See Henry Pierson Curtis, *County Judges Accused of Abusing Rights in Violence Cases*, ORLANDO SENTINEL, July 30, 1995, at 1, available in 1995 WL 9701888.

40. See *id.*

the incidence and prevalence of domestic violence.⁴¹ Although the tone of these exchanges fuels the battle for ownership of the problem, the substance is well taken. As the recent report to Congress on *Domestic and Sexual Violence Data Collection* states: "As we seize the opportunity to make a difference in the lives of women and children victimized by violence, we want to be sure to proceed on the basis of knowledge. We need sound data to guide our policymaking."⁴²

Unfortunately, we know surprisingly little about the outcomes of all violent crimes. Few studies compare the outcome of domestic violence with other violent offenses.⁴³ Furthermore, sparse

41. See, e.g., CHRISTANA HOFF SOMMERS, WHO STOLE FEMINISM? 12-17 (1994) (criticizing unfounded claims of domestic violence advocates that domestic violence is responsible for more birth defects than all other causes combined and that incidence of domestic battery tended to rise by 40% during the Super Bowl). Sommers argues that when feminists engage in "exaggeration, oversimplification, and obfuscation, [they] may be no different from such other advocacy groups as the National Rifle Association or the tobacco industry." *Id.* at 15.

For another prime example of the ongoing battle over statistics, see Liz Kates, *Wife Beating* (last modified Oct. 4, 1994) <<http://www.vix.com/men/battery/studies/lkates.html>>; Joel Schwartz, *A Reply to Liz Kates on Domestic Abuse* (last modified Oct. 17, 1994) <<http://www.vix.com/men/battery/studies/schwartz-counter.html>>.

42. JUSTICE RESEARCH AND STATISTICS ASS'N, NATIONAL INST. OF JUSTICE DOMESTIC AND SEXUAL VIOLENCE DATA COLLECTION: A REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 1 (1996) [hereinafter DOMESTIC AND SEXUAL VIOLENCE].

43. Here is what we do know: There are two official federal measures of crime, the National Crime Victimization Survey (NCVS) and the Uniform Crime Reports (UCR). The first consists of interviews from approximately 50,000 housing units and 100,000 persons. See BACHMAN & SALZMAN, *supra* note 25, at 6-7. All members of a selected household are interviewed every six months for three years. See *id.* Although problems remain with this source of data collection, the NCVS reports that in 1992-93 women reported about 3.8 million assaults to National Crime Victimization Surveyors. See *id.* at 2. In 29% of those cases, the offender was an "intimate"—a husband, ex-husband, boyfriend, or ex-boyfriend. See *id.* at 3. In other words, 9 in 1000, or approximately one million women, report being the victim of domestic violence each year. See *id.*

We do not have an official measure of how many of those self-reported cases actually make it into the criminal process. The UCR published by the FBI does not require local law enforcement to maintain data on the relationship between victim and offender except in the case of murder. See DOMESTIC AND SEXUAL VIOLENCE, *supra* note 42, at 4. In 1995, for those cases where the relationship between the victim and the perpetrator was known, 732 women were murdered by their husbands, and 482 were murdered by their boyfriends. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS 19 (1995), [hereinafter

data exists on the number of domestic violence cases that arrive in the criminal justice system and what happens to them once they get there.⁴⁴ The federal government and a majority of the states collect statistics on domestic violence, but there are wide variations in how each jurisdiction defines offenses, determines what is counted, and measures or reports incidents.⁴⁵ All fifty states now allow police officers to make warrantless arrests upon probable cause that someone committed a domestic violence misdemeanor or violated a restraining order.⁴⁶ Most jurisdictions

UNIFORM CRIME REPORTS 1995]. This represents a decrease from 1994, when 823 women were murdered by their husbands, and 525 were murdered by their boyfriends. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS 19 (1994). Among all female murder victims, 26% were slain by a husband or boyfriend. See UNIFORM CRIME REPORTS 1995, *supra*, at 17.

In 1996, the Bureau of Justice Statistics reported that there were 1,842 murders committed by current or former spouses, boyfriends or girlfriends. See George Lardner, Jr., *Unanswered Questions: A Study of Murders by Intimates Fails to Reveal Why the Victims Increasingly Are Women*, WASH. POST, Mar. 23, 1998 (National Weekly Edition), at 35. Although this represents a drop of 36% from the 2,957 such homicides committed in 1976, the study found that the percentage of women killed by intimates remained steady, at about 30% of all female homicide victims. See *id.* The study further estimates that there were 840,000 female victims of violence inflicted by an intimate in 1996, compared with 1.1 million in 1993. See *id.*

Interestingly, these numbers differ dramatically from a recent study done by the New York City Department of Health. In order to better understand the patterns in homicide of women, the Department studied the medical examiner records of all women ages 16 and older killed in New York City between 1990 and 1994. See SUSAN A. WILT ET AL., NEW YORK CITY DEP'T OF HEALTH INJURY PREVENTION PROGRAM: FEMALE HOMICIDE VICTIMS IN NEW YORK CITY, 1990-1994 (1997). The perpetrator's relationship to the victim was known in 42% of those cases. See *id.* at 12. Forty-nine percent of these known perpetrators were intimate partners. See *id.* In both the UCR and the New York Department of Health study, information on the perpetrator is gathered from police reports. These studies do not reflect whether anyone has been convicted of the offense.

The National Incident-Based Reporting System (NIBRS), authorized under the Federal Crime Bill of 1995, is aimed at changing the way in which these statistics are gathered. See DOMESTIC AND SEXUAL VIOLENCE, *supra* note 42, at 4. Until the new system is in place and refined, however, much of the information about domestic violence criminalization is based on individual jurisdictions. See *id.* Sadly, neither the NIBRS nor the NCVS will track case dispositions, including conditions of probation such as mandated treatment.

44. See UNIFORM CRIME REPORTS 1995, *supra* note 43.

45. See *id.* at 2-3.

46. See Toni L. Harvey, Student Work, *Batterers Beware: West Virginia Responds to Domestic Violence with the Probable Cause Warrantless Arrest Statute*, 97 W. VA. L. REV. 181, 190 (1994). Alabama and West Virginia, the only two states that did

have mandatory or preferred arrest policies that require or encourage police officers to arrest a suspect at the scene of a domestic violence incident.⁴⁷ A call to the police for a domestic violence incident is likely to end in arrest, not mediation,⁴⁸ regardless of the victim's wishes. Police departments nationwide report that domestic violence arrests continue to rise, putting increased pressure on already limited law enforcement resources.⁴⁹

Prosecutors and judges have numerous disposition options once a domestic violence case enters the system: outright dismissal; pretrial diversion;⁵⁰ postconviction probation with condi-

not allow for warrantless misdemeanor arrests in 1988, both recently enacted statutes. See ALA. CODE § 15-10-3 (1995); W. VA. CODE § 48-2A-14 (1996).

47. In jurisdictions with mandatory arrest policies, officers must arrest when they have probable cause to believe that a domestic violence assault has occurred. See LAWRENCE W. SHERMAN ET AL., *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 111 (1992). In contrast, jurisdictions with pro- or preferred-arrest policies encourage officers to arrest but do not require them to do so; these jurisdictions generally use the phrase "should arrest" rather than "shall arrest." See *id.* at 111-12; WILLIAM L. HART ET AL., U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 22-23 (1984); see also *Combating Violence Against Women: Hearing on S. 1720 Before the Senate Comm. on the Judiciary*, 104th Cong. 39 (1996) (statement of Janet Reno, Attorney General, U.S. Dep't of Justice) ("[VAWA] will . . . distribut[e] \$28 million in funding to encourage mandatory arrest policies for the primary aggressor in domestic abuse cases."); Alison Frankel, *Domestic Disaster*, AM. LAW., June 1996, at 55, 56 (reporting that 25 states already have mandatory arrest policies).

48. Prior to the 1970s, the typical police response to domestic violence was to mediate the situation. Police advised the husband or boyfriend to "take a walk around the block" rather than arrest him. See HART ET AL., *supra* note 47, at 22-23; UNITED STATES COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12-22 (1982); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47-48 (1992).

49. See Zorza, *supra* note 4, at 972 (stating that one-third of police time is spent responding to domestic disturbance calls, constituting the largest category of calls received by the police each year); see also *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 2 (1994) [hereinafter *Domestic Violence Hearing*] (statement of Rep. Charles E. Schumer) ("Domestic assault is the single most frequent form of violence that police encounter, more common than all other forms of violence combined."); Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse Violence*, L.A. TIMES, July 11, 1994, at A1 (noting that domestic violence calls to police rose 27% in California between 1989 and 1993, in partial response to increased law enforcement efforts).

50. Diversion is the channeling of a criminal defendant into a rehabilitative program instead of the justice system. See Reynolds, *supra* note 6, at 422-23. This

tions, including fines; batterer treatment and/or substance abuse counseling; or incarceration. Prosecution policies nationwide are becoming more rigorous,⁵¹ with many jurisdictions forming specialized prosecution units and implementing "no-drop" policies.⁵² The available data, however, suggests that most of these cases still end with arrest.⁵³ The reasons for lack of prosecution

will usually halt or suspend the formal criminal proceedings against the alleged perpetrator in favor of a noncriminal proceeding that, if successful, is the final disposition of the criminal offense. *See id.* In most cases, the defendant is never required to plead guilty. *See id.*

51. For an overview of current prosecution programs, see Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in DOMESTIC VIOLENCE, *supra* note 27, at 161, 162-77; Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Women Abuse*, in WOMAN BATTERING: POLICY RESPONSES 95, 97-109 (Michael Steinman ed., 1991). Several sources also provide useful descriptions of specific programs. *See* Asmus et al., *supra* note 28, at 128-29 (describing the Duluth, Minnesota prosecution program); Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. UNIV. L. REV. 297, 298-304 (1993) (describing the San Diego, California prosecution model).

52. Jurisdictions with aggressive, vertical, or no-drop policies include Alexandria, Virginia; Baltimore, Maryland; Quincy, Massachusetts; Brooklyn, New York; Denver, Colorado; Duluth, Minnesota; King County, Washington; Los Angeles, California; and San Diego, California. *See* Cahn & Lerman, *supra* note 51, at 162-64; Gwinn, *supra* note 3, at 19. At least four states have adopted legislation encouraging the use of no-drop policies. *See* FLA. STAT. ANN. § 741.2901(2) (West 1997); MINN. STAT. ANN. § 611A.0311(2)(5) (West Supp. 1997); UTAH CODE ANN. § 77-36-2.7(1)(e) (Supp. 1997); WIS. STAT. ANN. § 968.075(7)(a)(2) (West Supp. 1997).

In addition, specialized prosecution units are being established throughout the country. *See* Cahn & Lerman, *supra* note 51, at 164; Frankel, *supra* note 47, at 56; Gwinn, *supra* note 3, at 17; *see also* Mark Hansen, *New Strategy in Battering Cases*, A.B.A. J., Aug. 1995, at 14 (reporting that in San Diego, homicides related to domestic violence fell from 30 in 1985 to 7 in 1994, after successful completion of a no-drop program); Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, § 6 (Magazine), at 22 (finding that many more cases are prosecuted under hard no-drop policies). For a discussion of these trends and an argument that the criminal justice system needs to adopt reforms that incorporate a feminist perspective on battering, *see* Kurtz, *supra* note 27, at 26.

53. *See Domestic Violence Hearing*, *supra* note 49, at 2 (statement of Rep. Charles E. Schumer) ("In a case where a mugger might be sentenced to a lengthy jail term, a wife beater may not even be arrested."); Zorza, *supra* note 4, at 947-54 (citing the Milwaukee replication of the Duluth experiment and finding that only 37 of the 802 domestic violence offenders (.05%) were ever charged, and only 11 of the 802 (.01%) were ever convicted, results similar to those in Charlotte, where fewer than 1% of abusers spent any time in jail, other than during the initial arrest); *see also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 299 (1985) (finding that "[i]n any other context, irrefutable evidence of such severe physical and

are many: victim reluctance or refusal to cooperate; lack of proper police investigation; prosecutors untrained in how to proceed without the victim's testimony; and the belief that these cases are a private family matter.⁵⁴ Of those cases that are prosecuted, many are charged or pled down to misdemeanors despite facts that suggest the conduct constituted a felony.⁵⁵

psychological damage would cause an outraged demand for legal action"). What little data there is in this area suggests that prosecutors dismiss the vast majority of domestic violence cases before trial. See, e.g., MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT (1989), reprinted in 15 WM. MITCHELL L. REV. 825, 883-84 (1989) (describing a six-jurisdiction study in which none of the 224 domestic violence cases reviewed went to trial because all were disposed of by either dismissal or a guilty plea); Rhea Mandulo, *Programs Aim at Keeping Abuse Cases Alive*, N.Y. L.J., Jan. 6, 1993, at 2 (reporting that prosecutors in Manhattan and the Bronx drop 50 to 80% of domestic violence cases); Mary O'Doherty, *New Jefferson Wife-Abuse Unit to Make Cases Tough to Drop*, COURIER J. (Louisville, Ky.), Apr. 26, 1991, at 1A, available in 1991 WL 6850310 (citing a 70% dismissal rate for a local jurisdiction that made no special effort to prosecute domestic violence cases).

54. See Eve S. Buzawa & Carl G. Buzawa, *Introduction to DOMESTIC VIOLENCE*, supra note 27, at vii, xvii ("[P]rosecutors have consciously assumed that the motivation and commitment of victims is a legitimate case discriminator in deciding whether to prosecute an offender."); Hanna, supra note 2, at 1860; Janell Schmidt & Ellen Hochstedler Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 CRIMINOLOGY 487, 500 (1989) ("Decisions short of formal charging were . . . made in cases in which the burden of proof could conceivably be met, but the victim expressed a desire for the prosecutor to be lenient."); Wangberg, supra note 3, at 8, 8 ("High case attrition rates in domestic violence actions can generally be classified under the . . . rubric of 'victim reluctance.'").

55. See *Guns and Domestic Violence Change to Ownership Ban: Hearings on H.R. 26 and 445 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence) (finding that "to the extent criminal charges result in a domestic violence incident, it is likely to be charged and prosecuted as a misdemeanor crime"), available in 1997 WL 8219577; *Domestic Violence Hearing*, supra note 49, at 2 (statement of Rep. Charles E. Schumer) ("According to one study, as many as 90 percent of all family violence defendants are never prosecuted, and one-third of the cases that would be considered felonies if committed by strangers are charged as misdemeanors when committed by nonstrangers."); REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY BIAS COMMISSION (1990), reprinted in 42 FLA. L. REV. 803, 859-60 (1990); Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Reasoning of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & LAW 43, 74 (1995) (finding that most research indicates that "stranger offenders fare worse than nonstranger offenders in sentencing outcome"); see also Sarah Eaton & Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of New York City Courts*, 19 FORDHAM URB. L.J. 391, 461-62

When prosecutors decide to go forward, the final disposition is often a period of probation, either pre- or postconviction, contingent upon completion of a batterer treatment program.⁵⁶ For example, in Sussex County, New Jersey, counseling and other social services for both the victim and the abuser, rather than jail time, is the preferred sentence as a matter of jurisdictional

(1992) (citing criticism of prosecutors for reducing or minimizing charges in too many cases); Boxall & Muir, *supra* note 49, at A1 (quoting Gil Garcetti, Los Angeles County District Attorney, stating that his office's misdemeanor filing rate is too high); Rene Lynch, *Spousal Abuse Is Rarely Prosecuted as a Felony in O.C.*, L.A. TIMES, June 26, 1994, at A1 (finding that a significant number of domestic violence cases that start as felony arrests eventually are reduced to misdemeanors). According to California state figures, prosecutors file 80% of Los Angeles County's spouse abuse cases as misdemeanors. See Boxall & Muir, *supra* note 49, at A1.

56. Treatment has become an "all-purpose sentence" in the eyes of many judges. Frankel, *supra* note 47, at 67; see Gwinn, *supra* note 3, at 17; Elena Salzman, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 348-49 (1994).

In domestic violence cases, prosecutors are more likely to seek probation or special diversion programs than to seek jail sentences. See, e.g., Laura Lippman, *More Action Urged on Domestic Crime*, THE SUN (Baltimore), May 28, 1993, at 1B, available in 1993 WL 7367057 (reporting the findings of the Baltimore Domestic Violence Coordinating Committee that only about three percent of the 20,000 domestic violence complaints received by the police during the first three months of 1993 ended with an arrest). Diversion programs, which often include mandated counseling, can be entered into either pretrial or post-trial. See generally David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 176 (Kersti Yllö & Michele Bograd eds., 1988) (explicating a "profeminist analysis" of batterer's treatment programs); L. Kevin Hamberger & James E. Hastings, *Court-Mandated Treatment of Men Who Assault Their Partner*, in LEGAL RESPONSES TO WIFE ASSAULT, *supra* note 28, at 188, 225 (finding that, despite efforts, research about the effectiveness of batterer treatment programs has yielded few conclusions).

The creation of specialized courts for family violence also assists judges in placing defendants on probation with treatment requirements rather than incarceration, sometimes lessening the perception of the dangers of domestic violence. See FAGAN, *supra* note 3, at 20-23.

Batterers themselves often do not believe that their sentences are severe enough. For example, in a national mail survey devised by the American Prosecutors Research Institute, only five percent of respondents believed that their sentence was sufficiently severe. See Rebovich, *supra* note 3, at 186; see also Sharon D. Herzberger & Noreen L. Channels, *Criminal-Justice Processing of Violent and Nonviolent Offenders: The Effects of Familial Relationship to the Victim*, in ABUSED AND BATTERED 63, 70 (Dean D. Knudsen & JoAnn L. Miller eds., 1991) (finding that violent crimes against family members are handled differently at the bail-setting stage than the same crimes against unrelated victims and that suspects who are related to their victims and charged with a violent offense are treated more leniently).

policy.⁵⁷ There is little evidence, however, that probation departments follow up on these orders, allowing many abusers to slip through the cracks.⁵⁸

In addition, few batterers ever see the inside of a jail cell, even when convicted of a serious offense.⁵⁹ A recent *American Lawyer* story followed all domestic violence arrests in eleven jurisdictions on June 18, 1995.⁶⁰ Of the 140 arrests made in the eleven communities, 95 never made it to conviction, plea, or ac-

57. See Dennis O'Leary, *Domestic Violence Prosecutions—The Need for Prospective, Proactive Prosecutions*, THE PROSECUTOR, Sept./Oct. 1993, at 17, 19.

