SIDESTEPPING JUSTICE? ADJOURNMENTS IN CONTEMPLATION OF DISMISSAL IN MISDEMEANOR COURT

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I. INTRODUCTION

In the public mind, justice is served when defendants' rights are observed, when the legal process arrives at more, rather than less, accurate verdicts, and when the consequences of illegal behavior correspond to society's sense of fair sanctions. The goodness of fit between these ideals and reality is on public display in jury trials, sentencing reports, and appellate proceedings. But a great deal of adjudication—misdemeanor case processing—happens below this public radar, and is seldom subject to empirical research. Little is known about how prosecutors and judges handle cases in lower courts, where dispositions may involve options such as diversion and conditional dismissal that blur the legal lines around judgments of guilt. This article explores dispositions of partner violence cases in three city courts in upstate New York, focusing on one such procedure—adjournment in contemplation of dismissal—that simultaneously treats defendants as de facto guilty (by imposing a waiting period of "good behavior" before final disposition), in exchange for a contingent promise to withhold conviction and permanently seal public records of the charges or

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resolution.[1]

In principle, these adaptations of the pretrial process are justifiable when the consequences of a conviction and resulting sentence are clearly outweighed by the negative effects of such decisions for defendants, victims, and the community. Often the criterion or rationale for these dispositions is "the interest of justice."[2] This sort of diversion is both practical and sensible in many individual cases. For example, first-time offenders who, having violated the law, nonetheless have produced no harm and who exhibit remorse might appropriately be given an opportunity to avoid the stigma of conviction. However, when these dispositions become normative in any particular type of case, we might reasonably investigate the factors that are associated with these decisions, and consider their implications not only for defendants but for victims and the larger community as well.

In New York courts, adjournment in contemplation of dismissal (ACD) has long been a common disposition in domestic violence charges.[3] Historically these cases, which often involve physical abuse, threats, and property damage, have been marginalized by the legal system, often trivialized as "disputes," "mutual combat," or "family problems" rather than criminal acts.[4] Beginning in the 1980s, reformers argued for police and court practices that focused on defendant behavior and culpability rather than relationship dynamics.[5] By the mid-1990s, like many other states, New York

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[1] As explained in the New York Criminal Procedure Law:

> The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant [to] this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

N.Y. CRIM. PROC. LAW § 170.55(8) (McKinney 2013).

[2] *Id.* § 170.40(1).

[3] The disposition is so common that the Nassau County Public Defender disseminates an information sheet on ACDs (intended for clients). *See Adjournment in Contemplation of Dismissal Information Sheet*, NASSAU CNTY. ASSIGNED COUNSEL DEFENDER PLAN, http://nassau18b.org/forms/adjournment_in_contemplation_of_dismissal.pdf (last visited May 27, 2013).

[4] *See* Gael B. Strack, *"She Hit Me, Too" Identifying the Primary Aggressor: A Prosecutor's Perspective*, NAT'L CENTER ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/images/she_hit_me.pdf (last visited May 27, 2013) (stating that it is not uncommon for law enforcement officers to use these terms in order to describe scenarios that they either do not have time to sort out or do not believe that it is their job to sort out).

[5] Lisa A. Frisch & Joseph M. Caruso, *The Criminalization of Woman Battering: Planned Change Experiences in New York State*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 102, 108–10 (Albert R. Roberts ed., 1996).

had enacted a series of reforms aimed at increased enforcement and prosecution, and greater responsiveness to the specific needs and concerns of partner violence victims.[6] The goal of these reforms included increasing both the accountability of perpetrators and the accountability of the criminal justice system to victims and potential victims.[7]

Yet very little is known about the circumstances that result in these dispositions, which paradoxically imply guilt in the courtroom but sidestep a conviction, punishment, and public record of arrest. We suggest that routine use of ACD might constitute a misstep of justice if this outcome (1) is associated with offender or case characteristics that are legally irrelevant to a verdict, or (2) is not associated with legally relevant factors (such as evidence and blameworthiness) that ought to distinguish between convictions on the merits and acquittals or dismissals. We also suggest that ACDs might be judged missteps of justice if they appear to be little more than reifications of earlier legal decisions (such as bail decisions and appointment of counsel).

II. PROSECUTION OF DOMESTIC VIOLENCE CASES

Research on the prosecution and adjudication of domestic violence cases is uneven, sometimes contradictory, and ultimately inconclusive. Early researchers reasonably focused their efforts on the arrest decision, inasmuch as advocates and reformers suspected that police reluctance to process domestic violence claims was the primary roadblock to increasing offender accountability.[8] In many jurisdictions, police reluctance was countered with mandatory arrest policies requiring an arrest anytime police had probable

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[6] *Id. at* 109–10.

[7] *See id.* at 127–28.

[8] For early research on the arrest decision, see Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 270 (1984). For more recent reviews, see Elizabeth P. Cramer, *Variables That Predict Verdicts in Domestic Violence Cases*, 14 J. INTERPERSONAL VIOLENCE 1137, 1138 (1999), and Kris Henning & Lynette Feder, *Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes*, 32 CRIM. JUST. & BEHAV. 612, 612–13 (2005). In New York, the site for the Frisch and Caruso study, reform efforts in the mid-1990s were aimed primarily at changing police practices, and reformers ultimately succeeded in passing the New York Family Protection and Domestic Violence Intervention Act in 1994. Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 1994 N.Y. Laws 2704; Frisch & Caruso, *supra* note 5, at 110. Among its most visible (and at the time, controversial) provisions was a requirement that law enforcement officers make warrantless arrests in misdemeanor domestic violence situations (for which they could document probable cause). *Id.*

cause to believe that a domestic violence incident had occurred.[9] Mandatory arrest policies may be a first step in holding offenders accountable, and a good deal of research has examined the effectiveness of such practices.[10] But we know much less about what happens in these cases in the courtroom, and this is especially true where officials make common use of dispositions that leave little or no trace of the event.[11]

Numerous challenges account for this gap in the research on domestic violence prosecution and adjudication. First is the issue of data collection. Most cases involving partner violence are filed as misdemeanors and are disposed in lower courts, typically in relatively abbreviated proceedings that produce limited court records.[12] Perhaps as a result, many early studies of court decision-making relied not on records of case dispositions, but on surveys of court actors.[13] Furthermore, many studies have been based on a

[9] *See, e.g.*, Frisch & Caruso, *supra* note 5, at 110 ("The law now requires police to make arrests in cases in which there is reasonable cause to believe that a felony or misdemeanor was committed by one family member or household member against another, or if an order of protection was violated.").

[10] *See* Henning & Feder, *supra* note 8, at 612–13.

[11] *See* JOANNE BELKNAP ET AL., NAT'L CRIMINAL JUSTICE REFERENCE SERV., FACTORS RELATED TO DOMESTIC VIOLENCE COURT DISPOSITIONS IN A LARGE URBAN AREA: THE ROLE OF VICTIM/WITNESS RELUCTANCE AND OTHER VARIABLES, EXECUTIVE SUMMARY 1–2 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/184112.pdf.

[12] *See* Durant Frantzen et al., *Predicting Case Conviction and Domestic Violence Recidivism: Measuring the Deterrent Effects of Conviction and Protection Order Violations*, 26 VIOLENCE & VICTIMS 395, 397–99 (2011). This research challenge applies to misdemeanor courts generally, not merely domestic cases. These cases very seldom result in trials. *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 337 (2011) (citing a statistic that less than one-third of one percent of misdemeanor convictions resulted from trial verdicts in New York City in 2003). Moreover, states utilize a diverse array of dispositions other than guilty verdicts and outright dismissals, so the meaning of options such as diversion, conditional discharge, and—as we shall see in this study—adjournment in contemplation of dismissal, can be subtle but important, and can have significant implications for defendants as well as for victims and criminal justice system records. *See* Frantzen et al., *supra*, at 399.

[13] *See, e.g.*, James J. Alfini & Rachel N. Doan, *A New Perspective on Misdemeanor Justice*, 60 JUDICATURE 425, 430, 431–32 tbls.3, 4 & 6 (1977) ("This paper focuses on two environmental factors: presence or absence of attorneys—two key actors in the 'courtroom workgroup'—and external pressures on judges to dispose of cases quickly." (citing JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 10 (1977))); William Austin & Thomas A. Williams, III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306, 307 (1977) (comparing the responses of state district court judges when posed with the same hypotheticals in order to get a "relatively 'pure' estimate of sentencing disparity" between the same type of judges in a given jurisdiction); James Frank et al., *Sources of Judicial Attitudes Toward Criminal Sanctioning*, 11 AM. J. CRIM. JUST. 151, 153 (1987) (analyzing several factors and their influence on how judges view criminal punishment); Jennifer L. Hartman & Joanne Belknap, *Beyond the Gatekeepers: Court Professionals' Self-Reported Attitudes About and Experiences with Misdemeanor Domestic*

single court.[14] Finally, the conclusions of the few studies that have examined case outcomes in domestic violence prosecution are contradictory, inconclusive, and sometimes surprising. Contradictory or disparate findings may be due to factors such as differing courthouse cultures,[15] variation in local agencies' criminal justice policies,[16] and inconsistencies among states' substantive and procedural laws.[17]

Violence Cases, 30 CRIM. JUST. & BEHAV. 349, 350 (2003) (analyzing data collected through interviews of "key courtroom actors"); Karen Markle Knab & Brent Lindberg, *Misdemeanor Justice: Is Due Process the Problem?*, 60 JUDICATURE 416, 420 (1977) (determining misdemeanor courts' "typical" procedures through interviews of a number of "system personnel" in various courts); William F. McDonald, *Judicial Supervision of the Guilty Plea Process: A Study of Six Jurisdictions*, 70 JUDICATURE 203, 203 (1987) (examining the "supervisory role" of a judge during the process of negotiating and entering guilty pleas); Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 180–81 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) ("[T]he survey attempted to identify how local prosecutors perceive and address domestic violence cases in the context of all other crime-specific cases.").

[14] *See* BELKNAP ET AL., *supra* note 11, at 1–2; Frantzen et al., *supra* note 12, at 399; Alissa Pollitz Worden, *The Judge's Role in Plea Bargaining: An Analysis of Judges' Agreement with Prosecutors' Sentencing Recommendations*, 12 JUST. Q. 257, 258 (1995) (drawing only from Georgia's superior courts).

