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When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism

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WHEN COURTS COLLIDE: INTEGRATED DOMESTIC VIOLENCE COURTS AND COURT PLURALISM

Elizabeth L. MacDowell*

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ABSTRACT

This Article proposes court pluralism as a new theory for analyzing the role of the justice system in addressing domestic violence. It argues that a systemic view of the justice system is essential to developing coherent reform strategies, and lays out the foundation for taking into account the unique functions of civil and criminal justice in domestic violence cases. In doing so, the Article challenges the one-dimensional characterization of a fragmented court system as bad for victims of domestic violence that dominates legal scholarship, and shows that court fragmentation can be an opportunity and potential source of protection from systemic problems in the justice system. This more complete understanding of the significance of fragmentation in the justice system is especially important given current efforts to merge essential civil and criminal court functions within single, integrated domestic violence courts. The Article explores claims for integrated courts and argues that the value of court pluralism is overlooked.

Part I introduces the problem of integrated courts in a pluralistic court system. Part II examines the normative function of criminal courts in relation to domestic violence cases and contrasts the remedies available to victims in criminal and civil courts. Part III critiques the rationale for integrated domestic violence courts from the standpoint of litigation strategy, and identifies alternative avenues for system reform. This Part also examines the ways in which integrated courts compromise the autonomy-enhancing functions of civil courts.

Part IV shows that despite the advantages of civil courts for victims, the characterization of civil justice as relatively unproblematic is inaccurate, and revisits the normative role of the criminal courts. This Part demonstrates that the functionality of criminal courts is compromised by persistent process failures in dealing with domestic violence, and shows both the synergy between defendants' rights and victims' needs, and the inadequacy of evaluating domestic violence policies without taking court pluralism into account. This Part argues that, given the risks and lack of benefits to victims of integrating criminal and civil court functions, this reform strategy should be reconsidered in light of its impact on court pluralism.

Part V, the conclusion, urges reformers to work to identify and improve the distinct functionalities of civil and criminal courts for victims of domestic violence while maintaining the benefits of court pluralism, and identifies priorities for future research.

I. INTRODUCTION

Specialized domestic violence courts that integrate criminal and civil functions are often suggested by reformers as a way to improve court-based approaches to the problem of domestic violence.¹ These reformers argue that a fragmented court system, in which a single incident of domestic violence can spawn multiple civil and criminal actions, makes it difficult for victims to access important legal remedies and leads to conflicting court orders, endangering victims and allowing perpetrators to evade accountability.² Specialized, integrated domestic violence courts are purported to solve these problems by consolidating, to the greatest extent possible, civil and criminal dockets relating to domestic violence, with the paradigmatic integrated court assigning all related civil and criminal cases to a single judicial officer.³ However, reformers fail to show that integrating criminal and civil courts is necessary to solve problems identified with multiple forums. Moreover, recommendations for integrated domestic violence courts often ignore the fundamentally different purposes and characters of criminal and civil courts.

Broadly speaking, criminal courts are traditionally concerned with

1. See, e.g., Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L. J. 197 (2008); Lynn A. Combs, *Between a Rock and a Hard Place: The Legacy of Castle Rock v. Gonzales*, 58 HASTINGS L.J. 387, 410-11 (2006); Hon. Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981 (2004); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 40 (2000); Hon. Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000) [hereinafter *Judicial Paradigms*]; Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999). New York state is considered the leader in the integrated court movement, with at least 29 integrated court locations as of 2007. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., NEW YORK STATE DOMESTIC VIOLENCE COURTS FACT SHEET (Jan. 2, 2007), available at <http://www.criminaljustice.state.ny.us/ofpa/domviolcrtfactsheet.htm>.

2. See, e.g., Epstein, *supra* note 1, at 23-28. See also, Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L. J. 613, 637 (2004-05) (asserting that “[I]ack of communication among various systems impedes batterer accountability”).

3. See, e.g., Epstein, *supra* note 1, at 29 (describing integrated domestic violence courts as “typically . . . coordinat[ing] civil protection order, family law, and criminal dockets so that the court can handle cases, to the greatest extent possible, on a ‘one family, one judge’ basis.”); Goodmark, *Achieving Batterer Accountability*, *supra* note 2, at 637 (arguing that domestic violence courts improve batterer accountability by “bringing all of the information and services about and for the batterer within the jurisdiction of one judge (or set of judges)”).

accountability to social norms rather than individual needs.⁴ As such, they serve a powerful educative function that is strengthened by the application of consistent policies and procedures.⁵ The significance of applying these principles to domestic violence—a major social problem that was by turns condoned or disregarded by the American justice system until the latter part of the twentieth century—has been especially profound, although subject to controversy and critique from both within and outside the feminist anti-domestic violence movement.⁶

While civil courts may share the norm-setting function of criminal courts with respect to domestic violence,⁷ in contrast to the criminal justice system, the civil system is characterized by relative flexibility and individual discretion.⁸ Unlike criminal courts, where state interests

4. See, e.g., Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L. J. 457, 466-67 (2006) (describing criminal justice as an affirmative expression of social norms); William F. McDonald, *The Role of the Victim in America*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS, 295, 295-96 (Randy E. Barnett & John Hagel, III eds., 1977) (arguing that the criminal justice system exists for the benefit of the community rather than the victim); Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 441 (acknowledging criminal justice “serves the community’s interests in deterring and punishing crime”). Cf., Paul G. Chevigny, *From Betrayal to Violence: Dante’s Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 815 (2001) (arguing that “the criminal justice system responds to harms that seriously damage individuals because those harms cannot be satisfied through the system of civil justice, and because there is a popular political outcry against officials if they do not respond”).

5. See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1333 (1991) (describing criminal proceedings as a reaffirmation of moral rules); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1897-98 (1996) (discussing the normative effects of state responses to domestic violence); Epstein, *supra* note 1, at 23 (observing that “[a] criminal prosecution culminating in a conviction sends a powerful message—to the individual batterer and to the larger community—that the civil justice system cannot replicate”). See also, CAL. PENAL CODE § 243(e)(4) (West 2003) (stating that “[t]he Legislature finds and declares that [crimes against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant’s child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship] merit special consideration when imposing a sentence so as to display society’s condemnation for these crimes of violence upon victims with whom a close relationship has been formed”).

6. See *infra* Part II (discussing critiques of a more aggressive criminal justice response to domestic violence).

7. See, e.g., Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 122 (2005) (observing that civil remedies, like criminal prosecutions, bring domestic violence into a public forum and utilize state power to “send a message to abusers that domestic violence is unacceptable”). See also, Cheh, *supra* note 5, at 1404-05 (discussing civil protective orders as a civil-criminal hybrid).

8. See, e.g., Sarah E. Warne, *Rocks, Hard Places, and Unconventional Domestic*

generally govern, civil courts are accessed voluntarily by victims of domestic violence, who determine when and how to present their cases and what remedies to seek within the confines of the law.⁹ On the other hand, the individualistic bent of civil court lends itself to less formal legal procedures, especially in the family courts where victims will most likely seek assistance, and to a de-emphasis of accountability for perpetrators.¹⁰

From the perspective of victims of domestic violence, the fundamentally different cultures and functions of the criminal and civil courts each carry their own advantages and pitfalls. Integrating these courts into a single, specialized domestic violence court will inevitably alter the nature of each. Integration, then, raises a number of important questions, including: Which court features will predominate and to what effect? To the extent each court system offers potential advantages and pitfalls, will integrated courts be an improvement, or will the strengths of each be compromised or lost? Moreover, are these risks worth taking?

In the absence of uniform practices or reliable data on existing integrated courts, exploring these questions requires analyzing both the ideals and the drawbacks of both systems.¹¹ Recent legal scholarship continues a tendency to focus on critiques of the criminal justice system's response to domestic violence,¹² failing to ask the crucial question: as compared to what? Problems experienced by victims of domestic violence in civil forums have been extensively documented.¹³ But problems beyond

Violence Victims: Expanding Availability of Civil Orders of Protection in New York, 52 N.Y.L. SCH. L. REV. 279, 284-289 (2007-2008) (contrasting the discretion available to domestic violence victims seeking civil protective orders with criminal remedies); Smith, *supra* note 7, at 120 (explaining the choices available to the victim in a civil proceeding). Cf., Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1127 (2009) (stating that the decision whether or not to petition for a civil protective order is an important act of agency for an abuse victim).

9. Smith, *supra* note 7, at 120.

10. See *infra* Part IV (describing the delegalized culture of family courts).

11. See Hon. Donald E. Shelton, *The Current State of Domestic Violence Courts in the United States* 3 (Feb. 23, 2007) (unpublished paper), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=donald_shelton (observing there is no central or comprehensive source of information about specialized domestic violence courts).

The questions raised in this Article may also be challenging to answer empirically, as they are aimed at issues of court culture and function rather than case outcomes. See *infra* Part V (suggesting qualitative methods be employed to study specialized courts).

12. For example, on June 25, 2011, a Westlaw search for law review articles discussing mandatory arrest policies in domestic violence cases yielded 830 articles.

13. See, e.g., WELLESLEY CENTERS FOR WOMEN BATTERED MOTHERS' TESTIMONY PROJECT, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 2 (Nov. 2002) (reporting a pattern of human rights abuses against women and children in family courts, including discounting evidence of abuse and granting child custody to batterers); ARIZONA

those purportedly relating to court fragmentation are rarely acknowledged by advocates of integrated courts.¹⁴ Other scholars have idealized civil forums for the relative autonomy and choice available to victims seeking resolution of their legal claims.¹⁵ Both perspectives obscure the costs victims of domestic violence suffer as a result of the relative informality of civil forums such as family court.¹⁶ Conversely, proponents of integrated courts have not acknowledged the complex ways in which court integration compromises the features of civil courts identified as beneficial to victims.¹⁷ As a result of these deficiencies, current scholarship fails to consider whether integrated domestic violence courts may worsen rather than improve court-based responses to domestic violence. This Article is a preliminary effort to provide that missing analysis. More broadly, it seeks to build from the uncontroversial notion that civil and criminal courts perform distinct functions with regard to domestic violence a new theory of court pluralism and a more robust basis from which to engage in court-based domestic violence policy reform.

Part II of this Article provides a brief overview of the history of the criminal justice response to domestic violence and examines the normative function of criminal courts in relation to domestic violence cases in greater

COALITION AGAINST DOMESTIC VIOLENCE, BATTERED MOTHERS' TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE 6 (June 2003), available at

http://www.stopfamilyviolence.org/sites/documents/0000/0035/AZ_bmtpr_report.pdf (reporting that family courts ordered sole or joint custody to perpetrators in up to seventy-four percent of domestic violence cases surveyed). *See also* Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 657, 662 n.19 & appendix (2003) (reporting informal survey findings in 2002 showing that, of a total of thirty-eight appellate state court decisions involving custody and domestic violence, thirty-six awarded joint or sole custody to alleged or adjudicated batterers). *See also infra* Part IV (discussing the ways in which victims' access to civil court remedies for domestic violence is constrained by court culture and citing studies).

