TAKING THE NEXT STEP IN THE LEGAL RESPONSE TO DOMESTIC VIOLENCE: THE NEED TO REEXAMINE SPECIALIZED DOMESTIC VIOLENCE COURTS FROM A VICTIM PERSPECTIVE

KATHRYN GILLESPIE WELLMAN*

INTRODUCTION

S.S. and R.T.'s story involved many of the elements common to domestic violence cases: multiple instances of physical, verbal, and psychological abuse of S.S. by her ex-boyfriend R.T.; initial reluctance on S.S.'s part to report the incident to the authorities out of hope that the violence would simply cease; and the eventual arrest of and entry of an order of protection against R.T. that he repeatedly violated, resulting in the filing of additional charges against him.[1] As these charges moved into court, S.S. assisted the prosecution by providing "detailed written depositions outlining the history and circumstances of the altercations" between her and R.T.[2] Soon afterwards, the case, *People v. Tancredi*—like many others involving multiple, interconnected matters related to domestic violence in New York—ended up in one of the state's Integrated Domestic Violence ("IDV") courts.[3]

Then, less than a month after R.T. was arraigned in IDV court, his attorney filed a separate lawsuit on S.S.'s behalf, alleging that certain state actors had violated her civil rights by coercing her into testifying.[4] Given the essential role S.S. was playing in the

---

* J.D. 2013, Columbia Law School. Recipient of the 2012 Myra Bradwell Award. The author would like to thank Professor Jane Spinak for serving as her advisor and, in particular, for providing invaluable guidance on the sources for this Note and inspiring its framework. The author would additionally like to thank Martie Kutscher and Jenny Zhang for their assistance in editing and talking through ideas.

1 These facts are taken from a case heard by the Integrated Domestic Violence Court of Westchester County, New York. *See* People v. Tancredi, No. 07-60256, 2008 WL 795771, at *1–2 (N.Y. Sup. Ct. Mar. 6, 2008).

2 *Id.* at *2.

3 *Id.* An IDV court is one of the many forms of specialized domestic violence courts being implemented in jurisdictions across the country. For a more detailed description of IDV and other variations of specialized domestic violence courts, see *infra* Part III.A.

4 *Tancredi*, 2008 WL 795771, at *2.

prosecution, the state immediately filed a motion to appoint independent counsel for her.[5] The IDV court, recognizing elements of domestic violence in R.T.'s actions, readily granted the motion:

> This Court is part of the community's coordinated response to domestic violence. It would be contrary to our purpose and mission, if individuals charged with domestic violence offenses are permitted to utilize such a questionable attorney client relationship, as a sword, and thereby strategically block the prosecution of their cases . . . .
>
> . . . .
>
> Victims of domestic violence often fail to follow through with their initial willingness to cooperate with the People's prosecution. Many victims return to their abusive partners due to financial concerns . . . [or] due to fear for their safety or that of their family and children. And for some women, having become so entrenched in a cycle of abuse and violence, they return out of habit. By inducing, or by merely permitting a victim to enter into an attorney-client relationship with them, it is conceivable that the attorney participates knowingly or otherwise in the defendant's "strategy of coercive control."[6]

The court thus undertook to "provide the victim with a list of advocate organization[s]" to facilitate her access to "an independent and experienced attorney who is fully familiar with the special and unique dynamics of representing a victim of domestic violence."[7]

Tancredi offers a view into the ways in which specialized domestic violence courts, like the IDV court highlighted in the case, can offer an effective response to what has been recognized as a societal epidemic of domestic violence.[8] These courts—although they take slightly different forms in each of the jurisdictions in which they are implemented—are typically defined by a docket dedicated solely to domestic violence-related matters, court

5 *Id.*

6 *Id.* at *3.

7 *Id.* at *4. The remedy ordered by the *Tancredi* court was further influenced by its concern that R.T.'s attorney had a conflict of interest in representing R.T. in the IDV case and S.S. in the civil rights one. *See id.* at *3-4. This Note will only address the domestic violence elements of the court's analysis.

8 *See, e.g.*, Warren King, *Studies Find Epidemic of Domestic Violence*, SEATTLE TIMES, May 16, 2006, at B1, *available at* http://seattletimes.nwsource.com/html/localnews/2002996949_domesticviolence16m.html.

personnel trained in intimate partner violence, and close ties to community organizations that offer, among other things, batterer intervention programs and victim support. Whereas a non-specialized court's lack of resources might have prevented it from giving due attention to the state's motion, the *Tancredi* court was able to analyze in detail the issues it presented. Further, rather than simply assuming that an order of protection alone would keep S.S. safe, the *Tancredi* court—because of its specialized training in domestic violence—remained attuned to the ways R.T. could harm her, even recognizing how his supposedly benevolent move of aiding S.S. in seeking legal redress for violation of her civil rights might fit into his pattern of manipulation and control. Finally, the court's alliances with domestic violence-related community organizations allowed it to facilitate S.S.'s access to qualified counsel, effectively cutting off this route of domination from R.T.

While *Tancredi* shows specialized domestic violence courts to be a promising step in improving the effectiveness of legal interventions for domestic violence victims, it also illuminates some potential unanticipated consequences a specialized court system could create for victims, in particular, the effect of wide-ranging and centralized judicial intervention on victim self-determination.[9] Battered women's advocates have written extensively on the many unanticipated consequences stemming from initial legal responses to domestic violence in the 1970s. However, there has yet to be a systematic analysis of the origins, history, and causes of these unintended harms over time, leaving a gap in our understanding of the ways in which current interventions may or may not be adequate in addressing them.

As this Note will demonstrate, the specialized domestic violence courts that have sprung up in jurisdictions nationwide over the past few decades have sought to address the unanticipated consequences of prior legal reforms by striving for a more therapeutic, problem-solving approach. Nevertheless, these changes may not adequately address some of the key factors contributing to past harms inflicted on domestic violence victims by the legal system. First, the shift towards specialized domestic violence courts has not fully resolved the epistemological limitations and systemic biases inherent in the judicial system—including the inability of courts to gain adequate knowledge about the experiences, needs, and desires of the actual parties involved in a dispute, prevailing assumptions about the needs and characteristics of victims, and an institutional orientation toward law enforcement goals. Second, the therapeutic problem-solving approach embraced by domestic violence courts brings potential new barriers for victim empowerment and self-determination, as individual judges become highly involved in every aspect of victims' lives. As a result, policymakers must recognize the ongoing potential for the legal system

9 *See infra* Part III.B.

to cause collateral injuries to victims. More importantly, they can and should address these possible harms by creating avenues for domestic violence victims to share the stories of their encounters with the legal system, thereby also giving victims a role in reshaping this system to better accommodate their wide-ranging needs.

This Note will draw on Robert Merton's sociological theory of unanticipated consequences to demonstrate how the potential problems identified above may develop in the specialized domestic violence court context and to argue a corresponding need for policymakers to take a second look at these courts from a victim's perspective to ensure the legal system is responding to domestic violence in the most effective and least harmful way possible. Part I will set the framework for this Note by describing Merton's theory. Part II will examine the history of the legal response to domestic violence and the unanticipated consequences that advocates have identified as arising from the very first legal interventions. Part II will then apply Merton's theory to explain how the diverse and widely varied characteristics of domestic violence victims, as well as the values and motives underlying the legal system's involvement, caused these consequences to develop. Part III will describe the latest legal innovation in the field of domestic violence—specialized domestic violence courts—and demonstrate the ways in which the design and functioning of these courts respond to many of the unanticipated consequences that arose from previous legal reforms. Yet, Part III will also discuss how, despite the domestic violence court movement's careful attention to these prior problems, unanticipated consequences for victims are still a potential concern, requiring further scrutiny of specialized courts. Finally, Part IV will conclude that, in order to reexamine these courts from a victim's perspective, it is necessary for policymakers to integrate battered women's voices into their evaluative processes and suggest guiding principles to employ in doing so.[10]

I. Robert Merton's Theory of Unanticipated Consequences

Robert Merton first developed his theory of unanticipated consequences in a 1936 paper.[11] Describing how theorists had identified unanticipated consequences in such divergent fields as "moral responsibility" and "social prediction, planning and control,"[12]

---

10 Although domestic violence is by no means limited to violence inflicted by men upon their female intimate partners, this is still the most common form domestic violence takes and thus will be the primary focus of this Note.

11 Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936).

12 *Id.* at 894 n.2.

Merton demonstrated the need for a "systematic, scientific analysis" of the phenomenon so as to elucidate where and how unanticipated consequences arise.[13] Merton then set out to provide such an analysis through his own framework, limiting the application of this framework to "purposive social action."[14] Thus, Merton was concerned with conduct motivated by priorities and needs on a societal, rather than individual, level, and with intentional "action which involves motives and consequently a choice between various alternatives."[15]

Merton's framework describes how five factors influence the development of unintended consequences in any given field of purposive action: (1) inadequate knowledge, (2) error, (3) imperious immediacy of interest, (4) basic values, and (5) self-defeating prediction.[16] *Inadequate knowledge* may result either because those implementing an action are unaware of "certain aspects of the situation" or as a result of the range of possible consequences that could follow a given action and the corresponding inability of individuals to predict which consequence will occur in a particular case.[17] The *error*, *imperious immediacy of interest*, and *basic values* factors of Merton's framework are interrelated.[18] *Error* may occur when a group or government planning a particular type of action either assumes that actions that have led to desired outcomes in the past will continue to do so or attends only to some relevant aspects of the situation at hand.[19] *Imperious immediacy of interest* arises when a group or government is concerned only with "foreseen immediate consequences" of its action and does not consider other potential long-term or indirect effects.[20] Finally, *basic values* contribute to unintended consequences by precluding a group or government from considering any consequences other than those consistent with "certain fundamental

13 *Id.* at 894.

14 *Id.*

15 *Id.* at 895–96.

16 Merton, *supra* note 11, at 898–904. This Note does not discuss self-defeating prediction as a factor contributing to the development of unanticipated consequences in domestic violence legal reforms.

17 *Id.* at 898–900.

18 In fact, sociologist Diane Vaughan has more succinctly characterized the factors identified by Merton into two main categories: "limited knowledge," which encompasses inadequate knowledge, and "the taken-for-granted aspects of cognition that may lead to error," which encompasses error, imperious immediacy of interest, basic values, and self-defeating prediction. Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23, 32 (1998).

