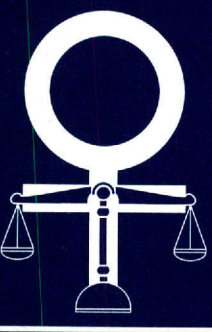

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Articles

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Articles

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WHEN COURTS COLLIDE: INTEGRATED DOMESTIC VIOLENCE COURTS AND COURT PLURALISM

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* Associate Professor of Law and Co-Director, Family Justice Clinic, William S. Boyd School of Law, University of Nevada Las Vegas. I am grateful to Marisa Silenzi Cianciarulo, Julie Goldsheid, Francis J. Mootz III, Nancy Rapoport, and Deborah Weissman for valuable comments on earlier drafts of this Article; Tamara Lawson and Emily Sack for helpful discussion about issues in the Article pertaining to their respective areas of expertise; and the organizers and participants of the Chapman University Symposium on Specialty Courts in Criminal Justice, especially Richard E. Redding for inviting me to present, and Hon. John A. Bozza and David Wexler for early feedback. I also wish to thank Jeanne Price and the Wiener-Rogers Law Library, and especially Jennifer Gross, for outstanding research assistance, and Dean John White and UNLV for generous research support. Heartfelt thanks to Lauren Hazarian as well, for diligent and indefatigable assistance with this project in its formative stages. All mistakes are, of course, mine.

ABSTRACT

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

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

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

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

I. INTRODUCTION

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

Broadly speaking, criminal courts are traditionally concerned with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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COALITION AGAINST DOMESTIC VIOLENCE, BATTERED MOTHERS' TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE 6 (June 2003), *available at* http://www.stopfamilyviolence.org/sites/documents/0000/0035/AZ_bmtp_report.pdf (reporting that family courts ordered sole or joint custody to perpetrators in up to seventy-four percent of domestic violence cases surveyed). *See also* Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 657, 662 n.19 & appendix (2003) (reporting informal survey findings in 2002 showing that, of a total of thirty-eight appellate state court decisions involving custody and domestic violence, thirty-six awarded joint or sole custody to alleged or adjudicated batterers). *See also infra* Part IV (discussing the ways in which victims' access to civil court remedies for domestic violence is constrained by court culture and citing studies).

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

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

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

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

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

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

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

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

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

II. DOMESTIC VIOLENCE REMEDIES IN A PLURALISTIC COURT SYSTEM

A. Criminal Courts and Domestic Violence

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

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

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

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

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

the criminal justice response through the advent of more aggressive policies, including mandatory arrest and pro-prosecution policies.[21] These advances remain tentative and incomplete for many reasons, including their limited applicability outside the context of heterosexual intimate violence involving victims who conform to an elusive ideal.[22] Nonetheless, the improved enforcement of anti-domestic violence laws is credited with removing violence against intimates from the realm of conduct outside the purview of the state and recasting it as a social problem and conduct subject to state sanction. To the extent that criminal justice policies against domestic violence are actually implemented,[23] they send a powerful social message that domestic violence is unacceptable[24] and help to ensure the safety of victims.[25] In this context, the adoption of clear, aggressive, and consistently applied criminal court processes are viewed as essential to providing victims "fair and equal protection under the law."[26]

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

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

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

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

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

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

i. Remedies Available in Criminal Courts

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

ii. Benefits and Drawbacks for Victims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Civil Courts in Contrast to Criminal Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

provide victims with "one-stop shopping."

III. MISDIAGNOSING THE PROBLEM: COURT FRAGMENTATION AND INTEGRATED COURTS

A. Fragmented Courts and Access to Justice

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

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

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

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

51. *Id.*

52. *Id.* at 25-26.

53. *Id.* at 25.

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

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

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

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

i. The Conflicting Orders Problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. The Under-Informed Victim Problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Civil Courts and Victim Autonomy

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

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

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70. *Id.* at 1129.

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

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

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

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

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

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

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

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

76. *Id.* at 289-90.

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

78. *Id.* at 95.

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

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

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

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

83. *Id.* at 1126-27.

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

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

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

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

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

86. *Id.*

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

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

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

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

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

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

IV. COURT PLURALISM AS PROTECTION

A. The Limits of Choice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

103. *See supra* Part III.

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

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

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

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

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

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

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

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

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

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

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

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

evaluations by mental health professionals in domestic violence cases[113] and recent calls to facilitate rather than discourage mediation and other informal dispute resolution processes in these cases[114] suggest that the trend is toward additional delegalization in family court responses to domestic violence, not less.

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

B. Criminal Court as Counterpoint

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

The functionality of criminal justice for victims is threatened by

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

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

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

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

i. Procedural Justice and the Benefits-Burdens Paradox

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Process Defects in Criminal Courts

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

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

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

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

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

127. *Id.*

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

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

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

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

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

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129. *Id.*

130. *Id.*

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

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

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

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

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

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

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

135. *Id.* at 1504-05.

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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TEENS, TECHNOLOGY, AND CYBERSTALKING: THE DOMESTIC VIOLENCE WAVE OF THE FUTURE?

Andrew King-Ries*

I. INTRODUCTION

The American criminal justice system is on the cusp of a potential domestic violence crisis. The United States has made progress in combating domestic violence in the last thirty years, primarily by recognizing that domestic violence is a crime and one that should be prosecuted. This progress is at risk of being undermined by the intersection of two recent developments: first, teenagers normalizing unhealthy relationship patterns through pervasive use of technology and second, law enforcement's inability to adequately respond to cyberstalking. The combination of these two trends suggests that American society is

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producing a whole new generation of domestic violence batterers.

Several recent studies have found that nearly all teenagers are using technology—primarily cell phones and text messaging—and using it to a staggering degree.[1] More importantly, teenagers are incorporating technology into the formation of their sexual identities and the patterns of their intimate relationships.[2] The incorporation of this pervasive technology use into normal teenage development is occurring largely without adult supervision or modeling.[3] Teenagers' use of technology has reduced or changed their expectations of privacy in their intimate relationships, normalizing a "boundarylessness" which may make them more accepting of—and more at risk from—abusive behaviors by their intimate partners. Given the well-documented prevalence of domestic violence in teenage relationships,[4] the damaging impact of violence during

1. *E.g.*, THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 6-7 (2008), *available at* http://www.thenationalcampaign.org/sextech/pdf/sextech_summary.pdf (finding that 87% of teens ages 13-19 reported having and using a cellphone; 84% reported that they send and receive text messages); *see also* VICTORIA J. RIDEOUT ET AL., KAISER FAMILY FOUNDATION, GENERATION M^2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 2-3 (Jan. 2010), *available at* http://www.kff.org/entmedia/upload/8010.pdf (finding that 7th-12th grade students spend an average of an hour and a half a day texting); AMANDA LENHART ET AL., PEW RESEARCH CENTER, TEENS AND MOBILE PHONES: TEXT MESSAGING EXPLODES AS TEENS EMBRACE IT AS THE CENTERPIECE OF THEIR COMMUNICATION STRATEGIES WITH FRIENDS 2 (Apr. 20, 2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP-Teens-and-Mobile-2010.pdf; HARRIS INTERACTIVE, A GENERATION UNPLUGGED: RESEARCH REPORT 2, 16 (Sept. 12, 2008), *available at* http://files.ctia.org/pdf/HI_TeenMobileStudy_ResearchReport.pdf.

2. *See* PETER PICARD, TEEN RESEARCH UNLIMITED, TECH ABUSE IN TEEN RELATIONSHIPS STUDY (prepared for Liz Claiborne, Inc.) (2007), *available at* http://www.loveisnotabuse.com/c/document_library/get_file?p_l_id=45693&folderId=72612&name=DLFE-204.pdf; THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 1, at 1, 3; THE ASSOCIATED PRESS & MTV, A THIN LINE: 2009 AP-MTV DIGITAL ABUSE STUDY, EXECUTIVE SUMMARY 2-3 (2009), *available at* http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf.

3. THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 1, at 6-7; MARY MADDEN & LEE RAINIE, PEW RESEARCH CENTER, ADULTS AND CELL PHONE DISTRACTIONS 5 (June 18, 2010), *available at* http://www.pewinternet.org/Reports/2010/Cell-Phone-Distractions.aspx; AMANDA LENHART, PEW RESEARCH CENTER, ADULTS AND SOCIAL NETWORK WEBSITES, DATA MEMO 1 (Jan. 2009), *available at* http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx. Moreover, many parents do not supervise technology use. RIDEOUT ET AL., *supra* note 1, at 18.

4. Teens experience violence in their relationships at a higher rate than any other age group. Susan L. Pollet, *Teen Dating Violence Is Not 'Puppy Love,'* 32 WESTCHESTER B.J. 29, 29 (2005). About one in three teens have been physically, verbally, or emotionally abused by a dating partner. ANTOINETTE DAVIS, THE NAT'L COUNCIL ON CRIME AND DELINQUENCY, INTERPERSONAL AND PHYSICAL DATING VIOLENCE AMONG TEENS 2 (Sept. 2008), *available at* http://www.nccd-

these formative relationships,[5] and the effectiveness of technology as a tool for domestic violence,[6] America is facing a crisis in its efforts to combat domestic violence. Our emerging adult population is normalizing unhealthy relationship patterns while embracing technology, which has become an effective tool for establishing power and control imbalances in those relationships.

The criminal justice system has yet to develop an effective response to cyberstalking. Technology provides increasingly sophisticated ways for batterers to stalk their intimate partners and avoid detection, apprehension, and prosecution. The centrality of stalking and cyberstalking to domestic violence is well-established. Twenty-six percent of stalking victims report being stalked through the use of some form of technology, such as e-mail, instant messaging (IM), or monitoring through global positioning systems (GPS), spyware, or digital surveillance.[7] Although stalking and cyberstalking are chronically under-reported, the connection between stalking and violence is clear: 80% of all stalking of intimate partners is coupled with physical violence against the victims[8] and 76% of all women killed by their intimate partners had also been stalked by that partner.[9] Efforts to prosecute digital domestic violence have been mainly ineffective, largely due to the continuing development of technology, the difficulty of investigation, and the lack of adequate resources.[10]

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crc.org/nccd/pubs/2008_focus_teen_dating_violence.pdf. In 2009, 9.8% of teens reported being "hit, slapped, or physically hurt on purpose by their boyfriend or girlfriend" within the previous year. Danice K. Eaton et al., Center for Disease Control and Prevention, *Youth Risk Behavior Surveillance: United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REP. 6 (June 4, 2010), *available at* http://www.cdc.gov/mmwr/ pdf/ss/ss5905.pdf [hereinafter CDC 2009]. *See also* PICARD, *supra* note 2, at 12; SARAH SORENSEN, ACT FOR YOUTH CENTER OF EXCELLENCE, ADOLESCENT ROMANTIC RELATIONSHIPS FACT SHEET 2 (July 2007), *available at* http://www.actforyouth.net/documents/AdolescentRomanticRelationships_July07.pdf.

5. SORENSEN, *supra* note 4, at 2.

6. PICARD, *supra* note 2, at 8, 15; Laura Silverstein, *The Double-Edged Sword: An Examination of the Global Positioning System, Enhanced 911, and the Internet and Their Relationships to the Lives of Domestic Violence Victims and Their Abusers*, 13 BUFF. WOMEN'S L.J. 97, 118, 121-22 (2006).

7. KATRINA BAUM ET AL., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, STALKING VICTIMIZATION IN THE UNITED STATES 5 (Jan. 2009), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1211; *see also* PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 6, 8 (April 1998), *available at* http://www.ncjrs.gov/pdffiles/169592.pdf.

8. *See* PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iv (July 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

9. Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. 300, 311 (1999).

10. U.S. DEP'T OF JUSTICE, 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR

The American criminal justice system, therefore, is facing a future domestic violence crisis. Unfortunately, authorities—both parents and law enforcement—tend to minimize the seriousness of violence within adolescent relationships and to minimize the seriousness of stalking. In addition, given the prevalence and embrace of technology by teenagers, criminalizing "normal" teenage behavior seems counter-productive. While an effective criminal justice system response to this problem has yet to be developed, the first step will be for parents and law enforcement to recognize the risk and take it seriously. The second step will be to "re-norm" unhealthy teenage relationship norms. It is possible that the very embrace of technology might hold a solution. With guidance, the power of social networking may provide an effective counter to the isolation and imbalance of the domestic violence relationship. The combination of these steps might help avert this domestic violence crisis.

Section II of this article will explore the dynamics and intersection of the domestic violence relationship, stalking, and technology. Section III will examine teenage identity formation, teenage use of technology, the incorporation of technology into teenagers' identity formation and relationships, and the prevalence of teenage domestic violence. Section IV will explore the potential consequences of current technology use in teenagers' intimate relationships. Section V will propose possible solutions to the burgeoning crisis in America's efforts to combat domestic violence.

II. DOMESTIC VIOLENCE DYNAMICS, STALKING, AND TECHNOLOGY

In the past thirty years, American society has developed a greater awareness and understanding of domestic violence.[11] Today, we understand that domestic violence is the leading cause of injury to American women and that a huge portion of women will experience violence in their intimate relationships.[12] This greater societal understanding of domestic violence has led to criminalization of domestic violence at the state and federal levels.[13]

LAW ENFORCEMENT AND INDUSTRY 6-9 (August 1999), *available at* http://www.justice.gov/criminal/cybercrime/cyberstalking.htm; Ellen Luu, *Web-Assisted Suicide and the First Amendment*, 36 HASTINGS CONST. L.Q. 307, 321 (2009). Silverstein, *supra* note 6, at 132-35; Mary L. Boland, *Model Code Revisited: Taking Aim at the High-Tech Stalker*, 20 CRIM. JUST. 40, 42-43, 57 (2005).

11. Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 6-7 (2005).

12. *Id.*

13. JEFFREY FAGAN, NAT'L INST. OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 7–9 (Jan. 1996), *available at* http://www.ncjrs.gov/pdffiles/crimdom.pdf.

It is also understood that some domestic violence relationships—battering relationships—are not simply about violence.[14] While violence is a critical component of the relationship, the broader power and control dynamic prevails:

> The battering relationship is not about conflict between two people; rather, it is about one person exercising power and control over the other. Battering is a pattern of verbal and physical abuse, but the batterer's behavior can take many forms. Common manifestations of that behavior include imposing economic or financial restrictions, enforcing physical and emotional isolation, repeatedly invading the victim's privacy, supervising the victim's behavior, terminating support from family or friends, threatening violence toward the victim, threatening suicide, getting the victim addicted to drugs or alcohol, and physically or sexually assaulting the victim. The purpose of the abusive behavior is to subjugate the victim and establish the batterer's superiority.[15]

Underlying the concept of power and control—and inherent in each of the potential tactics to establish that power and control—is a fundamental lack of appreciation or respect for the autonomy of the victim.[16] The batterer acts in ways that ignore, undermine, violate, or undervalue the autonomy of the victim to make decisions regarding her own body, life, work, and acquaintances.[17] Critically, this lack of respect for the autonomy of the victim can be viewed as an over-emphasis of the autonomy of the batterer and an under-emphasis of the victim's autonomy. The batterer does not appreciate or respect the victim's physical or emotional boundaries. Enduring a pattern of repeated violations of her boundaries, the victim may

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14. The National Coalition Against Domestic Violence defines battering as a "pattern of behavior used to establish power and control over another person through fear and intimidation, often including the threat or use of violence." *The Problem: What is Battering?*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/learn/TheProblem_100.html (last visited Mar. 28, 2011).

15. Andrew J. King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 304 (2005) (citations omitted).

16. *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1138-39 (2009); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 602-03 (2007).

17. Johnson, *supra* note 16, at 1121-22; Power and Control Wheel, DOMESTIC ABUSE INTERVENTION PROJECT, http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf (last visited Mar. 28, 2011); Melinda Smith & Jeanne Segal, *Domestic Violence and Abuse: Signs of Abuse and Abusive Relationships*, HELPGUIDE.ORG, http://www.helpguide.org/mental/domestic_violence_abuse_types_signs_causes_effects.htm (last rev'd Mar. 2011).

come to accept that her batterer will assert his right to invade those boundaries.[18] Importantly, acceptance of the fact that the batterer will invade her autonomy is not acceptance of the invasion.[19] While the lack of privacy and safety are accepted as a given, they are not accepted as appropriate.[20]

Survivors of intimate partner violence report extensive amounts of stalking behavior by their intimate partners.[21] In fact, recent studies of domestic violence document greater levels of stalking than previously considered, prompting the National Violence Against Women Survey to conclude that "intimate partner stalking is a serious criminal justice problem."[22] A 2009 Bureau of Justice Statistics study found that 3.4 million people over the age of eighteen are stalked each year in the United States.[23] Of that number, 75% of stalking victims are stalked by someone they know and 30% are stalked by a current or former intimate partner.[24]

The recent studies also demonstrate the centrality of stalking to the domestic violence relationship and the connection between stalking and risk of physical violence. According to the 1998 National Violence Against Women survey, more than 80% of stalking victims who were stalked by an intimate partner reported that they had also been physically assaulted by that partner; 31% were also sexually assaulted by that partner.[25] Further, 76% of women killed by their intimate partners were stalked by that intimate partner within twelve months prior to the murder.[26]

Broadly, stalking involves surveillance of the victim's whereabouts, activities, and contacts.[27] Stalking is an example of the batterer's belief that he has the right to control the victim.[28] Sometimes the surveillance is

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18. Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 430 (1994).

19. While it has been hypothesized that battered women will fall into a condition of "learned helplessness," (*see* Suarez, *supra* note 18, at 432-33 (describing Lenore Walker's theory of learned helplessness)), I do not believe that acceptance of the fact of the invasion is the same thing as acceptance of the invasion.

20. *Id.* at 431.

21. BAUM ET AL., *supra* note 7, at 4; *see* TJADEN & THOENNES, *supra* note 8, at 9.

22. TJADEN & THOENNES, *supra* note 8, at iii.

23. BAUM ET AL., *supra* note 7, at 1.

24. *Id.* at 4.

25. TJADEN & THOENNES, *supra* note 7, at 8.

26. McFarlane et al., *supra* note 9, at 311.

27. The National Crime Victimization Survey defined stalking as "a course of conduct directed at a specific person that would cause a reasonable person to feel fear." BAUM ET AL., *supra* note 7, at 1. The requirement that the victim feel fear is common to many stalking laws. However, stalking behaviors may not cause fear at first or in every case, especially in teens. *Teen Stalking Deserves Another Look*, 5 THE SOURCE 1, 2 (Summer 2005), http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=46628.

28. U.S. DEP'T OF JUSTICE, *supra* note 10, at 3.

surreptitious; other times, it is overt.[29] In either situation, the stalker asserts his "right" to invade the victim's boundaries and to know the victim's whereabouts, activities, and social interactions at all times.

Recent studies documenting unexpectedly high levels of stalking are also exposing high rates of cyberstalking—stalking using technology.[30] Cyberstalkers use GPS, spyware computer programs, cell phone monitoring chips, and tiny surveillance cameras to track the locations, activities, and communications of their victims.[31] They also use technologies such as social-networking sites, chat rooms, e-mail, and cell phones to harass or humiliate their victims.[32] Often the same power and control dynamic in off-line stalking is present with cyberstalking: "Many stalkers—online or off—are motivated by a desire to exert control over their victims and engage in similar types of behavior to accomplish this end."[33] Twenty-six percent of stalking victims report being stalked through the use of some form of technology, such as e-mail or instant messaging.[34] Eleven percent of stalking victims who report cyberstalking report being monitored with GPS, 46% report being monitored through video or digital cameras, and 42% report being monitored through listening devices.[35] As noted by the Attorney General in 1999, "As with offline stalking, the available evidence (which is largely anecdotal) suggests that the majority of cyberstalkers are men and the majority of their victims are women."[36]

For three primary reasons, it is anticipated that these statistics significantly underestimate the actual extent of cyberstalking: data on cyberstalking is truly in its infancy; our society is becoming ever more digitally dependent; and cyberstalking can take many forms and be difficult to detect.[37] First, according to the United States Department of Justice

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29. For example, spyware can be completely hidden from the ordinary computer user or a stalker can make his presence, if not his identity, known by sending anonymous emails or texts. *See, e.g.*, Chris Jenkins, *Stalkers Go High Tech to Intimidate Victims*, WASH. POST, Apr. 14, 2007, at A1.

30. *See* BAUM ET AL., *supra* note 7, at 5. "Cyberstalking is the use of the Internet, email, and other electronic communication devices to stalk another person . . . . Cyberstalking includes such acts as 'flooding a victim's email box with unwanted mail,' sending computer viruses to victims, 'using a victim's email address to subscribe her to multiple list servers,' sending out false information about the victim, and identity theft." Silverstein, *supra* note 6, at 120-21.

31. Jenkins, *supra* note 29.

32. *Id.*

33. U.S. DEP'T OF JUSTICE, *supra* note 10, at 3.

34. BAUM ET AL., *supra* note 7, at 4.

35. *Id.* at 5.

36. U.S. DEP'T OF JUSTICE, *supra* note 10, at 3.

37. *Id.* at 1, 3, 5; *see also* RIDEOUT ET AL., *supra* note 1, at 2-4 (discussing the increase in online media consumption among teens); Paul Bocij, *Victims of Cyberstalking: An Exploratory Study of Harassment Perpetrated via the Internet*, 8 FIRST MONDAY 10 (Oct. 6, 2003), *available at*

Bureau of Justice Statistics, "[f]ew national studies have measured the extent and nature of stalking in the United States."[38] In 2006, the Bureau of Justice Statistics conducted a supplemental victimization survey focusing specifically on stalking. The survey defines stalking as "a course of conduct directed at a specific person that would cause a reasonable person to feel fear."[39] The survey measured the following stalking behaviors: making unwanted phone calls; sending unsolicited or unwanted letters or e-mails; following or spying on the victim; showing up at places without a legitimate reason; waiting at places for the victim; leaving unwanted items, presents, or flowers; and posting information or spreading rumors about the victim on the Internet, in a public place, or by word of mouth.[40] This survey "represents the largest study of stalking conducted to date" and—for the first time—included information about possible cyberstalking.[41] As when the 1999 Attorney General Report on Cyberstalking was published, "current trends and evidence suggest that cyberstalking is a serious problem that will grow in scope and complexity as more people take advantage of the Internet and other telecommunications technologies."[42]

Second, our society continues to become increasingly digital. The move to a digital world creates greater opportunity to monitor individuals and to gather important information about them.[43] As the Attorney General noted, "Given the enormous amount of personal information available through the Internet, a cyberstalker can easily locate private information about a potential victim with a few mouse clicks or key strokes."[44] For instance, an increasing number of devices, such as cellphones and BlackBerries, are equipped with GPS. With downloadable, undetectable software, or savvy use of programs like Foursquare or Google Buzz, a stalker can use the GPS feature to determine the exact location of the device at all times.[45] As long as the victim is in possession of the GPS

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http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1086/1006.

38. BAUM ET AL., *supra* note 7, at 2.

39. *Id.* at 1.

40. *Id.*

41. Carolyn Thompson, *Stalkers Turn to Cell Phones to 'Textually Harass'*, ASSOCIATED PRESS, Mar. 3, 2009, *available at* http://www.msnbc.msn.com/id/29493158/.

42. U.S. DEP'T OF JUSTICE, *supra* note 10, at 2.

43. Silverstein, *supra* note 6, at 119-21, 124-28. "And the problem is only likely to grow, fueled by the availability of personal data online and the huge growth in social networking and dating sites, which are attracting investment from big companies." Tom Zeller, *A Sinister Web Entraps Victims of Cyberstalkers*, N.Y. TIMES, Apr. 17, 2006, *available at* http://www.nytimes.com/2006/04/ 17/technology/17stalk.html.

44. U.S. DEP'T OF JUSTICE, *supra* note 10, at 3.

45. Silverstein, *supra* note 6, at 103-07; Justin Scheck, *Stalkers Exploit Cellphone GPS*, WALL ST. J., Aug. 3, 2010, at A1; Leo Hickman, *How I Became a Foursquare Cyberstalker*, THE GUARDIAN, July 23, 2010, at G2. *See also* Spy Software for Mobile Phones, MOBILE

device, the stalker can easily keep tabs on her location from his own computer or iPhone.[46]

Another example of society's potentially dangerous digital dependence is the increasing number of important transactions that are being conducted electronically. Banking, travel plans, and legal activity are three significant examples. In addition, much business and personal communication is conducted electronically, particularly through e-mail and texting. Further, significantly more personal information is being stored electronically, including tax and financial statements and medical records. Computer programs that allow a person to remotely monitor every keystroke of another computer mean that a stalker can keep track of every financial transaction, every correspondence, and every website visited.[47] Imagine a victim trying to leave a relationship: her financial records, her travel plans, even her correspondence with attorneys could all be available to her cyberstalking batterer.

According to one cyberstalking domestic violence victim whose ex-husband engaged in online and off-line stalking, he "presented the computer information to prove that he could violate her sense of security whenever and wherever he wanted, even after he moved out of the region."[48] She stated,

> When the stalking comes from someplace, anyplace, it makes you wonder what he's really capable of... what he was going to do next. He could have been anywhere at any time looking into my life and getting to me. He could have seen anything, like legal documents I was forwarding; or where I was going to be. That's what I never knew.[49]

A third reason that cyberstalking rates are probably underestimated is that cyberstalking can take many forms and is often difficult to detect.[50]

SPY, http://www.mobile-spy.com/ (last visited Aug. 8, 2010).

46. Disturbingly, Forbes.com recently published an article normalizing several cyberstalking methods as merely options for "little spousely spying" to "track a cheating spouse." The options outlined including checking one's partner's voice and email logs, tracking a spouse's location by GPS, and installing keystroke logging software, motion-activated video cameras, and voice-activated recorders to capture a spouse's actions and conversations. Brian Caulfield, *How to Track a Cheating Spouse*, FORBES (Apr. 14, 2010), http://www.forbes.com/2010/04/14/tiger-woods-facebook-technology-security-cheating.html.

47. Silverstein, *supra* note 6, at 124, 128-30 (discussing the availability of court documents on the internet and the ability of batterers using spyware to monitor every keystroke, including passwords and websites visited).

48. Jenkins, *supra* note 29.

49. *Id.*

50. "Novice users may be less likely to detect and counter certain threats, such as computer viruses, due to a lack of technical knowledge and experience." Bocij, *supra* note 37.

Some spyware programs, for example, allow a person to monitor every keystroke entered on another computer; a person can gather passwords to access files, e-mail accounts, and bank accounts.[51] Other programs can combine GPS information to map current locations of several individuals. Importantly, it is often difficult to even discover that these programs are in operation or that a computer has been compromised. While this begins to sound far-fetched and infeasible, these programs are commercially available and, with a little computer savvy, are fairly straightforward to install.

Technology also provides opportunities for cyberstalkers to avoid being personally identified when the cyberstalking is not surreptitious, but difficult to trace. For instance, batterers can use technology to harass their victims by proxy. In 1999, Gary Dellapenta was sentenced to prison for posing as his ex-girlfriend on various online chat rooms and personal websites. [52] Dellapenta posted rape fantasies under his ex-girlfriend's name, providing her home address, and begging strangers to fulfill her fantasies.[53] Six men responded to the requests, terrifying Dellapenta's victim, before Dellapenta was arrested.[54] Additionally, "more experienced stalkers can use anonymous remailers to make it all-but-impossible to determine the true identity of the source of an email or other electronic communication."[55] Stalkers can also easily defeat caller identification systems. Caller ID spoofing is the practice of "deliberately falsify[ing] the telephone number relayed as the Caller ID number to disguise the identity and originator of the call."[56] BluffMyCall.com is one example of a Caller ID spoofing service. The BluffMyCall.com website states:

> Changing your Caller ID allows you to control what other people see when placing calls. It's that simple. Whether you want to make it seem like you are at the office when you're playing golf, or your kids are not picking up the phone when they see the house number on Caller ID, Bluff My Call is your only solution.[57]

BluffMyCall.com also offers the ability to "change your voice to sound like a male, female or just a sound that's not yours."[58] While Congress has

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51. Silverstein, *supra* note 6, at 128-30.
52. Zeller, *supra* note 43.
53. *Id.*
54. *Id.*
55. U.S. DEP'T OF JUSTICE, *supra* note 10, at 5.
56. *Caller ID and Spoofing: FCC Consumer Facts*, FEDERAL COMMUNICATIONS COMMISSION, http://www.fcc.gov/cgb/consumerfacts/callerid.html (last updated Oct. 20, 2008).
57. BLUFF MY CALL FEATURES (2009), http://bluffmycall.com/features.
58. *Id.*

passed, and President Obama has signed, a bill to make it a federal offense "to cause any caller ID service to transmit misleading or inaccurate caller ID information, with the intent to defraud, cause harm, or wrongfully obtain anything of value,"[59] it is unlikely that this law will greatly impact state investigation and prosecution of cyberstalking since all states already have laws criminalizing stalking and cyberstalking.[60] At this point, it takes far more computer know-how to identify, understand, and protect against the threat of cyberstalking than it does to engage in cyberstalking.

