Docket No. [redacted]
Dutchess County Court Ind. [redacted]

# Supreme Court of the State of New York
## APPELLATE DIVISION – SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

*Respondent,*

– against –

[redacted]

*Defendant-Appellant.*

**BRIEF OF *AMICI CURIAE* SANCTUARY FOR FAMILIES, DAY ONE NEW YORK, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, SAFE HORIZON, INC., HER JUSTICE, URBAN RESOURCE INSTITUTE, URBAN JUSTICE CENTER, EMPIRE JUSTICE CENTER, LEGAL MOMENTUM, NEW YORK LEGAL ASSISTANCE GROUP, NEW YORK CITY ALLIANCE AGAINST SEXUAL ASSAULT, AND LAWYERS COMMITTEE AGAINST DOMESTIC VIOLENCE, IN SUPPORT OF THE BRIEF OF DEFENDANT-APPELLANT NICOLE ADDIMANDO**

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## PRELIMINARY STATEMENT

*Amici Curiae* respectfully submit this Brief to bring the Court's attention to the widely recognized and well-documented body of research that provides critical insight into the devastating psychological and neurological impacts of domestic violence.[1] This research, as well as the experiences of *Amici*, provide requisite, foundational understandings of domestic violence that, in *Amici*'s view, are essential to New York courts' analysis of cases like those of Appellant [redacted] under the recently enacted Domestic Violence Survivors Justice Act (the "DVSJA").

This was not a close case. There is no question that Ms. [redacted] was a victim of domestic violence at the hands of her boyfriend, [redacted] The record before the sentencing court contained clear and extensive evidence that [redacted] physically, sexually, and emotionally abused [redacted] for years. The seemingly incontrovertible evidence presented during trial and sentencing not only revealed [redacted]s repeated, horrific physical and sexual abuse, but also demonstrated the severe psychological harm that resulted from his attempts to achieve total control over Ms. [redacted]—harm and trauma that fundamentally altered Ms. [redacted]o's cognition, memory, and decision-making. Despite this overwhelming evidence, the sentencing court reached an unfounded conclusion in denying Ms. [redacted] relief under the DVSJA: that the persistent and severe

[1] *Amici* do not address the legal issues in the case, which the parties have fully briefed.

domestic abuse she suffered was not a "significant contributing factor" in the crime.[2]

The court's denial of relief simply cannot be reconciled with the widely accepted understandings of the destructive psychological and neurological impacts of domestic abuse. The scientific community, academia, numerous courts, as well as entities charged with providing services to survivors, recognize that domestic abuse profoundly alters a victim's sense of self, decision-making, and memory, among other psychological effects. Decades of research and experience confirm that a victim's altered cognition causes her to behave in ways that may seem counterintuitive to an outside observer.

*Amici* maintain that courts must integrate these understandings of the psychological and cognitive impacts of domestic abuse into their analysis under the DVSJA if the statute is to have any meaning. For instance, courts should not discredit the testimony of a victim like Ms. [redacted] because her memory of abuse may be occasionally inconsistent. In fact, the research into traumatic memory and the experience of *Amici* supports the exact opposite conclusion: an inconsistent memory *is actually an indication of* severe abuse. So too must courts appreciate that

[2] More specifically, the court suggested that Ms. [redacted] should have left the abusive relationship, that her testimony was not credible, and that Ms. [redacted] was not in imminent danger on the night of the crime. *People v.* [redacted].

victims of abuse, like Ms. [redacted], are often subjected to tactics of coercive control by their abusers and rendered powerless to leave.

Ms. [redacted] is the ideal candidate for reduced sentencing under the DVSJA. This reduced sentencing scheme recognizes that victims of abuse like Ms. [redacted] are less culpable for crimes related to their abuse because of their altered cognition from (often years of) abusive control by their abusers; its aim is to ensure that punishments for victims of abuse are not "unduly harsh."[3] However, the DVSJA cannot achieve this end when sentencing courts—like the court that sentenced Ms. [redacted]—overlook the recognized psychological effects of domestic violence in their analysis. If Ms. [redacted] cannot obtain relief under the DVSJA based on the abuse she suffered and a voluminous record of evidence supporting her story, *Amici* fear no victim's claim will ever merit relief, rendering hollow decades of advocacy and the DVSJA itself.

As scholar Deborah Epstein aptly states, "[G]atekeepers within the justice system often lack information about the effects of violence-based neurological and psychological trauma on information processing and memory. . . . The best way to cure these knowledge gaps is—of course—improved understanding."[4] The aim of

[3] N.Y. Penal Law § 60.12(1) (Consol. 2019).

[4] Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences,* 167 U. PA. L. REV. 399, 453 (2019) (citation omitted).

*Amici* is precisely this: to address the knowledge gap inherent in the sentencing court's analysis of Ms. [redacted]'s abuse, and to provide an overview of the decades of scientific research into the far-reaching cognitive effects of coercive control, trauma bonding, and traumatic memory in order to improve understanding. By recognizing Ms. [redacted] as an ideal candidate for relief under the DVSJA, this Court can ensure that her abuse—and the abuse of victims like Ms. [redacted]—is given the more-informed consideration that the New York Legislature intended and that is essential to proper adjudication under the DVSJA.

## ARGUMENT

The sentencing court wrongly denied Ms. [redacted]s application for an alternative sentence under the DVSJA based on its finding that: (1) "the nature of the alleged abusive relationship between [Ms. [redacted]] and [redacted] is undetermined"; (2) Ms. [redacted] "had a tremendous amount of advice, assistance, support, and opportunities to escape her alleged abusive situation"; (3) "the abuse history presented by [Ms. [redacted] is undetermined and inconsistent" due to "the inconsistent statements by [Ms. [redacted] regarding her life-long abuse by [redacted] and others"; and (4) "most importantly, the specific facts of the homicidal act . . . reveal a situation where . . . . [Ms. [redacted] had a path to escape through the front door."[5]

[5] *Addimando*, 67 Misc. 3d at 439-40.

These findings demonstrate that the sentencing court misunderstood the nature of domestic abuse and its impacts on victims. Widely accepted research and the decades of collective experience of *Amici* in working with victims of domestic abuse show that the abuse can result in profound psychological trauma to victims.[6] Specifically, experts explain abusive behaviors using the well-accepted theory of "coercive control," in which an abuser's actions simultaneously cripple a victim's ability to make autonomous decisions and solidify the victim's attachment to him.[7] This can make it exceedingly difficult, if not impossible, for a victim to leave her abusive partner. Even when a domestic violence victim decides to leave, resources available to her often provide inadequate support and protection, in part because they are designed to protect victims from—and punish perpetrators for—discrete acts of violence as opposed to ongoing patterns of abuse. Exposure to cumulative trauma

[6] *See, e.g.*, Mary Ann Dutton, *Pathways Linking Intimate Partner Violence and Posttraumatic Disorder*, 10 TRAUMA VIOLENCE & ABUSE 211, 211 (2009) ("It is now well recognized that intimate violence victimization can lead to adverse mental health effects such as PTSD . . . , depression, and anxiety."); Loring Jones et al., *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA VIOLENCE & ABUSE 99, 100 (2001) (collecting dozens of peer-reviewed articles demonstrating that symptoms exhibited by women who experience domestic violence "are consistent with the major indicators of" PTSD); *see also* Jim Hopper, *How Reliable Are the Memories of Sexual Assault Victims*, SCI. AM. (Sept. 27, 2018), https://blogs.scientificamerican.com/observations/how-reliable-are-the-memories-of-sexual-assault-victims (discussing the neurological impacts of experiencing a traumatic event, including a sexual assault, on memory based on decades of research).

[7] *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1121 (2009) ("The notion of domestic violence as the operation of power and control has largely become part of mainstream consciousness."); Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. L. & FAM. STUD. 35, 47-48 (2008) ("The theory of 'coercive control' . . . has gained common approval among domestic abuse scholars and activists.").

can also significantly hinder a victim's memory processes, causing a victim's recollection of her abuse during interviews or sworn testimony to appear inconsistent.

An examination of Ms. [redacted]s history of abuse within the context of these established principles demonstrates that the sentencing court should have granted Ms. [redacted]'s DVSJA application.

## I. TRAUMA-COERCED ATTACHMENT AND INSUFFICIENT RESOURCES PREVENTED MS. ADDIMANDO FROM LEAVING GROVER

### A. Trauma-coerced Attachment

One example of the deleterious psychological effects of domestic violence is trauma-coerced attachment. Trauma-coerced attachment occurs when abusers subject their victims to tactics designed to intimidate, isolate, degrade, and ultimately control them. This trauma causes many victims to lose their sense of self and autonomy while, counterintuitively, strengthening their emotional attachments to their abusive partners. These effects can make it impossible for a victim to leave her abusive partner, even when a physical path to do so exists.

#### 1. Coercive Control Tactics

The coercive control model explains that domestic abuse typically involves an ongoing pattern of acts involving physical, emotional, and psychological abuse that an abuser uses to gain control over his partner and dominate her "autonomy,

liberty, and personhood."[8] Evan Stark, a renowned sociologist who has been influential in developing this model for understanding domestic violence,[9] divides coercive control tactics into acts designed to hurt or intimidate (coercion) and acts used to isolate or regulate (control).[10] As Professor Stark explains, the exact combination of tactics that an abuser uses varies because "[p]erpetrators adapt these tactics through trial and error based on their relative benefits and costs."[11]

Coercive tactics involve frequent physical and sexual violence as well as threats of violence. While some assaults can be mild, such as shoving or slapping, extreme violence is not uncommon: many abusers choke, strangle, cut, stab, and rape their victims.[12] Abusers also threaten their partners with assaults, both explicitly and in subtle ways that cannot be detected as a threat by others.[13] Some of the most effective abusers are able to undermine a victim's ability to resist to such an extent

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[8] Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 1000 (2014); *see also* Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. POLICE CRISIS NEGOTS. 199, 201, 206 (2012); Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555, 556-57 (2010).

[9] *See* Marilyn McMahon & Paul McGorrery, *Criminalising Coercive Control: An Introduction*, *in* CRIMINALISING COERCIVE CONTROL: FAMILY VIOLENCE AND THE CRIMINAL LAW 3, 4 (Marilyn McMahon & Paul McGorrery eds., 2020).

[10] Stark, *supra* note 8, at 207.

[11] Evan Stark, *Coercive Control*, in VIOLENCE AGAINST WOMEN: CURRENT THEORY AND PRACTICE IN DOMESTIC ABUSE, SEXUAL VIOLENCE AND EXPLOITATION, 17, 21 (Nancy Lombard & Lesley McMillan eds., 2013); *see also* Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 481 (2008).

[12] *See, e.g.*, Stark, *supra* note 8, at 207; Tania Tetlow, *Criminalizing "Private" Torture*, 58 WM. & MARY L. REV. 183, 191 (2016).

