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Breaking Up With the American Adversarial Approach in Criminal Domestic Violence Adjudication

Tess Berkowitz

I. INTRODUCTION

This paper takes the position that for survivors of domestic violence to be properly served by the legal system, such legal service must be made accessible through trauma-informed care. This includes trauma-informed care for both for the survivor and the abuser. This paper leaves to another day the topic of exactly what "justice" in such cases ought to be. However, it takes the position that true "justice" should not be sought in a system that was not made to address this specific kind of violence and fact worsens the resulting trauma. This paper asserts that the American adversarial system, regardless of different attempted safeguards, is unable to deliver justice in a trauma-informed manner. This paper argues that, should certain hallmarks of the inquisitorial approach be integrated into the adjudication of domestic violence, survivors, defendants, and society, in general, would benefit greatly. These elements include adopting a free proof approach to discovery, shifting the contest mentality between the prosecution and defendant to one focused on seeking truth and resolution, performing investigative interviewing of parties by a neutral trauma-informed fact-finder, and addressing domestic violence in a rehabilitative, rather than punitive, manner.

For the purposes of this paper, domestic violence is treated as a form of gender-based violence against women.[1] The term "women"

[1] Domestic violence can be, and is, committed by women against men, women against women, and men against men, as well as by and against non-binary and transgender persons. The mainstream American reckoning and criminalization of domestic violence is inherently tied to gender-based oppression against cisgender, heterosexual women, which itself is reflective of further oppression upon other groups. This paper does not intend to devalue other presentations of domestic violence nor other societal prejudice that contributes to domestic violence such as race, class, sexual orientation and gender identity. *See* Miranda Pilipchuk, Specters of Rape, Illusions of Justice: Sexual Violence Tropes and the Carceral System (Apr. 2021) (Ph.D. dissertation, Villanova University) (ProQuest) (explaining how the trope of the ideal victim of domestic violence is used by both the media and the

used throughout this paper indicates all persons who are female-identifying. However, the ultimate proposal - to replace certain rules inherent with the adversarial framework with inquisitorial system approaches - would benefit survivors of domestic violence of all sexualities and genders. Additionally, the use of the term "domestic violence" is intended as an umbrella term. Beneath this umbrella are various kinds of specific behavior: emotional abuse such as harassment and terroristic threats, as well as physical acts such as assault, sexual assault, and stalking. These behaviors are considered "domestic violence" when they occur between parties who have an intimate or familial relationship. This paper focuses primarily on domestic violence between intimate, romantic partners. It is also important to note that the above-listed examples of domestic violence are stipulated in criminal codes as crimes.[2] There are other acts of domestic violence that are not touched on in legislation, but also cause lasting harm to victims. These include financial control, social isolation, tactics to diminish one's self-esteem, among a myriad of other behaviors.[3]

This paper begins with identifying the gray area in which American society sees survivors of domestic violence. Impacted by factors such as race, victim-blaming and biases against women who have suffered abuse, current American culture is reflective of a holistic devaluation of women. This paper illustrates such with the case of R. Kelly and his repeated and allowed abuse of women, both adult, and underage.

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criminal justice system as a tool for white supremacy and cis-hetero dominance); *see generally* Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender*, 11 VIOLENCE AGAINST WOMEN 38, 39-40 (2005) (addressing the incongruities between intersectional feminism and the historic mainstream rhetoric surrounding gender-based domestic violence).

[2] *See* N.J.S.A. § 2C:25-19(a).

[3] *See Abuse Isn't Always Physical*, AVON & SOMERSET POLICE DEP'T, https://www.thisisnotanexcuse.org/domestic-abuse/abuse-isnt-always-physical/ (last visited Feb. 18, 2023).

Part Two breaks down the process by which domestic violence became criminalized. Understanding this history helps explain what makes domestic violence different from other kinds of crime, and thus, its inability to be properly addressed or remedied within the constraints of the American adversarial criminal justice system. This requires a comprehensive analysis of the historically strained relationship between the criminal justice system and intimate partner violence, specifically violence against women. The history behind the feminist push to require law enforcement to take domestic violence seriously depicts a trade-off of sorts: physical police protection in exchange for adherence to the formalities and constraints of the adversarial system of justice, even at the victim's expense. That cost however, is outweighed by the other side of the scale: the deadly consequences of domestic violence. With this police protection came a push to condemn domestic abusers, but nearly three decades since the passage of the Violence Against Women Act (VAWA),[4] the societal value and trust in women's stories has not shifted far.

Part Three of this article explains the traumatic effects of domestic violence upon survivors. It further explains trauma-informed care and the need for such in order to prevent further traumatization of those seeking the kind of justice our system has to offer.

Part Four breaks down exactly how the adversarial model is unable to serve the specific needs of survivors, the overwhelming majority of whom have experienced trauma as a result of their experience with domestic violence. Such individuals are at a high risk of re-traumatization should they comply with prosecutorial action.

II. THE PROBLEM IN CONTEXT

In January 2019, Lifetime released a six-episode docuseries entitled *Surviving R. Kelly*, which, through journalists' and survivors' first-hand accounts, detailed the grooming, sexual assault and domestic violence committed by Robert "R." Kelly, a widely beloved Grammy-

[4] Violence Against Women Act, 42 U.S.C. §§ 13925-14045d (1994).

award winning recording artist.[5] Not only did the docuseries give survivors a platform to explain the various forms of abuse that they were subjected to, but it also highlighted how many of these facts were known to the public, yet did not seem to tarnish his image.[6] Tracii McGregor, a media and music executive recounts, "It's strange. You have R. Kelly performing at the opening ceremonies of the [2002] Olympics, and at the same time that there is this sex tape [of him allegedly sexually abusing an underage girl]."[7] There were also questions in the media at that time about the safety of his wife and if she was also a victim of his abuse.[8]

R. Kelly was indicted on 21 counts of child pornography in 2002, however legal action related to his abusive sexual behavior spanned back as early as 1996.[9] After over six years of delay and a jury trial, he was ultimately found not guilty of any crime in 2008.[10] Of the prosecution's fourteen witnesses who identified the victim as underage, one was another alleged survivor of Kelly's abuse.[11] The defense impeached her credibility with accusations of extortion and went so far

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[5] *Surviving R. Kelly* (Lifetime television broadcast Jan. 3, 2019) (Season 1); *see also Surviving R. Kelly*, IMDB, https://www.imdb.com/title/tt8385496/ (last visited Jan. 25, 2023).

[6] Shani Saxon, *'Surviving R. Kelly': Powerful Docuseries is a Reckoning for the Singer – And Us*, ROLLING STONE (Jan. 3, 2019, 12:37 PM), https://www.rollingstone.com/tv/tv-features/surviving-r-kelly-lifetime-docuseries-review-774317/.

[7] *Surviving R. Kelly: Sex Tape Scandal* (Lifetime television broadcast Jan. 4, 2019), at 24:30.

[8] *Id.* at 29:35.

[9] Mark Savage, *R. Kelly: The History of Allegations Against Him*, BBC (June 29, 2022), https://www.bbc.com/news/entertainment-arts-40635526.

[10] David Streitfeld, *R. Kelly is Acquitted in Child Pornography Case*, N.Y. TIMES (June 14, 2008), https://www.nytimes.com/2008/06/14/arts/music/14kell.html.

[11] *Id.*

as to compare her to Satan.[12] A former juror recalled, "I just didn't believe them, the women. I know it sounds ridiculous. The way they dress, the way they act. I didn't like them . . . I disregarded all what they said."[13] *Surviving R. Kelly* pulled the curtain back on the reality that women who have suffered domestic violence are victim-blamed and not seen as credible.[14] It also highlighted society's complicity with the treatment of survivors and denial of their experience, especially that of black women.[15]

Two weeks after its original airing, Kelly was dropped by his record company and his concerts were cancelled.[16] Less than two months later, he was charged in Chicago state court with 10 counts of child sexual abuse.[17] Later that year on July 11, 2019, the U.S. District Court in Chicago returned a 13-count federal indictment, which included producing and receiving child pornography as well as conspiracy to intimidate survivors and obstruction.[18] The next day, on July 12, 2019 he was charged by federal prosecutors from the Eastern District of New York with racketeering and eight additional counts of

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[12] *Id.*

[13] *Surviving R. Kelly: The People vs. R. Kelly* (Lifetime television broadcast Jan. 4, 2019), at 30:31.

[14] Streitfeld, *supra* note 10.

[15] Macy Freeman, *Their Outrage Helped Spark a Movement Against R. Kelly. What Next?: A Q & A with #MuteRKelly Co-founder Kenyette Tisha Barnes*, THE LILY (Jan. 14, 2019) https://www.thelily.com/their-outrage-helped-spark-a-movement-against-r-kelly-what-comes-next/.

[16] Savage, *supra* note 9.

[17] Troy Clossen, *A Timeline of R. Kelly's Downfall, Three Decades in the Making*, N.Y. TIMES (Jun. 29, 2022) https://www.nytimes.com/2022/06/29/nyregion/r-kelly-timeline-charges-allegations.html.

