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## Understanding the effects of the court community on the processing of domestic violence cases

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**UNDERSTANDING THE EFFECTS OF THE COURT COMMUNITY  
ON THE PROCESSING OF DOMESTIC VIOLENCE CASES**

**A Dissertation Presented**

**by**

**Kathleen Erin Currul-Dykeman**

**to**

**The College of Criminal Justice**

**In partial fulfillment of the requirements  
for the degree of**

**Doctor of Philosophy**

**in the field of**

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**Northeastern University**

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**June, 2010**

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**ABSTRACT OF DISSERTATION**

Submitted in partial fulfillment of the requirements for the degree of  
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## **Abstract**

Domestic violence has been mistreated by the criminal justice system for years. These cases were ignored by police officers and neglected by courts. Hardly viewed as criminal, domestic violence was treated as a private family matter. Laws governing the criminal justice system response to domestic violence changed through the passage of mandated arrest and prosecution policies. While arrest rates, for domestic violence, increased throughout the 1990s and 2000s, these cases continue to receive lenient treatment by our courts. Most of these cases are resolved with dismissals. The purpose of this study is to explore if the court community literature can offer a possible explanation to this problem. Using feminist jurisprudence as a framework in which to understand how traditional and specialized courts differentially assess evidence and make decisions, this study analyzes the local legal culture of two courts, a traditional court and a specialized problem solving court to understand how they discuss and process domestic violence cases differently.

Two district courts of similar size, demographics, and economic conditions are compared. One received a grant from the National Institute of Justice which allowed it to create a specialized domestic violence court. The second, the comparison court, did not and is representative of a traditional court model. Both courts had very busy dockets and were located in small urban cities. The primary methodology employed by this study was twenty three semi structure interviews with court workgroup members. This qualitative approach allowed for in depth interviews which generated detail about each court's culture and processes. These

interviews were supplemented with in court observations which served to validate and strengthen the findings.

This study revealed that very different local legal cultures can exist in courtrooms in neighboring communities. Talking to the members of these court workgroups, I discovered a very different cohesion of people in each court. The goals of the courts were varied and were detrimental to the prosecuting of domestic violence cases. The way that the courts typified the cases and the resulting going rates were representative of these goals. The judges were responsible for establishing and communicating the goals of each session to the attorneys. Finally, the law was used differentially by the court workgroup members, and especially by their judges, in the pursuit of the goals of their court. The qualitative method this study employed allowed for an in-depth exploration of the nuances of each culture. It attempts to bring to the domestic violence literature a novel explanation for why domestic violence cases suffer in our nation's courts. By talking to the court workgroup members, it was revealed that many of them were frustrated with the results they were achieving but were somewhat powerless to control them. Additionally, this study examines how a specialized session can better serve the needs of victims of domestic violence and the community at-large. The specialized session called for different goals than the traditional courts and a different theory of punishment. Rather than focusing on the docket and punitive measures, specialized sessions can focus on the parties and their community, and seek to alleviate the social problem through a rehabilitative model.

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Finally, I would like to thank all the legal pioneers who have challenged the status quo and insisted on change. I have been thinking about and working on the issues that surround domestic violence since 1993 and am convinced that there is much work to be done. One day the social climate of our lives will no longer support this social problem, but that seems to be in the distant future.

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## Introduction

Domestic violence is a pattern of controlling and coercive behaviors used by one person against another to exert power and maintain control over them (U.S. Department of Justice, 2010). It can include physical, emotional, verbal, financial, and sexual abuse. Incidence of domestic violence occurs in both heterosexual and same-sex partnerships and can impact communities of every race, ethnicity, and socio-economic status. While domestic violence impacts a diverse population of individuals, it impacts women disproportionately over men. A recent study found that, “85 percent of the victims were female with a male batterer. The other 15 percent includes intimate partner violence in gay and lesbian relationships and men who were battered by a female partner” (Rennison, 2003). Additionally, the NCVS estimated that between 1993 and 1998, 22 percent of all violent crimes against women and 3 percent of all violent crimes against men took place between intimate partners. Likewise, the National Violence Against Women Survey stated that for women over the age of 18, the prevalence rate was 25 percent for women and 7.6 percent for men. So, while domestic violence is a social problem that impacts all members of our community, it victimizes women most often. Thus, I will be discussing the social problem from that perspective.

Women have been enduring physical abuse by their husbands and intimate partners for hundreds of years (Martin, 1976). In the early 1800s, it was lawful for husbands to physically beat their wives (Jones, 2000). Indeed, the Supreme Court of Mississippi held that a “husband had a legitimate right to discipline his wife physically, as long as it was done in a moderate manner with a stick no thicker than his thumb” (*Bradley v State*, 1 Miss (1 Walker) 156 (Miss.

1824)). By the late 1800s, Maryland, Delaware, and Oregon had enacted laws that made “wife-beating a punishable offense” (Buzawa & Buzawa, 2003). However, the issue was overshadowed by the Great Depression at the beginning of the 1900s (Maytal, 2008) and there was little improvement in preventing or punishing domestic violence by the criminal justice system.

Legal changes for victims of domestic violence did not begin again until the 1960s. These changes came in response to the woman’s movement of the 1960s and 1970s, as well as lawsuits brought against police departments that refused to protect and respond to abused women (Belknap, 1995; Schneider, 2000; Sherman 1992). The typical response of police officers to domestic incidents was to encourage the batterers “cool off” before they returned to their homes (Maytal, 2008). This left victims of domestic violence alone to deal with their battering husbands.

A civil lawsuit brought by a domestic violence victim, Tracey Thurman, against the police officers of the City where she resided brought national attention to the failures of the police to adequately respond to domestic violence. The facts of the case, *Thurman v City of Torrington* (1984), are as follows: between October 1982 and June 1983, Tracey Thurman notified the police department in the City of Torrington about her estranged husband’s repeated acts of violence and threatening behavior numerous times. Many of the incidents took place before independent witnesses and several of them took place in the presence of police officers. On June 10, 1983, Tracey Thurman’s estranged husband came to the residence where she was staying with their young son and another couple. She called the police for help and after waiting twenty-five minutes with no response, she went outside in an effort to quiet her husband down and ask him to leave the premises. He stabbed her several times in the neck, chest, and throat area. When police officers arrived, he dropped the bloody knife, went into the house, picked up

their young son and threw the child on the bloody body of his mother, Tracey Thurman. He then proceeded to kick Tracey in the head several times and walk about the yard. EMTs placed Tracey on a stretcher and her husband again attempted to attack her. Then the police finally placed the husband under arrest. Tracey Thurman sued the City of Torrington for their refusal to respond and protect her. She claimed that this refusal amounted to a denial of her equal protection rights on the basis of gender. She was successful and was awarded \$2.3 million dollars in compensatory damages.<sup>1</sup>

As cities began experimenting with new policies to encourage the police to make arrests in domestic violence situations in the early 1980s, Lawrence Sherman and Richard Berk conducted an experiment in Minneapolis, Minnesota to test the effectiveness of mandatory arrest programs. As 911 calls came into the police department, they randomly assigned the responding police officers to one of three options: 1) arrest the batterer; 2) separate the parties and institute a brief cooling off period; 3) engage in curbside counseling with the parties. They then waited for six months and investigated which of these offenders recidivated. They found that the defendants that were arrested reoffended less than the other types of offenders over the sixth month follow-up period (Sherman and Berk, 1984). This dramatic finding, coupled with the changes in the political climate and the increased civil liability for police departments to address domestic violence, caused police departments nation-wide to adopt discretion-limiting policies. Such policies mandated arrest as the preferred response to domestic violence calls for help.

By the early 1990s, twenty-one states and the District of Columbia had adopted mandatory or quasi-mandatory arrest policies (Buzawa & Buzawa, 2003). Studies that have evaluated their effectiveness since the original Sherman and Berk experiment in 1984 are mixed

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<sup>1</sup> <http://www.libraryindex.com/pages/2074/Domestic-Violence-Laws-Courts-LANDMARK-LEGAL-DECISIONS.html>>Domestic Violence—The Laws and the Courts - Landmark Legal Decisions</a>

(Bourg & Stock, 1993; Mignon & Holmes, 1995; Buzawa & Hoatling, 2000; Robinson & Chandek, 2000; Smith, 2001). Despite changes in police practices, domestic violence crimes still affect a large segment of our population. While, domestic violence is a crime that goes underreported due to the private circumstance of its occurrence it has been estimated that there are approximately 589,000 incidents of nonfatal domestic violence incidents each year (US Department of Justice, 2003). In over 85 percent of domestic violence occurrences, the victims are women (US Department of Justice, 2003). Among National Violence against Women Survey participants, the lifetime prevalence of all intimate partner victimization for women age 18 and older was nearly 25 percent and only 7.6 percent for men (Tjaden & Thoennes, 2000).

Mandated arrest policies shifted the point of discretion in the criminal justice system response from the police to the court workgroup. More batterers are arrested for domestic violence offenses but they continue to be treated leniently by the courts, often having their charges dismissed outright. Research has shown that prosecutors are still handling domestic violence cases leniently (Buzawa, 2003; Henning & Feder, 2005; Martin, 1994; Mignon & Holmes, 1995). Studies have revealed that simple assault prosecutions for domestic violence cases were significantly lower than when the assault took place between strangers (Martin, 1994). Other studies have shown high dismissal rates for domestic violence cases. Mignon and Holmes (1995) found that 66 percent of the cases resulted in dismissals, and Martin (1994) found 79 percent. Kingsnorth, MacIntosh, and Wentworth (1999) blamed this trend on the fact that prosecutors require a higher standard of corroboration in crimes between intimates than they do in stranger assaults.

The courts have made some efforts to deal with the high dismissal rates found among domestic violence cases. No drop policies were widely instituted by prosecuting offices in the

1990s who thought that their traditional victim dependent policies were ineffective. These policies reduced the discretion exercised by prosecutors when moving to dismiss domestic violence cases early in the process. In their best light, studies have found that these policies have helped reduce biases against victims on the basis of race, social class, and history (Stark, 2004). As of 1996, 66% of large jurisdictions had adopted no drop policies (Hotaling and Buzawa, 2001). Despite their widespread adoption, no drop policies have failed to improve court responses to domestic violence. The literature has shown that victims report these policies to be disempowering, entrapping, and coercive (Ford, 2003; McDermott and Garofalo, 2004; Mills, 1999, 2003). Finally, Buzawa and Buzawa (2003) report that even in jurisdictions where these policies have been adopted domestic violence cases still suffer from high dismissal rates.

Most recently, courts have attempted to combat their weak response problem by creating specialized domestic violence courts. Approximately three hundred “domestic violence courts” have been instituted across the nation (Keilitz, 2000). Domestic violence courts are specialized problem solving courts which have a more “social-problem approach” to crime (Mirchandani, 2005). There are many different types of specialized courts. Some other examples are drug courts; gun courts; and re-entry courts. While the focus of traditional courts is on efficiency, speed, and adjudication, specialized courts “attempt to fix broken systems” with hopes to shape the “future behavior of their litigants...and to ensure the future well-being of their communities” (Berman & Feinblatt, 2001). Problem solving courts accomplish this by changing their focus from a retributive to a rehabilitative model of justice. Instead of attempting to dispose of cases and punish the offender, these courts are more likely to leave cases open and maintain ongoing interactions with offenders in the hopes of getting offenders to agree to therapeutic programs

which address the root causes of their violence. Depending on the type of court, victim services and counseling are also often central in these models.

The domestic violence literature is rich with research exploring how the criminal justice system generally treats these types of cases. Numerous studies have explored the victim's perspectives on the challenges of prosecuting domestic violence cases (Bachman, 1998; Tjaden and Thoennes, 2000). Other studies have analyzed the decisions making of judges and prosecutors individually (Ptcek, 1999; Stark 2004). What is missing from the literature is an analysis of how the shared beliefs of the court community about domestic violence influence how court actors process cases. No research has examined whether not problem solving courts change the court community, resulting in different legal outcomes in domestic violence cases. The court community literature offers a novel framework in which to examine the problems that courts continue to face in processing domestic violence cases. This literature suggests that limitations in the criminal justice systems' ability to address domestic violence is not merely due to deficiencies in the law, but is a product of court culture.

Court communities exist in all courts (Eisenstein, Flemming, and Nardulli, 1999). A community is formed between its regular players, or court workgroup members, who work together day in and day out over a long period. Also known as the triad: judges; prosecutors; and defense attorneys; form relationships with each other which results in interdependence. Court workgroup members produce a local legal culture characterized by traditions, values, and norms (Eisenstein, Flemming, and Nardulli, 1999). Through day-to-day interactions, workgroup members learn how to prioritize and resolve their cases (Galanter, 1974). Through a process of symbolic interactionism, meaning is derived through the "agreements" they make with one another. For example, how the judge speaks to an attorney, whether a request for a continuance

is granted, or how often an attorney is able to work out a plea is the product of court workgroup cultures. Each interaction has meaning and adds to the way in which individuals will comport themselves in future interactions (Ulmer, 1997). The traditions of a court are internalized by court workgroup members and are resistant to change. Indeed, attorneys find it in their own professional best interests to learn the traditions and values of a court and abide by them. Informal sanctions can result when attorneys choose to “rock the boat” (Eisenstein and Jacob, 1977).

Throughout this process, a set of informal rules are established and adopted by its court workgroup members. These rules vary among courthouses, and are shared through informal communication networks (Ulmer, 1995). Court workgroup members learn the value of a case and what the applicable average sentence is for that crime type in a particular courthouse. These standards are greatly influenced by the judges and what they determine is acceptable. Eventually, a going rate is established and promulgated, with rewards of efficiency to those who abide by the rules. Going rates are based on how a case is typified, which are shorthand ways that court workgroup members’ size up cases and then classify them as strong or weak (Myers & Hagan, 1979).

Domestic violence cases have a history of non-criminalization, leading to a tradition of dismissals and lenient treatment that has been internalized by court workgroup member and is resistant to change. Additionally, the standards that are used to evaluate criminal cases traditionally deem domestic violence cases to be weak. In addition to these standards, court workgroup members in traditional courts share a central goal of the efficient management of cases (Eisenstein, Flemming, and Nardulli, 1999). These workgroup members have been trained to move cases along and to prevent a backlog. It is more preferable to dispose of a case quickly

than to engage in lengthy motion hearings or trials. The goal of efficiency is believed to be a primary cause of why domestic violence cases are easily dismissed. These cases are traditionally not easy to resolve. They often involve conflicting facts and result in lengthy investigations and case preparations. As a result of the court community traditions around case efficiency, domestic violence cases continue to be treated leniently and the problem of domestic violence continues to persist in communities across the United States.

This study explores how court community traditions affect the processing of domestic violence cases in both a traditional court and a specialized problem solving court. Central to this inquiry is understanding whether specialized domestic violence courts can alter the local legal culture enough to impact the manner in which they contemplate and process domestic violence cases. The two courts under consideration in the present study exemplify two models of justice: a problem solving court (the specialized session) and a traditional court (the comparison court).

Feminist jurisprudence theory guides the present study. “Feminist jurisprudence is an examination of the relationship between law and society from the point of view of all women” (MacKinnon, 1983). Feminist scholars argue that the normative nature of our laws, coupled with a conservative ideology toward women and domestic violence, perpetuates the problems with case processing. In this light, modern jurisprudence represents a “masculine” model of justice in that the lives and experiences of women are not reflected in legal doctrine (West, 1988). The “Rule of Law” our legal system operates under focuses on the importance of objectivity. This objectivity, however, reflects the interests and values of male experience alone and thus is not truly objective (West, 1988). For example, the reliance on the evidentiary strength in domestic violence cases appears to be benign. However, feminist jurisprudence theory suggests that it is actually patriarchal in nature. Its failure to recognize and value the unique characteristics of

cases between intimate partners and women's unique experience in that context is not arbitrary (Schneider, 2000).

Additionally, women's unique connection to others is not traditionally recognized or valued by the law. The "connection thesis" states that women are connected to other human life and that it is central to who they are and how they operate and men are not (West, 1998). Men value individuation and separateness. This can have practical application when analyzing our courts' actions. Traditional courts accurately represent a masculine model of justice. They deal with cases individually and their primary goal is case efficiency. They employ seemingly normative standards to all case types regardless of applicability. This has failed to serve victims of domestic violence and has most often lead to high rates of dismissals. Instead, of searching to discover the causes of their inability to effectively handle these complex criminal matters, legal practitioners in court communities typify the cases as weak and dismiss them. For many of these practitioners it appears to be unimportant that the problem is not being addressed for they hardly consider domestic violence to be a pressing social problem.

Problem solving specialized courts represent a feminist model of justice. Specialized courts are characterized by different goals with more emphasis on case investigation and offender rehabilitation. They operate in unison with other community members (police, advocates, medical) in order to address the broader social problem as it impact their community. Similar to what feminists Carol Gilligan and Catharine MacKinnon called for "to transform our polity...from the alienated world of atomistic competition to an interconnected world of mutual cooperation" (McCormick Mitchell, 1984, 74-75). Specialized domestic violence courts are seeking remedies for the victim, the defendant (in the form of rehabilitation) and the community at large and are working in "unison" with other community members to achieve some form of

justice for all. Practitioners in these courts prioritize the problem of domestic violence. They recognize that it impacts women and the community at large and that addressing these complex cases is an important and valuable use of court time and resources (Williams, 1989). Offender rehabilitation is stressed because these defendants will likely remain members of their community and rehabilitation is a more promising option than short periods of incarceration.

Using a theoretical framework of feminist jurisprudence, this study critically examines the local legal cultures of two courts of similar size and demographics—one with a specialized domestic violence session and one which operates as a traditional model. The study's main goal is to capture the attributes of culture that impact the processing of domestic violence cases in these two court models. Specifically, Chapter 3 of this study seeks to discover how the courts' cultures were shaped and what attributes of each cultures impacted domestic violence case processing the most. Chapter 4 unveils what criteria were used by each court in order to typify their domestic violence cases as strong or weak. Additionally, it discusses the ramifications of this typification process. Chapter 5 discusses and compares the resulting going rates for domestic violence cases in each court. Finally, in Chapter 6, a legal analysis is conducted regarding how members of the court workgroup respond to and use the law to achieve their goals in different ways.

## **Chapter 1: The Criminal Justice System's Response to Domestic Violence and the Problem of Courts**

### **Challenges to the Identification and Prosecution of Domestic Violence**

Domestic violence crimes face a myriad of legal and social barriers to effective case processing. Crimes between intimates were rarely handled by the criminal justice system until the 1980s. Seen as a private family matter, batterers were routinely told to “cool off” or “take a walk” when confronted by a police officer who responded for assistance. These responses are no longer accepted as adequate. Mandated arrest and prosecution policies have been enacted and victim services have increased. However, domestic violence crimes still persist and our nation's courts still struggle with handling them.

Prior to the late 1970s, all but 14 states required police officers to witness a violent misdemeanor prior to making a warrantless arrest (Buzawa & Buzawa, 1996). Starting in the mid-1980s, legal changes were made to arrest requirements. These statutory changes followed the Sherman and Berk (1984) Minneapolis Domestic Violence Experiment (MDVE). Sherman and Berk first studied the deterrent impact of arrest on domestic violence offenders. In their study, offenders were randomly assigned to three groups: 1) mediation; 2) arrest; 3) an order to cool off and leave the premises. Sherman and Berk found that the batterers who were arrested were the least likely to recidivate. Soon thereafter, states began to enact exceptions to the misdemeanor arrest laws for domestic violence cases. Often called mandated arrest policies, police officers were told that the preferred response to an allegation of abuse between domestic partners was arrest, and that this could be based on probable cause. These arrest laws, if uniformly applied, were intended to hold more batterers accountable. By 1992, 47 states and the District of Columbia enacted statutes authorizing arrest in domestic violence misdemeanor cases

(Buzawa & Buzawa, 1996). Fourteen of these 47 states mandated arrest when the officer concluded that a crime involved domestic violence (Buzawa & Buzawa, 1996). Replication studies have yielded mixed results. Evaluation studies were conducted in: Minneapolis, Minnesota; Metro-Dade County, Florida; Colorado Springs, Colorado; Milwaukee, Wisconsin; Charlotte, North Carolina; and Omaha, Nebraska. These studies attempted to replicate the findings of the Sherman and Berk's (1984) study. Overall, it was found that while arrest did initially deter reoffending among employed men, it did not have the same impact among the unemployed men sampled, and in the long run, battering increased (Buzawa & Buzawa, 1992, 1996; Schmidt & Sherman, 1998; Stark, 1998; Zorza, 1998).

By the early 1990s, twenty one states and the District of Columbia had adopted mandatory or quasi mandatory arrest policies (Buzawa & Buzawa, 2003). Despite the movement toward mandating arrest, only a fraction of all domestic violence crimes actually result in an arrest. There are many possible explanations for this discrepancy. Women are less likely to call the police when the defendant is known to them (Bachman, 1998; Tjaden & Thoennes, 2000). When they do contact the police, arrest is unlikely. In a sample of women residing in a shelter, Coulter, Kuehnle, Byers, and Alfonso (1999) found that more than half of the women contacted the police, but less than one-quarter of the offenders were arrested. Additionally, Smith (2001) found that the presence of physical injury did not lead to a higher arrest rate. In a study where more than 60 percent of cases involved physical injury to the victim, only 28 percent resulted in arrest (Smith, 2001). Other studies have published arrest rates that include 29 percent (Bourg & Stock, 1993), 33 percent (Mignon & Holmes, 1995), 34 percent (Buzawa & Hoatling, 2000), and 36 percent (Robinson & Chandek, 2000) respectively. Indeed, arrest for domestic violence

crimes still only occurs in one-third of all reported cases. This is because police officers have great discretion when they respond to a scene and can still decide not to take any official action.

Arrest is only the first step in the criminal justice process. In order for the mandatory arrest policies to affect domestic violence case processing, the remainder of the criminal justice system must support the policy and be prepared to follow through (Buzawa & Buzawa, 2003). Prosecutors have discretion in how they choose to handle these cases in the courts. Public pressure for increased prosecution of domestic violence cases rose after the adoption of mandated arrest policies (Rebovich, 1996). In response to such pressure, prosecutors often chose to either dismiss cases early in the process or to adopt a method for prosecution that could be successful without the victim's cooperation (Cahn, 1992). In response, "no-drop" policies have been implemented by many jurisdictions in attempt to change the way that cases are handled by prosecutors (Lerman, 1981). Under these policies, the victim's role as a witness in the case is emphasized rather than her being treated as the complainant. The prosecution attempts to prosecute the defendant with or without the consent of the victim. This rationale relies on the concept that domestic violence is not just a crime against a person but is a crime against the public order of the state. These policies have been widely instituted in large jurisdictions. Rebovich (1996), noted that 66 percent of a sample of local prosecutors, in large jurisdictions (population over 250,000), had instituted no-drop policies.

Subsequent to the adoption of mandated arrest and prosecution policies, statistics revealed low rates of prosecution in domestic violence cases (Ames & Dunham, 2002). Early estimates reported that less than 10 percent of misdemeanor cases were prosecuted under the newly adopted policies (Fagan, 1989; Ford 1993; Schmidt & Steury, 1989; Sherman, 1992). Dutton (1995) reported that obtaining convictions and sentencing defendants were even rarer.

Still, Robbins (1999) found that no-drop policies have been “the single most effective method for getting domestic violence charges to stick” (p. 217). Several more recent studies have found that victims report that they perceive these policies as being disempowering, entrapping, and coercive (Ford, 2003; McDermott & Garofalo, 2004; Mills, 1999, 2003). Stark (2004) found that even though these policies have flaws, there is still evidence that they help reduce the biases shown toward victims by law police officers and prosecutors on the basis of their race, history, and social class (Stark, 2004).

The unique nature of domestic violence cases could be blamed for their frequent dismissals and low conviction rates. These crimes often take place in private locations, with only the defendant and victim present. The private nature of the crime results in an absence of independent witnesses. Since the possibility of victim corroboration is absent, the cases often rely on victim credibility alone. It has been found that this reliance often leads to dismissals and low conviction rates (Hirschel & Hutchinson, 2001). Adding to this problem, victims of domestic violence are often unwilling to testify against their batterers. Studies have shown that victims are reluctant to cooperate in the prosecution of these cases for a host of social reasons (Buzawa, 2003). Financial dependence on the batterer makes proceeding with the criminal justice process difficult (Fagan, 1996). Victims are often afraid that incarceration could result from conviction, and they fear being unable to support themselves and their children in the absence of the batterer (Fagan, 1996). Social isolation is another important factor. Often times, victims of domestic violence become isolated from their extended families and friends. When victims are dependent on the batterer for both financial and social support, losing him can be terrifying. Bennett, Goodman, and Dutton (1999) found that lack of social support by families and friends and the severity of abuse added to victims’ reluctance to prosecute. Confusion and

frustration with the process, fear of the batterer, and internal conflict about incarcerating the batterer were also found to play a role (Bennett et al., 1999).

To compound these problems, when victims do cooperate with the criminal justice system they are often threatened or physically harmed by the offender (Fischer & Rose, 1995). Indeed, several studies have shown that the primary barrier to victims' seeking redress through the criminal justice system is fear of retaliation by the offenders (Ferraro, 1997; Mears, Carlson, Holden, & Harris, 2001; Zoellner, Feeny, Alvarez, & Watlington, 2000). Studies have shown that among batterers who were arrested for domestic violence, 27 percent re-battered prior to trial (Ford & Regoli, 1998). Consequently, victims of domestic violence often seek rehabilitation for the batterer or desire that the charges be dropped (Bennett, Goodman, & Dutton, 1999). This could pose a problem for prosecutors who work in jurisdictions with discretion limiting no-drop policies. However, in reality, research has shown that even in jurisdictions with explicit no-drop policies, informal case screening processes take place that alleviate having to prosecute a "weak" case. For example, in the San Diego City District Attorney's Office, the prosecutors refused to proceed against one-third of all domestic violence cases because without a cooperating witness, criminal conviction would have been impossible given the lack of independent corroborating evidence (Hartman, 1999). Additionally, "taking iffy misdemeanors to trial...is seen as wasteful, not ethical" (Hartman, 1999, p. 74).

Additionally, victims who have cooperated with the criminal justice system have often found their dealings to be humiliating and degrading. Due to the relationship between victim and batterer, victims' lives and pasts are often involved in the public court case. "The defense has a great deal more ammunition available to discredit the victim's testimony during trial." (Hartley, 2003, p. 415) Consequently, the themes of domestic violence trials often focus more on the

victim's blame in the incident than on traditional defense strategies (Colb, 2001; Scheppelle, 1992). A victim's psychiatric history, dependence on drugs or alcohol, and even the status of the custody of her children can all be used to discredit her. Such humiliating information alone could deter a victim's participation in the process. It has been found that the victims' continued exposure to and interaction with criminal justice agents affects their ability to identify themselves as credible victims (Dunn, 2001). Being a victim can be viewed as a "complex interactional process" where court community members continually make assessments and evaluations of victims' worth (Dunn, 2001, p. 289). When victims do not present themselves in an ideal manner, they are regarded and treated in a more culpable manner which could then be internalized and have negative consequences (Kennedy & Sacco, 1998, p. 14).

The existence of a relationship between the defendant and victim also leads domestic violence cases to be seen as weak and more difficult to prosecute. Decisions to prosecute cases often hinge on whether a relationship exists between the victim and defendant (Albonetti, 1987; Simon, 1996; Stanko, 1988). Spohn, Beichner, and Davis-Frenzel (2001) found that cases were less likely to be prosecuted when they involved a victim and defendant who were in a relationship, than when the incident happened between strangers. Prior relationships with the defendant raise questions about the legitimacy of the victims' account of the facts and may lead the victims to refuse to cooperate as the case moves forward (Myers & Hagan, 1979). Kingsnorth, MacIntosh, and Wentworth (2002) assessed the impact of prior relationship and victim characteristics on criminal justice proceedings by tracking 467 sexual assault cases through the Sacramento County Courthouse, from arraignment to sentencing. Among other things, they found that crimes involving strangers were almost twice as likely to go to trial, 33.9 percent versus 18.2 percent (Kingsnorth, MacIntosh, & Wentworth, 2002). Additionally, victims having a prior relationship

with the defendant on average reduced the sentence length by 35 months (Kingsnorth, MacIntosh, & Wentworth, 2002). Similarly, each victim characteristic viewed as negative by the judge reduced the sentence by 17 months (Kingsnorth, Macintosh, & Wentworth, 2002). This supports other studies that have found that when a victim demonstrated “nontraditional” behavior, the defendant received a shorter prison sentence (LaFree, 1989; Spears & Spohn, 1997). Examples of nontraditional behaviors include risk-taking behavior (hitchhiking, using alcohol and drugs), reputation for sexual promiscuity, and previous criminal records. Thus, there is a great focus on the victim, her cooperation, demeanor, behavior, and ultimately credibility when processing cases between individuals who have or have had a relationship.

While mandated arrest and prosecution policies affect the daily business of the courts, discretion remains. Court workgroup members’ attitudes toward domestic violence cases affect the manner in which they choose to handle them. Indeed, research has shown that prosecutors’ and judges’ attitudes have not changed in accordance with policy regarding the processing of domestic violence cases. A survey of prosecutors revealed that their attitudes in being assigned domestic violence cases ranged from “apathetic to disdainful” (Rebovich, 1996, p. 176). These negative views were due to prosecutors’ expectations that victims would be uncooperative, and a general misunderstanding of what legal options were available for prosecution (Ford & Regoli, 1993; Williams, 1976). Even when victims want the abuser pursued by courts, prosecutors have often found the victims to be unreliable witnesses (Buzawa & Austin, 1993; Erez & Belknap, 1998). Prosecutors’ and other court officials’ perceptions that domestic violence cases were trivial or difficult to prosecute successfully contributed to their negative attitudes when dealing with them (Rebovich, 1996). Hartman and Belknap (2003) talked to 62 judges, prosecutors, and public defenders that routinely processed domestic violence cases. They found that the

respondents routinely emphasized victim cooperation as being influential on case processing decisions. The respondents also described their domestic violence cases as “frustrating” and “unique” in terms of victims’ behaviors (Hartman & Belknap, 2003, p. 370). Court personnel did not report seeking alternative methods for processing cases and only seemed to focus on victim participation (or lack thereof). Most recently, Belknap, Hartman, and Lippen (2010) found that prosecutors’ time and investment in domestic violence cases was scarce. They found that the prosecutors blamed the victims’ lack of cooperation for their high dismissal rates, but also found that the prosecutors were not routinely making efforts to contact their victims prior to disposition. The researchers blamed a “serious structural problem” within the prosecutors’ office that precluded meaningful prosecution of domestic violence cases due to extremely high caseloads (Belknap, Hartman, & Lippen, 2010, p. 275). What remains unclear is whether the local legal culture of these courts had some impact on these prosecutors’ inability to meaningfully prosecute these cases. The findings about judicial attitudes toward domestic violence have also been troubling. Studies have shown that judges attempt to dissuade victims from pursuing charges against their batterer (Zora, 1992). Ptacek (1999) observed judicial demeanor during restraining order hearings and also conducted in-person interviews of judges in two courthouses. Like prosecutors, judges often assumed that domestic violence victims were in some way to blame for their abuse. Ptacek noted that judges often blamed the victims for using the court system as a way to litigate a “family squabbling” (Ptacek, 1999; Welch, 1994).

The negative perceptions of victims shared by prosecutors and judges impact how they view domestic violence cases in general. After repeated interactions with victims and each other, norms pertaining to domestic violence cases develop and become part of the local legal culture of the courthouse. Due to the perceptions of the court workgroup members, domestic violence cases

may be characterized as weak, have low priority status, and result in dismissals. As stated previously, domestic violence cases depend on victim credibility and the existence of independent corroborating evidence. This is a tricky combination of subjective judgments about victims and objective evidentiary requirements. How the court community has come to evaluate domestic violence cases precludes the majority of them from being fully pursued. Regardless of statutory changes, unless judges, prosecutors, and defense attorneys recognize the disjuncture between how they evaluate case strength and the reality of how domestic violence crimes transpire, these crimes will continue to be handled leniently.

### **The Court Community Response to Domestic Violence**

The local legal culture that exists in courts contributes to the lenient treatment that domestic violence cases receive. Until this study, the court community literature has not been utilized to help frame inquiries about the challenges of processing domestic violence cases. Previous studies have looked at the case processing decisions made by individual judges, prosecutors, and defense attorneys. There is no literature, however, that looks at how the community that forms between these court workgroup members might impact the processing of domestic violence cases. The court community literature offers a possible explanation as to why the processing of domestic violence cases: their reputation within the community, their low priority status, and their high dismissal rates; may be more a product of culture than of law. While each subsequent chapter provides a detailed review of the relevant literature on court communities, a brief overview of the main features of the court community that relate to the processing of domestic violence is provided here.

### **Court norms and culture**

Communities of key court actors develop in all of our courts across the country, each with its own unique local legal culture. A court's local legal culture is comprised of internalized norms, traditions, and values that are shared through informal communication networks (Eisenstein, Flemming, and Nardulli, 1988). Court workgroup members are comprised of judges, prosecutors and defense attorneys. Many of them appear day in and day out in the same court house and develop relationships with one another. These individuals are known by the literature as repeat players (Galanter, 1974). In order to get through the business of the day it is important to learn "how things are done" in a particular court (Kritzer and Zemans, 1993, 537). Interdependence is developed between its members. This means that court workgroup members depend on each other to efficiently work through their cases (Eisenstein, Flemming, & Nardulli, 1999). This interdependence is possible because court workgroup members share beliefs about how cases should be processed and resolved in their court. When the courts are busy and the dockets are full, being able to rely on each other and having shared knowledge helps to achieve the goals of the court more efficiently. Occasionally, an attorney will appear in a court in a limited fashion. He is called a one shooter (Galanter, 1974). Being a one shooter will impact the attorneys' abilities to effectively handle their cases because they may not know the rules of that court. Attorneys who have lower perceived status and power (due to lack of experience or to being part of the community for only a limited time) will also cause impact their influence in a court.

### **Case typifications**

Dependent on the court's local legal culture, court work group members typify cases as strong or weak. They use their informal shared understanding of how to evaluate a case which is

based on a combination of social and legal factors (Myers and Hagan, 1979). This will impact how attorneys prioritize their work; allocate resources, and their resulting sentencing recommendations. Weak case typifications are based in part on the stereotypes court workgroup members have internalized. They can lead the court community to conclude that certain cases are not serious. Domestic violence cases have historically suffered from weak case typification. How the local legal culture of the specialized session impacted this process and the conclusion that were drawn from their case typifications is discussed further in Chapter 4.

### **Going rates**

A set of informal rules is established and adopted by group members as to the value of a case (Ulmer, 1995). As cases are typified as strong and weak, court workgroup members come to agree on what an appropriate sentence is for the case type. This varies by court and is influenced by a number of factors (court congestion, perceived seriousness of other cases, judicial inclinations). In time, court workgroup members agree to what an appropriate sentence for a case should be or what that case is “worth.” This process is based on the norms that have been internalized by court workgroup members and is a result of the typification process. It is helpful and necessary for court workgroup members to agree in this manner for the courts are overburdened with cases. Since most traditional courts share the goal of efficiency, agreeing to the appropriate going rate helps to move cases along (Walker, 2001). Additionally, attorneys who do not go along with the going rate may suffer from informal sanctions and be viewed as “boat rockers” by other attorneys. Going rates are communicated informally between court workgroup members when they interact with one another.

### **The interaction of law and culture**

As previously stated, a strong sense of tradition is a characteristic of court communities. Court communities, like other complex organizations, have “shared pasts” because they engage in similar types of transactions on a day-to-day basis (Ulmer, 1995). The relationship between these members and the rules that they agree to live by has been found to be as influential in criminal case processing as the formal laws and policies held by the state (Dixon, 1995; Eisenstein et al., 1977, 1988, 1992). Indeed, they may be more influential in certain circumstances. Ulmer and Kramer (1998) looked at formal sentencing guidelines within the organizational context of the court community and found that court workgroup members used the formal guidelines “dependent on their local relationships, activities, and informal decisions making criteria” within the context of the court community (Ulmer & Kramer, 1998, p. 248). The result is that case outcomes will vary depending on where a case is adjudicated, regardless of a normative legal standard. Likewise, Engen and Steen (2000) found a pattern of charge manipulation being exercised by the prosecutors in response to a change in the sentencing guidelines which would have changed their pre-conceived notions of how certain case types should be dealt with inside that court house. Thus, several researchers have found that, despite the formal rules of the sentencing guidelines, the informal norms that have developed between court workgroup members allow them to make exceptions, circumvent the law, or differ in how they apply these formal rules (Knapp, 1987; Loftin & McDowell, 1981; Miethe, 1987). In many of these studies, prosecutors changed their charging decisions in order to accomplish what the court community had long regarded as the appropriate sentence and/or going rate for that crime type, independent of sentencing guidelines.

While discretion-limiting policy changes have been adopted across the country, they have had a limited impact on the processing of domestic violence cases. More individuals are being

arrested and processed than twenty years ago, but still, most of those cases are dismissed. A recent study found that about half of the domestic violence cases analyzed resulted in dismissal (Belknap, Hartman, & Lippen, 2010). Looking to the court community for a possible explanation for the problem in processing domestic violence cases may be the answer. Domestic violence cases may finish last in traditional courts whose local legal cultures are characterized by an overburdened docket, scarce resources, and varied cases. This, coupled with a primary goal to efficiently process cases, makes domestic violence cases a good target for quick dismissals. Chapter 6 more fully explores how this culture/law paradigm impacts the processing of domestic violence cases in a specialized and traditional court.

### **Problem solving Courts: An Answer to the Problem of Criminally Prosecuting Domestic Violence Cases?**

A specialized court model, which evaluated and valued domestic violence cases differently, could change how the cases are processed. Since the 1990s, “problem solving courts” have been developed to address specialized concerns (Mirchandani, 2005). Different examples include drugs courts, community courts, mental health courts, and domestic violence courts. These courts were created not only to address the individual troubles presented by certain cases but also to address the broader social problems of society. They operate within the constraints of the larger criminal court system but have the opportunity to create their own unique local legal cultures. Norms, goals, and priorities could potentially vary within these models. This could have an impact on the processing of domestic violence cases if the court community that processes them changes its evaluation and treatment of these cases. Domestic violence courts are not as widespread as other types of specialized courts. According to Fagan &

Dorf (2003) there was 1,091 drug courts nationwide compared to only 300 domestic violence courts (Keilitz, 2000).

Berman and Feinblatt (2001) at the New York-based Center for Court Innovation (CCI) identified six attributes that make specialized courts different from their traditional counterparts: 1) focus on case outcomes rather than processing alone; 2) judicial monitoring or having the judge monitor the case after adjudication; 3) informed decision-making or dedicated resources to target and deal with the problem at hand; 4) collaboration between community agents and criminal justice agents or within the criminal justice community itself; 5) nontraditional practices or employing different innovative ways that better serve the community as a whole; 6) systematic changes or widespread changes to the administration of justice in general.

Similar to other specialized courts, domestic violence courts can focus on the social problem of intimate partner violence. They typically try to help and protect victims of domestic violence but also closely monitor and aid the defendants in an effort to help end the cycle of violence. A specialized domestic violence court would coordinate the efforts of “medical, social service, and treatment providers and establish special procedures and alternative sentencing options to promote more effective outcomes” (Ostrom, 2003, p. 105). This alternative court model, which focuses on the broader social problems of domestic violence, and the courts’ connectedness to its community, can be viewed as a feminist court model.

### **Problem Solving Courts as a Model of Feminist Jurisprudence**

Feminist jurisprudence emerged as a response to a history of legally sanctioned discrimination against women. According to feminist scholar, Deborah Rhode when our founding fathers were creating the founding documents of the United States and spoke of men “being created equal” and being “endowed...with certain unalienable rights” –they meant men

specifically (Rhode, 1989, 19). Women's role as wife and mother was to be protected and many laws were created to do just that. For example, between 1870 and 1910 many states passed restrictive legislation that controlled the conditions of acceptable employment for women (Rhode, 1989, 38). As recent as 1945, the Supreme Court upheld a Michigan statute which "prohibited women from bartending unless they were the wives or daughters of male bar owners" (Rhode, 1989, 45). Stereotypical gender roles were also historically upheld by the law. Some states made it a crime for women only to have a "lascivious carriage" and for men only to "impugning the chastity of the opposite sex" likewise many states made it a defense to murder if a man (not a woman) came home to find their spouse having sex with someone else (Rhode, 1989, 47). Likewise, many states only allowed men to file for divorce from their wives based on her unchaste character. Even rights essential to citizenship were denied to women and sanctioned by the law. Women were not granted the right to vote until 1920 and were excluded from jury service as late as the 1960s.

The resurgence of the feminist movement in the 1960s challenged discriminatory statutes and constitutional provisions. Courts started to question how to handle sex-based discrimination law suits based on evolving understandings of gender roles. What followed was a "discourse of difference" which focused on trying to use a framework of difference to determine if a law should be upheld or not (Rhode, 1989, 82). A second framework was eventually suggested by feminist scholars which suggested that the analysis concentrate on disadvantage and dominance rather than biological and social difference. This framework would focus on the consequences of gender disparities in many realms: political; social status; economic security (Rhode, 1989, 83). These early frameworks lead to two different types of feminist thought: difference

feminism and dominance feminism. Both frameworks can be used by feminist jurisprudence to question the laws and their treatment of women.

Feminist jurisprudence is a philosophy of law based on social, economic, and political inequality between men and women (Baer, 1999). As a field of legal scholarship, it examines the seemingly “neutral” laws and practices of our legal system as gendered. The rules of evidence that exist to enable court community members to evaluate case strength have gendered components and implications when applied to domestic violence cases (Schneider, 2000). Examples include the reliance on the presence of independent witnesses and real evidence, the exemption of hearsay evidence, and the cursory evaluation of victim credibility (Childs & Ellison, 2000). Feminist jurisprudence contends that the language, logic, and structure of the laws are gendered and that the law represents and reinforces male values (Baer, 1999). This is problematic when male-centered laws are taken to represent the norm. Deviations from said norms are considered atypical and generate negative ramifications. The processing of domestic violence cases has suffered due to this.

From a feminist jurisprudential viewpoint, domestic violence courts, as compared with traditional courts, may represent a feminist version of justice with a different focus and goal. Specially trained court workgroup members who could work collaboratively and with a different end goal in mind could change the local legal culture of the court workgroup. This end goal could be less focused on case efficiency and conviction and more focused on justice and problem solving for the community at-large. Thus, specialized domestic violence courts could be viewed as a feminist jurisprudential model of courts whereby their going rates, hierarchy of cases, and case typifications differ from their traditional counterparts (Mirchandani, 2005). To what extent the broader organizational problems of scarce resources, caseload pressure, and uncertainty

avoidance impact the effectiveness of these specialized courts will be discussed in the following research.

The court community operates within the confines of the law. In this objective legal world, normative standards have been established. These standards represent a masculine version of justice (Scales, 1986). Assessments of case strength are based on these normative masculine standards. For example, cases with credible victims, independent witnesses, and real evidence are collectively determined to be “strong” by court community members (Myers & Hagan, 1979). When these factors are not present, cases are considered weak. Many domestic violence cases are lacking most, if not all, of these factors. These facts, in connection with the mandates of organizational culture, may lead to a perpetuation of weak case status and treatment over time. Analyzing the “seemingly neutral” case typification standard from a feminist jurisprudential lens would enable us to question how the court community members classify cases as strong or weak, and the communication networks and informal sanctions used to uphold the resulting norms of their local legal culture. The standards which are used to determine case strength and their resulting priority and status within the court community need to be questioned. It may be that when analyzing cases between intimate partners “on facts such as these, the standard(s) do not hold up” (Scales, 1986, p. 1403). This means that normative/masculine evidentiary standards do not work when analyzing domestic violence cases and their resulting weak case typification is unjust due to the private nature of the crime and the social context in which it occurs.