Importantly, cyberstalking poses a significant challenge to law enforcement. According to the 1999 Attorney General's report:

> Cyberstalking is a relatively new challenge for most law enforcement agencies. The first traditional stalking law was enacted by the State of California in 1990—less than a decade ago. Since that time, some law enforcement agencies have trained their personnel on stalking and/or established specialized units to handle stalking cases. Nonetheless, many agencies are still developing the expertise and resources to investigate and prosecute traditional stalking cases; only a handful of agencies throughout the country have focused attention or resources specifically on the cyberstalking problem.[61]

The report identifies that the primary obstacles to effective law enforcement investigation of cyberstalking are lack of specific training, expertise, and resources.[62] Officers must acquire "technological proficiency" and will often be required to use "unfamiliar legal processes."[63] In addition, technology continues to advance, compounding difficulties for law enforcement. "It seems like these stalkers are a step ahead of us. We're trying to keep up with it, but it seems like every day things are changing," stated Amy Santiago, a domestic violence detective with the Alexandria Police Department.[64] As a result of these difficulties, effective investigation and prosecution of cyberstalking is essentially non-existent.

Cyberstalking, as with all stalking, is a critical criminal justice concern, particularly given the fact that 80% of all stalking of intimate partners was coupled with physical violence against the victims and 76% of all women killed by their intimate partners had also been stalked by that

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59. Truth in Caller ID Act of 2009, Pub. L. No. 111-331, 124 Stat. 3572 (2010).

60. BAUM ET AL. *supra* note 7, at 1; *see also* NAT'L STALKING RES. CTR., CRIMINAL STALKING LAWS (Jan. 2010), http://www.ncvc.org/src/main.aspx?dbID=DB_StateByState_Statutes117 (compiling the criminal stalking laws of all the U.S. states and territories).

61. U.S. DEP'T OF JUSTICE, *supra* note 10, at 6.

62. *Id.* at 6-7.

63. *Id.* at 8.

64. Jenkins, *supra* note 29.

partner.[65] Unfortunately, technology provides an increasingly effective way for batterers to stalk their intimate partners. Technological developments continue to outstrip the criminal justice system's ability to combat cyberstalking. Victims of cyberstalking have great difficulty in even identifying that they are being stalked electronically. Further, stalking is chronically underreported to the police. According to the National Crime Victimization Survey, less than 50% of the stalking of women was reported to the police.[66] Even of those incidents reported, police departments do not have adequate resources to commit to investigation of cyberstalking, which requires specific computer training and investigation resources. Cyberstalking, therefore, is a major invasion of the victim's autonomy that has largely been unaddressed in the criminal justice system. And, given current trends in technology use by teenagers, the United States may be on the cusp of a rising wave of domestic violence.

III. TEENS, TECHNOLOGY, AND IDENTITY FORMATION

Adolescence is a critical stage in the development of future adult patterns. Teenagers are trying to figure out who they are, who they will become, and how to handle intimate relationships. These relationships are predictive of patterns they will experience in their adult relationships.[67] During this turbulent developmental stage, teenagers are also shifting their orientation from their parents to their peers.[68] Peers, therefore, become central sources of information about relationships and important sounding boards for assessing intimate relationships.[69] Teen peer communities tend to evince exaggerated stereotypical gender roles in which the male is expected to assume the dominant role and the female a submissive role.[70] Surrounded by these attitudes, teens may not see their relationships as abusive; rather, they may see possessiveness, harassment or even violence

65. TJADEN & THOENNES, *supra* note 7, at 8.

66. BAUM ET AL., *supra* note 7, at 9.

67. Ximena B. Arriaga & Vangie A. Foshee, *Adolescent Dating Violence: Do Adolescents Follow in Their Friends', or Their Parents', Footsteps?*, 19 J. INTERPERSONAL VIOLENCE 162, 163 (2004).

68. Wyndol Furman, Christine McDunn, & Brennan J. Young, *The Role of Peer and Romantic Relationships in Adolescent Affective Development*, *in* ADOLESCENT EMOTIONAL DEVELOPMENT AND THE EMERGENCE OF DEPRESSIVE DISORDERS 299, *3 (Nicholas B. Allen & Lisa B. Sheeber eds., 2008), *available at* http://www.du.edu/psychology/relationshipcenter/publications/pdfs/Theroleofpeerandromanticrelationships.pdf (manuscript at 3).

69. Jennifer Manganello, *Teens, Dating Violence, and Media Use: A Review of the Literature and Conceptual Model for Future Research*, 9 TRAUMA, VIOLENCE, & ABUSE 3, 11 (2008).

70. Suarez, *supra* note 18, at 427; Pamela Saperstein, *Teen Dating Violence: Eliminating Statutory Barriers to Civil Protection Orders*, 39 FAM. L.Q. 181, 186-87 (2005).

as signs of love.[71] While teenagers are trying to establish their sexual identities, they are also confronting violence in their relationships and exposure to technology. . Studies document that teenagers are experiencing significant amounts of dating or domestic violence. Depending on the population studied and the way dating violence is defined, between 9 and 35% of teens have experienced domestic violence in a dating relationship.[72] When a broader definition of abuse that encompasses physical, sexual, and emotional abuse is used, one in three teen girls is subjected to dating abuse.[73] Additionally, a significant number of teens are victims of stalking by intimate partners.[74] Studies also show that teenage use of technology is pervasive.[75] In fact, adolescents are incorporating technology into their sexual identity development. Too often, these patterns are unhealthy and suggest an imbalance in power and control.

A. Teenage Identity Development

The teenage years are a time of intense development and transition.[76] Teenagers have to navigate the turbulent waters between childhood and adulthood. During this transition, teenagers develop the ability to self-regulate, appreciate risk, and calculate future consequences of their actions.[77] In addition, teenagers are differentiating themselves from their parents, a necessary developmental process.[78] Inherent in that process of individualization is a fluidity of identity, caused by exploration.[79] Separation from parental control also involves a shift in focus and influence from adults to peers.[80]

The differences between adolescents and adults are well established. As the Supreme Court of the United States recognized, teenagers often demonstrate a "lack of maturity," greater susceptibility to peer pressure, and more fluid characters.[81] Adolescence is a period during which

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71. *Id.*

72. DAVIS, *supra* note 4, at 1. Moreover, most experts say that because teens often do not identify abusive relationships as abusive, the incidence of dating violence is underreported. Amy Karan & Lisa Keating, *Obsessive Teenage Love: The Precursor to Domestic Violence*, 46 JUDGES' J. 23, 24 (2007).

73. DAVIS, *supra* note 4, at 1; Suarez, *supra* note 18, at 426.

74. *Teen Stalking Deserves Another Look*, *supra* note 27, at 3 n.1.

75. *See* discussion *infra* Section III.D and accompanying notes.

76. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEXAS L. REV. 799, 820 (2003).

77. *Id.* at 813-14.

78. *Id.*

79. *Id.* at 801.

80. *Id.* at 813.

81. Roper v. Simmons, 543 U.S. 551, 569 (2005).

teenagers are trying to figure out who they are going to become, largely without significant input from adult authority figures. The "becoming" process is often difficult:

> Adolescence has often been described as a period of "identity crisis"—an ongoing struggle to achieve self-definition. According to developmental theory, the process of identity development is a lengthy one that involves considerable exploration and experimentation with different behaviors and identity "elements." These elements include both superficial characteristics, such as style of dress, appearance, or manner of speaking, and deeper phenomena, such as personality traits, attitudes, values, and beliefs. As the individual experiments, she gauges the reactions of others as well as her own satisfaction, and through a process of trial and error, over time selects and integrates the identity elements of a realized self. Not surprisingly, given adolescent risk preferences (perhaps combined with rebellion against parental values in the course of individuation), identity experimentation often involves risky, illegal, or dangerous activities—alcohol use, drug use, unsafe sex, delinquent conduct, and the like. For most teens, this experimentation is fleeting; it ceases with maturity as identity becomes settled.[82]

Significantly, this period of "trial and error" occurs when adolescents are also coming under greater influence of their peers. "Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control."[83] As they separate from their parents, teenagers seek a safe harbor in their friends. The increased peer orientation is manifested by "desire for peer approval (and fear of rejection)."[84] Adolescence, therefore, is marked by teenagers' rejection of their parents and conformity with their peer groups.

B. Teenage Sexual Identity Development

A critical aspect of the identity development taking place during adolescence is the development of sexual identity, largely through involvement in romantic or dating relationships.[85] A vast majority of teenagers become involved in significant romantic relationships for the first time during adolescence.[86] In fact, romantic relationships are a central part

82. Scott & Steinberg, *supra* note 76, at 813, 819.

83. *Id.* at 813.

84. *Id.* at 814.

85. Wyndol Furman, *The Emerging Field of Adolescent Romantic Relationships*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 177, 178 (2002).

86. CENTER FOR DISEASE CONTROL AND PREVENTION, UNDERSTANDING TEEN DATING

of adolescent social life.[87] According to several adolescent psychology experts:

> Romantic experiences are believed to play important roles in the development of an identity; the development of close relationships with peers; the transformation of family relationships; sexuality; and scholastic achievement and career planning. Mounting evidence indicates that, contrary to widespread skepticism, such experiences are also linked to individual adjustment and may influence the nature of subsequent romantic relationships.[88]

Although most adolescent relationships are of relatively short duration—a few weeks or months—"romantic relationships become increasingly significant" in the lives of teenagers as they move through adolescence.[89] A 2006 study found that 43% of teens at ages thirteen to fifteen reported having been in a dating relationship, going on dates, or hooking up, and 15 percent of reported having been in a serious relationship.[90] Among sixteen to eighteen year olds, the numbers go up to 71% having been in a dating relationship, going on dates, or hooking up, and 49% characterizing those relationships as serious.[91]

The nature of adolescent romantic relationships changes as teenagers move through adolescence. Generally, this progression follows three phases. First, teenagers begin to engage in mix-gendered group activities, such as dances and parties.[92] Second, adolescents begin to "date" in a group context.[93] Finally, teenagers begin to form individual intimate

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VIOLENCE: FACT SHEET 1 (2009), *available at* http://www.cdc.gov/violenceprevention/pdf/TeenDatingViolence2009-a.pdf.

87. Furman, *supra* note 85, at 178; SORENSEN, *supra* note 4, at 1.

88. Wyndol Furman & W. Andrew Collins, *Adolescent Romantic Relationships and Experiences*, *in* HANDBOOK OF PEER INTERACTIONS, RELATIONSHIPS, AND GROUPS 341, 341 (Kenneth H. Rubin, William M. Bukowski, & Brett Laursen eds., 2009) (citations omitted).

89. SORENSEN, *supra* note 4, at 1.

90. TEEN RESEARCH UNLIMITED, TEEN RELATIONSHIP ABUSE SURVEY (prepared for Liz Clairborne, Inc.) 1, 2 (2006), *available at* http://www.loveisnotabuse.com/c/document_library/get_file?p_l_id=45693&folderId=72612&name=DLFE-205.pdf [hereinafter TEEN RESEARCH UNLIMITED 2006]. Moreover, dating appears to be occurring more frequently and at a younger age: a 2008 study of dating among "tweens," youth ages eleven to fourteen, 47% of tweens and 37% of eleven and twelve year olds reported having been in a dating relationship. TEEN RESEARCH UNLIMITED, TWEEN AND TEEN DATING VIOLENCE AND ABUSE STUDY (prepared for Liz Clairborne, Inc.) 1, 7 (2008), *available at* http://www.loveisnotabuse.com/c/document_library/get_file?p_l_id=45693&folderId=72612&name= DLFE-203.pdf [hereinafter TEEN RESEARCH UNLIMITED 2008].

91. TEEN RESEARCH UNLIMITED 2006, *supra* note 90, at 2.

92. Furman & Collins, *supra* note 88, at 346.

93. *Id.*

relationships outside the group context.[94]

Sexual identity development involves the same three processes present in adolescent identity development generally: self-regulation, individuation from authority figures, and peer orientation. For a long time, social scientists have identified that teenagers are incomplete decision-makers. More recently, neuroscience studies based on new brain imaging technology have confirmed this social science research.[95] According to these studies,

> brain maturation is a process that continues through adolescence and into early adulthood. For example, there is good evidence that the brain systems that govern impulse control, planning, and thinking ahead are still developing well beyond age 18.[96]

Teenagers tend to be more short-sighted in their decision-making;[97] while teens are able to identify potential consequences of their actions, their awareness of risk does not significantly impact their choices.[98] In addition, teenagers have far less impulse control than adults.[99] Teenagers are willing to engage in risky behavior, partially due to the fact that they tend to overemphasize the potential benefits and underestimate the possible costs of the behavior.[100] Specifically in connection with intimate relationships, this lack of cognitive ability and development means that teenagers are more likely to engage in risky sexual activity.[101] Not surprisingly, teenagers report increased amounts of unwanted sexual activity and pregnancy.[102] Nearly one-fourth of teenage girls report having gone further sexually in a relationship than they wanted.[103] In addition, nearly one out of every three sexually active teenage girls will become pregnant.[104] Further, one out of two sexually active young people can expect to contract

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94. *Id.*

95. Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357, 362 (2006), *citing* Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation,* 21 J. NEUROSCI. 8819, 8827 (2001).

96. MACARTHER FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE, 1, 3, *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Aug. 17, 2010).

97. *Id.*

98. Cohen & Mandelbaum, *supra* note 95, at 364.

99. *Id.* at 365.

100. Scott & Steinberg, *supra* note 76, at 815.

101. SORENSEN, *supra* note 4, at 2.

102. *Id.*

103. *Id.*

104. *Id.*

a sexually transmitted disease prior to age twenty-five.[105] In the domestic violence context, it is notable that domestic violence behaviors tend to increase or begin once dating teens begin to date "seriously" or engage in sexual activity.[106]

Despite the risks involved, intimate relationships are an important component of adolescent development.[107] Intimate relationships are a principal way teenagers express their individuality and rejection of authority figures.[108] Researchers have found that for some adolescents, particularly boys, dating is viewed as a means of achieving independence.[109] In addition, teenagers who are individuating from their parents increasingly rely on their dating relationships for emotional support.[110] Importantly, teenage dating relationships are a "training ground" for adolescents to improve communication and negotiation skills, increase empathy, and learn how to sustain dating relationships.[111] This "trial and error" period involves increased reliance on peers for data on interpersonal relationships as opposed to parents.[112]

The shift to greater peer orientation plays a multifaceted role in the development of adolescent sexual identity. Many mid- to late-adolescents report spending more time with their romantic partners than with family or friends.[113] Social scientists have found that teenagers consider friends their primary source of information about dating and report that friends have the greatest influence on their dating choices.[114] Teenagers rank their peers higher than their parents with respect to information about dating: peers had more information, teens are more comfortable discussing dating issues

105. *Id.*

106. TEEN RESEARCH UNLIMITED 2006, *supra* note 90, at 6, 8, 10, 12, 14, 16; TEEN RESEARCH UNLIMITED 2008, *supra* note 90, at 13-14; Pollet, *supra* note 4, at 29; Karan & Keating, *supra* note 72, at 24.

107. Eileen Wood et al., *Sources of Information about Dating and Their Perceived Influence on Adolescents*, 17 J. ADOLESCENT RES. 401, 403 (2002) (noting that "intimate relationships serve as an important context" for the major task of adolescence, identity formation); SORENSEN, *supra* note 4, at 1-2 (noting that "[t]he quality of adolescent romantic relationships can have long lasting effects on self-esteem and shape personal values regarding romance, intimate relationships, and sexuality").

108. *See* Wood et al., *supra* note 107, at 403, 407 (while teens identify adults—parents and teachers— as the most accurate source of information about dating, they are most influenced by information garnered from peers); Furman & Collins, *supra* note 88, at 341 (as they age, teens spend increasingly more time with their romantic partner); Furman, *supra* note 85, at 178 (romantic partners become a major source of support during the teen years); Suarez, *supra* note 18, at 428.

109. Wood et al., *supra* note 107, at 403.

110. SORENSEN, *supra* note 4, at 2.

111. *Id.*

112. Wood et al., *supra* note 107, at 407.

113. SORENSEN, *supra* note 4, at 2.

114. Wood et al., *supra* note 107, at 407.

with peers, and peers have more influence on their dating choices.[115]

Not surprisingly, then, teenagers look to each other to assess their interpersonal relationships. This process of "gauging the reactions of others" is essentially a normalization process.[116] Although parental relationships remain influential, teens predominately use other teens to gauge the health of their relationships and to assess the appropriateness of particular behaviors within those relationships.[117] Recent studies indicate that "friends seem to be more influential than parents in shaping standards of acceptable dating behavior during adolescence."[118]

Significantly, adolescent intimate relationships are influential in the development of teenagers. These relationships can have "long lasting effects on self-esteem and shape personal values regarding romance, intimate relationships, and sexuality."[119] As teens explore these intimate relationships, developing patterns that will carry into their adult intimate relationships, they look to their peers far more than their parents to analyze the health of their relationships.

C. *Exposure to Domestic Violence*

Although involvement with romantic relationships is a critical aspect of adolescence, these relationships also present serious risks for teenagers. Unfortunately, adolescents in dating relationships are at greater risk of intimate partner violence than any other age group.[120] Approximately one third of adolescent girls are victims of physical, emotional, or verbal abuse from a dating partner.[121] Estimates of sexual victimization range from 14% to 43% of girls and 0.3% to 36% for boys.[122] According to the Center for Disease Control, in 2009, nearly 10% of students nationwide had been intentionally hit, slapped, or physically hurt by their boyfriend or girlfriend.[123] Twenty-six percent of girls in a relationship reported being threatened with violence or experiencing verbal abuse; 13 % reported being physically hurt or hit.[124] These statistics are especially concerning because

115. *Id.* at 411 However, teens perceive that parents and teachers have slightly more accurate information. *Id.*

116. Saperstein, *supra* note 70, at 186.

117. Arriaga & Foshee, *supra* note 67, at 178; Suarez, *supra* note 18, at 429.

118. Arriaga & Foshee, *supra* note 67, at 178.

119. SORENSEN, *supra* note 4, at 1.

120. *Id.* at 2; Pollet, *supra* note 4, at 29.

121. DAVIS, *supra* note 4, at 1.

122. Furman, McDunn, & Young, *supra* note 68, at 18.

123. CDC 2009, *supra* note 4, at 6.

124. FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON TWEENS AND TEENS AND DATING VIOLENCE 1 (2011), *available at* http://www.endabuse.org/userfiles/file/Teens/The%20Facts%20on%20Tweens%20and%20

dating violence can have long-term impacts on victims, including anxiety, depression, suicidal ideation, and post-traumatic stress disorder.[125]

As adolescents explore their sexual identities through romantic relationships, it is clear that they learn the patterns for those dating relationships largely from their peers. Significantly, the romantic relationship patterns learned in adolescence can impact romantic relationship patterns in adulthood. In other words, if teenagers learn unhealthy relationship patterns, there is a tendency for those unhealthy patterns to carry over into their adult relationships. Teens experiencing domestic violence in their intimate relationships are more likely to be involved in intimate partner violence as adults.[126]

D. Teenage Incorporation of Technology into Sexual Identity Development

During this time of individuation, identity formation, and creation of a sexual identity, studies indicate pervasive use of technology by teenagers.[127] In fact, it appears that teenagers are incorporating technology into that very process of identity formation. Cell phones, text messaging, e-mail, blogs, and social-networking sites—such as the appropriately named "MySpace" and Facebook—are significant components of adolescent social life.[128] Adolescence is a time of intense peer interaction. Often to differentiate themselves from authority figures, teenagers will develop idiosyncratic language usage, rules of engagement or interaction, and social conventions. Not surprisingly, as teens interact extensively with one another electronically, they have developed their own language idiosyncrasies, their own rules of engagement, and unique social conventions electronically as well.[129] Importantly, these patterns further the gap between adults and teenagers, as most parents are unaware of their

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Teens%20and%20Dating%20Violence%20FINAL.pdf.

125. Furman, McDunn, & Young, *supra* note 68, at 18.

126. SORENSEN, *supra* note 4, at 2.

127. Young people ages eight to eighteen consume almost 7.5 hours of media every day, seven days a week. In 2009, 66% report owning a cell phone, up from 39% in 2004 (85% of fifteen to eighteen year olds report owning a cell phone). Additionally, 84% of youth ages eight to eighteen report having home internet access and 33% report having internet access in their bedrooms. RIDEOUT ET AL., *supra* note 1, at 2-4.

128. Seven to twelfth graders report texting for over an hour a half every day. Eleven to eighteen year olds report an hour and a half of recreational computer time during a typical day. Of this computer time, 25% is spent on social networking sites, 13% instant messaging, and 6% on email—socially interactive activities. *Id.* at 18, 20-21.

129. *See e.g.* Ann Pleshette Murphy & Jennifer Allen, *ABC Good Morning America, Webspeak: The Secret Language of Teens*, ABC NEWS (Jan. 25, 2007), http://abcnews.go.com/GMA/AmericanFamily/story?id=2820582&page=1.

teenagers' electronic activities.[130]

Several recent studies document pervasive use of technology by teenagers and demonstrate how teenagers incorporate technology into their identity and sexual identity development. A 2009 study by the National Campaign to Prevent Teen and Unplanned Pregnancy and *CosmoGirl.com* demonstrated pervasive use of technology by teenagers.[131] The study found that nearly 90% of teenagers and young adults are online.[132] In addition: nearly 80% of teenagers have a computer; nearly 90% have a cell phone; nearly 90% have a profile in a social-networking site and actively view others' profiles and pictures on social-networking sites; more than 80% send and receive pictures or video on a computer; more than 60% of teenagers send and receive pictures and video on their cell phones; more than 80% of teenagers send and receive text messages; and 25% of all teenagers write personal blogs.[133]

According to the Nielson Company, in 2009, teenagers with cell phones average 2,272 text messages per month.[134] In comparison, in 2008, teenagers averaged 1,742 text messages per month while Americans in general averaged 357 texts per month.[135] Teenagers are far more likely to text each other on their cell phones than to call; however, calling remains the favored way to contact parents.[136] The average teenager only makes 203 calls per month.[137]

The Pew Internet and American Life Project conducts ongoing studies about American technology use, including teen use of social-networking sites. Social-networking sites, such as Facebook and MySpace, are websites which allow a user to create a profile and build a "personal network that connects him or her to other users."[138] In 2009, 73% of American teens reported using social-networking sites, compared to just

130. PICARD, *supra* note 2, at 5, 11-13.

131. THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 1.

132. *Id.* at 6.

133. *Id.* at 7.

134. Donna St. George, *6,473 Texts a Month, But at What Cost?*, WASH. POST, Feb. 22, 2009, at A1. One in three teens send over 100 texts a day, or 3000 texts a month. LENHART ET AL., *supra* note 1, at 2.

135. *In U.S., SMS Text Messaging Tops Mobile Phone Calling*, NIELSEN WIRE (Sept. 22, 2008), http://blog.nielsen.com/nielsenwire/ online_mobile/in-us-text-messaging-tops-mobile-phone-calling/.

136. LENHART ET AL., *supra* note 1, at 3.

137. St. George, *supra* note 134.

138. Project memorandum by Amanda Lenhart & Mary Madden for the Pew Internet & American Life Project, Re: Social Networking Websites and Teens: An Overview (Jan. 3, 2007), *available at* http://www.pewinternet.org/~/media//Files/Reports/2007/PIP_SNS_Data_Memo_Jan_2007.pdf.

5% in November 2006 and 65% in February 2008.[139] The primary use of social-networking sites for teenagers is to stay in touch with friends (90%) and to make plans with friends (72%).[140] The most popular way for teenagers to communicate on their social-networking sites is to post messages on a friend's profile, page, or "wall."[141] Amazingly, in 2010, Facebook has over 12.4 million users between the ages of thirteen and seventeen.[142] Of those, 6.9 million are girls and 5.6 million are boys.[143] MySpace, Bebo, and other sites have an even higher proportion of teenage users than Facebook.[144]

The *CosmoGirl.com* study also demonstrates that teenagers are using technology in their courtship and dating rituals. According to the survey, nearly 70% of teenagers have sent or posted sexually suggestive messages, or nude or semi-nude pictures or videos of themselves, to their boyfriend or girlfriend.[145] Nearly 60% of teenagers consider sending or posting sexually explicit messages or photos to be a form of flirtation.[146] Interestingly, more than 70% of teenagers believed that girls send sexy messages or pictures of themselves to get a guy's attention (85%), as a "sexy" present for a boyfriend (74%), to feel sexy (72%), to get a guy to like them (76%), to be fun or flirtatious (78%), and to get noticed (80%).[147] Far fewer teens thought boys send sexy messages or pictures of themselves for these reasons, although about 60% of teens still ranked getting or keeping a girl's attention and getting a girl to like them as the top reasons boys engage in

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139. AMANDA LENHART ET AL., PEW RESEARCH CENTER, SOCIAL MEDIA AND MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 2 (Feb. 3 2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf. The Kaiser Family Foundation study *Generation M2* found similar numbers: 74% of 7th through 12th graders reported having a social networking site profile and 82% reported having visited a social networking site at some point. RIDEOUT ET AL., *supra* note 1, at 22.

140. Lenhart & Madden, *supra* note 138, at 2.

141. *Id.* at 6; LENHART ET AL., *supra* note 139, at 20.

142. Eric Eldon, *Facebook's May 2010 US Traffic by Age and Sex: Younger Users Lead Growth*, INSIDE FACEBOOK (Jun. 3, 2010), http://www.insidefacebook.com/2010/06/03/facebook%E2%80%99s-may-2010-us-traffic-by-age-and-sex-younger-users-lead-growth.

143. *Id.*

144. Fourty-four percent of Bebo users and 33% of MySpace users are 17 or younger, compared to about 26% of Facebook users. *Study: Ages of Social Network Users*, PINGDOM (Feb. 16, 2010), http://royal.pingdom.com/2010/02/16/ study-ages-of-social-network-users/ (comparing demographics of several social networking sites using data from Google's Ad Planner).

145. THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 1, at 12.

146. *Id.* at 10.

147. *Id.* at 9.