[13] Stark, *supra* note 8, at 208.

that repeated physical violence becomes unnecessary: the mere threat of violence and the knowledge of what could occur if she disobeys is enough to control a victim.[14] Abusers also use shaming tactics, such as coercing or forcing their partner to participate in degrading sexual acts.[15]

Control tactics enforce obedience both directly and indirectly.[16] Methods of control include isolating a woman[17] from her family and friends by forbidding visits or communication, refusing to give a woman money for travel costs, or forcing her "to choose between 'them' and 'me.'"[18] Some abusers deprive their partners of basic necessities, such as food, sleep, money, and health care. This deprivation increases a victim's dependence on her abuser, which increases the abuser's level of control over her.[19] An abuser can also exert control over his partner by microregulating her everyday life, including how she dresses, cooks, cleans, socializes, cares for their children, or performs sexually.[20]

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[14] *See, e.g., id.*; Beck & Raghavan, *supra* note 8, at 562 (noting that "once the perpetrator has established that he is a legitimate source of threat, he is unlikely to need to use high levels of physical abuse to induce compliance"); Tetlow, *supra* note 12, at 192 ("The threat of violence, whether explicit or implicit, may do as much work as its actual infliction.").

[15] *See, e.g.*, Tetlow, *supra* note 12, at 195.

[16] Stark, *supra* note 11, at 26-27.

[17] Partner violence can be committed against all individuals, not just women. However, because women are disproportionately the victims of domestic violence, we refer to victims here as women. *See* DOMESTIC SHELTERS, *More About Coercive Control* (Oct. 16, 2015), https://www.domesticshelters.org/articles/identifying-abuse/more-about-coercive-control.

[18] Stark, *supra* note 8, at 210.

[19] Stark, *supra* note 8, at 211.

[20] *See id.*; Baker, *supra* note 7, at 47.

The record makes clear that [redacted] frequently engaged in extreme acts of coercive violence against Ms. [redacted]: he strangled her with her bathrobe belt (TT[21] 664-65); on numerous occasions, he heated a metal spoon in the flame of their gas stove, and burned her breasts, inner thighs, buttocks, and the interior and exterior of her vagina[22] (TT 654-57, 697); and he slammed her face on the kitchen counter, into a wall, and onto the top of a dresser, including while she was pregnant (TT 647, 677, 705, 711). [redacted] raped Ms. [redacted] (TT 648-50, 664-65, 712); he sexually assaulted her, penetrating her anally and vaginally with objects including fake knives he made using PVC piping and foam, a wooden spoon, a wine bottle, and even a gun (TT 700-02, 705-07, 1019-20). [redacted] further tortured and degraded Ms. [redacted] by recording himself binding her with twine or fabric, raping her, and then leaving her in restraints, sometimes for hours. (TT 667-68, 687-88.) Dr. [redacted] a clinical and forensic psychologist who specializes in trauma and interpersonal violence (TT 1579), testified that this sexual violence fell in "the top 10 percent of cases" of the "hundreds and hundreds and hundreds of individuals" she has evaluated over her career (TT 1630).

[redacted] also used control tactics, like isolation and deprivation. When Ms. [redacted] asked [redacted] if she could visit a friend without him, he responded

[21] All references to the trial transcript are denoted as "TT."

[22] As Professor Tania Tetlow observed, domestic violence abusers often "focus on vulnerable parts of the body, like breasts and genitals." Tetlow, *supra* note 12, at 191.

by saying that no one respected him and slammed Ms. [redacted]'s face into the wall. (TT 677.) He controlled their joint finances, forcing her to ask for permission to buy groceries (TT 1633, 1707); he prohibited her from using birth control (TT 1633); he decided what she could watch on Netflix (TT 1633); and he told her she should not waste time talking to her "little mommy friends" and forced her to watch porn instead (TT 844). Dr. [redacted] concluded that Ms. [redacted]s "report of intimate partner violence in her relationship with [redacted] was consistent with what we know as severe intimate partner violence with physical, sexual, emotional, and psychological abuse" (TT 1629), and his tactics were "absolutely coercive control" (TT 1634).

### 2. Trauma-coerced Attachment

Coercive control tactics reframe victims' perspectives of themselves and their abusers. Counterintuitively, victims of abuse commonly experience increased feelings of attachment to their abusers. This phenomenon, dubbed "trauma-coerced attachment" or "trauma bonding," occurs when persistent, cyclical abuse triggers a shift in a victim's reality, causing the victim to feel increased affection for the abusive partner and to believe she deserves the abuse.[23] This "paradoxical

[23] Chitra Raghavan & Kendra Doychak, *Trauma-coerced Bonding and Victims of Sex Trafficking: Where Do We Go from Here?*, 17 INT'L J. EMERGENCY MENTAL HEALTH & HUM. RESILIENCE 583, 584 (2015); *see also* Don Dutton & Susan Lee Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY 139, 150 (1981); Affidavit of Chitra Raghavan, *People v. Szlekovics*, Ind. No. 96-0915 (N.Y. Sup. Ct. Monroe Cty. Feb. 14, 2020).

idealization of the abuser" is strikingly similar to Stockholm Syndrome, where victims develop bonds of affection with their captors or kidnappers, and helps explain why women like Ms. [redacted] frequently report remaining in an abusive relationship because of "love" for their partners.[24]

Two common features of abusive relationships contribute to trauma-coerced attachment: a power imbalance between victim and abuser and intermittent periods of abuse and calm.[25]

First, a power imbalance can amplify a victim's sense of helplessness, causing her to feel helpless, vulnerable, and worthy of abuse.[26] She often comes to believe that *her* behavior—not that of her partner—is unreasonable and must be corrected.[27] As a result, a victim "idealizes her abuser" and "strives to please him."[28]

Second, intermittent periods of abuse and relative calm reinforce feelings of

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[24] Chris Cantor & John Price, *Traumatic Entrapment, Appeasement and Complex Post-Traumatic Stress Disorder: Evolutionary Perspectives of Hostage Reactions, Domestic Abuse and the Stockholm Syndrome*, 41 AUSTL. & N.Z. J. PSYCHIATRY 377, 377 (2007) (observing "both Stockholm and post-traumatic stress disorder . . . characteristics in victims of domestic abuse").

[25] Dutton & Painter, *supra* note 23, at 147-48.

[26] *Id.* at 147, 151.

[27] *See* Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS 377, 385 (1992) (explaining that victims' thought patterns shift as a result of abuse); *see also* Raghavan & Doychak, *supra* note 23, at 583-84; Donald G. Dutton & Susan Painter, *Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory*, 8 VIOLENCE & VICTIMS 105, 107-08 (1993); Dutton & Painter, *supra* note 23, at 151.

[28] Raghavan & Doychak, *supra* note 23, at 583.

affection for the abusive partner. When the physical assault ends,[29] the victim experiences an "emotional collapse" accompanied by an increased feeling of helplessness.[30] An abuser, on the other hand, often attempts to "make amends" after a violent event by being particularly loving toward the victim.[31] This continued pattern of abuse followed by reconciliation leads women like Ms. [redacted] to "focus[] on surviving each episode of violence for the sake of the hoped-for relationship" glimpsed during the periods of relative calm.[32] Abusers also are often skilled at appearing "charming" in public,[33] which reinforces a victim's belief that her partner is a fundamentally loving and supportive individual who occasionally slips up.

The evidence reveals these dynamics were at play in Ms. [redacted] and [redacted]s relationship. [redacted] repeatedly assaulted Ms.[redacted] But Ms. [redacted] also testified that, at times, [redacted] was affectionate and kind and could be "involved and supportive" (TT 779-81)—attempting to apologize for the abuse (TT 706), calling Ms. [redacted] pet names, and planning family activities (TT 727). Even on the day [redacted] died, Ms. [redacted] contemplated leaving him but

[29] Dutton & Painter, *supra* note 23, at 150.
[30] *Id.*
[31] *Id.*
[32] Margaret H. Kearney, *Enduring Love: A Grounded Formal Theory of Women's Experience of Domestic Violence*, 24 RES. NURSING & HEALTH 270, 275 (2001).
[33] John G. Taylor, *Behind the Veil: Inside the Mind of Men Who Abuse*, PSYCHOL. TODAY (Feb. 5, 2013), www.psychologytoday.com/us/blog/the-reality-corner/201302/behind-the-veil-inside-the-mind-men-who-abuse.

[redacted] a series of tests which showed that Ms. [redacted] was "dependent and conforming and submissive" (TT 1636) and Ms. [redacted] felt she was "somewhat not deserving, somewhat unworthy" (TT 1638).

Trauma bonding also helps explain Ms. [redacted]s reluctance to tell some individuals that [redacted] was abusing her despite being willing to disclose the identity of other abusers. Ms. [redacted]'s intense connection to [redacted]—her romantic partner and the father of her children—drove her to protect him and to conceal his abuse. (TT 720.)

When one accounts for the well-accepted research and *Amici*'s experience, the evidence shows that [redacted]'s abuse created a traumatic bond that made it impossible for Ms. [redacted] to leave permanently despite her attempts to do so.[34] Ms. [redacted] is not alone: eighty percent of victims leave their abusive relationships at least once—often with the help of community resources, including counselors, healthcare professionals, women's shelters, or the police—but many

[34] Ms. [redacted] tried to leave [redacted] at least once. She packed bags and left while [redacted] was at work (TT 929-30; ST 213-14), but ultimately returned out of fear (ST 214).

then return to the relationship.[35] Those who lack the foundational understanding of the impacts of trauma-coerced attachment may believe that victims who persistently seek help, but always return to the abusive relationship, are crying wolf and that the relationship is not as abusive as the victim claims. In actuality, this cycle more often signals the existence of trauma bonding stemming from ongoing abuse.[36] The sentencing court's decision evidences a failure to appreciate traumatic bonding.[37]

### B. External Resources

Many of the resources available to victims of domestic violence are structured in a manner that assumes abuse is a discrete violent act, rather than a pattern of physical and psychological abuse calculated to control the victim. As a result, even when a victim attempts to free herself from her trauma-coerced bonds and take advantage of resources available to her, she still may face insurmountable barriers to leaving.

As one example, the government's ability to protect women by prosecuting

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[35] *See* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 115-16 (2007).

[36] *See* Stark, *supra* note 8, at 204-05.