According to feminist jurisprudence, seemingly “neutral” principles and standards cannot apply to victims of domestic violence whose gendered role within that context has been socially constructed (Bartlett, 1991). The imbalance of power between the genders within our society

makes domestic violence a social problem (Frug, 1991). Our lawmakers' inability to recognize the unique circumstances that surround this type of violence, and to continue to evaluate and handle the cases in a gender-neutral fashion, mandate continued state-sanctioned violence with offenders who will remain unaccountable by virtue of their relationship to the victim. Feminist jurisprudence provides a theoretical framework from which we can critically examine this problem. Domestic violence cases disproportionately victimize women, and our legal system is still unable to successfully and uniformly prosecute the batterers (Dutton, 1995). The current laws and prevailing local legal cultures present in many courthouses attempt to apply seemingly "neutral" principles to a gendered problem with little success.

## Chapter 2: Research Methodology

A qualitative methodology including comprehensive interviews with court workgroup members and supplemental courtroom observations was used to answer the main research questions addressed in this study. At the outset of the study, I presumed that the mechanism of the court community might explain why domestic violence cases are still treated so leniently in our nation's courts. As a result, I wanted to determine if you changed the culture of the court community through a problem solving model grounded in feminist jurisprudence, could you change the way domestic violence cases are resolved by the courts. I examined two courts of similar size, caseloads, and demographics—one with a specialized domestic violence session (specialized session) and one without (comparison court). To this end, I asked:

1. How do the attributes of each court's local legal culture impact the processing of domestic violence cases in that court?
2. How did the court workgroups of each court typify their domestic violence cases?
3. What was the going rate for domestic violence cases in each court? How were they developed and shared?
4. How did each court workgroup use and cite the law differently in order to accomplish the goals of their court workgroup?

### **Why Qualitative Methods?**

The primary source of data in this study is the in-depth interviews with the court community members working in two district courts in the Commonwealth of Massachusetts. An open-ended interview format was the best mechanism for capturing the nuances of culture within the courts. Through these interviews, I was able to ask about and capture court community

members' attitudes about the nature of the work they did, their evaluation of domestic violence cases, and their interactions with other court workgroup members. They willingly shared their thoughts and feelings about the status of the local legal cultures in the courts in which they worked. They explained how their communities valued certain crimes, dealt with certain victims, and built their reputations. These attributes of culture could not have been described quantitatively. Indeed, standardized instruments would not have been able to be as reactive and flexible as I could be during the interviews. I had to modify my questions depending on the attitude and response of my respondents. I often chose to change focus when it appeared that the line of questioning was lost on or even offended a respondent. Often times, after I was able to gain the trust of the party I was able to ask the question again. Remaining flexible and intuitive provided me with 23 meaningful interviews. Having worked with some of interviewees, and being an attorney myself, I felt uniquely qualified to use their language and enter their culture in a nonthreatening manner. I was constantly assessing and adjusting my style in order to keep the respondents at ease and this opened the door to additional interviews.

The respondents were all attorneys and judges. They presented as a guarded type of professional who avoided putting things in writing. For example, I entered the courts with a tool I constructed to measure the uniform manner in which court workgroup members evaluated case strength. It was called the "Strong Case Indicator Scale." It listed forty factors that were derived from the literature on case typification and asked respondents to briefly answer if, in their opinion, the presence of these factors would tend to make a case: "Very Strong," "Strong," "No Effect" "Weak," or "Very Weak." The prosecutors from the specialized session, a group who trusted me the most, all completed this scale. We discussed some of their results and our discussions were taped, transcribed, and analyzed with the rest of their interviews. No other

group from either court would complete this scale. The judges in the specialized session refused to complete it, giving no reason. The defense attorneys in the specialized session found the instrument offensive. Many defense attorneys indicated that they felt the instrument was written from a prosecutor's perspective. They would not quickly assess case strength and thought that such a determination depended on many immeasurable variables. The problems were similar for both defense attorneys and prosecutors in the comparison court, who refused to complete the scale. Several respondents balked at its reliability, stating time and again that matters such as this are not standardized and have to be taken on a case-by-case basis. Respondents repeatedly became frustrated and agitated over the tool and kept saying that it really "depended" on the facts of the case. Even though they qualitatively discussed how they evaluated case strength and that the same factors were used in both courts, they could not commit it to writing. Thus, I eventually abandoned the use of this tool.

In addition to interviewing judges, prosecutors, and defense attorneys from two cities in one state, I also conducted several site observations in these courtrooms. While many of the participants knew I was conducting research, I came dressed as an attorney and sat among other attorneys and quietly observed the interactions among the court workgroup members. This experience helped validate much of what I was capturing during the interviews. It also allowed me to observe how the court workgroup members communicated to each other during the formal court process. It was important to observe how the domestic violence cases were handled in the two courts under study. In order to do this effectively, I would listen to the cases being called, jot down the name of defendant, and then use the court-generated list for that day to jot down the charges the defendant was charged with.<sup>2</sup> I was particularly interested in watching the court

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<sup>2</sup> The court-generated list is posted publically and available to all attorneys so that they know what their clients are being charged with and specific case information.

workgroup members work through the domestic violence cases. I was able to assess how the cases were handled by the court workgroup members: I could hear the language used to characterize the victims and the cases in general; observe the interactions between the defendants and victims inside the courtroom; roughly assess the amount of contact and time that the prosecutors' office spent with the victim; and witness domestic violence case dispositions.

### **The sites**

The first site was chosen because over a five-year period, starting in September 2000, this court housed a specialized domestic violence session. The primary goal of the session was to hear only cases involving intimate partner violence. All civil restraining orders, arraignments, pre-trial conferences, and probationary matters pertaining to intimate partner violence in the district were heard in this session. This court was the recipient of a grant from the Department of Justice to help pay for the costs of establishing a specialized domestic violence session. Staff members from the judiciary, the district attorney's office, and probation were specially trained in matters pertaining to domestic violence. This site is referred to throughout this study as the specialized session. The goal of the session was to see whether a more unified response to domestic violence would increase victim safety and batterer accountability, and reduce recidivism. As of 2000, the population of the location of the specialized session was 92,115 and the ethnic makeup was 36 percent African American, 32 percent Caucasian; 12 percent Hispanic or Latino, 11 percent Asian, 1 percent Native American, and 4 percent other (Department of Neighborhood Development, Policy Development and Research Division, 2006). The court house itself was very busy. From January to August 2002, it issued 1,448 civil restraining orders and arraigned 4,862 adults (Harrell and Castro, 2007).

The court which held the specialized session had a history of being particularly “good” with domestic violence cases. This was largely due to the efforts of the presiding judge and the demonstrated “history of interagency collaboration to meet the needs of domestic violence victims” (Harrell and Castro, 2007). For example, starting in 1991, the presiding judge of this court led a collaborative effort with other community agents to form the domestic violence round table. This group was created to help unify the community’s response to domestic violence. The round table served as a coordinated community response project that brought victims’ advocates in community health centers from half-time to full-time positions and established full-time advocates in the District Attorney’s Office and local hospitals. These advocates provided crisis intervention, referrals, counseling, safety planning, support groups, and criminal justice system advocacy. Round table members include representatives of many different segments of the community, including victim advocates, judges, police, prosecutors, probation officers, health care providers, mental health and substance abuse service providers, and social workers from batterer intervention programs (Harrell and Castro, 2007).

The second site was chosen as a comparison court because it had a caseload and population demographics similar to the specialized session court, but no special court program. As of 2000, there were 105,167 people residing in the city (United States Census Bureau, 2008). The ethnic makeup was 68.6 percent Caucasian; 16.52 percent Asian; 4.21 percent African American; 14 percent Hispanic; 6 percent other races (United States Census Bureau, 2008). From January to August 2002, the comparison court issued 1,625 civil restraining orders and arraigned 5,095 adults (Harrell and Castro, 2007). Both cities were comparable in terms of economic conditions. The second site did not have a separate session that specialized in the

processing of domestic violence cases and is referred to throughout this study as the comparison court.

These courts were similar in caseloads, demographics, and in the relative socioeconomic conditions of the cities where they reside. This makes comparing the two more meaningful. Additionally, because one had a reputation for being “good” with domestic violence and had set up a specialized session, and the other had a much more pro-defense orientation, differences in their cultures should be noteworthy and important.

### **Getting into the field**

Over a six-month period from April to November of 2008, I met with and interviewed 23 court workgroup members who worked primarily in two district courts in the Commonwealth of Massachusetts. Each participant handled domestic violence cases on a regular basis in their respective courthouses. We met in busy courthouse conference rooms, in the waiting area inside of lock-up, outside restaurants, at law offices, and even inside parking garages. Each meeting varied in length from thirty to ninety minutes and included semi-structured questions that were recorded and later transcribed. The questions began with their professional backgrounds, and then went into detail about their experiences within their respective courts, the existence of local legal culture, the utility of going rates, and how cases were typified as strong and weak. We spent much of our interview time discussing the unique problems that arise when processing domestic violence cases in particular. Some of the respondents were extremely open and eager to talk about these issues, while others were reluctant. A limited number of court workgroup members refused to meet with me. In particular, the presiding judge in the comparison court would not meet with me. I requested a meeting on four occasions with the head administrative assistant in the judge’s lobby and each time she graciously offered to look into it for me. I also

sent e-mails to the administrative assistant and also stopped in to see her on more than one occasion. While this judge was physically present in the building, I was told he was ill and then given some other reasons to explain he could not meet with me. Over time, it became clear that this judge was not interested in being interviewed. Additionally, one prosecutor from the comparison court was reluctant to meet with me and was somewhat defensive about answering many of the questions I posed to her. While I was still able to gain some important information from this meeting, her discomfort was obvious. All and all, I was able to gather a rich set of data that provide unique insights into the court communities and their handling of domestic violence cases.

Through this study, I obtained a first-hand view of how being “an insider” can truly impact your experiences in a courthouse. As a former prosecutor, I took for granted the liberties that I was granted when I practiced law. Having credentials I could flash at the security guards at the courthouse entrances made passage seamless. I never suffered the indignity of being stopped, frisked, or searched in any way. In some of the courts I worked in, I even used a separate entrance through the back or side of the building. There was often a parking space securely waiting for me on arrival. Entering these courts as a “non-player” was a very different situation. This may have impacted my access to certain court community members. It was with ease that I set up the interviews with the judges and prosecutors from the specialized session. It was much more difficult to gain access to the defense attorneys and court community members from the comparison court. Being a former prosecutor from the specialized session may have also impacted the candidness of the responses from the prosecutors and to a certain degree the judges from the specialized session, because I had their trust. I think that this was more of strength of the study rather than a limitation, however. That being said, I write this as a

criminologist who has a legal background, specifically who served as an Assistant District Attorney from 1998 until 2004. While I have made every attempt to be an unbiased observer, my life experience at times influences my writing and analysis.

Having previously worked in the specialized session I was treated well upon entrance at the front door by security. I was hardly given a second look by the security guards and was met kindly by members of the judge's lobby. But being a complete newcomer to the comparison court, whose culture was completely foreign to me, was a totally different experience. I waited in line at the front door and watched other attorneys stroll past. Then my briefcase actually set off some kind of alarm. The security guard ignored me and refused to make eye contact or utter a sound. I asked, "Am I all set here?" to which there was no response. So I picked up my things and began to walk away. When I was on the stairs, headed for the courtroom, he said, "Where are you going? You just beeped and walked away!" I responded, "Well, you ignored my question." He stated that he was very busy, even though there was no one in line behind me. Annoyed, I returned so that he could use his wand to determine if I was hiding something underneath my suit. A little humiliated, I walked up to the courtroom. There I passed an attorney whom I knew from years earlier. She looked at me amused, knowing of the research I was conducting, and asked, "Are you here to work today or are you still doing research?" There it was: a quick comment from an attorney that communicated so much to me. The research I was conducting was not valued and I should start working cases if I was going to gain some respect again. Keeping this in mind, I set out to get these attorneys to talk to me.

Initially, I requested permission from the court workgroup members' supervisors to conduct interviews of their employees and colleagues. I made contact with the presiding judges (or their representative) of the courts, the District Attorney of the county in which this court was

located, and a prominent bar advocate from the city. All individuals readily gave me permission to conduct interviews with their personnel. I wanted to locate individuals who handled domestic violence cases in the specialized session or in the comparison court on a regular basis and during a similar time period, from 2001 to 2004. This yielded a fairly small total population.

Years ago, I had formed a positive working relationship with the judges, prosecutors, and defense attorneys in the county which housed the specialized session. This made making initial contact and gaining their trust much easier than it was in the comparison court. The two judges in the specialized court were identified as the primary judges who worked in and ran the specialized session. A third judge was also identified as being a regular sitting judge but he was no longer working in this court. I interviewed both of them during the summer months. Next, I met with five different prosecutors who worked in the specialized session at different and overlapping times within the four-year period. All of these respondents had been promoted to a Superior Court Unit and thus these interviews took place at various locations close to their new offices. This left about four other prosecutors who were not included in this sample because they had either moved out of state or left the office for work elsewhere. Finally, with the help of a kind, experienced, and influential defense attorney, I was able to interview five defense attorneys about their experiences in the specialized session. While there are many different defense attorneys who appear in a court, there is a much smaller sample of defense attorneys who do this on a regular basis. A kind secretary in the judge's lobby told me that there are actually about 104 defense attorneys who could have potentially appeared in the specialized session during its operation. I was told that most of them did appear in the session at one time or another because they kept a fairly careful track of the rotation of attorneys. I contacted a very well-known and influential defense attorney first. She had been in practice for over twenty years and had

previously been a prosecutor. She referred me to other defense attorneys who had regularly worked in the specialized session. When their answers started to repeat each other's, I stopped seeking additional attorneys to interview. Two of these interviews took place in surrounding cities where the attorneys' private offices were located and the other three took place within the halls and conference room of the busy court. The interviews with these individuals were the shortest in duration, lasting about thirty to forty minutes each. I feel that the interviews in the specialized court were more candid than those in the comparison court. Most of the attorneys from the specialized court knew and trusted me. They appeared to be comfortable giving me the inside details about how things really work. The interviews were tape-recorded and at times I could tell that they preferred that their statements be made "off the record." When this happened, I temporarily paused the tape and did not use any of the information they shared with me in confidence. I feel this went a long way toward establishing trust and allowing them to feel free to discuss matters while the tape recorder was running. It is important to note, that I was asking these individuals to discuss their experiences and perceptions of working in the specialized session. I conducted these interviews in 2009 and the session had disbanded in 2005. Thus, I relied on their ability to accurately recall and describe the attributes of the court's culture several years prior. While the uniform nature of their responses lean toward validity it was something that I had to be mindful of when phrasing my questions and understanding their responses.

It was more difficult to gain access to the attorneys in the comparison court. Having no personal knowledge of them or experience working in their court community, it was initially very difficult to get a meeting with anyone. I finally used a connection I had within the first county to make the connection with the chief of the domestic violence unit in the county that

housed the comparison court. I interviewed her first and then she granted me permission to meet with and interview specific prosecutors. I met with three Assistant District Attorneys (ADAs) who worked in the comparison court handling domestic violence cases between the years 2000 and 2005, and one prosecutor who was still handling domestic violence cases on the date of our interview. These individuals were located in several different cities within this county and I spent several weeks going to their courts and offices to meet with them. As a former prosecutor, I had some credibility, though it was clear I did not have the same insider status as in the specialized session. I used the connections I built with the prosecutors to make connections with five defense attorneys from this court and to gain information about the presiding judges. At least four out of five prosecutors identified a similar list of defense attorneys whom they regarded as regular players in the comparison court. One prosecutor actually made a phone call on my behalf to one of these attorneys, paving the way for my initial contact. This defense attorney had been in practice in the court for many years. He verified the names of the other defense attorneys who “would be good to talk to” given my desire to talk to attorneys who had regularly worked in this court for a number of years.

Based primarily on the information I was able to glean from the ADAs, I reached out and met with five defense attorneys from the comparison court. Two met with me in the courthouse, and three others at their private offices. In addition to providing their own perspective on the process of domestic violence in the comparison court, they gave me similar information pertaining to the judges as the prosecutors had previously. I tried to make contact with and meet the two main judges of the comparison court. It was very difficult getting the members of the judiciary to meet with me. After a lengthy delay, I was finally granted an interview with one judge. This judge was not the presiding judge but was the other judge that had been regularly

sitting in this court for over ten years. We had arranged that after I met with him, he would escort me to meet with another judge. I was careful with my questions, hoping that I would still gain access to the other presiding judge, but at the end of our interview I was thanked and escorted out of the lobby and his office. We met for over an hour and he was candid about many matters of interest to my research. I was not able to get the presiding judge to meet with me. I was told of his health issues but observed him in the courtroom on numerous occasions. While it is unfortunate that I was not able to secure the second interview in the comparison court, I do not feel that my data suffered tremendously because of this loss. The other respondents, in the comparison court, were fairly united in their assessment of the judges' role in the court process. Thus, I was able to draw a number of conclusions based on the interviews that I had conducted.

Every time I went to the courthouses, I would sit in the sessions that heard domestic violence cases. Direct observations were more difficult in the court that housed the specialized session, because that session had since disbanded. Still, I was able to observe some pre-trial conferences in that court where the same judges still prevailed. In the comparison court, I made observations in the pre-trial and arraignment session and the trial sessions. I observed in a total of three courtrooms in the comparison court and two courtrooms in the specialized session. I often glanced at the list of cases that were scheduled for that day to see what, if anything, involved domestics and jotted those defendants' names and charges down. Then I sat and watched and listened. I heard conversations between intimate partners, and watched victims speak to defense attorneys. I watched cases get dismissed and pled out to various sentences. My observations helped solidify what my interviews revealed. They also allowed me to observe the interactions between the court workgroup members and the batterers and victims of domestic violence. Where the victim stands, how she is spoken to, and who comes to her aid can be very

revealing. In the comparison court, she was often sitting with the defendant, was asked to stand next to the defendant and swear she was not being intimidated, and looked to the defense attorneys for help getting the case dismissed. This speaks volumes about the local legal culture and how it impacts domestic violence cases.

### **Analysis**

The interviews with the court community members were semi-structured in nature. Semi-structured interviews occur within an open framework that generates conversational, two-way communication (Strauss & Corbin, 1990). Thus, the focus of the qualitative interviews was refined through the meetings with each criminal justice agent. Indeed, as the interviews moved along, questions were changed depending on the court actor's response. As answers presented themselves, common topical areas were identified and developed through follow-up questions. These areas included 1) the attributes of local legal culture and how it impacts domestic violence cases; 2) perceptions of the going rates and how they are established and communicated between court workgroup members; 3) essential features of a strong case and the effects of a strong/weak case typification; 4) perceptions of what outside factors might influence this process and how local legal culture can circumvent changes in the law to suit the needs of said culture; 5) the utility of objective standards explored for evaluating domestic violence cases.

All interviews were digitally tape-recorded. Over a three-month period, they were transcribed, yielding over two hundred pages of transcribed interviews and notes. The transcriptions and notes were uploaded into XSIGHT, a qualitative analysis software program, where the data were coded and organized thematically. Through hours of interviews, transcription, and then the entering of transcriptions into the software, thematic codes were developed (Strauss & Corbin, 1990). I developed a list of thematic codes that were emerging

during the interview process under certain topical areas. With each interview, many of these codes became more solid and at times new ones developed. This is because qualitative data analysis is both inductive and reflexive in nature (Charmaz, 2006). As time went on, thematic codes took on a whole new structure whereby the codes were grouped together and subheadings were formed under the main codes. While I set out with certain topical areas in mind, I was definitely informed by the interviewees about elements of their culture I had not originally conceived and so had to create new themes and headings to include these ideas into my analysis. The importance of the judge in setting the tenor of the culture became evident in the responses of the interviews. Both prosecutors and defense attorneys expressed learning much about how to conduct business and behave in a court in accordance to the expectations of that judge. Additionally, different courts cited different laws as justification for their actions. Even though they were working in the same state, different laws seemed to impact their culture differently. This was something I was not expecting to find, and led to the development of a new topical area.

### **The Research Questions**

This study sought to discover whether the attributes of culture can impact the processing of domestic violence cases. It explores how different courts with different local legal cultures can impact the manner in which domestic violence cases are perceived and handled by their court workgroup members. Convinced that changes in the law have been inadequate to impact domestic violence crimes and their dispositions in a positive way, I embarked upon this study to understand if local legal culture is more influential in, and even impervious to, changes in the law. Additionally, I was able to analyze how creating a problem solving domestic violence court impacts this process.

In order to do this, I first tried to capture the details and nuances about the local legal cultures of the two courts in question. An account of the striking differences found between the courts is provided. How do the attributes within each culture impact domestic violence case processing, either negatively or positively? Were there attributes of culture that respectively undermined the prosecution of domestic violence crimes? Did these attributes serve the goal of that court? Could judges change the rules that are typical in a traditional court in order to accomplish their ultimate goal or purpose in either court?

Next, employing ideas from the court community literature, I sought to establish whether going rates were prevalent in the local legal cultures of the courts explored. If the court workgroup members had an agreed upon going rate pertaining to domestic violence cases, what was it and how was it discussed by respondents? Additionally, I wanted to see if the going rates were different between the specialized session and the comparison court. Finally, an area that arose from the interview process was whether different going rates can exist and compete within the same court. Was there perhaps a goal going rate as well as the actual going rate? I wanted to see how this is different when a court has no goal going rate for its domestic violence cases.

From there, I attempted to analyze what attributes cause court workgroup members to typify domestic violence cases as strong or weak. Since the going rates of their respective courts are assumed to be based on these typifications, it was important to understand how court community members typify the cases and what attributes cause domestic violence cases to be typified as strong or weak. An analysis was then conducted of how this typification process is impacted by the local legal culture, thus explaining any differences between the specialized session and the comparison court.

Finally, I analyzed the more recent changes in the laws that were uniformly cited by the separate court workgroup members during interviews as justification for their handling of domestic violence cases. I examined how legal justifications were cited to excuse regular domestic violence case dismissals, and examined variation across the two courts. The origins of these laws are discussed and how the court workgroup members cited and used them in their everyday practice revealed. These areas are addressed in detail in each of the following substantive chapters.

### Chapter 3: Local Legal Culture Broadly

*“Everybody knows who those attorneys are that rock the boat, everyone is annoyed by it, from ADAs to defense attorneys and judges, everyone.”* (Defense Attorney 1, Specialized Session)

As one enters a courthouse, its culture is communicated to its listening visitors. The manner in which the security guards speak, the length of time victims are kept waiting or the amount of bail a defendant is held on can all communicate messages to those who are paying attention. For example, an overly formal security guard may indicate the formality under which the courtroom is run, a victim who is kept waiting all day to have her restraining order called may feel that her needs and case are not important, and a defendant learns from his high cash bail that he is a threat to the public and his case is to be taken seriously.

This chapter discusses the elements of each court’s local legal culture that impact the processing of domestic violence cases most profoundly. The judges of each court were discovered to be powerful and controlling of the culture in their courts. While the judges are markedly different in the two courts under study, they each have established clear goals for their courts that they seek to accomplish in a myriad of ways. These goals are communicated to the court workgroup members and impact the processing of all cases, including domestic violence cases. The perceptions of the courts that court workgroup members work in are explored. In a rather dichotomous manner dyads were evident in each court. There was obvious cohesion between the prosecutors and judges in the specialized session, and between the defense attorneys and judges in the comparison court. The “odd men out” in each court perceived their respective courts to be unfair for obvious yet different reasons.

This chapter also looks at how the judges used the court process differently to accomplish their goals. For example, lobby conferences and bench trials are common in the comparison court yet hardly exist in the specialized session. Additionally, jury trials and trial experience were stressed as important in the specialized session and prosecutors were given multiple dates in order to try to summons in the victims. Many prosecutors in the specialized session discussed the “trial pressure” they felt and thought that their professional reputations were in jeopardy because they handled domestic violence cases exclusively, a crime that rarely is tried. It was a source of frustration for many of them and in some way must impact domestic violence cases. Finally, the importance of resources is examined and there are glaring differences between the two courts. One court had a grant which enabled them to train and dedicate additional staff for the investigation and prosecution of domestic violence cases. This greatly impacted the local legal culture in the specialized session. It is less certain how great an impact it had on case outcomes, however. The comparison court, on the other hand, had scant resources in a busy court. The overriding goal of the comparison court was the efficient processing of cases, often resulting in the dismissal of cases that got in the way of this goal. In the following sections, I explore how the local court cultures of both specialized and comparison courts impacted the the handling of domestic violence. A framework of feminist jurisprudence is used to understand the social meaning attached to these differences in culture and how they impact domestic violence cases.

### **Relevant Literature**

The term culture itself was originally used by anthropologists to study the formal and informal practices, rules, and characteristics of social groupings, and has since been borrowed by other disciplines (Church, 1986). Its existence in the courts is obvious even to its practitioners,

who refer to it as “local practice” or “professional courtesy” (Church, 1986). Local legal culture is comprised of the shared norms that the practitioners of that courthouse have come to accept and adopt into their practice when they are there. These norms vary from courthouse to courthouse, even within the same county. Thus, attorneys have to remain flexible and aware of this fact in order to properly and efficiently practice law. The language of the courts, the pace of litigation, and the proper disposition of cases are all part of a court’s local legal culture (Church, 1986; Heumann, 1978). According to Kritzer and Zemans (1993), local legal culture reflects the courtroom workgroup’s idea of “how we do things here” (p. 537).

Legal culture has also been defined as “the values and perceptions of the principal members of the court community about how they ought to behave and their beliefs about how they actually do behave in performing their duties” (Eisenstein, Flemming and Nardulli, 1999, 28). Court workgroup members acquire such information about local legal cultures through informal communications networks or “grapevines” (Eisenstein, Flemming and Nardulli, 1999, 25). The language that is used in the courts may vary from courthouse to courthouse. A special language is adopted and shared between court workgroup members in how they discuss and characterize cases. In this manner court workgroup members demonstrate that they agree to the conclusions or characterizations about certain cases. For example, weak cases are often called “dogs” by prosecutors and other court workgroup members when prosecutors try to stall in bringing it to trial (Eisenstein, Flemming, and Nardulli, 1999, 32).

To varying degrees, members of a court community look to their own previous experiences and their court’s history when making decisions. For example, if the District Attorneys’ office has been particularly lenient on a certain case type for a number of years then this creates a history that other court community members rely upon. Upholding this sense of

tradition is important because court community members depend on one another in order to get through the business of the day. Interdependence is an important element of a court's local legal culture. Research has consistently shown that court workgroup members heavily rely upon each other (Eisenstein, Flemming, and Nardulli, 1999). Thus, if one party attempts to go against tradition or rupture the trust of his dependent colleagues then informal sanctions may result. Additionally, if a party is unfamiliar with the traditions of a court, his level of interdependence will be shallow. The more familiar court workgroup members are with each and the court the more likely they will actually be part of its community.

In fact, practitioners who routinely appear in the same courthouse will benefit from their "repeat player" status by being enmeshed in and knowledgeable about the local culture, while those who represent a client or a case in a limited fashion may feel the negative results of being a "one-shooter" (Galanter, 1974). In the context of a criminal court, one-shooters are usually privately-retained attorneys who have come into this jurisdiction merely because they have been hired to do so. Being a regular practitioner or an attorney who has practiced in the same place over a long period of time will have more status and power than individuals who are in place for a short period of time due to age or transiency (Eisenstein, Flemming and Nardulli, 1999). Those who have more status and power will have more influence over the values and beliefs of the court community.

Defense attorneys and prosecutors alike look to their respective senior attorneys for insight on the subtleties of their local legal culture. Often times, defense attorneys are more experienced than the prosecutors. Many young attorneys who want to get experience in court do so by working as prosecutors. It is often a poorly paid, temporary stop for many attorneys.<sup>3</sup>

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<sup>3</sup> Average starting salary for an Assistant District Attorney is between \$35,000 and \$40,000. [www.mass.gov](http://www.mass.gov).

Even the attorneys who choose to remain as prosecutors for several years seldom remain in the same district court for a long period of time. They could be subject to inter-county transfers or ultimately to promotion to superior court. Defense attorneys, on the other hand, are often older and more experienced attorneys. Many of them were former prosecutors. They generally build a reputation in a community court and handle many cases in a small handful of courts. Thus, prosecutors even turn toward defense attorneys for advice.

In district courts where there is a high turnover of prosecutors, steady streams of inexperienced assistant district attorneys are responsible for the daily business of the court. This was mentioned as a particular problem in the comparison court. As Defense Attorney 2 from the comparison court stated, "It's a problem; they (ADAs) rotate too often and there is not a lot of longevity." This can also be problematic for assistant district attorneys who may be at a disadvantage if they have not yet become aware of all the rules of the local legal culture and inevitably have limited power and influence.

Different courthouses have been found to render different versions of justice. Thus, having knowledge of the "local legal culture" is central to being a successful practitioner (Ulmer, 1995). The presence of a local legal culture, while not necessarily referred to as such by practitioners, is recognized by all. According to Eisenstein, Flemming and Nardulli (1999, p. 28), "the degree to which members consciously recognize the existence of a court community varies" by court. Knowledge of it is imperative in order to work professionally and efficiently within the court. All regularly participating parties eventually learn the rules that have been adopted by the community and what informal ramifications could exist should they chose to violate and or ignore those rules. For example, defense attorneys may be forced to wait long hours to have their cases called, to the detriment of their careers; prosecutors' supervisors may be

notified of transgressions; and all court workgroup members run the risk of having their reputations tarnished should they violate the norms of the local legal culture (Eisenstein, Flemming, & Nardulli, 1988). The “don’t rock the boat” mentality of the court community is a central feature to its members’ long term compliance to the rules (Eisenstein, Flemming and Nardulli, 1999, 29). Court community members share beliefs about how to govern their interpersonal relations with each other. When I was speaking to one defense attorney about local legal culture broadly, he said this:

You can walk into any court and find an attorney that works there regularly and in fifteen minutes they can give you the rundown on what to expect. Procedures, lobby conferences...a good rundown. You can learn how long you can expect to wait, what the clerks are like, even the small things. In one court, they use an alphabetical call of the list; in another court they won’t call your case until you turn in some paperwork...so even if you have the first name in the alphabet you’ll be there until 4:30 unless you turn some paperwork in...Knowing this can save you a lot of time. But more, the culture of a court really affects the resolution of cases. In one court the judge basically will not accept a disparate plea on the day of trial. So you make sure that if you want to make a deal that you work it out before the trial date. That judge does not want the jurors in there for no reason. So on the trial date, it is either a trial or an agreed-upon tender.<sup>4</sup> This is very different from the vast majority of the courts. So if you show up on a trial date thinking you’ll be able to get a lobby in order to work something out and then you can’t, that can put you in a very difficult situation. (Defense Attorney 3, Comparison Court)

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<sup>4</sup> An agreed-upon tender is terminology commonly used by attorneys to explain a guilty plea that is agreed upon by all parties. When a defendant pleads guilty he is tendering or offering a plea for the judge’s consideration.

The attorneys who play by the rules can get their jobs done more effectively. Playing by the rules and refraining from “rocking the boat” allows for a development of trust and the establishment of credibility between attorneys (Eisenstein & Jacob, 1977). Trustworthiness and keeping one’s word are common rules of interpersonal behavior (Eisenstein, Flemming, and Nardulli, 1999, 30). As Defense Attorney 1, from the specialized session, commented, “Everybody knows who those attorneys are that rock the boat, everyone is annoyed by it, from ADAs to defense attorneys and judges, everyone.” I asked what happens when attorneys do not rock the boat and she replied:

It’s smooth. It works. You can get your job when you don’t rock the boat...Rocking the boat can be as simple as being disrespectful or being a bitch instead of just saying, “Hey, this is what I have; let’s see what we can do on this one.” (She went on to describe an attorney who is a known boat-rocker.) People don’t want to deal with her. She is always pissing off everyone including the judge. It sort of sets the tone for the rest of the day. (Defense Attorney 1, Specialized Session)

Finally, court cultures have “shared attitudes about how cases are processed” (Eisenstein, Flemming, and Nardulli, 1999, 30). Court communities agree on how to handle individual cases. They establish “going rates” or “the appropriate sentence given the offense and the defendant’s criminal record” (Eisenstein, Flemming, and Nardulli, 1999, 30). This is one of the most influential attributes of culture on case processing and is discussed in more detail in Chapter 5. In general, going rates result from the traditions and interdependence that have been previously discussed. Court workgroup members are able to quickly dispose of and move cases along when they agree to its value. This is influenced by their shared understanding about which cases are

more serious and which are not. An informal consensus develops among colleagues and is internalized and resistant to change.

### **The Local Legal Culture in Two Courts and the Impact on the Processing of Domestic Violence Cases**

While the literature on local legal culture is rich and informative, there is nothing that has specifically addressed how it impacts the processing of domestic violence cases. Additionally, the literature has not yet compared how the local legal culture of a domestic violence specialized session may be different from a court where no specialty exists. As stated previously, the two courts under study are similar in terms of caseloads, demographics, and size. They are both courts with high populations of immigrant and minority citizens and both have had the same presiding judges for many years, even decades. These facts have impacted their local legal culture in many ways. I have highlighted some of the more striking attributes of each court's local legal culture that impacted the processing of domestic violence cases below. These were identified when talking to its court community members, and also by sitting in their courtrooms listening to attorneys talk to each other, and listening to the judges address everyone from the bench.

#### **The Judges: Their Philosophy and the Resulting Perceptions of Fairness**

The judges in this study have great influence on their court's local legal culture. Both courts had judges who had great power derived from the multiple years they had presided in their courts. They used this power to shape and impact their court's local legal cultures, differently. They accomplished this from the bench, where they communicated rules, norms, and expectations of behavior to the attorneys and the community at large. While it is not always appreciated, it is almost always adhered to. This is because the refusal to accept the rules of the

court can have negative ramifications for attorneys' caseloads and careers (Eisenstein, Flemming, & Nardulli, 1988). Attorneys quickly learned how to comport themselves to the dictates of their judges once inside "their" courtroom. Respondents in both courts discussed their perceptions of their judges as being a meaningful indicator of that court's local legal culture. The judges in the courts in this study were vastly different in their personalities, professional experience, and philosophy. The only real similarity between these judges was that they both had been sitting in their respective courts for many years, and that they both had great status and power to influence their courts' local legal culture.

### **Setting the goal of the session**

The two main presiding judges in the specialized session were both women who were former prosecutors. Their philosophy was impacted by the business of the courts they served, but not controlled by it. They were mindful of caseload pressure and the necessity to prioritize cases, but not at all costs. Indeed, philosophically they were far more concerned with justice and holding batterers accountable in some meaningful way than they were with closing cases or the doling out of unreasonably harsh penalties. They explained how, instead of focusing on a retributive model of punishment where the incarceration of offenders is ideal, they were far more interested in a solution that would ideally address the social problems affiliated with domestic violence. Indeed, a rehabilitative model was emphasized, where batterers were encouraged to go to counseling and hopefully learn how to curb their violence. This represents a more Durkeimian view of punishment, as it is an expression of the social solidarity that can be found in the specialized session (Garland, 1990). For example, according to a judge from the specialized session:

I think it [the specialized session] let victims see that there was accountability; they saw that it was not all about incarcerating...and we could see that people were making changes when defendants got up and said things like, “you know this is actually beginning to help me and I feel like it’s helping.” People were like, wow, he is changing and we hope it gave people some hope that people can change and get better whether you are the victim/plaintiff or the defendant. I like to think that people thought that there was some fairness in the process and certain accountability. (Judge 2, Specialized Session)

The judges’ motivations, personal experiences, and training had a direct impact on the culture and the disposition of cases. Much of this was dependent on how the judge identified the “goal of the session.” In the specialized session, the judges routinely asked prosecutors to dig deeper to justify their actions. Thus, while they were mindful of how busy their court was, they were not controlled by it. A case would stay open from arraignment to disposition on average from six months to one year. There was no preconceived timeline which they were trying to force attorneys to stick to. If a case warranted additional information, the judges advised participants to seek it, even though this may have resulted in a continuance for several more weeks and for the case to remain open for a further pre-trial date.

When I spoke to the presiding judge of the specialized session, she described for me a case where both parties were charged. This is often referred to as a cross-complaint or a mutual arrest. These cases often result in dismissals due to the possibility of a Fifth Amendment right. A Fifth Amendment right can arise whenever a party risks self-incrimination by way of his or her testimony. The Bill of Rights affords individuals protection from doing just that. Therefore, whenever there is a fact pattern in which it is possible that there was some mutual combat or a self-defense issue, the Fifth Amendment might be brought up. In this case, the female party had

visible injuries and was crying when the officers arrived at the scene. The male party was upstairs without injury but stated that he was assaulted with an umbrella. On the day of the pre-trial hearing (PTH), the ADA moved to dismiss the case against the male defendant because the victim had failed to appear and a default was issued against her. This judge asked:

Well, how do you know that she is not in a shelter? Has anyone ever made any contact with her? Because it was a cross complaint, the ADAs felt that they could not talk to her...How do you know she is not hiding in a shelter? So he [the ADA] was going to dismiss this case without making any effort to find her. (Judge 1, Specialized Session)

The judge continued the case in order to give the Commonwealth more time to try to discover the whereabouts of this party and make an informed decision about how to proceed with the case. Thus, rather than allowing for a dismissal, which would have moved the case along and kept things running more efficiently, this judge gave time to clarify a possible dangerous situation. This could have a direct impact in the outcome of the case and the safety of the victim. While the organizational goal of efficiency is noted in the literature as being common for overburdened district courts, it did not override other important goals of the specialized session (Uhlman & Walker, 1979). This is a great illustration of how the specialized session represents something different than their traditional counterparts. This specialized court altered the normative goals of traditional courts. By insisting that prosecutors dig deeper and attempt to work their cases, they are contradicting the mandates of case efficiency. Illustrative of a feminist model of jurisprudence, where courts can prioritize different things in order to serve the needs of their community, the specialized session was trying to ensure victim safety and get help for the batterers.

The comparison court members often spoke of how busy their court was and how difficult it was to get through the business of the day. In order to keep the docket moving, all court workgroup members were focused on quickly disposing of cases. Quick case disposition was the overriding goal of the comparison court. All parties in the comparison court mentioned feeling caseload pressure. They all mentioned with pride that cases in that court were typically only open for three months at a time. The literature states that this emphasis can create an atmosphere within the community where cases are disposed of as quickly as possible (Johnson, 2005; Ulmer & Johnson 2004). Indeed, it has been found that trial courts with extensive backlogs and high caseloads often rely on something called “plea bargain justice” (Uhlman & Walker, 1979). This is when members of the court community persuade others to enter into plea bargain arrangements to settle cases when at all possible (Jones, 1973). Miller, McDonald, and Cramer (1980) confirmed that prosecutors and defense attorneys often agree on the “usual sentence” for a case. Agreed-upon pleas are not just the result of caseload pressure but are also the result of a “socialization process within the court community that uses pleas in order to satisfy the goals of the triad” (Huemann, 1977). The manner in which cases were disposed of in the comparison court reflected this.

Consistent with this literature, the judge from the comparison court went so far as to identify himself as a “manager” of the court whose job it was to get the cases closed in a timely fashion. He said:

You can move business by doing bench trials instead of jury trials, if you have the trust of the bar. I don't mean that you have to give away the show, but if you have the trust of the bar they'll go jury waived and you can use a fraction of the time and resources required to do jury work. On the other hand, if you take the position, philosophically that

it's not your job to "manage" cases and you're just going to try whatever darkens your door, I'm sure you'll enjoy yourself if it is in fact trials that you love, but you will not be seen as a particularly efficient manager because you will be seen as an indulgent person, one who is only worried about their own session and not the needs of others. In this place, we have as many as five or six sessions going at a particular time. And the rule is, get done as soon as you can, finish your work so you can help out the others. If you can do that, then everybody benefits, especially the public. They are our customers. (Judge, Comparison Court)

This judge characterized it as selfish and indulgent to "try cases" in the trial session of this court. If a judge is unable to "work out a deal," then he will probably be viewed as an unsuccessful manager. Having the trust of the defense bar is necessary to make this happen in this local legal culture. This means that attorneys know that they can "safely" try cases before the judge alone, or plead out a case, and that their clients will not be penalized. This quote illustrates that the overriding goal of efficiency directly impacts how the judges think about the cases and, ultimately, case dispositions. According to one experienced defense attorney, while efficiency is a common goal among many of the district courts in which he has practiced, the lengths that are taken to ensure a quick turnaround from arraignment to disposition is somewhat unique to the local legal culture found in the comparison court. In other courts, even within the same county, cases did not go to trial until everyone agreed they were ready for trial. There could be as many as three or four dates in between the arraignment and the trial date. Discovery was handled and there was time to interview both victims and witnesses on a case. In this court, everything goes to trial straight from the pre-trial date.

In this court you come in for pre-trial and then you pick a trial date. You file discovery motions and argue the motions on that date; you do not have time to deal with the victim stuff on the pre-trial date. Here, on the day of trial, if your case is called in the trial session and your witnesses are not here, it gets dismissed. Very rarely is a second date given. That is why we usually have three to four months from arraignment to trial. Cases move pretty quickly here. (Defense Attorney 3, Comparison Court)

This is something that happens due to the concerted efforts of the bench to keep cases moving along. While caseload pressure impacts all the busy courts in a state, the daily business of this court was essentially dictated by this goal. This had ramifications for domestic violence cases. In the following chapters, the manner in which domestic violence cases are typified and their resulting going rates will be discussed at length. But briefly, a local legal culture that operates like a business, whose customers are its cases and whose primary goal is to move cases at all costs, results in a prioritization of cases. Prioritization is based on the strength of cases. Research has consistently shown that certain cases are less likely to result in negotiated pleas and trials. Research has also found that cases in which the prosecution believes they have a “strong” case, and the crime charged against the defendant is viewed as particularly serious and the defendant has an extensive record, are more likely to result in trial (Smith, 1986). Additionally, cases which are routinely regarded as “weak” are in greatest jeopardy of being undervalued and pled out. In the comparison court, only the strongest and most serious cases result in trials. Many other strong cases are pled out and the rest of the cases are dismissed. Domestic violence cases are not a high priority because they are seen as weak by the court community. Most of these cases are dismissed in the comparison court. Dismissal is one tool that the local legal

culture of the comparison court used to quickly dispose of domestic violence cases in order to accomplish their overriding goal of efficiency.

### **Mini-communities within the community (dyads)**

The judges of the specialized session were respected by the prosecutors and endured by the defense bar, who found the session to be “unfair” to their clients. These perceptions of unfairness had an impact on how the defense attorneys interacted with the other members of the court workgroup in this session and ultimately how they disposed of their cases. The goal of the session was one of the main reasons it was perceived as unfair by defense attorneys. Defense attorneys came to expect that the traditional goal of case efficiency was to be expected in all district courts. They were frustrated by the specialized session’s Durkeimian version of justice, which was less concerned with moving cases and more concerned with victim safety, batterer accountability, and rehabilitation. The specialized session’s goals caused cases to take significantly longer to be disposed of. Thus, defense attorneys were frustrated that it was more difficult to resolve their domestic violence cases in this session and that each case was handled with such “gravity.”

Strangely, this seemed to result in more agreed-upon tenders when cases did plead out. Defense attorneys always have the option to enter a tender for their client, where they either agree with what the prosecutor is recommending or not. According to a defense attorney from the specialized session, “It’s better in my opinion for any defense attorney to go into a plea with a joint recommendation. No matter how little the defense attorney’s recommendation may vary from the ADA’s recommendation, any variation makes the plea colloquy more difficult and judges, frankly, tend to lean toward the ADAs here” (Defense Attorney 2, Specialized Session). A couple of defense attorneys also mentioned the fact that “the vast majority of our judges were

former prosecutors” as being a reason why judges tended to side more often with the prosecution than the defense. In the specialized session, it became apparent rather quickly that the prosecutors were more in line with the thinking of the judges and the defense attorneys were the “odd men out.” In the comparison court, the judges and defense attorneys were more in line with each other’s thinking and the prosecutors were the “odd men out.” I think of these couplings within the triad as mini-communities within the court community that greatly impacted the way in which the cases were disposed of. This is consistent with the literature that found dyads could be formed in court communities when one of the key players was excluded in some way from the culture. In the specialized session, the defense attorneys were not part of the grant and they did not share in the goals of the session. The session was different from other traditional court models where they practiced and thus seemed unfair to them. Having the judges and prosecutors more align and creating a type of dyads could make defense attorneys feel that their clients were being treated unfairly and they complained of this.