[15] *See* EISENSTEIN & JACOB, *supra* note 13, at 10–11; JEFFERY T. ULMER, SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES 21–27 (1997); Peter F. Nardulli et al., *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, 76 J. CRIM. L. & CRIMINOLOGY 1103, 1129 n.25 (1985). Some scholars suggest that while courthouse cultures generate distinctive local norms and customs, particularly for lower-level cases, these differences might also be attributable to specific differences across judges' attitudes about types of cases. *See, e.g.*, Frank et al., *supra* note 13, at 151 ("Attitudes on sentencing are reflective on an individual's conceptions about the nature of crime and the role courts are to play in criminal justice policy." (internal citations omitted)); Anthony J. Ragona & John Paul Ryan, *Misdemeanor Courts and the Choice of Sanctions: A Comparative View*, 8 JUST. SYS. J. 199, 218 (1983) ("[A]mong the community of courtroom actors, there is widespread awareness of judicial differentiation in sentencing, including who the court's tough judges are and which judges make frequent use of rehabilitation-oriented sanctions."); Worden, *supra* note 14, at 258 ("Judges' proclivities in . . . participating in plea bargaining contribute significantly to the character of justice in their jurisdictions."). Still, others suggest that patterns in disposition customs may be associated with jurisdictional characteristics. *See, e.g.*, Kathryn Fahnestock, *Not in My County: Excerpts From a Report on Rural Courts and Victims of Domestic Violence*, 31 JUDGES' J. 10, 12–14 (1992) (examining characteristics shared by rural courts). Kathryn Fahnestock argues that courts in rural communities in particular engage in accelerated and sometimes careless proceedings; this can give short shrift to due process—a problem exacerbated by the frequent lack of counsel for defendants. *See, e.g.*, James R. Acker & Catherine L. Bonventre, Perspective, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1325–26 (2010) (discussing the unavailability of counsel in town and village courts). But, as Fahnestock points out, rural courts are likely to discourage victims from filing claims in the first place. Fahnestock, *supra*, at 12–13.

[16] *See, e.g.*, Nardulli et al., *supra* note 15, at 1129 & n.25 ("The routine in a given county is the result of . . . an amalgram of contextual and environmental factors . . . [including] prosecutorial policies and practices.").

[17] For a comparison of state domestic violence laws, see *State Summaries*, DOMESTIC VIOLENCE, SEXUAL ASSAULT, & STALKING DATA RES. CTR., http://www.jrsa.org/dvsa-drc/state-

This study was undertaken in the State of New York. In New York, misdemeanor cases may be resolved through several mechanisms. These include convictions and acquittals, but also include dispositions that attach neither guilt nor innocence.[18] New York allows for conditional discharge and adjournment in contemplation of dismissal.[19] Some of these dispositions may have conditions attached, such as avoiding re-arrest, protective orders, or treatment programs.[20] It would appear that a substantial number of cases are resolved through these sorts of mechanisms. In New York and other states, these types of dispositions are common.[21]

The variability of case dispositions is evident in data that indicate that rates of dismissals, guilty pleas, and intermediate dispositions vary. Most studies report dismissal rates (which might result from both prosecutors' and judges' judgments) that range from 5% to 34%.[22] Guilty verdicts (which overwhelmingly result from guilty pleas) appear to be a fairly seldom occurrence in some courts, but the norm in others.[23] This leaves the "intermediate" dispositions that may or may not include probationary conditions, the potential for a conviction should the offender violate these conditions, adjournment of cases without conditions or penalty if re-arrested,

summaries.shtml (last visited May 27, 2013).

[18] *See* Frantzen et al., *supra* note 12, at 396.

[19] *See* N.Y. PENAL LAW § 65.05(1)(a) (McKinney 2013); N.Y. CRIM. PROC. LAW § 170.55(1) (McKinney 2013).

[20] *See* PENAL LAW § 65.05(2); CRIM. PROC. LAW § 170.55(4)–(7).

[21] ERICA L. SMITH & DONALD J. FAROLE, JR., BUREAU OF JUSICE. STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228193, SPECIAL REPORT: PROFILE OF INTIMATE PARTNER VIOLENCE CASES IN LARGE URBAN COUNTIES 6 tbl.11 (2009) (reporting a pretrial diversion or deferred adjudication rate of 8.6%).

[22] Rates of dismissal as a disposition vary widely from 3% to 37%. Dismissal rates are difficult to capture accurately as they may include dismissal prior to charging or arraignment, dismissal after a period of adjournment, acquittals, and cases that are the result of a prosecutor's *nolle prosequi*. *See, e.g.*, Andrew R. Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995–2005*, 14 VIOLENCE AGAINST WOMEN 136, 140 (2008) (reporting a 31.5% dismissal rate); SMITH & FAROLE, *supra* note 21, at 6 tbl.11 (reporting a 33% dismissal rate); Henning & Feder, *supra* note 8, at 629 (reporting a 20.6% dismissal rate); *see also* Abigail Gewirtz et al., *Domestic Violence Cases Involving Children: Effects of an Evidence-Based Prosecution Approach*, 21 VIOLENCE & VICTIMS 213, 221 (2006) (reporting a dismissal rate of 34.1% prior to establishment of a specialized domestic violence prosecution unit and a dismissal rate of 11.2% after establishment of such unit).

[23] *Compare* Klein & Tobin, *supra* note 22, at 141 (reporting a 12% rate of guilty pleas); Cramer, *supra* note 8, at 1141, 1146 (reporting a 80% of convictions are by guilty plea, and that 27% of cases end with a conviction, so 21% of cases result in guilty pleas), *and* Carol E. Jordan, *Intimate Partner Violence and the Justice System: An Examination of the Interface*, 19 J. INTERPERSONAL VIOLENCE 1412, 1421 (2004) (finding similarly low rates in an earlier study), *with* Henning & Feder, *supra* note 8, at 628 (reporting that in 70.5% of the cases, "the defendants were found guilty, pled guilty, or placed [i]n diversion" programs), *and* SMITH & FAROLE, *supra* note 21, at 1 (reporting that over half of the defendants were convicted).

and assorted other dispositions. It is these "intermediate" dispositions that are of interest here.

States have various mechanisms for this middle ground of adjudication, most of which exist as a sort of compromise between a finding of guilt and a "get out of jail free" card. Virginia, for example, allows judges to "take cases under advisement" and also to "take cases under advisement with sufficient evidence to convict."[24] Other states allow for deferred adjudication,[25] and diversion.[26] One state, Massachusetts, allows for a "continuance without a finding"[27] that requires the offender take some responsibility for the offense in the form of an admission in court, but allows for dismissal of the case if the defendant abides by various rules during a probationary period.[28] On the other hand, a violation of conditions by the defendant may result in a conviction.[29]

This "intermediate" disposition takes other forms as well. Consider, for example, another jurisdiction, Tennessee, that allows for diversion,[30] a term typically synonymous with dismissal. In Tennessee, diversion is described as the same as a guilty plea, yet with the record expunged after one year, provided the defendant abides by the court-imposed condition.[31] In New York, no such mechanism exists. Instead, as we focus here, the adjournment in contemplation of dismissal neither requires any admission of wrongdoing, nor does it allow for a conviction should the offender be re-arrested during the period prior to dismissal.[32] In an area of the law such as domestic violence, given that reform has sought to increase accountability for domestic violence, this question must be considered: Whether an intermediate disposition, especially one that does not include any admission of wrongdoing, is a departure from justice.

Perhaps if the weaker and less serious cases result in these

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[24] Cramer, *supra* note 8, at 1140–41.

[25] *See, e.g.*, Frantzen et al., *supra* note 12, at 400 (Texas).

[26] *See* SMITH & FAROLE, *supra* note 21, at 6; Henning & Feder, *supra* note 8, at 638.

[27] MASS. GEN. LAWS ch. 278, § 18 (2013) ("Such request may include any disposition or dispositional terms within the court's jurisdiction, including . . . [that] the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation . . . ."). *See also* MASS. GEN. LAWS ch. 278, § 87.

[28] Klein & Tobin, *supra* note 22, at 140.

[29] *See* Wendy J. Kaplan, *Sentencing Advocacy in the Massachusetts District Courts*, 80 MASS. L. REV. 22, 30–31 (1995).

[30] Henning & Feder, *supra* note 8, at 628.

[31] TENN. CODE ANN. §§ 40-15-102–107 (2013); Henning & Feder, *supra* note 8, at 640 n.1.

[32] *See Adjournment in Contemplation of Dismissal Information Sheet*, *supra* note 3.

intermediate dispositions, it would indeed be a just result. Whatever the intermediate disposition, one would certainly believe that the stronger and more serious cases would be more likely to result in a conviction. As a result, the weaker and less serious cases would be riper for an "intermediate disposition." The difficult question, therefore, is: What are the predictive factors in the disposition in these domestic violence cases? If this question could be answered, perhaps we would be closer to determining whether intermediate dispositions sidestep justice and the goal of reform in domestic violence.

Unfortunately, this is the gaping hole in domestic violence research. Few studies look at the factors that are predictive of outcomes and those that do provide inconsistency and inconclusiveness. Although previous researchers have not been able to measure and collect data on some of these variables, we can observe some patterns. Researchers have examined whether case files often include information about physical violence, injuries, and the presence of a weapon—all indicative of more serious (harmful, threatening) behaviors, and greater legal seriousness.[33] Somewhat surprisingly, although Hartman and Belknap's interviews with court officials suggested that these factors would lead to guilty verdicts rather than diversion or dismissal, empirical studies of court outcomes suggest that they have little bearing on conviction.[34]

Justice would presume that the more serious the offense, the higher the likelihood of holding the offender accountable. In addition, justice would also presume that domestic violence prevention is a key goal in domestic violence prosecution. Importantly, studies have revealed that the greater the injury, the more likely the offender is to recidivate.[35] However, research does

[33] Henning & Feder, *supra* note 8, at 614 (citing various studies).

[34] *See* Hartman & Belknap, *supra* note 13, at 364–66 & tbl.5. Smith and Farole, as well as Henning and Feder, find that injuries make little difference in outcomes. *See* SMITH & FAROLE, *supra* note 21, at 4; Frantzen et al., *supra* note 12, at 402, 403; Henning & Feder, *supra* note 8, at 631; *see also* Kristin A. Bechtel et al., *Predictors of Domestic Violence in a State Court*, 7 VICTIMS & OFFENDERS 143, 151 (2012) (finding that presence of injuries was slightly associated with reduced risk of conviction). Likewise, studies led by Frantzen and Bechtel showed no association between use of a weapon and conviction. *See* Frantzen et al., *supra* note 12, at 403. *See generally* Bechtel et al., *supra*, at 150–51 (comparing injuries and making reference to use of weapons).

[35] *See, e.g.*, Frantzen et al., *supra* note 12, at 406 ("[A] powerful predictor of future domestic violence is the degree of injury to a victim—abusers who inflict more serious injuries are more likely to be rearrested after having been convicted of a family assault."); *see also* Klein & Tobin, *supra* note 22, at 145 (finding that a prior criminal history of domestic violence was predictive of future domestic violence and multiple future domestic violence offenses).

not consistently show that injury or even presence of a weapon consistently increases the likelihood of conviction.[36]

Another factor that would seem to increase the seriousness of a case is the presence of children. Studies that have measured the presence of children, or risk to children on the scene, likewise find that this variable is not clearly associated with conviction. Camacho and Alarid reported in a 2008 study that, although in 43.8% of the cases a child was present, this fact had no effect on the dispositions of the cases.[37] Gewirtz et al. examined a newly formed specialized domestic violence unit, examining how the involvement of children affected case disposition in an office focused on evidence-based prosecution.[38] Their analysis showed that the greatest impact was the use of a specialized unit.[39] They did find that the greater the child's involvement, the higher the likelihood of a guilty plea (though "involvement" was broadly defined).[40] A child's victimization was significantly more strongly related to outcomes than a child's simple presence.[41]

An additional set of factors that may influence disposition are the decisions that are made about offenders early in the legal process. Social scientists have long hypothesized that court decisions are cumulative and self-reinforcing: that early decisions on, for instance, apprehension, charging, bail, and assignment of legal counsel are taken as cues in subsequent decisions on disposition and sentencing.[42] In other words, a defendant in an orange

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[36] *See* Frantzen et al., *supra* note 12, at 403; Gewirtz et al., *supra* note 22, at 223 (regarding misdemeanor cases); Henning & Feder, *supra* note 8, at 632.

