

Domestic Violence and the Budget Crisis: The Use of a Risk Assessment Tool to Manage Cases in Prosecutors' Offices

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I. INTRODUCTION: DOMESTIC VIOLENCE INCREASES WITH RECESSION

In recent years, the country has seen a spike in lethal domestic violence fueled by financial troubles.¹ In California, Ervin Lupoe was despondent over losing his job.² Distraught, he murdered his wife and their five children before killing himself.³ In Michigan, James Kwiatkowski shot his wife and himself after losing his job.⁴ In Florida, Neal Jacobsen killed his wife and children because of financial distress.⁵ In another tragedy, in Ohio, Theodore Bayly strangled his wife and son and then killed himself.⁶ Before killing himself, he called the sheriff's office and

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1. Robert Roy Britt, *Recession to Fuel More Family Murder, Suicide*, LIVE SCI. (Feb. 2, 2009), <http://www.livescience.com/5288-recession-fuel-family-murder-suicide.html>. For a thorough review on how economic hardship leads to higher rates of domestic violence, see Deborah M. Weissman, *The Personal is Political—And Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387 (2007).

2. *Man Kills Wife, Five Kids, Himself After Being Fired*, CNN (Jan. 27, 2009), <http://www.cnn.com/2009/CRIME/01/27/family.dead/index.html?iref=allsearch>.

3. *Id.*

4. Lee Higgins, *York Township Man Shoots Wife, Then Himself after Losing His Job*, *Police Say*, ANNARBOR.COM (Oct. 23, 2009), <http://www.annarbor.com/news/crime/man-kills-wife-then-himself-in-york-township-deputies-say/>.

5. *Report: Man Killed Family Due to Money Issues, Depression*, WPBF.COM (Mar. 13, 2010), <http://www.wpbf.com/news/22831515/detail.html>.

6. *Sheriff: Ohio Man Claiming Financial Trouble Killed Family, Then Himself*, FOX NEWS (Feb. 18, 2009), <http://www.foxnews.com/story/0,2933,496025,00.html>.

cited financial problems as the reason for the murder-suicide.⁷ As the recession continues or deepens, experts say that the country will continue to see a rise in domestic violence and domestic violence homicides, in part because batterers experience low self-esteem and demoralization due to under or unemployment.⁸ Poverty or economic distress leads to stress; households with fewer resources are unable to effectively cope with that stress; and stress then becomes a source of violence.⁹

As incidents of domestic violence have increased, in part due to the recession, the criminal justice system has experienced massive budget cuts because of the recession.¹⁰ Prosecutors and district attorneys have grappled with how best to allocate scarce resources, and they are often forced to decline prosecution of deserving cases because of budget constraints.¹¹

Increasing caseloads and shrinking budgets have been particularly problematic with respect to the criminal justice system's ability to respond to domestic violence.¹² One response to meeting these demands is developing risk assessment tools.¹³ A risk assessment tool is an instrument, typically a questionnaire, that is used to assess the likelihood that a suspect or offender will reoffend.¹⁴ In the domestic violence context, a risk assessment tool can be used to predict future intimate partner dangerousness, including lethality.¹⁵ Prosecutors could use a risk assessment tool to help prioritize between the most serious cases that must be pur-

7. *Id.*

8. Philip N. Cohen, *Recession Begets Family Violence*, HUFFINGTON POST (Jan. 2, 2010), http://www.huffingtonpost.com/philip-n-cohen/recession-begets-family-v_b_409502.html?view=screen; see also Weissman, *supra* note 1, at 388 (noting that under and unemployment increases rates of domestic violence because of low morale and lack of community support in areas of particularly high unemployment rates).

9. Weissman, *supra* note 1, at 421.

10. Stephanie Chenn, *With Bleak Economic Forecast, Some States Free Prisoners Early*, CNN (Dec. 17, 2009), <http://www.cnn.com/2009/CRIME/12/17/prisoner.early.release/index.html?iref=allsearch>.

11. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 589 (2005) (discussing how budget constraints in prosecutors' offices have influenced charging decisions).

12. See Emily Heffter, *Defeat of Sales-Tax Measure Could Hurt Domestic-Abuse Program*, SEATTLE TIMES, Nov. 3, 2010, <http://seattletimes.nwsourc.com/html/localnews/2013340182.html>; see also Juliet Williams, *California Shelters Closing Amid Budget Cuts*, SEATTLE TIMES, Sept. 8, 2009, http://seattletimes.nwsourc.com/html/nationworld/2009826141_apuscaliforniabudgetdomesticviolence.html.

13. Robert Moyer, Presentation at the State of Maine Department of Corrections, Adult Community Services: Evidence Based Risk Assessment of Domestic Violence Offenders: The State of the Science in 2006 (July 13, 2006); Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171 (2000).

14. Roehl & Guertin, *supra* note 13, at 171.

15. *Id.*

sued immediately and those cases that could be delayed or potentially declined for prosecution.

This Comment addresses the growing concern that the incompatible forces of shrinking budgets and increased caseloads are leading to ineffective domestic violence case management, particularly in prosecutors' offices.¹⁶ With so many cases and so few resources, prosecutors need tools to discern which cases should have priority. Recognizing that risk assessment tools have many drawbacks, this Comment advocates for development of a risk assessment tool that can help prosecutors determine which cases to pursue and assist them in making other pretrial determinations. Part II of this Comment provides a background on domestic violence research and isolates the issues that arise in the context of case screening. Part III examines the risk assessment tools currently used in domestic violence cases. Part IV addresses the drawbacks and advantages of using risk assessment tools for case management. Finally, Part V advocates for a useful, but cautious, risk assessment tool for use by prosecutors in case management.

II. THE STATE OF DOMESTIC VIOLENCE IN THE CRIMINAL JUSTICE SYSTEM

Although domestic violence¹⁷ may take many forms, for the purpose of this Comment domestic violence is defined as "offenses committed by and against current or former intimate partners, married or unmarried, with or without children."¹⁸ There are over 1.5 million incidents of domestic violence in the United States each year,¹⁹ with approximately 1500 deaths²⁰ linked to intimate partner violence every year.²¹ The majority of cases involve a female victim and a male batterer,²² with approximately 85% female victims.²³

16. Moyer, *supra* note 13, at 4.

17. Domestic violence will also be used interchangeably with intimate partner violence.

18. ANDREW R. KLEIN, U.S. DEPT. OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES vi (June 2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

19. Roehl & Guertin, *supra* note 13, at 172.

20. *Id.* at 3. These deaths are often called "femicide" because the typology of most intimate partner violence is a male perpetrator and female victim. See Amy Karan & Lauren Lazarus, *A Lawyer's Guide to Assessing Dangerousness for Domestic Violence*, 78 FLA. B.J. 55, 55 (2004).

21. Karan & Lazarus, *supra* note 20, at 55–56.

22. *Id.* at 55. But see Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 KAN. J.L. & PUB. POL'Y 249, 249 (2003) (noting that existence of male victims and female batterers "is in fact a serious social issue that must be fully addressed by overcoming societal perceptions, conducting accurate studies, and enacting responsible legislation"). See also Melody M. Crick, *Access Denied: The Problem of Abused Men in Washington*, 27 SEATTLE U. L. REV. 1035,

The criminal justice system's response to domestic violence has changed dramatically over the last several decades.²⁴ This Part first addresses the changes in how police and prosecutors respond to domestic violence. Next, this Part explores how these changes have created additional financial constraints on the criminal justice system and its ability to respond to domestic violence.

