A Therapeutic, Preventative and Procedural Analysis of Pretrial Procedures in Criminal Law

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Introduction

95% of all convictions in state court are the result of the defendant pleading guilty. As this statistic indicates the study of therapeutic jurisprudence[1], preventative law[2], and procedural justice[3] in the criminal justice system requires a heavy focus on pretrial procedures. The author analyzes the relaxed rules that grand juries have as opposed to the court system through a therapeutic and procedural lens in part I. In Part II, victim's rights to be present at trial along with a right to be informed about alternative remedies other than prosecution are analyzed through a therapeutic and procedural lens. In Part III, plea

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[1] Therapeutic jurisprudence refers to the "[t]he study of the effects of law and the legal system on the behavior, emotions, and mental health of people; esp., a multidisciplinary examination of how law and mental health interact. This discipline originated in the late 1980s as an academic approach to mental-health law." Black's Law Dictionary (9th ed. 2009).

[2] Preventative law refers to [a] practice of law that seeks to minimize a client's risk of litigation or secure more certainty with regard to the client's legal rights and duties. Emphasizing planning, counseling, and the nonadversarial resolution of disputes, preventive law focuses on the lawyer's role as adviser and negotiator." Id.

[3] "Procedural justice refers to the empirical studies finding that, in judicial procedures, litigants' satisfaction sometimes depends nearly as much upon certain psychological factors as upon the actual outcome of the legal matter (e.g., winning or losing)." Dennis P. Stolle et al., Practicing Therapeutic Jurisprudence: Law as a Helping Profession 477 (Dennis P. Stolle et al. 2000)

bargaining domestic and sexual offenses is analyzed through a therapeutic lens with a primary focus on sentence and "charge bargaining." In Part IV, plea bargaining is analyzed through a thereaputic and preventative lens with a focus on giving prosecutors the power to offer defendants alternatives to incarceration and fines. The discussion of these issues can help to give a framework the analysis of pretrial procedures, inform law reform efforts, and criminal justice policy.

I. Grand Juries

The grand jury "serves[s] as a shield between the state and the individual, protecting the latter from unfounded criminal charges."[4]. Even though the function of the grand jury is to protect the individual, the Supreme Court has held that there are many of the accused Constitutional rights that do not attach in a grand jury proceeding. These rights include: the right to have an attorney present[5]; the exclusionary rule[6]; and Miranda warnings.[7] The argument for excluding these rights is that the grand jury serves as "an investigative body 'acting independently of either prosecuting attorney or judge.'"[8] While this was and probably still is the belief behind exclusion, it may not be entirely accurate and it may be greatly hampering procedural justice. It has been shown that "the excessive involvement of the prosecutor, the absence of judicial involvement, the lack of control over the reliability of the evidence, the

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[4] Susan W. Brenner & Lori E. Shaw, Federal Grand Jury: A Guide to Law and Practice 1 (2d ed. 2006).

[5] See Petition of Groban, 352 US 330, 333 (1957) (A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel); USCS Fed Rules Crim Proc R 6 (2011).

[6] See United States v. Calandra, 414 U.S. 338 (1974).

[7] See United States v. Mandujano, 425 U.S. 564 (1976).

[8] United States v. Dionisio, 410 U.S. 1, 16 (1973) (quoting, Strirone v. United States, 361 U.S. 212, 218 (1960)).

absence of cross-examination or other contrary evidence, and the low standard of proof prevent the jury from making a reasoned decision about the strength of the government's accusation."[9] This has been evidenced by documented cases of abuse of the grand jury system by prosecutors.[10] Overall, this raises serious questions over the independence of the grand jury.

The abuse of the grand jury system has a profound impact on procedural justice. The abuses have prevented witnesses from "being treated with respect and dignity, being heard, having an opportunity to speak and participate, and how trustworthy the authorities appear and behave."[11] In order to rebuild the grand jury function, it is important to analyze what effect if any a legislative recognition of the rights excluded would have on procedural justice.[12]

A. The Right to Have an Attorney Present

The Supreme Court has stated that"[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated

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[9] Andrew D. Leipold, WHY GRAND JURIES DO NOT (AND CANNOT) PROTECT THE ACCUSED, 80 Cornell L. Rev. 260, 288 (1995) (citing, Peter Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463 (1980); Leroy D. Clark, The Grand Jury (1975); Marvin E. Frankel & Gary P. Naftalis, The Grand Jury: An Institution on Trial (1977)).

[10] See, e.g., COMMISSION TO REFORM THE FEDERAL GRAND JURY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, infra n. 12 at 16-17 (2000).

[11] Stolle, supra n. 3, at 477.

[12] See, e.g., COMMISSION TO REFORM THE FEDERAL GRAND JURY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FEDERAL GRAND JURY REFORM REPORT & BILL OF RIGHTS, 24 Champion 16 (2000) (putting forth a Ten-Point "Federal Grand Jury Bill of Rights").

layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad."[13] The same logic applied by the Court in relation to the right to counsel at trial also applies to grand jury proceedings. Witnesses have a difficult time understanding the implications that their testimony can carry. They lack the understanding on how their testimony may result in self-incrimination, contempt, perjury, or incidental waiver of the attorney-client privilege.[14] Further, they are not in an adequate position to be able to judge whether a prosecutor or a juror is abusing their position. Even if the jurisdiction allows an attorney to stand outside the door "[m]ost prosecutors would admit that they count on the burden of leaving the room to *dissuade the witness from asserting his right to counsel."*[15] Thus, in a grand jury proceeding witnesses do not have the procedural right to be heard absent having the right to counsel. In order to rebuild the function of the grand jury it is important that there be legislation to recognize the right to counsel at a grand jury proceeding.