14. For an exception to the rule, *see* Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CTR. FOR FAM., CHILD. & COURTS 23, 26-27 (2000) (discussing ways in which family courts are guided by principles that may conflict with victim safety and batterer accountability). *See also, id.* at 29 (discussing the dangers of specialized domestic violence courts). However, Weber fails to consider how combining civil and criminal court functions in a domestic violence court might impact either system.

15. *See, e.g.,* Warne, *supra* note 8, at 284 (arguing that the civil system gives victims nearly complete control over their cases); Smith, *supra* note 7, at 122 (claiming that the interests of the state and the victim are better aligned in the civil system). *But see* Johnson, *supra* note 8, at 1138-53 (describing ways in which a limited definition of domestic violence, embodied in civil protection order statutes, harms victims).

16. *See infra* Part IV (describing a family court culture that fails to adequately protect victims of domestic violence and their children).

17. *See infra* Part III (showing how integrated courts threaten to undermine features of civil courts that are recognized as autonomy-enhancing for victims of domestic violence).

detail. This Part also sets out the remedies available to victims of domestic violence in a pluralistic court system that provides criminal and (often multiple) civil forums in which victims may seek relief.

Part III examines the rationale for integrated domestic violence courts based on characterization of the court system as “fragmented” and the resulting call to provide victims with “one-stop shopping.” By analyzing the assumptions underlying this rationale, this Part shows that integrating courts is unnecessary to effectively address problems purported to follow from the existence of multiple courts, and may actually worsen court conditions for victims. Next, this Part shows how civil courts may function as an alternative to criminal justice, providing greater choice than do criminal courts and enhancing the autonomy of victims of domestic violence. This Part also shows the ways in which integrated courts compromise those autonomy-enhancing functions.

Part IV shows why scholars’ characterization of civil courts as relatively unproblematic is inaccurate. This Part shows that civil courts remain a troublesome forum for victims trying to resolve legal problems that arise from abusive relationships due to the pervasive lack of accountability enjoyed by perpetrators in civil systems. In this context, the importance of the normative role of the criminal courts comes back to the fore. However, as this Part demonstrates, the functionality of criminal courts is compromised by a lack of procedural justice for defendants and the paradoxical benefits and burdens that are created as a result. While receiving comparatively little attention from legal scholars,¹⁸ the persistent process failures of criminal courts in dealing with domestic violence show both the synergy between defendants’ rights and victims’ needs in the context of a pluralistic court system, and the inadequacy of evaluating domestic violence policies without taking court pluralism into account.

Part V concludes that, given the risks and lack of benefits to victims of integrating criminal and civil court functions, this reform strategy should be abandoned. This Part urges reformers to work to identify and improve the distinct functionalities of civil and criminal justice while maintaining the benefits of court pluralism, and sets out an agenda for future research.

18. As observed by Professor Tamar M. Meekins, in the context of laudable reform goals, “few have ventured to comment on the abandonment of the notion of adversarial justice” that has tended to accompany the shift to specialized domestic violence criminal courts. Tamar M. Meekins, “*Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*,” 40 SUFFOLK U. L. REV. 1, 6-7 (2006).

II. DOMESTIC VIOLENCE REMEDIES IN A PLURALISTIC COURT SYSTEM

A. *Criminal Courts and Domestic Violence*

It is difficult to overstate the importance—simultaneously symbolic and material—of the criminal justice system’s normative functions in the context of domestic violence. Although a complete history is beyond the scope of this Article, a brief overview of the state response is helpful in illustrating the criminal justice function.

As is oft recounted, state responses to domestic violence in the United States have evolved from “overt legal approval” of violence against married women by their husbands at the country’s founding, to toleration by police and courts of such abuse from the mid-nineteenth century until the 1970s and the advent of the modern battered women’s movement.¹⁹ Still, conditions for victims seeking help from law enforcement and the courts were not much improved as late as 1980, when a report on domestic violence by a United States Commission on Human Rights found that American police departments and courts still relegated American women “to a status as second-class citizens in the eyes of the law.”²⁰

The latter part of the 1980s and the 1990s saw some improvement in

19. See, e.g., Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661-74 (recounting the history of American domestic violence policy from colonial times to the 1990s). Legal approval derived from the common law doctrine of coverture, under which a woman’s legal identity was subsumed within her husband’s upon marriage, and gave rise to the husband’s right to physically correct or “chastise” his wife. See Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 Geo. Wash. L. Rev. 582, 597-98 (1996) (describing the common law principle of coverture). For more detailed historical accounts of domestic violence policy in the United States, see Linda Gordon, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960* (1988); Elizabeth Pleck, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987). For critiques of historical accounts relying on common law doctrines of coverture and the right of chastisement on the one hand, and marital privacy on the other, to account for all intimate partner violence, see Goldfarb, *supra*, at 601-03, and sources cited therein (describing why these constructs cannot fully account for intimate partner violence in black, and gay and lesbian communities). See also, Reva B. Siegel, “*The Rule of Love; Wife Beating as Prerogative and Privacy*,” 105 YALE L.J. 2117 (1996) (examining the paradoxical consequences of status reform with regard to marital relations and domestic violence, including the ways in which the erosion of the right to chastisement reinforced both gender and class hierarchies).

20. GAIL GEREBENICS ET AL., U.S. COMM’N ON CIV. RTS., UNDER RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE i-ii (1982), available at <http://www.eric.ed.gov:80/PDFS/ED213812.pdf>.

the criminal justice response through the advent of more aggressive policies, including mandatory arrest and pro-prosecution policies.²¹ These advances remain tentative and incomplete for many reasons, including their limited applicability outside the context of heterosexual intimate violence involving victims who conform to an elusive ideal.²² Nonetheless, the improved enforcement of anti-domestic violence laws is credited with removing violence against intimates from the realm of conduct outside the purview of the state and recasting it as a social problem and conduct subject to state sanction. To the extent that criminal justice policies against domestic violence are actually implemented,²³ they send a powerful social message that domestic violence is unacceptable²⁴ and help to ensure the safety of victims.²⁵ In this context, the adoption of clear, aggressive, and consistently applied criminal court processes are viewed as essential to providing victims “fair and equal protection under the law.”²⁶

21. Sack, *supra* note 19, at 1669-74. *See also* Hanna, *supra* note 5, at 1861-63 (describing pro-prosecution policies including “hard” and “soft” no-drop prosecution).

22. *See, e.g.*, Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 82-92 (2008) (describing the paradigmatic female victim of domestic violence as passive, white, and heterosexual) and Goldfarb, *supra* note 19, at 587-89 (describing how construction of domestic violence from heterosexual experience renders violence in homosexual relationships unrecognizable).

23. Sack, *supra* note 19, 1697-98 (detailing ongoing problems of under-enforcement of domestic violence laws, including low proportions of domestic violence arrests and high proportions of arrests that are not prosecuted, even in cities with mandatory arrest and no-drop prosecution policies).

24. *See, e.g.*, Hanna, *supra* note 5, at 1897; Epstein, *supra* note 1. *See also*, CAL. PENAL CODE § 243(e)(4) (West 2008).

25. *See, e.g.*, Hanna, *supra* note 5, at 1893-94 (describing a more than twenty-three percent decrease in domestic violence homicides in San Diego following the inception of an aggressive prosecutorial strategy in that city in 1984 through 1994, along with decreased re-arrest and re-prosecution rates). *See also* Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 30 (2000) (stating that “[w]ithout legal intervention, many non-fatal [domestic violence] incidents escalate into more serious incidents”); Epstein, *supra* note 1, at 23 (noting that in some cases incarceration of the perpetrator may be the only way to ensure the victim’s safety). Criminal justice interventions may also protect “collateral” victims of the violence, including children, and disrupt the destructive intergenerational impacts of domestic violence. *See* LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT* 37-42 (2002) (describing the effects on children of exposure to domestic violence). In addition, like prosecution of other violent crimes, aggressive prosecution of domestic violence may protect other, future victims of the same or other crimes committed by the perpetrator. *See id.* at 19 (explaining that batterers tend to abuse multiple partners); *Judicial Paradigms*, *supra* note 1, at 139 n.2 (pointing out that perpetrators of domestic violence are not necessarily specialists but include criminals with long records of prior offenses).

26. Hanna, *supra* note 5, at 1898.

i. Remedies Available in Criminal Courts

In addition to the imposition of a sentence including jail or prison time,²⁷ criminal courts may order a defendant convicted of a domestic violence crime to attend a batterer treatment program, obtain treatment for drug or alcohol dependency, and pay restitution to the victim.²⁸ Additional remedies pending trial, and/or as a condition of sentence or probation, include orders prohibiting the defendant from engaging in further acts of violence and harassment against the victim and other specified persons, requiring the defendant to surrender firearms, excluding the defendant from the family residence, and limiting the defendant's contact with protected parties.²⁹ Ten states and the District of Columbia also permit inclusion of pets on protective orders.³⁰

ii. Benefits and Drawbacks for Victims

As noted earlier, there are broad social benefits from the criminal justice system's normative and educative functions. In addition, the specific remedies listed above benefit individual victims by, for example, providing for physical separation from the perpetrator through

27. See, e.g., CAL. PENAL CODE §§ 243(e) & 273.5 (West 2008) (describing time in county jail (up to one year) and state prison (two to four years) that may be imposed upon conviction for domestic violence crimes).

28. See, e.g., CAL. PENAL CODE § 1203.097 (West 2009) (mandating successful completion of batterer treatment for individuals convicted of domestic violence offences, and authorizing orders for treatment of chemical dependency, and for restitution, as conditions of probation in domestic violence cases). More controversially, some courts order defendants charged with domestic violence crimes to attend batterer treatment pending trial. See ROBERT V. WOLF ET AL., CTR. FOR CT. INNOVATION, PLANNING A DOMESTIC VIOLENCE COURT: THE NEW YORK STATE EXPERIENCE 8-11 (2004), available at http://www.courtinnovation.org/_uploads/documents/dvplanningdiary.pdf (discussing the court's use of batterer intervention programs as a condition of bail in order to facilitate judicial monitoring of alleged batterers).

29. See, e.g., CAL. PENAL CODE § 136.2 (West 1999) (authorizing issuance of a criminal protective order in a pending domestic violence case) and CAL. PENAL CODE § 1203.097 (West 2009) (authorizing issuance of criminal protective order). See also California Judicial Counsel Form CR-160 Criminal Protective Order—Domestic Violence (rev. Jan. 1, 2009) (incorporating statutory provisions).