"sexting".[148] These findings were also replicated in a recent study by the Associated Press (AP) and Music Television (MTV). In that study, of those who had shared a naked photo or video of themselves, a majority "report that they initially sent the photo to a significant other or romantic interest."[149] All of these reasons are related to initiating or conducting dating relationships. Interestingly, the AP/MTV study also found that almost half of all sexually active young people report engaging in "sexting."[150]

A 2007 study commissioned by Liz Claiborne, Inc. further demonstrates that teens are incorporating technology into their intimate relationships.[151] The study had four primary objectives: learn the rate at which teenagers employ cell phones and computers in dating relationships; determine whether technology was being used by adolescents to abuse or control their intimate partners; understand teenagers' perceptions of the seriousness of behaviors involving technology in intimate relationships; and document parent awareness of teen dating behaviors involving technology.[152] The study found pervasive use of technology by teenagers in their dating relationships.[153] The study also found that the technology was frequently being used to abuse or control the dating partner.[154]

First of all, the study documented that teenagers use technology to remain in constant connectivity with their partners.[155] For instance, during the period of time after school until 10:00 p.m., 50% of teenagers indicated that they either called or texted their partners.[156] Nearly 40% reported that they were in cell phone or text contact with their partners ten to thirty times an hour.[157] From the hours of 10:00 p.m. to midnight, 43% percent of teenagers had repeated contact with their partners (30% ten to thirty times an hour, 13% less than ten times per hour).[158] Amazingly, nearly 25% of teenagers reported cell phone conversations or text messages between the hours of midnight and 5:00 a.m.[159] In fact, one in six teenagers admitted to having communicated with their partners between ten and thirty times an hour between midnight and 5:00 a.m.[160]

148. *Id.*
149. THE ASSOCIATED PRESS & MTV, *supra* note 2, at 2.
150. *Id.* at 2.
151. PICARD, *supra* note 2.
152. *Id.* at 3.
153. *Id.* at 5.
154. *Id.*
155. *Id.* at 7.
156. *Id.*
157. PICARD, *supra* note 2, at 7.
158. *Id.*
159. *Id.*
160. *Id.*

Recent studies have also documented that technology is being used in negative ways in intimate teenage relationships. The Claiborne study found that over 35% of teenagers report that their partners use technology—cell phones, e-mail, or text messages—to check where they are, who they are with, and what they are doing.[161] The AP/MTV study found similar results.[162] Both studies also found a significant number of teenagers reporting that their partners use technology—Internet, e-mail, or cell phone—to call them names, harass them, or put them down.[163] The AP/MTV study also found that 25% of teenagers report that their intimate partners have checked the text messages on their phones without permission, and 10% report their partners demand their electronic passwords.[164]

Amazingly, the Claiborne study found a significant percentage of teenagers reporting classic cyberstalking behavior. For instance, 18% reported that their partners posted negative information about them on a social-networking site; 17% stated that their partners had impersonated them on e-mail, text messages, chat rooms, and social-networking sites; 16% reported that their partners purchased them a cell phone or cell phone minutes to stay in contact with them; 11% documented that their partners had shared private pictures of them against their will; 10% reported that they had been physically threatened by their partners via e-mail, instant messaging, text, chat, or cell phone; and 5% reported that their dating partners had used spyware to track their Internet activity.[165] Significantly, 17% of teenagers reported that their partners had made them afraid not to respond to a cell phone call, e-mail, or text message out of fear of what their partners might do.[166]

The Claiborne study also documented that teenagers do not generally share information about their relationships or technology use with their parents. For instance, 82% of teenagers did not tell their parents that their partners had asked for unwanted sexual activity; 78% did not tell their parents that their partners were harassing or embarrassing them on social-networking sites; 72% did not inform their parents that their partners were checking up on them over ten times an hour by e-mail or text messaging; and 77% did not share with their parents that their partners made them

161. *Id.* at 8.

162. THE ASSOCIATED PRESS & MTV, *supra* note 2, at 3 (nearly 25% of young people in a romantic relationship report that "their boyfriend or girlfriend checks up with them multiple times per day, either online or on a cellphone, to see where they are, who they're with, or what they're doing.")

163. PICARD, *supra* note 2, at 8 (25%); THE ASSOCIATED PRESS & MTV, *supra* note 2, at 3 (12%).

164. THE ASSOCIATED PRESS & MTV, *supra* note 2, at 3.

165. PICARD, *supra* note 2, at 9.

166. *Id.*

afraid not to respond to e-mails or text messages.[167]

Teenagers gave three primary reasons for not bringing these behaviors to the attention of their parents. Sixty-eight percent believed that the behaviors were not serious enough to report.[168] Over 25% of teenagers feared that their parents would limit their computer or cell phone usage if they knew of the conduct.[169] Finally, 27% feared that their parents would prevent them from seeing their partners.[170]

These recent studies confirm that teenagers' use of technology is widespread and particularly pervasive in their dating relationships. Further, they show that teenagers are actually incorporating technology into their intimate relationships. Teenagers use technology to initiate relationships, from "flirtatious" use of suggestive e-mails to nude texts. In addition, vast numbers of teenagers in intimate relationships are in nearly constant contact with their dating partners. Further, many dating teenagers are having their on- and off-line conduct monitored through technology by their intimate partners. Finally, nearly half of all teenagers do not see any serious problem in the way technology is being used in their relationships, and most teens do not think these behaviors are serious enough to report.

IV. ARE WE PRODUCING A NEW WAVE OF DOMESTIC VIOLENCE ABUSERS?

Given what we know about domestic violence and the pervasive use of technology in the lives of teenagers, should we be concerned that teenage use of technology might produce a profound increase in domestic violence in the future? Are we producing a new generation of domestic violence batterers?

There are four primary factors that suggest that the answer to these questions might be "yes." First, teenagers have fully incorporated technology into their personal lives. Second, teenagers are particularly vulnerable to unhealthy relationship patterns due to their developmental stage (which involves separating from their parents), their involvement in romantic relationships for the first time, and efforts to match their expectations about intimate relationships to their peers'. Third, there is a significant similarity between the dynamic in adult-battering relationships and the use of technology by teenagers in their intimate relationships. Finally, the power of the teenage norming process suggests that teenagers might be normalizing unhealthy relationship patterns that will carry over

167. *Id.* at 10.
168. *Id.* at 14.
169. *Id.*
170. *Id.*

into adulthood.

Teenagers have incorporated technology into all aspects of their lives.[171] Teenagers are online and connected in staggering amounts. Nearly all teenagers have cell phones and access to the Internet through computers and cell phones. Nearly all teenagers are engaging in social networking. More specifically, teenagers are incorporating technology into their romantic relationships in new and profound ways.[172] Teenagers use technology to meet and flirt with prospective romantic partners. They use technology to stay in contact and to plan activities with their dating partners. In fact, some teenagers may conduct entire relationships online. Regardless of how one feels about it, it is a settled fact that teenagers pervasively use and incorporate technology in their intimate relationships.

Further, due to aspects unique to the adolescent developmental phase, teenagers are particularly vulnerable to developing unhealthy relationship patterns.[173] Recall that adolescence is marked by several distinct developmental steps: identity development, individuation from parents, maturation of decision-making abilities, and a shift in orientation towards peers. Within this turbulent period of identity development—and as a significant aspect of it—teenagers are engaging in romantic relationships for the first time. During adolescence, most teenagers will experience their first romantic relationships. Interestingly, the shift in orientation from parents to peers means that teenagers look at each other's behavior and turn to each other for assessment of the health of their intimate relationships. Numerous risk factors are colliding: having friends who are perpetrators or victims of dating violence is an important predictor of an adolescent's own experiences;[174] many teens are experiencing power and control patterns in their relationships through technology,[175] and teens tend to believe that what is happening to themselves or their peers is normal.[176] Given their limited life experiences, teens are at significant risk of failing to identify unhealthy relationship patterns:

> [Teens] are especially susceptible to becoming "trapped" in the cycle of violence because of their vulnerable developmental stage. They are going through emotional, intellectual, and physiological changes while struggling with self-esteem issue and identity formation. They do not have the experience to know what is a healthy or unhealthy relationship.[177]

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171. *See supra* notes 121-134.
172. *See supra* notes 135-159.
173. *See supra* notes 76-103.
174. Arriaga & Foshee, *supra* note 67, at 178.
175. PICARD, *supra* note 2.
176. Roger J.R. Levesque, *Dating Violence, Adolescents, and the Law*, 4. VA. J. SOC. POLICY & L. 339, 350 (1997).
177. Pollet, *supra* note 4, at 30.

A significant number of teenagers experience violence in their intimate relationships. Nearly one third of adolescents are victims of physical, emotional, or verbal abuse from a dating partner.[178] Many teenagers are also sexually assaulted in their intimate relationships.[179] Dating violence can have a long-term impact on victims, including anxiety, depression, suicidal ideation, and post-traumatic stress disorder.[180] In addition, as teenagers place more of their lives in the digital universe, they expose themselves to greater risk of perpetration and cyberstalking.

The risk of teenagers failing to recognize unhealthy relationship patterns is compounded by the fact that their incorporation of technology into their intimate relationships is largely unsupervised by their parents.[181] Nearly all teenagers have personal cell phones, allowing them to conduct their conversations in private, away from eavesdropping parents. In some ways, texting is even more private given its relative silence. Of course, cell phone records document call times, numbers, and duration, and parents can obtain access to text messages and to social-networking sites. However, this kind of monitoring by parents may create more conflict and be considered a breach of privacy by their teenagers. Unfortunately, many parents do not monitor their teenagers' use of technology with dating partners. Only 18% of teenagers report that their parents actually limit their use of technological devices for communication with their intimate partners.[182] Additionally, teenagers rarely have the benefit of parental modeling of appropriate technology use in intimate relationships. While children can observe their parents' interaction with each other, it is harder to observe their parents engaging in texting, social networking, or other uses of technology. Moreover, adults use technology less and differently than do adolescents, so adolescents may not consider the technology use they do observe to be relevant in their own lives.[183]

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178. DAVIS, *supra* note 4, at 1.

179. Furman, McDunn, & Young, *supra* note 68, at 18.

180. *Id.*

181. Rules do work. The Kaiser *Generation M2* study showed that teens whose parents set limits on their use consume almost three hours less media per day. Additionally, the Kaiser study showed that only 36% of fifteen to eighteen year olds reported being subjected to rules about computer use by their parents, compared to 60% of eleven to fourteen year olds. Only 16% of teens reported that their parents enforced any rules about media use most of the time. RIDEOUT ET AL., *supra* note 1, at 36. Additionally, only 14% of teens reported that their parents imposed rules about how much they could text. *Id.* at 62.

182. PICARD, *supra* note 2, at 16. In contrast, 28% of parents reported that they limited their teens' communications. *Id.*

183. For example, while 84% of teens report texting, only 58% of parents report texting. THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *supra* note 1, at 6-7. Similarly, 35% of American adults who are online have profiles on a social networking sites, compared to 65% of online teens. LENHART, *supra* note 3, at 1. Moreover, the modeling that is occurring may not be positive. *E.g.* Rosalind Wiseman, *Caught in the Act*,

The similarity between the dynamic in an adult battering relationship and teenage use of technology is concerning. As discussed above, the adult-battering relationship is built on the premise that one party has the right to control the other party.[184] Inherent in this concept of control is a fundamental lack of respect for the victim's autonomy and for the understanding of boundaries implicit in personal autonomy. Over time, a power and control dynamic develops in battering relationships, which involves an assertion on the part of the batterer of the right to violate the victim's autonomy. The victim, on the other hand, accepts that the batterer will assert this right. A particular example of this assertion of the right to violate autonomy is manifested in stalking behavior. Stalking and cyberstalking often involve one party attempting to maintain constant contact and control over another person. This can involve surveillance of the other partner and monitoring of whom the partner is interacting with, where the partner is, and what the partner is doing. In this way, the victim's boundaries are always subject to violation; for the victim therefore, the domestic violence battering relationship can be conceptualized as "boundaryless."

As discussed above, teenage technology use is pervasive; many teenagers use technology around the clock and demand constant connectivity. Without question, connectivity can be a positive concept. It involves interaction and community. The concept behind a "social network" is to build a connection to a community. Unfortunately, constant connectivity can also have negative aspects. Studies document that teenage technology use is often about access to information about where their partner is, whom the person is with, and what the person is doing.[185] Constant connectivity can blur the notion of individual boundaries and can create a sense of entitlement or the perceived expectation that each party is privileged to information about the other party's location, activities, and acquaintances, resulting in a loss of boundaries in the relationship. Technology use has the potential to transform teenage intimate relationships into "boundaryless" relationships. In this way, it is possible to see a similarity between teenage use of technology and the dynamics in a domestic violence relationship. Of course, there is a dramatic difference between acceptance of a "boundaryless" relationship (teenage use of technology) and assertion of the right to violate the boundaries of another person's autonomy (domestic violence battering relationship).

LG TEXT ED, http://www.lg.com/us/mobile-phones/text-education/articles/caught-in-the-act-11007011338.jsp (last visited Aug. 1, 2010) (noting that 38% of parents and 83% of teens report texting in the middle of the night, and that 28% of parents and 43% of teens report "sexting").

184. *See supra* notes 11-17.

185. *See supra* note 159 and accompanying text.

Nevertheless, there is a disturbing conceptual similarity between the two and a potentially thin line between acceptance and assertion.

During a period of development when teenagers are already significantly at risk of exposure to unhealthy relationship violence and patterns, the concern is that teenagers' use of technology in their intimate relationships is normalizing the very behavior—a right to "boundarylessness"—underlying adult battering relationships. As discussed above, teenagers tend to assess the health of their intimate relationships and appropriateness of dating behavior by looking to other teenagers. Since teenagers are experiencing dyadic romantic relationships for the first time, they have extremely limited experience from which to assess appropriate relationship patterns. Looking primarily to peers produces a potentially unhealthy myopia and plays a significant role in normalizing attitudes about relationship behaviors. As the Claiborne study documented, more than two-thirds of teenagers in intimate relationships do not consider it a problem serious enough to inform their parents when their intimate partners: ask them for unwanted sexual activity; use information on social-networking sites to harass or put them down; make them afraid to not respond to electronic communication for fear of what the partner might do; share private or embarrassing pictures or videos of them; e-mail or text them up to thirty times an hour to check on them; or spread electronic rumors about them.[186] These types of behaviors reflect unhealthy relationship patterns similar to those in adult-battering relationships. The fact that a majority of teenagers do not see this type of behavior as unhealthy or problematic suggests a normalization of the idea that intimate relationships are "boundaryless."

It is important to highlight that the typical social norming process that occurs amongst teen peers is reinforced by the often public nature of technological use and abuse. Several of the problematic behaviors documented in the Claiborne study involved using information on social-networking sites to harass or put down intimate partners, sharing private or embarrassing pictures or videos of them, and spreading electronic rumors about them.[187] In contrast to the sense that domestic violence is a private matter, these behaviors are essentially public. Because they are public, if they are not responded to or identified as being inappropriate, the silence of the community can add to the normalization and, paradoxically, the

186. PICARD, *supra* note 2, at 10.

187. For example, 19% of teens reported that they have had a boyfriend or girlfriend spread rumors about them using a cellphone, email, instant messaging, text, web chat, a blog, or a social networking site such as MySpace, and Facebook. Eighteen percent reported that their boyfriend or girlfriend had used information from a social networking site against them. Eleven percent reported that their boyfriend or girlfriend shared private or embarrassing pictures or video of them with others. *Id.* at 8-9.

isolating effect of the conduct. Unfortunately, the majority of teenagers do not feel comfortable responding to derogatory comments made about them on social-networking sites.[188]

One critic of the use of technology in romantic relationships made a similar observation this way: "Facebook brings us too close to people too quickly. Dating is as much about maintaining healthy and safe boundaries as it is about intimacy—at least at first—and social networking makes that harder than ever. It's not dissimilar to dating someone who works in your office; you can't control the exposure you'll have, and that can be a recipe for disaster."[189]

There appears to be widespread acceptance by teenagers that their dating partners have total access—a right to know where they are, whom they are with, and what they are doing at all times. The concern is that once this concept is normalized within the teenage population, it is a short distance from acceptance by both parties to the assertion by one party of the right to this information. As this assertion of the right to violate personal autonomy is the heart of a domestic violence battering relationship, it is possible that teenage incorporation of technology into their intimate relationships puts more teenagers at risk of developing unhealthy relationship patterns.

An entire generation is normalizing "boundarylessness" and incorporating technology use into their intimate relationships. This generation of teenagers will become adults with great technological abilities. For those inclined to become batterers, they will have the know-how to be effective cyberstalkers. Additionally, a greater use of technology in engaging in intimate relationships means greater risk of being cyberstalked as adults. According to some researchers of teenage dating violence:

> Teen dating violence often occurs as adolescents begin dating and are unaware of boundaries for behavior in relationships. Because teens may have a greater likelihood of entering into other abusive relationships in the future once they have been exposed to dating violence, it is crucial to address this problem at an early age, as identifying and mitigating risk factors for partner violence during adolescence can reduce exposure to partner violence later in life.[190]

188. THE ASSOCIATED PRESS & MTV, *supra* note 2, at 4.

189. Samuel Axon, *Five Ways Facebook Has Changed Dating (for the Worse)*, MASHABLE (Apr. 10, 2010), http://mashable.com/2010/04/10/facebook-dating/.

190. Manganello, *supra* note 69, at 13 (citations omitted).

V. THE IMPORTANCE OF RECOGNIZING THE RISK AND RE-NORMING NORMS

The American criminal justice system is facing a domestic violence crisis. There are two steps that might help address—and possibly avert—this crisis. First, authorities—both parents and law enforcement—must recognize the risk and take it seriously. A critical aspect of this is to dedicate adequate resources for training of law enforcement officers and prosecutors and for investigation of digital crimes. Second, authorities need to provide guidance to teenagers and work to "re-norm" unhealthy teenage relationship norms. The combination of these two steps will help teenagers and society overcome the risk to today's teenagers for future domestic violence.

First and foremost, authorities must begin to take these risks seriously. Teenagers are reluctant to report domestic violence to authorities. This reluctance can stem from a fear of losing independence.[191] In addition, many teens do not receive support or validation from parents or law enforcement. Often, authorities fail to take teenage dating violence seriously.[192] This is manifested on two levels: first, authorities minimize the seriousness of relationships between teenagers and second, minimize the seriousness of the violence within those relationships:

> [Many misperceive] that dating violence does not really exist among teens, and, even if it does, it is not a serious problem.... Others believe that while teen dating violence may in fact exist, it is not a serious problem because, unlike adults, teens do not usually have serious romantic relationships and can easily leave their partners if the relationship becomes abusive. Individuals who adhere to this innocent notion of "puppy love" among teens are probably the ones most likely to advise a young victim to simply break up with her partner. Adults, including a teen's parents, may minimize the bonding that has occurred between two teens, and may not recognize that teens take their relationships very seriously. At least three research studies have indicated that parents themselves may contribute to the problem

191. Stacy L. Brustin, *Legal Responses to Teen Dating Violence*, 29 FAM. L.Q. 331, 349 (1995).

192. HELEN M. MARCY, CENTER FOR IMPACT RESEARCH, HELPING WITH DOMESTIC VIOLENCE: LEGAL BARRIERS TO SERVING TEENS IN ILLINOIS 18 (Nov. 2000), *available at* http://www.impactresearch.org/documents/legalissuesreport.pdf ("Teens were also adamant in their belief that police do not take domestic violence between teens seriously. One teen said that she knew someone who had called the police when she was fighting with her boyfriend. Once the police established that it was a dating relationship, the officers told the victim to 'stay away from him' and left.").

of teen dating violence by denying or minimizing the problem.[193]

In addition, law enforcement must dedicate sufficient resources for investigation, training, and prosecution of digital domestic violence. According to the United States Department of Justice:

> [I]t appears that the majority of cyberstalking victims do not report the conduct to law enforcement, either because they feel that the conduct has not reached the point of being a criminal offense or that law enforcement will not take them seriously. Second, most law enforcement agencies have not had the training to recognize the serious nature of cyberstalking and to investigate such offenses.[194]

Until law enforcement has adequate training and resources for investigation, batterers using technology will continue to avoid detection, apprehension, and prosecution for their crimes.

Secondly, adults must attempt to provide positive relationship guidance to teenagers. Studies establish that the health of teenagers' relationships—and the patterns developed in those relationships—are correlated to the health of their future adult relationships.[195] Given this connection, it is imperative that teenagers be given as much assistance as possible in developing healthy intimate relationships.[196] Because of the pervasiveness of technology use in their intimate relationships and the connections between technology use in intimate relationships and unhealthy relationship patterns, it is essential that healthy relationship assistance include discussion of appropriate use of technology.[197] Because the concern is that technology use in intimate teenage relationships has the potential to normalize unhealthy relationship patterns, the challenge is to "re-norm" the norm.[198] Although the design of programs will vary, this primary challenge remains constant. To be successful in this endeavor, any program will also need to be consistent with adolescent psychological development—it will need to reflect their individuation and their increasing peer focus.[199]

Addressing any major social issue is often a question of "re-norming" the norm. Driving under the influence is one example. Several generations ago, the ability to drink and drive was unquestioned.[200] In 1980, Mothers

193. Christine N. Carlson, *Invisible Victims: Holding The Educational System Liable For Teen Dating Violence At School*, 26 HARV. WOMEN'S L.J. 351, 359 (2003).

194. U.S. DEP'T OF JUSTICE, *supra* note 10, at 3.

195. Arriaga & Foshee, *supra* note 67, at 163.

196. SORENSEN, *supra* note 4, at 3.

197. Manganello, *supra* note 69, at 13.

198. *See id.* at 11, 13; SORENSEN, *supra* note 4, at 3.

199. *Id.*

200. Nady El-Guebaly, *Don't Drink and Drive: The Successful Message of Mothers*

Against Drunk Driving ("MADD") was founded and began the process of "re-norming" this norm of drinking and driving.[201] Since 1980, alcohol-related traffic fatalities have decreased nearly 50%, from more than 30,000 to fewer than 15,500.[202] MADD has been successful in changing the way American society perceives drinking and driving through the use of aggressive media campaigns, increased criminal penalties, and greater law enforcement.[203]

Today, it appears that teenagers are normalizing unhealthy patterns in their use of technology. Changing the way that teenagers think about their relationships and the way they think about their use of technology will be an uphill battle. Several organizations are currently making important efforts in this direction. For example, loveisrespect.org is an online resource around teenage dating abuse developed by the National Domestic Violence Hotline.[204] In 2007, loveisrepect.org launched its National Teen Dating Abuse Helpline with help from Liz Clairborne Inc. The hotline is a twenty-four-hour resource—accessible by phone or Internet, specifically designed for teens and young adults. The Helpline and loveisrespect.org offer real-time, one-on-one support from trained peer advocates.[205]

Another effort is That's Not Cool.com, a national advertising campaign developed by the Family Violence Prevention Fund, in partnership with the Department of Justice's Office on Violence Against Women and the Advertising Council.[206] That's Not Cool tries to empower teenagers to address digital dating abuse. According to its website, "Your cell phone, IM, and social networks are all a digital extension of who you are. When someone you're with pressures you or disrespects you in those places, that's not cool."[207] The program has developed "callout cards" that can be sent to people to notify them that a particular behavior is inappropriate or unappreciated. For example, one "callout card" reads, "Now that you've violated my e-mail account, I won't feel bad dumping you."[208] Another reads, "Congrats! With that last text you've officially

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Against Drunk Driving (MADD), 4 WORLD PSYCHIATRY 35-36 (2005).

201. *Id.*

202. Pamela Laughery, *Statistics*, REMEMBERING KELLY JEAN LAUGHERY (July 4, 2009), http://inmemoryofkelly.com/m-a-d-d/.

203. El-Guebaly, *supra* note 199.

204. *Who We Are*, NATIONAL DOMESTIC VIOLENCE HOTLINE, http://www.loveisrespect.org/who-we-are/ (last visited Aug. 16, 2010).

205. *Id.*

206. *Campaigns: That's Not Cool*, FAMILY VIOLENCE PREVENTION FUND, http://www.endabuse.org/content/campaigns/ detail/1206 (last visited Aug. 16, 2010).

207. *Where Do You Draw Your Digital Line?*, FAMILY VIOLENCE PREVENTION FUND, http://www.thatsnotcool.com (last visited Aug. 16, 2010).

208. *Callout Cards*, FAMILY VIOLENCE PREVENTION FUND, http://www.thatsnotcool.com/CalloutCards.aspx (last visited Aug. 16, 2010).

achieved stalker status."[209] These callout cards can be e-mailed or posted to social-networking site.

MTV has initiated another project, A Thin Line, aimed at appropriate use of technology. According to its website:

> MTV's A Thin Line campaign was developed to empower you to identify, respond to, and stop the spread of digital abuse in your life and amongst your peers. The campaign is built on the understanding that there's a "thin line" between what may begin as a harmless joke and something that could end up having a serious impact on you or someone else. We know no generation has ever had to deal with this, so we want to partner with you to help figure it out. On-air, online and on your cell, we hope to spark a conversation and deliver information that helps you draw your own digital line.[210]

Efforts such as That's Not Cool.com, loveisrespect.org, and A Thin Line, among others, are critical to supporting the development of healthy and respectful relationship norms among today's teenage population.

The success of any effort to re-norm the current norms must be consistent with adolescent development. During adolescence, teenagers are differentiating themselves from their parents and other authority figures. In connection with this process, teenagers become more peer focused. Consistent with these developmental changes, a successful program will need to engage teenagers to help other teenagers.[211] If other teenagers are perceived to consider particular behaviors and patterns to be unacceptable, adolescents will internalize that information. Efforts at educating teenagers about healthy relationship patterns will likely be more successful as a ground-up rather than a top-down type program. At all costs, the sense that adults are prescribing "appropriate" teenage behavior must be avoided.

On the other hand, adults should purposely model and discuss healthy relationship norms, establish appropriate media guidelines, and be open to teens who might be experiencing abusive relationships. Adults too often are not receptive or respectful when teens report dating abuse. Parents, teachers, and other authority figures may have a tendency to dismiss the seriousness of the teen's experience, believing that it is merely a phase, melodrama, or "puppy love."[212] Understanding and validating teens' experiences while helping them identify what makes a relationship healthy can go a long way towards counteracting unhealthy norms.[213]

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209. *Id.*

210. *About A Thin Line*, MTV & THE ASSOCIATED PRESS, http://www.athinline.org/about (last visited Aug. 16, 2010).

211. SORENSEN, *supra* note 4, at 3.

212. Saperstein, *supra* note 70, at 187.

213. SORENSEN, *supra* note 4, at 3.

Similarly, because teenagers are embracing technology to an unprecedented degree, a successful re-norming program, ironically, will likely need to embrace technology rather than cast aspersions on it.[214] First, teens are accessible online, are engaged online, and can absorb information online. Second, the apparent independence offered by technology connects with teenagers' need for greater independence and separation from their parents. Third, technology—particularly social networking—has demonstrated its ability to connect individuals to larger communities or communities of interest. Often domestic violence victims—teenagers or adults—experience a profound sense of isolation, frequently due to the concerted efforts of the batterer to isolate the victim from friends and family. Access to an online community has the power to break down that isolation and provide the victim with resources, support, and options.[215]

In addition, because some of the unhealthy behavior is actually being made public through social-networking sites, the social-networking community has the opportunity to see and assess that behavior. In many adult domestic violence relationships, the abusive behavior largely remains private and unavailable for public censure. In contrast, teenage technology abuse can have public aspects. These public aspects—for example, derogatory postings on social-networking sites—provide a wonderful opportunity for public censure. Teens and parents can be empowered to respond to unacceptable demonstrations of power and control dynamics. Therefore, not only does technology potentially provide victims a means of combating isolation and shame, it also gives the online community the opportunity to condemn specific, inappropriate conduct. In this way, the "re-norming" process has the benefit of being very personal and victim-specific yet public at the same time.

VI. CONCLUSION

America is on the verge of a domestic violence crisis. Technology, particularly the intense use of technology by teenagers in their intimate relationships, has the potential to reverse societal recognition of domestic violence as a crime. Only through the legal system's recognition of this risk, commitment to the seriousness of the risk, and dedication of sufficient resources for investigation and prosecution of digital domestic violence, will the production of a new generation of domestic violence batterers be avoided.

214. Manganello, *supra* note 69, at 13.
215. *See* Silverstein, *supra* note 6, at 113-16.

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ANOTHER CRACK IN THE THIN SKULL PLAINTIFF RULE: WHY WOMEN WITH POST TRAUMATIC STRESS DISORDER WHO SUFFER PHYSICAL HARM FROM ABUSIVE ENVIRONMENTS AT WORK OR SCHOOL SHOULD RECOVER FROM EMPLOYERS AND EDUCATORS

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I. INTRODUCTION

The premise of the "thin skull" or "eggshell" plaintiff[1] can be thought of as a carton of eggs.[2] Looking at the carton itself, without opening it up to inspect the eggs for damage, one simply purchases the eggs "as they find them." Likewise, when a plaintiff is injured by the actions of a defendant, the universally accepted rule of American tort law that the defendant "takes the Plaintiff as he finds her" applies.[3] According to the Restatement, "[t]he negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable [person] should have foreseen as a probable result of his conduct."[4]

A condition that has received little attention in relation to the "thin skull" plaintiff rule and foreseeability of injury is posttraumatic stress disorder (PTSD). "The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity;" or witnessing or learning about a similar event in relation to a closely connected person.[5] Thus, PTSD is not congenital, but an injury caused by external events. Considered by many to be a mere emotional condition triggered by past traumatic events, recent studies have confirmed that PTSD is a condition where physical harm to the hippocampus and the medial prefrontal cortex results when a person

1. Steve P. Calandrillo, *An Economic Analysis of the Eggshell Plaintiff Rule* 3 (Am. Law & Econ. Ass'n Annual Meetings, Working Paper No. 19, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1830&context=alea (indicating that the "universally endorsed rule of tort law not only applies where the condition which makes the plaintiff's injuries greater is not known to the defendant, but also where the defendant could not have discovered it by the exercise of reasonable care or even where the plaintiff, himself, is unaware of the condition he is suffering from until the harm is sustained"), citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §43 (5th ed. 1984).

