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Kimberly A. Thomas

University of Michigan Law School, kithomas@umich.edu

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INTERPERSONAL POWER IN THE CRIMINAL SYSTEM

Kimberly Thomas*

INTRODUCTION

Instances of interpersonal power in the criminal system are black holes in our collective discussion of the criminal law. Their effects are not visible to most outsider observers, yet they have a significant gravitational pull within the cases they involve and within the criminal system generally.

A few examples help to define the contours of interpersonal power.

Example 1: A loving mother has a mentally ill son. The son has, on prior occasions, been violent with members of his family, but the mother has not involved the police. The son has not been able to obtain what the mother believes to be effective treatment or medication. This time, the son hits his mother in the course of an argument. The mother, not knowing what else to do, reports the incident to the police and the son is arrested.¹

Example 2: One person “rents” his car to an acquaintance, who needs a car for the day. In exchange, the car owner receives a small payment he intends to use to purchase illegal narcotics. The acquaintance does not return the car on time. The owner reports the car stolen to police.²

Example 3: A man gets into an argument with his girlfriend. The argument might be purely verbal, or perhaps it is physical, but is not, in any sense commonly understood by the criminal system, a significant aggression on the part of the girlfriend. Nevertheless, the man calls the police³ and reports a domestic assault.

These cases have at least three common features relevant for this Article. First, the complainant has an interpersonal relationship with the alleged wrongdoer. This relationship is, in most instances, ongoing, rather than a one-time interaction between two people. Second, the complainant perceives himself to have a lack of power to influence or force action on the part of the other party. This perception may be accurate or inaccurate, but it is the complainant’s determination that is

* Clinical Professor, University of Michigan Law School. © 2013, Kimberly Thomas.

1. *See, e.g.*, State v. Buchanan, No. M2006-01186-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 76, at *4–8 (Tenn. Crim. App. Jan. 29, 2007) (upholding the revocation of defendant’s probation after he attacked his parents despite father’s testimony that defendant talks to the television and destroys objects at random).

2. *See, e.g.*, Gibson v. State, No. 03-99-00194-CR, 1999 Tex. App. LEXIS 8953, at *3 (Tex. App. Dec. 2, 1999) (“On cross-examination, [Officer] Enlow stated that Sammy Allen, the passenger in the car with appellant, was a known crack addict. He explained the concept of a ‘crack rental’—a situation in which a crack user, low on cash, lends his belongings (including a car) to a dealer in exchange for crack. He explained that the dealers will then often lend the belongings to other people.”).

3. The reasons for this call might include retaliation, teaching the girlfriend “a lesson,” or getting the girlfriend out of the house for a short time.

important.⁴ Third, the complainant reaches out to the criminal justice system for assistance, as opposed to taking extra-legal means or using the civil justice system.⁵

The potential effects of interpersonal power are tremendous, given the composition of cases that make up the criminal justice system. Often, when the public thinks about crime, it imagines the random street mugging or car theft by an unknown person. However, much crime is personal,⁶ involving violence, theft, or other affront by a known person.⁷ Contrary to popular perception, a large percentage of criminal offenses are perpetrated by persons who are not strangers to the victim.⁸ For example, for personal crimes of violence, more than 50 percent involved a non-stranger.⁹ These complex and ongoing relationships result in cases

4. Cf. David Finkelhor, *Violence: The Myth of The Stranger, The Reality of The Family*, in MENTAL HEALTH AND VIOLENCE 27–28 (Eugene Aronowitz & Robert Sussman eds., 1985) (describing perceptions of power imbalance, not actual power, and asserting this perception is significant in the context of domestic partners who abuse their significant others).

5. This decision to involve the criminal justice system is based on an assessment of their interpersonal power and relationship, more than any cut-and-dried obligation to report a “crime” to the police.

A likely, but not necessary, feature of these cases is an actual wrongdoing against the reporting person on the part of the soon-to-be defendant. The first two examples involve people who have, in some tangible way, been harmed. They both could, if they wanted to, report their problem to the police. But there are reasons why each one of them may or may not decide to do so. The veracity of the allegation is not necessary to the phenomenon described. The situations I describe could just as easily apply to a false report of a criminal event as to a true report. In both cases, the complained about conduct may be true, but does not need to be to fit within the framework I am suggesting. The complainant is still asserting the power of the criminal justice system for the goal of attaining personal gain, regardless of whether the allegation of wrongdoing is honest.

6. See, e.g., Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 344–58 (2007) (contrasting statistical evidence highlighting the prevalence of violent crime between non-strangers with the general belief that violent crime is perpetuated by strangers, and that violent acts by strangers are more deserving of the state’s attention).

7. See, e.g., JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP’T OF JUSTICE, NCJ 235508, NATIONAL CRIMINAL VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2010, at 9 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf> (noting strangers were offenders in roughly 39% of violent victimizations); see also Hessick, *supra* note 6, at 344–45 (citing a variety of studies from the past thirty years concluding a majority of violent crimes are perpetuated by non-strangers even though victims identify strangers as a greater threat); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 598–99 (2011) (suggesting “the prototypical crime in the popular imagination” is an act of violence committed by a stranger despite all statistical evidence to the contrary).

8. See, e.g., LISA BASTIAN, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP’T OF JUSTICE, NCJ-151658, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 1993, at 3 (1995), <http://bjs.ojp.usdoj.gov/content/pub/pdf/Cv93.pdf>; TRUMAN, *supra* note 7, at 9. Different offenses are more or less commonly committed by non-strangers. For women, though not specifically targeted in this Article, rape is the offense most likely to be committed by someone known to them. See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1446 n.182 (1999) (citing Bureau of Justice Statistics report, in 1992–1993, 78% of women victims of rape knew the offender); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1216 (1997) (explaining the Bureau of Justice Statistics found that in 1987, only 21.2% of rapes were committed by total strangers).

9. TRUMAN, *supra* note 7, at 9.

that challenge the boundaries of criminal law.¹⁰ To be sure, the artificial dichotomy of victim and perpetrator, of offended and offender, in the criminal law has not gone unnoticed.¹¹ The creation and use of interpersonal power through the criminal system is only one manifestation of the complex web of relationships between parties to an alleged criminal event. Yet this particular context, and the possible effects of this phenomenon, have not fully been considered.

Instead, cases of interpersonal power are largely invisible. Interpersonal power dynamics are found mostly in the deluge of state court misdemeanors and low-level felonies that make up the bulk of criminal cases. Most of these everyday offenses produce no written opinion and no appeal. Even when they do, the dynamics of interpersonal power would not, in most cases, make it into the court record, save, perhaps, as pre-determined facts from the trial court. Because of this invisibility to legislators and other policymakers, the presence of these cases has largely gone unnoticed in discussions of how to best structure criminal procedural and sentencing systems. Further, beyond the context of specific sub-categories of cases, such as domestic violence in the criminal system,¹² interpersonal power in the criminal system is overlooked in the academic literature as well. As these cases are rarely seen by scholars, the effect of these cases on the development of criminal law has largely been ignored.

This Article identifies the workings of interpersonal power in the criminal system and considers the effect of these cases on criminal theory and practice. By uncovering this phenomenon, this Article hopes to spark a legal academic dialogue

10. By definition, the scope of the argument is limited; not every person reports crimes for the distribution of interpersonal power. A number of obvious categories of cases do not fit the mold. Crimes against strangers, which account for approximately half of violent crimes and are a significant number of property crimes, are excluded. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES, tbl.27 (May 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus08.pdf> [hereinafter 2008 STATISTICAL TABLES] (detailing the number and percent distribution of incidents, by type of crime and victim-offender relationship). Additionally, crimes witnessed and reported by police or other unrelated "neutral" bystanders are not necessarily included; although in some cases, interpersonal power will affect the case once it reaches the courts. Third, "victimless" crimes account for a portion of criminal cases; in particular, narcotics offenses. While someone may report controlled substance use or distribution to achieve a shift in interpersonal power, many of these offenses will not conform to my thesis. This Article is not undermined by these examples, as it does not attempt to describe something common to *all* cases in the criminal system.

11. See GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 130 (2007) (discussing how the "sharp dichotomy between the guilty and the innocent purposely misrepresents the world of crime").

12. See Ristroph, *supra* note 7, at 598–602 (relating the historical challenges of domestic violence prosecution); cf. Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L. REV. 441, 486–93 (1997) (presenting how interpersonal power and legal power operate in a series of family law cases involving custody). See generally SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990) (discussing the "ways people who bring personal problems to the courts think about and understand law and the ways people who work in the courts deal with their problems" including marital problems and domestic violence).

and inquiry that has, until now, been unspoken.

This Article has roots in my former work as a Philadelphia public defender and in my current work as a clinical professor with students who appear in criminal and juvenile court. As an advocate for the poor in a busy courthouse, one of a lawyer's tasks is to discover the multiple "real" stories behind the charges and test alternative hypotheses for what may have occurred in a given situation. I am constantly struck by the courts' and criminal law's inability to account for the role of interpersonal power.

Part I gives a contextual overview of features of the current criminal and civil justice system that suggest people, and poor people in particular, might seek access to the criminal justice system as a way to exert interpersonal power usually associated more with the civil justice system. Among other things, these background conditions include the difficulty of accessing civil legal assistance and social services for mental illness and substance abuse.

Part II examines the theoretical and doctrinal problems these cases pose for criminal law. In particular, these cases fit within a literature that shows a growing discomfort with both the inability to draw a coherent line between civil and criminal justice systems as well as the ramifications of these new hybrid actions. The majority of the literature on this distinction focuses on regulatory and white-collar offenses. This Article is one of the first to highlight the blurring of criminal and civil law in the context of "average" criminal cases.

In Part III, the Article examines the "on the ground" dilemmas, unseen by outside observers that are created by the presence of interpersonal power in the criminal justice system. Until interpersonal power is acknowledged, these practical implications will not be adequately addressed. Part III also explores several possible approaches for addressing these cases within both the criminal and civil systems.

I. BACKGROUND CONDITIONS THAT LEAD TO THE USE OF INTERPERSONAL POWER IN THE CRIMINAL JUSTICE SYSTEM

People, especially low-income people, use the criminal justice system for systemic and individual reasons. These reasons suggest the criminal justice system is more frequently used by low-income persons for a re-distribution of personal power due to the absence of other viable options. While the focus of this Article is on the structural aspect of the criminal justice system, individual reasons merit a brief examination.