[18] *Recording Artist R. Kelly Arrested on Federal Child Pornography and Obstruction Charges*, U.S. ATTN'Y N.D. ILL. (Jul. 12, 2019) https://www.justice.gov/usao-ndil/pr/recording-artist-r-kelly-arrested-federal-child-pornography-and-obstruction-charges.

violations related to sex trafficking.[19] In August 2019, two counts of prostitution with a person under the age of 18 were brought against Kelly in Minnesota state court.[20] The movement, #MuteRKelly, which had been active since 2017,[21] gained national traction with the release of the docuseries.[22] Over the course of the three-night premiere, the amount of air play of R. Kelly's music was cut by more than half.[23] These reactions reflect a national community consensus turning against this kind of behavior that had not existed in decades prior.[24] However, the story of R. Kelly is an excellent example of how societal views of domestic violence are still in a state of flux. Even with a powerful wave of accountability and rebellion against him after the release of the docuseries, survivors were still painted to be "groupies" who took advantage of the singer's money and "pined to be with him."[25] There was also public push to discredit and blame the survivors,[26] triggering a

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[19] Sonia Moghe, *R. Kelly Convicted of Racketeering and Sex Trafficking by a Federal Jury in New York*, CNN (Sep. 28, 2021, 5:52 AM) https://www.cnn.com/2021/09/27/us/r-kelly-verdict/index.html.

[20] *Id.*

[21] Jason Newman, *'This Isn't the End': #MuteRKelly Co-Founder Finds 'Relief and Sadness' in Verdict*, ROLLING STONE (Sept. 29, 2021), https://www.rollingstone.com/music/music-news/mute-r-kelly-guilty-verdict-1234272/.

[22] Michael Blackmom, *The #MuteRKelly Campaign Appears to Be Succeeding at US Radio Stations After the Lifetime Doc*, BUZZFEED NEWS (Jan. 28, 2019, 3:25 PM), https://www.buzzfeednews.com/article/michaelblackmon/r-kelly-radio-mute.

[23] *Id.*

[24] *Id.*

[25] Char Adams, *R. Kelly's Defense Used a Strategy to Prop Up Famous Men and Shame Female Fans*, NBC NEWS (Sept. 29, 2021, 10:26 PM), https://www.nbcnews.com/news/nbcblk/r-kellys-defense-used-strategy-prop-famous-men-shame-female-fans-rcna2432 (citing Letter from Douglas Anton, Attorney for R. Kelly, to New York Judge (July 2019)).

[26] *See id.*; *see also Surviving R. Kelly – Part II: The Reckoning: It Hasn't Stopped* (Lifetime television broadcast Jan. 2, 2020), at 15:21 (R. Kelly's

need for creators to produce a second installment in the series.[27] Commenting on cultural and societal criticism of R. Kelly survivors, who are predominately black, one of the #MuteRKelly Founders reflected, "We call girls fast. We attach these precocious labels on them. So we have a problem when it comes to protecting black girls and how we're framing . . . black women as victims."[28] The intersection of race and gender-based biases result in harsher societal judgement upon minority victims.[29] Women are judged based on their proximity to society's idealized, innocent, victim.[30] While white women are by default closer to fitting this mold than minorities,[31] they are still subjected to an elusive, impossible standard that is rooted in sexism.[32]

III. THE CRIMINALIZATION OF DOMESTIC VIOLENCE

When analyzing the foundations of the American prosecutorial system, it is clear that victims of crime were not intended to be the focus

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lawyers released a statement that "'the accusers have not acted like victims at all' because 'they have used their accusations to promote contemporaneous books, albums, and speaking tours'").

[27] Andre Wheeler, *Surviving R Kelly Producers: 'We Wanted to Explain Why You Shouldn't Blame Survivors'*, THE GUARDIAN (Jan. 8, 2020, 5:14 PM), https://www.theguardian.com/music/2020/jan/08/surviving-r-kelly-directors-interview (a third docuseries has since been released).

[28] Freeman, *supra* note 15.

[29] Pauline K. Brennan & Danielle C. Slakoff, *White, Black, and Latina Female Victims in U.S. News: Multivariate and Intersectional Analysis of Story Differences*, 13 RACE & JUST. 155, 171-75 (2023).

[30] *Id.* at 158-59, 173.

[31] *Id.*; *see also* Hillary Potter, *Intersectional Criminology: Interrogating Identity and Power in Criminology Research and Theory*, 21 CRITICAL CRIMINOLOGY 305, 315 (2013). *See also* Philipchuk, *supra* note 1, at 71.

[32] *See* Philipchuk, *supra* note 1, at 62-73; *see also* Brennan & Slakoff, *supra* note 29, at 157, 171.

of the legal pursuit.[33] Common rhetoric frames prosecution around the concept of "fighting for victims" and this mentality has been shown to be present in prosecutorial culture; this is a significant shift from before the turn of the century.[34] However, criminal proceedings are a mechanism intended for the government to address the morally deviant behavior of defendants.[35] The injured party in a criminal proceeding is the government – not the victim.[36] The emerging rhetoric of "victims' rights," and the criminal justice system as a tool to achieve justice for victims, is a contemporary phenomenon developed throughout the twentieth century.[37] Increased legislation intended to protect women and children, groups culturally viewed as vulnerable, shifted the public's view of the criminal system's role and purpose in society.[38] This was a conscious choice by twentieth century feminists.[39]

The push for the criminalization of domestic violence came as a response to the commonly accepted idea that domestic violence was a family matter.[40] Mandatory law enforcement intervention into these

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[33] *See* JONATHAN DOAK & REBECCA PROBERT, VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 1 (2008).

[34] Sarah Goodrum, *Bridging the Gap Between Prosecutors' Cases and Victims' Biographies in the Criminal Justice System Through Shared Emotions*, 38 L. & SOC. INQUIRY 257, 282 (2013).

[35] DOAK & PROBERT, *supra* note 33, at 7.

[36] *Id.*

[37] *See id.* at 1, 9-12.

[38] *Id.* at 7-8.

[39] Claire Houston, Note, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 219-21, 250 (2014).

[40] *Id.* at 253, 265 n.364; Leigh Goodmark, *Should Domestic Violence be Decriminalized*, 40 HARV. J. L. & GENDER 53, 60 (2017); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the System but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 195-97 (2008).

perceived private spaces was a focus of many feminist activists to keep women alive.[41] When considering the government's historic inaction in domestic violence matters as an allowance and perpetuation of female oppression, to require legal action by the state can be seen as a way to combat and reverse social, patriarchal norms.[42] Thus, the criminalization of domestic violence, and subsequent civil litigation to ensure such legislation was enforced,[43] was a feminist movement to not only deter abusers, but also to neutralize the social power dynamic between the female victim and the male offender, increasing women's social value.[44] Criminalization as the primary one-dimensional solution to this problem has been reaffirmed time and time again in both federal and state legislation and political rhetoric.[45] This is not a unique response. Culturally, the United States rejects the concept of government intervention through social services.[46] Rather, it embraces criminalization, and subsequently mass incarceration, as a response to social problems.[47]

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[41] Houston, *supra* note 39, at 252-53.

[42] *Id.* at 256; Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 12-13 (1978). *See generally* Melissa L. Breger, *Reforming by Re-norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 185 (2017) (explaining the symbiotic relationship between cultural values and the criminal justice system, specifically in the context of domestic violence and gendered, societal norms).

[43] Woods, *supra* note 42.

[44] Houston, *supra* note 39, at 259 (quoting Pauline W. Gee, *Ensuring Police Protection for Battered Women: The* Scott v. Hart *Suit*, 8 SIGNS 554, 555); Goodmark, *supra* note 40, at 60.

[45] Houston, *supra* note 39, at 261-68; Goodmark, *supra* note 40, at 54-55.

[46] Goodmark, *supra* note 40, at 69-70.

[47] *Id.* at 64 n.54 (citing Jeremy Kaplan-Lyman, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 179 (2012) (explaining neo-liberalism's exception to government intervention for punishing crime)).

The feminist wave that initiated the criminalization of domestic and sexual violence against women is inherently a shift to a victim-oriented approach within American criminal prosecution.[48] The rooted purpose of the push to establish criminal charges for domestic violence against an abuser was centered around aiding the individual victim, not vindicating society.[49] At the time of this wave, American culture did not value women as equal members of society.[50] Women still have yet to reach social equity , especially in the sphere of family law and domestic violence.[51] This is seen in current and historic litigious strategies and law enforcement policies enacted to hold the criminal justice system to this legislation.[52] For example, mandatory arrest and no-drop prosecution policies were born.[53] The need for such policies reflects the fact that criminalizing such violence on paper does not automatically initiate a shift in societal value of women; they are still seen as unreliable and untrustworthy testifiers to their own story.[54] Feminist rhetoric surrounding the criminalization of domestic and sexual violence focused on changing the cultural view of such actions, from private and permissible "family matter[s]" to being morally wrong.[55] As stated by President George W. Bush in 2003, "The fight

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[48] Houston, *supra* note 39, at 221, 253; *see also* DOAK & PROBERT, *supra* note 33, at 1, 9-12.

[49] Houston, *supra* note 39, at 253.

[50] LENORE E. WALKER, THE BATTERED WOMAN ix (1980).

[51] *See generally* Breger, *supra* note 42, at 174-75 (discussing the layered planes of influence, including social norms and gender inequity, which intersect and oppress women specifically in the sphere of domestic violence); Michele N. Struffolino, *The Devil You Don't Know: Implicit Bias Keeps Women in Their Place*, 38 PACE L. REV. 260 (2018).

[52] Kohn, *supra* note 40, at 196-97; *see* Goodmark, *supra* note 40, at 60-65; *see* Woods, *supra* note 42, at 13-15; *see also* Gee, *supra* note 44, at 554-55.

