Taking It Seriously: Repairing Domestic Violence Sentencing in Washington State

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I. INTRODUCTION

Damon Overby wrapped a towel around his girlfriend's neck and proceeded to violently choke her.[1] This was not Overby's first offense—in fact, he had eight prior domestic violence convictions.[2] Yet Overby was sentenced to just twelve months work release for his latest domestic violence conviction.[3]

Gary Ruffcorn had a similar criminal history: six prior fourth-degree assault domestic violence convictions, three prior violations of a no-contact order, and two prior felony drug convictions.[4] But when Ruffcorn physically assaulted his girlfriend again, despite nine prior domestic violence convictions, only the nonviolent drug charges affected his offender score.[5] Ruffcorn's long history of domestic violence simply did not matter: the convictions carried no weight for the purpose of sentencing.[6] Thus, despite his extensive domestic violence history, Ruffcorn's

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1. Ruth Teichroeb, *Cracking Down on Chronic Batterers: Task Force Considers Toughening Sentencing Law*, SEATTLE POST–INTELLIGENCER, Sept. 5, 2008, at A1, *available at* http://www.seattlepi.com/local/377793_abuse05.html. There are no reported cases for Overby, Ruffcorn, or Greene because, as the cases did not involve novel areas of law, there was never a superior court opinion written.

2. ROB MCKENNA, WASH. STATE OFFICE OF ATT'Y GEN., DOMESTIC VIOLENCE SENTENCING REFORM: ENHANCED PENALTIES FOR REPEAT/SERIAL DOMESTIC VIOLENCE OFFENDERS 2 (2009) [hereinafter PROPOSAL], *available at* http://www.sgc.wa.gov/Minutes/11_Nov_08_DV_Sentencing_Reform_Package.pdf.

3. *Id.*

4. *Id.* at 5.

5. *Id.* at 6.

6. *Id.*

standard sentencing range barely differed from that of a misdemeanor sentence.[7]

Similarly, Marvin Greene racked up five misdemeanor domestic violence convictions, including two for domestic violence assault in the fourth degree, all against the same victim—his girlfriend.[8] But when Greene was convicted of felony domestic violence tampering with the same victim, he was considered a first-time offender.[9] The court simply gave no consideration to Greene's long history of domestic violence assault.[10]

Stories of repeat domestic violence offenders are common due to the pervasiveness of domestic violence in the United States.[11] In one study, nearly 25% of all women and 7.6% of all men surveyed reported being raped or physically assaulted by a current or former partner, spouse, or date.[12] Domestic violence is unique both because of its nature—abuse within the context of an intimate relationship—and because of its collateral consequences.[13] For years, feminists, scholars, law enforcement, and the judiciary have grappled with the question of how to address domestic violence. Today, further research from public-health professionals has shown the depth and cost of domestic violence.[14] While many agree that domestic violence needs to be taken seriously, parties disagree as to what "seriously" means. Is increased sentencing and the expansion of the prison system the solution, or is it a part of the problem? It is unclear how the criminal justice system should address domestic violence.

In 2009, Washington State Attorney General Rob McKenna proposed legislation to increase sentencing for repeat felony domestic violence offenders in Washington State.[15] According to McKenna, the new legislation "offers relief to the victims of domestic violence, brings ab-

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Patricia Tjaden & Nancy Thoeness, Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey*, *in* DOMESTIC VIOLENCE LAW 108, 109 (Nancy K. D. Lemon ed., 3d ed. 2005), *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm. The survey consisted of telephone interviews with a nationally representative sample, 8,000 U.S. women and 8,000 U.S. men, about their experiences with domestic violence. *Id.*

12. *Id.*

13. *See generally* Joan Zorza, *Women Battering: High Costs and the State of the Law*, *in* DOMESTIC VIOLENCE LAW, *supra* note 11, at 11.

14. *See infra* Part II.

15. *See* PROPOSAL, *supra* note 2.

users to justice, and treats serial domestic violence with the seriousness that it deserves."[16]

To create the legislative proposal (Proposal), McKenna convened a domestic violence advisory committee made up of prosecutors, police officers, and victim advocates.[17] The advisory committee agreed that the sentencing rules for chronic domestic abusers were inadequate—the rules did not "require judges to take into account the previous misdemeanor domestic violence convictions of the most dangerous offenders."[18] Furthermore, the sentencing rules were inconsistent with the way other nonviolent crimes were sentenced. For example, a car thief with Overby's record would be guaranteed at least three years in prison.[19] Yet Overby received only twelve months work release.[20] Because at the time, courts did not factor misdemeanor domestic violence convictions into offender scores, an offender could repeatedly batter his victim without receiving more than a proverbial slap on the wrist.[21] Thus, McKenna proposed a new sentencing structure to rectify the inadequacy of the old rules and bring domestic violence sentencing in line with both sentencing for other crimes and the seriousness of the crime itself.[22] The Washington State legislature passed House Bill 2777 (HB 2777) in March 2010, enacting the proposed sentencing structure; Governor Christine Gregoire signed HB 2777 into law in on April 1, 2010.[23] The new sentencing structure becomes effective in August 2011.[24]

This Comment explores Washington State's recent increase in sentencing for chronic domestic violence offenders, concluding that the increase is a significant step towards treating domestic violence with the seriousness it deserves. Part II discusses the costs and consequences of domestic violence. Part III provides a brief history of domestic violence laws and discusses the evolution of domestic violence sentencing in Washington State. Part IV explains HB 2777. Part V explores the

16. *Id.*

17. *Id.*

18. *Id.*

19. Teichroeb, *supra* note 1; *see also* David Martin, Senior Deputy Prosecutor, King County Prosecuting Attorney's Office, Workshop at Are We There Yet? Commemorating the Past, Celebrating the Future: A 30th Anniversary Domestic Violence Symposium: Making the Case for Progressive Penalties for Chronic DV Offenders (Sept. 12, 2009).

20. Teichroeb, *supra* note 1.

21. Martin, *supra* note 19.

22. *See* PROPOSAL, *supra* note 2; H.B. 2777, 61st Leg., Reg. Sess., 2010 Wash. Sess. Laws 2179, *available at* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/2777-S.SL.pdf.

23. H.B. 2777.

24. *See id.* § 403(21)(a).

strengths and weaknesses of HB 2777. Finally, Part VI concludes and offers suggestions for change.

II. COSTS AND CONSEQUENCES OF DOMESTIC VIOLENCE IN WASHINGTON STATE

Domestic violence is a critical public health and criminal justice issue—domestic violence often leads to serious injuries or homicide, and the impact on children who witness domestic violence is significant.[25] "An estimated ten to twenty percent of emergency department visits by women with partners . . . are [the] result of domestic violence."[26] One in five women in Washington report having been injured by domestic violence sometime in their lifetime.[27] And in a 2006 survey of women in Washington and Idaho, 44% of respondents reported some form of intimate-partner violence as an adult.[28] On average, more than 50,000 domestic violence reports are filed each year in Washington alone.[29] In fact, domestic violence calls "constitute the single largest category of [emergency] calls received by [the] police."[30]

The number of domestic violence fatalities is staggering—between January 1997 and June 2010, there were at least 755 deaths in Washington State alone.[31] Further, the number of domestic violence fatalities is

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25. WASH. STATE DEP'T OF HEALTH, THE HEALTH OF WASHINGTON STATE: DOMESTIC VIOLENCE 1 (2002), *available at* http://www.doh.wa.gov/HWS/doc/IV/IV_DV.doc; KING CNTY., DOMESTIC VIOLENCE AND CHILD MALTREATMENT COORDINATED RESPONSE GUIDELINE 14 (2010), *available at* http://your.kingcounty.gov/kcsc/docs/DVResponseGuideline.pdf.

26. WASH. STATE DEP'T OF HEALTH, *supra* note 25.

27. *Id.*

28. KELLY STARR, WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, COVERING DOMESTIC VIOLENCE: A GUIDE FOR JOURNALISTS AND OTHER MEDIA PROFESSIONALS 7 (2008), *available at* http://www.wscadv.org/docs/Media_Guide_2008.pdf (citing Robert Thompson et al., *Intimate Partner Violence Prevalence, Types, and Chronicity in Adult Women*, 30 AM. J. OF PREVENTIVE MED. 447 (2006)). This Group Health study surveyed 3,429 randomly sampled women and asked about their exposure to intimate-partner violence. Thompson et al., *supra* at 447–79.