[37] Christina M. Camacho & Leanne Fiftal Alarid, *The Significance of the Victim Advocate for Domestic Violence Victims in Municipal Court*, 23 VIOLENCE & VICTIMS 288, 293, 298 (2008); *see* SMITH & FAROLE, *supra* note 21, at 4; Douglas L. Yearwood, *Judicial Dispositions of Ex-Parte and Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161, 165 (2005) (finding no connection between the percent of victims "requesting that a defendant not interfere with . . . minor children and the courts granting th[e]s[e] request[s]").

[38] Gewirtz et al., *supra* note 22, at 214 ("Evidence based prosecution is an effort to prosecute successfully domestic violence based on a thorough investigation and gathering of all physical, audio, and photographic evidence. In contrast to earlier prosecution approaches, evidence-based prosecution does not require or rely on victim testimony.").

[39] *See id.* at 221. For example, researchers found that prior to establishment of a specialized prosecution unit the final disposition in felony cases resulted in a plea or conviction in only 6.3% of cases. *Id.* Yet, after the establishment of the specialized unit this number increased to 19.6%. *Id.*

[40] *Id.* at 220, 223. Measure "involved" on a scale of zero to five. *Id.* at 219. This ranged from direct involvement as the abuse victim to being present though neither seeing nor hearing the abuse. *Id.*

[41] *Id.* at 220–21.

[42] *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 (2012); Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical*

jumpsuit, standing alone at the bar, is less likely to gain a favorable disposition than one who has been released on his own recognizance and stands next to his attorney.[43] We might expect that suspects who are arrested on warrants (rather than on-scene arrests) register as more serious cases, since law enforcement had to invest extra effort to bring them to court;[44] we would expect the same for defendants who are detained following their first appearance.[45] Defendants who are represented by counsel might fare better than those who are not.[46] And of course, these variables are not independent of each other, and they are confounded with charging levels. Researchers have had few opportunities to examine how, if

Look at the Pro Se Felony Defendant, 85 N.C. L. REV. 423, 452 (2007); Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 362 (2006).

[43] *See* Baradaran & McIntyre, *supra* note 42, at 555; Hashimoto, *supra* note 42, at 452.

[44] *See* Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied With 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L. J. 743, 779–80 (2010) (explaining the use of police resources and time in obtaining arrest warrants).

[45] *See generally* Marc Zilversmit, Note, *Granting Prosecutors' Requests for Continuances of Detention Hearings*, 39 STAN. L. REV. 761, 762–64, 763 n.11 (1987) (explaining the federal statutory scheme in the Bail Reform Act of 1984, in which detention hearings were held at first appearances for serious crimes and cases in which the individual to be detained posed a threat to public security).

[46] Hashimoto, *supra* note 42, at 452. We note that in most courts, the vast majority of defendants are represented, if at all, by court-appointed counsel. *See, e.g.*, Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 102 (2010) (citing Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001)) (noting that about 90% of indingent capital defendants are represented by court appointed attorneys); Kennedy Cabell, *Calculating an Alternative Route: The Difference Between a Blindfolded Ride and a Road Map in Per Se Criminal Defense*, 36 LAW & PSYCHOL. REV. 259, 269 n.61 (2012) (noting that 66% of felony criminal defendants were appointed counsel). The law requires that indigent defendants be offered counsel if they cannot afford to pay for representation, if they face a risk of incarceration. *E.g.*, Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972). In misdemeanor courts, the real (as contrasted with practical) risk of incarceration is usually low. *See generally* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 593 & n.46 (2011) (documenting non-incarceration-based consequences from misdemeanor convictions and state efforts to decrease prison terms for misdemeanor convictions). Very little is known about how often lower-court defendants are provided counsel. *See* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 45 (2009), *available at* www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808; *see* Christopher Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention, System Involvement, and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263, 280 (1998). The matter becomes even more complicated in states that, like New York, provide for domestic violence charges that are violations, rather than misdemeanors. *See, e.g.*, N.Y. PENAL LAW § 240.26 (McKinney 2013) (stating that harassment in the second degree is a violation). *But see id.* § 240.30 (showing harassment of a family member is an aggravating factor constituting a misdemeanor).

at all, these variables shape dispositions, though at least one study found that charging level had no effect on disposition.[47]

Domestic violence cases are much more likely than other misdemeanor cases to involve parties to orders of protection, which vary considerably in duration, specificity, and conditions.[48] In many states, including New York, these orders may be issued by either civil or criminal courts.[49] Protective orders might function, in the disposition process, as a marker of good evidence, a measure of the defendant's incorrigibility, or as a cue from a previous legal decision maker about the gravity of the problem.

Finally, we consider the associations between defendant and victim characteristics and dispositions. Research on felony case processing and sentencing routinely includes measures of defendants' age, race, sex, and—less commonly—marital status, economic status, employment, and education.[50] Specifically in studies that seek to examine predictors of case outcomes in domestic violence cases, researchers routinely examine these same factors with some exceptions. First, because most cases involve a male offender and a female victim,[51] studies tend to focus only on male offenders.[52] Few studies have examined defendants' race and disposition; but Elizabeth P. Cramer somewhat surprisingly found that white defendants were more likely to face convictions than

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[47] Henning & Feder, *supra* note 8, at 630. Their study found that those with felony charges were less likely to be released on their own recognizance than misdemeanor offenders. *Id.* at 632, 634. However, they did not find any differences between the two groups with respect to likelihood of conviction. *Id.* at 630.

[48] *See generally* ALISSA POLLITZ WORDEN, NAT'L INST. OF JUSTICE, NCJ 199911, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR JUDGES 10 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/199911.pdf (reviewing data on orders of protection).

[49] *Id.*; N.Y. FAM. CT. ACT § 842 (McKinney 2013); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 2013).

[50] Indeed, many of these studies are expressly concerned with whether courts exhibit patterns of disparity and discrimination against racial minorities; empirical research on this question was set in motion by John Hagan. *See* John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357, 362–80 (1974) (examining racial discrimination). For a review of more recent research, see Chester Britt, *Social Context and Racial Disparities in Punishment Decisions*, 17 JUST. Q. 707, 707–30 (2000); Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 436–64 (2005).

[51] *See, e.g.*, SMITH & FAROLE, *supra* note 21, at 1 (stating in their study of sixteen large urban counties that included 3750 cases, 84% involved a male offender); *see also* Camacho & Alarid, *supra* note 37, at 292–93 (including a sample that included 87% female victims).

[52] *But see* Henning & Feder, *supra* note 8, at 631 (reviewing outcomes for female defendants in domestic violence cases). In their study, they examined the relationship between sex and case outcome. *Id.* at 613. They found that women, independent of other factors, were less likely to require bond to be released, more likely to have their charges dismissed, and less likely to serve time in prison than men. *Id.* at 630–31.

minorities.[53] Researchers have seldom found information in case files on defendants' economic and educational backgrounds.

Due to the nature of domestic violence, many studies have specifically examined marital status and nature of the relationship as factors that may be predictive of case outcome. It is important to note, however, the relationships between victims and offenders might be particularly salient, though not easily untangled. In some states, statutory definitions of domestic violence are quite broad and inclusive;[54] in others there are few, if any, laws that differentiate domestic violence from other forms of victimization.[55] For example, some states include cases of violence between non-intimate family members or those sharing living space.[56] On the other hand, some states focus on cases involving only intimate partners.[57]

The distinctions are important from a legal standpoint as well as considering the impact of the nature of the relationship or its status on case disposition. Parties involved in ongoing relationships (compared with those who have divorced, separated, or simply broken up) may have a greater stake in each other (and thus a "second chance" in the form of diversion or adjournment may seem more appropriate); on the other hand, these victims would appear to face a more immediate risk of further abuse. Evidence on how the courts respond to this cue is scarce and inconclusive.[58] One study examined the differences between couples that were in dating relationships and those in a family or marital relationship and

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[53] Cramer, *supra* note 8, at 1147.

[54] *See, e.g.*, CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF DOMESTIC VIOLENCE 21 (2011) [hereinafter DEFINITIONS OF DOMESTIC VIOLENCE], *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/defdomvio.pdf (discussing Illinois's domestic violence statute that is simply defined as causing bodily harm to any family or household member or making physical contact of an insulting or provoking nature).

[55] *Id.* at 4 (noting that sixteen states list specific acts that constitute domestic violence).

[56] *See, e.g.*, *id.* at 21, 30 (providing a list of Illinois's definitions of domestic violence and the protected persons included in Michigan's definitions); *see also id.* at 22, 30, 41 (indicating that Illinois, Michigan, and New York include non-intimate family members in their definition).

[57] *See, e.g.*, *id.* at 17, 29, 46 (indicating that Florida, Massachusetts, and Pennsylvania only include intimate partners in their definition).

[58] While the court officials interviewed by Hartman and Belknap claimed that parties' relationship was not relevant to their decisions, Edward W. Gondolf et al. found that courts were more likely to issue protective orders to married victims. Hartman & Belknap, *supra* note 13, at 365; Edward W. Gondolf et al., *Court Response to Petitions for Civil Protection Orders*, 9 J. INTERPERSONAL VIOLENCE 503, 511 (1994). Cramer found that cases involving married and cohabiting partners (compared with separated partners) were more likely to end in guilty verdicts. Cramer, *supra* note 8, at 1144–45. Camacho and Alarid, on the other hand, found no meaningful association between relationship status and disposition. Camacho & Alarid, *supra* note 37, at 298.

found that relationship status did not predict case outcome.[59]

The nature of relationships between perpetrator and victim may be associated with the victim's willingness to cooperate with the prosecution and therefore, the likelihood of a conviction.[60] As a result, a recurrent issue in prosecution of domestic violence cases has been defining the role of complainants. While court practitioners suggest that the victims' active participation is not a critical issue in obtaining guilty verdicts,[61] many times the victim's allegations constitute the primary and possibly the only legal evidence against the defendant.[62] Hence we would expect that victim engagement with the prosecution would be associated with conviction.[63] In fact, in one study, only two factors were predictive of filing cases. These included whether the victim signed the complaint and the defendant's history of domestic violence cases.[64]

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[59] *Id.* Furthermore, the researchers explained:

> Victims who knew their perpetrators through family or marital relationships were less likely to cooperate with prosecution and also more likely to have their cases dismissed than were victims who had a social relationship with their perpetrator. Experience as a victim advocate showed that victims who are related or married to the perpetrator had more at stake in the relationship and were more likely to request counseling for the defendant. These cases resulted in a continuance for 6 months and ultimately a dismissal, under the condition that the defendant complete a counseling program.

