According to FBI crime reporting statistics, over 1 million incidents of domestic violence were reported to law enforcement in 2004 alone. Compared to other violent crimes, domestic violence remains one of the most prevalent. The statistics for 2004 continue a trend of marked increases in domestic violence reports in the United States, but some argue that these numbers grossly underestimate the true picture, putting the estimate of actual incidents of domestic violence at 4 million each year. Underreporting is closely linked with the nature of the violence – by definition domestic violence occurs between intimates. Victims may be less willing to report an assault perpetrated by a partner than if committed by a stranger. In the context of the relationship, the abuser may also be more able to control the victim, using monetary support, children, and emotional manipulation to prevent detection of domestic violence by law enforcement.

**Challenges to the Justice System**

The criminal justice system’s difficulty in dealing with the unique circumstances surrounding domestic violence crimes does not end with reporting. Judges have struggled to define courts’ roles in this cycle of violence. Judith S. Kay, Chief Judge of the State of New York, explains the tension in this way: “Should [a court] view domestic violence as a serious social problem that [it] can and should help to solve? Or should it remain scrupulously detached, processing each case as it would any other and leaving it to the other branches of government to pass laws and execute strategies that will constitute society’s response?”
From the victim’s standpoint, the traditional trial process in criminal court may provide punishment for the offender, but fails to address the underlying problems of the cycle of violence in a meaningful way. Contrary to the principles of restorative justice, the defendant accused of domestic violence has every incentive not to admit his guilt, for the court will sure impose punitive measures if he does. The criminal system in this way actually incentivizes claims of innocence and punishes defendant accountability and apology. Further, by involving the criminal justice system in the family’s affairs, the victim may unwittingly open herself to adverse consequences. If the defendant escapes criminal culpability, he will have every incentive to avoid being caught again and may react by becoming more oppressive and violent with the victim. In addition, the attorney’s fees and court costs that the defendant must bear become the problem of the entire family, and the victim may suffer again because of inadequate resources or an increase in the offender’s economic control over her.

In the criminal process the victim is only a witness for the prosecution, an evidentiary tool to help prove the defendant’s guilt. The criminal court does not consider the needs or wants of the victim, nor the adverse consequences that the trial process might present for her and her family. Victims are not often fully apprised of the progress of the trial, as the punishment of the offender is pursued by the State in the criminal system, who assumes the role of the aggrieved party. For the real victim, the trial process provides no relief for economic or social problems that result from the violence. As a result of prosecutorial “no drop” policies, victims who do not wish to pursue trials have no say in the matter and often resort to denying testimony at the trial. The result, of course, is that the defendant cannot be convicted, and the cycle of violence continues.
The criminal trial process also offers little help to defendants accused of domestic violence. The adversarial trial system rewards a prosecutor who maligns the defendant’s character with a conviction, and the defendant’s only option is to deny guilt. There is no incentive for a defendant to accept blame for abuse of his partner and no relief given should a defendant ask for help. Some jurisdictions incorporate a therapeutic component of the criminal process, requiring a defendant convicted of domestic abuse to attend substance abuse counseling or a batterer’s intervention program. While substance abuse programs have been linked with decreasing recidivism for those defendants who qualify, batterer’s intervention programs have not been shown to have the same success. Some hypothesize that the criminal justice system so ingrains the idea of being punished for accepting responsibility that batterer’s intervention programs can do little to reverse this thought process and get offenders to admit guilt and pursue rehabilitation.

Though these problems persist in the current justice system, they represent progress from the traditional view of domestic violence – as a private affair, or worse, the status quo.