29. *See* WASH. UNIF. CRIME REPORTING PROGRAM, WASH. ASS'N OF SHERIFFS AND POLICE CHIEFS, CRIME IN WASHINGTON 2009 ANNUAL REPORT 110 (2010), *available at* http://www.waspc.org/files.php?fid=3353.

30. ANDREW R. KLEIN, NAT'L INST. OF JUSTICE, NCJ 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 1 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/225722.pdf. The purpose of this work is to describe to practitioners the day-to-day implications of the current domestic violence research. *Id.* at vi.

31. JAKE FAWCETT, WASHINGTON COAL. AGAINST DOMESTIC VIOLENCE, UP TO US: LESSONS LEARNED AND GOALS FOR CHANGE AFTER THIRTEEN YEARS OF THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 10 (2010), *available at* http://www.wscadv.org/docs/FR-2010-Report.pdf. The DVFR defines a "domestic violence fatality as a death that arises from an abuser's efforts to assert power and control over an intimate partner." *Id.* This definition includes:

1. All homicides in which the victim was a current or former intimate partner of the person responsible for the homicide.

likely much higher; the Domestic Violence Fatality Review (DVFR) states that their data "undercount[s] the true number of domestic violence-related fatalities in five key areas": (1) children killed by domestic violence abusers, (2) homicides that occurred within same-sex relationships, (3) homicides mistakenly classified as suicides or accidents, (4) missing women cases and unsolved homicides, and (5) suicides of domestic violence victims.[32] Additionally, approximately 60,000 children in King County alone are exposed to domestic violence each year.[33]

The physical abuse of domestic violence is often accompanied by emotional abuse, controlling behavior, and verbal abuse.[34] Domestic violence impairs a victim's ability to function in daily life, maintain relationships, and keep a job.[35] Batterers often attempt to isolate their victims from friends and family, and the emotional consequences of battering, such as shame or embarrassment, can further serve to isolate victims.[36] Additionally, domestic violence victims often take time off of work in order to visit the doctor or recover from beatings,[37] making it difficult to maintain employment.[38] Escaping the violence is often complicated, time consuming, and may require the victim to completely abandon her job, home, and belongings.[39]

In addition to the physical and emotional toll domestic violence creates for victims, their friends, and their families, domestic violence also has a significant financial cost.[40] The national health-related costs of rape, physical assault, stalking, and homicide by intimate partners exceed $5.8 billion each year.[41] Of this total, nearly $4.1 billion is for victims

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2. Homicides of people other than the intimate partner that occur in the context of intimate partner violence, or in the midst of a perpetrator's attempt to kill an intimate partner (for example, situations in which an abuser kills a current or former partner's friend, family member, or new intimate partner, or a law enforcement officer).
3. Homicides that are an extension of or in response to ongoing intimate partner abuse (for example, cases in which an abuser takes revenge on a victim by killing the victim's children).
4. Suicides of abusers that happen in the context of intimate partner violence.

Id.

32. *Id.* at 14; *see also* STARR, *supra* note 28, at 6.

33. Martin, *supra* note 19.

34. Tjaden & Thoeness, *supra* note 11, at 110.

35. Sushma Kapoor, *Domestic Violence Against Women and Girls*, 6 INNOCENTI DIGEST 1, 12–13 (2000), *available at* http://www.unicef-irc.org/publications/pdf/digest6e.pdf.

36. *Id.* at 4.

37. *Id.* at 14.

38. Barbara Johnson, *Reducing Intimate Partner Abuse: A Look at National, State, and Local Strategies for the Prevention of Domestic Violence*, MINN. CTR. AGAINST VIOLENCE & ABUSE (Apr. 8, 2002), http://www.mincava.umn.edu/documents/barbara/barbara.html.

39. *Id.*

40. *DV Myths*, AM. INST. ON DOMESTIC VIOLENCE, http://aidv-usa.com/myths.html (last visited Feb. 9, 2011).

41. *Id.*

requiring direct medical and mental-health services.[42] Moreover, lost productivity and earnings due to domestic violence account for almost $1.8 billion each year.[43] The World Health Organization reports that "[r]ape and domestic violence account for 5% to 16% of healthy years of life lost by women of reproductive age."[44] Another study, reported by the United Nations Children's Fund (UNICEF), estimates the direct cost of domestic violence in the United States between five and ten billion dollars annually.[45]

Despite the pervasive nature and extensive cost of domestic violence, it has not always been recognized as a serious crime in Washington. In fact, for much of Washington's history, it was completely ignored. The next Part will provide a brief history of domestic violence law in the United States and Washington, and conclude by discussing the evolution of domestic violence sentencing in Washington.

III. EVOLUTION OF DOMESTIC VIOLENCE SENTENCING IN WASHINGTON STATE

In order to understand the import of Washington's current sentencing change, it is important to understand the development of domestic violence law. Section A will provide a brief history of the courts' treatment of domestic violence in the United States, and section B will examine the development of domestic violence law in Washington State.

A. History of Domestic Violence Law in the United States

During the eighteenth century, English common law recognized the right of husbands to physically discipline their wives under the rule of chastisement.[46] Under this rule, because a man was responsible for his wife's behavior, it was permissible for him to discipline her.[47] The rule of chastisement had one limit: a man could only beat his wife in a "moderate" manner.[48] The limitation on the rule of chastisement came to be

42. *Id.*

43. *Id.*

44. Anthony Rodgers, *Quantifying Selected Major Risks to Health*, WHO WORLD HEALTH REP., 2002, at 47, 80, *available at* http://www.who.int/whr/2002/Chapter4.pdf.

45. Kapoor, *supra* note 35, at 12.

46. Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, *in* DOMESTIC VIOLENCE LAW, *supra* note 11, at 2, 6.

47. *Id.*

48. *Id.*

known as the "rule of thumb": a man was permitted to beat his wife with a rod or stick, so long as it was not thicker than his thumb.[49]

Initially, American colonies outlawed "wife abuse," but the new colonial courts were soon pressured into following the English common law.[50] Despite calling the rule "barbaric,"[51] American courts in the early nineteenth century permitted a man to chastise his wife "without subjecting himself to vexatious prosecutions for assault and battery, resulting in the discredit and shame of all parties concerned."[52] Well after the Revolutionary War, new states generally incorporated the English common law.[53] For example, in 1864, a North Carolina court held:

> [A husband may] use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted . . . to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain.[54]

By the mid-nineteenth century, the "conceptions of authority and family structure" were changing in America, if not in the courts.[55] In 1848, the emerging women's movement issued a formal Declaration of Sentiments, in which it "publicly denounced the common law doctrines of marital status and the hierarchical, vertical structure of American society."[56] Still, it took over twenty years for the first American court to officially reject a husband's right to chastise his wife.[57] In 1871, the Alabama Supreme Court declared:

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49. Caroline Dettmer, Comment, *Increased Sentencing for Repeat Offenders of Domestic Violence in Ohio: Will this End the Suffering?*, 73 U. CIN. L. REV. 705, 709 (2004); *see* People v. Romero, 13 Cal. Rptr. 2d 332, 341 n.14 (Ct. App. 1993).

50. Murray, *supra* note 46, at 6.

51. James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1158 (1995); *see* Dettmer, *supra* note 49, at 710.

52. Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (quoting B. Finesmith, *Police Response to Battered Women: Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 79 (1983)).

53. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, *in* DOMESTIC VIOLENCE LAW, *supra* note 11, at 7.

54. State v. Black, 60 N.C. (1 Win.) 262 (1864); *see* Murray, *supra* note 46, at 7.

55. Murray, *supra* note 46, at 7.

56. *Id.*

57. Fulgham v. State, 46 Ala. 143 (1871). In that same year, despite defendant's request that the court instruct the jury that "the husband had a legal right to administer due and proper correction and corporeal chastisement on his wife," the Massachusetts Supreme Court nonetheless held that "beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent." Commonwealth v. McAfee, 108 Mass. 458, 459, 461 (1871); *see* Siegel, *supra* note 53, at 9.

> Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. . . . [T]he privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.[58]

By the 1890s, American courts completely abandoned the idea that a husband may legally chastise his wife within reasonable limits.[59]

While laws prohibiting chastisement were enacted, they were rarely enforced.[60] Instead, courts began to ignore domestic violence based on "domestic harmony" concerns;[61] domestic violence was perceived to be an internal family matter, best left free from state interference.[62] As one court stated, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[63] Instead of using the "hierarchal-based" chastisement language, jurists began to employ "affective privacy" language.[64] Such language invoked "the feelings and spaces of domesticity."[65] More importantly, it translated an antiquated idea—the rule of chastisement—into a modern context that felt profoundly reasonable—domestic privacy.[66] By invoking marital- or domestic-privacy justifications, the courts preserved the system of oppression by changing only the language.[67] These justifications held firm until the 1960s, when domestic violence once again became a national issue.[68]

In the 1960s, legal-aid lawyers and feminists recognized that the nonexistent domestic violence laws "provided little or no relief to abused wives."[69] In response, advocates worked to develop services for domestic violence victims and pressured law-enforcement officers, the courts, and the legislature to recognize the severity and pervasiveness of domestic violence.[70] Furthermore, advocates pushed for new legislation that expli-

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58. *Fulgham*, 46 Ala. at 146 (citations omitted).
59. Siegel, *supra* note 53, at 8; Dettmer, *supra* note 49, at 710.
60. Siegel, *supra* note 53, at 8.
61. *Id.*
62. State v. Rhodes, 61 N.C. (Phil.) 453 (1868).
63. *Id.* at 459.
64. Siegel, *supra* note 53, at 8.
65. *Id.*
66. *Id.*
67. *Id.*
68. Murray, *supra* note 46, at 7.
69. Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV 983, 996 (1989).
70. *Id.* at 996–97.

citly named domestic violence as a crime.[71] At the same time, advocates sought to educate the public about domestic violence through the media, public speaking engagements, and outreach programs.[72]

Despite increased public awareness of domestic violence, police departments in the 1960s adopted policies mandating mediation in domestic violence cases, reinforcing the deeply entrenched belief that domestic violence was not a crime, but rather a dispute in which both parties were to blame.[73] These policies reinforced the idea that domestic violence did not have the same legal stature or importance as an equally violent assault on a stranger.[74] Despite police policies, in the 1970s, states began to take steps to recognize domestic violence as a serious crime.[75] Washington State did so by enacting the Domestic Violence Act (DVA) in 1979.[76]

B. Domestic Violence Sentencing in Washington State

Prior to 1979, domestic violence was not explicitly mentioned in Washington law. In 1979, however, the legislature recognized domestic violence as a "community problem that accounts for a 'significant percentage' of violent crimes in the nation and is disruptive to 'personal and community life.'"[77] To address the domestic violence problem, the legislature enacted what became the Revised Code of Washington (RCW) 70.123, providing funds and standards for shelters serving domestic violence victims.[78] The law states in part:

> The legislature finds that domestic violence is an issue of growing concern at all levels of government and that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence. Research findings show that domestic violence constitutes a significant percentage of homicides, aggravated assaults, and assaults and batteries in the United States.[79]

In that same year, the Washington State legislature enacted what became RCW 10.99, the DVA, which recognized domestic violence as a

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71. *See id.*

72. *Id.*

73. Dettmer, *supra* note 49, at 712; Marion Wanless, Note, Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?, 1996 U. Ill. L. Rev. 533, 537.

74. Dettmer, *supra* note 49, at 712.

75. *See* Sewell, *supra* note 69, at 997.

76. WASH. REV. CODE § 10.99 (2010); Danny v. Laidlaw Transit Servs., 165 Wash. 2d 200, 208–10, 193 P.3d 128 (2008).

77. *Laidlaw*, 165 Wash. 2d at 208–09 (quoting WASH. REV. CODE § 70.123.010).

78. WASH. REV. CODE § 70.123.010 (2010); *Laidlaw*, 165 Wash. 2d at 209.

79. § 70.123.010.

serious crime and required law enforcement, prosecutors, and the courts to "respond to domestic violence."[80] The legislature stated its purpose was not only to recognize the importance of domestic violence as a serious crime, but also to "assure the victim of domestic violence the maximum protection from abuse which the law . . . can provide."[81] Finally, the legislature articulated its intent that the response to domestic violence be "the enforcement of the laws to protect the victim and . . . [to] communicate the attitude that violent behavior is not excused or tolerated."[82]

While the DVA recognized the serious nature of domestic violence, it did not create a crime called "domestic violence." In fact, it explicitly stated "[t]he legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence."[83] It acknowledged that in the past, "societal attitudes" were "reflected in policies and practices of law enforcement agencies and prosecutors" resulting in "differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers."[84] The DVA, therefore, articulated its intent to ensure the full and equal enforcement of the laws in the context of domestic violence, and it made clear that a crime should not be treated as less serious simply because it occurred in the domestic context.[85] It did not, however, increase sentencing for crimes of domestic violence or differentiate crimes of domestic violence from other crimes—it simply recognized the serious nature of domestic violence and mandated that it be treated like any other crime.[86]

Shortly after enacting the DVA, the legislature enacted the first version of the Domestic Violence Prevention Act (DVPA), which recognized the growing nature of the domestic violence crisis and created the civil Order for Protection for victims of domestic violence.[87] The legislature found that, "Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more. The crisis is growing."[88]

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80. WASH. REV. CODE, § 10.99.010 (2010); *Laidlaw*, 165 Wash. 2d at 209.

81. § 10.99.010.

82. *Id.* It is noteworthy that the legislature discusses not only its intent to change the response to domestic violence, but also its intent to "communicate the attitude that violent behavior is not excused or tolerated." *Id.*

83. *Id.*

84. *Id.*

85. *See* Roy v. City of Everett, 118 Wash. 2d 352, 358, 823 P.2d 1084 (1992) ("RCW 10.99 . . . emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor.").

86. *Id.*

87. WASH. REV. CODE § 26.50 (2010).

88. § 26.50.030.

The DVA's failure to specifically increase sentencing for domestic violence crimes perhaps made sense in 1979, when felony offenders were sentenced in broad ranges and sentences were indeterminate—courts had significant discretion in deciding whether to impose a sentence and what the length of the sentence should be.[89] But Washington's Sentencing Reform Act (SRA), enacted in 1981, changed the sentencing discrepancies of the old rules.[90]

Prior to the SRA, judges had broad discretion to implement sentences, resulting in offenders who committed similar crimes receiving substantially different sentences.[91] The goal of the SRA was to fix inconsistencies by ensuring that offenders who had similar criminal histories and had committed similar crimes were similarly sentenced.[92] The SRA curtailed courts' wide discretion and determined sentences by the offense's seriousness and the offender's history, as opposed to the pure discretion of the trial judge.[93] The SRA did not, however, enhance penalties for crimes of domestic violence.[94] Rather, felony domestic violence offenses were given the same weight as nondomestic offenses, and prior domestic offenses were given the same weight as their nondomestic counterparts.[95]

Under the SRA, crimes are sentenced according to a standardized sentencing grid, and in practice, crimes of domestic violence are sentenced like all other crimes.[96] While there is a domestic violence designation under the DVA, the designation is not an element of the crime and does not need to be described in the charging information.[97] This is because the DVA did not create any new crimes—it simply emphasized that existing statutes needed to be enforced in domestic violence situations.[98] Calling a crime domestic violence "does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced."[99] Thus, under the DVA, crimes of domestic violence are qualitatively equal to other crimes—there is no difference between a bar fight and a domestic assault.

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89. Martin, *supra* note 19.

90. WASH. REV. CODE § 9.94A (2010); *see* Martin, *supra* note 19.

91. Martin, *supra* note 19.

92. § 9.94A.010; Martin, *supra* note 19.

93. §§ 9.94A.510–.515; *see* Martin, *supra* note 19.

94. §§ 9.94A.510–.515.

95. *Id.*

96. *See* § 9.94A; Martin, *supra* note 19.

97. State v. Goodman, 108 Wash. App. 355, 359, 30 P.3d 516 (2001) ("A sufficient information states the essential elements of each charged crime so that the accused may understand the charges and prepare a defense." (citations omitted)).

98. *Id.*

99. *Id.* (quoting State v. O.P., 103 Wash. App. 889, 892, 13 P.3d 1111 (2000)).

Blakely v. Washington further changed domestic violence sentencing and curtailed the courts' ability to enhance sentences.[100] In *Blakely*, the Court held that any factual finding that authorized a judge to exceed the standard sentence range must be found to exist beyond a reasonable doubt by a jury.[101] In *Blakely*, Ralph Blakely abducted his estranged wife, Yolanda, who had filed for divorce, from their home.[102] He bound her with duct tape and forced her at knifepoint into a wooden box in the bed of his pickup truck, all the while imploring her to dismiss the divorce suit and related trust proceedings.[103] "When the couple's 13-year-old son . . . returned home from school, [Blakely] ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so."[104] Blakely pleaded guilty to second-degree kidnapping involving domestic violence.[105] The facts admitted in Blakely's plea supported a maximum sentence of fifty-three months. Nevertheless, the judge found there to be "deliberate cruelty," a statutorily imposed ground to sentence outside of the standard range, and sentenced Blakely to ninety months in prison—thirty-seven months above the standard range.[106] The Court held that because the facts supporting Blakely's exceptional sentence were neither admitted by him nor found by a jury, the sentence violated Blakely's Sixth Amendment right to trial by jury.[107]

Washington State responded to *Blakely* by changing its procedures to require a jury trial for all contested facts that authorize an aggravated exceptional sentence.[108] Additionally, "[t]he legislature . . . codified all

100. Blakely v. Washington, 542 U.S. 296, 301 (2004).

101. *Id.*

102. *Id*. at 298.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 300.