19 Merton, *supra* note 11, at 901.

20 *Id.*

values."[21]

Although battered women's advocates have identified numerous unintended consequences attributable to the first domestic violence reforms in the 1970s, Merton's theory has never been specifically applied to the field of domestic violence to explain how and why these consequences arose. The following Part will describe these initial reforms and the unexpected results that followed and apply Merton's theory to explain the reasons behind them.

II. The Origins of the Legal Response to Domestic Violence and the Unanticipated Consequences that Resulted from These Initial Reforms

Although domestic violence courts represent the most recent innovation in the legal system's response to domestic violence, the very notion of intervention by courts and the criminal justice system is still a relatively new concept. Early American courts refused to address these cases, citing a husband's legal right to chastise his wife through use of physical force (a byproduct of the coverture doctrine) as their justification.[22] In the mid-nineteenth century, as this common-law right of chastisement gradually became incompatible with burgeoning notions of marital equality, judges switched to a family-privacy rationale for legal nonintervention into domestic violence.[23] This new doctrine held that because "legal intervention in the family is inevitably destructive," families "must be left free to resolve their differences without the damage that would be inflicted on their relationship if the law were to invade the private domestic sphere."[24]

As a result, throughout most of the nineteenth and twentieth centuries, even when a domestic violence victim attempted to gain legal protection, she was typically denied any assistance. The primary response by police officers called to a domestic violence incident

21 *Id.* at 903.

22 *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 10 (1999); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1495 (2008); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661 (2004).

23 Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Policy*, 105 YALE L.J. 2117, 2128, 2151–53 (1996) (noting that although the legal system rejected notions of outright equality between men and women in marriage, it eventually adopted an idea of companionate marriage, permitting it to justify non-interference in domestic violence on the basis of family privacy).

24 Goldfarb, *supra* note 22, at 1495; *see also* Epstein, *supra* note 22, at 10–11; Sack, *supra* note 22, at 1662.

was to advise the offending husband or boyfriend to "cool off" by taking "a walk around the block."[25] Officers rarely arrested batterers and, in some instances, were even informed by their departments that arrest was "a last resort" and that they should play the role of "mediator and peacemaker" when called to a domestic violence dispute.[26] Moreover, when arrests were made, a large percentage of cases were either never charged or eventually dismissed because the victims were unwilling or unable to cooperate.[27] Those victims who did take their cases to court faced even more of an uphill battle, as the remedies a court could provide were limited.[28]

The first signs of social change arose in the 1960s, when feminist activists mobilized in support of domestic violence victims and began establishing battered women's shelters erected around feminist ideals of "egalitarianism, autonomy, and self-determination."[29] These feminists recognized domestic violence as a distinctive social problem in that the gendered power disparities it created within the family were reinforced by a legal system that "operated to support and legitimate gender subordination" by failing to protect battered women.[30] As a result, early leaders of the battered women's movement were suspicious of

25 *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996) [hereinafter Hanna, *No Right to Choose*]; Sack, *supra* note 22, at 1662.

26 Siegel, *supra* note 23, at 2171 (quoting training bulletins provided by police departments to officers in the 1960s and 1970s); *see also* Sack, *supra* note 22, at 1663; *cf.* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case But Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 212–13 (2008) (describing how even if police officers would have wanted to arrest batterers, they would have been constrained from doing so because "[p]rior to the 1980s, the vast majority of American jurisdictions prohibited police from making warrantless arrests unless an officer witnessed violence," which was not likely to happen in cases of domestic violence, since it "most often occurs in private").

27 Sack, *supra* note 22, at 1664 ("Typically, prosecutors would drop charges in anywhere from 50% to 80% of cases" in which the victim failed to cooperate; furthermore, cases that were prosecuted were "frequently undercharged" as misdemeanors rather than felonies.).

28 *See id.* at 1665 (describing how no civil remedy was available to battered women, and there was no criminal penalty for violation of an injunction); *see also* Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 982 (2004) (noting other obstacles to victims attempting to pursue legal claims against batterers, including that "[a]s recently as 1968, only married women could obtain injunctions" and that "[i]n some jurisdictions, victims had to pay prosecutors a fee to pursue their cases").

29 G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 256–61, 286–87 (2005); *see also* Kohn, *supra* note 26, at 196; Sack, *supra* note 22, at 1666; Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1290 (2000).

30 Miccio, *supra* note 29, at 251 (describing how "[s]exual subordination in the private sphere was marked

law enforcement and unwilling to involve them in reform efforts.[31] Despite this initial reluctance, they quickly realized that an alliance with the legal system was necessary to protect women and ensure that domestic violence was viewed as a serious societal problem and, by the 1970s, began pursuing systemic changes within law enforcement and courts.[32]

The feminist activists found politicians amenable to pushing criminal reforms through state legislatures, since "[f]ighting crime has political appeal" in that "it is one of the few concerns that reaches across differences in fractious American politics."[33] Even politicians who were hesitant to stand up in favor of women's rights could wholeheartedly endorse the idea that men who beat women deserved to be punished.[34] Thus, early domestic violence legal interventions proceeded from two distinct, and sometimes conflicting, goals: a feminist goal of empowering victims so as to alleviate the power disparity that society had traditionally tolerated within the home and a law enforcement goal of protecting victims and punishing batterers based in values of deterrence and retribution.[35]

Section A of this Part describes the results of these initial legal interventions: expansion of the remedies available to battered women through civil protection orders and mobilization of the law enforcement system through mandatory arrest and no-drop prosecution policies. Section A further details the unanticipated consequences battered women's advocates have identified as arising from these first reforms. Section B then applies Merton's theory within the context of domestic violence to explain how and why these consequences developed.

---

not only by the violence of individual males but by the laws that made such violence normative").

31 Sack, *supra* note 22, at 1666.

32 *See id.*; Miccio, *supra* note 29, at 265–67.

33 Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 803–04 (2001).

34 *See* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 124 (1991).

35 *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1514–15 (1998) (noting that "[t]he criminalization of domestic violence has made for some strange bedfellows, albeit with different long-term expectations," including feminists who "argue that criminalization of domestic violence is one way to correct the historical, legal, and moral disparities in legal protections afforded to women, making public what traditionally has been thought of as a private crime" and social conservatives who, "not normally supportive of feminist legal reform, advocate using the law to enforce public morality and further the goals of retribution"); *see also* JEFFREY FAGAN, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 11 (1996), *available at* http://www.ncjrs.gov/pdffiles/crimdom.pdf.

A. Civil Protection Orders, Mandatory Arrest, No-Drop Prosecution, and the Unanticipated Consequences These Policies Created

The legal interventions for which domestic violence advocates initially pushed took three main forms: (1) civil protection orders, (2) mandatory arrest policies for police officers, and (3) no-drop prosecution policies.[36] Civil protection orders, broadly defined, enjoined batterers from further violence against victims and thus "provide[d] victims with a quicker, more comprehensive, less difficult to obtain form of protection than that which is available in the criminal system."[37] The terms of these orders could include anything from a requirement that the batterer stay away from his victim's home or workplace, his children's schools, and any other places frequented by the victim to a provision requiring him to leave their shared residence.[38] Mandatory arrest laws removed discretion from police officers called to a domestic violence scene, requiring them to make an arrest if there was probable cause to suspect that a domestic violence crime had been committed.[39] No-drop prosecutions compelled prosecutors to pursue domestic violence cases where there was sufficient evidence, regardless of whether the victim wanted the case to proceed. Batterers would thereby not be immune from punishment solely because they intimidated or retaliated against victims to deter them from pressing charges.[40]

---

36 *See* Goldfarb, *supra* note 22, at 1497–98; Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 10–11, 15–18 (2004) [hereinafter Goodmark, *Law Is the Answer?*]; Sack, *supra* note 22, at 1666–74.

37 Goodmark, *Law Is the Answer?*, *supra* note 36, at 10; *see also* Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 44 (1989) (contrasting civil protection orders with criminal remedies available to victims, since only civil protection orders can provide relief to a battered woman who does not want her partner arrested, who has been subjected to abuse which is not yet criminal or for which there is insufficient evidence to prosecute, or who wants her batterer evicted from the home).

38 Goodmark, *Law Is the Answer?*, *supra* note 36, at 10.

39 *See* Epstein, *supra* note 22, at 14; Goodmark, *Law Is the Answer?*, *supra* note 36, at 15; Miccio, *supra* note 29, at 265; Sack, *supra* note 22, at 1670. In addition to removing officer discretion as a factor in domestic violence arrests, mandatory arrest policies also were intended to "send a message to the community that police policy had changed dramatically, and that domestic violence was a crime that would not be condoned by the state"; provide at least short-term safety to battered women and their children while batterers were in police custody; and serve as "an entry point for social service providers to reach battered women." Sack, *supra* note 22, at 1671.

40 *See* Epstein, *supra* note 22, at 15; Goodmark, *Law Is the Answer?*, *supra* note 36, at 16–17; Miccio, *supra* note 29, at 265–66; Sack, *supra* note 22, at 1672–73. No-drop prosecution policies can further be separated into two different categories. In "hard" no-drop jurisdictions, the victim will be forced to testify if her testimony is deemed essential and is "also expected to participate extensively in pre-trial preparation." Goodmark, *Law Is*

Although the feminist activists and victims' rights advocates generally agreed that legal intervention was necessary to stem the tide of domestic violence, they also pointed to unintended consequences arising from these initial reforms. First, these legal remedies, in many instances, threatened victims' safety. Batterers who perceived their victims' attempts to seek assistance as the first step toward separation often escalated the violence, and, when they did, victims found civil protection orders and the minor criminal sanctions imposed on their abusers inadequate to defend them.[41] Furthermore, because dual arrests—where police officers unsure of which partner was the primary aggressor in a domestic dispute simply arrested both of them—and reports by law enforcement to child protective authorities were common, battered women often became targets of the legal system.[42]

Second, the increased presence of domestic violence cases in the courtroom gave batterers the opportunity to use the legal system as an additional avenue to harass their victims. Batterers could now file their own civil protection orders, fight for custody of their children, and, once in the legal system, attempt to re-victimize battered women by repeatedly dragging them into court.[43] Because most batterers have greater financial

---

the Answer?, *supra* note 36, at 17. In "soft" no-drop jurisdictions, victims cannot be forced to testify, meaning that prosecutors are likely to dismiss charges where the case cannot be made without them. *Id.*

41 *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 23, 34–35 (describing how "[s]eparation related violence is alarmingly common among battered women reaching out for assistance" and how "[b]attered women who go through the grueling process of criminal prosecution frequently find their abusers punished by nothing more than probation" or short stints in prison). Several studies of the effectiveness of mandatory arrest and no-drop prosecution policies have shown, at best, mixed results as to whether these policies increase victim safety. *See* Kohn, *supra* note 26, at 235–37. In addition, studies of civil protection orders have found that these orders do not necessarily stem the tide of domestic violence. *See* Tsai, *supra* note 29, at 1292 ("In 1996, one study found that 60% of orders of protection were violated within one year, while another study indicated that almost 50% of court-issued protection orders were violated within two years. In addition, a third study found that more than 17% of victims killed in domestic incidents had obtained orders of protection."). This is because "[a]ny abuser who is absolutely determined to batter or kill his partner will not be deterred by a piece of paper ordering him not to." Finn, *supra* note 37, at 45. Further, civil protection orders may not be entirely effective at protecting battered women due to lack of enforcement. *See id.* (describing how enforcement of civil protection orders may depend on a victim filing a contempt complaint but that "such private complaints are frequently taken less seriously by prosecutors and judges").

