

ERADICATING THE PLAGUE: CHARGING AND SENTENCING DOMESTIC VIOLENCE OFFENDERS USING SCIENCE, NOT TRADITION

I. INTRODUCTION

Every week, large groups of violent convicted criminals pile into community centers, churches, and therapy centers.¹ These violent convicts have left their victims with choke marks, black eyes, broken bones, and other scars of physical and mental abuse.² So, why are these criminals not confined to state prisons? These criminals, unlike other violent convicts, have escaped threat of confinement because they chose the right victims to exploit: their intimate partners. Instead of going to jail or prison, most domestic violence abusers are given the chance to attend batterer intervention classes so that they can be educated on the effects of violence and, eventually, rehabilitated.³

In most states, courts often sentence first-time domestic violence offenders to such intervention classes, frequently called batterer intervention programs (“BIPs”), in lieu of incarceration.⁴ In fact, the

1. See, e.g., ST. OF ME. DEP’T OF CORRECTIONS OFF. OF VICTIM SERVS., BATTERER INTERVENTION PROGRAMS (BIP), A REPORT TO THE FIRST REGULAR SESSION OF THE 128TH MAINE LEGISLATURE, Attachment C, http://www.maine.gov/corrections/VictimServices/documents/BIP_128.pdf (last visited Oct. 31, 2017).

2. See, e.g., Gal Tziperman Lotan, *Seminole Judge Jerri Collins Told to Take Anger-Management Course*, ORLANDO SENTINEL (Apr. 25, 2016), <http://www.orlandosentinel.com/news/breaking-news/os-judge-jerri-collins-anger-20160425-story.html> (discussing how Miles Brennan, a repeat domestic violence offender, was not sent to jail after he chased his victim with a knife, choked her, then pressed his thumb into her eyes).

3. See Ashleigh Owens, *Confronting the Challenges of Domestic Violence Sentencing Policy: A Review of the Increasingly Global Use of Batterer Intervention Programs*, 35 FORDHAM INT’L L. J. 565, 567 (2012).

4. See, e.g., CAL. PENAL CODE § 1203.097 (West 2015); FLA. STAT. ANN § 741.281 (West, Westlaw through 2017 First Reg. Sess. and Special “A” Sess. of the 25th Leg.); UTAH CODE ANN. § 77-36-5.1 (West, Westlaw through 2017 Gen. Sess.); see also Owens, *supra* note 3, at 567; Center for Disease Control and Prevention, *Menu of State Batterer Intervention Program Laws*, at 1-2 (Jan. 29, 2015), <https://www.cdc.gov/phlp/docs/menu-batterer.pdf>.

nationally-accepted response to domestic violence has been state-mandated BIPs because policymakers insist that the focus of domestic violence sentencing should be rehabilitation, not punishment.⁵

While BIPs do rehabilitate some offenders,⁶ these programs have large attrition rates and have not been shown to have any significant effect on reducing recidivism of domestic violence in the United States.⁷ Despite a surge of appeals to jurists and politicians to effectively target and combat domestic violence in the late twentieth and early twenty-first centuries, approximately twenty Americans become victims of intimate partner violence every minute.⁸

Domestic violence is a plague that can affect all aspects of victims' physical and emotional well-being.⁹ There are over seven million *reported* domestic violence incidents every year in the United States.¹⁰ Because domestic violence is an epidemic that not only affects the direct receiver of the violence, but also observers of the violence, the full impact of domestic violence on society may never be known.¹¹ Thus, batterers' children often become physical or psychological victims of domestic violence. For example, many children who observe domestic violence are highly likely to develop post-traumatic stress disorder, various anxiety disorders, severe

5. See Owens, *supra* note 3, at 567, 569, 575-77 (discussing how BIPs were designed to "reform batterer behavior").

6. See Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337, 369 (2015) (discussing how BIPs using the Duluth model can lead to abusers "sustain[ing] non-violent[t]" behavior); see also DAG MACLEOD ET AL., JUDICIAL COUNCIL OF CALIFORNIA, BATTERER INTERVENTION PROGRAMS IN CALIFORNIA: AN EVALUATION vi, (2008) [hereinafter BATTERER INTERVENTION PROGRAMS IN CALIFORNIA] (discussing how California's fifty-two week BIP program showed positive changes in program participants "along a number of dimensions including taking greater personal responsibility, understanding the effect of abuse on others, and anger management.").