107. *Id.* at 305. In *Blakely*, the Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301. In *Blakely*, the Court stated:

> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," which in this case included the elements of second-degree kidnapping and the use of a firearm. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed.

Id. at 304 (citations omitted).

108. SENTENCING GUIDELINES COMM'N, DISCRETION UNDER THE SENTENCING REFORM ACT AND THE IMPACT OF *BLAKELY V. WASHINGTON* 9 (2005), *available at* http://www.sgc.wa.gov/PUBS/SRA_Review_BlakelyReport.pdf.

aggravating factors which had been approved by the appellate courts and made the new list of aggravating factors exclusive."[109] The list of aggravating factors includes deliberate cruelty to the victim, knowledge that the victim is pregnant, and history of domestic violence.[110] History of domestic violence, however, only applied to the same victim.[111] Thus, while aggravating factors could still be used to increase sentences, *Blakely* further limited a court's ability to fashion sentences based on a person's overall domestic violence history.

After *Blakely*, one question remained: what exactly was the domestic violence designation under the DVPA? *State v. Hagler* was the "logical result" following the procedural and legislative changes made by the state.[112] In *Hagler*, the defendant was a forty-year-old man without a stable place to live.[113] He began an intimate relationship with the victim, a nineteen-year-old cosmetology student, and moved into her apartment.[114] Soon after, Hagler gave the victim approximately $1,300 in cash and gifts, which the victim believed was in exchange for a place to live.[115] Subsequently, Hagler assaulted the victim, hit her several times with a gun, and told her that she "owed him" and "was going to go and be a prostitute and give him back all of his money."[116] Further, he held a gun to her temple and told her that he would kill her.[117] The victim had never been a prostitute before.[118] Over the next few days, Hagler drove the victim to several locations to engage in prostitution, instructing her as to the type of men to look for.[119] While she was on the street, he kept the car and keys to her apartment and called her repeatedly to see whether she had "met anyone" and to see how much money she had earned.[120] He threatened to kill her if she went to the police.[121] But the third time Hagler took the victim out to be a prostitute, she escaped to the police and helped lure Hagler to a meeting, where the police arrested him.[122] The State, among other charges, charged Hagler with assault in the second

109. *Id.*
110. WASH. REV. CODE § 9.94A.535(3)(a), (c), (h) (2010).
111. § 9.94A.535(h)(i); *see also* PROPOSAL, *supra* note 2, at 9.
112. Martin, *supra* note 19.
113. State v. Hagler, 150 Wash. App. 196, 198, 208 P.3d 32 (2009).
114. *Id.*
115. *Id.*
116. *Id.* at 199.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

degree and promoting prostitution in the first degree, and designated both as crimes of domestic violence.[123]

Prior to trial, Hagler requested the court "not to inform the jury of the domestic violence designations."[124] But the court "denied the motion and read the charges as they appeared in the information."[125] Similarly, at the end of the trial, Hagler objected to the domestic violence designation being included in the jury instructions.[126] Again, the court overruled the objection and the designation appeared several times in both the jury instructions and verdict forms.[127] Hagler appealed, contending that informing the jury of the domestic violence designation was "prejudicial and unnecessary."[128] In response, the State contended that the designation "merely allow[ed] the jury to understand the exact charges."[129]

On appeal, the court held the domestic violence designation was not helpful to a jury and may result in prejudice; thus, a jury should not be informed that a crime has been designated a crime of domestic violence.[130] In making this determination, the court considered the purpose of the DVPA and further stated that the designation "does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced."[131] The court asserted that because the domestic violence designation is neither an element of the crime nor evidence relevant to an element, it does not assist the jury, whose job is to determine whether the State has proved the elements beyond a reasonable doubt.[132] Therefore, according to the court, because the domestic violence designation was of no assistance and may result in prejudice, juries should not be told that a crime is a crime of domestic violence.[133]

Thus, there is still no actual crime of domestic violence in Washington. Moreover, simply being labeled a crime of domestic violence does not increase sentencing, or in the opinion of the *Hagler* court, "assist the jury in its task."[134] While an aggravating factor can be used to increase sentencing, prior to HB 2777, it did not apply to recidivist abusers who do not abuse the same victim. Therefore, while the legal re-

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 200.
127. *Id.*
128. *Id.* at 202.
129. *Id.*
130. *Id.*
131. *Id.* at 201 (citing State v. O.P., 103 Wash. App. 889, 892, 13 P.3d 1111 (2000)).
132. *Id.* at 202.
133. *Id.*
134. *Id.*

sponse to domestic violence has made great strides from the days when it was legally sanctioned or totally ignored as a private family matter, it is still not recognized as a crime that is serious and distinct from other types of assaults.

IV. HOUSE BILL 2777

House Bill 2777, based on the Proposal by Rob McKenna, was introduced to the Washington State legislature by Representative Roger Goodman on January 14, 2010, and changes the current state sentencing guidelines for domestic violence.[135] The Bill "sets point levels to determine the offender score level of domestic violence, taking into account prior acts and continued abuse."[136] Governor Christine Gregoire signed the Bill into law on April 1, 2010.[137]

According to McKenna, "The hard work of pursuing and prosecuting repeat domestic violence offenders too often results in weak sentences that fail to protect the victim or to properly account for prior domestic violence convictions."[138] McKenna asserts that the result of this failure is that offenders become indifferent to legal consequences, the cycle of violence continues, victims are put at greater risk, and many victims lose hope.[139] In HB 2777, the legislature specifically states it intends to "give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable."[140] To this end, the Bill institutes numerous changes in domestic violence sentencing, including (1) scoring prior misdemeanor domestic violence offenses,[141] (2) multiplying repeat domestic violence felony convictions,[142] (3) adding a "serial offender" aggravating circumstance[143] and a "victim-defendant" mitigating circumstance.[144] Additionally, the domestic violence designation now needs to be pleaded and proved in order to conform with *Blakely*.[145]

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135. *2010 House Bill 2777*, WASH. VOTES, http://www.washingtonvotes.org/2010-HB-2777 (last visited Feb. 9, 2011); *see* PROPOSAL, *supra* note 2.

136. WASH. VOTES, *supra* note 135.

137. *Id.* The Bill was signed with a partial veto to section 202, which is unrelated to the scope of this Comment. *Id.*

138. PROPOSAL, *supra* note 2, at 5.

139. *Id.*

140. H.B. 2777 § 101, 61st Leg., Reg. Sess., 2010 Wash. Sess. Laws 2179, *available at* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/2777-S.SL.pdf.

141. *Id.* § 403(21)(c).

142. *Id.* § 403(21)(a).

143. *Id.* § 402(3)(h)(i).

144. *Id.* § 402(1)(h)(i).

145. *See supra* Part III.B.

A. Prior Misdemeanors Are Scored

HB 2777 allows judges to consider a convicted defendant's prior convictions for domestic violence-related misdemeanor crimes.[146] Prior to HB 2777, misdemeanor domestic violence crimes were not included in an offender score calculation.[147] HB 2777 creates a class of "repetitive domestic violence offense[s],"[148] which includes nonfelony domestic violence assault, violation of a no-contact order or domestic violence protection order, domestic violence stalking, and domestic violence harassment.[149] Thus, misdemeanors now matter: if a defendant is convicted of a felony domestic violence offense, the offender receives one point—and a corresponding longer sentence—for each prior adult repetitive domestic violence offense where domestic violence was pleaded and proved.[150]

David Martin, a Senior Prosecutor in King County and the chair of the Domestic Violence Unit, states that the repetitive domestic violence offenses "are key categories, as scoring would accomplish a critical step in sentencing repeat DV offenders by officially recognizing hard-fought misdemeanor DV convictions."[151] Moreover, scoring these misdemeanors, which are notoriously difficult for prosecutors to win, will help bring domestic violence sentencing in line with how other crimes are sentenced; for example, prior misdemeanors have long been counted in felony traffic offenses when the misdemeanor was "particularly relevant" to the felony conviction.[152] Hence, HB 2777 creates sentencing consistency for felony domestic violence by subjecting repeat domestic violence offenders to a sentencing multiplier.