58. According to a study in the Bronx, programs that accept court-mandated offenders are supposed to report those who stop attending. See Frankel, *supra* note 47, at 667. Yet, no one is sure if they actually do. See *id.* This does not appear to be a unique phenomenon, see Gwinn, *supra* note 3, at 21 (calling for better post-court follow-up), and also can happen when the treatment program is part of a pre-trial diversion agreement. See Melissa Hooper, Note, *When Domestic Violence Diversion Is No Longer an Option: What to Do with the Female Offender*, 11 BERKELEY WOMEN'S L.J. 168, 170-71 (1996) (finding that 54% of the defendants on diversion had no contact with probation officers for more than four months); see also Rebovich, *supra* note 3, at 187 (finding that tracking of probation fulfillment was rare in most jurisdictions).

59. Few cases report appeals of domestic violence sentences for either downward departures from regular sentencing guidelines or for reductions in sentences. In the few cases that have been appealed, courts are beginning to see the dangers of domestic violence and are reversing accordingly. See *State v. Huletz*, 838 P.2d 1257, 1257-60 (Alaska Ct. App. 1992); *State v. Hobbs*, 801 P.2d 1028, 1029-31 (Wash. Ct. App. 1990). *Huletz* held that the trial court's sentence of 40 hours of community service, a fine of \$250, and no contact with the victim for a year was too lenient in light of the fact that the defendant beat his girlfriend so badly that she required hospital treatment. See *Huletz*, 838 P.2d at 1260-61. The court found that the sentence was at the low end of the accepted sentencing guidelines for this type of assault, but no mitigating factors warranted the reduction. "[T]he sentence imposed below fails to satisfy any of the . . . sentencing goals, including the goal of rehabilitation." *Id.* at 1260. *Hobbs* held that the trial court's sentence of three months in jail and one year of community service was not supported by the facts of the case. See *Hobbs*, 801 P.2d at 1030-31. The court found that the trial court should not have counted the ongoing relationship between the victim and the defendant as a mitigating circumstance justifying downward departure. See *id.* at 1031.

Other appellate courts, however, continue to treat these cases lightly. See, e.g., *State v. Powell*, 696 So. 2d 789, 790-91 (Fla. Dist. Ct. App.) (finding that a twelve-year suspended sentence for sexual battery of an ex-girlfriend was justified in light of the fact that the victim did not want her child's father incarcerated and the defendant was amenable to treatment), *aff'd*, 703 So. 2d 444 (Fla. 1997).

60. See Frankel, *supra* note 47, at 54, 56. The injuries sustained by the victims on that day included bruising, lacerations, black eyes, bloody lips, strangulation marks, burns, stab wounds, and unconsciousness. See *id.* at 69-73.

quittal.⁶¹ Cases were dismissed even in jurisdictions with avowed no-drop policies.⁶² Only sixteen of the forty-four defendants who were convicted or pled no contest served any time; the vast majority received probation or a suspended sentence, including one man who sent his wife to the hospital with a broken nose and a broken rib.⁶³ He received six months' probation.⁶⁴ A man who slapped his wife in the face and tried to stab her with a kitchen knife received one year, the longest sentence given on this day.⁶⁵ The court found that two prior felony drug convictions, not the severity of the crime, justified the length of the sentence.⁶⁶

What would happen to these defendants if they assaulted a stranger or acquaintance rather than a loved one? Unfortunately, we do not know. There is an abysmal lack of data comparing violent domestic and nondomestic cases.⁶⁷ To date, no empirical evidence supports the assertion that authorities treat domestic violence offenses less seriously than other violent crimes. In fact, Kathleen Ferraro and Tascha Boychuk examined violent criminal cases in Maricopa County, Arizona from 1987 to 1988 and found that all people prosecuted for crimes of violence, whether against an intimate or a nonintimate, received relatively lenient treatment.⁶⁸ Offenders closely related by blood or sexual ties to

61. See *id.* at 56.

62. In Atlanta, 17 of 27 cases were dismissed or not prosecuted; in Dade County, the figure was 13 of 27; in Oakland, California, the number was two out of six. See *id.* at 69-73.

63. See *id.* at 72.

64. See *id.*

65. See *id.*

66. See *id.* at 56, 72.

67. See JoAnn L. Miller, *Family Violence Research: Some Basic and Applied Questions*, in ABUSED AND BATTERED, *supra* note 56, at 5, 13-15 (arguing that establishing treatment and control groups is ethically problematic but vital for research on family violence and identifying an urgent need to collect systematic data).

68. See Kathleen J. Ferraro & Tascha Boychuk, *The Court's Response to Interpersonal Violence: A Comparison of Intimate and Nonintimate Assault*, in DOMESTIC VIOLENCE, *supra* note 27, at 209, 219-21. In a review of 104 cases of adult intimates and 100 cases of nonintimate violent crimes, only two cases resulted in a verdict of guilty by a jury and one by a judge. See *id.* at 219. One of the 204 cases resulted in a verdict of not guilty by a jury trial. See *id.* A significant difference existed, however, between the proportion of intimate and nonintimate cases disposed of through guilty pleas. See *id.* In addition, courts dismissed a much larger portion of

their victims were usually given probation or had their cases dismissed, but so too were offenders unrelated to their victims.⁶⁹ The authors concluded that nondomestic violence receives the same treatment as domestic violence.⁷⁰ "If incarceration is used as a measure of disapproval, few . . . violent acts in these data are strongly disapproved."⁷¹ Given the changes in arrest and prosecution policies, as well as the increased public pressure in the ten years since Ferraro and Boychuk conducted their study, it is just as likely that domestic assault and battery cases are being treated more seriously than nondomestic assault and battery cases, even overzealously in some instances.

Social scientists can and should do much better;⁷² comparison studies like Ferraro and Boychuk's are not difficult,⁷³ yet they are vital. At the same time, feminist activists should not claim that the criminal justice system treats domestic violence differently than other violent offenses until we have further proof. Criminalization rhetoric creates a powerful illusion that the system is "getting tough" on violent crime. But many violent offenders appear to be "getting off."

nonintimate cases than intimate ones. *See id.* For cases actually resulting in a conviction, usually through a guilty plea, 43% received probation and only 11% spent time in jail. *See id.* at 221.

69. *See id.*

70. *See id.* at 223-24.

71. *Id.* at 224.

72. *See, e.g.,* Murray A. Strauss, *Identifying Offenders in Criminal Justice Research on Domestic Violence*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?*, *supra* note 3, at 14, 17-19 (discussing how the "clinical" population of domestic violence offenders differs from characteristics of the general population who may manifest the same behavior and describing the "researcher's fallacy" in generalizing from a representative sample of a community to a clinical population).

73. *See* Ferraro & Boychuck, *supra* note 68, at 210-11. In their study, the researchers relied primarily on computer-generated data and prosecutor files, not victim or offender interviews. *See id.* Because this type of research does not place victims in the same sort of danger that studies using control groups do, there is no ethical excuse for the lack of comparative research. *See infra* notes 121, 131-32 and accompanying text (discussing ethical dilemmas posed by the use of comparison groups when evaluating treatment programs).

B. *The Practice of Punishment*

In 1984, the Attorney General's Task Force on Family Violence wrote that "the most successful treatment occurs when mandated by the criminal justice system."⁷⁴ Although the report recommended incarceration for serious offenses, it encouraged the use of batterer treatment programs in cases where the injury to the victim was not serious.⁷⁵ Most states and the federal government have since adopted faith in treatment as a matter of policy. Some states, such as California, Alaska, and Florida, require courts to order attendance in a treatment program as a condition of probation in a domestic violence case.⁷⁶ Montana requires an offender convicted of partner assault to "complete a counseling assessment with a focus on violence, dangerousness, and chemical dependency."⁷⁷ Connecticut requires anyone convicted for a lesser family violence offense to participate in a "family violence education program."⁷⁸ South Carolina allows court-ordered counseling for domestic violence offenses but forbids a court from sentencing the offender to more than thirty days in jail.⁷⁹ The VAWA⁸⁰ also endorses batterer treatment programs for violations of its criminal provisions.⁸¹

Domestic violence offenders can complete a pretrial treatment program to avoid conviction in some jurisdictions.⁸² These programs are generally not available for other violent offenses. For example, Louisiana has a pretrial diversion program available

74. HART ET AL., *supra* note 47, at 49.

75. *See id.*

76. *See* ALASKA STAT. § 12.55.101(1) (Michie 1996); CAL. PENAL CODE § 1203.097(a)(6) (West Supp. 1997); FLA. STAT. ANN. § 741.281 (West 1997).

77. MONT. CODE ANN. § 45-5-206(4)(a) (1997).

78. CONN. GEN. STAT. ANN. § 46b-38c(h) (West 1995).

79. *See* S.C. CODE ANN. § 16-25-20, 16-25-60 (Law Co-op Supp. 1996).

80. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C.).

81. *See* 18 U.S.C. § 3563(a) (1994) ("The court shall provide, as an explicit condition of a sentence of probation . . . (4) for a domestic violence crime . . . by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program . . .").

82. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-3601 (West Supp. 1996); MINN. STAT. ANN. § 518B.01 Subd.6(a)(7) (West Supp. 1997); NEV. REV. STAT. ANN. § 200.481.2(a) (Michie 1997); OHIO REV. CODE ANN. § 2929.51(B) (Baldwin 1997); UTAH CODE ANN. § 77-36-5.(2)(b) (Supp. 1997).

only to domestic offenders.⁸³ Dade County, Florida has a specialized domestic violence court that permits pretrial diversion for first-time offenders if the offenders complete a batterer treatment program.⁸⁴

Some jurisdictions are moving away from pretrial diversion and instead require a conviction before treatment can be ordered.⁸⁵ The rationale for disallowing diversion programs is that they fail to demand that the batterer acknowledge any wrongdoing. Drop-out rates are high; once an abuser stops attending, the prosecution rarely obtains a conviction.⁸⁶

C. A Review of Treatment Programs

Controversy surrounding who should receive treatment and how it is structured reflects the larger debate between feminists and social scientists as to the root causes of domestic violence. The first major dispute centers around whether clinical intervention should be aimed at both members of the couple or only the male.⁸⁷ Couples therapy relies on the underlying premise that poor conflict management skills and anger control cause domestic violence. Both partners are expected to take some responsibility for their behavior to reduce conflict and avoid violence.⁸⁸ Treatment programs in which the male and female participate report reducing violence between spouses who wish to stay together.⁸⁹

83. See LA. REV. STAT. ANN. § 14:79 (West Supp. 1997).

84. See Linda Dakis, *Dade County's Domestic Violence Plan: An Integrated Approach*, TRIAL, Feb. 1, 1995, at 44, 45; see also FAGAN, *supra* note 3, at 17 (describing the Dade County Domestic Violence Court and its emphasis on treatment).

85. In 1995, California repealed its pretrial diversion statute. See CAL. PENAL CODE §§ 1000.6 to 1000.96, repealed by Act of Oct. 5, 1995, ch. 641, 1995 Cal. Legis. Serv. 3964 (West). Utah does not allow pretrial diversion in domestic violence cases. See UTAH CODE ANN. § 77-36-2.7(6) (Supp. 1997). Michigan requires a guilty plea before a batterer can enter treatment or probation. See MICH. COMP. LAWS ANN. § 769.4(a) (West Supp. 1997).

86. See Gwinn, *supra* note 3, at 17, 21.

87. See Barry D. Rosenfeld, *Court-Ordered Treatment of Spouse Abuse*, 12 CLINICAL PSYCHOL. REV. 205, 208 (1992).

88. See, e.g., Peter H. Neidig et al., *Domestic Conflict Containment: A Spouse Abuse Treatment Program*, 66 SOC. CASEWORK 195, 195-97 (1985) (describing the principles underlying the U.S. Marine Corps' Domestic Conflict Containment Program).

89. See *id.* (finding that 87% of participants in a highly structured program in the military for couples who wished to stay together remained violence-free for a four-

Many have discredited couples therapy because the dominant paradigm for explaining domestic violence shifted from one of conflict theory to one of feminist theory;⁹⁰ most court-ordered treatment programs today treat only men.⁹¹ Feminist-informed treatment resocializes men to be less controlling of women.⁹² Women need not participate because men are entirely responsible for their own violent behavior.⁹³ The reported success rates of male-only treatment programs have not, however, been vastly different from programs that treat both spouses.⁹⁴

Furthermore, many states mandate the length of programs through legislation;⁹⁵ treatment programs of six months to a year are becoming commonplace. Yet, there is no convincing evidence that the length of a program determines its effectiveness.⁹⁶ For example, Jefferey Edleson and Maryann Syers

month period); Carol U. Lindquist et al., *Evaluation of Conjugal Violence Treatment Program: A Pilot Study*, 3 BEHAVIORAL COUNSELING & COMMUNITY INTERVENTION 76 (1983) (finding that in a nine-week pilot program for couples involved in moderate-to-mild spouse abuse, several of the couples indicated an improved relationship).

90. But see K. Daniel O'Leary et al., *Assessment and Treatment of Partner Abuse: A Synopsis for the Legal Profession*, 58 ALB. L. REV. 1215, 1232 (1995) (advocating the use of couples treatment in certain situations).

91. See Gwinn, *supra* note 3, at 21 (noting that most jurisdictions now follow the Duluth Model, which advocates and uses male-only treatment programs).

92. See generally ELLEN PENCE & MICHAEL PAYMAR, *EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 1-5* (1993) (describing the philosophy of the Duluth Model).

93. See *id.*

94. See Clyde M. Feldman & Carl A. Ridley, *The Etiology and Treatment of Domestic Violence Between Adult Partners*, 2 CLINICAL PSYCHOL. SCI. & PRAC. 317, 337 (1995); Rosenfeld, *supra* note 87, at 208; see also O'Leary et al., *supra* note 90, at 1232 (concluding that "couples treatment appears very viable, and indeed a preferred option of both men and women in highly conflictual relationships").

The move away from couples counseling paralleled the move away from mediation of domestic violence cases. Others have made similar arguments as to why mediation is inappropriate in domestic violence cases. See Reynolds, *supra* note 6, at 417-18 (finding that the balance of power in most violent relationships conflicts with the underlying concept of mediation [and couples counseling]—the equal balance of power between the parties).

95. California and Colorado, for example, require court-mandated programs to be one year in length. See Gwinn, *supra* note 3, at 21.

96. A recent five-year study of participants in the Duluth program found that "[o]f the 100 men included in the sample, 40 were identified as recidivists . . . 22 had been convicted again for domestic assault, 15 had been the subject of orders for protection because of domestic assault, and 33 had been police suspects for domestic assault." PENCE & PAYMAR, *supra* note 92, at 166-67 (citing Melanie Shepard, *Predict-*

found that in comparing six different group treatment programs for men who batter, twelve session treatment groups were as effective as thirty-two session groups in reducing incidents of violence and terroristic threats at the follow-up period.⁹⁷ They speculate that men in twelve session groups accelerate their efforts to make the greatest use of the shorter amount of time available.⁹⁸ Edward Gondolf found similar shortcomings in "model"⁹⁹ programs. Although model programs tend to be longer in length, larger in number of participants, and confrontational in treatment modality, they also report higher dropout rates.¹⁰⁰ In fact, less than fifty percent of men court-ordered to treatment complete the program in many model jurisdictions.¹⁰¹ This research casts doubt on the policy assumption that longer programs work better.

Mental health programs that focus on psychotherapy, stress management, anger control, and conflict resolution are also becoming less common.¹⁰² Feminists criticize these models as insufficient to address domestic violence as a social problem em-

ing Batterer Recidivism Five Years After Community Intervention, 7 J. FAM. VIOLENCE 167 (1992)).

97. See Jeffrey L. Edleson & Maryann Syers, *Relative Effectiveness of Group Treatments for Men Who Batter*, SOC. WORK RES. & ABSTRACTS, June 1990, at 16.

98. See *id.*

99. Gondolf defined a model program as one in operation for more than five years as a full-time counseling program for batterers that involved regional training and conducted regular outcome assessments. See Edward W. Gondolf, *An Exploratory Survey of Court-Mandated Batterer Programs*, 13 RESPONSE TO VICTIMIZATION WOMEN & CHILDREN 7, 7 (1990). Staff of these programs had extended program visibility and reputation through conference presentations and/or published papers. See *id.*

100. See *id.* at 10; see also Feldman & Ridley, *supra* note 94, at 337 (reviewing the 30 published studies on the effectiveness of batterer treatment programs and finding that community-based treatment programs that are shorter in length have significantly higher completion rates, independent of treatment modality).

101. See Gondolf, *supra* note 99, at 10.

102. Note that extreme variance remains in program design. See Jerry Finn, *Men's Domestic Violence Treatment Groups: A Statewide Survey*, 8 SOC. WORK WITH GROUPS 81, 81 (1985); Alan Rosenbaum & Roland D. Maiuro, *Perpetrators of Spouse Abuse*, in TREATMENT OF FAMILY VIOLENCE 280, 292-301 (Robert T. Ammerman & Michael Hersen eds., 1990); see also David L. Myers, *Eliminating the Battering of Women By Men: Some Considerations for Behavior Analysis*, 28 J. APPLIED BEHAV. ANALYSIS 493, 500 (1995) (describing the various types of treatment programs implemented by various jurisdictions today, including models based on anger expression, psychoeducational programs, or profeminist theories of battering).

bedded in sexist social structures.¹⁰³

The Duluth, Minnesota model is the prevailing approach utilized by a growing number of jurisdictions.¹⁰⁴ The Duluth model philosophy is: "Batterers, like those who intervene to help them, have been immersed in a culture that supports relationships of dominance. This cultural acceptance of dominance is rooted in the assumption that, based on differences, some people have the legitimate right to master others."¹⁰⁵ The curriculum uses an educational and counseling approach, as opposed to anger-control intervention.¹⁰⁶ It focuses on the use of violence by the batterer to establish power and control over his partner. Men meet in weekly groups run by a facilitator. The facilitator is not necessarily a mental health professional but is a trained lay person. Participants engage in exercises geared towards confronting their violent behavior. For example, each participant maintains a "control log" or diary that identifies their abusive behavior.¹⁰⁷ Role plays based on individual experiences are used to build nonviolent skills.¹⁰⁸ Videotapes, such as *Profile of an Assailant*, are shown to prompt discussion.¹⁰⁹ Skills such as taking time-outs and recognizing women's anger are also taught.¹¹⁰ Most of these exercises preclude discussion of the particular relationship, instead focusing on the underlying issues of power and control.¹¹¹

EMERGE in Boston is another popular feminist-inspired treatment model.¹¹² The program considers itself a "collective" of men working to end violence against women.¹¹³ Although trained counselors run the program, sessions are conducted as

103. See Edward W. Gondolf & David Russell, *The Case Against Anger Control Treatment Programs for Batterers*, 9 RESPONSE TO VICTIMIZATION WOMEN & CHILDREN 2, 2-5 (1986).