A. Mandatory Arrest and Prosecution

Prior to the early 1980s, domestic violence cases in the criminal justice system were infrequent,²⁵ often because officers and others in the criminal justice system perceived domestic violence as a private family matter and declined to arrest or charge offenders.²⁶ But the criminal justice system's response to domestic violence changed after a landmark study²⁷ in 1981, in which researchers found that arrest was the single most important step to reduce recidivism in domestic violence cases.²⁸ In response to this report and additional research about domestic violence, more than half of jurisdictions today mandate arrest in cases where police officers have probable cause to believe that an assault had taken place.²⁹ As a result, arrests in domestic violence cases increased dramatically.³⁰ In one city, domestic violence arrests increased nine-fold be-

1036 (2004) (noting that there is a gross inequality between the treatment of male and female batterers in Washington State).

23. Angela M. Killian, *Mandatory Minimum Sentences Coupled with Multi-Facet Interventions: An Effective Response to Domestic Violence*, 6 UDC/DCSL L. REV. 51, 56 (2001).

24. *Id.* at 55; see also *infra* Part II.A.

25. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 556–58 (1999) [hereinafter Mills, *Killing Her Softly*].

26. Cheryl Hanna, *No Right to Choose: Mandated Victim Participations in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857–58 & n.41 (1996) [hereinafter Hanna, *No Right to Choose*] (noting that there are a variety of rationales for failing to intervene: (1) blaming the victim, (2) believing domestic violence is a victimless crime, (3) family privacy, and (4) society and legal institutions are unable and ill-equipped to manage domestic violence); see also KEITH GUZIK, *ARRESTING ABUSE: MANDATORY LEGAL INTERVENTIONS, POWER, AND INTIMATE ABUSERS* 24 (2009) (noting that officers have traditionally resisted involvement in domestic violence cases because they perceived domestic violence calls as particularly dangerous).

27. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). Researchers Sherman and Berk, in conjunction with the Police Foundation and the Minneapolis Police Department, conducted a randomized field experiment in Minneapolis, Minnesota to evaluate the effect of arresting the domestic violence perpetrator. *Id.* For a complete overview of how the research was conducted and the results of the research, see *id.*

28. Mills, *Killing Her Softly*, *supra* note 25, at 558–59.

29. *Id.*; see also John Q. La Fond & Sharon G. Portwood, *Preventing Intimate Violence: Have Law and Public Policy Failed?*, 69 UMKC L. REV. 3, 3 (2000).

30. N. Zoe Hilton, Grant T. Harris & Marnie E. Rice, *The Effect of Arrest on Wife Assault Recidivism*, 34 CRIM. JUST. & BEHAV. 1334, 1335 (2007); see also GUZIK, *supra* note 26, at 4 (providing a thorough review of mandatory legal interventions in domestic violence cases).

tween the years 1996 to 2002, an increase from forty arrests to 317 in one year.³¹

As law enforcement agencies began mandating arrest in domestic violence cases, many prosecutors' offices instituted policies of mandatory or no-drop prosecution thus leading to an increase in domestic violence cases. No-drop prosecution policies require that prosecutors pursue charges, even if victims do not cooperate.³² No-drop prosecution is based on the premise that domestic violence is a societal harm even when it occurs in the privacy of one's home.³³ Victims often recant or refuse to testify out of fear that their batterer will harm them, but prosecution continues even in the absence of victim consent.³⁴

While domestic violence advocates applaud the increased attention in domestic violence cases,³⁵ advocates are concerned that legislative and judicial responses to domestic violence have been limited and ineffectual.³⁶ Some advocates are concerned that mandatory policies may actually increase violence against women in the long-term.³⁷ For example, one study found that mandatory intervention does not deter offenders.³⁸ Rather, offenders view their arrest and prosecution as an injustice, and they find ways to further victimize their intimate partners.³⁹ Further, some

31. GUZIK, *supra* note 26, at 25. Guzik examined the Plainsville Police Department rates of arrest and noted that the arrest rates increased dramatically when mandatory arrest policies were implemented. *Id.*

32. *Id.* at 4.

33. Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 306–08 (2005).

34. *Id.* at 307–08. Many domestic violence victims are also completely dependent on their male batterers. Batterers may impos[e] economic or financial restrictions, enforc[e] physical and emotional isolation, repeatedly invad[e] the victim's privacy, supervis[e] the victim's behavior, terminat[e] support from family or friends, threaten[] violence toward the victim, threaten[] suicide, get[] the victim addicted to drugs or alcohol, and physically or sexually assault[] the victim. The purpose of the abusive behavior is to subjugate the victim and establish the batterer's superiority.

Id. at 304.

35. See Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards A New Agenda*, 4 B.U. PUB. INT. L.J. 339, 339–40 (1995).

36. E.g., Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 419 (1998).

37. Mills, *Killing Her Softly*, *supra* note 25, at 565–66. Mills notes that the research on mandatory prosecution is indeterminate, and its effectiveness is not yet clear. *Id.* at 568–69; see also LaFond & Portwood, *supra* note 29, at 4–5; Linda G. Mills, *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, 188–91 (1997) [hereinafter Mills, *Intuition and Insight*] (noting that mandatory prosecution may actually harm the battered woman more); Hilton, Harris & Rice, *supra* note 30, at 1342 (noting that arrest may merely delay recidivism, not stop it).

38. See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1531–38 (1998) [hereinafter Hanna, *The Paradox of Hope*].

39. GUZIK, *supra* note 26, at 120, 121.

scholars have noted that mandated state intervention might even create a kind of emotional violence for women, forcing women to participate even when they no longer wish to press charges.⁴⁰ Finally, some scholars have noted that prosecutors are ill-equipped to handle domestic violence cases.⁴¹ For example, some scholars have suggested that prosecutors are unable, and perhaps reluctant, to help the victim emotionally because of heavy caseloads and lack of time.⁴² This inability to help victims emotionally has been increasingly problematic in jurisdictions where budget constraints have led to layoffs for victims' advocates, because advocates are no longer available to help victims with the emotional burdens of a trial or other court proceedings.⁴³

B. The Overburdened Criminal Justice System

One unintended consequence of mandatory arrests and no-drop prosecutions is increased costs and caseloads,⁴⁴ which the already overburdened criminal justice system cannot effectively manage. For example, while many victims may obtain civil protection orders prohibiting contact from an alleged abuser, protection orders often lack widespread enforcement⁴⁵ because of limited resources.⁴⁶ Some jurisdictions decline

40. Mills, *Intuition and Insight*, *supra* note 37, at 185–86. Emotional violence means that it may be traumatizing for women to be forced to participate in court proceedings against their will, particularly after already experiencing physical violence from an intimate partner. Mills states:

Mandatory prosecution, like mandatory arrest, disempowers women by forcing a decision upon them without taking into account their individual needs. "Mandatory arrest" forces the police to detain a perpetrator of intimate abuse The battered woman's claims no longer matter—the police arrest regardless In a . . . no-drop jurisdiction, the battered woman's preference is irrelevant, except to the extent that she helps, or does not help, win the prosecutor's case.