B. Repeat Domestic Violence Offenders Are Subject to a Sentencing Multiplier

Drug, sex, car theft, and felony traffic offenses are all subject to a sentencing multiplier—those crimes count more heavily in calculating an offender's score.[153] But, prior to HB 2777, felony domestic violence of-

146. H.B. 2777 § 403(21)(c).
147. *Id.* § 403(22).
148. *Id.* § 403(21)(c).
149. *Id.* § 401(39)(a)(i)–(iv).
150. *Id.* § 403(21)(c).
151. Martin, *supra* note 19.
152. *Id.*; PROPOSAL, *supra* note 2, at 7.
153. H.B. 2777 § 403(21)(a). When a sentencing multiplier is worked into the sentencing scheme, the points assigned to affected offenses are multiplied. For example, in 2007, it was decided to make all theft-of-a-motor-vehicle offenses "triple" if convicted of a future car-theft related offense. H.B. 1001, 60th Leg., Reg. Sess., 2007 Wash. Sess. Laws 741 (codified as amended in scattered sections of WASH. REV. CODE §§ 9A.56, 9.94A, 13.40, 36.28A, 46.63), *available at* http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Session%20Law%202007/1001-

fenses were not subject to such a sentencing multiplier.[154] HB 2777 adds a multiplier for each adult and juvenile prior conviction of certain crimes of felony domestic violence, including: violation of a no-contact order or protection order, harassment, stalking, first-degree burglary, first- and second-degree kidnapping, and unlawful imprisonment.[155] Thus, for such offenses, two points are added to the offender score for each prior adult conviction "where domestic violence (as defined in RCW 9.94A.030) was [pleaded and proved] after August 1, 2011."[156] For a juvenile offense, one point is counted for each conviction where domestic violence has been pleaded and proved after August 1, 2011.[157]

The sentencing multiplier does not apply to or multiply all domestic violence convictions; it focuses on "core domestic violence felonies."[158] HB 2777 excludes "domestic violence property crimes, felony violation of a no contact order . . . and residential burglary domestic violence."[159] Moreover, almost all domestic violence felony offenses are in the bottom third of the SRA seriousness levels; thus, earning a longer sentence will still require multiple convictions.[160] Because of the limited nature of HB 2777, the King County Prosecuting Attorney's Office estimates that after six years, only about 14% of domestic violence cases would be affected by the new law.[161] Further, HB 2777 does not affect misdemeanor sentencing except to recognize aggravating factors.[162]

C. Addition of Felony Aggravating Circumstances (Serial-Offender Aggravator) and Felony Mitigating Circumstance (Victim Defendant Exception)

Prior to HB 2777, there was no aggravating factor for a general history of domestic violence if the same victim was not implicated.[163] HB 2777 changed the aggravating-factor scheme, allowing for "multiple vic-

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S3.SL.pdf. Therefore, if an offender's criminal history consists of one prior theft of a motor vehicle and the offender subsequently committed another theft of a motor vehicle, the offender would have three points on the sentencing grid at the time of sentencing of the second car-theft offense. In contrast, if the same offender committed a non-car-theft related offense, the offender would have only one point on the sentencing grid. *Id.*

154. *See* H.B. 2777 § 403(21)(a).

155. *Id.*

156. *Id.*

157. *Id.* § 403(21)(b).

158. PROPOSAL, *supra* note 2, at 8.

159. *Id.*

160. Martin, *supra* note 19.

161. *Id.*

162. *Id.*

163. *Id.*

tims" as opposed to only the current victim of domestic violence.[164] This serial-offender aggravator recognizes the danger of serial batterers and allows all past domestic violence history to be considered as a factor in sentencing.[165] Under the serial-offender aggravator, domestic violence offenders can now be held accountable for their prior abuse if they (1) would have qualified for the "history of domestic violence" aggravator with a past victim but have been charged with a crime against a new victim or (2) would not have qualified for the history of domestic violence aggravator with any single victim but have a history of abuse across multiple victims.

In addition to the serial-offender aggravator, HB 2777 added a "victim defendant" exception as a mitigating factor.[166] The language, added by the judiciary committee, allows a court to order a lesser sentence for a "victim defendant"—an abuse victim who commits a crime in self-defense.[167] This exception can be used as a mitigating factor in sentencing when "[t]he current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse."[168]

D. Prosecutors Must Plead and Prove the Domestic Violence Designation

Appellate courts have affirmed the fact that the domestic violence designation is largely meaningless.[169] Prior to HB 2777, this designation was informational only—it did not affect punishment.[170] *Blakely* requires that any designation that increases an offender's sentence be pleaded and proved.[171] To conform to *Blakely* under the new sentencing proposal, prosecutors will need to actually plead and prove the domestic violence designation beyond a reasonable doubt to the jury, as though the designation were an element of the crime.[172] For example, if a defendant is

164. H.B. 2777 § 402(3)(h)(i), 61st Leg., Reg. Sess., 2010 Wash. Sess. Laws 2179, *available at* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/2777-S.SL.pdf.

165. PROPOSAL, *supra* note 2, at 9.

166. H.B. 2777 § 402(1)(h)(i).

167. Kathie Durbin, *Bills Toughen Domestic Violence Sentencing*, COLUMBIAN, Mar. 5, 2010, http://www.columbian.com/news/2010/mar/05/bills-toughen-domestic violence-sentencing-senate/.

168. H.B. 2777 § 402(1)(h)(i).

169. *Id.*; *see, e.g.*, State v. Spencer, 128 Wash. App. 132, 144, 114 P.3d 1222 (2005); State v. Clark, No. 54843-3-I, 2005 WL 1303489, at *1 (Wash. Ct. App. May 23, 2005); State v. Felix, 125 Wash. App. 575, 578–81, 105 P.3d 427 (2005).

170. *See Felix*, 125 Wash. App. at 578.

171. *Supra* Part III.B.

172. *See* Blakely v. Washington, 542 U.S. 296, 301 (2004).

charged with fourth-degree assault, domestic violence, the prosecutor will have to prove beyond a reasonable doubt not only the statutory elements of fourth-degree assault, but also the domestic violence nature of the crime as defined by RCW 10.99.020. But the domestic violence element would not affect the conviction, only the sentencing. If the prosecutor fails to prove the domestic violence designation, the sentence would simply "revert back to the sentencing structure currently in place."[173]

V. THE STRENGTHS AND WEAKNESSES OF HB 2777

The sentencing reforms in HB 2777 are significant strides towards treating domestic violence sentencing with the seriousness it deserves. Further, it is noteworthy that the Bill was not created by the criminal-justice community alone; domestic violence advocates from many different organizations took part in its development.[174] The widespread community involvement is important; it indicates both the support and wisdom of domestic violence service providers beyond the criminal justice system.

HB 2777 is a step in the right direction for a number of reasons. First, increased sentencing for repeat domestic violence offenders not only recognizes the societal import of domestic violence, but also may deter repeat offenders. Second, specific emphasis on repeat felony offenders also recognizes the recidivist nature of domestic violence. Third, HB 2777 highlights the seriousness of domestic violence offenses and ensures consistency with the way other crimes are sentenced. Finally, HB 2777 is limited in scope, targeting only the "worst of the worst" domestic violence offenders, reducing its impact on the prison system.

Despite the many strengths of HB 2777, increased sentencing raises certain concerns. First, HB 2777 fails to adequately address the need for domestic violence prevention. Second, increased sentencing may serve only to expand a prison system that is already at its capacity. The prison population in the United States is already both expansive and expensive; the United States has the highest documented incarceration rate in the

173. PROPOSAL, *supra* note 2, at 8.

174. *Id.* at 3–4. The Proposal was created by a group of professionals who have devoted their careers to dealing with the devastating effects that domestic violence has on survivors, their families, and their communities. The attorney general's domestic violence task force, which created the Proposal, was comprised of experts from the criminal-justice community, including representatives from several county prosecutors' offices: Benton, Snohomish, Kitsap, Thurston, Spokane, Yakima, Pierce, Clark, and King. The task force also included representatives from the Washington State Attorney General's Office, the University of Montana School of Law, the Crystal Judson Family Justice Center, and other advocacy organizations. *Id.* at 6.

world.[175] Further, some argue that the prison system is simply broken: it no longer, if it ever did, serves to rehabilitate prisoners. Finally, the prison system actually causes more harm to communities than other alternatives, and thus, increased sentencing under the Bill only exacerbates existing problems. Section A discusses the strengths of HB 2777 and addresses each of these concerns in turn. Section B discusses the weaknesses of HB 2777 and presents alternative views.

