Pleas, Plea Bargaining, and Domestic Violence:

Procedural Fairness as an Answer to a Failing Process

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In 2007, I had the privilege of helping to create and then preside over an innovative domestic violence docket in the rural county of Bennington, Vermont: the Bennington Integrated Domestic Violence Docket (IDVD). With few financial resources but energetic justice system and community support, we created a holistic, collaborative court process, which combined misdemeanor criminal domestic violence cases with related family docket protective order cases, as well as some related divorce and parentage cases in a same-day/one-judge, conferencing-type docket. Subsequent studies by the Vermont Criminal Research Group (VCRG) showed significantly improved outcomes for those who found themselves caught in the formal justice system due to the seemingly unremitting impact of domestic violence (DV). In a recidivism study comparing statewide traditional criminal court treatment of misdemeanor DV cases with treatment of similarly situated cases in the IDVD docket over a three-year study period, the rate of DV criminal recidivism decreased by over 40% while the rate of recidivism for any new crime decreased by over 50%.[1] In 2014 this program was duplicated in another county, and a preliminary research note by the VCRG showed no criminal recidivism during an initial eleven-month period.

There is little dispute that historically our traditional justice system's attempts to address domestic violence have been something less than successful. Analyzing why the Vermont IDVD programs were successful in substantially reducing criminal recidivism for one of our most intractable types of criminal behavior may provide a roadmap for addressing other types of criminal behavior, as well. An overview of the details of the full Bennington IDVD was published by the National Center of State Courts in the 2013 edition of *Trends in State Courts*. There are many lessons to be learned from the IDVD experiments in Vermont. For this article, the focus is on one of those lessons: How purposely incorporating the essential components of procedural fairness into DV criminal plea hearings can make a significant difference.

Few would argue that our traditional plea-bargain-based criminal justice system has effectively served victims, offenders, and their families. Yet, for various reasons, despite the best efforts of many justice system players, this process has generally remained unchanged since crimes of domestic violence first began to be addressed by the criminal laws. The IDVD programs took a fresh look at the critical process by which the vast majority of domestic violence criminal cases are resolved by our criminal courts—the plea-bargained/plea-sentencing hearing, as well as examining how the principles of procedural fairness could be incorporated into that process to begin to achieve better outcomes for all. To best appreciate the reasons for why and how the successful IDVD criminal plea process developed, a brief review of how our traditional criminal justice system has addressed domestic violence cases is helpful.

If the criminal justice system were to operate as designed, it would first effectively and clearly determine culpability of a person charged with a crime of domestic violence, through either a trial or clear admission of guilt by the defendant. Once culpability was established, then and only then the court would conduct a full sentencing hearing and, based on all the background information provided, determine an appropriate sentence, considering the established goals of sentencing in light of the history and context of the violence. The judge would know whether the violence arose out of the dynamics of a couple's separation and never had occurred previously (Separation Instigated Violence), or was one event out of many minor incidents of violence between couples who are unable to resolve conflict without both becoming physically aggressive (Situational Couples Violence), or was part of a pattern of abusive coercive controlling behavior by one toward the other (Controlling Coercive Violence). In other words, before a defendant would be sentenced, the process would make clear to the judge exactly what happened and why, as well as which of the very different types of intimate partner violence needed to be addressed.[2]

Those of us who work in the real criminal justice system, however, know that individuals charged with crimes of domestic violence (or any crimes) rarely go to trial, rarely have guilt established beyond a reasonable doubt, and rarely are sentenced after a full sentencing hearing where all relevant information is provided to the judge. Seldom do judges have a clear understanding of what happened and why, or enough background and context to know what type of violence needs to be addressed. Seldom do judges have sufficient reliable information upon which to base individualized sentencing decisions, especially in misdemeanor cases.