30. Phil Arkow & Tracy Coppola, *Expanding Protective Orders to Include Companion Animals*, AM. HUMANE, <http://www.americanhumane.org/assets/pdfs/interaction/hab-link-ppo-companion-animals.pdf> (last visited Apr. 5, 2011) (compiling legislation). States currently permitting protection of pets are California, Colorado, Connecticut, Illinois, Louisiana, Maine, Nevada, Tennessee, and Vermont. *Id.* at 2. For information on the relationship between domestic violence and animal abuse, see Frank R. Ascione et al., *Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women*, 13 VIOLENCE AGAINST WOMEN 354 (2007).

incarceration or stay-away orders, and by requiring a defendant to obtain treatment. Moreover, in contrast to the civil system, these remedies are sought and obtained by the state using state resources. Victims who cannot afford an attorney to assist them in a civil court action may especially benefit from access to free, summary, and effective processes of criminal law.³¹

The role of the state in criminal prosecution may also benefit victims in other, more complex ways. The fact that decisions about whether to prosecute are made independently of the victim's wishes in some jurisdictions is a benefit to victims who are pressured to "drop" charges by perpetrators and family members regardless of their desire for the case to proceed.³² Some victims who are otherwise ready and willing to see the perpetrator arrested and prosecuted may benefit from the state taking responsibility for those decisions for other reasons. For example, taking direct action that may lead to incarceration of another person with whom one shares a connection that may include love, children, and/or other family and community ties, might be perceived by the victim as a betrayal of personal or group values.³³ For members of minority communities who

31. For an early argument to this effect from a Progressive-era reformer, see Reginald Heber Smith, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO THE LEGAL AID WORK IN THE UNITED STATES* (1919) (arguing criminalization of family-related crimes improved the position of women before the law by eliminating barriers to justice present in civil court such as costs and delay). See also Judith Wittner, *Reconceptualizing Agency in Domestic Violence Court*, in *COMMUNITY ACTIVISM AND FEMINIST POLITICS: ORGANIZING ACROSS RACE, CLASS, AND GENDER* 81, 87 (Nancy A. Naples ed., 1998) (reporting that women using domestic violence court are mostly without resources and have no choice but to rely on public agencies for assistance in escaping violent relationships). The speed as well as the nature of relief available in the criminal courts may, however, vary by jurisdiction. Compare Epstein, *supra* note 1, at 24 n.114 (noting delays in prosecution of domestic violence offences in the District of Columbia of up to six months) with WOLF ET AL., *supra* note 28, at 5-6 (identifying procedures for swift judicial action in domestic violence cases as a key court component).

32. Of course, victims may be pressured to oppose prosecution regardless of prosecutorial policies. For example, clients whom I have represented in domestic violence cases have reported overt pressure from relatives to "drop" criminal charges against the perpetrator, including daily phone calls and emails, threats of retaliation, and, in one instance, provision of a written script of what to say to the prosecutor in order to convince him to drop the case, despite prosecutorial policies that did not formally take victim wishes into account. See also Keith Guzik, *The Agencies of Abuse: Intimate Abusers' Experience of Presumptive Arrest and Prosecution*, 42 *LAW & SOC'Y Rev.* 111, 124-26 (2008) (describing the efforts of domestic violence criminal defendants subject to presumptive prosecution to influence their abused partners in order to gain more control over their case). However, such policies do shield the victim from direct responsibility for the decision to prosecute.

33. In a recent case, a client called me to report her husband's location so that he could be arrested for outstanding bench warrants related to criminal domestic violence charges.

experience mistreatment by criminal justice authorities, or who are subject to deportation, the feeling of betrayal may be particularly great.³⁴ Mandatory arrest and prosecution policies can shield victims from direct responsibility for decisions to arrest and to prosecute by camouflaging, but not requiring, victim cooperation.

Despite these benefits to victims, the criminal justice response to domestic violence has been the target of intense criticism. Numerous legal scholars argue that the criminal justice process is overly focused on the perpetrator—both in terms of its emphasis on punishment and on procedures designed to protect defendants' constitutional rights—at the expense of victims' immediate concerns about safety and economic survival, perpetrator rehabilitation, and family (re)unification.³⁵ In this context, policies that deny victims control over the decision whether to arrest or prosecute domestic violence criminal offences have been

When I asked her why she had not called the police herself, she responded that she was not comfortable “making that call,” and preferred that I call the police instead.

34. See, e.g., Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in LatCrit Theory and Praxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1048 (2000) (observing that the risk of an undocumented partner being deported, as well as a fear of being deported herself if she is undocumented, may lead a victim to fear calling the police for help); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (asserting a general unwillingness of people of color to subject their private lives to intrusion by a frequently hostile state). See also, Elizabeth L. MacDowell, *When Reading between the Lines is Not Enough: Lessons From Media Coverage of a Domestic Violence Homicide-Suicide*, 17 AM. U. J. GENDER SOC. POL'Y & L. 269, 286-88 (2009) (discussing the ways in which post-colonial Indian nationalism interacts with the immigration experiences of Asian Indians in the United States, such that revealing domestic abuse is perceived as a betrayal of culture by Asian Indian victims and their communities). But see Leslye E. Orloff et al., *Recent Development: Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 67-70 (2003) (reporting survey findings suggesting that while the victim's immigration status is a significant factor in predicting likelihood of calling for police assistance with domestic violence, the perpetrator's status was not significant); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 438-41 (2003) (discussing mixed findings in studies regarding victim calls to 911 and the limitations of current approaches to researching the problem).

35. See, e.g., Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 610 (1999) (critiquing the use of mandatory intervention in domestic violence as potentially jeopardizing the victim's long-term safety and ability to heal). Cf. Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 471 (2003) (acknowledging that aggressive prosecution is flawed, but at the present time is the most effective way to deal with domestic violence).

characterized as undermining victim safety and autonomy.³⁶ Related prosecution strategies for trying domestic violence cases without victim participation (“victimless prosecution”) have also been criticized for further eliminating victims’ voices from the courtroom.³⁷ Many scholars also note the differential impact of these issues on the poor and communities of color, who are more likely to be subject to criminal justice procedures.³⁸ These scholars argue that the victim’s opinion about which steps to take should be incorporated into the criminal justice decision-making process for material, as well as therapeutic reasons.³⁹

In this context, civil courts emerge from critiques of criminal justice as advantageous due to the comparative as well as complimentary benefits that civil remedies and procedures can provide for victims. The likelihood that victims will need to access this system in addition to, or instead of, criminal justice fuels arguments for integrated courts.

B. Civil Courts in Contrast to Criminal Courts

Remedies available in civil courts may supplement criminal justice in ways that may be both additive and complementary.⁴⁰ In addition to stay-away orders, conduct orders, and criminal protective orders for batterer treatment, civil protective orders typically allow for detailed orders regarding custody and visitation of children.⁴¹ Civil protective orders may

36. See, e.g., Mills, *supra* note 35, at 554-55.

37. See Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 B.Y.U. L. REV. 1, 33-43 (describing negative consequences of eliminating victim participation in domestic violence prosecutions).

38. See, e.g., Coker, *supra* note 34, at 1042-49 (discussing risks of pro-arrest policies for poor Latina victims of domestic violence, including risk of arrest, police abuse, increased state intervention into personal life, and deportation); Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 323-24 (2005) (discussing the ways in which even seemingly neutral criminal justice procedures, and their impacts on minority communities, cannot be understood outside the context of racism). See generally, DAG MACLEOD ET AL., CAL. ADMIN. OFFICE OF THE COURTS, BATTERER INTERVENTION SYSTEMS IN CALIFORNIA: AN EVALUATION 54-55 (2009), available at <http://www.courts.ca.gov/xbcr/cc/batterer-report.pdf> (finding that men sentenced to batterer intervention programs in California have disproportionately low levels of educational attainment, and are disproportionately poor and Hispanic).

39. See, e.g., Coker, *supra* note 34, at 1020 (arguing that with adequate resources, women can decide a course of action that better meets their needs). Some scholars also critique criminal justice strategies on more philosophical grounds. See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 823-24 (2007) (arguing that criminalization and conservatization of the domestic violence movement has reinforced society’s patriarchal attitude towards women).

40. See Cheh, *supra* note 5, at 1342-43 (discussing civil injunctive relief, including in domestic violence cases, as a supplement and alternative to criminal justice).

41. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered*

also provide additional economic relief beyond restitution, including child and spousal support and payment of household or other bills. Civil courts can also address broader legal issues of the relationship, including dissolution of marriage or domestic partnership, division of property, and parentage of children. There may also be actions in tort for damages connected to the abuse available in civil, but not criminal, courts.⁴²

Some forms of temporary relief may also be available more quickly in civil court. Temporary orders of protection often may be obtained on the same day an application is made, and in some cases may be issued without notice to the restrained party.⁴³ Orders available after notice and a hearing usually require only several weeks' notice, and orders shortening time for notice may be available if adequate supporting facts can be alleged.⁴⁴

The distinctions between the relief available in civil, as opposed to criminal, forums can be overstated. For example, although criminal courts do not normally adjudicate child custody and visitation, a criminal court can protect child witnesses and victims by including them as protected persons in criminal protective orders.⁴⁵ When bench officers in criminal courts defer to family courts and fail to exercise their discretion to make these orders, they arguably thwart what is for victims a key advantage of the criminal justice system, throwing state responsibility for protecting the public back onto the victim. This is, however, a matter of practice and not a result of a limitation on the court's authority to act.

Differences in the timeliness of relief available can also be overstated. For example, although limited relief may be available in civil court on an

Women: An Analysis of State Statutes and Case Law, 21 HOFSTRA L. REV. 801, 910-1006 (1993) (describing remedies available under civil protective orders in various states). In some states civil protective orders may remain in effect longer than criminal orders, as well. For example, civil protective orders issued under California's Domestic Violence Prevention Act can be renewed permanently upon request after an initial term of up to five years. CAL. FAM. CODE § 6345(a) (West 2009 & Supp. 2011). See also Klein & Orloff, *supra*, at 1085-88 (describing duration of various states' civil protective orders, from a period of one year to an indefinite duration).

42. See, e.g., CAL. CIV. CODE § 1708.6(a) (West 2009) (providing that an individual can be liable for domestic violence in tort once specific elements are satisfied). See also Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 507 (1995) (observing that civil remedies for torts involving gender-based violence are available in several states and the District of Columbia).

43. See Klein & Orloff, *supra* note 41, at 1031-42; CAL. FAM. CODE §§ 240-246 (West 2004).

44. See, e.g., CAL. FAM. CODE § 242 (West 2004) (providing that a temporary protective order shall be made returnable in no more than twenty five days); CAL. FAM. CODE § 243(f) (West 2004) (providing that the Court, on either the applicant's motion or its own motion, can shorten the time for notice).