A. Strengths of HB 2777

1. Increased Sentencing May Deter Repeat Offenders

Increased sentencing may deter batterers from reoffending.[176] In crafting the Proposal, the task force considered a special report from the National Institute of Justice (NIJ Report) concerning the practical implications of current domestic violence research.[177] Most previous research indicated that certainty of prosecution has a deterrent effect, but the severity of punishment does not.[178] The NIJ Report calls this conclusion into question, stating that more "intrusive" sentences, such as jail time, significantly reduce rearrest rates for domestic violence as compared to less intrusive sentences.[179] Additionally, another study included in the NIJ Report "confirmed that sentence severity was significantly associated with reduced recidivism."[180]

According to the NIJ Report, the research is fairly consistent: "Simply prosecuting offenders without regard to the specific risk they pose, unlike arresting domestic violence defendants, does not deter further criminal abuse."[181] A defendant's prior criminal history and history of abuse indicate the risk of reabuse.[182] "The minority of abusers arrested who are low risk are unlikely to reabuse in the short run, whether prosecuted or not."[183] "Alternatively, without the imposition of significant sanctions . . . the majority of arrested abusers who are high risk will reabuse regardless of prosecution—many while the case against them is pending."[184] These findings suggest that the more invasive the communi-

175. ROY WALMSLEY, INT'L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 1 (2009), *available at* http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

176. KLEIN, *supra* note 30, at 47.

177. *Id.* at vi.

178. Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 59 (2001).

179. KLEIN, *supra* note 30, at 37.

180. *Id.* at 47.

181. *Id.* at 46, 52.

182. *Id.* at 52.

183. *Id.*

184. *Id*. at 47.

ty is in dealing with offenders, including increased sentencing and probation, the better the outcome in reducing recidivism.[185]

In addition to the NIJ Report, the task force also considered a 2007 Washington State Institute for Public Policy (WSIPP) study on static risk assessment[186] in the Department of Corrections.[187] WSIPP stated that "offenders with a record of domestic violence have higher felony and violent felony recidivism rates than offenders without a record of domestic violence."[188] This is particularly true for the association between felony domestic violence and violent felony recidivism.[189] As a result of this strong association, felony domestic violence has a high weight in the "Violent Score" on the static risk assessment.[190] HB 2777 recognizes the high risk of reoffense in domestic violence crimes and may serve as a more effective deterrent. Further, HB 2777 recognizes that domestic violence is often recidivist in nature and offenders are likely to reoffend.

2. The Recidivist Cycle of Violence

According to Martin, "Felony domestic violence is the single greatest predictor of future violent felony behavior. We see this pattern every day, and it too often leads to hospitalizations and even murder."[191] One of the greatest strengths of HB 2777 is its recognition of the recidivist nature of domestic violence and the danger that nature poses to victims. Both domestic abusers and domestic-abuse victims become trapped in a cycle of violence.[192] The cycle of violence has three distinct phases: the tension-building phase, the acute-battering phase, and the contrite or

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185. Martin, *supra* note 19.

186. Static risk assessment is based on criminal history and demographics. For an explanation of WSIPP's static risk assessment tool, see ROBERT BARNOSKI & ELIZABETH K. DRAKE, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON'S OFFENDER ACCOUNTABILITY ACT: DEPARTMENT OF CORRECCTIONS STATIC RISK INSTRUMENT 2 (2007), *available at* http://www.wsipp.wa.gov/rptfiles/07-03-1201.pdf.

187. Martin, *supra* note 19. The portion of this study specifically concerning domestic violence is not publically available, as it was compiled specifically for David Martin at the King County Prosecutor's Office. This research was presented at Are We There Yet? Commemorating the Past, Celebrating the Future: A 30th Anniversary Domestic Violence Symposium on Sept. 12, 2009. *Id.* Static risk assessment is a risk-assessment tool that examines certain factors to determine risk of recidivism. BARNOSKI & DRAKE, *supra* note 186.

188. Martin, *supra* note 19.

189. *Id.*

190. *Id.*

191. Press Release, Wash. State Office of the Att'y Gen., Former Miss Washington—Victim of Past Abuse—Endorses Att'y Gen.'s Domestic Violence Proposal (Oct. 20, 2009), http://www.atg.wa.gov/pressrelease.aspx?id=24632.

192. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993); *see also* Hernandez v. Ashcroft, 345 F.3d 824, 836–38 (9th Cir. 2003) (discussing the cycle of violence); LENORA E. WALKER, THE BATTERED WOMAN 55–75 (1979).

"honeymoon" phase.[193] The first phase, tension building, is characterized by seemingly minor incidents.[194] The victim strives to please his or her abuser's desires, which are often irrational, anger-ridden, and ever-changing.[195] Over time, the tension builds, with the abuser becoming increasingly more demanding, angry, and abusive.[196] This continues until something snaps—there is a breaking point resulting in "an acute battering incident."[197] This is the phase where police intervention often occurs—the violence is extreme and the abuser is nearly uncontrollable.[198] But this is generally not the end of the cycle. After the acute-battering phase, the abuser moves into the contrite, or honeymoon, phase, during which the abuser is apologetic, caring, even sweet; victims often describe an abuser as "the person they fell in love with."[199] This phase rarely lasts. Soon the tension-building phase once again begins, and the entire cycle repeats itself.[200]

HB 2777 recognizes that often, domestic violence is repetitive in nature: "[d]omestic violence is not an isolated, individual event, but rather a pattern of repeated behaviors . . . against the same victim by the same perpetrator."[201] According to some, "the most effective way to prevent domestic violence from occurring is for law enforcement officials to stop the 'cycle of violence' by implementing mandatory arrest and 'no-drop' policies."[202] Yet, because many domestic violence crimes do not currently affect the offender score, these policies are ineffective at ending the violence—the abuser is simply able to return home, pick up at the

193. WALKER, *supra* note 192, at 55.

194. *Id.* at 56–59.

195. *Id.*

196. *Id.* at 57.

197. *Id.* at 59.

198. *Id.* at 59–65.

199. *Id.* at 65–70.

200. *Id.* at 69.

201. Ann L. Ganley, *Understanding Domestic Violence*: *Preparatory Reading for Participants*, *in* DOMESTIC VIOLENCE: A NATIONAL CURRICULUM FOR FAMILY PRESERVATION PRACTITIONERS 60, 62 (1995), *available at* http://www.andvsa.org/wp-content/uploads/2009/12/60-ganely-general-dv-article.pdf.

202. H. Morely Swingle et al., *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MO. B. 220, 220 (2002). A mandatory-arrest policy "requires a police officer to detain a person based on a probable cause determination that an offense occurred and that the accused person committed the offense." RESPECTING ACCURACY IN DOMESTIC VIOLENCE REPORTING, JUSTICE DENIED: ARREST POLICIES IN DOMESTIC VIOLENCE 3 (2008), *available at* http://www.mediaradar.org/docs/RADARreport-Justice-Denied-DV-Arrest-Policies.pdf. Similarly, a no-drop policy generally provides that the victim of domestic violence cannot withdraw, or "drop," a criminal complaint. Cathleen A. Booth, Note, *No-Drop Policies: Effective Legislation or Protectionist Attitude?*, 30 U. TOL. L. REV. 621, 634 (1999). Both mandatory-arrest policies and no-drop policies are controversial. *See id.*; Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 180 (1997).

honeymoon phase, and continue the cycle. HB 2777 requires courts to consider an offender's full criminal record, including past misdemeanor domestic violence convictions, during sentencing.[203] True intervention is thus possible at an earlier point—the courts will not have to wait until a victim is killed before imposing a lengthy sentence.

Longer sentences may serve an additional purpose: to give the victims time to move on by finding safety, a new community, and a support system. Abusers rarely let a victim walk away; they will use violence and other control tactics to maintain the relationship.[204] Increased sentencing helps the victim break free, which is vital. Without increased sentencing, post-release the abuser and victim are at high risk to fall back into the previous cycle of violence. Because domestic violence relationships are complicated, marked by domination and control, and victims have often been isolated from friends and family, it can be difficult for victims to safely break the cycle of violence on their own.[205] In fact, one author described the difficulties of leaving, stating:

> [He] always found ways to get her to come back. He would come and tell her how sorry he was and how much he loved her; he would promise never to do it again. And she wanted to believe him. . . . When she wavered and it appeared his pleas and promises might not work, he would threaten to kill her if she refused to come home, threats which his past behavior gave her every reason to take seriously.[206]

The disturbing phenomenon of separation assault exacerbates the difficulty of safe separation.[207] Victims are at their greatest risk when they separate from their abusers.[208] In over 70% of domestic violence injuries, the homicide or injury occurred after the victim had left, divorced, separated from, or attempted to leave the abuser.[209] The most extreme violence and the most severe injuries often occur at separation.[210] Moreover, the majority of domestic violence fatalities happen shortly after separation.[211] Hence, longer sentences may allow victims to safely separate from their abusers.