[53] Kohn, *supra* note 40, at 197-99.

[54] *Id.* at 199-211.

[55] Houston, *supra* note 39, at 225; *see also* DOAK & PROBERT, *supra* note 33, at 7-8; *see also* Breger, *supra* note 42, at 193-98 (discussing the influence

against domestic violence is a national movement . . . . Government has got a duty to treat domestic violence as a serious crime, as part of our duty. If you treat something as a serious crime, then there must be serious consequences; otherwise, it's not very serious."[56] This paper will also discuss how trauma-informed care can address and combat this stigma of unreliability.

Intervention of domestic and sexual violence as morally deviant behaviors, specifically through the judicial system, is inherently linked to the societal value of women.[57] Nevertheless, women have yet to reach social equity with men.[58] This is magnified by race.[59] Violence against women cannot be a crime against society if society systemically doubts, devalues, and permits violence against women, including non-

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legislation and precedential case law has on societal definitions and moral impressions of domestic violence).

[56] President George W. Bush, Remarks on Domestic Violence Prevention (Oct. 8, 2003).

[57] *See* BONNIE E. CARLSON & ALISSA POLLITZ WORDEN, PUBLIC OPINION ABOUT DOMESTIC VIOLENCE 4 (DEPT. JUST., DOC. NO. 198329, 2002); *see also* Houston, *supra* note 39, at 265-66.

[58] Woman-identifying persons experience negative gender-based implicit bias that is passed down through generations in various areas of cultural value which, in turn, contributes to gender oppression in a variety of sectors. *See* Struffolino, *supra* note 51, at 272-76; *see also* Lin Bian et al., *Evidence of Bias Against Girls and Women in Contexts that Emphasize Intellectual Ability*, 73 AM. PSYCH. 1139, 1151 (2018). *See generally* Breger, *supra* note 42, at 176.

[59] Anita Raj, *Where is Gender Equality in the United States?*, GEO. INST. WOMEN, PEACE & SEC. (Nov. 5, 2020), https://giwps.georgetown.edu/where-is-gender-equality-in-the-united-states/ (analyzing results of the 2020 U.S. Women Peace, and Security Index); *see also* Press Release, Georgetown L., Research Confirms that Black Girls Feel the Sting of Adultification Bias Identified in Earlier Georgetown Law Study (May 15, 2019), https://www.law.georgetown.edu/news/research-confirms-that-black-girls-feel-the-sting-of-adultification-bias-identified-in-earlier-georgetown-law-study/.

white women.[60] In such social contexts, a prosecuting attorney must make efforts to keep the victim in the center of the dispute and reaffirm her societal value, which for women is their likeability in a patriarchal society, for the fact finder to see the defendant's alleged actions as morally deviant.[61] Prosecutors often humanize the victim, thus encouraging the fact finder to like, possibly identify with, feel sympathy for, or even vengeful on their behalf.[62] When victims are framed as having the primary interest at stake, to punish the defendant is not restitution to society, but to the individual survivor.[63] This mentality will remain so long as violence (both sexual and domestic) against women is not seen as a crime against society as a whole. Prosecutorial good practice generally instructs prosecutors not to align themselves with the individual victim, but rather balance the three interests: the public, the victim and the defendant.[64] However, research consistently shows that the victim is the center focus for the decision maker in domestic and sexual violence proceedings.[65]

Americans generally do consider domestic violence, specifically physical forms of violence, a crime against society.[66] Additionally, there is evidence of high prosecution rates for domestic violence arrests.[67] The Bureau of Justice Statistics conducted an analysis of domestic violence convictions in fifteen counties in a given month.[68]

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[60] *See* CARLSON & WORDEN, *supra* note 57, at 3; *see also* Breger, *supra* note 42, at 182-83.

[61] Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 559-61 (2005).

[62] *Id.* at 559-61, 569.

[63] *Id.* at 561; DOAK & PROBERT, *supra* note 33, at 10.

[64] Gershman, *supra* note 61, at 561.

[65] CARLSON & WORDEN, *supra* note 57, at 63

[66] *Id.*

[67] SMITH ET AL., U.S. DEP'T JUST., NCJ 214993, STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 2 (2008).

[68] *Id.* at 1.

Domestic violence sexual assault cases were prosecuted at a rate of 89%, and domestic aggravated assault prosecuted at a rate of 66%.[69] Of those pursued, 97.5% of domestic sexual assault cases and 86.5% of domestic aggravated assault resulted in convictions.[70] These high numbers are at least partly attributed to no-drop requirements, mandatory arrests, and other measures taken to reaffirm domestic violence's status as a serious crime deserving of criminal prosecution.[71]

However, the report found that only 3.1% of domestic sexual assault convictions came from trials, leaving the remaining 96.9% a result of plea bargains.[72] Additionally, 7.1% of domestic aggravated assault convictions were the result of a trial, with the remainder from plea bargaining.[73] Therefore, while the statistics surrounding prosecution and convictions seem high, these numbers do not suggest that public opinion is shifting in favor towards victims, that more juries believe victim testimony, nor do they provide compelling evidence that the adversarial trial model is a successful tool to achieve justice for survivors. While there are multiple reasons why the criminal justice system as a whole prefers, and is largely reliant on, plea bargaining for convictions,[74] there is evidence that in cases of domestic and sexual violence, additional factors lead prosecutors to avoid going to trial on such matters.

The Bureau of Justice report found that of domestic sexual and aggravated assault charges not prosecuted, 78% of those were dismissed or not prosecuted because of a lack of victim cooperation.[75] Research also shows that stereotypes and myths surrounding victims of sexual assault are more determinative considerations to prosecutors when

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[69] *Id.* at 2.

[70] *Id.* at 3.

[71] *See* Kohn, *supra* note 40, at 211-25.

[72] SMITH ET AL., *supra* note 67, at 4.

[73] *Id.*

[74] *See generally* LINDSEY DEVERS, U.S. DEP'T OF JUST., RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 3 (2011).

[75] SMITH ET AL., *supra* note 67, at 2.

making charging decisions, rather than myths about alleged perpetrators or even the strength of the evidence at hand.[76] Thus, the permeation of victim scrutiny, even on an implicit level, is inextricably connected to the criminal justice system. This coincides with the experience of the survivors of R. Kelly; as public scrutiny and stereotyping of survivors were challenged by the broadcast, willingness to reopen and charge cases almost immediately followed.

IV. The Trauma of Domestic Violence and the Need for Trauma-Informed Care

Studies of survivors of intimate partner violence consistently confirm that there is an association between intimate partner violence and depression.[77] At baseline, women in general are at higher risk for depression than men, which is at least partially attributable to negative societal gender roles and treatment.[78] Intimate partner violence experiences for women are associated with a myriad of both physical and mental health conditions.[79] These include anxiety, depression, suicidal ideation, and PTSD symptoms such as flashbacks, nightmares,

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[76] St. George & Spohn, *Liberating Discretion: The Effect of Rape Myth Factors on Prosecutors' Decisions to Charge Suspects in Penetrative and Non-Penetrative Sex Offenses*, 35 JUST. QUARTERLY 1280 (2018).

[77] Karen M. Devries et al., *Intimate Partner Violence and Incident Depression Symptoms and Suicide Attempts: A Systematic Review of Longitudinal Studies*, 10 PLOS MED., May 2013, at 6, e1001439, https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001439. There is clear evidence of association between IPV and increased depressive symptoms and suicide attempts among women survivors. While there is not a clear association in male survivors between IPV and depressive symptoms, this may be due to the limited number of studies that include male survivors in their data pool.

[78] Janet Shibley Hyde et al., *The ABCs of Depression: Integrating Affective, Biological, and Cognitive Models to Explain the Emergence of the Gender Difference in Depression*, 115 PSYCH. REV. 291, 291, 304-05 (2008).

[79] Gunnur Karakurt et al., *Impact of Intimate Partner Violence on Women's Mental* Health, 29 J. FAM. VIOLENCE 693, 693 (2014).

emotional numbing, lowered self-esteem and shame.[80] Compared to non-victimized women, female survivors of intimate partner violence are also more likely to abuse alcohol and become drug-dependent.[81] Increased frequency of intimate partner violence correlates with greater likelihood of substance abuse, and approximately two-thirds of women in substance abuse treatment report experiencing intimate partner violence.[82]

Serious mental health conditions and symptoms stemming from sexual violence occur across most populations, and are found no matter the type or manner of assault.[83] A study published in the American Journal of Public Health found that experiences of sexual violence and interpersonal violence were associated with higher levels of PTSD, depression, and anxiety.[84] Furthermore, "[R]esults showed that the length of time since [sex] trafficking had ended was associated with reduced risk of anxiety and depression but not with any reduction in risk of PTSD symptoms."[85] Therefore, at least in the context of sexual violence, there is evidence that severe psychiatric symptoms often continue to affect victims for years after the initial trauma.[86] Approximately 63% of survivors of intimate partner violence experience PTSD, compared to lifetime estimates in the general

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[80] *Id.* at 694-95.

[81] *Id.* at 694.

[82] *Id.*

[83] April Fulton, *Building Strength and Resilience After a Sexual Assault: What Works*, NPR (Oct. 4, 2018, 9:35 AM), https://www.npr.org/sections/health-shots/2018/10/04/654151008/building-strength-and-resilience-after-a-sexual-assault-what-works.