45. See, e.g., CAL. PENAL CODE § 136.2 (West 1999) (authorizing criminal courts to make orders for the protection of victims and witnesses of crime, and the children of victims and witnesses).

expedited basis pursuant to an ex parte application for an order of protection, a pending criminal case arising from the same facts may delay a full hearing on the civil matter until the criminal matter concludes—effectively mooting the timeliness distinction for orders relating to economic issues, including child and spousal support and bill payment.⁴⁶ In addition, the availability of orders for economic relief is relevant only to that subset of victims whose spouse or co-parent has funds obtainable through such orders.

Nonetheless, civil remedies are obviously different in character and type than criminal remedies. Victims subject to criminal abuse may in fact need to access the civil system instead of, or in addition to, the criminal system for economic or other legal issues arising from and collateral to an abusive relationship. Moreover, civil remedies not only complement criminal remedies, they may also provide a forum for redress of abuse that does not rise to the level of a cognizable crime, including non-physical abuse such as emotional and economic abuse.⁴⁷ In addition, the lower burden of proof in civil actions may allow redress for criminal abuse that a prosecutor determines cannot be proven beyond a reasonable doubt.⁴⁸

As advocates of integrated courts point out, victims of domestic violence may therefore find themselves in multiple courts dealing with legal problems arising from the same set of facts—a situation that may be complicated by the multiplicity of civil forums adjudicating family law matters in some jurisdictions.⁴⁹ The difficulties that arise from this situation are the basis for arguments for integrated courts as a way to

46. In my experience litigating domestic violence-related matters in civil court, judicial officers are very reluctant to go forward with a civil case while a criminal case is pending due to concern for the criminal defendant's right to avoid self-incrimination. *But see* Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 54-55 (2000) (reporting that some states limit the number of continuances permitted in civil protection hearings, and at least one state provides that the civil case cannot be used as evidence in the criminal case in an effort to address this problem).

47. *See* Cheh, *supra* note 5, at 1406 (observing that civil protection orders can prohibit non-criminal conduct even though such orders may be enforceable with criminal penalties). *But see* Johnson, *supra* note 8, at 1138 (explaining that only one-third of states provide a civil remedy for abuse absent a threat of physical violence).

48. *See* Cheh, *supra* note 5, at 1405 (describing the importance of civil protective orders in cases where prosecution is impractical or unlikely); Smith, *supra* note 7, at 119 (observing that the lower standard of proof required for civil protection orders permits victims who lack sufficient evidence to support a criminal order the ability to obtain redress).

49. *See, e.g.*, Epstein, *supra* note 1, at 21 (explaining that a victim typically has to manage both civil and criminal cases located in different courtrooms or courthouses); Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L. Q. 31, 47 (1999) (critiquing the traditional legal system's effect on family law matters, due in part to its sub-categorization of cases within civil and criminal courts).

provide victims with “one-stop shopping.”

III. MISDIAGNOSING THE PROBLEM: COURT FRAGMENTATION AND INTEGRATED COURTS

A. *Fragmented Courts and Access to Justice*

Proponents of integrated courts argue that the fragmented nature of the traditional court system makes it difficult for victims to obtain the complementary relief that may be available to them in civil and criminal courts.⁵⁰ As described by Deborah Epstein, a victim with a pending criminal case may also need a civil protective order, and to file for divorce, child custody, and child and/or spousal support.⁵¹ Many victims will receive incomplete or inaccurate information about available relief.⁵² For those who learn about the availability of multiple court-based solutions, more barriers await. In some jurisdictions:

To initiate each case the victim must master an unfamiliar set of court procedures and wait in line for hours. Each case must be filed in a separate clerk’s office and, in many jurisdictions, a different courthouse in another part of town. If she is employed, or has difficulty obtaining child care, she often cannot spare the hours and sometimes days it takes to get into several court systems, let alone pursue multiple cases through to trial. For a person in crisis, who may be recovering from a beating the night before, these obstacles can prove insurmountable.⁵³

Moreover, a lack of case coordination within any given court system can result in the involvement of multiple judicial officers in even a single case. Because courts typically do not share information about related cases,⁵⁴ a proliferation of cases and decision-makers increases the likelihood of under-informed decisions and conflicting orders.⁵⁵ Resulting

50. *See, e.g.*, Epstein, *supra* note 1, at 23 (characterizing the traditional court system as one that deprives victims of “the comprehensive protection they need and the relief to which they are legally entitled”).

51. *Id.*

52. *Id.* at 25-26.

53. *Id.* at 25.

54. *See id.* at 27 (observing that the traditional adversarial system leaves an “information vacuum” around the fact finder).

55. *But see, e.g.*, CAL. FAM. CODE § 3031 (West 2004) (encouraging courts considering child custody or visitation to make “a reasonable effort to ascertain” if any protective orders are in effect concerning the parties or minors and not to make any order inconsistent therewith); S.F., CAL., UNIF. LOCAL R. CT. 19, *available at* <http://sfsuperiorcourt.org/Modules/ShowDocument.aspx?documentid=2638> (setting forth

ambiguities may compromise victims' safety, advantage perpetrators, and ultimately "preclude domestic violence victims from obtaining comprehensive justice."⁵⁶

Reformers envision integrated civil and criminal domestic violence courts as a way to resolve the problems associated with a fragmented court system by concentrating court services within a single court. Upon close examination, however, separate civil and criminal courts are not the source of these problems, nor is the integration of civil and criminal courts their solution.

i. The Conflicting Orders Problem

Integrated courts that coordinate or combine related cases would seem to reduce the problem of conflicting orders, along with the associated potential for dangerous ambiguities and gamesmanship by perpetrators of domestic violence. But in order to ascertain whether integrated courts are a reasonable solution, it is important to distinguish between conflicts that occur solely within either the civil or criminal court systems and conflicts that occur between systems, and to analyze these problems separately. This is where the relationship of the problem to the purported solution breaks down.

First, to the extent that conflicting orders emanate from defects within civil or criminal court systems that are unrelated (or not specific) to adjudication of domestic violence, the problem obviously impacts more than just those cases identified as involving domestic violence. Moreover, the American Bar Association reports that domestic violence issues implicate not just family and criminal law, but arise in almost every area of law, including corporate, bankruptcy, tort, and real property law.⁵⁷ Therefore, it would be more logical to address the problem systemically within the civil and criminal courts, rather than programmatically through the creation of a specialized, integrated court handling only domestic violence cases.

Proponents of integrated courts acknowledge the broader nature of the conflicting orders problem, but argue that the problem is greater for domestic violence cases because victims of domestic violence tend to have

protocols for communication between criminal and family courts regarding domestic violence and child custody cases).

56. Epstein, *supra* note 1, at 28.

57. Deborah Goelman & Roberta Valente, ABA COMMISSION ON DOMESTIC VIOLENCE, WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT I-5 (1997). *See generally* Kathleen Finley Duthu, *Why Do You Need to Know About Domestic Violence? How Attorneys Can Recognize and Address the Problem*, 53 LA. B.J. 20 (2005) (describing the effect of domestic violence on different types of legal practice).

multiple cases arising from the same facts.⁵⁸ However, the diversity of actions associated with domestic violence suggests an argument for a systemic solution, not a fix for only those cases identified as domestic violence cases. Systemic court reforms, such as improved case assignment and management and stable judicial assignments, would better resolve this problem for all litigants, any number of whom may be litigating cases impacted by domestic violence, than would creating specialized, integrated courts.

Second, to the extent that conflicts arise from the relationship between orders made in separate civil and criminal domestic violence proceedings, the problem is more easily resolved by rules governing the priority of court orders than by integrating the courts. For example, California has resolved this problem by providing that protective orders issued by criminal courts take precedence over all other court orders except more restrictive emergency protective orders.⁵⁹ As to the likelihood that other types of cases might spawn conflicting civil and criminal court orders,⁶⁰ a more comprehensive priority rule may be in order. However, integrated domestic violence courts are simultaneously unnecessary and insufficient to solve the problem of conflicting orders.

Third, integrated courts create a new problem for victims: the “all your eggs in one basket” problem. This problem results because assignment to a single judicial officer only helps the limited number of victims with multiple cases whose first case proceeds favorably and where the hearing officer is provided with complete information. This problem is worth examining closely.

A victim with both a criminal and a civil domestic violence case will likely proceed with only one case at a time, with the criminal case litigated first.⁶¹ There are at least three possible outcomes in the criminal case if the prosecutor goes forward: the case may settle with a plea of guilty or no contest to some portion of the charges, it may proceed to trial and result in a conviction (although not necessarily on the most serious charge), or it may proceed to trial and not result in a conviction (either through a finding

58. *See, e.g.*, Epstein, *supra* note 1, at 21 (arguing that the unique characteristics of domestic violence cases make them more likely to result in conflicting orders than other types of cases).

59. CAL. PENAL CODE § 136.2(e)(2) (West 1999). Emergency protective orders are issued only upon the request of a law enforcement officer stating a reasonable belief that the party is in imminent danger, and may last no longer than seven days from issuance. *See* CAL. PENAL CODE § 646.91 (West 2010).

60. For example, witnesses in the prosecution of a white-collar crime might be subject to protective orders that conflict with orders regarding the management of property.

61. *See supra* note 46. If the civil case proceeds first, due process concerns raise a separate set of problems from those considered here. *See infra* Part IV (discussing the ramifications of process defects in criminal courts).

of not guilty or a mistrial). Of these potential outcomes, a plea of guilty or no contest or a guilty verdict on domestic violence charges may help the victim in the subsequent civil case.⁶² However, even with a favorable result, the victim will probably need to present additional evidence about the abuse relevant to the civil proceeding, and will definitely want to do so if the criminal case was resolved with a plea prior to the criminal trial. Therefore, the supposed litigation advantage to the victim related to a single hearing officer is limited.