42 *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 23, 25–26 (describing how women who contact the police or courts for help may face dual arrest when "[o]fficers [are] faced with conflicting stories and little or equivocal physical evidence (for example, injuries inflicted on the abuser by the victim while defending herself)," be prosecuted for violating a protective order, or be targeted by the child protective system); *see also* Sack, *supra* note 22, at 1680, 1684; Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 175–76 (2003).

43 *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 24, 34 (noting that "modifications, extensions, and

resources than their victims, their increased use of the legal system harmed victims: often, batterers alone were financially capable of hiring private counsel, and victims also suffered economically from having to miss work repeatedly or obtain childcare to appear in court.[44]

Third, rather than empowering victims by demonstrating that "the power of the state [was] behind them,"[45] mandatory arrest and no-drop prosecution policies were criticized for depriving women of the agency and autonomy to make decisions based on their own needs. In some cases, a victim might not want her batterer to be arrested or prosecuted because of her desire to maintain her relationship with him.[46] In other cases, a victim might prefer not to pursue criminal charges based on her prediction that, given the cycle of abuse with which she is familiar, an arrest would only aggravate the violence against her.[47] In still other cases, a victim might opt against prosecuting the case so as to be able to use the threat of prosecution as leverage over her batterer and thus obtain some degree of power to end or mitigate the abuse.[48] In all of these cases, mandatory policies deprived victims of the ability to make this important choice for themselves.[49] Battered women's advocates thus

violations of child support, visitation, and civil protection orders all lend themselves to misuse by batterers" and describing a Massachusetts study which "found that batterers regularly file multiple, harassing or retaliatory motions; make false allegations against their victims in court; manipulate the court system to avoid child support; and use parallel actions in various courts and jurisdictions to gain advantage"); *see also* Sack, *supra* note 22, at 1682.

44 *See* Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 32 (2000) ("Women who are economically dependent on the batterer may not have independent transportation to make multiple trips to the courthouse. Women with children may have to find child care for court appearances. Injured battered women may find employers unwilling to accommodate court appearances even though the employers had been considerate about medical appointments."); Goodmark, *Law Is the Answer?*, *supra* note 36, at 38–39.

45 Goodmark, *Law Is the Answer?*, *supra* note 36, at 31.

46 *See id.* at 19, 21 (describing a type of battered woman who "still loves her abuser despite the violence and wants to make the relationship work" and noting that "[h]aving your husband or boyfriend arrested and jailed may be an unappealing prospect if your goal is to minimize violence from within the relationship").

47 *See id.* at 30 (stating that a "battered woman will best know how to keep herself safe given 'her unique ability to predict the abuse, to use techniques to minimize the violence, and to assess when it is safe to leave'" (quoting Ruth Jones, *Guardianship for Coercively Controlled Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 627 (2000))); Sack, *supra* note 22, at 1679.

48 *See* FAGAN, *supra* note 35, at 17–18; Coker, *supra* note 33, at 805.

49 Laurie Kohn discusses how use of civil protection orders has also deprived battered women of agency. Some courts have denied victims' motions to vacate protective orders, citing "psycho-social domestic violence theories" such as Lenore Walker's battered women's syndrome. Kohn, *supra* note 26, at 232–33. A judge who does so "credits her own independent judgment—an 'objective fear' assessment—more than the [victim's]

argued that mandatory arrest and no-drop prosecution policies "essentially recreate[d] the victim's abusive relationship, placing the state in the shoes of the batterer."[50] As a corollary of this removal of agency from victims, these policies threatened to have the perverse consequence of actually discouraging resort to the criminal justice system.[51]

Finally, critics of these three reforms noted that the influx of battered women into the legal system actually resulted in courts, prosecutors, and police officers developing negative views of battered women. Because of the increasingly aggressive approach toward batterers, an attitude developed within the law enforcement system that "there [was] no defensible reason" why a battered woman would not want to seek out legal remedies.[52] Thus, women who resisted arrest and refused to cooperate in prosecutions were "seen as suffering from learned helplessness, as recalcitrant, or as dishonest."[53] Even those women who accepted the legal system's aid could find themselves the target of negative perceptions for their emotional and oftentimes erratic behavior in court.[54]

These varied and widespread effects of initial domestic violence reforms suggest that the factors identified by Merton as relevant to development of unanticipated consequences are likely present in the domestic violence context. The next Section therefore applies Merton's theory to the field of domestic violence in order to explain how and why these consequences resulted.

---

testimony and stated preferences," a "practice [that] is [otherwise] unheard of in civil litigation." *Id.* at 234.

50 Goodmark, *Law Is the Answer?*, *supra* note 36, at 31; *see also* Kohn, *supra* note 26, at 243; Sack, *supra* note 22, at 1679.

51 *See* Sack, *supra* note 22, at 1679 ("When victims realize that they have no choice once police and prosecutors get involved, they are less likely to initiate calls for help, and mandatory policies thus have an effect contrary to that which was intended.").

52 Goodmark, *Law Is the Answer?*, *supra* note 36, at 21.

53 *Id.*

54 *See* Epstein, *supra* note 22, at 40–41 (describing how "untrained court personnel and judges can and do misinterpret victim behavior that is symptomatic of the psychological trauma induced by extended abuse" and that because "explanations of battered women's behavior are not intuitively obvious, and because they differ greatly from the behavior and demeanor that a judge encounters in his normal experience, they are often incorrectly interpreted as indications of her lack of credibility").

B. Application of Merton's Theory to the First Domestic Violence Legal Interventions: Inadequate Knowledge, Error, and Other Factors Contributing to the Unintended Consequences These Reforms Created

Merton's factors of inadequate knowledge, error, imperious immediacy of interest, and basic values shed light on the epistemological and systemic flaws that characterized the first set of domestic violence legal reforms, thus demonstrating why unanticipated consequences may have resulted for victims. Inadequate knowledge likely contributed to the system's collateral harms because those behind the initial reforms did not truly understand the complex dynamics between batterers and victims and assumed that a certain type of victim would predominate in the legal system. Thus, domestic violence reforms took as their guiding principle that the battered women who came into contact with the law would either be embracing of its help and eager to leave their batterers or so beaten down by the abuse that they would lack the ability to make choices for themselves and need legal actors to substitute their judgment.[55]

As battered women's advocates often describe, however, there is no prototypical victim of domestic violence.[56] They are "all ages, all ethnicities, [and] from all socioeconomic groups."[57] They may seek repeatedly to leave their batterers, or they may feel compelled, or even desire, to stay. When they stay, this decision may also result from a multitude of factors. Battered women may be physically, financially, or emotionally dependent on their abusers.[58] Their abusers' awareness of this dependence may, in turn, lead them to use it as

55 *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 19 ("The majority of our responses to domestic violence, and certainly the legal responses, are largely premised on the idea that all battered women want—or should want—to separate from their abusers."); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 814–15 (2007) (describing reformers' "ideal battered woman" as encompassing only "ones who are pro-prosecution and ones who have lost all of their free will from fear of abuse" because "[p]ro-prosecution victims present no obstacles to mandatory policies, and anti-prosecution victims are characterized as objects of their abusers," thus allowing reformers to "discount [their] desires").

56 *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1993) ("The psychological realities of battered women do not fit a singular profile—in fact, they vary considerably from each other.").

57 Donna M. Moore, *Editor's Introduction: An Overview of the Problem*, *in* BATTERED WOMEN 7, 20 (Donna M. Moore ed., 1979).

58 *Id.* at 20–21. Financial dependency may be exacerbated by the fact that women face many obstacles in establishing alternate forms of economic support once they leave their batterers. *See* Del Martin, *What Keeps a Woman Captive in a Violent Relationship?: The Social Context of Battering*, *in* BATTERED WOMEN, *supra* note 57, at 33, 53 (describing how domestic violence victims who are married, in particular, may have difficulty establishing eligibility for welfare or other forms of social services).

a form of leverage over them, thus increasing the likelihood that they will stay.[59] Women may also be motivated to stay by fear—either of retaliation by their batterers or of social stigma.[60] Finally, women may fail to leave their husbands out of "a combination of hope and love."[61]

Additionally, battered women may have differing views of the legal system depending on their cultural or socioeconomic backgrounds. Victims in neighborhoods of color frequently targeted by police may view law enforcement as more harmful than helpful, and immigrant battered women are also likely to avoid police contact out of fear of deportation.[62] Given this wide array of battered women's perceptions of their relationships and of legal actors, the victims who initially appeared in courts likely did not embody either prototype envisioned by the legal system: they were neither wholeheartedly pro-prosecution and re-empowered by the legal system's mobilization on their behalf, nor so helpless and brainwashed as to require rescue by this system.[63] Those implementing

59 For instance, even where women leave, and their batterers are ordered to pay child support, these men may fail to do so, leaving victims with little economic support and forcing them to come back to court to seek redress. *See* Moore, *supra* note 57, at 21–22 (describing how "it is important to understand when working with battered women that promises of alimony or child support are not very realistic answers to financial needs").

60 *Id.* at 22–23; Dutton, *supra* note 56, at 1232.

61 Moore, *supra* note 57, at 23 ("She may stay because she loves this man when he is not beating her and holds out the hope that each beating will be the last . . . . If she leaves the home temporarily in order that she and her husband can change their responses to each other and then reunite, she may fear that such changes will decrease the likelihood that he wants her back."); *see also* Dutton, *supra* note 56, at 1235–36 (describing how women may also be influenced by "stereotypic sex-role socialization," which expects a woman to "see her husband through hard times, hold the family together, and 'forgive and forget,'" as well as by religious or spiritual beliefs).