**Domestic Violence: Legal History**

Throughout the United States’ history, the legislature and courts have struggled with how to deal with domestic violence. The Massachusetts Body of Laws and Liberties, propounded by the Puritans in 1641, was the first criminal code to explicitly criminalize domestic violence, stating that “every married woman shall be free from bodily correction or strips by her husband, unless it be in his own defense upon her assault.” It is suggested, however, that however progressive these laws seem, in practice they were rarely enforced, perhaps due to the Puritans’ belief that males had a “duty to enforce rules
of conduct within the family”. In the years following, legislatures moved away from Massachusetts’ example in domestic violence laws, choosing rather to reify the legal difference between public and private acts, reasoning that the community had little interest in what happened within the home. In effect, this made the husband or father the head of governing his own household, with little or no accountability to the community for what happened within the home. In 1824, the Supreme Court of the State of Mississippi decided the case of *Bradley v. State of Mississippi* and gave rise to the colloquial expression “rule of thumb”. The Court held that “a husband [had] the legitimate right to discipline his wife physically, as long as it [was] done in a moderate manner… with a stick no thicker than his thumb”. *Bradley v. State*, 1 Miss. 156 (Miss. 1824). Similarly the North Caroline Supreme Court in 1874 upheld the imposition of a $10 fine upon a husband for whipping his wife and inflicting bruises that remained for two weeks, stating: “if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive.” *State v. Oliver*, 70 N.C. 60, 61-62 (1874).

By the late 1800’s, however, twelve states considered criminalizing “wife-beating” largely as a result of the women’s suffrage movement, which promoted women’s rights to vote, own property and not be considered the chattel of her husband. These legislative issues became overshadowed in the following years by the emphasis on economic regulation and the Great Depression. Sadly, it was not until the radical movements of the 1960’s that the case to reform crimes between intimate partners was
once again taken up. Feminist activists pushed reforms in state domestic violence statutes and court procedures and raised society’s awareness of the issue.

Early efforts at reform struggled to incorporate the relationships intrinsic in domestic violence. One statute, for instance, limited domestic violence to incidents between married partners, excluding crimes committed against non-married victims or any children. Another statute made obtaining an order of protection contingent upon the victim agreeing to file for divorce from the abuser. Evidence suggests that even when a woman was granted an order of protect or restraining order, police enforcement was very weak, with some police departments codifying a “hands off” approach to domestic crimes in their policy manuals. Before the enacting of mandatory arrest statutes, police intervention in domestic assaults would sometimes result in officers “[walking] the husband around the block to ‘cool off’ instead of making an arrest, leaving the woman with no criminal recourse.”

By the 1970’s, “domestic violence” was a familiar term in communities, and problematic statutes were reconsidered. This time was also marked by the development of social services programs addressing domestic violence issues: anonymous battered women’s shelters, rape crisis hotlines, and batterers’ intervention programs. A series of lawsuits were also brought to address the problem of lax police procedures, alleging civil liability for departments’ “not responding to victims’ calls to police, ignoring complaints or requests for protection, and not enforcing criminal assault laws when domestic violence occurred.” See also Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984)(holding that police’s intentional withholding of protection from female victims who were assaulted by their partners violated the equal protection clause); Estate of
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*Bailey by Oare v. York County*, 768 F.2d 503 (3d Cir. 1985)(holding that police have an affirmative duty to protect persons in the community and that this duty requires police “having notice of the possibility of attacks on women in domestic relationships ‘to take reasonable measures to protect the personal safety of such persons in the community.’”)

These decisions led to sweeping reform in police procedures as well as new laws aimed at law enforcement in the domestic violence context. Many departments adopted pre-arrest or mandatory arrest policies for all domestic violence calls after the Minneapolis Domestic Violence Experiment, a 1981-82 study, found that the most effective police response to domestic violence situations was arrest. The study found that the rate of recidivism against the same victim within six months was cut in half when an abuser was arrested.

With a growing number of police departments making arrests for alleged domestic violence, the focus shifted to the prosecution of the offenders. Prosecutors struggled to win convictions in cases with uncooperative witnesses or where the victims did not wish to pursue charges. Also, since civil cases that arose from the same incident were often pursued concurrently with criminal prosecutions, separate courts sometimes issued conflicting orders, leaving compliance for defendants in a legal gray area. The ambiguity of which order would be enforced left victims feeling unsafe and distrustful of the criminal justice system, making them even less willing to cooperate in the criminal case. The court also faced problems in punishing offenders. Statistics showed that defendants convicted of domestic violence had higher rates of recidivism than defendants convicted of other violent crimes, and their re-arrests were often for offenses against the same victim. With the problems inherent in the system, courts began different approaches
for domestic violence cases, asking (as Judge Kaye puts it): Is there a larger role for a court to play in crafting a meaningful intervention that may change future behavior?