B. Exclusionary Rule

The Supreme Court in holding that the exclusionary rule does not apply to grand juries stated, "for the most part, a prosecutor would be unlikely to request an indictment where a conviction would not be obtained."[16] Even though one would hope this proposition was correct,

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[13] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

[14] See, COMMISSION TO REFORM THE FEDERAL GRAND JURY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, supra n. 12 at 21.

[15] Id. (citing Subcommittee on Constitutional Rights, U.S. Senate Committee on Judiciary, Reform of the Grand Jury System, Sept. 18, 1976 (94th Cong.), at 272 (statement of Charles F.C. Ruff) (emphasis added)).

[16] United States v. Calandra, 414 U.S. 338, 351 (1974).

the facts indicate otherwise. "In testimony before Congress in 2000, the Department of Justice (DOJ) stated that 99% of the cases brought before federal grand juries resulted in indictments."[17] While possible, it is highly unlikely that 99% of all cases to come before the grand jury are fit for conviction. What is likely is that the Supreme Court was correct when they recognized that the grand jury may not always be serving its historic role as an independent body.[18] This failure of independence in turn hurts the procedural trustworthiness of the Grand Jury. Additionally, it calls into question whether witnesses are being treated with respect and dignity. The lack of independence has hurt the procedural function of the grand jury so much that it has led some to conclude that grand juries should be abolished.[19] Even though this certainly would solve the problem a less drastic solution is probable. Allowing witnesses to have access to an attorney would certainly help to balance out prosecutorial overreach. Further, applying the exclusion rule to grand jury's would prevent a grand jury from "rubber stamping" an indictment on faulty evidence. By simply reintegrating these rights into grand jury proceedings it will help to rebuild

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[17] THADDEUS HOFFMEISTER, CRIMINAL LAW: THE GRAND JURY LEGAL ADVISOR: RESURRECTING THE GRAND JURY'S SHIELD, 98 J. Crim. L. & Criminology 1171, 1176 (2008).

[18] See Dionisio, 410 U.S. at 17 ("The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor...")

[19] See, e.g., Melvin P. Antell, The Modern Grand Jury: Benighted Super government, 51 A.B.A. J. 153, 155 (1965); National Comm'n on Law Observance and Enforcement, Report on Prosecution 36-37 (1931); William J. Campbell, Eliminate the Grand Jury, 64 J. Crim. L. & Criminology 174, 178-79 (1973); Richard D. Younger, The Grand Jury Under Attack, 46 J. Crim. L. & Criminology 26 (1955) (surveying efforts in England and America to abolish the grand jury).

the procedural trustworthiness of the process and make sure witnesses are treated with respect and dignity.

Assuming arguendo that the Court's trust in prosecutors to not abuse the grand jury process is correct it still creates a major problem. Ut still begs the question when a prosecutor would request an indictment that he knew a conviction could not be obtained. It seems likely that these situations would at the very least be fishing expeditions. How can a situation where a prosecutor is seeking an indictment without adequate evidence to convict be called anything else but a fishing expedition? Of course a prosecutor may also be using the indictment process for political purposes or otherwise, but at the very least [s]he is engaging in a fishing expedition. Whether it be a fishing expedition, political or otherwise, trust in the grand jury procedure demands at the least that the prosecutor may only engage in that expedition with admissible evidence.

C. Miranda Warnings

Miranda warnings are an important part to the respect and dignity that should be given to a target or subject of an investigation. In essence, they go to the bottom line of fairness to the target or subject.[20] Target[21] and subject[22] witnesses of an investigation cannot be expected to understand at the outset that they have the right to not self-incriminate. Requiring such a

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[20] See COMMISSION TO REFORM THE FEDERAL GRAND JURY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, supra n. 12 at 24.

[21] "A 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. Dept. of Justice, United States Attorneys' Manual 9-11.151 (2007).

[22] "A 'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation." Id.

warning in federal proceedings would be simple to implement since the Department of Justice already requires a Miranda-like warning to be given.[23] Thus, "[i]n order to...permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[24] In doing so, we help to restore trust in the grand jury and advance procedural justice.

II. Victim's Rights

Every state has some sort of protection to victims of crime.[25] In addition, in 2004 the federal government added protections for victims in federal case.[26] The protections afforded to victims are substantial and much has been written on them. Even with the advancement of victim's rights there are two areas that need to be addressed: the procedural and therapeutic right to be informed about alternative remedies; and the ant-therapeutic effect of the right to be present.

A. The Right to be informed about alternative remedies

Most if not all of jurisdictions require prosecutors keep in contact with a victim about the ongoing criminal proceeding.[27] However, a problem arises when the criminal proceeding has ended or the case is dismissed. When this occurs victims naturally feel that the justice system

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[23] See id. (The Department of Justice requires an "Advice of Rights" form to be attached to all grand jury subpoenas to be served on any "target" or "subject" of an investigation)

[24] Miranda v. Ariz., 384 U.S. 436, 467 (1966).

[25] See, e.g., Ariz. Const. art. II, § 2.1; Cal. Const. art. I § 28 ; NY CLS Exec, 18 U.S.C. §§ 640-649 (2006).

[26] See 18 U.S.C. § 3771 (2006).

[27] See, e.g., 18 U.S.C. § 3771(a)(5) " A crime victim has the... reasonable right to confer with the attorney for the Government in the case."); Ariz. Rev. Stat. § 13-4419 (LexisNexis 2011) (requires prosecutor to confer with victim upon request).

failed them and that any injury obtained will go uncompensated. Victims unfamiliar with the legal system may be unaware with their right to obtain compensation or protection via other legal avenues. In order to illustrate this point I offer the following example. Jane Smith's sister, Jill Smith, keyed Jane's vehicle one day while Jane was at work. Jill Smith admitted to keying Jane's vehicle in here diary, however, police obtained the evidence from Jill's home without a warrant. For this reason, at trial, the evidence was excluded. Due to the lack of useable evidence the State was forced to drop the charge of criminal damage against Jill. Subsequent to the dismissal Jill begins to harass Jane incessantly to the point that Jane is fearful for her own safety. Jane believed that the criminal proceeding would provide her justice, restitution, and protection. Unaware about her legal rights to obtain a protective order against Jill and to seek civil compensation Jane believes that the system failed her and that it is corrupt.