Moreover, it may be more difficult to convince an officer who oversaw the criminal matter to permit time for a full evidentiary hearing on abuse as it relates to civil issues, such as child custody, than it would be to obtain such a hearing in a different forum with a hearing officer who cannot claim familiarity with the salient facts. In addition, the victim may believe the officer is predisposed toward the defendant regardless of the outcome of the first case, or even because of it.⁶³ In each of these instances, the availability of another forum for the civil matter would be a boon rather than a detriment to the victim.

ii. The Under-Informed Victim Problem

Proponents of integrated domestic violence courts also seek to improve victims' access to information about available legal and extra-legal remedies and services.⁶⁴ Integrated courts are purported to facilitate

62. For example, twenty-five states have statutory presumptions that an adjudicated perpetrator of domestic violence shall not be awarded custody of minor children. *See* NAT'L COUNCIL ON JUVENILE & FAMILY COURT JUDGES, REBUTTABLE PRESUMPTION THAT A PERPETRATOR OF DOMESTIC VIOLENCE SHALL NOT HAVE SOLE CUSTODY, JOINT LEGAL CUSTODY, OR JOINT PHYSICAL CUSTODY (Jan. 1, 2009) (compiling state statutes) (on file with author). A prior finding of domestic violence in criminal court may also be relevant to the division of marital property in a subsequent action for dissolution of marriage. *See* Edward S. Snyder & Laura W. Morgan, *Domestic Violence Ten Years Later*, 19 J. AM. ACAD. MATRIMONIAL L. 33, 52-54 (2004) (discussing the approaches to considering domestic abuse as a factor in property division at divorce). Some states also consider a history of domestic violence in connection with the award of spousal support. *See, e.g.*, CAL. FAM. CODE § 4325(a) (West 2004) (establishing a rebuttable presumption affecting the burden of proof against an award of temporary or permanent spousal support to a spouse convicted of an act of domestic violence against the other spouse within the five-year period before commencement of the action or at any time thereafter).

63. Most experienced litigators have observed the tendency of judges to give the losing party on one issue some favor on subsequent issues. *See also* Meier, *supra* note 13, at 675 (describing the belief of judges in domestic violence cases that it is unfair to consider the perpetrator's violence against the other parent when addressing child custody issues).

64. *See, e.g.*, Winick, *supra* note 1, at 39 (explaining that domestic violence courts can offer a range of services to victims facilitated by the use of judicial referrals); *Judicial Paradigms*, *supra* note 1, at 144 (supporting the implementation of a specialized domestic violence court that is "victim-centered in terms of providing concrete court and community

this goal by concentrating domestic violence cases within a single forum.⁶⁵ However, this solution relies on the supposition that domestic violence cases typically enter the court system in a uniform manner (e.g., in the immediate aftermath of a domestic violence incident when the victim is in crisis), pre-packaged as domestic violence cases, or can otherwise be discerned by the court. To the contrary, empirical evidence shows that many cases involving domestic violence are never identified by courts as domestic violence cases, even when the violence is relevant to the issues before the court.⁶⁶ Moreover, intake processes established specifically to identify the existence of domestic violence have been unsuccessful.⁶⁷ Thus, it is highly likely that there will be numerous domestic violence cases that do not get captured by any specialized domestic violence court and that end up being litigated in other courts instead.⁶⁸

The proliferation of specialized domestic violence courts may also have the unintended and paradoxical effect of marginalizing both those domestic violence cases within, and outside of, the specialized court system. Domestic violence cases already tend to be disfavored by judges and considered less important than other cases.⁶⁹ Segregating them from other legal claims may reinforce rather than mitigate these attitudes,

services and resources to victims and their children”); Tsai, *supra* note 1, at 1317-18 (claiming integrated courts improve victims’ access to services).

65. See, e.g., Tsai, *supra* note 1, at 1322 (arguing that advocates will have improved access to victims in a single, integrated court). See also Shaffer, *supra* note 1, at 993 (noting that integrated courts will also increase efficiency through the coordination of service providers, court personnel, judges and others from the community).

66. See, e.g., Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1013 (2005), available at <http://vaw.sagepub.com/cgi/content/abstract/11/8/991> (reporting that almost one-half of marital dissolution cases surveyed that involved a substantiated history of male-perpetrated domestic violence contained no mention of domestic violence in the case file; the remaining case files contained allegations of domestic violence with no substantiation, despite the existence of such evidence); Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022, 1046 (2005), available at <http://vaw.sagepub.com/content/11/8/1022> (reporting evidence that family court mediators in child custody cases “often failed to recognize and report [domestic violence to the bench officer] even when there were clear indicators of [domestic violence].”).

67. See, e.g., Johnson et al., *supra* note 66 (reporting that court forms used by family court mediators in child custody cases to report the existence of domestic violence to bench officers “very often failed in signaling the existence of abuse”).

68. It is also important to note that a non-disclosure of domestic violence to court personnel may be the result of a victim’s reasoned decision to withhold information. See *infra* Part IV (discussing why a victim may choose not to disclose a history of domestic violence in the context of a family law case).

69. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local”* 42 B.C. L. REV. 1081, 1112 (2001).

resulting in the further stigmatization of domestic violence claims and reducing the likelihood that they will be taken seriously in any court.⁷⁰

In addition, the existence of specialized courts may discourage non-specialized judicial officers and other court personnel from educating themselves about domestic violence or seeing the potential relevance of domestic violence to the cases before them.⁷¹ Similarly, the concentration of information and services in specialized courts makes it less likely that such benefits will be available to litigants throughout the court system. As a result, the significant numbers of victims of domestic violence who are likely to be litigating in the general court population at any given time may be not only under-informed, but also isolated and unrecognized by a court system that is hostile to their domestic violence claims should they arise.

Although the potential to further marginalize domestic violence cases is a problem common to all specialized domestic violence courts, its effects may logically be heightened by efforts to relegate both civil and criminal domestic violence cases to a single, integrated court. Integrated courts also threaten to erode the benefits to victims of a pluralistic court system, even as proponents seek to facilitate victims' access to justice. In particular, integrated courts pose an increased risk to autonomy-enhancing aspects of civil systems that have been identified as particularly valuable to victims of domestic violence.

B. Civil Courts and Victim Autonomy

As reflected in the critiques of criminal justice responses to domestic violence discussed in Part II, victims who have grounds to proceed in either civil or criminal forums may choose to proceed in civil court for many reasons, including concerns about the impact of criminal processes on physical safety, economic, social, and immigration status, and personal autonomy. In regard to the latter, scholars note that civil remedies are not simply different in type or character than criminal remedies, but differ in the level of choice by which they are accessed and pursued within the system.⁷²

For example, in contrast to the control exercised by law enforcement and prosecutors over entry to the criminal court system, the decision to initiate an order of protection in civil court "lies solely with the victim."⁷³

70. *Id.* at 1129.

71. *Id.* at 1113-14; Goelman & Valente, *supra* note 57; Weissman, *supra* note 69, at 1128-29.

72. Warne, *supra* note 8, at 288-89; Smith, *supra* note 7, at 122; Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 553 (2010).

73. Warne, *supra* note 8, at 284.

The victim also selects the remedies that are appropriate for the victim's individual situation.⁷⁴ Similarly, decisions to proceed to trial, seek settlement, or withdraw a petition lie with the victim, subject only in some circumstances to court approval.⁷⁵ Moreover, if the abuser violates a civil protective order obtained by the victim, the victim may have the choice of enforcing the order in civil or criminal court, or both.⁷⁶

Scholars suggest that the degree of choice given to the victim about timing and strategy make civil remedies more effective than identical criminal remedies.⁷⁷ This view assumes that victims have superior knowledge and ability to discern what steps are necessary to ensure their safety. In addition, civil remedies may "work" because they "giv[e] the victim a sense of control over her life"⁷⁸ and empower the victim to make additional, positive life changes.⁷⁹ Control over the court process is also associated with additional benefits to victims, such as a greater sense of security and wellbeing.⁸⁰ In this context, scholars characterize choice as a value available to victims in civil, as opposed to criminal, courts.

Integrated domestic violence courts arguably impinge on the level of choice that would otherwise be available to victims through separate civil courts. This is due in part to the paradoxical nature of administrative responses to domestic violence. As described by Deborah Weissman, the earnest desire to improve system responses to domestic violence is not the only reason for the development of specialized domestic violence courts.⁸¹ These courts also result from administrative efforts to deal with an influx of domestic violence cases following the expansion of legal remedies and public education about domestic violence.⁸² Further, the administrative response is associated with increased bureaucratization and routinization in the handling of domestic violence and other family-related cases, including the proliferation of standardized forms and reliance on lay advocates to assist unrepresented litigants.⁸³ While arising from efforts to increase

74. Smith, *supra* note 7, at 120.

75. Warne, *supra* note 8, at 286-87.

76. *Id.* at 289-90.

77. See, e.g., Smith, *supra* note 7, at 95 n.15 (opining that civil protective orders may be more effective than criminal protective orders "because the victim, not the government, is the petitioner").

78. *Id.* at 95.

79. See Naomi Cahn & Joan Meier, *New Approaches to Poverty Law, Teaching, and Practice: Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 347 n.25 (1995) (observing that "[s]uccess stories of this kind do not appear in the press because the absence of violence is not considered a newsworthy event").

80. See Smith, *supra* note 7, at 117 n.155, 121 n.176 (citing studies).

81. Weissman, *supra* note 69, at 1128.

82. Weissman, *supra* note 69, at 1126-28. See also, Shaffer, *supra* note 1, at 993 (arguing that integrated courts are a more efficient service delivery model).

83. *Id.* at 1126-27.

access to justice for victims as well as to increase administrative efficiency, these practices have helped reduce domestic violence claims “to quasi-legal experiences which reinforce the legal system’s propensity to prevent them from being presented as formal legal claims at all.”⁸⁴

In the context of integrated domestic violence courts, the over-routinization of domestic violence cases may result in victims being directed to court services based on what court personnel believe is appropriate, rather than what the victim came for or would select through an informed choice.⁸⁵ Epstein warns that “a woman who enters a comprehensive Intake Center seeking only a civil protection order is likely to also be automatically routed to a prosecution advocate to initiate criminal charges without being asked whether she wishes to do so.”⁸⁶ Thus, she observes, even if victims receive more information, the ability of victims to decline services may be reduced.⁸⁷

For victims with children, the level of choice that would normally be available to them in civil systems is further reduced in an integrated court by their increased exposure to charges of failing to protect their children from the perpetrator’s abuse.⁸⁸ Exposure to child protection agencies curtails victims’ choices in complex ways. The threat of failure-to-protect charges means that victims cannot freely choose whether to go forward with a civil order of protection after expiration of the temporary protective order. Victims may also (reasonably) believe it necessary to accept unwanted “voluntary” services in order to appease social workers.⁸⁹ Even worse, victims are discouraged from accessing the courts at all when courts

84. *Id.* at 1129. For a summary of the broader critique of efficiency-driven justice (aka, rationalized or technocratic justice) see Rekha Mirchandani, *What's So Special about Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 LAW & SOC'Y REV. 379, 383-86 (June 2005).

85. See Epstein, *supra* note 1, at 38 (describing how a victim may be directed toward unwanted services in an integrated court setting).

86. *Id.*

87. *Id.* See also Rebecca Fialk & Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 BUFF. WOMEN'S L.J. 171, 180-83 (2004) (discussing potential conflicts between victims and non-attorney advocates in domestic violence court).