Pleas account for nearly 95% of all criminal convictions in

Footnotes

1. See http://www.crgvt.org/reports.html; David Suntag, *Procedural Fairness, Swift and Certain Sanctions: Integrating the Domestic Violence Docket, in* TRENDS IN STATE COURTS 2013 (C. Flango et al., eds.), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2003.
2. Different types of domestic violence include Controlling Coercive Violence, Separation Instigated Violence, and Situational Couples Violence, only the first of which involves a pattern of intimidation and violence intended to control the victim. REBECCA STAHL & PHILIP M. STAHL, REPRESENTING CHILDREN IN DEPENDENCY AND FAMILY COURT: BEYOND THE LAW (American Bar Association 2018); Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence*, 46 FAM. CT. REV. 476.

the country[3] and most often by plea bargains, where the determination of criminal culpability and sentence are arrived at by agreement of the prosecution and defendant, not by a jury or judge. "[Plea bargaining] is not some adjunct to the criminal justice system; ***it is*** the criminal justice system."[4]

In my home state of Vermont, for example, the Vermont Center for Justice Research looked at five years of data regarding cases of domestic violence between 2008 and 2013. Of the 8,693 misdemeanor domestic violence (DV) charges filed, only 1.5% went to trial, and of the 3,383 felony DV charges, 2.3% went to trial. All others were either dismissed or resolved by plea, usually as part of an agreed-upon sentence in a plea bargain. It is clear that the plea/sentencing hearing has become ***the*** critical proceeding in the vast majority of DV criminal cases. Many have critically written about the general ineffectiveness of our plea-based system, as well as the motivation and voluntariness of some of those entering plea agreements and how such agreements do not always reflect actual guilt or an appropriate sentence for any offenses.[5]

Despite the critical significance of plea/sentencing hearings, such hearings in misdemeanor cases especially are usually short affairs, with little inquiry by the judge and even less detail in the parties' explanations for the basis of the agreement. In jurisdictions which permit no-contest pleas, there is not even an acknowledgment of guilt but rather only a statement of willingness to accept a sentencing offer from the prosecution by not contesting the charge. In fact, the judge is not even required to determine whether there is a factual basis for such a no-contest plea.[6] In effect, cases are resolved without any acknowledgment of guilt or determination that there is sufficient evidence to justify the conviction by the court. In some jurisdictions, the only words uttered by the defendant are "guilty" or "no contest."

Undoubtedly, a quick process, which allows the prosecution and defendant to reach a resolution by agreement without having to detail how and why the offense occurred, makes for speedier case resolution. An overcrowded system, which has adjusted its resources to fit the current state of minimal trials, understandably tends to encourage speedy resolution without trial and with less careful searching for reasons to slow down or discover the potential inappropriateness of the agreed-upon resolution. In my years as a local prosecutor, this process also made perfect sense to me. Although the judge retained the ability to reject the plea agreement I reached with the defense, seldom did that occur. Judges rarely questioned the appropriateness of an offered plea agreement, content to move the case off the docket. In effect, I as prosecutor determined the sentence. This was true even when I was fresh out of law school and a newly minted, inexperienced prosecutor. But does it make for effective justice, particularly in DV cases?

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Often criminal DV case dispositions are subject to a "cookie cutter" approach. In many jurisdictions, there is a typical sentence (or "going rate" as Malcolm Feeley wrote in *The Process Is the Punishment*, Russell Sage Foundation; Paperback ed., 1992) sought and often accepted for every misdemeanor DV criminal case, regardless of type of violence. In my state, the going rate involves some period of probation with various conditions including successful completion of a Batterers' Intervention Program (BIP), a treatment modality based on the power/control wheel. Yet, by the very nature of a standard plea bargain, driven by the name of the offense and not by the details of the event and individuals involved, individualization and its potentially positive impact on the outcome can be lost.

We now know that there are different types of domestic violence, which require different levels of intervention to be effective, making a "cookie cutter" standard response not only often ineffective, but potentially damaging or dangerous.[7] BIP programs are generally structured to address those who have engaged in controlling coercive violence (battering), where violence or threat of violence is used as part of a pattern of abusive control. With other types of violence, however, this pattern of coercive control often does not exist. Calling all "domestic violence" offenders batterers and requiring batterer's intervention, therefore, makes little sense and often does damage in cases. Seeing all victims/survivors as victims of controlling coercive violence dehumanizes and disrespects the dignity and worth of many victims. It allows judges to disregard victims' stated preferences and desires explicitly or implicitly assuming they are victims of controlling coercive violence. A cookie cutter approach tends to place all victims in a category that makes them subservient to justice system players as though judges, prosecutors, and defense attorneys know best what the victim needs despite her/his statements at times to the contrary. Of course, what victims of controlling coercive violence say in court or to the police, prosecutors, and defense counsel may very well be influenced by