[37] In contrast, other courts in New York have recognized the impact of trauma bonding and coercive control. *See, e.g.*, *People v. Abdur-Razzaq*, 77 N.Y.S.3d 842, 852 (N.Y. Sup. Ct. Bronx Cty. 2018) (recognizing that "trauma bonding and coercive control are scientific theories that provide the most logical persuasive explanation for often paradoxical behaviors of victims of sex trafficking"); *Grano v. Martin*, No. 19-CV-6970 (CS), 2020 WL 1164800, at *24 (S.D.N.Y. Mar. 11, 2020) (recognizing that coercive control is "undoubtedly a serious form of domestic abuse"); *L.M.L. v. H.T.N.*, 2017 N.Y. Slip Op. 51333(U), 2017 WL 4507541, at *5 (N.Y. Sup. Ct. Monroe Cty. Oct. 3, 2017) (recognizing "coercive control" as a form of violence).

their abusers is limited by this erroneous assumption. Prosecutors charge only a fraction of cases referred, and in the small numbers of cases when prosecutors bring charges, they often classify assaults that cause serious injury as misdemeanors.[38] As a result, in states where arrest for domestic assault is mandatory, only one to five percent of those arrested are convicted or serve any jail time,[39] and the vast majority of abusers are quickly released after arrest—creating a dangerous situation for victims.[40] While protective orders can provide some measure of safety, they are not a failsafe because, for many abusers, violation of a court order is no more a deterrent than the criminal laws they violated in their initial assaults.[41] Indeed, 32 percent of victims are re-victimized within six months of a criminal justice intervention.[42]

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[38] *See* Tetlow, *supra* note 12, at 198 n.71 ("If a victim seeks help from the criminal justice system, at best, it will respond with a misdemeanor prosecution of the perpetrator with no offer of protection for her."); Darrell Payne & Linda Wermeling, *Domestic Violence and the Female Victim: The Real Reason Women Stay!*, 3 J. MULTICULTURAL, GENDER & MINORITY STUD. 1, 3 (2009).

[39] Stark, *supra* note 8, at 205.

[40] *See* Suraji R. Wagage, Note, *When the Consequences Are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV. 195, 219-22 (2014) (advocating for mandatory pretrial detention in domestic abuse cases because the gap between arrest and prosecution leaves victims vulnerable).

[41] Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 214-15 (1999) (explaining study in which issuing a protective order was associated with a decrease in number of women reporting physical violence after protective order, but no change in the number of reported incidents for women who experienced violence after protective order); J. Reid Meloy et al., *Domestic Protection Orders and the Prediction of Subsequent Criminality and Violence Toward Protectees*, 34 PSYCHOTHERAPY 447, 450 (1997) (discussing study where even after issuance of protective orders, 18% of abusers were subsequently arrested for victim-related offenses); Payne & Wermeling, *supra* note 38, at 3.

[42] *See* Payne & Wermeling, *supra* note 38, at 3; *see also* WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, RECIDIVISM TRENDS OF DOMESTIC VIOLENCE OFFENDERS IN WASHINGTON

Thus, for many victims, the criminal justice system offers, at best, an incomplete solution for the abuse they continue to suffer.

Women also may stay in abusive relationships out of well-founded fear that it could be even more dangerous to leave. Statistics show that women are at the highest risk of severe or fatal injury when they try to leave an abusive relationship.[43] Of the approximately 4,000 women killed by a domestic partner each year, about 75 percent of victims were killed as they attempted to leave the relationship or after the relationship had ended.[44]

Abused mothers face yet another obstacle when trying to leave their abusive relationships: if the abuser is the father of their children, they likely will be required to litigate child custody issues and may find themselves subject to court orders that require them to co-parent with a former abuser, thereby "provid[ing] opportunities for continued abuse."[45] Women also risk losing their children in a custody battle

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STATE (Aug. 2013), https://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report (reporting that for offenders with a current domestic violence offense, 18 percent were convicted for a new domestic violence felony or misdemeanor within 36 months of conviction).

[43] *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991).

[44] DOMESTIC ABUSE SHELTER, INC., DOMESTIC VIOLENCE STATISTICS, https://domesticabuseshelter.org/domestic-violence; *see also* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 (1999); STARK, *supra* note 35, at 115 ("Almost half the males on death row for domestic homicide killed in retaliation for a wife or lover leaving them.").

[45] April M. Zeoli et al., *Post-Separation Abuse of Women and their Children: Boundary-setting and Family Court Utilization among Victimized Mothers*, 28 J. FAM. VIOLENCE 547, 547 (2013); *see also* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection:*

with an abuser.[46] Ms. [redacted] confided in her therapist that [redacted] told her he would "get the kids" if she ever left, preying on her existing fear that any revelation of [redacted]'s abuse could lead to losing her children. (TT 838; ST[47] 261-62.) For victims who are mothers, abuse in the form of threats to take children away can be incredibly effective in achieving dominance and control. For many mothers, including Ms. [redacted], this risk is too great to make leaving an option.[48]

## II. MS. [redacted]'S TESTIMONY AT TRIAL REVEALED THE FAR-REACHING IMPACTS OF TRAUMA ON MEMORY

The trauma associated with physical, sexual, and psychological violence committed by a domestic partner can have long-lasting impacts on the ability of a victim to form and to relate memories. Trauma causes neurobiological and psychological changes: the brain often reconstructs, fragments, or altogether deletes memories of abuse.[49] These neurological effects alter the way in which a trauma

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*Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 679-80 (2003).

[46] *See* Tetlow, *supra* note 12, at 193-94 (describing how abusers routinely seek and gain custody of their children as a form of punishment after victims successfully leave).

[47] All references to the sentencing transcript are denoted as "ST."

[48] *See* CASA DE ESPERANZA: NATIONAL LATIN@ NETWORK & NO MORE, THE NO MÁS STUDY: DOMESTIC VIOLENCE AND SEXUAL ASSAULT IN THE U.S. LATIN@ COMMUNITY 11 (2015) (citing fear of losing their children as one of the top three reasons domestic violence victims do not seek help); Michael A. Anderson et al., *"Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 J. FAM. VIOLENCE 151, 154 (2003) (finding that 24.4% of victims reported "[f]ear that I might lose my children" as a reason to stay with their abuser); Buel, *supra* note 44, at 20 (noting that custody battles can become "yet another weapon for the abuser").

[49] This is not a new theory: researchers have investigated trauma's effect on memory for over a hundred years. *See* Pierre Janet, *L'Amnesie et la Dissociation Dessouvenirs par L'Emotion*, 1 J. PSYCHOL. 417 (1904); Bessel A. van der Kolk, *The Body Keeps the Score:*

victim recalls her experience, and the untrained listener—with no understanding of how trauma impacts memory—may perceive her testimony as vague, nonlinear, or inconsistent.

### A. Neurological and Psychological Impacts of Trauma

When an individual perceives a serious current threat, the body triggers certain stress hormones intended to lower the perceived threat and distress in the short term.[50] As a result, the brain often does not process the traumatic memory like a typical memory: either the event is not encoded at all, or peripheral details, rather than the central event, are encoded.[51] The memory disconnects from certain times or places of the trauma, and aspects of an individual's consciousness, thoughts, emotions, and sensory perceptions dissociate from one another.[52] The victim therefore may recall "the sensory and emotional elements of the traumatic experience" but lack the "linguistic/contextual factors."[53]

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*Memory and the Evolving Psychobiology of Posttraumatic Stress*, HARV. REV. PSYCHIATRY 253, 258 (1994) (referencing Janet's seminal research on traumatic memory).

[50] Anke Ehlers & David M. Clark, *A Cognitive Model of Posttraumatic Stress Disorder*, 38 BEHAV. RES. & THERAPY 319, 320 (2000).

[51] Yochai Ataria, *Traumatic Memories as Black Holes: A Qualitative-Phenomenological Approach*, 1 QUALITATIVE PSYCHOL. 123, 123-25, 137 (2014). *See generally* Ehlers & Clark, *supra* note 50, at 331-33.

[52] Charlotte Bishop & Vanessa Bettinson, *Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offense of 'Controlling or Coercive Behaviour'*, 22 INT'L J. EVID. & PROOF 3, 15 (2017); Ataria, *supra* note 51, at 123-24.

[53] Ataria, *supra* note 51, at 124-25; *see also* Bessel A. van der Kolk & Rita Fisler, *Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study*, 8 J. TRAUMATIC STRESS 505, 518 (1995) ("[I]t is in the very nature of traumatic memory to be . . . stored as sensory fragments without a coherent semantic component."); *cf.* Ehlers & Clark, *supra* note 50, at 331 (noting that "[s]ome trauma victims describe that their thinking was

The failure to recall key features of a traumatic event, and the inability to integrate the event with other experiences, "lies at the very core of PTSD pathology."[54] Prolonged, repeated exposure to traumatic events increases the likelihood of these biological changes: the more cumulative the trauma, the more significant the symptoms.[55] A victim like Ms. Addimando, who has experienced decades of abuse at the hands of multiple perpetrators, is particularly susceptible to experience complex symptoms of PTSD.[56]

Given these biological changes, trauma hinders an individual's ability "to recount an event in a coherent, consistent and sufficiently detailed way."[57] Traumatic memory may lack context or a linear narrative, and inconsistencies—an otherwise normal feature of human memory—in a victim's recollections are

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extraordinarily clear . . . whereas others report confusion and overwhelming sensory impressions").

[54] Ataria, *supra* note 51, at 125; *see also* Epstein & Goodman, *supra* note 4, at 411 n.40; Melissa Jenkins et al., *Learning and Memory in Rape Victims with Posttraumatic Stress Disorder*, 155 AM. J. PSYCHIATRY 278, 278 (1998).

[55] *See* Bishop & Bettinson, *supra* note 52 at 11-12; Marylene Cloitre et al., *A Developmental Approach to Complex PTSD: Childhood and Adult Cumulative Trauma as Predictors of Symptom Complexity*, 22 J. TRAUMATIC STRESS 399, 404-05 (2009).

[56] Bishop & Bettinson, *supra* note 52, at 11; Cloitre et al., *supra* note 55, at 404-05; *see also* Annie S. Lemoine, Note, *Good Storytelling: A Trauma-Informed Approach to the Preparation of Domestic Violence-Related Asylum Claims*, 19 LOY. J. PUB. INT. L. 27, 38 (2017).

[57] Bishop & Bettinson, *supra* note 52, at 15; *see also* Ehlers & Clark, *supra* note 50, at 324 ("Their intentional recall is fragmented . . . details may be missing and they have difficulty recalling the exact temporal order of events.").

exacerbated.[58] The victim may recall one strong memory without a story,[59] or may only have vague recollections of trauma—"blurred and generalized memories of traces of violence"—rather than the memory of discrete actions.[60]

If a victim publicly testifies about the abuse she suffered, these imprecise traumatic memories can impede her ability to paint a clear picture of the abuse. The experience of being subjected to adversarial cross-examination, in particular, tends to heighten these inconsistencies because the examining attorney's primary strategy is often "to challenge the applicant's credibility and highlight discrepancies—or even induce them."[61] For instance, research into memory has revealed that, when another individual—like a police officer or a lawyer—directly asks a victim to recall a traumatic experience, the victim's narrative is often fragmented or "disorganised, showing variability and errors in recall across time."[62]

Other times, because the brain does not encode and process central details of a traumatic event, a testifying victim might "narrate events at various levels of

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[58] Ataria, *supra* note 51, at 123; Ehlers & Clark, *supra* note 50, at 324 at 325; Bishop & Bettinson, *supra* note 52, at 15.