Id.

[60] *See* Hartman & Belknap, *supra* note 13, at 365. *See generally* Camacho & Alarid, *supra* note 37, at 290–91 (describing how encouraging victim cooperation is necessary for the success of a case).

[61] *See* Hartman & Belknap, *supra* note 13, at 364; SMITH & FAROLE, *supra* note 21, at 7; Rebovich, *supra* note 13, at 189. But also note that in surveys, judges and prosecutors make low estimates of victim withdrawal. *See, e.g.*, Hartman & Belknap, *supra* note 13, at 361–62. During the 1970s and 1980s, assumptions about victim non-involvement (often termed "non-cooperation") justified limited enforcement and prosecution in family violence cases. Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. ISS. IN NURSING (2002), *available at* http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html. By the 1990s, reformers recognized the risks and challenges inherent in asking victims to confront their batterers in court, and experts recommended evidence-based ("victimless") prosecution: building cases that could produce convictions without the victim's involvement. *Id.*

[62] *See generally* Hartman & Belknap, *supra* note 13, at 350–51 (noting that prosecutors have been reluctant to prosecute domestic violence and that they require higher standard of corroboration for domestic violence cases).

[63] An extension of this hypothesis is that victim engagement with a court-associated advocate would be more likely to produce a guilty verdict, and less likely to result in a dismissal. Some find support for this thesis, although they cannot account for why some victims choose to accept support and advocacy and others do not. *See* Bechtel et al., *supra* note 34, at 154; Camacho & Alarid, *supra* note 37, at 297–98.

[64] Robert C. Davis et al., *A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filing Versus Following the Victim's Lead*, 7 CRIMINOLOGY & PUB. POL'Y 633, 648–49 (2008). Weapon and injury did not influence whether the case was

What are the justifications for a disposition that sidesteps both conviction (and the social and legal consequences that might follow) and acquittal (based on rules of evidence)? In principle, when a court is convinced that a defendant has committed a crime, it might nonetheless wish to spare that defendant not only the punishment that accompanies conviction, but also the stigma and curtailed opportunities that accompany a criminal record. Typically, such decisions are justified as serving "the interests of justice." In the cases of partner violence, scenarios that might seem to call for this sort of disposition might include a victim making a plea for restoring the family, or a deeply remorseful defendant who wishes to spare his family shame or lost earnings, or commission of an illegal act that in fact generated very little real risk or threat to family members. However, perhaps because those case elements are seldom measured (and possibly because, in fact, they occur far less often than many believe), there is little evidence in the literature that dispositions are (or are not) empirically associated with such conditions.

Of course, there is a flip-side to this picture: one could imagine a judge or prosecutor, faced with inconclusive evidence, who is nonetheless motivated to find a way to keep a potentially dangerous person on a short legal leash. While that defendant might, from a due process perspective, be well advised to fight the charges, he (and his lawyer, if he has one) may recognize the benefits of accepting a diversionary disposition if the ultimate outcome is not only the dismissal of the charges but also the erasure of any court record that he was charged at all. New York's adjournment provision allows for precisely this outcome.[65] Hence, from two very different—and potentially even conflicting—perspectives, ACD (and some other diversionary dispositions) provides a tempting compromise to the evidence-based adjudication process.

Are these usages, therefore, problematic, from the perspective of "doing justice"? One answer to this question is that it depends on whether these dispositions are relatively rare, or are, in fact, more ordinary than not. Previous research would suggest that, in domestic violence cases at least, they are quite common in some jurisdictions.[66] A second standard for evaluation would be whether

filed. *See id.* at 649.

[65] *See Adjournment in Contemplation of Dismissal Information Sheet*, *supra* note 3.

[66] Cramer, *supra* note 8, at 1142 (reporting that 41% of cases were "taken under advisement"); Klein & Tobin, *supra* note 22, at 140 ("A little less than half (49.5%) [of cases] were placed under probation supervision, half after a finding of guilt and half after a finding

judges resort to these dispositions more commonly (or less so) in domestic incidents than in similar cases involving parties who are acquaintances, coworkers, or strangers.[67] A third standard might be whether the case attributes associated with dispositions line up with the possible justifications noted above. In general, are adjournments more likely than guilty verdicts in cases that involve less threatening or damaging behavior? Are defendants with records of criminal behavior less likely to be diverted or dismissed? Further, do dispositions reflect, net of other factors, earlier steps in the process? For example, do defendants who are released on recognizance or who are assigned counsel receive more favorable outcomes? Further, is there reason to believe that factors unrelated to the offense and to future risk—defendant's race or age, for instance—are associated with dispositions? Does the nature of the victim-offender relationship influence outcomes?

Another approach to gauging justice might be assessment of the short- and long-term consequences of dispositions. One might argue that if those who receive an intermediate disposition recidivate less often, then those dispositions, in retrospect, were just: either judges correctly identified offenders who were unlikely to recidivate, or else the offenders made the most of their "second chances" and desisted, or both. Klein and Tobin examined recidivism in batterers in Massachusetts.[68] They found that regardless of case disposition, the majority of offenders engaged in domestic violence in the nine-year follow-up period, but they and Frantzen et al. also found that "offenders who had a prior domestic violence arrest reoffended more quickly than those offenders who did not have any prior arrests."[69] High rates of recidivism and increased likelihood that offenders will re-offend, if they have prior domestic violence arrests, would lead us to speculate that dispositions that mitigate the effects of arrest—as intermediate dispositions might do—would work against efforts to hold offenders accountable and reduce re-victimization.[70] While this study cannot directly address this question, we can investigate the conditions that are, and are not, associated with these sorts of dispositions in New York, and consider their implications for their

of or admission of sufficient facts of guilt, but in which the judge 'continues the case without a finding.'").

[67] Unfortunately, data to assess this issue would be quite difficult to collect and would be beyond the scope of this study.

[68] Klein & Tobin, *supra* note 22, at 136.

[69] *Id.* at 146; Frantzen et al., *supra* note 12, at 403.

[70] *See, e.g.*, Frantzen et al., *supra* note 12, at 398–99.

use or misuse in these cases.

III. RESEARCH METHODOLOGY

Data on misdemeanor court decisions are rare. State-maintained databases include much more detailed information on felonies and on incarcerated populations than on misdemeanors. In many communities there are no databases of court dispositions at all, and the data available are limited to cases that resulted in convictions. Because this project models court decisions, it required detailed information from court files and, of course, data on cases that were adjourned in contemplation of dismissal and ultimately sealed. Hence we relied on data collected from police reports[71] and courthouse files in three upstate New York cities.[72] These files were coded in 1996 and 1997,[73] two and three years after the New York State Legislature passed significant reforms in the way domestic violence cases were to be handled by police and courts.[74] These reforms included requirements that police complete, and submit to state authorities, Domestic Incident Reports (DIRs) on all cases that were dispatched as such (regardless of whether an arrest was made);[75] designation of "family offenses" that would mandate warrantless arrest in many misdemeanor cases, without requiring victims to sign complaints;[76] creation of a statewide registry for protective orders issued in domestic cases;[77] and the opportunity for "family offense" victims to choose to have their cases handled in criminal court, family court, or concurrently in both.[78]

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[71] *See* ALISSA POLLITZ WORDEN, NAT'L INST. OF JUSTICE, NIJ 95-WT-NX-0006, MODELS OF COMMUNITY COORDINATION IN PARTNER VIOLENCE CASES: A MULTI-SIDE COMPARATIVE ANALYSIS 112, 165 tbl.4.3 (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187351.pdf (describing data collection from police agencies).

[72] *Id.* at 22. These data were collected in part through a collaborative research effort with the New York State Office for Prevention of Domestic Violence, *see id.* at 19 n.7, and through a National Institute of Justice research grant. *See id.* at title page. This research was approved by the University's Institutional Review Board. *See id.* at second title page, 19 n.7. Because the project required access to sealed cases, special safeguards were put into place, in each court, to ensure that the identity of parties to these cases remained confidential.

[73] *Id.* at 26.

[74] *See* Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, § 1, 1994 N.Y. Laws 2704, 2705.

[75] *Id.* § 27, 1994 N.Y. Laws at 2712.

[76] *Id.* § 32, 1994 N.Y. Laws at 2714.

[77] *Id.* § 50, 1994 N.Y. Laws at 2718–19.

[78] *Id.* § 4, 1994 N.Y. Laws at 2705–06. At the time of data collection, these "family offense" provisions applied only to a subset of misdemeanors, and more importantly, only to parties who were related by blood, marriage, or children in common. *Id.* § 7, 1994 N.Y. Laws at 2706.

A. Research Sites

This project was undertaken in three upstate New York cities, pseudonymously named Lakeport, Stockade, and Carthage. These cities were selected because they represent small cities whose criminal justice agencies, based on preliminary research, differed considerably in their approaches toward domestic violence. We present here 1996 demographic and crime characteristics for each city, the year immediately following enactment of the sweeping New York State domestic violence reforms. According to the 1996 U.S. census, the cities of Stockade and Carthage had populations of 50,000–75,000,[79] and Lakeport's population range was half that at 20,000–25,000 residents.[80] In each site, the vast majority of the population was white (ranging from 87%–94% in Lakeport). Carthage was the most economically disadvantaged with a median household income of $20,000; Stockade's was $24,000, and Lakeport's median income was $32,000 (each below the national median of $35,492).[81] Lakeport and Carthage were similar with respect to violent crime rates (2.3 and 3.1 per 1000, respectively), while Stockade's rate was more than two times higher at 7.3 violent crimes per 1000. The size of the police departments, expressed as officers per 1000 population, was very similar, ranging from 2.2 to 2.6 officers per 1000 population. Based on these indicators, Lakeport stands out as the least socially disadvantaged site among the three.

Another important contextual dimension of the sites is the nature of each city's response to domestic violence. This description is drawn from interviews two of the authors conducted with police and court actors in each community and is supplemented by an earlier

Approximately half of all domestic calls to police met these criteria. *See, e.g.*, *City of Reno: Apartment Calls for Police Service, 2012 Annual Report*, CITY OF RENO, http://www.reno.gov/modules/showdocument.aspx?documentid=37071 (last visited May 27, 2013) (reporting that approximately 25% of domestic calls in Reno in 2012 were for family crimes, although 56% of the calls were for "neighborhood concern," suspicious activities, and "unknown trouble," which likely skewed the data downward). Furthermore, it was not clear to law enforcement how to apply mandatory arrest policies to absent offenders, and so departments varied considerably in their policies and practices. Of the court cases included in these analyses, 35% to 45% were legally "family offenses." We did control for this legal variable in analyses because it is almost completely duplicate of measures of relationship and arraignment charge.