88. See Epstein, *supra* note 1, at 34-35 (acknowledging increased risk of victims being reported to child protection agencies when using an integrated domestic violence court); Fialk & Mitchel, *supra* note 87, at 183 (describing risks to victims from exposure to mandated child abuse reporters in domestic violence court).

89. See, e.g., CAL. WELF. & INST. CODE § 301(a) (West 2008) (authorizing social workers to implement a “program of supervision . . . in lieu of filing a petition . . . with the juvenile court” (e.g., for removal of the child from the home) if she or he determines a child “is within the jurisdiction of the juvenile court or will probably soon be within that jurisdiction” and obtains the consent of the child’s parent or guardian for the supervision program).

are perceived not as safe havens, but as victim-blaming institutions.⁹⁰

The heightened risk of failure-to-protect charges faced by victims in integrated courts has been attributed to their exposure to government attorneys and others with differing professional and institutional interests within the integrated court environment.⁹¹ This risk and the associated reduction of choice for victims may also be related to another facet of court bureaucratization: routine discovery of information about litigants and cases by court personnel. Proponents of integrated courts recommend court-initiated discovery of information, such as related cases, as part of the general effort to reduce court fragmentation and its attendant difficulties.⁹² But proponents fail to acknowledge the impact of such procedures on victims inside and outside of integrated courts.

By further breaking down the latent role of the court that is characteristic of the adversarial process, court-initiated discovery encourages the bureaucratic, de-legalized attitude toward domestic violence cases discussed above. This attitude—in which court personnel are akin to social workers and litigants to clients—erodes the distinctions between institutional processes and encourages the kind of interagency relationships and information sharing likely to result in increased failure-to-protect charges against victims. Moreover, the legitimization of court-initiated discovery by proponents of integrated courts makes it more likely that such procedures will spread to other courts and outside the context of petitions for protective orders, effectively eliminating the ability of victims to choose whether or not to disclose a history of domestic violence. In this way, the practice of court-initiated discovery threatens to extinguish a fundamental difference between civil and criminal court processes for victims—the availability of autonomy-enhancing choices about litigation strategy.

IV. COURT PLURALISM AS PROTECTION

A. *The Limits of Choice*

Although civil courts may provide victims of domestic violence with a level of choice absent from traditional criminal forums, it would be a mistake to idealize the legal culture of civil courts and underestimate the balancing function of the criminal courts' normative role. In fact, there are

90. See Weber, *supra* note 14, at 26-27 (describing the dangers of exposing victims who are using civil courts to charges of failure to protect their children from domestic violence).

91. Epstein, *supra* note 1, at 34-35.

92. See, e.g., *id.* at 33 (stating that in an integrated court each judge “typically receives information about the other pending and resolved suits involving the same family”).

a number of ways in which the level of “choice” theoretically available to victims in civil, as opposed to criminal, forums may be curtailed.

First, victims who cannot meet the legal criteria for existing remedies, such as protection orders, obviously do not have access to domestic violence remedies in civil court. Victims may be excluded from civil remedies for domestic violence because they cannot meet relationship criteria for such relief.⁹³ In many jurisdictions, victims are also excluded from civil as well as criminal remedies if the violence has not yet risen to the level of a physically abusive or criminal act.⁹⁴ In either case, the exclusion from civil remedies for domestic violence has far-reaching consequences for other legal matters, such as child custody and access to immigration relief.⁹⁵

Second, even if a victim has access to civil remedies in theory, he or she may not have the opportunity to “choose” civil court as an alternative to criminal justice. Entanglement in the justice system is often not a choice. Instead, victims may turn to the police and other public resources for assistance due to the absence of other viable alternatives.⁹⁶ Someone other than the victim may also initiate these entanglements. For example, data indicates that emergency police calls often originate from individuals other than the victim, such as other household members.⁹⁷ The perpetrator may also instigate a civil or criminal case involving the victim, including as a means of furthering the abuse.⁹⁸

Third, choices about engaging the civil system are limited by litigants’ lack of access to legal representation.⁹⁹ Lack of representation limits the

93. See, e.g., Warne, *supra* note 8, at 281 (describing then-existing New York law requiring parties to a civil protective order to have a legally recognized marriage or child in common). See also Klein & Orloff, *supra* note 41, at 814-842 (describing qualifying relationships of various states).

94. See Weissman, *supra* note 69, at 1138 (explaining that the majority of states limit civil remedies for domestic abuse to those cases where there is a threat of physical violence).

95. See *id.* at 1152-53 (describing the relationship of civil protective orders to relief under other civil laws affecting family, immigration and welfare status).

96. See, e.g., Wittner, *supra* note 31, at 87 (observing that women using the domestic violence court lacked alternatives).

97. See, e.g., Casey G. Gwinn & Anne O’Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 308 n.35 (1993) (reporting that in 1988, thirty-one percent of 911 calls to the San Diego City Attorney’s Domestic Violence Unit were placed by children in the household where the violence was occurring).

98. See, e.g., BANCROFT & SILVERMAN, *supra* note 25, at 113-15 (reporting that batterers are more likely to seek custody of their children than non-battering parents and describing their motivations for doing so, including the desire to impose control in the relationship, retaliate against their former partners, and vindicate themselves).

99. See, e.g., Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL’Y & L. 567, 593-94 (2003) (discussing the prohibitive cost of legal

substantive value of legal options as a practical matter.¹⁰⁰ The high number of unrepresented parties in civil forums adjudicating family matters, including domestic violence, may also exacerbate the problem of judicial interventionism observed in these cases, effectively eroding the distinctions between civil and criminal processes.¹⁰¹ Moreover, overcrowded calendars in under-resourced courts place severe restrictions on parties' ability to be heard, whether represented or not.¹⁰² In addition, as detailed by proponents of court integration, there may be access-to-justice problems created by a disjointed, ill-planned civil system.¹⁰³

Finally, the culture of family courts may inhibit victims' choices to the extent they perceive that revealing the violence may hurt their case, especially with regard to child custody. Such a perception could be warranted: extensive literature documents the continued failure of civil courts to adequately protect parents and children who are victims of domestic violence, including failure to make appropriate orders for financial support,¹⁰⁴ child custody,¹⁰⁵ and child visitation.¹⁰⁶ Efforts to address the problem by curtailing judicial discretion through statutory reform have had limited effect.¹⁰⁷ Empirical evidence suggests that bench

representation in family law cases); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511 (2003) (reporting that only 36 of 142 women surveyed had legal representation in their civil protection order court hearings).

100. See, e.g., Murphy, *supra* note 99, at 511-12 (reporting that women seeking domestic violence restraining orders were successful eighty-three percent of the time when they were represented by an attorney, compared with thirty-two percent without an attorney).

101. See Weissman, *supra* note 69, at 1149 (describing judges in civil protection order cases as "more interventionist" than in other kinds of civil litigation).

102. See Freedman, *supra* note 99, at 601 (discussing the impacts of under-resourced family courts on cases involving domestic violence).

103. See *supra* Part III.

104. See, e.g., JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 128-33 (Northeastern Univ. Press 1999) (reporting that judges in Massachusetts courts discouraged or ignored women's requests for temporary child support orders in connection with restraining order applications, although the judges were authorized to make such orders).

105. See, e.g., BANCROFT & SILVERMAN, *supra* note 25, at 113 (reporting that perpetrators of domestic violence are as likely to prevail in their efforts to obtain custody of their children as non-perpetrators).

106. See, e.g., Kernic et al., *supra* note 66, at 1014-15 (reporting that only 16.8% of fathers in cases surveyed where the court was aware of substantiated domestic violence were denied child visitation; supervised visitation "was no more likely" to be ordered for the abusive parent in cases involving domestic violence than in other cases).

107. See, e.g., Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1101 (2005), available at <http://vaw.sagepub.com/cgi/content/abstract/11/8/1076> (reporting that in states with a statutory presumption against awarding custody to batterers, forty percent of fathers adjudicated as having committed domestic violence against the mother

officers frequently disregard statutory presumptions that batterers are unfit for physical custody,¹⁰⁸ and often moot the purpose of such presumptions—even when custody to batterers is denied—by granting them visitation without safety restrictions.¹⁰⁹

The problems faced by victims of domestic violence in family courts have been associated with a shift away from traditional adversarial processes toward a growing reliance on informal dispute resolution and non-legal decision makers.¹¹⁰ This trend is widely viewed as problematic for victims of domestic violence.¹¹¹ To the extent that informal processes are mandatory and/or part of a court culture favoring informal resolution of claims, they also impinge on the autonomy-enhancing aspects of the civil system for victims.¹¹² Yet the growing reliance of courts on child custody

were still awarded joint custody; where there were competing statutory provisions regarding custody (e.g., a presumption in favor of joint custody and favoring the parent perceived by the court as more open to shared parenting) sole custody was awarded to battering fathers more often than to the mothers who were their victims).

108. *See id.* at 1093, 1102 (reporting that mothers actually received sole physical custody less frequently (sixty-four percent of the time) when the father was an adjudicated batterer in states with such statutory presumptions than in states with no statutory presumption (sixty-seven percent); if there were competing presumptions, mothers generally received “primary” physical custody, which is tantamount to shared custody (eighty-two percent)).

109. *See id.* at 1102 (reporting that although bench officers in states with a presumption against awarding custody to adjudicated batterers imposed conditions on visitation more often than in states without such a presumption, “at best, only sixty-four percent of orders in these states imposed structure or conditions on visitation orders”).

110. *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 731-33 (1988) (describing mediators and social workers as supplanting legal actors in the family courts and recasting divorce and child custody as emotional rather than legal issues); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 900-02 (2010) (describing the “new paradigm for family law decisionmaking”).

111. *See, e.g.,* Johnson *et al.*, *supra* note 66, at 1046-48 (reporting evidence of mediator bias in domestic violence cases, including that mediators recommended joint child custody arrangements more often in cases involving allegations of domestic violence than in cases that did not involve such allegations; supervised child visitation was recommended in a higher percentage of cases where there were no indicators of domestic violence than in cases where there was substantiated abuse; the lowest rate of recommendations for supervised visitation occurred in cases with victim-acknowledged domestic violence that was not reported to the court by the mediator). *See also* Jane C. Murphy, *The Changing Paradigm in Family Law: From the Adversary System to the Therapeutic State* 26-27 (Mar. 28, 2009) (University of Baltimore Legal Studies, Research Paper No. 2009-18), *available at* <http://ssrn.com/abstract=1376782> (observing that many courts “are still ordering couples who have experienced domestic violence to mediate their family law disputes with little or no particularized examination of the couples’ circumstances” despite a consensus “that cases involving family violence need special treatment in mediation, reflected in both standards for mediators and mediation statutes and rules”). The risks associated with lack of adversarial process may be greatest for the poor. Murphy, *supra* note 110, at 910-11.