In the comparison court, defense attorneys were not motivated to enter into agreed-upon tenders, as they were in the specialized session, because they knew that they had the judges in their corner and that the prosecutors were relatively alone and powerless. The dyad that existed in this court was between the judges and defense attorneys who had shared pasts and goals. Additionally, the prosecutors were not regular players to the same extent as the defense and attorneys and judges and this put them at a cultural disadvantage. This coupled with the heavy caseloads caused these prosecutors to suffer professionally.

Prosecutors often had so many cases scheduled for trial on a single date that there would not be an expectation that they could truly prepare for and be ready for trial in every instance. If they were not ready for trial, their cases would be dismissed. When their cases were ready for

trial, judges would often offer the defendants a plea that the defense attorneys “could not refuse.” This impacted the relationships of the members of the court workgroup. Not surprisingly, the judges in the comparison court were well-respected by the defense bar but merely tolerated by the assistant district attorneys. All defense attorneys spoke of the judges with reverence and commented on how they had been sitting in this court for quite some time. With admiration, the attorneys noted how these judges knew the “players” and could easily sort through cases in order to properly prioritize them. According to a defense attorney in the comparison court,

They [the judges] try and find what would be fair and reasonable. And I think, especially with the public defender’s office, some have been here long enough that we have the respect of a lot of these judges. So if we can say “Look, judge, this is my client, he’s a really good person,” they can rely on us. (Defense Attorney 4, Comparison Court)

Indeed, in the comparison court, the defense bar relied on the judges to expedite case resolution. They shared a common goal. For the judges, it was moving the cases to relieve an overburdened docket and for the defense attorneys it was a quick and lenient resolution to their clients’ cases. While the district attorneys’ office was not always willing to resolve their cases, the judges were able to move cases along by offering sentences that the defense attorneys agreed with. This impacted the judge’s relationships with the prosecutors. Many times, the judges in the comparison court would resolve cases in a manner that was not agreeable to the ADAs, and even over their objections. This resulted in a less cohesive relationship between the judiciary and the prosecuting attorneys than was obvious between the judiciary and the defense bar. Comparatively, the same judges characterized the defense bar in this manner: “We have a very strong defense bar in this court.” And the prosecuting attorneys with this: “They’re kids for the

most part, I don't think they have much authority, I think they are scared silly" (Judge, Comparison Court).

Cohesion was obvious in the specialized session between the judges and prosecutors, and between the judges and defense bar in the comparison court. This was possibly due in part to the striking differences in the goals of these two sessions and the striking differences the judges brought to the bench with them. In summary, the judges in the specialized session were both women who were former prosecutors. They both sought fairness and accountability in their domestic violence courtroom, a courtroom that specialized in handling cases between intimate partners. As former prosecutors, both of these judges prosecuted serious felonies and cases between intimate partners along with many other serious felonies. The judges who presided primarily in the comparison court were both men. Both were former defense attorneys: one worked in the prison system for many years, working to ensure the rights of his clients were not infringed upon. They were focused, almost exclusively, on moving cases through a busy court. If the specialized session represented a feminist jurisprudential model of justice, the comparison court represented a traditional liberal legal tradition, often acting in opposition to the values of feminist jurisprudence.

### **Perceptions of fairness and the judges**

From time to time, a judge from a different court would be assigned to the specialized session for the day or some very short period of time. This was done most often to cover the session when the two primary judges were unavailable. This had a serious impact on the local legal culture of the court during that short time interval. Prosecutors and defense attorneys agreed that the judges who sat regularly in the specialized session handled the cases differently than when other judges came in for a day to sit in that session. Prosecutor 5 from the specialized

session characterized this difference based on a broad knowledge of the issues that surround a domestic violence cases: “I felt that there was most certainly a deeper understanding of domestic violence, the undertones of domestic violence and the issues that you are dealing with... other judges that came into the session and didn’t regularly sit there did not have that same understanding.” The lack of understanding about domestic violence cases had repercussions for case outcomes. This same prosecutor discussed a visiting judge who came into the specialized session to cover for the day.

I remember one very specific time a judge who was visiting from a different court...It was a restraining order hearing and the judge asked, “Why did you go back to that man!” She actually said that...A woman judge said, “Why did you go back to this man if he did that to you?” And I was horrified; I was absolutely horrified because it just showed a lack of understanding about domestic violence. And there was another judge that came in and you know he had a lack of sensitivity...and the victims perceived it and the defense attorneys jumped on it. (Prosecutor 5, Specialized Session)

Thus, the version of justice that prosecutors came to expect in the specialized session was dependent on the actual judges who were presiding over it. Absent these judges, the unique nature of domestic violence cases and the “goals of that session” were not considered. In order for the session to function as a specialized session, it was necessary for the judges to be educated and mindful about the cases. Often times, when the “regular” judges were absent, a completely different culture emerged, at least temporarily.

The court workgroup becomes skillful at appreciating changes in the judiciary tenor on a particular day. This causes them to dispose of their cases in a different manner than they would be able to before the regular judges in the specialized session. If a substitute judge was in the

session on a given day and that judge did not handle the cases “with the same gravity” that the other regular judges would, then the cases would resolve in a different manner. Another excellent example is an account of a situation from another prosecutor in the specialized session about a judge who came to sit in the specialized session from time to time.

There were some judges who would come from time to time and I would even question if they thought that DV<sup>5</sup> ever happened. There was one judge who would encourage defense attorneys to do bench trials.<sup>6</sup> He would say, “Why you don’t do a bench trial?” Then he would take his glasses off and twirl them around and everyone who was familiar with this judge knew, do a bench trial, it’s a not guilty. That was his way of communicating that...it didn’t make much of a difference to him if the victim was present or not. (Prosecutor 2, Specialized Session)

Changes on the bench had a drastic impact for how business was conducted on a temporary basis. While this is true in other courts, it was especially meaningful in the specialized session because the goals of that session were different than other traditional courts. This had an impact on domestic violence case processing. The judges who regularly sat in this session were particularly cognizant of domestic violence and the issues that surround these cases, while the visiting judges were not.

The two main presiding judges in the specialized session were women, as were all of the prosecutors. The judges’ gender and the gender of the prosecutors assigned to the specialized session was a source of concern for many defense attorneys. They felt that having mainly women presiding over the session and prosecuting their clients was unfair to their clients. This

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<sup>5</sup> DV = Domestic violence.

<sup>6</sup> A bench trial requires a defendant to waive his constitutional right to a jury trial and have the case go before a sole judge alone. In theory this should be riskier than jury trials, where the prosecution has the burden to convince six jurors unanimously of the defendant’s guilt beyond a reasonable doubt. Thus, often times attorneys advise their clients to go “jury waived” when their chances for success (not guilty) are almost guaranteed before hand.

was due in part to the fact that their clients were mainly men and they felt that their clients perceived an injustice at being adjudicated upon by females predominantly. As one defense attorney from the specialized session said:

A big problem that I had with the session was that it was all women and most of the defendants were all men. I think that was a problem...The ADAs and judges were all women. The defense attorneys were a mix because they walked in and were assigned to the session for that day. But the people who really had your liberty at stake were all females and the defendants were all males. It impacted the cases because, say you had a bullshit case, and your client is all bitter and twisted and here was a woman making accusations against him, whether they were true or false, and he is being prosecuted by a woman, and judged by a woman, and god forbid being defended by a woman...so especially if he is already angry and now is being judged by the very same gender that put him in that position. It created a lot of problems. (Defense Attorney 2, Specialized Session)

The defense bar from the specialized session agreed on the perceived unfairness of having a largely female court workgroup in the specialized session. They felt that the session was “slanted against men.” The defense attorneys gave numerous examples to illustrate this. For example, one defense attorney noted, “In dual arrest situations, 99 times out of 100 the issue was with the man and not the woman.”<sup>7</sup> According to this defense attorney, in dual arrest situations, when a decision was made to dismiss one of the complaints and pursue the other, that 99% of the

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<sup>7</sup> Occasionally both parties would be arrested at the scene. This is called a dual arrest. This came to be frowned upon and polices were put in place to force police officers to try to decipher who the primary aggressor was and only arrest that party. When dual arrests did occur, prosecutors had the discretion to decipher, if possible who the primary aggressor was and dismissed the case against the other party. This defense attorney is taking offense with the practice and saying that the dismissed case was usually the one involving the woman and the criminal issue remained against the male defendant.

time the complaint against the woman was dismissed and the complaint against the man was pursued. They also often mentioned the restraining order hearings as a source of seeming unfairness against men:

I can't tell you how many times I've seen on an application for a civil 209A<sup>8</sup>...where the woman would routinely come in and get the 209A and a man would come in and not get the order. The judge wouldn't encourage him to say whether or not a violent act took place....In many other instances the judge would read over the affidavit, see no mention of violence, and then try to help the woman to come up with something. Did he hit you? Was there any violence? Whereas with men, that did not happen, even the men who got the 209A issued, it was only for 6 months. (Defense Attorney 1, Specialized Session)

Under Massachusetts General Laws Chapter 209A §7, "A judge shall make a finding, based upon all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner." According to the defense bar of the specialized session, judges were more willing to discover threats of bodily harm when the petitioner was a woman and the defendant was a man. In the rare instance that the judges did grant a male petitioner a restraining order, the judges would limit its strength by making it valid for only six months. Judges have the discretion to allow the orders to be valid for up to one year.

I asked one of the two female presiding judges about perceptions of fairness due to the gender of the judges and Judge 2 conceded some agreement. While she believed that the bench treated all cases fairly, she also understood the concern that defendants might have facing an all-female court and had concerns about their perceptions of fairness. She explained that when the court was initially trying to put the specialized session in place that they were told by the

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<sup>8</sup> 209A is the statute under Massachusetts General Laws that defines who is eligible to obtain a restraining order.

National Institute of Justice that the gender of the judges should not be considered, that it should have no impact on the running of the session. She noted:

I think perceptions of fairness are important. The reality might be that I am just as fair as a guy. That maybe, well maybe I'm not but I hope I am. That might be the reality but the fact that of the matter is that men come in here looking at women every single day, feeling like...I heard people say it over and over again....One day during a restraining order hearing after the female had a chance to speak, I turned to the male and said, well sir, what do you have to say and he said, "Well you're a girl, she's a girl, we both know where this is going." (Judge 2, Specialized Session)

The expectation of individuals in the "gender-neutral courts" is to find a male version of justice. In the specialized session, they were greeted by a largely female court workgroup which was handling cases that were primarily against men. The reaction by the defense bar and their clients was anger and protest. They felt as though the session was patently unfair due to the gender of the judges and prosecutors. In a reverse situation—male judges and attorneys—the gender of the court workgroup members is not raised as an issue because it is the norm. Masculine jurisprudence is the law and any variation from it feels like an infringement of the norm. This made people feel uncomfortable, even the female judges to some extent. This session was operating as a feminist model of justice. Its goal was broader and was social-problem oriented. It derived value from allowing a more lengthy process rather than insisting on resolving the cases as quickly as possible. The significance of this was lost on many of the defense attorneys who appeared in the session.

The two main presiding judges in the comparison court were men who were former defense attorneys. The gender of this court workgroup was not mentioned as a cause for concern

by anyone in the comparison court. Even though all of the judges who sat in the comparison court were men, and domestic violence is a crime that largely victimizes women, this was not mentioned as a source for potential unfairness by any of the respondents. Additionally, the primary judges of the court were former defense attorneys and thus they seemed to have the respect of the defense attorneys in the local legal culture and some perceptions of unfairness by its prosecutors who were left somewhat powerless and outside of the court community in general.

### **How the Judges Used Court Processes to Accomplish the Goals of their Local Legal Culture**

The two courts under study used different procedural mechanisms to achieve their goals. The existence or absence of the procedural mechanisms impacted each court's local legal culture. The manner in which court workgroup members conducted their daily business and their expectations for case resolution depended on these factors. This had a direct impact on the processing of domestic violence cases.

The specialized session was one session in a courthouse which had five or six other sessions running simultaneously. The specialized session heard all matters that were designated "domestics" by a member of the clerk's office; they narrowly defined "domestics" to include primarily matters between intimate partners. They would occasionally take in a "nondomestic" matter if the defendant had an open domestic matter in the specialized session. The specialized session heard all restraining order hearings, arraignments, pre-trial hearings, motions, violation of probation hearings, and regular probation checks on individuals who were on probation for a domestic incident. The session did not hear jury trials. All matters that were scheduled for jury trial were called together in one session. When matters were ready to be tried, they were sent out

to another trial session, depending on judge availability. This impacted the local legal culture of the session because there was this singular focus. Additionally, domestic violence cases did not have to “compete” for resources against other case types until they got to the trial session. Once there, they did not fare well.

The comparison court did not have a specialized session for domestic violence cases. Thus, all arraignments and pre-trial hearings took place before one judge in the first session and all matters that were put on for trial were sent to the second session. This fact, coupled with a busy docket and scarce resources, impacted the gravity with which domestics were perceived. The domestic violence cases had to compete for resources against other cases that were perceived as stronger or which did not have “victim issues.” This impacted how they were perceived and handled by the court community as a whole. It also impacted how the judges dealt with them. The use of lobby conferences, bench trials, and what it meant to schedule a case for a jury trial was impacted by this court’s caseload pressure.

### **Lobby conferences**

The courts under study were two of the busiest in the Commonwealth. For example, in 2004 the comparison court heard a total of 8,759 different cases. The criminal matters were all heard for arraignment and pre-trial in the first session and if necessary were all sent out to the second session for trial. The criminal matters were composed of 2,547 motor vehicle offenses; 65 breaking and entering; 803 larceny and fraud; 154 disturbing the peace; 551 malicious destruction of property; 511 assault; 55 firearms; 332 narcotics; and 338 other (Statistics for the District Court Departments, 2004). Comparatively, the court that housed the specialized session heard a total of 7,891 cases. All criminal matters were arraigned in the first session and were sent to the fifth session for pre-trial hearings, except those matters that took place between

intimate partners or if the defendant had an open case with an intimate partner; then, their matters were heard in the specialized session. The criminal matters heard in the court in 2004 contained 6,851 motor vehicle offenses; 515 breaking and entering; 1,966 larceny and fraud; 312 disturbing the peace or disorderly person; 513 malicious destruction of property; 3,209 assaults; 610 firearms; 2,251 narcotics; and 2,293 other (Statistics for the District Court Departments, 2004).

One procedural mechanism employed by the judges in the comparison court, in an attempt to deal with caseload pressure and the overburdened docket, is a lobby conference. A lobby conference allows the defense attorney and prosecutor to enter the judge's chambers and discuss the merits of the case "off the record." While this was not done in the specialized session, lobby conferences were reported as "always" being used on the day of trial in the comparison court. Oftentimes, the judge of the comparison court would tell the attorneys what type of a sentence he would be willing to give on a case, if the defendant pled. The defense attorneys felt free to enter into disparate pleas with knowledge of what the actual sentence would be. In the comparison court, this was liberating for defense attorneys and damning for prosecutors. The prosecutors felt that their cases were routinely undersold by judges in an effort to close cases.

The judges in this court went so far as to tell the attorneys that they would be willing to dismiss certain charges based on the representations made in the lobby. This was common even over the prosecutor's objection. For example, if a defense attorney commented that the victim was present but did not want to testify, it was common for the judges to offer to dismiss the case. According to the judge, "Lobby conferences are essential to case management, and I for one would be loathe to not do them. They are very helpful for me." According to Defense Attorney 2,

“If you have a case on for trial and your witnesses are present and your client is inclined to take a deal, you go into lobby and get a deal that you can’t refuse. Generally speaking, that is what happens. The ADA is not budging but the judge will help.” How often does this occur? According to one ADA, “Ninety-nine percent of the cases are lobbied, then resolved” (Prosecutor 3, Comparison Court). Thus, how the bench feels about certain cases can truly impact how they are disposed of in this court. If the judges did not find certain cases to be as serious or as strong, then they could dismiss them or grant lenient sentences. This routinely happened to domestic violence cases in the comparison court. Having the goal of the court focused on relieving caseload pressure and increasing efficiency, coupled with the utilization of lobby conferences, served to restrict prosecutors and empower the judges.

Cases were not lobbied in the specialized session. There were no private meetings prior to trial where the parties privately worked out a deal. While cases were certainly dismissed in the trial session, it was mainly due to repeated failed efforts of the Commonwealth to produce sufficient evidence to meet their burden at trial. Using lobby conferences to quickly resolve cases was characteristic of the local legal culture in the comparison court. It impacted how domestic violence cases were perceived and handled and was not used in the specialized session.

### **Trials**

Once a case is put on for trial, in the comparison court there is little expectation of it’s actually being tried. This is evidenced by the fact that prosecutors may have as many as 20 to 30 cases scheduled for trial on a given day. It would be impossible for any prosecutor to truly prepare for trial for so many cases. If prosecutors are forced to have an unreasonable number of cases scheduled for trial on a given day, many of which are lobbied and dismissed, the cases they end up preparing for trial are merely the ones they can be “guaranteed” convictions...“like a

solid trespassing case.” A trespass case only requires that the defendant have knowledge that the area is a no-trespass area and that they remained on the area. These cases usually have a police officer who asked the defendant to leave and he returned, or a sign that is clearly posted and the police officer observed the defendant there in violation of the sign. Trespass is a six-month misdemeanor in Massachusetts, whereas domestic violence cases require a credible victim with obvious injuries and other corroborating evidence in order to convince a jury (or some judges) to believe the victim’s version of facts. This is a rarity from an evidentiary perspective and thus there are no guaranteed convictions. Domestic violence cases take place in private and often lack evidence independent of the victim’s version of events. Victims of domestic violence often refuse to cooperate with prosecution leaving the cases weak from an evidentiary perspective. This is problematic in a court so heavily burdened and without adequate resources. This court lacked ample prosecutors to work up and focus on domestic violence case preparations. Indeed, it only had one assigned domestic violence designee at a time that generally carried a caseload of upwards 400 diverse cases. Thus, domestic violence cases fell apart and were dismissed on the day of trial, often after a lobby conference.

The result of routinely lobbying cases in lieu of trial in the comparison court is that the session is not really seen as a trial session at all. It is more of a dispositional session, where up to one hundred cases of mixed type are scheduled for trial on a given date. From January 2003 to August 2004, out of the 581 domestic violence cases that were disposed of in the comparison court, only 7 of them were by way of trial, and two of those were bench trials (Judicial Oversight Demonstration Project Data, 2007). If the prosecution cannot answer as ready for trial on the first date that it is scheduled, the case is often dismissed. If parties answer as ready for trial, the case is lobbied and gets a deal. Consequently, not many cases are actually

tried in this court. This affects everyone, and ultimately, the local legal culture. According to one prosecutor:

The problem is that not a lot of stuff goes to trial. You can get a great deal in lobby. You can get your case dismissed. I would say, “You know, judge, I am not agreeing with this, right?” And he would say, “Oh, I know.” And then he would get out there and say “Over the commonwealth’s objection, I’m allowing for pre-trial probation.” So, you don’t have to agree. I don’t think I can ever remember agreeing. They just don’t care.  
(Prosecutor 4, Comparison Court)

Bench trials were another option used routinely in the comparison court for quick case disposal. The judge in the comparison court admitted that he had the trust of the defense bar and that many defendants would waive their right to a jury trial because they know that the judge will “fairly” hear their case. All of this is justifiable to the defense bar and the judges alike, due to the busy nature of the court. According to one defense attorney:

This is such a busy court with so many important cases. Here, if the judges are going to get anything done, they can’t dick around. It’s like being in an emergency room; practicing law here is like practicing medicine in an emergency room. [I asked how this affects the cases.] Well, you’d better be ready. If you’re not ready, it’ll get dismissed.  
(Defense Attorney 5, Comparison Court)

Domestic violence cases were rarely ready for trial in the comparison court. They are victim-dependent and thus successfully finding and convincing the victim to appear in court was essential for the prosecutor to being able to answer, “Ready for trial.” In the comparison court, many domestic violence cases were often dismissed on the first scheduled day of trial. The justification exemplified in the above quote was that their court was too busy to “dick around”

with weaker cases. Here, giving prosecutors additional attempts at finding the victim, or ensuring that domestic violence prosecutors had manageable caseloads, was not a priority, and would not have helped the community achieve its goals. In this masculine model of jurisprudence, success was dependent on efficient management. A three-month turnaround was boasted of and jury trials were an indulgence.

In the courthouse that housed the specialized session, all of the domestic violence cases that could not be resolved in the specialized session were sent to the trial session. The trial session heard all of the matters that the court had set for trial on that day, including non-domestics. Different from the comparison court, the specialized session had more resources so that prosecutors had smaller caseloads and more time to prep their cases. Additionally, the domestic violence prosecutors only handled matters between intimate partners. Thus, they did not need to prioritize between “triable” trespass cases or trickier domestics. The prosecutors of the specialized session were all motivated to gain trial experience as a means to build their reputation within the community. This eventually became problematic because the majority of domestic violence cases being sent to trial were eventually dismissed. Indeed, from January 2003 until November 2004, of the 649 domestic violence cases that were disposed of in this court, only three went to trial.

Thus, the number of domestic violence cases that were actually tried before a jury was similarly low in each court. While these numbers were similar, the reasons were different. In the specialized session, the inability to try domestic violence cases was not a matter of judicial will or caseload pressure. Domestic violence jury trials did not occur because the prosecutors were not “ready for trial” due to insufficient evidence—that is, the victims refused to appear and testify. The judges gave the prosecutors multiple dates to appear ready for trial and if they could

never answer in the affirmative, then the cases were eventually dismissed. Unlike the judges in the comparison court, these judges were not lobbying cases on the day of trial, they were not entertaining bench trials, and they were not dismissing cases over the Commonwealth's objection. Cases either meaningfully pled out prior to trial or they were dismissed after repeated efforts to go forward. This exemplifies a great difference in the two local legal cultures.

It is also important to bear in mind that the specialized session was just one session within a busy courthouse which had four or five other sessions running simultaneously. While the specialized session heard only matters concerning domestic violence, it did not hear any trials. As stated previously, the courthouse had a separate trial session that heard all matters scheduled for trial. For the most part, different judges sat in this session. This impacted domestic violence cases because defense attorneys quickly recognized this opportunity. It wasn't long before they started to push many of their domestic violence cases to the trial session for final resolution, a session that did not have a feminist jurisprudential model or problem solving approach to domestic violence. This caused domestic violence cases to be open for longer periods of time in this courthouse than in other courts. According to Defense Attorney 2 from the specialized session, "It resulted in DV cases taking a lot more time to get disposed of." Many defense attorneys felt that this was a product of the specialized session.

The main reason that so many domestic violence cases were placed on the trial list in both courts was that these cases were ultimately victim-dependent. A number of respondents from both sessions stated that many of the cases went to trial simply because the case relied heavily on victim cooperation. The prosecutors in the specialized session would not dismiss a domestic violence case prior to its trial date, regardless of case strength. Thus, many of them were put on for trial just to see if the victims would appear. If the victim did not appear in the

courthouse that had the specialized session, these judges were told to give the Commonwealth at least one additional date to try to get the victim to appear. Prosecutors from the specialized session stated that they even got second continuances, but by the third trial date, the judges would dismiss the case without prejudice to the Commonwealth. This is different from what was happening in the trial session of the comparison court, where cases were often dismissed prior to trial and if the victim did not appear for trial, cases were not continued but dismissed on the first scheduled date. I discuss the unique nature of domestic violence cases as being victim-reliant and the importance of victim credibility in the upcoming chapters.

### **How Reputation can Impact the Processing of Domestic Violence Cases**

Building a strong professional reputation as a court workgroup member is important for the successful management of cases, but how one accomplishes this can vary depending on one's role within the community. "Reputation, routines, and hence predictability bubble up from day-to-day encounters over cases to contribute to the common sense of the courtrooms and courthouses" (Flemming, Nardulli, & Eisenstein, 1992, p. 205). I also found that the types of cases that attorneys (prosecutors in particular) handle can impact their reputation. As a general rule, attorneys who had a lot of "trial experience" had stronger reputations. Additionally, certain case types warranted additional respect from other court workgroup members. For example, drug, gang, and gun cases seemed to be the most prestigious cases, which directly impacted an attorney's professional reputation in a positive way. Domestic violence cases had the opposite impact. The reputation of attorneys who handled exclusively domestic violence cases suffered. From a feminist jurisprudential viewpoint, the establishment of one's professional reputation was compromised for attorneys who only dealt with these more "feminine" types of cases, and there

was evidence that one's reputation was strengthened when handling more "masculine" case types.

The process of establishing a reputation is fluid in nature. Court workgroup members are constantly assessing their own and others reputations. Without being asked any specific questions, respondents constantly characterized each other. The language used was dependent upon which court actor was being described—with the judges, "She was pretty fair"; with the defense attorneys, "He is a good guy, pretty trustworthy"; and with the prosecutors, "She's really on the ball, a go-getter". What became clear within our conversations was that judges, defense attorneys, and prosecutors all have slightly different ways in which their credibility is assessed and their reputation built.

Judges generally built a reputation as being "fair and reasonable" or not. This is derived from the types of decisions they make and how they communicate with others from the bench. If they are viewed as being "too one-sided," then the other side will characterize them as being unfair and either "pro-defense" or "pro-prosecution." As discussed earlier, I saw this in both of the courts under study. Court workgroup members communicate a judges' reputation with each other and make case processing decisions based on these perceptions. To the extent it is allowed, defense attorneys seek to have their cases heard before a judge that is more likely to have a reputation for being pro-defense, and for the prosecution, it is just the opposite. The judges from the specialized session were characterized by the prosecutors as being "pretty fair" and very knowledgeable about the issues surrounding domestic violence. Prosecutor 4 from the specialized session said, "The judges in this session are fair; they have a deeper understanding of domestic violence, its issues and undertones." In general, the prosecutors from the specialized session respected its two primary judges greatly. Contrary to this, the defense attorneys from the

same session were cynical about the fairness of the specialized session judges. They found the primary judges who sat in it to be “pro-prosecution” and ultimately found ways to get their cases out of the session for final disposition. The defense attorneys stated that the judges always leaned with the ADAs and attributed this to the fact that they were former prosecutors. This is very different from the comments that were made about the judges in the comparison court. The judges in the comparison court were viewed as being “pro-defense” by the prosecution, and this caused the prosecutors to view their actions as unfair. When discussing the presiding judge of the comparison court, Prosecutor 4 stated: “He is very pro-defense. It would pain him to sentence someone to jail.” The defense attorneys in the comparison court counted on and looked to their judges as being professionals who have “great common sense and years of experience.” The defense attorneys considered themselves to be “blessed” because of their judges. With this, he was commenting on how the judges of the comparison court truly understood the value of a case and were brave enough to handle matters in a manner that most of the defense attorneys agreed with.

The defense attorneys’ reputations hinged on being characterized by prosecutors and judges as being “trustworthy” and “honest” practitioners. These attributes were mentioned routinely in both courts when describing defense attorneys who were well-respected within the court workgroup. Being a trustworthy lawyer would mean that they would fully disclose evidentiary issues, and that they would be upfront and honest about their cases and their clients. One defense attorney also mentioned some common things that stood out for her regarding defense attorneys whose reputations were compromised within the community. She said:

The ones that are disheveled, don’t have their files, are always late, are not professional...even with the formalities that attorneys have to go through...”May it

please the court,” “Your honor,” etc. This can affect how they do their job for their client.  
(Defense Attorney 1, Specialized Session)

Additionally, knowing the local legal culture and not rocking the boat seemed to be helpful when trying to establish credibility and build one’s reputation as a defense attorney. Defense attorneys who have practiced for a long time in a certain court are called “old-timers.” They have generally built their reputation through a long history of dealings with a variety of cases and the other regular court workgroup members. Defense attorneys who handle “more serious” cases and who “are not afraid to try a case” have even stronger reputations than those who always plead their clients out to sentences without trying a case every now and then. This criterion is agreed upon by all members of the court community in both courts. Being mindful to avoid rocking the boat can be to the detriment of certain case types, if those cases have a history of lenient treatment from the court community. Characterizations about defense attorneys and their reputations were consistent across courts. One thing that was unique about the specialized session was the manner in which defense attorneys or bar advocates were assigned domestic violence arraignments. The members of the judges’ lobby controlled the list of bar advocates and worked out a rotation for which bar advocates would handle the session’s arraignments on a given day. There were potentially 104 different defense attorneys that could be assigned to that session. After the session was up and running for a while, defense attorneys tried to avoid being assigned to that session. They did not want to be assigned cases in the specialized session and it was a chore for the judges’ lobby to make sure it remained fair. According to Judge 1, “I had a defense attorney bring in a doctor’s note stating that his blood pressure was negatively affected by taking cases in the session. I told him that I did not know what his blood pressure was when he was in other sessions and that he had to be part of the rotation... (Laughter)” All joking aside,

defense attorneys did not want to handle the domestic violence cases. While it did not impact their professional reputations, for they handled a wide variety of different case types, this reluctance to appear in the session and take on several domestic violence cases is indicative of how the community viewed domestic violence crimes.

There was further evidence that defense attorneys uniformly preferred to handle other crimes over domestic violence. In general, the more statutorily significant the charges, the more likely a certain amount of prestige would attach. Many defense attorneys admitted a preference for handling cases involving drugs or guns. They spoke of these cases with interest and excitement. They spoke of their domestic violence cases with annoyance and intolerance. I asked one defense attorney what his favorite types of cases were to handle and he readily replied, “The gun and drug cases.” This was a common response. When I asked him to explain, he said:

They are more interesting. They are more based on legal issues rather than on emotion. It’s either a motion to suppress based on whether or not there is probable cause to do a search and you kind of see where the case is going. You know after reading a police report and meeting your client if this case is going to go or not. Unlike with DV cases you have no idea what is going on. Today the victim could be on board; tomorrow she might not be. You have no idea day-by-day what’s going on with the case. (Defense Attorney 2, Comparison Court)

Really, two things are going on in this response. There is a characterization that domestic violence cases do not have legal issues and are instead based on emotion. This is damning to the way that the cases are viewed and handled by the court workgroup members and how resources and attention are subsequently allocated. If cases are viewed as less serious, or as based on emotion, then they will be given a lower priority status by court workgroup members, especially

in courts that are governed by case efficiency with scarce resources. Also, there is frustration that the cases are unpredictable. This frustration is shared by all the court workgroup members in both courts.

For prosecutors, building a reputation can be more complicated because they never control their assignment of cases and can be assigned to handle only certain types of cases. In the specialized session, they were called domestic violence court (DVCT) prosecutors, and in the comparison court they had certain prosecutors who were called domestic violence (DV) designees, who handled some special DV cases among other case types. If prosecutors are handling only domestic violence cases, they will have to rotate into the arraignment session on a given day. On that day they will handle all new arrests from the night before and argue bail and other preliminary matters. If their office has a vertical prosecution policy (meaning that they will keep the case from arraignment to disposition), then they will retain these cases until they are disposed of. If the prosecutor is not assigned to a special case type, they will probably just be assigned to a particular session that day and speak on behalf of the district attorney's office on whatever pre-trial, motion, or trial that is scheduled for that day, depending on the session they are assigned to. Additionally, their actions are governed by existing office policy, which is communicated by their supervisors. All of this can impact a prosecutor's reputation because the criteria for assessing the reputation are based primarily on what types of cases the individual handles and how often and successfully they bring matters to trial.

As stated previously, the types of cases a prosecutor is assigned and the number of cases they actually try before a jury will still impact their reputation and perceived success as a prosecutor, even if this is somewhat out of their control. The number of trials that a prosecutor accrues will often translate into his or her perceived success. This perception is universal within

the court workgroup. The more trials one conducts, the better for a prosecutor's reputation within the district attorney's office, but also among other court workgroup members. Judges and defense attorneys alike share the belief that better attorneys try more cases. Domestic violence cases seldom result in trials and are often dismissed on the day of trial. Thus, being a domestic violence prosecutor could be detrimental to one's career because they will lack "trial experience." Prosecutors who have been primarily assigned to handle domestic violence cases are very much aware that the assignment could have a negative impact on their careers.

Feminist jurisprudence would not ignore the fact that that this mainly impacted female prosecutors. In both courts, all of the prosecutors assigned to handle the domestic violence caseloads were women (except for one man in the specialized session for a brief period of time). It was not uncommon, in either office, for female prosecutors to be assigned victim cases. They were assigned to handle these cases either because they expressed an interest in working with them or because a superior decided that they were "good with victims." Yet this assignment was perceived, especially in the community that held the specialized session, as negative and harmful to one's career. The community hides the justification for this on a normative standard. Prosecutorial reputations are built on your willingness to "try a case." But this was not always an option when it came to domestic violence cases, which were rarely able to be tried. Many prosecutors felt that they were at a professional disadvantage within the office once they were assigned to domestic violence and other victim-oriented units. It was with frustration and some resignation that they answered these questions about the difficult position they were in professionally due to their assignment and its reputation within the community. One prosecutor tried to explain how perceptions of the domestic violence unit worked as opposed to other units.

OK, the perception is...that we do not try cases, and most people are here [in the DA's office] because they want to be trial lawyers, and this is the best place to do that. They think that we can't do anything with our cases and we don't try them, that we get crappy sentences on pleas, they say...D.V., you know you can't do anything with that...the women never follow through, etc., etc. (Prosecutor 2, Specialized Session)

This prosecutor made it clear that it was the court workgroup's perception of domestic violence cases that was damning to the reputation of those who were assigned to handle them. Prosecutors felt that other nondomestic violence prosecutors did not want to be assigned domestic violence cases and tried to avoid being promoted to the superior court domestic violence unit.

People don't want to do it [prosecute domestic violence cases] and they feel bad for the people who do. They assume that we must not be as good, ummmm, that we are not go-getters, or what have you....Just don't go near it, don't go up there, that's a hot mess. In district court it was very much like, "Oh you're in the DVCT..." same thing same thing. (Prosecutor 2, Specialized Session)

Assignment to certain crime types can impact a prosecutor's reputation as perceived by other court workgroup members. One defense attorney stated,

My impression within the DA's office is that when you go to superior court, if you can get into the major crimes or the firearms prosecution unit, you can advance much more rapidly. A couple ADAs from here have gone downtown [lingo for being promoted to a superior court team] and have accelerated their careers in the office by going to one of those units. (Defense Attorney 4, Specialized Session)

The units that were identified as being prestigious in the county that housed the specialized session were the gang, gun, and general felony units. This was somewhat less emphasized by the district attorneys in the comparison court due to a lack of similar infrastructure. The establishment of victim-focused superior court teams took place decades ago in the county that held the specialized session, and were just beginning to take shape in the county of the comparison court. This being said, most prosecutors from the specialized session reported that the gang unit was the most prestigious and sought-after unit to be promoted to (aside from homicide). According to a prosecutor from the specialized session, “The gang unit has always been the glorified place to go. Of course homicide is like the end-all-be-all for everybody. But I would say that the gang unit is like the sexy unit that people want to go to.” Not only do people aspire to be assigned to that unit, but once one gets there, a certain amount of prestige comes with the assignment. Most interestingly, this unit also has trouble bringing cases to trial due to reluctant or scared victims and witnesses. Despite this similarity to the DV unit, the gang unit remains a “cool and sexy” place to be assigned. This analysis revealed that the negative reputation associated with domestic violence cases is more than a product of weak case typification. It is a product of societal prejudice. Domestic violence was historically seen as a private matter, really just some family squabbling; they were not regarded as serious or important. This remains true today despite the many changes that have taken place. Gang cases, which have very similar evidentiary and victim issues, are perceived very differently by the court community. Assignments of these cases can “fast-track a career.”

Why is assignment to a gang unit in the DA’s office or as a police officer a glorified place to be when assignment to domestic violence units are perceived so negatively and even as a source of punishment? As one prosecutor put it:

They think...you know, it's gangs...it's sexy in terms of, well, they must try a lot of cases...but in actuality they have a lot of victim issues too because people do not want to come and rat on the fellow gang members, so they confront some of the same issues. I've watched, I don't think they go to trial all that much...but they are still perceived as sexy and cool...guns are cool. There's a lot of cop involvement and prosecutors (a lot of them are wannabes) so they are going to be able to hang out with cops...and deal with cops...whereas, dealing with battered women, that's not cool. (Prosecutor 2, Specialized Session)

Perceptions of prestige associated with handling certain crime types were also mentioned by respondents as impacting the members of the police departments in the specialized session. Several respondents mentioned that an assignment to a gang, gun, or major felony detective unit was a source of pride. As one defense attorney put it:

With respect to the police there is no question. There are officers who we see in this court who make it a point to tell the defense attorneys and everyone else that they are either involved in the gang unit or one of the other special investigatory units. The gang unit especially seems to be very prestigious...They make no bones about pointing that out to everybody. They consider themselves special actors. (Defense Attorney 4, Specialized Session)

Contrary to this statement, assignment of a detective to the domestic violence unit was seen by some as a source of punishment. According to one prosecutor,

The police haven't done much for our cases. DV detectives are assigned to the unit because they are the people who have screwed up and they don't know where else to put them...They are usually piss poor...There are some stand-outs...but overall they are not

good and they won't do anything for you. So if you don't get those pictures, the DV detectives won't go out and take them or interview the defendants or anything. They don't do much. I won't even put them on the stand because they didn't do anything.

(Prosecutor 2, Specialized Session)

In general, assignment to domestic violence cases, especially in the court workgroup and the district attorney's office that handled the specialized session, was damning to a prosecutor's reputation. Still regarded by most members of the court community as frustrating and as less serious than other cases, being assigned to handle domestic violence cases could result in fewer trials and a dead-end career. This will impact how and by whom they are handled. Most interesting is that this was particularly pronounced by the court workgroup members in the county where the specialized session was handled. The specialized session was operating in a local legal culture that did not value these cases. This impacted the amount of influence that the session could have over the court community. There was evidence that defense attorneys, prosecutors, and even detectives do not want to handle these matters. This must impact who is assigned to these cases and how they do their jobs.

## **Resources**

When resources are limited, organizations need to prioritize. Prioritization of work in a court community can result in certain cases receiving low priority status. Low priority status results in cases not being investigated and prepared as carefully. In courts with high caseloads and limited resources, this can be particularly problematic, especially if they handle many cases that the court workgroup considers to be "serious" on a regular basis.

The local legal culture of the specialized session was affected by the allocation of additional resources by the federal government in the form of a grant. This grant was designed to create the specialized domestic violence session and attempted to change the way that domestic violence cases were handled by the court. These resources translated to trainings for prosecutors, judges, probation officers, and police officers about the unique nature of domestic violence cases. Additionally, assistant district attorneys were chosen to work in the specialized session who dedicated their time exclusively to domestic violence cases. The grant allowed the district attorney's office some flexibility in assigning additional ADAs to the session as well. There were six ADAs assigned to handle all of the domestic violence cases of this one district court. This translated to reductions in caseloads and increased time spent on case preparation. These facts surely contributed to the perceptions of unfairness that were characteristic of the defense bar's experiences with the session. Defense attorneys were neither part of the training nor recipients of the grant. This made them structurally outsiders from the grant, which in turn translated into outsiders within the session.

When I asked prosecutors about their work in the specialized session and how it was different from working in other district court sessions, they mentioned the training they received as one of the big differences. "From the onset of joining the specialized session the training was different the way you were taught to approach the cases was different, the way they were analyzed from arraignment all the way through the court process was different" (Prosecutor 4, Specialized Session). The intensity of the trainings was mentioned as a source of difference, as well as the fact that these prosecutors handled domestic violence cases to the exclusion of all other crime types. Prosecutors also had much smaller caseloads, resulting in more time allocated to the investigation of the cases. As a result, in-depth interviews with victims happened on a

regular basis. A trained civilian investigator was assigned to the prosecutors and paid for by the grant. This person would search for independent witnesses, take photographs of crime scenes and injuries, serve summonses, and help prosecutors or fully develop their cases. This was not a common district court practice. Prosecutors were trained about legal matters pertaining to investigating and prosecuting domestic violence cases. Additionally, they were also trained about the unique nature of the crime, how to be culturally competent, and other social implications of domestic violence.

Typically, district court assistant district attorneys are assigned to work in certain sessions on certain days. In this model, a prosecutor would be assigned to “arraignments” and handle all the arraignments in that court on that date, or they would be assigned to the “pre-trial” session where they would conference all the cases assigned to that session that day. In general, when an office is set up like this, the prosecutor is accountable for the case on that date alone. At the end of the day, they might be in charge of prepping the case for the next scheduled date, filling out some paper work, etc., but then the case gets filed away and reassigned for someone else to handle in a couple of months.

In the specialized session, cases were assigned to a prosecutor prior to the defendant’s being arraigned, and remained with that arraigning prosecutor until the case was disposed of. This model of case assignment is called vertical prosecution. This can yield different case processing results. Vertical prosecution allows for a more uniform approach to the case from one court date to the next. Prosecutors were more accountable for their work on a particular case when they were responsible for it at every scheduled date. This accountability began within the court community itself. Judges were cognizant of vertical prosecution and thus had higher expectations of the prosecutors in that session. There was no confusion about who was

responsible for the case; if witnesses were not summonsed or the case was not properly prepared, the individual prosecutor would have no one to blame but herself. This could impact prosecutors' reputation within the community and within their office. Vertical prosecution also afforded prosecutors the chance to form relationships with their victims. This enabled them to better uncover any history of violence that might exist between the parties that could lead to better lethality assessments. As one prosecutor described:

First, once a case came onto your desk, from arraignment on there was familiarity with the case from the beginning—which often times other prosecutors never get. You get the case at the beginning; you become familiar with the victim, the witnesses, even the defendants; the defendants pick up other cases; you get those as well; you have a relationship with the defendant (laughter/joking)...so that's definitely different. I think the way that you're taught to prep your cases is different. The way that you're taught to perform discovery obligations is different; as opposed to waiting to the end, you try to deal with things if you think your case might go to trial. You're prepping things from the beginning; you're treating the case as if you're never going to see that victim again, which is a pretty negative angle to come at it from, but that was the reality of it. (Prosecutor 3, Specialized Session)

This quote reiterates the impact that vertical prosecution can have on case processing. It also brought up the fact that prosecutors were trained to treat cases from the beginning as if “you're never going to see that victim again.” This was a common sentiment of the session. Prosecutors were trained about the unique nature of the cases and how it is difficult for domestic violence victims to remain cooperative through the pendency of the case. Thus, prosecutors would attempt to secure any and all independent evidence from the onset of the case, just in case

the victim failed to appear or started to recant the original version of facts. This was an attempt to take some of the burden off the victim.

The differences in prosecutorial style in the specialized session contributed to the defense attorneys' perceptions of unfairness as compared to other sessions, as one defense attorney noted when she compared the domestic violence cases she handled in the specialized session with the other sessions where she appeared. "In other courts, there was definitely less focus. I would say it was not in the spotlight. There were no special prosecutors, no people getting paid under a grant, or a judge focused on that sort of thing." (Defense Attorney 3, Specialized Session). Defense attorneys and prosecutors alike were well aware of the existence of the grant and how the prosecutors were spending much more time preparing their cases and attempting to get them ready for trial. With more trained prosecutors the quality of work they could do made a meaningful difference in their philosophy on how to handle domestic violence cases. Indeed, these prosecutors singularly focused their attention and resources on the prosecution of domestic violence cases alone, a fact that did not go unnoticed by the defense bar. One defense attorney, who had been in practice for over twenty years, described his frustration with all the focus on the domestic violence cases in the specialized session. He still maintains that the cases are weak and not worthy of so much time and effort, and points out that this session is different from others because they are exhausting more resources on cases that "fall apart" in the end anyway:

The DV cases were separate and apart. You have to understand that in the DV session, that DV cases, because they were designated DV and there was a special session for them and the judges and the court thought there was an issue with DV, that they were set apart from the regular body of cases. That was one of the things that I resented about the DV session...Because many of these cases, as is shown by the fact that the alleged victim

walks away from the case most of the time, are bullshit. But nevertheless, because of this session these cases were looked at with more scrutiny when they shouldn't have been.