I offer the above simplistic example to hopefully illustrate what a crime victim feels many times when the criminal justice system fails them. In an effort to prevent this anti-therapeutic effect officers, prosecutors, and judges must be authorized or even required to give crime victims a general overview of the possible other avenues for compensation and protection. Victims who did not voluntarily place themselves into their status as a victim should not be expected to understand the legal system and their possible avenues for redress. It should be those who are experienced with the system (i.e, officers, prosecutors, and judges) who should inform them of these avenues.

The next question becomes how this information can be dispersed ethically. Officers, prosecutors and judges may fear that giving this information to a victim borders on giving legal advice. If true this would open up officers to charges that they are engaging in the unauthorized practice of law. It would open up prosecutors to possibly developing an attorney client privilege

that would be in conflict with their duty as a prosecutor to represent the state. Lastly, it would violate the judicial code of conduct.[28]

First, it is important to point out that a general overview of the legal options that people have in our system of justice should not be seen as unethical. If an individual tells a victim that they should seek this remedy then this would be giving legal advice. However, an individual that is just giving a general overview of our legal system would simply be providing factual information about our system of justice.

Second, in an effort to alleviate the concern and danger that an individual might go too far I would propose that this information be given as part of a victim's rights pamphlet that many states already require victims to receive.[29] In relation to judges they could provide this information in document format just like some jurisdictions provide to defendants at their arraignments. (See appendix 1).

Lastly, prosecutors in many states are already required to keep in continuous contact with victims. [30] Prosecutors at the conclusion of any case that did not result in restitution for a victim or protection for the victim (e.g., requirement to have no contact with victim) could provide victims with the same document.

When a case is dismissed, a charge is downgraded, or when the victim fails to receive full compensation for their injury victims lose trust in the system. In order that victims know that they have other options it is important that they are informed of the other legal remedies that they

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[28] See Arthur Garwin et al., Annotated Model Code of Judicial Conduct 395 (2d ed. 2011).

[29] See eg., http://chandlerpd.com/wp-content/uploads/2010/12/victim_rights.pdf (last visited November 20, 2011).

[30] See, e.g., Ariz. Const. art. II, § 2.1(6).

can pursue. This need can easily be addressed by providing victims with a document that explains the other vectors of our legal system that might help them get the justice they deserve. (See attachment 2 for an example).

B. The right to be present

The general rule of witness exclusion requires that prior to the start of trial, judges must exclude witnesses "so that they cannot hear the testimony of other witnesses."[31]However, many states have an exception to this rule that gives victims the right "[t]o be present at all criminal proceedings."[32] In relation to federal courts, the Federal Rules of Evidence provides for an exception to the rule of exclusion for "a person authorized by statute to be present." [33] Relying on this the Eleventh Circuit in 2008 found that the "Federal Crime Victim's Rights Act, that gives victims the right to present, was an exception to the rule of exclusion.[34] The Attorney General of New Jersey stated that the reason for the rule is that "those who have had their lives forever maimed and changed by violent acts are not only part of the public but also have a special standing to be present and to observe the system at work."[35] While it is true that the right to be present serves this noble goal, it does not mean that it comes without anti-thereauptic consequences. In particular, when the victim is present during the entire case of the prosecution they are then subjected to an exchange with the defense that goes something like this:

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[31] Ariz. R. Evid. 615.

[32] Ariz. R. Crim. P. 39; Ariz. Rev. Stat. § 13-4420 (LexisNexis 2010); See Ariz. Const. art. II § 2.1(3).

[33] See Fed. R. Evid. 615.

[34]See United States v. Edwards, 526 F.3d 747 (11th Cir. 2008); Ariz. R. Evid. 611(a).

[35] State v. Williams, 960 A.2d 805, 814 (App. Div. 2008).

Defense attorney (D): Mrs. Smith, you have been present in the courtroom during the prosecutor's entire case?

Victim (V): yes.

D: You heard to the entire testimony of Officer John Doe?

V: yes.

D: You heard the other witnesses' testimony?

V: yes

D: You heard the experts' testimony?

V: Yes

D: You heard all of this testimony while you were sitting in the back of the courtroom?

V: Yes.

D: You heard all of this evidence while you were sitting in the back of the courtroom and had the opportunity to think about your own testimony?

V: Yes.

The exchange with the defense attorney might continue from there or else the defense may be done with their underlying accusation of fabrication or even perjury. Some have even gone so far as to suggest that the victim may be "irretrievably tainted from hearing the testimony of other witnesses."[36] Even if the victim isn't irretrievably tainted and the prosecutor is

[36] Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment, 1994 Utah L. Rev. 1373, 1393 (1994); See ROBERT P. MOSTELLER, Victims Rights and the United

successfully able to "rehabilitate" the victim, this accusation of fabrication or perjury places the victim in the place of being re-victimized all over again.

In addition to the re-victimization of the victim, the right to be present creates due process challenges. Even when these challenges do not succeed they still extend the process for the victim and make the defendant believe that they were convicted in a system that supports fabrication. Even though this alone should not be the reason to get rid of the right to be present, it is a concern that should be avoided if at all possible.