7. SHELLY JACKSON ET AL., NAT'L INST. OF JUSTICE, OFF. OF JUST. PROGRAMS, U.S. DEPT' OF JUST., BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? iii (2003), <https://www.ncjrs.gov/pdffiles1/nij/195079.pdf> [hereinafter BATTERER INTERVENTION PROGRAMS] (concluding that BIPs in Florida and New York have had "little to no effect"); see also Ramsey, *supra* note 6, at 367.

8. Statistics, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, NACDV, <http://ncadv.org/learn-more/statistics> (last visited Mar. 30, 2017).

9. See Marilyn Bonem et al., *A Behavioral Approach to Understanding Domestic Violence: A Functional Assessment Based on Batterer-Identified Contingencies*, 1 THE J. OF BEHAVIOR ANALYSIS OF OFFENDER AND VICTIM TREATMENT AND PREVENTION 209, 210 (2008) ("domestic violence . . . disrupt[s] all aspects of a victim's life, jeopardizing social, psychological, and physical health.").

10. See *National Statistics Domestic Violence Fact Sheet* (2015), NAT'L COALITION AGAINST DOMESTIC VIOLENCE, NACDV, https://ncadv.org/assets/2497/domestic_violence.pdf.

11. Statistics, *supra* note 8 (stating that one in fifteen children are observers of intimate partner violence every year).

behavioral disorders, and various drug addictions.¹² Consequentially, domestic violence batterers pose a uniquely dangerous risk to society because even a few brief incidents of their rage can translate into years of suffering for their victims.

Because of the unique risk that domestic violence batterers pose to their present and future victims, a more precise and effective national approach to sentencing and, possibly, rehabilitating domestic violence abusers is needed and long overdue. Psychological research and batterer assessment studies have suggested that many domestic violence offenders exhibit mild to severe symptoms of behavioral-personality disorders.¹³ Behavioral-personality disorders (also referred to as “personality disorders” and “conduct disorders”) are psychosocial disorders that can cause affected individuals to react with abusive behavior when they are faced with painful thoughts and emotions.¹⁴ Thus, individuals with personality disorders will exhibit behavior that deviates significantly from societal norms.¹⁵

While current state-mandated BIPs successfully rehabilitate some batterers, these programs will likely fail to rehabilitate batterers with personality disorders. Cognitive Behavioral Therapy (“CBT”) has been proven to rehabilitate domestic violence offenders with personality disorders.¹⁶ However, there exists particularly heinous offenders, who must

12. *Children and Domestic Violence*, NCTSN, NAT'L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/content/children-and-domestic-violence> (last visited Nov. 17, 2017).

13. See Bonem et al., *supra* note 9, at 215. “Approximately half of partner violent men in primarily court-mandated clinical samples possess prominent personality disorder traits, with even more showing relevant signs and features of these conditions.” Casey T. Taft et al., *Personality, Interpersonal, and Motivational Predictors of the Working Alliance in Group Cognitive-Behavioral Therapy for Partner Violent Men*, 72 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 349, 349 (2004).

14. See generally Derrick R. Tollefson, *A Mind-Body Approach to Domestic Violence Perpetrator Treatment: Program Overview and Preliminary Outcomes*, 18 J. of AGGRESSION, MALTREATMENT & TRAUMA 17, 22 (2009) (discussing that the “root cause” of abusive behavior can be found in the “Identity System” of an abuser). Abuser rehabilitation should focus on bringing the abuser’s Identity System to a “resting” state in which normal, natural thought does not lead to “tension and overwhelming emotions.” See *id.* at 22, 25; see also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 461 (American Psychiatric Publishing, 5th ed. 2013) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS] (explaining that “[d]isruptive, impulse-control, and conduct disorders include conditions involving problems of self-control of emotions and behaviors” that are unique in manifesting through aggressive behavior).

15. Men are much more likely than women to exhibit symptoms of behavioral disorders. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 14, at 461.

16. Mark W. Lipsey et al., *Effects of Cognitive-Behavioral Programs for Criminal Offender*, 6 CAMPBELL SYSTEMATIC REVIEWS, Aug. 2007, at 23 (stating that there is “little doubt that CBT is capable of producing significant reductions in the recidivism of even high risk offenders under favorable conditions.”).

be sentenced to state prison for the safety of their victims and society.¹⁷ Therefore, in the interest of justice, domestic violence would be more effectively eradicated if every act of domestic violence were charged as a felony, so that prosecutors could have the discretion to advocate for state prison sentences that may be needed for offenders with severe personality disorders or any particularly dangerous batterer.