62 *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1993) ("Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile."); Goodmark, *Law Is the Answer?*, *supra* note 36, at 35–38 (describing how battered women of color are more reluctant to call the police due to a view that the police force has and will continue to be hostile to them and "a more generalized community ethic against public intervention"; how battered immigrant women fear deportation when they seek legal assistance; and how poor battered women face obstacles in "marshaling the resources to engage the legal system").

63 Even though it would seem that battered women in court would be receptive to the legal system's help because they sought it out, this is not necessarily true. Domestic violence cases often end up in court as a result of neighbors or other affected parties, rather than the victims themselves, calling the police. *See* Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 421 (2001) (noting that in interviews of prosecutors, defense attorneys, judges, and victim-witness advocates in Lake County, Indiana, "some interviewees pointed

purposive social action in the field of domestic violence thus faced problems of inadequate knowledge because they were unequipped to understand and accommodate the wide spectrum of backgrounds, perspectives, and experiences with which victims entered the legal system.

The factor of error also played a role in the unintended consequences of the 1970s legal reforms. These reforms were largely a result of "tough on crime" governmental policies and thus aimed at criminalizing and punishing domestic violence so as to reduce its incidence.[64] As a result, error was present in the legal system's response to domestic violence in both the senses identified by Merton. In criminalizing domestic violence, the legal system treated violence between intimate partners as equivalent to violence inflicted upon strangers and assumed that criminal intervention would lead to the same desired outcome: deterrence and thus decreased incidence of domestic violence.[65] Further, in aiming to punish those who perpetrated domestic violence, the legal system failed to attend to another relevant aspect of the domestic violence problem: the issue of victim empowerment.[66]

Application of the imperious immediacy of interest and basic values factors of Merton's framework illuminates issues similar to those discussed for the error factor. Imperious immediacy of interest was reflected in the legal system's focus on an immediate

out that often it is not the victim who calls the police, but rather a neighbor, child or some other third party who overhears or witnesses the abuse").

64 *See* Gruber, *supra* note 55, at 792, 818 (describing how "conservatives . . . appropriated domestic violence discourse and made it part of the larger conservative effort to be tough on crime" and how these policies focused solely on "how to punish or deter persons once they are batterers"); *see also* ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 11 (1984) ("These intentional, purposeful acts of physical and sexual abuse by one family member against another must be defined and recognized by the criminal justice system as serious criminal offenses. A strong commitment by law enforcement officials, prosecutors, and courts in responding to family violence as a crime can aid in deterring, preventing and reducing violence against family members.").

65 As numerous commentators have noted, this assumption is a type of error because domestic violence is, in fact, very different from stranger violence. *See, e.g.*, Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 37–38 (2000) (describing the differences in that stranger violence is "a one-time incident," while domestic violence "tends to be an on-going course of behavior involving both violence and threats of violence" and that domestic violence produces a more severe psychological impact on the victim) [hereinafter Winick, *Applying the Law Therapeutically*].

66 *See* Gruber, *supra* note 55, at 809 (describing how reforms that implemented mandatory policies so as to criminalize domestic violence "systematically denie[d] the autonomy of female victims who are not pro-prosecution"); Hanna, *No Right to Choose*, *supra* note 25, at 1870 ("In the domestic violence context, the goal is to punish the batterer in order to protect potential victims. Although removing a woman's right to choose whether to prosecute may undermine her autonomy, such an infringement on her liberty is necessary to protect women overall.").

goal of criminalizing domestic violence without consideration of the consequences these policies could have for battered women's sense of autonomy and self-determination. Basic values influenced legal responses to domestic violence because the legal system was (and continues to be) more concerned with the punishment and deterrence of offenders than with empowering the victims who encounter it.[67] Indeed, a focus on victim empowerment might actually have contradicted basic values by forcing the uncomfortable—and, for many people not familiar with domestic violence, unimaginable—recognition that not every woman wanted to separate from the man who was abusing her and that some women continued to be very much in love with their batterers.[68]

Application of Merton's theory to domestic violence thus demonstrates that the past occurrence of unanticipated consequences may be less related to the actual reforms that were being undertaken and more a result of certain aspects of the legal system's perceptions of domestic violence and of battered women themselves. This, in turn, suggests that until systemic problems in perception are resolved, unanticipated consequences may continue to result from other types of domestic violence legal reforms, including the current movement toward specialized domestic violence courts. The following Part describes this domestic violence court movement and the potential unanticipated consequences it could create for victims.

III. The Modern, Court-Based Era of Domestic Violence Reform and Its Potential Unanticipated Consequences

At the same time that battered women's advocates were speaking out against the ramifications of mandatory arrest and no-drop prosecution policies, the specialized domestic violence movement was beginning and advocating for changes to the entire nature of the courts and criminal justice system as they related to domestic violence. This Part details the results of these efforts to create courts dedicated exclusively to domestic violence issues. Section A describes the origins and key characteristics of specialized domestic violence courts and identifies the ways in which these courts took into account prior unanticipated

67 *See* Hanna, *No Right to Choose*, *supra* note 25, at 1870 (describing how the criminal justice system exists for the community's benefit to "'deter crime, rehabilitate criminals, punish criminals, and to do justice, but not to restore victims to their wholeness or to vindicate them'" and stating that "[t]hese goals still hold true when the crime takes place within the family sphere" (quoting William F. McDonald, *The Role of the Victim in America*, *in* ASSESSING THE CRIMINAL 295, 295–96 (Randy E. Barnett & John Hagel, III eds., 1977))).

68 *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 19 (describing how, in Goodmark's training of "judges, lawyers, social workers, and others on the dynamics of domestic violence," raising "the possibility that the battered woman still loves her abuser despite the violence and wants to make the relationship work" results in "an uncomfortable silence").

consequences to form an entirely new legal approach to domestic violence. Section B then applies Merton's theory to highlight the specific unanticipated consequences that could occur for victims as a result of the specialized domestic violence court movement.

A. The Development of Specialized Domestic Violence Courts and Their Attention to Prior Unanticipated Consequences from Legal Reforms

Specialized domestic violence courts first appeared in jurisdictions across the country in the 1990s.[69] Yet, the development of these courts actually formed part of a broader problem-solving court movement, which began in the late 1980s with the founding of drug treatment courts in Miami that were widely lauded for "helping many addicts to end their addiction and to avoid re-involvement with the criminal court."[70] Problem-solving courts are based on the understanding that certain types of disputes before a judge may be indicative of larger underlying issues that, if addressed, can prevent the parties from having to return to court.[71] Thus, rather than simply imposing criminal sanctions, problem-solving courts partner with community-based social service providers to address the root of the

---

69 Although the domestic violence program in Quincy, Massachusetts, began as early as 1976, *see* Tsai, *supra* note 29, at 1297, the creation of actual courts to handle domestic violence matters did not gain attention until the development of such courts in Dade County, Florida, the District of Columbia, and Brooklyn, New York, in the 1990s. *See* Epstein, *supra* note 22, at 28; Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 6 (1999); *cf.* Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work?: Lessons from New York*, 42 JUDGES J. 5, 5 (2003) (describing how, alongside the reforms targeted at police and prosecution responses to domestic violence in the 1990s, "there was a parallel movement taking place within state court systems" toward specialized domestic violence courts).

70 Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056–57 (2003) [hereinafter Winick, *Therapeutic Jurisprudence*]; *see also* Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts into the Mainstream: A Report Card from the CCJ-COSCA Problem-Solving Courts Committee*, 39 CT. REV. 4, 4 (2002) ("Problem-solving courts originated with the drug court movement. After judges and other community leaders first learned about the anecdotal successes of drug courts, they applied the same techniques to other types of cases, including mental health, domestic violence, and gun violence.").

71 Winick, *Therapeutic Jurisprudence*, *supra* note 70, at 1055 (describing problem-solving courts as an "attempt to solve a variety of human problems that are responsible for bringing the case to court," "often involving individuals who need social, mental health, or substance abuse treatment services"); *see also* Shaffer, *supra* note 28, at 990–93 (describing drug courts and mental health courts as examples of successful problem-solving courts in that these courts have resulted in decreased criminal recidivism and defining other benefits of problem-solving courts as "long term cost savings" through "greater judicial efficiency and consistent decision-making, as well as smoother coordination among judicial, criminal justice, and treatment providers").

problem that has brought each litigant to court.[72] The judge in this type of court takes on a new and unfamiliar role for the judiciary, shifting from a distanced decision-maker to "an active participant, even the head of a team" of experts on the issue facing litigants.[73] The judge coordinates with the experts to develop an individualized plan for the defendant, closely monitors compliance, and, if the defendant successfully completes the plan, has the power to drop any criminal charges.[74] In doing so, the judge is encouraged to motivate defendants "through creative uses of the court's authority to accept needed services and treatment."[75] Further, the judge is expected to advocate for the particular issue his court addresses within the larger community.[76]

Problem-solving courts are modeled on principles of therapeutic jurisprudence,[77] a theoretical approach that focuses on addressing the potential negative effects that legal rules and legal actors can have on the psychological well-being of those who encounter them.[78] Accordingly, problem-solving courts aim to identify the aspects of the legal system that lead to these negative effects and to implement alternatives that will encourage both

---

72 *See* Winick, *Therapeutic Jurisprudence*, *supra* note 70, at 1060–61; Kathryn C. Sammon, Note, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 ST. JOHN'S J. LEGAL COMMENT. 923, 925–26 (2008).

73 Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 258 (2008); *see also* Becker & Corrigan, *supra* note 70, at 4; Winick, *Therapeutic Jurisprudence*, *supra* note 70, at 1060.

74 Becker & Corrigan, *supra* note 70, at 4 (citing as examples of individualized plans "participating in a treatment program, submitting to periodic substance abuse screenings, and providing restitution").

75 Winick, *Therapeutic Jurisprudence*, *supra* note 70, at 1061.

76 *Id.* at 1060–61 (describing how problem-solving judges "play an educative role in raising community consciousness about the problem in question, its causes, and the resources that courts need to resolve it" and "become advocates for the populations they deal with and for the increased allocation of community resources needed to resolve their problems").

77 Although most problem-solving courts today are modeled on principles of therapeutic jurisprudence, the origins of the movement—beginning with the first drug courts in Miami—had different motivations. *See* Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1518 (2003) (describing how drug courts were originally founded on "[t]he need to address a case overload crisis in the criminal courts" and "to reduce expenditures of other criminal justice agencies . . . with particular emphasis on reducing lengthy incarceration terms of drug offenders" and only later moved to a focus "on using therapeutic approaches to ending drug addiction" and noting that these two goals "are in tension with one another," since the "latter [therapeutic] innovations could arguably be costlier than typical criminal adjudication and incarceration of drug-involved offenders").