[79] U.S. DEP'T OF COMMERCE, ECON. & STATISTICS ADMIN., BUREAU OF THE CENSUS, 1996 CENSUS DATA (1996) (on file with author).

[80] *Id.*

[81] *Id.*

survey of police and prosecutors. Through interviews and surveys, we captured information on the police departments' practices and policies for responding to domestic violence, prosecution, and court policies, and the extent to which the community response reflected a coordinated effort. While there were some differences between Lakeport and Stockade in these terms, these two cities were, in the main, similar, and Carthage emerged as distinct. By way of explanation and example, we highlight several key indicators here.

By policy and in practice, Carthage police utilized a more restrictive definition of domestic violence than did Lakeport and Stockade. Moreover, Lakeport and Stockade had strong presumptive arrest policies for domestic violence in place that predated legal reforms; the same was not true for Carthage. Prosecution's policies and practices in Carthage, like those of the police, were less oriented toward offender accountability and victim safety than those in place in the other study sites. Carthage routinely released defendants on their own recognizance (ROR) with support from both the judiciary and the district attorney's office. The judiciary in Lakeport would routinely ROR defendants, though the district attorney's office would not offer this as a recommendation; Stockade made the least use of ROR as a pretrial option.

Two additional policy areas serve to highlight the differences between Carthage on the one hand and Lakeport and Stockade on the other. The latter cities had strong no-drop policies and victimless prosecution policies in place (where victim cooperation was not forthcoming the district attorneys' offices would work with the police departments to strengthen alternative evidence), neither of which were the case in Carthage. Interviews with judges in each site suggested that the orientation of the judiciary in Carthage did not stress offender accountability. Indeed, those judges, in sharp contrast to their colleagues in Lakeport and Stockade, expressed little understanding of the dynamics of domestic violence and open skepticism about the motives of victims and the culpability of perpetrators.

Last, we examined the coordination of the community response to domestic violence in terms of the participation of key criminal justice actors, cooperation across criminal justice agencies, collaboration with domestic violence agencies, shared goals and priorities, and formal and informal information sharing protocols and practices. Expressed in these terms, and as it did with respect to police and prosecutorial practices, Carthage emerges as the least

progressive study site. In all three cities, we noted high levels of coordination and participation among criminal justice actors; however, in Carthage, that coordination did not extend to domestic violence agencies and service providers as it did in the other sites. In sum, Lakeport and Stockade's policies and practices suggested a coordinated community response to domestic violence that stressed offender accountability and addressed victim safety to a greater extent than did the practices and policies in place in Carthage.

B. Data and Measures

We limited our investigation to cases that involved partner relationships: parties who were married, divorced, designated by police as "boyfriend and girlfriend" or formerly of such status, or parents of at least one child. These constituted approximately 80% of all domestic incidents that generated domestic incident reports.[82] We further restricted our analyses to cases that involved male perpetrators and female complainants or victims, approximately 80% of all partner incidents.[83] Finally, we examine only those incidents that were arraigned as misdemeanors or violations, not felonies. In these three cities, between 1% and 9% of cases arraigned had a top charge that was a felony. Because these cases were typically arraigned in city court but transferred to county court for adjudication, we excluded them from our analysis. The distribution of arraignment charges was remarkably similar across the three courts: Penal Law section 240.26[84] accounts for 42% to 50% of cases, section 120.00[85] accounted for 13% to 19% of cases, and 215.50[86] accounted for 10% to 15%.

The process of coding case data required identifying all domestic incident reports filed by police in each community for the period of time in which we engaged in fieldwork.[87] These reports (which differed only somewhat from standard incident reports used in all

[82] Specifically, 81.4% of police reports in Stockade, and 78.5% in Lakeport, involved partners, as we have defined the term. Carthage authorities did not provide case records for domestic calls that were not partner relationships.

[83] We excluded female suspects because the reforms, at both state and federal levels, were unambiguously directed toward female victims. Preliminary analyses also suggested that the dynamics of legal decision-making differed for male and female perpetrators.

[84] N.Y. PENAL LAW § 240.26 (McKinney 2013) ("Harassment in the second degree is a violation.").

[85] *Id.* § 120.00 ("Assault in the third degree is a class A misdemeanor.").

[86] *Id.* § 215.5 ("Criminal contempt in the second degree is a class A misdemeanor.").

[87] These time periods were May 1996 through June 1997 in Stockade, January 1996 through September 1996 in Carthage, and May 1996 through September 1997 in Lakeport.

other cases) included check-off items as well as empty space for handwritten narratives, which officers completed in the field approximately 75% of the time. We relied primarily on fill-in and check-off boxes for many items, such as suspect age, race, and arrest decision. Other items, such as the presence of children at risk at the scene, required more detailed coding strategies: identifying the presence of parties under the age of eighteen (in "witnesses" and "parties" boxes), identifying offenses specific to children (e.g., endangering the welfare of a child), and coding narrative information that referenced threats or injuries to children. All cases that resulted in arrest (either on-scene, or following an executed warrant) were sought in city court files. Not all warrants were executed, so not all validated complaints resulted in arraignments during the time period we sought those data (one year following the incident).

Docket books and court files included all documents that prosecutors, clerks, and judges added: copies of incident reports, records of arraignments and hearings, notations indicating appointment of counsel and identity of lawyers representing the accused, records of bail and detention decisions, initial and final charges filed, and dispositions and sentencing. At the time of the field research, there was no standardized system for recording misdemeanor court records across the state. Hence the data collection protocol was adapted slightly for each community.[88] In each of these communities, a single judge handled all or most of the misdemeanor cases. Cases typically began with an arraignment on charges, which in on-scene arrest cases usually occurred within forty-eight hours of the arrest. While the district attorney's charges often mirrored those recorded on police incident reports, they were sometimes upgraded and, less often, downgraded.

Table 1 reports descriptive statistics for the dependent variable, disposition type, and the independent variables, for each of these communities.[89] Dispositions were initially coded as dismissals, adjournments in contemplation of dismissal, or guilty verdicts. Almost invariably guilty verdicts resulted from guilty pleas.[90] The

[88] For example, in one community, the record of court proceedings was largely documented through the judge's handwritten notes on the inside of the file folder. Despite the seeming informality of this practice, very few missing data elements resulted from it.

[89] *See infra* Table 1.

[90] Of all cases that involved domestic partners and proceeded to a court hearing, fewer than 2% in each court proceeded to a trial (which usually resulted in a guilty plea). In Carthage and Stockade, a handful of cases were resolved through conditional discharge; 21%

most common outcome, in all three cities, is a guilty plea. A significant minority of cases in all courts, however, are settled as ACD. The Stockade court very seldom dismissed or acquitted charges. This outcome was also rare in Lakeport and Carthage. We elected to focus on factors that differentiated ACD from guilty verdicts, leaving out dismissals, for two reasons. First, and practically, the rarity of dismissals in at least one community (Stockade) made multinomial logistic regression unstable. Second, and more substantively, our primary interest is in learning how judges and prosecutors decide who ends up with a conviction and who does not among cases in which adequate grounds exist for continuing the possibility of prosecution.[91]

We coded four variables that signal both harm done and evidence for each incident: whether the police report indicated victim injury, property damage, the use of a weapon, and a dichotomous measure of risk posed to children on the scene.[92] We also coded the presence (in either the police report or court file) of a pre-existing valid order of protection (issued either by family or criminal court). It is reasonable to predict that cases with these characteristics would be less likely to be adjourned, and more likely to end in a guilty plea. Interestingly, the distributions on these variables are quite similar

of cases were thereby resolved in Lakeport. In that court, conditional discharge entailed a guilty plea, accompanied often by conditions (fines, compliance with a protective order, occasionally community service). A conditional discharge differs from adjournment in contemplation of dismissal in that the former requires a request, after a time period, for expungement of the record. The latter (in theory, at least) automatically produces a sealed record, and information about the defendant's legal encounter does not become part of his local or state rap sheet. Hence we coded conditional discharges as equivalent to guilty pleas.

[91] Framing the question this way does, of course, presuppose that the small number of dismissals are materially justified through a lack of evidence, a credible defense, or some other grounds for reasonable doubt. In fact, our data do not permit us to confirm this, nor do we suspect that it is necessarily true. In order to explore this assumption, we ran multinomial logistic regressions (including all three disposition types) for the two cities with enough dismissals; we also ran binomial logistic regressions that differentiated between those cases that were dismissed, and those that were ACD. The measures of harm and risk, prior legal decisions, and victim/offender characteristics explained very little of the variance between dismissals and ACD (and results were consistent across the multinomial and binomial models). In Lakeport and Carthage, married defendants were slightly more likely to get ACD than dismissal; in Carthage, cases that began with on-scene arrests were more likely to end as ACD and, interestingly, defendants who had been detained after arrest were more likely to win a dismissal. In Lakeport, defendants who had legal counsel were slightly more likely to be dismissed. Variables that would indicate seriousness, harm, or risk played no role.

[92] This dichotomous variable was coded if the police report indicated any victim under the age of eighteen, if offense charges included endangering the welfare of a child, if the police report made reference to possible child abuse, or if the report indicated that Child Protective Services were called to the scene.

across the three jurisdictions.[93]

In addition to these measures of evidence and harm, we might expect courts to consider a defendant's prior record in deciding whether he is a candidate for ACD.[94] In none of these cities, however, were rap sheets routinely included in court files, so we cannot know how often, if at all, prosecutors or judges were knowledgeable about defendants' pasts. It is possible that in these small cities, recidivists were readily recognized or that information about their previous local arrests was informally passed from police officers to court officers. It is equally possible that in many cases, given the brevity of proceedings and these cases' relatively low level of legal seriousness, judges simply did not inquire about legal records. In one of these cities, Stockade, we had access to state-level data on criminal history (data that would not have been readily available to court actors at the time of disposition). For that city, we included a categorical measure of number of arrests in the preceding five years, as reported to state authorities. Half of the defendants had at least one arrest; 30% had at least four arrests.

We also coded measures of legal actions and decisions prior to disposition (and we note that an active order of protection also fits this category): on-scene vs. warrant arrest, level of arraignment charges, bail status, and presence of legal counsel. We measured whether the arrest preceding arraignment occurred on the scene, or as a result of a warrant, on the premise that prosecutors and judges may see warrants as a cue that police are more committed to pursuing them since those cases require greater investments of time and effort than on-scene arrests.[95] However, the use of warrants

[93] Previous researchers have measured victim injuries in many ways (for example, noting only injuries that required medical attention). This has resulted in disparate levels of incidence, ranging from 35% to 83%. *See* Bechtel et al., *supra* note 34, at 150–51; Davis et al., *supra* note 64, at 651; Frantzen et al., *supra* note 12, at 404; Murphy et al., *supra* note 46, at 271. Reports of weapon use are more consistent across studies, and fairly consistent with our data in all three cities; weapons were involved in no more than 25% of cases. Bechtel et al., *supra* note 34 at 150; Davis et al., *supra* note 64, at 651; Gewirtz et al., *supra* note 22, at 220; Henning & Feder, *supra* note 8, at 629.