(Defense Attorney 4, Specialized Session)

So while more time and money was spent working up these cases, the defense bar found this to be a source of resentment. They saw it as wasteful to allocate resources on cases they perceived to be patently weak by virtue of the victim's behavior. These attorneys were not given resources or training under the grant. This may have been a flaw with the session that could have been dealt with if the defense bar had been included more. They were also more likely to appear in other sessions within this courthouse and in other courthouses while the specialized session was up and running. Keeping their practice diverse, in respect to where they practiced, served as a reminder that things were quite different in the specialized session than anywhere else. The defense bar's goal was more consistent with the comparison court's goal and likely more akin to most traditional courts. They wanted to keep their cases moving and get dismissals on the domestics quickly. They were very frustrated that the additional resources were making this impossible.

In the comparison court, scarce resources impacted the court's local legal culture. All prosecutors were burdened with very heavy caseloads. The district attorney's office stated that they created "DV designees" who were supposed to have reduced caseloads. But when asked, time and again these designees responded that they had caseloads of 300 to 400 open cases at a time. Because of the court's goal of efficiency, many cases were put on the trial list before they were ready to be tried. This would result in having many cases scheduled for trial on a given day. This has a meaningful impact on their ability to "prepare for trial." Indeed, if several cases are scheduled for trial on any given day, how they allocated their time was influenced by

“uncertainty avoidance” (Albonetti, 1986). Uncertainty avoidance is a concept which is used to describe the process that prosecutors go through when prioritizing cases. Since prosecutors need to obtain convictions yet have limited resources to do so, they need to allocate their time and energy to the cases that they are certain will succeed and to avoid cases where this certainty is diminished. This can have serious implications for domestic violence cases, where the certainty of success is minimal. As one defense attorney put it:

Here, there’s a disjointing between the first and second session.<sup>9</sup> You can’t get anything resolved in the first session, so hundreds of cases go to the second session...People don’t even know what their cases are about. I’ve seen serious assault and battery cases go away because the ADA spent their time building up a solid trespass case. They are not prioritizing; they are just trying to figure out which cases the people are going to respond to them in. They put all their eggs in that basket. From a policy perspective it doesn’t make much sense. (Defense Attorney 2, Comparison Court)

When I asked a prosecutor to comment on this, she agreed that having a “busy court” directly impacts the way that DV cases are handled. “Yes, they get dismissed because we’re too busy to do anything with them.” From the supervising prosecutor’s perspective,

If you have 95 cases, the quality of work you can do with 95 cases is different than what you can do in a court where you have 400 cases each...You can’t have the same level of follow-through. It’s impossible. (Prosecutor 1, Comparison Court)

This supervising prosecutor discussed the problems that she saw in the comparison court. She discussed things that the district attorney’s office was trying to do to combat the problems that the prosecutors had in trying to prosecute domestic violence cases in that court. She

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<sup>9</sup> In the comparison court, the first session is the pre-trial session and the second session is the trial session.

described how the district attorney's office created the "DV designee" in order to put specially trained prosecutors in charge of the domestic violence cases. The prosecutors are allegedly better with victims and have more experience than some of the other prosecutors who may have just begun their careers. While the model would require that DV designees have reduced caseloads, this has not yet become a reality. The DV designees that were identified and interviewed in the comparison court each admitted to having close to 400 open cases. Thus, this program should help to combat the problems associated with scarce resources in a busy court, but it cannot work unless the prosecutors truly experience the reduced caseloads.

### **Conclusion**

Court workgroup members quickly learn the local legal culture of the courts where they work. They have to. Failure to adhere to the culture's rules, norms, and values can have repercussions that could ruin their day and impact their careers. After repeated appearances and day-to-day encounters with the same players, attorneys communicate to each how things get done in that court. This varies from court to court. The rules of a court's local legal culture are born of tradition, but in this study were also highly dependent on judicial will. That is because in both courts, the judges had a large degree of power.

The judges in this study had great influence on the local legal culture in the courts where they presided due to their long histories in their respective courts. Each court had vastly different goals. The specialized session was operating under a grant which set out to change the manner in which domestic violence cases were handled. The judges adopted a more rehabilitative model of justice which emphasized treatment for batterers and making sure that the prosecutors had ample time to investigate the cases prior to disposition. The judges of the comparison court truly saw their role as case managers. It was indulgent to "try" a lot of cases

because the main objective was to move cases along and dispose of them as quickly as possible. These goals are very different and they control many aspects of each court's local legal culture. These differences also impacted the processing of domestic violence cases. From a logistical standpoint, the cases were open a lot longer in the specialized session. There, they received a much higher caliber of time and attention. In the comparison court, the cases received very little time and attention because they were among hundreds of cases that need to be disposed of quickly.

The different themes of these two courts could be classified as a feminist model of justice and a masculine model of justice. The specialized session represents the feminist model, where the goal is broader than its traditional counterparts. The court workgroup members were not controlled by caseload pressure and the closing cases, as is often the case in traditional models. Rather they were taking a deeper look at a social problem that has plagued their community, and particularly women, and were trying to address it with an alternative approach. The comparison court could be seen as a masculine or traditional model, mainly because its focus is more normative in fashion. The court community literature has established that case efficiency and caseload pressure are themes that can control the local legal culture of courts, and this was the case in the comparison court. Each court community identified two main judges that had been sitting in their court for many years. The judges that were identified in the specialized session were both women who were former prosecutors, and the judges from the comparison court were both men who were former defense attorneys. These differences in gender cannot be ignored and surely impacted the local legal culture of the courts.

The items that made the specialized session a feminist model of jurisprudence were the same ones mentioned by some court workgroup members (particularly defense attorneys) as

sources of unfairness—namely, the gender of the judges and the alternative problem solving orientation in which they were trying to approach the cases. Perceptions of unfairness were apparent among defense attorneys when they discussed the specialized session. They felt at odds with the prosecutors and judges in the session. Mini-communities (dyads) developed between the judges and prosecutors of the specialized session. These were characterized by judges and prosecutors who more often agreed on how to resolve the cases and how much attention should be given to the investigation and preparation of these matters—from the defense attorneys’ perspectives, entirely too much attention. They even went so far as to mention that it seemed unfair for female judges and prosecutors to be predominantly handling cases that impacted male defendants. This was noteworthy because it was different from the norm and what the local legal cultures of other courts traditionally had. Even the judges were aware of and commented on these perceptions.

Gender was not mentioned as a source of perceived unfairness in the comparison court. Even though the judges were all men and the victims were all women whose cases were being dismissed and disposed of at a rapid rate. The mini-community (dyad) that existed in this court was between the judges and defense attorneys. The defense attorneys thought the judges were a “blessing” and they could count on them to side with their client if an unagreed-to plea was offered. The prosecutors were at odds with these parties and were rendered powerless by the judges who truly fashioned their own version of justice. One possible explanation for this was that the prosecutors were rotated out of the comparison court on a rapid rate and never got firmly entrenched in the local legal culture. The judges in the comparison court always lobbied cases on the day of trial. This was a private setting where the parties could discuss the case and the judge would tell them how he would resolve the matter. Prosecutors objected and complained

but could not stop the cases from being disposed of in the manner the judges felt were appropriate. This resulted in very few domestic violence matters being tried. Many cases were dismissed or put on pre-trial probation prior to the date of trial; those that remained on the trial list were lobbied and dismissed, or given a “deal that one could not refuse.” Refusal to try cases in the comparison court was mostly a product of the caseload pressure by which the court workgroup members were controlled.

The domestic violence cases did not result in many trials in the specialized session either, but this was not for a lack of trying. Many matters were placed on the trial list. Many continuances were granted by trial judges so that prosecutors could try to summons the victim and be ready to try their cases. But many cases were eventually dismissed on the day of trial. They were not dismissed because of caseload pressure however, but rather because the prosecutors had exhausted their efforts at trying to go forward with the cases and simply could not move for trial.

The domestic violence prosecutors suffered from this lack of trial experience more than any other court workgroup members in either court. Trial experience is the normative way to measure the reputation of any attorney. Domestic violence cases rarely went to trial and the domestic violence prosecutors felt that their careers were suffering as a result. Other court workgroup members also cited examples of prosecutors who were rapidly advancing in their careers because of placement on a major felony team, not a victim-oriented, emotionally heavy, messy domestic violence cases. The manner in which reputation is assessed and the negative characterizations that domestic violence cases suffer both have gendered components. Feminist jurisprudence would suggest that this is based on gender and in society’s inability to recognize the value in alternate sanctions for domestic violence cases. A rehabilitative model is valuable.

Helping a victim leave an abusive relationship or become independent and self-sufficient with her housing and employment options are valuable and worthwhile outcomes. Additionally, getting batterers to enter counseling and plead to the batterers' program is also a valuable outcome. Using the male standard of trial and conviction as the only measurement of professional success is narrow-minded. Additionally, there was much evidence that the reputations of domestic violence cases themselves still suffer greatly within both court communities. Like a vicious circle, domestic violence case assignment can be damaging to one's career because the cases themselves are messy, not based on legal issues, and not at all important, valued, or sought after. The judges, and to some extent the prosecutors, in the specialized session sought to change this paradigm but were working in a vacuum of sorts. Without the support of the greater community at-large, their influence was limited. This tradition of negative associations and treatment of domestic violence cases is strongly entrenched in the fabrics of our courts. It manifests itself in the amount of resources that are allocated to the investigation and handling of certain case types. Great differences were noted in the two courts regarding how resources were allocated to domestic violence cases. Feminist jurisprudence would suggest that we expose the manner in which domestic violence cases are considered and handled by court communities and make them responsible for maintaining the lenient manner in which domestic violence cases are still treated.

## Chapter 4: Case Typification and Domestic Violence Cases

*“Serious cases are baby murderers or people who are mean for no reason, but I feel much less threatened when there are two people that know each other involved.”* (Defense Attorney 5, Comparison Court)

In this chapter we will review the process by which court workgroup members in each court typified domestic violence cases as strong and weak. We will examine what criteria were cited by court workgroup members as necessary for strong case typification and how this impacted domestic violence cases. Surprisingly, I found that both courts used similar normative standards to evaluate case strength. Each court listed numerous pieces of evidence that, if present, would allow for strong case typifications. Unfortunately, domestic violence cases rarely have this evidence, resulting in weak case typification. Additionally, it became clear that even when such evidence did exist, domestic violence cases were still often typified as weak and the evidence deemed not credible. Thus, a higher threshold for assessing case strength was found when it came to domestic violence cases.

This chapter also explores how a court’s local legal culture interacts with this typification process. While both courts used similar criteria for case typification, what “weak” meant in the specialized session was different than what it meant in the comparison court. While the outcomes may not have been so different ultimately, the language that was used, the time that was spent processing the cases, and the resources that were allocated to case preparation and investigation was different in each court. Ultimately, the message that was sent to the community at large about the court’s tolerance of domestic violence crimes was very different in

each court. This is because the judges and prosecutors in the specialized session discussed the evidentiary problems that domestic violence cases pose, but still considered them serious and potentially lethal. The comparison court, on the other hand, did not allocate resources and time to domestic violence cases because of their weak case typification. They found creative ways to dismiss these cases quickly based on their weak typifications and the way that the court community characterized them.

These differences are explored through the lens of feminist jurisprudence. A reliance on evidentiary strength was still tantamount to strong case typification in both courts. Similar pieces of evidence were cited by each court workgroup member independent of place. However, in the feminist model of justice, the specialized session inferred different meaning and allotted a different amount of resources and attention to the domestic violence cases in spite of this reliance on often non-existent evidence. The judges and prosecutors talked about domestic violence as a serious problem. Due to their weak evidentiary nature, they believed that the cases warranted additional time for investigation and smaller caseloads for prosecutors with the hopes to bolster case strength. The traditional court, a masculine model of justice, did not consider the unique nature of domestic violence, with its weak evidentiary presentation, as anything but an excuse to typify the cases as weak and to dismiss them.

### **Relevant Literature**

Court workgroup members use informal shared understandings on how to evaluate a case's relative strength and generally agree on which cases are strong and which are weak. Typifications are often subjective and are a mix of both social and legal considerations (Myers & Hagan, 1979). While a more serious charge should impact strong case status, evidentiary strength is paramount. The need to have an efficient system and produce convictions after trial

could cause even the most serious of charges to be labeled as weak if there is a lack of evidence. Case typification has serious repercussions on how the cases are viewed and handled by the court community members. Indeed, “Resources are allocated, cases are labeled, and sentencing decisions are made depending on how the case is typified” (Myers & Hagan, 1979, p. 439). Domestic violence cases are deemed to be weak from an evidentiary perspective and have a history of being minimized socially. This leads to weak case typifications that can have devastating results. In this study, resources were scarce in the comparison court; the cases were labeled as weak and most cases were dismissed. The specialized session attempted to address these problems by allocating additional resources, but they continued to struggle with how the community labeled and ultimately sentenced the cases.

Through everyday interactions, case stereotypes are developed and reaffirmed continuously, allowing for the efficient processing of cases (Sudnow, 1965). Court actors develop schemata of shared assumptions and stereotypes about cases that help speed case processing (Farrell & Holmes, 1991). Indeed, once these schemata are internalized by the court community, they are resistant to change (Ross & Anderson, 1982). This is a powerful statement when the schemata associated with domestic violence cases are based on victim credibility and weakness in general. This has ramifications for cases that fall outside the parameters of the schemata. Atypical cases are those which cannot be easily interpreted using the prevailing stereotypes for the crime and may reduce implied seriousness (Farrell & Holmes, 1991). While cases that fit into defendant or offense stereotypes and categories can be processed on a routine basis, atypical cases could present confusion for court actors (Farrell & Holmes, 1991). Since domestic violence cases have been historically deemed weak by court workgroup members, this weak case stereotype has probably been internalized by court workgroup members and is

difficult to undo. A specialized session could be the mechanism for changing how cases are typified and stereotyped. In order to do this, the session needs to be successful at truly changing the court's local legal culture. It would be difficult to do if court workgroup members are resistant to the changes posed or do not change the manner in which they think about the cases.

Assessments of evidentiary strength are often based on the presence or absence of eyewitness accounts, real evidence, testimony from experts, and credible testimonial evidence (Belknap et al., 1999; Garcia, 2003; Hirschel & Hutchinson, 2001; Meyers & Hagan, 1979; Ventura & Davis, 2005). Thus, strong case typification has been found to be dependent on many legal factors, mainly evidentiary strength. Victim/witness credibility is largely a subjective judgment made by court workgroup members and can be based on a number of extra-legal factors. Prosecutors realize that judges and juries will acquit if the victim's character and or behavior cast doubt on allegations, reduce the quality and availability of evidence, or mitigate the defendant's culpability. Weak case labels result when victims are identified as not credible. Research suggests that the process of assessing the credibility of a victim is largely subjective in nature. For example, a victim's socioeconomic status and behavior prior to the crime has been found to have an impact on the prosecutor's assessment of victim credibility (Miller, 1970). The race of the parties involved in the crime has also been found to impact the assessment of case strength. Newman (1966) found that black victims of black defendants were considered less credible by prosecutors than white victims of black defendants. These assessments are motivated by a prosecutor's subjective beliefs regarding the likelihood of conviction. Factors, such as victim credibility, that could reduce the probability of conviction are considered "weaknesses" that could justify a plea or dismissal (Kaplan, 1965; McIntyre, 1968; Miller, 1970; Newman, 1966).

Within the discretionary systems literature, issues that affect case processing decisions are known as “focal concerns” (Kramer & Ulmer, 2002; Savelsberg, 1992; Steffensmeier & Demuth, 1998). These concerns seek to explain decisions that are legal, organizational, and extra-legal in nature. How these concerns are interpreted and emphasized will vary depending on the court community’s local legal culture. Through an informal and almost subconscious process, “perceptual shorthand” is developed by court workgroup members to determine offenders’ perceived level of culpability and dangerousness (Hawkins, 1981; Steffensmeier, 1998). These short-hands are based on stereotypes that the court workgroup member associates with race, sex, age, status, and membership in certain social groups, as well as other cues (Hartley, Madden, & Spohn, 2007). Focal concerns have been found to impact sentencing decisions. For example, the meaning a judge attaches to the facts of a case, the relevant laws, and the people involved explained between five and six times as much variation as the straight legal variables when examining sentencing decisions (Hogarth, 1971). More recently, Ulmer, Bader, and Gault (2008) found that court community members’ religious context can impact how they determine a defendant’s relative blameworthiness and could impact their theory of punishment.

Legal factors have also been found to be important considerations for court community members when assessing cases. Legal factors are more normative and less subjective by definition. They include case processing factors (amount of bail set, case type and the length of the defendant’s record). They can also include evidentiary issues that a case possesses. Using case disposition data, Bernstein, Kelly, and Doyle (1977) found that the number and type of arrest charges, the defendant’s pre-trial confinement status, and the length of time that elapsed between arrest and the final disposition were significantly related to case outcomes. A few years

later, Myers and LaFree (1982) pointed to the importance of the lack of “real evidence, eyewitness identification, and the number of victims and witnesses” as sources for differences in decision-making processes between sexual assault cases and other types of felonies (Myers & LaFree, 1982). More recently, Kerstetter (1990) and Kerstetter and Van Winkle (1990) stressed the importance of evidentiary sufficiency when making decisions concerning sexual assault complaints.

Many others found that court community members use a combination of legal and extra-legal factors when making decisions. Extra-legal factors include non-legal criteria that influence punishment decisions. For example, socio-demographic factors such as age, race, gender, education, and employment status of the parties have been analyzed as being correlated with sentencing decisions. Feeley (1979) suggested that a combination of such legal and extralegal factors affect decision-makers. Case dispositions in the lower courts of a medium-sized city found that the defendant’s prior criminal record, the nature of the arrest, the seriousness of the offense, the number of criminal charges pressed, the presence of the defense attorney, the victim-offender relationship, the defendant’s age, pretrial confinement status, and the number of court appearances were all related to decisions not to prosecute (Feeley, 1979). Adams and Cutshell (1987) looked at shoplifting cases where prosecutors dropped the charges by “nol-prossing” them. They found that a combination of factors affected their decisions to nol-pros. A nol-pros is a motion that is in the exclusive discretion of the prosecutor to have the charges against the defendant dropped. Generally, prosecutors do not have to explain their reasons for moving to nol-pros a case and such motions are often used when it is determined that insufficient evidence exists to warrant prosecution. Adams and Cutshell (1987) found that the defendant’s prior record, the number of offenses charged, and the gender and race of the defendant all had an

effect on the prosecutor's decision to nol-pros a case (Adams & Cutshell, 1987). More recently, Ulmer, Kurlychek, and Kramer (2007) analyzed the disposition of cases in Pennsylvania following recent amendments to the sentencing guidelines in 1999 and 2000. They found that both legal and extra-legal factors were used by prosecutors to assess a defendant's blameworthiness and ultimately the decision to apply mandatories (Ulmer et. al., 2007). Even under a structured sentencing system, they found that discretion remains.

Independent of evidentiary issues, prosecutors often make subjective judgments about whether or not to go forward with the case dependent on how they perceive the victim. Victims of crime are often labeled as good or bad by court workgroup members. This label may determine case strength, which eventually affects case outcomes. For example, prosecution is less likely when the victim has a drug or alcohol problem (Rauma, 1984). A good victim has more outward signs of trauma and is more cooperative with the criminal justice system, whereas the uncooperative or chemically dependent victim is seen as bad (Hirschel & Hutchinson, 2001). Many domestic violence victims fall into the "bad victim" category. Studies have looked at the charging decisions of prosecutors when discussing the victim credibility issue. In an early study, Miller (1969) found that the "attitude" of the victim and the presence of a "guilty" or "immoral" victim were influential on a prosecutor's decision to go forward with a case. Frohmann (1991) and Spears and Spohn (1997) similarly found that prosecutors spent much of their investigatory time challenging the version of facts as told to them by the victims. They sought to discredit the victim and used a variety of subjective criteria to determine which victims were credible and which were not. This was part of the weak case typification process and had great implications for their charging decisions. They chose to not proceed against defendants when the victims presented themselves in a less-than-ideal manner. Prosecutors would use official reports and

records to compare with the victim's version of events, typifications of "rape-relevant behavior," and any knowledge of the victim's personal life and possible criminal connections. Both of these studies looked at sexual assault crimes and focused on one court workgroup member: the prosecutor. One study that also took into account the relationship between the parties was Spohn and Hollernan's (2001). While they still were mainly interested in sexual assault cases, they added the variable of relationship between the victim and defendant. They found that the victim's reputation and behavior affected the charging decisions of prosecutors (independent of case strength) only in cases between acquaintances and intimate partners, but did not have an effect on sexual assaults between strangers. In sexual assaults between strangers, prosecutors were more reliant on evidentiary concerns such as the presence of real evidence (e.g., whether the defendant used a gun or knife in the assault). The victim's race was significantly related to credibility in stranger rapes. White victims were found to be more credible by prosecutors in this type of crime. Consistently, domestic violence cases always occur between people who know each other, causing them to immediately be labeled as weaker by court workgroup members.

Prosecutors and other court workgroup members seek to discover the victim's relative culpability when assessing case strength. These "victim blaming" attitudes have been found to be central to the prosecutor's decision-making process when they are used to evaluate the credibility of a victim and the strength of a case (Ellis, 1984). Studies have demonstrated that cases outcomes (especially in sexual assault cases) have been influenced by risk-taking behaviors such as hitchhiking, drinking, or using drugs (Bohmer, 1974; Kalven & Zeisel, 1966; Lafree, 1981; McCahill et al., 1979), and by a victim's reputation, mainly of allegations of sexual promiscuity (Feldman-Summer & Lindner, 1976; Field & Bienen, 1980; Holmstrom & Burgess, 1978; Kalven & Zeisel, 1966; McCahill et al., 1979; Reskin & Visher, 1986). Prior relationship

with the defendant, preference with respect to prosecution, prior victim/defendant conflict, alleged victim misconduct prior to the crime, and the victim's prior criminal record have also been found to be correlated to "bad" victim typifications (Myers & Hagan, 448). While the literature on how prosecutors make decisions pertaining to their cases is rich, this study looks at how the entire court workgroup perceives and typifies domestic violence cases collectively. While sexual assault crimes take place between intimate partners, they represent only a portion of all domestic violence crimes. Victim-blaming attitudes impact case typifications for domestic violence crimes because the crimes are so victim-dependent.

### **Case Typifications and Domestic Violence Cases**

The court workgroup members in the two courts agreed that domestic violence cases were typified as weak in general. Respondents in both courts pointed to independent evidence as the main source for enhancing case strength. Independent evidence consists of anything that can corroborate the victim's version of events. It can stand on its own to tend to prove the charges against the defendant (such as a weapon seized at the scene) or it can serve to corroborate what the victim stated (911 tapes, statements made at the scene to police). The requirement of independent evidence exists regardless of whether the victim was cooperative or not. This is because there was a presumption that victims of domestic violence are not credible and their "stories" need to be corroborated in order to be believed. This was true of all victims and was true of all the court workgroup members in the comparison court, and of the defense attorneys and some of the prosecutors from the specialized session. Victims who had a previous relationship with the defendant are thought to be somewhat culpable for the crime. Some attorneys did not consider them "real" victims and some considered their victimization to be in a

“gray” area. Solely by virtue of the fact that they had a relationship with the defendant, their credibility was immediately in question.

Differences were captured between the two courts in how they came to understand the unique nature of domestic violence cases. While the judges and prosecutors in the specialized session discussed it as a justification for increased allocation of resources in an attempt to bolster case strength, the comparison court saw the unique nature of domestic violence cases as their fatal flaw, or ultimate weakness. While the “dispositional outcomes” for many of the cases in both courts were reported to be quite similar, the process of arriving at those outcomes was different. The manner in which a case is processed sends a message to the community at-large about how that court feels about domestic violence cases. Victims, defendants, and court workgroup members all hear the messages that are communicated to them about domestic violence cases. While the specialized session worked within the confines of the law, they were constantly communicating a message that domestic violence cases were being taken very seriously and that they would not be dismissed easily. This was different than the message that was being communicated in the traditional court, which almost seemed to create an “atmosphere conducive to domestic violence” (Buzawa & Buzawa, 2002). Borrowing from Buzawa and Buzawa, the court workgroup in the comparison court so readily disposed of the domestic violence cases that the crime hardly seemed illegal. The local legal culture and resulting weak case typifications created an atmosphere whereby domestic violence crimes were tolerated and not treated as criminal.

### **Evidentiary Strength and the Importance of Corroboration**

The cases with the most real evidence were generally deemed to be the strongest by members of both court communities. Real evidence is physical/tangible evidence. Time and

again, the responses from attorneys echoed what the literature showed. In order to deem a domestic violence case to be strong, the victim's version of events needed to be corroborated through the use of independent evidence. For prosecutors, this was a source of frustration. It was difficult when the court community (and the community in general) had such high expectations and requirements for independent evidence. Prosecutors in both jurisdictions referenced the fact that jurors have come to expect a certain level of evidence based on their viewing of popular culture television crime shows. This can be frustrating because the majority of domestic violence cases, especially at the district court level, simply do not have that type of evidence available. According to a prosecutor in the specialized session:

A good case in the eyes of a jury is a case that has a lot of stuff. Juries, in my experience, like stuff. They want pictures, medical records, DNA, ballistics, the more stuff you give them the better. I know some of my colleagues and myself will put in our openings and closing, "Ladies and gentlemen this is not CSI, this is not Law & Order, I am not going to whip out a smoking gun; it is what it is...What we have here is a woman's story about what happened to her." (Prosecutor 2, Specialized Session)

Prosecutors indicated that they had to apologize in order to justify the lack of evidence that the cases they were trying to prosecute contained. Many domestic violence cases lack the type of independent corroborating evidence that the court community and the community at large have come to expect. Some respondents felt this was due to the private nature of the crime. Others felt the lack of evidence was due to the negligence of responding officers and detectives. Studies have assessed the effect of independent evidence on the processing of domestic violence cases. A comprehensive study that looked at what impact the existence of photographs, taped 911 calls, medical records, and police testimony had on case outcomes was done by Belknap et

al. (1999). It found that taped 911 calls never impacted case outcomes; the existence of photographs had a positive impact on the numbers of days incarcerated; and police testimony had a reverse impact on the number of days a defendant was on probation (Belknap et al., 1999). This and other studies did not look to community effects for why certain pieces of evidence would impact case outcomes. Also, it measured the importance of these pieces of evidence with the case outcome measure of impacting days incarcerated (Hirschel & Hutchinson, 2001).

When cases do possess independent evidence, it can be used by members of the court community in two ways. It can be introduced to speak for itself,<sup>10</sup> but it is most often used to corroborate the victim's version of events. All respondents from both jurisdictions discussed how important it was to have independent evidence to corroborate the victim's version of events. According to one prosecutor:

There are definitely some things that you look at to determine whether a case is strong or not...You look to the evidence, who was present during the commission of the crime, what corroboration of the crime exists, do you have an injury on the victim, visible injuries, does she have injury documented by medical records, photographs, was there an independent witness present, or any witness, was there a call to 911, what did the call say, what did the police officers see when they responded, what did they observe about the victim's demeanor, was the defendant apprehended and if so what did he say, did the defendant have injuries, were his injuries consistent with what the victim said happened—you have to look to the whole case to see if what they said makes sense. (Prosecutor 4, Specialized Session)

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<sup>10</sup> *Res ipsa loquitur*, “the thing speaks for itself.”

Throughout a criminal trial, the burden of proof remains with the prosecution to prove beyond a reasonable doubt that the complaining victim/witness's version of the facts is true and amounts to a crime. Domestic violence victims are inherently low-credibility victims, and in the absence of a witness whose statements can be corroborated by real evidence, doubt is created. This doubt makes the case weak. Prosecutors spend much of their time trying to corroborate the victim's statements and defense attorneys are busy doing just the opposite. Independent corroborating evidence is also used to "convince" court workgroup members that the victim/witness is credible and reliable. There seems to be a presumption made by prosecutors and defense attorneys that the victim is not telling the truth and that they need to prove her veracity in order to typify the case as strong and thus to proceed with the case. This was the same in both jurisdictions. According to Prosecutor 4 from the comparison court, "You never really know what really happened unless you have an independent witness, like a neighbor or something, that can validate the victim's version of the facts."

There are also other pieces of real evidence that are collected and used primarily to corroborate the statements that the victim made while speaking to the police and then later to the prosecutors. "You need corroboration. A neighbor who says this had happened many times in the past, physical damage to the property, a broken window, a drunk defendant who was thrown out an hour earlier" (Prosecutor 3, Specialized Session). The absence of corroboration may lead to a determination of untrustworthiness. "We use other evidence and other pieces of discovery to put the case together and try to solidify the case. Medical records, 911 tapes, photographs, and comparing the initial interview the victim had with the cops and detectives to what she said to us" (Prosecutor 5, Specialized Session). Time and again, I heard that domestic violence cases are weak unless they have a lot of corroborating evidence. Time and again, I heard that domestic

violence cases just don't have that kind of evidence and when they do you still have to question the reliability of the evidence. The larger question is why court workgroup members continue to require something that is not physically available and how they can change their assessment of these unique cases to better serve the victims and community at large? I spend the next section going into the pieces of physical evidence. I heard repeatedly from every respondent about which items of physical evidence may have impacted their evaluation of case strength.

### **Serious injuries**

The literature has examined how the presence of victim injuries impacts police officers' decisions to arrest (Buzawa & Hotaling, 2000; Hotaling & Buzawa, 2001) and prosecutors' decisions to charge (Martin, Hirschel, & Hutchinson, 2001; Schmidt & Steury, 1989). It has not looked to the presence of serious physical injuries as a predictor of strong case typification by court workgroup members or how they will impact the processing of domestic violence cases.

In this study, all attorneys mentioned injuries as a primary source of evidence that makes domestic violence cases stronger in their eyes. Although not a required element of the law under 265 §13A,<sup>11</sup> the attorneys felt that they were required by the court community and potential jurors to show injury. Additionally, many respondents required that the injuries be rather serious in nature to warrant a strong case typification. Minor injuries alone would not be sufficient to typify the case as strong. When I asked attorneys which types of domestic violence cases are "perceived to be more serious," several responded, "Cases where there are injuries, serious injuries." Another attorney responded, "Injuries with hospitalization." This is a high burden for a district court misdemeanor that statutorily only requires "an unconsented-to offensive touching, however slight" (Mass. Gen. Law 265 §13A). They also suggested that the court community and

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<sup>11</sup> Massachusetts General Laws 265§13A: Assault and Battery – An unconsented-to offensive touching, however slight.

the public at large do not “care” about cases where the injuries are only slight or nonexistent. The respondents often used the word “care” when discussing these issues. They felt that people simply did not have a vested interest in cases where the victims were not badly hurt.

When I asked defense attorneys in the comparison court, “what makes a domestic violence case strong?” the most resounding answer was physical injuries. It was again characterized as being necessary for the jury to “care” about the case, but also in the opinion of these defense attorneys, for the prosecutors to “care” about the case there had to be some obvious physical injuries. One defense attorney stated:

It’s all about the condition of the victim: blood, guts, stitches, a swollen eye....That’s when the DAs get more serious about it. When it’s just “he hit me” and there is no bruising, that’s when they don’t care as much. (Defense Attorney 1, Comparison Court)

Another defense attorney who had been practicing for over thirty years put it simply: “Well, is there blood.....how much blood?” He stated that judges “care” about injuries and those injuries will impact the sentence more so than any other factor that is being considered and presented. I asked him to explain why he thought, as a scholar of the law, that physical injuries were so important to prove a charge that does not statutorily require them? He replied that it was a matter of creating a context and prioritizing the cases. “You know, we’re working in a sewer. But even in a sewer, some of the shit on top isn’t as bad as the shit on the bottom.” In this informal way, this attorney was saying that there is a prioritization of cases going on in criminal courts. Simple domestic crimes without serious injuries are low priority; they are “the shit at the bottom.” These responses indicated that a higher standard was required by court workgroup members than was required by law. Not only did they admit that they required it themselves, but

that they perceived that their fellow court workgroup members required it and the jurors themselves required it.

Ultimately, the requirement of serious physical injury also connects to the court community's heightened requirement for corroboration in domestic violence cases. The seriously injured victim is more credible. Her assault is worthy of the court's time and resources. Minor injuries and complaints are not believed or not worthy of the court's time. The schemata that have developed for these cases cause the court workgroup to doubt the victims allegations initially. They need to be convinced that she is a "real" victim. If she is seriously injured, they feel more confident about her truthfulness and going forward. Feminist jurisprudence questions an objective legal standard that causes women to become seriously injured in order to get justice. If the law states "unconsented-to offensive touching, however slight," why must she be hospitalized in order to be believed?

**Photographs (to prove the presence of the serious injury)**

Garcia (2003) found that defendants charged with domestic violence were six times more likely to plead guilty, four-and-one-half times more likely to be convicted, and five times more likely to be sentenced to time in custody when digital photographs captured the victim's injuries (Garcia, 2003). Consistently, all court workgroup members mentioned photographs as a piece of evidence that, if provided, could serve to strengthen a domestic violence case. Photographs can capture an injury and be used as a piece of real evidence which, at their best, will properly preserve the presence of injuries for others to see months later. One defense attorney spoke about their use in domestic violence cases:

My memory is that juries don't care too much about DV cases unless there are pictures of a black eye or somebody there to say they actually saw this guy hit her. If it's just a case

where the photos are negligible or there are no pictures and there is something else going on, then juries didn't really care too much about them. (Defense Attorney 3, Comparison Court)

While virtually everyone mentioned photographs as an important piece of evidence, many responding defense attorneys discussed how photographs could be unreliable when used in domestic violence cases. One defense attorney from the specialized session stated that photographs of injuries were not always helpful or corroborative. He claimed that photographs were not very reliable.

The photos that we see don't really show much. If somebody takes a beating, you're going to know. But you also don't know when it occurred. We know when the cops took the picture. We don't know how, when the victims really got the bruises, could there have been a car accident or a fight with another woman in the street? People joke all the time, oh did you just fall down and bruise yourself, take pictures we'll use them later. People say that stuff because that's what they think happens. (Defense Attorney 5, Specialized Session)

Defense attorneys report that the photographs have to reflect a serious injury. Even when they do reflect serious injury, in domestic violence cases they are sometimes deemed not to be credible. The court community starts with the assumption that these cases are weak or did not occur. They look to the evidence to convince themselves that it did occur but, because the case is a domestic, they question its credibility. They tend to doubt the origins and reliability of the evidence that does exist. The standard of evidence that is required to make a strong case typification is higher when it comes to domestic violence cases. The local legal culture has so internalized the weak case typification for these cases that they are seeking more than what is

required by the law. Additionally, they are demanding documentation of injuries and still doubting its credibility when provided. Once schemata are internalized, they are difficult to change (Ross & Anderson, 1982).

### **Independent witnesses**

Given the private nature of many domestic violence crimes, the availability of a third-party unbiased independent witness is rare. While all members of the court community agree that this would make a domestic violence case stronger, several defense attorneys focused on their necessity. One defense attorney from the specialized session contended that an independent witness is the most important piece of evidence when making a strong case determination. Indeed, this attorney felt that other forms of real evidence can be deemed unreliable when an independent witness is not available. She explained:

I think if you don't have an independent witness, the photos and everything else goes to the wayside in DV cases because a jury wants to hear from a person, so that's what I think makes it strongest. The weakest is when it is just the two parties involved, unfortunately. (Defense Attorney 1, Specialized Session)

A defense attorney in the comparison court agreed.

I think a strong DV case is one where an independent witness observes it. That is what I think makes a DV case strong because if those two kiss and make up, or break up, or flee, or get back together, or whatever the case may be, if we have an independent witness (and I would prefer a civilian and not a cop) but you know...I think that makes a DV case stronger. (Defense Attorney 2, Comparison Court)

A defense attorney from the comparison court, Defense Attorney 3, stated that in order for a domestic violence case to be strong, even a civilian witness would not suffice. This

attorney raised the bar even higher and stated that a strong case is when “A police officer sees a client committing an assault and battery and the defendant makes an admission. This I would resolve short of trial.” Thus, when it comes to domestic violence cases, the burden is very high and the availability of evidence is very low. This attorney requires a police officer witnessing the assault and an admission from the defendant before he will accept a plea. This is an unrealistic requirement and speaks to the fact that he finds the cases so weak that he would really need to be convinced by police officers and his client’s own admission. Independent witnesses very seldom occur in domestic violence incidents for obvious reasons. Requiring them is superfluous. This requirement speaks to the fact that the victim’s testimony is not trustworthy. Third parties would assure attorneys of which side is telling the truth. According to the principles of feminist jurisprudence, this is because the crime cannot escape its social history, a history that did not truly criminalize domestic violence until the last twenty years and still grapples with recognizing the matter as truly criminal. Thus, the court workgroup members seek evidence that simply does not exist in order to be convinced that the victims are telling the truth.

### **Defendant and case characteristics**

Studies have consistently shown that case decisions are impacted by defendant and case characteristics. The defendant’s record and his character in general have been found to influence charging decisions made by prosecutors (Albonetti, 1992). I found that defendant and case characteristics also come into play when typifying domestic violence cases. When the defendant is in custody and is held on a high cash bail, defense attorneys are motivated to dispose of their cases and generally typify these cases as strong for the Commonwealth. However, defense attorneys will take into consideration specific characteristics of the defendant when evaluating case strength in these circumstances. They often evaluate the case based on their client’s

perceived chances of being able to successfully complete terms and conditions of probation. Many times, defense attorneys have to decide whether it is better to leave a client in custody until the case is scheduled for trial or to plead out a case at the much earlier arraignment or pre-trial date. The caveat is that a released client will likely be placed on probation. “Home life, homeless, drug addict, what are the chances that he is going to be successful? So even when there are chances that I could get him out...and that will be huge...but if he’s back there in a week then it’s really not” (Defense Attorney 1, Specialized Session).

Prosecutors also mentioned defendant characteristics as being an important part of the evaluation of domestic violence case strength. However, they focused on the history of abuse between the parties and how serious the defendant’s record was. As a prosecutor from the comparison court put it:

Does the defendant have a bad record? Sometimes there is a dangerous defendant. Sometimes it is obvious on its face, what has happened here is really horrible. Maybe there’s been a history, or sometimes the case itself isn’t particularly horrible and you realize through meeting with someone that there is a long history with these people. (Prosecutor 3, Specialized Session)

The history of violence between the victim and defendant is something unique to domestic violence crimes that make the cases more serious and, one could deduce, “stronger.” Rules of evidence govern the admissibility of prior bad acts between the parties involved. One thing is certain: their admissibility would still hinge on the willingness of the victim to testify, not just about the case at hand but about previous bad acts inflicted upon her by the batterer.<sup>12</sup>

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<sup>12</sup> “Evidence of prior bad acts is not admissible to demonstrate the defendant’s bad character or propensity to commit the crime charged but, if too remote in time, may be admissible to show motive, opportunity, state of mind, intent, preparation, plan, pattern of operation, common scheme, relationship between defendant and a victim,

Prosecutors in both courts and the judges in the specialized session mentioned the history between the parties as it relates to the perceived dangerousness of the defendant. Examining the history of violence that exists between the parties is something that is routinely done by prosecutors when handling domestic violence cases. This process is important in crimes when the parties know each other. If done, it can help paint the total picture of the extent of the abuse and aid in making lethality assessments. It is something that is unique to domestic violence cases, however, and is not used by all members of the court workgroup. In the specialized session, it was mentioned by the prosecutors and judges and in the comparison court only by the prosecutors. This was something that was done more routinely in the specialized session. It is evidence of how the change in culture impacted the way that court workgroup members tried to evaluate cases and evidence. Rather than just looking at the lack of real evidence, digging deeper and considering the history between the parties influenced how lethal the current situation could have been. This is a good illustration of the feminist model of jurisprudence. Operating under this model, court workgroup members saw the value in discovering the history of violence between the parties. They did not rely solely on a defendant's record for evidence of this, recognizing that a board of probation record may not properly reflect the abusive history between the parties and the gravity of the current situation.

### **Victim Credibility**

More so than any other variables, domestic violence cases hinge on the availability of a credible victim. This is problematic for many reasons. First and foremost, the social history and schemata that have developed have made the court workgroup members question the victim from the outset. Additionally, when parties know each other, court workgroup members are

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knowledge, identity, or absence of mistake or accident.” Commonwealth v Brusgulis, 406 Mass. 501, 505. (1990). Massachusetts Criminal Model Jury Instructions 2009 Edition.

additionally leery of their motivations. Finally, in domestic violence cases it is common for the victim to be uncooperative with the prosecution. Victims often fail to appear for court dates, become angry and frustrated with the prosecution, and recant the violence they suffered when the case is scheduled for trial. The court community does not always understand the many reasons why victims behave in this manner. It is what makes the crime truly unique from other crimes and potentially more lethal.

There are many reasons why this is so. Research has shown that economic, sociological, and psychological restrictions inhibit victims' abilities to leave abusive relationships (Belknap, 2007). "Battered women stay because they rarely have escape routes related to educational or employment opportunities, relatives are critical of plans to leave the relationship, parenting responsibilities impede escape, and abusive situations contribute to low self-esteem and negative emotions—especially anxiety and depression" (Forte et al., 1996, p. 69). Most importantly, however, is the threat of danger and fear that accompanies a decision to leave an abusive relationship (Belknap, 2007; Buzawa & Buzawa, 2002). The reasons why victims of domestic violence recant and are not cooperative with the prosecution are well documented. Still, they are rarely cited by the court workgroup members and, if anything, the victim's behavior is the most prevailing reason for the resulting weak case typification and intolerance by court workgroup members.

Throughout the pendency of a case, domestic violence victims flounder in their level of cooperation. Often times they are intimidated from cooperating by their batterer. Frequently, they are too emotionally and physically exhausted to deal with the court. Many members of the court community use these facts alone as criteria for deeming a victim not to be credible. Both

prosecutors and defense attorneys alike mentioned on multiple occasions that victims are rarely cooperative, and that this was a source of weak case typification.

According to Defense Attorney 2 from the comparison court, “It is not usual for them to be cooperative. It is frustrating when the victim comes in at arraignment after she just bailed him out.” Several attorneys characterized the victim as not credible based on her behavior during the pendency of the case. How can one put trust in a victim who is not sure herself whether or not she wants to testify against the defendant? Victims tarnish their own credibility by changing their versions of the facts in order to shield the defendant against prosecution. According to one prosecutor,

A lot of times they are cooperative at the beginning but come the day of trial they are, like, I don’t want to do this, or they don’t show up or...sometimes they say, “Yeah I know I said that before but if you put me up there now I will say something different.”

(Prosecutor 5, Specialized Session)

A victim’s cooperation and her floundering condition during the pendency of the case impact assessments of credibility. The judges in the specialized session and the prosecutors in both courts seemed to understand the unique position that domestic violence victims are in and the justifications for their floundering cooperation. Still, without the victim, cases often cannot go forward from an evidentiary perspective. This puts prosecutors in a difficult position and hinders their relationships with victims. It impacts how court community members assess their “good victims.” According to Prosecutor 1 from the specialized session, “A good victim is anyone who is willing to participate in the prosecution, that’s credible, I mean I’ll even take a victim that is not credible if she’s willing to show up and come to court.”

The court community of the comparison court and defense attorneys in the specialized session said that victims of domestic violence are in general less credible. These court community members expressed time and again how cases between people who knew each other were “per se” not as strong as cases between strangers. It was reported that even when there is a cooperative victim who is willing to testify, it comes down to a “he said/she said” situation. According to Prosecutor 4 in the comparison court, “When victims don’t participate, you have nothing...When they do, you have two different people telling their sides of the story...it’s hard either way.” Thus, domestic violence cases are deemed weak even when the complaining victim is present and willing to testify. This will always impact the case typifications of domestic violence cases.