104. See Gwinn, *supra* note 3, at 21.

105. PENCE & PAYMAR, *supra* note 92, at 3.

106. For a description of the Duluth Model, see *id.*

107. See *id.* at 35.

108. See *id.* at 53-64.

109. See *id.* at 22.

110. See *id.* at 56-64.

111. See *id.* at 64.

112. See EDWARD W. GONDOLF, MEN WHO BATTER: AN INTEGRATED APPROACH FOR STOPPING WIFE ABUSE 20-22 (1985).

113. See *id.* at 22.

supervised self-help groups.¹¹⁴ EMERGE considers itself to be part of a movement organizing men to challenge sexism in society.¹¹⁵ Battered women's shelters established other programs, like the House of Ruth in Baltimore and the Domestic Violence Project in Ann Arbor, Michigan.¹¹⁶ Shelter staff attempt to monitor both sides of the relationship and oversee both parties involved.¹¹⁷ Most programs charge the abuser a fee;¹¹⁸ many will not accept an abuser into their program unless he pleads guilty and acknowledges the underlying abusive behavior.¹¹⁹

D. The Effectiveness of Batterer Treatment Programs

Empirical research on treatment programs suggests that the preference for treatment as a disposition to a criminal domestic violence case is misinformed public policy.¹²⁰ Lawmakers should not bow to political pressure to support "feel good" programs that have yet to be proven effective in the thirteen years since the Attorney General's Task Force recommended them. An informed understanding of this research, including its method-

114. See *id.*

115. See *id.*

116. See *id.* at 19. See generally Myers, *supra* note 102, at 500 (noting that many psychoeducational and profeminist programs are adjuncts to battered women's programs or otherwise have battered women's advocates in substantial leadership roles).

117. Shelter involvement in batterer treatment is part of a trend within the shelter movement to "treat" abused women rather than using the movement to engage in political and social reform. See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 993 (1991) ("Battered women [in shelters] tend now to be positioned as clients. They are increasingly psychiatrized, addressed as victims with deep, complicated selves") (quoting Nancy Fraser, *Struggle over Needs: Outline of a Socialist-Feminist Critical Theory of Late-Capitalist Political Culture*, in WOMEN, THE STATE, AND WELFARE 199, 215 (Linda Gordon ed., 1990)).

118. California incorporates a sliding fee schedule based on the batterer's ability to pay. See CAL. PENAL CODE § 1203.097(C)(1)(P) (West Supp. 1998). Connecticut requires a \$200 fee for its family violence education program. See CONN. GEN. STAT. ANN. § 46b-38c(h) (West 1995). Florida charges for participation in its court-mandated batterer treatment program because of a systemic belief that payment is important to the batterer taking responsibility for his actions. See FLA. STAT. ANN. § 741.325(6) (West 1997). Massachusetts imposes a \$350 assessment on treatment program participants on top of the cost of the program. See MASS. GEN. LAWS ANN. ch. 209(A) § 10 (West Supp. 1997).

119. See Gwinn, *supra* note 3, at 21.

120. See Rosenfeld, *supra* note 87, at 205.

ological shortcomings,¹²¹ is imperative if we are to make progress in this area. As David Faigman has argued:

As science, the social sciences can provide the law only modest assistance. Indeed, modesty is a quality that proponents of social science would do well to exercise. At the same time, however, the significance of social science research should not be underestimated, for ultimately it provides a check on the suppositions of its critics as well as its proponents.¹²²

Some available data suggests that court-ordered treatment *correlates* to a reduction in physical violence,¹²³ although treatment neither terminates violence in many cases nor curbs the more subtle psychological forms of abuse.¹²⁴ Whether treat-

121. In particular, randomly assigning men to treatment or nontreatment alternatives is difficult due to the ethical issues involved. See Edleson & Syers, *supra* note 97, at 16-17. Furthermore, the choice of outcome criteria to judge a successful program is controversial. Numerous studies have found that men underreport their violence in comparison to their partners' reports. Some studies use victim reports to measure recidivism; others use official data like arrest records or civil restraining order files. See, e.g., Rosenfeld, *supra* note 87, at 210; Daniel G. Saunders & Jennifer C. Parker, *Legal Sanctions and Treatment Follow-Through Among Men Who Batter: A Multi-variate Analysis*, SOC. WORK RES. & ABSTRACTS, Sept. 1989, at 23.

In addition, obtaining accurate follow-up data is difficult. "Most empirical studies have reported outcome data only for those subjects who have completed treatment and/or were available at follow-up." Rosenfeld, *supra* note 87, at 210. Because men who experience a beneficial impact from treatment are more likely to respond to follow-up investigation, they are likely to be overrepresented in outcome data. See *id.*

The inclusion and exclusion of certain subjects in these studies are also likely to skew results. For example, some spouse treatment programs have excluded subjects with alcohol or drug addictions, mental illness, or general lack of motivation. The elimination of difficult subjects may overestimate the success of many of these programs. See *id.* at 211 (collecting studies).

Finally, one of the methodological problems that plagues this research is the lack of a "base rate of abuse." See *id.* at 212. Although we assume that men who abuse will continue to do so unless there is intervention, this certainly is not true for all men. Whether any involvement with the legal system or court-ordered treatment is successful in reducing the levels of violence is also difficult to gauge. See *id.*

122. See David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1095 (1989).

123. See Donald G. Dutton, *The Outcome of Court-Mandated Treatment for Wife Assault: A Quasi-Experimental Evaluation*, 1 VIOLENCE & VICTIMS 163 (1986); Michael Waldo, *Relationship Enhancement Counseling Groups for Wife Abusers*, 10 J. MENTAL HEALTH COUNSELING 37, 43-44 (1988).

124. See Jeffrey L. Edleson & Roger J. Grusznski, *Treating Men Who Batter: Four*

tion.¹²⁹ A control group would give researchers confidence that treatment, not some other variable, such as threat of incarceration, individual motivation, support from one's partner, social stigma attached to being labeled an abuser, or other external factors¹³⁰ is influencing the change in violent behavior. Granted, establishing control groups to measure the effectiveness of treatment can be troubling. Partaking in research studies could place victims in danger.¹³¹ Although ethical issues arise when treatment or incarceration results in further injury to the victim,¹³² unless these studies have control groups, policymakers and judges will continue to fumble around in the dark, lacking insight into whether treatment will work with certain offenders. Blind faith in treatment does not minimize the risks women like Kelly Gonzales face when their partners remain free to get counseling.

Additionally, study samples are usually too small to apply conclusions to larger populations. This is particularly troubling given that most studies that report treatment success only in-

129. See generally FAGAN, *supra* note 3, at 30-33 (discussing the weaknesses of existing empirical studies); Simon, *supra* note 6, at 74 (commenting on the dearth of research examining the sentencing differential between domestic violence offenders and stranger offenders).

130. Experiments regarding the effects of arrest on domestic violence raised an important hypothesis about the interaction of legal and social controls. See Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 3, at 43. In these studies, arrest appears to increase the risk of violence for unmarried and unemployed suspects and to deter the risk for those married and employed. See *id.* at 49. Jeffery Fagan reported a similar relationship between the deterrent effects of prosecution and the social position of the offender. See Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, in FAMILY VIOLENCE, *supra* note 124, at 377, 394.

These results suggest that the offender must have a "stake in conformity" for legal sanctions to deter behavior. Formal legal sanctions are likely to be more effective when reinforced by informal social controls. For an overview of "stake in conformity" theories, see Charles R. Tittle & Charles H. Logan, *Sanctions and Deviance: Evidence and Remaining Questions*, 7 L. & SOC. REV. 371 (1973).

131. See Miller, *supra* note 67, at 14-15 (discussing the dilemmas researchers face when victims of family violence can be put in more jeopardy by participating in studies and suggesting ways to minimize risks of harm by maximizing informed consent).

132. See *id.* at 15 (arguing that "we must imagine the 'what if' question to decide whether the benefits from the controlled experiment outweigh the potential costs of denying treatment" and acknowledging the ultimate difficulty in minimizing harms that result when researching family violence).

ment itself, or simply individual "motivation" brought on by legal intervention *causes* the reduction of violence, is unclear. In fact, some studies have found that men arrested and treated resume their violent behavior as frequently as do men arrested and not referred to treatment.¹²⁵ Other studies have found no significant difference in recidivism rates between men who complete batterer treatment and men who drop-out.¹²⁶ Holding someone criminally responsible for their actions may be as effective as any treatment modality.

Additionally, treatment does not work for everybody. For men ordered by the court to attend treatment, recidivism rates have been reported as high as fifty-four percent within six months of *completing* a treatment program.¹²⁷ This data might suggest treatment causes at least some men to change their behavior, but it is just as likely that men who complete court-ordered treatment and do not recidivate are the most motivated and amenable to treatment.¹²⁸

The available research is hampered by the lack of a control group; to date there has been no study that randomly assigned abusers to incarceration, treatment, or unsupervised proba-

Years of Outcome Data from the Domestic Abuse Project, 12 J. SOC. SERVICE RES. 3 (1988); Edleson & Syers, *supra* note 97, at 16; Daniel G. Saunders & Sandra T. Azar, *Treatment Programs for Family Violence*, in FAMILY VIOLENCE 481, 533 (Lloyd Onlin & Michael Tonry eds., 1989).

125. See Rosenfeld, *supra* note 87, at 215.

126. See *id.*

127. See Edleson & Syers, *supra* note 97, at 14. This statistic is based only on 14 men and thus not statistically significant. The results of other recidivism rates studies have varied greatly. See Dutton, *supra* note 123, at 170 (finding slightly over 4% recidivism in a study with 50 men and police reports on a four-month treatment program); Huey-tyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J. FAM. VIOLENCE 309 (1989) (finding 10% recidivism over 14 months based on a study of 120 men and police reports on an unknown treatment program length); L. Kevin Hamberger & James E. Hastings, *Skills Training for Treatment of Spouse Abusers: An Outcome Study*, 3 J. FAM. VIOLENCE 121, 126 (1988) (finding approximately 30% recidivism based on a one-year study with some court-referred and some voluntary); Shepard, *supra* note 96, at 171 (finding 40% recidivism over five years). For a general discussion on recidivism studies and domestic violence, see Hamberger & Hastings, *supra*.

128. See Rosenfeld, *supra* note 87, at 211 (collecting studies that excluded batterers based on some characteristic, such as alcohol and/or drug abuse problems, mental illness, or a general lack of motivation).

clude subjects who have no substance abuse problems, no psychiatric difficulty, and high motivation.¹³³ The elimination of difficult subjects skews results, overstating the success of many programs.

Finally, treatment programs must be accountable to the public. A common and significant problem of data collection arises when researchers are "aware of the hypothesis being tested and [are] positioned to affect the cast of the data collected."¹³⁴ This is likely to occur when treatment staff conduct their own follow-up studies and report results. Outside independent evaluations check the biases of self-evaluators to reach results that keep their programs alive, particularly in the interpretation of the data.¹³⁵ For example, Melanie Shepard's independent evaluation of the Duluth program found that of the 100 men included in the sample, forty percent were identified as recidivists because they were either convicted of domestic assault, the subject of a protection order, or a police suspect for a domestic assault.¹³⁶ Interestingly, this data could be interpreted as proving the treatment program a success—60 percent of men who complete the program do not recidivate—or unsuccessful in comparison to other programs that report better results.¹³⁷ Yet, Shepard is cautious before drawing any conclusions about the success of the program given methodological shortcomings and the considerably longer follow-up period than other studies.¹³⁸ Most important, Shepard concludes: "The results of the discriminant function indicates [sic] that characteristics of the batterer were more important in predicting recidivism than was the form of intervention."¹³⁹ In particular, she finds that recidivists were abusive for shorter periods of time prior to their initial contact with the system. "Men who batter may follow a

133. See, e.g., Dutton, *supra* note 123.

134. Faigman, *supra* note 122, at 1062.

135. See *id.*

136. See Shepard, *supra* note 96 at 173.

137. See *id.* at 174-75.

138. See *id.* at 174 (noting that the use of records that underreport rates of violence, the selection of a sample from only one agency, and the limitations of stepwise procedures in discriminant analysis present methodological shortcomings to this study).

139. *Id.* at 175.

pattern whereby behavior does not change until there are increasingly high costs or greater risks involved. This may be analogous to 'hitting bottom' for the alcoholic."¹⁴⁰ Furthermore, chemical dependency and abuse as a child further contributed to recidivism.¹⁴¹ Only independent evaluators who have no stake in the outcome of the study can perform such careful analyses.

Whether court-ordered treatment programs are more effective in reducing violence than traditional forms of punishment, such as incarceration or probation without treatment, is unclear. As Barry Rosenfeld argues: "The old adage 'You can lead a horse to water but you can't make it drink' may apply to spouse abuse treatment programs."¹⁴² Treatment may work for some, but we are a long way from confirming that the preference for treatment over incarceration is sound policy. "An answer to the far more complex question of what works best with whom, under what circumstances, and for what level or type of violence remains largely unknown."¹⁴³

This research raises ethical and legal dilemmas for those who continue to put their punishment eggs in the treatment basket. Court-mandated treatment in criminal cases may offer a woman "false hope"¹⁴⁴ that her partner will be permanently rehabilitated, when in fact, he may only be deterred in the short term, and perhaps not at all. This is troubling if, as one researcher suggests, a woman is most likely to remain with her abuser if he attends treatment.¹⁴⁵ Violent offenders often are released without evidence that they are "cured," putting some women at an increased risk of further injury or death.¹⁴⁶

Furthermore, punishment that differs based on the gender and relationship of the victim to the offender implicates issues

140. *Id.*

141. *See id.* at 175-76.

142. Rosenfeld, *supra* note 87, at 222.

143. Feldman & Ridley, *supra* note 94, at 337.

144. Gondolf, *supra* note 99, at 10.

145. *See* Edward W. Gondolf, *Who Are Those Guys?: Toward a Behavioral Typology of Batterers*, 3 VIOLENCE & VICTIMS 187, 200 (1980).

146. *See generally* Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53-64 (1991) (discussing the phenomenon of separation assault).

of equal treatment.¹⁴⁷ As we have seen in the arrest context, courts may soon look at the preference for probation and treatment for these, but not other violent crimes, as violating state and federal equal protection and due process laws.¹⁴⁸

Finally, these programs have received substantial support from the criminal justice community, states, and the federal government.¹⁴⁹ The more entrenched these programs become, the harder they are to change or eliminate.¹⁵⁰ Policymakers must examine whether scarce resources are being well-spent. Simply exploring the causal relationship between court-ordered treatment and recidivism rates will likely fuel the battle for

147. This dilemma is analogous to the Tracy Thurman case. See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). Ms. Thurman received a \$1.9 million settlement from the Torrington Police Department for its policy of nonintervention and nonarrest in domestic violence cases. See Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 795 (1986). On numerous occasions, Ms. Thurman asked the police to protect her from her estranged husband, but she received little help. See *Thurman*, 595 F. Supp. at 1524. Ultimately, on June 10, 1983, Ms. Thurman's husband arrived at her home demanding to speak to her. See *id.* at 1525. Ms. Thurman telephoned the Torrington police, asking that her husband be arrested on the outstanding warrant for his violation of probation. See *id.* After 15 minutes, when the police failed to arrive, Ms. Thurman went outside to speak to her husband. See *id.* He stabbed her repeatedly in the chest, neck, and throat. See *id.* Twenty-five minutes after the police received the call, Officer Frederick Petrovits arrived and watched Charles Thurman, who was holding a bloody knife, kick his wife in the head. See *id.* at 1525-26. The officer continued to do nothing while Mr. Thurman went into the house, picked up his three-year old son, and dropped him on his wounded bleeding mother. See *id.* at 1526. Mr. Thurman then kicked Ms. Thurman in the head again. See *id.* It was not until after other officers had arrived and Ms. Thurman was placed on a stretcher that Mr. Thurman was arrested. See *id.* Ms. Thurman successfully alleged that the City of Torrington had a policy of treating women and children who were assaulted by a man with whom they had a relationship differently from women and children who were assaulted by strangers. See *id.* at 1526-29 (ruling that Ms. Thurman alleged facts in her complaint sufficient to evidence a pattern or custom of deliberate indifference toward women who were victims of domestic violence).

148. For a history of litigation surrounding police responses to domestic violence, see Marvin Zalman, *The Court's Response to Police Intervention in Domestic Violence*, in DOMESTIC VIOLENCE, *supra* note 27, at 79; see also *Developments*, *supra* note 3, at 1557-74 (discussing equal protection and due process claims brought against state actors in the domestic violence context and arguing that the use of these legal doctrines could be expanded to afford women greater protection).

149. See *supra* note 56 and accompanying text.

150. See Rosenfeld, *supra* note 87, at 223.

ownership. Nevertheless, we cannot be afraid to make the connection between perception and reality.

II. WHO'S TO BLAME?: THE COMPLEX MOTIVATIONS THAT DRIVE SENTENCING DECISIONS

A. *Theories of Punishment and The Privacy of Rehabilitation*

In this section, I explore different theories of punishment and how they relate to domestic violence offenses. Too often, judges and legal scholars feel compelled to justify punishment on a particular theory without examining the underlying tensions of those theories when applied in practice. I argue that rehabilitation, the most common theoretical rationale for punishing domestic offenders, disguises the subversive notion that abuse is private and pathological; embracing rehabilitation will likely destroy the public goals of criminalization. Nevertheless, although other rationales for punishment, such as general and specific deterrence, therapeutic jurisprudence, incapacitation, and retribution, are not so laden with notions of privacy, they too are an imperfect fit when applied to domestic violence. Thus, rather than search for perfect punishment theories, ultimately we should be pragmatic, justifying decisions based on both general policy goals and the particulars of individual cases.