A. *Individual Reasons*¹³

The personal motivation for reporting or assisting in the prosecution of a crime

13. This is an area in which psychologists and others, more than legal scholars, have made significant efforts to understand behavior. This Article references a few psychology studies, but a detailed portrait of the psychology research in this area is beyond the scope of this Article.

may be straightforward or complex. In many instances, at least part of the calculus is the reporting person's desire to obtain the power to influence the accused's behavior, solicit outsiders to give the reporting person more control over the situation, force compensation to the reporting person for their alleged loss, or in some other way affect the ongoing interpersonal relationship between the parties. But not all crimes are reported to the police.¹⁴ Even when someone is a victim of a crime, that person makes a choice about whether or not to involve the criminal justice system.

For any crime, a victim could have any number of reasons to report or not report the offense.¹⁵ The available statistics suggest, in addition to factors that apply across the board, victims who are deciding whether or not to report an offense make the nature of the relationship and the effect on that relationship and the offender a part of their calculation.¹⁶ One study showed 52.8 percent of violent victimizations in 2002 were not reported to law enforcement.¹⁷ The most common

14. See, e.g., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS (2010), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/CIUS2010downloadablefiles.zip>; CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE, NCJ 209911, NATIONAL CRIMINAL VICTIMIZATION SURVEY AND UNIFORM CRIME REPORTING, HATE CRIMES REPORTED BY VICTIMS AND POLICE 4, tbl.4 (2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf> (reporting about 44% of hate crimes are reported to police and about 49% of other violent crimes are reported); 2008 STATISTICAL TABLES, *supra* note 10, at tbls. 93, 93a (reporting about 40% of property crimes and about 47% of violent crimes are reported to police).

15. See, VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS, at xv-xvi (1977) (hypothesizing interpersonal power and prior relationships play an enormous role in how crimes are reported and whether they are prosecuted). Some factors believed to contribute to the decision of whether to report a crime include: the severity of the offense, 2008 STATISTICAL TABLES, *supra* note 10, at tbl.102; see also HARLOW, *supra* note 14, at 5 (stating for hate crimes—in which perpetrators were more likely than average to be strangers—offenses were reported because victims wanted to prevent further crimes, to stop the incident and obtain help, and to perform their public duty); the perceived receptivity of law enforcement, see 2008 STATISTICAL TABLES, *supra* note 10, at tbl. 104 (stating about 25% of victims of sexual assault at the hands of non-strangers declined to report sexual assault to the police because of privacy and about 6% cited police indifference or ineffectiveness); cf. Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1616–18 (2008) (relaying a number of features intrinsic to the criminal justice system to explain why some sexual assaults go unreported). For property crimes, the value of the loss may affect reporting. See 2008 STATISTICAL TABLES, *supra* note 10, at tbl.100. Victims also call the police to “catch” or punish the perpetrator. *Id.* at tbl.101; see also HARLOW, *supra* note 14, at 5.

16. See Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1127–28 (2011) (discussing why victims choose to report some crimes while acting privately to resolve others and stating that in making “private settlements” the private party is “essentially harnessing the power of the state and converting that state authority into a more flexible, personalized power over the perpetrator”). The difficulty of isolating a person's motive for reporting an alleged crime is exacerbated by bias or inaccurate self-reporting on the part of the complainant. See 2008 STATISTICAL TABLES, *supra* note 10, tbl.101 (basing data on self-reported surveys).

17. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 207846, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 26, tbl.4.5 (2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf>; see TRUMAN, *supra* note 7, at 10 (discussing violent victimizations reported to the police); see also TIMOTHY C. HART & CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, U.S. DEP'T OF JUSTICE, NCJ 195710, REPORTING CRIME TO THE POLICE, 1992–2000, at 5 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rcp00.pdf> (noting regarding victim-offender relationship, “[w]ith two exceptions, [rape and sexual assault], there was no difference in the percentage of violence reported to the police

reason for not reporting the offense to the police was that the incident was a “private/personal matter.”¹⁸

In contrast, not every call to law enforcement is for a legitimate criminal offense.¹⁹ As little as we know about why people report and prosecute—or choose not to—legitimate crimes, even less is known about why someone might falsely report an offense.²⁰

B. Systemic Reasons

Poor people have insufficient access to the civil justice system, and they face financial and other constraints on their access to social services—especially treatment for substance abuse and mental health. This limited access to civil justice remedies and social services can force individuals to look elsewhere for options to resolve interpersonal tensions. Even for those who do not want to involve themselves in the criminal system, the criminal justice system may be the only viable option.

1. Access to Civil Justice

For some situations in which interpersonal property and relationship disputes boil over, the civil law system might be better suited to resolving conflicts between two parties and providing a remedy to the aggrieved person.

However, many poor people do not have the ability to successfully access civil legal means of resolving these disputes.²¹ The poor, whether engaged in a divorce, child custody proceeding, eviction, or other civil case, are not constitutionally

when committed by persons known to the victims and when committed by strangers For every type of violence except rape/sexual assault, a higher percentage of victimization by an intimate than by a friend/acquaintance was reported to the police.”).

18. See DUROSE ET AL., *supra* note 17, at 26 (finding almost 23% cited this reason for not reporting and nearly 20% did not report to the police because they had “reported to some other official”). Specifically, for the 1.4 million victims of violent crimes that occur between family members—a number that does not include boyfriends or girlfriends—approximately one-third of those responding did not report because the event was “private/personal matter”). *Id.* An additional 12% of non-reporting family violence victims indicated they did not report to “protect the offender.” *Id.*

19. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 984–86 (2004) (addressing the trouble with determining valid statistics on false reporting and unfounded claims in the context of rape, particularly given the lack of empirical data). Note the FBI stopped keeping track of “unfounded” claims in its annual Uniform Crime Report after 1997. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 26 (1997).

20. See Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 163–65 (2009) (offering several reasons rooted in interpersonal power which may encourage a domestic violence victim to provide false information or recant testimony); see also CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP’T OF JUSTICE, REPORTING CRIMES TO THE POLICE 9 (1985) (discussing reasons for not reporting crimes to the police).

21. See DEBORAH L. RHODE, ACCESS TO JUSTICE 3–7 (2004) (discussing why the civil legal needs of the poor are largely left unmet).

entitled to an attorney to represent their interests.²² In addition, access to a legal aid or a pro bono lawyer is limited. Some estimate the current legal system fails to meet four-fifths of the civil legal needs of low-income persons.²³ Even for middle-income persons, a civil attorney may be out of reach.²⁴ Further, some people do not seek out the civil justice system because they believe it will not be able to help them. In one study, of those who had an identified civil legal need but did not turn to the civil system, 20 percent of low-income households stated they did not think it would help and 16 percent were concerned about the costs.²⁵

This lack of access, or perceived lack of access, is relevant. In an ongoing relationship, unresolved issues that begin as civil matters can escalate to more severe, and possibly criminal, problems. Additionally, due to the lack of access to the civil system, parties will seek out other avenues. Some low and moderate income persons with a concern having a legal dimension sought out the help of social service providers instead.²⁶ The criminal system serves as another alternative. For example, an argument over personal property that might be resolved through a civil suit could instead be brought as a criminal theft allegation. To the extent the civil system does not present a suitable means of addressing interpersonal problems, the criminal system offers an available, if not ideal, alternative.

2. *Mental Health and Substance Abuse Treatment*

Informal and intra-community methods of addressing interpersonal conflict are an alternative to using the criminal legal system.²⁷ A girlfriend might attempt to have her boyfriend seek counseling for his drug or alcohol abuse. A neighbor might ask a young man's family to persuade the young man to see a counselor or obtain medication for the conduct resulting from his mental illness. A look at the state of the social services network, especially for the poor, shows that attempts to access these resources may be met with limited success.²⁸

The treatment needs of persons with mental illness, especially the indigent, are

22. See Debra Gardner, *Justice Delayed is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 60–63 (2007); see also *Lassiter v. Dep't. of Social Services*, 452 U.S. 18, 32–33 (1981) (finding petitioner was not denied due process of law when counsel was not appointed for her in a parental status termination proceeding).

23. RHODE, *supra* note 21, at 3, 103; see also ALBERT H. CANTRIL, AMERICAN BAR ASSOCIATION, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 9–10 (1996) (finding “most Americans are not seeking out the civil justice system when they might benefit from it” and “[f]ewer than three in ten legal problems (29%) of low-income households are brought to the justice system”).

24. RHODE, *supra* note 21, at 3 (stating “two- to three-fifths of the needs of middle-income individuals, remain unmet”).

25. CANTRIL, *supra* note 23, at 10.

26. *Id.* at 11.

27. See *id.*

28. A full discussion of the added real, and significant, problems of efficacy of these services and the incidence of relapse is beyond the scope of this Article.

unmet. For example, one federal survey on drug use and health found “[l]ess than half . . . of adults with past year [serious mental illness] received treatment for a mental health problem” during the previous year.²⁹ A significant reason for the lack of treatment for mental illness is the cost of appropriate services.³⁰ When those living in poverty need mental health services for themselves or their families, their options are limited. The price of private, inpatient mental health treatment is significantly beyond their means.³¹ One federal study, for example, found that among those who were not receiving treatment but perceived an unmet need, half cited the cost of treatment as the reason.³²

Like treatment for mental illness, there is a tremendous unmet need for substance abuse services. According to one study, in 2000, approximately 4.7 million people needed treatment for illicit drug use, but only 16.6 percent received

29. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMINISTRATION, NATIONAL SURVEY ON DRUG USE AND HEALTH, THE NSDUH REPORT: REASONS FOR NOT RECEIVING TREATMENT AMONG ADULTS WITH SERIOUS MENTAL ILLNESS (2003), <http://www.samhsa.gov/data/nsduh/2k4mrb/ShortRptReasons.pdf> [hereinafter THE NSDUH REPORT: REASONS FOR NOT RECEIVING TREATMENT].

30. See *id.* at tbl.2 (reporting more than 50% of those who did not receive treatment or counseling cited cost as the reason). While the problem of mental illness is not, of course, limited to the poor, studies do suggest mental illness is particularly prevalent among some vulnerable populations, such as the homeless and those incarcerated. See generally Joseph D. Bloom, “The Incarceration Revolution”: The Abandonment of the Seriously Mentally Ill to Our Jails and Prisons, 38 J.L. MED. & ETHICS 727, 728–29, 731–32 (2010) (discussing how declines in state funding for mental health preceded the “large-scale criminalization of the mentally ill”).