Id. at 185. Another scholar notes that even the use of risk assessment tools creates a kind of emotional violence for women. She notes that the "state's and legal system's pervasive use of lethality assessment tools encroaches on women's dignity unnecessarily and even detrimentally." Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 519 (2010).

41. Mills, *Intuition and Insight*, *supra* note 37, at 194–95.

42. *Id.* at 194.

43. *E.g.*, *York Co. Layoffs Cuts Victims' Advocates in Court*, WMTW.COM (Sept. 15, 2009), <http://www.wmtw.com/r/20935731/detail.html>.

44. Kirk R. Williams & Amy Barry Houghton, *Assessing the Risk of Domestic Violence Reoffending: A Validation Study*, 28 LAW & HUM. BEHAV. 437, 438 (2004).

45. Not only do civil protections often lack widespread enforcement but victims also are not permitted to bring suit against police agencies that fail to enforce civil protection orders. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). The *Gonzales* case is currently under review by the Inter-American Commission on Human Rights to determine if the United States violated an international treaty, The American Declaration on the Rights and Duties of Man, to protect "the rights to life, nondiscrimination, family life/unity, due process, petition the government, and the rights of domestic violence victims and their children to special protections"; a decision on the mer-

to enforce misdemeanor and gross misdemeanor warrants because of jail overcrowding.⁴⁷ Increased caseloads have also led to changes in sentencing of offenders, higher rates of incarceration, and programs for victims and defendants.⁴⁸ Batterers often receive probation and mandated domestic violence batterer treatment, programs that are costly and potentially ineffective to deter the batterer from engaging in future abuse.⁴⁹

Moreover, some prosecutors' offices are so financially overburdened that they must decline prosecuting certain cases.⁵⁰ In one of the most egregious examples, the Topeka City Council approved a measure to decriminalize domestic violence and repealed the city law that made domestic violence a crime.⁵¹ The council approved this measure as a result of budgetary constraints.⁵²

Despite these budget and personnel constraints, many advocates continue to argue for aggressive prosecution of domestic violence offenders.⁵³ Some scholars call for mandatory minimum sentences for domestic violence batterers,⁵⁴ a policy that would increase the already

its is pending. See Cheryl Hanna, *Rethinking Consent in A Big Love Way*, 17 MICH. J. GENDER & L. 111, 125 (2009) [hereinafter Hanna, *A Big Love Way*].

46. See Hon. Philip J. Van de Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 SEATTLE U. L. REV. 847 (2003).

47. *Id.* Judge Van de Veer, a judge in northeastern Washington, noted that many counties in Washington refuse to arrest, detain, or transport defendants who are wanted on misdemeanor or gross misdemeanor charges. *Id.* at 852–53. For example, in Thurston County, Washington officers have not served nearly 10,000 warrants because of jail overcrowding. *Id.* at 852.

48. See generally Hanna, *The Paradox of Hope*, *supra* note 38. Hanna notes, however, that many domestic violence batterers do not actually go to prison or receive jail time. *Id.* at 1513.

49. *Id.* at 1513–14.

50. E.g., A. G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES, Oct. 11, 2011, <http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalizedomesticviolence.html?scp=1&sq=topeka%20moves%20to%20decriminalize%20domestic%20violence%20&st=cse>.

51. *Id.*

52. *Id.*

53. Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 173–74 (1997). She states:

Aggressive prosecution is the appropriate response for several reasons. First, domestic violence affects more than just the individual victim; it is a public safety issue that affects all of society. Second, prosecutors cannot rely upon domestic violence victims to appropriately vindicate the State's interests in holding batterers responsible for the crimes they commit because victims often decline to press charges. Third, prosecutors must intervene to protect victims and their children and to prevent batterers from further intimidating their victims and manipulating the justice system.

Id.

54. Killian, *supra* note 23, at 52–53. These scholars note that the benefit of mandatory sentencing is deterrence. They argue that such minimum sentences will deter batterers from reoffending because other programs, such as suspended sentences and probation, would amount to a mere slap on the wrist. *Id.* at 68–69.

overpopulated prisons and jails.⁵⁵ Some scholars also advocate for more reform, including social workers in prosecutors' offices, better treatment programs for offenders, specialized probation departments, and education for criminal justice personnel⁵⁶—all programs that would increase costs in the criminal justice system.

In light of shrinking resources, prosecuting attorneys' offices have been left with a difficult task: to protect the public and victims while allocating scarce resources in such a way as to most efficiently process these cases.⁵⁷ Some jurisdictions have dealt with case management concerns by creating special domestic violence courts.⁵⁸ Although some jurisdictions have developed programs to manage domestic violence cases, including creating special domestic violence units in prosecutors' offices,⁵⁹ few jurisdictions have employed additional measures to help manage cases, such as employing risk assessment tools to determine which cases to file. Some jurisdictions, however, have implemented statistical risk assessment instruments to assist in the analysis and management of domestic violence cases. Part III examines the current use of risk assessment tools in the criminal justice system and specifically in domestic violence cases.

III. CURRENT USE OF RISK ASSESSMENTS IN THE CRIMINAL JUSTICE SYSTEM AND DOMESTIC VIOLENCE CASES

Attempts to address concerns of shrinking budgets and limited resources have led actors in the criminal justice system to prioritize cases

55. *But see* Virginia E. Hench, *Essay: When Less is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. HAW. L. REV. 37, 56–57 (1997). Hench argues that reclassification of abuse to a lesser crime creates less violence because, even though the sentence is longer, the crime is punished more swiftly. *Id.* at 56–57. Thus, reduced sentences may actually reduce violence against women. *Id.* at 56–57; *see also* Patricia Sully, *Taking It Seriously: Repairing Domestic Violence Sentencing in Washington State*, 34 SEATTLE U. L. REV. 963, 992 (2011) (arguing that the legislature should do more than just increase or change sentencing; it must increase services for victims).

56. Hanna, *The Paradox of Hope*, *supra* note 38, at 1575–81.

57. *See* Williams & Houghton, *supra* note 44, at 438.

58. Jennifer Thompson, *Who's Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407, 426 (2004). Thompson notes that domestic violence courts are able to employ an interdisciplinary system of handling cases so that court actors, social service providers, and others in the community are able to provide a more individualized approach to the batterer and the victim. *Id.*; *see also* Hon. Randal B. Fritzler & Leonore M. J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000); Hon. Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 987 (2004); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1287 (2000).

59. *See* Robert T. Jarvis, *A Proposal for a Model Domestic Violence Protocol*, 47 LOY. L. REV. 513, 513–14 (2001).

by assessing defendants' risk of future dangerousness or lethality. Risk assessments have taken place in one of two ways: (1) clinical or subjective judgments, and (2) actuarial risk assessment instruments.⁶⁰ A clinical⁶¹ risk assessment is subjective and based on personal, anecdotal experiences.⁶² In contrast, an "[a]ctuarial risk assessment is an evidence-based prediction process based on statistical analysis."⁶³

Anecdotal risk assessments have been used for years in the domestic violence arena.⁶⁴ For example, judges use certain information about the defendant, such as history of domestic violence or other violent crimes, and information about the offense, such as seriousness, to determine whether to impose higher levels of bail or to keep the defendant in jail.⁶⁵

But most scholars agree that statistical tools are far more accurate than subjective, informal clinical evaluations, particularly when predicting violent behavior.⁶⁶ Scholars note that a subjective evaluation of dangerousness is often limited and inaccurate.⁶⁷ In fact, one critic of using clinical risk assessments noted that "[e]very single day many thousands of predictions are made by parole boards, deans' admission committees, psychiatric teams, and juries hearing civil and criminal cases To use the less efficient of two prediction procedures in dealing with such mat-

60. Williams & Houghton, *supra* note 44, at 438.

61. "Clinical" does not refer to a psychologist or psychiatrist. Rather, clinical in this context refers to the practitioner's (such as the judge, attorney, health care professional, etc.) subjective evaluation.