1. *Rehabilitation*

Legal distinctions between the public and the private spheres have justified the lack of state intervention into domestic violence situations. As Elizabeth Schneider points out:

The concept of male battering of women as a 'private' issue exerts a powerful ideological pull on our consciousness because, in some sense, it is something that we would like to believe. By seeing woman-abuse as 'private,' we affirm it as a problem that is individual, that only involves a particular male-female relationship, and for which there is no social responsibility to remedy.¹⁵¹

151. Schneider, *supra* note 117, at 983.

Legal reforms of the last twenty years mark a shift in the characterization of domestic violence from a private to a public problem. Yet, notions of privacy continue to affect sentencing decisions.¹⁵² The judicial system remains reluctant to break up the family via criminalization.¹⁵³ As the Supreme Court of Ohio recently ruled: "Certainly a court's resources in a domestic violence case are better used by encouraging a couple to receive counseling and ultimately issuing a dismissal than by going forward with a trial and impaneling a jury where the only witness refuses to testify."¹⁵⁴

Although criminalization serves to make public what was considered a private family matter, treatment seeks to reunite the

152. Even though domestic violence is a crime against the state, courts often defer to the victim's wishes in sentencing decisions, at times to the detriment of the victim herself. The court will attempt to alleviate the concerns of the victim by creating lengthy periods of probation and requiring the batterer to attend treatment. *See, e.g., State v. Powell*, 696 So. 2d 789, 791 (Fla. Dist. Ct. App.), *aff'd*, 703 So. 2d 444 (Fla. 1997).

153. *See, e.g., Commonwealth v. Hatfield*, 593 A.2d 1275, 1276-77 (Pa. Super. Ct. 1991), *aff'd*, 610 A.2d 466 (Pa. 1992) (upholding the trial court's decision to quash a subpoena issued for the wife to testify against her husband for assault on her, noting that "the trial court found that the ends of justice would best be served by granting the petition, apparently seeing the termination of the prosecution . . . as a means of preserving the Hatfields' marriage").

154. *State v. Busch*, 669 N.E.2d 1125, 1128 (Ohio), *reconsideration denied*, 671 N.E.2d 1286 (Ohio 1996). The court held that the trial court did not abuse its discretion in dismissing a criminal case over the prosecution's objection in which the victim, who had been thrown down stairs and burned with a cigarette by her boyfriend, wished not to proceed. *See id.* The victim testified pretrial that she and the defendant had three counseling sessions in the previous month and a half and therefore wished the charges to be dropped. *See id.* at 1126-27. The trial court stated:

I want the record to reflect that the prosecuting witness has been down here a number of occasions now; she has appeared when she was subpoenaed to be here; and on a number of occasions, she has come in stating that this is her desire. The prosecutor's office has made it very clear, both to the court and to the prosecuting witness, their position on this matter. However, these are two adults. These parties think they can work their problems out. And this branch of the court doesn't think it should stand in their way of doing that.

Id. at 1127.

The Supreme Court of Ohio partially based its decision on the assumption that there was no evidence other than the victim's testimony. *See id.* at 1129. The record, however, contained photographs of the injuries, police reports, and testimony that may have been sufficient to sustain a conviction. *See id.* at 1126-27.

offender and the victim, thus privileging the sanctity of the family over other policy objectives. Indeed, the emphasis on treatment arguably has had the unintended consequence of reinforcing the social hierarchy that allows, and encourages, men to govern their spouses, thus supporting male dominance over women.

Ordering someone with a pattern of violence against the same victim to attend a program trivializes domestic violence. As Natalie Loder Clark argues:

The cause of a violent argument often makes the whole incident seem trivial. For example, an argument over a burned meal, use of the car, or a tape recorder does not sound terribly serious to some people. The same method of trivialization, however, could doubtless be applied to other battery cases as well. The causes of barroom brawls often include such earth-shaking items as dart games, football scores, and television program choices. Clearly the original cause of an argument is irrelevant to the degree and significance of the resulting violence; sometimes even murders result from causes such as those listed above.¹⁵⁵

One who abuses women needs help; one who abuses a stranger is dangerous. Even if the barroom brawler does not pose so great a threat that he is prosecuted and incarcerated, the difference between these two situations is that the brawler does not have continued access to his victim; the abuser does. If a barroom brawler continued to strike out against the same patron over and over, then it is hard to imagine a court ordering "barroom brawler" treatment.¹⁵⁶ Arguably, rehabilitation is not punishment because the goal is to make the offender's life more meaningful in the long run, not to deprive him of his liberty.¹⁵⁷ Treatment is a benefit—the offender is rewarded with services

155. Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 289 (1987).

156. If the barroom brawler has an alcohol or drug addiction, however, certainly treatment is appropriate, although addiction does not excuse or cause criminal behavior in most cases. The same should hold true for abusers. Addiction treatment in cases where substance abuse is an aggravating factor is warranted, but should not be a substitute for punishment.

157. See Reed, *supra* note 6, at 363.

that might not otherwise be available to him had he not broken the law. This is particularly true when defendants pay relatively little to attend these programs.¹⁵⁸

One of the most frustrating cases that I handled involved a woman whose boyfriend beat her and then intentionally burned her with a curling iron. Prosecutors dropped at least three other cases because the woman was too scared to go forward and no other evidence had been produced to sustain a conviction. In this case, however, the police did an excellent job documenting the battery, including photographing the burns. The defendant pled guilty to battery. I recommended a six-month period of incarceration, which was still disproportionately low to the resulting harm. The victim was too afraid to appear at the sentencing hearing; she just wanted the defendant out of her life. The defense attorney opposed the sentence recommendation, arguing that the defendant should be allowed to enroll in a treatment program in lieu of jail, otherwise he would lose his job. The judge agreed with defense counsel.

A few weeks later the police found cocaine on the defendant during a traffic stop. Because it was the defendant's second offense for possession with intent to distribute, he received a one-year sentence. Neither the judge nor the prosecutor mentioned that he was currently on probation for a battery charge. It struck me as unfair that the justice system would sentence these two cases with such disparity. I blamed the judge in the battery case for "not getting it."

Although critics of incarceration argue that it is a practical impossibility to put every abuser in jail, the American public is willing to support policies that result in incarceration. For example, under federal and many state laws, drug offenders face severe sentences for possession with intent to distribute illegal drugs.¹⁵⁹ The prison population contains well over one million occupants, compromised predominately of drug offenders.¹⁶⁰ The reasons for disparity in sentencing between offenses involv-

158. See *supra* note 118 (describing the fee structures of some programs).

159. The debate over the war on drugs is better left for another forum. See STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* 178-80 (1993).

160. See *id.* at 179.

ing violence against women and illegal substances are indeed many, but we should not ignore the implicit value judgment about which offenses constitute the greater social harm. In comparison to other crimes, preferring treatment to incarceration for domestic violence looks like lingering sexism.

2. Deterrence

Other theories of punishment are less influenced by the downside of privacy¹⁶¹ and better serve the public function of the criminal law.¹⁶² General deterrence—punishment for the sake of prevention—can have a long-term instrumental effect in changing public views of battering.

The decisions of the courts and actions by the police and prison officials transmit knowledge about the law, underlining the fact that criminal laws are not mere empty threats, and providing detailed information as to what kind of penalty might be expected for violations of specific laws. To the extent that these stimuli restrain citizens from socially undesired actions which they might otherwise have committed, a general preventive effect is secured.¹⁶³

161. Privacy is not necessarily a negative concept for women. Elizabeth Schneider poignantly argues that privacy can have an affirmative meaning for women. See Schneider, *supra* note 117, at 996-98 (arguing that privacy can derive from an affirmative concept of liberty rather than the right to be left alone); *infra* notes 179-81 and accompanying text (discussing the positive aspects of privacy).

I use the term "privacy" in a manner more similar to Catharine MacKinnon's concept of privacy. The downside of privacy has justified the right of a man to beat his wife without fear of criminal prosecution. See MACKINNON, *supra* note 15, at 100 ("[F]eminism has had to explode the private . . . In this sense, [for women] there is no private, either normatively or empirically."); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1506 (1983) (explaining the theory of the private family).

162. As William McDonald explains, "The criminal justice system is not for [the crime victim's] benefit but for the community's. Its purposes are to deter crime, rehabilitate criminals, punish criminals, and do justice, but not to restore victims to their wholeness or to vindicate them." William F. McDonald, *The Role of the Victim in America*, in ASSESSING THE CRIMINAL 295, 296 (Randy E. Barnett & John Hagel, III eds., 1977).

163. Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 949 (1966).

The emphasis on treatment undermines the general deterrent function of the law. Battering becomes analogous to illness; men who beat women are "sick," rather than engaging in criminal behavior of their own free will. This allows potential offenders to distance themselves from other abusers by creating two classes of men—sick and healthy. This false dichotomy subverts the education of the citizenry about what constitutes acceptable behavior.

Specific deterrence theory—imposing a sentence on a defendant that will prevent him from repeating the same behavior—avoids the privacy trap by emphasizing the individual costs of wrongdoing. It assumes that people are rational actors; they choose to abuse and thus are less likely to engage in the behavior again if the sentence is high enough. Opponents of specific deterrence cite high recidivism rates for those punished. It is just as likely, however, that the costs associated with beating one's partner have been too low to motivate a change in behavior.¹⁶⁴ Again, Clark's insights are useful: "Criminal remedies . . . 'tak[e] from the guilty the fruits of his offence.' Instead of the abuser controlling the victim's person or life, the abuser's life and person are instead subjected to control by the state."¹⁶⁵

164. This individual cost-benefit analysis is complicated because some studies suggest that specific deterrent effects of criminalization will be greater for batterers who perceive higher social costs associated with acts of violence. See Lee H. Bowker, *Coping with Wife Abuse: Personal and Social Networks*, in *BATTERED WOMEN AND THEIR FAMILIES*, 168, 188 (Albert R. Roberts ed., 1984); Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC. REV. 545, 594-48 (1986). These social costs can include the loss of a job, relationship, children, and social status. See Williams & Hawkins, *supra*, at 558; Kirk R. Williams & Richard Hawkins, *Controlling Male Aggression in Intimate Relationships*, 23 L. & SOC. REV. 591, 593-600 (1989); Kirk R. Williams & Richard Hawkins, *The Meaning of Arrest for Wife Assault*, 27 CRIMINOLOGY 163, 166 (1989); see also *supra* note 130 (describing the correlation between recidivism and employment of the abuser in arrest experiments).

What this theory might suggest is that people with fewer economic and social resources require harsher punishments to be deterred. Such a policy, however, would likely disadvantage people whose economic situation already increases the likelihood that they would resort to violence. See *supra* note 130 and accompanying text. This could result in a cycle of poverty, punishment, and violence. Perhaps different punishments coupled with programs that help people become more vested in our communities are necessary.

165. Clark, *supra* note 155, at 280 (quoting JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 201 (N.M. Tripathi Private Ltd. ed., 1975) (1802)).

When the final outcome in a criminal case is treatment, the offender gains many benefits and suffers few consequences. In fact, studies suggest that psychological abuse, including threats of violence, increases during treatment.¹⁶⁶ Treatment facilitates ongoing psychological abuse by allowing the abuser to stay with his victim, thus imposing few negative sanctions.

3. *Therapeutic Jurisprudence*

Therapeutic jurisprudence, growing largely from a merger of rehabilitation and specific deterrence theories, focuses on the psychological and behavioral aspects of the offender to prevent future criminal behavior.¹⁶⁷ The goal of punishment is to promote behavioral changes through an understanding of the psychology of the offender. "The schema of therapeutic jurisprudence suggests that the law can act as a therapeutic agent, whereby legal rules, legal procedures, and the roles of legal actors (such as police, lawyers, and judges) can constitute social forces that often produce therapeutic or antitherapeutic results."¹⁶⁸

In a compelling article about therapeutic jurisprudence and domestic violence, Leonore Simon argues:

Requiring prosecutors to recommend sentences commensurate with other crimes could have therapeutic effects on offenders and victims by communicating to them that a serious crime has occurred, and that the perpetrator will be punished.

Judges also can confront offender denial and minimization by sentencing these cases as they would other crimes, and by recognizing that offenders will violate sentencing orders and conditions with impunity if they believe that nothing will happen to them.¹⁶⁹

166. See Myers, *supra* note 102, at 501; Tineke Ritmeester, *Batterers' Programs, Battered Women's Movement, and Issues of Accountability*, in PENCE & PAYMAR, *supra* note 92, at 169, 176-77.

167. For a general discussion of therapeutic jurisprudence and the relationships between legal arrangements and therapeutic outcomes, see ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990).

168. Simon, *supra* note 6, at 50 (footnotes omitted).

169. *Id.* at 75 (citing STEPHEN B. HERRELL & MERIDITH HOFFORD, FAMILY VIOLENCE PROJECT, NATIONAL COUNCIL JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 21 (1990)).

From this perspective, lenient treatment is antitherapeutic for both the offender and the victim. Therapeutic justice, however, may have the unintended consequence of reinforcing the notion that domestic violence is an aberrational illness rather than part of a culture that generally condones violence. Furthermore, like many psychological theories, the science supporting this rationale for punishment remains inconclusive. Nevertheless, therapeutic approaches to punishment, at least theoretically, do not necessarily militate against punishment that results in incarceration.

4. Incapacitation

Incapacitation theory provides that for the good of those who abide by the law, offenders who violate social norms ought to be prevented from reoffending in the future.¹⁷⁰ Incapacitation has grown in popularity with the public and lawmakers who are increasingly anxious about stranger-danger in particular.¹⁷¹ For example, skepticism about treatment has led to statutes intended to remove sex offenders from society indefinitely. Recently, in *Kansas v. Hendricks*¹⁷² the Supreme Court held that states can indefinitely incarcerate violent sexual predators who have completed their sentences in mental hospitals, even if they are not actually mentally ill, if they are believed to be dangerous.¹⁷³ Statutes like the one at issue in *Hendricks* should protect innocent victims from offenders who are arguably untreatable and undeterable.

Long-term incapacitation certainly is warranted in many sex offender cases,¹⁷⁴ but *Hendricks* has potentially frightening

170. For a thorough study of incapacitation theory, see FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION* (1995).

171. See Michele L. Earl-Hubbard, *supra* note 12, at 851.

172. 117 S. Ct. 2072 (1997).

173. See *id.* at 2079-81.

174. For example, Jesse Timmendequas, seven-year-old Megan Kanka's killer, was a twice-convicted sex offender who served only six years in prison before he lured Kanka into his house, raped her, and strangled her with a belt. See Dale Russakoff

long-term implications. It gives psychiatrists a crystal ball to gaze into the future and predict whether sex offenders will recidivate. These powers of prediction can result in the permanent deprivation of liberty for offenders who have already paid their debt to society. The Supreme Court arguably has given psychiatrists too much power to decide who among us ought to be removed. *Hendricks* also could lead to the sort of individualization-syndromization that excuses violent behavior, undermining individual free will and responsibility. Whether such legislation would be upheld if applied to other types of offenders is unclear. A time could come, however, when courts classify some offenders as "serial batterers."¹⁷⁵ *Hendricks* indicates that indefinite incapacitation for batterers might be preferred and constitutional policy. Advocates of aggressive criminalization of domestic violence are cautioned: We must be careful what we wish for. Taken to its extreme, incapacitation theory signals that we have given up hope entirely. *Hendricks* may lead us down a path of

TON CHRON., June 21, 1997, at 15, available in 1997 WL 6565864; *Sex Offender Indicted in Megan Kanka's Slaying: Death Penalty will be Sought*, RECORD, NORTHERN N.J., Oct. 20, 1994, at 3A, available in 1994 WL 7784740. Sex offender legislation today often is referred to as Megan's Law, after Megan Kanka. See Russakoff & Harden, *supra*, at 15. Timmendequas should have served a longer sentence and received treatment before being released. This may have prevented Kanka's death. A New Jersey jury recently convicted Timmendequas of Kanka's death, and he received the death penalty. See *id.*

175. See David A. Ford et al., *Future Directions for Criminal Justice Policy on Domestic Violence*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 3, at 243, 249 (predicting that lawmakers will soon include the concept of "serial batterers" in the definition of habitual battering to account for new victims of one violent offender). According to the American Psychiatric Association, the criteria for borderline personality disorders include recurring periods of dejection and apathy interspersed with spells of anger, anxiety, or euphoria; wavering energy levels and irregular sleep-wake cycles; repetitive self-destructive thoughts; a preoccupation with securing affection and maintaining emotional support with intense reaction to separation; and conflicting emotions towards others, notably love, rage, and guilt. See AMERICAN PSYCHIATRIC ASS'N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 301.83, at 650-54 (4th ed. 1994) [hereinafter DSM-IV]. Dutton argues that these criteria seem consistent with cyclically abusive men. See DUTTON WITH GOLANT, *supra* note 18, at 144-45; see also *infra* notes 240-48 and accompanying text (regarding cyclically abusive men). If Dutton's theory gains credibility, then the same criteria for civil incarceration for sex offenders could be applied to domestic abusers as well.

despair that we never intended to travel.

5. *Retribution*

Finally, retribution theory argues that persons who choose to do wrong deserve punishment.¹⁷⁶ Failure to impose punishment undermines the idea that the offender is a moral agent acting of his own free will. Critics of retribution theory argue that it validates hatred and encourages vengeance. Nevertheless, Kant's notion of reciprocal obligation may have some useful place in theories for domestic violence punishment. As Stephen Reed suggests:

To maintain a free society, Kant explained, citizens have a 'reciprocal obligation' not to impinge upon the freedom of others. Should a member of society interfere with another's freedom, punishment can be imposed to regain the 'equilibrium' of the community that has been knocked out of balance by the violator's conduct. Punishment consists of a 'counterbalancing disadvantage' imposed upon the person attempting to gain an unfair advantage on the other members of society.¹⁷⁷

Kant's notion of reciprocal obligation has an instrumental as well as retributive value when applied to gender inequality. It promotes the notion that men should not be allowed to gain unfair advantages over women via intimate violence. Retribution theory further adds an air of moral condemnation to domestic violence—a sentiment that the advocacy community has sought to promote. Its emphasis on accountability as opposed to self-improvement is thus consistent with both feminist and conservative rationales for the criminalization of domestic violence.

There are both benefits and drawbacks to any theory of pun-

176. For arguments about retribution theory, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 742-52 (1992); Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99 (1996).

177. Reed, *supra* note 6, at 361 (footnotes omitted) (quoting ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 47 (1986)).

ishment one chooses to justify domestic violence sentencing decisions. Clearly, however, justifying punishment solely on rehabilitation is far more costly than might first appear. Despite notions to the contrary, when judges make sentencing decisions with the sole purpose of rehabilitating the offender, they are often reinforcing the private nature of violence and putting women and the community at great risk. Seemingly well-intentioned sentences often have unintended consequences. Furthermore, criminalizing domestic violence must serve both general and specific objectives; none of the traditional theories of punishment discussed provides an adequate foundation for balancing those often competing goals. Therefore, rather than search for a perfect justification of punishment in this context, we should be pragmatic by distinguishing those men who are genuinely deserving and capable of rehabilitation from those who are not.