In order to clearly explain the need for domestic violence policy reform, this Note is divided into three main parts. The first part of this Note explains why CBT can rehabilitate domestic offenders that exhibit personality disorders. The second part of this Note explains why BIPs are not the most ideal rehabilitation method for all domestic violence abusers. The third part of this Note argues that the sentencing phase of a domestic violence trial should be an extensive assessment into batterers' personalities and criminal acts to determine the most appropriate sentence for convicted domestic violence defendants.

II. COGNITIVE BEHAVIORAL THERAPY AS AN EFFECTIVE BATTERER REHABILITATION METHOD

Psychological research, utilizing Behavioral Assessment Tools,¹⁸ has shown that many batterers exhibit symptoms of personality disorders.¹⁹ Personality disorders that affect an individual's conduct are more precisely referred to as disruptive disorders, impulse-control disorders, and conduct disorders.²⁰ Affected individuals are known to become "easily annoyed,"²¹ poorly deal with frustration,²² and "misperceive the intentions of others as more hostile and threatening than is the case."²³ Common personality disorders that cause the affected individual to "violate the rights of others" include "oppositional defiant disorder, intermittent explosive disorder, antisocial personality disorder, and conduct disorder."

A personality disorder is not just diagnosed by its type, but also by the level of impairment that the personality disorder is causing an individual.²⁴

17. See *infra* Part IV (analyzing the corporal injury requirements to be able to hold a defendant to a felony standard of accountability).

18. See Bonem et al., *supra* note 9, at 216 (discussing how Behavioral Assessment Tools are useful as a "summary of batterer's perceptions of abuse").

19. See Taft et al., *supra* note 13, at 349.

20. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 14, at 461.

21. *Id.* at 462.

22. *Id.* at 464.

23. *Id.* at 472-73.

24. See *id.* at 775.

The *Diagnostic and Statistical Manual Of Mental Disorders* uses a five-point scale (starting at zero and ending at four) to classify the level (i.e., the “degree”) an individual is impaired.²⁵ The five-point scale assesses impairment based in four categories: identity, self-direction, empathy, and intimacy.²⁶ If an individual is assessed to be at a level of zero for all four categories, the individual is usually not impaired by a personality disorder.²⁷ On the other extreme, if an individual is assessed at a level four in all categories, the individual is said to exhibit psychotic tendencies and is diagnosed as being a danger to others.²⁸

Because of the wide range and levels of personality disorders that can exist in affected individuals, proper treatment can never begin without proper assessment.²⁹ Proper Batterer Assessment Tools are particularly necessary because personality disorders are known to begin during childhood.³⁰ Therefore, proper treatment of a personality disorder will always examine the “root cause” of that disorder.³¹

Successful CBT will commonly target the abuser’s Identity System, which can be thought of as a “holistic system responsible for regulating [an individual’s] mind-body state.”³² An individual’s Identity System is responsible for maintaining self-esteem and controls how an individual

25. *Id.* at 775-78.

26. The “Identity” category is the assessment of an affected individual’s self -esteem. *Id.* The “Self-direction” category is the assessment of an affected individual’s ability to set short and long-term goals and an affected individual’s ability to accomplish those goals. *Id.* The “Empathy” category is an assessment of an affected individual’s ability to show empathy towards others. *Id.* The “Intimacy” category is an assessment of an affected individual’s ability to maintain a cooperative relationship. *Id.*

27. *Id.* at 775.

28. *Id.* at 778.

29. See Bonem et al., *supra* note 9, at 216 (stating that Behavioral Assessment Tools attempt “to approach assessment and treatment avoiding the pitfalls of a reliance on personality constructs.”).

30. See Bruce D. Perry, *Applying Principles of Neurodevelopment Clinical Work with Maltreated and Traumatized Children*, in *WORKING WITH TRAUMATIZED YOUTH IN WELFARE* 27, 29 (Nancy Boyd Webb ed., The Guilford Press, 2006) (discussing how chaos and traumatic stress, during childhood, can lead to lasting behavioral and cognitive malfunctions).