78 Winick, *Therapeutic Jurisprudence*, *supra* note 70, at 1062–63; *see also* Fritzler & Simon, *supra* note 44, at 34.

rehabilitation and compliance.[79] The integration of therapeutic jurisprudence into domestic violence courts can be seen in the manner in which they engage with both abusers and victims: for abusers, courts have made use of "court-mandated batterer intervention programs as a sentencing option";[80] for victims, recent reforms have focused on developing features that enhance their safety and perception of the legal system by "coordinating the legal response of the courts, law enforcement, corrections, and victim advocates . . . ."[81] Despite this therapeutic component, domestic violence courts recognize a distinctive aspect of domestic violence as compared to other issues addressed by problem-solving courts: defendants have oftentimes inflicted severe and horrific injuries upon their intimate partners.[82] Thus, these courts primarily focus on twin aims of victim safety and batterer accountability over replacing criminal sanctions with rehabilitative efforts.[83]

Although each locality has adopted a distinctive approach in instituting specialized domestic violence courts, several components overlap across jurisdictions. Broadly defined, a specialized domestic violence court is a court that hears domestic violence "criminal or civil matters or a combination of both" and where "particular attention is paid to how cases are assigned, the need to screen for related cases, who performs intake-unit functions, what types of services are provided to victims and perpetrators, and the importance of monitoring respondents or defendants."[84] Some courts may handle only criminal matters involving domestic violence.[85] In others, the judge may handle "both civil protection orders

---

79 Tsai, *supra* note 29, at 1295–96 (describing how "issues such as 'sentencing, offender rehabilitation, and deterrence' involve psychological and social components, making therapeutic jurisprudence particularly appropriate in these areas"); *see also* Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 194 (1997) (describing how therapeutic jurisprudence encourages "consideration of alternative legal arrangements that might produce more functional behavior, such as the contention that the expansion of the unconscionability doctrine under the Uniform Commercial Code would increase the self-esteem of economically disadvantaged consumers by providing them with a mode of empowerment—a legal tool to fight back against those who might exploit them economically").

80 Tsai, *supra* note 29, at 1296.

81 Fritzler & Simon, *supra* note 44, at 34.

82 *Id.* at 31.

83 *Id.*; Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAMILIES, CHILD. & COURTS 23, 26 (2000).

84 Weber, *supra* note 83, at 23; *see also* Mazur & Aldrich, *supra* note 69, at 7 (describing "the building blocks of a successful domestic violence court" as "victim services, judicial monitoring, accountability, and coordinated community response").

85 Weber, *supra* note 83, at 23.

and criminal domestic violence cases."[86] Still others may be fully integrated, meaning that "a single judge . . . oversee[s] criminal cases, orders of protection, custody, visitation, and divorce matters for one family," thus relieving litigants of the burden of having "to navigate multiple court systems simultaneously."[87] Common characteristics of specialized domestic violence courts include a screening or intake process focused on identifying domestic violence cases, as well as any peripheral legal matters; specialized court personnel who are trained in domestic violence;[88] and coordination with community partners, such as "batterer intervention programs, probation departments, shelters, counseling services for victims, and supervised visitation programs."[89]

These aspects of problem-solving courts in general, and the domestic violence subset of these courts in particular, demonstrate the ways in which more recent legal reforms have addressed some of the unanticipated consequences identified as arising from prior ones. First, the consolidation of multiple—or, in jurisdictions with fully integrated courts, all—cases involving domestic violence perpetrators and victims allows specialized domestic violence courts to mitigate batterers' attempts to use the legal system to inflict re-victimization. This is because consolidation leads to fewer court appearances, lessening the economic burden on battered women. Further, the familiarity of the judge with the dynamics of a particular relationship lessens the danger of a judge "getting it wrong" and

86 Winick, *Applying the Law Therapeutically*, *supra* note 65, at 39.

87 Mazur & Aldrich, *supra* note 69, at 7; *see also* Epstein, *supra* note 22, at 28 (identifying the District of Columbia, Florida, and Hawaii as jurisdictions that have created such unified courts).

88 These court personnel can encompass "special coordinators, whose role may include serving as a liaison between the judge and court partners for the purpose of improving the flow of information," as well as "personnel from victim advocacy, probation, and prosecution agencies." Samantha Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature*, CTR. FOR COURT INNOVATION 1, 5 (2009), http://www.courtinnovation.org/sites/default/files/DV_Court_Lit_Review.pdf.

89 Weber, *supra* note 83, at 25. Betsy Tsai describes how within these broad categories common to domestic violence courts, jurisdictions have developed their own approaches. For instance, in New York City, each domestic violence courtroom is staffed by "specially trained judges, prosecution teams, and a team of domestic violence personnel," including a Victim Advocate, who provides support, counseling, and social services referrals to victims; a Defendant Monitor, who "assists in overseeing defendant compliance with court-ordered conditions, such as orders of protection and participation in counseling programs"; and a Resource Coordinator, who "acting as a conduit of information for the judge . . . obtains victim status and defendant compliance information directly from Victim Advocates and Defendant Monitors." Tsai, *supra* note 29, at 1300–01. In Dade County, judges, prosecutors, and even some public defenders are subject to mandatory domestic violence training, and "judges' responsibilities extend to community education . . . , requiring public appearances in both the community and the media." *Id.* at 1303. The Dade County program emphasizes treatment of batterers over punishment and also requires group counseling for children "who are living in violent households and witnessing domestic abuse." *Id.* at 1303–04.

granting the batterer the relief he requested solely as a means of harassing his victim.[90]

Relatedly, consolidation or coordination of cases promotes victim safety by ensuring that conflicting orders are not entered by different courts to govern the relationships and interactions of one family.[91] In some jurisdictions, victim safety has also been found to be promoted by domestic violence courts' integration of criminal sanctions, rehabilitative efforts through mandatory batterers' intervention programs, and intensive monitoring of batterer compliance with court orders.[92] Although studies of the effects of domestic violence courts, when assessed in the aggregate, show mixed levels of success in reducing batterer recidivism, these studies have also indicated that specialized courts may at least illuminate the factors that increase the likelihood of recidivism, thus allowing courts to take preventive action in certain types of cases to promote victim safety.[93]

---

90 These benefits are most prominent in the integrated domestic violence court context. *See* Epstein, *supra* note 22, at 33 (describing benefits of a coordinated system in that a judge presiding over a domestic violence case receives information regarding other cases involving the same family, allowing him to "obtain a more complete story about the parties' history together" and thus make "a better-considered ruling"); Amy Karan et al., *Domestic Violence Courts: What Are They and How Should We Manage Them?*, 50 JUV. & FAM. CT. J. 75, 83 (1999) (arguing that a judge cannot fashion effective remedies in domestic violence cases when "he or she hears one case in isolation with no knowledge of the multiple related cases possibly in the system or understanding of the complex dynamic between batterer and victim"); *cf.* Mazur & Aldrich, *supra* note 69, at 8 (encouraging specialized courts to assign a single judge to handle domestic violence cases because "[t]he judge's ability to hold a defendant accountable is compromised when the defendant has more information than the court and can 'play' the system").

91 *See* Fritzler & Simon, *supra* note 44, at 31 (describing as a principle of an effective domestic violence court coordination of all cases involving "the perpetrator, victim, or their family" so as "to avoid conflicting or incompatible orders," particularly "those involving 'no contact' or protection order provisions"); Karan et al., *supra* note 90, at 80 (stating that, when judges in different divisions of a court hear related cases involving one family facing domestic violence, "[t]he probabilities . . . are high that they will enter inconsistent, ineffective, and sometimes dangerous orders because of this lack of knowledge").

92 *See* MOORE, *supra* note 88, at 7 (citing studies from five different domestic violence courts, which all showed that "increased judicial monitoring significantly increased the likelihood and severity of penalties for noncompliance"); Tsai, *supra* note 29, at 1318–19 (citing the example of Quincy, Massachusetts, where, although "[t]he number of domestic violence homicides in the Commonwealth of Massachusetts had increased from one woman killed every twenty-two days in 1986 to one woman killed every four days during the early part of 1995 . . . in the area served by the Quincy District Court Domestic Abuse Program, there has been only one homicide resulting from domestic violence in 16 years" and also stating that "the majority of methodologically sound studies conducted on batterer intervention programs thus far have shown that men who attend these programs are less likely to be violent in the future than men who do not attend any programs at all").

93 *See* MOORE, *supra* note 88, at 9 (describing studies that "show a strong correlation between criminal history and re-arrest for domestic violence," show that "the probability of re-arrest was significantly higher for younger defendants," and suggest a relationship between "having more charges filed on the current arrest" and

Other aspects of domestic violence courts indicate how those charged with creating these courts have integrated principles of therapeutic jurisprudence so as to address concerns that the legal system inflicts further psychological harm on domestic violence victims. First, by dedicating specific resources solely to domestic violence issues, these specialized courts send a message to victims that the legal system takes domestic violence seriously.[94] In addition, by mandating continuous and in-depth education of judges and court personnel, these courts attempt to avoid the problem of judges who, lacking a true understanding of domestic violence, increase the trauma to victims as a result of their seemingly insensitive courtroom demeanor.[95] Finally, the presence of victims' advocates devoted solely to helping women understand and navigate the court system and to providing support and referrals to social services agencies may aid in preserving victims' sense of agency and autonomy.[96]

The legal system has thus come a long way in appropriately addressing domestic violence, particularly when viewed from the perspective of battered women. However, numerous factors regarding the nature of domestic violence and its victims suggest the continued potential for the legal system's intervention in domestic violence to produce unanticipated consequences for victims. The following Section details these considerations.

---

recidivism). At the same time, it is questionable whether this preventive potential alone justifies the dedication of a separate court to a particular issue. After all, many of the central characteristics of domestic violence courts—specialized training for court personnel and close ties to community organizations—could be achieved within a single, all-purpose courtroom. *Cf.* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 63 (2009) ("Questions remain about the efficacy and propriety of problem-solving courts. It is not at all clear that specialized courts offer a superior alternative to the traditional case-processing model in preventing recidivism . . . . In addition, there has been insufficient study of the real economic costs of such courts . . . .") [hereinafter Quinn, *The Modern Problem-Solving Court Movement*].

94 Fritzler & Simon, *supra* note 44, at 30, 34 (noting that "[a]s long as domestic violence cases are processed in the same courts that handle other crimes, they are less likely to be treated seriously" and arguing that "[a] specialized court that treats domestic violence cases as seriously as violence between males at each stage of the legal process can enhance therapeutic outcomes").