B. Feminist Approaches to Punishment

One might assume that incarceration, which ultimately removes male control over women, would drive feminist punishment agendas. But we ought to be careful not to stereotype feminists as wanting all bad men behind bars. A complicated dynamic keeps advocates for battered women from rejecting outright faith in treatment despite the lack of empirical evidence that mandated counseling works. Feminist advocates have not only accepted treatment but have embraced it. Despite feminist criticism of low sentences in particular cases and calls for increased probation supervision,¹⁷⁸ the preference for treatment over incarceration has largely gone unchallenged.

There are many reasons why feminists might prefer treatment over more, arguably male, modes of punishment. The first is largely pragmatic. The domestic violence advocacy community is painfully aware of the reluctance of judges and prosecutors to

178. See Barbara Hart, *Battered Women and the Criminal Justice System*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 3, at 98, 110-13; cf. GAIL GOOLKASIAN, U.S. DEPT OF JUSTICE, *CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES* (1985) (indicating that critics of the judicial response to battering focus on judges' leniency and failure to impose sanctions commensurate with similar violent crimes involving strangers).

take these cases seriously, let alone incarcerate offenders. Treatment programs offer at least some state supervision over the offender. Because most of these offenses are misdemeanors, the length of any jail stay would be short; unless some treatment option is available, the offender never learns the skills to change his behavior. Treatment is not perfect, but something is better than nothing.

Treatment also caters to the "upside" of privacy for women. Many in the feminist community argue that autonomous aspects of privacy can further women's equality and freedom. Privacy need not be confined to its historical meaning—as a separate domestic sphere where men are left alone to oppress women—but rather can refer to a preservation of autonomy over important life decisions.¹⁷⁹ Because many women want their partners to change their behavior but do not want to end the relationship with incarceration, treatment is entirely consistent with the feminist notion that the law ought to protect "basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."¹⁸⁰ The availability of treatment thus empowers women to shape their intimate relationships.¹⁸¹

A feminist acceptance of treatment might also be explained in part by what Carol Gilligan calls the "ethic of care."¹⁸² Through research on psychological theory, Gilligan argues that women resolve moral dilemmas differently from men.¹⁸³ Boys resolve conflict by employing a hierarchy of values; girls focus on pre-

179. See Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1173 (1993); see also Schneider, *supra* note 117, at 976-79 (arguing that privacy can also have an affirmative role for women).

180. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis omitted).

181. See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 37 (1992) (arguing that privacy should protect consensual associations when consent and freedom are not illusory); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629-47 (1980) (arguing that the freedom to create, maintain, and terminate intimate associations is a necessary component of any meaningful privacy right).

182. CAROL GILLIGAN, IN A DIFFERENT VOICE 164 (1982).

183. See *id.* at 24-63.

serving relationships.¹⁸⁴ Women see "a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules."¹⁸⁵ Treatment, which resolves the problem of battering by focusing on improving the relationships between men and women, is entirely consistent with Gilligan's ethic of care. Women are rehabilitationists; men retributionists.¹⁸⁶

It is just as plausible that a feminist endorsement of treatment raises the issue of who controls the solution to domestic violence.¹⁸⁷ If men are gender-motivated to use violence, then one way to correct this imbalance is to re-educate them to view women as equals. Treatment programs turn the tables of control from misogynist men to profeminist women and men whose agenda it is to restructure gender relations. This shifting of power from patriarchy to matriarchy, however, does not necessarily equalize the power balance between men and women; it may have the unintended consequence of reinforcing dominance and control of one group over another—precisely the problem that we are trying to solve by criminalizing domestic violence.

Feminist treatment programs are as political as they are therapeutic. They have much vested in the idea that treatment can restructure gender relations.¹⁸⁸ These programs are not without merit. But just as some men find it difficult to give up control of women through violence, so too will feminist advocates face challenges relinquishing control over offenders through treatment.

184. *See id.*

185. *Id.* at 29.

186. Gilligan's theory is controversial within the feminist legal community; some have argued that women do not speak in a different voice but that male supremacy dictates this ethic of care when it works to support men. *See Seymore, supra* note 5, at 1068-69. Catharine MacKinnon disputes Gilligan's assertions, stating that the "ethic of care" is simply "what male supremacy has attributed to us for its own use." *Id.* at 1069 (quoting MACKINNON, *supra* note 15, at 39).

187. *See supra* notes 14-22 and accompanying text.

188. As the Duluth program argues, treatment can "diminish the power of batterers over their victims and . . . explore with each abusive man the intent and source of his violence and the possibilities for change through seeking a different kind of relationship with women." PENCE & PAYMAR, *supra* note 92, at 1.

C. *The Realities of Practice*

No theory can be so nuanced as to capture the day-to-day realities of criminal domestic violence practice.¹⁸⁹ Nor should it. As Daniel Farber has argued, the hardest questions in life—the ones that promote a more flourishing society, are those that are answered more by experience than by theory.¹⁹⁰ This section discusses several practical dilemmas that result from the over-reliance on treatment, even by the most well-intentioned in the criminal justice system. I attempt to merge theory and practice in a way that is meaningful to those who struggle to do the right thing, especially when the right thing is so hard to do.

1. *Not All Cases Are Created Equally*

Prosecutors face growing pressure to go forward with as many domestic violence cases as possible, regardless of the sufficiency of the evidence or the seriousness of the offense,¹⁹¹ particularly in jurisdictions that have policies limiting prosecutorial discretion.¹⁹² At the same time, advocates argue that if the victim

189. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2152 (1995) (arguing that when merging feminist concerns with the criminal law, "theory is not up to the task").

190. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1347 (1988).

191. Many district attorney's offices have adopted pro-prosecution policies in domestic violence cases. See Rebovich, *supra* note 3, at 189. Although these policies vary greatly among jurisdictions, their purpose is to check prosecutorial discretion and actively encourage prosecution. See Hanna, *supra* note 2, at 1860-63.

192. Numerous reasons explain why prosecutor discretion traditionally led to case dismissal and why these cases historically have not been prosecuted. See Buzawa & Buzawa, *supra* note 54, at xvii ("[P]rosecutors have consciously assumed that the motivation and commitment of victims is a legitimate case discriminator in deciding whether to prosecute an offender."); Janell Schmidt & Ellen Hochstedler Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 CRIMINOLOGY 487, 500 (1989) ("Decisions short of formal charging were . . . made in cases in which the burden of proof could conceivably be met, but the victim expressed a desire for the prosecutor to be lenient."); Wangberg, *supra* note 3, at 8 ("High case attrition rates in domestic violence actions can generally be classified under the general rubric of 'victim reluctance.'"); see also Cahn & Lerman, *supra* note 51, at 96 (stating that, in the past, prosecutors failed to proceed in domestic violence cases because they believed that the victim perpetrated the abuse or that battering was a "minor dispute[]" or a "private family matter"); Waits, *supra* note 53, at 299-302 (1985) (arguing that the legal system has used many rationales for nonintervention,

will be "revictimized" or "disempowered" as a result of prosecution, the case should not be prosecuted.¹⁹³ The advocacy community keeps sending out mixed messages. On one hand, they want the criminal justice system to take these cases seriously; on the other, they are unwilling to acknowledge the practical dilemmas posed when a jurisdiction pursues an aggressive strategy. For example, in serious cases, the better decision might be to proceed with a case against the victim's wishes and bear the risks involved with that decision. For first-time, minor offenses

including family privacy, the perception that battering is a "victimless crime," the notion that "legal institutions are ill-equipped to deal with complex social and psychological problems" like battering, and the erroneous stereotype that legal intervention hurts women).

193. See Hart, *supra* note 178, at 106-10; Mills, *supra* note 2, at 191-92; see also Bruce L. Benson, *The Lost Victim and Other Failures of the Public Law Experiment*, 9 HARV. J.L. & PUB. POL'Y 399, 399, 424-27 (1986) (arguing that crime victims should have primary responsibility for prosecution of crimes and should receive compensation for their injuries as in tort law); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 388-90 (1986) (noting that the criminal justice system alienates the victim and can effectively preclude her from receiving restitution); Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 731-32 (1988) (proposing the use of court-appointed prosecutors to represent crime victims who do not receive the full protection of the law); Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, § 6 (Magazine), at 22 (citing Susan Schechter, a well-known and well-respected advocate and author, who contends that no-drop policies can "erode a battered woman's sense of self-esteem and control"); Deborah P. Kelly, *Have Victim Reforms Gone Too Far—Or Not Far Enough?*, CRIM. JUST., Fall 1991, at 22, 22-28, 38 (outlining recent victim reform statutes and arguing that these reforms reflect a consensus that victims of crime should factor into the criminal justice system); Sarah Buel, *Combating Domestic Violence*, Address at Vermont Law School (Mar. 21, 1997) (videotape on file with author) (arguing that victim safety, not prosecution, should be the goal of state intervention).

Personally, I have been troubled by the suggestion that cases should be dropped if prosecution places the victim in more danger or "revictimizes" her emotionally. First, there is no accurate way to predict whether the woman will be in more or less danger if the case proceeds. Furthermore, those defendants who are least deterred by criminal prosecution are precisely the ones that we most ought to prosecute and incarcerate because they pose the greatest danger to women and our communities.

Arguments that equate proceeding in a criminal case with a reluctant victim and abuse and the possible risk of death trivialize the physical harm that women experience. These arguments ultimately portray women as helpless victims who are too emotionally unstable to recognize the public goals of the criminal system and their role within it.

where no serious injury results, the better decision might be to dismiss that case in order to concentrate efforts on the more serious ones.

Furthermore, prosecutors receive the mixed message that they are both therapist and trial attorney,¹⁹⁴ in fact, one commentator advocates that "prosecutors should commit to nurturing the victim emotionally, with the overall goal of reducing domestic violence."¹⁹⁵ Yet, supporting the victim emotionally and holding the batterer criminally responsible are often conflicting goals.¹⁹⁶ This dichotomy can frustrate prosecutors untrained and unprepared for such a dual role.¹⁹⁷ In my experience training prosecutors, I find that many well-intentioned district attorneys end up resenting these cases, feeling as if they spend too much time "hand-holding" and not enough time investigating cases, preparing witnesses, and perfecting trial strategies that can increase the likelihood of conviction.

Many jurisdictions handle a staggering number of cases,¹⁹⁸

194. Some jurisdictions employ social workers or work closely with victim advocates to ease this dilemma. See Cahn & Lerman, *supra* note 51, at 102-03. In Alexandria, Virginia, for example, a victim can drop charges after appearing before a counselor or a judge to explain her refusal. These programs have been criticized for mandating that the victim appear in court before the case is dismissed, claiming that such programs punish the victim. See *id.* at 101. Nevertheless, even if an office has a social worker, prosecutors often feel compelled to act as social worker when working with victims.

195. Mills, *supra* note 2, at 195. The problem with Mills's analysis is that it fails to recognize the realities of practice. It also pathologizes women. No matter how "emotionally nurtured" women are by district attorneys, they cannot prevent their partners from engaging in violence. It is the role of law enforcement, not individual women who have been victimized, to ensure that dangerous offenders are held accountable and that the most dangerous are incapacitated.

196. See Waits, *supra* note 53, at 307. There is a conflict between the public and private goals in the response to domestic abuse, resulting in a difficult determination for prosecutors. Although their formal client is the state, domestic violence prosecutors often find themselves as advocates for abused women. This dual role results in a crisis of conscience for the determined prosecutor, who often dismisses charges against the batterer out of respect for the victim's wishes. See Asmus et al., *supra* note 28, at 157 (noting that prosecutors "often experience[] the same intensity of reaction and blame that victims experience, particularly when the victims themselves fail to appreciate the efforts extended in their behalf").

197. See FAGAN, *supra* note 3, at 16-17.

198. For example, the San Diego police department has a special domestic violence unit with a full-time staff of 20 detectives, three sergeants, and an additional support/volunteer staff of eight. See Gwinn & O'Dell, *supra* note 51, at 297-98. The unit

and most jurisdictions do not have the investigative resources to distinguish and prioritize.¹⁹⁹ Defendants usually refuse to plea bargain unless incarceration is off the table. En masse guilty pleas with treatment recommendations, in lieu of jail, help expedite overcrowded dockets.²⁰⁰ Everyone ends up with treatment even though offenses and offenders vary greatly.

Experience tells us that these cases are as much differences of kind as differences of degree. Some cases are serious, evincing a pattern of ongoing abuse, while others are isolated incidents, often complicated by alcohol or drug use. For example, while practicing, I often had cases where someone called the police to report noisy neighbors. When the police arrived, both parties were intoxicated and sometimes violent, but no injuries were apparent. Often the male would be arrested under our preferred arrest policy. Upon investigating those cases, it was simply unclear what happened. The woman would tell me that they were both drinking and "things got out of hand" but denied that her partner struck her. She would sometimes claim, "I started it and he was just trying to calm me down." Many times there were no prior arrests for any criminal violation for either the defendant or the alleged victim. Although troubling, cases like these are not as serious as others, and often the evidence supporting the charge is minimal, at best. Nevertheless, with forty to one hundred cases to screen a week, pressure not to drop, and fear about

investigates over 1200 cases a month. *See id.* The Domestic Violence Council established the unit through grass roots efforts. *See id.* at 305-06. Some jurisdictions that have appropriated monies for specialized units have had to scale back due to budgetary constraints. Caseloads in specialized units can be staggering. In Baltimore City, for example, two attorneys and two paralegals handle over 7000 cases per year. *See Cahn, supra* note 51, at 171; *see also* Salzman, *supra* note 56, at 362 (noting that lack of funding creates a "formidable barrier" to the Quincy program and to domestic violence prosecution throughout Massachusetts); Philip J. LaVelle, *Budget's New Victim: Domestic Violence*, SAN DIEGO UNION-TRIB., Oct. 30, 1992, at A1, available in 1992 WL 4758652 (stating that as many as 2000 domestic violence cases in San Diego would go unprosecuted due to budget cutbacks).

199. *See* Hanna, *supra* note 2, at 1901-06 (outlining evidence-gathering strategies to differentiate between serious and minor incidents).

200. Long delays between arraignment and trial lessen the likelihood of conviction. For a general discussion of the benefits of an accelerated docket for domestic violence cases, *see* Federic B. Rodgers, *Develop an Accelerated Docket for Domestic Violence Cases*, JUDGES' J., Summer 1992, at 2 (describing the Westminster, Colorado municipal court accelerated, or "fast-track," domestic violence program).

what would happen if my instinct was wrong, I often kept these cases in the system longer than necessary, trying to get some guilty plea with a condition of treatment—just in case.

Ironically, the most serious cases often end with probation and counseling, if not outright dismissal, because taking a case from conviction to incarceration poses many risks, even in jurisdictions willing to mandate the victim's participation.²⁰¹ High-risk defendants control their victims; they are most unpredictable and frightening. It is therefore difficult for prosecutors to gain the victim's cooperation and keep her safe during the prosecution process.

One of the worst cases I handled involved a woman who had been beaten severely by her boyfriend. He once hit her with a belt and strangled her with pantyhose ripped from her legs. She always failed to appear for court despite supportive efforts from my staff and a criminal subpoena. On the day scheduled for trial, I sent a police officer to her home to remind her to attend court, something I did only if the victim had a history of nonappearance. When the officer arrived at her home, he found her handcuffed to the bed, allegedly by the defendant.

The woman was willing to cooperate with the criminal case, but she threatened to disappear unless I recommended probation and counseling. She feared her boyfriend would retaliate if sentenced to jail. There was not enough evidence to proceed without the victim's cooperation,²⁰² and I did not have the time or the resources to devote the attention this case deserved.²⁰³ I choked on my words as I told the judge that I would be willing

201. See Hanna, *supra* note 2, at 1865-68, 1885-94.

202. Model jurisdictions such as San Diego, California and Quincy, Massachusetts focus on evidence gathering, and thus prosecutors are able to go forward in many cases without the victim's testimony. See Gwinn, *supra* note 3, at 19; Salzman, *supra* note 56, at 345; see also Hanna, *supra* note 2, at 1901-09 (describing evidence-gathering techniques that assist the prosecution in meeting its burden of proof without relying solely on the victim's testimony). These programs are still in their infancy; most prosecutors still rely solely on victim testimony to proceed. See Rebovich, *supra* note 3, at 189-90 (recommending that prosecutors devote increased efforts to explore the full range of methods that can be applied to successfully solicit the participation of the victim in the criminal justice process).

203. My caseload averaged from 40 to 100 cases a week. This load is not unusual in many urban jurisdictions. See *supra* note 198.

to accept probation with attendance in treatment. The victim disappeared soon after the guilty plea. I could not confirm if the defendant ever attended a treatment program, not that it would have done him any good.

This story illustrates the frustration that results when there is too much pressure to proceed in every case, too few resources to document the serious ones, and little time to do the job right. Court-mandated treatment programs allow everyone to save face. The prosecutor checks-off "conviction" on his stat sheet; the defense attorney feels like she did some good for her client; the victim has a sense of hope, however false, that the criminal justice system will help her partner change his ways; the offender avoids jail; the judge is not accused of taking these cases too lightly; the treatment program gets yet another client to support its existence; and we all go home happy . . . until the next time.

2. *Autonomy and the Rubric of Empowerment*

Court-mandated treatment not only facilitates the "administration of justice" in these cases, but it also promotes notions of victim empowerment and decision making. Whether autonomy and the right to make one's own decisions offer more liberation for women,²⁰⁴ or are false notions masking subordination,²⁰⁵ continues to be debated in feminist legal scholarship. In practice, most victims want the violence in their relationships to stop and to that extent will cooperate with the state. Many women, however, will resist outcomes that involve criminal records, jail, fines, or other punitive measures. When a woman wants her partner to receive treatment despite a serious offense or his

204. See Schneider, *supra* note 117, at 996-98; Stein, *supra* note 179, at 1173. Justice Douglas argued that privacy should protect "basic decisions of one's life," *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis omitted), but that this privacy derives more from an affirmative concept of liberty rather than from the (arguably masculine) right to be left alone. See Schneider, *supra* note 117, at 996.

205. See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (criticizing the conception of the female in liberal legal feminism and in radical feminist legal criticism and noting that both groups fail to address the distinctive quality of women's subjective, hedonic lives).

long-term dangerousness, the prosecutor and judge must navigate the tricky waters between a victim's personal autonomy and concerns for public safety and justice.