[94] Prior research reports that 60% to 80% of suspects arrested for domestic violence charges have some sort of criminal history record, and at least 40% have records that involve previous domestic incidents. *See* Bechtel et al., *supra* note 35, at 150; Davis et al., *supra* note 64, at 650; Frantzen et al., *supra* note 12, at 401; Gewirtz et al., *supra* note 22, at 220; Andrew Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 195 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

[95] Of all cases involving partner violence with male suspects, such suspects were present at the scene when police arrived in 44% of Stockade incidents, in 42% of Lakeport incidents, and in 49% of Carthage incidents.

differed across the three communities. In Stockade, it was police policy to attempt to find an absent suspect if the situation warranted arrest, even when that meant rolling the case over to the next shift. Hence, when officers were successful, no warrant was sought or executed. In Lakeport, police department policy was to pursue an absent suspect when misdemeanor charges were involved, and to advise the complainant to file charges with the district attorney in violation cases. But in Carthage, police seldom pursued absent suspects and did not seek warrants in these cases. Instead, they issued summonses (known locally as "appearance tickets," similar to a traffic ticket) that instructed defendants to appear in court the following weekday. In a small percentage of cases, these tickets were given to suspects who were on the scene when police arrived. Hence we include a measure for warrants, or summons, but in an exploratory spirit.

The city courts were sites for all arraignments, including felonies. However, cases arraigned as felonies were then referred to county courts (of general jurisdiction) and hence were excluded from the study.[96] We distinguish between cases that are charged as misdemeanors and those charged as violations. In New York, violations include acts such as simple trespassing,[97] disorderly conduct,[98] and some forms of harassment.[99] Sanctions for these offenses are generally defined as fines, with the potential for up to fifteen days in jail.[100] In each city, misdemeanors and violations were about equally common at arraignment, though misdemeanors were more common in Carthage.[101]

Sentencing research often uncovers evidence that case outcomes are associated with initial decisions about pretrial release and the assignment (or presence) of counsel. Defendants might be released on recognizance,[102] released after bail is set and made,[103] or detained when bail is not made.[104] The courts varied considerably on these decisions. In Stockade, almost a third of defendants were

[96] Using the original sample of cases, it appears that 8% of cases in Lakeport were filed as felonies, followed by those in Stockade and Carthage, where cases were filed as felonies 5% and 1% of the time, respectively.

[97] N.Y. PENAL LAW §§ 140.00, 140.05 (McKinney 2013).

[98] *Id.* § 240.20.

[99] *Id.* § 240.26.

[100] *Id.* § 55.10(3).

[101] *See infra* Table 1.

[102] N.Y. CRIM. PROC. LAW § 530.10 (McKinney 2013); *see also id.* § 500.10(2) (defining the action of releasing a defendant on their own recognizance).

[103] *See id.* § 500.10(3), (8).

[104] *Id.* § 500.10(4).

detained, far more than in Lakeport (4%) or Carthage (15%).[105] The presence of counsel was noted, albeit in different ways, in all three courts. In Stockade and Carthage, the court files indicated the presence of publicly appointed, privately retained, or no counsel. In Lakeport, the file included the name of the lawyer, if the defendant was represented, but not his or her professional status. The majority of defendants were represented by counsel in Stockade and Carthage; fewer than half had lawyers in Lakeport.[106]

Finally, we controlled for three variables that are typically included in analyses of court decision-making: offender age (trichotomized), offender race (dichotomized as white or African-American),[107] and the character of the parties' relationship. We used two variables to capture relationship: a dummy variable identifying those who were currently legally married, and another that noted parties who were identified as current boyfriends and girlfriends. The omitted group includes those whose relationship, according to the complainant, had ended (ex-spouses and ex-partners) and those who were identified in the police reports as parents of a child in common (who presumably were not in a current partner relationship, married or otherwise). Once again, these three cities were similar on these measures, although Lakeport had a slightly older caseload, with a higher percentage of white defendants and a lower percentage of unmarried intimate partners.

IV. ANALYSIS AND FINDINGS

We present the results of our analyses in three steps. First, we examine the results for each city. We present the results of Model I,[108] which includes offender, relationship, and incident characteristics. These are the cues that, admittedly incompletely, provide estimates of the strength of evidence and the harm and risk

[105] *See infra* Table 1. Note that in a minority of cases in each city, there was no information in the case files on a bail decision. In some of these cases, the matter was resolved on the day of arraignment; we included those in the ROR category. In others, we could not determine the decision, which was not related to charges. The results presented here omit these missing cases. However, when the models were run with missing cases recoded to release (no detention), the same coefficient patterns emerged (results available from authors).

[106] *See infra* Table 1.

[107] *See infra* Table 1. Racial or ethnic identities (as noted on police reports) other than white and African American were rare (for example, two cases of Asian defendants in Carthage, two Native Americans each in Stockade and Carthage, and several noted as "other" on the reports; these were combined with whites to create the dichotomous variable for race).

[108] *See infra* Table 2.

involved. We compare these with the results of Model II, which adds as independent variables several legal decisions—charging, detention, and legal representation—in an effort to estimate the extent to which disposition decisions are adjusted by judges's knowledge of previous legal judgments of the case. Table 3 presents these results for Stockade, Lakeport, and Carthage, respectively.[109] Next, we compare results across courts. Table 4 summarizes these results side by side, to permit a more convenient comparison of findings.[110] Finally, we draw conclusions about whether ACD and guilty dispositions can be meaningfully and consistently distinguished on the basis of evidence, risk and harm, and preceding legal judgments, or whether, instead, the use of the adjournment option may, in fact, sidestep conventional notions of justice.

A. Three Tales of Three Cities

In Stockade, as reported in Table 2, most of the variables in the model have a negligible relationship to disposition.[111] The coefficients do not reach statistical significance and the odds ratios suggest that the defendants face similar chances for an ACD regardless of incident and personal characteristics; presence of a protective order is the only exception, and defendants whose complainants held such an order have a sharply reduced probability of an adjournment.[112] Models I and II differ little. However, two additional prior legal decisions included in Model II were associated with disposition. Defendants who face misdemeanor (rather than

[109] *See infra* Table 3.

[110] *See infra* Table 4.

[111] *See infra* Table 2. Binomial logistic regression produces estimates of the association between a dependent variable that has two possible values (here, adjournment vs. guilty verdict) and a set of independent variables. Two elements of the results are salient here: the statistical significance of the coefficients, and the odds ratios for each variable. Statistical significance refers to the probability that the relationship between two variables, observed in the sample data, might have occurred by chance rather than representing the population from which the sample is drawn. Because statistical significance is also a function of sample size, we note any relationships that are statistically significant at the .10, .05, .01, and .001 levels. Odds ratios indicate the relative likelihood of the groups represented by an independent variable of being associated with the outcome; for example, how much more (or less) likely are African Americans than whites to end their cases in an ACD rather than a guilty verdict. Positive coefficients (and odds ratios of greater than 1.00) indicate higher likelihood of ACD compared with a finding of guilty.

[112] *See infra* Table 2. Because we had prior arrest data only for Stockade, we initially ran the regression excluding that variable (for comparability with the other two cities) and then a second time, including it. Because inclusion of prior arrest did not substantively change the coefficients for the remaining variables, we present only the full model here.

violation) charges, and those who were detained (rather than released on bail or recognizance) are less likely to secure ACD; specifically, misdemeanants are only about half as likely, and detained defendants about a quarter as likely, to get ACD as violation or released defendants. We note that the other coefficients in the model do not meet even our generous standard of statistical significance.

Lakeport generates a somewhat different picture. Model I suggests that defendants in non-marital but ongoing relationships are more likely than others to be found guilty, as are defendants who used weapons during the incident. Little else is associated with outcomes in Model I. Addition of the legal decision variables in Model II suggests that arraignment on a misdemeanor (rather than violation) is likely to result in a guilty verdict. Representation by counsel, however, triples the odds of an adjournment.[113] Too few defendants were detained to permit inclusion of this variable in the model.

Finally, results of the analysis of Carthage cases, based on Model I, suggest that older defendants, those whose cases did not involve property damage or weapons, and who came into court on a summons (rather than arrest) have a better chance at adjournment. When prior legal decisions are entered in the equation (Model II), we observe that weapons and on-scene arrest still increase the odds of a guilty verdict, but age and property damage lose their significance. Interestingly, African Americans were twice as likely to secure ACD compared with whites.[114] Arraignment and detention are statistically significant predictors of disposition: defendants who come in on a summons are twice as likely to be adjourned, and those who are arraigned on misdemeanors are a third as likely (and those detained a quarter as likely) to be adjourned.[115] The remaining variables did not reach statistical significance.

B. Comparing Across Courts

If courts processed cases through a strict application of the laws of evidence, substance, and procedure, one would expect that predictive models would be driven by legally relevant case

[113] *See infra* Table 3.
[114] *See infra* Table 2.
[115] *See infra* Table 2.

characteristics, and would evidence similar patterns across jurisdictions within the same state. It comes as little surprise, however, that we do not find such patterns here, since research on local criminal courts has emphasized the high levels of discretion that are exercised there and, less commonly but importantly, noted how much jurisdiction may account for variations in outcomes.[116] In this section, we attempt to identify consistencies and inconsistencies in relationships, focusing on the direction (and not just the statistical significance) of coefficients.

We found little evidence that markers of evidence and harm and risk had consistent effects across these three courts. For example, in no model did victim injuries emerge as significant predictor of a guilty verdict in Stockade and Lakeport, and the coefficient was in the direction opposite of expected for Lakeport. Property damage counted for nothing in Stockade, but approached (although did not meet) conventional standards for statistical significance in Lakeport and Carthage—but in opposite directions. Presence of a weapon had a consistently negative effect, but only reached a statistically significant level in Carthage. Indicators of children at risk were consistently associated with guilty verdicts, but did not approach statistical significance in any jurisdiction. Protective orders reduced the likelihood of an ACD in Stockade, and drifted the same direction (albeit not significantly) in Lakeport. In Carthage, the coefficient in Model II was, while not significant, in the opposite direction.