95 *See* Epstein, *supra* note 22, at 45 (describing the effects of domestic violence training on judges in the District of Columbia and noting that judges deciding issues of custody and child support "even occasionally take the time to talk to perpetrators about the harmful impact that witnessing adult-on-adult abuse can have on children and the intergenerational nature of domestic violence").

96 *Id.* at 20 (citing studies suggesting that victims' advocates can be empowering to women by "amplifying victims' voices" so as to "help the government better respond to individual concerns" and arguing that "victim advocates could be a key to transforming one-size-fits-all prosecution policies into responses that are also tailored to the concerns of individual women").

B. Application of Merton's Theory to the Specialized Domestic Violence Court Movement: Unresolved Factors and Potential New Contributors to the Unanticipated Consequences of Domestic Violence Legal Reforms

Integration of therapeutic jurisprudence principles and adaptation of the problem-solving court model have created an entirely new approach to domestic violence victims within the legal system that, while laudable for its efforts to address prior problems with the legal response to domestic violence, should be examined for its own potential to produce unanticipated consequences. As the history of domestic violence legal reforms demonstrates, numerous problems have arisen as a system accustomed to taking a one-size-fits-all approach encounters victims with diverse experiences and needs. This Section will thus highlight particular aspects of specialized domestic violence courts that, in light of these experiences of domestic violence victims and the legal system's approach toward them, suggest a risk of unexpected results, as well as the ways in which the sources of prior collateral consequences may not have been completely alleviated by court reforms to date.

First, the central tenet of problem-solving courts—the idea of the charismatic judge who is involved in every aspect of the lives of the litigants in front of her—may create unanticipated consequences in the domestic violence context. Bruce Winick describes the ideal domestic violence court judge as one who "avoids a paternalistic approach, treats the defendant with dignity and respect, displays good faith and a sense of caring, and listens attentively to whatever the defendant has to say" and creatively participates in the defendant's rehabilitative efforts through "the application of judicial praise and encouragement for positive compliance and sanctions for failure to comply."[97] Yet, for a battered woman who has struggled for years to end the cycle of abuse, it could be harmful to witness such a judicial attitude that praise and positive reinforcement alone can change a batterer's behavior. Further, in integrated domestic violence courts, judges have both the power and the responsibility to direct the most intimate parts of a victim's life. As victims' rights advocates have noted, a battered woman may experience the legal system's exercise of such a substantial degree of control over her as a type of second victimization.[98] And while specialized domestic violence judges are trained to exhibit greater sensitivity toward victims, their empathy alone may not address this potential damage to a battered woman's sense of agency and self-determination.[99]

97 Winick, *Applying the Law Therapeutically*, *supra* note 65, at 42–43.

98 *See supra* note 50.

99 *Cf.* Weber, *supra* note 83, at 32 (describing a risk that specialized domestic violence judges who refer

Furthermore, aspects of the problem-solving court model that require the judge and other court personnel to become community champions of the particular issue and to speak out regarding their court's work may make those charged with creating and implementing domestic violence courts particularly susceptible to assumptions and biases about their success.[100] As a result, there is a potential for these individuals to focus on evidence of the improvement in domestic violence victims' experiences with the legal system that is attributable to the existence of specialized courts at the expense of remaining attuned to signs that further reform may be necessary. Studies have reasoned that increased satisfaction on the part of victims with domestic violence courts over previous legal responses to domestic violence suggests that "victims have positive perceptions of domestic violence courts."[101] Yet, the data seems to indicate more mixed results,[102] and at least one study has suggested that court officials may perceive victims to be more satisfied with the judicial process than

---

victims to counseling or other services may "send the message that coming to court *seeking protection* means being required to participate in various programs" and emphasizing that these judges therefore "need to resolve how to best provide services that are accessible and attractive to those who may benefit from them without using the power and control tactics with which the victim is already familiar").

100 As Jane Spinak has noted, both opponents and supporters of problem-solving courts are subject to biases and assumptions in their respective views of the future of court reform. *See* Jane M. Spinak, *A Conversation about Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 113, 132–33 (2010) (attributing the lack of meaningful conversation between problem-solving court proponents and opponents at a symposium to each side's inability to consider the opposing viewpoint and noting that "participants in the symposium who have been developing and experiencing the court reforms on the ground emphasize the aspects of the reforms that appear to be working").

101 MOORE, *supra* note 88, at 10.

102 For instance, a 2000 study found, in "comparing victims' experiences" in nine Florida counties with specialized domestic violence courts with those in nine counties without specialized domestic violence courts, "little difference in terms of attitudes regarding procedures within the criminal justice system." Martha L. Coulter et al., *Specialized Domestic Violence Courts: Improvement for Women Victims?*, 16 WOMEN & CRIM. JUST. 91, 103 (2005). Another 1999 study of the Quincy, Massachusetts' District Court—widely recognized as a leader in the development of specialized domestic violence courts—showed that about fifty-six percent of the victims surveyed reported being "generally satisfied" with all components of the criminal justice system, while seventeen percent were "generally dissatisfied," and the remaining surveyed victims had mixed feelings. GERALD T. HOTALING & EVE S. BUZAWA, VICTIM SATISFACTION WITH CRIMINAL JUSTICE CASE PROCESSING IN A MODEL COURT SETTING 2 (2003), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/195668.pdf. A comparison of victim perceptions of the court system prior to and following implementation of a domestic violence court in Milwaukee in 1994 found no statistically significant difference between the two on most measures used by the researchers and even found that the percentage of victims who would go to court if hurt again had dropped from ninety-eight percent pre-specialized court to eighty-six percent post-specialized court. Robert C. Davis et al., *Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee*, 22 JUST. SYS. J. 61, 68–69 (2001).

they really are.[103]

Apart from these potential unanticipated consequences unique to the specialized domestic violence court movement, the factors under Merton's theory that led to unanticipated consequences from prior legal reforms may remain issues in the current regime. First, inadequate knowledge may still exist within these courts. Although they have been fashioned to be more responsive to the needs of litigants, the policies they employ still assume a particular type of victim, one who desires a full-fledged legal response to her problems and who is willing to separate completely from her abusive partner. To gain access to the services domestic violence courts offer, there must first be an arrest, a prosecution, and, in integrated domestic violence courts, an affirmative request by either partner to separate the family unit through initiation of a matrimonial or family law case.[104] As the examination above of the different demographics of domestic violence victims demonstrates, however, not every domestic violence victim wishes to separate from her abuser or pursue legal charges against him. Moreover, nothing about the innovations that have led to these specialized courts makes it any less likely that a victim will enter the legal system with a desire to stay with her partner and shelter him from criminal sanctions. In fact, there may even be some reason to suspect that battered women encountering the court system today are more likely to desire a continued relationship with their batterers.[105] The partnerships between specialized domestic violence courts and community organizations providing victims' services may well have increased the amount of resources these

---

103 In Coulter's study, the attorneys, judges, and courtroom police who were surveyed perceived that victims felt safe and supported, while the victims themselves reported the opposite. Coulter et al., *supra* note 102, at 104.

104 *See* JUDY HARRIS KRUGER, NEW YORK STATE PROBLEM-SOLVING COURTS: FIVE-YEAR REPORT 3, *available at* http://www.ncsc.org/Conferences-and-Events/DV-Summit/~/media/Files/PDF/Conferences%20and%20Events/DV%20Summit/New%20York%20State%20Resources/NewYorkState%20ProblemSolvingCourts5YrReport.ashx ("To be eligible for [integrated domestic violence] court, a family must have a criminal domestic violence case as well as a family court case, a matrimonial case, or both, where at least one of the defendant and complaining witness to the criminal case is also a party to the family or matrimonial case."); *cf.* Mazur & Aldrich, *supra* note 69, at 41 (stating that the victims' services provided by domestic violence courts "are offered primarily to help victims achieve independence").

105 Robert Davis's study of victim perception of specialized domestic violence courts suggests that victims in these courts may be even more likely to resist arrest and prosecution of their batterers. *See* Davis et al., *supra* note 102, at 69 (finding in a comparison of victim perceptions pre-specialized court and post-specialized court that, while the district attorney "began to loosen the domestic case-screening practices" and prosecute more cases, "victims after the specialized court began were less interested in seeing the defendant prosecuted (72% post-specialized court vs. 85% pre-specialized court) and even less interested in seeing the defendant jailed than victims in the pre-specialized court sample (38% post-specialized court vs. 72% pre-specialized court)").

organizations allocate to court-referred victims.[106] This could hinder the organizations' ability to reach out to others, making it necessary for battered women to engage with the legal system to obtain needed services.

The *Tancredi* case cited in the Introduction demonstrates the ways in which inadequate knowledge may still be present in the specialized domestic violence court context, thus making unanticipated consequences possible for victims. The court's assumptions about S.S.'s desire for separation and legal intervention influence its reasoning and the remedies it granted: S.S. was in need of independent counsel, in part, because her initiation of the civil rights case was most likely the product of fear or dependency induced by her batterer's intimidation.[107] Despite the soundness of the court's reasoning, absent from this analysis is a serious inquiry into S.S.'s actual interests, including the possibility that she may have wanted to preserve her relationship with R.T.

The error, imperious immediacy of interest, and basic values factors may also still be present in the domestic violence court context. Although these courts have integrated principles of therapeutic jurisprudence to allow for greater understanding of the effects of the legal system on victims and batterers, victim safety and batterer accountability remain their primary focus.[108] Because legal actors are more familiar with these types of

---

106 *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 40–43 (noting that "the focus of the last thirty years on the development of the legal response to domestic violence has certainly diverted money, attention, and energy from other initiatives" but that there are "other, potentially more effective strategies for addressing domestic violence," including programs developed by local organizations to foster "preventive and early intervention strategies" within the community); *see also* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 128 (2008) (noting that "it is worthwhile to attempt to tell [battered women's] stories in the legal system," given the "dearth of other avenues to address violence . . . and the benefits that can accrue to those who are successful in bringing legal claims") [hereinafter Goodmark, *When is a Battered Woman*].

107 *See* People v. Tancredi, No. 07-60256, 2008 WL 795771, at *3 (N.Y. Sup. Ct. Mar. 6, 2008). As previously noted, the court's concern over a potential conflict of interest was also a significant factor in its analysis and decision. *See supra* note 7.