31. See Tollefson, *supra* note 14, at 21-22 (discussing that the “root cause of [domestic violence] lies in understanding the mind-body state of the perpetrator before his aggressive outburst.”). Tollefson’s Mind-Body approach follows the components of typical CBT, but differs in that Tollefson’s method is premised on the client being constantly connected to “a wellspring of healing, goodness, and wisdom.” See *id.* at 22. This Note only focuses on the reasoning of Tollefson’s method so that the reader can understand the rationale underlying this Note’s policy arguments.

32. See *id.* at 21-22.

experiences, tolerates, and regulates a full range of emotions.³³ CBT allows participants to “effectively control and manage both their internal emotional and physiological states.”³⁴ CBT also allows batterers to become “in tune” with their reaction to stressful events, so that batterers can realize that it is their own Identity System that is creating unnecessary “tension and overwhelming emotions” when they face stressful events.³⁵ Thus, many CBT participants ultimately realize that their own Identity Systems cause them to “feel damaged”³⁶ and react with violence.

Successful CBT participants will ultimately learn that the overwhelming emotions they feel are not “reflective of reality.”³⁷ Because batterers with personality disorders often associate negative emotions with seemingly normal events,³⁸ CBT allows abusers to consciously connect with “negative[ly] associated” emotions and with the source of the negativity.³⁹

CBT’s goal is to have abusers realize that these negative associations are cluttering their mind and hindering the “natural functioning” of their Identity Systems.⁴⁰ Towards the end of proper CBT, abusers become aware of the triggers of their negative emotions that led them to feel the need to control others with force and violence and, ultimately, caused them to have dysfunctional relationships.⁴¹ Rehabilitated batterers become aware that their Identity Systems were causing “dysregulated internal emotions.”⁴² Thus, CBT does not *teach* batterers alternative behaviors, but allows batterers to experience rational thought after dissociating negative emotions from traumatic events. Rehabilitated batterers will realize that their intimate partners were innocent bystanders to the batterers’ irrational thought process.

When rehabilitated batterers are faced with negative emotions, instead of making irrational associations, rehabilitated batterers are able to avoid

33. See *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, *supra* note 14, at 775.

34. See Tollefson, *supra* note 14, at 24.

35. See *id.* at 25.

36. See *id.* at 28.

37. See *id.*

38. See *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, *supra* note 14, at 472-73 (stating that “aggressive individuals with conduct disorder frequently misperceive the intentions of others as more hostile and threatening than is the case and respond with aggression that they then feel is reasonable and justified.”).

39. See Tollefson, *supra* note 14, at 28.

40. See *id.* at 31 (stating that abusers’ Identity Systems impair their “natural functioning”).

41. See *id.* at 36.

42. See *id.* at 25.

resorting to violence because they are capable of solving interpersonal conflicts through abstract thinking and causal reasoning.⁴³ Positive results of CBT leave psychologists with “little doubt that CBT is capable of producing significant reductions in the recidivism of even high risk offenders under favorable conditions.”⁴⁴

III. THE FLAWS OF BATTERER INTERVENTION PROGRAMS

Unlike CBT, BIPs have been widely implemented since the late twentieth century.⁴⁵ During this time, domestic violence was viewed as a “private matter,” and family reconciliation was the objective of domestic violence policy.⁴⁶

By the early 1980s, states began to recognize domestic violence as a crime.⁴⁷ However, even in the 1980s, domestic violence abusers were seldom criminally punished;⁴⁸ thus, BIPs developed as an alternative tool to hold domestic violence abusers accountable for their violence.⁴⁹ BIPs are still used in many jurisdictions as an alternative to incarceration.⁵⁰

One of the first BIP models developed in the late twentieth century was the Duluth Model.⁵¹ The Duluth Model views domestic violence as a symptom of male privilege and a product of the male desire to exert dominance and control over women.⁵² Today, many states have

43. See Lipsey et al., *supra* note 16, at 5 (stating that “Cognitive skills training aims to teach such thinking skills as interpersonal problem-solving . . . abstract thinking, critical reasoning, causal thinking, goal setting, long-term planning, and perspective taking.”).

44. *Id.* at 23; see also, e.g., Tollefson, *supra* note 14, at 41 (reporting an attrition rate of only seven percent, and a recidivism rate of only four percent).

45. Owens, *supra* note 3, at 574-75.

46. *Id.* at 574.