Assessments of victim credibility are also somewhat subjective in nature. Prosecutors in the specialized session meet with victims of the crime to discuss the incident prior to disposition. During these meetings, prosecutors evaluate how the victim presents herself and the manner in which she speaks. Surprisingly, according to a prosecutor from the specialized session, “You can just tell from the beginning if this is someone who is really a victim or not.” There is a distinction that even the prosecutors from the specialized session seek to make when they sit down with domestic violence victims about the genuineness of their victimization. Through a subjective lens, a prosecutor evaluates the victim’s choice of words, demeanor, and possible motivations. “Just the way they tell their story, their demeanor, and whether or not they have an axe to grind with the defendant usually becomes very clear.” What is interesting about these subjective standards is that they vary according to who is conducting the interview. Two prosecutors could disagree on what a credible victim looks like and how she should present

herself. For example, a prosecutor from the specialized session had some very specific examples of things that cause her to doubt a victim's credibility:

Victims who are always distracted by other things, always looking at their watch, always looking at their cell phone, asking questions like how much longer is this going to take. Those always make me question what's going on here, is there an ulterior motive, why is this person so distracted by all these other things. People who can give you eye contact, actually look at you, actually feel like they're engaged in conversation, they're listening to your questions and they're trying to really think about their answer, you think that these people are actually invested in what's going on and they are invested because it matters to them. (Prosecutor 4, Specialized Session)

To this prosecutor, the importance of eye contact was tantamount. If a victim was nervous, fidgety, and not making eye contact, it was concluded that she was not "invested" in the case. This was not something that was even mentioned by other prosecutors who were asked about victim credibility. To some, it was all about their manner of speech, choice of words, and general demeanor. Subjective standards of victim credibility are dangerous indicators of case strength because they depend largely on the personality and preferences of individual prosecutors and not on the law. This is similar to what Frohmann found in 1991 regarding charging decisions in rape cases. Here prosecutors are making the same subjective judgments of credibility that lead to weak case typifications.

The perception of domestic violence cases by court workgroup members also contributes to their understanding of and respect for its victims. There was a general feeling in the comparison court that domestic violence cases are messy and that the victims are in part to blame for their messiness. Defense Attorney 4 from the comparison court put it this way: "In some

cases there are innocent victims. Like a check fraud situation or a larceny....people who don't know each other and there are crimes involved, those are generally going to be trial matters." Many respondents discussed this notion of portioning out victims into two groups: real victims, and the rest. As Prosecutor 3 from the comparison court said, "Some of these victims are really victims and some just are not." This was not a phenomenon that occurred only in the comparison court. Defense attorneys from the specialized session also characterized victims as being "real" or not. Defense Attorney 1 from the specialized session felt very strongly about this point.

My belief about domestic violence is that you either have the really horrendous cases or you have the bullshit cases where the victim made it up. I don't personally believe there is any gray area and I am a woman. Especially in [the specialized session], lower income, lack of education, lack of job/employment...I can only imagine what it is like now with the economy so bad...but I think that women know how to use the system to their advantage. That is the basis for my belief that it is either horrendously bad (getting beat up all the time with injuries and photos, the case that you're going to plead because it's so bad) and then the cases where the girl just knows how to do it and she does it. I don't think there is any gray area. (Defense Attorney 1, Specialized Session)

Many respondents pointed to more objective standards as indicators of questionable victim credibility. Most prosecutors and defense attorneys agreed that issues such as "criminal records, custody issues with their kids, and a history of fabrication in the past" can all serve to bring the victim's credibility into question on the present matter.

Prosecutor 4 in the comparison court stated, "We do see a lot of motions for criminal records of the victim here. Any evidence of or cases where the victim was drinking will also

make it tough.” Additional objective factors include motivations to lie, jealousy, and substance abuse as being the strongest signals that the victim is not credible and the case is weak. Defense Attorney 4 from the specialized session stated that race and socioeconomic status were correlated with credibility. He stated, “This is a sensitive area, but white victims are listened to a lot more than black victims.” This was a defense attorney who was working in a court that had predominantly black victims. When the occasional white victim was before the court, it appeared to him that their cases were taken more seriously, were more likely to be deemed as strong, and were more likely to go forward primarily because the victim was deemed to be more credible based on her race. Other factors he mentioned that were correlated to her race were “the socioeconomic status and educational status of the alleged victim.” These would also have an impact on whether or not she was determined to be credible. This would impact the amount of resources that are allocated to the case and consequently the amount of independent evidence collected.

Judge 1 from the specialized session affirmed these thoughts. While I was talking to this judge about how to evaluate case strength, a particular case and investigation came to her mind. She spoke of a victim of domestic violence who also happened to be employed as a security guard in the area. This victim was strangled but survived, and her case was taken very seriously by the responding police officers, detectives, and the court community at-large.

The police report said that night, that he strangled her and that she had red marks on her neck. By the next day there started to be bruises on her neck and the petechiae hemorrhaging was starting to show. Several days after that, her eyes were out to here, discolored both of them, and there were red marks on her neck. That’s the only time I have ever seen that. I have been first justice for 14 years and that is the first time I have

ever seen that. The police kept going back because she was a security guard...so everybody was on it, everyone was photographing it, and she got the kind of attention that most victims of domestic violence in this community don't get. The other thing is too that bruises just show up better on white people. But the petechiae hemorrhaging, I mean, I did a dangerousness hearing once with a woman who testified with eyes the color of these strawberries. But there wasn't an extra photograph of that. So, that kind of follow up was enormous. (Judge 1, Specialized Session)

This is an illustration of a "real victim." The court community collectively found this victim to be credible for a variety of factors. Her race, somewhat "insider" status, education level, and socioeconomic status made her a more credible victim to start. Then additional resources were allocated and invested in her case, which yielded the independent evidence that is necessary in order for the case to be typified as strong. Repeated photographs were taken by the police documenting how her injuries evolved over time. This judge candidly stated that she has had other serious types of strangulations in her court before, but that this case was the first in fourteen years that had sufficient investigation and follow-up in order to help prosecutors prove their case and for the court community to typify it as strong.

Case strength relies on independent evidence. If this type of evidence is only gathered for victims that are determined to be "real" or "credible" by the court community, the case will be weak. These determinations are based on subjective factors and by the race, socioeconomic status, and educational level of the victim. This leaves many victims without evidence and with the burden to convince everyone that she is a "real" victim.

### **Same Standards, Different Local Legal Culture**

I set out to find how different court communities typify domestic violence cases as strong and weak. I was surprised to find that they use similar criteria for typification, even in a specialized domestic violence session. Both court workgroups cited similar items of evidence and the presence of a cooperative and credible victim as necessary for strong case typification. This is challenging because domestic violence cases do not often yield independent evidence due to their private nature. Additionally, court workgroup members judge victims of domestic violence to be inherently not credible and have generally higher standards of corroboration for domestics than they have for other case types.

What was different between these two courts were the conclusions they drew from the evidence or lack of evidence involved in the case, and how they rationalized the recanting victim. The prosecutors and judges in the specialized session recognized the unique nature of domestic violence cases and, while troubling from an evidentiary perspective, still thought the cases to be “serious” and problematic in terms of threat to the victims. They refused to dismiss the cases outright and pushed many cases to trial. The defense attorneys stood alone in the specialized session and were frustrated that it took so much longer to get their cases dismissed in this environment than in many other courts in which they have appeared. The local legal culture of the specialized session acknowledged the unique challenges that domestic violence cases present and attempted to deal with them, however limited their attempts were by the law.

The judge in the specialized session addressed the unique nature of domestic violence cases and how this should be taken into consideration when deciding whether a case is strong or weak. I asked, “So how do we differentiate between a strong case and a weak case?” She responded:

On the face of things it's very difficult to tell. I can think of one particular victim, and I say victim because she most certainly was a victim that's been in and out of this court for years. She has been beaten and choked to within an inch of her life so many times. She has been in here with both eyes swollen black, bruised all over her body like nothing I've ever seen, and in every instance she recants. (Judge 1, Specialized Session)

Thus, for the judge in the specialized session, this case was very serious. A recanting victim, while not an ideal witness, is not someone to speak of in a disparaging manner. She is not someone whose case should land at the bottom of a priority list. Was she just a victim who was a liar and not to be believed, or was she the victim of a horrific crime who may still be in danger and who is not free to fully participate due to that danger? This characterization is crucial to the local legal culture where the case is heard and to the eventual outcome of the case.

The other judge from the specialized session characterized the unique nature of domestic violence cases in this manner:

Most of the cases involve an allegation of violence. In the context of a domestic relationship there is a whole history that goes with it that is unlike violence between strangers. There are so many complicating factors with relationship violence, whether it's the kids, immigration, jobs, just the number of things and complications that come up. They're never straight forward. An A&B that you might get from a bar room, for instance where two guys get into a fist fight, or somebody hits somebody with a tire iron, it's violent, yes, it's serious, yes, but there's not this whole context within which it occurred that makes it difficult for a defense attorney, makes it difficult for a prosecutor, and makes it difficult for a judge. And I think it's really draining for the defense attorneys; they have angry clients who don't understand what is happening to them. I

think it's hard for the prosecutors; every case is high stakes. All of these cases have the possibility for disaster and trying to determine which case is the disaster and the lethality issues are extraordinarily difficult, as you know. There are red flags but defense attorneys and prosecutors and judges, as much as we try, we're not psychiatrists; we try to read the literature and make determinations. (Judge 2, Specialized Session)

From this judge's perspective, the unique nature of domestic violence and its potential lethality makes the cases more "serious" than stranger assaults. This should result in additional resources or time being allocated to the cases in order to help make them stronger. Allocation of resources is not something the judges have complete control over, however. While the judges in the specialized session applied for and received a grant to establish the specialized session, they still could not ensure that the prosecutors and police were fully investigating their cases and helping to bolster case strength. Nor could they control the legislative changes that soon followed. (This is discussed more in chapter 6.)

In contrast, the court community in the comparison court viewed the unique nature of domestic violence cases as a reason to typify the cases as weak. This led to outright dismissals in the comparison court. It is only fair to say that the prosecutors in the comparison court stood alone in trying to convince the rest of the community to "care" about domestic violence cases. They were relatively powerless and consequently unsuccessful at trying to convince others. The unique nature of domestic violence cases was discussed by the judge in the comparison court. He emphasized the victims' financial dependence as justification for not imprisoning the batterer, who was necessary in order to support the abused.

Well, there's no such thing as a typical domestic violence case. What I encourage the ADAs to do is to talk to their victim and find out what she wants. I don't want to re-

victimize her. If she is still in the relationship, and she has kids, and he's the sole breadwinner, what's putting him away going to do to her? Does she really want that? Or would she be more apt to appreciate a probationary decision which gave her some protection and allowed him to continue earning money? (Judge, Comparison Court)

This represents a vastly different viewpoint from that of the judges of the specialized session. When asked to characterize a typical domestic violence case and discuss its unique nature, the judges of the specialized session discussed how lethal and serious they were and how difficult they were to handle. At the same time, the judge in the comparison court rationalized reasons for not prosecuting batterers, given the financial dependence that many victims experience. Instead of considering how dangerous these situations can be or the justifications for a recanting victim, he explained that if the victim does not want the batterer to go to jail, and she is reliant on him for support, then he listens to the victim and respects her wishes. Generally, speaking from the observations I made in this court, it came usually in the form of a dismissal.

### **Conclusion**

Domestic violence crimes take place in private. Successful prosecution relies on the victim's testimony about what happened. Victim credibility is constantly called into question. Victims are not believed. The victim has a motive to lie; she is spiteful and angry, and she is uneducated and poor. She is not enough. All members of the court community look for corroborating independent evidence in order to call a domestic violence case strong. But even when they get it, the cases are still deemed weak. This is because the weak case typification of domestic violence has existed for years and has been internalized by court community members. Court community members find ways to doubt the credibility of existing independent evidence when it is a domestic violence case, and generally have higher standards of production in this

case type. Even when victims cooperate, they are not believed. Victims are put under a microscope and analyzed for untruths.

Time and again, prosecutors and defense attorneys alike stated that in order to have a strong domestic violence case, one needs to have evidence. But the very nature of these crimes causes them to lack evidence. They'll suggest that you need to have an independent witness, but these crimes most often take place in private. They'll say you need serious injuries, even though this is not required by law, and even then, some documentation to corroborate that the injuries incurred took place in accordance with the victim's version of the events. According to one prosecutor, "You have to look at the whole case to see if what they say makes sense." (Prosecutor 3, Specialized Session). In both courts, this type of scrutiny took place. In both courts, the victims were not believed, though the search for corroboration would help to make a typical victim more credible. Corroboration was very hard to come by.

The one thing that made the specialized session different in this vein was its local legal culture. The judges in the specialized session pushed the prosecutors to dig deeper and seek more evidence. They were not using these normative standards as an excuse or justification for dismissal, but saw them as the rationale for why domestic violence cases were particularly serious. Because they were so hard to prove and pose great danger to victims their lack of evidence was seen as troublesome. The judges in the specialized session were trying to change the manner in which attorneys viewed the cases and treated each case with gravity. They wanted to know about the history between the parties because they took the crime and its potential for harm seriously. They also understood that there were social explanations for why victims flounder in their willingness to cooperate. This in itself was not a reason to typify as case as weak. This is different from the local legal culture in the comparison court—a court whose

judge discussed the unique nature of domestic violence cases as justification for dismissals. The comparison court used similar criteria for assessing case strength and then drew the conclusion that the cases were not very serious or worthy of time and resources.

The judges of both courts operate in what is supposed to be the objective world of the law. Defense attorneys and prosecutors alike cited many evidentiary requirements in order for them to typify domestic violence cases as strong. As the literature pointed out, lack of independent evidence resulted in weak case typification. However, a higher standard of production was observed for domestic violence cases. This is because the weak case schemata had been so internalized by court workgroup members. Additionally, judgments about the credibility of existing evidence were subjective in nature. Thus, the local legal culture of a court will impact how court workgroup members interpret the availability of evidence or lack thereof. Creating an atmosphere that acknowledges the unique nature of domestic violence cases and their social context should eventually translate into requiring less in order to typify a case as strong, believing the victims, and using different, less judgmental criteria when interviewing victims. The specialized session should be the proper model if the entire court community received training on the issues regarding domestic violence and its social context. While domestic violence cases may always suffer from limited physical corroboration, this does not mean they need to be typified as weak.

This study contributes to the literature which has traditionally looked at these factors and how they have impacted individual court actors and the decisions they make. This study affirmed that weak case typification is indeed a process that will adversely impact the case processing decisions of court actors, but that it is also a product of culture. The culture in which the court workgroup members practice may impact how they typify cases and more importantly

what that typification means. Weak case typification, from an evidentiary standpoint, does not mean that the case should not be taken seriously. Indeed, depending on the local legal culture, it could mean that additional investigation and resources need to be allocated. This is true in the specialized session. Previous literature has not looked at how weak case typifications may yield different results in a specialized versus non-specialized session. While both court workgroups in this study similarly characterized domestic violence cases as weak, this led to different conclusions in the specialized session than in the comparison court.

How a court community typifies a case as strong or weak will impact the crime's going rate (Myers & Hagan, 1979). Going rates are the collective belief about the value of a case and are shared by court workgroup members. Thus, weak case typifications will impact the processing of domestic violence cases and their going rate. In general, strong case typifications are based on "a credible witness; serious offense; and a credible victim" (Myers & Hagan, 1979, p. 441). Cases typified as strong "serve the organizational goal of efficiency" and enhance the probability of conviction at trial (Eisenstein, Flemming, & Nardulli, 1988, p. 153; Myers & Hagan, 1979, p. 440). The weak case typification that is experienced by domestic violence cases in both courts should result in similarly lenient going rates. However, if the informal norms and local legal culture of a court are more controlling of the going rate, then differences could be noted.

## Chapter 5: The Going Rate of Domestic Violence Cases

*“After a while you just have to develop a sense of what a case is worth. And frankly, it takes time.” (Defense Attorney 5, Comparison Court)*

The establishment of a going rate is not the vernacular used by attorneys in busy district courts. However, if you ask them what a “typical possession of class-D case is worth,” they will have a ready answer. That is because possession of marijuana cases are common, low-level, nonthreatening matters that everyone can easily talk about. Asking them the same question about domestic violence cases was a different matter. It was difficult for court workgroup members to quickly answer that question. The literature has shown that the establishment of a going rate is a somewhat fluid process. It is dependent on the local legal culture of the court house, informal networks of communication, and agreements about levels of case strength (Eisenstein, Flemming, & Nardulli 1988). In the current study, I have found vastly different local legal cultures but similar criteria for evaluating case strength. This chapter will explore what the court workgroups in each court perceived the going rate for domestic violence cases to be.

In courts across our country, court community members meet on a daily basis to discuss the cases that are scheduled for that day. If a case is on for arraignment, the parties will have to make a bail decision. In that context, the facts are quickly analyzed and characterized in order to come up with a recommendation. In the context of a pre-trial hearing, defense attorneys and prosecutors meet to determine if the case could be disposed of short of trial. They need to be able to determine what an appropriate sentence recommendation would be, given the “going rate” for a particular crime in that court house. Eisenstein, Flemming, and Nardulli (1988) found

that court workgroup members often agree on the value of a case. The development of going rates, coupled with the common belief that “rocking the boat” is bad for one’s reputation, leads to similar cases being disposed of in the same way, time and again. “Adherence to and acceptance of the going rates mentality is evidenced by the fact that many pleas are reached as the product of consensus not concession” (Eisenstein, Flemming, & Nardulli, 1988, p. 255). This means that the court workgroup members often agree what the appropriate sentence for a given case should be, based on the norms that have developed regarding case worth. Rather than arguing about the appropriate sentence for a case, or having to compromise, the parties (who should theoretically represent varied interests) agree on what the going rate is and often make joint recommendations to the court (Walker, 2001). Finally, on the trial date, court community members wait to see if the prosecutors are “ready for trial” and with domestic violence cases, this translates to whether the victim has appeared or not. Then decisions are made regarding disposition. Through all of these exchanges, the actors develop a sense of how the court community values a particular case type and a going rate is established. I hypothesize that this process negatively impacts the processing of domestic violence cases in most traditional courts. Courts that are influenced by caseload pressure. They have a history of weak case typification for domestic violence cases and they do not appreciate or have an understanding of the unique nature of domestic violence cases. These factors must lead them to agree on a lenient going rate for domestic violence cases.

The domestic violence literature is rich in exploring how it is treated by the criminal justice system. Studies have explored the issues with prosecution and accountability from the victims’ perspective (Bachman, 1998; Tjaden & Theonnes, 2000) and from the court workgroup members’ perspectives (Belknap, Hartman, & Lippen 2010; Ptcek, 1999; Stark 2004). Studies

have consistently shown that domestic violence cases are treated leniently by the criminal justice system (Ames & Dunham, 2002; Smith, 2001), including police officers (Buzawa & Hoatling, 2000; Robinson & Chandek, 2000). Studies have also sought to explain why victims of domestic violence are resistant to pursue the charges brought against them (Mears, Carlson, Holden, & Harris, 2001; Zoellner, Feeney, Alvarez, & Watlington, 2000). What is missing from the literature is an analysis of how the court community's shared beliefs about domestic violence can influence its established going rate. Also missing is research on whether the lenient treatment suffered by these domestic violence cases is more a product of culture than of law. In these court workgroups, there is an interest in maintaining the norms of the group and upholding the traditional manner in which certain cases are handled in the name of case efficiency. This has damning effects on the processing of domestic violence cases.

Court workgroup members discuss how they learn the going rates in a myriad of ways. Maybe they are just listening to their colleagues characterize the evidence or describe the victim, or perhaps they are watching the judge dismiss or dispose of a similar cases in a similar manner day after day. One thing is certain: A message is sent about the value of a case through all of these interactions. Additionally, in order to gain and maintain the credibility of one's peers, it is necessary to become familiar with the going rates and to make every attempt to adopt them when making a recommendation about the disposition of a case. This chapter will discuss how the standards about going rates are established, learned, and communicated by court community members, using data from interviews with court community members in two courts. It then examines the established going rate for the specialized versus non-specialized sessions and identifies what happens when a court creates a goal going rate that is different from the way in

which the court community traditionally handled the crime, and what happens when no such goal exists.

### **How the going rate is established**

#### **The specialized session**

The two judges of the specialized session discussed how going rates come to exist and who was responsible for setting them. They readily adopted the language of the court community and were frank and self-reflective when talking about the going rate. They admitted that they directly impacted the establishment of the going rate in the specialized session. They made a conscious decision to affect it from the bench and they accomplished this by making constant what they would and would not accept on a plea. Both judges immediately discussed the necessity for sentences' including a Certified Batterer's Intervention Program (CBIP) as an example of this process.

In the specialized session, the judges would only accept a probationary sentence if the CBIP<sup>13</sup> was a term and condition of probation in cases where there was a history of domestic violence. Based on the Massachusetts Guidelines for Judicial Practice Abuse Prevention Proceedings, the CBIP was the recommended course of action for domestic violence dispositions

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<sup>13</sup> "Certified Batterers Intervention Program (CBIP): "Certified batterer intervention programs (BIPs) currently operate in every county of Massachusetts. BIPs work to increase the safety of all domestic violence victims. BIPs provide educational groups for batterers to stop their abusive behavior. Batterers are taught about the damaging effects of abuse on victims and children. BIPs also teach batterers to use respectful and non-abusive behaviors with their intimate partners and their children. Although the two are often confused with one another, certified batterer intervention programs are not the same as anger management programs. Participation in an anger management program is not a substitute for participation in a certified batterer intervention program. Only certified batterer intervention programs focus entirely on domestic violence and intimate partner abuse. In fact, according to state law, "The court shall not order substance abuse or anger management treatment or any other form of treatment as a substitute for certified batterer's intervention" (St.2002 c.184 s.114). Certified batterer intervention programs provide a range of services to meet the needs of people in their communities, including slots for low-income batterers to attend for free or for as little as \$5 per session; free services for adolescent male perpetrators of dating/domestic violence; services for non-English speaking batterers; services for gay or lesbian perpetrators of intimate partner violence" ([www.mass.gov](http://www.mass.gov)).

as early as 1990.<sup>14</sup> Judge 1 and I discussed the importance of these guidelines and how they are an excellent illustration of the way in which judges can affect the going rate from the bench. CBIP is generally a forty-week program that is designed to help stop the batterer from continuing the abusive behavior. While the program can cost the defendant up to \$3500,<sup>15</sup> a community service option is available as well as free attendance for low-income defendants. Some defense attorneys and judges feel that the \$3500 fee is too burdensome for defendants to have as a term and condition of probation, even though there are alternative payment options available. An alternative program is the 20-week anger management program. This program is shorter and less costly, but has been found to be less effective for crimes between domestic partners (Bocko, Cicchetti, Lempicki, & Powell, 2004). Still, many defense attorneys argue against probation conditions that include the CBIP. The judges in the specialized session decided to combat this resistance to the CBIP by trying to make it part of the going rate. Judge 1 from the specialized session stated, “You just have to shift the continuum.” When I asked her how one does that, she responded, “very consciously.” An example of this was illustrated by this judge: “There was a time when a lawyer would say to his client, I’ll get this dismissed because it’s a domestic, and now they say, “I can try to keep you out of that awful program.” What I want them to say is, “I can try to keep you out of jail.”” This judge also discussed how in other district courts, judges

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<sup>14</sup> MA Guidelines for Judicial Practice, Commentary 6:01: In a case where social services can address some of the factors relating to abuse, such as alcohol or other substance abuse, the court may properly recommend or make referrals to such services, although these do not replace intervention to address the abuse. See *Standards on Substance Abuse*, Supreme Judicial Court (Approved April 28209A, which expressly authorizes the court to “recommend to the defendant that the defendant attend a recognized batterers’ treatment program.” The Department of Public Health certifies batterers’ treatment programs; St. 1990, c. 403, § 16. Similarly, the court may recommend services helpful to the victim. Such recommendations are not inconsistent with the protective purpose of c. 209A (1998), Standard V at 18, at Appendix A-4. In addition, Section 3 of c., “MA Guidelines for Judicial Practice are applied to proceedings under the Abuse Prevention Act, G.L. c. 209A, in the District Court, Boston Municipal Court, Probate and Family Court, and Superior Court Departments of the Trial Court and to related criminal proceedings in the District Court and Boston Municipal Court departments. All proceedings under c. 209A should be undertaken with sensitivity to both the personal and emotional nature of the issues involved and the need to ensure due process.” They are written as guidelines for judges to follow when acting under this section of the law.

<sup>15</sup> Department of Public Health, Batterer Intervention Program Fee Structure, 7.2.

expressed frustration about the CBIP. “Other judges said that people won’t plead to it and I said if you make it the going rate then they’ll have to.” This is a very important difference in the specialized session. The literature has found that traditionally the judges’ role in the “craft of justice” revolves around “moving cases and monitoring guilty pleas” (Flemming, Nardulli, & Eisenstein, 1992, p. 79). However, judges in the specialized session were actually crafting justice by causing batterers to attend Certified Batterers Intervention Programs. This was not always “required” before, but the judges in the specialized session were crafting a new going rate, or what they wanted to become the going rate, for domestic violence cases in their session. Rather than just being motivated by a burdensome docket, judges in the specialized session were motivated to alter the going rate in a way that could impact the lives of both the defendant and the victim. They had a broader goal than just efficient case processing. They were trying to deal with the crimes of domestic violence and were concerned with how they impacted their community.

Judge 1 from the specialized session addressed the literature from the 1990s that had stated that the Certified Batterer’s Intervention Programs did not work. She maintained that the programs did work and suggested that the problem was that the wrong people were being sent to the program. “We send people to the CBIP that should’ve gone to flipping Walpole or Cedar Junction.<sup>16</sup> Sometimes you’d get a visitor,<sup>17</sup> because no one from the local bar would dare say this to me, who’d say, ‘Judge, but he’s not a batterer...All he did was punch her, knock her down the stairs, and kick her.’ He may not say this last sentence but in fact that was what he was pleading to.” The judge was explaining that the continuum was such that only the really serious cases were pleading to the CBIP and that those cases truly deserved state prison time. The

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<sup>16</sup> Walpole and Cedar Junction are maximum security prisons located in Massachusetts.

<sup>17</sup> Visitor = one-shooter, a defense attorney who appeared in court with a private client on a one-time or limited basis.

defendants who could have benefited from the program were simply not getting it. While some “shifting” had already been accomplished, more was needed in order to make the going rate more meaningful and worthwhile. According to this judge, accomplishing this was a matter of “judicial will.” Thus, according to the judges in the specialized session, whenever there was a plea in a domestic violence case and there was a history of violence, the going rate included the CBIP.

The other specialized session judge discussed how conversations with the defense bar changed as the going rate was altered. She explained that defense counsel would stand up and say,

“Judge, he can’t do this. You’re setting him up for failure because he’s poor and you’re asking a guy in a poor community to do something unreasonable.” I think the review showed us that the vast majority of men could do it, did do it. And there was a community service alternative. It was not about making poor men destitute or about making them say I’m a bad man I’m a bad man...And I think the defense bar started to soften over time about the CBIP and about whether or not this was just a thing to set up men. Their arguments changed and people were more accepting. I noticed a gradual change over the years. Lawyers [defense attorneys] actually recommending the CBIP, now they might be asking for it with a CWOFF and understanding that their guy is looking for something more serious but more willing to make the pitch.”<sup>18</sup> (Judge 2, Specialized Session)

The language used to make arguments about pleas changed as the continuum changed. This impacted the going rate. As new attorneys entered the court community, they picked up on

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<sup>18</sup> CWOFF (continuation without a finding of guilty) does not require a guilty adjudication to enter defendant’s board of probation record if he satisfies the terms and conditions of probation.

the language used and quickly figured out what the appropriate going rate was in that particular court. While this judge mentioned that it takes time for the going rate to change, it appears that by making the CBIP a constant requirement of a plea to a domestic with a history of abuse, defense attorneys started accepting it and even including it in their own recommendations. This is a court-specific phenomenon, however. It is important to note that in other district courts that did not have a specialized session, this continuum change pertaining to the CBIP was not occurring.

It is well-established that going rates vary from courthouse to courthouse. One of the judges from the specialized session was assigned to sit in a different district court in a different county on a regular basis, for some period of time. She noticed that the CBIP was not part of the going rate in the other county court. She asked the prosecutor why she was never asking for the CBIP as a condition of probation on a plea. According to the judge, the prosecutor responded, “Well, we never ask for it because we never get it.” Judge 2 told the prosecutor, “Well, you should ask for whatever the appropriate sentence is and if the judge doesn’t go along with it, then the judge doesn’t go along with it. But you shouldn’t stop asking.” While the CBIP was enmeshed as part of the going rate in the specialized session, this was not the case in other courthouses and counties. Judge 2 from the specialized session noted, “In a lot of other places you go, it just isn’t on the table. And despite the fact that there has been a lot of education for judges and litigants, people still ask for anger management programs as an alternative and judges still give it.” This judge could not change the going rate in the different county with her limited presence alone. If she told the parties that she would only accept a plea that would require the CBIP, then the parties would continue the case to a time when this judge would no longer be

available. Thus, the parties could get a plea with the conditions that they were accustomed to and that was accepted as part of their going rate.

This might be something one could almost come to expect in different counties where the policies governing the prosecutors' recommendations come down from different elected officials. But according to a specialized session judge, the same thing was happening in different courthouses even within the same county. Judge 2 of the specialized session believed that prosecutors' offices have the power to affect the going rate and was puzzled why they were doing so in a discretionary fashion within a small geographic area. She stated, "Sentences vary from court to court within the same county...It seems ludicrous to me that within the same county, prosecutors have different policies based on where you are." This judge was frustrated that the prosecutors in one courthouse would not agree to dismissals of possession of class-D cases on court costs when just miles away they agreed to them routinely. Certain legal actions do give power to the prosecution alone. The power to dismiss a case prior to trial rests solely on the prosecution.<sup>19</sup> Except for matters where the defendant's constitutional rights are at stake, judges cannot dismiss cases over the Commonwealth's objection because the decision to go forward on a case "rests with the executive branch of government and, absent some legal basis, cannot be entered over the Commonwealth's objection" (*Shepherd v Attorney General*, 1991). Thus, in some circumstances, prosecutors can affect the going rate by agreeing to move for dismissal or by objecting to a pre-trial dismissal made by a judge. The fact that the norms of one court house made a pre-trial dismissal of possession of class-D cases the going rate and that

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<sup>19</sup> MA Guidelines for Judicial Practice, Commentary 8:12: There is no question that the court has the authority to dismiss a complaint over the objection of the prosecution based on a violation of the defendant's rights, such as a defective complaint or a violation of the right to speedy trial. Such dismissals must be requested by motion. Mass. R. Crim. P. 13. 309, 310 (1991).

prosecutors were not willing to do this just miles away is evidence of the importance of the local legal culture and its impact on the processing of cases.

Judges in the specialized session accept a large portion of the burden in establishing the going rate. However, they note that shifting the continuum is not something that they could accomplish independently. The judges in the specialized session need the prosecutors to adequately prepare their cases and to push the higher going rate. Without the support of the prosecutor's office, the judges cannot really impact the going rate. If the prosecutors are not trained and are not preparing their cases to a point where they could be plea worthy, then the judges are working alone in trying to shift the continuum. One judge said:

It is also a matter of prosecutorial will and effort because I can't hold everyone accountable if no one can prove a case. If they are not working on corroboration and if they are not asking for things, you know the DA's office comes and goes and there is a new relatively inexperienced class...that hasn't been trained in domestic violence prosecutions. (Judge 1, Specialized Session)

The value of a case was not easy for prosecutors to determine in the specialized session. They reported that the process by which they acquired information pertaining to the going rate was informal in nature. While some formal training existed pertaining to domestic violence as a unique case type, prosecutors learned about the going rates in the specialized session mainly through informal avenues. They described the process of learning the going rate as occurring primarily by word of mouth and daily interactions with other court actors. One prosecutor described learning the going rate this way: "That's the hardest part; I'm like can we have a class on this?" In a joking manner, this prosecutor mentioned how having some kind of formal training would have been beneficial.

Several others reported that acquiring the knowledge of the going rate took time and was largely gathered through experience and by running things past fellow prosecutors. Prosecutor 5 from the specialized session said, “That is always hard starting out. You get a feel for it. You come into a new court with new people and of course when you’re new you don’t know what to do, so you’re constantly running things by others to bounce ideas off them.” Prosecutor 1 from the specialized session noted that it was important to observe other prosecutors’ work as well. “I learned mostly from doing it and from watching other people who have done DV cases a lot longer than me.” A seasoned prosecutor discussed the process by which she learned the going rate in order to make a recommendation on a plea. She stated,

Once I was more comfortable, I was able to come up with resolutions on my own, but there are still cases where you want to bounce it off somebody...and get their expertise. Whether they’ve been there longer than you or less time than you, sometimes just getting somebody else’s opinion and getting their analysis to see if you’d be on the same page, because there is no exact science on how to come up with a resolution. (Prosecutor 3, Specialized Session)

Prosecutors also mentioned that they can learn the “appropriate recommendation on a case” from judges to some extent.

Sometimes judges can be helpful if you recommend something and just from the bumps and bruises of learning you hear, “You know I am really not seeing eye-to-eye with you on this one,” then next time you think this judge didn’t think this was reasonable, let me try to remember why. It’s trial and error. (Prosecutor 5, Specialized Session)

Prosecutor 2 mentioned that the passage of time and learning the personalities of the judges helps in understanding the going rate of a court. “The longer you do them [domestic

violence cases] and then you just get used to your judges... You have to learn what your judges are going to be willing to do.” Thus, prosecutors have to be somewhat malleable, depending on which judge is sitting in their session on that day. This is different from the specialized session. For the most part, the same two judges sat in the session on a daily basis. Thus, the prosecutors came to believe that a CBIP was a necessary component of the session’s going rate. As the session became more entrenched, other judges would also sit occasionally in the session. These judges did not always follow the same going rate that the other two judges were working so hard to establish and maintain.

When I asked a prosecutor in the specialized session if the judges communicate to them how they feel about their recommendations, and if that in turn affects the going rate, she responded, “It really depends on your judge. Some are more pro-prosecution and some are more pro-defense.” By this she meant that after a time, prosecutors come to learn which judges are more willing to agree with the prosecution’s recommendations and which judges are more likely to side with the defense attorney’s recommendations. A judge who routinely dismisses cases over the Commonwealth’s objection, or who refuses to give the recommended CBIP as a term and condition of probation, could be classified as more “pro-defense,” whereas a judge who routinely requires batterers to attend a CBIP and who tends to agree with the Commonwealth’s recommendations would be deemed “pro-prosecution.” Like anything else, this knowledge is acquired over time, through interactions with judges. There is no formal list of which judges will make decisions in what type of manner, but members of the court community come to know the reputations of judges and share this information with each other over lunch, coffee, or in hushed hallway conversations. In the specialized session, this was somewhat controlled, but having the

separate trial session and an occasional visiting judge gave prosecutors from the specialized session these experiences with varied going rates.

Some prosecutors commented on their interactions with the defense bar as well. Prosecutors learn which defense attorneys are “legitimate” and which are not. The term legitimate was used by prosecutors to describe attorneys who have solid reputations. The good reputation of a defense attorney comes from interactions that the prosecutors have with them over time and by word of mouth from other prosecutors. A legitimate defense attorney is one who is honest about his case and fair in his dealings with the victim. They will also at times agree to plead out a case that is particularly serious, rather than taking every case to trial. Prosecutors judge their own abilities at understanding the value of a case against the way these legitimate attorneys determine the cases’ worth. According to Prosecutor 4 , “As time went on, I knew that I was learning what I was supposed to learn because I was becoming more and more on the same page with the legitimate defense attorneys.” When I asked which defense attorneys were legitimate, she responded, “The ones with the good reputation, the ones that could say ‘I am trying to get this for my client but at the same time I can see what this case is worth.’” Legitimate defense attorneys and prosecutors have more congenial relationships than adversarial.

Conversations with the defense bar in the specialized session were significantly different from the conversations I had with the judges and prosecutors. Defense attorneys felt that the going rate in the specialized session was unfair to their clients. The issues of perceived unfairness to defendants was not raised by the other members of this court community, but was regularly mentioned by the defense bar. Most of the defense attorneys’ comments were couched in terms of the injustice of having a going rate in the specialized court that differed from the

other local courts. When I asked how the specialized session was different, one attorney responded,

Well first of all, the people outside of the specialized session are not quite so intense about it, and second, the disposition. The dispositions aren't nearly so demanding and harsh in most cases in other courts. Like, every single person charged with a DV that pled out had to do the batterers' program, you know, what's up with that? (Defense Attorney 2, Specialized Session)

I think it is important to make a distinction between the actual disposition commonly reached in the specialized session and its going rate. When the defense attorneys discussed the injustice of the session, they were concerned with the going rate as it was communicated to and sought after by the judges and prosecutors in the specialized session. They would refuse to dismiss domestic violence cases prior to trial and they required a CBIP upon a plea. What actually happened to the majority of the cases did not always follow the goal going rate that was established. Indeed, even in the specialized session, many cases were dismissed on the day of trial.

Most defense attorneys in the specialized session concurred that putting forward an agreed-upon tender is in the best interests of their clients because it minimized their client's risks. Many of them felt that sometimes they did go disparate in the specialized session because they did not want to subject their clients to a CBIP. (Disparate in this context means simply not agreed to, or in the language of the court community, "unagreed.") An unagreed tender allows prosecutors and defense attorneys to write down how they feel the crime should be resolved. It then leaves the decision on how to dispose of the matter to the judge who is hearing the plea. There is little risk to the defendant involved in these pleas because in Massachusetts there is

something called a defendant cap plea.<sup>20</sup> That means if the judge's recommendation exceeds what the defendant agrees to take on a plea, then the defendant will be given a chance to withdraw his plea, without being sentenced, and suffer no consequence of the admission. Once the plea is withdrawn in the pre-trial session, the case will likely be scheduled for trial. Often, months later, the defense attorney can again decide to tender a plea and see if this trial judge would be more likely to agree with his recommendation. In the court that housed the specialized session, this was often a different judge. Also, the status of the case is likely to change with the passage of time. The unagreed tender will, however, remain in the file for the next judge to view prior to hearing the plea on the trial date. There is less chance involved when the defense attorneys and prosecutors agree on the tender from the beginning. In this situation the judges are far more likely to go along with the terms and conditions of the plea.

Thus, in order to avoid an uncertain situation, many defense attorneys agree that if they are going to plead, putting forward an agreed-upon tender is the best course of action and is the least risky for their clients. However, this was very difficult to do in the specialized session, according to the defense attorneys. "A lot of defense attorneys here go disparate very often. I make it a point to try to get the ADAs to come down but...." This defense attorney was stating that it was not always possible to persuade the prosecutors in the specialized session to reduce their recommendations and agree to a tender that would be acceptable to their client. They characterized the prosecutors in the specialized session as having very little discretion over how to dispose of their cases. The defense attorneys were accustomed to getting their domestic violence cases dismissed by prosecutors early in the process in other sessions. In the specialized session, prosecutors were not doing this. Prosecutors were trying to get defendants to agree with

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<sup>20</sup> Mass. Gen. Laws, Chapter 278, Section 18.

what the judges were promoting as the going rate and accept a CBIP. Many defendants were simply not willing to do this.

Like the prosecutors, defense attorneys felt that the longer an attorney practices in a court, the more likely they will learn the rules of that court and how to resolve cases amicably. According to Defense Attorney 3, “The more experience the players have, the more likely they will agree. When you first start out as a defense attorney or an ADA, they don’t know the value of a case and they can’t really assess it on their own.” With experience comes consensus. Defense attorneys and prosecutors agreed that consensus makes it easier to move cases forward and dispose of them efficiently. However, in the specialized session, the going rate was driven by the goal of holding batterers accountable. Thus, consensus was harder to come by between the prosecutors and defense attorneys in this session.

### **The comparison court**

The comparison court is a traditional court that does not contain a specialized session. Domestic violence cases are handled in the same session as all the other matters that are scheduled on the list for that day. I will discuss my findings pertaining to its going rate in the same fashion I did for the specialized session: starting with the judge, then moving on to the prosecutors, and ending with the defense attorneys.

I described the concept of a going rate before asking the judge of the comparison court any questions about its existence. While there is no question that every court has established and communicated going rates, it can be an unconscious process. Certainly the language of the “going rate” is a product of the court community literature and not something used by its practitioners. Thus, while court workgroup members are intimately familiar with the existence of going rates and use them on a daily basis, they do not necessarily think of them as such and

certainly do not use the terminology. Despite an explanation of the concept, the judge of the comparison court felt very strongly opposed to the existence of any average type of sentence that could be uniformly applied to a case type. He thought this was akin to a discretion-limiting sentencing guideline. While he agreed that going rates can exist in some cases, he then went on to criticize them as discretion-limiting, something he would have no tolerance for.

Yes, you'll see your marginal cases handled in a way that makes sense for that community. That's good in the eyes of some, horrible in the eyes of others. There's no goddamn way that....and I can't stand sentencing guidelines. I think the system is a travesty. I think every person is different and every single person should be seen for what he or she has as a positive sort and a negative sort, and they deserve something other than cookie-cutter justice. The generic doesn't fit. You ought to be able to tailor it.  
(Judge, Comparison Court)

This judge was defensive about being asked what the average sentence was for domestic violence cases. He did not want to admit that any such average existed, and called such a suggestion a travesty. Instead he discussed the importance of having full judicial discretion and control. One may wonder what the prosecutors' role would be in a community that values full judicial discretion above any type of community agreed-upon going rate. Thus, I asked this judge about the input a prosecutor could have in trying to establish a going rate. His answer was also very telling. He stated:

I don't see very many ADAs doing a lot of risk taking. I don't think they have much authority...and they're working for people who are elected officials and, for the most part, and it wasn't always this way. They are going to resist temptation to do anything

that might backfire because they want to go places in their future careers. (Judge, Comparison Court)

In this response, the judge admits that the prosecutors have very little perceived power and influence on how their cases are processed. Their ability to impact the going rate is extremely limited in the comparison court. Additionally, the prosecutors of the specialized session agreed with the judges about the goal of the session. The prosecutors and judges of the comparison court did not agree to the goal of their court or how to handle domestic violence cases.

The only judge that I was able to interview had been working in this court for multiple years and he went on to give credit to the presiding judge, who had been sitting in that court for decades. While he would not agree that any type of going rate exists regarding domestic violence matters, he did think that the presiding judge, with all of his years of experience, truly understood the big picture on domestic violence and if anyone could establish a going rate for this court, it was him. Regarding this presiding judge, he said: “He really knows the value of a case because of his experience. When you’re making sausage and trying to put a deal together, we know more than the ADAs. We have more of a macro view.” He then went on to explain how having experience and knowing the defendant and victims well can give one a broader view on such matters and will better enable one to “truly” know the value of a case. Because the ADAs are young and because there is a high turnover of ADAs who work in this district court, the ADAS do not have credibility with the judges. What is similar between the two courts is that the judges have a lot of power and influence over their court’s going rate.

One glaring difference was in the way that this power was enacted. While the exclusive power to dismiss cases prior to trial was reserved for prosecutors in the specialized session, this was not the case in the comparison court. Judges routinely dismiss cases prior to trial, and even

over the prosecutor's objection, in the comparison court. Such dismissals are against the recommendations of the guidelines for judicial practice.<sup>21</sup> This leaves the prosecutors in the comparison court relatively powerless and frustrated. Many of the prosecutors I interviewed from the comparison court seemed nervous and anxious about talking to me. They seemed to be very much aware that this particular district court has been "run" by its judges for years now, to the detriment of their cases. While some of the prosecutors were nervous about discussing this problem, others commented on how they learned to adapt their behavior to the mandates of this local legal culture.