3. Padilla v. Kentucky, 130 S.Ct. 1473 (2010).
4. Missouri v. Frye, 132 S.Ct. 1399 (2012).
5. Michael M. O'Hear, Plea Bargaining and Procedural Justice, Faculty Publications, Paper 557 http://scholarship.law.marquette.edu/facpub/557 at 410, FN2 (2008); Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty,* 49 J.L. & ECON. 353, 355-56 (2006) (proposing reforms to reduce risk of convicting innocent); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 HARV. L. REV. 2463, 2468 (2004) ("Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence."); Joseph A. Colquitt, *Ad Hoc Plea Bargaining,* 75 TUL. L. REV. 695, 759 (2001) (arguing that "ad hoc" plea bargains should be regulated because, *inter alia,* they "may bear little or no relationship to the charged offense or penological goals"); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure,* 49 STAN. L. REV. 547, 600 (1997) (arguing for full implementation of Federal Rule of Criminal Procedure 11 and American Bar Association Standards for Criminal Justice to prevent wrongful convictions in plea bargaining); Oren Gazal-Ayal, *Partial Ban on Plea Bargains,* 27 CARDOZO L. REV. 2295, 2299 (2006) (arguing for partial ban on plea bargaining to reduce risk of wrongful convictions).
6. V.R.Cr.P. 11(f).
7. STAHL & STAHL, *supra* n. 2.

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fear, control, and intimidation, but this is just *one* form of domestic violence. By avoiding detailed inquiry and simply accepting "standard" plea agreements, which, for example, require BIP, judges cede their sentencing authority and independent judgment to the attorneys and defendants who may have reasons for entering into the agreement unrelated to effective justice in DV cases or who may be uninformed by our evolving understanding of what is appropriate for different categories of DV.

How did we attempt to address these issues in the Vermont IDVD programs? In large part, we purposefully incorporated procedural fairness principles in plea/sentencing hearings. Burgeoning research makes clear that perceptions of fairness have a significant impact on voluntary acceptance of court orders and compliance. As explained by Prof. Tom Tyler, perceptions of fairness can be broken down into four essential components: 1. Parties have an opportunity to be heard; 2. Parties view the decision maker as trying to be fair; 3. Parties understand the proceedings including how decisions are made; 4. Parties are treated with respect and dignity. If parties leave a court process that accomplishes these key procedural fairness principles, they are significantly more likely to accept and voluntarily comply with resulting court decisions and orders.[8]

By providing for voice to defendants and their victims, ensuring that both understood the process and decision making, treating both with respect, and demonstrating fairness to both, we began to move criminal DV cases out of the cookie cutter, "just get it done" approach in place for so many criminal cases. A closer look at the IDVD method provides some examples of how even small changes can make significant improvements.

IDVD CRIMINAL CASE PLEA PROCESS

The process by which pleas were taken and sentence imposed by the IDVD judge in these agreed-upon criminal case resolutions was designed to be more thorough than often occurred for misdemeanor pleas in the more crowded regular criminal docket. The plea/sentencing process proceeded as follows:

First, before taking the bench, the judge reviewed any written proposed plea agreement accompanied by a required written stipulation of facts which the court would review to determine if it was sufficient to support a factual basis for the offense to be pled. If needed, the judge would meet with counsel in chambers to review the plea agreement and supporting documents and address any issues or obstacles to a plea.

Second, in the courtroom, the judge would first provide a simple "roadmap" of the process for the defendant, letting the defendant and all others in the courtroom know what will take place during the hearing, including an explanation of the reasons for engaging in that process. The roadmap process is strongly recommended by communication experts to improve understanding.[9]

Third, the judge would review the terms of the written plea agreement directly with the defendant, explaining that it was important for the court to be sure that the defendant understood the agreement fully. The judge would encourage questions if there was any confusion.