47. See Amanda Dekki, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT. 549, 554 (2004).

48. *Id.* at 558-59 (discussing how domestic arrests were seldom made in the twentieth century because domestic violence was considered a simple assault and battery (a misdemeanor)).

49. Johnna Rizza, *Beyond Duluth: A Broad Spectrum of Treatment for a Broad Spectrum of Domestic Violence*, 70 MONT. L. REV. 125, 130 (2009).

50. See, e.g., FLA. STAT. ANN § 741.281 (West, Westlaw through 2017 First Reg. Sess. and Special “A” Sess. of the 25th Leg.); UTAH CODE ANN. § 77-36-5.1 (West, Westlaw through 2017 Gen. Sess.).

51. See Rizza, *supra* note 49, at 130 (discussing how the Duluth Model began in the late twentieth century). When the concept of domestic violence as a crime first emerged, the “Duluth group developed the most effective and treatment program possible.” *Id.*

52. See *id.*; see also Ramsey, *supra* note 6, at 372 (discussing that the Duluth Model is based on the ideology that domestic abusers are primarily sexist men who have never learned to respect women; some psychologists note that the Duluth model is simply based on openly shaming the abuser in an attempt to rid the abuser from sexist ideologies).

implemented some variation of the Duluth Model in their BIPs.⁵³ In fact, forty-five states have mandated at least some components of the Duluth model for BIPs that operate in their states.⁵⁴

The Duluth BIP is composed of a series of group classes that meet at least once a week for approximately twenty-six weeks.⁵⁵ Because the Duluth Model focuses its curriculum on accountability, the first week of a Duluth BIP will consist of the abusers thinking of ways they can modify their violent behavior.⁵⁶ The Duluth Model purports to reject the idea that anger-management will improve batterer behavior.⁵⁷ However, Duluth BIPs still focus on teaching batterers alternative behaviors.⁵⁸

Even though BIPs were designed to rehabilitate batterers, most convicted batterers that are sent to court-mandated Duluth Model BIPs are never asked *why* they resorted to violence.⁵⁹ In fact, if batterers deny their violent acts or are unwilling to change, they are often moved to a “lectured-based” curriculum or reported to probation for noncompliance.⁶⁰

The curriculum itself does not give batterers much of a voice, either. Each Duluth-based class usually begins with a demonstration of certain domestic scenarios that would cause typical batterers to react violently.⁶¹ Batterers then react to those scenarios and think of alternative behaviors, even if the batterers do not believe the scenarios are indicative of the issues they face with their intimate partners.⁶² The batterers must, then, act out those alternative behaviors in front of the entire group.⁶³ If any batterer objects to a proposed non-violent alternative behavior, that batterer could be dismissed from the program and reported to probation.⁶⁴

53. See Dekki, *supra* note 47, at 583.

54. PATRICIA CLUSS & ALINA BODEA, THE EFFECTIVENESS OF BATTERER INTERVENTION PROGRAMS: A LITERATURE REVIEW & RECOMMENDATIONS FOR NEXT STEPS [ABR. VERSION] 8, (Univ. of Pittsburgh, Mar. 2011), <http://fisafoundation.org/wp-content/uploads/2011/10/BIPsEffectiveness.pdf>.

55. See Ramsey, *supra* note 6, at 365.

56. *See id.*

57. *See id.* at 364.

58. *See id.* at 365.

59. *See id.* (stating that while BIP “[p]articipants are screened . . . abusers are not allowed to lean on . . . factors as excuses” for their abusive actions).

60. *See id.*; *see also, e.g.*, FLA. STAT. ANN § 741.281 (West, Westlaw through 2017 First Reg. Sess. and Special “A” Sess. of the 25th Leg.) (stating that courts can impose a sentence of imprisonment if any domestic batterer “does not qualify” for a program).

61. Dekki, *supra* note 47, at 569-70.

62. *Id.*

63. *Id.* at 569-70; *Men’s Nonviolence Classes*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/change/mens-nonviolence.html> (last visited Nov. 1, 2017).