**Shortcomings of the Traditional Restorative Approach**

Just as the traditional justice system has struggled to accommodate the unique parties involved in domestic crimes, the restorative and therapeutic justice communities have faced challenges in devising lasting solutions in domestic violence situations. Traditional methods, namely victim-offender mediation, are quite controversial in the context of domestic violence, and most of the pilot programs for DVVOM have been pursued in Europe.

The first argument against the use of victim-offender mediation in domestic violence cases is normative. A wholly restorative approach to domestic violence is seen by some as minimizing the importance of an issue that is already only marginally accepted as a social problem. Victims’ rights advocates especially point to the lack of victim-offender mediation programs for other crimes of serious violence as setting up a comparison whereby domestic violence is seen as a comparatively “lesser” crime than assault against strangers. Given the history of the domestic violence movement in the United States, advocates are unwilling to jeopardize the view that domestic violence is just as serious – if not more so – than other violent crimes. Also, from a pragmatic standpoint, research on the success of DVVOM has yielded mixed results with few definitive findings except identifying a context in which VOM does not work. Research based on VOM programs in Vienna showed that although success could not be predicted accurately for participants in DVVOM, failure could be predicted in cases where there was a high degree of social and/or economic dependence of the victim on the abuser. In
these most serious cases, violence continued even after VOM where participants reported satisfaction and in one case, escalated. Even among lower-risk cases where parties appeared reconciled or reported satisfaction with the process, research showed that VOM was a short-term solution to the domestic violence program, more fully dealing with individual occurrences of violence rather than ongoing patterns.

A more serious concern that some critics have raised about VOM in the domestic violence context is structural. They argue that the traditional VOM setting, which lacks an authoritative moderator, actually allows the power imbalance which characterizes domestic violence relationships. In typical domestic violence relationships, the abuser relies on the helplessness of the victim in order to isolate and force her compliance with his authority. Without an authority figure, in VOM the abuser can retain the upper hand even in mediation; further, current mediation programs do not necessarily include an empowerment component for victims to cure the imbalance either. Even the goal of reconciliation in mediation is problematic in the domestic violence context. Many abusers are very emotionally manipulative to their victims, and this behavior is often firmly entrenched in the relationship long before mediation occurs. Reconciliation, then, can be used to manipulate the victim into staying within the abuser’s control, prolonging the power imbalance and defeating intervention into the cycle of violence. Along with using the process for victim manipulation, some researchers have observed that abusers also manipulate the justice system by feigning reconciliation if required to escape criminal penalties.

New Responses from Courts
In light of the difficulties that the traditional criminal justice system and the restorative justice community has had dealing with domestic violence cases in ways that are beneficial to victims and offenders, recently new problem-solving court models have sought to cure the current deficiencies in the process.

Funding from the 1994 Violence Against Women Act allowed several innovative courts to implement alternative strategies to deal with the special challenges of domestic violence cases. Four primary models of court reform emerged during the late 1990’s and early 2000’s, two focusing on specialized procedures in existing courts and two creating new court systems solely for domestic violence issues.

A. Pretrial Conferencing

The first model focuses on the pre-trial period and requires special pre-trial plea conferences on a separate court calendar. This process serves the dual function of centralizing case activity and maintaining efficiency in cases where timeliness is essential. Court Services Supervisor for Clark County District Court Chuck Bristol observes that the “closer you put the consequences to the act, the more [the offenders are] willing to buy into treatment.” The victim also receives a benefit from quick disposition, both in terms of satisfaction with the system and lessening the period in which the offender may attempt to intimidate or manipulate her into changing her story.

Because of the nature of domestic violence, many more parties need to be in attendance at hearings than in more general violent crimes. In addition to the parties, attorneys for both sides and the judge, domestic violence hearing are often attended by victims’ advocates, probation officers, representatives of batterer’s intervention and substance abuse programs, and increased security officers. Having a centralized calendar
allows regularity to the procedure and ensures that all parties can be present for hearings. Additionally, it enhances the relationship of the victim with the system by placing all the related parties in a courtroom at a scheduled time for her to consult. She will not have to call four separate offices for updates on her case; she will know to appear in court (for instance) every first Tuesday of the month in the same courtroom.