[59] *See* Ataria, *supra* note 51, at 131 ("The traumatic memory is reduced to one specific fragmented moment, a moment without a story.").

[60] Guy Enosh & Eli Buchbinder, *Strategies of Distancing from Emotional Experience*, 4 QUALITATIVE SOC. WORK 9, 19-20 (2005).

[61] Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 495 (2016). Abuse survivors who are women face particular "credibility obstacles" when testifying in court. Julia R. Tolmie, *Coercive Control: To Criminalize or not to Criminalize?*, 18 CRIMINOLOGY & CRIM. JUST. 50, 55 (2018).

[62] Bishop & Bettinson, *supra* note 52, at 15; *see also* Ataria, *supra* note 51, at 124.

distance, taking the position of an outsider or of an observer witnessing the experience."[63] Her testimony may contain gaps in time or focus on seemingly insignificant details.[64] A victim may therefore describe an attack with little detail or emotional distress, defying stereotypic societal expectations that a victim testify with "perfect clarity"[65] even though "scientific evidence does not support [this] belief[]."[66]

### B. Ms. [redacted]'s Trial Testimony Was Consistent with Research on Trauma-affected Memory

The sentencing court's finding that Ms. [redacted]'s testimony was inconsistent, and therefore less reliable, fails to appreciate the impact of abuse on her memory. Certain portions of her testimony revealed telltale signs of a trauma-affected memory. For example, she recalled only having "partial memory" of certain events, referring to years of her abuse as "blurry," and at times she struggled to articulate a linear timeline of the abuse she suffered. (TT 804, 819.) In discussing [redacted]s abuse with Dr. [redacted] she testified she had "many fragmented memories and that I only remember partial pieces of certain things and that I can't connect

[63] Enosh & Buchbinder, *supra* note 60, at 14, 25-26; *see* Ataria, *supra* note 51, at 124; Richard J. McNally, *Psychological Mechanisms in Acute Response to Trauma*, 53 BIOLOGICAL PSYCHIATRY 779, 783 (2003) ("Attention narrows, enabling only certain aspects of the experience to get encoded" when experiencing a traumatic event).

[64] Enosh & Buchbinder, *supra* note 60, at 14.

[65] Max Ehrenfreund & Elahe Izadi, *The Scientific Research Shows Reports of Rape Are Often Murky, but Rarely False*, WASH. POST. (Dec. 11, 2014), www.washingtonpost.com/news/wonk/wp/2014/12/11/the-scientific-research-shows-reports-of-rape-are-often-murky-but-rarely-false.

[66] Bishop & Bettinson, *supra* note 52, at 15-16.

them anymore." (TT 823.)

Ms. [redacted] at times could testify to certain details of violence but not to the central act itself. When prompted to recall a particularly violent rape by an abuser, she could not recall the physical violence: "My memory is driving down [the road] with my wrists zip tied together, and I asked [someone] to come cut them apart." (TT 820.) Regarding another heinous act of abuse—sexual assault with a power tool—Ms. [redacted] only recalled the sound and smell of the tool used, not the assault itself. (TT 824-25.) This is consistent with research into the sensory nature of traumatic memories[67] and *Amici*'s collective experience interviewing and working with countless domestic violence and sexual assault survivors.

That the testimony of a trauma survivor like Ms. [redacted] may at times be fragmented or vague "tells us nothing about the reliability of the details they do recall, and nothing about their credibility."[68] The sentencing court appeared to believe that a clear, coherent narrative of abuse indicates witness credibility, but scientific evidence suggests the opposite.[69] Instead, disconnected testimony from a

[67] *See* Ataria, *supra* note 51, at 132 (noting intrusive memories are usually experienced through victim's senses (*e.g.*, taste, smell)).

[68] Hopper, *supra* note 6; *cf.* Paskey, *supra* note 61, at 494-95 (noting, in the context of reviewing applications for asylum, that "nearly all of the criteria used to assess credibility are unreliable when applied to the stories told by trauma survivors").

[69] *See* Bishop & Bettinson, *supra* note 52, at 16. *See generally* Hopper, *supra* note 6.

victim may evidence the truth of her narrative to a trauma expert.[70] When applying the science and psychology of trauma, the way victims like Ms. [redacted] tell their story—at times disjointed—makes their testimony about the abuse they suffered all the more plausible.[71]

Even though victims often are unable to corroborate their testimony with other evidence due to the private nature of domestic abuse,[72] Ms. [redacted]s testimony was corroborated by extensive photographic, video, and testimonial evidence. *See, e.g.*, Trial Exhibits HH, II, JJ, LL, MM, NN, OO, QQ, FFF, HHH, LLL. *Amici* fear that if this documented record can nonetheless result in a finding that the "nature of the alleged abusive relationship . . . is undetermined,"[73] a victim will never be able to convince the court that she was a victim of domestic violence.

## III. THE SENTENCING COURT'S FINDINGS ARE THE RESULT OF A KNOWLEDGE GAP

The sentencing court based its decision on an interpretation of the evidence that lacks any support in the scientific research on domestic violence. The sentencing court's finding that "the nature of the alleged abusive relationship" was "undetermined" is irreconcilable with the evidence of extreme physical and sexual

[70] *See* Epstein & Goodman, *supra* note 4, at 411 ("[D]isconnected, inconsistent testimony is in fact evidence of the truth of [the victim's] narrative; to the untrained ear, however, it makes her story suspect.").

[71] *Id*. at 410-11.

[72] *See* Lemoine, *supra* note 56, at 38.

[73] [redacted], 67 Misc. 3d at 439.

committed against Ms. and shows it did not understand that cyclical patterns of abuse followed by periods of relative calm are a key feature of abusive relationships, not an anomaly. The sentencing court's decision similarly evidences a failure to acknowledge the impact of trauma on memory. Inconsistent statements about the extent of abuse are telltale signs of a trauma-affected memory that make Ms. 's testimony more credible, not less.

The sentencing court's finding that Ms. had ample opportunities to leave, both before and on the night of makes clear that the court also failed to acknowledge the devastating impact of coercive control tactics on a victim's autonomy and decision-making ability. The cumulative impact of 's abuse created a traumatic bond that made it impossible for Ms. to leave before the night of As a result of her traumatic bond, Ms. was left with no viable options[74] to protect herself and her young children when, for the first time, threatened to end her life with his gun.[75] (TT 1020.)

[74] The sentencing court's conclusion that Ms. had "a myriad of non-lethal options" (Order at 46) because "she had a path to escape through the front door of her apartment" (*id.* at 43) is astounding to *Amici*, as this "escape" would have required a mother to abandon her two young children and leave them alone with a man threatening murder.

[75] made explicit threats to shoot (TT 732), paralyze (TT 731-32), and kill (TT 730-31) Ms. including threatening "I'm going to kill you, I'm going to kill myself, and then your kids have no one" (TT 1116).

When the knowledge gap is closed and the evidence of Ms. [redacted] and [redacted]s relationship is properly understood against the backdrop of the widely accepted scientific research on coercive control, trauma bonding, and traumatic memory, there can be no doubt that Ms. [redacted] "was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse" inflicted by [redacted], and that "such abuse was a significant contributing factor to [her] criminal behavior." Penal Law § 60.12(1). By recognizing that Ms. [redacted] has shown she is entitled to relief under the DVSJA, this Court can ensure that domestic abuse victims are not forced to meet an impossible standard, and that the DVSJA can protect victims from punishments that are "unduly harsh," as the New York Legislature intended.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to take the well-documented research on coercive control and trauma-impacted memory, which we believe support Ms. [redacted]'s appeal, into account when considering the application of the DVSJA to this case.

Dated: [redacted]

[redacted]

*Attorneys for Amici Curiae*

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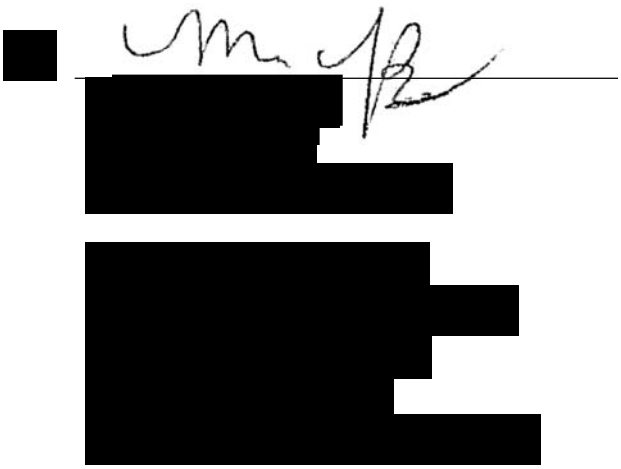

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United States District Court, S.D. New York.

Sergi Hernandez GRANO, Petitioner,
v.
Katherine Patricia MARTIN, Respondent.

19-CV-6970 (CS)
|
Signed March 11, 2020

**Synopsis**
**Background:** Husband filed petition for return of child under the Hague Convention on the Civil Aspects of International Child Abduction, seeking order requiring immediate return of his child to Spain, after wife traveled with child from Spain to the United States and neither had returned to Spain.

**Holdings:** The District Court, Cathy Seibel, J., held that:

preponderance of evidence showed that parties shared an intent to live together with child in Spain, and thus, Spain was child's habitual residence;

husband established by preponderance of the evidence that wife's agreement to return to Spain with child was voluntary; and

wife did not carry her burden to establish that husband posed grave risk to child by virtue of his coercive control over wife for purposes of Conviction's grave risk exception.

Petition granted.

**Procedural Posture(s):** Petition for Return of Child Under the Hague Convention.

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Seibel, J.

## BACKGROUND

***1** 1. Petitioner Sergi Grano is a Spanish citizen and Respondent Katherine Patricia Martin is a U.S. citizen. Grano and Martin are married and have a child, to whom the Court will refer as "D.H." or the "Child." On October 24, 2018, Martin traveled with D.H. from Spain to New York, and neither has returned to Spain since.

2. On July 25, 2019, Petitioner filed this suit under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (the "Hague Convention" or "Convention"), seeking an order requiring an immediate return of the Child to Spain.