64. Dekki, *supra* note 47, at 570, 572.

Some batterers, however, do not need to be formally asked to leave the program; Duluth-based programs have attrition rates ranging from nearly forty to sixty percent.⁶⁵ Upon completion of the program, recidivism rates are known to be as high as seventy-five percent⁶⁶ and as low as fifteen percent.⁶⁷ In a 2003 study conducted by the US Department of Justice (“DOJ”), the DOJ concluded that BIPs had “little to no effect” on recidivism or the batterers’ attitudes towards domestic violence.⁶⁸ Notably, BIPs in California, a state that has moved away from the pure Duluth Model,⁶⁹ have an overall positive effect on domestic violence recidivism.⁷⁰

Nevertheless, some male batterers do need BIPs to provide them with rigorous instruction on the proper treatment of women. For too long misogynistic men have been plaguing their intimate partners and families with violent outbursts that stem from their inherent conviction of gender superiority. These men would benefit from continued Duluth Model BIP classes that run significantly longer than twenty-six weeks.

On the other end of the spectrum, there are men and women, who are affected with behavioral personality disorders, and cannot regulate their emotions or violent outbursts no matter what class they are mandated to participate in.⁷¹ These batterers need to understand why they are behaving the way they do before any significant behavioral change takes place.⁷²

Therefore, the wide range of results of most BIPs is most likely due to many batterers not belonging in BIPs. If the justice system assessed these batterers before they were sent to BIPs, then the risk of these batterers being improperly subject to a BIP would be greatly reduced.

65. Julia C. Babcock et al., *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023, 1028-29 (2004).

66. See Ramsey, *supra* note 6, at 367.

67. See Dekki, *supra* note 47, at 573 (discussing that “direct physical abuse of victims stopped in 53% to 85% of cases””).

68. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, DO BATTERER INTERVENTION PROGRAMS WORK? TWO STUDIES 1 (Sept. 2003), www.ncjrs.gov/pdffiles1/nij/200331.pdf.

69. See BATTERER INTERVENTION PROGRAMS IN CALIFORNIA, *supra* note 6, at 33 (discussing how California’s fifty-two week batterer intervention program includes mandatory counseling, which is a very different approach from the Duluth class model).

70. *See id.* at 79.

71. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 14, at 472-73 (stating that “aggressive individuals with conduct disorder frequently misperceive the intentions of others as more hostile and threatening than is the case and respond with aggression that they then feel is reasonable and justified”).

72. See Tollefson, *supra* note 14, at 31 (stating that abusers’ Identity System impairs their “natural functioning”). Thus, abusers cannot understand or stop their violent behavior until they learn to function naturally.

IV. RESTRUCTURING DOMESTIC VIOLENCE PROSECUTORIAL PROCEDURES TO ENSURE REHABILITATION OF BATTERERS AND VICTIM SAFETY

The first step to proper domestic violence sentencing reform would be to charge every act of domestic violence as a felony. Some states often differentiate between misdemeanor and felony domestic violence.⁷³ In most states, in order for prosecutors to be able to charge domestic violence as a felony, the violence must have resulted in some sort of physical injury.⁷⁴

Given the fact that many domestic violence victims live in constant fear of their abusers, the idea that signs of physical injury must exist in order for prosecutors to be able to hold a defendant to a felony standard of accountability is unsettling. For instance, injuries like bruising, swelling, and redness can be difficult to see directly after an incident, but these injuries still constitute “corporal injury of the traumatic condition.”⁷⁵ Also, because many victims of violence live in fear of reporting their abusers,⁷⁶ the incident that is reported is reasonably and most likely not the first incident.

Because many domestic violence abusers can exhibit high levels of psychological impairment, the justice system must not allow any known abuser to be released on low misdemeanor bail without the opportunity for a prosecutor to, at the very least, assess the abuser’s crime to the greatest extent possible.

A felony charge would be most appropriate because it would provide a heightened sense of protection to the victim. If victims knew that their domestic abusers could spend over a year in state prison, and not be released on misdemeanor bail, victims would, most likely, be more willing to cooperate with the prosecution⁷⁷ and agree to receive and enforce emergency restraining orders.

Because many domestic violence offenders suffer from personality disorders,⁷⁸ prosecutors need the discretion to issue emergency and long-term restraining orders not only to the victim, but to anyone that is

73. Compare CAL. PENAL CODE § 243(e)(1) (misdemeanor domestic violence) with CAL. PENAL Code § 273.5 (felony domestic violence requiring “corporal injury resulting in traumatic condition”).

74. See CAL. PENAL CODE § 273.5 (West 2014); FLA. STAT. ANN § 784.041 (West 2007).

75. 17A CAL. JUR. 3D § 478 (2017) (explaining that the injury needed to satisfy the “traumatic condition” element of assault and battery in California can be as simple as a bruise).