2. Although either "thin skull" or "eggshell" plaintiff is considered acceptable, the term "thin skull" will be used throughout this article.

3. Calandrillo, *supra* note 1, at 1.

4. RESTATEMENT (SECOND) OF TORTS § 461 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM §31 (Proposed Final Draft No. 1, 2005).

5. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV § 309.81 (2000) [hereinafter DSM-IV].

experiences PTSD stimuli.[6]

PTSD is more widespread than the majority of the population realizes. Common types of psychological trauma that trigger the disorder are "car accidents, military combat, rape, and assault."[7] In fact, approximately 7.7 million American adults (eighteen and older) have PTSD in a given year.[8] When compared to adults who suffer from obsessive compulsive disorder (OCD) (2.2 million),[9] panic disorder (6 million),[10] or bipolar disorder (5.7 million),[11] the number of people afflicted with PTSD is striking. For example, about 19% of Vietnam veterans experienced PTSD at some point post-war.[12] In 2006, 89% of rape or sexual assault victims were women.[13] Furthermore, nearly one-third of all rape victims develop Rape-Related Posttraumatic Stress Disorder (RR-PTSD) sometime during their life.[14] Even more devastating is that roughly 16% of American women (40 million) are sexually abused before reaching eighteen years of age—the age of adulthood.[15] Because of its staggering prevalence, childhood abuse may be the most common cause of PTSD in American women.[16] Childhood abuse affects double the number of women (10%) as it does men (5%).[17]

Workplace sexual harassment results in so many cases of PTSD[18] that

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6. J. Douglas Bremner, *The Invisible Epidemic: Post-Traumatic Stress Disorder, Memory and the Brain,* THE DOCTOR WILL SEE YOU NOW (March 1, 2000), http://www.thedoctorwillseeyounow.com/content/stress/art1964.html.

7. *Id.*; *see also* 6 C.J.S. *Armed Services* § 295 (2009) (discussing service-connected disabilities including PTSD).

8. Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCHIATRY 617, 620 (2005) (estimating that 3.5 percent of American adults suffer from PTSD).

9. *Id.*

10. *Id.*

11. *Id.*

12. Bruce P. Dohrenwend et al., *The Psychological Risks of Vietnam for U.S. Veterans: A Revisit with New Data and Methods*, 313 SCIENCE 979, 982 (2006).

13. *Rape-Related Posttraumatic Stress Disorder*, NAT'L CTR. FOR VICTIMS OF CRIME (2009), http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32366.

14. *Id.*

15. Jeanne McCauley et al., *Clinical Characteristics of Women with a History of Childhood Abuse: Unhealed Wounds*, 277 J. AM. MED. ASS'N 1362, 1362-1368 (1997) (including rape, attempted rape, or other form of molestation in the definition of sexual abuse).

16. Bremner, *supra* note 6, at 1.

17. Ronald C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048, 1052 tbl.2 (1995).

18. *Sexual Harassment in the Workplace*, SEXUAL HARASSMENT SUPPORT, http://www.sexualharassmentsupport.org/SHworkplace.html (last visited Aug. 26, 2010) (showing that the majority of complaints in the workforce come from women); *Sexual*

this article will focus on women who have been physically violated due to sexual assault. "Traumatic events such as rape cause both short-term and long-term stress reactions."[19] This premise will form the foundation for applying the "thin skull" plaintiff rule in tort litigation.

Showing how abusive behavior in educational and work environments can cause physical harm to PTSD sufferers and open the negligent actors up to tort law liability under the universally accepted "thin skull" plaintiff rule is the focal point of this article. Part II of this article explains PTSD as a medical condition. The law surrounding the "thin skull" plaintiff doctrine is evaluated in Part III. Because there is evidence that PTSD is a physical injury, this section also addresses the possibility of moving it out of the realm of a mental injury and into the established and more accepted realm of a physical injury for the application of the "thin skull" plaintiff rule. Part IV examines workplace and educational scenarios where PTSD symptoms may be triggered. It also addresses the alternative notion that based on statistics, a reasonable person should have foreseen the injury as the probable result of his/her conduct. Finally, given the number of people who suffer from PTSD as a result of various life experiences, the authors conclude that it is foreseeable that abusive educational and work environments can cause physical injury to the brain and open the negligent actor up to liability under the "thin skulled" plaintiff rule.

II. POSTTRAUMATIC STRESS DISORDER (PTSD) – THE MEDICAL CONDITION

Posttraumatic Stress Disorder is a medical condition that encompasses both a physical and a mental component. Just as a portion of the brain is damaged when an individual sustains a physical impact to the head, such as a hockey player getting "checked" and hitting his head on the ice, so are particular portions of the brain damaged when an "indirect hit" of a PTSD triggering event occurs. This section seeks to explain the manner in which PTSD is diagnosed, the nervous system response, and the physical harm that results. Finally, examples of what a PTSD/RR-PTSD victim experiences are proffered to show the actual harm that results when PTSD is triggered.

A. DSM-IV Criteria

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)

Harassment in Education, SEXUAL HARASSMENT SUPPORT, http://www.sexualharassmentsupport.org/SHEd.html (last visited Aug. 26, 2010).

19. *Rape-Related Posttraumatic Stress Disorder*, *supra* note 13.

criteria are disseminated by the American Psychiatric Association and set forth the diagnostic criteria used by professionals to diagnose different psychiatric conditions, including PTSD.[20] The diagnostic criteria consist of Criteria A-F and include: "a history of exposure to a traumatic event meeting two criteria and symptoms from each of three symptom clusters: intrusive recollections, avoidant/numbing symptoms, and hyper-arousal symptoms. A fifth criterion concerns duration of symptoms and a sixth assesses functioning."[21] The core DSM-IV states that "[t]he essential feature of Posttraumatic Stress Disorder is the evolution of characteristic symptoms following exposure to an extreme traumatic stressor."[22] Once the extreme traumatic stressor has been identified, a qualified mental health professional will evaluate the individual with each of the elements of the DSM-IV criteria. If all of the criteria are met, a definitive diagnosis may be made.

20. National Center for PTSD, *DSM-IV-TR Criteria for PTSD*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.ptsd.va.gov/professional/pages/dsm-iv-tr-ptsd.asp (last updated June 15, 2010) (relaying that in 2000, the American Psychiatric Association revised the PTSD diagnostic criteria in the fourth edition).

21. *Id.*

22. *Id.*

Because of the nature of PTSD, the assessment process is intense. Specifically, the elements of the DSM-IV criterion include the following:[23]

DSM-IV Criterion Item	*Relevant Question*
Criterion A1	Was the patient exposed to an extreme traumatic stressor?
Criterion A2	Did the response to the event involve intense fear, helplessness, or horror?
Criterion B	Is the patient experiencing persistent re-experiencing of the traumatic event?
Criterion C	Is persistent avoidance of stimuli associated with trauma and numbing of general responsiveness present?
Criterion D	Are there persistent symptoms of heightened arousal?
Criterion E	Is the full symptom spectrum present for more than one month?
Criterion F	Does the disturbance cause clinically significant distress or impairment in social, occupational, or other important areas of functioning?

After these criteria have been assessed, it may be possible to further specify onset and duration of symptoms. These "specifiers" are broken down into acute, chronic, and delayed onset. The designation is based on how long the symptoms persist.[24]

Once the onset and duration of the symptoms are established, psychiatrists further categorize symptoms into four areas: intrusive

23. *Id.*

24. *Id.* (defining each specifier in the following manner: acute – symptoms last three months or less; chronic – symptoms last three months or longer; with delayed onset – at least six months have passed between the traumatic event and symptom onset).

symptoms, avoidant symptoms, symptoms of hyper-arousal, and associated features.[25] A constellation of symptoms is usually seen with an interpersonal stressor (e.g., childhood sexual or physical abuse, rape) and include: "feelings of ineffectiveness, shame, despair, or hopelessness; feeling permanently damaged; a loss of previously sustained beliefs, hostility; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual's previous personality characteristics."[26] Overall, using the DSM-IV criteria as a guide, a mental health professional, preferably a psychiatrist, can provide a clinical diagnosis of PTSD and establish the extent of the harm from the initial or re-experienced event.

B. Nervous System Response

Like a complex computer network, the nervous system acts as the control center for the body by communicating through an electrical-chemical wiring network.[27] The cornerstone to maintaining homeostasis, the nervous system detects, interprets, and responds to fluctuations in both internal and external stimuli.[28] The nervous system is composed of two primary systems: the central nervous system (CNS) and the peripheral nervous system (PNS).[29] The CNS includes the brain and the spinal cord.[30] The remaining nerves are part of the PNS.[31] In essence, nerves serve as couriers and exchange messages between the CNS and the rest of the body.[32]

The PNS can be broken down further into two parts: the somatic

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25. Gregory Bayse, Symptoms of PTSD, HOUGHTON COLL. DEP'T OF PSYCHOL., http://campus.houghton.edu/orgs/psychology/ptsd/symptoms.htm (last visited Feb. 18, 2010) (defining each of the four types of symptom categories as the following: (1) intrusive – the most distinctive because the traumatic event remains a dominating psychological experience that evokes panic and the individual may actually start to act out the event while in a dissociative state; (2) avoidant – emotional constriction or numbing whereby the victim has a need to avoid feelings, thoughts, and situations reminiscent of the trauma, loss of normal emotional responses, or both; (3) hyperarousal – these symptoms can resemble those seen in panic and generalized anxiety disorder because of the heightened sense of awareness of the threat of trauma that caused the illness initially; and (4) associated features – unhealthy coping mechanisms, including drug and alcohol abuse, used in an attempt to remove flashbacks, isolated feelings, and panic).

26. DSM-IV § 309.81. *See id.*

27. *Nervous System Information*, BESTHEALTH.COM, http://www.besthealth.com/besthealth/bodyguide/reftext/html/nerv_sys_fin.html (last visited February 7, 2011).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

nervous system and the autonomic nervous system.[33] The somatic nervous system is charged with controlling the movements of skeletal or voluntary muscles.[34] Conversely, the autonomic nervous system or involuntary nervous system works to maintain equilibrium within the body.[35] By communicating with the receptors within the internal organs, the afferent nerves carry information to the CNS and receive responses back through the efferent nerves to the effectors. In this system, the effectors consist of smooth muscle, cardiac muscle, and glands.[36]

The efferent segment of the autonomic system is further divided into the sympathetic and parasympathetic nervous system.[37] The sympathetic nerves trigger the "fight or flight" response that occurs during stress.[38] This response in turn causes increased blood pressure, breathing rate, and blood-flow to the muscles.[39] By way of contrast, the parasympathetic nerves have the inverse effect because they decrease heart and breathing rates, promote digestion, and elimination.[40] Both the sympathetic and parasympathetic systems are classified as a neuroendocrine system because of the electronic impulses and release of hormones from different glands.[41]

In patients suffering from PTSD, the autonomic nervous system is impacted and the following relay occurs: when the person experiences a triggering event, the brain, as part of the CNS, sends messages through the efferent nerves to the effectors. Different glands are contacted and the sympathetic nervous system, the "fight or flight" response, is triggered. In turn, hormones are released and physiological symptoms emerge.

Unfortunately, because PTSD patients often remain in a heightened state of awareness, critical stress hormones are released in an unhealthy manner.[42] For example, a stress response triggers the release of norepinephrine and cortisol. Norephinephrine is released as an acute response to stress while cortisol has a long-term release. Both of these hormones are released simultaneously, but cortisol has a negative effect on the endocrine system, primarily by affecting insulin utilization.[43]

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33. *Nervous System Information*, *supra* note 28.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Nervous System Information*, *supra* note 28.
40. *Id.*
41. *Id.*
42. *See generally* Rachel Yehuda, Sarah Halligan, & Robert Grossman, *Childhood Trauma and Risk for PTSD: Relationship to Intergenerational Effects of Trauma, Parental PTSD, and Cortisol Excretion*, 13 DEV. & PSYCHOPATHOLOGY 733, 753 (2001) (examining associations between childhood trauma and PTSD in 51 adult children, in addition to evaluating the variables and correlating them to 24-hour urinary cortisol levels).
43. *See generally* M. Michele Murburg, *The Psychobiology of Post-Traumatic Stress*

Another reason that responses in PTSD victims are impaired is because physical changes to the hippocampus and medial prefrontal cortex occur whenever the initial or re-experiencing event occurs.[44] The hippocampus is a part of the brain involved in learning, memory, and the handling of stress. Responsible for regulating emotional responses to fear and stress, the medial prefrontal cortex works closely with the hippocampus.[45] Therefore, it is not surprising that symptoms associated with PTSD occur because of the physical damage to these two vital areas of the brain.[46]

C. *Physical Harm and Diagnostic Standards*

While it is not surprising that damage to the hippocampus from stress not only causes problems in dealing with memories and other effects of past stressful experiences, it can also impair new learning.[47] But, with the correct individualized treatment and therapy, the hippocampus has the potential to regenerate nerve cells (neurons) as part of its normal functioning.[48] However, because stress impairs the healing function by stopping or slowing down neuron regeneration, the more re-experiences a person endures, the lower the likelihood of regeneration.[49] Also, just because someone has suffered a traumatic event, it does not mean that his or her memory is impaired in relation to the event. Intuitively this makes

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Disorder: An Overview, 821 ANNALS N.Y. ACAD. SCI. 352, 353 (1997) (expressing that "relative basal quiescence of [catecholamine] systems with enhanced responsivity to stimulation may provide for enhancement of 'signal to noise ratios' in neuronal and other systems. Such enhancement may facilitate selective attention and selective responding to the most strongly determined inputs . . . potentially contributing to symptoms including hypervigilance, insomnia, flashbacks, intrusive memories, panic, physiological hyperactivity, and startle.").

44. Darren Weber, *Hippocampal Functions in Post-traumatic Stress Disorder*, http://psdlw.users.sourceforge.net (follow "Career" hyperlink; then follow "Hippocampal Functions" hyperlink, found under PTSD Notes) (explaining the nature of hippocampal damage in PTSD, the use of functional neuroimaging in demonstrating reduced hippocampal volume and the relationship to stress-related glucocorticoids).

45. Bremner, *supra* note 6.

46. J. Douglas Bremner et al., *Magnetic Resonance Imaging-based Measurement of Hippocampal Volume in Posttraumatic Stress Disorder Related to Childhood Physical and Sexual Abuse: A Preliminary Report*, 41 BIOLOGICAL PSYCHIATRY 23, 26-27 (1997); *see also* Jose M. Canive et al., *MRI Reveals Gross Structural Abnormalities in PTSD*, 821 ANNALS N.Y. ACAD. SCI. 512 (1997).

47. Bremner, *supra* note 6.

48. Elizabeth Gould et al., *Proliferation of Granule Cell Precursors in the Dentate Gyrus of Adult Monkeys Is Diminished by Stress*, 95 PROC. NAT'L ACAD. SCI. U.S. 3168, 3168-71 (1998); K.J. Sass et al., *Verbal Memory Impairment Correlates With Hippocampal Pyramidal Cell Density*, 40 NEUROLOGY 1694, 1694-97 (1990).

49. Bremner, *supra* note 6.

sense because if the mind and body did not remember, then no outward symptoms would occur.[50] This is not to say that fragmented memory does not occur, but it does mean that even though a rape victim may be dissociating during an attack, she still is able to recall significant details.[51]

A physical exam, laboratory tests, functional imaging studies, and autonomic functioning studies (heart rate, electromyography, and sweat gland activity) are methods by which a patient is evaluated for physical harm or changes in baseline physiological function.[52] Numerous studies have analyzed the correlations between hippocampal atrophy and medial prefrontal cortex blood flow in functional imaging and PTSD.[53] Two common types of functional imaging used are positron emission tomography (PET) and functional magnetic resonance imaging (fMRI).[54] PET scans of PTSD patients, compared to nondisabled patients, indicate decreased blood flow to the medial prefrontal cortex and increased blood flow to areas of the brain involved with memory and visuospatial processing.[55] Likewise, decreased blood flow to the frontal areas of the anterior cingulate gyrus and the medial frontal gyrus have been observed

50. *Id.* (highlighting the question of memory and the hippocampus in relation to recovered memories of childhood abuse: "[I]n the case of the PTSD sufferer who was locked in a closet as a child, she had a memory of the smell of old clothes but other parts of her memory of the experience, such as a visual memory of being in the closet or a memory of the feeling of fear, are difficult to retrieve or completely lost. In cases like this, psychotherapy or an event that triggers similar emotions may help the patient restore associations and bring all aspects of the memory together.")

51. J. Douglas Bremner et al., *Deficits in Short-term Memory in Posttraumatic Stress Disorder*, 150 AM. J. PSYCHIATRY 1015, 1015-19 (1993).

52. *See, e.g.*, Patricia A. Agatista et al., *Impairment of Endothelial Function in Women with a History of Preeclampsia: An Indicator of Cardiovascular Risk*, 286 AM. J. HEART AND CIRCULATORY PHYSIOLOGY 1389 (2003) (describing the methods by which baseline physiological functions may be measured).

53. *See, e.g.*, Jan E. Kennedy et al., *Posttraumatic Stress Disorder and Posttraumatic Stress Disorder-Like Symptoms and Mild Traumatic Brain Injury*, 44 J. REHABILITATION RES. & DEV. 895, 903 (2007).

54. A PET Scan is a type of nuclear medicine imaging that produces a three dimensional picture after a mixture of a biochemical substance and positron-emitting isotopes has been injected into the patient and exposed to radiation. *Definition of Positron Emission Tomography*, MEDTERMS.COM, http://www.medterms.com/script/main/art.asp?articlekey=11912 (last visited Mar. 18, 2010). Functional Magnetic Resonance Imaging (fMRI) is a particular type of MRI; it is a brain imaging technique that measures increased blood-flow and allows for real-time evaluation of cerebral activity as the mind thinks, listens, dreams, and imagines. Definition of Functional Magnetic Resonance Imaging, THEFREEDICTIONARY.COM, http://www.thefreedictionary.com/functional+magnetic+resonance+imaging (last visited Mar. 18, 2010).

55. J. Douglas Bremner et al., *Neural Correlates of Exposure of Traumatic Pictures and Sound in Vietnam Combat Veterans With and Without Posttraumatic Stress Disorder: A Positron Emission Tomography Study*, 45 BIOLOGICAL PSYCHIATRY 806, 809-10 (1999).

using fMRI.[56] Hence, utilizing various forms of testing confirms that physical damage, especially to the medial prefrontal cortex and hippocampus, occurs in PTSD sufferers.

D. The Victim's Perspective

> Offenders run the gamut of every socioeconomic and ethnic group. I've seen guys who dig ditches or are on unemployment, as well as people who are the pillars of the community—attorneys, doctors, people who are doing extremely well in their lives.[57]

Abusers have a lot to gain from not being forthright,[58] but a victim has a lot to lose. The process of diagnosis is often invasive, violating, and personal, yet it is a necessary step.

The cluster of symptoms associated with a person's response to an extreme, traumatic stressor was first documented during the United States Civil War and was known as "Da Costa's syndrome."[59] The same cluster of symptoms was called "shell shock" during World War I and a "gross stress reaction" following World War II.[60] The diagnostic cluster of symptoms assumed a war-related event that impacted a male soldier. Witnesses to the constant shelling of World War I testified that outside trauma could overwhelm an average soldier.[61] While the public sympathized with returning veterans of both World Wars, the public expected the veterans would readjust. The medical community and the public declined to accept that outside events could cause mental illness.[62]

In the 1920's, the medical community recognized that the same cluster of symptoms associated with shell shock occurred in children and women following a history of mental, physical, and/or sexual abuse.[63] Erskine Caldwell's books, *God's Little Acre* and *Tobacco Road*, disclosed these

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56. Ruth A. Lanius et al., *Neuronal Correlates of Traumatic Memories in Posttarumatic Stress Disorder: A Functional MRI Investigation*, 158 AM. J. PSYCHIATRY 1920, 1920 (2001).

57. ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE, 500-01 (Harper Perennial 1994).

58. *Id.* at 499.

59. Oglesby Paul, *Review: Da Costa's Syndrome or Neurocirculatory Asthenia*, 58 NEURO. HEART J. 306, 307 (1987) (describing how Jacob Da Costa, a military physician, first discovered a "cardiac malady common among soldiers" during the Civil War).

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* ERSKINE CALDWELL, TOBACCO ROAD (Univ. of Georgia Press 1995) (1932); ERSKINE CALDWELL, GOD'S LITTLE ACRE (Univ. of Georgia Press 1995) (1933).

abuses as the norm when published in 1932 and 1933 respectively.[64] Still, the public was reluctant to accept that extreme traumatic stressors similar to the stress of the horrors of war could exist within its own community. Nevertheless, the medical community did not approve the diagnostic criteria for post-traumatic stress syndrome for another fifty years.[65]

In the late 1960's and 1970's, veterans were returning from Vietnam with a cluster of symptoms associated with PTSD.[66] After years of debate, the American Psychiatric Association (APA) published the diagnosis of PTSD, in part because the severity of the impairment of the Vietnam veterans could not be associated with normal traumatic events, such as divorce.[67] PTSD requires a traumatic event, but a traumatic event does not always cause a mental disorder. The traumatic event must be associated with the mental illness that followed.

In 1980, the APA finally published diagnostic criteria for PTSD.[68] The required trauma included wartime events, natural disasters, torture and rape. The traumatic event was presumed to have overwhelmed the patient. This is the *only* psychiatric diagnosis that requires an outside-the-body event in the APA's diagnostic manual. Before 1980, the medical community described the PTSD cluster of symptoms as an adjustment disorder.[69] Adjustment disorders describe the difficulty a person may have following a traumatic life event, such as a divorce or the death of a loved one, leading to depression and perhaps phobia.[70] The diagnostic criteria were subsequently revised in 1987, 1994 and 2000.[71] A further revision is

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64. *Id.*

65. *The History of Post-Traumatic Stress Disorder (PTSD)*, PSYCHIATRICDISORDERS.COM, www.psychiatric-disorders.com/articles/ptsd/causes-and-history/history-of-ptsd.php (last visited Aug. 10, 2010) (indicating that the American Psychiatric Association (APA) added PTSD to the Diagnostic Manual of Mental Disorders (DSM) in 1980).

66. *Id.*; Edgar Jones & Simon Wessely, *Psychological Trauma: A Historical Perspective*, 5 PSYCHIATRY 217, 217 (July 2006) ("During the 1970s a paradigm shift occurred in the way that psychological trauma was conceived and managed.").

67. Richard J. McNally, *Progress and Controversy in the Study of Posttraumatic Stress Disorder* 54 ANN. REV. PSYCHOL. 229, 230 (2003).

68. M.J. Horowitz et al., *Diagnosis of Posttraumatic Stress Disorder*, 175 J. NERVOUS MENTAL DISORDERS 267 (1987).

69. T.M. Keane et al., *Differentiating Post-traumatic Stress Disorder (PTSD) From Major Depression (MDD) and Generalized Anxiety Disorder (GAD)*, 11 J. ANXIETY DISORDERS 317 (1997).

70. *Adjustment Disorders*, MAYO CLINIC (Mar. 20, 2009), www.mayoclinic.com/health/adjustment-disorders/DS00584.

71. Damian McNamara, *Latest Evidence on PTSD May Bring Changes in DSM-V: Subthreshold Events Can Lead to Disorder*, CLINICAL PSYCHIATRY NEWS (Nov. 2007), *available at* http://findarticles.com/p/articles/mi_hb4345/is_11_35/ai_n29395031/?tag=content;col1 (describing the changes in the definition of PTSD through the various DSM editions).

under public review. In the past thirty years, surveys have demonstrated that five percent of men and ten percent of women show symptoms of PTSD.[72]

Every individual has a personal mental and physical integrity. Patients with PTSD describe symptoms that impair, affront, and/or disrupt their personal integrity and associate these symptoms with specific events. When a stressor event is followed by symptoms, the severity of the event and the nexus to the symptoms are evaluated. The stressor events run along a continuum ranging from torture to overcoming a rumor.

> The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1).[73]

Presently, the APA is accepting public comment on a new definition of PTSD.[74] The new definition's objective includes a better definition of "atraumatic" to distinguish between the events that are depressing, but do not extend to the atraumatic threshold.[75] The new definition was released to the psychiatric community for a two-year evaluation on April 20, 2010,

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72. *See, e.g.*, R.C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048 (1996).

73. *See* DSM-IV, § 309.81, ("Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness. For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury. Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Events experienced by others that are learned about include, but are not limited to, violent personal assault, serious accident, or serious injury experienced by a family member or a close friend; learning about the sudden, unexpected death of a family member or a close friend; or learning that one's child has a life-threatening disease. The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape). The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase.").

74. *DSM-5 Development: §309.81 Post Traumatic Stress Disorder*, AM. PSYCHIATRIC ASS'N (Aug. 20, 2010), http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=165.

75. *Id.*

before official inclusion in the new DSM-V in 2013.[76]

There is a natural tendency in Western culture to describe and pass judgment on the cause of the stressor event.[77] The discussion of causality to the stressor event, however, has little application for the psychiatrist. The diagnosis is defined by symptoms following exposure to the traumatic event.[78] For example, a patient may have nightmares before and after the event, but the PTSD diagnosis requires nightmares about the event.[79] Further, the traumatic stressor event is rarely a simple, single, non-recurring event, such as the Oklahoma City bombing or 9/11, where the agent of cause is easy to define. The more common example is sexual assault in children, where the person causing the trauma will blame the child. The medical community has shown that repeated events, such as molestation, which can be the same event over and over, qualify for PTSD.[80] The defining trait is that the symptoms occur following exposure to a stressor. The investigation of who or what caused the stressor has no significance to the psychiatrist in treatment, except to assure that the patient is not responsible for the trauma.

Another consideration is that the personality traits of the patient will affect the patient's response to the treatment and to the trauma itself. While different persons have different responses to trauma, distancing the stressor event from the treatment is a characteristic of the psychiatric treatment. The severity of the occupational and social impairment is different for every patient.[81]

The APA uses a rating system, referred to as the global assessment

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76. *Id.*; *cf.* WORLD HEALTH ORGANIZATION, ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIORAL DISORDERS: CLINICAL DESCRIPTIONS AND DIAGNOSTIC GUIDELINES (F43.1 (World Health Org. 1992), *available at* http://www.who.int/classifications/icd/en/GRNBOOK.pdf (showing that the international diagnosis for PTSD is similar to the present APA definition).

77. ETHNOCULTURAL ASPECTS OF POST-TRAUMATIC STRESS DISORDERS: ISSUES, RESEARCH AND APPLICATIONS (Anthony J. Marsella et al. eds., 1996).

78. Keane, *supra* note 69, at 326.

79. Thomas Maier, *Post-traumatic Stress Disorder Revisited: Deconstructing the A-criterion*, 66 MED. HYPOTHESES 103, 106 (2006). Everyone is susceptible to having bad dreams,so when someone describes nightmares and they mention that the nightmares preceded the event, it is necessary to differentiate the pre-event nightmares from the post-event nightmares. PTSD requires the post-event nightmares be tied to the event to support the PTSD diagnosis. Nightmares about the event are the usual criteria and are sought by clinicians for diagnosis.

80. *See* F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 1 (Jan. 2010) (defining PTSD as "the psychiatric diagnosis now given to a set of reactive symptoms that result from experiencing a traumatic event or a series of such events").

81. Naomi Breslau, *Epidemiologic Studies of Trauma, Posttraumatic Stress Disorderrauma, Posttraumatic Stress Disorder, and Other Psychiatric Disorders*, 47 CAN. J. PSYCHIATRY 923 (2002).

functioning scale (GAFS), to rate the severity of the impairment between zero and one hundred percent.[82] For some people a stressor does not cause PTSD. PTSD only occurs when the patient's mental and physical integrity has been affronted beyond the patient's ability to cope with persistent symptoms for greater than one month.[83]

Within the American Psychiatric Association or the DSM-IV (revised) definition of PTSD are three clusters of occurring symptoms: shell shock, intrusive memories, and hyper-arousal.[84] The shell shock cluster is for those who are so affected that any kind of memory or response to the stressor will cause a kind of numbness on the part of the patient.[85] Shell shock is most easily recognized in adults, Shell shock symptoms are similar for a variety of stressors; molested children and rape victims' symptoms differ little from soldiers who have suffered classic shell shock.[86] Shell shock symptoms are the central diagnosis for PTSD as patients experience social and occupational impairment. Note that the current diagnosis does not address the long-term effect in children, such as self-deprecation and loss of identity.