62. NEIL WEBSDALE, NAT'L RESOURCE CTR. ON DOMESTIC VIOLENCE, LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS (2000), http://snow.vawnet.org/Assoc_Files_VAWnet/AR_lethality.pdf.

63. Daniel J. Sheridan et al., *Prediction of Interpersonal Violence: An Introduction, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS* 3 (Jacquelyn C. Campbell ed., 2d ed. 2007).

64. Websdale notes that many researchers have relied on unofficial, qualitative data such as the following:

escalating domestic violence and the increasing entrapment of battered women; the separation/estrangement/divorce of the parties; obsessive possessiveness or morbid jealousy on the part of the abusive partner; threats to commit intimate partner homicide, suicide, or both; prior agency involvement, particularly with the police; the issuance of protection or restraining orders against one of the parties, nearly always the male; depression on the part of the abuser; and, a prior criminal history of violent behavior on the part of the abusive man.

WEBSDALE, *supra* note 62, at 2 (citations omitted).

65. *Id.*

66. N. Zoe Hilton & Grant T. Harris, *How Nonrecidivism Affects Predictive Accuracy*, 24 J. INTERPERSONAL VIOLENCE 326, 327 (2009); see also William M. Grove, *Clinical Versus Statistical Prediction: The Contribution of Paul E. Meehl*, 61 J. CLINICAL PSYCHOL. 1233 (2005). Although note that Williams and Houghton argue that some risk assessment tools use both objective (actuarial) and subjective data. Williams & Houghton, *supra* note 44, at 438.

67. Moyer, *supra* note 13, at 4.

ters is not only unscientific and irrational, it is unethical.”⁶⁸ This statement underscores scholarly preference for using scientific, statistical methods of risk assessment.

Despite agreement on the need to use risk assessments in the criminal context, scholars and practitioners still debate how best to implement such assessments. In the non-domestic violence context, risk assessment tools have been used predominantly in three areas.⁶⁹ First, risk assessment tools were created for use in deciding whether or not to continue to civilly commit people with mental disorders.⁷⁰ In addition, risk assessment tools are used to indefinitely commit people who are labeled sexually violent predators.⁷¹ Finally, risk assessments are used in some jurisdictions in criminal sentencing to determine the appropriate length of incarceration, and later, the appropriate amount of supervision once offenders are released.⁷²

Statistical risk assessment tools in domestic violence have received increased attention in the last two decades, in part because criminal justice actors are seeking ways to manage the growing number of domestic violence cases.⁷³ In fact, at least thirty-three domestic violence risk assessment tools have been created in the last decade.⁷⁴ Initial risk assessment tools had poor predictive accuracy.⁷⁵ Researchers, however, note that the current accuracy and reliability of predicting future dangerousness and lethality has improved, partly because the tools take into account a variety of complex factors.⁷⁶ For example, scholars agree that the most important risk of future intimate partner violence is a past history of

68. William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical—Statistical Controversy*, 2 PSYCHOL. PUB. POL’Y & L. 293, 320 (1996).

69. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 396 (2006).

70. Risk assessment tools for mental illness were created in large part due to violence following hospital discharge. Kirk Heilbrun & Gretchen Witte, *The Macarthur Risk Assessment Study: Implications for Practice, Research, and Policy*, 82 MARQ. L. REV. 733, 744 (1999). Research indicated that clinical judgment about whether or not a patient was likely to commit a violent act was modest, and potentially inadequate. Thus, mental health professionals began implementing statistical tools to assist in evaluations. *Id.* at 739–40.

71. See Monahan, *supra* note 69, at 403. Risk assessment tools are used to label sex offenders “sexually violent predators” and to hold offenders indefinitely in civil commitment. Use of risk assessment tools to civilly commit sex offenders is not without controversy. Many scholars question whether such tools are accurate. See Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 678 (2008).

72. Roehl & Guertin, *supra* note 13, at 171.

73. *Id.* at 171–72.

74. Eve Waltermaurer, *Measuring Intimate Partner Violence (IPV): You May Only Get What You Ask For*, 20 J. INTERPERSONAL VIOLENCE 501, 504 (2005).

75. Sheridan et al., *supra* note 63, at 9–10.

76. *Id.* at 10.

intimate partner violence.⁷⁷ In fact, 67%–75% of intimate partner homicides include a history of domestic violence against the female victim.⁷⁸ If previous assaults were severe or frequent, the risk of recidivism or reassault is very high.⁷⁹ Other common predictors of future dangerousness or lethality include mental illness,⁸⁰ low socioeconomic status,⁸¹ substance abuse,⁸² gender,⁸³ and race or ethnicity.⁸⁴ If children, particularly stepchildren, are present in the home, the risk and severity of recidivism is also high.⁸⁵ Finally, factors such as witnessing parental abuse or violence as a child, trauma, and borderline personality features also contribute to risk of future dangerousness or lethality.⁸⁶ Scholars also note that there is a strong parallel between intimate partner assault recidivism and predictors of general violence.⁸⁷

There are currently three types of risk assessment tools being used in three discrete aspects of domestic violence cases: (1) tools for health care professionals and others treating victims, (2) tools for front-line police officers, and (3) tools for sentencing domestic violence batterers. The following sections explore the current use of risk assessments in the domestic violence context. The examples provided are merely illustrative and are not meant to exhaustively explore all current risk assessment tools.

77. *Id.* at 10–11.

78. *Id.* at 10. This number does not reflect intimate partner homicides among same-sex couples. To date, there has been no “systematic study of risk factors for male same-sex partner homicides,” and there has been only one for female same-sex partner homicides. *Id.* at 11. For additional research regarding the representation of victims of same-sex domestic violence, see Satoko Harada, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing A Victim of Same-Sex Domestic Violence*, 41 U. BALT. L.F. 150 (2011).

79. N. Zoe Hilton & Grant T. Harris, *Assessing Risk of Intimate Partner Violence*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS*, *supra* note 63, at 106–10.

80. Some scholars argue that there are ethical considerations with using these factors as predictors of future violence. For example, using mental health as a predictive tool rather than as a means to treat emotional and psychological distress may create ethical considerations for the mental health clinician. Sheridan et al., *supra* note 63, at 16–17.

81. Hilton & Harris, *supra* note 79, at 106–07.

82. *Id.* at 107.

83. Because most risk assessment tools have been created with a male batterer and female victim in mind, it is unclear whether these risk assessment tools can be used to evaluate female batterers or same-sex intimate partner violence. *See id.* at 105–06.

84. Sheridan et al., *supra* note 63, at 10–16. *See* discussion *infra* Part IV about ethical considerations of potential racial profiling when using a risk assessment tool.