76. See Dekki, *supra* note 47, at 555-57 (discussing how many victims of domestic violence often fear retaliation from their abusers).

77. See, e.g., Lotan, *supra* note 2 (discussing how the uncooperative victim was severely abused by a repeat domestic violence offender who served little time, but refused to cooperate with prosecution).

78. See Ramsey, *supra* note 6, at 387.

acquainted with the victim, at any time within the statute of limitations of the offense. A verdict in a domestic violence trial can take several months to obtain. In order to ensure victims their safety from batterers, who could possess severe symptoms of a violent personality disorder,⁷⁹ victims must be entitled to as many degrees of separation between them and their abusers as necessary and feasible.⁸⁰

Even if the abuser was a man, without a personality disorder, who felt the need to control his female victim, restraining orders for the victim's acquaintances would definitely be needed.⁸¹ Misogynistic, violent males could stop at nothing to intimidate, frustrate, and threaten their victims throughout trial and beyond sentencing.

The post-trial sentencing phase is the most critical phase of prosecution for any domestic violence defendant because the victim's physical life and emotional well-being lies in the hands of the sentencing court. Every domestic violence trial would be best adjudicated if specialized sentencing guidelines were followed to ensure the most appropriate sentence can be imposed upon a convicted defendant.

During sentencing, the judge could use character evidence, propensity evidence, and psychological experts' testimony, to determine if the convicted defendant should be sentenced to CBT, a BIP, state prison, or some other more appropriate sentence. These sentencing options would require that the prosecution's psychological expert examine the defendant and conduct a thorough post-conviction screening of the defendant. These experts can assess whether the defendant is a good candidate for CBT or a BIP, and then present their analysis to the court. The defense could preserve its interest by presenting its own expert's findings, and the attorneys would be left to advocate for the sentence they feel is best suited for the convicted defendant.

Presumably, in many cases, neither CBT nor BIPs would be the most appropriate sentence. Some personality disorders effect individuals' ability to show any remorse or empathy, leaving the affected individuals to exhibit psychotic tendencies and remain an extreme danger to their victims.⁸² These batterers are so dangerous that a state prison sentence, exceeding a

79. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 14, at 461-62.

80. Twenty percent of intimate partner violence related homicides did not result in the death of the intimate partner, "but family members, friends, neighbors, persons who intervened, law enforcement, or bystanders." *Statistics, supra* note 8.

81. "[Seventy-two] percent of all murder-suicides involve an intimate partner." *See id.*

82. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 14, at 469-72.

year and followed by strict orders of parole, would be the only plausible way to fully protect the victim and society.

In other cases, a BIP could be appropriate, but the crime itself might be so heinous that justice might call for the BIP to be administered during a state prison sentence.

Notably, justice might not call for state prison, CBT, or a BIP. In some cases, post-conviction assessment of the batterer could reveal a severe substance abuse issue that affects the defendant's behavior. In these instances, justice might call for a drug rehabilitation program. And yet in other cases, a convicted domestic violence offender could just need basic anger management courses to solely learn alternative behaviors and regulate aggression.

No matter what the advocated sentence is, the court can use this proposed sentencing method to choose the most appropriate sentence for all types of domestic violence offenders, and, therefore, avoid ineffective rehabilitation that will, inevitably, lead to increased recidivism.

V. CONCLUSION

Because every convicted domestic violence defendant would be convicted of a felony, any attrition or non-compliance with alternative sentencing would subject the defendant to state prison. If convicted batterers were given alternative sentences, such as CBTs or BIPs, then the slightest non-compliance must not be tolerated.

Felony sentencing models are focused on punishing convicted criminals and protecting victims. Because, however, society has deemed it acceptable that domestic violence batterers be given a chance to rehabilitate, rehabilitation must be strictly enforced with little tolerance of non-compliance. Therefore, as this author's wise mentor, Los Angeles County Deputy District Attorney Anastasia Sagorsky, once argued to the Court, "when [felony] defendants fail to comply with court-mandated

programs that are meant to *help* them, then there is only one program available to them: that program is state prison.”⁸³

*Mina Elmasry**

83. Telephone Interview with Anastasia Sagorsky, Deputy District Attorney, Los Angeles County District Attorney’s Office (June 1, 2017).

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