31. See Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 167–69 (2012) (relaying the history of state-provided mental facilities, including the impact of federal and state cuts on the cost of psychiatric treatment); see also U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, NO. GAO-03-397, CHILD WELFARE AND JUVENILE JUSTICE: FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVS. 2 (2003), <http://www.gao.gov/new.items/d03397.pdf> [hereinafter CHILD WELFARE AND JUVENILE JUSTICE]; H. Richard Lamb & Linda E. Weinberger, *Persons With Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVS. 483, 485 (1998); Douglas L. Leslie & Robert Rosenheck, *Shifting to Outpatient Care? Mental Health Care Use and Cost Under Private Insurance*, 156 AMER. J. OF PSYCHIATRY 1250, 1252 (1999) (stating the mean cost of private inpatient mental health services has declined from \$8,246 in 1993 to \$5,739 in 1995 due to fewer bed days per patient). Medicaid, Medicare, and other public programs help defray the cost of mental health care. See, e.g., Richard G. Frank et. al., *Paying for Mental Health and Substance Abuse Care*, 13 HEALTH AFFS. 337, 338–40 (1994) (breaking out persons funded by Medicaid and Medicare, as well as the Department of Veterans Affairs, from those using private sources of funding).

32. See OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMINISTRATION, NATIONAL SURVEY ON DRUG USE AND HEALTH, THE NSDUH REPORT: SERVICE UTILIZATION FOR MENTAL HEALTH PROBLEMS AMONG ADULTS 2–3 (2006), <http://www.samhsa.gov/data/2k6/MHtx/mhTX.pdf>; see also THE NSDUH REPORT: REASONS FOR NOT RECEIVING TREATMENT, *supra* note 29, at 2; Roland Sturm & Cathy Donald Sherbourne, *Are Barriers to Mental Health and Substance Abuse Care Still Rising?*, 28 J. BEHAV. HEALTH SERVS. & RES. 81, 84–85 (2001) (noting of the approximately 10% of the population perceiving a need for mental health, more than one fourth reported problems in obtaining mental health care with the cost of care as the primary reason given).

treatment at a specialized facility.³³ While some are not willing to seek treatment for themselves, approximately 381,000 people believed they needed treatment and still were not able to access it.³⁴ Limited treatment options for substance abuse are particularly acute among low-income persons, who depend on the depleted public system to help them recover.³⁵

3. *Resort to the Criminal System*

The incidence of persons who are drug-addicted or mentally ill in the criminal courts suggests the justice system unwillingly steps into the void. For example, about three-fourths of arrestees have alcohol or controlled substances in their system at the time of arrest.³⁶ Two-thirds of jail inmates were dependant on or abusers of alcohol or controlled substances.³⁷ Similarly, the prevalence of persons with mental illness in the criminal system is astonishing.³⁸ Drug abuse can be an entrance into the criminal justice system, either due to an arrest for a drug offense,³⁹ or for an offense spurred by either the need for drug money⁴⁰ or drug-induced behavior.⁴¹ In some cases, mental illness precipitates criminal

33. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMINISTRATION, DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL AND STATE ESTIMATES OF THE DRUG ABUSE TREATMENT GAP: 2000 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 4 (2002).

34. *See id.*

35. *See* Albert Woodward, *Access to Substance Abuse Treatment and Mental Health Surveys: A Literature Review*, in HEALTH SERVICES UTILIZATION BY INDIVIDUALS WITH SUBSTANCE ABUSE AND MENTAL DISORDERS 21, 29 (Carol L. Council ed., 2004) (stating there is a "two tiered" system—the private system for those with insurance or ability to pay, and the public system for everyone else).

36. ZHIWEI ZHANG, NATIONAL OPINION RESEARCH CENTER, DRUG AND ALCOHOL USE AND RELATED MATTERS AMONG ARRESTEES, tbl.3 (2003), <https://www.ncjrs.gov/nij/adam/ADAM2003.pdf> (indicating, of the cities surveyed, the median percentage of all arrestees testing positive for alcohol or one of nine controlled substances was 73.9%).

37. JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 209588, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 1 (2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatj02.pdf>; *see also* ZHANG, *supra* note 36, at tbls.9, 10 (finding the median percentage of arrestees that were deemed to be at risk for drug dependence was 39.1%, while the median was 28.6% for alcohol dependence).

38. *See, e.g.*, KATHLEEN R. SKOWYRA & JOSEPH J. COCOZZA, THE NATIONAL CENTER FOR MENTAL HEALTH AND JUVENILE JUSTICE, BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM, 1 (2006) (finding about seventy percent of youth in the juvenile justice system have one or more psychiatric disorders); ZHANG, *supra* note 36, at tbl.14. For male arrestees, approximately 10% had been in mental health treatment at some point in their life, approximately 21% had been in inpatient substance abuse treatment, approximately 27% had, at some point, been in outpatient substance abuse treatment. The numbers for women were higher for all categories, including mental health treatment, where the median percentage was 18%. *See id.*

39. *See* SKOWYRA & COCOZZA, *supra* note 38, at 1 (finding "more than 75 percent of Louisiana's incarcerated youth were locked up for nonviolent and drug offenses").

40. *See* KARBERG & JAMES, *supra* note 37, at 5–7 (reporting more than half of state prison inmates in 1997 used drugs in the month before their arrest and about one-sixth committed the offense to obtain money for drugs).

41. *See* William D. Bales, Shanna Van Slyke & Thomas G. Blomberg, *Substance Abuse Treatment in Prison and Community Reentry: Breaking the Cycle of Drugs, Crime, Incarceration, and Recidivism?*, 13 GEO. J. ON POVERTY L. & POL'Y 383, 383 (2006).

behavior.⁴² While some people are arrested for drug offenses by police officers who witness a drug purchase or other offense, at least some arrestees are undoubtedly reported by family or community members who are fed up and do not see another alternative.⁴³

Likewise, the criminal system—and its jails and prisons—are left as a last resort for guaranteed mental health treatment, however inadequate. As one example, at least 12,700 parents in one year placed their children into the juvenile justice or child welfare systems so their child could receive mental health care.⁴⁴

While the dearth of appropriate, affordable services is part of the problem, the situation is even more difficult for families of persons who are unwilling to accept treatment. Friends and families of people who need substance abuse or mental health treatment may reach out to the criminal justice system—often as a last-ditch effort—to achieve what they perceive to be beneficial goals for their loved one. In the short term, the person can be immediately detained and removed from a dangerous or volatile situation. If arrested and held (or if a family member refuses to pay bail), a person with a substance abuse problem may detox after a few days in jail. With our current understanding of alcoholism, we may cringe when reading Justice Black's explanation of the "therapeutic" benefits for alcoholics of jail, where they "are given food, clothing, and shelter until they 'sober up' and thus at least regain their ability to keep from being run over by automobiles in the street."⁴⁵ However, family members may have this exact motivation in mind when they call the police on their loved ones.

Incarcerated defendants with mental health conditions will have corrections officials monitoring the amount and type of their medication. This enforcement mechanism may be appealing to loved ones of people who are not compliant with their medication regime.⁴⁶ As Thomas N. Faust, Executive Director of the National Sheriff's Association, put it:

42. See DEREK DENCKLA & GREG BERMAN, CENTER FOR COURT INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 20 (2001) (reporting from interviews of ex-offenders with mental illness that these ex-offenders "baldly state[d] that their mental illness . . . helped drive their criminal activity"); Marvin S. Swartz et al., *Violence and Severe Mental Illness: The Effects of Substance Abuse and Nonadherence to Medication*, 155 AM. J. PSYCHIATRY 226, 226–31 (1998) (finding noncompliance with a medical regime for mental illness combined with substance abuse were associated with violent acts).

43. See DENCKLA & BERMAN, *supra* note 42, at 3 (noting jails and prisons have in some cases become "hospitals of last resort"); Bonnie J. Sultan, *The Insanity of Incarceration and the Maddening Reentry Process: A Call for Change and Justice for Males with Mental Illness in United States Prisons*, 13 GEO. J. ON POVERTY L. & POL'Y 357, 357–59 (2006) (analyzing the deficiencies in mental health care in prisons).

44. CHILD WELFARE AND JUVENILE JUSTICE, *supra* note 31, at 20.

45. *Powell v. Texas*, 392 U.S. 514, 538–39 (1968) (Black, J. concurring).

46. See Joyce A. Cramer & Robert Rosenheck, *Compliance With Medication Regimens for Mental and Physical Disorders*, 49 PSYCHIATRIC SERVS. 196, 196–200 (1998) (noting range of rates of compliance in previous data, finding mean compliance of fifty-eight percent in this data and finding at least some disparity due to definitional issues).

There is something fundamentally wrong when, for some families, the only way to obtain involuntary treatment for a mentally ill family member is to have that person arrested. But that is, in fact, regularly happening in many states.⁴⁷

Moreover, if circumstances warrant it, the court or corrections facility may order the defendant to be committed to a psychiatric unit of the jail or a mental health facility prior to trial and disposition of the criminal case.⁴⁸

In the long term, family and friends may perceive that the criminal justice system will require, help pay for, and enforce, if necessary, a treatment regimen. In some circumstances, courts will pay some portion of the cost of a treatment program for indigent criminal defendants or the cost of a program in jail or prison will be incorporated into the cost of incarceration.⁴⁹ Often, these treatment options are not voluntary means to improve the defendant's sentencing alternatives and outcome; they are required. The court backs up these orders with the possible penalty of incarceration or increased incarceration if the defendant is not compliant.⁵⁰

It is not foolish to think the arrest and possible conviction of a loved one will result in treatment for those unwilling or unable to access such services. One study found that of those jail inmates who were determined to be dependent on drugs or alcohol, 63 percent had, at some point, participated in a treatment program.⁵¹ Forty-seven percent of those determined dependent had participated in substance abuse treatment or other program while under corrections supervision.⁵²

In sum, the insufficient options for civil legal services, substance abuse services, and mental health treatment push individuals and their families to seek other solutions. These underlying problems—and the interpersonal conflicts they create—spill over into other systems. The criminal justice system then acts as a “solution” of last resort to address these personal and interpersonal crises.

II. THEORETICAL AND DOCTRINAL IMPLICATIONS OF INTERPERSONAL POWER IN THE CRIMINAL SYSTEM

These cases of interpersonal power do not make their way into criminal law books. Few people consider the facts of these cases, or even review these cases, after disposition. If these cases have dispositions, the vast majority will be guilty

47. Thomas N. Faust, Editorial, *Shift the Responsibility of Untreated Mental Illness Out of the Criminal Justice System*, CORRECTIONS TODAY, 6–7 (April 2003), http://www.aca.org/publications/ctarchivespdf/april03/editorial_april.pdf.