85. Hilton & Harris, *supra* note 79, at 110.

86. *Id.* at 107–08.

87. *Id.* at 119.

A. Use by Health Care Professionals and Other Advocates

Early domestic violence risk assessment tools were developed for use by health care professionals with the goal of intervening and assisting women so that they could understand their risk of lethality.⁸⁸ The Danger Assessment (DA) was created by Nurse Jacqueline Campbell in 1985 as a tool for health care workers and victims' advocates.⁸⁹ Unlike risk assessment tools used by frontline police officers, which are usually meant to test the likelihood of recidivism, the DA is used to predict the risk of lethality or near-lethality.⁹⁰ Today, the DA is perhaps one of the best-known domestic violence risk assessment tools and is used in numerous settings, from medical professionals to counselors and domestic violence shelter volunteers.⁹¹

The DA consists of a two-part analysis. In the first part, the victim uses a calendar to identify the days when abusive incidents occurred.⁹² The second part of the analysis consists of an interview of twenty questions in which victims are asked to answer *yes* or *no*.⁹³ Questions are scored,⁹⁴ and those who score the highest are encouraged to "seek safety assistance from social services support groups, law enforcement, and the judiciary . . . [or] require assertive safety measures from criminal justice professionals."⁹⁵ Health care professionals hope that the high-risk victims will take action, such as entering a domestic violence shelter or seeking other services such as protective orders, after learning about their risk of lethality.

The DA has received considerable attention in the last several years. Results are mixed on whether the DA reliably predicts reassault.⁹⁶ Although Campbell argues that the DA is the best predictor to determine lethality or near-lethality in a reoffense,⁹⁷ some scholars argue that the DA may actually produce false positives, where victims are inaccurately

88. Sheridan et al., *supra* note 63, at 16.

89. Johnson, *supra* note 40, at 524.

90. *Id.*

91. Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence will be Murdered by Their Partner*, 24 WIS. J.L. GENDER SOC'Y 277, 282–83 (2009).

92. *Id.* at 284.

93. The Danger Assessment initially consisted of fifteen questions but was revised recently to include additional questions. See JACQUELYN C. CAMPBELL, DANGER ASSESSMENT (2010), <http://www.dangerassessment.org/uploads/pdf/DAEnglish2010.pdf>.

94. Certain risk factors may be weighed more heavily "because they have been found to be more significantly correlated with near-lethal or lethal outcomes." Hitt & McLain, *supra* note 91, at 284.

95. *Id.* at 285.

96. Johnson, *supra* note 40, at 530–31.

97. Jacquelyn C. Campbell, *Commentary on Websdale: Lethality Assessment Approaches: Reflections on Their Use and Ways Forward*, 11 VIOLENCE AGAINST WOMEN 9, 1209–10 (2005).

assessed as being in danger.⁹⁸ In contrast, a study in 2005 found that the DA is one of the most statistically accurate risk assessment tools currently used.⁹⁹ Regardless of the controversies surrounding the DA, it is one of the most widely used risk assessment tools in the United States.¹⁰⁰

B. Use by Police

Risk assessment tools also are used in the domestic violence context to assist police officers and detectives. This section explores three risk assessment tools currently used by law enforcement: the Lethality Assessment Program, the Ontario Domestic Assault Assessment, and the Portland Danger Assessment.

1. Lethality Assessment Program

Law enforcement officers created a modified DA, known as the Lethality Assessment Program (LAP).¹⁰¹ The goal is for law enforcement to identify high-risk victims and refer them to domestic violence services.¹⁰² Police officers conduct the LAP questionnaire, which consists of eleven questions. After scoring the questionnaire, officers refer women who are at risk of lethality or near-lethality to services and shelters.¹⁰³ The LAP is currently used nationwide.¹⁰⁴ Despite this widespread use, the LAP has not been subjected to published validity testing.¹⁰⁵

2. Ontario Domestic Assault Assessment

In Canada, researchers developed the Ontario Domestic Assault Risk Assessment (ODARA) to be used as a risk assessment tool by front-line police officers.¹⁰⁶ Police use only information that is readily available in the field to assess the risk of intimate partner assault recidivism.¹⁰⁷

98. *Id.* at 1210; WEBSDALE, *supra* note 62, at 1, 4. The majority of indicators used to assess lethality are “characteristic of many domestic violence relationships, the vast majority of which do not end in death.” *Id.* at 4. Thus, it is difficult to determine if these “risk factors” are unique to the lethality assessment or indicative of all domestic violence relationships.

99. Johnson, *supra* note 40, at 530–32.

100. *Id.* at 519, 542.

101. *Id.* at 532–34.

102. *Id.*

103. *Id.*

104. *Id.* at 539–40.

105. *Id.* at 542.

106. N. Zoe Hilton, Grant T. Harris, Marnie E. Rice & Ruth E. Houghton, *An In-depth Actuarial Assessment for Wife Assault Recidivism: The Domestic Violence Risk Appraisal Guide*, 32 LAW & HUM. BEHAV. 150, 150 (2008).

107. *Id.* at 151.

The questionnaire consists of thirteen questions,¹⁰⁸ which include questions specific to domestic violence¹⁰⁹ and questions common to antisocial behavior generally.¹¹⁰ Analysis has revealed that the ODARA accurately predicts recidivism 77% of the time, far better than other current risk assessment tools.¹¹¹ The ODARA has been widely adopted in Ontario and throughout Canada.¹¹² Versions of the ODARA are currently in use in the United States, including the State of Oregon.¹¹³ The ODARA is also used by front-line police officers to make investigative decisions and to calculate the importance of arrest in specific contexts.¹¹⁴

One critique of the ODARA is that it tests data against incarcerated individuals and institutional files.¹¹⁵ Thus, it is unclear if the data would come out the same if tested at the time of initial arrest.¹¹⁶

In addition, analysis of ODARA data has revealed that police may already arrest men who are more likely to recidivate, even in the absence of an actuarial tool.¹¹⁷ The criminal justice intervention may already occur in the highest-risk cases, and thus, an actuarial tool at the police stage may not be as beneficial as initially thought.¹¹⁸ In addition, some scholars note that the ODARA may reveal “false positives”¹¹⁹ that distort the predictive accuracy of the tool.

108. Hilton, Harris & Rice, *supra* note 30, at 1335. To construct the questionnaire and test the accuracy of the ODARA, researchers used “589 cases followed up over an average of 5 years” in which the “ODARA score significantly predicted wife assault recidivism . . . corresponding to a large effect size . . .” *Id.* “A perpetrator’s ODARA score indicates the likelihood of his recidivism and how he ranks among other known wife assaulters with respect to risk of recidivism.” *Id.*

109. Questions are about “prior domestic violence, confinement of the victim, number of children, perpetrator assaulted victim when she was pregnant, victim’s children from prior relationships, victim’s concern about future assaults, and barriers to victim support . . .” Hilton, Harris, Rice & Houghton, *supra* note 106, at 151.

110. Questions also include “prior correctional sentence, failure on conditional release, substance abuse, threats of violence, and two items pertaining to prior nondomestic violence.” *Id.*

111. Moyer, *supra* note 13, at 9.

112. *Id.* at 10.