3. On July 31, 2019, the Court set a discovery schedule and set an evidentiary hearing for September 9, 2019. (Minute Entry dated July 31, 2019.) On September 6, 2019, upon the parties' joint request, the Court adjourned the hearing to December 2, 2019. The hearing took place from December 2 through 5, and then was completed on January 6, 2020.[1] The Court ordered the parties to submit post-trial briefing no later than January 14, 2020, and permitted the parties to reply no later than January 17, 2020.

[1] The parties estimated a four-day hearing, (Doc. 8 at 2), but the hearing did not finish within four days. Due to a previously scheduled trial, the Court initially told the parties it was unable to continue the hearing immediately after December 5. But on December 6, that previously scheduled trial settled, so the Court offered the parties the opportunity to continue the hearing on December 9. Petitioner informed the Court that he could not finish the hearing then, so the Court adjourned the final day of the hearing until January 6.

  

**FINDINGS OF FACT**

4. Grano was born and raised in Barcelona, and he has lived in Spain for his entire life except for a two-month period when he lived in Las Vegas, Nevada. (Tr. at 8:8-10, 105:16-22.) He works in his family's business as a commercial director for a group of companies in the sports field. (*Id.* at 9:6-10.)

5. Martin was born in the United States in 1990. When she was a toddler, she moved to the Dominican Republic to live with her grandmother, where she remained until she graduated university. Martin is a Dominican and U.S. citizen. (*Id.* at 368:7-19; *see id.* at 514:19-21.)

6. Martin moved to Spain on a student visa in October 2012, when she was twenty-two years old, to attend graduate school to obtain a master's degree in clinical psychology. (*Id.* at 369:14-22.) Martin's coursework was set to take approximately two years to complete, and her plan was to move to New York once she obtained her degree. (*Id.* at 370:9-13.) Her father, grandmother, aunt, cousin, and the rest of her extended family lived in New York, and she had no family in Spain. (*Id.* at 370:14-22.)

7. In March or April 2013, Martin and Grano met on a dating website and began dating shortly thereafter. (*Id.* at 371:3-6.) Martin was still a student at the time. Early on while dating, Grano told Martin that it was always his dream to move to Las Vegas, and that he had lived there for a couple of months when he was younger. (*Id.* at 371:19-372:11.)

***2** 8. After Martin and Grano had been dating for a month or a month and a half, Grano asked Martin if her intention was to return to the United States or to stay in Spain with him. Grano explained that if it was the former, he would end the relationship. Martin told Grano that she intended to stay in Spain with him. (*Id.* at 101:25-102:5; 122:21-123:6.)

9. Sometime between July and September 2013, Martin moved into Grano's apartment. (*Id.* 15:17-19, 373:4-16.) While living together, Grano and Martin agreed that Martin, who had finished school and was not working, would handle the household chores, including cleaning the house, doing laundry, and preparing dinner. Grano told Martin early on in their relationship that he did not intend to do any chores himself. If Martin did not do her chores properly, as determined solely by Grano, Grano would yell at her. He would call Grano "stupid" and "bitch" for her failure to do chores properly. (*Id.* at 138:12-139:18, 377:6-25, 390:12-20.)

10. In late 2013 or early 2014, Martin's student visa was about to expire, so Martin and Grano registered as what Grano called a "couple-of-fact" in their local municipality. (*Id.* at 11:12-17.) As a couple in fact, Martin was given new legal status in Spain and granted all of the rights of a Spanish citizen except the right to vote. Martin's new legal status was valid for five years. (*Id.* at 12:8-14, 104:3-6.)

11. Sometime after Martin moved in with Grano, Martin told her father that she was going to remain in Spain with Grano. Martin's father stopped providing her with money and stopped paying her rent, health insurance, and credit card bills. (*Id.* at 123:19-124:1, 169:17-22, 253:21-23.) Martin then relied on Grano for financial support. Martin stopped talking to her father for approximately two years after he cut her off. (*Id.* at 513:10-17.) Grano often spoke negatively about her family after they left her in Spain without financial support. Grano called Martin's father a "motherfucker," a "piece of shit," and "human scum." (*Id.* at 376:5-20.) Grano also expressed anger over the fact that he had to financially support Martin. He would call Martin "stupid" and a "bitch" for her failure to support herself and for being depressed about her father cutting her off. (*Id.* at 376:2-377:5.)

12. Once Grano started supporting Martin, Grano would yell at Martin that she needed to find a job. But if Martin found a job that Grano did not consider to be high-earning enough to pay a housekeeper to handle the chores that Martin handled at home, Grano would instruct Martin not to take the job. (*Id.* 378:1-379:1.)

13. Sometime in 2014 or 2015, Grano started a serious diet and a rigorous exercise routine. (*Id.* at 90:5-17; *see id.* at 196:8-14, 358:14-24.) He initially went to the gym three days a week, and then began a five-day-a-week routine. (*Id.* at 359:3-6.) Grano would go to the gym for an hour to an hour and a half either early in the morning or around 4:00 p.m. (*See id.* at 363:6-15; 366:10-14.) He was unable to drink heavily or eat fattening foods at this time. (*Id.* at 127:8-10, 359:7-11.) When Grano was on his diet, he would yell at Martin if she cooked his food with fattening ingredients or if she ate unhealthy food in front of him. (*Id.* at 127:14-128:10, 397:9-24.)

14. In 2014, Martin became pregnant but had a miscarriage. (*Id.* at 12:21-25, 384:6-10.) About a year later, Martin became pregnant a second time and again had a miscarriage. (*Id.* at 13:1-7.) Martin and Grano went to the doctor, who told Martin and Grano that Martin had endometriosis. (*Id.* at 14:2-10.) Martin had surgery, and the couple kept trying to get pregnant. (*Id.* at 14:13-20.)

  

***3** 15. After the first miscarriage, Martin and Grano got engaged. (*Id.* at 384:6-8.) Their initial intention was to have a wedding in New York, so in 2015, Martin and Grano traveled to New York to look at potential wedding venues. But after Martin's father (with whom she had achieved something of a reconciliation) failed to put down an initial deposit at the venue, as he had agreed to do, Martin and Grano called off the New York wedding. (*Id.* at 16:1-18)

16. During the aforementioned trip to New York, Grano went to Las Vegas for five days. (168:21-169:1.)

17. On January 15, 2016, Martin and Grano were married in Spain. (*Id.* at 15:5-12.) They got married at a city building in Sant Cugat del Valles and did not have an event afterward. (*Id.* at 15:11-25.) No one from Martin's family came to the wedding. (*Id.* at 15:20-22.) Martin and Grano were married under a separation-of-property regime whereby each party's property was kept separate from the other. (*Id.* at 37:24-38:2.)

18. After Martin and Grano were married, they again considered moving to Las Vegas. Grano put his apartment up for sale, and Martin began applying for jobs there. (*Id.* at 387:4-388:3.) Grano also created a spreadsheet detailing what their potential expenses and schedules would be if they moved to Las Vegas. (R's Ex. G.)[2] Additionally, in 2016, Martin and Grano traveled to Las Vegas for about four or five days and looked at properties to buy. Ultimately, because of Grano's business and family obligations in Spain, they did not move. (*See* Tr. at 390:4-18.)

[2] References to "R's Ex. ____" refer to Respondent's exhibits, and references to "P's Ex. ____" refer to Petitioner's exhibits.

19. After their marriage, Grano continued to yell at Martin and call her names. One of the main sources of tension revolved around Martin's unemployment. Grano wanted Martin to find a job, but Martin had been unemployed for their entire relationship. (*Id.* at 131:20-132:5, 377:6-378:22.) Grano also continued to yell at Martin if her chores were not done correctly, including not cleaning, doing laundry, or cooking up to Grano's standards. (*Id.* at 379:8-380:5.) He would sometimes scream inches away from her face, bang his hands on tables, or slam doors shut while arguing. (*Id.* at 380:6-381:25.) The two would argue at least once per week. (*Id.* at 380:22-25.) Martin would usually cry after Grano yelled at her, which would further incite Grano. (*Id.* at 386:9-12.) After arguments, Grano would occasionally leave the apartment to either take a walk or a drive. (*Id.* at 146:21-147:1)

20. Sometime in 2016, Martin took a job as a customer service representative at a technology company. (*Id.* at 136:9-21, 393:21-22.) The commute to her office was approximately an hour and a half, and the working hours were 8:00 a.m. to 7:00 p.m. each day, so Martin did not have time to do the household chores for which Grano held her responsible. (*Id.* at 137:4-13, 393:24-394:23.) Grano would yell at Martin for not completing the chores, even during this time when she was employed. (*Id.*)

21. Grano continued to insult and degrade Martin and tell her that she did not deserve the life he provided for her. (*Id.* at 386:19-23.) If Martin did not complete her assigned chores up to Grano's standards, he would make her redo the tasks. For example, he would throw out the food she cooked for him and make her cook again if he thought she used fattening ingredients, or he would throw all of the clean laundry on the floor and make her refold it if he did not like the way she had done it the first time. (*Id.* at 396:18-21, 399:7-16)

***4** 22. Grano exerted control over other aspects of Martin's life. He instructed her how to dress and wear her hair, yelling at her if it was not the way he liked it. (*Id.* at 405:24-408:10.)

23. Grano also repeatedly told Martin that she was unable to sexually satisfy him. And whenever Grano went out without Martin, he would want to have sex with her when he got home. He would repeatedly urge Martin to have sex with him even when she did not want to, and sometimes she would agree. (*See id.* at 408:22-409:15.)

24. Martin would ultimately try to acquiesce to all of Grano's requests to please him and to avoid further arguments. Yet despite Martin's efforts, Grano suggested that he and Martin get a divorce three or four times within their first year of marriage. (*Id.* at 142:12-15.)

25. On November 11, 2016, Martin learned she had become pregnant a third time. (*Id.* at 400:22-24.) Despite the numerous conversations she and Grano had recently had about divorce, they agreed to work out their marriage for the benefit of the unborn child. (*Id.* at 141:13-17.) But the arrangement did not work, and their arguments continued and intensified, in part because Martin believed that Grano was cheating on her. (*Id.* at 147:21-148:10.)

26. Sometime after Martin became pregnant, Grano told Martin that within the house, they would not be a couple and they would sleep in separate rooms, but outside of the

  

house, they would pretend that things were fine at home and that they were still a couple. (*Id.* at 501:2-21.) Two weeks after Grano told Martin that the two of them were separated, Grano had a relationship with another woman, and when Martin learned of the affair and confronted Grano, Grano showed no remorse because he understood them to be separated at the time. (*See id.* at 147:21-148:7, 505:10-14, 510:4-11.)

27. In approximately March 2017, Martin told Grano that she was moving into his parents' home. (*Id.* at 503:14-504:23). Martin testified that she had no family in Spain, so his parents' home was the only place she felt she could go. (*See id.* at 504:24-505:2.)