48. See, e.g., N.Y. CORRECT. LAW § 508 (McKinney 2011) (permitting the sheriff to commit an inmate to a mental health institution prior to trial); STATE OF MICHIGAN, GENESEE CNTY., MENTAL HEALTH COURT, LOCAL ADMINISTRATIVE ORDER 2010-6J (2010) (providing for the creation of a mental health court and state-imposed mental health treatment prior to trial).

49. *Id.*

50. *Id.*

51. See KARBERG & JAMES, *supra* note 37, at 1.

52. *Id.*

pleas,⁵³ while some portion will result in outright dismissal.⁵⁴ The few tried to a guilty verdict will probably not be appealed. Even in the rare case that leaves a written transcript or appellate opinion, the face of the record is unlikely to expose the dynamic at work. Criminal cases that explore the use of interpersonal power are not the stuff of published appellate case law. These cases are neither seen nor understood. Yet this dynamic exists in criminal practice. In this Part, the Article explores possible implications of these cases for criminal law.

A. *On the Border Between Civil and Criminal Law*

These cases are important and overlooked examples that blur the line between criminal and civil law. Without making a judgment about the effects on the criminal system, the features of these interpersonal cases fall short when compared to criminal law ideals. In fact, the tension between criminal and civil law is particularly acute in these cases.

Conventional wisdom suggests the significant ends of the criminal law should be the punishment of the defendant and the transmission of a moral message of societal condemnation of the wrong-doer.⁵⁵ By contrast, the correction or adjustment of an imbalance between two parties is the hallmark of the civil justice system.⁵⁶

Cases of interpersonal power can fit both systems. Where the allegations of the complainant are true, or partially true,⁵⁷ an actual harm has occurred.⁵⁸ This harm alleged (even if not fully realized) has been defined by the legislature as a harm which, when inflicted in conjunction with other circumstances, would constitute a criminal offense.⁵⁹ The harm and attendant circumstances alleged, if true, appropri-

53. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.5.22.2010 (2010), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>.

54. *Id.*

55. See, e.g., Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS., 401, 405 (1958) (“[Criminal sanctions] take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction.”).

56. See, e.g., Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 756 (1943); see also Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS., 23, 27 (1997) (“The traditional rough distinction between criminal and civil matters has been that criminal actions are brought by the sovereign to punish and deter violations of social norms, while civil actions are brought by private parties (or occasionally by the government in a proprietary or administrative capacity) to compensate those who have suffered damage or to prevent harms from occurring.”).

57. Set aside, for a moment, cases in which the complainant makes a false report of an offense in an attempt to exert interpersonal power. In cases of a false report, the fit within criminal law is less clear.

58. See Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 425 (2008) (“[T]he criminal law punishes the defendant for the harm to society that resulted from his decision to engage in the conduct that hurt the individual victim.”); Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 695 (2006) (including harm within the criminal system while differentiating criminal sanctions as crafted without the need to match the individualized “harm” of the criminal act, unlike the civil counterparts).

59. Not every harm that occurs is criminal. If the harm is not so defined by the legislature, even an aggressive police department or prosecutor could not go any further with the case. Some have suggested wrongdoing is an

ately would be handled in the criminal system. However, to make this tidy fit, I have deliberately chosen a specific way to define a criminal offense.

Interpersonal power cases can also fit into a civil tort framework. The aim of the interpersonal action is to correct an imbalance of power. This is similar to a tort suit, in which the aggrieved party seeks to be made whole again, or recover damages, following a harm imposed by the defendant.⁶⁰ The civil plaintiff is resolving a private affair between herself and the defendant with the possible goals of being made whole or influencing the actions of the other party. She is not rectifying a larger social wrong.⁶¹ So, for example, reconsider the acquaintances with the “rental” car at the start of the Article.⁶² The owner of the vehicle may have been harmed in some way by a late return of the vehicle, or damage done to the vehicle, but believes he cannot openly disclose the “rental agreement” made. What the owner is trying to accomplish by reporting the car stolen, however, is the prompt return of an undamaged car, or compensation for harm. Thus depending on what factors we deem relevant and how we define the appropriate reaches of the civil and criminal systems, cases of interpersonal power can fit either paradigm.

Up to this point, the distinction between criminal and civil has been discussed as if it was clear and agreed upon. But the line between criminal and civil law has never been clearly defined.⁶³ Historically in England, wrongs were not divided into civil and criminal.⁶⁴ In the United States, the legal system by the time of the Constitution had developed categories of criminal and civil wrongs.⁶⁵ However, some have stated law and practice did not clearly define or adhere to these categories.⁶⁶

In reality, a great deal of actual conduct fails to respect doctrinal or theoretical distinctions between criminal and civil law. As John Coffee notes, “most crimes involving specific victims are also torts.”⁶⁷

In implementation, each system has appropriated ideas from the other. For

additional requirement for criminalization. *See, e.g.*, STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 39–47 (2006) (discussing wrongfulness as one of three elements of the moral content of criminal offenses, along with harmfulness and mens rea).

60. *See* Hall, *supra* note 56, at 757–58.

61. *See id.*

62. *See supra* note 2 and accompanying text.

63. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1327 (1991); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992).

64. *See* JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 160–61* (1996) (mentioning, until the 12th century, the English common law had neither a concept of crime nor any distinction for punitive-criminal prosecutions).

65. *See* Cheh, *supra* note 63, at 1325.

66. *See, e.g.*, HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 31 (1968).

67. *See* Coffee, *supra* note 63, at 194 n.4.

example, tort law seeks compensation meant to make the victim whole, while criminal law is designed primarily to punish the transgressor. But victim compensation is prominent in the criminal system. Defendants found criminally liable are almost always ordered to pay restitution,⁶⁸ including medical bills, or other victim-specific compensation. The criminal trial sometimes serves a function of allowing the victim to be “heard,” even though the victim is not technically bringing the case.⁶⁹ Most sentencing proceedings allow for the victim to give a written or oral statement describing the crime’s effect on them.⁷⁰ In fact, the criminal trial or plea process can function as an airing of the issue and give the victim a forum to voice his complaint and seek to be made whole.⁷¹

The Supreme Court has not enunciated a meaningful distinction. The issue has most frequently presented itself to the Court in the context of determining whether a sanction constitutes punishment or not.⁷² The Court has, on various occasions, looked at a variety of factors, including whether the sanction is aimed at “the two primary objectives of criminal punishment,” retribution and deterrence,⁷³ and whether the statute contains an intent requirement.⁷⁴ In the end, however, the Court has largely deferred to legislatures on whether a measure is civil or criminal in nature.⁷⁵

68. See, e.g., ALASKA STAT. ANN. § 12.55.100(a)(2) (West 2012); CAL. PENAL CODE § 1203.1(a)(3) (West 2012); MICH. COMP. LAWS ANN. § 771.3(1)(e) (West 2012); see also Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 971 (1986) (“Orders of restitution generally are employed in the criminal process as a condition of probation.”).

69. See, e.g., Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims’ Rights Act*, 26 YALE L. & POL’Y REV. 431, 449, 453 (2008) (arguing, from a victims’ rights perspective, the right to victim allocution is vital as ritual even when the statements are irrelevant to sentencing).

70. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 615 (2009) (pointing out 48 states allow victim impact statements in all cases, and two states allow victim impact statements at the judge’s discretion); see also Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 and 42 U.S.C. §§ 10603 (d)–(e) (2006)) (detailing the rights of the victim in the federal criminal system).

71. See Giannini, *supra* note 69, at 453–55.

72. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (noting punitive sanctions require application of criminal law procedures, while civil sanctions require less protective measures); George Fletcher, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290, 292 (1965).

73. See *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997).

74. See, e.g., *Kennedy*, 372 U.S. at 168–69 (listing seven possible factors for determining whether a statute is primarily punitive, including “whether it comes into play only on a finding of scienter”).

75. The legislative determination will be ignored “only where a party challenging the statute provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” *Hendricks*, 521 U.S. at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). The Court has described this showing contrary to the legislature’s stated purpose as a “heavy burden.” *Id.*; see also *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citing *Hendricks* approvingly).

B. Comparison to "White Collar" Crime

The lines between civil and criminal have become increasingly blurred.⁷⁶ Most prominently, criminal penalties have been applied to regulatory, administrative, and procedural wrongs, further contributing to the lack of distinction between criminal and civil law.⁷⁷ These offenses, typically described under the rubric of "white collar crimes,"⁷⁸ have received increased attention of both the public and of prosecuting authorities.⁷⁹ For example, one study of securities violations found a trend towards increased criminal prosecution of these offenses.⁸⁰

White collar criminal prosecutions and interpersonal power cases have significant differences, and they have not developed in the same way or due to the same forces. But white collar crimes and interpersonal power cases straddle the civil-criminal boundary, and that particular aspect of white collar crime has been given sustained scholarly attention.⁸¹ This Part now briefly discusses potential ways of thinking about cases that fall on this civil-criminal boundary, and examines the differences between the oft-discussed white collar cases and the mostly ignored interpersonal power cases. In the end, this Part concludes scholars seeking to clarify the divide between criminal and civil law should expand their scope beyond these white collar crimes to develop an account that considers the range of cases that bridge this gap.

76. See Cheh, *supra* note 63, at 1326–27 (discussing use of civil remedies to address criminal behavior); see also PAMELA H. BUCY, *WHITE COLLAR PRACTICE: CASES AND MATERIALS* 556–57 (3d ed. 2004) (noting white collar crimes blurs the distinction between civil and criminal law); TONY G. POVEDA, *RETHINKING WHITE-COLLAR CRIME* 45 (1994)

77. See Lynch, *supra* note 56, at 36–38.

78. See GREEN, *supra* note 59, at 1–2 (noting the variety of possible offenses typically thought of as "white collar crimes" and that many of these are not actually committed by high-income people). This Article uses the term "white collar crime" as a placemaker without further definition and references a number of scholars, many of whom do not clearly agree on the meaning of "white collar crime."

79. See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *STAN. L. REV.* 85, 91 (2005) (noting 21.6% of offenses prosecuted in federal court are economic crimes, including white collar crimes, making it the second largest category behind drug-related crimes); see also Kip Schlegel et al., *Are White Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 *W. ST. U. L. REV.* 117, 123–24 (2001) (summarizing prior research, including a study that found white collar prosecutions accounted for an increase from 8% to 24% of the federal criminal prosecutions from 1970 to 1983 and another that found little change in the criminal enforcement of environmental offenses from 1984 to 1990).