The second cluster of symptoms of PTSD is intrusive memories of the event. This is an anxiety-producing and depression-producing form of PTSD. The third cluster of symptoms is sometimes referred to as hyper-arousal symptoms associated with memories of the stressor.

The new diagnostic criteria for PTSD propose a fourth cluster, which is associated with avoidance/numbing in response to the psychopathology recognized in school-aged children and adolescents. Biologically, PTSD, especially with the shell shock cluster has demonstrably affected the hypothalamic-pituitary-adrenal (HPA) axis abnormalities.[87] HPA axis abnormalities cause a decreased baseline cortisol development and an increased negative feedback regulation in the hypothalamus gland, which

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82. Schedule of Ratings–Mental Disorders, 38 C.F.R. § 4.130, (2009), *available at* http://www.vva.org/ptsd_levels.html.

83. Jennifer Travis Lange, Christopher L. Lange, & Rex B.G. Cabaltica, *Primary Care Treatment of Post-traumatic Stress Disorder*, AM. FAM. PHYSICIAN, Sept. 1, 2000, *available at* http://www.aafp.org/afp/20000901/1035.html.

84. John P. Wilson, *The Historical Evolution of PTSD Diagnostic Criteria: From Freud to DSM-IV*, 7 J. TRAUMATIC STRESS 681, 693 (1994).

85. *Id.*

86. Pamela Grundy, *Facts About Post-Traumatic Stress Disorder*, SUITE 101 (Jan. 6, 2010), http://clinical-psychology.suite101.com/article.cfm/facts_about_ptsd.

87. William Meller et al., *HPA Axis Abnormalities in Depressed Patients With Normal Response to the DST*, 145 AM. J. PSYCHIATRY 318, 318 (1988), *available at* http://ajp.psychiatryonline.org/cgi/content/abstract/145/3/318 (the HPA-axis is "our stress response system consisting of the hypothalamus, the anterior pituitary gland, and the adrenal glands that produce stress hormones."); *Glossary*, CENT. FOR STUDIES ON HUMAN STRESS, http://www.hlhl.qc.ca/centre-for-studies-on-human-stress/glossary.html (last visited Mar. 19, 2011).

can cause permanent biological effects on the body, especially in children.[88]

The biological chemistry associated with PTSD differs from the biology of ordinary stress.[89] These biological differences may eventually lead to further defining PTSD. For example, the avoidance/numbing cluster of symptoms can cause a distinct biological print distinct from the other diagnostic clusters.[90] Further, the PTSD intrusion/hyper-arousal cluster of symptoms appears to give a biological print similar to emotional distress. Unfortunately, PTSD patients, especially the young, may have permanent HPA axis abnormalities (decreased baseline cortisol and increased negative feedback regulation, suggesting HPA axis over-sensitivity) and physiological, electrophysiological, and neurochemical aberrations in the regulation of sympathetic nervous systems and other neuromodality systems.[91] These previously sustained abnormalities are triggered when an adult is exposed to a stressor, thereby exacerbating the reaction and damages.

III. THE "THIN SKULL" PLAINTIFF RULE AND THE LAW

First articulated in the 1901 English case *Dulieu v. White*,[92] the "thin skull" plaintiff rule has a prominent place in American tort law. Just prior to the English court's coining of the "thin skull" doctrine, a Massachusetts court held that "the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person."[93] For over a century, the "thin skull" doctrine has appeared in nearly every legal treatise and the majority of jurisdictions have accepted and applied the rule to negligence cases.[94]

While the norm among jurisdictions is to apply the "thin skull" rule to pre-existing physical conditions,[95] there remains little consensus about its

88. R. Yehuda & A.C. McFarlane, *Conflict Between Current Knowledge About Posttraumatic Stress Disorder and Its Original Conceptual Basis*, 152 AM. J. PSYCHIATRY 1705 (1995).

89. Matthew A. Friedman, *Post-Traumatic Stress Disorder*, AM. C. OF NEUROPSYCHOPHARMACOLOGY (2000), http://www.acnp.org/g4/GN401000111/CH109.html.

90. *See* Gordon J. G. Asmundson et al., *Are Avoidance and Numbing Distinct PTSD Symptom Clusters?*, 17 J. TRAUMATIC STRESS 467, 474 (2004).

91. *See* NEUROBIOLOGICAL AND CLINICAL CONSEQUENCES OF STRESS: FROM NORMAL ADAPTATION TO PTSD (Dennis S. Charney et al. eds., 1995).

92. Dulieu v. White & Sons, [1901] 2 K.B. 669 at 670 (Eng.),

93. Spade v. Lynn & B.R.R., 52 N.E. 747, 748 (Mass. 1899).

94. *See* Scott M. Eden, *I am Having a Flashback...All the Way to the Bank: The Application of the "Thin Skull" Rule to Mental Injuries–Poole v. Copland, Inc.*, 24 N.C. CENT. L.J. 180, 183 nn.33-34 (2001).

95. KEETON ET AL, *supra* note 1, at 291-92; *see* J. Stanley McQuade, *The Eggshell Skull*

application to mental injuries. It has been said that:

> [t]he most difficult issues courts must grapple with are whether a plaintiff sustains mental injury and, if so, whether the defendant caused it. If the defendant caused the plaintiff's mental harm, courts must determine if the defendant caused all the mental harm, activated a latent medical condition, or aggravated a preexisting mental condition.[96]

The question then is how PTSD is designated and how the designation impacts the "thin skull" plaintiff rule.

A. Legal Facets and PTSD

During the course of research for this article, no case was discovered in which PTSD was pled as a physical injury under the "thin skull" plaintiff rule. While attorneys and courts have addressed PTSD as a mental injury in relation to the "thin skull" plaintiff rule, there is disagreement as to whether a "defendant caused all the mental harm, activated a latent medical condition, or aggravated a preexisting condition."[97] Distinguishing between these three types of mental harm is critical because if the plaintiff has a latent mental condition or the defendant caused all of the harm, then the defendant is liable for all of the mental harm sustained by the plaintiff.[98] If, however, PTSD is classified as a preexisting mental condition, then courts have held the defendant to be liable only for aggravation of the condition.[99]

B. Case Law

Traditionally, the "thin skull" plaintiff rule was applied by the

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Rule and Related Problems in Recovery for Mental Harm in the Law of Torts, 24 CAMPBELL L. REV. 1, 2-3 (2001).

96. Candice E. Renka, Note, *The Presumed Eggshell Plaintiff Rule: Determining Liability When Mental Harm Accompanies Physical Injury*, 29 T. JEFFERSON L. REV. 289, 289-90 (2007).

97. *Id.*

98. Salas v. United States, 974 F.Supp. 202, 209 (W.D.N.Y. 1997) (relaying that the defendant "may be liable for damages for aggravation of a pre-existing illness or for precipitation of a latent condition"); Calcagno v. Kuebel, Fuchs P'ship, 802 So.2d 746, 752 (La. Ct. App. 2001) (holding the defendant completely accountable for all of the mental harm because the physical injury activated age-related changes in the brain that were previously asymptomatic); LaSalle v. Benson Car Co., 783 So.2d 404, 408-09 (La. Ct. App. 2001) (holding that all of the plaintiff's mental harm was caused by the defendant because prior to the physical injury, the plaintiff had no psychological problems, but subsequently required psychiatric treatment).

99. *See Salas*, 974 F. Supp. at 209; Touchard v. Slemco Elec. Found., 769 So.2d 1200, 1202 (La. 2000) (expressing that because the plaintiff's injuries were preexisting, it was up to the jury to decide whether the defendant aggravated them).

majority of jurisdictions to physical injuries. With the wider acceptance of mental injuries came a broader application of the "thin skull" plaintiff rule. In the 1998 case *Poole v. Copland, Inc.*, the North Carolina Supreme Court affirmed a decision by the North Carolina Court of Appeals that enabled the "thin skull" rule to apply to mental injury cases.[100] Here, a former employee sued her former co-worker alleging both intentional and negligent infliction of emotional distress.[101] Under the doctrine of respondeat superior, she also sued the employer.[102] The employee ultimately prevailed, recovering actual and punitive damages "resulting from a flashback of repressed memories of childhood sexual abuse when aggravated by the on-the-job sexual harassment."[103] Significantly, her susceptibility to triggers causing severe emotional distress was recognized and she recovered the full extent of her damages.[104] And, for the first time, the North Carolina Supreme Court afforded the application of the "thin skull" plaintiff rule to mental injury cases.[105]

In New York, a district court grappling with determining liability when mental harm accompanies physical injuries illustrates a conundrum many courts face.[106] In *Salas v. United States*, a forty-nine year old teacher was involved in a 1991 car accident when the defendant ran a stop sign.[107] At the emergency room, she was diagnosed with minor injuries, yet she continued to experience severe symptoms disproportionate to the physical injuries.[108] Five years later, at the time of trial, the plaintiff continued to suffer from "extreme anxiety, confusion, pain in virtually every part of her body, and limited affect."[109] Medical experts agreed that she was not "malingering,"[110] but rather she was suffering disproportionately to the severity of the accident, thereby implicating a psychological component.[111]

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100. Poole v. Copland, 498 S.E.2d 602, 604 (N.C. 1998).

101. *Id.* at 603.

102. Eden, *supra* note 93, at 180.

103. *Id.* at 180 (citing *Poole*, 498 S.E.2d at 604).

104. *Id.*

105. North Carolina had taken steps toward this result in two earlier cases. In *Potts v. Howser*, 274 N.C. 49, 52, 161 S.E.2d 737, 742 (1968), the North Carolina Supreme Court indicated that the "think skull" plaintiff rule included aggravating or activating a pre-existing physical or mental condition. Even before that, in *Johnson v. Ruark Obstetrics*, 395 S.E.2d 85, 90 (1890), the North Carolina Supreme Court relayed that "mental injury is simply another type of 'injury'—like 'physical' or 'pecuniary' injuries."

106. Salas v. United States, 974 F.Supp. 202, 209 (W.D.N.Y. 1997) .

107. *Id.* at 203-04.

108. *Id.* at 203-06.

109. ROBERT JEAN CAMPBELL, CAMPBELL'S PSYCHIATRIC DICTIONARY 15 (Oxford Univ. Press 2004) (1940) (defining affect as "a person's disposition to react emotionally in certain specific ways . . . the fluctuating, subjective aspect of emotion").

110. *Id.* at 383 (defining "malingering" as the intentional exaggeration of physical symptoms).

111. *Salas*, 974 F. Supp. at 205.

The court did not decide whether the plaintiff had a previous mental condition or a latent mental condition because it rejected outright the defendant's argument that the plaintiff had a preexisting condition that would have caused her harm independent of the accident.[112] Unfortunately, the court never explained how its decision was reached, nor did it provide elements of a test for future courts to apply.[113]

The problem is not with courts recognizing liability for mental harm; instead, it is how the "thin skull" plaintiff rule is applied to mental harm that accompanies physical injury.[114] Courts have not reached a consensus on differentiating between a latent and preexisting mental condition. A dormant "disorder that has not erupted into full-blown psychotic symptoms" qualifies as a latent mental condition.[115] A latent mental condition can be analogized to the Newtonian physics notion that "an object at rest remains at rest unless acted on by an outside force."[116] Likewise, a latent mental condition exists but the outside event causes it to "move."[117]

"In contrast, a preexisting mental condition is a condition that existed before the physical injury occurred, was symptomatic, and affected the plaintiff's functioning in daily life."[118]

Where does PTSD fall along this continuum? PTSD encompasses both a physical and a mental injury and requires an outside actor or event to trigger the condition. Therefore, unlike a case such as *Salas*, where the plaintiff received different mental disorder diagnoses ranging from schizo-affective disorder to borderline personality from various experts, [119] individuals diagnosed with PTSD have much clearer parameters. PTSD is the only mental medical condition that *requires* an outside event or actor in order to cause physical brain damage and trigger mental symptoms.[120] Therefore, because of the unique nature of PTSD having mental and

112. *Id.* at 208-13.

113. *Id.*

114. McQuade, *supra* note 94, at 2-3.

115. CAMPBELL, *supra* note 109, at 366.

116. ISAAC NEWTON, THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 109 (U. Cal. Press 1999) (1687).

117. Walton v. William Wolf Baking Co., 406 So. 2d 168, 171-73 (La. 1981) (illustrating that the court held that the plaintiff either had no mental condition before the accident or had a latent mental condition, but rejected defendant's arguments that the plaintiff had a preexisting mental condition).

118. Renka, *supra* note 96, at 293.

119. *Salas*, 974 F. Supp. at 206-07, 209 (holding that the plaintiff's "emotional problems were caused by the accident" because every expert testified that she was able to cope before but not after the accident. Although there was conflicting testimony of whether the condition was preexisting or latent, the court found that a lone dissenting expert will not defeat causation).

120. McNamara, *supra* note 69.

physical harm components, the "thin skull" plaintiff rule should render the defendant liable for all of the plaintiff's mental and physical harm, and not merely liable for aggravation of a mental condition.

C. *Evidence Law*

Justice Benjamin Cardozo once said, "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed."[121] From an evidentiary standpoint, the admissibility of relevant evidence and expert testimony seems to point to the notion that our rules of evidence were framed for psychoanalysts. If the tendency is "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," the evidence is relevant and hence potentially admissible.[122] Unfortunately, labeling a person with a mental disorder can be a "powerful means to discredit a person, [but] its role as trial evidence goes largely unexamined, unquestioned, and unregulated by courts."[123] Even though the Federal Rules of Evidence prohibit this type of character evidence to be admitted, as a general rule, courts often admit it.[124]

Civil defendants typically "use evidence of a plaintiff's alleged current or prior psychiatric diagnosis or treatment in three occasionally overlapping contexts:"[125] (1) the mental illness is evidence of an alternative cause(s) of the alleged psychological injuries; (2) the credibility of the plaintiff is impeached by asserting that there is an inability to accurately perceive or recount events because of the mental illness; and (3) the mental illness was a factor in the event because such a condition indicates certain propensities related to the acts in question on a particular occasion.[126] These instances are what Rule 403 of the Federal Rules of Evidence was designed to protect against.[127] Because of the stigma accompanying psychiatric diagnosis,

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121. Shepard v. United States, 290 U.S. 96, 104 (1933).

122. FED. R. EVID. 401.

123. Deidre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 751 (2009).

124. *See* FED. R. EVID. 404(a) (requiring that with the exception of certain circumstances, "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.").

125. *Spade*, 52 N.E. at 752.

126. *Id.*

127. FED. R. EVID. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* FED. R. EVID. 412(a). Enacted by Congress, the rule provides that certain types of evidence is generally inadmissible and includes: proof that the victim engaged in other sexual behavior, or evidence offered to prove any victim's sexual predisposition. FED. R. EVID. 412(b) includes exceptions to inadmissibility in the

admitting evidence of the plaintiff's mental history "poses a significant risk of unfair prejudice to the plaintiff in light of the persistent and pervasive stigmatizing effects of psychiatric diagnoses."[128] Therefore, even when courts determine that psychiatric history is relevant to the claim of intentional or negligent infliction of emotional distress, the defendant's position is enhanced in terms of discovery.[129]

Because mental injuries, including emotional distress, are an integral component of civil noneconomic damages, recovery is possible in a myriad of civil actions ranging from common law tort, to statutory civil rights actions, to employment discrimination cases.[130] In these instances, the relevance of psychiatric history is often undisputed, but there remains little framework to guide the jury on applying this type of evidence to resolve causation and apportionment of damages issues.

In relation to the "thin skull" plaintiff rule, the defendant is liable for aggravation of an already present condition, whether classified as preexisting or latent, regardless of whether the aggravation was foreseeable.[131] The difference in terming the condition preexisting or latent is the impact on the damages. A defendant will often skew the preexisting condition to argue that the condition, and not the defendant's tortious acts, is a partial or substantial cause of the injuries.[132] Even when defendants have attempted to use this type of evidence in this manner, courts have held to the contrary.[133]

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following specific circumstances: "(1)(A) evidence of specific instances of sexual behavior is offered to prove that a person other than the accused was the source of the semen, injury or other physical evidence; (1)(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (1)(C) evidence the exclusion which would violate the constitutional rights of the defendant."

128. Smith, *supra* note 122, at 753.

129. Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 121-28 (2008).

130. *Id.* at 84-85; *see also* JAMES J. MCDONALD, JR. & FRANCINE B. KULICK, PREFACE TO MENTAL AND EMOTIONAL INJURIES IN EMPLOYMENT LITIGATION xli (James J. McDonald, Jr. & Francine Kulick eds., 2d ed. 2001).

131. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §26 cmt. K (Proposed Final Draft No. 1, 2005).

132. Smith, *supra* note 122, at 762.

133. Freeman v. Busch, 349 F.3d 582, 590 (8th Cir. 2003) (entitling the plaintiff in a civil sexual assault case to the "thin skull" instruction based upon evidence that she had received prior treatment for sexual abuse and that the condition was exacerbated by the alleged rape); Hare v. H&R Indus., No. 00-CV-4533, 2002 WL 777956, at *2 (E.D. Pa. Apr. 29, 2002) (holding that despite other factors contributing to the plaintiff's psychiatric hospitalization subsequent to the sexual harassment incident, the defendant was still liable for all of the medical expenses on the premise of the "thin skull" plaintiff rule plus the difficulty in apportioning the harms).

PTSD is dependent upon an external stimulus, just like stress or exertion aggravates angina (an area of the heart deprived of oxygen-rich blood causing pain),[134] so there is less ambiguity in terms of causation. The ordinary minds, for whom our rules of evidence were created, should be able to recognize that PTSD is the only psychiatric condition requiring an outside actor/event to trigger the condition that produces both a physical and mental injury. Still, it is incumbent upon courts to scrutinize what evidence is admissible so that the probative value is not outweighed by a prejudicial impact.

D. PTSD: Mental or Physical Injury for the Purposes of the "Thin Skull" Application

PTSD is both a mental and a physical injury. That is, PTSD qualifies as a mental injury per DSM-IV.[135] But, due to evidence that the hippocampus, frontal premedial cortex, and neurons experience physical damage when the initial trauma or recurring triggering event occurs, PTSD should also be plead as a physical injury.[136] Hence, in the case of PTSD, the argument that "a mental injury may be completely subjective in its diagnosis, origin, and treatment"[137] is invalid.

Diagnostic testing, such as an MRI of the brain, has not been sanctioned by the American College of Radiologists as a stand-alone means of determining a post-traumatic condition.[138] While post-traumatic conditions have been included as an extended indication of an MRI, the totality of the circumstances and other diagnostic criteria need to be considered.[139] Because "the practice of medicine involves not only the

134. *What Is Angina*?, NAT'L HEART LUNG & BLOOD INST. (revised Mar. 2010), www.nhlbi.nih.gov/health/dci/Diseases/Angina/Angina_WhatIs.html.

135. *DSM-IV-TR criteria for PTSD, supra* note 20.

136. Bremner, *supra* note 6; Kennedy, *supra* note 40.

137. Eden, *supra* note 93, at 181.

138. *See* AMERICAN COLLEGE OF RADIOLOGISTS, PRACTICE GUIDELINE FOR THE PERFORMANCE AND INTERPRETATION OF MAGNETIC RESONANCE IMAGING (MRI) OF THE BRAIN 1 (Revised 2008), *available at* http://www.acr.org/SecondaryMainMenuCategories/quality_safety/guidelines/dx/head-neck/mri_brain.aspx. "These guidelines are an educational tool designed to assist practitioners in providing appropriate radiologic care for patients. They are not inflexible rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. For these reasons and those set forth below, the American College of Radiology cautions against the use of these guidelines in litigation in which the clinical decisions of a practitioner are called into question. The ultimate judgment regarding the propriety of any specific procedure or course of action must be made by the physician or medical physicist in light of all the circumstances presented. Thus, an approach that differs from the guidelines, standing alone, does not necessarily imply that the approach was below the standard of care."

139. *Id.*

science, but also the art of dealing with the prevention, diagnosis, alleviation, and treatment of disease," solely relying on a radiographic image for post-traumatic conditions is not determinative of the existence of PTSD.[140] Like endometriosis, an enigmatic condition, just because a condition may not appear on diagnostic radiographs and images does not mean that it does not exist.[141] Due to the increasing amount of documentation available, it is clear that post-traumatic stress disorder includes both a mental and physical harm component. Therefore, PTSD can be diagnosed objectively, and it is unreasonable to suggest otherwise.

IV. FORESEEABILITY OF PTSD IN WORKPLACE AND EDUCATIONAL ENVIRONMENTS

Given the large numbers of people, and of women in particular, who suffer from PSTD, it is important to examine not just the legal but also the underlying policy reasons why courts should acknowledge the physical damage that results when a PTSD victim is subjected to an abusive environment at work or at school.[142] Public policy dictates that courts should recognize PTSD as both a physical and a mental disability in application of the "thin skull" doctrine in cases of workplace or educational harassment and/or abuse. Defendants in such cases must not be permitted to use the plaintiff's PTSD as an excuse for their own abusive behavior.

According to the U.S. Department of Justice's National Crime Victimization Survey, 248,300 sexual assaults occurred in 2007.[143] This data, which only includes victims twelve and older, equates to a sexual assault occurring once every two minutes.[144] Furthermore, one in six

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140. *Id.*

141. Rachel V. Rose, *Cutting Funds for Oral Contraceptives: Violation of Equal Protection Rights and the Disparate Impact on Women's Healthcare*, 5 MOD. AM. 23 (2009); *Facts About Endometriosis*, CLEVELAND CLINIC, http://my.clevelandclinic.org/disorders/endometriosis/hic_facts_about_endometriosis.aspx (last rev'd Mar. 30, 2010).

142. If nothing else, the notion of market deterrence supports application of the "thin skull" rule in academic and employment situations just as it does in personal injury cases. *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Calvern, Jr.*, 43 U. CHI. L. REV. 69, 95-97 (1975). Judge Calabresi notes that "the person with a thin skull generally recovers for all his injuries even though his knowledge of the situation must be vastly superior to the defendant's." *Id.* at 97. Furthermore, he observes at n.40 that '[i]n our society, staying at home is not a meaningful alternative, and protective gloves do not exist." This recognizes the reality that our world is populated by many potentially "thin skulled" plaintiffs, and that we cannot ignore this reality without liability.

143. U.S. DEPARTMENT OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY 1 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv07.pdf.

144. *Statistics*, RAPE, ABUSE, AND INCEST NATIONAL NETWORK, www.rainn.org/statistics (last visited Mar. 19, 2011).

women will be sexually assaulted during their lifetime compared to one in thirty-three men.[145] Women are more likely to be victims of sexual assault than men.[146] Even without express knowledge that an individual would suffer from PTSD, it is foreseeable that a female employee or student could re-experience a traumatic event. Teachers, administrators, and employers may fairly be held responsible for foreseeing this possibility.

According to the Restatement, "the negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable [person] should have foreseen as a probable result of his conduct."[147] Given the statistics, a reasonable person should foresee the injury as a probable result of his actions, but even if the extent of the injury is unforeseeable, every jurisdiction in the United States applies the "thin skull" doctrine to hold the negligent actor liable: the actor must take his or her victim as he or she is found.[148]

Abusive or harassing treatment by a co-worker may trigger "flashbacks" in a plaintiff who suffers from dissociative disorder as a result of childhood abuse; such flashbacks, while arguably not foreseeable, still give rise to liability in tort.[149]

> A dissociative disorder occurs when a person has had a bad experience and rather than being stored normally in the brain as a memory, it is broken into several parts and stored in the brain so the person does not remember it and does not have to face it. A traumatic experience can cause the parts to reunite, and the person then remembers the bad experience. This is called an abreaction or flashback.[150]

A flashback of this nature would be unforeseeable to the plaintiff as well as the defendant, yet it is compensable in tort because the defendant takes his plaintiff as he finds her. PTSD is no different. A teacher or employer will

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145. *Id.*

146. *Survey of Recent Statistics*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, http://www.americanbar.org/groups/domestic_violence/resources/statistics.html (last visited Mar. 18, 2010) ("According to the *National Violence Against Women Survey*: 78% of the victims of rape are women and sexual assault are women and 22% are men.").

147. RESTATEMENT (SECOND) OF TORTS § 461 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM §31 (P.F.D. No. 1, 2005).

148. *See id.* at § 31. The Reporter's Note observes that "extensive research has failed to identify a single United States case disavowing the rule." Federal and state courts apply the doctrine. *See* Lancaster v. Norfolk & W. Ry. Co., 773 F.2d 807, 822 (7th Cir. 1985) ("The tortfeasor takes his victim as he finds him . . . that is the eggshell skull rule.").

149. *Poole*, 498 S.E. 2d at 602-604.

150. *Id.* at 603-04.

be liable for injuries that exceed those that might have been foreseeable.

In a related matter, in 1998, the United States Supreme Court decided two landmark cases that broadened the circumstances under which employers could be held liable for sexual harassment claims. In *Burlington Industries, Inc. v. Ellerth*, the Court considered imposing vicarious liability on the employer as a result of a manager creating a hostile work environment for a female sales representative. [151] Although the sales representative ultimately left the company, she did not register an internal complaint or file a formal complaint, despite having awareness of the company's anti-harassment procedures.[152] In light of the facts, the Supreme Court upheld the fundamental common law principles of agency law[153] and created an employment-related exception to the general rule that an employer is not liable for the torts of employees acting outside the scope of the employment.[154]

In *Faragher v. City of Boca Raton*, the Court reaffirmed its holding in *Burlington Industries*, but under a different set of facts.[155] Here, a female lifeguard for the City of Boca Raton, Florida established that over the course of a five-year period male supervisors sexually harassed her through offensive and non-consensual physical contact, lewd remarks, and generally offensive references to women.[156] Since the City was unable to provide any evidence that it used reasonable care,[157] the Court reiterated the general rule and the affirmative defenses it established in *Burlington Industries*.

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151. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

152. Shawn M. Collins & Charles J. Corrigan, *The New Supreme Court Standards in Sexual Harassment Cases*, 11 J. DUPAGE CNTY. BAR ASS'N (DCBA Brief Online) (1998-1999), *available at* http://www.dcbabrief.org/vol110998art4.html (comparing the landmark Supreme Court cases and their impact on employer liability).

153. RESTATEMENT (SECOND) OF AGENCY, § 219(2) (1957).

154. *Burlington*, 524 U.S. at 756 (holding that "an employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment").

155. *Faragher*, 524 U.S. at 780-86.

156. *Id.* at 780 ("So far as it concerns the Title VII claim, the complaint alleged that Terry and Silverman created a 'sexually hostile atmosphere' at the beach by repeatedly subjecting Faragher and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms. The complaint contained specific allegations that Terry once said that he would never promote a woman to the rank of lieutenant, and that Silverman had said to Faragher, 'Date me or clean the toilets for a year.' Asserting that Terry and Silverman were agents of the City, and that their conduct amounted to discrimination in the 'terms, conditions, and privileges' of her employment, 42 U.S.C. § 2000e-2(a)(1), Faragher sought a judgment against the City for nominal damages, costs, and attorney's fees.").

157. *Id.* at 808 (holding "as a matter of law that the city could not be found to have exercised reasonable care to prevent the supervisor's harassing conduct").

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. See Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action....[158]

It then follows that an employee who suffers from PTSD due to prior abuse thus suffers a more severe injury when she is abused by a co-worker or employer. Given the statistics on sexual abuse causing PTSD, it is not unreasonable to attribute to the employer knowledge of the possibility that the employee will be similarly situated. Likewise, a student who suffers from PTSD as a result of abuse is foreseeably going to be more severely injured by harassment than a student who does not suffer from PTSD.[159]

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158. *Id.* at 777-78.