28. Martin testified that she packed up her clothes and shoes in boxes and moved them all to Grano's parents' house, (*id.* at 505:20-24), though Martin also testified that she brought only "some change of clothes, because it was very close to the apartment that we used to live to his parents, so I could go at any moment to pick up some stuff," (*id.* at 504:17-20). Martin testified that she stayed at Grano's parents' house for a couple of weeks to a month, (*id.* at 506:23-24), but Grano's parents stated she stayed there for only a few days, (*id.* at 293:11-17, 306:6-9).

29. In April 2017, while pregnant, Martin traveled to New York. (*Id.* at 18:18-22, 511:19-21.) Grano and his mother drove Martin to the airport for this trip. (*Id.* at 511:22-23.) Grano testified that Martin wanted D.H. to be born in the United States so that D.H. could more quickly receive U.S. citizenship, and due to the issues that Martin and Grano were having, Martin wanted to get "some space" by living outside of Spain for a time. (*Id.* at 18:23-19:4, 20:6-10.) Martin testified that she intended to move back to the United States permanently and would return to Spain only to pick up her belongings and allow Grano and his family to meet the baby. (*Id.* at 511:4-512:6.) Her testimony is corroborated by her Spanish physician's notes, which indicated that Martin asked her physician to summarize her medical history because she "[wa]s going to live in another city," (R's Ex. H.), and further corroborated by the fact that while Martin was in New York, she was considering buying a day care from another woman, which would require her presence in New York, (*see* Tr. at 515:15-518:6; R's Ex. DD).[3] The Court finds Martin's testimony on this issue credible, and thus that when Martin traveled to New York to give birth to D.H., the parties were not in agreement as to where D.H. would live permanently once he was born, and at least not in agreement that he would live in Spain.

[3] Martin obtained an application from the City to become a licensed day care provider and obtained information about the day care from the owner, but she never completed the application and never bought the day care. (*See* R's Ex. DD.)

***5** 30. While Martin was in New York, she had regular contact with Grano via telephone, WhatsApp, and other forms of electronic communication. (Tr. at 20:11-15.) Their conversations were tense, and Martin informed Grano that if their marriage was not reconciled, she did not know where she would live. (*Id.* at 20:22-21:4.) Grano sent Martin both text and audio messages in which he called her insulting names, such as "motherfucker" and "human scum." (*Id.* at 165:8-23; R's Ex. J at 13739.) Grano also regularly insulted Martin's family. (Tr. at 167:17-23; *see* R's Ex. J at 12988.) Additionally, Grano at times told Martin that he wanted a divorce and that he would try to get custody of their unborn child. He also stated that he would not travel to New York for the child's birth, because it would be too painful to become attached to the child and then have to be separated from him. (*See* Tr. at 166:14-167:5, 177:13-178:16, 527:21-24; R's Ex. J at 12977, 13746, 13976.)

31. In a June 27, 2017 voice note that Grano sent to Martin, Grano stated that it would take "months, even a year, or more than a year" to fix their relationship. (R's Ex. J at 17733.) He added, "if not, if I don't want to be with you, and we don't fix our things, you go back to New York – or that is, you stay in New York, and I am left without the child. Very well. I still think it's blackmail." (*Id.*)

32. When Martin was in New York, but prior to the birth of D.H., she visited a doctor and reported that she had been emotionally abused but never physically assaulted by Grano. (R's Ex. E at 74 ("No complications in the pregnancy – except that [Martin] has left her abusive (not physically) spouse in Spain."); *id.* at 83 ("[Martin] states no physical abuse; husband unfaithful."); *id.* at 100 ("No [history of] assault."); Tr. at 796:1-4.) Martin also did not report any physical violence when she first met with her expert in this case. (Tr. at 486:5-8, 902:7-9.)

33. Shortly before D.H. was born in July 2017, Grano traveled to New York, and he stayed at the Paramount Hotel. (*Id.* at 22:4-6.) Grano testified that when he and Martin saw each other in New York, their love was immediately rekindled. (*Id.* at 22:23-23:2.) Martin did not disagree. (*See id.* at 528:16-529:1 (stating that when Grano came to New York, "it was very emotional to see each other again. I think a lot of feelings came.").) Martin stayed with Grano at the hotel until D.H. was born, and Martin decided that Grano would be the one person she

  

was permitted to have present during the birth. (*Id.* at 22:7-23:2, 24:12-15.) Messages from around the time that D.H. was born, including the day he was born, suggest that Grano and Martin had reconciled their relationship during the period when Grano was in New York. (*See* P's Ex. I Binder 3 at 95-96 (Martin discussing that she was "happy" with the way things were going with regard to she, Grano, and D.H., discussing that her, Grano, and D.H. were "a family," and discussing Martin's and Grano's parents' reaction to seeing Martin and Grano together).)

34. Martin testified that Grano pressured her to be induced so that the child would be born before Grano had to travel back to Spain. (Tr. at 530:11-531:5.) Grano denied doing so, (*id.* at 183:20-184:12), but WhatsApp messages from July 20, 2017, show that Grano was pressuring Martin to have her doctor induce the birth.[4] Grano stated, "So tomorrow at the latest. Tell him clearly. Or giving you permission to fly and have him in Spain. But I'll get mad if I miss it. Very." Martin responded, "Yes, I know, I told him." (P's Ex. I Binder 3 at 95.) But even that day, both parties made statements suggesting that they viewed themselves as a family unit with D.H. (*Id.* at 96 (Grano stating "We'll be 3 very soon," to which Martin responded, "Yessss").)

[4] Unless otherwise noted, when the Court references "messages" or a "message" herein, it is referring to messages sent via WhatsApp. The Court also notes that it is relying on the certified translation of these messages provided by the parties.

***6** 35. D.H. was born on July 21, 2017. (Tr. at 530:9-10.) Grano was present for D.H.'s birth but returned to Spain two-and-half days later. (*Id.* at 24:12-22.)

36. Grano testified that while he was in New York for D.H.'s birth, he and Martin agreed that Martin and D.H. would move back to Spain to live with Grano. (*Id.* at 23:3-10, 27:20-23.) Martin, however, testified that she did not think she and Grano had a firm agreement that she and D.H. would move to Spain at that time. (*Id.* at 532:15-19.) She stated that she did not seriously consider moving back to Spain until the end of the summer of 2017, after August or September. (*Id.* at 532:24-533:4; *see id.* at 535:8-10.) Messages, however, support Grano's testimony and cast doubt on Martin's. From as early as July 22, 2017, the day after D.H. was born, Martin and Grano discussed Martin's return to Spain in a way that made clear they had already agreed to it. For example, on July 22, 2017, Martin messaged Grano, "Now it'll be your turn to prepare [D.H.'s] things for when we come." (P's Ex. I Binder 3 at 96.) On July 23, Grano told Martin, "I'll see you in October in our home!" (*Id.* at 97). And the following day, on July 24, 2017, Martin said to Grano, "You'll be [with D.H.] very soon." (*Id.*) There are numerous similar messages.

37. It is undisputed that Grano and Martin also agreed that they would try to rehabilitate their marriage, but the parties dispute the timing of when they made that agreement. As early as July 24, 2017, however, there are messages suggesting that the parties would attempt to reconcile their marriage once Martin returned to Spain. Martin said to Grano that "things will go back to their place [in Spain,]," to which Grano responded, "Yes, it seems so." (*Id.* at 98.) When Martin questioned why Grano said it seemed so, Grano said to Martin, "I still want you to show me changes and when you come, take a path (with my help, as always)," to which Martin responded, "That's what we agreed." (*Id.*)

38. Despite Grano and Martin's agreement to reunite as a couple in Spain, they still got into fights via WhatsApp while Martin and D.H. were in New York. Grano told Martin that both of them had to make changes, but he would not make changes until he saw Martin trying to improve first. (Tr. at 534:11-16.) Martin believed that Grano was going out and living the life of a single man, which upset her. (*Id.* at 533:5-11.) Martin also told Grano that certain things had to change when she returned to Spain. (*Id.* at 533:14-534:6.)

39. On September 2, 2017, Grano messaged Martin stating that he was going to "file for bankruptcy and shoot [himself]." (P's Ex. I Binder 3 at 120.) He then repeatedly suggested that he was going to commit suicide, (*id.* at 120-23), but said that Martin should still come to Barcelona with D.H. in October, (*id.* at 123). Martin responded, "You know very well that I won't go there if you're not there." (*Id.*)

40. On September 14, 2017, Grano got angry with Martin because Martin took D.H. on a trip to Pennsylvania to see her aunt, Wanda Castillo, before bringing D.H. to Spain. (*See* R's Ex. O Sept. 14, 2017 at 14:38:29-15:23:44.[5]) Grano told Martin that she should not come to Barcelona, but he still wanted D.H. to come. (*Id.* at 15:27:22-15:28:03.)

[5] Respondent's Exhibit O is not paginated in any way, so references to it herein will be to date and timestamp.

***7** 41. On September 17, 2017, after arguing for some time, Grano said to Martin "Either you come or you stay, and we do what we must do.... In a week, you've said 3 times that you'll get here, that you won't, that you will,

that you won't anymore." (P's Ex. I Binder 3 at 145.) Later that day, Grano stated that he and Martin were "over," but Grano wanted the documentation establishing that D.H. was his son. (*Id.* at 148-49.) Martin, after ignoring multiple requests, stated, "[W]hen I'm there, I'll give them to you." (*Id.* at 150.) The argument continued in this fashion, going back and forth between the parties stating that they were broken up yet also making plans for when they would be in Spain together. (*Id.* at 150-54.)

42. Martin's friend Anayanzy Zurita Perez was scheduled to visit Martin in New York after Martin gave birth to D.H. (Tr. at 685:25-686:3.) Perez bought plane tickets and was planning on staying in Martin's father's home in New York. (*Id.* at 686:4-7.) But on September 17, 2017, Grano messaged Martin stating that if Perez met D.H. before Grano's parents did, Grano would never speak to Martin again. (*See* P's Ex. I Binder 3 at 153.) Grano pressured Martin to come back to Spain before Perez arrived in New York. (*See id.*; Tr. at 650:21-651:9.) In asking to postpone her return to Spain a week to accommodate Perez's visit, Martin messaged Grano, "I'm telling you: Three more weeks and we will be there for a lifetime." (P's Ex. I Binder 3 at 154.)

43. On September 18, 2017, Grano and Martin again got in a fight about Perez's visit to New York. Grano said to Martin, "Let's see, Patricia, if you're scared about me starting a fight for [D.H.], which would never happen if we were together or separated but remained close, but if we are 8,000 [kilometers] apart, it's logic that I would do that, as so would you." (*Id.* at 158.) Ultimately, Martin returned to Spain before Perez arrived, which essentially ended Martin's and Perez's friendship. (*See* Tr. at 651:16-23, 686:8-15.)