One example of this model is in the Municipal DV Pretrial Court in Seattle, Washington. In addition to the special pretrial calendar, this court also uses a rotating panel of only three judges to conduct all pretrial hearing on domestic violence cases, adding consistency of decision as another benefit to their program. Additionally, there are two dedicated prosecutors to handle all pretrial hearings.

B. Non-Evidentiary Appearances

The second model also addresses the pretrial phase, but enlarges the specialization to all non-evidentiary hearing, including arraignment, pretrial conferencing, entering pleas and sentencing.

The Domestic Violence Home Court in Sacramento, California is one example of this model. One judge (or one back-up judge) hear all matters that are non-evidentiary, whether in misdemeanor or felony cases. In addition to the hearings listed above, judges in the Home Court also conduct mandatory status reviews for defendants in batterer’s intervention or substance abuse programs. There is also a dedicated prosecutorial team of five attorneys assigned to the Home Court: one supervising attorney, one intake attorney, and three trial attorneys. Only the trial is held outside the Home Court.
The remaining models go further to adjust courts to better suit domestic violence cases. The third model utilizes a separate specialized court to hear all matters, including trial, in criminal domestic violence cases.

C. All Appearances in Specialized Court

The Clark County District Court in Vancouver, Washington, one judge hears all criminal domestic violence cases, from arraignment to sentencing. This court focuses on promoting consistency in decision-making, but requires significantly more funding than the previous models.

Also under this model is the Brooklyn Felony Domestic Violence Court, established in 1996 with the goals of promoting victim safety, increasing defendant accountability and encouraging coordination among all the offices in the criminal justice system that deal with domestic violence. To promote victim safety, alleged victims are each assigned a victim advocate, court personnel who explains the process, helps the victim make a safety plan, and gives referrals to community resources. The advocate is the primary conduit between the activities of the court and the victim, gathering information from all of the offices involved and communicating with the victim regularly about the status of her case. This regular communication also allows a court officer to monitor developments that may endanger the case, such as reports of victim intimidation or violations of orders of protection. The relationship between the advocate and the victim increases the victim’s feelings of safety, satisfaction with the criminal justice system, and willingness to participate in her case. Using a dedicated staff person also allows a more thorough understanding of each situation; prosecutors often do not have time to devote to the in-depth communication with victims needed to build a strong case,
nor do they have adequate training to deal with emotionally fragile victims. Many advocates either hold social work degrees or have completed special training to deal with precisely these difficult situations.

The Brooklyn Court also aims to increase offender accountability by strictly monitoring compliance with court orders such as restraining or “no contact” orders, batterer’s intervention programs, or drug and alcohol abuse programs. Offenders are required to appear at mandatory status checks before a judge. Offenders on probation are monitored by heightened supervision by probation officers and are required to appear for less-frequent status checks for compliance. Judge John Leventhal says, “I see defendants every two to three weeks just to let them know the court is watching them.”

The court also aims to improve coordination between the various court and community entities involved in each case. The court employs a dedicated team of a judge, prosecutors, victim advocates and probations officers who deal solely with domestic violence cases. These characters form “teams” who, once assigned a case, follow it from start to finish. The court has also created a new role, a Resource Coordinator, who gathers information from all agencies involved and issues a standardized report before each court appearance. The presiding judge also holds monthly meetings on court performance with representatives from key players in the system: prosecutors, defense attorneys, victim advocates, treatment providers, probation, parole and corrections officers, and other social services representatives.

D. Hybrid Criminal/Civil Jurisdiction

The final model of court reform is a combined-jurisdiction court, which hears all matters pertaining to the same parties, whether civil or criminal.
The Clark County District Court in Vancouver, Washington also utilizes this model in its courts. In implementing this program, Vancouver looked at the realities of domestic violence situations: while the State’s interest in reducing domestic violence was represented in the criminal trial, much of the actual adjudication on individual situations occurred in civil court hearing for orders of protection, divorce, and child custody. This bifurcated process often led to conflicting orders about the extent of contact the offender was allowed with the victim. By using the same forum to address all the domestic matters in a single family, there is increased accuracy and consistency in the court’s rulings. It also lessens the amount the offenders may be able to manipulate the system by taking advantage of being before numerous different judges who may be willing to give him the benefit of the doubt in a first appearance. This “integrated” court system is also being piloted in the New York Unified Court System.