159. At least one court has found that PTSD is an "unforeseeable" risk for which a school board may not be held liable. In *Jachetta v. Warden Joint Consol. Sch. Dist.*, 176 P.3d 545 (Wash. Ct. App. 2008), the court affirmed summary judgment in favor of the school board because "[i]t was not foreseeable that the School District's actions (listed above) would result in Billy's PTSD. The School District's 'duty to use reasonable care extends to such risks of harm as are foreseeable" (*citing* J.N. v. Bellingham Sch. Dist. No. 501, 871 P.2d 1106 (Wash. Ct. App. 1994)). *Id.* at 548. However, in *Jachetta* the PTSD was alleged to be the source of the plaintiffs' damages; the eggshell skull doctrine was not implicated. The court may have determined that PTSD was an unforeseeable result of the School District's actions, but it did not find that it was unforeseeable that any student might already suffer from PTSD, and in fact the court clearly assumed that PTSD was a legitimate injury. Another court did find that symptoms of PTSD are not compensable physical injuries, but again, that case, involving a child left on a school bus, did not implicate the

There can be no doubt that the "thin skull" doctrine applies to mental as well as physical injuries,[160] so even if the physical aspects of PTSD are not fully recognized by courts, the doctrine still applies. Whatever its underlying source may be, any "peculiar susceptibility"[161] of the victim is part and parcel of the condition in which the defendant finds him or her, whether the defendant can recognize that susceptibility or not. Through no fault of his or her own, the plaintiff suffers damages for which compensation is required by law, even if those damages exceed what a person of normal susceptibilities would have suffered. This is why the "thin skull" doctrine is applied in every jurisdiction in the United States.

V. CONCLUSION

It is not difficult to imagine scenarios of conduct directed towards specific individuals that would trigger a re-experiencing of a traumatic event. Individuals who have experienced trauma are not simply sensitive. Rather, as noted previously, a complex neuro-chemical reaction occurs within the body that causes both physical and mental injuries.

Teachers and administrators can and should be held responsible for foreseeing this possibility and taking steps to ensure that the harassment[162] does not occur. Such steps include: not addressing a sensitive topic such as rape on exams; evaluating workplace environments to decrease the risk of sexual harassment;[163] and educating employees, educators, and fellow students of the potential liability of their actions. If employers, educators, or peers fail to foresee what is so reasonably foreseeable, courts should not hesitate to apply the "thin skull" plaintiff doctrine so that defendants may be held fully responsible for the damages caused by their misconduct. Any other result defies reason and logic in the face of the statistical prevalence of PTSD and its physical manifestations.

PTSD is unique because it encompasses both a mental and a physical

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eggshell skull doctrine. Ware v. ANW Spec. Ed. Coop. No. 603, 180 P.3d 610 (Kan. Ct. App. 2008). The court did not address the aforementioned physical manifestations of PTSD in the brains of its victims.

160. *Poole*, 498 S.E.2d. at 605.

161. *Id.* at 604 (noting that "if the defendant's misconduct amounts to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by the plaintiff notwithstanding the fact that these damages were unusually extensive because of the peculiar susceptibility of the plaintiff").

162. Sexual harassment in the educational setting may take many forms, ranging from quid pro quo demands for sexual favors in exchange for grades to requiring students to work with inappropriately explicit or obscene materials in a classroom setting.

163. Heather McLaughlin, Christopher Uggen & Amy Blackstone, Sexual Harassment, Workplace Authority, and the Paradox of Power (Oct. 3, 2009) (unpublished manuscript), *available at* http://carlsonschool.umn.edu/assets/160274.pdf.

harm. Unlike mental disorders such as bipolar and schizophrenia, which have only a mental component, PTSD requires an outside actor to cause the harm. That is, the initial or subsequent triggering events that may have caused a physical injury and led to the DSM-IV mental diagnosis, are caused by an outside actor. Because all jurisdictions recognize a physical harm as an appropriate injury for applying the "thin skull" plaintiff rule, there should be no question that PTSD victims should be able to recover under the doctrine. Additionally, based on statistics, a reasonable person should have foreseen the injury as the probable result of his/her conduct. Given the number of individuals whose life experiences cause PTSD, it is foreseeable that being abusive in educational and work environments can cause physical injury to the brain and open the negligent actor up to liability under the "thin skulled" plaintiff rule.

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CRITICAL CONFLICTS BETWEEN FIRST-WAVE AND FEMINIST CRITICAL APPROACHES TO ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

This article examines the contradictory responses of critical legal theory to alternative dispute resolution (ADR) mechanisms. By tracking the changing character of the responses this article identifies significant developments over the last twenty-five years in the methodology and conclusions of critical legal scholarship.

The analysis finds that feminist critical approaches to ADR differ markedly from the first-wave (from the mid-1970s until the mid-1980s) critical accounts. They are not only more pragmatic than earlier critical theorists; feminist accounts advocate solutions that are in direct conflict with those of first-wave theorists. Where feminists embrace ADR, first-wave critical theorists express grave concern. Yet this divergence remains

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largely unacknowledged.

The article argues that this discontinuity in critical scholarship serves to indicate just how successful and total the attack on formality, championed by first-wave scholars, was. Furthermore, the shift in critical scholarship may be explained by critical feminist scholarship's adoption of the individual as its unit of analysis, while retaining the critiques of formality it had inherited from first-wave scholarship. The result is a more personalized conception of conflict, rights and remedies.

I. INTRODUCTION

"The primary business of informal institutions is social control. Consequently, the central question must be: Do they expand or reduce state control? The authors in this volume agree...informal justice increases state power."[1]

—Richard Abel

"...I had come to see [mediation] as a necessary corrective to the pain and draconian results of courts, with the promise of processes we could see as enriching, empowering, and dare I say, humanely transformative."[2]

—Carrie Menkel-Meadow

The quotations above are emblematic of an interesting and little noted divide among scholars engaged in critical analysis of the law. Although these scholars come out of a similar tradition, the quotes provide a sample of their dramatically diverging opinions on the rise of alternative dispute resolution. Though striking, the divergence has not been acknowledged or addressed, not even by the scholars themselves. This article examines the divide, finding that early critical legal scholars raised fundamental concerns about the proliferation of informal legal mechanisms, but that this initial critique faded away and was replaced by critical scholarship supportive of ADR, including among feminist scholars. What accounts for their conflicting attitudes to ADR? The article argues that this shift results from a significant methodological distinction between the two moments of critical legal scholarship, one that has consequences both for their overall assessment of the ADR movement and what it means to be a critical scholar of law.

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1. 1 RICHARD L. ABEL, 1 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES, 5-6 (1982) [hereinafter POLITICS OF INFORMAL JUSTICE].

2. Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1422 (1997).

A. The Rise of Alternative Dispute Resolution

In 1976 then-Chief Justice Warren Burger helped to organize a national conference on "The Causes of Popular Dissatisfaction with the Administration of Justice."[3] As is evident from the conference title, the high-profile event took as its starting premise the existence of widespread disillusionment with the legal system. The organizers planned to consider and disseminate new methods that could address what they perceived to be the growing problems of the court system.[4] This conference and, in particular, the paper presented there by Frank Sander, "Varieties of Dispute Processing," are often considered the official start of the alternative dispute resolution (ADR) movement.[5] Sander advocated an exploration of "ways of resolving disputes outside the courts."[6] His theory was that different dispute resolution mechanisms would be effective at resolving different types of disputes. Support for ADR, less formal than the institutions of the court and trial, gathered momentum in the late 1970s and 1980s. The federal government became involved in funding and establishing ADR procedures in the 1970s, including community justice pilot projects.[7] Other innovations ensued, from court-annexed arbitration, to mandatory mediation for custody battles. Some support for the development of ADR mechanisms stemmed from a belief that litigation was increasing and that the courts were unable to handle the changes in and increased demand for litigation. While the actuality of this impending "litigation crisis" has been challenged,[8] the feeling of crisis helped spur efforts to decrease the volume of cases in the courts by adopting informal, less law-like, means. Much advocacy for ADR went further, seeing ADR not merely as a measure necessitated by circumstance, but actually as a better means of resolving disputes.[9]

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3. *See* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1976).

4. *Id.*

5. Frank E.A. Sander, *Varieties of Dispute Processing, in* THE POUND CONFERENCE, *supra* note 3, at 65 (A. Leo Levin & Russell R. Wheeler eds., 1976).

6. *Id.* at 66.

7. These projects were initiated under the auspices of the Omnibus Crime Control and Safe Streets Act of 1968. In 1978 the federal government provided funding for three, eighteen-month long pilot programs that established "neighborhood justice centers" in Atlanta, Los Angeles, and Kansas City.

8. *See, e.g.*, Mark Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); David M. Trubek, *Turning Away From Law?*, 82 MICH. L. REV. 824, 826 (1984) (stating that "[o]ne could argue that the purported litigation crisis was invented to justify the solution of informalism, rather than the other way around").

9. Indeed, Judith Resnik has more recently documented judges' strong preference for both settlement and ADR: "Judges repeatedly opine that 'a bad settlement is almost always

B. Apparent Affinities Between ADR and Critical Legal Scholarship

In the year following the conference founding the ADR movement, a group of left-leaning critical scholars established the Conference on Critical Legal Studies.[10] While the political and practical forces driving each movement may have differed substantially, both events shared certain concerns about formality and adjudication. Indeed, common to both movements was a sense that formal legal processes were inadequate to address and appropriately resolve disputes (or conflict) in society. This insight was not unique to Critical Legal Studies (CLS) and ADR. Both movements arose at a time when the legitimacy of law itself was being called into question.[11] As several scholars have noted, movements in the legal academy at this time became "preoccupied with the apparent loss of certainty and determinability within legal reasoning and legal institutional decision-making."[12] CLS scholars, among others, theorized an explicit rejection of the claim that law operates objectively or that it can arrive at truth independently.[13] Within this theoretical climate, the ADR movement offered practical alternatives to the legal process that was deemed to be failing in any number of respects—from the standpoint of efficiency (cost and speed) to that of achieving justice.

Because of the intersections between ADR and critical scholarship, an examination of the critical response to ADR promises an intriguing look at the development of critical legal scholarship over time, and its response to ADR's practical instantiation of critiques of formality. This article will examine critical analyses of ADR, considering how critical scholarship's ambivalence to and critique of formality affect the movement's approach to the development of ADR.

C. Two Moments in Critical Legal Scholarship

This article divides the critical response to ADR into two categories,

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better than a good trial' . . . Moreover, the judiciary is also enthusiastic about ADR outside of courts. During the same decades that judges promoted court-based ADR, judges also expanded their enforcement of private contractual agreements to arbitrate disputes . . . ." Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 158-59 (2002).

10. *See* John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 395-96 (1984).

11. *See* Martha Minow, *Law Turning Outward*, 73 TELOS 79 (1987).

12. *Id.* at 91; *see also* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 766-67 (1987); Owen Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 9 (1986); Gary Minda, *The Law and Economics and Critical Legal Studies*, *in* LAW AND ECONOMICS 87, 99 (Nicholas Mercuro ed., 1989).

13. Minow, *supra* note 11, at 102.

reflecting earlier and later periods of scholarship.[14] The two moments of critical legal scholarship share much, including a general concern with social questions, attentiveness to the inadequacies of formal law, and a conviction about the political nature of the law. However, the first wave of critical legal studies is marked by its inability to reconcile itself to legal institutions in a capitalist society, and its diligent efforts to construct a highly generalized theory of law to reflect these realities. The second wave is more pragmatic, making positive proposals for legal reform. It also believes identity, e.g.- race or gender, to be central to understanding inequality in society. This essay will treat critical feminism as representative of this later development in critical legal thought.[15] Through the comparison between first-wave critical works and feminist critical legal theory, we can better understand how critical scholarship has changed over the period in question.

The ADR movement garnered support from many corners and for many reasons, none greater than a widespread disenchantment with formal law.[16] Formality itself came to be understood as an obstacle to the resolution of conflict. This view seems consistent with critical positions on law. And yet, when addressing the rise of ADR, first-wave critics mount a defense of formality over ADR's informality. Indeed, in their analysis of ADR, they are concerned by the lack of an objective conception of justice (where one might have expected critical scholars to argue against a belief in objectivity, rather than to worry about its effects); or the coercive results of a retreat from rights (in opposition to their own critique of rights). Accordingly, the ADR movement, they contend, personalizes justice while emphasizing and structuring private conflict. Thus the first-wave literature on ADR appears to back-track to some degree from the CLS attack upon formality—because the paradoxical result of the widespread disillusionment with formality, they claim, is an ever-expanding formalization of social conflict.

Given feminist critical legal scholarship's heritage, we might expect the feminist critical take on ADR to have much in common with the first-

14. This categorization is not uncommon. *See e.g.,* Peter Gabel, *Law and Hierarchy*, TIKKUN, March/April 2004, at 43, *available at* http://www.tikkun.org/article.php/mar2004_gabel/print.

15. Scholarship on ADR from a critical standpoint has been undertaken with great vigor by feminist legal analysts. Procedural concerns are central to the feminist approach and have been noted to be one way in which critical feminists diverged from other critical legal critiques. Because "method and process are essential aspects of feminist critique," it is fitting that feminist critique would be highly attentive to ADR's proposals and the momentum it gathered in the last part of the century. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 65 (1988).

16. Minow, *supra* note 11.

wave critique. Yet the discontinuity in the critical perspective is striking. First-wave accounts of ADR are consumed by the overarching concern that ADR, in apparent contradiction to its own goals, maintains and expands law's formalization of social relations, and through this, strengthens state mechanisms of order maintenance and social control.[17] First-wave scholars are skeptical of ADR developments, because they believe ADR redraws the boundaries between public and private while personalizing and depoliticizing conflict.[18]

In contrast, feminist critics view ADR methods and mechanisms as offering great possibilities for transforming social relations and achieving societal peace. To the extent that they offer critiques of ADR, their proposals are pragmatic, calling for greater formal protections for ADR participants, or suggesting that ADR is not appropriate for all cases or all disputants.[19] Thus while first-wave theorists harbor grave concerns that the ADR movement is expanding formal law to ever-wider areas of social life, feminist analyses hope to cure particular defects of ADR by advocating reforms of ADR in particular circumstances. The ADR literature thus reflects a major shift in critical theory over the course of the 1980s and early 1990s.

Given first-wave scholars' skepticism of ADR, why do feminist critics embrace it warmly? This article suggests that the answer lies in the methodology adopted by feminist scholarship,[20] and specifically, the

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17. *E.g.*, CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 130 (1985); RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE xxxiii (1987).

18. *E.g.*, Richard L. Abel, *The Contradictions of Informal Justice*, *in* POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 267.

19. *E.g.* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) [hereinafter *For and Against Settlement*]; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Janet Rifkin, *Mediation from a Feminist Perspective: Promises and Problems*, 2 LAW & INEQUALITY J. 21, 22-23 (1984). *But see* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (arguing for a return to a legal model in child custody cases). Fineman notes that her criticism differs from what she terms the "typical feminist or liberal critiques" since it is not primarily interested in analyzing the disadvantages to the "weaker" party to a mediation, which she suggests leads to individualized solutions that remain within the control of mediators themselves. She is instead interested in an analysis that will unmask the structures that leave primary caregivers disadvantaged as a group, a power imbalance that she claims "can only be understood at the macro-level." *Id.* at 729. Within the typology I sketch in this article, Fineman's analysis maps more closely onto first-wave methods. However, she characterizes Richard Abel's *Contradictions of Informal Justice* in THE POLITICS OF INFORMAL JUSTICE as one of the typical feminist or liberal critiques from which she is departing. *Id.* at note 6.

20. *See infra* text accompanying notes 68-69.

feminist belief in "direct and personal experience as the place that theory begins."[21]

Part II of the article will consider first-wave accounts of ADR. Part III of the article will examine feminist legal scholarship on ADR, exploring the contrast between first-wave concerns and feminist optimism about ADR processes. As a means of exploring the changing analytical framework from first-wave to feminist scholarship, Part IV of the article will turn to public negotiation literature, which applies the theory and techniques of ADR to political and social disputes. Part IV considers whether first-wave concerns about the depoliticized and personalized character of ADR are resolved by deploying ADR methods in explicitly political and public disputes as public negotiation theory aims to do; and what feminist scholars conclude about the use of ADR in this broader arena. The development of public negotiation theory does little to alter feminist support for ADR and appears to heighten first-wave concerns. Thus the divide between the two theoretical approaches remains.

II. FIRST-WAVE CRITICAL APPROACHES

First-wave critical legal scholarship on informalism and alternative dispute processing reads the ADR movement as an expression of a deeper trend in American legal thought and practice.[22] By considering why it arises at this particular time, and what forms it takes, the critical analysts believe they can discover something about the changes in the legal establishment's conception of law.[23] These analyses of ADR echo other critiques of contemporary law, expressing disillusionment with legal process and fundamental rights values, a limited view of the law's (autonomous) reach, and skepticism as to the accuracy and benefit of formal methods.[24]

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21. Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223, 1226 (1993).

22. *See generally* Richard L. Abel, *Introduction*, *in* POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 1. In the Introduction to POLITICS OF INFORMAL JUSTICE, Richard Abel posits that the rising preference for informality in hearing complaints and processing disputes might be connected to several other contemporary phenomena including an attack on professionals, advocacy of decentralization, and demands for decriminalization and delegalization of private behavior such as drug use and divorce. He asks: "What is it that is really changing: ideology, substantive norms, processes, or institutions?"

23. *See id.* (identifying the themes that unite the wide-ranging essays in the collection).

24. For a discussion of such contemporaneous critiques of law, *see generally* Minow, *supra* note 11, at 79; Posner, *supra* note 12 (explaining the decline of law as an autonomous discipline); Fiss, *supra* note 12 (critiquing the critical legal studies and law and economics movements that emerged in the 1970s) and accompanying text. Abel describes the works collected in POLITICS OF INFORMAL JUSTICE as "offer[ing] a variety of explanations for the rejection of formal legal institutions, rights, and processes." Abel, *Introduction*, *supra* note

What marks these critical works as distinctive, both from the broader disillusionment with law and from other ADR analyses, is their focus on social transformation.[25] None of the works reviewed for this section of early critical scholarship on ADR accepts the parameters of liberal law. On the contrary, they consistently take the ADR movement to task for accepting present structures of social relations and attempting to operate within them.[26] They do not offer positive suggestions of how alternative dispute processing might be made better or more effective. Their project is to understand what ADR is, how it operates, and what changes within law and society it expresses.[27] Their conclusions are unflattering. The push to ADR is an indication of law's internal contradictions, and its inability to resolve these.[28] For first-wave critical scholars, the establishment of alternatives to courts within the judicial system itself serves to suppress social conflict, dissipating tensions that might lead to calls for radical social change.[29] These developments are not the direct result of the ADR movement itself, but rather the movement is an expression of wider difficulties and dissatisfactions with formal, liberal law.[30]

22, at 3. The first-wave works utilize a variety of approaches. Some are idealist, identifying changing political and social ideas as primary factors in the rejection of formality. Others are materialist, emphasizing the relationship between capital and labor. Still other works emphasize political forces, explaining the rise of an ADR movement as a reaction to political victories of the 1960s and early 1970s. Finally, a fourth approach emphasizes the role of professionals in the ADR movement. *Id.* at 3-5.

25. *See, e.g.,* Abel, *Introduction*, *supra* note 22, at 2, 6 ("How should we assess and compare the political meaning of formal and informal legal institutions and processes in order to maximize their contribution to social justice . . . . [T]he central question must be: Do they expand or reduce state control?").

26. *See, e.g., id.* at 6-7. "Informal institutions control by disorganizing grievants, trivializing grievances, frustrating collective responses. Their very creation proclaims the message that social problems can be resolved by fiddling with the control apparatus once more, that it is unnecessary to question basic social structures."

27. *See id.* at 1-3.

28. *E.g.*,"[I]t is possible—and essential—to penetrate the comforting façade of informalism and begin to reveal its political meaning. Informalism is a mechanism by which the state extends its control so as to manage capital accumulation and defuse the resistance this engenders. Its objects are not randomly distributed but rather are concentrated within the dominated categories of contemporary capitalism: workers, the poor, ethnic minorities, and women. This is not accidental . . . ." *Id.* at 6.

29. *E.g.*, "The primary business of informal institutions is social control. Consequently, the central question must be: Do they expand or reduce state control? The authors in this volume agree...that informal justice increases state power. Informal institutions allow state control to escape the walls of those highly visible centers of coercion—court, prison, mental hospital, school—and permeate society. They extend control temporally—beyond the civil judgment, the criminal sentence, the school term, the period of confinement in a mental institution—so that supervision and review never end. They increase the variety of behavior that can be controlled by diversifying and individualizing the remedial apparatus so as to transcend the limited repertoire of prison, fine, and money damages." *Id.* at 5-6.

30. *See id.* at 12 ("[T]he enthusiasm [informalism] inspires among liberal reformers can

A widely cited early collection on ADR is Richard Abel's *The Politics of Informal Justice*.[31] Since the work developed out of a panel discussion at the second Conference on Critical Legal Studies, in which many of the authors participated, it is a useful starting point for establishing the first-wave critical approach to ADR.[32] In fact, as one becomes more familiar with the field, it seems that Abel gathered together almost every critical scholar then examining ADR developments. Abel's introduction provides an overview of the major themes and methodology of the critical essays within.[33]

The essays seek to explain the development of a trend they describe variously as "informal justice," "substantively rational law," and "informalism."[34] There is a general sense that major changes are afoot in the legal order, and these critical legal scholars seek to explain what it is and what its implications are for the future of the legal system and society at large.[35] The phenomenon in question is understood to be a push toward

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be explained only by the fact that it expresses certain fundamental values . . . "); *see also* Boaventura De Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, *in* THE POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 249.

31. THE POLITICS OF INFORMAL JUSTICE, *supra note* 1.

32. Abel did make sure to note, however, that his volumes are not an official publication of CCLS. Abel, *Introduction*, *supra* note 22, at # n.1.

33. Abel, *Introduction*, *supra* note 22, at 1-13.

34. One contributor offers the following list of shared characteristics that comprise the informal justice movement:

> 1. Emphasis on mutually agreed outcomes rather than on strict normative correctness
> 2. Preference for decision through mediation or conciliation rather than adjudication
> 3. Recognition of the competence of the parties to protect their own interests and to conduct their own defense in a setting that is deprofessionalized and a process that is conducted in ordinary language
> 4. Choice of a nonjurist as the third party (though one with some legal training) whether or not elected by the community or group to be served by the conflict resolution institution
> 5. Little if any coercion that the institution can mobilize in its own name

Santos, *supra* note 30, at 255.

35. *See, e.g.*, Abel, *Introduction*, *supra* note 22, at 1 ("We are presently experiencing what may well be a major transformation of our legal system. Recent years have witnessed repeated tirades against the expansion of substantive and procedural rights, the delivery of more professional legal services, and the proliferation of formal legal institutions . . . . At this early stage the contours of the change are uncertain and its significance ambiguous."); Christine B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 37 ("[T]he delegalization of minor dispute processing occurs within the context of a broader social reform: the construction and reconstruction of a rationality for judicial management of lower court organization and for intervention in everyday conflicts in capitalist society. Although strategies of judicial management may not be coherent, "uni-directional," or "uni-dimensional," they do reflect a mode of rationalization for both the work process and the adjudication process in courts." (quoting Wolf Heydebrand, *Organizational Contradictions in Public Bureaucracies: Toward a Marxian Theory of Organization*, 18 SOC. Q. 83, 30 (1977))).

legal mechanisms and structures combining a variety of characteristics that are to some extent opposed to those of formal law. The ADR movement seeks legal methods that are "unsystematic, ambiguous, unpredictable, rule-free."[36] Mechanisms can therefore be "oriented to social situations and characteristics rather than abstract components of behavior,"[37] and inquiries can be personalized, attentive to the particularities of the case at hand, non-adversarial, developing resolutions that are "mutually acceptable" and voluntary.[38] ADR seeks to provide a personalized proceeding. This personalized proceeding can attend to particular, unique dynamics of the controversy before the forum, which formal law does not attempt to do. Furthermore, ADR is intended to develop resolutions that are "mutually acceptable" and voluntary. What is significant about these traits is their very opposition to the characteristics of the formal legal system and, even, to the goals it aims to achieve.

The first-wave authors draw attention to these non-formal characteristics. As Richard Abel describes in his introduction, "[W]hatever unity the [ADR] movement may possess is derived more from the sense of a common enemy—formalism—than from any clearly shared goal."[39] The fact that formal law, a cornerstone of liberal legal ideology, is coming under attack or appearing inadequate for many types of cases, is understood by the critical scholarship as a reflection of law's own legitimation crisis:

> The attack on 'old' legal form and the search for 'new' legal substance represent two sides of the malaise that afflicts contemporary scholarship and practice. At a relatively prosaic level this malaise is translated into a question of the formality or informality of legal arrangements. Even though many who criticize bourgeois law seek to do no more than to render the legal order more 'efficient' and 'responsive,' they share with the most radical critics a concern over the impersonality, rigidity, remoteness, insensitivity, and formality of the law. They express, albeit in a shallow and truncated fashion, a profound and widely felt discontent with the law as an objectification and reification of social relations in capitalist societies.[40]

As the first-wave scholars view it, the desire for unsystematic, ambiguous legal institutions reflects a common notion that there are

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36. Steven Spitzer, *Dialectics of Formal and Informal Control, in* THE POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 174.

37. *Id.*

38. Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective, in* THE POLITICS OF INFORMAL JUSTICE , *supra* note 1, at 209.

39. Abel, *Introduction*, *supra* note 22, at 2.

40. Spitzer, *supra* note 36, at 169.

important ends unattainable through formal legality. The first-wave theorists view the ADR movement as an indicator that all across the spectrum of political and legal thought, people are dissatisfied with formal law's ability to achieve desirable social goals. As described below, these theorists dig further to understand why formal law is deemed to be insufficient. They not only refuse to accept the commonly offered account of "overloaded" courthouses, they generally give it no consideration at all.[41] They are after more fundamental causes for the popularity of informal processing. The first-wave scholars consider the characteristics of informality historically and contextually, to determine whether the informal response to formal "failure" will be socially transformative, liberating, or limiting and even, perhaps, furthering of social control. This is the measuring stick for critical scholarship.[42] Since ADR is judged by its transformative impact, the dispute processing mechanisms are assessed by a criteria external to their stated goals. As Christine Harrington explains, it is not enough to establish what the goals of the ADR reform movement are, and then to assess its "success" or otherwise by the extent to which it is able to achieve those goals; the goals themselves must be interrogated.[43] As she puts it, "[t]he reform goal of informalism is itself problematic."[44] They cannot simply be taken at face value. This is the normative thrust of the first-wave critical approach.

The first-wave accounts of ADR never lose sight of the interrelationship between law and society, and as such are far more closely related to the social sciences than to a doctrinal or legal analysis of procedural mechanisms. They are not, however, empirical studies that "test" ADR's actual ability to achieve its stated objectives.[45] Critical accounts consider the merits of the goals on a theoretical and normative

41. *See* Abel, *Introduction*, *supra* note 22, at 7. Abel describes the claim that courts are "overcrowded" and that there is "too much" litigation as an "ostensibly factual characterization [that] must actually be a value judgment . . ." and posits that even were these claims conceded, the appropriate response would be contested. That is, if courts are overcrowded it does not render informal mechanisms necessary or desirable.

42. The Introduction to POLITICS OF INFORMAL JUSTICE, identifying the common themes of the essays within, posits that "[t]he primary business of informal institutions is social control. Consequently, the central question must be: Do they expand or reduce state control? The authors in this volume agree with Foucault that informal justice increases state power." Abel, *Introduction*, *supra* note 22, at 5-6.

43. CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985).

44. Harrington, *Delegalization Reform Movements, supra* note 35, at 39.

45. For example, Christine Harrington asserts: "The degree of institutional coercion or the level of dependency are not merely quantitative measures. Qualitative differences in the social and political power of mediation institutions and their clients, and qualitative power differences between neighborhood justice centers and courts must also be taken into account." HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 106.

rather than empirical basis. Because their normative goal is some form of human emancipation, critical assessments continually examine the ADR developments in light of ADR's effects on liberation and social control.

In her study of what she calls "the alternatives movement," Harrington explains that "we are concerned with the structures of reform ideology and their political significance."[46] To avoid an analysis that simply tests ADR in terms of its own goals, Harrington adopts a sociological and historical perspective. She considers calls to informalism throughout the twentieth century, attempting to understand what role the "ideology of informalism" has played in the structures and functions of the legal order.[47] The approach, characteristic of critical analysts, is to take calls to legal reforms neither as "a set of idealized reform goals" nor as an independent, technical development of law.[48] Rather, they are considered in light of the organization of legal resources, the distribution of political power, and the broader social and political context of the time.