44. On September 19, 2017, Martin messaged Grano and stated that she wanted their relationship to change when she returned to Spain. She told Grano that she did not want D.H. to hear them argue or to see her cry. (P's Ex. I Binder 3 163.) Martin added that they had a lot to work out when she returned, and Grano responded that he agreed but it was impossible to do so while they were so many miles apart. (*Id.* at 164.)

45. On September 21, 2017, Martin told Grano that when she came back to Spain, she wanted Grano to stop insulting her and stop yelling at her for the way she did chores around the house. Grano responded that when Martin returned, they had to discuss the issues they had with one another and work to try to alleviate their problems. (Tr. at 543:21-544:2.) On the same day, Martin messaged Grano explaining that her family did not want her to return to Spain because of how unhappy she was when she previously lived with Grano. (P's Ex. I Binder 3 at 168.) She added, "[T]hey're just worried that things go wrong, especially now that [D.H.] is involved. That's why I'm saying that this time it has to work out." (*Id.*) Grano responded that he wanted "the same, that this works out." (*Id.*) In response, Martin stated,

> Well, that's it. There's something I want to ask you, and I need you to make all your best to do it.... And it's that from now on you don't talk about me or make any negative comments on me with anybody, even if it's a joke. That hurts me.... And neither about the things going on in the house. Please.... [T]hat's something that you do or did, and it really hurts me.

(*Id.*) Grano agreed. (*Id.*)

46. On September 24, 2017, Martin and Grano were discussing the languages that D.H. would learn while living in Barcelona, and Grano said that D.H. will have to learn Catalan in school. (*Id.* at 172.) Martin responded, "I hope that we're not still living in Spain by the time he goes to school." (*Id.*) Grano said, "I hope not. High school particularly," to which Martin responded she was thinking they would be out of Spain before D.H. was in kindergarten. (*Id.*; Tr. at 549:2-7.) Grano said, "No way," suggesting they would be in Spain at least until D.H. was in kindergarten. (P's Ex. I Binder 3 at 172.)

***8** 47. On September 25, 2017, Martin made Grano promise that he would not "betray" her, adding that she was "leaving a great future for [D.H.] and for me behind here, and I'm really scared." (*Id.*) Grano swore that he would not betray Martin and stated that his intentions were for their relationship to work out, but that they would need to have conversations about their relationship and reach "agreements" upon Martin's return. (*Id.* at 172-73.)

48. On September 27, 2017, Martin messaged Grano stating that she was feeling "nostalgic" about leaving New York. (*Id.* at 174.) She explained that, while she wanted to leave, "there [wa]s also a part of [her] that [did not] want to." (*Id.*) She added that she wanted D.H. "to have a healthy relationship" with Martin's family and "for him to come every year and have his two families." (*Id.*) The latter half of the statement meant that Martin intended for

  

D.H. to live in Spain but to visit New York once a year to maintain a relationship with both sides of his family. (Tr. at 32:17-24.) Grano agreed to this arrangement. Grano responded that he wanted to work toward their goal of moving to Las Vegas, but certain guarantees had to be in place before they could do so. (P's Ex. I Binder 3 at 175.) Martin later explained that she was "returning just for [Grano]," because she thought that D.H. would have a better future in New York than he would in Barcelona. (*Id.*)

49. On October 3, 2017, Martin returned to Spain with D.H. on a one-way ticket, and they moved into Grano's apartment. (*See* Tr. at 33:18-34:5; P's Ex. I Binder 3 at 169 (discussing one-way ticket).) Prior to returning, Martin arranged to ship most of D.H.'s things to Spain, including his crib and other furniture from his room in New York. (Tr. at 28:19-21.) Martin did not maintain a bank account, apartment, car, or job in New York once she left. (*Id.* at 816:16-22, 817:19-818:3.) She stated she left behind only some clothes and connections with her family and friends. (*Id.* at 817:1-24.)

50. Martin argues that her agreement to relocate to Spain with D.H. "was conditional on [1] the improvement of the parties' relationship and [2] the cessation of certain abusive behaviors from Mr. Grano." (Doc. 30 ("R's Mem.") ¶ 6.) Starting with the latter, the Court finds she and Grano did not agree on such a condition at the time they agreed that Martin would return. Based on Grano's testimony at the hearing, messages he sent, and Martin's testimony, it is clear that Grano would not and did not agree to the "cessation of certain abusive behaviors." Grano repeatedly stated at the hearing that he did not think he was ever abusive toward Martin, and thus Martin's testimony that Grano would agree to stop being "abusive" is not credible. There were times where Grano said he would improve his behavior, but both Grano and Martin testified that Grano thought that Martin was the main cause of problems in their relationship, and that he believed it was her, not him, that had to do the majority of the work in mending their marriage. (Tr. at 176:4-21 (Grano saying the relationship problems were more Martin's fault than Grano's fault); *id.* at 534:11-16 (Martin testifying that sometimes Grano would respond, "I'm not going to change anything until you start changing").) In fact, as noted, the only messages suggesting that Martin and Grano had an agreement to change the way they treated each other made around July 2017, the time they agreed Martin would move back to Spain, were the following: Grano said to Martin, "I still want you to show me changes and when you come, take a path (with my help, as always)," to which Martin responded, "That's what we agreed." (P's Ex. I Binder 3 at 98.) These messages suggest that, if anything, the agreement Grano and Martin had was that Martin would make changes so the couple could improve their relationship. Further, messages from September 2017 show that Martin's requests that Grano change his behavior came after the parties' agreement that Martin would return to Spain. For example, on September 21, 2017, Martin told Grano that her family was worried about her returning to Spain and said to Grano, "There's something I want to ask you, and I need you to make all your best to do it.... And it's that from now on you don't talk about me or make any negative comments on me with anybody, even if it's a joke." (*Id.* at 168.) This statement – specifically, Martin's *request* that Grano change his behavior – coming months after they had agreed that Martin and D.H. would relocate to Spain, establishes that the parties did not already have in place an agreement that Grano would cease his abusive behavior. Accordingly, the Court rejects Respondent's argument that her agreement to relocate to Spain with D.H. was, at the time it was formed, mutually conditional on Grano changing his behavior.

***9** 51. The harder question of fact that the Court must resolve is the related question of whether Martin and Grano's agreement that Martin and D.H. would move to Spain was, at the time it was made, conditional on the improvement of the parties' marriage, or, in other words, their reconciliation. Martin testified that her move to Spain was conditional on her and Grano's reconciliation and the continuation of their marriage and cohabitation, and she testified that she explained this conditional arrangement to Grano many times, and he agreed to it. (Tr. at 534:25-535:2, 543:21-545:23, 546:14-24, 551:1-21.) Yet, despite thousands of messages produced between Grano and Martin, not one of them says that Martin would move back to the United States with D.H. if the parties did not reconcile their marriage in Spain, let alone that Grano agreed to such an arrangement. Martin also testified that she informed her friend Karla Hernandez Baco, Castillo, and her father of the conditional nature of her return to Spain. (*Id.* at 551:19-552:2.) Yet none of these witnesses was able to credibly corroborate Martin's account. While Baco said at the hearing that Martin messaged her via WhatsApp explaining that the move was conditional, (*id.* at 703:4-15, 704:10-21), the message was never produced in Court or turned over to Petitioner, which suggests that no such message exists. Castillo testified that Martin told her that the move was conditional, but I am not crediting Castillo's testimony as she lied numerous times on the stand. Castillo denied making numerous statements to Martin despite Petitioner having proof that Castillo made such statements. (*Compare id.* at 932:5-8 (denying

  

encouraging Martin to bring D.H. back to the United States), *with* P's Ex. J-2 at 10 ("[I]f I were you, I'd take my boy and come here."); *compare* Tr. at 932:18-933:3 (denying telling Martin that if Martin did not take child support from Grano, it may benefit her in the future because Grano would lose his rights to his unborn child), *with* P's Ex. J-2 at 2 ("Sometimes it's better that they don't give anything, because they won't have any rights in the future"); *and compare* Tr. at 932:2-4 (denying advising Martin to claim that Grano had beaten her), *with* P's Ex. J-2 at 7 ("Call the embassy and say ... that he beat you, fuck him").) Additionally, Castillo had told Martin to "exaggerate everything so [Grano] gets more screwed," (P's Ex. J-2 at 3), suggesting she would lie to keep D.H. with Martin and away from Grano. Accordingly, Castillo's incredible testimony does not corroborate Martin. Finally, Martin's father did not testify, and thus cannot corroborate Martin's account. The only credible corroborating testimony came from Respondent's witness Mariel Ortega de los Santos, who testified that Martin told her that the move back to Spain after D.H. was born was conditional on Martin's reconciliation with Grano. (*Id.* at 666:14-667:10.) There were also some messages sent between the parties in September 2017 that accord with Martin's account. (*See, e.g.*, P's Ex. I Binder 3 at 123 (Martin's September 2, 2017 message to Grano, "You know very well that I won't go [to Spain] if you're not there."); *id.* at 175 (Martin's September 27 message stating that she was "returning just for [Grano]," because she thought that D.H. would have a better future in New York than he would in Barcelona).) And Martin's statements made around that time suggesting that she intended D.H. to be raised indefinitely in Spain were explicitly or implicitly tied to Martin and Grano being together with D.H. as a family, (*see* P's Ex. I Binder 3 at 105 ("We have a lifetime for the four of us."[6]); *id.* at 174 ("I want [D.H.] to have a healthy relationship ... [a]nd for him to come every year and have his two families.")), or made to placate Grano when he was mad at her for being in New York with D.H. while he was in Spain, (*see, e.g.*, *id.* at 154 (in asking to postpone her return to Spain a week to accommodate Perez's visit, Martin messaged Grano, "I'm telling you: Three more weeks and we will be there for a lifetime.")).