Fourth, in taking the plea, the judge would then review the elements of the crime to be pled and incorporate plain English explanations of each element of the offense in clear, non-technical language. For example, if pleading to a domestic assault,[10] the judge might explain that the element of "bodily injury" means any sort of physical pain, even if slight; that "family or household member" means spouses, couples who are living together or have lived together, or two people who have had a sexual relationship; and "intentionally" means on purpose.

I found that one of the most difficult explanations concerned the element of "recklessness" in the Vermont statute. Here is the definition of "recklessness" adopted by the Vermont Supreme Court:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[11]

The Flesch-Kincaid Grade Level reading index (available as part of Microsoft Word) for this paragraph is 20, meaning that to fully understand the language one would need a post-undergraduate college level of education. To improve a defendant's understanding of the mental element of "recklessness," we found it best explained once the defendant was asked how he/she hurt or tried to hurt the victim. Should a defendant, for example, acknowledge hitting the victim causing her/him pain, then the explanation of the "recklessness" element would be: "When you hit a person the way you hit her/him, you knew this carried a high risk that you would hurt her/him. You then ignored that risk and hit her/him anyway. By doing that you acted outrageously, far beyond what a law-abiding person should have done in that situation."

Further, for assault pleas, although not technically an ele-

8. Tom Tyler, Why People Obey the Law (Yale University Press 2006).
9. Kelly Tait, *Effective Communication with Self-Represented Litigants,* National Judicial College Case in Point (2011).
10. 13 V.S.A. § 1042: "Any person who attempts to cause or willfully or recklessly causes bodily injury to a family or household member or willfully causes a family or household member to fear imminent serious bodily injury shall be imprisoned not more than 18 months or fined not more than $5,000.00, or both."
11. Vermont has adopted the Model Penal Code definition of "recklessness." Model Penal Code §2.02(2)(c); *State v. Brooks,* 163 Vt. 245, 251 (1995).

ment unless the defendant brought forward some evidence of self-defense, it made sense to ascertain whether the defendant hit the victim in self-defense or for some other reason.[12] The best way to do this would be simply to ask the defendant to describe what happened, thereby allowing the judge then to determine whether there was an actual claim of self-defense. If there was, that would be explained, and the process would stop. Taking an assault plea without determining a self-defense claim may result in a defendant violating a probation condition requiring successful completion of a counseling or treatment program, due to a failure of the defendant to take responsibility for the offense, while never having been given a chance to review such a self-defense claim before conviction.

Defense attorneys are certainly not going to encourage their clients to raise self-defense claims or tell the judge "sure I hit her/him but she/he started it" when attempting to have a plea bargain accepted. Yet creating an environment where such explanations by a defendant are initially discouraged if not forbidden does nothing to further the goals of criminal case disposition in IDVD. First, if there is a real claim of self-defense, for example, the case should not resolve but should be set for trial. Second, if an insufficient claim of self-defense or provocation is mentioned, the court then has the opportunity to begin the explanation that such circumstances still do not legally excuse the defendant's conduct and that the defendant must learn an alternative to the use of violence in such situations in the future.

Only guilty pleas would be accepted, with rare exceptions. The only time a no-contest plea was acceptable was if the defendant credibly explained that due to intoxication or drug use, he/she simply had no recollection of the events but had reviewed the evidence and accepted the facts as true. So-called *Alford* pleas[13] were never accepted in IDVD.

Principles of procedural fairness upon which this process was built promoted dialogue with the defendant. The judge would provide an opportunity for the defendant to speak about the offense first by engaging in a detailed colloquy about the facts being admitted directly with the defendant. Simply asking if the defendant agreed with facts in a probable-cause affidavit, police report, or as recited by the prosecutor tended to allow for the easiest default answer of yes or no without meaningful confirmation of whether defendant understood and agreed with the facts as stated. Worse, simply accepting the defense counsel's acknowledgment of factual support for the offense being pled without direct discussion with the defendant provided no voice to the defendant. In the IDVD process, the judge would listen carefully to what the defendant said, explaining that, in turn, the judge expected the defendant to give the judge the same attention. The judge, therefore, needed at times to listen to statements of minimization, self-defense, or provocation and then evaluate their accuracy if possible. Active listening by the judge to a defendant would increase perceptions of judicial neutrality and respect toward the speaker, critical components of procedural fairness.