80. Schlegel et al., *supra* note 79, at 131. The authors did not find support for the perception of increased criminal liability against firms and corporations.

81. See, e.g., Travis Hirschi & Michael Gottfredson, *Causes of White-Collar Crime*, 25 *CRIMINOLOGY* 949, 951–52 (1987); Susan P. Shapiro, *Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime*, 55 *AM. SOC. REV.* 346, 359–61 (1990); Edwin H. Sutherland, *Is "White Collar Crime" Crime?*, 10 *AM. SOC. REV.* 132, 136–37 (1945).

1. *Ways of Thinking about the Civil-Criminal Divide*

In the area of white collar crime, the circumstances in which civil or criminal liability should be imposed for “bad” corporate behavior are contested.⁸² Part of the debate about white collar offenses focuses on the extent to which white collar wrongs can be deterred through criminal statutes⁸³ and whether criminal law is appropriate because, at least in some instances, actions lack culpability requirements typically associated with the label of “criminal.”⁸⁴

Scholars, such as Professors Mann, Cheh, and others, have offered several hypotheses in their attempts to draw distinctions between crimes and civil misdeeds. Some note the difference is the purpose of criminal sanctions—punishment—as compared to the purpose of civil sanctions—compensation.⁸⁵ Others argue the sanctions themselves, in particular the loss of liberty associated with a criminal conviction, distinguish criminal law from civil.⁸⁶ The distinct social stigma that adheres to a criminal conviction and community condemnation implied by violation of a criminal law is yet another means of drawing the line.⁸⁷ A more economic approach might characterize tort law as “seek[ing] to balance private benefits and public costs” and price these offenses, while criminal law prohibits conduct and does not give any weight to the private benefit of the offender.⁸⁸ Other distinctions could be based on the (now often absent) mens rea requirement in criminal law, the relative unimportance of actual harm in the criminal law as compared to the civil law, or the use of a public prosecutor.⁸⁹

82. See Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 501–03 (2004) (arguing there is an inherent lack of moral clarity in white collar offenses); David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1406–11 (2008) (using the example of private sector bribery to demonstrate how traditional “harms” may be unclear under white collar crime statutes); see also Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 973–75 (2003) (suggesting, for several reasons, criminal prosecution should be a last resort for remedying white collar offenses).

83. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1330 (2001) (“Criminal law has a deterrent role, but compared to well-developed administrative law regimes it looks like a pretty crude means to encourage compliance. It is easy to see how appealing civil options can be for deterrence.”); see also John Hasnas, *Foreword to Corporate Criminality: Legal, Ethical and Managerial Implications*, 44 AM. CRIM. L. REV. 1269, 1270 (2007) (noting the difficulty of obtaining evidence for white collar prosecutions, because it rests with the wrongdoer, reduces the deterrent value of the possibility of criminal sanctions).

84. See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1883 (2000) (noting in trials for perjury and other white-collar offenses it is often unclear what the defendant did was a violation of the rules, let alone something that is clearly criminal conduct; this conduct is “far removed from the moral core of the offense”).

85. See Mann, *supra* note 63, at 1796–97 n.1–6. The purpose could be determined ex post by a court, or courts could defer to legislatures’ enunciation of purpose; see also Cheh, *supra* note 63, at 1354 (stating a tenable distinction, albeit somewhat circular, is the purpose given by the legislature).

86. See Cheh, *supra* note 63, at 1349–50.

87. See Coffee, *supra* note 63, at 223; Cheh, *supra* note 63, at 1349–50 (suggesting, but rejecting, this distinction).

88. See Coffee, *supra* note 63, at 194.

89. See *id.* at 210 (suggesting, but rejecting, these alternatives).

Some of these distinctions lend little assistance to thinking through whether conduct, either white collar or interpersonal, should belong in the criminal or civil system. These distinctions merely describe the result of choices made, but they do not give scholars, legislatures or lawyers the tools to make choices in the first place. Defining the line between civil and criminal based on the use of a prosecutor or the sanction that is ultimately imposed for a violation both suffer from this problem.⁹⁰ Deference to a legislative determination also fails for this reason.⁹¹ If the distinct social stigma resulting from a criminal conviction is defined merely by the fact that it is a criminal conviction, as opposed to a civil judgment, then any corresponding analysis may describe the results of legislative and prosecutorial choices, but it does not provide insight into the wisdom of these choices.⁹²

Other distinctions have a little more explanatory traction, such as the purpose of the sanction imposed and the type of harm. Just as these distinctions have been tested in the context of white collar cases, they can help give contours to how we acknowledge and address cases of interpersonal power. Take the all-too-common example of a desperate parent who calls the police to have her son arrested because she wants to get him “help” for his mental illness or addiction. We can wonder whether this situation fits best under a civil or criminal paradigm, where the goal of initiating the action is not punishment. The case will, if the parent gets her way, involve consideration of the private benefit of the offender and be forward looking—meant to affect future behavior as opposed to merely sanction bad past conduct.

2. Differences

The differences between white collar and interpersonal cases can help scholars challenge facile conclusions about the civil-criminal divide, as well as better inform how we think about interpersonal cases.⁹³ Contrast a corporate fraud scheme, in which the perpetrator is involved in insider trading or deception of shareholders or investors,⁹⁴ with the mother “getting help” for the son who assaulted her. Some pragmatic distinctions first: white collar offenses are for the most part prosecuted in federal court where, even there, they make up a fraction of

90. See Cheh, *supra* note 63, at 1352–53, 1360.

91. See *id.* at 1360 (noting the circularity of this distinction).

92. See *id.* at 1353–54.

93. Of course, white collar crimes began to be discussed as a separate category due to their distinctions from traditional criminal offenses. As interpersonal cases fit, at least on the surface, within these traditional crimes, the differences should be largely unsurprising.

94. Recent high-profile examples of this include Raj Rajaratnam, the hedge fund investor who was convicted of fraud and conspiracy and sentenced to prison, and the retired head of McKinsey consulting, Rajat K. Gupta, who was convicted of conspiracy and securities fraud. Chad Bray et al., *Insider Case Lands Big Catch*, WALL ST. J. (June 15, 2012), <http://online.wsj.com/article/SB10001424052702303822204577468470878668722.html>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Obtains Record \$92.8 Million Penalty Against Raj Rajaratnam (Nov. 8, 2011), <http://sec.gov/news/press/2011/2011-233.htm>.

the federal docket.⁹⁵ The focus is on a small number of high profile criminal prosecutions of alleged white collar wrongdoers.⁹⁶ Cases of interpersonal power, on the other hand, are almost exclusively prosecuted in state court because of the nature of the offenses: common thefts, assaults, and the like. Cases of interpersonal power in the criminal system, though impossible to quantify, are more typical than white collar cases. They appear in greater numbers and on a more regular basis.

Another distinction is the type and amount of harm imposed. This is particularly significant because the amount or type of harm is one means of trying to distinguish criminal from civil cases.⁹⁷ Violations such as those prosecuted in white collar cases cause harm, sometimes substantial harm.⁹⁸ Yet the impact may be spread across a large number of people, or it may not be directly perceived by the entity harmed.⁹⁹ Other white collar crimes are described by certain commentators as victimless.¹⁰⁰ At the least, prosecuting certain offenses, such as perjury, enforce moral norms of the community¹⁰¹ without readily identifiable victims.¹⁰²

A final set of distinctions between interpersonal power cases and white collar cases is the role of the prosecutor and the role of the complainant or victim. Prosecutors in white collar cases also have, in comparison to other cases, the

95. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 862 (2001) (noting, in 1997, approximately 16% of the federal criminal docket consisted of white-collar cases). Federal criminal prosecutions represent only a fraction of the total criminal prosecutions nationwide. Compare Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1283 (1995) (stating the number of federal criminal prosecutions in 1992 as 47,472), with MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, NCJ 215646, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf> (citing the number of state felony convictions in 1994 as 872,200). Note, many states also have laws covering what might be seen "white collar" types of crimes, such as identity theft; these laws give prosecuting authorities additional choices.

96. See Jamie L. Gustafson, Note, *Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers*, 40 SUFFOLK U. L. REV. 685, 691 (2007); Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 88 (2006).

97. See Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 500 (2006) (discussing the public's perception of the harm of white-collar crimes in relation to other crimes).

98. See *id.*; Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 59 (2007). For example, the prosecution asserted at the trials of Enron executives Kenneth Lay and Jeffrey Skilling that the Enron corporate fraud resulted in thousands losing their jobs and billions of investor losses. Shaheen Pasha & Jessica Seid, *Lay and Skilling's Day of Reckoning: Enron Ex-CEO and Founder Convicted on Fraud and Conspiracy Charges; Sentencing Stated for September*, CNNMONEY.COM (May 25, 2006), http://money.cnn.com/2006/05/25/news/newsmakers/enron_verdict/.

99. Mills & Weisberg, *supra* note 82, at 1375–76.

100. See Kurt Eichenwald, *White-Collar Defense Stance: The Criminal-less Crime*, N.Y. TIMES (Mar. 3, 2002), <http://www.nytimes.com/2002/03/03/weekinreview/the-nation-white-collar-defense-stance-the-criminal-less-crime.html>.

101. GREEN, *supra* note 59, at 133–40.

102. Cf. Mills & Weisberg, *supra* note 82, at 1390–94 (raising the philosophical challenges posed by statutes criminalizing public corruption when the public official is performing routine tasks).

luxury of time, in part because most cases do not involve interpersonal violence.¹⁰³ Because the alleged crimes are often administrative or regulatory in nature, the government can take the time to assess the case and, if necessary, conduct further investigation. In some white collar cases, due to the amorphous nature of the victim,¹⁰⁴ the prosecutor is left to piece together the case against the defendant.¹⁰⁵ This means the choice between enforcement in the civil system or the criminal system is almost always an issue of government discretion.¹⁰⁶ When the choice exists, prosecutors, usually federal prosecutors, receive the relevant evidence and determine whether the alleged violation should be seen as criminal.¹⁰⁷ Finally, once the case is initiated within the criminal system, the sole decision about whether to allow the accused to avoid criminal prosecution is usually within the authority of the prosecutor. This person does not usually have a particular “victim” who could vociferously object to this decision.¹⁰⁸

White collar prosecutors can also choose a forum for more instrumental reasons. For some, the relative ease of obtaining a civil judgment, as compared to also obtaining a conviction, could come into play. The lessened procedural protections for defendants in civil court are one significant reason to pursue punitive sanctions through the civil, as opposed to criminal, justice system.¹⁰⁹ These include a lower burden of proof, no right to counsel for the defendant, as well as other constitu-

103. See Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 596 (2006) (discussing the length of time involved in the Martha Stewart case).