Like the prosecutors in the specialized session, these prosecutors gained knowledge about the value of cases from their day-to-day encounters, from running things past peers and supervisors, and from trainings put on for them by the DV unit chief. Their interactions with judges were also consistently mentioned as having an effect on their dispositions and the established going rate. As was detailed in Chapter 3, lobby conferences were regularly held in the comparison court. This gave the judges a unique opportunity to communicate what they perceived to be the value of the cases "off the record" and out of the public eye.<sup>22</sup> While the prosecutors of the comparison court are trained to ask for the CBIP as a term of probation for domestic violence cases, the prosecutors reported that the judges almost never gave it. This

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<sup>21</sup> The law is clear, and the guidelines emphasize that it is inappropriate for a judge, over the Commonwealth's objection, to dismiss a criminal case because the judge has made a discretionary determination that the case should not be tried due to the alleged victim's reluctance or otherwise. The law leaves this decision to the prosecutor. Moreover, the prosecutor usually has facts that are often not known to the judge, including the defendant's criminal record, past history of unprosecuted violence, mental status, indications that the defendant may be contemplating suicide or homicide, an opportunity to observe the victim's behavior over time, and knowledge about the presence of children in the home and any danger to them.

<sup>22</sup> Lobby conferences – an off the record meeting of defense counsel, ADAs and judges to discuss the case, its merits and possible sentence. Many times 276§87 are given over the prosecutors objection or even outright dismissals may result.

impacted their recommendations. As Prosecutor 4 candidly told me, “It’s kind of hard when you’re in lobby and you ask for it every time, because you would never get it.” When I asked if she thought that this might affect her credibility with the judge, she said,

I hate to say it, but I think that’s true, especially, the presiding judge. If I can say, “Judge I know you don’t like it, but you know I don’t ask for it every time ...but in this case xyz,” he wouldn’t always do it but he would listen to me more I think. We have pretty frank conversations in the lobby. When people are outrageous in what they are asking, he doesn’t like it. (Prosecutor 4, Comparison Court)

Thus, in order to establish credibility with the judges in the comparison court, this prosecutor admits to defying office policy regarding the CBIP. In this court, the CBIP is seen as an outrageous request to make in every domestic violence case. Thus this prosecutor saves the request for cases that are very serious. She thinks she has more of a chance of getting the program as a term and condition of probation if she rarely requests it. I asked her what the judge would do when prosecutors followed office policy and asked for the CBIP on every plea. She stated, “He would have little respect for them. When you get up there and beg for a new date, if you have good rapport with the judge, then...” Thus the going rate for domestic violence cases does not include the CBIP in the comparison court. In fact, it lessens one’s credibility with the presiding judge if it is requested in every case. The going rate that the judges of the specialized session were working to establish was viewed as outrageous by the judges in the comparison court. Thus, even with a District Attorney Office policy that mandated the request for CBIP with domestic violence pleas in the comparison court, the ADAs were hesitant and did not always do so because of the ramifications it would have for their relationships with the judges and their perceived credibility with the bench. In order to establish credibility with the judges in the comparison court,

prosecutors were not asking for what the domestic violence cases needed. They needed to avoid “rocking the boat” in order to gain the judge’s respect. This had detrimental effect on their domestic violence cases.

Unfortunately for the prosecutors, they stated that it was common for the judges and defense attorneys to tell them that their recommendations were ridiculous.

You sit in lobbies with these judges every day. You try to be reasonable. It hurts the ADAs relationship when they ask for things every day. I’ve had judges inappropriately talk to me about other ADAs and how it was so ridiculous what they were asking for, and then they have a bad reputation with that judge. And in this court, that’s tough!  
(Prosecutor 4, Comparison Court)

One prosecutor theorized that the reason why the judges may have established certain going rates has more to do with their background than with the law.<sup>23</sup> “I think you can see that certain judges display a propensity to not favor or to consider certain cases more serious than others. That’s natural; they come from different backgrounds bringing different experiences to the table. They’re human beings with natural propensities too.” (Prosecutor 2, Comparison Court) Most respondents knew that the two main judges in the comparison court were former defense attorneys. While justice is supposed to be blind, judges seem to be affected by the legal backgrounds that they have. Studies have shown that judicial background and context can impact their decisions on the bench (Britt, 2000; Johnson, 2006). In this study, both judges in the specialized session were former prosecutors who were pushing prosecutors to investigate their cases and were giving them additional time to do so. The judges in the comparison court

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<sup>23</sup> Judges in the comparison court are former defense attorneys, a fact that is well-known by prosecutors and defense attorneys alike. One judge bragged, “I headed up and founded a prison legal services office in Suffolk County, and I did that for six years and I had about 3,000 files by the end of that time.”

were cynical of the district attorney's policies and would not allow them to impact their notion of what the going rate for domestic violence cases should be.

Prosecutors in the comparison court did not raise the gender of the judges as an explanation for this problem. While the gender of the presiding judges in the specialized session was raised by defense attorneys as a source of unfairness, it was not raised here by the prosecutors in a similar manner. Perhaps this is because maleness is the standard and it is not a cause for question, but surely it follows along the same rationale the prosecutors used to justify the actions of the judges who were former defense attorneys. Gender was only spontaneously cited as an issue of concern when that gender was contrary to the agreed-upon expectations of that court community. When the judge was male, it was normal, but when she was female, it was different and gave reason for pause and speculation.

The supervising prosecutor in the comparison court was trying to change the dynamic between prosecutors and judges as it existed in that court.

Part of my job is to change the way that prosecutors evaluate their cases. And ultimately I hope that the judges will change the way they evaluate cases. For example, there is a big difference between a CBIP and an anger management program. We had a big training for differences between the two of them. The ADAs can now articulate these differences in their pleas. Now when a judge says, "I'm going to give anger management," an ADA can tell them, "Well, judge, I'd rather have nothing than have anger management," based on what they learned at training. The judges are kind-of taken aback. That's what I mean by training the judges. (Prosecutor 1, Comparison Court)

During the time I spent at this comparison court, I watched the judges sentence batterers to anger management on several pleas. On one occasion, I watched a prosecutor ask for anger

management on a domestic violence case scheduled for trial. The prosecution was ready for trial and had a victim waiting to testify, along with a civilian witness and a police officer witness. The prosecutor requested probation with an anger management program. The judge refused to sentence the defendant to any treatment whatsoever. Instead he sentenced the defendant to a one-year continuance without a finding of guilty (CWO) with a no-abuse order. A no-abuse order is an order by the court that the defendant not abuse this victim again and that if the defendant chooses to do so, this would revoke the condition of probation and could turn the plea into a guilty and face whatever penalties would be attached after a revocation hearing. The facts of this case were that the defendant punched the victim in the face in front of their children and in front of an independent witness. The manner in which this case was handled was representative of how domestic violence cases were viewed by the court in general. Specifically, in the comparison court, even when a case is “ready for trial,” a defendant can expect to get a very lenient sentence. The majority of cases are not ready even for trial with several witnesses willing to testify. These cases are dismissed. Watching this scene unfold was telling about the going rate and the local legal culture that would entertain such conditions in these circumstances. It is a marked difference from what would have occurred in the specialized session.

Defense attorneys in the comparison court are a tightly knit group of people who appear in the court on a regular basis and have done so for many years. They have watched ADAs come and go and have gotten to know the regularly sitting judges very well. They talked about the advantages of working for many years in a court and how one learns the culture and going rates of a court by working constantly in a place. “After a while you just have to develop a sense of what a case is worth. And frankly, it takes time. Unfortunately, most of the prosecutors you’ll find in this courthouse are in their first three years of practice, which is why it sometimes appears

that the judges are siding with the defendants.” (Defense Attorney 5, Comparison Court) This attorney felt that the ADAs in the comparison court were not particularly experienced and that they had little discretion over their recommendations. He almost seemed to think that they didn’t fully understand the value of a case, but that the judges and defense attorneys agreed on what a fair disposition or going rate of a case should be. This attorney chalked their agreement up to experience and knowledge. He went on to explain:

I think that the judges, the regular judges...they sort of know who the bad guys are. That’s the most important part of this whole process. I’m convinced that the judges know who the police are really concerned about. And the vast majority of people don’t fall into that group. (Defense Attorney 5, Comparison Court)

The judges and defense attorneys, with all their years of experience and repeat player status, have developed a close relationship in which they agree on the value of a case and the dangerous level of their defendants. The prosecutors are not part of this mini-community. The judges and defense attorneys also agree on which cases should be typified as weak and should be treated very leniently. Unfortunately, most of the domestic violence cases fall within this category.

A different defense attorney compared the community in this courthouse to other courthouses she had worked in. She stated that it is “far more enjoyable working together and trying to get the right result for your client” (Defense Attorney 4, Comparison Court). She went on to say that the absence of community between prosecutors and defense attorneys definitely affects how pleas are entered and that they rarely agree on dispositions. In this comparison court, there seemed to be a court community comprised of judges and defense attorneys alone. The prosecutors were, by and large, not part of it. This impacted the going rate, in that the judges

most often agreed with the defense attorneys' recommendations. "You see, the young prosecutors don't get it. But *here*, the judges get it. Some prosecutors have their orders and very few have discretion in district court. That's when you need the judges to step in" (Defense Attorney 1, Comparison Court). It appears that in the comparison court, the judges step in very often.

### **What is the Going Rate?**

According to the Judicial Oversight Demonstration (JOD) data that was gathered by the Urban Institute from both these courts from January 2003 until August 2004, 47.4 percent of domestic violence cases in the court that housed the specialized session were disposed of with either a CWOFF (20.6 percent) or received a guilty (25.3 percent) adjudication. This is much higher than the comparison court statistics, where 12.2 percent of the domestic violence cases were resolved with a CWOFF and 14.6 percent with a guilty adjudication. In both courts these numbers did not constitute even half of the total domestic violence cases that were analyzed. The majority of cases in both courts resulted in dismissal. Fifty-two percent of the domestic violence cases in the specialized session resulted in dismissal, as compared with 71.9 percent of cases in the comparison court.<sup>24</sup>

It was difficult to get court workgroup members to discuss the going rate for domestic violence cases. Thus, when discussing it with court community members, I first tried to gather information about the phenomenon itself by using open-ended questions about the value of a case, how they learned what cases were worth, and how it varied from one court house to the next. I didn't want to initially push the respondents about what the going rate for domestic violence cases was out of fear that they would get defensive and shut down. So I enjoyed several

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<sup>24</sup> The comparison courts numbers can be further broken down between outright dismissals (46.8 percent) and deferred prosecutions under 276 §87, which ultimately resulted in dismissals (25.1 percent).

minutes of discussing the cultural context of going rates as something employed by all court houses, without necessarily putting them on the spot about the bottom line for certain crime types. I did eventually ask them to what they perceived to be the actual going rate for domestic violence crimes. I generally asked about possession of marijuana cases first. These cases were still considered criminal at the time but were commonly regarded as an extremely low-level offense. Once they seemed comfortable with the idea that crimes have “going rates” and we had discussed possession of marijuana cases, then I further pushed them to talk about the domestic violence rates, an area full of contradictions and confusion.

### **The specialized session**

Again, I often started the conversations about case dispositions and going rates by asking them to talk about the possession of class-D (marijuana) cases and how they are disposed of in their courts in comparison to other district courts. All respondents readily answered these nonthreatening questions, even when their court’s going rate was significantly less serious than other courts in comparison. I simply asked all respondents, “What does a defendant typically get on a possession of class-D in this court,” and they had a ready answer. In the specialized session it was simple to capture the going rate for these cases. All parties interviewed—judges, prosecutors, and defense attorneys alike—quickly answered that those cases were dismissed on court costs. Many discussed how this was not the going rate in other courts. Many felt that in more rural or less busy courts, these cases might receive harsher penalties but that this was a fair disposition for such a minor offense. Coincidentally, these conversations were taking place around the time that the legislature was considering decriminalizing the possession of small amounts of marijuana.<sup>25</sup>

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<sup>25</sup> Massachusetts General Laws, Chapter 94C §34 states that “No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a

It was far more difficult to capture the going rate for a domestic assault and battery case. After talking to 12 attorneys and judges from the specialized session, I was able to decipher that most domestic violence cases that are handled in the specialized session are dismissed on the date of trial. None of the parties mentioned this as the going rate, however. Indeed, it appears that even though this was the reality of what happened to most of these cases, the going rate was to try to get the batterers on some period of probation with the CBIP as its primary term and condition. Thus, there was a clear disjunction in the specialized session between what the perceived going rate was and what the perceived average disposition was on a domestic assault and battery. Because the specialized session was a problem solving court, it appears that they were operating with two going rates: 1) an ideal going rate that the judges and prosecutors were trying to consciously make become true; 2) the actual or real going rate. The judges discussed the importance of a CBIP and how they have managed to make this part of the discussion on cases which might plead; the prosecutors, as well, discussed trying to get defendants to plead so that they could get the batterer to enter the CBIP; and the defense attorneys discussed how unfair the specialized session was in comparison to other courthouses, especially due to the requirement of the CBIP.

One judge commented on the going rate of domestic violence cases in the specialized session in this manner:

Because such a large percentage of victims are uncooperative with the government or minimally cooperative, that affects rate or dispositions. Prosecutors routinely offer dispositions that are less than what they might offer based on the facts of the case because

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practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter.” This was amended on December 4, 2008 by 2008, 387, Sec. 5, which simply added the language “except for as provided by section 32L, which allowed for possession of less than one ounce of marijuana to be considered a civil offense.”

they feel there is little likelihood of winning a case at trial. They might be able to offer a disposition to someone, a lesser sentence; at least they might try to get them on probation to get some result out of the case that might impact the situation. I think judges routinely give lower sentences than they would in an attempt to get people into programming that might be helpful, recognizing the fact that the biggest sentence you can potentially get on a straight A&B is 2.5 years in the HOC and when you add parole, even if a person got a maximum punishment, even if convicted after a trial, they're coming out and probably going back to the same woman, if not another woman, and so what do we do to try to address this issue, successfully or unsuccessfully? (Judge 2, Specialized Session)

Thus, within the context of domestic violence assault and batteries, judges are mindful of the fact that the batterers who are even given the maximum sentence will be released rather quickly and could potentially do further harm. Thus, for the majority of these cases the goal isn't necessarily jail time, but is getting the defendant to successfully complete a batterers' program and hoping that it has an impact on their relationships with this victim or future victims. The other judge from the specialized session interviewed further articulated this point. She stated unequivocally that probation with CBIP is "worth more" than a short jail sentence.

I'll take probation with BIP with close supervision and monitoring with no victim contact over a short jail sentence any day, because we've come to learn that it goes on. The next partner will be a victim; it is not just a toxic relationship. We don't have a death penalty, we don't have life in prison for these kinds of cases, and I'm not saying we should, so you want to invest in them, in their future. If you know about how it affects children, that affects how seriously you take it, and also your sentencing decisions. (Judge 1, Specialized Session)

The cases that did not plead and receive a CBIP were often dismissed on the day of trial. Unique to the specialized session was how few cases were dismissed prior to this date. Many unprosecutable cases were arraigned in the specialized session. Cases in which there were no injuries, records, or cooperating witnesses—even these cases were pushed to trial in the specialized session. One judge expressed frustration over this.

If you dumped the ones where it isn't possible to go forward on, those walk-in reports where somebody is recanting the next day, and there's no physical evidence but nobody will...if they dumped those early on, then they'd have a little more time on their hands. That's the whole point of prioritizing. If you could take everything with you forever, that's fine, but I think in a cover-your-ass kind of fashion, they take everything to a trial date, you know. We started putting them all on for trial on a Friday.<sup>26</sup> It's all the DV cases that are going to be dismissed and I am trying to keep them out of the regular trial session. It's stupid. Every one of those cases ought to be dismissed. (Judge 1, Specialized Session)

Thus, the judges felt that a distinction should be made by prosecutors between cases that ought to be set for trial and those cases that could never be successfully tried. There was some tension between the judiciary and the prosecutor's office about who would in essence be "responsible" for the dismissal. By putting cases on for trial, and then not being able to go forward for "want of prosecution," the judges were given the right to dismiss the cases, which they did. Prior to the trial date, this power statutorily rests within the purview of the prosecution. However, the prosecutors in the specialized session would not dismiss cases prior to trial under any

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<sup>26</sup> There are no jurors summonsed to this court on Fridays. Essentially, putting these cases on for "trial" on Friday helped alleviate the bogged-down trial session from Monday through Thursday. If the Commonwealth could not go forward, the case was dismissed without prejudice on the Friday trial date.

circumstances. ADAs euphemistically called this an evidence-based prosecution policy, but what it amounted to was a no-drop policy for domestic violence cases in the specialized session. This led to tension between court workgroup members and could potentially have led to some ramifications for other more serious cases. As the judge mentioned, “if they dumped those early on then they’d have a little more time on their hands.” By this she meant that if prosecutors were able to prioritize their cases and to dismiss some prior to the trial date, then they could use more of their time preparing the remaining cases so that they could be “ready for trial” on more cases that were had strong case typifications.

The prosecutors willingly admitted that they left cases open until the date of trial. I asked, “So you’d keep a case open at least to trial?” The prosecutor responded, “Yes, and if they didn’t show up and we couldn’t go forward without them, then we had a lot of cases that got dismissed without prejudice [by the trial judge].” The rationale, according to prosecutors, was complicated. Many victims change their minds about their willingness to testify several times prior to trial; also, defendants appear to exhibit their best behavior when they have an open case hanging over their heads with the threat of a bail revocation. I asked if there was ever an occasion when cases would get dismissed prior to the trial date and the prosecutor responded, “Never at arraignment. We would dismiss at pre-trial conference in a couple of situations, one jumping out at me is the victim has a Fifth Amendment privilege in a cross-complaint situation...and the second was the marital privilege” (Prosecutor 5, Specialized Session). These concepts are explained in detail below. The prosecutor is pointing out in this excerpt that there are times when the law provides legal rights to victims which shield them from being compelled to testify by the prosecution. The Fifth Amendment right against self-incrimination is often invoked by victims when they tell the responding police officers (or in some cases, the court)

that the assault and battery in question was the result of mutual combat. Thus, if they were to testify, they could potentially be offering into evidence statements that would incriminate themselves regarding their own culpable behavior. If both parties are arrested at the scene, this is referred to as a cross-complaint. In many jurisdictions this leads immediately to a dismissal. In the specialized session, resources were dedicated to training prosecutors and police officers about how to decipher who the primary aggressor was in a situation, dismiss the complaint against the less culpable party, and pursue charges against the primary aggressor. This was not always easy to do. The second occasion when the law provides a protection from being subpoenaed to testify is when the victim and the defendant are married to each other. The law seeks to protect the institution of marriage and does not allow the prosecution to force a person to testify against a spouse. If a party can prove that she is legally married to the defendant and that she is “choosing” to invoke her marital privilege, then the prosecution is denied access to that victim or witness regardless of the seriousness of the charge. Of course, a person is not denied the right to testify against her spouse and can choose to do so; she just cannot be compelled to do so, like other civilian witnesses.

When I spoke with the prosecutors, they articulated that they were trained on the “best practices” to be used when trying to prosecute domestic violence cases. Examples of this included interviewing the victim and maintaining contact with her throughout the case; taking photographs and collecting anything that could be used as evidence early in the case; using a civilian investigator to contact neighbors who might have heard or seen something; listening to 911 tapes; and summoning medical records and EMT trip sheets and other investigatory strategies in an effort to produce corroborating evidence. Even with the additional resources allocated that made this kind of in-depth investigation possible, the prosecutors of the specialized

session were universally frustrated that the vast majority of the cases were unprosecutable, and the ones that were prosecutable rarely received harsh penalties. Unlike the judges, the prosecutors were committed to seeking the highest possible sentence on a case and were frustrated by the sentences that most of their relatively strong domestic violence cases received. They felt that many cases were dismissed on the trial date for reasons outside their control and that, even when they had a strong case, many received lenient sentences. One prosecutor discussed these lenient sentences this way:

I have given lectures to students at a local university. I show them pictures of injuries and ask them what do you think this guy got for a sentence. They are just blown away....In my experience it is pretty standard, first time offender domestic, as long as the injuries aren't too serious, you know a black eye and no record, then you are looking at a one year CWOF with a batterer's program. And that is pretty standard. (Prosecutor 1, Specialized Session)

Prosecutors felt that even when they had a cooperative victim, their cases were not always getting harsh enough sentences. Prosecutors did not agree that a CBIP was the best possible sentence for all of their cases. The prosecutors felt that incarceration would be a more suitable sentence when the facts and victim could support conviction. The problem solving court brought with it challenges to the traditional manner in which prosecutors viewed their role. Treating batterers for their violent crimes seems to excuse their crime (Schneider, 2000). It is frustrating for prosecutors to accept this new model and alter how they view their definition of justice (Berman & Feinblatt, 2001; Menkel-Meadow, 2002). Frustration is expressed in the remarks made by this prosecutor:

It's tough to stand before a judge, especially one when you know what they are willing to give, and let's say this guy deserves 2.5 years in the house, and you stand up and say this case deserves 2.5 years in the house, I encourage you to give him that, but sometimes judges are like, "No, no, CWOFF!" (Prosecutor 4, Specialized Session)

Because the judges were mainly concerned with getting the batterers on probation and into the BIP, they allowed CWOFF more often than the prosecutors thought was acceptable. CWOFFs are generally reserved for first offenders. In the specialized session, judges were allowing them for repeat offenders who would agree to go into the CBIP. In fact, in the specialized session, from January 2003 to August 2004 approximately 20.6 percent of domestic violence cases were resolved by way of a CWOFF (JOD data, 2007). This was more than were disposed of in a similar manner in the comparison court, which amounted to only 12.2 percent (JOD data, 2007).

Ultimately, both judges and prosecutors in the specialized session wanted to hold the batterers accountable. However, the prosecutors' theory of punishment was much more punitive and less problem solving-oriented, whereas these judges were trying to solve the bigger problem of ending domestic violence in their community. The judges were trying to implement a version of therapeutic jurisprudence that was difficult to enforce without the support of the other court community members (Worrall, 2008).

Defense attorneys expressed paradoxical views about going rates. While they admitted that the vast majority of their cases in the specialized session resulted in dismissal, they still felt that the session was unjustly harsh and unfair. This is because, in order to be successful, they should challenge the manner in which they now must approach their clients and how they achieve justice on their behalf (Spinak, 2003). Additionally, it is not uncommon for defense

attorneys to be less involved at the inception of problem solving courts (Spinak, 2003). Thus, defense attorneys may feel alienated or left out of this process and therefore are less likely to adopt the changes that come with it.

Indeed, many defense attorneys from the specialized session characterized it as unfair to their clients because it “subjected them to much higher and tougher penalties just because they happened to get arrested there.” Defense Attorney 3 of the specialized session went on to say, “The people subjected to the DV court were basically discriminated against because they faced penalties far above-and-beyond what people in other courts would have faced.” Later in the conversation, when I asked this same attorney what happened to most of the cases she was assigned, she answered, “For me personally, they were placed on for trial and the majority of them were dismissed.” I further inquired whether this happened even in the specialized session, to which she responded, “The majority of the cases would be dismissed because the victim would not show up to testify. I mean, that is the general pattern.” This was not uncommon. Many defense attorneys discussed their perceived unfairness of the session while admitting that most of their cases were eventually dismissed.

One good illustration of the way in which the session was perceived to be unfair by the defense attorneys was in how it handled restraining order applications and bail hearings. Defense Attorney 1 from the specialized session thought that it was preposterously easy to be granted a restraining order in the specialized session. “The other thing about the DV session is restraining orders. Lawyers always say you can indict a ham sandwich. It didn’t matter what they said. It didn’t matter if how recent it was, it didn’t matter if she had a history of being a bold-faced liar, yup, issued. It was like a rubber stamp.” She had a similar experience with bail hearings. “The same thing with bails, you could have walked in there: first offense, no record,

owned your own home, and they were holding you on bail.” So while the session could not alter the eventual disposition of domestic violence cases, it could procedurally impact the cases and the court community when conducting hearings on bails and restraining orders. These matters often seem to lead to feelings of unfairness by the defense bar. I asked this same attorney what, on average, happened to the cases that she worked on in the session and she responded that the majority of them got dismissed. This was a common response. Most of the cases were eventually dismissed, but the process in order to have this done took longer and was harder to accomplish in the specialized session than in other courts, and thus caused the defense attorneys to perceive it as unfair to their clients.

Many of the cases were not dismissed until the trial date. Defense Attorney 1 of the specialized session went on to explain this by offering, “You had no choice but to push it to trial because if you resolved it [in the specialized session], the conditions on a resolution were so utterly ridiculous that you were setting your client up to fail in a way.” I further inquired “What conditions?” She responded, “I have a big problem with long periods of probation. I don’t think it’s humanly possible for someone to not be in the wrong place at the wrong time...batterers...humph” (Defense Attorney 1, Specialized Session). This attorney, like many others, thought that long periods of probation with the CBIP were unfair to their clients. It was not the going rate in other courts and just because they were arraigned in this specialized session they were subject to this program as a term of probation. This upset many defense attorneys.

Defense attorneys agreed that the going rate of a domestic assault and battery case with a cooperating victim is probation with the CBIP. Defense Attorney 2 of the specialized session stated, “I think the majority of those plead.” “To what?” I asked. “It depends; if it’s a first offense you can get a CWOFF.” I asked about CBIP. She responded, “Always requested for

probation. Before [the specialized session], they would give you anger management and stuff like that.” Another defense attorney stated:

Most judges were more amenable to give a CWOFF rather than a guilty finding only because the judge wanted that person on probation. They’ll do anything to get him on probation and throw a lot of programs on it because in [the specialized session] they don’t differentiate between probation on a CWOFF or a guilty or a suspended sentence. The judges in [the specialized session] would violate him and send him to jail on a CWOFF, just the same as a guilty. (Defense Attorney 5, Specialized Session)

This was also a marked difference in the specialized session. CWOFFs (continued without a finding of guilty) are generally reserved for first offenders and are not considered to be convictions under the law. Theoretically, they allow offenders to stay on the straight and narrow for a period of time and then have their cases dismissed upon the end of the term of probation. In some courts, a violation of a CWOFF may turn the adjudication into a guilty but keep the defendant on probation. In the specialized session, CWOFFs were offered to defendants, even those with prior records, in order to get them to plead and enter the CBIP. If they violated their probation, especially with new charges, it was known that they would probably be sent to jail. So while the judges were willing to give the CWOFF to induce pleas and get the defendant into a CBIP, they were not as lenient if the defendant then violated his probation, especially with a new violent offense. Judges in that instance were known to violate the batterers and send them to jail.

### **The comparison court**

In order to ease into this conversation about going rates on domestic violence cases, I went through the same process in the comparison court. The respondents quickly supplied me with the going rate for possession of class-D (marijuana) cases. It was harsher than the going

rate in the specialized session, which was a dismissal with court costs. In the comparison court, the going rate for possession of class-D was a six-month CWOFF. It was more difficult to get a unified answer pertaining to domestic violence cases from court community members. While the defense attorneys had a quick reply—“They get dismissed”—the judge and prosecutors were unwilling to admit this. When pushed as to what ultimately happened dispositionally to the vast majority of their domestic violence assault and batteries, the response was a unanimous, “They get dismissed.” Unlike the specialized session, there was no one in the corner of domestic violence victims’ cases trying to “shift this continuum.”<sup>27</sup>

Like the specialized session, many cases are set up for trial to see if the victim will appear and then they are dismissed by the court. If they make it to the date of trial, they are most frequently dismissed on its first scheduled date. This is different from the specialized session, which often gave the prosecutors more than one attempt to get the victim to appear and testify. So many cases are set up for trial on this date that it is not expected that the victims will appear. Indeed, if the victims/witnesses did appear, the court would not have the resources to entertain trials in all of the cases. When a victim does appear on a trial date, the case is often lobbied and a plea is worked out. Lobby conferences are unique to the comparison court, as compared to the specialized session, as discussed in the previous chapter. Many times, the sentences offered in the lobby are very lenient. Also unlike the specialized session, many more cases are dismissed at the pre-trial hearing as well.

The judge in the comparison court discussed with me the problem created by putting so many cases on the trial list. He admitted that few of them are really expected to be trials and that you can generally tell which ones will be trials with a cursory look. I asked him, “Can you tell

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<sup>27</sup> This was the language used by Judge 1 in the specialized session.

easily which cases might actually go to trial?" He responded, "Oh sure, with domestic A&Bs...So many of those we'll see the victim exercise the Fifth Amendment right or martial privilege...so you do anticipate that. They don't have excited utterances anymore, so yea, you know that" (Judge, Comparison Court). He mentioned these legal barriers to prosecution as justification for the high dismissal rate found in this court. He did not account for the number of cases that are dismissed out of the pre-trial session or out of a lobby conference without legal justification.

In trying to decipher what the going rate would be if a domestic violence case were to actually receive a sentence, other than a dismissal, I asked this judge about the specialized session's going rate. I asked him if probation with the CBIP was a possible outcome for domestic assault and batteries when they do plead. He stated:

The batterer's program is less and less attractive because it is so expensive. The anger management/no-abuse order is an option, but what we're seeing is that probation itself is becoming more and more expensive. Supervised probation is \$65 per month. And most people out there, not all, but most of our people don't have that kind of money. And yea, there's a community service option, but you're oftentimes dealing with people who are on social security disability. It's not easy. It's not clear cut. There are so many darned variables that you have to, you have to keep an open mind about how you're going to dispose of a case, how to fit a disposition to a particular fact pattern. You want as good a fit as you can possibly produce. (Judge, Comparison Court)

Contrary to what the judges said in the specialized session, this judge considered any term of probation as being too burdensome for many domestic violence defendants. He quickly dismissed the use of the CBIP and went on to state that probation itself was difficult for many

defendants due to its cost. This is a marked difference to the way that the judges in the specialized session viewed the cases and the importance of probation with a CBIP. The largest motivator for this judge was reducing the costs to the defendant. This judge was truly focused on efficiency in all respects: efficiency of the docket and of the sentence being administered to the defendants. This judge did have a problem solving orientation when it came to domestic violence. But the problems he was seeking to resolve had to do with an overburdened docket and indigent defendants. One prosecutor discussed the perceptions of the CBIP in the comparison court:

It's very hard here. They [the judges and defense attorneys] think which is not true, that they're setting a defendant up to fail because they can't afford the program. It's entirely income-dependent. There's a guy who runs a CBIP and he has given talks to the judges at some conference about why this is not true. You get into lobby and ask for the CBIP and explain this...then the defense attorney says their client can't afford it, that it's setting them up to fail, and makes all these misrepresentations about the program and how their client can't do it. Again, out of hundreds of cases where I ask for the program, I got a handful of times when the judges here gave it, almost never. (Prosecutor 4, Comparison Court)

Relying on the financial impracticability of the program and of probation in general, judges and defense attorneys alike rarely sentence batterers to CBIP. Even in the light of trainings that dispel the myths about the costliness of the program, the going rate has not shifted in the comparison court to included CBIP because the judges have not made it a priority and do not see value in this type of punishment.

Prosecutors stated that domestic violence cases are routinely dismissed by judges in the comparison court. They were frustrated by how little power they had to impact the disposition of many of the cases in this court. DV cases are dismissed when a victim does not appear on the trial date or when she is just not willing to testify. According to Prosecutor 5, “The problem here is that a lot of stuff is not actually tried. You can get a great deal in lobby; you can even get your case dismissed.” She is obviously speaking in terms of the defendant and what a great deal he can get on his case if his attorney merely lobbies the matter. A mere hint that there is an uncooperative victim or a victim who does not want to see the defendant punished and the judge will dismiss the matter. This is very difficult for the prosecution and is unique to the local legal culture of the comparison court and has a devastating impact on the going rate. This prosecutor went on to characterize the trial session as “a final pre-trial session. Sure, in some cases victims cannot be compelled to testify because they have a marital privilege.<sup>28</sup> However, in other cases, in the absence of a privilege, victims can be compelled to testify.” But the judges are not allowing that to happen. Prosecutors will be answering ready for trial or at least think they are in a position to entertain a plea. Defense attorneys merely have to mention that the victim does not actually want to testify or bring the case to trial and the judge will either dismiss the matter outright over the prosecutor’s objection, or put the defendant on a pre-trial probationary sentence

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<sup>28</sup> Chapter 233, Section 20. Competency of witnesses; husband and wife; criminal defendant; parent and child. “Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows: First, Except in a proceeding arising out of or involving a contract made by a married woman with her husband, a proceeding under chapter two hundred and nine D and in a prosecution begun under sections one to ten, inclusive, of chapter two hundred and seventy-three, any criminal proceeding in which one spouse is a defendant alleged to have committed a crime against the other spouse or to have violated a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, section three, three B, three C, four, or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C, or a similar protection order issued by another jurisdiction, obtained by the other spouse, and except in a proceeding involving abuse of a person under the age of eighteen, including incest, neither husband nor wife shall testify as to private conversations with the other.

(which is a continuance that eventually ends in a dismissal). Under Mass Gen Laws 276 §87, pre-trial probation can be given to defendants. It is neither an admission of guilt nor a final adjudication. It is less serious than a CWOFF and is really just a mechanism for keeping a case open, and in the care of the probation department, for a period of time, upon completion of which the case is dismissed if no new offenses have been committed. If a new offense is committed, there is no probation violation hearing; the matter is simply restored to the trial list and the Commonwealth has the burden of trying to go forward on a case that is several months older.<sup>29</sup>

Prosecutor 4 from the comparison court commented on this fact: “If the judge knows, even if I’m saying I don’t care if she’s cooperative—she doesn’t have a privilege—if the judge gets wind from the defense attorney that the victim is concerned with a plea and doesn’t really want to go forward, then the judge will just say pre-trial probation...Even if I say ‘Judge, I’m objecting to this,’ it is still many times ordered.” Even when the victim does appear, if the defense attorney represents to the judge that the victim is reluctant to proceed, and the case is not atrociously violent, then the defendant can ask and receive some form of pre-trial probation. According to Prosecutor 5 from the comparison court, “One thing I’ve noticed in this court is that pre-trial probation is a pretty acceptable thing to ask for.” I asked, “Can they really do that over the Commonwealth’s objection?” She responded, “Yes, they do, even though it is not really

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<sup>29</sup> Chapter 276: Section 87. Placing certain persons in care of probation officer. The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant’s consent, before trial and before a plea of guilty, or in any case after a finding or verdict of guilty; provided, that, in the case of any child under the age of seventeen placed upon probation by the superior court, he may be placed in the care of a probation officer of any district court or of any juvenile court, within the judicial district of which such child resides; and provided further, that no person convicted under section twenty-two A or twenty-four B of chapter two hundred and sixty-five or section thirty-five A of chapter two hundred and seventy-two shall, if it appears that he has previously been convicted under said sections and was eighteen years of age or older at the time of committing the offense for which he was so convicted, be released on parole or probation prior to the completion of five years of his sentence.

lawful.” Putting solid cases on pre-trial probation puts the defendant on a form of probation, a violation of which would simply reopen the case and put it back on the trial list. However, if the case is put back on the list, there is no guarantee that the Commonwealth will still be able to go forward. In fact, the Commonwealth is generally in a worse condition after the passage of time. She said, “It puts us in a position to prove a case that is now older, with a victim who is less interested.”

Prosecutors estimated that seven out of ten times, defense attorneys can expect to get a dismissal for their client if he is charged with a domestic incident in the comparison court. Actually, 71.9 percent of domestics resulted in dismissals in the comparison court (JOD data, 2007). Another mechanism for dismissal often employed in the comparison courts is called an “accord and satisfaction.” An accord and satisfaction is an agreement entered into by victims of crimes who are supposed to have pending civil matters against the defendant. In lieu of an additional criminal penalty, victims state under oath that they have been satisfied civilly for all damages and that the criminal case against the defendant can be dismissed. One prosecutor commented on how commonly this was used in the comparison court. “They can get the victim to sign an Accord and Satisfaction at pre-trial and have the case dismissed.”<sup>30</sup> Many members of the court community cited a 2006 case as making this practice entirely lawful and appropriate. However, few of these cases actually had pending civil matters, and the judicial guidelines are

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<sup>30</sup> *Commonwealth v. Guzman*, 446 Mass. 344, 845 NE2d 270 (2006). Accord and Satisfaction. Case regarding the constitutionality of MGL c.272, s.55, which states, “If a person committed to jail is under indictment or complaint for, or is under recognizance to answer to, a charge of assault and battery or other misdemeanor for which he is liable in a civil action, unless the offence was committed by or upon a sheriff or other officer of justice, or riotously, or with intent to commit a felony, and the person injured appears before the court or justice who made the commitment or took the recognizance, or before which the indictment or complaint is pending, and acknowledges in writing that he has received satisfaction for the injury, the court or justice may in its or his discretion, upon payment of such expenses as it or he shall order, discharge the recognizance or supersede the commitment, or discharge the defendant from the indictment or complaint, and may also discharge all recognizance and supersede the commitment of all witnesses in the case.”

clear that accord and satisfactions agreements are not to be used in this manner.<sup>31</sup> Defense attorneys know that the victims do not have civil claims, but since the judges have made this practice acceptable in this court, the defense attorneys take advantage of it. This is never done in the specialized session. According to prosecutors in the specialized session, the judges would never entertain such an agreement in lieu of a disposition. Indeed, there would be some form of ridicule or sanction against a defense attorney who tried. A detailed explanation and analysis of this will be found in the next chapter.

Defense attorneys in the comparison court agree that most domestic violence cases get dismissed. Different mechanisms for dismissal were discussed. The most common type of dismissal occurred on the day of trial. According to Defense Attorney 2 of the comparison court, “The most common is the wife/spouse/significant other doesn’t show up and then there is no witness for the case, so I request a dismissal and it gets dismissed.” But he admits that many cases can also be dismissed prior to the trial date in the comparison court. The most common form is “The ones with an accord and satisfaction.” This was markedly different from the specialized session, which would not tolerate them.

Another defense attorney I interviewed spoke about the use of the marital privilege in the comparison court. We were discussing dismissals at the pre-trial date and he mentioned that if a victim claims to be married to the defendant and tells the judge that she does not want to testify against him, the case is often dismissed. I asked if the court required physical documentary evidence to verify the marriage and he responded, “NO, they don’t require that! Sometimes

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<sup>31</sup> General Laws c. 276, §55 appears to authorize the court, in effect, to dismiss a misdemeanor charge of assault and battery or other misdemeanor for which the defendant “is liable in a civil action” (with certain restrictions), if the injured person appears before the court and acknowledges in writing that he or she “has received satisfaction for the injury.” This “accord and satisfaction” provision, however, makes no reference to whether the court can order such dismissal over the objection of the prosecution, and, generally, a case involving family violence should not be dismissed over the prosecution’s objection on an accord and satisfaction, for the reasons stated above.

you'll get an ADA that's kind of picky. They'll ask when and where they got married. Some judges might ask that too; some just take it for granted." Since the goal of this court is to move cases as quickly and efficiently as possible, prosecutors who request documents verifying the marriage are characterized as picky.

All in all, defense attorneys agree that most domestic violence cases are dismissed in the comparison court. The really strong cases that they would push to trial would likely plead out to pre-trial probation or a CWOFF on the day of trial. "If it gets that far, it is probably a pretty strong case. You can get a CWOFF on a plea, but you're going to have to work for it because if it has gone that far then you have a *victim who is cooperating*" (Defense Attorney 1, Comparison Court). In the comparison court, even when the victim is cooperating and the community recognizes the case as strong, the judge can still offer the defendant a CWOFF without a CBIP and plead out the case.

### **Conclusion**

The judges are primarily responsible for setting and establishing the going rate. Through consistent and regular communication with the other members of the court community, the value of a case is determined and established. This varies between courthouses. Thus, a going rate that is different than one that is expected at nearby courts can cause some to interpret it as unjust or unfair. Going rates that cause cases to remain open longer, or open defendants to additional penalties down the line, are also perceived as unfair.

The goal of the specialized session was to hold batterers accountable while helping them stop their violence, and to assist and protect victims. Keeping this goal in mind, the judges in the specialized session sought to alter the going rate of domestic violence cases and were consciously working to "shift the continuum." They admitted to trying to craft justice in a

manner that would result in placing more defendants on some term of probation so that they could complete a CBIP. They communicated this to the prosecutors and defense attorneys by refusing to accept pleas that did not include this language in the terms and conditions. This caused the defense attorneys to perceive the session as unfair to their clients because they were accustomed to more lenient treatment at other courts. Even some prosecutors complained that a CWOFF with a CBIP was too lenient for some of the defendants who had serious records and previous incidents of violence. The judges were aware of this, but felt that this was the best disposition for most. A CBIP was most likely to help batterers stop their violence and help protect victims. Thus, the judges attempted to shift the continuum and require it on every plea. The judges also admitted that they could not shift the continuum alone. They needed the support of a trained and hard-working district attorney's office. Without enough time and resources allocated to case preparation, defendants would simply not plead and would likely push their case forward to trial.

While a large proportion of the domestic violence cases from the specialized session result in dismissal, the court community members did not respond that dismissal was the going rate. They perceived that probation with a CBIP was the going rate. There was a discrepancy between the actual disposition of domestic violence cases and their perceived going rate. This is a product of the local legal culture that was changing in the session, due in large part to the efforts of the judges. In this different problem solving and feminist model of justice, how one defined the going rate was not based on case outcomes alone. Unlike traditional models, in this session there was a goal or ideal going rate that was promulgated by the judges in an effort to change the way the court community thought about the way in which they process domestic violence cases. There was also an average disposition that was actually received by many of the

domestic violence cases due to legal insufficiencies that many of these cases faced in the trial session. However, the culture in the trial session was still more conducive to the goals of the specialized session and the feminist model than in other traditional courts. This was evidenced by the fact that once the matter was in the trial session, cases were given several continuances in order to attempt to reach and bring forward the victim. These continuances were based on the greater importance of victim safety than on moving the cases off the docket. This is significant, for it communicates to the community how serious domestic violence cases are.

Operating under a problem solving model, the judges of the specialized session had a unique opportunity to alter the going rate for domestic violence cases. This is in accordance with the problem solving court literature (Dorf & Fagan, 2003). However, the judges' desire to alter the going rate for domestic violence cases was contrary to the expectations of the other court workgroup members. The prosecutors were seeking to hold batterers accountable, and in the strongest of cases, believed in a retributive model of justice. Operating under this model, they often believed that incarceration was the ideal punishment, not probation with a certified batterer's program. This is in accordance with the traditional role they have always played (Hanna, 1998). The defense attorneys were accustomed to getting their domestic violence cases dismissed more quickly. Thus, they found the session unfair and were hesitant and cautious about the ramifications of putting their clients on probation in order for them to attend the CBIP. These findings were also consistent with the literature which suggests that defense attorneys may react negatively to a change in the paradigm where they are a lesser stakeholder than the other court community members (Spinak, 2003).

Specialized sessions in general seek to use the power of the court to address underlying social problems of their community (Berman & Feinblatt, 2001). What I found when

interviewing these court workgroup members was that all court workgroup members were frustrated. It would take more than judicial will to change the attributes of this court community. Actual case outcome changes will only follow with support from all members of the court system and changes in the law. Establishing a specialized domestic violence session allowed its court community to establish an “ideal” or “goal” going rate that all parties were aware of. This alone, however, could not accomplish significant actual changes in dispositions.

The goal of the comparison court was similar to traditional courts: the efficient processing of cases. The turn-around time for cases was three months from arraignment to disposition. This was mentioned by all interviewed. There was no “problem solving” goal in this court and the going rate reflected that. The judge in the comparison court did not want to discuss the idea of “going rates” or their existence. Instead, he discussed the importance of judicial discretion in order to dispose of cases quickly. He admonished the use of CBIP as being too expensive and inefficient and even thought that supervised probation was counterproductive in many instances. While he would not admit that dismissal was the going rate for domestic violence cases in his court, he did mention that many domestic violence cases would never be tried and he had a myriad of legal justifications for those dismissals. It was helpful to the judge that he had the full support of the defense bar. The defense attorneys remarked that the judges truly understood the value of a case and were great at getting to the bottom of things and disposing of the cases that weren’t worth the court’s time. In the comparison court, prosecutors were facing an uphill battle. The judges quickly dismissed domestic violence cases, even over their objections. Defense attorneys readily admitted that domestic violence cases get dismissed in this court. Unless there are very serious injuries or a credible victim who is willing to testify, these cases may get a CWOFF or pre-trial probation. All this seemed to happen under the guise of

efficiency; they simply could not waste their time on cases that were weak and historically unimportant.