One proposal that has been suggested is "that a crime victim can be required to testify as the first witness and then watch the remainder of the trial."[37] Judges are given a lot discretionary latitude in the "control over the mode and order of interrogating witnesses and presenting evidence so as to [] make the interrogation and presentation effective for the ascertainment of the truth... and [] protect witnesses from harassment or undue embarrassment."[38] Calling the victim first at trial would help to ascertain the truth in the instances where the viewing of other witness's testimony would result in the victim fabricating their testimony. Further, it would protect the victim from being harassed and embarrassed by the accusation of fabrication. In those instances where foundation must be laid as to some portion of the victim's testimony, the judge could allow the prosecutor to recall the victim after foundation is laid. In the end judges in

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States Constitution: An Effort to Recast the Battle in Criminal Litigation, 85 Geo. L.J. 1691 (1997); Douglas E. Beloo and Paul G. Cassell, SYMPOSIUM: CRIME VICTIM LAW: THEORY AND PRACTICE: SYMPOSIUM ARTICLE: THE CRIME VICTIM'S RIGHT TO ATTEND THE TRIAL: THE REASCENDANT NATIONAL, 9 Lewis & Clark L. Rev. 481, 539 (2005).

[37] Douglas E. Beloo and Paul G. Cassell supra at 540.

[38] Fed. R. Evid. 611(a); Ariz. R. Evid. 611(a).

using their discretionary power to control the order of interrogating witnesses could help to prevent victims from being re-victimized; help keep the case from being extended by appeals; and remove the belief that the system supports fabrication.

III. Plea Bargaining Domestic violence and Sexual Offenses

"Charge bargaining...occurs when an offender is charged with the actual crime the state believes he committed, but is allowed to plead guilty to a reduced charge."[39] ""sentence bargain"ing" occurs when an offender is charged with the actual crime the state believes he committed, but receives a sentence concession..."[40] In relation to domestic violence, "charge bargaining" can have a major impact on the offender getting the rehabilitative counseling necessary in order to help prevent re-offending. As to sexual offenses "charge bargaining" can impact whether the people in their community receive the tools necessary to help and protect themselves. Further, ""sentence bargain"ing" can hamper offenders taking responsibility and victims from receiving retribution

[39] Jeffrey A. Klotz et al., Cognitive Restructuring Through Law: A Therapeutic Approach to Sex Offenders and the Plea Process, 15 U. Puget Sound L. Rev. 579, 586-87 (1992) (citing H. Richard Uviller, Pleading Guilty: A critique of four models, 41 Law & Contemp. Probs. 102, 109 (1977)).

[40] Id.

A. Domestic Violence Offenses

Domestic violence is the leading cause of injury to women in the United States.[41] Despite this staggering statistic prosecutors at times will allow, in a "charge bargain," a defendant to plead to a non-domestic offense even though the defendant is also charged with a domestic offense. For example, some states require that if an offense is domestic in nature then the charging document must include the domestic violence charge.[42] In these states prosecutors might allow a defendant to plead guilty to disorderly conduct where the victim is non-domestic rather than pleading to assault of a domestic victim. In other states there isn't a requirement that a domestic offense include in the charging document a domestic violence charge. [43]In these states prosecutors can plea a defendant to a simple assault rather than the domestic violence offense. However, the fact that this downgrade can happen in these jurisdictions should not be taken to mean that it is the rule. In actuality downgrading domestic violence offenses is probably the exception of the rule due to departmental policies that discourage it.[44] However, in an effort to prevent these exceptions to the rule some states have stripped prosecutors of the option completely and require that the domestic violence charge go forward. [45] The benefit of a no-drop policy is clear. A no-drop policy does "not allow batterers to control the system of justice

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[41] See Elena Salzman, Note, The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention, 74 B.U. L. Rev. 329, 329 (1994).

[42] See, e.g., Ariz. Rev. Stat. § 13-3601(H).

[43] See, e.g., Cal. Penal Code § 273.5 (2010).

[44]See e.g, http://www.acadv.org/Prosecutionguidelines.pdf (last accessed November 20, 2011); Kan. Stat. Ann. § 22-2309 (2010); http://www.sedgwickcounty.org/da/dv_prosecution.asp (last access November 20, 2011).

[45] See, e.g., Colo. Rev. Stat. § 18-6-801(3) (2004); Nev. Rev. Stat. Ann. § 200.485(8) (LexisNexis 2010)

through their victims."[46] The batterer knows that they have to answer to the domestic violence charge and that there is no way to use the victim as a pawn to lessen such a charge. In relation to the offender a no-drop policy can also mean that they get the help that they need. Most of jurisdictions require individuals convicted of domestic violence to attend some sort of counseling.[47]

The only problem is that defendants will likely risk trial knowing that a plea offer will require pleading to the domestic violence charge. At trial the prosecutor will be forced to call the victim to the stand in order to prevent a hearsay and Crawford violation.[48] This becomes a problem because many domestic violence victims will be reluctant to testify or no longer even desire prosecution. Prosecutors are stuck in a position where they are forced to subpoena the victim with a threat that they will have a bench warrant issued if the victim does not show. The result of this is that "[w]hen we force arrest and prosecution on battered women, they often recant and lie."[49] Even in cases where this does not happen, the prosecutor still is in the position where the victim becomes an adversary. In essence no-drop policies may have the adverse effect

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[46] Donna Wills, Domestic Violence: The Case for Aggressiveness for Prosecution, 7 UCLA Women's L.J. 173, 180 (1997).

[47] See, e.g., Ariz. Rev. Stat. § 13-3601.01.

[48] See Crawford v. Washington, 541 U.S. 36 (2004); Fed. R. Evid. 801; See generally Neal Hudders, NOTE: THE PROBLEM OF USING HEARSAY IN DOMESTIC VIOLENCE CASES: IS A NEW EXCEPTION THE ANSWER?, 49 Duke L.J. 1041 (2000).