108 *See* MELISSA LABRIOLA ET AL., CTR. FOR COURT INNOVATION, A NATIONAL PORTRAIT OF DOMESTIC VIOLENCE COURTS 30–31, 33 (2009), *available at* http://www.courtinnovation.org/sites/default/files/national_portrait.pdf; Lisa Lightman & Francine Byrne, *Addressing the Co-Occurrence of Domestic Violence and Substance Abuse*, 6 J. CENTER FOR FAMILIES, CHILD. & COURTS 53, 56 (2005) (stating that "the primary goals of domestic violence courts have always been to ensure victim safety and defendant accountability," even though "[m]any services linked to the domestic violence court focus on victims' needs"); *cf.* 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, 23 (2006) ("With community service requirements and liberal use of jail time as a sanction, many domestic violence courts emphasize punishment and retribution rather than treatment for the alleged abuser or

goals, and because focus on a goal of victim empowerment may force the uncomfortable acknowledgement that some women wish to remain with their batterers, there is still a concern that these goals will be prioritized to victims' detriment and that the legal system's judgment will be substituted for that of victims.[109] For one thing, the same tough-on-crime policies that originally led to outcry against the legal system's response to domestic violence are still in place in many domestic violence courts.[110] Opponents of these policies argue that the legal system's continued reliance on mandatory arrest and prosecution policies can have deleterious effects on empowerment of battered women.[111] Others have noted that the dedication of particular courts solely to domestic violence issues may encourage pursuance of these policies with greater zeal, thus threatening more substantial harm to victims' sense of autonomy and self-determination.[112]

protection and empowerment of the victim.").

109 *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 31 (2009) (noting that "as the state became more involved in the lives of women who had been battered, empowerment found itself competing with other goals, particularly victim safety and offender accountability") [hereinafter *Autonomy Feminism*]. Mae Quinn has similarly identified the ways in which prioritization of goals of victim safety and batterer accountability may lead to less focus on the unique circumstances of each victim's situation by comparing modern domestic violence courts to New York's Home Term Part, a criminal domestic violence court that was developed in 1946. *See* Mae C. Quinn, *Anna Moscowitz Kross and the Home Term Part: A Second Look at the Nation's First Criminal Domestic Violence Court*, 41 AKRON L. REV. 733, 760 (2008) ("Compared to today's domestic violence courts with their binary approach to family problems and myopic focus on intervening to rescue victims and control defendants, Home Term may suggest a more nuanced understanding and approach to social, personal, relational, and familial dynamics."). Factors of the Home Term Part that contributed to this were its respect for "the desires of women who wished to stay with their partners or withdraw criminal charges," development of "individualized case work plans rather than standard case resolutions for all matters," and consideration of "various factors that might help explain improper conduct on the part of alleged batterers." *Id.* at 760–61 (describing how these factors allowed the Home Term Part to promote victim autonomy and avoid the "'one-size-fits-all approach' that seems to permeate today's domestic violence courts and contemporary attempts to explain violence between intimates").

110 *See* Tsai, *supra* note 29, at 1306–08 (describing how the four jurisdictions Tsai discusses in her paper "emphasize prosecutorial and law enforcement interventions, with some including no-drop and mandatory arrest policies" and naming two other jurisdictions that also utilize these policies).

111 *See* Goodmark, *Autonomy Feminism*, *supra* note 109, at 46–47 (noting that "[t]he state has put substantial resources behind policies like mandatory arrest and no-drop prosecution, and an entire generation of police and prosecutors has been schooled" in them and that, given the harm these policies pose to victim autonomy, a better solution would be for battered women "to decide how they will engage with the legal system" so as to allow them "to craft the solutions that they perceive are most likely to meet their goals, whether those goals are safety, accountability, economic stability, or maintenance of their intimate relationships").

112 Fritzler & Simon, *supra* note 44, at 38 (describing as an unintended consequence of one domestic violence court "the zeal with which the state prosecutor and city attorney's office went forward in trials without

The potential influence of the error, imperious immediacy of interest, and basic values factors are also apparent in the *Tancredi* opinion. The court's emphasis on a law enforcement goal can be seen in its concerns about R.T.'s attempts to evade prosecution and its understanding of the importance of S.S.'s assistance to this prosecution.[113] While the court views itself as protecting S.S. by appointing separate counsel for her, its analysis and ruling may still unintentionally undermine the goal of victim empowerment. Since it decides the motion to appoint independent counsel on the papers, there is no opportunity for S.S.'s voice to play a role in the court's decision through testimony regarding her own needs and desires. Similarly, the opinion does not consider any reference to these needs and desires in the motion and opposition submitted by the parties, or in any prior statements by S.S. in court.

In sum, then, numerous aspects of domestic violence and its victims, as well as of the legal actors who encounter these victims, suggest their potential to create unanticipated consequences and thus a need to reexamine domestic violence courts to determine how victims perceive them. Additionally, certain problems that advocates identified as arising from prior legal reforms—such as batterers' exploitation of their superior financial resources and greater knowledge of the legal system to inflict further trauma on their victims—may simply be incapable of complete resolution by the legal system.[114] While these problems do not therefore qualify as unanticipated consequences of specialized domestic violence courts and certainly do not represent any shortcoming on the part of these courts, they do at least suggest the usefulness of reexamining the legal system's current response to domestic violence victims to ensure that it is doing what it can to mitigate these issues. The following Part will elaborate on this call for reexamination of specialized domestic violence courts, arguing that it is essential for victims' voices to be incorporated into it and suggesting ways that policymakers may do so.

---

direct participation by the victims" and convictions obtained "in several cases where the victim has recanted her original allegations" and noting that "[i]t is an open question to what extent such prosecutions are therapeutic for the victim").

113 People v. Tancredi, No. 07-60256, 2008 WL 795771, at *2–3 (N.Y. Sup. Ct. Mar. 6, 2008).

114 While a judge who has had extensive interactions with a particular family may be more attuned to the ways in which a batterer may be abusing the legal system so as to harm the victim, a judge may not always be able to intervene where a batterer is doing so. *See* Goodmark, *Law Is the Answer?*, *supra* note 36, at 34 (noting that "[l]ittle can be done" to prevent a batterer from filing extensive trivial motions and contemporaneous lawsuits designed to harass his victim through the court system, since "courts are rightly reluctant to deprive any litigant of the ability to petition the court for redress, and matters such as child custody, visitation, and child support are subject to review until the child reaches the age of majority").

IV. Reexamining Domestic Violence Courts from a Victim Perspective: Why It Is Necessary and How It Can Be Done

The existence of over 200 domestic violence courts nationwide[115] demonstrates growing support for this court model and suggests that specialized courts are quickly becoming a favored legal response to domestic violence. Numerous domestic violence advocates, while acknowledging criticisms and potential problems with these courts, argue that, because the adversarial system has failed domestic violence victims in the past, specialized courts represent the best possible way of dealing with this societal epidemic.[116] As a result, the focus of further legal reforms related to domestic violence has been on expanding use of these courts and on importing components of certain well-known ones into other jurisdictions.[117] Yet, as Part III demonstrated, several aspects of the design and functioning of these courts, as well as an understanding of the dynamics of domestic violence and its victims, caution in favor of reexamining domestic violence courts before new courts are developed based on principles of existing ones. This Part argues that such a reexamination of specialized domestic violence courts must take battered women's voices into account to ensure the legal system will, in the future, be as effective as possible in responding to the needs of the victims who encounter it. This Part further suggests strategies policymakers

---

115 *See* MOORE, *supra* note 88, at 3 (identifying 208 confirmed domestic violence courts and noting that, while twenty-seven states have established at least one such court, "five states, New York, Washington, Florida, California, Alabama, account for more than half of all courts"); *cf.* Mazur & Aldrich, *supra* note 69, at 6 (noting that "there are more than 300 courts nationwide that have special processing mechanisms for domestic violence cases").

116 *See, e.g.*, Fritzler & Simon, *supra* note 44, at 39 (identifying problems with the "way in which resources are applied (or the failure to apply appropriate resources)" throughout the adversarial system and arguing that "[i]n contrast to the adversarial system's procedural and other goals that relate to the offender, therapeutic jurisprudence, preventive law, and restorative justice [promoted by domestic violence courts] allow more focus on making victims whole again"); Tsai, *supra* note 29, at 1316–18 (arguing that "the movement toward model domestic violence court programs is a more promising alternative for combating domestic violence than the traditional approach, an approach that did little to discourage violence in the home" and which viewed "[v]ictim support and advocacy services" as "secondary concerns to be handled outside of the [legal] system").

117 *See* Quinn, *The Modern Problem-Solving Court Movement*, *supra* note 93, at 61–62 (noting that "the Conference of Chief Judges, which represents judges from the high courts of every state, has established a 'national agenda' to encourage further implementation of problem-solving court programs" that "calls for each jurisdiction to develop a particularized 'state plan to expand the use of the principles and methods of problem-solving courts'" and "also calls for judges to reach beyond the courthouse walls and press law schools to 'include the principles and methods of problem-solving courts in their curricula' in order to train lawyers to embrace problem-solving court techniques"); *see also* Mazur & Aldrich, *supra* note 69, at 3 (describing as the purpose of their article "to communicate the basic lessons of domestic violence courts in New York" so as "to provide judges, attorneys, court administrators, and others with the benefit of New York's experience").

may use to integrate victims' perspectives into future court reform efforts.

Many domestic violence courts are built on a principle of accountability to litigants and the larger community and thus already participate in periodic self-evaluative exercises to measure how successfully they are meeting their goals. In New York, for instance, judges convene regular meetings with "all of the court's partners—representatives from the prosecutor's office, the defense bar, court officers, victim advocates, resource coordinators, batters intervention programs, and probation"; additionally, court personnel "keep track of case numbers, dispositions, and the number of victims linked to services in order to assess their progress."[118] While these efforts are certainly a helpful starting point for a reexamination of specialized domestic violence courts from a victim's perspective, they cannot serve as the sole method of doing so. For one thing, there is strong reason to believe that no one but domestic violence victims themselves can provide a clear picture of whether these courts are achieving their objectives while respecting the uniqueness of each victim's situation and promoting her autonomy and self-determination. As noted above, court officials may perceive that victims are more satisfied with the judicial process than they really are.[119] Further, even the victims' advocates and community organizations currently involved in these evaluative efforts do not serve as perfect substitutes for battered women's voices, as their opinions on specialized courts may be influenced by their own views of what is appropriate for victims.[120]

Even if these advocates could fully represent battered women's perspectives, their presence still would not eliminate the need for victim participation, since the individuals charged with court reform may simply be less attuned to advocates' voices than they would be to those of victims. As is demonstrated by the experience of states that have successfully enacted domestic violence reforms, policymakers who continuously disregard secondhand testimony regarding the plight of domestic violence victims are often spurred to action when they hear victims' stories directly.[121] These personal narratives convey the human

118 Mazur & Aldrich, *supra* note 69, at 9, 12 (providing the example of partner meetings in Westchester County, which "frequently draw representatives from as many as fifty agencies to share new strategies and form new linkages").