It is ADR's isolation of problems from their political and social base that raises serious concerns for first-wave critical scholars. In seeking to provide an alternative to the "abstract" and "rule-like" formal law, the ADR movement aims to foster "concrete," "fact oriented," "personalized" fora.[49] Though these goals incorporate ADR's "warm" aims of fostering important communicative, problem-solving, humanizing values, the "personalized" nature of the process is exactly what concerns first-wave critical analyses. What the sociological approach of the first-wave critical scholar considers to be highly social, political conflict, the ADR movement understands to be an individual problem between two related parties. The forum is intended to be "attentive to differences rather than similarities between cases."[50] Thus, the very aim is to focus upon the dispute at issue as a distinct problem and not as part of a pattern of identical social relations. For first-wave critics, where formal law individuates social problems, abstracting them to distinct, patterned, individualized problems, ADR goes one step further; each particular situation is dealt with as if it were a system in and of itself, unrelated to anything beyond the parties involved. Where formal law reduces social conflict to a matter of individual, reified rights, ADR reduces it to a matter of the particular relationship at issue. While rights in a liberal legal order express an individualized conception of social relations, they remain universal concepts, theoretically applying to all similarly situated people. Dispute resolution, on the other hand, removes even this level of universality from

46. *Id.* at 13.
47. *Id.* at 2.
48. *Id.*
49. HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 7-11.
50. Spitzer, *supra* note 36, at 174.

social relations and conflict. Thus, ADR serves to locate the agent of social conflict at the level of the individual or individual relationship. For first-wave critical scholars, who understand conflict as an expression of the structure of society at large, and who believe the solutions to those conflicts require collective action, ADR moves society even further away from the focus of social change than the formal liberal legal order once did.

First-wave scholarship calls attention to this characteristic of ADR as problematic for the movement in principle: these conflicts are not products of individual disagreements, but rather have social causes that can only be solved through social transformation. The focus on individual dispute is wrong—it obscures the reality of the situation and it is therefore counter to its own goal of resolving conflict.

In "The Contradictions of Informal Justice," Abel examines precisely this aspect of the ADR mechanism: its effort to address broad social issues through "dispute resolution" mechanisms.[51] According to Abel, ADR mechanisms can expand state control and "neutralize conflict that could threaten state or capital."[52] Abel explores the category of consumer-seller disputes, noting that this is a category of conflict that ADR emphasizes over the struggle between labor and capital.[53] The effect of ADR fora is a response to grievances that inhibits their transformation into serious challenges to the domination of the state and economic structure. Abel explains that ADR mechanisms addressing consumer-seller disputes arise because "consumers must... be kept passive."[54] Abel finds that ADR mechanisms enable greater enforcement (presumably by "state and capital," depending on the ADR forum) of the contract of sale, through, for example, innovative remedy devices such as the use of installment payments.[55] Through myriad means, informal mechanisms designed to address consumer grievances increase state control while appearing to withdraw it, and try to disguise coercion in the form of volition.[56]

In similar ways, ADR's treatment of domestic disputes increases the state's surveillance and control over the domestic sphere. Disputes that previously would have been overlooked, now become the subject of mediation.[57] Indeed, Abel views ADR's early focus on domestic relations as "a diversion of state resources and citizen attention from problems that are relatively insoluble and therefore dangerous—because they oppose the

51. Richard L. Abel, *The Contradictions of Informal Justice*, *in* POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 267.

52. *Id.* at 280.

53. *Id.* at 281-85.

54. *Id.* at 281.

55. *Id.* at 295-301.

56. *Id.* at 307-08.

57. *Id.* at 308.

individual to state or capital—to problems that are certainly less dangerous and relatively 'soluble,' if only by exit."[58] The effect of "individualizing grievances" this way is to neutralize conflict:

> Although neighborhood institutions constantly speak about community, what they actually require (and reproduce) is a collection of isolated individuals circumscribed by residence.... The individual grievant must appear alone before the informal institution, deprived of the support of such natural allies as family, friends, work mates, even neighbors.[59]

The content of conflict is actively separated from collective interests. What is relevant to the resolution of the dispute is the immediate relationship between the parties.[60] The matters covered by alternative dispute resolution, the informal process that requires attention to be focused upon future behavior rather than external criteria of wrongdoing, and even the operation in total privacy all serve to remove any social context from the conceptualization of the problem and to inhibit collective action.[61] Abel thus connects the rise of the ADR movement to broader social forces that seek to maintain the present structures of society:

> This seems to me a more subtle form of the very explicit, often brutal, efforts by state and capital to prevent, undermine, and delegitimate attempts by the oppressed to organize and take collective action—such as the suppression of strikes and demonstrations, the subversion of unions and political organizations, or red-baiting.[62]

As described by first-wave critics, in order for ADR to focus the dispute upon the immediate relationship between the parties, it is important that external factors remain outside the forum. This includes external, objective criteria. The aim is for the parties to achieve a workable agreement as to future behavior that will avoid further conflict. This is understood to serve ADR's reform goals of encouraging non-adversary proceedings and achieving harmony. For first-wave theorists, removing normative expectations as to outcome further atomizes the disputants—parties cannot even look to the cases of others similarly situated as an aid in assessing their own situations. Further still, by shutting out appeals to legal

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58. *Id.* at 287.

59. *Id.* at 289.

60. Hofrichter, *Social Control Problems, supra* note 38, at 240.

61. "[T]he NJC [Neighborhood Justice Center] ignores the social basis of conflict by handling problems on a case-by -case basis without generating a public record. And although disputants can technically raise any question or issue, the content of conflict is divorced from collective interests, segregated from similar cases, and limited to the immediate relationship between the disputants." *Id.*

62. Abel, *Contradictions*, *supra* note 52, at 289.

rights (it is, after all, supposed to be an informal proceeding), ADR proceedings divert the parties' attention from concrete political gains and established societal norms. Christine Harrington chooses to conclude her book on the subject of informalism by drawing attention to the fate of rights in the ADR context:

> This focus on dispute techniques has separated the politics of problem solving from the politics of taking rights seriously. The management style of informal dispute processing in the Neighborhood Justice Center tends to separate rights from their social base in political struggles.... The alternatives movement seems to have abandoned an important resource and arena for political struggle—rights and courts... [ADR] adopt[s] strategies that move resources and direct attention away from rights and what goes on in courts... [and] abandon[s] an important political resource that structures bargaining in informal settings.[63]

This discomfort with the shift away from rights is an important element of first-wave critical concern. The emphasis on rights exemplifies an important contradiction in first-wave critical approaches to ADR. Having launched a critique of rights in the late 1970s, first-wave critical scholars now faced the effects of the non-rights-based conceptual framework. And they did not like what they found. Indeed, many contributors to Abel's volume anticipate the issues that defined critical race scholarship's split with critical legal studies in the mid-1980s.[64]

One sees in Abel's domestic relations examples[65] that the social ramifications of an abdication of external criteria is striking for women undergoing divorce. His concerns in the divorce context sound the same notes of concern as critical race theorist Richard Delgado's discussions of mediation,[66] and feminist accounts that raise concerns about the dangers for women (and minorities) of informal dispute procedures.[67] The no-fault divorce regime "quickly tends toward an all-fault regime."[68] The petitioner bringing the divorce, whom Abel describes as "almost always a woman,"[69] is scrutinized as much as her respondent husband; the leverage once

63. HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 173.

64. *See e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (presenting one theory of critical race scholarship).

65. Abel, *Contradictions*, *supra* note 52, at 308.

66. *See* Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (warning that mediation may result in inequitable treatment of minorities, and suggesting that disadvantaged groups would be better served by formal adjudication in some cases).

67. *See* infra, text accompanying notes 119-121.

68. Abel, *Contradictions*, *supra* note 39, at 308.

69. *Id.*

available through fault-based divorce is gone, and the woman is left to her own devices to assert her own desires for the split. The pressure for non-adversary methods and harmonious resolutions urges compromise. Without recourse to a clear entitlement, the disadvantaged party is channeled into compromising, and therefore often conceding, important political demands.[70]

The ADR movement's criteria for assessing the success of the forum is instructive. Programs are assessed by the volume of cases handled and by the satisfaction of the individual parties. Objective substantive goals play no role in determining whether dispute-processing is achieving desired results. "[T]he precise response to any given dispute or deviant act is unimportant....Informal institutions produce this result by treating all conflict as individually caused and amenable to individual solutions."[71]

Critical assessments of both the individuated format of alternative processes and their preference against objective standards of outcome express concern over the desire to limit, repress, or deny conflict. The critical scholars assert that, where conflict already exists in actuality, to establish processes that sidestep it is to attempt to depoliticize real concerns and political struggles.[72] The very concept of legal controversies and claims brought before the court, where rights are what are at issue, is shifted to one of "disputes" where what is of concern is an acceptable navigation of the relationship between the parties.

Several critical accounts point to the politicized nature of the 1960s and early 1970s as a contributing factor in the call for harmonizing, community-oriented dispute resolution.[73] Similarly, the political gains made in the legal sphere through the expansion of rights are commonly understood to have contributed to the anxiety about "overloaded courts" and too much law.[74] Harrington draws attention to the changing nature of the political struggle over legal resources from the 1960s to the mid-1970s. The 1960s struggle had focused on problems of the poor and underrepresented, fighting to win them greater representation, indeed, fighting to demonstrate a right to it. In the 1970s movement for alternatives, legal resources are no longer conceived of as rights, but rather

70. For example, Abel describes the situation of the consumer who is persuaded by the regulatory agency to compromise his complaint of excessive price, poor quality, or dangerous design, without achieving reciprocal benefits of increased protection. *Id.*

71. Abel, *Introduction*, *supra* note 22, at 7.

72. *See, e.g.*, Hofrichter, *Social Control Problems*, *supra* note 38; Abel, *Contradictions*, *supra* note 52, at 280-95.

73. *See, e.g.*, Andrew Scull, *Community Corrections: Panacea, Progress, or Pretense?*, *in* POLITICS OF INFORMAL JUSTICE *supra* note 1, at 99-118.

74. *See* Abel, *Contradictions*, *supra* note 52, at 284-85; HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 73-74; Mark Lazerson, *In the Halls of Justice, the Only Justice is in the Halls in* POLITICS OF INFORMAL JUSTICE, *supra* note 1, at 119, 120.

as institutions that facilitate negotiation.[75] The resources that must be maintained are the capacity of the courts to aid disputants in reaching settlement; the protection of rights drops out of the discussion.[76] It is no longer social conflict that is at stake but interpersonal dispute.[77] For Hofrichter, ADR mechanisms "can be identified not as an alternative or complement to courts but as an alternative to politics and community organizing."[78]

The first-wave critical scholar is concerned that the social contradictions contributing to the advent of the ADR era make it difficult to grasp what is the true nature of dispute-processing reforms, what interests they serve, and what impact they will have. By exploring the contradictions between ADR's stated goals and its actual function, first-wave critical analysis hopes to make clearer the social dynamics at work in informal reform. Contradiction is the key for critical assessments. Whether they focus on contradictions of law, of informalism ideology itself, of the nature of state power, or of the entire capitalist system, the first-wave critical understanding of the social processes at work is formed through recognizing contradiction. Christine Harrington exhorts: "Research on entry into dispute processing must move beyond focusing alone on the concern with access, and begin to identify internal contradiction in the socio-legal organization of dispute processes."[79]

By attending to the contradictions, the first-wave critical scholars seek to show that informal law expands state control even as it ostensibly contracts the scope of formal state authority; that coercion is wielded under the guise of participation; that dispute is atomized in the name of community problem-solving;[80] in sum, that informalism has succeeded in rendering more powerful all the processes at work in the formal law. Indeed Abel tells us that the authors in his volume "agree with Foucault that informal justice increases state power."[81] According to Harrington:

> Conflict in this setting is absorbed into a rehabilitative model of minor dispute resolution. The creation of a tribunal to mediate these disputes in an individualized therapeutic style signifies a transformation in order maintenance policy that extends the scope of judicial authority. It expands the state's role in

75. HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 73-74, 77-81.

76. Id.

77. HOFRICHTER, NEIGHBORHOOD Justice, supra note 17, at xxvi.

78. *Id.* at xxx.

79. HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 162.

80. *See* Santos, *supra* note 30, at 262; Hofrichter, *Social Control Problems*, *supra* note 38, at 232; Abel, *Introduction*, *supra* note 22; Harrington, *Delegalization Reform Movements*, *supra* note 35.

81. Abel, *Introduction*, *supra* note 22, at 6. *See also* Santos, *supra* note 30, at 259; Hofrichter, *Social Control Problems*, *supra* note 38, at 242.

identifying and channeling order maintenance problems.[82]

For Harrington, the seemingly surprising results of ADR reflect the contradictory aspects of the movement itself.[83] Goals of participation by disputants and flexibility of proceedings are responses to perceived failings of adjudication, and, therefore, they are attempts to reconstruct the legitimacy or authority of the judicial system. Thus, while they seem to eschew formal judicial modes, the reformers are aiming to preserve, or rebuild, judicial authority as a whole.[84] This explains the contradiction of "alternatives" to the judicial system being established by the system itself, and actually maintained within the system. Hofrichter, in a later work that reveals the critical concern with state expansion, calls attention to the contradiction of the court's sudden interest in minor neighborhood and family disputes it was historically uninterested in and incapable of handling: "[T]he state now plans informal justice for this purpose—it formalizes informal justice."[85]

Thus for critical scholars interested in transforming social relations and expanding liberty, the expansion of state control is disquieting, but it is unsurprising since the ADR movement can only be understood to be part of the underlying social changes of its time.[86]

What is surprising is critical scholarship's potential role in these developments. The fact that formalism, what critical scholars had attacked as the problem of the law throughout the previous decade, now seemed a better alternative to the prospect of formalism's demise, raises peculiar questions for the critical legal enterprise. Scholars can only hope that the social, political, and legal contradictions that have shaped the movement to alternatives will allow a liberating potential to emerge from within its structures.[87] Indeed, many of the critical legal accounts end on a searchingly optimistic note. They speculate that informalism carries within it the seeds of liberating transformation, even while it is dominated by

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82. HARRINGTON, SHADOW JUSTICE, *supra* note 43, at 130.

83. *Id.*at 11.

84. *Id.* at 11-23.

85. HOFRICHTER, NEIGHBORHOOD JUSTICE, *supra* note 17, at xxiii.

86. *See* Santos, *supra* note 30, at 250; Hofrichter, *Social Control Problems*, *supra* note 38, at 221; Harrington, *Delegalization Reform Movements, supra* note 35, at 73-74; Scull, *supra* note 74.

87. *E.g.*, Santos, *supra* note 30, at 262. *But see* Spitzer, *supra* note 36, at 167-206, which begins by presuming that the goals of anti-formalism are consistent with transformative projects, but by uncovering the political impetus behind the rise of ADR concludes that no meaningful social change can arise within its contours; Scull *supra* note 74, at 114-15 ("Thus there seem to be few immediate prospects for social change in the direction of increased equity and equality...I think a realistic pessimism is to be preferred to a synthetic comfort built upon...illusions about the possibilities of humanizing a fundamentally inhuman system.")

tendencies toward expanding social control. After a powerful analysis seeking to uncover the system of social control in which neighborhood justice centers are embedded, Richard Hofrichter concludes his study with the speculation that the centers' novelty may offer "a public forum for questioning the foundations of the legal system." He suggests that neighborhood justice centers are "highly vulnerable to transformation from below," that their presence might result in protest and community organizing, while also allowing residents to develop skills in negotiation and mediation that will help in their political struggles.[88] Similarly, in the final paragraph of his article critiquing community justice institutions, Santos states: "[W]e cannot do justice to informalization or community reforms 'unless we are willing to concede the presence within them of a more positive function as well, that is, an utopian or transcendtal potential.'"[89] These concluding remarks are often surprising, because they seem so out of step with the findings of the authors. Repeatedly, critical legal analysts urge that neither formalism nor informalism can be absolutely hailed or denounced. Richard Abel's own conclusion provides clarity as to why the critical legal analysts insist on this. The values that the movement expresses, Abel tells us, are ones we can all support and should try to bring about: "It is advocated by reformers and embraced by disputants precisely because it expresses values that deservedly elicit broad allegiance."[90] Harmony, equal access, speed and affordability, citizen participation, and substantive justice are goals fully shared by critical legal theorists. Thus even though their accounts determine that the 1970s ADR movement is not the vehicle through which these goals can be realized, "[t]hose ideals must, and will, continue to inspire the struggle to create the institutions—and the society—that can realize them."[91]

III. CRITICAL FEMINIST APPROACHES

Critical feminist work on ADR mechanisms is overwhelmingly concerned with the movement's "warm" goals.[92] In line with feminist theory's cooperative, relational, and communicative ethic, critical feminists

88. Hofrichter, *Social Control Problems*, *supra* note 38, at 243.

89. Santos, *supra* note 30, at 265 (quoting Frederic Jameson, *Reification and Utopia in Mass Culture*, 1 SOCIAL TEXT 130, 144 (1979).

90. *Id.*

91. Abel, *Contradictions*, *supra* note 52, at 310.

92. Support for ADR can be grouped into two sets of concerns, dubbed "cool" and "warm." "Cool" goals of ADR concern minimizing the total cost of resolving disputes, decreasing pressure on the federal courts, and the like. "Warm" aims focus on the quality of the resolution, concerning the forum's responsiveness to parties, conciliatory methods, communicative ethics, and mutuality in arriving at a resolution. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 12 (2001).

share ADR's search for a better process of resolving disputes, one that focuses on the relationship between the parties rather than abstract principles.[93] Feminist literature supports ADR efforts to create an alternative to adjudication's "objectivist" approach, moving away from individualist, hierarchical, abstracted processes.[94] To the extent that various types of ADR are able to move us toward these goals, feminists are often in the front ranks of its proponents. But their attention to these "warm" values can lead them to caution against ADR in certain contexts, and to remain critical in their stance, urging their fellow ADR proponents not to lose sight of these warm ideals, or to sacrifice them to a false conception of efficiency.[95]

In fact, feminist analysis tends to put little stock in ADR's "cold" face. Not only does it remain a low priority among feminist concerns, they are broadly skeptical of ADR's success in achieving its efficiency goals. Feminist analysis tends to assert that if ADR strives toward its "warm" aspirations, this will be the best way of achieving efficient outcomes (in the Pareto optimal sense).[96] By focusing upon justifying and actualizing "warm" goals, critical feminist writing on ADR defines itself in opposition to proponents of the "cold" objectives. The questions raised by first-wave critical scholars are not addressed by feminist scholarship. Feminist criticism simply does not acknowledge the existence of such concerns. In fact, Carrie Menkel-Meadow and other feminist writers cite works by Richard Abel without any suggestion that these might problematize the ADR project. Thus, feminist scholars direct their focus to the battle for what the *nature* of ADR will be and how its goals will be understood, whether by its cold or warm objectives. At times, feminist ADR proponents address liberal critiques, but the first-wave criticism is

93. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process* 1 BERKELEY WOMEN'S L.J. 39, 43-49 (discussing work of psychologists Carol Gilligan, Nancy Chodorow and Dorothy Dinnerstein identifying how women's psychological development values affiliation, relatedness, responsiveness and caring as compared with men who value principle, rights and universalism) [hereinafter *Portia in a Different Voice*].

94. Feminist support for ADR aims stems in part from theoretical commitments shared with first-wave critical legal scholars. As Katharine Bartlett describes the geneaology: "Postmodern feminism made its entry into the law first by way of the critical legal studies movement...a loose coalition of left-leaning academic scholars who...argued that law is indeterminate, non-objective, hierarchical, self-legitimating, overly-individualistic, and morally impoverished." Katharine T. Bartlett, *Perspectives in Feminist Jurisprudence, in* FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY 15-16 (Betty Taylor et al. eds., 1999).

95. *See, e.g. For and Against Settlement*, *supra* note 19; Grillo, *supra* note 19, at 1609; Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

96. *See, e.g., For and Against Settlement*, *supra* note 19, at 510.

noticeably absent.

Crucial to the effort to fulfill "warm" ideals is the need for a method of determining when one is succeeding. It is not simply the ADR goals that feminist scholars support that derives from their feminist perspective, it is also their way of understanding whether and when ADR is achieving its goals, and in determining positive proposals for improvement.

Feminist theory's self-consciously critical stance toward the existing order, and particularly women's treatment in that order, makes it evidently inclined toward "alternatives." But feminist theory's critical analysis nonetheless seems to leave it more hospitable to ADR's reform-type alternative than first-wave theories. There are a few significant differences in theoretical outlook between the two bodies of scholarship that may account for critical feminists' greater proclivity to support ADR and their more reformist bent.

These stem directly out of the fundamentals of feminist theory. The cornerstone is an experiential epistemology, rooting theory at the individual level, with an individual who is personal:[97]

> Feminist theories share an emphasis on direct and personal experience as the place that theory begins. Theory is not something which is 'out there,' but 'in here'; it develops from our lived experiences, and grows out of the sharing of personal experience.[98]

The personal aspect of the individual is a crucial departure from the liberal individual for whom there is only a public political aspect. For the feminist theorist, the individual's personal aspect cannot be ignored and is in fact the critical locus for initial inquiry, hence the feminist catch-phrase, "the personal is political."[99] More than simply asserting the private side of human life as politically relevant, this phrase embodies the feminist challenge to the very dichotomizing of public and private. That distinction does not hold up in feminist analysis. As Schneider explains, "direct and personal experience" becomes the starting point for theory. Theory then takes us outward, to an understanding of connections to the wider world,

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97. "A first premise of feminist conversations is that we begin with the actual experience of women." Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1919 (1990).

98. Schneider, *supra* note 21, at 1226.

99. *See, e.g.*, Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). Bartlett describes MacKinnon's explanation of the phrase as "perhaps the best…'It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal – private, emotional, interiorized, particular, individuated, intimate – so that what it is to *know* the *politics* of woman's situation is to know women's personal lives.'" *Id.* at note 143 (citing MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 535) (1982).

and a reevaluation of personal experience and self.[100] This initial point of inquiry represents a dramatic shift from the first-wave critical accounts' focus on broader historical trends in society that can explain the particular phenomenon or event at issue, to the particular experience that will inform our understanding of wider developments and structures. While the critical scholars who examined the ADR movement in the late 1970s and early 1980s maintained what we might call a social or societal perspective, feminist scholarship insists upon a personal, individual perspective.

From this individuated analytical starting point, critical feminism generates its criteria for assessment of any proposals or actual reforms. Because theory is built up from the individual outward, and is rooted in the individual (woman's) experience, theories, proposals, and projects must be tested and verified experientially. When we consider the feminist critical accounts of ADR mechanisms, a distinction in criteria is apparent as compared with the non-feminist critical analyses. The feminist accounts call for empirical data to help resolve open questions about ADR's claims; they tend to focus on the effects of ADR mechanisms to particular groups and to any one disputant that might come into contact with the forum.

The feminist theoretical formulation bears some similarity to empiricism, since empiricism rests upon a model of the subject as an individual observer. For both, then, individual observation forms the basis of further abstraction, and of knowledge. Yet feminists reject empiricism's understanding of observation as unmediated—feminists understand observation to be partial and mediated by one's experience, which in turn is shaped by one's position in society. The world cannot be understood so mechanistically as the empiricist would have us believe.[101] In this vein, the not-uncommon feminist demands for empirical study of ADR processes seem surprising.[102] Their existence highlights a difficulty within critical feminist theory. Its epistemological foundation rejects any totality, and encourages the idea that different approaches are best for different people, which perhaps can only be known through an experiential assessment of all individual cases. To some extent, then, it seems that the anti-objectivist

100. Schneider, *supra* note 21, at 1226. *See generally*, Bartlett, *supra* note 99, at 863-67 (describing the practice of feminist consciousness raising).

101. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1715 (1990) (describing pragmatism as a "mediating way of thinking," and exploring the theoretical connections between feminism and pragmatism including how they offer "a way of understanding our simultaneous commitments to optimism *and* pluralism, to concrete empiricism *and* principles, to an incomplete and dynamic universe *and* to the possibility of perfection...").

102. Though surprising, it is not uncommon within feminist jurisprudence more broadly. *See* Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*,, 1 BERKELEY WOMEN'S L.J. 65, 65-66 (1985) (reflecting on how feminist jurisprudential scholarship also often refers to empirical data).

position of feminist legal thought results in a feminist pragmatic reliance upon methods originally looked upon with suspicion by feminist theory.[103]

Both of these characteristics—the shift in focus to the individual as the unit of analysis and the empirical nature of the evaluative criteria—are visible both in feminist defenses of ADR and in their critiques. An important set of aims supported by feminist analyses and promoted by ADR are what Carrie Menkel-Meadow has dubbed "substantive process" claims.[104] Substantive process makes two claims. First, the character of the process affects the legitimacy of the outcome and the substantive justice it can achieve. Second, the quality of the process serves values separate from the value derived from a positive outcome.[105] Since feminist theory understands that there is an "interrelationship between process and result... in a deep sense, process and result are linked,"[106] it is clear that the first substantive process value is one understood by feminist critics. Not only can the process tell us something about the outcome, but the outcome will be able to tell us something about the merits of the process. The second substantive process value concerns such things as the "'warmer' modes of dispute processing."[107]

The substantive process purposes of ADR repeatedly invoked by feminist analyses are participation, communication, and flexibility.[108] The non-adjudicative format is understood to enhance disputants' self-determination by allowing their participation in the process, not merely that of their lawyers.[109] Similarly, greater flexibility in both the process by which agreements are reached and the remedies that can be devised enables the parties to achieve resolutions that best suit their personal needs. Meanwhile, the less formal mechanism "fosters a communication process that can be more direct and less stylized than litigation."[110] Thus the process itself of resolving the dispute carries the potential to benefit the parties completely apart from the specific resolution of the matter at hand, as the parties may experience long-term advantages such as the good will

103. It is important to keep in mind, however, that empirical aspects of feminist criticism differ from a purely empirical approach in that the answer for feminist critical scholars cannot be found merely in amassing cold data. Feminist attention to mediating experience and personal perspective is never out of sight.

104. *For and Against Settlement*, *supra* note 19, at 489.

105. *Id.*

106. Schneider, *supra* note 21, at 1228.

107. *For and Against Settlement*, *supra* note 19, at 489-490.

108. *See, e.g. Portia in a Different Voice*, *supra* note 93, at 50-55 (describing how women, attentive to these traits, might model legal structures after approaches that already exist in ADR mechanisms); Rifkin, *supra* note 19, at 22-23.

109. *Portia in a Different Voice*, *supra* note 93, at 53 (explaining that mediation models, by enabling parties to engage in direct communication and forge their own solutions, may appeal to women's "ethic of care" and "heightened sense of empathy").

110. *Id.* at 505.

that attends to reaching agreement without a fight, or the potential to learn a better way to handle future disputes that might arise. "By learning how to communicate and work together,"[111] parties utilizing an ADR mechanism have the possibility of developing skills that will strengthen indefinitely the ongoing relationship between them.

Simultaneously, feminist accounts claim that ADR can achieve substantive justice in ways they believe are foreclosed by the adjudicative system's objectivist approach. The process flexibility, mentioned above, is understood to enable *better*, more just outcomes. This occurs on two levels. One is in the outcome, when creative remedies can be devised without the restrictions that are imposed on the formal legal system. The other is in the process, when flexibility enables the mechanism *itself* to be tailored to the conflict at hand in a way that may help to illuminate mutual interests to be considered and mutual benefits to be attained.[112] Being able to adjust the form to the content of the dispute brings about the possibility that *each* case is treated by the system in the manner *most* attentive to its needs.[113]

The remedial flexibility contributes to a separate substantive justice gain. Since resolutions do not need to be rendered in a binary, zero-sum method, the remedy can achieve a better relationship between the parties, an outcome good for both, or a termination of the relationship in ways that leave both parties better off than they might have been with alternative resolutions.[114] Specifically, there is no need to find one party "right" and the other "at fault."[115] Instead there is a relational understanding of the situation, in which it can become apparent that there is more at stake than binary results allow.[116]

Finally, procedural flexibility allows for a more complete treatment of the problem. Issues do not need to be framed in narrow, pre-defined legal parameters. Thus, all factors contributing to the conflict, and hence potentially enabling a resolution, can be accommodated by the forum.[117]

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111. Grillo, *supra* note 19, at 1609.

112. Menkel-Meadow describes how ADR theory indicates that when the scope of interests recognized expands, it will be easier to identify mutual interests and to achieve a suitable settlement. Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons From General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 343 (2003) [hereinafter *Correspondences and Contradictions*].