112. Any system that advantages settlement presents barriers to due process for a minority viewpoint because that viewpoint bears the most litigation risk. *See* Robert H.

evaluations by mental health professionals in domestic violence cases¹¹³ and recent calls to facilitate rather than discourage mediation and other informal dispute resolution processes in these cases¹¹⁴ suggest that the trend is toward additional delegalization in family court responses to domestic violence, not less.

In sum, although civil forums have the potential to offer victims important alternatives to criminal justice that may enhance their safety and autonomy, they cannot be counted on by victims to hold perpetrators of domestic violence accountable for abuse or to reliably produce orders that help keep their families safe. Thus, while those attributes of the civil system that are valuable to victims should be expanded and protected, the importance of maintaining the criminal court functions identified in Part II is underscored.

B. Criminal Court as Counterpoint

Even a more fully realized civil system would mean little to victims without an effective criminal system to back it up. After all, the option of filing a criminal complaint instead of proceeding in civil court, and the possibility of exacting criminal penalties for violation of a civil protective order, are what give weight to the “choice” of civil action. But court integration may undermine key criminal court functions, thus further eroding the important autonomy-enhancing functions of civil courts.

The functionality of criminal justice for victims is threatened by

Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978-80 (1979) (observing that parties bargain in light of a predicted legal outcome; if the outcome is uncertain, the party with less power in the relationship and/or the most risk adverse suffers most). The rights talk of victims represents a minority viewpoint in a system favoring informality.

113. See Meier, *supra* note 13, at 707-08 (discussing courts’ over-reliance on custody evaluators and other purportedly neutral experts in cases involving domestic violence); CLARE DALTON ET AL., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGES GUIDE 11 (2006), available at <http://www.afccnet.org/pdfs/BenchGuide.pdf> (urging that a custody evaluation is almost always warranted if there is “[a] history of physical violence in the parents’ relationship”).

114. See, e.g., Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009) (arguing that policies restricting courts’ ability to order parties to mediation in cases involving domestic violence fail to recognize the agency of battered women and should be abandoned); Desmond Ellis, *Divorce and the Family Court: What Can be Done About Domestic Violence*, 46 FAM. CT. REV. 531, 531-32 (2008) (arguing that the availability of mediation should be expanded in family law cases involving domestic violence due to the negative emotions reported by participants in adversarial proceedings in family courts); Kohn; *supra* note 72, at 580 (advocating a restorative justice “track” for domestic violence cases within the civil court system).

integrated courts in several respects. The long history of judicial resistance to domestic violence claims in both civil and criminal courts makes it easy to predict that relaxation of the legal formalism and accountability associated with criminal court processes would eventually follow court integration. As discussed above, an enforcement-oriented approach to domestic violence in criminal justice is still new, and is under fire by critics calling for the reform of arrest, prosecution, and sentencing protocols in domestic violence cases. Reformers, while often motivated by the desire to empower victims, neglect the distinct roles of the criminal and civil court systems. Their calls for reform may also weaken the resolve of members of a besieged system to maintain functions that benefit victims. Moreover, while informalism in the civil system threatens the utility of that system for victims, routine practices implemented in many criminal courts with regard to domestic violence have created due process burdens for defendants that may ease the slide into informalism that integration with the civil system portends.¹¹⁵

i. Procedural Justice and the Benefits-Burdens Paradox

If domestic violence was a male prerogative within the family under the “rule of thumb” and subsequent criminal justice paradigms,¹¹⁶ its treatment under modern-day criminal law is more difficult to characterize as either a benefit or as a burden imposed on certain relationships.¹¹⁷ This is not only because of differing treatment from one jurisdiction to another, but also because of the perhaps counter-intuitive significance of those distinctions for defendants and victims alike. Post-adjudication diversion programs are a case in point. In jurisdictions where a domestic violence charge is eligible for diversion, the program typically requires the defendant to plead guilty, subject to dismissal if he or she successfully completes a mandatory treatment program.¹¹⁸ Diversion thus offers

115. See, e.g., Meekins, *supra* note 18, at 37-50 (describing the deleterious impact of specialty courts, including specialty domestic violence courts, on the ability of defense attorneys to protect the rights of criminal defendants); Mirchandani, *supra* note 84, at 399-400 (2005) (describing the negative impact on due process norms of domestic violence court procedures).

116. See *infra* Part II, and citations therein.

117. See DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE & THE CHALLENGE OF FAMILY TIES (2009). Of course, a family ties analysis of modern domestic violence law is also complicated by the fact that applicability of domestic violence laws is no longer strictly associated with family status in most jurisdictions. See *id.* at 152.

118. See, e.g., Meekins, *supra* note 18, at 31-33 (describing the deferred sentencing program of Washington D.C.’s domestic violence unit). Defendants with no significant criminal history and who are not alleged to have caused substantial injury to the victim are eligible to participate in the program. *Id.* at 33. Treatment in the Washington D.C. program includes domestic violence counseling. *Id.*

significant benefits for a defendant, who may avoid a criminal record and thereby also avoid any enhanced penalties if there is a subsequent domestic violence offense.¹¹⁹ However, diversion also presents the defendant with significant due process burdens.

A criminal defendant makes the decision whether or not to enter diversion—a decision waiving important constitutional rights, including the right to a jury trial and to remain silent—early on in the case, before his or her attorney can ascertain the facts of the case and without full knowledge of the results of failing to successfully complete the program.¹²⁰ The defendant may also be under coercive pressure to accept diversion, facing, for example, the dilemma of choosing between immediate release from jail or pleading guilty and entering treatment.¹²¹ Moreover, diversion is typically offered in the context of other court practices that thwart effective assistance of counsel in making this and other crucial decisions related to the case.¹²² In this light, diversion can hardly be considered a benefit to criminal defendants charged with domestic violence.

Of course, coercion may be present in other plea bargaining scenarios and in other types of cases as well.¹²³ But these practices may be

119. See, MARKEL ET AL., *supra* note 117, at 152 (using diversion programs as an example of policies that treat domestic violence as a family ties benefit).

120. Meekins, *supra* note 18, at 39-40.

121. *Id.* at 16 n.69 (further noting that similar dilemmas arise if the defendant faces sanctions for alleged failures in treatment). Meekins compares this practice to traditional plea bargaining: “While jurisdictional differences exist in plea bargaining practices, in almost all situations when a defendant elects to waive his or her rights . . . he or she knows what sentence will be handed down, or knows the range that the sentence might entail. This range results in a bargained for outcome, which is usually lower than the time that the defendant faces if she elects to proceed to trial.” *Id.* at 39 n.177.

122. *Id.* at 16-22. Meekins describes five characteristics of specialty courts that alter the justice system in ways that impede effective assistance of counsel: imposition of mandatory treatment early on in the life of the case; acceptance of increasingly punitive sanctions as a condition of participation in treatment programs; utilization of a team approach that incorporates treatment and other professionals outside the purview of the court and defense counsel; an enhanced role for judges that includes increased interaction directly with the defendant, wherein defense attorneys are expected not to intervene; and explicit disavowal of adversarialism, including by defense counsel. *Id.* The first characteristic is subject to variation in specialty domestic violence courts, which (outside the context of diversion) typically treat batterer’s treatment as a punishment, requiring it as a condition of probation or sentence after trial. See *id.* at 24; *infra* Part II. Domestic violence courts may also impose additional due process burdens on the defendant by requiring him or her to go forward without representation in civil matters related to the alleged abuse that are heard in the specialized criminal court. *Id.*; see also Mirchandani, *supra* note 84, at 399-400 (describing non-adversarial court procedures utilized by specialized domestic violence court officials despite their negative impact on due process norms).

123. See Guzik, *supra* note 32, at 127 (citing research showing that the majority of defense attorneys are cooperative and “willing to cooperate with the state’s attorney’s office by moving their defendants to plea bargain.”); Michael M. O’Hear, *Plea Bargaining and*

particularly significant in the domestic violence context. Recent studies show that plea bargains are used in misdemeanor domestic violence cases to gain additional control over defendants and to secure harsher sentences than can be obtained via trial.¹²⁴ Unsurprisingly, research also shows that defendants in domestic violence cases who are subject to such practices blame an unfair system for their punishments rather than their own behavior, and come “to see themselves as victims of the law.”¹²⁵ The result is to undermine criminal justice functions with respect to domestic violence in several ways that run counter to general principles.

As Markel et al., observe in their explication of burdens in the criminal law based on family ties, such burdens generally do not implicate normative concerns about incentivizing more crime or inaccurate identification of wrongdoers—concerns that are relevant to the analysis of criminal law benefits based on status.¹²⁶ This makes sense: in the case of burdens, we are not talking about *exceptions* to criminal liability based on status, but about the *creation or enhancement* of criminal liability where none would exist absent a particular relationship. Therefore, while normative concerns about inequality and gender bias might apply, letting wrongdoers get away and encouraging crime is not at issue.¹²⁷ But these generalizations do not apply with regard to burdens imposed in domestic violence cases as a result of due process failures.

ii. Process Defects in Criminal Courts

The consequences of a lack of due process for domestic violence offenders are multifold. First, such practices may increase crime by adding gravitas to defendants’ perceptions of unfair treatment. Research shows that domestic violence defendants who feel they were treated unfairly in the criminal justice system are more likely to reoffend.¹²⁸ One study of domestic violence arrestees showed that perceptions of fairness were more

Procedural Justice, 24 GA. L. REV. 407, 415-17 (describing the truncated “bargaining” typical of misdemeanor cases generally).

124. See Mirchandani, *supra* note 84, at 397, 409 (reporting that efficiencies obtained through standardized plea bargaining allow domestic violence court personnel to subject defendants to multiple court appearances); Guzik, *supra* note 32, at 122 (reporting that prosecutors rely on plea bargains to obtain convictions with harsher sentences than are available by trial). Plea bargaining practices where serious felonies are charged may present different issues. See O’Hear, *supra* note 123, at 415 (noting distinctions are drawn by researchers between plea bargaining practices involving misdemeanor and low-level felonies, and more serious felonies).

125. Guzik, *supra* note 32, at 129-30.

126. MARKEL ET AL., *supra* note 117, at 82.

127. *Id.*

128. Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163, 186 (1997).

predictive of re-offense than severity of outcome (e.g., arrest vs. release after a brief detention).¹²⁹ The recidivism rates for defendants who perceived that they had been treated fairly by police were lower at statistically significant rates in either case.¹³⁰ The significance defendants attach to fair treatment within the justice system suggests that the due process deprivations that transform seeming benefits like diversion into burdens may also increase the likelihood of recidivism.