119 *See supra* note 103.

120 *See* Goodmark, *Autonomy Feminism*, *supra* note 109, at 30 (noting that although such service providers are said to empower victims by "reinstat[ing] choice for women whose options have been restricted by their partners," often "those choices have been constrained by what service providers, advocates, and policy makers deem acceptable alternatives for women who have been battered").

121 *See* Jane C. Murphy, *Lawyering for Social Change: The Power of Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1274–92 (1993) (noting how a campaign focused around battered women's

suffering resulting from problematic legal approaches to battered women with a sense of urgency and emotion that cannot be replicated by those who have not lived through the victims' struggles.[122] Thus, it is essential that specialized domestic violence courts integrate victims themselves into future evaluation efforts, to ensure both adequate portrayal of battered women's voices and full attentiveness by policymakers to the opinions held by these victims.

Finally, and perhaps most importantly, courts' integration of battered women's voices into their self-evaluative efforts would provide an opportunity for these women to engage in a narrative process, thus furthering goals of victim empowerment that have traditionally been neglected by the court system in favor of law enforcement priorities. Narrative, which has long been considered an important process in defining one's identity and organizing one's perception of the world, gains added significance for a domestic violence victim:

> Battering can fundamentally change a woman's personality and undermine her confidence in her ability, her skills, and even her sanity. Narratives that enable a woman to see that she is not responsible for the violence against her, and that she is actively struggling against that violence, can be an essential tool in helping her hold on to her sense of self.[123]

Narrative is thus empowering on an individual level, as it allows a victim to talk through and make sense of her life, which previously may have seemed chaotic and disordered to her.[124] Moreover, narrative offers benefits to battered women in a social sense. The mere process of asking a victim to share her story, listening attentively to that story, and perhaps

stories generated executive orders commuting the sentences of eight battered women convicted of killing or attempting to kill their spouses, as well as legislation permitting the introduction of battered spouse syndrome testimony and a new civil protection order law, even though prior efforts to obtain these reforms through use of statistics, social science research, and litigation had failed).

122 As Jane Murphy has noted in her analysis of Maryland's domestic violence legal reforms, stories related directly to legal decision-makers by domestic violence victims confront these decision-makers with "both the existence and closeness of the problem of domestic violence," often causing them to reverse longstanding ambivalence toward reforms. *Id.* at 1268. For instance, Maryland Governor William Donald Schaefer—who "had never actively supported legislation or policies designed to improve the plight of domestic violence victims"—changed his mind after meeting with some of these victims: "You read a newspaper: 'Mary Jones shot her husband.' When you see Mary Jones and understand how she got there, it is a little different . . . . [The women told] stories of a lack of self-esteem, abuse, hoping things got better, things don't get better, and finally a point where the women break." *Id.* at 1284–85 (alteration in original).

123 Goodmark, *When is a Battered Woman*, *supra* note 106, at 79.

124 *See* ELAINE J. LAWLESS, WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE 6–7 (2001).

even acting based on the information within it instills in her the sense that she matters.[125] For a woman who has been repeatedly subjugated and treated as worthless by the person who is supposed to love her most, such an experience can be particularly empowering. In light of the role the legal system previously played in permitting and compounding the abuse of women, and given specialized courts' understanding of their own role as extending into community efforts to combat domestic violence and aid those who have suffered from it, it is appropriate for these courts to integrate a victim empowerment goal into their self-evaluative practices by providing opportunities for battered women to share their stories.

Although court reformers cite many obstacles to involving battered women,[126] the history of court reform and the studies of battered women's impressions of these courts suggest that it is possible to bring victims' voices into this process. The stories of battered women's encounters with the judicial system were, in some cases, what motivated the development of specialized domestic violence courts in the first place,[127] and battered women's advocates have continued to conduct interviews and seek victim testimony to raise awareness regarding the need for further improvement in the court system.[128] In one study of victim satisfaction with specialized domestic violence courts, victims specifically noted their desire to comment formally on the court process to generate improvement of

---

125 Elaine Lawless, describing her experiences interviewing battered women at shelters in Missouri, notes how the mere process of asking a victim to tell her story and taking the time to listen can aid the victim in developing feelings of importance and worth. *Id.* at 7 ("I am aware that the simple fact of my requesting their stories imbues them with an importance they have probably never encountered before. I believe that during the time they spend telling me their stories, they feel empowered. When they agree to 'give' me their stories, I agree to sit alone with them for hours and listen attentively to the lives they have lived . . . ."). Leigh Goodmark describes the additional empowerment that can result when the victim sees her story spur the legal system to act. *See* Goodmark, *When is a Battered Woman*, *supra* note 106, at 128 (describing as one benefit of a battered woman successfully bringing a legal claim the sense of "validation that can come from telling a story and having the system respond positively as a result").

126 *See* Mazur & Aldrich, *supra* note 69, at 42 (noting that because "the court has no legal hold on [victims]" and "many victims are loath to 're-live' their victimization by participating in follow-up studies," "it is often difficult to track victims over the long haul" and thus "to find out whether domestic violence courts are meeting victims' service needs").

127 *See Statement Orchid G. in Support of the Constitutional Amendment for NYS Court Reform*, http://www.courtinnovation.org/sites/default/files/Orchid.pdf (last visited Feb. 22, 2013) (domestic violence victim's story that led to development of integrated domestic violence courts in New York).

128 *See* Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709 (2005) (describing the findings of the Massachusetts Battered Mothers' Testimony Project, which used victims' stories to demonstrate the ways in which Massachusetts family courts were committing human rights violations against batered mothers).

some of the problematic aspects they perceived.[129] This suggests that those charged with implementing specialized domestic violence courts should at least reach out to battered women to attempt to integrate them into further reform efforts, rather than simply assuming that victims will not be interested in contributing.

In beginning this process of seeking a victim perspective on specialized domestic violence courts, policymakers could examine prior narrative-based projects to identify which aspects were effective in encouraging battered women to speak up. For instance, in Maryland, the coalition of domestic violence advocates who brought women's voices into legal reform efforts used three methods of communicating women's stories: "on videotape, during one-on-one meetings, and in written or live testimony."[130] Offering a similar array of choices to victims in the specialized court reform process may serve to facilitate battered women's willingness to contribute, as they could choose the mode of communication with which they were most comfortable. Court policymakers could also draw on their partnerships with victim advocacy organizations to develop safe spaces for victims to articulate their experiences and ensure that their efforts are promoting therapeutic goals. Leigh Goodmark has suggested that attorneys, in particular, are powerful resources for encouraging battered women to share their stories, as an attorney can "provide the client with a sense of the importance of her story within the larger context of the legal system and of the battles that women . . . who come after them" may face.[131] Since many of the attorneys representing battered women in specialized domestic violence courts are repeat players, courts could readily reach out to these advocates for aid and support.[132]

Some proponents of domestic violence courts suggest that these courts have already succeeded at taking into account battered women's autonomy and self-determination in a way that was not possible through the traditional adversarial system. In New York's integrated domestic violence courts, for instance, a judge hears from both the prosecutor in the criminal case and the victim in the family court case, thus allowing integration of

---

129 *See* Coulter et al., *supra* note 102, at 104–05.

130 Murphy, *supra* note 121, at 1278.

131 Goodmark, *When is a Battered Woman*, *supra* note 106, at 12.

132 The Center for Court Innovation has additionally suggested that specialized domestic violence courts track victim satisfaction with the court process by partnering with "local university or othe researcher to conduct focus groups and/or interviews with victims." Ctr. for Court Innovation, *Performance Measures for Specialized Domestic Violence Courts*, http://www.isc.idaho.gov/dv_courts/articles/DV%20Court%20measures.pdf (last visited Oct. 25, 2012).

both stakeholders' needs and desires into her orders.[133] However, the fact that these courts appear facially to be far preferable to prior legal responses to domestic violence from a victim perspective does not mean that there is no need to seek out victims' voices to ensure specialized courts are truly meeting their needs. Further, even if integrating victim feedback merely confirms that certain features are effective in responding to victims' needs, this is still important information for court reformers: it may allow them to strengthen what judges are already doing informally into official policies and set benchmark practices for other jurisdictions.

For instance, in cases like *Tancredi*—where a judge intervenes to shelter a battered woman from what the judge perceives to be another cycle of control and domination—victim feedback might reveal these protective gestures to be appreciated by women who fear they could not personally resist their batterers without endangering themselves. This type of victim response might then justify courts in extending their use of such measures. On the other hand, victims' stories could indicate that these measures interfere with a battered woman's attempt to exercise control over her own life, for example, in *Tancredi*, by asserting her civil rights. In either situation, victim input has an important role to play in the future of domestic violence courts, making it necessary for policymakers to seek it out as they establish new courts and continue operating existing ones.

CONCLUSION

Specialized domestic violence courts are an effective legal innovation in that they address the unique problems presented by domestic violence cases and give judges the flexibility to deal with the individual circumstances of each family afflicted by domestic violence. At the same time, application of Robert Merton's sociological theory of unanticipated consequences demonstrates that the unexpected problems that resulted for victims from previous domestic violence reforms may still arise from the current specialized domestic violence court movement. Further, certain distinctive features of these specialized courts—such as the active and involved judge and court personnel who serve as champions for the domestic violence cause in the larger community—could create additional consequences for the victims who encounter them. As a result, it is important for those charged with court

133 *See* Liberty Aldrich & Judy Harris Kluger, *New York's One Judge-One Family Response to Family Violence*, 61 JUV. & FAM. CT. J. 77, 86 (2010) (describing how "judges hearing multiple cases involving a particular family . . . have the unique advantage of hearing directly from both the State and the victim," putting them "in the best position to design a tailored response for that particular case"). For instance, a judge who enters a full stay-away order in response to the prosecution's concerns can then modify its conditions after hearing from the victim on the family court case that she wants her children to have supervised visitation with their father. *Id.* at 81–82.

reform to take a second look at specialized domestic violence courts, and, particularly from a victim's perspective, to ensure that these courts are responding as effectively as possible to the plight of battered women. Such a focus on victim perception of the legal process may, in turn, encourage more battered women to utilize this system and thus help stem the tide of domestic violence.