104. See Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821 (1990); Neal Shover & Aaron S. Routh, *Environmental Crime*, 32 CRIME & JUST. 321, 329 (2005) (“[U]nlike conventional white collar crimes, the ‘victims’ are often not only people but also wildlife habitats or endangered species for which there is no easily ascertained economic value.”); see also Mills & Weisberg, *supra* note 82, at 1375–76 (criticizing the idea of the victim for certain corporate crimes as “a kind of co-dependent capitalist decrying a relationship gone bad”).

105. It would be a rare case where the citizen whose health care, in the end, been affected, will call in a health care fraud complaint or the investor who initiates a securities fraud case has the evidence to support a criminal suit.

106. See Bharara, *supra* note 98, at 56; see also Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COMM. L.J. 321, 344–45 (2007) (noting federal prosecutors have tremendous discretion on choice of legal theory and charge, and that courts do not intervene with this discretion).

107. See Cheh, *supra* note 63, at 1328 n.19 (discussing the implications that the blending of criminal and civil punishments might have on the organization of prosecutors’ offices); Kip Schlegel et al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 131–32 (2001) (examining the number of securities cases that proceeded as criminal matters); see also *About Us*, UNITED STATES ATTORNEY’S OFFICE NORTHERN DISTRICT OF ILLINOIS, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usao/iln/aboutus/index.html> (last visited Jan. 18, 2013) (discussing the difference between the civil and criminal divisions).

108. Of course within the criminal system, the prosecutor is not obligated to act according to a victim’s wishes and is not a representative of the alleged victim. In cases with an actual victim, the prosecutor will, however, hear this person’s complaints if he or she disagrees with the prosecutor’s decision.

109. See Pamela H. Bucy, *Moral Messengers: Delegating Prosecutorial Power*, 59 S.M.U. L. REV. 321, 325–26 (2006).

tional protections that adhere to criminal cases.¹¹⁰

In interpersonal power cases, the complainant has much more control over the ultimate forum for the case. If a person filed a civil suit for damages but did not notify law enforcement, the police or state prosecutor would be unlikely to find out about the alleged violation and initiate a separate, criminal, matter. While some tortuous conduct against individual persons may not also be criminal, the converse is not true. A person who believes such a wrong has been committed against her has, assuming the ability to do so, a choice about how to classify what allegedly occurred.¹¹¹ The complainant may make this choice informed by both her desire to exert interpersonal power with respect to the violator and an assessment of the other options available to accomplish this. Once the complainant in an interpersonal case involves the criminal justice system, the actors in that system will be the ones who make decisions about the case's disposition. To be sure, police and prosecutors have some discretion not to pursue complaints. However, this discretion can be more limited.¹¹²

Because of their visibility, white collar prosecutors can think more methodically about office-wide policies that take their goals for the criminal system into account. These policies could help insure like cases are treated alike and offenders are not over- or undercharged. Prosecutors in an overloaded state criminal system, faced with what appears to be a case brought for interpersonal reasons, can try to problem-solve on a case-by-case basis, but will be harder pressed to think systematically about treatment of these offenses.¹¹³

These differences are raised to further worry the demarcation between civil and criminal law. An account of this divide should not only attempt to avoid circularity and to help develop useful distinctions between civil and criminal white collar cases. Academics have focused, because of the prominence of white collar cases, on how and when cases should remain on the civil side; however, these discussions hold little relevance for interpersonal cases, which are criminal cases, essentially, as a matter of last resort. An account of the division between civil and criminal should also seek to have explanatory value in a range of contexts, including the diametrically different situation of interpersonal cases.

110. *Id.*

111. This Article uses conditional language, such as alleged, not only to recognize the important presumption of innocence, but also to draw attention to the possibility of false claims of wrongs. A false report presents a similar set of options as a true report.

The choice drawn here, between using the civil or criminal system, ignores the very real option of using extra-judicial ways of addressing the wrong.

112. See Ristoph, *supra* note 7, at 599–600 (noting some procedural changes, including mandatory arrests, designed to reduce prosecutorial discretion and encourage criminal prosecutions for domestic violence); see also MISS. CODE ANN. § 99-3-7 (West 2011) (mandating arrest for misdemeanor domestic violence or violation of protective order regardless of victim consent).

113. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U. L. REV. 261, 288–93 (2011) (arguing overburdened state prosecutors are less able to keep victims informed and ultimately determine questions of innocence).

III. CONFRONTING AND ACKNOWLEDGING INTERPERSONAL POWER IN PRACTICE

A. *Problems Created By Interpersonal Power Cases*

The use of the criminal law system for the transfer of interpersonal power also has ramifications on the practice of criminal law. Specifically, the use of the criminal system to influence interpersonal power can distort criminal cases.

First, the goal of the complainant may be limited and may be achieved before final resolution of the criminal case. For example, the reporting party may have only intended to have the arrested person removed from the house for a few days; but have no intention of actually pursuing a criminal case. Second, the complainant may change his or her mind when he or she realizes the ramifications of involving the criminal system. The reporting party may realize she does not have the autonomy in the system to choose to “drop” a case once it has begun. Further, she may realize the consequences to the accused of a conviction—such as loss of a job, loss of other financial or emotional support, or a term of incarceration. Less sanguinely, the reporting party may understand the ostracism from her family or even the retaliation she will experience for pursuing her goals through the criminal system.¹¹⁴

This information may result in attempts by the reporting party to manipulate the criminal process. The reporting party may choose to not show up in court, may refuse to testify, or may testify but with a different version of the events that is designed to exculpate the accused or to mitigate the prior version of events given.¹¹⁵ The goal of these choices is to achieve an outcome that, in the eyes of the reporting party, is more aligned with her desired end result. As another option, the reporting party may state to the court or the prosecutor that she filed a false police complaint. In other words, if the reporting party perceives the offender is in a vulnerable position, the reporting party will attempt to achieve an individualized justice through the means she has at her control within the criminal system. In the example of the mother who gets her son arrested for theft of her property to “get him help,” she may cooperate with the prosecution and the courts until she sees the outcome of the court is not aligned with her desires—for example, the son will face significant incarceration because of prior offenses and not be eligible for community treatment. At this point, the mother, whose testimony will almost certainly be necessary if the case were to go to trial, may choose to stop showing up in court and returning calls from court officials. The mother may even inform her son of this decision so he knows it is not necessary to plea bargain his case, because the prosecutor has lost its witness.

114. See Simmons, *supra* note 16, at 1128 (suggesting victims may be less likely to report property crimes conducted by family members).

115. See Rutledge, *supra* note 20, at 150 (describing non-cooperation as “an epidemic in domestic violence cases”) (citation omitted).

These actions have ramifications for all parties. The reporting party may put herself at risk within the criminal system, which may threaten or actually prosecute her for filing a false report or perjury.¹¹⁶ The reporting party's failure to appear for court or otherwise cooperate with the prosecution may result in case delays. These delays mean additional court hearings,¹¹⁷ occupying time for the defendant, attorneys, and the court. They also potentially mean prolonged incarceration for the offender, especially if bail was set beyond the means of the offender or his family. If this incarceration does not serve to make sure the offender will appear for court¹¹⁸ or to protect community members,¹¹⁹ it needlessly restricts the liberty of the accused and serves little penological purpose. State resources are wasted by the cost of incarcerating this person and the possibility a more dangerous or riskier accused person could be housed instead.

These cases may result in a criminalization¹²⁰ of the accused, particularly those with mental illness or substance abuse problems, which achieves the social stigma of conviction but accomplishes little else.

B. Acknowledging Interpersonal Power in Practice

Considering the potential irregularities and inconsistencies created by the presence of interpersonal power, it is paramount we acknowledge this dynamic, and develop more systemic ways to address it. There is no easy fix. This Article considers three possible approaches. One approach is to address some of the underlying reasons for this phenomenon directly. While perhaps desirable, this overarching approach is not feasible. Second, the criminal system can expand on a variety of existing mechanisms to accommodate these cases. This approach, while the most promising, has its own limitations. Third, some portion of these cases

116. *Id.* at 153–56 (discussing perjury in domestic violence cases, including the potential for frustration to determine whether prosecutors and judges pursue criminal charges against a victim turned accused perjurer).

117. For example, in Philadelphia, the practice was often to dismiss the charges if the complainant failed to appear two times in a row. If the complainant never intends to come to court and further pursue the case, the second court date, and time spent incarcerated by the accused, is a waste of court and corrections resources.

118. See 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 761 (3d ed. 2004) (examining the role of bail and bond in the criminal justice system); see also *Bell v. Wolfish*, 441 U.S. 520, 583 (1979) (noting the posting of bail ensures against flight risk).

119. See WRIGHT ET AL., *supra* note 118, at § 761; see also Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (2006); *United States v. Salerno*, 481 U.S. 739, 749 (1987) (upholding the Bail Reform Act of 1984, finding the government's interest in preventing crime by those out on bail was both legitimate and compelling).

120. What results might be called overcriminalization, except that begs the question and does not comport with the more common usage of the term. For example, Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1537 n.5 (1997), discusses overcriminalization in the context of offenses that are “morally neutral,” but also recognizes the term is used to describe “victimless” offenses or harmless morality offenses. See generally DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008). Others, however, argue overcriminalization can have alternative meanings. One fitting definition: “[O]vercriminalization represents the imposition of a criminal sanction more frequently than merited given other social control responses that are available and the imposition of punishments in a fashion disproportionate to their intended purpose.” Schlegel et al., *supra* note 79, at 120.

may be more appropriately dealt with within the civil system. This final approach has seen the least academic traffic, but it also may hold out some tentative promise.

1. Addressing the Underlying Factors that Contribute to the use of Interpersonal Power in the Criminal System

The first approach is to claim that improving access to civil justice, substance abuse treatment, and mental health services will eliminate all “unnecessary” interpersonal cases from within the criminal system. More options for poor people would provide a better resolution of interpersonal matters and would likely shift some cases from the criminal system to other institutions. These options might include increased access to civil counsel or pro se assistance. The ability to provide additional attorneys for low-income people is constrained by funding, as well as current allocation of legal services priorities.¹²¹ Increasing the ability of persons to conduct their own civil cases through improved pro se materials and handbooks is a less expensive and sometimes viable alternative. For example, many courts have a well-established system that allows someone to get a personal protection order without counsel.¹²² These examples provide a model for other pro se assistance that would improve poor people’s access to civil court.