[49] Linda Mills, MANDATORY PROSECUTION IN DOMESTIC VIOLENCE CASES: INTUITION AND INSIGHT: A NEW JOB DESCRIPTION FOR THE BATTERED WOMAN'S PROSECUTOR AND OTHER MORE MODEST PROPOSALS, 7 UCLA Women's L.J. 183, 190 (1997).

of placing the victim in a position that makes them feel as if they are being re-victimized. Because of the difficulty involved in prosecuting a case where the victim does not desire prosecution many prosecutors just opt to never charge the case in the first place. One study estimated found that the reason prosecutors decided not to charge a domestic violence offense, in 45% of the cases, was because the victims did not desire prosecution.[50] This study did not focus on domestic violence cases or on no-drop jurisdictions, however, one can surmise that no-drop jurisdictions likely have even a higher amount of cases that never get charged. Thus, removing prosecutorial discretion in the area of charging and pleas may actually hamper the effort to seek justice and protection for domestic violence victims.

If no-drop policies are not the solution and at times a domestic violence charge will not result in conviction (e.g., plea to non-domestic offense, dismissal due uncooperative victim, etc.), then what is the solution? One of the solutions lies with the police, prosecutor, and the court letting the victim know their other possible remedies (see section IIA above).

The second solution, probably the primary solution in the context of domestic violence, lies with criminal defense attorneys. Bruce Winick says that "[t]he criminal defense attorney can [] function as a therapeutic agent in helping clients face and deal with problems that, if not confronted, can lead to greater difficulties, future criminal charges, and greater punishment."[51] In order to serve this function "defense attorneys need to familiarize themselves with the full range of rehabilitative opportunities that might be available in their community, the conditions

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[50] See Janell Schmidt & ellen Hochstedler Steury, Prosecutorial Discretion in Filing Charges in domestic Violence Cases, 27 Criminology 487, 495 (1989).

[51] Stolle, supra n. 3, at 254.

for eligibility for admission into these programs, and the mechanics of assisting their clients to gain entry into them."[52] A lot of defense attorneys have started to institute this method of preventative justice in relation to plea bargaining and sentencing. Legislatures have implemented it in relation to mandatory requirements for counseling upon a conviction of a domestic violence offense. However, defense attorneys lack the initiative to suggest counseling to their clients in the case of dismissal or downgrade. A probable reason for this is that many attorneys focus on the case here and now without looking at the broader picture. A criminal defense attorney who gets their client's case dismissed sees it as the best possible outcome. In looking at their client so narrowly they miss the broad picture that if their client is on a path to re-offending then they should address this as to prevent them from being back in the system.

Criminal defense attorneys who look at the broader view could help their clients from returning to the system by offering them voluntary counseling opportunities. Just a few of the opportunities include: private counseling; non-profit counseling, entering into the same counseling program required for domestic violence offenses; substance abuse programs; and mental health programs. The voluntary opportunities for clients are vast and detemrining which are appropriate for your client depends on their own individual situation. What is important is that a criminal defense attorney knows their own client's issues and to refer them to these programs even when there is a dismissal or downgrade. In this way the criminal "lawyer and the client work collaboratively to identify potential legal difficulties...and minimize the risk of legal

[52] Id. at 263.

problems in the future."[53] By failing to do so criminal defense attorneys take a harmful narrow perspective on their client's case and risk them being placed right back into the system.

B. Sexual Offenses

Defendants attempt to "charge bargain" with prosecutors in order to lessen their criminal record and lessen the penalties that they face.[54] On the other hand, prosecutors use "charge bargaining" as an "efficient method of handling a large caseload."[55] In many criminal cases this might be appropriate. For instance, allowing a defendant to plead disorderly conduct instead of a simple assault might be appropriate. However, in relation to sexual offenses the consequences can be staggering. When a defendant pleads guilty to a sexual based offense it opens them up to requirements such as registering[56], not living near schools,[57] and enhanced penalties under some conditions.[58] By allowing a defendant to "charge bargain" sexual based offenses prosecutors put at risk these requirements that are in place to protect the community.[59] Additionally,

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[53] Susan Swaim Daicoff, Lawyer, Know Thyself 177 (2004).

[54] Klotz, supra note 37, at 587.

[55] Douglas D. Guidorizzi, COMMENT: SHOULD WE REALLY "BAN" PLEA BARGAINING?: THE CORE CONCERNS OF PLEA BARGAINING CRITICS, 47 Emory L.J. 753, 765 (1994).

[56] See, e.g., Ariz. Rev. Stat. § 13-3821; 42 U.S.C. §§ 16901-16929 (2006).

[57] See, e.g., Cal. Penal Code § 3003(g) (Deering 2010).

[58] Ariz. Rev. Stat. § 13-406.

[59] Elizabeth J. Letourneau, Ph.D, et. al., Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women, available at https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf (last accessed November 20, 2011).

prosecutors risk that "[c]harge bargaining may feed into cognitive distortions."[60] A defendant who is able to plead guilty to assault rather than molestation may believe that what they did really was not that bad. This in turn may hamper any effort at getting them to face their behavior and ultimately hamper any rehabilitative effortl. When you add to this that the community does not know the extent of the individual's actual offense (i.e., molestation), the result is disastrous. In an effort to help sexual offenders to face the reality of their offense "charge bargaining" sexual offenses must be prohibited. In an effort to protect the community and encourage transparency, "charge bargaining" sexual offenses must be prohibited.

""sentence bargain"ing" sexual offenses can also hamper preventative law. Prosecutors at times will offer a lighter sentence to defendants accused of a sexual offense in order to get them to plead guilty.[61] By getting defendants to plead guilty it makes sure that they will be subject to the multiple requirements that come with a sexually based offense conviction.[62] There are some that argue that the requirements serve to push away defendants from accepting a plea and instead take a shot at trial.[63] However, this overlooks the question of whether the requirements for a convicted sex offender should be taken into consideration at all in a plea. This is because the purpose of registration and notification is "to protect the public from sex offenders and offenders

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[60] Klotz, supra note 37, at 587.