113. *Id.*

114. N. Zoe Hilton, Grant T. Harris, Suzanne Popham & Carol Lang, *Risk Assessment Among Incarcerated Male Domestic Violence Offenders*, 37 CRIM. JUST. & BEHAV. 815, 815 (2010).

115. *Id.* at 816–17.

116. *Id.*

117. Hilton, Harris & Rice, *supra* note 30, at 1340–41.

118. *Id.*

119. Moyer, *supra* note 13, at 7–8. Moyer argues that by casting a “wide net,” one will always be able to have a high-risk assessment accuracy, but there may be people who never actually reoffend included in the risk appraisal. Moyer notes:

An informative measure of accuracy must reflect how well a test correctly labels reoffenders and how well it avoids incorrectly labeling men who do not reoffend. A measure of accuracy that does this is called the Area Under the Curve (AUC). The AUC tells us how often a randomly chosen recidivist will have a higher score on the risk assessment than a randomly chosen non-recidivist. The AUC can be as low as 50% (meaning that the recidivist is just as likely to score lower as he is to score higher than the non-

3. Portland Danger Assessment

The Portland Danger Assessment, another risk assessment tool used by police, was created in Portland, Oregon in response to budget constraints and an increased caseload.¹²⁰ According to the Portland Police Department, nine officers were charged with handling a caseload of over 3000 referrals for domestic violence cases.¹²¹ Of those 3000, only approximately 15% could be investigated.¹²² With such a heavy caseload, reviewing the cases took the equivalent of two fulltime officers, roughly 20% of the task force.¹²³ Officials charged with investigating the crimes also were concerned with the risk of selecting the “wrong” cases by not being able to protect victims or inadvertently introducing biases into the decision-making.¹²⁴

In response to these concerns, the department decided to identify objective methods that could be used to assess cases and place higher priority on higher-risk cases.¹²⁵ The department partnered with University of Oregon researchers to develop a statistical tool to conduct risk assessments.¹²⁶ The tool evaluates level of risk, and officers investigate cases that are deemed to be at the highest level of risk. Using the tool, officers conducted their own risk assessment and reduced the number of hours spent reviewing case data. As a result, there was a 111% increase in the number of cases that were investigated.¹²⁷ Because the tool was only recently developed, little is known about the tool’s predicative accuracy and long-term efficacy.

C. Risk Assessments Used in Sentencing

Courts in some jurisdictions have also experimented with using risk assessment tools to sentence offenders.¹²⁸ Courts in Colorado, Connecticut, Delaware, Minnesota, Nebraska, Vermont, and Canada currently use

recidivist, and that therefore the test doesn’t distinguish between these two groups any better than we could by flipping a coin) or as high as 100% (meaning that the recidivist will always score higher than the non-recidivist, and that therefore the test perfectly distinguishes between the two groups.

Id. at 8.

120. Greg Stewart & Kris Henning, Ph.D., Presentation at the 2nd Annual Washington State Domestic Violence Symposium: Risk Assessment for Intimate Partner Violence: The Portland Police Bureau’s Model (Sept. 9, 2010) (on file with the *Seattle University Law Review*).

121. *Id.* Referrals refer to cases that detectives need to investigate.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. For a comprehensive review, see Roehl & Guertin, *supra* note 13.

risk assessment tools to assist them in sentencing domestic violence offenders.¹²⁹ Some jurisdictions have state mandates to implement a risk assessment tool,¹³⁰ while other jurisdictions informally require a risk assessment.¹³¹

One example of a risk assessment tool used in sentencing is the Domestic Violence Screening Instrument (DVSI). The DVSI is an actuarial risk assessment tool used to classify offenders and determine level of supervision.¹³² Versions of the DVSI are currently used in Colorado, Connecticut, and Hawai'i.¹³³ When offenders are released from custody or sentenced for domestic violence related crimes, courts use a questionnaire to score the offender and label him as low-risk, medium-risk, or high-risk for reoffense.¹³⁴ These labels form the basis for supervision determinations.¹³⁵

IV. DRAWBACKS AND BENEFITS OF USING A RISK ASSESSMENT TOOL FOR CASE MANAGEMENT

Advocates of risk assessment tools argue that the development of an actuarial risk assessment tool would be beneficial to help manage many aspects of the criminal justice system,¹³⁶ and such tools may also assist prosecutors in making tough decisions about which cases to prosecute. In the criminal justice system generally, pretrial agencies must perform numerous services and tasks.¹³⁷ Similarly, prosecutors must perform many functions, and they have enormous discretion to determine whether or not to charge a defendant.¹³⁸ As budgets dwindle and case-loads remain steady or increase, prosecuting attorneys' offices will have to make tough decisions about which cases to prosecute and which cases to let go.

Despite widespread use of risk assessments in other criminal justice contexts, prosecutors' offices do not currently use risk assessment tools

129. *Id.* at 177.

130. Johnson, *supra* note 40, at 540–41 nn.103–10.

131. *Id.*

132. Williams & Houghton, *supra* note 44, at 437.

133. *Id.*; see also Roehl & Guertin, *supra* note 13, at 174–75.

134. Williams & Houghton, *supra* note 44, at 441.

135. *Id.*

136. See Hilton & Harris, *supra* note 66, at 327; WEBSDALE, *supra* note 62, at 7; see also Hitt & McLain, *supra* note 91, at 282–83.

137. Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 FED. PROBATION 33, 33 (2009). Pretrial tasks include making bail recommendations, deciding which cases to file, and making other charging decisions

138. *Id.*

to assist in case-management determinations.¹³⁹ In the domestic violence context, a call for using risk assessment tools in pretrial proceedings and case setting has been limited.¹⁴⁰ In order to address the underlying issues of increased caseloads and shrinking budgets, I propose development of a risk assessment tool that can be used by prosecutors to manage cases, such as charging decisions and bail recommendations. Although there may be drawbacks to using a risk assessment tool in case management, a risk assessment tool is increasingly necessary as prosecutors are forced to decide which cases they can prosecute. Below, I outline the potential drawbacks to using risk assessment tools for case management. But I rebut these drawbacks with advantages to using a risk assessment tool for case management.

A. False Positives and False Negatives: A Risk Assessment Tool Could Pick the Wrong Case to Prosecute . . . But at Least There Would Be Some Predictive, Statistical Accuracy

Advocates and others fear that risk assessment tools may create false positives, overpredicting some defendants as more dangerous than they are, and create false negatives, underpredicting defendants as being more low risk than they really are.¹⁴¹ If the perpetrator is predicted to be less dangerous, there is the potential that the victim could be seriously injured or even killed.¹⁴² If the perpetrator is predicted to be more dangerous than he is during pretrial determinations, he could be unfairly incarcerated prior to trial and being found guilty.¹⁴³ The following example underscores the concern of practitioner error:

At 3:00 in the morning in October 2009, Milord Gelin broke into the home of his ex-girlfriend, LW, through her garage, snuck up the stairs, and beat her with a hammer as she slept. LW survived by fighting her way to her bedroom window, and screaming for help, leaving a trail of blood on the window frame. Her 14-year-old daughter, who was home at the time, saw Gelin as he fled down the stairs, and identified him as the perpetrator. Despite clear evidence that Gelin had committed the assault, people who knew him were

139. Roehl & Guertin, *supra* note 13, at 178. There have been other risk assessment tools not mentioned here. For example, the Violence Risk Appraisal Guide (VRAG) is an actuarial tool created “to address violence potential in men undergoing pretrial psychological forensic assessments.” Sheridan et al., *supra* note 63, at 3. But this tool has not been widely used, is very complicated to administer, and would take considerable training for police officers, prosecutors, and others to implement. *Id.* at 3–4.