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203. PROPOSAL, *supra* note 2, at 9.

204. Ganley, *supra* note 201, at 66.

205. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 63 (1991).

206. *Id.* (quoting CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE 2 (1989)).

207. Dutton, *supra* note 192, at 1212; Mahoney, *supra* note 205, at 5–6.

208. Mahoney, *supra* note 205, at 5–6.

209. *Domestic Violence: Fast Facts on Domestic Violence*, CLARK CNTY. PROSECUTING ATT'Y, http://www.clarkprosecutor.org/html/domviol/facts.htm (last visited Feb. 9, 2011).

210. Mahoney, *supra* note 205, at 5–6.

211. *Id.*

3. HB 2777 Treats Recidivist Domestic Violence Seriously

HB 2777 mandates that courts recognize the serious nature of domestic violence crimes and sentence them accordingly. The NIJ Report provides that "[s]entences that do not reflect a defendant's prior criminal history (and prior sentences) may suggest to the defendant that domestic violence offenses are not taken as seriously as other offenses."[212] Domestic violence sentencing was, prior to HB 2777, disproportionately light and inconsistent with sentencing for other crimes. For example, in a recent case, an abuser held a broken glass bottle to the bare neck of his girlfriend, threatened to kill her, and chased her out of the house with scissors.[213] He was subsequently arrested for assault.[214] Yet if convicted, he could face as little as three months in jail, even if he has multiple misdemeanor domestic violence charges.[215] But under HB 2777, prior domestic violence misdemeanors would be considered in his sentencing, resulting in a sentence up to four times longer.[216]

Moreover, HB 2777 could help change perceptions of domestic violence in the criminal justice system. Many judges simply do not take domestic violence as seriously as other crimes. For example, in the previous case, despite a prosecution motion to set bail at $50,000, the defendant's bail was set at just $5,000.[217] According to a prosecutor at the Clark County Domestic Violence Prosecution Center, this is a symptom of a larger problem: courts do not take domestic violence sentencing seriously.[218] The Clark County prosecutor stated, "Some courts, when they hear the term 'domestic violence,' automatically set the sentence lighter. There are a couple of judges in the community who still see domestic violence as something that can be taken care of in the home or through marriage counseling."[219] Essentially, many prosecutors and judges are not as concerned about crimes against intimate partners as they are about crimes against strangers, and it shows.[220] Stronger sentencing laws may result in a cognitive shift—by statutorily treating domestic violence as a serious crime, culturally, the criminal justice system and communities will begin to recognize the seriousness of the crime. This broader cultural shift is vital to protect women. Currently, stranger assaults receive

212. KLEIN, *supra* note 30, at 48.

213. Kathie Durbin, *Domestic Violence Sentencing Criticized*, SPOKESMAN-REV., Nov. 26, 2009, http://www.spokesman.com/stories/2009/nov/26/domestic violence-sentencing-criticized/.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

stronger sentences, and police respond faster to stranger-assailant emergency calls than to domestic-partner calls.[221]

4. HB 2777 Targets Only Felony Repeat Offenders

Finally, HB 2777 is restrained in scope: it targets only felony repeat offenders—the "worst of the worst"[222]—10% of all domestic violence offenders. Further, the Bill only affects recidivist offenders, which comprise 10% of felony domestic offenders.[223] Thus, in order to be affected by the Bill, an offender must offend at the felony level multiple times. And because the Bill impacts a relatively small subclass of offenders, it will neither result in a great increase in the number of people sentenced, nor result in nonviolent offenders receiving greatly increased sentences. It will only affect those offenders who truly pose a risk to society and have proved that risk by offending multiple times.

B. Potential Weaknesses and Alternative Views

A highly skilled team of domestic violence advocates created HB 2777, but like all things, it is not without criticism. HB 2777 aims to give teeth to the DVA by bringing domestic violence sentencing in line with sentencing for other crimes. After all, there is something inherently wrong with the idea that three felony car thefts results in a five-year prison sentence while three felony domestic violence crimes results in a nine-to-twelve-month sentence.[224] But this reasoning assumes the problem is that domestic violence sentencing is too low. There is another view of the problem: maybe domestic violence sentencing is not too low, but sentencing for car theft is too high. That is to say, maybe we have not undersentenced domestic violence, but rather oversentenced other crimes.

There are a number of reasons why increased sentencing may not be the appropriate way to regulate domestic violence. First, HB 2777 fails to provide adequate prevention measures. Second, the prison system in the United States is both expansive and expensive, and it hinders development of services to victims and longer societal solutions to domestic violence. Finally, while prisons serve a retributive purpose, they do not rehabilitate.

221. Zorza, *supra* note 13, at 15.
222. Durbin, *supra* note 213.
223. Martin, *supra* note 19.
224. *Id.*

1. HB 2777 Does Not Demand Prevention

The Domestic Violence Fatality Review (DVFR) reports that in "almost all cases" of domestic violence, victims report the violence to at least one person. In contrast, only 51% contacted law enforcement, 29% sought court orders,[225] and a mere 12% contacted a domestic violence advocate.[226] Despite the fact that almost all victims report the abuse to a friend, family member, or coworker, "[i]n most cases . . . community members did not have the information or skills they needed to help."[227] Similarly, review panels found that "schools did not provide adequate education or resources to address dating violence"[228] and "communities completely lacked tools outside the legal system to respond to abusers' violence."[229]

While HB 2777 increases sentencing for repeat felony domestic violence offenders, it does not demand community education or prevention programs for domestic violence. And while increased sentencing addresses a serious need, if the Washington State legislature is serious about reducing domestic violence, more prevention is needed. As made clear by the DVFR, law enforcement is not enough. Community education and prevention programs must be established in order to empower communities to address the problem of domestic violence.

Such prevention programs are not unprecedented. For example, Washington State has a Washington Traffic Safety Commission (WTSC), which identifies "priority" areas in traffic safety.[230] The WTSC has identified "impaired driving" as a priority and states, "We're working with other state agencies to keep alcohol- and drug-impaired drivers off the roads. Washington wants to increase impaired driving arrests, improve prosecution, set up more DUI courts, and promote the use of ignition-interlock devices."[231] HB 2777 fails to adequately establish similar prevention and education for domestic violence.

A similar Domestic Violence Commission could address core needs in prevention of domestic violence, including the need for safety planning, education, and improved access to services for victims in historical-

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 29.

229. *Id.* at 31.

230. *Programs and Priorities*, WASH. TRAFFIC SAFETY COMM'N, http://www.wtsc.wa.gov/target-zero/priorities/ (last visited Feb. 9, 2011).

231. *Impaired Driving*, WASH. TRAFFIC SAFETY COMM'N, http://www.wtsc.wa.gov/programs-priorities/impaired-driving/ (last visited Feb. 9, 2011).

ly "marginalized communities," all of which have been identified as key areas to improve Washington State's response to domestic violence.[232]

2. The Prison System Is Expansive and Expensive

The U.S. prison population is disproportionately high. In the past twenty years, the number of people in prison has not just increased but increased exponentially—by over 400%.[233] Globally, the United States has only 5% of the world's population,[234] yet the United States claims over 25% of the world's prison population.[235] Over 7.3 million people are in the prison system—one out of every thirty-one Americans is either in jail, on probation, or on parole.[236]

In Washington, the prison population has nearly tripled since 1970—there are now over 17,926 people incarcerated in the state.[237] While growing at a rate slower than the national average, the growth in Washington's prison population is significant.[238] Further, WSIPP anticipates that the incarceration rate will increase another 10% by 2019.[239] In 2010, the cost to house each offender in the Washington prison system was $94.84 per day.[240] The average yearly medical cost per offender was $6,413.[241]

HB 2777 not only fails to demand adequate prevention programs, but also shifts money and resources to expand the already bloated prison

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232. FAWCETT, *supra* note 31, at 25.

233. CRITICAL RESISTANCE, WHAT IS CRITICAL RESISTANCE?, http://criticalresist.live.radicaldesigns.org/downloads/What_is_CR.pdf (last visited Mar. 19, 2011).