[84] Mazeda Hossain et al., *The Relationship of Trauma to Mental Disorders Among Trafficked and Sexually Exploited Girls*, 100 Am. J. Pub. Health 2442, 2445 (2010).

[85] *Id.* at 2446-47.

[86] *Id.*

population of 1.3%-12.3%.[87] However, compare this to approximately 38%-65% of PTSD prevalence in those fleeing from war and mass violence.[88] Further, intimate partner violence has been shown to increase the odds of suicide attempts in female survivors.[89] The literature is extensive, clear, and consistent; domestic violence is directly correlated with increased serious mental health consequences for survivors.

The resulting symptoms of such can create serious credibility issues to those who are uneducated on the effects of trauma:

> For many survivors, being in a courtroom, in close proximity to an abusive partner – particularly while being instructed to review his abusive behavior in detail – constitutes a potent trigger. Instead of providing the judge [or jury] with a clear, logical narrative, a survivor may have flashbacks or feel overwhelmed by emotion. The predictable result is that she will skip, or forget, certain parts of her story – or, indeed, be unable to speak key elements of it out loud. Again, this disconnected, inconsistent testimony is in fact evidence of the truth of her narrative; to the untrained ear, however, it makes her story suspect.[90]

Trauma informed care provides services where the delivery of such reflects "an understanding of the impact of interpersonal violence and victimization on an individual's life and development . . .The absence of this understanding about the impact of trauma on a [victim]'s life is . . . the equivalent of denying the existence and significance of

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[87] Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 J. FAM. VIOLENCE 99, 116 (1999).

[88] Derrick Silove et al., *The Impact of Torture on Post-Traumatic Stress Symptoms in War-Affected Tamil Refugees and Immigrants*, 43 COMPREHENSIVE PSYCHIATRY 49, 49, 54 nn.10-14 (2002).

[89] Devries et al., *supra* note 77, at 6.

[90] Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 UNIV. PENN. L. REV. 399, 410-11 (2019).

trauma in [victims'] lives."[91] In other words, trauma-informed care provides the "trained ear."[92] This is not a treatment of psychological trauma, but rather, a promotion of trauma recovery and avoidance of re-traumatization.[93] This is particularly important in the context of domestic violence, where the experience largely has a traumatic psychological effect on a majority of survivors, as aforementioned. The philosophy behind trauma-informed services is analogized by Harris & Fallot to the Americans with Disabilities Act:

> The Americans With Disabilities Act (1990) mandated that a wide range of civic and cultural organizations construct their environments so that events are accessible to persons with a range of special needs. As a result, concerts and museums now provide wheelchair access, most theaters have at least one performance that is signed for the hearing impaired, and convenient parking at restaurants is set aside for patrons who cannot walk long distances. These organizations are not delivering specific services for persons with disabilities. Instead, by becoming "disability informed," they are making their services truly available to all people.[94]

Trauma-informed care in the context of domestic violence emphasizes individual autonomy and control; a dichotomy to the oppression a survivor endured by an abuser.[95] Additionally, such an approach requires staff to "*accept survivor's responses without*

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[91] Denise E. Elliot et al., *Trauma-Informed or Trauma Denied: Principles and Implementation of Trauma-Informed Services for Women*, 33 J. CMTY. PSYCH. 461, 462 (2005).

[92] *See* Epstein & Goodman, *supra* note 90, at 410.

[93] Elliot et al., *supra* note 91, at 462; *see also* Maxine Harris & Roger D. Fallot, *Envisioning a Trauma-Informed Service System: A Vital Paradigm Shift*, 89 NEW DIRECTIONS FOR MENTAL HEALTH 3, 3, 5 (2001).

[94] Harris & Fallot, *supra* note 93, at 5.

[95] Joshua M. Wilson et al., *Bringing Trauma-Informed Practice to Domestic Violence Programs: A Qualitative Analysis of Current Approaches*, 85 AM. J. ORTHOPSYCHIATRY 586, 588 (2015).

judgement," avoiding reactions that may shame, embarrass or elicit guilt from clients.[96] This requires cultural competency and representation to properly accomplish such for all, widely diverse clients.[97] Interviewers should allow for breaks if needed, and should be predictable and transparent in their interactions with survivors.[98] All of these behaviors foster an environment that restores the survivor's control and choice.[99]

Trauma-informed care of domestic violence matters also requires the survivor to have a leading role in the decision making and outcome of their situation.[100] In the context of criminal prosecution, this requires the utmost respect and adherence to a victim's wishes; even if that means to not prosecute an objectively strong case. This includes an understanding and respect that survivors may have many valid reasons for not wishing to pursue criminal charges. Their reasons may include legitimate threats of emotionally or physically violent retaliation by the abuser, both explicit and implicit. They may also be tied to feelings of shame or guilt that someone they still care about will be punished, a recognized desire to put the entire ordeal behind them in order to heal, past negative interactions in court, financial harm through explicit threat by the abuser or implicit result if the abuser is sentenced to prison, a desire to co-parent children, cultural values, and more.[101]

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[96] *Id.* at 589 (emphasis in original).

[97] *Id.* at 593.

[98] *Id.* at 590.

[99] *Id.*

[100] *Id.*

[101] WASH. STATE ADMIN. OFF. CT., DV MANUAL FOR JUDGES 2015 5-1 to -3 (2016).

V. DOMESTIC VIOLENCE'S INCOMPATIBILITY WITH THE ADVERSARIAL MODEL

Protecting the mental health of domestic violence victims is incompatible with the American adversarial model employed today.[102] The adversarial system itself creates a high risk of re-traumatization of victims through strategic lawyering tactics such as aggressive arguments and selective presentation of facts.[103] The process of adjudicating rape in an adversarial court has been termed "judicial rape."[104] Victims of crime generally need a space to be heard, social validation, and a sense of control.[105] Low social support is correlated with increased feelings of dejection as well as depression and anxiety. among domestic violence survivors.[106] An undesired outcome of litigation thus has potential to negatively affect a victim's mental health status and symptom presentation. Litigating one's trauma brings a public challenge to the facts of one's experience (such as if it even happened), their credibility, and it strips the survivors' control over the

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[102] Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159 (2003) ("The mental health needs of crime victims are diametrically opposed to the requirements of legal proceedings.").

[103] *See* Louise Elaine Ellison, *A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems* (July 1997) (Ph.D. dissertation, University of Leeds) at 7-8 (on file with the University of Leeds).

[104] *Id.* at 7 (citing Sue Lees, *Judicial Rape*, 16 WOMEN'S STUD. INT'L F. 11, 11-16 (1993)).

[105] *See id.* at 9.

[106] *See* Bonnie E. Carlson et al., *Intimate Partner Abuse and Mental Health: The Role of Social Support and Other Protective* Factors, 8 VIOLENCE AGAINST WOMEN 720, 738 (finding that partner support has a protective effect upon the presence of depression and anxiety among abused women); Umbreen Khizer et al., *Impact of Perceived Social Support and Domestic Violence on Mental Health Among Housewives*, 6 J. BUS. & SOC. REV. EMERGING ECONS. 1153, 1154 (2020) (this study was designed to capture mental health influenced by perceived social support and domestic violence among Pakistani housewives).

presentation of their experience(s)of such through complex procedural and evidentiary rules.[107] Offering evidence in criminal rape proceedings has been described as "gruelling" and "degrading."[108] A study of mental health professionals found that the vast majority of participants (81%) believe that rape survivors' contact with the legal system was psychologically detrimental.[109] This begs the question: why is it that the system culturally viewed as the institution to protect survivors of domestic and sexual violence, seemingly harming them further?

A. The Right to Confront One's Accuser and *Crawford*

Jurisprudential expansion of defendants' rights can also breed further opportunities for abusers to harass, intimidate, or revictimize survivors of domestic and sexual violence. This paper does not take the position that stripping such rights of defendants is the answer to survivors' obstacles to resolution; defendants' rights are vital in an adversarial framework. However, they are incompatible with providing the survivor, and the alleged abuser, a trauma-informed space to address their experience. This section outlines how the adversarial model's protections for the defendant is incompatible with trauma-informed care of survivors.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[110] In *Mattox v. U.S.*, Justice Shiras described this right as the defendant's opportunity to test the credibility of the witness's testimony through cross-examination and to allow the jury to assess the witness's credibility by observing their behavior.[111] Without the opportunity for confrontation on cross-examination, testimony from a witness outside the walls of the relevant courtroom

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[107] Ellison, *supra* note 103, at 151-52.

[108] *Id.* at 3, 89 (study compared U.K. and Netherlands rape trial processes).

[109] Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 267 (1999).

[110] U.S. CONST. amend. VI.

[111] Mattox v. United States, 156 U.S. 237, 259 (1895) (Shiras, J., dissenting).

proceedings, must fall within narrow, specific hearsay exceptions.[112] The right to confront one's accusers is so essential to the sanctity of the adversarial system, it is considered a fundamental due process right.[113] In *California v. Green*, the Court referred to cross-examination as "the greatest legal engine ever invented for the discovery of truth."[114]

The constitutionally protected right to test the credibility of a domestic violence survivor's accusation, an essential pillar to a defendant's ability to have a fair trial within the adversarial framework, is inherently incompatible with trauma-informed care. Recognizing this obstacle, twentieth-century legislators made efforts to balance the defendant's constitutional interests and the traumatic effects of trial, but only for a select population: abused children.[115] Specifically, in *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecution*, Mostellar observes that "we as a society care immensely about the treatment of children . . . because children obviously differ from adults, society is willing to rethink procedures and evidentiary rules. We begin almost with a presumption that the ground rules should be different."[116] The shift in evidentiary standards is an example of the legal system's attempt to create a trauma-informed framework that is accessible to victims and their unique struggle.[117] This was only made possible by the societal consensus that abused children are worthy of approaches that stray from the status quo and arguably infringe on defendants' constitutional rights.