Ultimately, however, this is a long-term solution that requires funding, political will, and a shift in our thinking about entitlement to civil legal assistance.¹²³ Further, many of the defendants in interpersonal cases are judgment proof, meaning the remedies provided by the civil system will be insufficient to address the goals of interpersonal cases.

An effort to increase access to substance abuse and mental health treatment would encounter some of the same limitations, even though such programs would provide a better result than handling interpersonal power cases within the criminal system. One benefit is provision of these services outside of the criminal system

121. See, e.g., Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 891 (2009) (highlighting the absence of legal counsel for low income persons, particularly in areas concerning survival needs which exist outside current frameworks for appointing lawyers).

122. See Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 925–26 (2010) (referencing the court-based pro se projects in Maryland). Compare *Family Law Self-Help Centers*, MARYLAND JUDICIARY, available at <http://www.courts.state.md.us/family/selfhelp.html> (last accessed Nov. 23, 2012), and *How to File for a Peace or Protective Order*, MARYLAND JUDICIARY, (2012) <http://mdcourts.gov/courtforms/joint/ccdcdvpo001br.pdf> (last accessed Nov. 23, 2012), with MD. CODE ANN., FAM. LAW § 4-501 (West 2012). But see Gardner, *supra* note 22, at 71–72 (relying on statistical evidence to argue that parties seeking a domestic violence protection order are significantly more likely to succeed, particularly when facing procedural challenges, when represented by an attorney).

123. See Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 697 (2006) (arguing for a constitutional right to legal counsel in civil cases). But see Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1269–74 (2010) (arguing against constitutionally-mandated legal representation in civil cases as a “deeply conservative and backward looking solution” which ignores tremendous costs as well as the current reforms in making courts more accessible to pro se defendants).

might be more cost-effective.¹²⁴ Second, availability of services at the time of initial need—instead of a time of crisis¹²⁵—could possibly avert the later-occurring criminal conduct and the need for more intensive services. However, this “solution” ignores the public, fiscal, and political realities that plague the solution of improved access to civil court.¹²⁶ It is naïve to think that merely providing certain services would keep interpersonal power outside the criminal justice system. Inevitably, some cases will make their way into the criminal courtroom.

2. *Better Accommodating Interpersonal Power Cases within the Criminal System*

Mere awareness of interpersonal power cases in the criminal system may encourage the courts to develop ways of incorporating interpersonal goals into the structure of a traditional criminal case. Additionally, mechanisms that are already commonly used within the criminal system to divert cases from the traditional plea and trial track could be used in interpersonal power cases.¹²⁷ As an example, courts will defer entry of a plea or sentencing if offenders comply with conditions of the court. Imagine this option is available to the son who “needs help” and is arrested at his mother’s prompting. This option provides compliant offenders the chance to avoid a conviction on their record. In a diversion, the accused might voluntarily enter into a substance abuse program, participate in community service, pay fines, or perform other requirements. If the tasks are completed, the case will be dismissed. While some courts offer diversion prior to plea, the majority only permit it after the defendant has pled guilty and waived several rights, including

124. See, e.g., Hon. Jon D. Levy, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 581–82 (2010) (citing studies and programs from Massachusetts, Florida, and Wisconsin to argue for enhanced civil legal aid for victims of domestic violence and juvenile criminal defendants).

125. See generally Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 354–57 (2002) (presenting several programs of “community prosecution” and extrajudicial treatment designed to prevent crime before charges are filed).

126. The true financial cost of addressing these cases within the criminal system is unknown. It might be asserted—and might be correct—that in the long run, the cost of addressing these unmet needs would be less than the cost of involving these cases in the criminal system. Reliable comparisons, however, are not readily available. See, e.g., Teresa W. Carns, Michael G. Hotchkin & Elaine M. Andrews, *Therapeutic Justice in Alaska’s Courts*, 19 ALASKA L. REV. 1, 8, 18, 54 (2002) (addressing the costs of therapeutic programs, the challenges of making long-term conclusions with short-term data, and the enduring possibility of more than a one third reduction in costs compared to incarceration). Even if true that, in this context, an ounce of prevention might be worth a pound of cure, the significant shift of funds from one resource to the other presents sufficient political and practical constraints that it is unlikely to be a realistic approach.

127. See, e.g., Tiffany Cartwright, “*To Care for Him Who Shall Have Borne the Battle*”: *The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL’Y REV. 295, 305–07 (2011) (discussing the creation of veterans’ treatment courts as a diversionary program); see also SALLY T. HILLSMAN & SUSAN SADD, VERA INST. OF JUSTICE, *THE DIVERSION OF FELONY ARRESTS: AN EXPERIMENT IN PRETRIAL INTERVENTION* (1980) (reporting on the nation’s first pretrial diversion program, launched in 1967); cf. Diane M. Ellis, *A Decade of Diversion: Empirical Evidence That Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1221 (2003) (presenting data showing how a diversionary program has made a positive impact on one state’s regulation of attorney practice).

the right to jury trial. In these cases, if the accused does not comply, he has already given up the ability to contest any errors in police procedure or the charges themselves.¹²⁸

Diversionary programs are limited in scope; typically reserved for first-time offenders, youthful offenders, or offenses that are perceived to be minor.¹²⁹ However, there is no reason diversion programs could not be expanded or developed to address the particular needs of interpersonal power cases. Similarly, courts may continue the pretrial matter via a series of status conferences to encourage a personal resolution between the parties or completion of a treatment program.¹³⁰

Most of these mechanisms require the agreement of the prosecuting attorney.¹³¹ While many prosecutors might be willing to try new applications of these devices to help resolve interpersonal power cases, others are not aware of the extent of interpersonal power cases within the criminal system. Prosecutors may also be reluctant to offer a chance of dismissal to someone who is not youthful or a first-time offender, or they may see efforts of the criminal system to address these more complex problems as futile.

Beyond these simple practices, there are other “alternative” approaches in existence, such as treatment courts and restorative justice, which may help resolve interpersonal cases.¹³² Drug treatment courts were instituted as part of the nationwide “War on Drugs” in the 1980s,¹³³ and their success inspired the

128. A complete critique of these diversionary programs, especially the requirement that defendants relinquish almost all of their important trial rights in order to access these programs is beyond the scope of this Article and has been voiced by others. See, e.g., Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 2–4 (2004).

129. See, e.g., MICH. COMP. LAWS § 333.7411 (2012) (Michigan drug diversion statute limited to first-time drug offenders and for “possession” and “use” offenses); see also Liesel J. Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-violent Offender Limitation*, 24 J. CONTEMP. HEALTH L. & POL’Y 69, 71–74 (2007) (criticizing this act for limiting mental health diversions to a limited category of cases); *Recommendations from the ABA Youth at Risk Initiative Planning Conference*, 45 FAM. CT. REV. 366, 375 (2007) (recommending more diversionary programs for at risk youths such as those in New York, Florida, and Chicago); Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365 (2001).

130. See Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 89–90 (2000) (arguing for the use of pretrial diversion and status conferences to monitor treatment of domestic violence offenders).

131. See Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 NYU REV. L. & SOC. CHANGE 37, 57 (2000–2001) (noting the discretion of the prosecution in drug courts in New York).

132. See Arthur J. Lurigio et al., *The Effects of Serious Mental Illness on Offender Reentry*, 68 FED. PROBATION 45, 50 (2004) (citing the need for more alternatives to incarceration for the mentally ill).

133. LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 280–81 (2001).

creation of homelessness courts,¹³⁴ family-centered courts,¹³⁵ and others. More than 2,000 drug courts alone are currently in operation or being planned.¹³⁶

At their best, these courts recognize the complexity of cases that involve substance abuse, family relationships, homelessness, and other non-criminal factors that lead or contribute to criminal offenses.¹³⁷ At their worst, these courts purport to adopt an alternative model but refuse to acknowledge the ongoing nature of substance abuse or mental illness.¹³⁸ Some iterations of these courts punish defendants for relapses that are expected by those treating substance abuse, for example.¹³⁹ These courts can also be conviction-focused, mandating a guilty plea and waiver of trial rights as condition for treatment.¹⁴⁰ This is a heartbreaking Catch-22 for some defendants and their families desperate for services. Finally, one structural limitation is the inability of these courts to require participation on the part of the reporting party.¹⁴¹ This structural limitation can be contrasted with the parties in civil court, who can be compelled to submit to case evaluation,¹⁴² mediation,¹⁴³ or other alternative avenues of settlement.

Restorative justice also attempts to acknowledge the complexity of criminal cases and the relationships between parties to a criminal case.¹⁴⁴ Restorative justice holds appeal for those concerned about interpersonal cases because, in addition to acknowledging the dynamics, it attempts to develop alternative and

134. *Id.* at 283, 301.

135. John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 923 (2000).

136. *History: Justice Professionals Pursue a Vision*, NAT'L ASSOC. OF DRUG COURT PROF'LS., <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Mar. 7, 2012).

137. See Adam Lamparello, Note, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes of Addiction"*, 16 OHIO ST. J. ON DISP. RESOL. 335, 347 (2001) (advocating for drug courts and mediation for "crimes of addiction").

138. See Quinn, *supra* note 131, at 60.

139. *Id.* at 49.

140. *Id.* at 54–56.

141. This limitation can be mitigated in some juvenile court cases, where the court can order parents to participate in treatment services. See, e.g., MO. REV. STAT. § 211.134 (2012) (empowering a juvenile court to mandate parental participation in counseling or institutional treatment).

142. See, e.g., Edward F. Sherman & Christopher M. Fairman, *Interplay Between Mediation and Offer of Judgment Rule Sanctions*, 26 OHIO ST. J. ON DISP. RESOL. 327, 347–52 (2011) (outlining the Michigan rules on judicially-mandated case evaluation).

143. See, e.g., Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 S. TEX. L. REV. 849, 853–55 (2006) (stating Texas law permits judges to refer any civil case to mediation, regardless of whether any party consents and regardless of whether a party has moved to refer the matter for alternative dispute resolution).