Domestic violence cases will continue to be dismissed and diminished in the comparison court. The going rate is firmly entrenched. It is impervious to the prosecutors' efforts and has persisted for years. The defense bar and judges have each other's trust and share similar goals. They both benefit from the efficiency model that is being promoted and relied upon. This court was not the recipient of a grant which allocated it additional resources. The district attorney needs to staff this court with more prosecutors who remain in place for a longer period of time and who have reduced case loads. In this situation, it may be possible for prosecutors to become more meaningful participants in the court workgroup and they may have greater success in impacting the going rate. This model of justice cannot recognize or handle the special circumstances of domestic violence cases

The manner in which domestic violence cases were characterized and discussed varied greatly by court, while many domestic violence cases in both courts resulted in dismissal, the cases took different paths depending on where they were being heard. Many more opportunities for dismissal, earlier in the case process, were available in the comparison court. While the laws that the courts operated under were the same, the court communities operated differently under them in order to accomplish their goals. Statistics could not have been able to capture the great differences in these courts, but talking with and observing the court workgroup members could.

## **Chapter 6: Same Law, Different Results: A Legal Analysis of How Local Legal Culture Prevails Over Time**

*“Under Massachusetts case law, especially now, if your victim is not cooperative, and you don’t have independent corroborating evidence, you have no case.” (Prosecutor 5, Specialized Session)*

Case dispositions for domestic violence cases are impacted by the court’s local legal culture. This culture dictates what the going rate will be in that court, and this varied between the courts. Hypothetically, this process should occur within the confines of the law. Many court workgroup members cited legal justifications for the high dismissal rates their domestic violence cases suffered. How the laws that were cited and interpreted differed by court. These differences were representative of the local legal cultures in which they occurred. This chapter is intended to illustrate how the formal laws were used by court workgroup members to implement the goals of their session. In this same vein, it also reveals how other laws were ignored. The judges were responsible for establishing the way in which the laws were going to be used in their courts. Finally, the law itself is analyzed from the lens of feminist jurisprudence, which suggests that the laws in the liberal legal tradition do not work when applied to situations based on unequal gender power dynamics and which are highly infused with gendered situations, like domestic violence cases.

### **Relevant Literature**

A number of studies have examined the actions of court workgroup members and how legal changes impacted them (Feeley & Kamin, 1996; McCoy, 1990). The majority of this research has focused on how discretion-limiting policies impact the actions of prosecutors and judges. It was often found that court workgroup members resisted changes in the law that had a

great impact on their roles and actions. The literature has most often examined the impact of mandatory minimum sentencing statutes in this vein. It has been found that judges and prosecutors routinely resisted the changes imposed upon them by these laws. They stated that these laws interfered with the efficient processing of cases and that the new laws imposed would not be consistent with their internalized going rates. Many court workgroup members actually found ways to circumvent or sabotage legal changes when they interfered with the mandates of their local legal culture.

Minimum/mandatory sentencing statutes cause judges to lose discretion when sentencing. Prosecutors were found to change their charging decisions in order to maintain the going rate of their court (Miethe, 1987). For example, if the going rate in that court was seven years for an armed robbery and now the guideline called for ten, the prosecutor would use his or her power to downgrade the charge to an unarmed robbery. This would maintain the court workgroup's established going rate. Several studies found that prosecutors could use their discretion to minimize the impact of sentencing guideline policy changes (Engen & Steen, 2000; Knapp, 1987).

After the passage of mandated arrest and prosecution policies, many more domestic violence cases began to be brought into the courts for resolution (Buzawa & Buzawa, 2003). The court communities had a firmly entrenched manner for dealing with these matters that was challenged when arrests skyrocketed and prosecution policies changed. The specialized session responded to these changes by creating a problem solving court designed to handle this surge in cases and help solve this serious social problem. The manner in which they did this was not fully accepted by the other court workgroup members, who still tried to accomplish their individual agendas. Prosecutors were more in line with the goals of the session, but were still

trying to work under a retributive model, and defense attorneys were working to move their matters out of the session. The judges and defense attorneys of the comparison court took matters into their own hands in response to the influx of domestic violence cases. Together they agreed that the going rate for these cases was dismissal and that served the court's goal of case efficiency well. The judges in both sessions used the laws differently to achieve their individual goals, thus attempting to uphold the going rate for domestic violence cases in their sessions.

Ultimately, it is the judges who set the tenor of the local legal culture. They are responsible for communicating to other court workgroup members what they will tolerate as their session's going rate. Additionally, it is the judges who are granted the power to interpret and apply the laws to the cases that come before them. Studies have examined the manner in which judges justify their positions under the law. Philips (1998) examined the plea bargaining decisions of judges and divided them into two groups. Procedure-oriented judges are those who utilize elaborate procedures when making decisions. Philips saw them as politically liberal. She thought that they often saw their role as a kind of protector. Philips refers to the other group of judges as record-oriented judges. These more conservative judges practiced abbreviated procedures and were not influenced by the same burdens that the other judges were controlled by. Both sets of judges found a basis in the law for their positions and the decisions that they made, even though their decisions were very different.

Acting under the control of the judges, the court workgroup members in this study found ways to interpret and use the laws in order to accomplish their goals. How they cited and applied the laws to the same types of cases varied greatly by place. Borrowing from Philips, the judges in the specialized session could be viewed as procedure-oriented judges who were influenced by a more liberal agenda and took the time to more closely follow the written law. Conversely, the

judges in the comparison court could be viewed as record-oriented judges. Their conservative agenda as managers of the court relieved them of the burdens of the larger social problem and allowed them to practice a more abbreviated version of justice.

### **The Fifth Amendment**

Both courts cite the Fifth Amendment as legal justification for dismissal in domestic violence cases. Given the private nature of domestic violence cases and the subsequent lack of witnesses, the claim of a Fifth Amendment privilege can be particularly problematic. Mutual arrests often result when police officers who have been dispatched to a scene arrest both parties. There was a rise in the number of mutual arrests involved with domestic violence cases after the passage of mandated arrest policies (Buzawa & Buzawa, 2003). Since then, many police departments have trained their police officers to make determinations as to which party was the “primary aggressor” and arrest this party alone, thereby relieving the court of a Fifth Amendment issue.

However, sometimes Fifth Amendment issues are not raised until much later in the process. Victims of domestic violence, desperate for a way out of the case, may not raise the issue of mutual combat or self-defense until the pre-trial or even trial stage of the case. These assertions may still result in dismissal. This is because both parties are protected by the Constitution from being compelled to testify. As the amendment states, “nor shall be compelled in any criminal case to be a witness against himself.” (U.S. Constitution, Art. I, §8, cl. 5) When a valid Fifth Amendment privilege is found, the cases are often rendered unprosecutable due to the subsequent lack of evidence. The regularity of finding a valid Fifth Amendment privilege, and the manner in which the judges verify these assertions, were found to vary by local legal culture.

The law in the Commonwealth is clear and sets guidelines about how and when the Fifth Amendment may be validly asserted and used. Under the case law of the Commonwealth, whenever a witness, or the attorney for a witness, asserts the privilege against self-incrimination, the judge “has a duty to satisfy himself that invocation of the privilege is proper in the circumstances” (*Commonwealth v. Martin*, 1996). The mere assertion of the privilege is not enough. The witness or her attorney must show “a real risk.” The answers to the questions will indicate “involvement in illegal activity,” as opposed to “a mere imaginary, remote or speculative possibility of prosecution” (*Commonwealth v. Martin*, 1996). If the court is unable to find that a basis exists for the privilege, it may conduct a private hearing to ask the witness about the basis of her alleged assertion (*In re Brogna*, 1978). “A witness also is not entitled to make a blanket assertion of the privilege. The privilege must be asserted with respect to particular questions, and the possible incriminatory potential of each proposed question, or area which the prosecution might wish to explore, must be considered” (*Commonwealth v. Martin*, 1996). If, however, it is apparent that most, if not all, of the questions will expose the witness to self-incrimination, and there is no objection, it is not necessary for the witness to assert the privilege to each and every question (*Commonwealth v. Sueiras*, 2008).<sup>32</sup>

In the comparison court, the protocol laid out by *Commonwealth v. Martin* (1996) was often ignored and the Fifth Amendment was regularly used as justification for dismissal. Oftentimes, the victims in the comparison court requested to assert their Fifth Amendment privilege and it was granted. Both defense attorneys and prosecutors in this court indicated that it was so done without a private hearing and on a regular basis. Regardless of the protocols established by *Commonwealth v. Martin* (1996), the judges in the comparison court made quick

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<sup>32</sup> *Massachusetts Guide to Evidence*, 2008-2009 Edition. Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, Section 511: Privilege Against Self-Incrimination.

determinations regarding the victims' assertions which inevitably resulted in case dismissals. Additionally, the judges of the comparison court made these determinations over the objections of the prosecutors, and without written findings. A prosecutor in the comparison court discussed the way in which Fifth Amendment issues were identified and dealt with by that court:

It usually plays out pretty badly for the Commonwealth. It does not follow the protocol.

There is no hearing...Some judges have an informal sidebar where they sort-of follow the steps, others will just say that the victim has a Fifth, so what do you want to do...Many things were dismissed over our objection. (Prosecutor 4, Comparison Court)

Fifth Amendment assertions are a valuable tool to guarantee dismissals in a court that values efficiency above all else. Defense attorneys are aware that the mere mention of an assertion directly translated into dismissals in the comparison court. Prosecutors were frustrated with a system that was not following case law and left them powerless to object. Many times, victims did not raise Fifth Amendment assertions and then suddenly on the date of trial the defense attorney would bring it up. As one prosecutor said,

Victims find out about their Fifth Amendment right through the defendant's attorney. Sometimes we'll get out for a trial date and the defense attorneys say, "Hey, I think there's a Fifth Amendment issue," and there's nothing we can really say. They'll ask the court to appoint somebody to speak to the victim about their potential Fifth (a different defense attorney) and they'll come back to court and say they are going to waive it or they are not going to waive it. (Prosecutor 3, Comparison Court)

The Fifth Amendment was used in this community to achieve case dismissals and to move cases along quickly. Regardless of whether the victim truly had a valid right, when it was asserted it was granted and the case was dismissed. The fact that this was done over the

Commonwealth's objections is noteworthy, because the law requires written findings whenever judges dismiss cases in this fashion over the objection of the Commonwealth. There was no evidence of this happening in the comparison court. Additionally, it is suspect when a victim's Fifth Amendment is not raised until the date of trial, but it is still found valid. Court community members knew there was a difference between a victim asserting her Fifth Amendment privilege in order to avoid self-incrimination and when a victim was fabricating a Fifth Amendment right in order to avoid testifying. Judges chose to ignore this difference, avoid a time-consuming hearing, and grant immunity from testifying which resulted in dismissals.

The specialized session did not ignore the existence of the Fifth Amendment. However, the judges in that session followed the protocol as laid out in *Commonwealth v. Martin* (1996). Additionally, members of the local police departments were trained in how to make a primary aggressor determination and to avoid arresting both parties. Still, at times, victims would try to assert their Fifth Amendment privilege. The judges of this court, however, followed proper protocol and provided written findings on cases in which the Commonwealth objected. Because the court community did not expect to get "easy" dismissals by asserting the privilege, they were not used as regularly as in the comparison court. The specialized court took time to schedule these hearings and make written findings. While proper protocol is not efficient, it is required under the law. Prosecutor 2 illustrated how the assertion of the Fifth Amendment is handled differently in different sessions.

It was dependent on who the judge was. It was totally different for judges who worked in DV court all the time than if you had a sub—they would just dismiss it outright and all you had to do was bring the victim forward in the front, and I've seen this happen in other courts, they could say I have a Fifth and that was it. Not when the regular judges

were there; defense attorneys wouldn't ask for that and if they did we'd have to have a proper *Luman Martin* hearing. They had to disclose their Fifth and the judges in DVCT would often reject them. (Prosecutor 2, Specialized Session)

This comment exemplifies how different judges create different versions of justice depending on the mandates of their local legal culture. Even in the specialized session, when the two regular judges were not present, the law was regularly circumvented. The goals of the specialized session were vulnerable when visiting judges took the bench.

### **The Marital Privilege**

The marital privilege shields victims of domestic violence from being compelled to testify against their spouse. As it currently exists in Massachusetts, the privilege states, "A spouse shall not be compelled to testify in the trial of an indictment, complaint, or other criminal proceeding brought against the other spouse."<sup>33</sup> The existence of the privilege depends on whether the spouse who asserts it is then married. The privilege applies even if the spouse was not married at the time of the events that are the subject of the criminal trial (*Commonwealth v. DiPietro*, 1977). The privilege "not to testify against a spouse" applies regardless of whether the testimony would be helpful or harmful to the other spouse (*Commonwealth v. Maillet*, 1987). The privilege is broad and it applies even when a spouse is called to testify about matters that concern "persons other than the spouse" (*Matter of a Grand Jury Subpoena*, 2006). There are exceptions to when the privilege does apply. For example, "the privilege does not apply in civil proceedings, or in any prosecution for nonsupport, desertion, neglect of parental duty, or child abuse, including incest."<sup>34</sup> This is interesting because in the interests of justice for child abuse victims, the law does not allow for the assertion of the marital privilege. The law has not made

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<sup>33</sup> Mass. Gen. Laws Chapter 233 §20.

<sup>34</sup> Massachusetts Guide to Evidence, 2008-2009 Edition, § 504: Spousal Privilege and Disqualification.

an exception for victims of domestic violence who are in grave need of protection from intimidation and abuse. Feminist jurisprudence theorists would question why lawmakers would allow such a privilege to remain on the books. This privilege within the context of domestic violence cases clearly serves to benefit men and to further victimize women, the assertion of which was handled differently by court in accordance with their individual goals.

In the comparison court, victims regularly invoked their marital privilege. A form called a “marital affidavit” was created and used by some defense attorneys. On this form, the victim would assert that she is “legally married to the defendant and would choose to invoke her marital privilege if she was called on to testify” (quoted from the Marital Affidavit Form, Comparison Court). This is a common practice in the comparison court. The court does not require that the parties produce any documentation to support the alleged marriage. Once the victim signs the form, the judge accepts that the parties are married and dismisses the case against the defendant. It should be noted that it was not uncommon for victims of domestic violence to be in contact with the defense attorney. While victims often contact the defense attorneys themselves, it is common practice for attorneys to hire private investigators to go out and “interview” the victims.

During one observation, I watched a dismissal based on the execution of a marital privilege in the pre-trial session of the comparison court. The husband and wife were sitting together just behind me in the court room. They were waiting for his case to be called. The husband was charged with Assault and Battery and Assault and Battery with a Dangerous Weapon against her. The victim flagged down a defense attorney and they discussed her case. This attorney produced a form for her to sign and this form was handed to the clerk. When the defendant’s case was called, the existence of the privilege was briefly discussed and the case was dismissed. The victim did not have contact with a prosecutor or victim witness advocate on this

day. She sat in the courtroom with the defendant and dealt only with a defense attorney who helped her fill out the necessary form in order to have the case dismissed. No showing was required, and no marriage certificate was requested. According to one defense attorney,

In this court I know they'll take my representation. I just have to go in and state that I've talked to her and that she states that they're legally married and she'll take her marital privilege if called to testify. The prosecutors can do very little about it. (Defense Attorney 3, Comparison Court)

A close alliance was observed between the judges and defense attorneys in the comparison court. The judges "trust" the defense attorneys and took their representations that the marriage was valid. The prosecutors were again powerless to do anything about it. Victims routinely asserted their marital privilege without documentation in the comparison court, resulting in dismissals. While it is lawful (assuming their assertions to be valid), failure to exercise due diligence in its application has created a culture of dismissals. It was another efficient mechanism used to move cases along and uphold the goal of the court. This can be very frustrating for prosecutors of the comparison court. According to one prosecutor,

The judges know we don't have the resources to appeal every case, so even if a victim asserted her marital privilege, and I say I have three independent witnesses, a judge would say, well, how can you prove that she didn't consent to being hit? He could care less. (Prosecutor 4, Comparison Court)

The prosecutors of the comparison court were frustrated that the judges and defense attorneys within their community were distorting the law in order to quickly dismiss domestic violence cases. This benefited both parties greatly, defense attorneys got their clients' cases dismissed, and judges moved cases quickly off the docket. The prosecutors were interests were

not served by these actions but without adequate resources they were powerless to do anything about it.

The marital privilege is something that also impacts case processing in the specialized session. Prosecutors and judges in this court, however, routinely required victims to produce a marriage certificate. Cases still resulted in dismissal if a marriage certificate was provided and there was no other independent evidence available on the day of trial. Unlike the comparison court, this did not happen during pre-trial conference. In the specialized session, dismissals did not occur without some factual showing by the victim. Additionally, the judges in the specialized session did not dismiss these cases over the Commonwealth objection. The prosecutors retained the power to dismiss cases prior to trial, and thus many cases were kept open until the date of trial, when showings of proof and decisions were made. When the goal of the session is to hold batterers accountable and try to get them help in order to fix the broader social problem of domestic violence, cases could not be dismissed on the mere assertion of a privilege. Evidence was necessary. Again, this exemplifies a feminist model of justice where the goal is not the tradition of case efficiency alone, but rather is at solving the problem of domestic violence as it affects the community.

However, if a valid privilege did exist, then there was nothing that could be done by any party. Whether Mass. Gen. Laws Ch. 233 §20 should include matters pertaining to domestic violence crimes on its list of matters excluded from the privilege is another issue. Feminist jurisprudence would argue that it should, and to ignore the social context of these cases and to use the law to uphold marriages where one party is beating the other is an aberration. At times, changes in the law are necessary when the law no longer serves the interests of all parties. For example, in the 1970s, women were not granted restraining orders against their husbands unless

they were “willing to file for divorce at the same time” (Tjaden & Thoennes, 2000). In time, this law was reformed since it did not serve the interests of women seeking protection under the law. When laws only protect and define the interests of men and ignore the unique position of women, they could be viewed as a form of “patriarchal jurisprudence” (West, 1988). In the situation of domestic violence, laws that serve to preserve the sanctity of marriage, even when one party is beating the other, and that limit the testimony of a spouse in order to allow the batterer to go unpunished, illustrate how laws can serve men and not women. Given the social context, even if this privilege is permissive, the ability of the victim to choose must be questioned. Ramsey (2010) calls for the provocation aspect of a murder defense to be questioned from a feminist lens. She suggests that the use of provocation to mitigate guilt on a murder charge disproportionately serves men who kill their spouse in an impassioned rage due to infidelity, but not women who kill after being abused for years at the hands of their spouse. The provocation required must equate to “sudden heat” and be contemporaneous in fashion. This has stereotypically served the interests of men over women who kill their intimate partners. Thus, Ramsey calls for legal reform that takes the social context of the parties and other important variables into account for mitigation purposes.

### **Accord and Satisfaction**

An “accord and satisfaction” is a legal agreement between the victim and defendant whereby the victim states that she has been “satisfied” civilly and thus the pending criminal matter can be dismissed. They are generally prepared by defense attorneys and were being used routinely as grounds for dismissal at the pre-trial stage in the comparison court. The legislative history is as follows.

The legality of accord and satisfaction agreements was dealt with by the Massachusetts Supreme Judicial Court in the case, *Commonwealth v. Guzman* (2006). The facts of that case were as follows. On October 18, 2003, police responded to a report of a woman yelling at the defendant's house. The police entered the home and observed an injury to the eye of the defendant's wife. The defendant admitted to striking his wife in the eye and he was placed under arrest. He was charged with assault and battery and was later released on his own recognizance. In January 2004, the defendant filed an accord and satisfaction in the district court, which his wife signed. The Commonwealth objected to the dismissal based on the accord and satisfaction agreement, arguing that the statute was unconstitutional.<sup>35</sup> The judge agreed to hold a hearing and asked both parties to make written submissions. After the hearing in February 2004, the judge dismissed the case and issued written findings holding the statute constitutional. The Commonwealth appealed and lost. The Supreme Judicial Court affirmed on March 29, 2006, and held that the accord and satisfaction statute was constitutional. In their decision the court stated that a judge must be informed about what satisfaction the defendant received before making a decision to dismiss a charge based on an accord and satisfaction agreement. This may appear in the accord and satisfaction itself, or may be proffered in an affidavit or at a hearing. While the "satisfaction" need not be monetary, and may be minimal, there nevertheless must be some credible evidence as to its nature. The court also instructed that if a judge dismisses the complaint pursuant to the execution of an accord and satisfaction, the record must show the

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<sup>35</sup> Mass. Gen. Laws Chapter 276 § 55: "If a person committed to jail is under indictment or complaint for, or is under recognizance to answer to, a charge of assault and battery or other misdemeanor for which he is liable in a civil action, unless the offense was committed by or upon a sheriff or other officer of justice, or riotously, or with intent to commit a felony, and the person injured appears before the court or justice who made the commitment or took the recognizance, or before which the indictment or complaint is pending, can acknowledge in writing that he had received satisfaction for the injury, the court or justice may in it or his discretion, upon payment of such expenses as it or he shall order, discharge the recognizance or supersede the commitment or discharge the defendant from the indictment or complaint, and may also discharge all recognizance's and supersede the commitment of all witnesses in the case."

reasons for the judge's decision. This will allow for a determination that the judge properly exercised discretion.<sup>36</sup>

Ironically, the Massachusetts Trial Court System, Guidelines for Judicial Practice, Abuse Prevention Proceedings, commentary 8:12, states that Mass. Gen. Laws c. 276, §55, appears to authorize the court to dismiss a misdemeanor charge of assault and battery or other misdemeanor for which the defendant "is liable in a civil action" (with certain restrictions), if the injured person appears before the court and acknowledges in writing that he or she "has received satisfaction for the injury." This "accord and satisfaction" provision, also states that "cases involving family violence should not be dismissed over the prosecution's objection on an accord and satisfaction." (Massachusetts Trial Court System, Guidelines for Judicial Practice, commentary 8:12, January 4, 2010).

Despite the legal proscription, the dismissal of cases over the prosecutor's objection was routinely happening in the comparison courts. All respondents in the comparison court mentioned the use of accord and satisfactions as a customary practice in their court. During observations, the comparison court routinely cited the *Commonwealth v. Guzman* (1996) case as legal justification for dismissals. In the opinions of those interviewed in the comparison court, the use of accord and satisfaction agreements for domestic violence cases was sanctioned by law. Defense attorneys routinely got quick dismissals with them in the pre-trial session, even though the guidelines for judicial practice advised against such a use over the Commonwealth's objection in cases involving domestic violence. Accord and satisfactions here were used multiple times per day. While, the *Guzman* case required "a showing that the victim was satisfied," the judges in the comparison court would dismiss the case as long as the victim signed

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<sup>36</sup> The official website of the MDAA.

a document in which she claimed to be satisfied. I asked one defense attorney what the usual compensation was for such an agreement. He stated,

If somebody has made up for your harm as long as it's a misdemeanor, the case can be dismissed. It can be as minimal as a dollar and no one has ever overruled me on that. I always said a heartfelt apology is enough because the law says "de minimus." (Defense Attorney 3, Comparison Court)

This is an example of how the local legal culture can accomplish its goals by using the law as it sees fit. Here the judges of the comparison court closely followed the language of the *Guzman* decision and ignored the judicial guidelines. This helped them to achieve their overriding goal of efficiency and upheld their internalized norms regarding domestic violence cases. While most of these cases did not have a pending civil matter, nor were the victims actually "satisfied" by anything, the court culture used this decision in order to dismiss many cases. Defense attorneys were offering them and the judges were accepting them in the pre-trial session. This was often done over the Commonwealth's objection.

I observed several dismissals based on accord and satisfactions while sitting in the pre-trial session. The cases were called and the defense attorneys handed the accord and satisfaction document to the clerk, who would in turn pass it along to the judge. The judge read the document and called the victim to step up to the bench, alongside the defendant. The victim stood alone before the court; there was no attorney to represent her interests and there was no advocate by her side. The judge asked the victim to vouch for her signature on the document and for her to state (alongside the defendant) that she was not in any way coerced into stating that she was civilly "satisfied" and was in agreement with having the criminal matter dismissed. The judges in this court did not ask about the type of satisfaction that was awarded to the victims.

There was no hearing on whether or not there was indeed a civil matter pending. The cases were dismissed.

This sent a clear message to the batterers and victims before the court and in the audience. This court demonstrated that it was either ignorant of the unique nature of domestic violence cases, or that it did not care. Placing an unrepresented victim alongside her abuser and asking her if her signature is coerced is an exercise in futility. It demonstrated to the defendants how easily their domestic violence cases can be dismissed and may lead to further victim intimidation.

Accord and satisfactions were never used in the specialized session. This is also an example of how judges can circumvent the law in order to uphold the mandates of their local legal culture. The judges in the specialized session were familiar with the *Guzman* decision, but did not think that it should apply to domestic violence cases due to their unique nature. Not one respondent mentioned using them in any way, for any cases, in their court. Indeed, I interviewed members of the specialized session first and the issue never came up. It wasn't until I started interviewing court workgroup members in the comparison court that I realized how serious the issue was. Thus, I circled back to members of the specialized session after completing my interviews with the comparison court to inquire if accord and satisfactions and/or the *Guzman* case impacted the processing of domestic violence cases in their session. The overwhelming response was no, not at all. After discussing the matter with them, it became clear that it was because the judges in the specialized session would not "tolerate it." One prosecutor explained the judges' intolerance for accord and satisfactions in the specialized session as stemming from an understanding of the power dynamic implicit in a domestic violence relationship.

I only saw them [accord and satisfactions] attempted to be offered 2 or 3 times in [the specialized session] when I was there. The judges routinely rejected them, as both parties were not negotiating from an equal power level. I have never heard of one being successful here, but I'm not sure about other courts (Prosecutor 4, Specialized Session).

Another prosecutor explained that the judges would admonish any attorney who dared to suggest that the case be resolved in such a manner. She characterized their use in a manner that is drastically different from the way in which they were talked about in the comparison court. Hearing the differences in these characterizations are great examples of how different these judges and local legal cultures were.

During my entire experience as a DV prosecutor, accord and satisfaction was always viewed as a major no-no! The concept of brushing everything under the rug simply because both parties agree to do so was never acceptable as a resolution. Luckily when I was there, the judges would not only refuse to accept an accord and satisfaction; if a defense attorney suggested it, she would go nuts. With most DV cases, we would do everything we could to prosecute the case, even if the victim wanted nothing to do the case. When a case is resolved, we certainly consult with the victim to see what they would like to see happen, and we certainly try to do everything they want us to do as far as a resolution. But we also would never agree to let a case go (whether it was serious or minor) simply because both parties agree that is the way it should be handled. In my seven years here, I have seen the issue raised once or twice by defense (only in district court), but never have a seen a case actually resolved by an accord and satisfaction” (Prosecutor 1, Specialized Session).

The local legal culture of the specialized session did not tolerate the use of accord and satisfaction agreements as a means for dismissal of domestic violence cases. A message was clearly sent to that community about their perceived inappropriateness. Allowing them would have been contrary to the problem solving mission of the session. It would undermine the goal of the session: to hold batterers accountable and get them help in order to deal with domestic violence as a social problem. The judges' refusal to allow them was characterized as their understanding of the unique nature of domestic violence cases and the power imbalance implicit in the cases. This type of understanding may have been something unique to the judges of the specialized session and exemplifies how the session can be viewed as a feminist model of justice.

This marks a drastic difference between the two courts in how the local legal culture was communicated to the court workgroup members and to all listening visitors. While the comparison court cited *Guzman* and used accord and satisfactions very regularly, the specialized session did not and would not, even though the law allowed it in some situations. Thus, the local legal culture of the specialized session was impervious to the change in case law under *Commonwealth v. Guzman*, which opened the door to disposing of domestic violence cases by means of an accord and satisfaction, and the accomplishment of the goals of the comparison court, was somewhat dependent on it.

### **The Hearsay Exception and the Confrontation Clause**

The final legal issue that was raised by respondents, particularly in the specialized session, was excited utterances and their admissibility as an exception to the hearsay rule. Respondents from the specialized session cited the way in which this issue impacted their local legal culture and the options they had pertaining to the processing of domestic violence cases. It was not mentioned by the members of the comparison court as having any impact on the way in

which they processed domestic violence cases, because they were not allowed, even when lawful.

For many years, prosecutors in the specialized session attempted to go forward with domestic violence cases without the cooperation of the victim. They called it “evidence-based prosecution,” and the theory was that if enough real evidence was collected at the scene and the victim’s statements were introduced through police officers, 911 tapes, EMTs’ trip sheets, and medical records, there was still ample evidence to sustain the Commonwealth’s burden. The victim’s “excited utterances” were allowed as an exception to the hearsay rule that stated that their truthfulness could be implied because they were made spontaneously during the excited event and before there was time to contemplate and reflect upon what was happening. Like most exceptions to the hearsay rule, there are indicia of reliability because of their contemporaneous nature. Police officers were called to the stand and had to testify about the length of time it took for them to be dispatched and arrive on scene. They would then have to explain the emotional and physical condition of the victim upon arrival. In theory, if they could state that they arrived on scene relatively quickly and that the victim was still under the emotional distress of the “exciting event,” then the statements made to the police officers about the incident would be introduced.

Generally, these statements included matters regarding the identity of the defendant, lack of consent, and the incidents harmful and distressing nature. Photographs of any possible injuries and other physical damage done to property was also collected and introduced in order to corroborate the officer’s testimony regarding the spontaneous utterance. Any statements that the victim made to EMT professionals or fire fighters could come in a similar fashion once the proper foundation was laid. While prosecution was still an uphill battle, being able to use and go

forward with excited utterances was a very powerful tool for prosecutors. It gave them some control in these difficult cases. It also took the pressure off the victims, because the Commonwealth could go forward with the case independent of the victim's state of mind and cooperation level. This represented business as usual for court community members working in the specialized session for a long period of time. All of this changed, however, after the ruling in the case of *Crawford v. Washington* (2004). Once the *Crawford* decision was rendered, prosecutors were left somewhat powerless, even in the specialized session. There was little that could be done with domestic violence cases that did not have a cooperating victim, now that excited utterances were deemed to violate the confrontation clause of the United States Constitution. Below is a discussion of how this drastically impacted the local legal culture of the specialized session and how it did not have any impact in the comparison court.

The facts of *Crawford* are as follows. On August 5, 1999, Sylvia Crawford's husband was arrested after the police officers discovered the murdered body of Kenneth Lee. Sylvia was taken into custody, Mirandized, and interrogated. She did not testify at her husband's trial, invoking her marital privilege, but a tape recording of Sylvia's statements during interrogation, potentially refuting her husband's claim of self-defense, were appropriately admitted under the state's hearsay exception. On appeal, her husband argued that it violated his Sixth Amendment right to confrontation. Scalia interpreted the confrontation clause for the court and articulated the controlling standard to be, "testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Scalia went on to say that statements made in the course of interrogations are also testimony under this narrow standard and thus her statements were excluded.

This 2004 decision made handling domestic violence cases difficult to near-impossible in the specialized session. Prior to this time, it was customary in many jurisdictions to go forward with a domestic violence case using whatever independent evidence was collected at the scene, along with the excited utterances of the victim as told to police officers and other first responders when they arrived on scene. Now these statements would be excluded, as they were deemed part of the formal interrogation and investigation of police officers. Depending on the judge and the evolution of case law, even some 911 tapes were excluded. It would hinge on whether the call was made while the incident was still in progress or was more reflective in nature and thus subject to the confrontation clause (*Hammon v. State*, 2005; *State v. Davis*, 2003).

The respondents in the specialized session all mentioned how this case crippled the processing of domestic violence cases in their court. Their answers took on a pre/post *Crawford* tone because the going rates and local legal culture had been so altered by this case. As Prosecutor 3 put it, “Under the case law, especially now, if your victim is not cooperative, and you don’t have independent corroborating evidence, you have no case.” Prosecutor 2 said, “Basically, spontaneous utterances don’t come in anymore. If you don’t have a victim, you’re done; the police can no longer testify, “I showed up at the scene and the victim was crying and hysterical and said XYZ to me.” That is now considered interrogation.”

This had a direct impact on how cases are evaluated and disposed of in the specialized session. There was a time when cases with strong spontaneous/excited utterances would warrant pleas by defendants. According to Prosecutor 5, “For a while, cases were pleading out left and right...but then they started getting a little smarter as to how the changes in the law worked.” After *Crawford*, cases without victims cannot be typified as strong because there is no way to go forward without them. This change in case law made a huge difference in this local legal

culture. It changed how cases were typified and disposed of. More cases were dismissed on the date of trial than ever before. I asked Prosecutor 4 if the amount of evidence that was allowed to come in for trial was impacted by the *Crawford* decision. She said, “Oh absolutely, the statements the victims made to the cops, the medical records, the EMT’s trip sheets, all of it would have come in before Crawford. After Crawford, we could have none of it.” The *Crawford* decision impacted police officers and the way in which they respond to a domestic incident. I asked another prosecutor how this impacted the police officers. She said,

The police were very upset about it. They would try under the new limitations to write police reports a little differently, to be more creative and respond to scenes with a little different mindset...Instead of asking, “What happened?” they were asking questions like, “Are you hurt?” So we could argue the statements were not a product of a police interrogation of the victim. That worked with some judges and not some others. Again once a judge made a ruling on that; if it was in our favor it usually was a plea. (Prosecutor 3, Specialized Session)

Defense attorneys admit that the *Crawford* decision changed things in the specialized session. It changed how cases were prepped, pled, and tried. The going rate that was trying to be established by judges was even harder to establish now because the bargaining power for prosecutors had changed grossly. Defense Attorney 2 summed it up by saying, “The purpose of excited utterances was that the DAs never had a cooperating victim; they relied on those excited utterances. So prior to Crawford they could try to get them in; at this point they can’t even try.” This took away whatever power prosecutors had, and truly crippled the specialized session. According to one defense attorney,

Once Crawford came down it was pretty much the end of the specialized session. Before Crawford they could try to go forward without the victim. They didn't really need her. They had the officer testify as to what he saw, his observations, and then get in what the victim said at the scene. After Crawford, that could not come in anymore. (Defense Attorney 2, Specialized Session)

This changed the ability of prosecutors and judges to try to impact the going rate and get batterers on a CBIP. Why would they plead to anything if they knew that the cases were not going to be trials unless the victim testified? The *Crawford* decision made the defense attorneys' job much easier in the specialized session. The defense attorneys admitted this.

It made it a little easier for us in a lot of ways because the excited utterances were being really overused and allowed in a way beyond what they were originally intended to be. You'd get whole complete statements that would take an hour and a half to give that would come into evidence. As opposed to after Crawford, initially they were all out and they have seemed to clarify them a little bit as time goes by. (Defense Attorney 5, Specialized Session)

Defense attorneys also stated that this impacted domestic violence cases in particular. "In gang, gun, or drug cases, the excited utterances never really came into play. They had other evidence, but in domestic violence cases they were reliant on excited utterances because those cases hinged on the statements of the victims as to what the defendant did to her." Judges in the specialized session admitted that Crawford has made going forward on domestic violence cases "*much much harder.*" The judges hold out hope for the prosecutors that there is still some chance at evidence-based prosecutions, but admit that "it has changed things enormously...it is much harder."

From a feminist jurisprudential angle, this normative application of the confrontation clause crippled the prosecution of domestic violence cases and almost legalized domestic violence. The Supreme Court refused to recognize the unique and private nature of domestic violence crimes and their reliance on the admissibility of spontaneous utterances. The confrontation clause is an important right for all humanity. That being said, domestic violence victims cannot always testify against their abuser for safety and emotional reasons. The law needs to understand and recognize this. The law should not ignore the social context and legal history of these cases. Necessitating that victims appear to testify puts them in more danger, makes them subject to increased intimidation and abuse, and ignores the unique nature of domestic violence cases. The law refuses to allow police officers to give testimony pertaining to the emotional statements that victims make, even when made contemporaneous with the crime. This serves the interests of batterers and not victims, of men and not women.

From a court community standard, this ruling changed “business as usual” in the specialized session, but did not impact the comparison court whatsoever. While prosecutors from the specialized session felt crippled by the *Crawford* decision, prosecutors in the comparison court were hardly impacted. This is because the judges in the comparison court did not allow statements to come in as excited utterances prior to the *Crawford* case. Even though the law allowed it prior to 2004, they simply did not. This is an example of how that court initially circumvented the law that was contrary to its goals and culture.

The prosecutors from the comparison court were somewhat defensive about the questions posed to them regarding the way in which the *Crawford* decision impacted their cases. They seemed guilty that they did not try to go forward more with cases without the victims, pre-*Crawford*. Many other respondents admitted that the judges would never have allowed those

cases to go to trial without the victim taking the stand, regardless. Only one prosecutor answered that she had ever had a trial without a victim based on excited utterance prior to *Crawford*. That trial was in a different court in the same county, however. A different prosecutor mentioned a superior court trial that allowed excited utterances prior to *Crawford*; this too was not under the control of the judges in the comparison court. One prosecutor put it this way:

I haven't tried any DV cases since *Crawford*, but I want to be as clear as I can be here. The difficulty of going forward on spontaneous utterances depends on the judge. Some judges will resolve these cases before they ever get to the trial session, knowing the case was based purely on spontaneous utterances and was going to pose problems here. Judges would try to do the reasonable thing and resolve it. (Prosecutor 3, Comparison Court)

Defense attorneys spoke of how things did not change in their local legal culture after the passage of *Crawford*.

Here, things pretty much stayed the same. I used to prepare for the possibility that a spontaneous utterance would be used, and then I didn't have to even do that anymore. It is one of those things...If the husband and wife don't want to go forward, then no one is going to push it. (Defense Attorney 3, Comparison Court)

Thus, while this defense attorney was aware of the possibility of a case going forward to trial based on the admissibility of an excited utterance, he knew that in the local legal culture of the comparison court, no one was going to try to "push it" when the victim did not want to testify. Another experienced defense attorney compared how handling cases changed pre- and post-*Crawford*. While he noticed a big difference in some of the other courts he worked, in the comparison court there was no change.

This wasn't one of those courts. In another court they used to always do full hearings on spontaneous utterances—but this presiding judge was never a big believer in them. He always felt that the issue was finally resolved in Crawford. He always had very strict guidelines and wouldn't let a lot of spontaneous utterances in. He felt very strongly about confrontation and just would not let them in, even pre-Crawford. (Defense Attorney 5, Comparison Court)

Thus, this attorney summed up the issue of the way in which the local legal culture can prevail over the law. Even when excited utterances were perfectly lawful up to and until 2004, the judges in the comparison court “knew better” and did not entertain them. The community was not altered by the passage of that case because the status of the law prior to this would have given rise to a lengthy motion hearing and trials without victims. This was not worth their time and violates the norms that they imposed on their court. Thus, local legal cultures were found to be strong and can operate in order to accomplish their goals independent of the law. Indeed, it seemed that the judges often chose which laws to use and which to ignore in order to justify their actions.

### **Conclusion**

Different cultures used and cited different laws and cases differently to suit the needs of their culture. Even when a person's Fifth Amendment is firmly rooted in the Bill of Rights, the frequencies in which they were raised and the manner in which they were dealt with varied by court. The testimonial marital privilege was known by members of both communities, but it was used sparingly, and the prosecutors and judges required physical documentation to prove its existence in the specialized session. The mere mention of it in the comparison court, coupled with a defense attorney-generated “marital affidavit,” was ample justification for pre-trial

dismissal. While accord and satisfactions have been around for years and have more recently gotten approval from the SJC to be used in certain matters and in specific ways, the specialized session would not hear of or tolerate them in matters pertaining to domestic violence. Informal sanctions and some ridicule resulted for those who dared to attempt them. In contrast, in the comparison court the *Guzman* case was regularly cited by all during interviews. Dismissals under this case happened routinely and with justification. Finally, the change in the admissibility of excited utterance testimony changed the culture of the specialized session and drastically impacted case outcomes. It made it much more difficult for prosecutors to force pleas or take victimless cases to trial. This crippled the prosecutors' efforts and frustrated the judges alike in the specialized session. At the same time, it had no impact on the comparison court. In the comparison court, judges did not allow excited utterances to be introduced at trial, even when they were legally admissible.

Thus, this cursory look at the legal matters that were cited routinely by court workgroup members yielded interesting results. Local legal culture impacts the processing of domestic violence cases more significantly than does the law. This is because judicial discretion and tradition are more powerful forces than the passage of laws. Judges can choose to acknowledge, interpret, and apply the law differentially to suit the needs and mandates of their different local legal cultures, and this was demonstrated to me when I interviewed these court workgroup members. This is in accordance with Philips' (1998) findings where our judges do seem to fit into the model she used. While Philips analyzed only judicial decisions when entertaining guilty pleas, this study looks at different types of decisions specific to case type and within a complex local legal culture.

From a feminist jurisprudential angle, the manner in which these courts use and interpret the laws proceeds along gendered lines. The specialized session, which acknowledged the unique nature of domestic violence cases and their social context and history, attempted to follow proper protocols and not to grant quick dismissals. The comparison court, which had a tradition of holding domestic violence cases at a low priority status, ignored laws that would challenge the goals of their session.

Additionally, feminist jurisprudence would state that many laws pertaining to domestic violence cases serve to their detriment, making successful prosecution impossible and the crime practically legal. The *Commonwealth v. Guzman* (1996) and *Crawford v. Washington* (2004) cases have both been used to cripple the efforts of domestic violence prosecutors. These male-dominated laws have created loopholes that protect the interests of batterers and perpetuate the victimization of women. Under *Guzman*, batterers can have their cases dismissed as long as the victim states that she has been “satisfied.” Even an apology has been accepted by judges in the comparison court as ample satisfaction. This clearly serves the interests of batterers and not of victims, who may be pressured into stating that they are satisfied. This is also a great illustration of how local legal culture prevails over the law. The Massachusetts guidelines for judicial practice clearly stated that judges should not entertain accord and satisfaction agreements in domestic violence incidents over the objections of the prosecutors.

While the judges in the comparison court entertained these agreements regularly, the judges in the specialized session refused to entertain them. This is also an example of how culture prevails over the law, for the judges in the specialized session refused to deal with them whatsoever, even though they were mandated by law. This circumvention, from a feminist jurisprudential angle, allowed the judges in the specialized session to recognize the unique nature

of domestic violence cases. The judges were concerned with the power imbalances between the parties when they entered these agreements. They questioned the satisfaction of victims who have been abused by their intimate partners. The judges of the specialized session took the social context of the crime into consideration when deciding how to deal with these cases. In order to accomplish their goals they worked around the law. The judges of the comparison court were really doing the same thing. In order to accomplish their goal of case efficiency they too worked around the law.

Before *Crawford*, prosecutors could use a responding police officer who spoke to the upset victim at the crime scene. Prosecutors could move to have the victim's statements introduced through the police officers as a spontaneous utterance exception to the hearsay rule. The rationale of the exception was that there were indicia of reliability in statements made contemporaneous to and under the guise of the exciting event. Prosecutors relied on this in the specialized session. If introduced, defendants pled, programs were assigned, and victims did not have to testify. Thus, it served two purposes: holding batterers accountable and providing safety for victims by shielding them from testifying. This is because the cases did not have to rely as heavily on victim testimony and could go forward without her cooperation. The *Crawford v. Washington* decision was a step backward and an example of masculine jurisprudence. It did not contemplate the unique needs of women as victims of domestic violence when it limited its use in this manner. While the case impacted the local legal culture of the specialized session profoundly, it did not impact the comparison court. The comparison court never allowed those statements into evidence. They always practiced under the masculine model of justice.