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[112] FED. R. EVID. 804.

[113] *See* Crawford v. Washington, 541 U.S. 36, 42 (2004) (quoting Pointer v. Texas, 380 U.S. 400, 404-05 (1965)).

[114] California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 John Henry Wigmore, Evidence in Trials at Common Law § 1367 (3d ed. 1940)).

[115] Robert Mostellar, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecution*, 4 ILL. L. REV. 691, 692 (1993).

[116] *Id.*

[117] Harris & Fallot, *supra* note 93, at 5.

By the early 1990s, numerous state legislatures had procedures which specifically shielded child victims from the traumatic effects of cross-examination, to include courts accepting testimony of a minor witness as if they are unavailable; this pushes the bounds of due process.[118] One way to qualify for the unavailable witness hearsay exception is if the witness is physically unavailable to testify.[119] In many scenarios with minor victims, the child was physically available, but their prior testimony from an earlier date would be offered on the record, without the opportunity for the defense to cross-examine ("confront") the witness.[120] This specifically deprived the defendant of their constitutionally recognized right to test the witness's credibility and allow the jury to assess the witness as their testimony is challenged on cross-examination, as noted by Justice Shiras in *Mattox*.[121] Different legislatures varied on the requirements of the circumstances for these concessions, ranging from age restrictions of the victim, to merely having the testimony be considered "generally trustworthy," by the court,[122] to imposing a burden on the prosecution to show that "the child would suffer serious emotional or mental strain if required to testify at trial." [123] These approaches were ultimately determined to be in direct contrast to the core identity of American criminal procedure, and state regulations were systematically overturned in light of the *Crawford* decision.

Crawford interprets the Confrontation Clause of the Sixth Amendment to mean that a defendant has the right to cross-examine a witness for their testimonial statements under oath.[124] When applied to an unavailable witness's testimonial statements, *Crawford* dictates that such statements are only permitted when the unavailable witness has

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[118] *See* Mostellar, *supra* note 115, at 693-94.

[119] FED. R. EVID. 804(a)(4), (5).

[120] Mostellar, *supra* note 115, at 696-708.

[121] Mattox v. United States, 156 U.S. 237, 259 (1895) (Shiras, J., dissenting).

[122] Mostellar, *supra* note 115, at 696-97.

[123] *Id.* at 702 (citing Utah R. Crim. P.15.5(1)(h) (repealed 2009)).

[124] Crawford v. Washington, 541 U.S. 36, 53-56 (2004).

given those statements in a prior circumstance where they were under oath, and an opposing party could cross-examine that testimony.[125] The requirement for some form of confrontation reinforces the importance the adversarial system places on cross-examination. Additionally, judicial rejection of legislative attempt to protect vulnerable victims of crime from arguably the most challenging parts of the adversarial process,[126] shows that meaningful protections for traumatized victims are not a legitimate option within the adversarial framework.

B. Rape Shield Laws & Other Rules of Evidence

Generally, "Rape Shield Laws" are prohibitions against an opposing party to cross examine victims of sexual misconduct regarding their sexual history or predisposition to sexual behavior, thus preventing such information from being admitted into evidence. [127] They are a colloquial term for Federal Rule of Evidence 412 and corresponding state rules of evidence. [128] This is a reasonable blockade for clearly fallacious arguments; it is illogical to think that because someone consented to sexual contact with others in the past, that has any bearing on whether they consented in the current matter with the accused.[129] There is also a prejudicial aspect to this rule, as the litigation of rape has historically created a space for the moral condemnation of sexually active or "unchaste" women.[130] However, this is not an absolute bar to get information about the survivor's sexual history into the fact-finder's consideration, triggering both bias and subsequently further trauma and

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[125] *Id.* at 53-54. *See also* FED. R. EVID. 804(a) (explaining the hearsay exception regarding unavailability).

[126] *See* Herman, *supra* note 102, at 164.

[127] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 54 (2002).

[128] FED. R. EVID. 412.

[129] Anderson, *supra* note 127, at 54-55.

[130] *Id.* at 52-53.

shame unto her.[131] The problem is three-fold: (1) the survivor's sexual history is not factually relevant to the act or offense being litigated;[132] (2) the protection of privacy to one's sexual history proliferates the moral condemnation that sex is shameful and has an immoral connotation (therefore, if such details are admitted, it is salacious and triggers bias against the 'unchaste' witness);[133] and (3) a zealous defense attorney will attempt to bring out such bias-inducing facts, [134] and there are evidentiary loopholes which allow such.[135]

For example, rape shield law protection generally does not extend to the admission of evidence regarding sexual history between the victim and the alleged perpetrator.[136] The Rape, Abuse & Incest National Network (RAINN) reports that 33% of rapes are committed by a current or former spouse, boyfriend, or girlfriend.[137] Thus, the rape shield laws are largely ineffective in domestic violence proceedings regarding intimate partner sexual violence, as victims of domestic violence largely have had multiple, likely consensual, sexual relations with their romantic partner/abuser in the past. This effectively removes the protection from the prejudicial effect that rape shield laws were designed to provide in domestic violence proceedings involving sexual assault.[138]

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[131] *Id.* at 104 (citing multiple studies where mock jurors punished defendants less harshly when offenses were against a perceived promiscuous victim). *See also* LEE MADIGAN & NANCY GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUAL BETRAYAL OF THE VICTIM 104-05 (1991).

[132] Anderson, *supra* note 127, at 54-55.

[133] *Id.* at 56.

[134] Adams, *supra* note 25 (statement of Aya Gruber) ("The defense attorney can play into some of the worst prejudices and stereotypes.").

[135] Anderson, *supra* note 127, at 55-56.

[136] FED. R. EVID. 412(b)(1)(B).

[137] *Perpetrators of Sexual Violence: Statistics*, RAINN, https://rainn.org/statistics/perpetrators-sexual-violence (last visited Feb. 15, 2023).

[138] Anderson, *supra* note 127, at 52-53.

Additionally, while Rape Shield Laws generally prohibit testimony regarding victim's past sexual history or supposed promiscuity, in some jurisdictions, convictions of prostitution can be admitted into evidence. For example, an exception to New York's Rape Shield Law includes convictions of prostitution within the last three years.[139] Many jurisdictions also allow evidence of sexual history with third parties other than the defendant, under the rationale of relevance and impeachment rules.[140] If such sexual history is allegedly related to the episode at hand, it can be admissible for impeachment purposes to discern the victim's motivations, so long as such is more probative than prejudicial.[141]

The emotional toll on witnesses is thus the same as if there is no rape shield provision: victims must consider and potentially endure a challenge to their recount of traumatic events through the weaponizing of their sexual history and perpetuating a sexual-shaming bias in a public forum.[142] As such, they are often left to the mercy of the trial judge's discretion, and that discretion can be emotionally detrimental to the testifying survivor.[143]

Other rules of evidence create debilitating obstacles for survivors to succeed in the adversarial system. Due to the private and secretive

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[139] *See e.g.*, NY CLS CPL § 60.42; *see also Legislative Memo: The Rape Shield Reform Bill*, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/legislation/legislative-memo-rape-shield-reform-bill (last visited Feb. 15, 2023).

[140] Anderson, *supra* note 127, at 85.

[141] *See* Commonwealth v. Palmore, 195 A.3d 291, 298 (Pa. Super. Ct. 2018) (trial court erred in excluding victim's alleged past sexual history with defendant's roommate because the possibility that the victim fabricated the rape in reaction to defendant informing victim's boyfriend of her alleged transgressions was more probative than prejudicial).

[142] Anderson, *supra* note 127, at 52-53.

[143] *See e.g.*, Ellison, *supra* note 103 (generally noting the dangers of judicial discretion and its possible detriment to survivors); *see also* Campbell & Raja, *supra* note 109, at 267.

nature of many domestic violence matters, there are often no first-hand witnesses who could testify to the abuse, should the survivor decline to.[144] Hearsay rules generally prohibit statements of out of court persons to be admitted.[145] Therefore, without a victim testifying as to their first-hand knowledge, prosecutors are left with the challenge to meet their burden of proof through, often minimal, physical or admissible testimonial evidence from other sources. This paper does not extensively explore the need to rid proceedings of hearsay rules, because such limitations generally come into play when the survivor does not wish to testify. Rather, this paper takes the position that, as part of trauma-informed care, the survivor's wishes must be respected. There are a multitude of legitimate, valid reasons why a survivor may not want her abuser to face criminal charges.[146]

Additionally, character evidence rules generally prohibit admission of a defendant's prior bad acts for propensity purposes. This is to ensure that if the defendant did something unsavory in the past, judgement of that unrelated conduct will not inform the fact-finder's determination of whether or not they committed the crime at hand.[147] Such propensity evidence is seen as unfairly prejudicial, and thus, it is prohibited from admission.[148] Of important note, trials concerning sexual assault and child molestation are an exception to this virtually absolute bar.[149] In 1994, Congress passed FRE 413 and FRE 414, allowing past victims of a defendant to testify in sexual assault or child molestation trials, respectively.[150] These exceptions to the general prohibition of character evidence both bolster the victim's credibility and can also assist

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[144] Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future*, 4 UNIV. ILL. L. REV. 1115, 1116 (2003).