We found evidence that, controlling for case characteristics, court officials tended to reify previous decisions by criminal justice

[116] This line of research, focused on explaining variation in local courthouse norms, was launched by James Eisenstein and Herbert Jacob in a landmark study of three urban courts. *See* EISENSTEIN & JACOB, *supra* note 15, at 12–16; *see also* Noelle E. Fearn, *A Multilevel Analysis of Community Effects on Criminal Sentencing*, 22 JUST. Q. 452, 452 (2005) (examining community characteristics on sentencing using a multilevel technique); John C. Harris & Paul Jesilow, *It's Not the Old Ball Game: Three Strikes and the Courtroom Workgroup*, 17 JUST. Q. 185, 188–90 (2000) (examining interview and survey results of judges, prosecutors, public defenders, and court personnel from six California counties regarding the Three Strikes law's impact on the criminal justice system); Stacy Hoskins Haynes et al., *Courtroom Workgroups and Sentencing: The Effects of Similarity, Proximity, and Stability*, 56 CRIME & DELINQ. 126, 127 (2010) (examining the effect of similarity, proximity, and stability of the courtroom workgroup on a decision to sentence a defendant); Jeffery Kramer & John Ulmer, *Downward Departures for Serious Violent Offenders: Local Court "Corrections" to Pennsylvania's Sentencing Guidelines*, 40 CRIMINOLOGY 897, 897 (2002) (examining the relationship between downward departures from guideline recommendations and local court actors' sentencing concerns for violent offenders in Pennsylvania); Nardulli et al., *supra* note 16, at 1104–05 (examining procedural fairness and consistency for felony defendants from nine counties in Illinois, Michigan, and Pennsylvania).

agents. Cases that were arraigned as misdemeanors (not violations) were less likely to result in ACD in all three courts. In the two jurisdictions where we could analyze the effect of pretrial detention, we observe that detention was associated with a guilty verdict, not ACD. However, having legal representation benefits defendants only in Lakeport.

Finally, dispositions are largely independent of defendant and victim characteristics. Notably, once legal decision variables are controlled, race seems to matter in Carthage; relationship status in Lakeport. We can only speculatively interpret these findings. Much sentencing research focuses on the race of the suspect as a possible trigger for judgments of dangerousness. The results in Carthage break the other direction, raising the possibility that in that community, the victims of minority men (who themselves were nearly uniformly minorities) are thought to merit slightly less protection or validation of victimization than are white victims. The tendency for Lakeport judges to impose guilty verdicts rather than adjournments on couples in continuing relationships might suggest that court actors see less risk from men who are no longer with their partners. Prior arrest record does not materially reduce a defendant's chances of obtaining an ACD.

V. DISCUSSION

This article reports the results of a comparison of three city courts' dispositions in misdemeanor domestic violence cases in the late 1990s in New York. At that time, New York's legislature and executive agencies had passed a series of reforms intended to increase offender accountability and victim safety in these cases.[117] Most of these efforts were directed at law enforcement.[118] Our inquiry focused on accounting for decisions to adjourn cases in contemplation of dismissal—a disposition that, unlike a guilty verdict, generates no punishment and no record of arrest or prosecution, much less conviction. This disposition occurs in at least one-third of cases in each court.[119]

We find that dispositions tend to reinforce preceding legal judgments: pretrial detention and charging are associated with

[117] *See e.g.*, Judith S. Kaye & Susan K. Knipps, *Judicial Responses To Domestic Violence: The Case For a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 6–10 (2000) (discussing New York's reforms).

[118] *See id.* at 7–8.

[119] *See infra* Table 1.

guilty verdicts, so those who are not detained and those who are charged with violations rather than misdemeanors are more likely to be adjourned. There, however, the consistencies end. We expected that markers of risk and harm, and variables that reflect stronger evidence would reduce the odds of adjournment. Protective orders have this effect in only one court, Stockade (and that is Stockade's only significant correlate with outcome).[120] Use of a weapon is associated with a guilty verdict only in Carthage.[121] Victim injuries, property damage, and the presence of children at risk play no significant role in dispositions.[122] Surprisingly, prior arrest history had no effect on decisions.[123] Notably, the inclusion of legal decision variables in Model II does not substantially shift the interpretations of coefficients; in other words, detention and charging do not appear to be very direct summary measures of risk, harm, and evidence that simply "capture" the variation that would otherwise be explained by case characteristics.[124]

These results also highlight the importance of paying attention to community and courthouse variation. While the mixes of cases that judges face vary little across these three cities, courthouse practices on detention and presence of counsel vary significantly.[125] Theorists have suggested that dispositions and sentencing are subject to greater discretion (and hence the emergence of disparate norms) in low-level offenses, where legal structures such as sentencing guidelines are irrelevant and public scrutiny is largely absent.[126]

Like all social research, this study has limitations. The sample sizes were relatively small.[127] We lack measures of victims'

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[120] *See infra* Table 2.

[121] *See infra* Table 2.

[122] *See infra* Table 2.

[123] *See infra* Table 2.

[124] *See infra* Table 3.

[125] *See infra* Table 1.

[126] Spohn and Cederblom have labeled this phenomenon the "liberation hypothesis." Cassia Spohn & Jerry Cederblom, *Race and Disparities in Sentencing: A Test of the Liberation Hypothesis*, 8 JUST. Q. 305, 306, 323 (1991).

[127] Small sample sizes run the risk both of misrepresenting the larger universes of cases, and of producing unstable coefficients when the number of variables in models is large relative to the number of cases. *E.g.*, DAVID G. ELMES ET AL., RESEARCH METHODS IN PSYCHOLOGY 172–73 (8th ed. 2006) ("Generally speaking, the greater the number of observations in our sample, the more confident we can be that the sample reflects the characteristics of the population. . . . [A] large random sample is likely to yield a more externally valid representation of the population than is a small one. Large samples dilute the effect of having selected an unusual individual."). To assess the latter risk, we ran the models including only those variables that approached or met statistical significance, for each city. The results were substantively the same as the full models (results available from authors).

preferences and involvement (beyond the nearly universal notation that they typically signed the police incident report).[128] We have no measures of defendants' social and demographic characteristics (though police and court personnel in all three sites asserted that the great majority of cases started in low-income neighborhoods). Importantly, we have prior record data in only one community. However, our three sites appear to be fairly representative of the diversity of city courts in upstate New York at the time the data were gathered.

Should these findings give us reason to question the appropriateness of the widespread use of ACD, and to consider it a potential misstep of justice? In keeping with our original criteria, we note that ACDs are not clearly associated with extralegal factors—such as age or relationship—that ought not to shape judgments. The data do suggest, however, that ACDs are quite common (and far more common than outright dismissals). This suggests that they may serve either as a "free pass" for some defendants who are factually as well as legally guilty, or as a "sword of Damocles" hanging over the heads of some defendants who, in fact, could not be convicted in court.[129]

We allow for the possibility that variables that we could not measure (because they were not in police or court files) might account for these dispositions in ways that would resolve these concerns. Perhaps defendants whose cases were adjourned expressed remorse and personal commitments to reform. Perhaps some of them worked in fields in which a conviction would reduce earning power or employability, with negative consequences for family members as well as defendants. Perhaps the complainants in these cases found ways to express misgivings about convictions that did not end up recorded in case files. But there is reason to doubt that these factors would account for much variance. No pretrial assessments were made of defendants that would reveal

[128] No information on a victim's participation was routinely included in court files. Interviews in two courts suggested that the stereotype of the victim who recants or pleads for reconciliation and release of her partner is, in fact, more stereotype than type: defendants usually showed up in court alone. Judges in the Carthage City Court, on the other hand, were openly skeptical of victims' motives in calling the police and opined that many complainants used the legal system inappropriately. The DIRs included a box for victim's or complainant's signature. In the cases that reached the court, the overwhelming majority were signed complaints. This suggests that perhaps victims who did not favor prosecution were screened out before charges were filed.

[129] *See* J. David Hirschel & Ira W. Hutchison, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 117–19 (1992).

their state of mind or the frequency of violence in their relationships. Many of these cases involved violation-level charges that need not be reported on employment applications. Victims reportedly seldom appeared in court.

Hence we suggest that adjournments (and other non-conviction, sealed dispositions) may constitute a "misstep" of justice. Among reformers and scholars, the term "miscarriage of justice" usually refers to both individual cases and structural system characteristics that unjustly condemn innocent parties to the stigma of conviction and the pain of punishment. These conditions merit close and continued scrutiny, especially under the Blackstone dictum that it is better to err—by a large margin—in the direction of erroneous acquittals than false convictions.[130] Nonetheless, issues of victims' and the public's safety, as well as offender accountability, are legitimate concerns of the justice system as well. Domestic violence, like many under-reported crimes, often recurs and is sometimes chronic. Many victims remain tied to their partners (and offenders often continue to harass partners who have moved out of these relationships). A disposition that erases any history of legal proceedings also erases the record of a victim's complaint, potentially undermining her confidence in legal authorities. It also leaves little basis for later judgments about recidivism, or for considerations of threats or violence in later determinations about protective orders or child custody. The problematic consequences of routine use of these sorts of disposition becomes apparent when one considers the social costs that would results from applying them to other sorts of chronic offenses, such as child abuse or drunk driving.

What do these findings suggest for future research? First, we note that the data for this study were collected at a historically important moment, in the wake of national as well as state and local efforts to change criminal justice practices with regard to family violence, and toward violence against women.[131] One might expect that fifteen years later courts would have institutionalized these reforms, yet recent research in other jurisdictions suggests that case processing practices have not changed as much as laws

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[130] 4 WILLIAM BLACKSTONE, COMMENTARIES *358 ("[B]etter that ten guilty persons escape than that one innocent suffer.").

[131] *See generally* Symposium, *Reconceptualizing Violence Against Women By Intimate Partners: Critical Issues*, 58 ALB. L. REV. 957 (1995). Prior to murder of Nicole Brown Simpson, it seemed unlikely that New York bill was going to pass, but the O.J. Simpson trial brought greater attention to the proposed reforms. Karen Burstein, *Naming The Violence: Destroying The Myth*, 58 ALB. L. REV. 961, 964 & n.11 (1995).

promised and advocates hoped.[132]

Second, before rendering a judgment about the use of intermediate dispositions such as ACD, researchers would do well to expand the methodological approaches to studying court decisions. We relied on case data, viewed through a general interpretive lens of on-site interviews; previous studies have been based on surveys of court actors.[133] These results offer some insight into general perspectives on family violence, and provide some purchase for inferences about how decisions are made. We might learn even more by focused interviews that offer judges and prosecutors the opportunity to narrate their reasoning about hypothetical (or actual) cases.

A third and related issue is research on the locus of the disposition decision itself.[134] Surprisingly few studies of criminal courts are conducted in a way that permits researchers to clarify the motivations, preferences, and relative strength of the various actors. Plea-bargaining is typically cast as the product of an agreement between defense lawyer and prosecutor, rubber-stamped by the judge.[135] Adjournments in contemplation of dismissal may have a

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[132] *See, e.g.*, Davis et al., *supra* note 64, at 635 (containing a study of specialized domestic violence courts). For examples of studies on mandatory prosecution and sentencing policies, see Christopher Carlson & Frank J. Nidey, *Mandatory Penalties, Victim Cooperation, and the Judicial Processing of Domestic Abuse Assault Cases*, 41 CRIME & DELINQ. 132, 146–47 (1995); Cramer, *supra* note 8, at 1138, and see also Frantzen et al., *supra* note 12, at 396 (discussing prosecutorial policies and examining the differences among domestic violence offenders). For a study concerning prosecutors' office policies about the timing and triage of misdemeanor cases, see SMITH & FAROLE, *supra* note 21, at 1. For a study on fast-tracking cases, see Davis et al., *supra* note 64, at 635. These studies have produced mixed results of effectiveness, in large part because these reforms tend to shift the incentive systems in plea negotiations away from existing norms.