[61] See John Q. La Fond, SPECIAL THEME: SEX OFFENDERS: SCIENTIFIC, LEGAL, AND POLICY PERSPECTIVE: SEXUALLY VIOLENT PREDATOR LAWS AND REGISTRATION AND COMMUNITY NOTIFICATION LAWS: POLICY ANALYSIS: THE COSTS OF ENACTING A SEXUAL PREDATOR LAW, 4 Psych. Pub. Pol. and L. 468, 497 (1998).

[62] See id.

[63] See id.

against children, and in response to the vicious attacks by violent predators against [multiple] victims."[64] Futher, the purpose of registration and notification does not serve any of the legal theories of punishment.

Retribution is defined as "punishment imposed as repayment or revenge for the offense committed."[65] Registration and notification aim to prevent future harm and have nothing to do with punishing for past harm.

Rehabilitation is defined as "the process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."[66] Registration and notification do not aim to improve the defendant. If anything, there is research to show that these requirements can hamper a sex offender in being able to function in society.[67]

Incapacitation is defined as "the action of disabling or depriving of legal capacity."[68] The clear way of making a sex offender incapable of re-offending is by imprisoning them. Clearly registration and notification do not serve this purpose.

Restorative justice is defined as "an alternative delinquency sanction focused on repairing the harm done, meeting the victim's needs, and holding the offender responsible for his or her actions."[69] Restorative justice is a noble concept. However, there is a question whether or not it

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[64] 42 U.S.C. § 16901 (2006).

[65] Black's Law Dictionary (9th ed. 2009).

[66] Id.

[67] See generally Catherine Wagne, NOTE: The Good Left Undone: How to Stop Sex Offender Laws From Causing Unnecessary Harm at the Expense of Effectiveness, 38 Am. J. Crim. L. 263 (2011).

[68] Black's Law Dictionary (9th ed. 2009).

[69] Id.

can work in relation to sex offenders. I leave this question for another paper, but for the purpose of this one it is clear that registration and notification do not serve this purpose. Registration and notification aim to keep the victim (and other) at a distance from the offender or at least with knowledge of the possible danger they might pose.

The final legal theory that some will argue in relation to registration and notification requirements is deterrence. Deterrence is defined as "the act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment."[70] The purpose of registration and notification laws at first glance seems to lend itself to this theory. If an individual knows that their name, address, and offense are public, then they will be less likely to re-offend. However, the problem with this analysis is three-fold.

First, in examining the purpose of registration and notification closer it becomes clear that it is not related to deterrence. "To protect the public from sex offenders and offenders against children" relates the power that it gives to citizens to protect themselves and their children. Registration and notification on its face presumes that there may be a reason to notify. So in essence, registration and notification assumes that the offender may re-offend (i.e., lack of deterrence).

Second, registration and notification statistically has little to no effect on deterring sex offenders. In 2008 a study on the effectiveness of registration found "little evidence to support

[70] Id.

the effectiveness of sex offender registries, either in practice or potentially."[71] While there have been some studies to find some deterrent effect, most studies have found the same analysis as the 2008 study.[72] At the bare minimum, these studies stand for the proposition that the evidence is unclear as to whether there is a deterrent effect of notification and registration laws. This is a weak proposition to stand on when ""sentence bargain"ing."

Lastly, sentencing a sexual offender needs to be based on more than just deterrence. Sexual offenses have a lifetime impact on the victims. Sexual offenses have an effect on the physical, mental, and sexual health of the victims.[73] Victims of sexual offenses facing these lifetime issues deserve justice. They deserve more than just a plea that is based on a weak hope of deterrence. Victims of sexual offenses deserve retribution. When prosecutors "sentence bargain" defendents charged with sexual offenses sexual they sacrifice retribution for the victims in exchange for a faulty hope of deterrence. Thus, in the interest of retribution for victims of sexual offenses it is important that prosecutors don't "sentence bargain" based on registration and notification requirements.

Registration and notification requirements do not serve to advance any of the legal theories for punishment. Registration and notification requirements are in place to empower the public to

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[71] Amanda Y. Agan, Sex offender registries: Fear without function?, University of Chicago, 3, available at http://www.solresearch.org/~SOLR/cache/date/20081201-AAgan-Regry.pdf (last accessed November 20, 2011).

[72] See, Washington State Institute for Public Policy, Does Sex Offender Registration and Notification Reduce Crime? A Systematic Review of the Research Literature, exhibit A, available at http://www.wsipp.wa.gov/rptfiles/09-06-1101.pdf (last accessed November 20, 2011) (One study found increased rates of recidivism, two found decreased rates of recidivism, and four found no statistically significant differences).

[73] Learn A. Craig et al., Assessing Risk in Sex Offenders XI (2008).

have the knowledge necessary to protect themselves and others. Thus, it is important that prosecutors in offering pleas not consider these requirements to be part of the punishment. They should be seen as collateral consequences of a conviction and not punishment in itself. By not doing so prosecutors risk doing injustice to the victims, society, and even the defendant.