[145] *E.g.*, FED. R. EVID. 801.

[146] *See* DV MANUAL FOR JUDGES, *supra* note 101, at ch. 5, 1-3.

[147] *E.g.*, FED. R. EVID. 404.

[148] *See* Kovach, *supra* note 144, at 1120-21.

[149] *Id.* at 1122.

[150] FED. R. EVID. 413, 414.

prosecution in the event a victim chooses not to testify.[151] Some states, within their own rules of criminal procedure, have implemented a similar exception in the specific context of domestic violence,[152] or have extended the trial court the discretion to admit such under pre-existing exceptions.[153] In regard to constitutional challenges, courts have upheld this propensity exception based on strong policy interests to address domestic violence.[154] While this certainly paves a positive path to increase the social value in addressing acts of domestic violence and fostering an environment for survivors to explain their experience, such measures only are applicable in certain circumstances. Furthermore, even these progressive solutions do not eradicate other significant obstacles survivors face in the adjudication process.

C. Zealous Advocacy

One of the most archetypical ethical requirements of an attorney is the commitment to zealous advocacy for one's client. The American Bar Association's (ABA) *Model Rules of Professional Conduct* are not binding on states, but rather serve as a model for each state's own code of attorney ethic requirements.[155] Interestingly, the requirement for an attorney to advocate for their clients "with zeal" is not enumerated as a *rule* but rather as a comment, to Rule 1.3.[156] Comments are not requirements themselves, but rather guidelines as to how a lawyer may best comply with a given rule.[157]

Zealous advocacy has historically been both a needed shield and an unruly weapon within the legal system. Specifically to criminal

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[151] Kovach, *supra* note 144, at 1123, 1132, 1139.

[152] CAL. EVID. CODE §1109; Alaska R. Evid. 404(b)(4).

[153] *See* COLO. REV. STAT. ANN. § 18-6-801.5 (West 2002) (allowing past acts of domestic violence, including acts against persons other than the current victim, "to show common plan, scheme, design, identity, modus operandi, motive or guilty knowledge or for some other purpose").

[154] Kovach, *supra* note 144, at 1135-36.

[155] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N. 2020).

[156] MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N. 2020).

[157] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N. 2020).

defendants, the Sixth Amendment's right to counsel was significantly expanded throughout the twentieth century to include the right to *effective* assistance of counsel.[158] *Strickland v. Washington* dictates that an attorney can "deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'"[159] The Court goes on to explain, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[160] Thus, zealous advocacy, as highlighted within the *Model Rules* as a standard for legal assistance, works towards the ultimate goal of just adjudication. Culturally, it is considered a necessary and integral part of pursuing fairness, which is a pinnacle goal of criminal defendants and, holistically, the criminal justice system.[161]

Zealous advocacy can also be used distastefully, and arguably abused, by attorneys.[162] It is frequently cited as the rationale behind facially undesirable or unprofessional behavior by lawyers: "[Zealous advocacy] squeez[es] decency and civility out of the law profession," and "infects and weakens the truth-finding process and makes a mockery of the lawyers' claim to officer the court status."[163] In the context of sex crimes, the effects of such conduct can have drastic

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[158] Kit Thomas, *In Their Defense: Conflict Between the Criminal Defendant's Right to Counsel of Choice and the Right of Appointed Counsel,* 74 WASH. & LEE L. REV. 1743, 1747-48 (2017) (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

[159] *Strickland*, 466 U.S. at 686 (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

[160] *Id.*

[161] *See id.* at 689 ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is…to ensure that criminal defendants receive a fair trial.").

[162] *See* Allen K. Harris, *The Professionalism Crises- The 'Z' Word and Other Rambo Tactics: The Conference of Chief Justices' Solution,* 53 S.C. L. REV. 549, 568-69 (2002).

[163] *Id.* at 569-70 (quoting Judge Richard Curry).

consequences for victims.[164] Zealous advocacy is a vessel through which the natural consequences of the adversarial system are magnified. Scholar Judith Maute compares adjudication in an adversarial proceeding as a "game."[165] They write, "the game is actually played by aggressive competitors who gauge the restraints on their conduct through a romanticized ethic of adversary zeal . . . While the procedural game rules were written to promote fair contests and accurate, rational outcomes, their precise terms left too much discretion for the zealous advocate to violate that spirit."[166]

While standards of conduct provide a tangible framework for judges to apply to violating advocates, there is nationwide disagreement on what crosses the line.[167] Furthermore, limiting zealous advocacy, whether through court sanctions or otherwise, could cause a chilling effect on the necessary and important attorney duties of truth-seeking and fairness.[168]

Nevertheless, courts have attempted to clarify the boundary of where zealous advocacy ends and inappropriate behavior begins. However, this paper asserts that there are three primary complicating factors preventing the creation of a bright line rule as to what is ethical zealous advocacy and what is not. First, determining the limits of zealous advocacy is difficult due to the lack of a clear objective

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[164] *See* Herman, *supra* note 102, at 159 ("The mental health needs of crime victims are diametrically opposed to the requirements of legal proceedings"); *see also* Ellison, *supra* note 103, at 3, 85 (describing giving testimonial evidence in criminal rape proceedings as "grueling" and "degrading"); *see also* Adams, *supra* note 25 (quoting Aya Gruber, "Victim blaming is, kind of, a part of defending.").

[165] Judith L. Maute, *Sporting Theory of Justice: Taming Adversarial Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 30 (1987).

[166] *Id.* at 28.

[167] *Id.* at 30.

[168] Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 107 (2011).

definition of such, as well as the confusing gray area created by Rule 8.4(g). Per the ABA's *Model Rules for Lawyer Disciplinary Enforcement*, determining what actions are allowed and what are not is made by the fact finder (be it a judge or a disciplinary board) when an attorney is facing sanctions.[169] However, such a determination is far more complex in the realm of zealous advocacy (under the umbrella of "diligence") versus more cut-and-dry rules, such as conflicts of interest or misappropriation of funds.[170] Ethical versus non-ethical conduct, or civil versus uncivil behavior, are not definitions that can be defined in universally-applicable terms.[171] They are complex ideals that are inherently fact-specific, granular, and can vary widely due to their inherent subjectivity. In the adjudication sphere, this leaves little room for easily applicable precedence. Furthermore, this gray space is made more difficult to navigate due to language such as that found in *Model Rule* 8.4(g) which reads:

> It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination of the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identify, marital status or socioeconomic status in conduct related to the practice of law . . . . This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[172]

Comment [3] of *Model Rule* 8.4 goes on to explain: "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct."[173] Thus, 'legitimate advocacy' could include

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[169] MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 3 (AM. BAR ASS'N. 2020). In the context of Harmless Error Doctrine evaluations, the fact-finder would be a judge.

[170] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N. 2020). *See also* MODEL RULES OF PRO. CONDUCT r. 1.15(a) (AM. BAR ASS'N. 2020).

[171] Maute, *supra* note 165, at 17-18.

[172] MODEL CODE OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N. 2020).

[173] MODEL CODE OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N. 2020).

derogatory or demeaning verbal conduct, clearing a path for the ugly underbelly of zealous advocacy. Some might argue that there is extensive precedent based on attorney performance regarding the Harmless Error Doctrine. However, courts applying the harmless error analysis focus on how trial proceedings affected the verdict, and thus, how the decision affected the defendant.[174] This analysis is not concerned with professional conduct violations or mistakes that have detrimental effects on the witnesses, or other players involved, if they do not affect the ultimate outcome.[175] Furthermore, the standard to prove such an effect on the verdict has become higher and higher; currently, the standard is interpreted to require *overwhelming* evidence of error.[176]

Second, litigation costs associated with unraveling the varying webs of circumstances to create precedent on zealous advocacy requires channeling already scarce resources towards matters that do not directly resolve disputes.[177] Third, the *Model Rules* are not universally applied: each state has their own specific professional conduct rules. While some states, such as Colorado, have zealous advocacy within the comments as the ABA *Model Rules* do,[178] a minority of jurisdictions, namely District of Columbia and Massachusetts, have zealous advocacy enumerated within the actual rule itself.[179] Other states, such as California and New York, do not include zealous advocacy in any part

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[174] Amanda M. Chaves, *The Doctrine of Harmless Error in Criminal Cases in Massachusetts*, 18 SUFFOLK J. TRIAL & APP. ADV. 282, 287-88 (2013).

[175] *Id.* at n. 44.

[176] *Id.* at 288 (citing Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting)).

[177] *See* Campbell, *supra* note 168, at 105-06.

[178] Colo. RPC 1.3 cmt. 1 (2018).

[179] MASS. R. PROF. C. 1.3 (2015); D.C. R. OF PROF. CONDUCT 1.3(a) (2020); *see also* Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, 245 N.Y. L. J. 1, 2 (2011).

of their professional rules of attorney conduct.[180] This is part of an emerging trend throughout states to distance themselves and their ethical frameworks from the unsatisfactory connotations associated with zealous advocacy.[181] Nevertheless, even if all jurisdictions adopted the *Model Rules* verbatim, it is unlikely that such guidelines would be applied uniformly across all states, magnifying the clarity difficulties previously discussed.