This dilemma is particularly painful in cases where incarceration could result in financial hardship.²⁰⁶ In Baltimore City, for example, one of the best defenses to incarceration was employment, or what was often facetiously referred to as "punch and pay." Despite improved social services intended to help abused women through difficult times,²⁰⁷ courts often face the difficult decision of whether to incarcerate a dangerous offender and risk the family's loss of income or to permit the defendant to attend treatment and risk future violence. This dynamic is complicated further when judges fear that the stress of unemployment might exacerbate the violence upon the offender's release.

Furthermore, strong emotional ties exist between women and their abusers. Women often feel responsible for breaking this bond; the experience of separation can be traumatic.²⁰⁸ Defendants may pressure victims to drop charges or to request counseling so the couple can reunite. No evidence suggests that harsher sanctions place victims at greater risk of new violence,²⁰⁹ but in individual cases, the defendant may escalate vio-

206. Arguably, the victim faces an economic life at or below poverty level upon leaving the relationship. See RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1986); see also David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 L. & SOC'Y REV. 313, 319 (1991) (noting that women may be more concerned with surviving economically than with using legal institutions to guarantee their own safety); Hart, *supra* note 178, at 103 (noting that some victims fear prosecution will wreak economic havoc on the family).

207. For a description of social services available to violence victims, see *Developments*, *supra* note 3, at 1506-09.

208. See Donald G. Dutton & James J. Browning, *Concern for Power, Fear of Intimacy, and Aversive Stimuli for Wife Assault*, in *FAMILY ABUSE AND ITS CONSEQUENCES: NEW DIRECTIONS IN RESEARCH* 163, 168 (Gerald T. Hotaling et al. eds., 1988).

209. See David A. Ford, *Preventing and Provoking Wife Battery through Criminal Sanctioning: A Look at the Risks*, in *ABUSED & BATTERED*, *supra* note 56, at 207-08. Criminal justice processing is likely to anger defendants, and some experiences may be more angering than others. See *id.* at 208. Overall, though, victims are not at greater risk for new violence because of criminal prosecution. See *id.* at 207-08. It is always difficult to predict whether violence that happens after a criminal case is initiated results from that initiation or if the abuse would have occurred regardless of the prosecution.

lence to coerce his partner into reconciliation.²¹⁰

Finally, there is a deep ambivalence as to whether children who live in violent homes are better served by sending the abuser to treatment or to jail. Children who grow up in violent homes are more likely to be abused themselves and abuse as adults.²¹¹ At the same time, parent absenteeism correlates to a child's future involvement in the criminal justice system.²¹² Court-mandated treatment offers at least some compromise as to what might be in the best interest of children.

D. The Paradox of Hope

"Evil" motivations alone cannot account for bad sentencing decisions. All of us who work in this field experience the paradox of hope—the optimistic but unrealistic belief that abusers can unlearn their violence through treatment. This might be true in individual cases, but it does not hold true universally. The challenge, then, is to develop a better understanding of when to maintain hope and when to abandon it.

Ironically, the most often asked question in these cases is why the woman does not leave.²¹³ Women "stay" for many reasons: financial dependence;²¹⁴ fear of separation assaults;²¹⁵ concern for the children; low self-esteem; a perception that there is no place to go; and hope. Many women believe that the violence

210. See Hart, *supra* note 178, at 106-07.

211. See Scott Harshbarger et al., *Report on Domestic Violence: A Commitment to Action*, 28 NEW. ENG. L. REV. 313, 334 (1993) (citing research suggesting that "30 percent of abused children grow up to be abusive parents"); Salzman, *supra* note 56, at 331 (arguing that "children who witness family violence will perpetuate the abuse as adults"); Waits, *supra* note 53, at 297-98 (finding that children who view their fathers abusing their mothers are more likely to become involved in abusive relationships themselves, either as victims or batterers); Arthur L. Burnett Sr., *Dispensing Justice in Domestic Violence Cases: Pretrial Release and Sentencing of Offenders*, CRIM. JUST., Winter 1995, at 8, 57 (finding that "[a]buse of a parent is detrimental to children whether or not they are physically abused themselves").

212. See Travis Hirschi, *The Family*, in CRIME 121, 136 (James Q. Wilson & Joan Petersilia eds., 1995).

213. See Mahoney, *supra* note 146, at 61-68 (arguing that women can try to leave many times before freeing themselves from a violent relationship).

214. See Frankel, *supra* note 47, at 60; Waits, *supra* note 53, at 276, 282; Wangberg, *supra* note 3, at 10.

215. See Mahoney, *supra* note 146, at 61-63.

will stop and the relationship will improve if only . . . (*fill in the blank*). The wish list can include: he gets a job; he stops drinking; I keep the kids from crying; I pay more attention to him; I clean the house; or I love him more. Occasionally, women stay until it is too late. This hope masks a deeper sense of powerlessness. Nothing a woman does can stop the violence unless her partner wants and is able to change. In my own work with abused women, I find these conversations painful as I have come to appreciate that it is the visionary part of people, not the blind part, that believes personal transformation is possible.

This same sense of hope among criminal justice personnel is partially what motivates the preference for treatment. Faith in treatment reflects as much our naive idealism about the power of change as it does our deeply ingrained reluctance to criminalize violence against women. Legal decision making in this context is not so different from personal decision making by women to remain with abusive men. Recognizing the "good" as well as "evil" motivations that drive sentencing decisions should temper our arrogance about who "gets it" and who doesn't.

III. UNDERSTANDING DIFFERENCES AND DEVISING SOLUTIONS

This section asks "who are these guys" and argues that the tendency to refer to a "profile of a batterer" is both inaccurate and misleading. The section then discusses emerging research on men who are violent and argues that although we are not there yet, we are on our way to understanding what kind of punishment might work best with which type of offenders and when incarceration should be the only alternative. This section concludes with practical recommendations for the criminal justice system.

A. *The Dangers of Essentialism in Domestic Violence Work*

In recent years, scholars and advocates have challenged the idea that there is a "profile of a battered woman."²¹⁶ Attacks have come from two fronts. First, many have been critical of the trend to pathologize abused women—to explain the dynamics of

216. See Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 4-7 (1994).

abuse in terms of complex psychological traits of individual women.²¹⁷ Rather, many have argued that the emphasis on psychology fails to capture social forces that lead to violence against women.²¹⁸ It also has the unintended consequence of promoting the notion that abused women are irrational.²¹⁹

Second, many have challenged the "profile of a battered woman" as reflecting only white, middle-class battered women.²²⁰ Early feminist legal theory in particular had this tendency to essentialize women's experiences.²²¹ Seldom did this work explore how race, class, or religion might affect women's experience with violence. Consequently, work on woman abuse has become much more sophisticated. There is a growing understanding that for each woman, the battering experience is both unique and common; women are affected by violence as much by

217. See *id.* at 7 (arguing that the defense of battered women who kill their abusers often "defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities"); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 646 (1980) (voicing concern that expert testimony on learned helplessness may promote stereotypes of women).

218. See Coughlin, *supra* note 216, at 7; Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 395-97 (1993); Schneider, *supra* note 7, at 527.

219. See generally Coughlin, *supra* note 216 (describing the failures, despite initial feminist support, of the battered woman syndrome defense).

220. See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* ix (1988) (arguing that the generic "woman" notion "obscures the heterogeneity of women and cuts off examination of the significance of such heterogeneity for feminist theory and political activity"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601 (1990) (arguing that the criminal justice system historically has ignored violence against black women and perpetrated violence against black men); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1319-20 (1991) (finding that Asian American women are less likely to involve the criminal justice system in instances of battering for fear of bringing shame to the family and the community); Schneider, *supra* note 7, at 532 (noting that although the popular misconception is that most battered women are poor, women of color, or both, the experience and understanding of white women largely has shaped work on battering); Beth Richie, *Battered Black Women: A Challenge for the Black Community*, BLACK SCHOLAR, Mar./Apr. 1985, at 40, 43 (finding that African Americans have a difficult time turning to the criminal justice system as a "vehicle for protection and problem resolution").

221. See Minow, *supra* note 15, at 47; Schneider, *supra* note 7, at 531.

internal factors, such as low self-esteem and abusive childhoods,²²² as by external factors, such as class and ethnicity.²²³

Ironically, legal academics, including myself, are guilty of writing about "batterers" as if they constitute a single, homogeneous group. For example, a recent article by Malinda Seymore argues: "The typical batterer is a traditionalist, believing in male supremacy, the stereotyped masculine sex role in the family, and his entitlement to use violence to discipline his wife. His assumption that male entitlement has priority over female needs allows him to deny the wrongness of the violence."²²⁴ This tendency to essentialize men who abuse as gender-motivated obscures a far more complex phenomenon.

What these men do have in common is their criminal behavior; they assault and batter their intimate partners without legal justification. No evidence yet supports the proposition that there is a "profile of a batterer." Just as women's experiences of violence are influenced by both internal and external factors, so too is men's behavior influenced by a number of variables that make batterers as different as they are alike.²²⁵ These differences

222. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 14-22 (1984) (describing the "psychosocial characteristics" of the interested parties).

223. See Harris, *supra* note 220, at 601; Rimonte, *supra* note 220, at 1319-20; Richie, *supra* note 220, at 40; see also Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171 (1995) (describing the particular difficulty Orthodox Jewish women face in dealing with abusive relationships).

224. Seymore, *supra* note 5, at 1039 (footnotes omitted).

225. Research on batterer typologies and characteristics also has methodological shortcomings. Like research on batterer treatment programs, we ought to be aware of these shortcomings to better assess the usefulness of the data presented. First, one important limitation of subtypes of batterers is that they have included only men who actually enter treatment programs or battered women in shelters. See Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOL. BULL. 476, 493 (1994). Because many men have not been identified publicly as violent, samples may not be as representative of the community at large.

Second, researchers generally have not compared their subtypes of violent men with nonviolent men. Such comparisons are essential to understand how violent and nonviolent men differ. See *id.* at 493-94.

Third, sample sizes tend to be small in these studies. The sampling of larger populations is necessary to assure a more diverse cross-section of men—batterers and nonbatterers, treated and nontreated. See Gondolf, *supra* note 145, at 199.

Fourth, reliance on imprecise, self-report descriptors of violence needs to be re-

partially account for the failure of treatment to deter violence in many cases.

B. Unessentializing Men Who Batter

This section reviews research on batterer typologies, psychological factors,²²⁶ biomedical factors, and environmental factors that correlate to family violence. This research can better inform domestic violence policy, though a note of caution is warranted. None of this research suggests that men who abuse suffer from

placed by verified behavioral measures. Currently, researchers use different measurements that are not necessarily consistent with each other. *See id.*

Fifth, just as in the research on batterer treatment programs, although women's identification of violence may be more accessible and reliable than the batterers, women are likely to underreport in areas of general violence, criminality, and social history. The woman may not be fully aware of the batterer's behavior outside the relationship. *See id.*

Sixth, there is still no conceptual agreement on what constitutes abuse. "The focus on battering as physical abuse and other forms of violence and antisocial behavior may in fact obscure 'nonphysical' terror experienced by the women, regardless of type of batterer." *Id.* We also ought be cautious that these typologies do not fuel the notion that women are better off with one type of batterer over another. *See id.*

226. Some researchers have identified psychological correlates of aggression. For example, researchers generally view attachment to other individuals, including dependency on others and empathy for others, as resulting from childhood experiences with care givers. *See Holtzworth-Munroe & Stuart, supra* note 225, at 488. These experiences can lead to insecure relationships. *See id.* Some hypothesize that men who are attached to, and preoccupied with, their wives are at risk to engage in marital violence when threatened with the loss of their relationships. *See id.* Many researchers have focus on attachment issues as a correlate to abusive behavior. *See id.*; *see also* DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN* 121-60 (1995) (describing research on the abusive personality).

Some suggest that the ability to empathize with others correlates with the use of violence. *See Holtzworth-Munroe & Stuart, supra* note 225, at 488. Researchers assume that the more empathy a man feels for others, the more likely he is to engage in family-only aggression. *See id.*

Another psychological variable often studied is impulsivity. Some researchers suggest that this "is presumably an inherited, biologically based personality dimension related to temperament, physiological reactivity, and neurologically based behavioral control systems." *Id.* Some personality theorists have related impulsivity to aggressiveness and psychopathy or antisocial personality disorder. *See id.*

Finally, many have made distinctions between overcontrolled and undercontrolled batterers. *See DUTTON WITH GOLANT, supra* note 18, at 29. Overcontrolled batterers are "control freaks" who extend their need to dominate others, although undercontrolled batterers have difficulty checking their aggression and thus act out impulsively. *See id.*

a syndrome or other illness that undermines their free will. Rather, most, although not all, violence appears to be strategic; it is used in varying degrees and with different motivations to gain some advantage or control over a mate. Research on men who abuse is only useful to the law in that it helps us understand what motivates male behavior so that we can devise better sentencing alternatives. Current research does not provide an escape route for abusive men to avoid criminal responsibility.

1. Batterer Typologies

Some of the most promising domestic violence research attempts to differentiate among batterers. Different "types" of batterers emerge from a synthesis of this research. Amy Holtzworth-Munroe and Gregory Stuart recently reviewed nineteen studies on typologies and identified three subtypes of abusive men: family-only batterers; borderline batterers; and generally violent/antisocial batterers.²²⁷ I rely primarily on the categories hypothesized by Holtzworth-Munroe and Stuart, but also integrate the research of Edward Gondolf, Donald Dutton, and others. Emerging typologies among different researchers are surprisingly similar: differences lie more in terminology than in concept.²²⁸ Family-only batterers constitute approximately fifty

227. See Holtzworth-Munroe & Stuart, *supra* note 225, at 476. These subtypes are consistent with other subtypes developed in the literature. See, e.g., Gondolf, *supra* note 145, at 196-97 (identifying sociopathic, antisocial and typical batterers); Stephen D. Hart et al., *The Prevalence of Personality Disorder Among Wife Assaulters*, 7 J. PERSONALITY DISORDERS 329, 330 (1993) (identifying antisocial psychopathic batterers who display high levels of anger and jealousy and have criminal records that include crimes in addition to domestic violence; sociopathic batterers who are frequently and severely violent both inside and outside the home, suffered abuse as children, and have lengthy criminal records; and men who are violent solely or primarily in their relationships with women); Daniel G. Saunders, *A Typology of Men Who Batter*, 62 AM. J. ORTHOPSYCHIATRY 264, 273-74 (1992) (identifying family-only, generalized, and emotionally volatile aggressors).

228. In a recent piece, Myrna Raeder proposes that prosecutors be permitted to introduce domestic violence, social science framework evidence that is not syndrome- or profile-oriented in order to level the playing field and provide a background against which domestic violence evidence can be understood at trial. See Myrna S. Raeder, *The Better Way: The Role of the Batterers' Profile and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147 (1997). Professor Raeder argues that "we need to study batterers to best understand what makes them tick, how to control or cure their violent tendencies, and how to

percent of all batterer samples.²²⁹ These men tend to engage in the least severe marital violence, psychological and sexual abuse.²³⁰ Family-only batterers are less impulsive, less likely to use weapons, and more likely to be apologetic after abusive incidents.²³¹ These men may be the most deterred by the threat of criminal sanctions and the most treatable because of their ability to function normally outside of their relationships.

Borderline batterers constitute approximately twenty-five percent of batterer samples.²³² These men tend to "engage in moderate to severe abuse, including psychological and sexual abuse."²³³ Their violence generally is confined to the family, but not always. They may evince borderline personality characteristics and may have problems associated with drugs and alcohol. Batterer treatment, as it is currently structured, is likely to be insufficient to change their behavior because many men in this group may need more intensive treatment.²³⁴

Generally violent or antisocial batterers engage in moderate to severe violence, including psychological and sexual abuse. Ed-

ensure that they receive the appropriate punishments for their crimes." *Id.* at 151. I could not agree more with her conclusion. However, Professor Raeder bases her analysis on Dr. Donald Dutton's work concerning abusive personalities. *See id.* at 155-78. Dr. Dutton's work offers valuable insights, but I am hesitant to suggest that his analysis is the only useful one that exists. The feminist community must be careful not to rely selectively on social science when it is consistent with a particular political agenda, ignoring data that is contrary to a particular position. For example, many feminists were quick to jump on the battered woman's syndrome bandwagon when the science supporting it was questionable, at best. *See* David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 75-76 (1997) (reviewing the scientific data on the battered women's syndrome and concluding that it was never a matter of good science). In fact, such reliance on bad science can have unintended consequences. *See* Coughlin, *supra* note 216; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986). I have attempted to take a broader view of the research on batterer typologies that may not necessarily be consistent with any particular political agenda.

229. *See* Holtzworth-Munroe & Stuart, *supra* note 225, at 481-82.

230. *See id.* at 484-86.

231. *See* Gondolf, *supra* note 145, at 197.

232. *See* Holtzworth-Munroe & Stuart, *supra* note 225, at 482.

233. *Id.*

234. *See id.*

ward Gondolf terms these batterers sociopathic.²³⁵ It is estimated that this group constitutes twenty-five percent of batterer samples.²³⁶ Uniformly, studies have found that generally violent men engage in more severe family violence than family-only men.²³⁷ This finding challenges the myth that abusers are only violent against family members. Generally violent batterers often have extensive criminal histories, including property, drug or alcohol offenses, and violence crimes against nonfamily victims.²³⁸ These men are the most impulsive, the most likely to use weapons, and feel the least amount of empathy towards their victims.²³⁹ Batterer treatment programs for this group are inappropriate given the high degree of danger they pose. Arguably, sociopathic batterers may be untreatable, and, in many cases, ought to be incarcerated if only to protect their potential victims.

All abusive men are not equally dangerous. Some men are frequent and severe batterers; others are not.²⁴⁰ Dr. Donald Dutton, a psychology professor at the University of British Columbia and director of the Assaultive Husband's Program in Vancouver, focuses his research on personality traits of abusive men. He distinguishes "cyclical" batterers from men who may occasionally be aggressive in their relationships, "like the distinction between a single fender bender and continual head-on collisions."²⁴¹ Cyclical batterers constitute a subgroup of men who are violent only in their intimate relationships.²⁴² They

235. See Gondolf, *supra* note 145, at 196-97.

236. See Holtzworth-Munroe & Stuart, *supra* note 225, at 482.

237. See *id.* at 484-86 (reviewing current research on batterer typology and concluding that studies uniformly find that generally violent men engage in more severe violence).

238. See Gondolf, *supra* note 145, at 197; Holtzworth-Munroe & Stuart, *supra* note 225, at 482, 484-86.

239. See Gondolf, *supra* note 145, at 196-97; Holtzworth-Munroe & Stuart, *supra* note 225, at 484-86.

240. See, e.g., DUTTON WITH GOLANT, *supra* note 18, at 22-38; Michael Hershorn & Alan Rosenbaum, *Over- vs. Undercontrolled Hostility: Application of the Construct to the Classification of Maritally Violent Men*, 6 VIOLENCE & VICTIMS 151, 155-56 (1991).