140. *But see* Hanna, *The Paradox of Hope*, *supra* note 38, at 1573, 1584; *see also* Lowenkamp & Whetzel, *supra* note 137, at 33.

141. Sheridan et al., *supra* note 63, at 17.

142. *Id.*

143. *Id.*

shocked. He and LW had only recently ended a three-year relationship, one that was free from domestic abuse.¹⁴⁴

In this example, Milord Gelin's bail was very high but not because of the nature of his crime.¹⁴⁵ Rather, his bail was high because he fled the state and had to be apprehended by U.S. Marshals.¹⁴⁶ One victims' advocate opined that Gelin's bail would have been much lower had he not fled, particularly if a risk assessment tool had been used to make bail determinations because he had no prior criminal history or history of domestic violence.¹⁴⁷ Had Gelin been free to leave jail after posting bail, he potentially could have harmed his victim even more.

This example underscores why many domestic violence advocates are critical of the use of risk assessment tools in case management decisions. For example, a victims' advocate in Seattle, Washington has noted that risk assessment tools tend to portray incidents of intimate partner violence in shades of "black and white," not accounting for circumstances that would never be caught with a risk assessment tool.¹⁴⁸

Despite these concerns, relying on a statistical risk assessment tool is more advantageous and objective than merely relying on subjective clinical decisions.¹⁴⁹ As prosecutors must make tough decisions about who to prosecute and when to recommend lower bail determinations, they will need a tool to help discern between those cases that pose a greater risk of lethality or near-lethality and those that do not.¹⁵⁰ A risk assessment tool will provide the prosecutor with a tool to decide efficiently between cases, without relying on personal opinion. The advocate in Seattle agreed that, despite her concerns about statistical risk assessment tools, victims just as easily could be endangered by prosecutors' reliance on subjective, clinical assessments.¹⁵¹ Advocates believe overall that formal risk assessments should be used as *part* of the case evalua-

144. KOMO Staff, *Sleeping Woman Attacked with Hammer*, KOMO NEWS (Oct. 12, 2009), <http://www.komonews.com/news/64003132.html>.

145. *Id.*

146. *Id.*

147. Interview with Keri Duncan, Victim Advocate, King County Prosecuting Attorney's Office, in Seattle, Wash. (Jan. 15, 2011).

148. *Id.*

149. See discussion *supra*, Part III.

150. Prosecutors may face an ethical dilemma by choosing to prosecute a case based upon the results of an actuarial risk assessment tool. Prosecutors are subject to ethical responsibilities not only to protect the victim but also to protect the defendant. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006). Moreover, a prosecutor has a duty to the community to be a "minister of justice." *Id.* Scholars have not examined whether use of a risk assessment tool violates a prosecutor's ethical obligations. Such a discussion is outside the scope of this Comment.

151. Interview with Keri Duncan, *supra* note 147.

tion.¹⁵² Many argue that analysis of risk assessment information “should be part of any decision relative to a battered woman’s safety . . . whether to grant an order of protection” or at other stages of the proceeding.¹⁵³ “For judges, lawyers, advocates, police, and other professionals who work with victims of domestic violence, risk assessment is an art, not a science. Risk assessment research simply provides more information to the court in its exercise of discretion.”¹⁵⁴ Although a risk assessment tool may over or underpredict risk in a minority of cases, use of a statistical tool is better than clinical judgment, which numerous studies have indicated are far less accurate.

B. Race Bias Against Perpetrators and Victims Could Be Mitigated with a Risk Assessment Tool

Some scholars argue that risk assessment tools inherently devalue the input of migrant and minority victims of domestic violence.¹⁵⁵ Many instruments are available in only English, which is problematic because most current risk assessment instruments use victim statements and information to score the instruments.¹⁵⁶ Moreover, research has demonstrated that women who are members of minority populations are not as likely to provide intimate information as majority victims.¹⁵⁷ For example, African-American women often are “reluctant to report their black male abusers to the criminal justice system because that system has historically oppressed the African-American community”¹⁵⁸ Similarly, battered Asian women are reluctant to discuss their victimization because of cultural norms that discourage discussing private matters with police.¹⁵⁹ Therefore, a risk assessment tool may disproportionately ignore migrant and minority women.

In addition, some scholars worry that risk assessment tools may disproportionately impact minority batterers as well.¹⁶⁰ The role of prosecutorial discretion in deciding whether to file charges and what bail recommendations to make in a particular case has been the subject of in-

152. This Comment is not advocating that prosecutors’ offices should simply ignore subjective assessments. Rather, subjective assessments and statistical evaluations should be used in conjunction with one another to make the best decision about how best to prosecute domestic violence cases in light of the current economic climate. See Williams & Houghton, *supra* note 44, at 438.

153. Professor Janet A. Johnson, Professor Victoria L. Lutz & Professor Neil Websdale, Panelists, *Death by Intimacy: Risk Factors for Domestic Violence*, 20 PACE L. REV. 263, 278 (2000).

154. *Id.*

155. WEBSDALE, *supra* note 62, at 5.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Sheridan et al., *supra* note 63, at 17.

tense scrutiny.¹⁶¹ Many argue that prosecutorial discretion can lead to race biases or unethical decision-making.¹⁶² Some even argue that prosecutors do not receive proper training to make decisions about which cases to file.¹⁶³ “Evidence indicates that people of color are more likely to be prosecuted.”¹⁶⁴ Further, using race and ethnicity as a predictive tool may create a greater likelihood of racism and classism.¹⁶⁵

While some critics suggest that migrant and minority women are disproportionately neglected by risk assessment tools, these concerns could be remedied by creating a risk assessment tool that does not rely on victim statements or information. That is, by using a risk assessment tool that relies solely on factors attributable to the perpetrator, race bias against the victim may be diminished or even eliminated.

Moreover, a risk assessment tool could help eliminate race bias against perpetrators. Advocates of a pretrial risk assessment tool argue that a tool may actually eliminate race biases in filing decisions and other pretrial decisions by focusing on other factors such as risk of future lethality.¹⁶⁶ By eliminating subjective determinations, a risk assessment tool may also mitigate any race-bias allegations that have traditionally plagued prosecutors’ offices.

C. Risk Assessment Tools Use Subjective Information to Reach “Objective Results”

One objection to the use of risk assessment tools is that “lethality assessments in particular” try to “employ a scientific language that seeks to foretell the future.”¹⁶⁷ Such tools are given scientific weight but are based on data of women’s lives; each woman’s experience is complex and varies in experience. One scholar notes:

161. See, e.g., Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53 (2008). This scrutiny was heightened by the United States Supreme Court’s decision in *United States v. Salerno*, 481 U.S. 739 (1987), in which the Court held that the Bail Reform Act, which permits pre-trial detention, did not violate a defendant’s constitutional rights.

162. Stephens, *supra* note 161, at 53; see also Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 467 (2009) (arguing that racial bias exists in charging decisions); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805 (2012); Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012).