This paper does not suggest that *Crawford* was a poor decision, or that zealous advocacy and other regulations in favor of defendants should be disregarded; in fact, the opposite. Within the adversarial framework, such universal standards are necessary to ensure that the parties are playing on an even playing field. However, ensuring equity and objectivity in process is not equivalent to finding out what happened and how the wrong should ideally be rectified. The adversarial system in many ways expects "that such zealous representation will not always have as its focal point a search for the truth."[182] This in turn begs the question: if such mechanisms are essential to the functioning of the American adversarial system, yet are directly counterproductive to the nuanced and convoluted web of domestic violence, and are in many ways a hinderance to finding truth to solve the issue at hand, should such matters be subjected to this system of adjudication?

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[180] *Compare* CAL. R. OF PROF. CONDUCT 1.3 (2018) (lacking any reference to zealous advocacy), *and* N.Y. R. OF PROF. CONDUCT 1.3 (2009) (omitting any mention of "zeal" or "zealous advocacy"), *with* MODEL RULES OF PRO. CONDUCT r. 1.3, cmt. 1 (AM. BAR ASS'N. 2020) (mentioning "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

[181] Saunders, *supra* note 179, at 1.

[182] Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Bias in the American Criminal Justice System*, 7 IND. INT'L COMP. L. REV. 63, 76 (1996).

VI. THE INQUISITORIAL SYSTEM: A COMPARISON

The inquisitorial system is not the "game" with rigid rules seen in American judicial procedure;[183] it is an open-ended inquiry with the goal for the government to discover truth.[184] In contrast, the goal in the American adversarial framework is a fair trial;[185] in this context, 'fair' is *assumed* to result in the truth.

There is a fear in American jurisprudence that too much judicial control could breed abuse and injustice.[186] This is supported by the constitutional right to be tried by a jury of one's peers.[187] This paper does not deny or discredit that fear. While modern discussion of bias in the judicial system focuses predominately on the jury,[188] bias of any decisionmaker is obviously problematic. Scrutiny in jury bias has been focused on its effect upon the defendant.[189] This paper takes the position that in the specific instance of domestic violence and abuse, the judicial

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[183] *See* Maute, *supra* note 165, at 30.

[184] Ellison, *supra* note 103, at 13 (quoting Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 563, 581 (1973)).

[185] Pointer v. Texas, 380 U.S. 400, 405 (1965) ("[C]onfrontation and cross-examination [are] essential and fundamental requirement[s] for the kind of fair trial which is this country's constitutional goal.").

[186] *See* Crawford v. Washington, 541 U.S. 36, 43-45 (2004).

[187] U.S. CONST. amend. VI.

[188] Guha Krishnamurthi, *The Constitutional Right to a Bench Trial*, 100 N.C. L. REV. 1621, 1639-40, 1660-69 (2022); *see generally* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias,* 44 C.T. L. Rev. 827, 836 (2012) (discussing effects prevention of juror bias and differentiating the need for such mitigation from judges' implicit bias who are bound by ethical duties and have been found to be able to mitigate such with training).

[189] Krishnamurthi, *supra* note 188; *see generally* Colin Miller, *The Constitutional right to an Implicit Bias Jury Instruction*, 59 AM. CRIM. L. REV. 349 (arguing that criminal defendants have a constitutional right to a. jury instruction regarding implicit bias and race under the Sixth Amendment.)

control over the proper treatment of such crimes is not only preferable to the defendant who may face implicit bias, but also for victims.

Within the adversarial system there is a binary winner and loser; it is a contest between two sides.[190] Like any contest, it is only truly fair to both rivals if the rules are applied in a universal manner, hence the rules of evidence.[191] The rules of evidence also serve the purpose of ensuring judicially sound and trustworthy material to be considered by the jury, who are lay persons.[192] Inquisitorial approaches to justice favor a system of "free proof," where relevant evidence may reach the fact finder, and they are trusted to determine the weight and reliability such evidence should be given when adjudicating the matter at hand.[193] Importantly, there is the opportunity for the fact finder, the person who is determining the reliability, controlling most parts of the adjudication, and ultimately rendering the decision to the dispute, to be someone educated and knowledgeable in the nature of the dispute at hand, rather than a jury of lay persons.[194]

The adversarial model is deeply engrained in the American perception of justice. The strides in due process rights of defendants throughout the Warren era "breathed life and substance into the notion of the accusatorial system," in American criminal proceedings.[195] The Confrontation Clause, *Crawford*, and arguably the vast majority of constitutional protections offered to the defendant are a definitive

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[190] PETER J. KOPPEN & STEVEN D. PENROD, ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 1-2 (2003); *see also* Maute, *supra* note 165, at 9 (describing the adversarial system as a "game"); *see also* Ellison, *supra* note 103, at 12 (describing the adversarial system as a "contest").

[191] KOPPEN & PENROD, *supra* note 190, at 2-3.

[192] *Id.* at 3.

[193] *Id.*

[194] *Id.* at 3-5.

[195] Mack, *supra* note 182, at 64.

rejection of an inquisitorial approach.[196] There is a large amount of loyalty to the Confrontation Clause, jury trials and adversarial model as a whole due to the fear of giving the government too much control over judicial outcomes.[197] Going back to the inception of American jurisprudence, the promotion of an adversarial model is an explicit rejection to the perceived abuses of English courts whose procedures encompassed an inquisitorial approach.[198] Justice Scalia takes extensive space in the majority opinion of *Crawford* to explain the injustices committed upon Sir Walter Raleigh in the 17th century, which he argued were a direct result of subjective, too-powerful judges and no standardized rules to ensure fair presentation of evidence and argument.[199]

The rules governing the adversarial model are presumably applied uniformly to reach an objectively fair result.[200] The criminal justice system, while being fair, also wants to get it right. Thus, defendants' due process rights, such as the Confrontation Clause and *Crawford* are often described as vehicles to achieve accuracy.[201] The irony is that objectivity in a system based on moral punishment is a myth due to implicit bias.[202] Statistics show extreme bias in the outcomes

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[196] Mostellar, *supra* note 115, at 752 ("[S]ubstantial evidence exists that the Confrontation Clause was meant as a ringing rejection of the inquisitorial model.").

[197] Ellison, *supra* note 103, at 13 (quoting Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 583 (1973)).

[198] *See* Mostellar, *supra* note 115, at 739-40.

[199] *See* Crawford v. Washington, 541 U.S. 36, 43-45 (2004).

[200] KOPPEN & PENROD, *supra* note 190, at 2-3.

[201] Lee v. Illinois, 476 U.S. 530, 540 (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.").

[202] Mack, *supra* note 182, at 70.

from the allegedly objective criminal justice machine based on race.[203] Despite procedural and evidentiary processes' focus on protections for the criminal defendant, minority defendants are overwhelmingly treated more harsh than White defendants in the adjudication of crime.[204] This is illustrated through sentencing trends.

The NAACP reports that one out of every three Black males can be expected to be sentenced to prison in their lifetime, compared to one out of every 17 White males.[205] A 2014 ACLU inquiry found that 71.3% of federal prisoners who were serving life without parole sentences were Black, even though approximately 13% of the population is Black.[206] This implicates at least three things. First, Black defendants are sentenced harsher when found guilty of the same crimes as White defendants.[207] Second, prosecutors are charging Black defendants with more serious crimes or adding more charging enhancements, thus carrying longer sentences, than White defendants.[208] Third, sentencing disparities suggest biased plea offerings by prosecutors,[209] as plea bargaining makes up an overwhelming majority of adjudication and convictions in the American

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[203] *See generally* ELIZABETH HINTON ET AL., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM, VERA INST. JUSTICE 2-3 (May 2018) https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

[204] *Id.* at 2; *see* also Mack, *supra* note 182, at 65-66.

[205] *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Feb. 16, 2023).

[206] AM. CIV. LIBERTIES UNION, WRITTEN SUBMISSION OF THE AM. CIV. LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING TO THE INTER-AM. COMM'N ON HUM. RTS. 2 (Oct. 27, 2014).

[207] *Id.* at 1.

[208] *Id.* at 2-3.

[209] *Research Finds Evidence of Racial Bias in Plea Deals*, EQUAL JUST. INITIATIVE (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals/.

criminal justice system.[210] Thus, even while the adversarial framework is founded on the concept of objectivity through process, the discretion of the actors in this process have caused outcomes that prove the system of adjudication is still inherently subjective.[211] While much research has been done on how these biases affect perceptions, judgements and prejudices against defendants based on race and gender, such implicit bias against the complaining witness, the victim in domestic violence matters, also informs the decisions of state actors and ultimate outcomes in judicial proceedings.[212]

While judges can be a fact finder in the adversarial model, their primary purpose is to be a passive umpire, again, focusing and maintaining the objectivity of the adjudication process.[213] As Chief Justice Roberts so famously stated at his Senate Confirmation Hearing, a judge's job is to "call balls and strikes."[214] In contrast, the inquisitorial system is primarily focused on finding out what happened in each

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[210] DEVERS, *supra* note 74, at 1.