241. DUTTON WITH GOLANT, *supra* note 18, at 22-23.

242. See DUTTON, *supra* note 226, at 125-27; DUTTON WITH GOLANT, *supra* note 18, at 39-57.

are repeat offenders who injure their partners, both psychologically and physically, until courts intervene, but appear "normal" to the outside world because they direct their violence primarily at their mates.²⁴³ Dutton theorizes that these characteristics are a product of being abandoned by a loved one earlier in life.²⁴⁴ These men attribute their negative feelings to real or perceived misdeeds by their partners and retaliate.²⁴⁵ Violence diminishes anxiety about attachment by maintaining control over a partner.²⁴⁶

Dutton's distinction between men who are chronically abusive and those who are not has important implications for prosecutorial and sentencing decisions. "If *once* in his marriage a man happens to push his wife in reaction to situational stresses, he would still be considered abusive. . . . But, psychologically, that is a very different type of individual than one who repeatedly abuses or beats up his wife or engages in more serious assaults."²⁴⁷ According to Dutton, *only* two percent of the total male population are "repeatedly severely assaultive" to women in any given year.²⁴⁸ Thus, the criminal justice system ought to be cautious before treating every man who engages in intimate violence as a high-risk offender. In fact, Dutton's research suggests that we may be able to identify and focus limited resources on the chronically abusive, similar to other crime control strategies that target career criminals rather than petty offenders.

243. See DUTTON WITH GOLANT, *supra* note 18, at 41-42.

244. See DUTTON, *supra* note 226, at 159-60.

245. See DUTTON WITH GOLANT, *supra*, note 18, at 41-57.

246. See DUTTON, *supra* note 226, at 154-57. Dutton further hypothesizes that Post-Traumatic Stress Disorder (PTSD), the general diagnostic category describing battered women's syndrome, is a "possible" feature of abusiveness because his research revealed that many cyclically abusive men exhibited symptoms that resembled those of PTSD. See DUTTON WITH GOLANT, *supra* note 18, at 74-77. The *DSM-IV* describes PTSD as "the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or threat to one's physical integrity." *DSM-IV*, *supra* note 175, at 424. Symptoms, which can last for more than one month and disturb normal functioning, include difficulty sleeping, irritability, outbursts of anger, difficulty concentrating, and exaggerated responses. See *id.* at 428.

247. *Id.* at 22.

248. DUTTON, *supra* note 226, at 10 (hypothesizing that 1,550,000 men in America "present the core problem for the criminal justice system").

2. *Biomedical Factors*

Some researchers have suggested that some violent behavior may correlate to biomedical conditions.²⁴⁹ For example, one study found that men with previous head injuries were six times as likely to display marital aggression as other men.²⁵⁰ This research is consistent with findings that there may be a link between head trauma and violent behavior.²⁵¹

Other research has linked aggressive, dominant and antisocial behavior to high testosterone levels and impulsive aggression to low serotonin levels.²⁵² To date, however, whether testosterone and/or serotonin are potential correlates of family violence remains unclear.

Sociobiologists and evolutionary psychologists might also add to our understanding of violent behavior by men against women, although the application of evolutionary theories is still too new for any valid conclusions to be drawn. From a biologist's perspective, men have an inherited tendency to secrete adrenalin when they believe themselves to be sexually threatened by other males.²⁵³ The label applied to this arousal, however, will be socially determined.²⁵⁴ Thus, male aggression against females is part of male reproductive strategies geared toward reproducing offspring and ensuring paternity; this sexual aggression is well-documented throughout the primate world and cross-culturally.²⁵⁵

Biomedical factors alone cannot account for all abusive behav-

249. See, e.g., Alan Rosenbaum et al., *Head Injury in Partner-Abusive Men*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1187, 1991 (1994).

250. See *id.*

251. See, e.g., Patricia A. Brennan et al., *Biomedical Factors in Crime*, in CRIME, *supra* note 212, at 65, 78-82.

252. See Amy Holtzworth-Munroe et al., *An Overview of Research on Couple Violence: What Do We Know About Male Batterers, Their Partners, and Their Children?*, 2 IN SESSION: PSYCHOTHERAPY IN PRACTICE 7, 10 (1996); see also Brennan et al., *supra* note 251, at 82-83 (summarizing findings on the relationship between neurochemistry and aggression).

253. See DUTTON, *supra* note 226, at 30-33.

254. See *id.* at 32.

255. See Hanna, *supra* note 20 (applying evolutionary and biological research to domestic violence and arguing that evolutionary insights can help devise better criminal justice strategies); Smuts, *supra* note 20 (examining male violence against women from an evolutionary psychology perspective).

ior.²⁵⁶ At best, a more complex interaction of social and neurological factors trigger violence in some.²⁵⁷ Nor is there any evidence suggesting that biological factors should be a legal excuse to violent behavior.²⁵⁸ Nevertheless, the emerging research on biology and human behavior may provide valuable future insights. Additionally, screening abusers for medical as well as psychological factors might be prudent. Some men might benefit from medical as well as psychological interventions, especially in cases involving substance addictions or patterns of antisocial behavior. At the very least, this research suggests that we need to take a broader view of what "treatment" or other interventions might entail apart from the current feminist-based group therapy models currently in vogue.

3. *External Factors*

Although domestic violence occurs across all socioeconomic, ethnic, and age groups, some groups may be at higher risk of

256. See Brennan et al., *supra* note 251, at 79.

257. Margo Wilson and Martin Daly have done extensive work in this field. See MARTIN DALY & MARGO WILSON, *HOMICIDE* (1988). In this book, the authors argue that intimate homicides follow a pattern that cannot be understood without the aid of a sociobiology perspective. See *id.* at 1-15. They argue that males are far more likely than females to experience extreme sexual jealousy because males have no guarantee of paternity. See *id.* at 137-40. Hence, jealousy as a motive for homicide should be more frequent with male perpetrators.

For more explanation about evolutionary psychology and gender issues, see SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES, *supra* note 20. See also Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117 (1997) (arguing that the evolutionary perspective can usefully supplement, not supplant, prevailing notions of behavior concerning child abusers). Jones's article also provides an excellent bibliography about the links between biology, human behavior, and the law.

258. See generally Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L.J. 377 (1993) (suggesting that the criminal law be more flexible in considering both the internal and external factors in determining an individual's eligibility for a criminal defense, but finding unclear whether some environmental factors such as lead poisoning produce internal disorders, such as neurodevelopmental delay or hyperactivity, that might lead to violent behavior); Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615 (1988) (exploring the tension between individual freedom and social protection or responsibility in assessing culpability based on biological defenses).

violence.²⁵⁹ For example, children exposed to violence are more likely to become violent or to be victims of violence.²⁶⁰ Couples in their twenties and thirties and those who cohabitate experience more violence than those who are older and married.²⁶¹

The most severely abusive men are not composed of mere low-income or minority cases,²⁶² as some batterer stereotypes might suggest.²⁶³ Empirical evidence, however, points to a connection between domestic violence and low family income.²⁶⁴ Other studies have found that abused women are more likely to live in communities with the highest rates of stranger violence,²⁶⁵ suggesting a link between domestic violence, general violence, and neighborhoods with fewer economic and social resources.

Multiple interpretations can be made from these findings. First, people in lower socioeconomic groups are more likely to

259. See, e.g., Edleson & Syers, *supra* note 97, at 15.

260. Numerous studies have documented the correlation between growing up in an abusive household and engaging in future violence. See Alfred DeMaris & Jann K. Jackson, *Batterers' Reports of Recidivism After Counseling*, 68 SOC. CASEWORK 458, 463 (1987); *supra* notes 211-12 and accompanying text. Several have found that children who witness abuse between their parents are likely to continue the pattern themselves as adults because they believe that violence is the solution to most problems. See *supra* notes 211-12 and accompanying text. Most of these studies are premised on the notion that children model the behaviors of their parents and learn their attitudes. Some have suggested an alternative explanation for the correlation between childhood exposure to violence and adult battering. For example, Amy Holtzworth-Munroe and others hypothesize that parental violence may disrupt children's attachment processes, interfering with their ability to develop healthy adult relationships. See Holtzworth-Munroe et al., *supra* note 252, at 12-13.

261. See Holtzworth-Munroe et al., *supra* note 252, at 7.

262. Although some research has suggested a correlation between minority status and domestic violence, the difference tends to lie not with race or ethnicity itself, but with other factors such as income, employment status, and age. For example, in a nationally representative survey, rates of abuse were approximately 17% for African American couples, 17% for Latino couples, and 12% for white couples. See Holtzworth-Munroe et al., *supra* note 252, at 8. When controlling for sociodemographic variables, ethnicity and race were no longer significant. See *id.*; see also WILT ET. AL., *supra* note 43, at 3 (finding that in New York City, female homicide victims were killed disproportionate to race).

263. See Gondolf, *supra* note 145, at 195.

264. See Gerald T. Hotaling & David B. Sugarman, *Prevention of Wife Assault, in TREATMENT OF FAMILY VIOLENCE*, *supra* note 102, at 385, 400; Holtzworth-Munroe et al., *supra* note 252, at 8.

265. See FAGAN, *supra* note 3, at 29.

report violence to police, police are more likely to arrest people in poor and middle-class neighborhoods than upper-class ones, and women without economic resources are more likely to seek shelter than those with higher incomes. Those with a lower socioeconomic status are likely to be over-represented in batterer samples.

Second, some have theorized that the relationship between lower socioeconomic status and domestic violence is due, in part, to the existence of a "subculture of violence" that condones violence in general and assaultive behavior towards women in particular.²⁶⁶ This explanation emerges from theories linking domestic violence to deep-seated cultural acceptance of violence more generally. As William Stacey and Anson Shupe conclude:

[W]e think there is good reason to believe that a cult of violence is spreading throughout our society and affecting every sector. By "cult" we do not mean that it is an organized movement or conspiracy. Rather, it is a cultural pattern, a trend. The glorification of violence in motion pictures, television, and books, and the electronic media's technical sophistication that shows us violence realistically but makes it exciting, contribute to this cult. But this is not the cause. The cult is an acceptance of violence, learning to expect it, to tolerate it, and to commit it, however much one dreads it. This cult is stimulated by a violent environment that affects each generation of men and women, making them more yet desensitized to the problem.²⁶⁷

Those in lower socioeconomic groups might be more susceptible to this "cult of violence" because they have more to gain and less to lose by engaging in violent behavior; in other words, they have no stake in conforming to cultural norms that dictate against violence.²⁶⁸ "Culture of violence" theories remain highly controversial as they have a tendency to essentialize poor and

266. See Hotaling & Sugarman, *supra* note 264, at 401.

267. WILLIAM STACEY & ANSON SHUPE, *THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA* 196 (1983). The authors reached this conclusion from a study of 542 case histories and 2096 telephone interviews. See *id.* at xvi-xvii.

268. See *infra* notes 272-77 and accompanying text (describing factors that lower one's stake in conformity).

minority communities as inherently violent.²⁶⁹ Such theories suggest, however, that violence may be a rational response given certain environmental and social conditions, not pathological or determined behavior.

Just as likely is that those with fewer resources face more stressors. "Indeed, it is generally believed—and certainly makes good clinical sense—that stress in itself does not lead directly to violence, but rather that various other factors exacerbate or buffer the relationship between stress and [domestic] violence."²⁷⁰ Living in a stressful environment may place some men at higher risk for the use of aggression.²⁷¹

The link between domestic violence and poverty is controversial. Describing domestic violence as "our" problem and not "their" problem is powerful political rhetoric. It facilitates legal reform and avoids stereotyping poor people and people of color as inherently dangerous.²⁷² Although demographic factors do not predict violence, this research suggests that poverty breeds many ills—domestic violence among them.²⁷³

Intimate relationships tend to be established between people of the same ethnic and social background.²⁷⁴ Ferraro and Boychuk suggest that the criminal justice system may treat intimate violence leniently because of racial and social biases as opposed to any legal support for patriarchy.²⁷⁵ "Otherwise, violent crime between nonintimates would be treated more punitively than that between intimates, and it is not."²⁷⁶ We might best concentrate resources in communities that suffer

269. See Mark L. Rosenberg & James A. Mercy, *Assaultive Violence*, in *VIOLENCE IN AMERICA: A PUBLIC HEALTH APPROACH* 14, 25-26 (Mark L. Rosenberg & Mary Ann Fenley eds., 1991).

270. Holtzworth-Munroe et al., *supra* note 252, at 12.

271. See *id.* at 8-9, 12.

272. See, e.g., Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 93, 100-01 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

273. See Rosenberg & Mercy, *supra* note 269, at 40-41 (arguing that one way to reduce assaultive behavior is to both decrease the cultural acceptance of violence and reduce racial discrimination).

274. See Ferraro & Boychuk, *supra* note 68, at 215.

275. See *id.* at 222-23.

276. *Id.* at 223.

disproportionately from this problem rather than equalize efforts that are likely to result in unequal outcomes. If life stressors like poverty and racism exacerbate the use of violence by men, and possibly women as well, then it is politically irresponsible and intellectually dishonest to ignore this potential connection.²⁷⁷

C. *Recommendations for the Future*

This section outlines practical steps to improve domestic violence sentencing practices. Although none of the following recommendations are radical in concept, they are intended to provide guidance and spark innovation among those who work in this field. These recommendations are intended to address both the general and the specific goals sought to be accomplished by punishing domestic abuse. The criminal justice system needs to reduce its emphasis on individual rehabilitation, at least until we have a better understanding of what kinds of programs work best with which types of offenders. These recommendations are also intended to extract the politics from the practice of punishment. In our search for solutions it is imperative that we not let

277. Many scholars have suggested that the criminalization of domestic violence can further racism. See, e.g., Crenshaw, *supra* note 272, at 103 (arguing that for racially subordinated people, "home is not simply a man's castle in patriarchal terms, but it is also a safe haven from the indignities of life in a racist society"); Rimonte, *supra* note 220, at 1319-20 (arguing that Asian women are often reluctant to call police to report domestic abuse because involvement with the criminal justice system brings shame on the family); Richie, *supra* note 220, at 43 (arguing that it is problematic for the African-American community, which has experienced widespread injustice within the criminal justice system, to turn to the same system "as a vehicle for protection and problem resolution"). But see Randall Kennedy, *The State, The Criminal Law, and Race: A Comment*, 107 HARV. L. REV. 1255, 1255-56 (1994) (arguing that allegations of the criminal justice system being used as a tool of racial oppression are overblown and counterproductive and that the main problem confronting black communities is the failure of the state to provide black communities with the equal protection of the laws). I share some of Kennedy's concerns. In our efforts to be racially, culturally, and economically sensitive, we should not allow violence to go unchecked under the rationale that state intervention is always racist, ethnocentric, or classist. The underenforcement of domestic violence laws in certain communities denies women legitimate state protection that would allow them to be free from violence. We also must be careful that sensitivity does not lead to underenforcement, thus solidifying the perception that the criminal justice system marginalizes the concerns of poor and minority women.

the competition for control blind us to our ultimate goal of reducing violence.

1. *Improve Case Screening*

Prosecutors and probation departments should screen cases prior to making decisions about case disposition, distinguishing between high-risk offenders and others who pose less danger.²⁷⁸ To date, no validated risk screening or assessment used in the United States can guide prosecutors, courts, and probation departments in differentiating among cases.²⁷⁹ Currently, both the Vermont Department of Corrections and the Colorado Office of Probation Services have received grants under the Violence Against Women Act to undertake such studies.²⁸⁰ This instrument can give the criminal justice system another tool to make better, albeit imperfect, sentence recommendations.²⁸¹

In the meantime, the criminal justice system should screen for certain factors in case assessments, recognizing that prosecuting every case or trying treatment first is not the best use of scarce resources. In particular, cases should be screened not just for the sufficiency of evidence,²⁸² but also for past incidents of do-

278. See Murray A. Straus, *Identifying Offenders in Criminal Justice Research on Domestic Assault*, in DO ARREST AND RESTRAINING ORDERS WORK?, *supra* note 3, at 14 (arguing for the need to distinguish between high- and low-risk offenders and describing the use of the Conflict Tactics Scale in conjunction with a checklist to help make these risk distinctions).

279. Some jurisdictions employ a lethality assessment, although it has not been validated empirically. This type of evaluation requires prosecutors to explore with the victim such things as the defendant's threats of homicide or suicide, use of weapons, depression, alcohol or drug abuse, and other patterns of behavior indicating a disregard for social or legal consequences. See Barbara Hart, *Assessing Whether Batterers Will Kill* 12-14 (1990) (on file with author). For example, "[a] man who idolizes his female partner, or who depends heavily on her to organize and sustain his life, or who has isolated himself from all other community, may retaliate against a partner who decides to end the relationship. He rationalizes that her 'betrayal' justifies his lethal retaliation." *Id.* at 13.

280. See, e.g., Vermont Dept. of Corrections, Risk Instrument Validation Study (requesting proposals for the development of a risk assessment instrument for domestic violence offenders) (on file with author).

281. See O'Leary et al., *supra* note 90, at 1220-22. The authors have appended the Modified Conflicts Tactics Scale to their article, and they urge attorneys to use it as a tool for screening for domestic violence. See *id.* at 1234.

282. See Hanna, *supra* note 2, at 1900 (discussing why these cases need to

mestic violence that may have gone unreported. Past incidents of violence not directed at family members seem to be a clear indication that someone is a chronically violent person;²⁸³ batterer treatment programs as currently structured are unlikely to do much good in these cases because the motivations for violent behavior are not likely to be entirely gender-motivated.

Undertaking risk assessments is difficult, particularly for prosecutors untrained in social service skills. One way to ease this burden is for prosecutors' offices to hire social workers to assist in risk assessments and to aid the victim in preparing for the prosecution and sentencing outcomes. This can include preparing a safety plan for the victim, relocating her, or helping her find alternative financial resources if she is economically dependent on the defendant. If jurisdictions employ social workers, then they are likely to find less resentment and frustration among prosecutors.²⁸⁴

Furthermore, the victim's wishes should not dictate a sentence, particularly in serious cases that warrant incarceration.²⁸⁵ Exploring the victim's concerns about the outcome of the case is vital, but prosecutors must recommend sentences that are appropriate to the crime and to the history of the defendant, and judges must order the same. Extreme caution should be used before allowing a victim to state her sentencing preference in front of the abuser. Women may face retaliation for requesting more severe sanctions.²⁸⁶ In my experience, many women will ask publicly that the case be dismissed or referred

overcome the presumption of innocence in order to avoid the appearance of motivation by a feminist or political agenda).