## Chapter 7: Conclusions and Limitations

The criminalization of domestic violence began in the U.S. in the 1970s and early 1980s. Since that time, our courts have been slow to respond. The research presented here reveals that the culture of our court communities helps explain why domestic violence cases are still handled so leniently by our courts. Local legal cultures, rich with tradition, whose successful operation is based on adherence to norms and rules that have been internalized by court workgroup members and are resistant to change, undervalue domestic violence cases and the norm is to dismiss them quickly. As a result, the court community can drastically affect the processing of domestic violence cases. No two local legal cultures are the same. Most courts follow a traditional model that values efficiency. Specialized problem solving models have been developed to address domestic violence and their aim is to change court cultures by altering the goals and rules of a court. A framework of feminist jurisprudence is used to analyze the difference observed between the two models under study and to question the laws that serve to perpetuate the inadequate handling domestic violence crimes receive.

The two courts studied were similar in demographics and caseloads but were very different in both their local legal culture and their approach to domestic violence. I attribute much of these differences to the judges who presided in the courts. Time and again, the judges were referenced by interviewees as directly impacting the going rates. What the judges would accept on a plea or the mechanisms they used to dispose of cases were all indicative of that court's going rate. The judges were also responsible for setting the tenor and goals of the courts. Whether it was case efficiency in the comparison court or problem solving, in the specialized court, the judges were able to communicate their goals to the court workgroup members. Court

workgroup members were found to have varying degrees of power within their local legal culture, and sub communities were formed within these courts. The central role of the judge and concerns about efficiency were similar to what Eisenstein, Flemming, and Nardulli found in their larger study of traditional courts. In traditional models, judges and defense attorneys were found to be focused on case efficiency and were more aligned in their opinions about case processing and goals for the session (Eisenstein, Flemming, and Nardulli, 1999). Within the traditional court community the prosecutors were “isolated” from the rest of the community in this way (Eisenstein, Flemming, and Nardulli, 1999, 190). This is similar to what I found in the comparison court. In the comparison the prosecutors were called “powerless” by other court community members and expressed frustration regarding their position. Creating the specialized session changed this dyad. In the specialized session, I found that there was more cohesion between the judges and prosecutors and that the defense attorneys were intellectually isolated from the court community. In this I mean, that they did not share the goals or agree with the going rates as stressed by the judges and prosecutors. In fact they perceived the session to be unfair. Depending on court, these mini communities or dyads worked together to accomplish the goals of the session.

Both courts typified domestic violence cases as weak from an evidentiary perspective. They used similar criteria to assess case strength. Both cited similar examples of corroborating evidence that, if available, might serve to bolster case strength. Studying case typifications revealed that the court workgroup members in both courts required a great deal of evidence in order to typify a domestic violence case as strong. Indeed, they required more than was statutorily required. There was a tradition of weak case status for domestic violence cases in both courts. This led to court workgroup members distrusting the validity of evidence and victim

accounts. Indeed, all court workgroup members in both courts disclosed that victims of domestic violence are inherently untrustworthy and their testimony alone is insufficient. This is true, even though they rarely are willing to testify. When a victim does testify, her statements need to be corroborated in order to be believed. This is not required by the law and is often only the case in matters where there is a witness who is not credible for some reason. Feminist jurisprudence would suggest that there is a gendered explanation for this—that victims of domestic violence are most often women, and they are not taken seriously or believed by court workgroup members. The court workgroup members in both courts use normative standards and subjective opinions to base their opinions on. When victims did not behave in a typical fashion, they were deemed not credible, similar to Frohman's (1997) findings regarding prosecutorial decisions in relation to sexual assault cases. Frohman (1997) found that prosecutors made decisions to prosecute cases based on their own subjective opinions on victim credibility. Many times these opinions actually contradicted each other within the same office.

In this study, I discovered similar propensities by all court workgroup members pertaining to domestic violence victims. Court workgroup members sought to discredit the victims of domestic violence. They even questioned the available corroborating evidence because they had serious doubts about victim credibility. For example, the authenticity of photographs was called into question by many when it was a domestic violence case. The court community literature offers a possible explanation for this. A history and tradition of weak case typification for domestic violence cases transcends corroborating evidence. The court community is more powerful than the law and its requirements. Even the court workgroup members in the specialized session have not overcome this history. They, too, called the credibility of victims into question, especially the defense bar.

Feminist jurisprudence would suggest that a different criterion to assess case strength for domestic violence cases is necessary. When the normative standards that have been created and passed down as the rules of a culture do not “work,” then new rules and norms need to be established. While the specialized session did not create different standards to assess case strength, they did draw different conclusions from the typification process. Judges and prosecutors in the specialized session recognized that domestic violence cases were regarded as weak by the court community and by the community and regarded this as problematic. They discussed the cases as lethal and very serious. They changed the typical district court pattern of “business as usual” and took their time with the cases and their victims. For example, additional time was given to prosecutors to find the victims and ensure victim safety issues. Cases were kept open longer after the pre-trial stage, and were given continuances in the trial session. In this way, the process was the punishment (Heumann, 1975). Additional resources were allocated for investigation and review in an attempt to bolster case strength and monitor defendants’ progress and compliance after being sentenced. Judges and prosecutors discussed the danger that can accompany quick adjudication and dismissal of domestic violence cases. Indeed, they took into account the unique nature of domestic violence cases (between intimate partners; in private; history between the parties) and instead of seeing it merely as a factor for weak case typification, they saw it as justification for additional resources, investigation, and review. One judge commented on how, because of these unique variables (the same ones that can be used to characterize a case as weak), these cases actually have more potential to be dangerous and even deadly, and thus warrant additional time, resources, and effort.

The judges and prosecutors in the specialized court acknowledged the social context of domestic violence cases and spoke of them with seriousness. This was communicated daily to

the community who sat in the session and listened to the judges and prosecutors characterizing the cases. While this did not amount to great changes in dispositions of domestic violence cases, it did amount to change in the local legal culture and in the community at large. Defendants and their attorneys discussed how much more seriously cases were treated in the specialized session and how unfair the session was. Even though the outcome data revealed little difference between the courts, 52% of cases were dismissed in the specialized session and 71.9% were dismissed in the comparison court (46.8% outright and 25.1% 276,§87) the defendants believed that they were going to be punished more severely in the specialized session and that it would be better to have their cases in other traditional court settings. In the specialized session, a defendant who had been prosecuted for domestic violence said to Judge 1, “I am moving....A man can’t be a man in his own house in this city.” In this he clearly articulated that domestic violence cases were being treated differently and more seriously in the specialized session, and that this was being communicated to the community at large.

Feminist jurisprudence would suggest that we use different criteria to assess the differences found between these courts. Rather than just looking at outcome data to discover difference, where little would be found, we should examine the processes which these cases follow. There is value in the process that ensures victim safety, in attorneys who speak of domestic violence as a serious social problem, and in community members who feel that their cases are being taken very seriously in the courts. So, while the court workgroup members relied on the same evidentiary criteria to assess case strength, their response to it was markedly different, and these different messages were communicated on a daily basis in the specialized court.

The court workgroup in the comparison court used similar criteria as the specialized court to make weak case typifications of domestic violence cases. The main difference that was found was that they used these weak case typifications as justification for quick dismissals. Judges did not grant continuances when victims did not appear for trial. Court community members in the comparison court did not discuss domestic violence cases as being serious or lethal. They discussed them as being annoying, weak and messy. They felt that, “the majority of domestics probably shouldn’t be in the system to begin with” (Defense Attorney 2, Comparison Court). This also represents how traditions regarded domestic violence crimes as non criminal are internalized by these traditional court community members. The unique nature of domestic violence cases and their lethality was not apparent in this culture. Even though the prosecutors were trying to argue for more time and attention, they were powerless in the culture. 71.9% of the cases resulted in outright dismissals or in postponed dismissals under Mass. Gen. Laws Ch. 276 §87. They did this over the Commonwealth’s objection and without a proper hearing, as required by law. A reluctant victim or lack of corroboration was ample reason to dismiss cases outright and quickly. They had a tradition of treating domestic violence cases in this manner and used the business of their court as an excuse for why they could not give these cases additional time. The district attorney’s office was trying to change the culture in this court, but could not do so alone. Cumulatively, their words and actions communicated to the court community members and to the community at large that domestic violence cases are not serious. They are hardly criminal at all. These cases were deemed by the comparison court to be weak and a waste of the court’s time and resources.

Another difference that was discovered between the two courts was in the establishment of the going rate. The judges in the specialized session were purposefully trying to alter the

going rate which emphasized a rehabilitative (problem solving) model of justice in the form of treatment for batterers (through the Certified Batterers Intervention Program). This is another example of how the court operated as a feminist model of justice. The judges in the specialized court discussed the social context of a disposition and how the result of punishment could impact other parties in the future. They were mindful of the connectedness of their dispositional decisions and how it could impact the future decision to batter made by the defendants. Rather than take cases on a purely individual basis they focused on context and connectivity. These are illustrations of feminist jurisprudence (Williams, 1976; Wolgast, 1980). The judges in the specialized session were seeking the batterers intervention program for disposition above all else. They were actively communicating to other court community members that this was the optimal disposition for all domestic violence cases. This was sometimes frustrating to defense attorneys and prosecutors alike. The defense attorneys felt that domestic violence cases should be dismissed quickly (as they are in most traditional courts) and that the cases in the specialized session were being dragged out unnecessarily. The prosecutors (still operating under a retributive model of justice) often felt that their stronger cases were unjustifiably receiving probationary periods with treatment program instead of incarceration. The judges explained that the impact of a short jail sentence was less pronounced than the successful completion of the batterer's intervention program.

The judges in the comparison court were responsible for and content with the going rate. Their primary role was as managers of a court whose goal was to move and close cases. This traditional goal (which is shared by many district courts) worked to the detriment of domestic violence cases. All parties mentioned that their court was busy. All mentioned that they were proud to be able to close cases within three months time from arraignment to disposition. This

resulted in having to prioritize cases and be able to quickly assess which were serious and which were not. As mentioned earlier, one defense attorney illustrated this by comparing the work of the court to working in a sewer. He stated that, “the shit at the bottom is not as serious as the shit at the top” (Defense Attorney 5, Comparison Court). This negatively impacted domestic violence cases that were viewed in this community as on the bottom. Domestic violence cases were deemed as not very serious and their going rate was dismissal.

Case disposition is more than a product of a courts’ going rate. The local legal culture in the specialized session could not change the outcome for all domestic violence cases. While the judges in the specialized session tried to alter the going rate by insisting on a certified batterer’s intervention program they could not achieve this in all cases. Many defendants knew that the cases were “weak” from an evidentiary perspective and chose not to plead. Instead, their cases were continued for a jury trial. Thus, the CBIP was really more of a “goal going rate” than the actual disposition reached in all cases. While perceptions of the going rate for domestic violence cases were different in the two courts, the actual final dispositions domestic violence cases received were similar. In both courts, many cases were still dismissed on the day of trial, a little over half of all the domestic violence cases they processed.

The frequent dismissal of domestic violence cases in both courts is in part because the law does not support the prosecution of domestic violence cases. Feminist jurisprudence provides the lens with which we should analyze these normative laws and seek changes that could meaningfully result in difference for the quality of life of both victims and batterers. By exempting victims of domestic violence from the benefits of the marital privilege, by reversing *Crawford v. Washington* in its applicability to domestic violence cases, and by refusing to

entertain accord and satisfaction agreements when it comes to domestic violence cases, the cases could instantly become “stronger.”

Recent changes in case law have served to decrease the effective prosecution of domestic violence cases. The degree to which these changes have impacted the processing of domestic violence cases and the actions of the court workgroup members depended on the court’s local legal culture. The court workgroups uniformly cited and used different cases. The respondents in the specialized session unanimously mentioned the *Crawford v. Washington* decision. They saw it as a change in the law which crippled the efforts of prosecutors to go forward at trial with domestic violence cases. As discussed previously, the cases pertained to spontaneous utterances and their admissibility. The *Crawford v Washington* court held that statements made by victims to first responders at crime scenes could no longer come in without a cooperative testifying victim. The court held that allowing such statements in violated defendant’s constitutional rights to confront their accuser. It became the main reason why so many cases were dismissed in the specialized session. It devastated the specialized session and some even said “ended” it. In comparison, this case was never mentioned by the court workgroup members in the comparison court. Where it was discussed, respondents in the comparison court mentioned that the judges never allowed the introduction of spontaneous utterances prior to 2004 and thus this change in law was insignificant in that community. These differences illustrate that a court’s local legal culture is more controlling on case outcomes and processing than is the law. The Judges in the traditional comparison court did not entertain lengthy spontaneous utterance hearing and did not allow such statements in when they were admissible and lawful. This would have taken far too much time and resources and would not have served the goal of that court. As a result, while the

legal changes dramatically affected the specialized court they were unnoticed by the comparison court.

In a similar fashion, the court workgroup in the specialized session never mentioned the use of accord and satisfaction agreements, while the court workgroup members in the comparison court uniformly discussed accord and satisfaction agreements and cited the *Commonwealth v. Guzman* (2006) case as legal justification for their actions. In *Guzman*, the court held that pending criminal matters could be dismissed upon a showing that the victim has been civilly satisfied. Mandated by law, the court workgroup in the comparison court stated that accord and satisfaction were routinely accepted by judges as a mechanism for dismissal of most domestic violence cases. This case was never cited by any respondents in the specialized session interviews. When I circled back to the specialized session respondents, to ask about accord and satisfaction issues, they stated they were never entertained or accepted in the specialized court. While lawful, the “attorneys knew better than to bring one [accord and satisfaction] before one of their judges.” Who would “go crazy” if someone did. Thus, I have found that the local legal culture of a court can have a dramatic effect on the how they interpret and use the law and that this can impact the processing of domestic violence cases. To this end, court workgroup members circumvented the law or utilize it to fit their needs depending on the demands of their local legal culture.

The study of court community norms in the processing of domestic violence cases was approached from the theoretical perspective of feminist jurisprudence. Feminist jurisprudence looks critically at existing law and questions its reliability and neutrality. While the laws and policies pertaining to domestic violence have changed vastly in the past twenty years, research shows that cases are still undervalued and receive low-priority status. According to feminist

jurisprudence, seemingly “neutral” principles and standards cannot apply to victims of domestic violence whose gendered role within that context has been socially constructed (Bartlett, 1991). The imbalance of power between the genders within our society makes domestic violence a social problem (Frug, 1991). Our lawmakers’ inability to recognize the unique circumstances that surround this violence, and the manner in which our legal authorities continue to evaluate and handle these cases in a gender-neutral fashion, mandate continued state-sanctioned violence, with offenders who will remain unaccountable by virtue of their relationship with the victim.

The specialized domestic violence court, as a feminist model of justice, attempted to alter the way the local legal culture utilized the law by changing its going rate, increasing allocation of time and physical resources, and drawing alternate conclusions from the weak case typification processes. Actors in the specialized court communicated to the community that domestic violence crimes are serious. Perceptions of unfairness expressed by defense attorneys in this court were largely expressions of how different this feminist jurisprudential model was from other district courts in and around the state. While many cases were still dismissed at trial, it was a much bigger struggle to get that dismissal in the specialized court than in most other courts in the Commonwealth. To this end, the *Commonwealth v. Guzman* (2006) decisions did not impact the local legal culture of this court because the judges refused to tolerate accord and satisfaction agreements on domestic violence cases. As discussed previously, the judges had the backing of the law which made these decisions discretionary on the part of the judges. This was different from their normative counterparts in the comparison court. Despite these tools, court actors in the specialized court were still powerless to withstand the changes in law that came with the passage of *Crawford v. Washington* (2004).

The comparison court, operating under what they considered to be normative and neutral laws, did not allow spontaneous utterances testimony even when it was lawful, prior to *Crawford v. Washington* (2004) and routinely dismissed cases under *Commonwealth v. Guzman* (2006). Case load pressure and the efficiency of the docket were the justification for speedy resolution of cases at all costs. All respondents boasted that cases were closed within three months of arraignment and this was at great cost to domestic violence cases. The unique nature of domestic violence cases was not considered as reason to give the cases special attention or priority and was justification for their weak label and dismissal. At the very least, if this community recognized the treatment options for batterers as valuable and helpful, they might have required more of them to attend. The batterers program was viewed as “too expensive” and as “setting the defendant up for failure.” The court workgroup members in the comparison court thought only of this individual defendant and case and not the broader community when making dispositional decisions. Domestic violence was not treated as a serious social problem worthy of effort and resources. This commonly shared interpretation of domestic violence was communicated to the community on a daily basis through quick dismissals of such cases.

### **Limitations**

This study deals with a very small sample of court workgroup members in only two courts in one state. To help improve the external validity of this research future studies could attempt similar designs in different courts in different locations. We might find variations in both the types of comparison and nature of the specialized courts that would impact the conclusions that could be drawn about local court communities. Additionally, the two courts used in this sample were destined from the beginning to be quite different. Since one had a specialized session and a history of being “good with domestic violence cases,” and one had a

reputation of being quite the opposite, I captured differences that were polar to each other. It is possible that there are many courts whose communities fall somewhere in the middle of these opposites which might inform future study.

When I interviewed the court workgroup members from the specialized session, the session had been extinct for a little over one year. Some of the prosecutors had been promoted to superior court for at least one additional year prior to that. Thus, I was asking the respondents to recall how things were in the past. Doing this could have impacted the validity of their comments, since they were retrospective in nature. In future projects it would be better to talk to court workgroup members who are working in fully functioning specialized domestic violence courts. This will alleviate the questions raised by asking respondents to discuss their previous court experiences.

My sampling method was purposeful in nature. Starting with a narrow selection criterion, I only interviewed core workgroup members who appeared in these courts on a very regular basis over a short period of time. In the specialized session, I interviewed the two main judges who worked in that session during its existence. I interviewed all prosecutors that were available and still working for the District Attorney's Office. In order to find defense attorneys that met my selection criteria, I first met with a bar advocate who had been practicing in this court for over twenty years. She was well regarded and respected in the community and was mentioned by judges and other prosecutors as a staple in the court. In a snowball manner, she then identified other defense attorneys who were regular players and had worked in the specialized session.

In the comparison court, I began in the District Attorney's Office. The lead prosecutor for domestic violence, who previously worked in that court, was interviewed first. She then

identified other Assistant District Attorneys who met my selection criteria. I gathered information from the prosecutors as to a list of defense attorneys who were regular players. I interviewed those that were identified by other court workgroup members and their supervisors as being available and trustworthy. This methodology could have skewed my results as it was not a random sample. In order to gain access to individuals firmly entrenched in the community I relied on the opinions and direction of court workgroup members. While it provided me with some rich interviews it had its limitations methodologically.

Finally, despite multiple attempts, I was unable to interview the presiding judge in the comparison court. While this interview would have been valuable, the data I collected showed signs reliability as numerous respondents in the comparison court site repeated similar ideas about the court culture and I was able to interview the second judge in that court. What were missing from this sample were one-shooters or individuals who worked in these courts in a limited fashion. I purposely excluded these individuals from my sample as I was primarily trying to capture nuances of culture that only the core members would be able to discuss. Still, it is possible that their experiences as marginal court players would have been different from the regular court community members and could have added to the results.

Finally, having worked previously in the specialized session, my objectivity may be called into question. My previous relationships with some of the interviewees in that session may have biased their responses. The candid manner in which these respondents discussed their experience in the specialized court was somewhat dependent on my quasi insider status. I even used my previous experience as a prosecutor to gain the trust of the court workgroup members in the court where I had never appeared. While having an insider status improve my access and may have made some court workgroup personnel more open to speaking with me, it is important

to recognize that such access is always a double-edged sword. It is equally possible that respondents with whom I had previous experience changed the way they talked about their experiences in line with what they expected me to hear. It is impossible to ever know the full extent of such biases on my findings, but it is important to note them honestly. Despite my previous experience in the criminal justice system, as a result of this research I came to many contrary findings compared to what I initially thought when designing the study. Like the stereotypical prosecutor, before this research I did not see the value in a rehabilitative model and did not contemplate the courts or laws as having a feminist theoretical explanation for their differences. I was completely naïve about the existence of the court community of which I was a part. Through this research, I have gained a deeper respect for the judges in the specialized session, which I had previously resented. When they yelled at prosecutors to dig deeper and insisted on the batterer intervention programs, I was previously frustrated and annoyed. Indeed, I had a preconceived notion that the specialized session would not be much different from a traditional court, having been focused on a retributive model professionally. Through this research, I gained a much more nuanced understanding about local legal culture and how it impacts the processing of domestic violence cases. Most importantly, that case dispositions are not the only way to measure that impact. The language that is used, the process the cases travel, and the manner in which the cases are disposed of are just as important as the actual final result.

This study revealed that a court's local legal culture impacts the processing of domestic violence cases above all else. It prevails over the law and impacts the community where the court resides. Outcome data alone would not have revealed the great differences that were discovered between these courts, the relationships between the parties, and their opinions about domestic violence cases. The specialized session operating as a problem solving court created a

goal going rate which stressed batterer accountability and rehabilitation. Its existence impacted the court's local legal culture, the language that was used and their perceptions of the cases and each other. Most importantly it impacted the conclusions that were drawn from the weak case typification process. Even though the cases were deemed "weak" from an evidentiary perspective they were still treated with "gravity" and seen as potentially lethal. The traditional court operated as a traditional model whose focus on case efficiency negatively impacted the processing of domestic violence cases in a myriad of ways. Cases were dismissed routinely and quickly. The community was sent a message from this court that domestic violence cases are weak and not worthy of the court's scarce time and resources. Finally, the normative laws that exist to govern how these cases are processed do not support its criminalization. The courts interpreted them differently in order to accomplish their individual goals and in this way their culture prevailed over the law.

## **Chapter 8: Implications for Research and Policy**

This study both confirms long held beliefs about court communities and advances our understanding of how court culture can be altered through a specialized court session. A number of new questions can be raised based on the findings of this study. Initially, it would be helpful to explore if the findings could be replicated in other specialized and traditional courts in different parts of the country and in courts of different sizes and orientations. Future studies should include other members of the court community outside of the triad of judges, prosecutors and defense attorneys may complement this research and provide novel insights and explanations.

In addition to the implications for research on court community culture, more research is needed to evaluate the effect of a specialized domestic violence session on offenders and the community. This study suggests that having a specialized court creates a different local legal culture than traditional courts. Thus, the implementation of more specialized courts should help change the internalized norms our court community members share about the processing of domestic violence cases, potentially resulting in different experiences for victims and batterers that might be expected to reduce further victimization and decrease recidivism. The adoption of additional specialized courts throughout the county would bring with it increased resources and training for court workgroup members about the phenomenon of domestic violence that may help increased its prioritization in courts. Such changes might be expected to alter both the manner in which the cases are processed and contemplated and may have more broad affects on the local legal culture. Finally, the findings from this study suggest more research is needed on

changes in the laws that may hinder successful prosecution of domestic violence cases. These recommendations are discussed in more detail below.

### **Directions for future research**

This study had similar findings to previous court community scholarship. I found similar attributes of culture in the comparison court as Eisenstein, Flemming, and Nardulli (1999) identified. Specifically, the court community members interdependence on one another enabled them to move cases quickly through the system for they shared common beliefs about the values of cases. Additionally, dyads of judges and defense attorneys were created in the comparison court because of the prosecutors' diminished position of power. The comparison court's focus on case efficiency is similar to what was found in previous court community scholarship as well (Albonetti, 1986; Ulmer, 1987).

Advancing the work of previous court community scholarly, this study additionally found that the creation of a specialized session changes some of the elements of court culture. The specialized session in this study did not share the common goal of case efficiency. Prosecutors in the specialized session were less concerned with uncertainty avoidance because they had adequate resources, smaller caseloads, and a singular focus. The judges were specially trained and were more in line with the prosecutors in terms of agreement to the going rate and their beliefs and values pertaining to domestic violence cases.

Thus, this study makes an original contribution to the existing court community scholarship. It is the first study to qualitatively examine how the attributes of a specialized court impact the processing of domestic violence cases. A number of differences were identified between the comparison court and the specialized court in the interactions of triad members, case processing decisions, and the goals for the courts. Differences were also found in how these two

court communities perceived domestic violence cases and processed cases. While both courts evaluated evidence in domestic violence cases as weak, the specialized court kept the cases open for longer periods in order to investigate, ensure victim safety, and prepare for trial. In part based on this evidentiary weakness, the specialized session considered these cases to be serious and potentially lethal and thus worthy of additional time and resources. The difference in perceptions and actions identified in the two courts may provide guidance on how to best alter the typification process and resulting going rates to improve the prosecution of domestic violence case.

Despite the advances made by the present study, more research is needed. At the outset, additional research is needed to examine this process in a jurisdiction that maintained the specialized session for a longer period of time. Again, this study looked at a specialized session that existed for a five year period and asked respondents to reflect back upon their previous experiences. Additionally, given that this study only looked at only two courthouses in one state, replication of this study is needed to see if the results remain the same in other locations. Additionally, replication is needed in different locations. According to Eisenstein, Flemming, and Nardulli (1999) there are several factors that help explain why court communities are different by place. Some of these factors include, “size of the jurisdiction, the number of individuals in the community, structural and cultural factors...and variation in the political and economic characteristics ...and practices and policies of the principal sponsoring organizations” (Eisenstein, Flemming, and Nardulli, 1999, p. 26). Thus, subsequent research would advance our understanding to seek courts with diverse factors and discover the impact on domestic violence case processing and culture. For comparison purposes, it would be helpful to explore the local legal cultures of courts with specialized domestic violence sessions in other states and

countries. Such a study would allow researchers to compare how diverse communities established their going rates and typification processes. Additionally, in 2004 England and Wales created seven different specialized domestic violence sessions (Burton, 2006). Much could be gained by studying how the local legal cultures in English courts have been affected by these changes, and if they could be successful, given their late onset and firmly entrenched feelings pertaining to the social problem in those areas. A legal analysis of the difference in how the English Common Laws system impacted these processes would complement the research.

Future research should also engage in conversations with other court actors outside of the triad of judges, prosecutors and defense attorneys. Police officers, probation officers, and victim witness advocates are all regular players in the court community and have slightly different roles from the traditionally interviewed triad. It would be interesting to examine how their experiences with arrests, case investigations, and victim services have been impacted by the local legal culture where they work and the laws they operate within. For example, how are police officers' decisions to arrest and respond to domestic violence impacted by the local legal culture of the court where they work? If the court's local legal culture undervalues and regularly dismisses domestic violence cases, are they less likely to aggressively investigate, gather evidence, or make arrests?

Additionally research comparing the processing of domestic violence cases with other types of cases that face similar evidentiary challenges would also be important. The reputation of prosecutors and detectives assigned to domestic violence cases was discussed by respondents in the specialized session. The weak typification received by domestic violence cases are in part responsible for how few of them are tried in district court. The reputation of prosecutors in the specialized session (and to some degree the detectives who handled these cases exclusively)

suffered. There are two main reasons for this: 1) domestic violence prosecutors were not “trying” cases as regularly as other prosecutors; and 2) domestic violence cases were viewed by the community outside the specialized session as weak, messy, and undesirable. The negative manner in which defense attorneys and even other prosecutors perceived domestic violence cases was more than just a product of the weak case typification. When this issue came up during the interviews, I asked respondents to compare gang cases to domestic violence cases. The comparisons were based on the fact that both types of cases are ripe with evidentiary weaknesses; intimidated witnesses; and credibility issues. A major distinction between gang and domestic violence cases is gender. Domestic violence cases are perceived as particularly feminine, the victims are women, and the prosecutors assigned were all women, while the gang cases are more stereotypically masculine. The reputation of individuals who handle domestic violence cases was threatened, while the reputations for the prosecutors and detectives who handled gang matters were exalted. This was noted by all who were asked. Feminist jurisprudence could help to explain this contradiction. Both case types can be typified as weak from an evidentiary perspective. However, the conclusions that are most often drawn based on weak case typifications are drastically different by types. Gang cases are “challenging” and worthy of additional resources and time due to the serious nature of the crime, while domestic violence cases are still barely viewed as criminal and in many traditional courts are seen as a waste of precious resources. Many people can rationalize why gang victims and witness are unwilling to cooperate with prosecution but few are willing to understand why domestic violence victims remain in abusive relationships and are unable to cooperate. Thus, additional research is necessary to compare the resources that are allocated to each, the typification process for each, their reputation within the court community, and dispositional data.

More needs to be done to understand why specialized domestic violence sessions do not survive in traditional court systems. When I spoke to the judges about the demise of the specialized session, they mentioned that there were a number of possible explanations for its end. Logistically, the grant had ended. Indeed, it was originally intended to support the session for five years but the court community supported it for a sixth year. Judge 1 also mentioned that the numbers of domestic violence cases being processed in the session changed over time. There were notably fewer defendants being processed for domestic violence after this five-year period. As a manager of the court, she could no longer justify using so many court resources when much fewer cases were being processed. When contemplating the reason for this change, two possible explanations were offered: 1) the specialized session had changed the battering behaviors of defendants who were no longer abusing their intimate partners; or 2) victims were no longer calling for help with domestic violence in this city because of the existence of the session. A study which looked to answer which of these explanations is most accurate is necessary for each explanation has a number of drastically different social implications. Visser, Newmark, and Harrell (2007) evaluated the specialized session and broadly found that the inter-agency collaboration was helpful when dealing with domestic violence. In response to this collaborative model, they also found that there was more consistency within the justice system in how to respond to intimate partner violence. Finally, they noted improvements in post conviction review hearings, investigation and prosecution strategies, and a greater involvement by probation. They did not investigate the drop in calls for help after the termination of the session.

The findings in this study have a number of important implications for domestic violence scholarship. Previous studies which focus on case outcomes alone miss important differences in culture that impact case processing. Cultural differences were found between these two courts

that impacted how domestic violence was perceived and discussed. Differences in case process alone were found to be significant and important. This calls for more studies which look at how the process can be an important part of the “punishment” process for domestic violence cases. Meaning, that when a case is left open for longer periods of time, and bail revocation is at risk, are batterers less likely to reoffend creating haven of victim safety and opportunities for counseling and changing the patterns of violent behavior? This study also found that there was value in having a rehabilitative model for domestic violence case processing. Studies that attempted to measure this value would be meaningful. Finally, the findings presented here should prompt additional research that further explores and challenges the laws which have perpetuated domestic violence victimization. Through this research, I found that many of the existing laws in Massachusetts impact domestic violence case processing negatively.

This study also makes a number of unique contributions to and raises questions about feminist jurisprudence. This study identified the specialized domestic violence court as a feminist model of justice. The feminist jurisprudential model affected the court’s local legal culture and case processing decisions. Recognizing an orientation to change in the community versus individual case orientation is an important product of feminist jurisprudence. This study found that the specialized domestic violence court operated under the dictates of the “connection thesis” (West, 1998). This is remarkable because most traditional courts fail to see or recognize the value in a community orientation and instead deal with the cases as they come in individually. The judges in the specialized session saw value in having batterers attend treatment rather than short periods of incarceration. They articulated that this would better serve the community they were living in if the batterer learned to refrain from violence and abuse. The specialized court elongated the process in their busy courts to ensure victim safety. Most

significantly, they communicated a message to the listening public that domestic violence is a crime and is to be taken seriously. Months after I completed this study, I spoke to the presiding judge in the specialized session about the aftermath of the domestic violence session and she mentioned a comment a defendant had made to her one day in court. He said, “I am moving out of this town...A man can’t be a man in his own house here.” Despite a large number of cases resulting in dismissals, a message about intolerance for domestic violence was clearly heard by some members of this community.

Since judges alone likely cannot successfully change the outcomes for domestic violence cases and their local legal cultures alone. It will take more than the sheer will of a couple of legal pioneers to address the problems of domestic violence. This calls into question the impact gender had on the judges in these courts. The specialized session was presided over by female judges and the comparison court male. Studies have shown that gender does impact the decisions made by judges in certain cases. Indeed, judges tend to demonstrate “male” and “female” voices when making decisions (Fox and Van Sickle, 2000). It has been shown that female judges have been more supportive of females’ claims regarding sex discrimination cases (Palmer, 2001). Broadly, this study could imply that more female judges need to be appointed to the bench in order to better protect victims of domestic violence, help to rehabilitate their batterers, and end domestic violence in their communities. At the very least, more research is needed to unveil if gender has impacted judicial decisions pertaining to domestic violence cases.

## **Policy Implications**

### **Changing Court Culture**

As a first step to changing court culture, more training is needed for judges and court workgroup members about the unique nature and importance of domestic violence cases is

necessary. While strategies for successful case investigation and prosecution are important, I found that appreciating the unique nature of these crimes and their potential lethality was paramount. When court communities conclude that these cases are weak from an evidentiary standpoint but very serious and potentially lethal, the conversations about them change. The language that is used, how they are characterized and eventually the resources that are allocated will be increased.

Additional resources need to be allocated to the investigation, prosecution, and disposition of domestic violence cases, including treatment options for batterers. Resources could include extra staff so that caseloads would be reduced. It could also include an increase in time allocation so that cases could be held open for longer periods resulting in longer periods of victim safety. Making the batterers programs affordable and available to defendants could also result in more individuals successfully completing them. Many of these things were being done in the specialized session and this study found that there were a number of positive differences in the culture of these courts and how they process cases due to the adoption of that model. Thus, increasing the number of specialized domestic violence courts nationwide might improve the processing of domestic violence cases and increase the likelihood that courts would hold batterers accountable.

The specialized session adopted a problem solving approach to case processing. The court succeeded in changing the local legal culture and going rate for domestic assault and batteries in their court. However, the normative standards for evaluating case strength and typifying cases remained the same and the passage of new laws crippled them in a way that made holding batterers accountable became nearly impossible. Additionally, more recently the grant that they were operating under ceased to exist and additional resources were no longer available

to prosecutors. This resulted in the prosecutors not fully investigating their matters and the judges becoming increasingly frustrated. Promulgation of specialized sessions or integration of specialized session practices into traditional courts could help to change how domestic violence cases are thought of and treated by the community at large

### **In Law**

Even if the changes listed above were implemented, they would not be successful without some serious consideration and action by lawmakers. Court workgroup members operate, to some extent, within the confines of the law. Passing laws that make successful prosecution of domestic violence cases more difficult is akin to government sanctioning of violence against women. On a broader scale, this study questions the andocentric nature of the laws that hinder the prosecution of domestic violence cases.

The marital privilege and its availability in domestic violence cases have only served to empower the batterer and weaken the victim in the name of marriage. When one married partner is physically abusing the other, the abuser should not be shielded from prosecution because of a privilege sanctioned by law. Thus, exempting domestic violence victims from receiving the marital privilege would help reduce the victim-dependent atmosphere ripe with intimidation by batterers. As stated previously, exemptions from the use of the privilege exist for child abuse and neglect cases and should similarly exist in domestic violence cases.

Additionally, it should not be lawful for batterers and victims to enter accord and satisfaction agreements that lead to dismissals. Many of these agreements are based on fictitious civil contracts where the victims have to allege “satisfaction.” This study revealed that an apology has been accepted as sufficient satisfaction. These agreements put victims in a precarious position by granting the false power to grant criminal relief to their violent offenders.

They promote intimidation and sanction abuse. While the guidelines for judicial practice advise against their use in domestic violence cases, I found they were still being used on a regular basis in the comparison court to the detriment of victims.

The availability of the spontaneous utterance exception to the hearsay rule in domestic violence cases must be reinstated due to their unique nature. I found that prior to *Crawford v Washington (2004)* the prosecutors in the specialized session were able to go forward to trial in reliance of the admission of spontaneous utterances. After the passage of this case, they were no longer able to answer ready for trial. More cases were dismissed, fewer cases plead guilty, and less batterer's were being held accountable. *Crawford v Washington (2004)* failed to recognize the unique nature of domestic violence victimization and the importance of the admissibility of these statements. In accordance with other exceptions to hearsay, there is an indicia of reliability associated with the screams for help from terrified victims of domestic violence. Domestic violence victims often become unavailable to testify due to many conditions, including their own personal safety. The social context of this crime needs to be considered and taken seriously and these statements need to be allowed again. Using the confrontation clause as justification for not allowing these statements is unjustified when numerous other hearsay exceptions exist. Additionally, legislation which aggravates crimes when they take place between intimate partners is necessary. In an effort to fully recognize the lethality of domestic violence and acknowledge the real impact it has on the entire family and surrounding community.

### **Moving Forward**

Everyday, and in the safety of their own home, women become victims of domestic violence. They may call for help in order to prevent the escalation of violence. It is likely that arrests will be made. Soon thereafter, abusers will likely be released and the pressure is on the

victim to stay safe. The ability of courts to hold batterers accountable in most courts is dependent upon the testimony and evidence provided by the victim. The defendant and his attorney know this, and with a little help from the victim, they can easily get these matters dismissed. By regularly dismissing domestic violence cases courts continue to send the message to communities that abuse is acceptable. There is little that anyone can do about it. Mandated arrest policies cannot cause the court communities to hold batterer accountable, especially when more recent case law continues to make successful prosecution near impossible.

Court communities are overburdened. The goal of most courts is to process the business of the day as quickly and efficiently as possible. In these busy courts, if a victim is begging to have the case dismissed, if she does not appear to be credible, if the case lacks evidence and she is “satisfied” to have the matter dropped it seems reasonable that such difficult cases are dropped. The courts have been relying on this rationale for decades. It has become the internalized norm. It serves the court’s goal of efficiency for these cases have always been “typified as weak” and the victims “unreliable.”

Specialized domestic violence sessions have the potential to change this. They can change the focus from case efficiency to social justice. They create new norms and attempt to end this cycle. With additional resources and more highly trained court workgroup members the manner in which domestic violence cases have been typified and disposed of can begin to change. The language that is used and the conclusions that are drawn from the lack of evidence can be more positive and community oriented. They will not be successful however, without the help of lawmakers who have a responsibility enact legislation that sends a message of non-tolerance pertaining to domestic violence cases. The andocentric nature of our current laws which fails to recognize the experiences of women and gender imbalances in society continues to

perpetuate the problems. As this study has shown, real change in the successful processing of domestic violence cases requires change in both court cultural and legal changes in order to end domestic violence.

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Appendix A  
Table of Cases

*Commonwealth v. Brusgulis*, 406 Mass. 501, 505. (1990)  
*Commonwealth v. Diaz*, 422 Mass. 269, 274 (1996)  
*Commonwealth v. DiPietro*, 373 Mass. 369, 382 (1977)  
*Commonwealth v. Guzman*, 446 Mass. 344 (2006)  
*Commonwealth v. Maillet*, 400 Mass. 572, 578 (1987)  
*Commonwealth v. Martin*, 423 Mass. 496 (1996)  
*Commonwealth v. Sueiras*, 72 Mass. App. Ct. 439 (2008)  
*Crawford v. Washington*, 54 U.S. 36 (2004)  
*Hammon v. State*, 829 NE2d 444 (2005)  
*In Re Brogna*, 509 F2d. 24 (1978)  
*Matter of C.J. Subpoena*, 447 Mass. 88, 97 (2006)  
*Sheppard v. Attorney General*, 409 Mass. 398 (1991)  
*State v. Davis*, 64 P3d 661 (2003)  
*Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

Appendix B  
Legally Relevant Materials

Department of Public Health, Batterer Intervention Program Fee Structure, 7.2

Massachusetts Criminal Model Jury Instructions, 2009 Edition

Massachusetts General Laws 265§13A

Massachusetts General Laws Chapter 233 §20

Massachusetts General Laws Chapter 276 § 55

Massachusetts General Laws Chapter 278 §18

Massachusetts Guide to Evidence, (2008-2009 Edition) Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, Section 511: Privilege Against Self-Incrimination.

MA Guidelines for Judicial Practice, (January 4, 2010). Commentary 6:01

MA Guidelines for Judicial Practice, (January 4, 2010). Commentary 8:12

Massachusetts Rules of Criminal Procedure. 13. 309, 310 (1991)

Appendix C  
Strong Case Indicator Scale

1. Cases involving guns that have been recovered
  - Very Strong; Strong; No Effect; Weak; Very Weak
2. Cases involving drugs with a valid drug cert
  - Very Strong; Strong; No Effect; Weak; Very Weak
3. Cases involving eye witness testimony
  - Very Strong; Strong; No Effect; Weak; Very Weak
4. Cases involving serious injuries
  - Very Strong; Strong; No Effect; Weak; Very Weak
5. Cases involving photographs of injuries
  - Very Strong; Strong; No Effect; Weak; Very Weak
6. Cases involving photographs of crime scene
  - Very Strong; Strong; No Effect; Weak; Very Weak
7. Cases involving medical records
  - Very Strong; Strong; No Effect; Weak; Very Weak
8. Cases involving 911 recordings
  - Very Strong; Strong; No Effect; Weak; Very Weak
9. Cases involving police testimony
  - Very Strong; Strong; No Effect; Weak; Very Weak
10. Cases involving EMT testimony
  - Very Strong; Strong; No Effect; Weak; Very Weak
11. Cases involving expert witnesses
  - Very Strong; Strong; No Effect; Weak; Very Weak
12. Cases between strangers
  - Very Strong; Strong; No Effect; Weak; Very Weak

13. Cases between intimate partners
  - Very Strong; Strong; No Effect; Weak; Very Weak
14. Cases where the victim knew the defendant
  - Very Strong; Strong; No Effect; Weak; Very Weak
15. Cases where the victim has reconciled with the defendant prior to trial
  - Very Strong; Strong; No Effect; Weak; Very Weak
16. Cases where the victim is financially dependent on the defendant
  - Very Strong; Strong; No Effect; Weak; Very Weak
17. Cases involving a child's testimony
  - Very Strong; Strong; No Effect; Weak; Very Weak
18. Cases involving a nurse's testimony
  - Very Strong; Strong; No Effect; Weak; Very Weak
19. Cases involving a neighbor's testimony
  - Very Strong; Strong; No Effect; Weak; Very Weak
20. Cases of violence between gang members
  - Very Strong; Strong; No Effect; Weak; Very Weak
21. Cases where a stranger is stalking a victim
  - Very Strong; Strong; No Effect; Weak; Very Weak
22. Cases where a stranger has raped a victim
  - Very Strong; Strong; No Effect; Weak; Very Weak
23. Cases where a stranger has raped a man
  - Very Strong; Strong; No Effect; Weak; Very Weak
24. Cases where a husband has raped his wife
  - Very Strong; Strong; No Effect; Weak; Very Weak
25. Cases where a man has raped a prostitute
  - Very Strong; Strong; No Effect; Weak; Very Weak

26. Cases where a rape is alleged and both parties are said to have been drinking
  - Very Strong; Strong; No Effect; Weak; Very Weak
27. Cases where an assault and battery occurred but no injuries resulted
  - Very Strong; Strong; No Effect; Weak; Very Weak
28. Cases where a the victim is a prostitute
  - Very Strong; Strong; No Effect; Weak; Very Weak
29. Cases where the victim is poor and uneducated
  - Very Strong; Strong; No Effect; Weak; Very Weak
30. Cases where the victim is mentally ill
  - Very Strong; Strong; No Effect; Weak; Very Weak
31. Cases where the victim is black
  - Very Strong; Strong; No Effect; Weak; Very Weak
32. Cases where the victim was drunk at the time of the incident
  - Very Strong; Strong; No Effect; Weak; Very Weak
33. Cases where the victim was high at the time of the incident
  - Very Strong; Strong; No Effect; Weak; Very Weak
34. Cases where the victim does not speak English and relies on an interpreter
  - Very Strong; Strong; No Effect; Weak; Very Weak
35. Cases involving the federal authorities
  - Very Strong; Strong; No Effect; Weak; Very Weak
36. Cases where there is dispute between what the victim told the police and what she is stating in court
  - Very Strong; Strong; No Effect; Weak; Very Weak
37. Cases where the defendant is in custody
  - Very Strong; Strong; No Effect; Weak; Very Weak
38. Cases where the defendant has a private attorney
  - Very Strong; Strong; No Effect; Weak; Very Weak

39. Cases where the defendant has a court-appointed attorney

- Very Strong; Strong; No Effect; Weak; Very Weak

40. Cases which result in a dual arrest

- Very Strong; Strong; No Effect; Weak; Very Weak