234. *Study: 7.3 Million in U.S. Prison System in '07*, CNN.COM (Mar. 2, 2009, 3:09 PM), http://www.cnn.com/2009/CRIME/03/02/record.prison.population/index.html (discussing a study by the Pew Center on the States compiling data from the U.S. Department of Justice and U.S. Census Bureau).

235. *Id.*

236. *Id.* The numbers are even graver for minority groups: African Americans are four times more likely to be under correctional control. *Id.* One in every eleven black adults is in the correctional system. *Id.* And if one considers just the twenty-to-twenty-nine age group, one in every three African American men are incarcerated. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 19 (2003). Also, African American women are incarcerated at a rate of 5.4 times to that of white women. JUSTICE POLICY INST., NEW PRISON STATISTICS: NATION'S USE OF INCARCERATION ON THE RISE AGAIN 2 (2003), *available at* http://www.prisonpolicy.org/scans/jpi/new_prison_stats.pdf. "Latino men were imprisoned at 2.6 times the rate of white men, and Latinas were imprisoned at twice the rate of white women." *Id.*

237. WASH. STATE INST. FOR PUB. POLICY, OPTIONS TO STABILIZE PRISON POPULATIONS IN WASHINGTON: INTERIM REPORT 2 (2006), *available at* http://www.wsipp.wa.gov/rptfiles/06-01-1202.pdf.

238. *Id.*

239. *Id.*

240. Eldon Vail, Department of Corrections: An Introduction 11 (Jan. 11, 2011) (unpublished PowerPoint presentation), *available at* http://www.doc.wa.gov/aboutdoc/docs/Departmentof Corrections101-1-10-11.pdf.

241. *Id.* at 12.

system. While asserting intent to "improve the ability of agencies to address the needs of victims and their children and the delivery of services," the Bill fails to fund services for victims. Such funding is vital: adequate access to shelter services lead to a 60%–70% reduction in incidence and severity of reassault.[242] In the 2006 fiscal year, the Washington State Domestic Violence Hotline answered 22,370 calls; domestic violence programs served 19,456 adults and children; domestic violence shelters provided emergency shelter for 6,147 survivors and their children; and an additional 36,522 were turned away.[243]

While shifting funds from the prison system to victim services is a persuasive argument at first glance, it should also be noted that the financial cost of the sentencing reforms in HB 2777 is marginal.[244] Because scoring will not start until August 2011, and because the changes are entirely prospective, all domestic violence offenders are essentially starting at zero for enhanced scoring. An offender cannot receive an enhanced offender score under HB 2777 until the State has pleaded and proved domestic violence in cases that occur after August 2011, there is a qualifying conviction, and the defendant reoffends at a felony level with a qualifying conviction. Thus, the initial fiscal impacts of the program are negligible.[245]

Ultimately, whether one agrees that increased sentencing is the best solution depends on whether one believes that the prison system is the best and most effective way to address domestic violence. The efficacy of the prison system will be addressed in the next subsection, which considers the rehabilitative effect of prisons.

3. Prisons Are Ill-Suited for Rehabilitation

As early as the late 1700s, reformers advocated for a change in the way criminal punishment was administered.[246] The idea emerged that if punishment moved from the public sphere into the private sphere, punishment would move beyond revenge and into reform.[247] As the idea of prisons being places of "religious self-reflection and self-reform" devel-

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242. *Domestic Violence Statistics*, DOMESTIC VIOLENCE RES. CTR., http://www.dvrc-or.org/domestic/violence/resources/C61/#dom (last visited Feb. 9, 2011) (quoting J.C. CAMPBELL, PROTECTIVE ACTION AND RE-ASSAULT: FINDINGS FROM THE RAVE STUDY (2007)) ("Shelter services led to greater reduction in severe re-assault than did seeking court or law enforcement protection, or moving to a new location.").

243. STARR, *supra* note 28, at 6–7. This number is not unduplicated and includes the following: individuals for whom there was no available space, individuals who were not domestic violence victims, and individuals with special needs that the shelters could not accommodate. *Id.* at 7 n.8.

244. Martin, *supra* note 19.

245. *Id.*

246. DAVIS, *supra* note 236, at 41.

247. *Id.*

oped, so did the idea of the penitentiary.[248] There were two early models of penitentiaries, the Pennsylvania system and the New York system, and both emphasized isolation and solitude.[249] These systems have been criticized since their birth.[250] While some believed that self-reflection would lead to "moral renewal and thus mold convicts into better citizens," Charles Dickens believed that "[t]hose who have undergone this punishment MUST pass into society again morally unhealthy and diseased."[251] Today, many prisons draw on the historical concept of the penitentiary; however, nearly all reference to individual rehabilitation has been abandoned.[252]

Prison abolitionists argue that prisons are ill-suited for individual rehabilitation—they no longer, if they ever truly did, serve a rehabilitative purpose. Prisons are simply ineffective at dealing with gender violence, and despite an exponential increase in the numbers of men in prisons, women are not any safer from sexual assault or domestic violence.[253]

Despite the flaws of the prison system, even prison abolitionists concede that people who "exhibit persistent patterns of behavior defined as dangerous, require restraint or limited movement for specific periods of their lives."[254] "The goal of such 'last resort' procedures [such as prison] should be to work out the least restrictive and most humane option for the shortest stated period of time."[255] It is notable that HB 2777 is consistent with the idea that people who have consistently proved themselves to be dangerous must be restrained because the Bill is limited to offenders who have proved through repeated felony domestic violence offenses that imprisonment is the only feasible solution to stop their behavior. Yet the Bill fails to provide adequate treatment programs or rehabilitation for offenders.

The Washington State legislature has funded, albeit on a limited basis, several offender programs, including vocational education, basic education, cognitive behavior treatment (including "Moral Reconation," "Stress & Anger Management," and "Getting It Right"), and chemical

248. *Id.* at 45–46.

249. *Id.* at 47. While these two systems were philosophically similar, they did have one major difference: the New York system allowed for "labor in common," while the Pennsylvania system called for total isolation. *Id.*

250. *Id.* at 48.

251. *Id.* at 49 (quoting Charles Dickens, AMERICAN NOTES 119–20 (1842)).

252. *Id.*

253. *See* FAY HONEY KNOPP ET AL., INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 31–45 (Mark Morris ed. 1976), *available at* http://www.prisonpolicy.org/scans/instead_of_prisons/.

254. *Id.* at 129.

255. *Id.*

dependency programs.[256] But more must be done to ensure that repeat offenders do not simply serve longer prison sentences. In order for longer sentences to be truly meaningful, there must be adequate, targeted treatment and education programs.

VI. CONCLUSION

HB 2777 is excellent at what it aims to do: ensure that chronic domestic violence offenders serve proportional prison sentences. It is a moderate change, applying to only 10% of those convicted of domestic violence crimes—repeat offenders with established records of abuse.[257] Moreover, as previously noted, the Proposal for HB 2777 was not created by the criminal justice system alone. Rather, the domestic violence community as a whole contributed, and ultimately, it is the continued work and support of the domestic violence community that is needed to fully enact the intent of the Bill.

But in order to truly effect systemic change and alter the patterns of violence, there must be community alternatives that help prevent future violence, adequate services and protection for victims of violence, and programs to help rebuild communities damaged by violence.[258] Such alternatives include community-based economic resources, education models, forums, services, and medical care.[259] These services are vital to addressing the pervasive problem of domestic violence. Treating domestic violence seriously must go beyond increased sentencing for repeat felony offenders. We must do more—we must empower communities to effectively address domestic violence.

Increased punishment alone will simply never be enough—the legislature must fulfill its expressed intent; it must not only increase sentences, but also increase safe access to services for victims, improve treatment programs, and improve agencies' abilities to address victims' needs. Ultimately, "[t]he question is not how to abolish or improve prisons; it is how to change a society that is becoming so largely inhuman, unjust, self-centered, [and] indifferent to the suffering of others."[260] Hopefully, increased sentencing for repeat domestic violence offenders is a step towards this goal. But we must do more: we must hold the legislature accountable by insisting that it provide prevention services, education services, and victim services, not just longer prison sentences.

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256. Vail, *supra* note 240, at 15.

257. Durbin, *supra* note 167.

258. CRITICAL RESISTANCE, WHAT IS ABOLITION?, http://criticalresist.live.radicaldesigns.org/downloads/What_is_Abolition.pdf (last visited Mar. 19, 2011)

259. *Id.*

260. A.S. NEILL, PUNISHMENT FOR AND AGAINST 145, 161–62 (1971).