IV. Alternatives and Supplements to Incarceration and Monetary Sanctions

A. Work Assignments

Work assignmenst are therapeutic to inmates because it reduces idleness, allows the inmate to develop readiness skills, and it helps to prevent recidivism.[74] The fact that work assignments help to reduce recidivism also advances preventative law. The Federal Bureau of Prisons (FBOP) found that "those offenders who received training and work experience while in prison had fewer conduct problems and were less likely to be arrested the first year after release."[75] Additionally, they were "24% more likely to obtain a full-time or day-labor job during this time."[76] Even though the value of work assignments cannot be disputed, only fifty-three percent of those eligible to participate in work assignments had work assignments in 2000 in the United States. The state that serves as an exception to this rule is Oregon. In 1994 the voters enacted a constitutional amendment that requires "[a]ll inmates of state corrections institutions [] [to] be actively engaged full-time in work or on-the-job training."[77] As a result of this requirement, the

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[74] Rob Atkinson and Knut A. Rostad, Can Inmates Become an Integral Part of the US Workforce? 7 (paper presented at Urban Institute's Reentry Roundtable, New York, May 2003) (citing William G. Saylor and Gerald G. Gaes, The Post-Release Employment Project, Federal Prisons Journal 2, no. 4, Winter 1992, pp. 33-36).

[75] Id.

[76] Id.

[77] Or. Const. art. I, § 41 (2).

percentage of inmates participating in correctional programs has more than doubled.[78] Additionally, in order to hold these institutions accountable the Oregon Department of Corrections maintains data on inmate compliance. This data shows that from October of 2010 to September 2011 inmate compliance was in the range of sixty-five to sixty-nine percent.[79] It follows from all of this that if states wish to advance preventative law and therapeutic jurisprudence, then a key component is expanding work assignments. By expanding work assignments we serve a thereuptic role in helping prisoners to build the tools necessary to re-integrate into society and replace idleness with work ethic.[80] By requiring work assignments society advances preventative law by reducing recidivism rates. In an effort to advance these important goals states should consider the course that Oregon has taken in requiring full participation in work assignments.

B. Community Service

Community service release can have as much benefits as work assignments and work release. Many jurisdictions allow for work release for those jailed in relation to misdemeanor offenses. The policy is premised on the belief that being engaged in a job is important so that the individual does not re-offend. In 2002, a study found "[w]ork crew/community service has the

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[78] See Kevin L. Mannix, P.C., Measure 17 After Five Years, report available at http://www.mannixlawfirm.com/PDF/Meaure17.pdf (last accessed November 20, 2011).

[79] http://www.oregon.gov/DOC/RESRCH/docs/m17source.pdf?ga=t

[80] See generally Or. Const. art. I, § 41 (1).

lowest rates [of recidivism] for high/medium risk offenders (10%)."[81] A system that allows individuals to engage in community service release may help to advance the same purpose that work release does (i.e., preventing re-offending). Work release and work assignments serve as an example for how the system has opened the door to those that are incarcerated to allow them to give back to the community. They also serve as an example of how these programs help to prevent individuals from re-offending. By giving the power to and encouraging prosecutors and the court to offer community service release or community service as an alternative to jail we advance these goals. By advancing these goals we reduce the amount of recidivism; help to prevent overcrowding; and reduce jail costs.

C. **Alternatives to Fines**

Community service, education, job training, and employment are important tools for the criminal justice to utilize in lieu of fines. Over One Billion Dollars is collected in the United States every year as a result of fines.[82] Over forty-percent of all offenders were unemployed or marginally employed prior to arrest.[83] "Eighty-three percent of probation and parole violators were unemployed at the time of violation."[84] There are many jurisdictions that allow in relation

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[81] Oregon Department of Corrections, Community Corrections Review: Advisor Committee for the Review, available at http://www.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf?ga=t (last accessed November 20, 2011).

[82] Larry J. Siegel & Clemens Bartollas, Corrections Today 102 (2010).

[83] Donna Bellorado, Making Literacy Programs Work: A Practical Guide for Correctional Educators, National Institute of Corrections, 1986.

[84]US Department of Justice, Report to the Congress of the United States in the Activities of Correctional Job Training and Placement During Fiscal Year 1998 1, available at http://static.nicic.gov/Library/014886.pdf (last

to misdemeanors, offenders to do community service in lieu of some or all of the offender's fines.[85] These jurisdictions recognize that a high amount of offenders are poor and unable to pay fines.[86] Further, they recognize that imposing fines on these individuals only risks the offender engaging in further crime in order to pay the fines.[87] As one writer put it in relation to NY laws and the effect on the homeless, "it pushes the homeless deeper into that vicious cycle of poverty, forcing them to deal with additional fines, jail time, and the inability to focus their time and energies on working toward more stable lives.[88] Alternatives to fines are an integral part of reintegrating offenders into society, preventing recidivism, and stopping the cycle of poverty. In an effort to reform individuals is important that the system expand the opportunities to individuals available in lieu of fines. Our system has started to see the value to work release in jail. However, it has generally overlooked the value of encouraging individuals to better their lives out of jail. By allowing an unemployed individual an opportunity to get training in lieu of fines, we encourage stability in their lives. By allowing an unemployed person the opportunity to get a job in lieu of fines, we encourage them to be responsible. By allowing an individual to get their G.D. in lieu of fines, we encourage them to take pride in their lives. Most all, we

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accessed November 20, 2011) (citing State of New York Department of Labor, Ex-Offender Employment Rights, Your Winning Edge (Undated)).

[85] See, e.g., W. Va. Code § 62-4-16 (2011)

[86] See Siegel & Bartollas, supra note 82, at 102

[87] See id.

[88] Tanene Allison, VOICE: Confronting the Myth of Choice: Homelessness and Jones v. City of Los Angeles, 42 Harv. C.R.-C.L. L. Rev. 253, 258 (2007).

remove the dollar sign from the individual's case and replace it with a name. We give the power to prosecutors and judges to work for more than just money; to work for a better community.

Conclusion

The criminal justice process must be more than just a revolving door. It is important that there is in place a robust system that changes lives. By changing lives we get replace the revolving door of the justice system with solutions. In order to this it is important to focus on pretrial procedures and how they affect the process. This paper has laid the foundation for this focus. A foundation that overall is premised on procedural justice, preventative law, and therapeutic jurisprudence.