113. Carrie Menkel-Meadow relies on this conception to argue against uniform settlement guidelines, or agreement by an establishment on a single best method: "lawyers want different things in different cases. Thus, a routinized settlement agenda is not likely to be successful in satisfying their desires." *For and Against Settlement, supra* note 19, at 509.

114. *Id.* at 504.

115. *Id.*

116. *Id.*

117. *See* Rifkin, *supra* note 19, at 23-24; *Portia in a Different Voice*, *supra* note 93, at

Better still, it is the parties themselves who recognize a concern, feeling, or interest as relevant, and thus they are more in control of what gets resolved and how. This greater self-determination for the parties recognizes their "internal wisdom" of their own situation.[118] It is this type of knowledge, derived from women's personal experience, that feminist theory deems the cornerstone of developing an understanding of the world.[119]

The expansion of what is acceptable to consider in the resolution process also supports the feminist perspective that lives are inter-relational rather than atomized and competing. The move away from narrowly identified entitlements that are raised before a court so that one may be deemed to have won out, is in harmony with the feminist conception of interpersonal connection. By allowing the *context* of a dispute, the details of the *relationship* between the parties, into the discussion, the conflict is reframed from one of narrow and diverging self-interests to one of relational and common concerns; encouraging, perhaps, a notion of problem-solving rather than of battle.[120]

This long set of ADR characteristics can tell us more than merely what critical feminists find compelling about the movement. By reflecting upon why these aspects of ADR are appealing to feminist theory, we can uncover certain ideological commitments of feminist analysis that are strikingly reflective of the wider legal profession.

If we again consider the shared ADR-feminist values in two sets—substantive process and substantive justice—we find at work the individuated starting point of feminist theory, and directly related to it, the experiential/empiricist basis for assessment. Substantive process concerns are connected to the feminist emphasis on the relational nature of the human person.[121] The relational understanding of the human person, when treated as a central component to understanding why conflicts arise and how to resolve them, reflects an individuation of the problem. It is difficult to devise a political conception of the conflict (drawing in broad societal structures and trends) when one understands the conflict to be rooted in the particular relationship between the disputants. Be it flexibility, or fact and context-attentiveness, or the "responsiveness" of ADR mechanisms to the parties' individual needs, the substantive justice gains that critical feminists

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49-50, 52-53; Bartlett, *supra* note 99, at 849.

118. Grillo, *supra* note 19, at 1582.

119. *See* Bartlett, *supra* note 99, at 887–88 (describing the importance of consciousness-raising as a feminist legal method.)

120. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

s 121. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE in PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Library of Congress Cataloging in Publication Data 2003) (1982); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication* 72 VA. L. REV. 543 (1986).

believe can be made through ADR rest on the premise that every dispute is unique, and that a system that allows for particularized methods, evidence, assessments, and remedies will be better able to achieve justice.[122]

The unit of concern, then, is the individual relationship before the forum. This is hardly surprising, given the feminist critique of traditional, formal law for its emphasis on abstract, universal principles.[123] What is perhaps unexpected, however, is that the concept of justice becomes in many ways completely personalized. While feminist theory begins with individual experience, this experience is supposed to enable individual women (and men) to then recognize their commonalities and comprehend a wider struggle. A touchstone of feminist theories is that there exists a "profound link between individual and group interest between individual change and social change."[124] But because feminist assessments of dispute focus upon the particularity of each situation, the possibility to draw further connections to wider society is nearly extinguished, even as, perhaps, the connection to the opposing party becomes more evident. If each dispute is unique in any meaningful sense of the word, it seems to minimize the significance of connections across disputes.[125] Possibilities for "social change" so important to feminist commitments, are reduced in this context to the possibility that the parties may learn a form of communication that helps resolve or avert these interpersonal disputes in the future.[126]

This aspect of critical feminist analysis helps explain why their conclusions on ADR differ so starkly from first-wave critiques. The initial critical legal critique of law drew attention to law's individuating effect in order to call into question both its legitimacy and the possibility for social transformation through law. ADR extends this personalization to such an extent that classical liberal legal scholars critique it for its privatizing, individuating nature.[127] With this liberal assessment, first-wave legal scholars agree. But the feminist approaches accept on a theoretical level the premise that the individual is the locus of agency (and on this point, of course, they overlap with the liberal conception). Thus the two critical,

122. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Carrie Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985).

123. *See, Wishik*, *supra* note 102.

124. Schneider, *supra* note 21, at 1227.

125. This tension and the challenge it presents is recognized by feminist legal theorists. *See, e.g.*, Bartlett, *supra* note 99, at 856–57. Fineman's analysis of mediation in the child custody field provides an example of how this challenge can be met successfully. *See* Fineman, *supra* note 19, at 726 (identifying "custodical mothers" experience in marriage and divorce as a springboard for proposals to rectify the disadvantage that changes in the field of custody law had created for that group).

126. *See, e.g.*, Grillo, *supra* note 19.

127. *See e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

left-oriented approaches find themselves at odds. What is thrown into sharp relief is the shift that has occurred from a socializing analysis in first-wave critical accounts to an individualized one in critical feminist works.

Trina Grillo's critical assessment of mediation (particularly in the context of child custody disputes) appears to bear out these theoretical implications.[128] Under the subheading, "Are All Agreements Equal?" Grillo explains that the wariness toward abstract principles and values leaves mediation in the unsatisfactory position of having no means by which to judge the parties' agreement other than by the fact of their consent.[129] Thus, what specific outcome is agreed upon is potentially irrelevant to whether it was a "good" or "bad" settlement. Grillo herself seems perturbed by this, and notes that most respondents in one study "expressed discomfort with the norm, prevalent in the no-fault divorce context, that no consequences whatsoever—including financial sanctions or even courtroom embarrassment—are to be imposed on an adulterous spouse."[130] Yet Grillo does not resolve the paradox and cannot tell us how we may develop objective appraisals of settlement outcomes when analysis begins, and ends, with the parties' own experiences.

Critical feminism privileges ADR mechanisms over the adjudicative process for their arrival at consensual agreements rather than coercive ones. The mutual consent involved in reaching a settlement lends the proceedings legitimacy. The importance of consent as legitimation stems from the declining legitimacy of the authority held by the decrees of judges, and the principles on which they are supposed to rely. The feminist methodology takes as a starting point the degraded legitimacy of traditional law. As such it becomes unclear how we can determine what the "proper" outcome to a dispute should be, and why the officials of the judicial system should be able to make such determinations. ADR theorists then celebrate the parties' ability to determine what is best for themselves, and since there are few (if any) clear, collectively-held values by which to judge a best outcome, mutual agreement by the parties becomes the best possible signifier.

The feminist understanding that theory begins with individual experience has implications for how critical feminists assess the merits of ADR proposals. In account after account, critical feminists are unwilling to decide based on theoretical suppositions as to what *should* be good for the law, the parties, women, or efficiency. They continually draw attention to the lacking empirical basis for most assertions made both by proponents and detractors of ADR:

128. Grillo, *supra* note 19, at 1551-55.
129. *Id.* at 1560-61.
130. *Id.* at 1559 n.55.

> [B]oth sides make unspecified assumptions about the empirical reality of both the formal adjudicatory system and the alternative dispute resolution mechanisms.
> Those who criticize the settlement function, I fear, have enshrined the adjudicative function based on an unproven, undemonstrated record of successful performance, just as the efficiency experts have exalted settlement conferences relying on unconvincing statistics.[131]

The critical feminist has little use for abstract theories of the role that ADR is playing in the state's social control apparatus, nor in attempting to construct the social forces that are bringing it about. Instead the critical feminists take a far more pragmatic view—how can we identify the contexts in which ADR is beneficial, and how does it compare with how adjudication actually takes place *in practice* (not in its idealized form)? The anti-objectivist feminist perspective is insistent not to allow the debate over ADR and adjudication to take place at the level of abstract principle.

And how should the feminist legal scholar assess ADR's "benefits" or lack thereof? Consistent with feminism's concern for the individual experiences of women (and generally of the adverse impact of society upon the oppressed), critical feminism urges that we return to this unit in our ongoing examination of ADR mechanisms: "These are questions we must persist in asking when we evaluate procedural reforms: who is helped and who is hurt, whose chances for self-development and for redress are enlarged and whose are compressed by the systems we produce and maintain?"[132]

Thus even accounts critical of certain aspects of ADR proffer criticism that individuates the potential harm. In Grillo's discussion of the problems for mediation in the absence of objective principles, she does not suggest a theory of mediation within a framework of principles, nor does she discuss a generalized, or social dilemma created by the shift away from principle and fault. Instead Grillo tells us that "[s]ometimes, however, all agreements are not equal. It may be important, from both a societal and an individual standpoint, to have an agreement that reflects cultural notions of justice and not merely one to which there has been mutual assent."[133] The ramifications of the decline of principle and fault never are explained beyond assertions that "in some situations" and for "many" people both principle and fault can play an important role.

More illustrative still is Grillo's discussion of the possibility of prejudice infecting the mediation proceeding. Citing Richard Delgado's

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131. *For and Against Settlement, supra* note 68, at 499.

132. Martha Minow, *Some Realism About Rulism: A Parable for the Fiftieth Anniversary of the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2249, 2257 (1989).

133. Grillo, *supra* note 19, at 1560.

work, Grillo draws attention to the dangers of partiality in the mediation context.[134] Yet again the discussion is somewhat surprising given the feminist desire to unmask societal structures of oppression that serve to repress dominated groups. Although for feminist theory concern with the particular should draw our attention to the structures of oppression, since those structures reproduce themselves on an individual level, the societal view seems to elude feminist analyses like Grillo's. Prejudice becomes a problem of the individual mediator, her personal prejudices may not be adequately held in check by the informal processes of mediation. Even when the mediator is trying to counteract power imbalances between the parties, "the mediator, due to *her own internal processes*, may not in fact have a sufficiently clear vision of the interaction between the divorcing spouses to make a considered decision about if and how the power needs to be balanced"[135] (emphasis added). Grillo's feminist and race-attentive account somehow turns the questions of racial, gender, and class prejudice into a problem of the individual mediator's potential for bias—bias that affects the proceeding due to the mediator's *internal* processes. Thus the societal, class and race conflicts are reduced to problems located in individual mentalities.

IV. PUBLIC NEGOTIATION AS RESOLUTION?

Much of the first-wave scholars' critique centered upon a concern that ADR obscures the social nature of conflict, disaggregating and personalizing claims. Their feminist successors often support ADR for related reasons, for its recognition of the personal and individual. Given the strong commitments by both sets of scholars, it may help to grasp their positions more firmly by exploring how each would approach the field of public negotiation and public dispute resolution. Public negotiation brings the theory and techniques of ADR to public disputes, problems encompassing vast sectors of society that cannot be broken down to the level of a single relationship between two people. Does this attention to collective disputes dilute the particularized nature of ADR that feminist critique finds compelling? Does it manage to fulfill the desires of the first-wave critics for collective action? Interestingly, it seems that the expansion of ADR to encompass public disputes does little to alter either critical approach to the field. Feminist critique remains supportive, while raising some concerns that an expansion of uniform dispute resolution theory will place flexibility and particularity at risk.[136]

134. *Id.* at 1589.
135. *Id.* at 1592.
136. *See e.g., Correspondences and Contradictions*, *supra* note 112; IMAGINE

In their influential work, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*,[137] Lawrence Susskind and Jeffrey Cruikshank make the case for applying ADR techniques to public controversies. Published in 1987, *Breaking the Impasse* seeks to outline a new process by which consensus may be built to resolve public, political conflicts. The authors explain that our courts were not really designed to reconcile conflicting interests.[138] They exist to interpret the law, and are therefore unwilling and ill-equipped to create remedies that serve the interests of all sides.[139] Similarly, our political process is not set up in a manner conducive to the effective settling of policy disputes. Thus while our democratic institutions and our courts serve useful functions, we cannot turn to these structures in hopes that they will be able to resolve our public conflicts. As they describe it, "In the United States, we are at an impasse. Public officials are unable to take action, even when everyone agrees that something needs to be done."[140] What is needed now is a new, extra-institutional process through which to build the consensus we need behind action and solutions to our nation's problems (or in the international context, to ethnic, national or global problems). "Fortunately, new approaches to resolving public disputes have been developed and tested over the past few years... Those tools are *negotiated approaches to consensus building* and they have worked effectively in many situations."[141] Such approaches require informal, face-to-face interaction including all "stakeholding" groups.[142] The participants must voluntarily seek to achieve an "all-gain" rather than "win-lose" solution.[143]

Susskind and Cruikshank posit that the use of such mechanisms can "generate agreement," decreasing the need for litigation and restoring government credibility.[144] Thus their goals match those of ADR as a whole, hoping to restore harmony and authority to our political sphere, while minimizing the need for and use of our legal one. The fact that many public disputes end up in the courts (the authors focus particularly on environmental regulations and their subsequent litigation) is understood to be a symptom of our failing political system, and an indication that as a society we are unable to resolve our conflicts constructively, just as individual Americans are too litigious and should be taught the non-

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COEXISTENCE (Antonia Chayes & Martha Minow eds., 2003).

137. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987).

138. *Id.* at 9.

139. *Id.*

140. *Id.* at 3.

141. *Id.* at 11.

142. *Id.*

143. *Id.*

144. *Id.* at 13.

combative disputing techniques of ADR.[145]

Susskind and Cruikshank recognize that negotiated consensus is not easy to achieve.[146] It requires awareness of and attention to several possible obstacles. These obstacles are largely methodological: how should we identify participants; how can we maintain government accountability while allowing for some degree of privacy in negotiating; how can participating groups be bound by their promises; what technical assistance must be provided to less experienced participants; do people exist who have the requisite skills to mediate a dispute like the one in question?[147] Process concerns such as these abound, and the *manner* in which the negotiation is conducted will surely affect the success of the outcome. As the authors explain, "If the obstacles to consensus building were trivial, we would not have so many unresolved public disputes confronting us today."[148] The growing field of public negotiation, they believe, carries "satisfactory answers" to such questions that will help to achieve good outcomes.[149]

To do so, however, we must understand *what type* of solution we aim to achieve through public negotiation. Susskind and Cruikshank identify four criteria of a "good negotiated settlement:" fairness, efficiency, wisdom, and stability.[150] There are both process and substance elements to fairness. A fairness inquiry would be concerned with whether the negotiation process was public, what type of participation it involved, both who was allowed to participate as well as the extent to which they were able to do so.[151] Did the process allow for due process complaints, and was there any means to ensure accountability of the negotiators?[152] All of these elements contribute to the fairness of the negotiation process. In assessing the substantive fairness of the outcome, the most important factor is the perceptions of the participants: "the best way to determine the fairness of a negotiated solution is to evaluate the attitudes and perceptions of the parties most affected."[153] A process is deemed to be fair if the disputants and the wider community consider it to be so.[154] It will also, most likely, be more effective since their perception of fairness will lead them to abide by the outcome.[155]

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145. *Id.* at 16-22.
146. *Id.* at 13.
147. *Id.* at 11.
148. *Id.* at 12.
149. *Id.*
150. *Id.* at 21.
151. *Id.*
152. *Id.*
153. *Id.* at 25.
154. *Id.* at 24.
155. *Id.* at 25.

In public negotiation theory, a better process is considered to produce not only fairer outcomes, but more efficient ones as well. This is a result of the climate of cooperation and joint problem solving that is fostered through the negotiating techniques.[156] Such collaborative efforts that are made possible through negotiated settlements also allows for "wise" outcomes.[157] Through cooperation, the many different stakeholders can *share* their respective information about the problem and together help to determine what is correct. "The answer lies in cooperation: both sides must participate in an effort to minimize the risk of being wrong."[158] Wisdom thus comes from achieving two goals of ADR theory—by moving away from adversarialism, which gives participants incentives to mask the truth and to avoid collaboration; and by enabling the forum to benefit from personal or "local knowledge." The public negotiation literature calls this "prospective hindsight."[159] Often stakeholders will have had enough experience both with the community involved and with similar types of problems to anticipate future difficulties or results.[160]

The final element, stability, can be achieved through a focus on relationships and feasibility. Susskind and Cruikshank explain that unrealistic expectations are one powerful source of instability.[161] To avoid unsettling good outcomes, participants in public dispute resolution are urged to focus on feasibility. "It is better to seek and offer modest commitments rather than all-encompassing and unrealistic promises."[162] By focusing on the on-going nature of participants' relationships, all will be encouraged to think of long-term feasibility and to be willing to come back to the table if the agreements need to be modified. "If disputing parties build a good working relationship, the prospects for stability are greatly enhanced."[163] As we shall see below, public negotiation's conception of a good outcome proves highly problematic to first-wave critiques, but it models feminist and ADR goals in private disputes and the domestic context.

As Susskind and Cruikshank's characterization of public dispute resolution makes clear, the "public" nature of conflicts does not alter the basic assumptions of alternative dispute processing theory. Public negotiations are participatory in nature, party-oriented, anti-adversarial,

156. *Id.* at 26.
157. *Id.* at 30.
158. *Id.*
159. *See e.g.*, Michael Wheeler, *The Need for Prospective Hindsight*, 3 NEGOTIATION JOURNAL 7 (1987).
160. SUSSKIND & CRUIKSHANK, *supra* note 138, at 28.
161. *Id.* at 31.
162. *Id.* at 31.
163. *Id.*at 33.

attentive to the relationships among the disputants, and process-focused. Critical feminist support for ADR processes rests on just such characteristics. Feminist writing on conflict resolution tends to extend its support for ADR mechanisms. Negotiated processes offer enough flexibility that they can be attentive to the context of the particular dispute at hand. Indeed, because public negotiation is structured to get the stakeholders talking to each other, outcomes are built upon the information that the disputants themselves possess. Consensus is developed through the parties' own evaluation of that information, and their own understanding of what is at stake and what is likely to occur in the future. Perhaps most importantly, good negotiated agreements recognize that such conflicts arise out of *continued* interaction among the stakeholders, and thus require long-term and on-going solutions.[164] Thus the cooperative process itself can transform the nature of the conflict, by training the disputants in methods that will enable them to continue to work on the conflict as time goes on.[165]

Finally, Susskind and Cruikshank argue for public negotiation as opposed to the encrusted, gridlocked government process and equally to the continual return to the courts. Susskind and Cruikshank understand the courts to be ill-equipped for resolving conflicting interests. They simply do not have the remedial capabilities to restore harmony. This account calls to mind Menkel-Meadow's frequent critique of the "limited remedial imagination of courts."[166] Negotiated public agreements have the advantage of relying on the stakeholders' own insights, and the flexibility to devise creative solutions that "meet the needs of all sides."[167]

Meeting the needs of all sides was a goal that drew sharp criticism from the contributors to Abel's *Politics of Informal Justice*. The first-wave critical analyses objected to what they understood as the re-formulation of major social conflict into a communication problem that could be resolved to everyone's benefit if only the parties would learn to speak to each other properly. Although public dispute resolution aims to reconnect ADR to the *social* nature of conflict—a major concern for first-wave critics—it still conceives of social conflict, and its solutions, in technical, apolitical terms that would likely cause even graver alarm for first-wave commentators. Public dispute resolution theory, as articulated by Susskind and

164. *See, eg.,* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9-24 (1998). The very conception of the "mass violence" inquiry is one based upon a notion of inter-personal relationships within a society, who will and must have on-going contact with one another. Whether or not they will be able to do so peacefully, and how, is the central question. It is a paradigmatic case of relational peace-making on a mass level.

165. *See, e.g.,* IMAGINE COEXISTENCE, *supra* note 137, at xx-xxi.

166. *See For and Against Settlement, supra* note 19, at 501.

167. SUSSKIND & CRUIKSHANK, *supra* note 138, at 12.

Cruikshank, envisions that the participatory, cooperative *process* itself will resolve societal difficulties, concerns, and even major conflicts. Thus, as in the interpersonal ADR context, public dispute resolution finds solutions through formality—too much formality for first-wave critical scholarship.

Laura Nader is one of the very few legal commentators who might be characterized as part of Abel's set of first-wave critics who has continued to write about, and critique, ADR unabated. As such her work offers us a glimpse into how the first-wave critical scholars might have reacted to notions of public dispute resolution. Nader expresses why the folding of ever-wider social issues into the ambit of ADR does not assuage her original fears:

> [O]ne result of trading justice for harmony is politics without conviction, without passion, is: "[p]ragmatic candidates who tend to be less polarizing, less critical of business interests and inclined toward solving difficult problems with compromises that avoid creating clear winners and losers... what is occurring, particularly on economic issues is the Hands-Across-Americanization of Democratic politics... [b]uilding their appeals on the premise that everyone shares the same goals and need only be encouraged to hold hands and work together to solve the nation's problems."[168]

Nader describes a process in which not just personal conflicts such as divorce are fully individualized, but even major structural problems are re-cast as large-scale psychological issues:[169] "disputes are reshaped...so that value conflicts or interest conflicts become 'communication problems.'"[170] She takes aim at the therapeutizing language of ADR, from Chief Justice Burger's speeches depicting lawyers as "healers" and plaintiffs as "patients" needing "treatment" to the widespread concern that lawyers were suffering "burn-out."[171]

In the individualization of conflict that occurs in conflict resolution literature, outcomes cannot be measured according to some objective, external criteria.[172] As Susskind and Cruikshank put it, there is "no single

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168. Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RES. 1, 24 (1993) (quoting Ronald Brownstein, Opinion, *Where's the Political Heat? Democrats Lose Their Fire*, L.A. TIMES, July 12, 1987, §5, at 3).

169. *Id.* at 12-14, 18-20.

170. *Id.* at 8 (describing a study conducted by Judy Rothschild in Judy Rothschild, Mediation and Social Control (1986) (unpublished Ph.D. dissertation, Department of Sociology, University of California (Berkeley)).

171. *Id.* at 6, 10, 21-22.

172. "In our view, it is more important that an agreement be perceived as fair by the parties involved than by an independent analyst who applies an abstract decision rule." SUSSKIND & CRUIKSHANK, *supra* note 138, at 25.

indicator of substantive fairness that all parties to a public dispute are likely to accept...."[173] Thus, process takes on heightened significance, because for instance, fairness in public negotiation must be defined through the perceived legitimacy of that process. One aim of the literature on conflict resolution is to identify and define formalized processes or factors of public dispute resolution that can resolve social conflict: "If the involved parties think a given process has been fair, they are more likely to abide by its outcome: if they do not, they will seek to undermine it."[174]

Two renowned feminist legal scholars, Menkel-Meadow and Minow, accept the formalized approach to social change inherent to the theory of public dispute resolution (or conflict resolution). Menkel-Meadow turns her attention to Northern Ireland, Camp David, and Oslo; Minow casts her eye to Rwanda, Bosnia, Argentina and other locations of mass violence, to discover what we may learn from their conflict resolution efforts. These international situations of massive social and political strife qualify as cases of conflict resolution, the processes utilized holding the potential for insight for the field of dispute resolution.[175] For Nader, this feminist approval of ADR, while understandable is deeply problematic:

> The rhetoric by which Justice Burger promoted ADR, was seductive. Who could be against harmony or civilized behavior or healing or efficiency? The appeal was to a broad audience, and many, especially women, were attracted to the soft or gentle aspects of an informal justice.[176]

The problem is that in public negotiation analyses of what a "good outcome" is, justice is never mentioned. As Nader says, "issues of what is just become irrelevant."[177] Instead, the process itself becomes good or bad. "For the mediation movement, the point was not just to help clients, but to help them in a nonadversarial manner. It was the forum that attained first importance."[178] In Nader's socio-political analysis, the shift to negotiated agreement is part of the general move from justice to what she calls "harmony ideology," an ideology that reconstructs conflict into a personal characteristic that can be learned away—and that elevates harmony above all else, especially justice.[179] It is not the injustice behind the conflict that

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173. *Id.* at 21.

174. *Id.* at 25.

175. At the same time as she includes these in her analysis, however, Menkel-Meadow cautions against the search for a single, homogenizing "meta-theory" that would hold true "across widely different domains." *Correspondences and Contradictions, supra* note 112, at 320.

176. Nader, *supra* note 169, at 24.

177. *Id.* at 8.

178. *Id.* at 12.

179. *Id.* at 3.

is the problem, not a "root-causes analysis" as Nader calls it,[180] but the conflict itself that must be resolved.

Once again, successors to the first-wave critical scholars are not merely less radical or more pragmatic; we find them calling for the very opposite of their critical predecessors. Where first-wave analysis saw greater formalization, the erosion of political struggle, and the exponential encroachment of the state, feminist analyses see the potential for a better society, a correction of the highly-masculine, abstract, warring methods that failed us in the past. First-wave critique is peculiarly non-legal. It does not advocate, as do liberal scholars, a return to formalized adjudication as the proper ideal model.[181] They hope to shore-up adjudication only as a means of ebbing the tide of ADR's triumph. What they decry does not seem to be the loss of a golden age of adjudication, but rather an increasingly apolitical approach to social problems, a fear that all realms of political struggle will eventually be engulfed by technical, formalized processes, perhaps of "communication" rather than "suit."

V. CONCLUSION

The critical literature on ADR allows us to comprehend the development of critical legal thought as it passed from its first-wave into the identity era and makes apparent the distance lying between the different approaches. Yet that distance seems to have been underexamined by critical scholars, as exemplified by the fact that critical feminist works on ADR do not respond to the challenge of first-wave critique. Generally, later feminist works do not acknowledge that there is a point of contention, much less the severe breach, between their work on ADR and that of earlier critical scholars.

The transformation in critical thought that is apparent between feminist and first-wave critiques is perhaps most strongly characterized by a shift of the locus of analysis. Critical feminist theory states explicitly that theory begins with the individual[182] and is concerned with the patriarchal nature of traditional law. In contrast, the first-wave critiques of ADR are concerned with economic and social hierarchies and state power. No less significant, however, is the feminist desire to make positive proposals for legal reform, a departure from first-wave's commitment to critique even in the absence of concrete suggestions for improvement.

First-wave accounts seem to call again and again for political action

180. *Id.* at 22.

181. For an example of liberal approaches to ADR, *see* Fiss, *supra* note 128; *see also* Resnik, *supra* note 9.

182. *See* Schneider, *supra* note 21.

and collective struggle as the proper expression of social conflict and as the only transformative means for its resolution. As Abel summarized in his introduction, "[n]o legal institution, formal or informal, can successfully depoliticize conflict... [I]f the assertion of authority to resolve disputes and control behavior has the potential to contribute to the creation of a countervailing power that can oppose both state and capital, it can do so only as part of a broad social movement."[183] Indeed, some acknowledge a pressure to be more than "negatively critical," by providing a detailed proposal for change or improvement.[184] They reject the call to offer concrete suggestions, because they worry that to do so will not improve and may help to perpetuate what they believe are deeply problematic institutions.[185]

In contrast to this, feminist scholars make proposals for the reform and enhancement of ADR. An observation from Carrie Menkel-Meadow suggests that the feminist interest in positive critique may actually be related to the feminist focus on the individual woman's experience. Expressing her frustration with ADR critics' emphasis on structural and institutional values to the exclusion of the actual individuals involved in the dispute, she writes, "I fear, but am not sure, that this debate can be reduced to those who care more about the people actually engaged in disputes versus those who care more about institutional and structural arrangements."[186] Although Menkel-Meadow is not addressing first-wave critics directly, this observation would apply to their accounts as well, for they are unwilling in their analyses to abandon the lens of state power and social control, in favor of an analysis that relies on the experience or expressed preferences of individual disputants.

The first-wave scholars raised significant concerns in the early days of the ADR movements that have never been adequately resolved. This literature offers important lessons for those interested in legal process and the operation of justice through the law. In the temptation to focus on incremental and pragmatic reforms to the legal system, these first-wave critiques of informality have been overlooked. As a result, important insights have been lost that would help to create a textured and broad reading of procedural reform, the legal system, and how best to render justice in society. Revisiting some of the questions they presented could prove important guidance as the drive to restructure our legal institutions continues.

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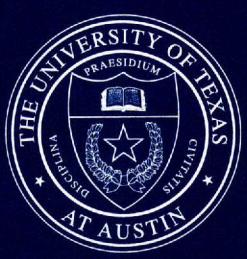
183. Abel, *Introduction*, *supra* note 22, at 12.

184. *E.g.*, Scull, *supra* note 74, at 115.

185. *Id.*

186. Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995).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