An attempt to connect with the defendant in some way is important to creating an environment that increases the chance of the defendant hearing and really understanding the import of the judge's message. We found that defendants more readily grasped the short- and long-term impact of domestic violence committed by him/her when children were part of the discussion, whether the children were the offspring of the offender and victim or were the children of only one of them. We emphasized that the key obligation of the defendant while on IDVD probation, which would be strictly enforced, was to make sure that no child would witness further violence or grow up in a home where there was any violence upon or by a parent. Should the victim be present at this hearing, something which the program attempted to encourage by integrating the family docket protective-order hearings, having both parents hear the same message tended to increase future compliance. In my experience, there were times when allowing for this discussion caused a defendant to reveal his/her own childhood abuse or the abuse in his/her family while growing up. Above all, the court must avoid demonizing the defendant or chastising a victim in any way and must prevent the attorneys from doing so, even if the victim is not in favor of any criminal court action. Treating a defendant or victim in a manner of disrespect or without recognition of their integrity and personal perspective was self-defeating and often alienated not only the defendant from the process but also the victim. The court would nevertheless send the message that the offense was unacceptable and extremely destructive to those impacted, especially children, and would not be tolerated.

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Another method of ensuring the defendant, prosecution, and court were addressing the same facts at the plea/sentencing hearing was for the judge to simply ask the defendant to "tell me what happened." This allowed the defendant to tell his/her story of the event despite the absence of trial, clearly providing the defendant with voice. There were certainly times that the defendant's recitation of the facts was not consistent with that submitted with the plea agreement, did not support the elements of the crime to be pled, or both. In my experience there were three appropriate responses to this inconsistency. First, some defendants, while disagreeing with some of the facts presented by the prosecutor, acknowledged other facts that were sufficient to support the same offense to be pled. After ensuring that the attorneys were willing to accept those facts, the plea took place but with facts that were acknowledged by all. Second, in some cases, the parties asked for a recess and worked out a different deal that accepted the defendant's facts as accurate or the defendant returned after consulting counsel with a renewed accep-

12. See State v Urbina, 115 A.3d 261, 221 N.J. 509 (NJ 2015) (court requires inquiry into factual self-defense claims during pleas in assault or homicide cases).

13. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

tance of the original facts as previously laid out by the plea agreement. Finally, when neither the first nor second alternative made sense, the case would then be set for trial. In terms of making sure that the process resulted in an actual determination of events that were to be resolved by plea and appropriate sentence, we saw this process as more helpful than simply failing to determine whether an issue of clear culpability existed to move the case off the docket.

Finally, by integrating family docket protective-order cases and, when possible, other family docket matters involving the same individuals into the same proceeding as the criminal matter, we increased the frequency of victim presence and participation at the plea/sentencing hearing. By ensuring that the victim of the protective-order matter had counsel available,[14] victims either directly or through counsel were provided with an increased opportunity to address the court during the plea/sentencing hearing and to have their protective orders adjusted to avoid any conflict with criminal-supervision conditions placed on the defendant. The presence of counsel for the victim, who during the conferencing portion of the process would have helped the court construct appropriate protective-order and criminal-probation conditions, increased victim agreement and understanding of the process and outcome. The judge also took steps to explain the conditions of supervision and protective order in open court to ensure full understanding of those requirements for all, as well as how they might be properly modified if appropriate in the future. The judge would invite questions from defendant, victim, and their counsel to ensure absence of any confusion. There are many other opportunities and likely many different ways during a plea/sentencing hearing to allow for the defendant's voice as well as the victim's, but only if the judge understands the importance of doing so and is prepared to deal constructively with whatever is said.

The fact that one program that incorporated the essential components of procedural fairness at the plea/sentencing phase saw significant reduction in recidivism rates for domestic violence says much for this method. By doing so, judges can come closer to learning exactly what happened and why, thereby gaining better insight into the type of violence involved and the best sentence to address it. It is long past time to return the cookie cutter to the kitchen drawer and take it out of the courtroom.

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14. In the IDVD programs established in both counties in Vermont, we had the services of an organization named "Have Justice Will Travel," which provided free legal representation for protective-order victims at the integrated hearings, providing voice to the victim.