Appendix One

GLENDALE CITY COURT- ARRAIGNMENT INFORMATION

WHAT IS ARRAIGNMENT ?

Arraignment is when you are being told the charges against you and your rights. All charges in this court are misdemeanors. You will plead: Not Guilty, Guilty, or No Contest. In some cases, the prosecutor will meet with you and you can decide if you want to plead not guilty, guilty, or no contest. You always have the right to plead Not Guilty. The prosecutor is the attorney for the state, not your attorney. In some cases, the Court can appoint an attorney for you. If the prosecutor cannot meet with you today, a plea of not guilty is entered and you must return to court for a pretrial conference in about 30 days. The judge will not hear your side today.

ENTERING A PLEA Today you will plead: (1) Guilty OR (2) Not Guilty OR (3) No Contest.

1. GUILTY -- You voluntarily admit to the crime. You give up all the legal rights . You will be convicted without further proof of guilt and will have a conviction on your record. You may be sentenced immediately, or you may have to come back for sentencing on another day. This depends on the nature of the crime and whether the court needs to consider other factors.

2. NOT GUILTY -- Your case will be set for a pretrial conference (PTC) in about 30 days. You will meet with the prosecutor to discuss your case. At this PTC you can see the police report and change your plea if you want. If you want to talk to an attorney first, you may ask the judge to appoint one. Not all cases are eligible to have an attorney appointed. If you change your plea from not guilty, the judge will conduct a plea proceeding and sentence. If you cannot resolve your case, you can ask to continue your pretrial or you can ask to set your case for trial.

3. NO CONTEST -- You are not admitting guilt, but you do not want to fight the charges or take your case to trial. The court enters a judgment of guilt and conviction on your record just as if you plead guilty.

YOUR LEGAL RIGHTS

You have the rights to: (a) Trial before a judge, or in some cases, a trial by jury, (b) The assistance of an attorney at all stages of the case including an appeal, and, if eligible, to a court-appointed attorney, (c) Confront witnesses against you and cross-examine them as to the truth of their statements, (d) Present evidence on your behalf and subpoena witnesses at no expense to you, (e) Remain silent, not incriminate yourself, and be presumed innocent until proven guilty beyond a reasonable doubt, (f) Appeal.

PENALTIES

The range of penalties is from a minimum suspended fine to the following possible maximum penalties plus surcharges which are like taxes on fines. Some crimes have mandatory fines or jail.

Class III: 30 days jail, $500 fine, one year probation (Leaving the Scene, Excessive Speed, Trespass, some assaults)

Class II: 120 days jail, $750 fine, two years probation (Criminal Damage Under $250, Reckless Driving, Fictitious Plates, some assaults)

Class I: 180 days jail, $2,500 fine, three years probation (DUI probation maximum is 5 years) (DUI, Driving on a Suspended License, Theft, Shoplift, Disorderly Conduct, Threatening, Assault with injury, All underage alcohol offenses, Interference with Judicial Orders, Trespass to Residence, Drag Racing, Dog at Large, City Ordinances)

OTHER CONSEQUENCES: There can be jail fees for each day of jail. For some offenses, MVD can take action against your license. For any conviction, another conviction can increase the penalties. Convictions may affect your job, professional license, right to possess a weapon, and status or possible deportation as a non-citizen in the U.S. If you are a school teacher, your conviction record may be sent to your school employer.

May 2005[89]

Attachment Two

Other Legal Avenues Available for Victims of a Crime[90]

[89] Glendale Arizona Arriagnment information, available at http://www.glendaleaz.com/brochures/#A under the heading COURT (last accessed November 20, 2011).

Is this criminal case the only way for me to be compensated?

No, if you are seeking monetary compensation for an injury that you received from the accused you may have civil remedy. In a criminal case the burden is on the state to prove beyond a reasonable doubt that the accused violated the law. After this you would be entitled to restitution. However, in a civil case you have to meet a lower burden in order to get monetary compensation. You would be required to prove by a preponderance of the evidence that the individual was responsible for the damage/injury. A preponderance of the evidence simply means that it is more likely than not that the individual caused committed the act that caused the damage/injury. Additionally, if the monetary damage is less than $2500, you would be able to file in small claims court. This would mean that there would be fewer fees to file and generally you would not need a lawyer to handle the case. Lastly, it is important that you know that generally if your claim involves an insurance company they might not pay if restitution is ordered. However, if your claim is civil then generally an insurance might pay for your damages.

Is this criminal case the only way that I can get protection from future injury?

No, if you feel you or your children are in any sort of danger from the accused you can ask the court for an order of protection or an injunction against harassment. Filing for an order of protection requires two things: (1) you are related to the accused or had an intimate relationship; and (2) a domestic violence act was committed against you. If one of these things do not meet your current situation then you would file an injunction against harassment. If you

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[90] This example is based on Arizona law. It provides a framework for other jurisdictions, but will need to be modified to reflect the law of the jurisdiction.

are unsure you can ask the prosecutor whether or not the case against the accused involves a domestic violence allegation.

Is there a way that I can protect my assets and my children from the accused when we are married?

If you are married to the accused and desire to separate from the accused permanently, then you have the ability to file for divorce. In a divorce the Court will determine how to divide your assets with your married partner and also who will get custody of your children. Because this can be a difficult process it is suggested that you seek the advice of an attorney if you fell you need to seek a divorce.

Note of Caution

The information provided above does not constitute legal advice. It is intended to help you understand generally what other legal avenues you might have. Any generalization made might not apply to you and your situation. It is important that if you have questions about specifics in relation to your case that you seek the advice of an attorney. For your convenience we have provided a list below of places that you may contact if you like. This list is not an exhaustive list of organizations or people you can contact, but it gives a few places that will attempt to offer you advice.

(provide a list of local non-profits and governmental agencies that may be able to give victim advice as to their individual case)