163. David C. James, *The Prosecutor’s Discretionary Screening and Charging Authority*, 29 PROSECUTOR 22, 22 (1995).

164. Sheridan et al., *supra* note 63, at 17.

165. *Id.*

166. Lowenkamp & Whetzel, *supra* note 137, at 33.

167. WEBSDALE, *supra* note 62, at 5.

[P]redictive studies work as part of an economy of power which involves the fast and frugal screening and classification of women to “efficiently” weed out those at the greatest risk of lethal interpersonal violence with the minimum amount of effort on the part of overworked agency personnel. Care for women may take a back seat to the need to produce an assessment of her life that can be readily quantified, compared to others, related to a norm, and subsequently disposed of.¹⁶⁸

This statement underscores many scholars’ argument that applying an efficient, objective tool to classify each domestic violence experience undermines the uniqueness of each woman’s experience.¹⁶⁹

Despite concerns that risk assessment tools undermine the complexity of domestic violence, research has consistently demonstrated that objective tools have greater accuracy over subjective, clinical evaluations.¹⁷⁰ As budgets become more constrained and prosecutors’ offices must make filing determinations and reduce the number of cases they prosecute, an objective risk assessment tool is far more advantageous than using only subjective judgments.¹⁷¹

D. Risk Assessment Tools May Mitigate Risk of Unfair Prejudice to the Defendant

Some scholars argue that risk assessment tools may infringe on the defendant’s constitutional protection of the presumption of innocence.¹⁷² Others argue that by using the fear of future dangerousness as a bail determination, prosecutors’ offices are infringing on the defendant’s Eighth Amendment right to be free from excessive bail.¹⁷³ Using risk assessments to preventatively detain defendants prior to trial may impermissibly punish the defendant prior to being found guilty.¹⁷⁴ One opponent of using risk assessments in pretrial determination notes that “[d]enial of freedom on the ground of dangerousness is based on a crime that may be committed in the future.”¹⁷⁵ If defendants are detained for fear of future dangerousness, there is never any data to compare whether the detention

168. *Id.* at 5–6.

169. *Id.*

170. *See supra* Part III.

171. Moyer, *supra* note 13, at 20.

172. The Eighth Amendment of the Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. A defendant is presumed innocent until found guilty.

173. Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 31–35 (2005).

174. Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 918–19 (2009).

175. *Id.* at 920.

decision was correct.¹⁷⁶ That is, because of the nature of the defendant's confinement, it will never be possible to tell if a nondangerous person has been impermissibly or incorrectly held prior to adjudication.

Despite these concerns, proponents suggest that using risk assessments at this stage will improve bail decisions.¹⁷⁷ In fact, the American Bar Association advocates for the use of an objective standardized guideline for pretrial determination.¹⁷⁸ They suggest that benefits include, "increased public safety, protection of civil liberties with minimal disruption in the lives of those presumed innocent, efficiently managed jail space and staff, and a reduction in disparity for bail decisions/release decisions."¹⁷⁹ If such advantages are present when using risk assessments to make bail determinations, similar benefits may be realized by using risk assessments in other case decisions.

E. Risk Assessment Tools Reserve Resources for Higher-Risk Defendants

There are also mixed opinions about whether arrest and risk assessment play any role in defendant recidivism. Some evidence suggests that arresting low-risk offenders in the nondomestic violence context may actually increase the likelihood of recidivism.¹⁸⁰ Research for domestic violence specific offenders has not ruled out "similar deleterious effect(s)" indicating that recidivism is more likely when low-risk domestic violence defendants are arrested.¹⁸¹ In contrast, offenders who are labeled high-risk often need more services and supervision, and arresting these defendants may reduce recidivism.¹⁸² Labeling defendants as low- or high-risk may actually increase efficiency by releasing defendants who pose little risk of dangerousness or lethality. Moreover, using a risk assessment tool to determine which cases are more serious will reserve scarce resources in the criminal justice system for defendants who pose a higher level of risk of lethality or near-lethality.

176. *Id.* at 918–19.

177. Lowenkamp & Whetzel, *supra* note 137, at 33.

178. Christopher T. Lowenkamp, Richard Lemke & Edward Latessa, *The Development and Validation of a PreTrial Screening Tool*, 72 *FED. PROBATION* 2, 2 (2008).

179. *Id.* at 3.

180. *Id.*

181. Hilton, Harris & Rice, *supra* note 30, at 1336.

182. *Id.*

V. CONCLUSION AND CALL FOR DEVELOPMENT OF A
RISK ASSESSMENT TOOL

On May 6, 2009, sheriffs in King County, Washington responded to a domestic violence call.¹⁸³ Upon entering the home, they found a woman who had been repeatedly assaulted by her husband, J.C. Johnson, with a large rock.¹⁸⁴ In the past, Johnson had tried to strangle his wife, threatened her with both an ice pick and a large kitchen knife, and forced his Rottweiler to bite her.¹⁸⁵ His probation officer called him the “worst repeat DV (domestic violence) offender I have ever supervised.”¹⁸⁶ Had a risk assessment tool been used to process his cases, it is possible that he would have been labeled a high-risk offender and perhaps placed on stricter supervision.

Despite drawbacks to the development of a risk assessment tool for prosecutors’ use, specific examples such as the Johnson case underscore the need for use of a risk assessment tool to manage domestic violence cases. A risk assessment tool for prosecutors’ use would potentially lead to more effective means of domestic violence case management. Further research should be conducted to determine the most effective risk assessment tool for use in prosecutors’ offices. Tools such as the Portland Assessment or Danger Assessment could be modified to meet the unique needs of prosecutors’ offices.

Although this Comment advocates for use of a risk assessment tool, extensive validation studies should be conducted before implementing such tools. Validation studies ensure that such tools are proven reliable for a population of people.¹⁸⁷ One researcher found that many risk assessment tools are never validated.¹⁸⁸ Instead, these tools are often implemented in jurisdictions without first being tested to determine whether they accurately predict dangerousness or risk of reoffense.¹⁸⁹ To ensure that risk assessment tools are achieving their desired goal of protecting victims who may be at risk of lethality or near-lethality, the tools should be validated before being implemented.

Although scholars and practitioners currently debate whether risk assessment tools are advantageous, this debate will evolve in favor of

183. John de Leon, *Deputies Looking for “Worst Repeat” Domestic Violence Suspect*, SEATTLE TIMES, May 14, 2009, http://seattletimes.nwsourc.com/html/theblotter/2009221070_deputies_looking_for_worst_rep.html.

184. *Id.*

185. *Id.*

186. *Id.*

187. CYNTHIA A. MAMALIAN, U.S. DEP’T OF JUSTICE, PRETRIAL JUSTICE INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 20 (2011).

188. *Id.* at 19.

189. *Id.*

using risk assessment tools as the criminal justice system continues to search for better ways to manage its increased caseloads. As prosecutors' offices become even more overburdened due to shrinking budgets, the problems of how best to manage caseloads will increase. Risk assessment tools in prosecutors' offices can help prosecutors discern between the most serious and least serious cases, permitting prosecutors to focus their attention on cases in which the victim is at risk of lethality or serious injury. The current debate of whether to use a risk assessment tool in prosecutors' offices will be solved by the reality of a deep budgetary crisis that will likely get worse before it gets better.