144. See, e.g., Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 424 (2007) ("Restorative justice is a process involving the direct stakeholders in determining how best to repair the harm done by offending behavior.") (internal citation omitted); see also Jim Dignan, *Restorative Justice and the Law: the Case for an Integrated, Systemic Approach*, in RESTORATIVE JUSTICE AND THE LAW 168, 171–75 (Lode Walgrave ed., 2002) (noting the difficulty of developing one definition of restorative justice that can be agreed upon; contrasting those who see it as a "type of decision-making process" from those who place more emphasis on "restorative outcomes").

longer-term solutions that address the relationship, behavior or emotions underlying the criminal act.¹⁴⁵

On the other hand, restorative justice can be limited by its principal focus on the rights and interests of the victims of criminal cases.¹⁴⁶ Typically, the offender's involvement is gauged or discussed only in relationship to the role of the victim in her search for justice, closure, understanding, or other goals.¹⁴⁷ Restorative justice initiatives can become absorbed in victims' rights and the attendant concerns that criminal victims' voices be heard¹⁴⁸ or that victims' autonomy be recognized.¹⁴⁹ Those restorative justice scholars who focus on both the offender and the victim are careful to distinguish themselves from this general rule and defend their choice to make the offender part of their concern.¹⁵⁰ A focus on victims, without the related focus on offenders, undermines the strength of restorative justice for interpersonal cases—an understanding of the interrelated nature of the parties and the ongoing circumstances. For example, to the extent restorative justice initiatives have supported victims' rights more generally, they may develop a more punitive

145. See GEORGE PAVLICH, *GOVERNING PARADOXES OF RESTORATIVE JUSTICE 2* (2005) (describing variety of practices encompassed in restorative justice but noting the commonality is a rejection of adversarial retribution and an embrace of “nuanced concepts of harm, obligation, need, restoration, healing, reconciliation, reintegration, participation and—when appropriate—forgiveness”); see also Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 22–25, 28–30 (2003) (noting most victims seek more than merely enhanced punishment from the criminal justice system, making restorative justice an ideal fit).

146. See PAVLICH, *supra* note 145, at 2 (stating restorative justice involves a “community-based, victim-centered approach[] to crime”); John Braithwaite, *In Search of Restorative Jurisprudence*, in *RESTORATIVE JUSTICE AND THE LAW* 150, 160 (Lode Walgrave ed., 2002) (noting the difficulty that “equal justice for victims is incompatible with equal justice for offenders”); Barbara Hudson, *Victims and Offenders*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 177, 186 (Andrew Von Hirsch et al. eds., 2003) (noting restorative justice “individualises cases more than established justice does and so allows for greater variation between cases, [but] solves the problem of equilibrium in the single case in the same way that established criminal justice does, by coming down clearly on one side—that of the victim. . .”). But see Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 263, 266–68 (2000) (emphasizing that restorative justice is not just part of the victims' rights movement, but seeks to benefit both victims and offenders). An additional limitation is, in general, restorative justice is assumed to occur within the current criminal justice system. See Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 *WASH. U. J. L. & POL'Y* 91, 95–96 (2011) (presenting an argument against the majoritarian process-based approach to restorative justice); PAVLICH, *supra* note 145, at 18–20 (noting while restorative justice's roots are incompatible with the criminal system, there is a strong strain that also view it as “an alternative to specific processes provided within that system” instead of a critique of the entire system).

147. See generally R. A. Duff, *Restorative Punishment and Punitive Restoration*, in *RESTORATIVE JUSTICE AND THE LAW* 82, 93 (Lode Walgrave ed., 2002) (noting the offender should recognize his culpability and warning that “it is all too easy for censure and blame to become exercises in oppression, humiliation or exclusion”).

148. See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 293–98 (arguing for greater victim participation throughout criminal cases while acknowledging that “victim participation may or may not conflict with the value of the primacy of the individual defendant”).

149. See *id.* at 296–97.

150. See, e.g., Hudson, *supra* note 146, at 186–87 (explaining, “[t]hough it may seem obvious that a victim's right to safety must have priority over an offender's right to privacy or to freedom of movement, the scales should not be weighted so that the one is everything and the other is nothing”).

stance towards defendants.¹⁵¹ However, in interpersonal cases, the desires of the victim are not necessarily punitive for a variety of reasons.¹⁵² While restorative justice may help us understand interpersonal cases, it does not provide a panacea.

3. *Moving Interpersonal Cases into the Civil System*

It may be possible to move select interpersonal criminal cases into the civil system or use approaches from the civil system. This approach acknowledges the dual nature of these cases, but keeps the criminal and civil systems distinct.¹⁵³

There are few models to emulate for moving cases from the criminal to civil system. One potential example, derived from restorative justice ideals, is the use of victim-offender mediation in criminal cases. In victim-offender mediation, the complainant and the accused are brought together by a trained mediator, to discuss the offense and the effect of the offense, and develop a plan to address the harm done.¹⁵⁴ While this idea has been around for at least twenty-five years,¹⁵⁵ it is primarily used in juvenile court and for non-violent offenses.¹⁵⁶ When it has been used in more serious offenses, mediation prior to trial may deprive the defendant of legitimate procedural or substantive defenses, while mediation that occurs after conviction may negate the wishes of the complainant who does not want to

151. See, e.g., Lynne Henderson, Commentary, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 590–92 (1998) (discussing how victims' rights groups highlight the anger of victims to advocate primarily for harsher criminal punishments). But see Kent Roach, *Criminology: Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 700–13 (1999) (presenting punitive and non-punitive models of victims' rights).

152. As many have discussed, the desire of the victim not to aggressively pursue a criminal case against a defendant may be based in the victim's previous physical or mental abuse at the hands of the accused. See, e.g., Rutledge, *supra* note 20, at 174–75 (observing the threat of continued domestic violence is the most common justification for victims who decide to stop cooperating with a criminal prosecution); see also Braithwaite, *supra* note 146, at 150–51 (noting courts, in particular in New Zealand and Canada have tended to overturn restorative justice agreements in favor of more punitive sanctions); *id.* at 161 (noting there is an "empirically wrong . . . presumption . . . that victims will demand more punishment than the courts deem proportionate, whereas in fact the 'problem' is that they more often demand less than the courts deem proportionate").

153. See Mann, *supra* note 63, at 1863, 1865 (endorsing the growing use of punitive civil sanctions for situations which do not merit the serious condemnation of criminal punishment).

154. William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 137–38; Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 29 (2001).

155. See ROBERT C. DAVIS, MARTHA TICHANE & DEBORAH GRAYSON, VERA INST. OF JUSTICE, *MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES* (1980) (evaluating an early mediation program), available at <http://www.vera.org/content/mediation-and-arbitration-alternatives-prosecution-felony-arrest-cases>.

156. See, e.g., Maureen E. Laffin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 584–85 (2004) (pointing out, for violent crimes, crimes committed by adults, and felonies, victim-offender mediation is uncommon).

criminalize the conduct of the offender.¹⁵⁷ In at least some interpersonal cases, however, the parties could be voluntarily brought together with a mediator and a plan could, at least in some cases, be developed to address the concerns of the complainant that caused her to involve the criminal system.

Another possibility is to look, again, to the treatment of white-collar offenses.¹⁵⁸ Could there be a choice in interpersonal cases to pursue them in—or divert them to—the civil system instead of the criminal system? In many white-collar cases, the ability to move cases between criminal and civil is eased because the initial investigation and enforcement of violations are pursued by the same agency.¹⁵⁹ This agency, therefore, has some voice in the method of enforcement. Further, even if a parallel criminal enforcement is started, the agency may choose to negotiate for a remedy that results in civil liability, but no criminal liability.¹⁶⁰ The government can, in exchange for moving the case into civil court, demand a remedy that includes significant financial compensation or penalties in a white-collar case.¹⁶¹ This is a hollow option in an interpersonal power scenario.

The practical constraints of moving everyday criminal cases into the civil system are significant. Courts would have to address the jurisdiction of prosecuting authorities and who would pursue the case on behalf of the plaintiff; the possibility of the waiver of a defendant's right to a speedy trial; and the finality of a civil resolution. Current law suggests double jeopardy concerns could be overcome¹⁶² and Fifth Amendment protection would also need to be addressed. While more study is necessary, the transfer of some interpersonal criminal cases into civil court is worth considering.

CONCLUSION: COMING TO TERMS WITH INTERPERSONAL POWER IN THE CRIMINAL SYSTEM

Cases of interpersonal power quietly populate the criminal justice system. These cases, which are brought to the criminal system by a person with an ongoing

157. Cf. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 560 (2006) (recommending either party have the ability to go forward with the formal court system if restorative justice measures are not satisfactory).

158. Cf. Braithwaite *supra* note 146, at 153 (noting there is no necessary disparity in restorative justice between showing mercy for corporate criminals, such as agreements for safety or compliance regimes in lieu of criminal prosecution, and for street criminals).

159. See Andrea L. Ciota et al. *Ninth Survey of White Collar Crime: Securities Fraud*, 31 AM. CRIM. L. REV. 827, 868–72 (1994) (outlining the use of investigative and litigative powers by the Securities and Exchange Commission, including the use of parallel lawsuits and referral for criminal prosecution).

160. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1525 (1996).

161. See Thomas C. Pearson & Gideon Mark, *Investigations, Inspections, and Audits in the Post-SOX Environment*, 86 NEB. L. REV. 43, 91–93 (2007).

162. See *United States v. Ursery*, 518 U.S. 267, 292 (1996) (finding no double jeopardy violation when defendant was criminally prosecuted and subject to in rem civil forfeiture because the forfeiture action was a separate remedial sanction, not punishment, for double jeopardy purposes).

relationship with the defendant in an effort to exert interpersonal power on the defendant, have largely gone under the scholarly radar.

These cases are handled in criminal courtrooms, in part because of the lack of access to civil legal services, and sufficient treatment options, especially for lower-income persons. Faced with a familial problem that is spiraling out of control, the criminal justice system can serve as a lifeline.

Interpersonal cases, however, do not neatly fit into our understanding of criminal law or our practice of criminal law. For one, these cases press upon the distinction between civil and criminal law in ways that are different from the more common topic of scholarly discussion—white-collar crime. A full accounting of this divide must also include cases of interpersonal power.

This Article seeks to introduce these cases to an academic audience and integrate them into the scholarly debate about the lines demarcating criminal law, as well as begin an admittedly challenging discussion of ways to better address interpersonal cases in the day-to-day of criminal courts. The dialogue on the theoretical and practical ramifications of interpersonal cases in the criminal system will, hopefully, continue from here. The prevalence and significance of these cases demand that it should.