283. Some have suggested that violence against animals is often a precursor to, and an integral part of, severe domestic violence. See, e.g., A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals*, THE PROSECUTOR, Jan./Feb. 1996, at 31 (arguing that animal cruelty is often an integral part of domestic violence and recommending that prosecutors take animal cruelty cases more seriously and track convictions to support research into criminal patterns that include violence toward animals).

284. See *Developments*, *supra* note 3, at 1506-09 (discussing the role shelters and support services for battered women play in facilitating criminal prosecution).

285. See, e.g., *State v. Hobbs*, 801 P.2d 1028, 1031 (Wash. Ct. App. 1990) (finding that reconciliation with the victim and her professed desire for them to be together did not create a mitigating factor justifying a downward departure in the sentence).

286. See Hart, *supra* note 178, at 99-101.

to treatment and in private beg that everything be done to keep her partner in jail. Finally, even if the victim believes she would be better off if the defendant goes to treatment and not jail, such an outcome undermines the broader social goals of criminalization. The criminal justice system ought to be sensitive to the victim's needs and wishes, but it cannot, nor should it, serve the victim's personal preferences at the expense of broader community safety.

2. *Provide for an Array of Treatment Programs*

Jurisdictions need to develop a variety of treatment alternatives, including programs that provide medical screening, drug and alcohol counseling, and individual as well as group therapy. We also may want to revisit couples therapy for some families. Until we have a better idea of how to match people with programs, we ought to remain open to new and possibly "unconventional" modes of treatment, including those that vary in underlying philosophy, length, treatment modality, and curriculum.²⁸⁷ Unfortunately, little research has attempted to match men with different forms of treatment.²⁸⁸ We need to experiment.

Treatment programs should not be dismissed because they fail to embrace a particular political agenda or theory of violence. Criteria for court-mandated treatment programs can be too rigid, leaving little room for the development of innovative programs.²⁸⁹ Also, as in Sussex County, New Jersey,²⁹⁰ criminal

287. See Gondolf, *supra* note 145, at 200.

288. Cf. D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *CRIMINOLOGY* 369, 386 (1990) (calling for a dramatic increase in the number of evaluative studies of correctional service over the next decade).

289. See *id.* at 372 (noting that a growing number of scholars and practitioners agree that the effectiveness of correctional treatment "is dependent upon what is delivered to whom in particular studies"). For example, Florida requires a 29-week program with 24 weekly sessions. See FLA. STAT. ANN. § 741.325(3) (West 1997). The program must include a psychoeducational model that employs a program content based on tactics of power and control by one person over another. See *id.* § 741.325(4). California requires men to fulfill a lengthy list of requirements, including cultural sensitivity training and responsibility assessments. CAL. PENAL CODE § 1203.097(c) (West Supp. 1997).

290. See Hanna, *supra* note 2, at 1878-79.

justice personnel should try to uncover whether some first-time or minor cases might be aggravated by a stressful life event, such as the loss of a job or the death of a family member. In these cases, job training or other services might prove more useful than mandated batterer treatment in improving the life situation of those involved.

There is not enough evidence to yet suggest whether pretrial diversion programs should be abandoned. Although pretrial diversion can undermine accountability,²⁹¹ in some cases pretrial diversion may be appropriate. The issue is not the concept, but rather who may participate. For example, young men in their first relationship who "experiment" with violence may benefit from a pretrial diversion program and avoid the stigma of a criminal record early in their adult life. In addition, others have argued that pretrial diversion can be beneficial to women who get arrested for defending themselves in the midst of a violent argument.²⁹²

Only those people without any criminal record whatsoever ought to be eligible for such a program. For example, the Connecticut program that allows for pretrial diversion if one has other criminal convictions, though barring those with domestic violence convictions, is clearly inappropriate.²⁹³ Not only does this undermine individual accountability, but it also sends a dangerous message that these cases are not as serious as other offenses. Furthermore, the most dangerous offenders are likely to have criminal records that do not involve family violence offenses.²⁹⁴ Any criminal conviction ought to make one ineligible for a pretrial diversion program.

Judges should be creative with sentencing options and not fear political backlash if they opt for unconventional alternatives. For example, judges could sentence offenders to weekend incarceration, allowing them to keep their jobs, but impressing upon them the costs associated with engaging in violent behavior toward their family members. Short-term incarceration, with

291. See Gwinn & O'Dell, *supra* note 51, at 316.

292. See Hooper, *supra* note 58, at 172-73.

293. See CONN. GEN. STAT. ANN. § 46(b)-38(c) (West 1995 & Supp. 1997).

294. Cf. Gondolf, *supra* note 145, at 196-97 (describing the sociopathic batterer typology).

the threat of longer stays, may be enough incentive to motivate some abusers to change their behavior. "[T]he more certain punishment is, the less severe it need be."²⁹⁵

Another promising alternative is the use of electronic monitoring devices that monitor the movements of offenders, notifying probation departments if the offender is not within a certain radius.²⁹⁶ This can help ensure that the defendant obey any stay-away orders forbidding contact with the victim.

3. *Incarcerate When Appropriate*

Too few, not too many, men are incarcerated for severe and chronic violence against their intimate partners. Their abuse is part of an ingrained pattern of extensive violence and antisocial behavior that is unlikely to yield to either anger-management or feminist-based models of treatment.²⁹⁷ As Edward Gondolf suggests:

Many of the batterers are, in other words, "system failures" in that they have eluded or not been deterred by previous apprehension or treatment for their antisocial behavior. Therefore, short-term jailing or mandated treatment for their battering seems also unlikely to deter them The sociopathic batterers, in particular, are likely to be incorrigible, needing continual restraint.²⁹⁸

Borderline and sociopathic abusers can present the greatest threat to victims during the criminal process because they are impulsive, unpredictable, and may have problems with drugs or alcohol as well as violence.²⁹⁹ It is incumbent upon prosecutors

295. BENTHAM, *supra* note 165, at 201.

296. For a description of these devices see, Ford et al., *supra* note 175, at 261.

297. See Gondolf, *supra* note 145, at 200.

298. *Id.*

299. See *id.* at 197. If Dutton and other social scientists are correct, abusers can become suicidal and even homicidal when their partner leaves because they are terrified of being left alone. See DUTTON WITH GOLANT, *supra* note 18, at 103, 111. This can increase the risk of separation assault and homicide. See Mahoney, *supra* note 146, at 65-71 (describing separation assault); see also Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3, 11 (1993) (finding that many spouse killings follow marital separation or assault).

and victim advocates to help keep these offenders' victims safe during the criminal process.³⁰⁰ Furthermore, these offenders likely will continue to be violent with new partners given the serial nature of their battering. Thus, incarceration can also protect potential future victims.³⁰¹

Legislators should develop sentencing guidelines that mandate incarceration when certain factors exist.³⁰² Judges should not have the discretion to allow men who inflict serious injury on their partners, use a deadly weapon, or continue to stalk or harass their victims to remain at large. Although debate continues about the effectiveness and fairness of mandatory sentences, at the very least legislators should provide some guidance to the judiciary as to the appropriate sanctions that ought to be imposed in serious cases.

Abused women face many hurdles in putting their lives back together.³⁰³ Yet, well-intentioned arguments that incarceration against a woman's wishes "disempowers" her are overstated.³⁰⁴

300. See Hart, *supra* note 178, at 107-08 (describing victim advocacy approaches that help keep women safe during the prosecution process).

301. Cf. Ford et al., *supra* note 175, at 249 (predicting future state legislative responses to "habitual batterers").

302. Several states provide examples of mandatory sentencing in domestic violence cases. In Montana, a batterer convicted for assault will be fined not less than \$100 and jailed for no less than 24 hours for a first offense. See MONT. CODE ANN. § 45-5-206(3)(a) (1997). On the second offense, the fine jumps to not less than \$300 and jail time of not less than 72 hours or more than one year. See *id.* On a subsequent conviction, the batterer shall be fined not less than \$500 and serve not less than 30 days. See *id.* California requires incarceration for not less than 96 hours upon a second domestic violence conviction, and not less than one year in a treatment program. See CAL. PENAL CODE § 273.5(f) (West Supp. 1998). Upon a third conviction, the minimum time for incarceration is 30 days. See *id.* § 273.5(g). In Hawaii, violation of a temporary restraining order is a misdemeanor, and upon a first conviction incarceration is required for 48 hours. See HAW. REV. STAT. § 586-4(c) (1993). Upon a second conviction, mandatory incarceration is 30 days. See *id.*

Some commentators have suggested that lawmakers will include the concept of "serial batterers" in the definition of habitual battering to account for new victims of one violent offender. See Ford et al., *supra* note 175, at 249. If this happens, then it is likely that legislators will enact statutes similar to sex offender statutes. See *supra* notes 172-75 and accompanying text.

303. See, e.g., *supra* note 206 and accompanying text (discussing the economic hardships women face during a partner's incarceration).

304. Cf. Evan Stark, *Mandatory Arrests of Batterers: A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 3, at 115, 141-45 (criticizing arguments that mandatory arrest policies "disempower" battered women).

These arguments essentialize women as victims, failing to recognize the resilience and strength that many women find after they are safely away from their abusers. A woman often needs the peace of mind that the defendant will be in jail so that she can start her life anew. Incarceration provides both physical and mental security. Although most offenders will be released after only a brief stay in prison, even short-term reprieve from an abuser can provide the victim with some opportunity to make what changes she needs to make without fear.

Those who see economic loss as equally "victimizing" as physical abuse trivialize and obscure the actual harm and risk of death that result when the most dangerous offenders remain at large. A woman may face short-term financial hardship if her partner goes to jail, but this is no different than if her partner was incarcerated for a drug or property offense. Furthermore, incarceration of a spouse may motivate a woman to be more financially independent, reducing the likelihood that she will stay with an abusive partner for financial reasons. In the long term, hopefully she can gain more confidence in herself and the system.

Jurisdictions should automatically notify victims whose abusers are in jail of parole hearings, furloughs, transfers to community facilities, and discharges from incarceration.³⁰⁵ Women should have the right to participate in parole hearings. When domestic violence victims believe that early parole will jeopardize their safety, prosecutors and advocates can work together to provide the parole board with information before making an early release decision.³⁰⁶

What to do with the children in these cases presents the most difficult challenge to prosecutors and judges. A correlation exists between witnessing violence and becoming a violent adult.³⁰⁷ In the most serious domestic violence cases, there is also a correlation between domestic violence and child abuse; children who grow up in violent homes can be injured or abused by a violent

305. Many states already have laws that require these procedures, *see, e.g.*, PA. STAT. ANN. tit. 71, § 180-9.3 (West Supp. 1997), but most only cover notice to victims of felonious assaults. Furthermore, victims are generally only entitled to this information if they request it from the district attorney. *See, e.g., id.* § 180-9.7.

306. *See Hart, supra* note 178, at 104-05.

307. *See supra* notes 211, 260 and accompanying text.

parent or step-parent.³⁰⁸ Yet, evidence also suggests that children whose parents are incarcerated, or absent from the home, are more likely to be incarcerated themselves.³⁰⁹

One innovative way to ease the impact on children whose parents are incarcerated for spousal abuse is to develop programs like the one developed in the Dade County Domestic Violence Family Court. The court, in partnership with a facility associated with the University of Miami School of Medicine, developed a ten-week, age-specific counseling program for children who have witnessed domestic violence.³¹⁰ Parents learn about the effects of violence on children, and some judges make completion of the counseling by the defendant's children a condition of probation.³¹¹ Although the Dade County Domestic Violence Family Court only handles misdemeanor cases that are diverted to treatment instead of jail, similar programs could be developed for children whose parents are incarcerated as a result of a domestic offense.

4. *Establish Specialized Probation Departments*

Many police departments and prosecutor's offices have specialized domestic violence units.³¹² This trend can be expanded to probation departments. Specialized probation units give higher priority and follow-up in domestic violence cases that normally slip through the cracks.³¹³ Probation officers in these units can continue to work with victims as well as offenders, ensuring that if the defendant recidivates, consequences will follow. They can also assist prosecutors in filing violations of probation charges, thus providing more information through intensified supervision of offenders. Finally, it takes experience to develop the skills

308. *See id.*

309. *See Hirschi, supra* note 212, at 136-37.

310. *See FAGAN, supra* note 3, at 22.

311. *See id.*

312. *See Cahn, supra* note 51, at 171; Hart, *supra* note 178, at 105-08; *see also supra* note 52 and accompanying text (discussing specialized prosecution units).

313. *See Cahn, supra* note 51, at 175-76; *see also FAGAN, supra* note 3, at 11, 16-17 (finding that specialized prosecution units created incentives for vigorous prosecution without competing with other units for scarce resources, allowing prosecutors to focus on the more personalized nature of domestic violence).

necessary to monitor these cases; staffing units with dedicated people facilitates long-term success.

5. *Educate Criminal Justice Personnel*

Prosecutors, judges, and other court personnel need education about domestic violence. Some states mandate judicial education.³¹⁴ But the education rarely includes issues such as batterer typologies, treatment programs, and the different theories that might be used to better understand this phenomenon. Court personnel need more complete information to make better sentencing decisions.

Furthermore, defense counsel should be included in domestic violence education programs. We often overlook the difficult position many private and public defenders are placed in when having to advise clients on guilty pleas and sentence recommendations. Many defense attorneys are concerned with their clients' long-term well-being as well as their short-term acquittal. Bringing defense counsel into the fold is likely to improve coordinated community responses to domestic violence.³¹⁵

6. *Undertake More Collaborative Research Efforts*

Bridging the gap between lawmakers, activists, and the social sciences holds enormous potential for further understanding and ultimately better policies. Interdisciplinary teams can develop and evaluate creative programs.³¹⁶ Funding for research on intervention programs must be adequate.³¹⁷ Studies of treatment

314. See, e.g., WASH. REV. CODE ANN. § 10.99.030(12)(c) (West Supp. 1998) (requiring training for police chiefs on how to deal with domestic violence cases); see also HART ET AL., *supra* note 47, at 99 (encouraging judicial education).

315. See Buel, *supra* note 193 (discussing the involvement of defense counsel in community coordinating councils).

316. See, e.g., PENCE & PAYMAR, *supra* note 92, at 17-19; Gwinn & O'Dell, *supra* note 51, at 304; Hanna, *supra* note 2, at 1897-98; Salzman, *supra* note 56, at 338-53. For example, on March 21, 1997, Vermont Law School sponsored a conference with the Schweitzer Fellowship Program that brought together various experts in and around the state of Vermont to discuss the community impact of domestic violence, including efforts between medical and legal personnel. See Royal Ford, *Leaving the Road Behind: Vt. Woman Quits Trucking to Aid the Fight Against Abuse*, BOSTON GLOBE, Mar. 16, 1997, at B1, available in 1997 WL 6245785.

317. See FAGAN, *supra* note 3, at 34-35.

programs should be longer and broader in scope; random assignments with control and comparison groups are vital to meaningful research in this area.

One reason for the inadequate knowledge base about violence or its interventions has been the traditionally low level of funding for violence research. Reductions in violence, like progress in the fight of disease and technological advancement, will begin when there are investments in knowledge development commensurate with the urgency of the problem.³¹⁸

Although grants under VAWA will certainly aid in this effort,³¹⁹ whether the funding for research and interventions will be adequate to make a long-term difference remains to be seen. In particular, a randomized study that assigns abusers to different punishments is vital before we continue to put faith in treatment. We also need better evaluations of treatment programs, measuring both short- and long-term recidivism rates. Finally, we should not be afraid to ask what information the medical community might offer about the relationship between chemical addiction and other neurological conditions that might influence violent behavior.

In addition, lawmakers need to pay more attention to good social science research and become more comfortable sifting through data before instituting politically promising policies. At the same time, academics need to write about their findings in such a way that is accessible to the general public. Much of the current research is coded in technical language, making it difficult for lawmakers to put to use. To build the bridge among dis-

318. *Id.* at 47 (citations omitted).

319. The Violence Against Women Act authorizes grants to fund state domestic violence coalitions that further the purpose of domestic violence intervention and prevention through activities such as "the adoption of aggressive and vertical prosecution policies." 42 U.S.C. § 10410(a)(2)(E) (1994). Furthermore, the federal government makes available "Model State leadership grants" to 10 states that have statewide policies that "authorize and encourage prosecutors to pursue cases where a criminal case can be proved, including proceeding without the active involvement of the victim if necessary; and . . . implement model projects that include either . . . a 'no-drop' prosecution policy; or . . . a vertical prosecution policy." *Id.* § 10415(b)(3)(A)-(B).

ciplines we need to listen and speak a more common language.

We are a nation obsessed with violence and deeply troubled by the breakdown of the American family. We continue to restructure social institutions to promote opportunities for women. Domestic violence stands in the way of achieving these goals. If we are committed to social policies that keep us safer, help families stay together, and provide women with more freedom, then we have to make some hard choices about how aggressively we want to fight this problem, and we have to live with the costs as well as the benefits of those decisions.

IV. CONCLUSION

This Article suggests that those responsible for the solutions to domestic violence have much to learn from each other before claiming to have found "the answer." As the criminal justice system's misguided preference for batterer treatment as "punishment" illustrates, until we can distinguish among men, we risk overpoliticizing domestic violence and foregoing opportunities to develop a richer understanding of intimate violence. Interdisciplinary insights and close attention to both empirical and descriptive data can illuminate our search for punishment alternatives that serve both social goals and the particulars of each case.

I am not prepared to abandon my optimism that we can make a difference. The criminalization of domestic violence plays a crucial, albeit not solitary, role in curbing family violence. Like any solution to a problem as complex as battering, progress will have its price. If we institute more comprehensive risk assessments along with more aggressive arrest and prosecution policies, then we are likely to find that more men are incarcerated rather than treated. Some jurisdictions may not pursue minor cases, concentrating resources on the serious ones. Batterer treatment programs as we now know them may no longer be the preferred punishment alternative. Women victimized by violence may find themselves struggling economically and emotionally if their partners go to jail. Children in these homes face a no-win situation. All of these strategies will require an investment of time and resources. And there are no guarantees that in every case we can ultimately deter violence and keep women safe.

Nevertheless, we must be honest. All men are not alike. Some

can and want to change their behavior through some form of treatment. Others cannot or will not change. As we continue to struggle to do the right thing, we ultimately have to accept the paradox of hope.