[211] *See id.* at 1-2 ("Prosecutors have been found to use threats that coerce defendants into accepting pleas to secure a conviction when the evidence in a case is insubstantial . . . prosecutorial biases can influence the plea bargaining process, because prosecutors are given such wide latitude when they reduce charges for offenders."); *see also* Mack, *supra* note 182, at 74-75 (noting that the prosecutor holds the power for the matter to even come before the fact finder: "[B]iases and prejudices can infiltrate the decision making process [to prosecute]").

[212] *See* Breger, *supra* note 42, at 185 (citing Sherilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 447 (2000)).

[213] *See* Mack, *supra* note 182, at 78; *see also* Maute, *supra* note 165, at 14. *See generally* KOPPEN & PENROD, *supra* note 190, at 3.

[214] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.)

specific event, rather than controlling the process of discovering such.[215] In an inquisitorial approach, the judge can lead the process of questioning the accused and interviewing witnesses.[216] The prosecutor, rather than being engaged in a competition with the defense to win, is not tasked with creating a theory that they must defend beyond a reasonable doubt.[217] Rather, they merely represent the state in its discovery to find out what happened, which can include follow-up questions or suggesting additional lines of inquiry.[218] The prosecutor's role becomes more periphery compared to the adversarial framework and creates a different environment for both victim and defendant from the adversarial courtroom.[219] Defense counsel's role also shifts from protecting the defendant's rights and attempting to control the process of adjudication to seeking truth.[220] They do this through encouraging the defendant to tell the truth, as well as only intervening in the adjudication if they feel that important evidence has been overlooked. Thus, less emphasis is on protecting rights of the defendant, and more effort ensuring that the truth be found through all evidence available.[221] Simply put, everyone is on the same team and has the same goal.

VII. Applying an Inquisitorial Approach to Domestic Violence: How it Benefits Survivor, Defendant and Society

Many systems that are considered "inquisitorial" actually employ a hybrid approach.[222] As such, this paper argues that the survivor, defendant, and society as a whole, would benefit from

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[215] Ellison, *supra* note 103, at 12-13 (citing Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 583 (1973)).

[216] Mack, *supra* note 182, at 75.

[217] *See id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* at 77.

[221] *Id.*

[222] KOPPEN & PENROD, *supra* note 190, at 4.

absorbing different inquisitorial characteristics into domestic violence proceedings, while ridding some of the harmful and counterproductive elements of the adversarial approach previously discussed. This paper asserts that trauma-informed adjudication is possible when elements of an inquisitorial approach are integrated into the legal process. These include (1) removing the rigid rules of evidence for a free proof approach; (2) performing investigative interviewing of parties by a neutral trauma-informed figure and in a trauma-informed manner; (3) removing the contest mentality between the prosecution and defendant; and (4) addressing domestic violence in a rehabilitative, rather than punitive, manner.

As aforementioned, the universally applied rules of evidence in the adjudication of domestic violence do little service to domestic violence matters in court. Rather than assuming "one-size-fits-all," a free proof approach allows the interviewer to actively listen to the actor's view of the matter through their full lens. The rules of evidence are rooted in the desire to ensure reliability and relevance of the evidence presented to a jury – lay persons.[223] The rules of evidence also purport that only a certain kind of evidence is reliable.[224] This paper takes the position that with a trauma-informed leader at the helm, they are equipped with the knowledge to accurately determine the reliability of testimonial evidence and the credibility of the individual, as well as consider nuances stemming from trauma that the lay person may misinterpret or miss altogether.

Additionally, a key to fostering a trauma-informed judicial system that does not further proliferate cultural or personal harm to the survivor requires the removal of the contest mentality in domestic violence judicial proceedings. Specifically, cross-examination, protected by the Confrontation Clause and *Crawford*, is a tool used by an advocate whose one job is to break down and discredit the survivor's

[223] *Id.* at 3.

[224] *Id.*

recount of events.[225] Furthermore, professional rules of conduct require that advocate to do so with zeal, a duty owed to their client and their client alone.[226] With the free-proof approach and decision-maker working as a neutral investigator, this tension and combative nature between the parties disintegrates, and allows for an opportunity for meaningful and lasting problem-solving that can benefit both parties moving forward.

This is not to be taken as a suggestion that removing the requirement of cross-examination would eliminate bias against victims of domestic violence. Courts have historically devalued the word of female accusers in sex crime proceedings, and with a free-proof approach, certain protections, such as rape-shield laws' prohibition against evidence of a survivor's past sexual history, would no longer be present. However, a skilled and trauma-informed investigative fact finder would not seek to elicit such information the way that an opposing party looking to win a verdict would. Furthermore, with the elimination of the contest mentality and refocusing on seeking truth, determining reliability of evidence and credibility of survivors of a domestic violence matter can be done in a trauma-informed setting with the inquisitorial approach, arguably leading to a far more accurate determination.

Another essential element to the success in this shift of mentality from competition to truth-seeking is a serious reevaluation and reckoning on how we address abusers as a society. American criminal justice operates with a deterrence and retributivist mentality whose answer to perceived wrongdoings is almost entirely punitive.[227] This

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[225] Lee v. Illinois, 476 U.S. 530, 540 (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials."); Crawford v. Washington, 541 U.S. 36, 42 (2004).

[226] MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N. 2020).

[227] Daryl V. Atkinson, *A Revolution of Values in the U.S. Criminal Justice System*, CTR. FOR AM. PROGRESS (Feb. 17, 2018),

means that "those who commit certain kinds of wrongful acts . . . morally deserve to suffer a proportionate punishment."[228] It also categorizes the act of punishing a deserving party as morally good.[229] This feeds into the binary, competitive narrative of the adversarial approach: there is a winner and a loser; a morally right and a morally wrong. Harsh and expansive punishment has become accepted in American society by dehumanizing those who receive convictions for criminal acts.[230] This paper has discussed an adversarial trial regarding a crime of domestic violence to be focused around discrediting the victim. An adversarial trial is as much a competition for the defendant to be credited as human, likely also a victim of trauma, and not worthy of the extensive punishment utilized in the United States. A successful inquisitorial approach to domestic violence must reject the current American retributivist view. Incarceration, and the physical,[231]

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https://www.americanprogress.org/article/revolution-values-u-s-criminal-justice-system/.

[228] *Retributive Justice*, STAN. ENCYCLOPEDIA OF PHIL. (July 31, 2020).

[229] *Id.* Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRITISH J. AM. LEG. STUD. 263, 278 (2013) (citing IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 147 (1989).

[230] *See* Bastian et al., *The Roles of Dehumanization and Moral Outrage in Retributive Justice*, 8 PLOS ONE, 1, 9 ("When dehumanization arises in response to criminal behavior, it is likely to be associated with the individual's moral character . . . . This interpretation is supported by our finding that dehumanization was negatively related to perceived suitability for rehabilitation . . .").

[231] *See* Michael Massoglia & Brianna Remster, Special Article, *Linkages Between Incarceration and Health*, 134 PUB. HEALTH REPS. 8S (2019) (reviewing literature finding, among other correlations, elevated risk and prevalence of poor health and stress-related conditions such as hypertension and heart disease among incarcerated persons both while imprisoned and after release when compared to never-incarcerated persons).

psychological,[232] and financial[233] punishments that it carries, are far too great a pressure to hold against the defendant while simultaneously asking them to be honest and forthright in an inquisitorial proceeding. In order to move away from a contest mentality, *both* the survivor and the abuser must be viewed through a trauma-informed lens, aware of cultural, racial, and gender implicit biases; such a lens is inherently rehabilitative in nature.[234]

VIII. CONCLUSION

The adversarial contest directly contrasts with what studies and professionals show domestic and sexual violence victims what they actually need to be made "whole." The conceptualization of domestic violence as a criminal offense has been rationalized and consistently reaffirmed by the idea that justice, and thus healing, for victims can only be delivered by the legal system. Furthermore, it reaffirms the tie between criminalization and cultural morality. This legal system is overwhelmingly defined by punishment for offenders. As this paper has demonstrated, the push for criminalization within the adversarial framework of American jurisprudence has been an attempt to fit domestic and sexual violence into the only mold of justice that this system offers. However, there are consequences faced by survivors as a result of this approach. Survivors, like those of R. Kelly and other outspoken #MeToo activists are cross-examined not only in the courtroom but in society, in the court of public opinion.

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[232] Craig Haney, *Prison Effects in the Age of Mass Incarceration*, PRISON J. 1 (2012) (discussing psychological effects of imprisonment to include increased risk of suicide, and PTSD).

[233] Christian Brown, *Incarceration and Earnings: Distributional and Long Term Effects*, 40 J. LAB. RESEARCH 58, 79 (2019) (finding incarceration carries severe wage penalties after release and such penalties are relatively homogenous across both higher-income and lower-income groups).

[234] This paper leaves to another day the debate regarding decriminalization of domestic violence versus a shift from the prison industrial complex to a treatment court model of criminal punishment. *See generally* Goodmark, *supra* note 40.

This paper's goal was to widen the reader's lens and consider another tool for justice that shifts away from the contest framework of the adversarial system. The contest mentality forces both sides to dig their heels into their polar ends of the spectrum of cultural stereotypes and values. In the courtroom, this tension, magnified through zealous advocacy, proliferates the oppression of women and does not solve the epidemic of domestic violence. Rather, by changing the goal to one of understanding and truth-seeking, in a manner that respects and trusts a survivor's choices, the judicial system has the potential to be not simply a machine of punishment with empty promises of deterrence, but a tool to address and reshape cultural stigmas, and prevent further trauma to both survivors and abusers.