Though the integrated model is certainly the most specialized and arguably the most restorative for both victims and offenders, it is also the most controversial. Where civil and criminal procedures intersect, it is usually to the detriment of criminal defendants. For instance, defendants in civil domestic violence hearings (such as an order of protection hearing) often address the court about the situation, where he would have the right to remain silent in criminal court. When civil and criminal hearings are combined, a court must disregard the defendants’ testimony given on the civil action in the criminal action; many doubt that judges are actually able to do this, but also fear abuse by defendants who may divulge incriminating information in the civil matter to prevent prosecutors from using the testimony in the criminal context. Additionally, the victim’s testimony is also problematic. Using the example of an order of protection
hearing, a victim must procure private counsel, even if before the same court in which a prosecutor is handling the criminal case. Since the prosecutor represents the State, she cannot appear on behalf of the victim in any of the civil matters. The victim’s testimony at the order of protection hearing, however, may be used by the defense as impeachment evidence when she testifies at the criminal matter.

Despite these concerns, specialized court systems show indicators of success. Though most of these programs are still in the preliminary phases, there is research on some. The Brooklyn DV Court, in its first two years, decreased dismissal rates by 60% and cut probation violations in half. Prosecutors may also be more willing to bring charges in borderline cases in order to give victims access to the system of services the domestic violence court provides. Finally, although conviction rates have not changed significantly, more cases have reached disposition by guilty plea rather than trial, showing the effectiveness of both the plea bargaining phase and the court’s attempt to increase offender accountability.

Because data on domestic violence in the criminal justice context is still emerging, recidivism statistics are imprecise; research estimates that recidivism rates for domestic violence are between 30 and 50%, higher than the rates for violent crimes generally. Domestic abusers are additionally much more likely to commit new acts against the same victim. A study of 273 offenders convicted of domestic violence crimes in the Chicago area found that 41% were re-arrested for new violent offenses within twenty-four months. It found that the top factors associated with recidivism are: history of drug and alcohol abuse, residential instability, employment instability, and prior criminal convictions.
Prior arrests for drug and alcohol abuse were the strongest indicator for recidivism, roughly doubling the odds of re-arrest on probation. Substance abuse impairs decision-making and adds stress to the intimate relationship. It is also strongly correlated with financial problems, which also increase stress. The study found residential instability also strongly correlated to recidivism; for every address change the offender had in the past three years, his risk of re-offending increased 1.5 times. This correlation is most likely linked to feelings of lack of control and increased stress. Employment instability is also a strong marker of recidivism, increasing the risk of re-offending 1.4 time for every job held in the past three years.

In addressing these factors, problem-solving domestic violence courts employ several strategies. First, some courts have a program mandate of either batterer intervention or substance abuse treatment (or both, in some cases). Offenders are accountable not only to probation officers for compliance and program participation, but also to the court in the form of status review hearings, often before the judge who mandated participation. Additionally, because of the enhanced communication that the integrated approach provides for victims, they are often notified of these hearings and allowed to be present. The individualized monitoring system also provides closer scrutiny of the offender’s other risk factors. The integrated approach allows the parties access to a wide array of State programs and community social service agencies, which may be able to address residential and employment instability.

Conclusion

The intimate relationship between the parties in domestic violence cases has provided a challenge for courts and traditional restorative justice methods. The
innovating strategies of problem-solving domestic violence courts have shown early indicators of success, but have also raised concerns about fundamental fairness. Problem-solving courts, however, have arguably provided the most comprehensive and restorative outcomes for parties in domestic violence cases and should be more widely integrated into the U.S. criminal justice system. Judge Kaye makes an eloquent argument for continuing to push the boundaries of the traditional court system to accommodate domestic violence cases:

But perhaps the ultimate answer to these objections is: what’s the alternative? Domestic violence cases – hundreds of thousands of them – are in our nation’s courthouses, and we have to deal with them in one way or another. If we handle them inadequately, tragedies occur. Lives are lost. And public confidence in our justice system moves down yet another notch. If we refuse to take action, refuse to change, we may preserve our traditions and decorum. But at what cost?
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