[133] *See* Camacho & Alarid, *supra* note 37, at 354 (using detailed questionnaires to form the basis of its conclusion about what factors affect case outcomes).

[134] Research devoted to explaining discretionary decisions of criminal justice practitioners generally utilizes one or more of several explanatory models. Some scholars have focused on characteristics of the case (including both legal and extra-legal variables). *See* Elizabeth Stanko, *Hidden Violence Against Women*, *in* VICTIMS OF CRIME: A NEW DEAL? 40, 46 (Mike Maguire & John Pointing eds., 1988); Cassia Spohn & Jeffrey Spears, *The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions*, 13 JUST. Q. 649, 650 (1996); Martha Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 442–43 (1979). Others have found that the characteristics of the decision maker influence decision. *See* LIEF CARTER, THE LIMITS OF ORDER 45 (1974); MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURTS 62 (1979). Still others have found that characteristics of the organization, or the environment in which the decision is made, shape the outcomes. *See* EISENSTEIN & JACOB, *supra* note 13, at 12–16; Thomas Church, *Examining Local Legal Culture*, 10 AM. B. FOUND. RES. J. 449, 505–06 (1985).

[135] F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L.

different dynamic, however. No plea is required or offered, and one might reasonably assume that in many such cases, had the prosecutor found the charges unworthy he would simply not have filed them. Hence judges may play a more active role in these dispositions. This would suggest that we pay more attention to the way judges think about family violence. In a study of rural magistrates in upstate New York, McLean (2003) found that attitudes were particularly important in shaping decisions in partner violence cases among magistrates whose decision style was individualistic and who did not feel constrained by the preferences of other courtroom actors; moreover, their substantive beliefs about domestic violence varied considerably.[136] Likewise, Websdale and Johnson (1998) found that decisions are reflective of individual judicial attitudes.[137] There is reason to believe that city court judges are likewise guided by their value systems when they are afforded the extra discretion of the ACD option.

Third, given the findings here, closer examination of other low-visibility decisions—detention, initial charging and charge reduction, issuance of protective orders and assignment of counsel––should be retained on the research agenda. In some jurisdictions, legal decisions may be cumulative: each decision point may be a shorthand cue about how the next official should react to the case. But does this sort of chain of decision making retain sufficient information about events, defendants, and victims to render just outcomes? And does it allow sufficiently for the discovery of new information (or the resurrection of prior records)?

Finally, social scientists might inform court policy through continued investigation of dispositions, such as ACD, that shift the burdens of proof and responsibility in ways that may have long-term consequences. There is little doubt that ACD is a very desirable outcome for a defendant; indeed, a New York lawyer who offers online advice calls it "the 'Holy Grail' of negotiated settlements."[138] Its availability (and its common use) affects the

189, 189–90, 239 (2002).

[136] *See* Sarah McLean, Rural Magistrates: An Exploratory Study of Decision Making in Partner Violence Cases (unpublished Ph.D. dissertation, University at Albany) (on file with author).

[137] Neil Websdale & Byron Johnson, *An Ethnostatistical Comparison of the Forms and Levels of Women Battering in Urban and Rural Areas of Kentucky*, 23 CRIM. JUST. REV. 161 (1998).

[138] *See Adjournment in Contemplation of Dismissal (ACD)—The "Holy Grail" of Misdemeanor Negotiations (But Not Always)*, N.Y.C. MISDEMEANOR INFO., http://www.nycmisdemeanor.com/adjournment-in-contemplation-o (last visited May 27, 2013).

incentives of both prosecutors and defense lawyers; when it is an option on the table, it dilutes their motivation to establish or contest guilt. Were future researchers to find evidence that ACD is used in circumstances that are in fact aligned with the clear interests of justice, courts' reliance on it would be justified. The judiciary should perhaps reconsider the practice, however, if research provides no such evidence, or if research reveals evidence that public safety is compromised by dispositions that effectively deletes a record of violent behavior.

TABLE 1: DESCRIPTIVE STATISTICS

		Stockade n=233	Lockport n=101	Carthage n=206
Disposition	Guilty plea or verdict ACD	67.0 33.0	56.4 43.6	66.0 34.0
Offender age	18–25 26–35 36 and older	30.9 47.2 21.9	30.7 34.7 34.7	30.6 47.1 22.3
Offender race	White African American	64.8 35.2	83.2 16.8	59.2 40.8
Relationship	Former Partners Unmarried Partners Married Partners	30.5 45.9 23.6	33.6 33.7 32.7	28.1 37.9 34.0
Victim injured	No Yes	63.1 36.9	64.4 35.6	54.9 45.1
Property	No Yes	69.5 30.5	67.3 32.7	72.8 27.2
Weapon	No Yes	88.8 11.2	92.1 7.9	86.9 13.1
Children at risk	No Yes	85.4 14.6	85.1 14.9	83.5 16.5
Protective order	No Yes	76.0 24.0	85.1 14.9	86.9 13.1
Prior arrests	None 1 2–3 4–6 7 or more	49.5 6.4 13.3 10.7 20.2	n/a	n/a
Arrest	At scene/pursuit Warrant or summons	67.4 32.6	60.4 39.6	59.2 40.8
Arraigned as	Violaton Misdemeanor	50.2 49.8	52.5 47.5	39.3 60.7
Bail status	ROR or bail release Detained	68.7 30.9	96.0 4.0	85.0 15.0
Counsel	None Assigned or retained	33.9 65.7	53.5 45.5	24.3 75.7

TABLE 2: BINOMIAL LOGISTIC REGRESSION MODEL PREDICTING ACD: MODEL I[139]

	Stockade (N=233)				Lakeport (N=101)				Carthage (N=206)		
	b	SE	Odds ratio Exp (B)		b	SE	Odds ratio Exp (B)		b	SE	Odds ratio Exp (B)
Constant	-.47	.54	.63		.87	.92	2.39		-1.56	.63	.21
Age	.10	.21	1.10		.00	.29	1.00		.25**	.23	1.28
African American	-.28	.32	.76		-.60	.62	.55		.76	.33	2.15
Married partners[140]	.10	.43	1.10		-.25	.56	.78		.17	.42	1.19
Boyfriend-girlfriend	.08	.39	1.08		-1.48**	.64	.23		.37	.41	1.44
Victim injury	-.09	.31	.91		.02	.51	1.02		-.19	.33	.83
Property damage	.05	.32	1.05		.15	.49	1.17		-.74*	.38	.48
Weapon	-.17	.48	.85		-2.01*	1.16	.14		-1.30**	.56	.27
Children at risk	-.31	.46	.74		-.39	.64	.68		-.01	.45	.99
Protective order	-1.36***	.44	.26		-.64	.62	.53		-.36	.48	.70
Number of prior arrests	-.14	.09	.87								
Warrant/Summons	.46	.33	1.59		-.68	.57	.51		.81**	.33	2.24
% correctly classified	67%				64%				71%		
Nagelkerke r^2	.10				.15				.14		

*p < .10 **p < .05 *** p<.01 **** p< .001

[139] The reference category is guilty plea.

[140] The reference category for both "married partners" and "boyfriend-girlfriend" is ex-partners.

TABLE 3: BINOMIAL LOGISTIC REGRESSION MODEL PREDICTING ACD: MODEL II[141]

	Stockade (N=233)			Lakeport (N=101)			Carthage (N=206)		
	b	SE	Odds ratio Exp (B)	b	SE	Odds ratio Exp (B)	b	SE	Odds ratio Exp (B)
Constant	.99	.75	2.72	2.12	1.19	9.00	.14	.82	1.16
Offender age	.08	.22	1.08	.05	.32	1.05	.35	.24	1.42
Offender African American	.11	.35	1.12	-.78	.70	.46	.80***	.35	2.22
Married partners[142]	-.10	.46	.91	-.54	.63	.58	-.04	.44	.96
Boyfriend-girlfriend	.06	.41	1.06	-1.87***	.71	.15	.14	.43	1.16
Victim injury	-.10	.33	.91	.38	.56	1.46	.13	.36	1.14
Property damage	.03	.35	1.03	.41	.53	1.51	-.42	.41	.66
Weapon	-.08	.50	.92	-1.84	1.26	.16	-1.05*	.60	.35
Children at risk	-.30	.48	.74	-.66	.70	.52	-.14	.48	.87
Protective order	-.84*	.49	.43	-.29	.71	.75	.20	.54	1.22
Number of prior arrests	-.16	.10	.85						
Arrested on warrant/Summons	.37	.35	1.45	-.42	.60	.66	.72**	.35	2.06
Arraigned as misdemeanor	-.60*	.34	.55	-1.39***	.51	.25	-1.11***	.39	.33
Detained at arraignment	-1.52****	.42	.22				-1.33**	.60	.27
Represented by counsel	-.48	.32	.62	1.16*	.49	3.19	-.19	.39	.83
% correctly classified	72%			72%			71%		
Nagelkerke r^2	.22			.30			.24		

*p < .10 **p < .05 *** p<.01 **** p< .001

[141] The reference category is guilty plea.

[142] The reference category for both "married partners" and "boyfriend-girlfriend" is ex-partners.

TABLE 4: SUMMARY OF RESULTS FOR MODELS I AND II: ADJOURNMENT IN CONTEMPLATION OF DISMISSAL[143]

	Stockade (n=233)		Lakeport (n=101)		Carthage (n=206)	
	Exp (B)		Exp (B)		Exp (B)	
	Model I	Model II	Model I	Model II	Model I	Model II
Constant	.63	2.72	2.39	9.00	.21	1.16
Offender age	1.10	1.08	1.00	1.05	1.28	1.42
Offender African American	.76	1.12	.55	.46	2.15	2.22
Married partners[144]	1.10	.91	.78	.58	1.19	.96
Boyfriend-girlfriend	1.08	1.06	.23	.15	1.44	1.16
Victim injury	.91	.91	1.02	1.46	.83	1.14
Property damage	1.05	1.03	1.17	1.51	.48	.66
Weapon	.85	.92	.14	.16	.27	.35
Children at risk	.74	.74	.68	.52	.99	.87
Protective order	.26	.43	.53	.75	.70	1.22
Number of prior arrests	.87	.85	n/a	n/a		n/a
Arrested on warrant/Summons	1.59	1.45	.51	.66	2.24	2.06
Arraigned as misdemeanor		.55		.25		.33
Detained at arraignment		.22		n/a		.27
Represented by counsel		.62		3.19		.83
% correctly classified	67%	72%	64%	72%	71%	71%
Nagelkerke r^2	.10	.22	.15	.30	.14	.24

Shaded cells represent coefficient values that were statistically significant at the .10 level or higher.

[143] The reference category is guilty plea.

[144] The reference category for both "married partners" and "boyfriend-girlfriend" is ex-partners.