High rates of plea bargains in domestic violence cases may also facilitate crime by undermining the victim's confidence in the system. To the complaining victim, plea bargains of all types can look like the defendant is getting off easy, with reduced charges, a reduced sentence, and reduced accountability.¹³¹ Like the defendant who feels coerced, the frustrated victim reflects and embodies the erosion of public perceptions of and belief in the criminal justice system, regardless of whether she is exposed to additional abuse as a result of system failures. If, as a result, victims are less likely to report future crimes against themselves or others, or cooperate with the system, these policies may indirectly increase crime in this way as well.

A second challenge to the criminal justice system's normative framework created by due process failures is an increased potential for inaccuracy. If the focus of the court is on obtaining plea agreements rather than correctly identifying perpetrators and holding them accountable, then the possibility of inaccuracy in the form of false convictions is increased. Given the number of domestic violence arrestees who claim to be the real victim, this should be a concern for victim advocates as well as defendants.¹³²

More generally, the undue curtailment of adversarial practice in some jurisdictions has profound implications for system functionality. Commentators note that, in the absence of normal adversarial processes, prosecutors can over-populate the system with cases of dubious merit that would ordinarily not be charged.¹³³ In the context of other specialty courts,

129. *Id.*

130. *Id.*

131. Although legal scholars tend to focus on victims who do not want the state to proceed in prosecuting domestic violence, in my experience victims are also often frustrated with the opposite problem: prosecutorial decisions to offer plea bargains rather than proceeding to trial, which are interpreted by victims as not taking the crime seriously and giving the defendant a "break."

132. Women are increasingly the arrestees in domestic violence cases. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFF. CRIM. L. REV.* 801, 831 (2001) (discussing studies and implications of increased arrest rates for women).

133. Mae Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 *N.Y.U. REV. L. & SOC. CHANGE* 37, 58-59 (2000-2001);

the ramifications of such practices have been far reaching: police have increased arrest rates, making arrests in cases where they would previously not have occurred;¹³⁴ court dockets have been overwhelmed;¹³⁵ and defender offices have been “inundated by an increase in the number of cases, particularly those with little or no merit.”¹³⁶ Moreover, each of these developments has had a disproportionate impact on poor and working class communities of color.¹³⁷ Thus, regardless of whether a greater criminal law burden is appropriate for domestic violence crimes,¹³⁸ the burdens imposed on domestic violence defendants by virtue of a lack of procedural due process have consequences that undermine the functionality of criminal justice in these cases—implicating not only the efficacy of the criminal system, but the benefits of court plurality for victims.

It is important to note that most proponents of specialized domestic violence courts affirm the role of criminal courts in ensuring the accountability of domestic violence perpetrators to the legal system.¹³⁹ Indeed, criminal courts specializing in domestic violence are typically distinguished in the literature from other specialty courts by their retention of an emphasis on adversarial process and defendant accountability, as well as by concerns unique to the domestic violence context such as enhancing victim safety.¹⁴⁰ Some specialty domestic violence courts may be functioning in a manner consistent with these ideals.¹⁴¹ Moreover, given

Morris Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1502-03 (2000) (noting a significant increase in the number of drug case filings after the Denver Drug Court was established).

134. Hoffman, *supra* note 133, at 1502-03.

135. *Id.* at 1504-05.

136. Meekins, *supra* note 18, at 44.

137. *Id.* at 49 (citing statistics and discussing reasons why members of these groups are disproportionately represented in specialty criminal courts). See generally MACLEOD ET AL., *supra* note 38, at v (finding overrepresentation of poor, uneducated Hispanic men among offenders sentenced to batterer intervention programs in California).

138. See MARKEL ET AL., *supra* note 117, at 152-53 (discussing the absence of a theory for treating domestic violence more harshly than other forms of interpersonal violence).

139. See, e.g., *Judicial Paradigms*, *supra* note 1, at 149 (observing that “punishment, deterrence, and traditional criminal objectives must remain a high priority” in a domestic violence court); Weber, *supra* note 14, at 26-27 (listing batterer accountability as among the guiding principles of domestic violence intervention); Emily Sack, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 5-6 (May 2002), available at http://www.endabuse.org/userfiles/file/Judicial/FinalCourt_Guidelines.pdf (identifying defendant accountability as a core value and principle of domestic violence courts).

140. See, e.g., Weber, *supra* note 14, at 24-25 (distinguishing domestic violence courts from other specialty courts, such as drug courts, that generally deal with non-violence offences); Shelton, *supra* note 11, at 9-11 (comparing differences between other specialized courts, such as drug courts, and domestic violence courts).

141. See *Judicial Paradigms*, *supra* note 1, at 148 (reporting a move away from routine plea bargaining procedures, which resulted in more trials: the domestic violence court in

the proliferation of specialty courts, even outspoken critics have identified modifications that would allow those courts to better comport with due process principles.¹⁴² Thus, a more robust adversarial process in specialty courts is theoretically possible.

Similarly, there is nothing endemic to the process of plea bargaining, for example, that makes it incompatible with tenets of procedural justice.¹⁴³ In fact, commentators have emphasized the relative ease with which existing practices, including those related to plea bargaining, can be modified to comport with defendants' perceptions of procedural justice.¹⁴⁴

None of this, however, should relax concerns about integrated courts. Instead, the persistence of these process problems in criminal courts suggests the ease with which criminal justice functions are susceptible to further weakening through integration with the civil system. But even if criminal processes remain unaltered in favor of the further transformation of civil processes through court integration, victims still lose. This is because both systems offer advantages as well as drawbacks to victims seeking help. Maintaining separate civil and criminal systems preserves the advantages and helps contain the potential pitfalls for victims navigating violent relationships. Combining them risks it all, with unknown consequences over time.

V. CONCLUSION

There are significant concerns having to do with fragmentation in court systems that creates barriers to justice for victims of domestic

Vancouver, Washington tried approximately forty-one percent of all criminal jury trials held in the county in 1999).

142. Meekins, *supra* note 18, at 50-55 (detailing reforms that will facilitate more effective representation of defendants in specialty courts).

143. See O'Hear, *supra* note 123, at 426-31 (describing ways to incorporate procedural justice principles into plea bargaining).

144. *Id.* Notably, however, suggestions for reform of criminal justice policies, as opposed to practices, in order to increase perceptions of procedural justice appear misguided. For example, Epstein recommends (albeit tentatively) a shift away from mandatory to presumptive arrest and prosecution policies in order to facilitate defendants' perceptions of procedural justice. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1887-89 (2002). But subsequent research has found that batterers feel unfairly treated under presumptive arrest and prosecution policies, "frequently [echoing] the statements that police officers, jail guards and defense attorneys used to render them compliant with policing and court setting power." Guzik, *supra* note 32, at 131. Guzik's findings suggest that these statements tend to minimize the appearance of the speaker's discretion in ways that directly correspond to the batterer's sense of unfair treatment. *Id.* at 132 (describing a defendant recounting the arresting police officer's claim that "someone has to go to jail on a domestic battery call"). Thus, arrest and prosecution policies alone are not determinative of perceptions of procedural justice; the manner of their implementation must be addressed.

violence. However, such problems can and should be addressed in ways that preserve court plurality, which itself may provide victims of domestic violence some protection from system flaws, while supporting autonomy and safety. Reformers should therefore also work to identify and improve the distinct components of civil and criminal courts that support the efforts of victims to seek help and resist violence. In the case of civil courts, this means strengthening those institutional practices, structures and functions that allow victims to pursue with self-direction remedies addressing their unique circumstances and needs. With regard to the criminal courts, reform efforts should be guided by the broader public commitments of the criminal justice system, which demand individual accountability to social norms rather than individual desires. In this context, the test for reform should be the likelihood that a proposal will strengthen the core functions of the court while maintaining the benefits of court pluralism.

As this test suggests, taking court plurality into account will require consideration of more than the ideal functions of one or both systems. Instead, it is imperative that policy analysts consider the ways in which system functions are impacted by current court culture and practice. A better understanding of the nature of court pluralism and court functions in a pluralistic court system may alter the analysis of problems and proposals for reform in significant ways. What has been referred to as court pluralism in this Article—the notion that the differences between civil and criminal courts with regard to features and functions are important—points to the need for further inquiry. Moreover, the ways in which civil and criminal courts fall short of their ideal functions in domestic violence cases suggests some priorities for future research.

Chief among these priorities is an examination of the relationship between a robust adversarial process and the functions of civil and criminal courts. The impact of process failures in civil and criminal courts on domestic violence cases suggests that erosion of adversarial systems negatively impacts court functions, yet many proposed reforms involve moving away from formal adjudicatory processes. Inquiry is needed into how consideration of court functions—and function failures—in a pluralistic system changes the analysis of such reforms.

Further inquiry is also needed into the appropriate relationship of civil and criminal remedies to one another and the respective goals of these systems. For example, if it is in keeping with the function of civil justice for civil domestic violence remedies to be more expansive than many jurisdictions currently provide—allowing for remedy of a broader array of harms than can or should be addressed through criminal law—is a corresponding adjustment to criminal law penalties indicated on the other side of the equation? This question has dimensions independent of reform in the civil arena (e.g., are criminal penalties and practices properly crafted

to address the social harm of domestic violence?), and dimensions that work in tandem with civil reforms (e.g., through the criminal enforcement of civil restraining orders). Consideration of court plurality would strengthen inquiries into all aspects of the calibration of civil and criminal remedies by affording a more complete analysis of the problem.

In addition, analysis of integrated courts begs the more general question: what is the appropriate role of specialized domestic violence courts in a pluralistic court system? How and to what extent are specialized domestic violence courts compatible with the functions of either civil or criminal justice with regard to this particular social problem? In addressing these questions, empirical research methods might be employed to study impacts of specialty courts on court function. The normative concerns raised here are obviously not amenable to study by quantitative measures alone. However, qualitative research methods such as interviews and court observation could be employed to discern impacts of specialty domestic violence courts on court functions, with particular reference to the experiences of victims and perpetrators.

Finally, the complex relationship between autonomy and court functions demonstrated above suggests a closer analysis of autonomy will be essential to this research agenda. Accounts of autonomy in legal scholarship that focus on the provision of choice are revealed as dangerously incomplete when viewed in light of court pluralism. In contrast, recent scholarship from the social sciences drawing on relational views of autonomy and emerging theories of the state as fractured and dynamic rather than monolithic and static suggests promising new directions for analyzing the relationship between individuals and the justice system.¹⁴⁵ An interdisciplinary approach might therefore benefit efforts by legal scholars to build a more accurate and useful account of autonomy in the context of court pluralism. In all instances, the study of court-based responses, and the utility of proposed reforms to victims of domestic violence, will benefit from a systems view that takes court plurality into account.

145. See Elizabeth Ben-Ishai, *The Autonomy-Fostering State: "Coordinated Fragmentation" and Domestic Violence Services*, 17 J. POL. PHIL. 307 (2009).