6 The fourth family member was the parties' dog. (Tr. at 875 at 16-19.)

52. Grano testified that his agreement with Martin for her to return to Spain with D.H. was in no way conditional; rather, they agreed that Martin and D.H. would move to Spain, and separate and apart from that agreement, they decided to try to reconcile their marriage. (*See* Tr. at 23:11-15, 65:24-66:22, 266:4-13.) Petitioner's witnesses Enryc Pallirols and Paloma Garcia Monton Sanchez, Grano's friends, testified that neither Grano nor Martin ever said that Martin's return to Spain after D.H. was born was conditional, (*see id.* at 323:22-24, 340:7-12), but this testimony is not particularly helpful as Grano and Martin would not necessarily share this information with their friends. Grano's parents, Jorge Hernandez and Maria Mercedes Grano Font, also testified that Martin and D.H.'s return to Spain was not conditional, but neither of them were credible witnesses, as they both minimized the abuse their son inflicted on Martin and lied on the stand. For instance, Hernandez stated that he was not aware that Grano and Martin were having relationship problems prior to Martin's travel to New York to give birth, (*id.* at 296:12-15), which cannot be true considering Grano's and Martin's testimony that they regularly argued, including arguing in front of Hernandez, as well as Hernandez's testimony that he was present in Grano and Martin's home the night of D.H.'s first haircut, just after Grano and Martin got into an argument and just before Martin called a domestic violence hotline (which will be discussed further below). Font too tried to minimize the issues that her son was having with Martin. For example, Font testified that the arguments that Grano and Martin had "were always because of the same thing," but also said that she never knew about what Grano and Martin argued, two facts that cannot be reconciled. (*See id.* at 307:1-11.) Additionally, Font initially testified that Martin stayed at her house while pregnant for two or three days, but later when asked if Martin stayed at her house for a few weeks, as Martin testified, Font responded that it was four days. (*Compare id.* at 306:6-11, *with id.* at 307:12-20.) While the difference between two or three days and four days is minimal, the discrepancy indicates that Font was not being truthful in her responses and could not recall exactly what her lie was. Further, both Hernandez and Font have a motive to fabricate or exaggerate, as they want their son to succeed in bringing their grandson back to Spain. Accordingly, the Court affords essentially no weight to Hernandez's and Font's testimony regarding whether Martin's move was conditional, and thus they do not corroborate Grano's testimony regarding the unconditional nature of Martin and D.H.'s relocation. There are messages, however, indicating that Grano, at least at times, planned to raise D.H. in Spain even if he and Martin had to separate, (*see* R's Ex. O Sept. 14, 2017 at 15:27:22-44 (Grano told Martin that she should not come to Barcelona, but he still wanted D.H. to come)); P's Ex. I Binder 3 at 158 ("If you're scared about me starting a fight for D.H., which would never happen if we were together or separated but remained close...."); *id.* at 148-49 (Grano stating he and Martin were "over" but requesting Martin send documents to Spain proving Grano was D.H.'s father); *id.* at 172-73 (Grano swearing

  

that he has the best intentions for them to reconcile once together in Spain, but repeatedly stating that they would have to make "agreements" once Martin returned).

***10** 53. Considering only the credible evidence presented at the hearing, the Court finds that Martin and Grano were not in agreement on the conditional nature of the move. As a threshold matter, none of the thousands of messages exchanged between Martin and Grano presented at the hearing show that they entered into such an agreement. Additionally, Grano credibly testified that any attempts at reconciliation were separate and apart from the parties' agreement to have D.H. grow up in Spain, which was corroborated by the messages he sent to Martin suggesting that he planned to raise D.H. in Spain whether they were together or separated. The Court also finds that it is more likely than not that Martin did not have even the unilateral intention to return to the United States if she and Grano were unable to reconcile. While some of the evidence suggests that she intended to move to Spain only if she and Grano rehabilitated their marriage – *e.g.*, her lack of connections to Spain directly prior to the move, her statements that D.H. would have better opportunities in New York, de los Santos's statement that Martin said her relocation was conditional, and Martin's ultimate return to the United States with D.H. – the preponderance of the evidence suggests that her relocation was not conditional. First, and most critically, Martin's actions once in Spain, discussed in greater detail below, overwhelmingly suggest that Martin intended her and D.H.'s move to be of an indefinite duration, which militates against finding that it was a conditional relocation. Second, while Martin expressed some trepidation prior to her relocation, she never told Grano, to whom she spoke constantly about the topic of her relocation, that her move was conditional. Rather, she made numerous statements suggesting that she planned for D.H. to have a permanent life in Spain, while still maintaining connections to Martin's family in New York by visiting during the summers. Third, Martin herself did not testify that she formed a unilateral conditional intent to return to Spain. Instead, she testified that she reached an agreement with Grano, which the Court finds, as described above, is not true. Accordingly, the Court finds that in September 2017, Grano and Martin did not share an intent to raise D.H. in Spain conditioned on their reconciliation, nor did Martin unilaterally decide her relocation to Spain would be conditional on the same.[7]

[7] Ultimately, however, whether the parties entered into a conditional agreement in September 2017 does not change the outcome of this case. As discussed below, Martin and Grano's marriage was not rehabilitated after Martin returned to Spain, and thus the condition was never met. And even if Martin had the unilateral intention to return to the United States, Grano did not share that intent with her.

54. The Court finds by a preponderance of the evidence, however, that in July 2017, while Grano was in New York for D.H.'s birth, the parties agreed that Martin would bring D.H. back to Spain, and there is no evidence to suggest that Martin's intent at that time was conditioned on anything. Numerous messages sent the days immediately before and after D.H. was born establish that the parties shared an intent for D.H. to relocate to Spain and live there with Grano and Martin. (*See* P's Ex. I Binder 3 at 96 (Martin stating on the day that D.H. was born, "We're a family already"); *id.* (Martin stating on July 22, "Now it'll be your turn to prepare [D.H.'s] things for when we come"); *id.* at 97 (Grano telling Martin on July 23, "I'll see you in October in our home!"); *id.* (Martin telling Grano on July 24, "You'll be [with D.H.] very soon"); *id.* at 99 (discussing on July 24 that October is when Martin and D.H. will be back in Spain); *id.* at 100 (discussing on July 25 plans to ship D.H.'s belongings to Spain).) Yet the evidence is also clear that, at that time, the parties did not have an agreement that they would attempt to reconcile their marriage. (*Id.* at 99 (July 24 message form Martin to Grano stating, "I'm left with the feel[ing] that we're together. But it's something we didn't talk about," and Grano responding, "True, we didn't talk about it.").) This is likely because Grano and Martin were, almost immediately upon Grano coming to New York, acting as if they were back together and cohabitating. Grano testified that within a few hours after he arrived in New York in mid-July, he and Martin "started being a couple," meaning that they were reconciled and together as a family at that time. (Tr. at 23:2.) Martin's testimony seemingly corroborated Grano's account, or at the very least did not rebut it. (*See id.* at 528:16-529:1 ("Q. And did you two stay together when he came to New York? A. Yes. Q. Why? A. Um, I remember that after all those months fighting and everything, that we see each other, it was very emotional to see each other again. I think a lot of feelings came. I was with my big belly, I remember that. And I don't know, I don't know, I don't know, I don't know what to say about that, why I stay with him or, I don't know, it was a moment, a long time."); *see also id.* at 532:14 (stating that Grano was treating her well while he was in New York).) Put differently, Grano and Martin did not then agree to rehabilitate their marriage because it would have been unnecessary – they were already acting as if their marriage was rehabilitated from the period of July 16 through July 23, 2017, while Grano was in New York. The parties were reconciled, cohabitating, and making plans to restart their life together in Spain with D.H. Accordingly, the Court finds

  

that at that time the parties had a shared and unconditional intent to live in Spain as a family.

***11** 55. Beginning the day after Grano returned to Spain, Martin started expressing her fears that Grano would sleep with other women, (*see* P's Ex. I Binder 3 at 96), and then within a few months, started making Grano promise that he would not cheat on or disrespect her, (*see, e.g.*, *id.* at 172). Grano too expressed concerns about their reconciliation and at times suggested he did not want Martin to come to Spain. (R's Ex. O Sept. 14, 2017 at 15:27:22.) But that the parties expressed trepidation about their reunification in Spain or otherwise changed their intent does not change the fact that they shared an intent for D.H.'s permanent residence to be Spain during this week-long span in July 2017.[8]

[8] Neither party argues that Las Vegas is or was intended to be D.H.'s habitual residence, and although the parties discussed possibly moving to Las Vegas after July 2017, there is no evidence that they ever got far enough along in that process to have shared an intent for Las Vegas to be D.H.'s permanent home.

56. Once Martin returned to Spain, she stayed home and took care of D.H. She was still responsible for many household chores, but Grano also hired a maid to work three hours per day to clean the apartment. (*See* Tr. at 202:2-21.)

57. When Martin first moved back to Spain, the parties' relationship was acceptable, but after approximately two weeks, they began arguing again. (*Id.* at 652:22-653:1.) Grano screamed at Martin if she did not do things the way that Grano expected her to, including relating to D.H. Grano also yelled at Martin for giving too much attention to D.H. and not enough to Grano. (*Id.* at 731:6-12.) Martin testified that she could never live up to Grano's standards, and he was constantly yelling at her. (*See id.* at 655:22-656:17.) On at least four occasions, the arguments occurred in a car with D.H. inside, and Grano would drive fast and recklessly while yelling at Martin. (*Id.* at 654:10-25.) Martin also testified that Grano yelled at D.H. "a couple of times," which caused the Child to cry. (*Id.* at 731:16-732:6.)

58. Despite the fighting, Martin and Grano began looking at schools for D.H. (*Id.* at 43:20-22.) They looked at least two schools, including Agora International School ("Agora"). (*Id.* at 44:17-18.) Agora was a school for children as young as one-year old, and students could remain there until they went to university. (*Id.* at 44:24-45:1.) It was a private school that required yearly tuition. (*Id.* at 45:2-6.) In evaluating Agora, Martin was especially interested in its language programs and asked questions about music opportunities available to students when they turn seven or eight. (*Id.* at 47:18-48:2.) She also asked about which "precollege ... fields" Agora offered its students when they turn sixteen, as schools in Spain require some level of specialization prior to graduation. (*See id.* at 48:3-7.) Martin and Grano agreed that D.H. would enroll in Agora. (*Id.* at 48:8-15.) Initially, the plan was for him to start in September 2018, and for Martin to get a job by then to help pay D.H.'s tuition. (*Id.* at 48:10-12, 57:19-58:8, 835:5-9, 837:23-838:8, 839:8-14.)

59. In December 2017, Martin and Grano agreed to buy a house in Spain. (*Id.* at 35:8-12.) They had visited a property in Spain prior to D.H.'s birth and ultimately decided not to buy it, but once Martin returned to Spain, the pair again looked at properties, and this time agreed to buy one. (*See id.* at 812:23-813:8.) The house was under construction, and both Martin and Grano were involved in suggesting improvements and changes to the architect during the construction process, and both were involved in furnishing the house. (*Id.* at 813:17-815:20, 846:1-18.) The architect overseeing the project was Grano's father's close friend, and he said that both parties insisted on certain things when planning the renovations. (*Id.* at 18:10-14, 354:3-9, 348:21-24.)

***12** 60. In early 2018, Grano and Martin's arguments began to intensify. On March 16, 2018, Grano messaged Martin, stating that she is a "bad person" and "do[es] all this because [she] know[s] that the child keeps [Grano] with [her]" even though their relationship was over. (P's Ex. I Binder 2 Tab 4 at 20.)[9] Grano added, "I'll pay for your ticket to USA but before that, we sign the divorce and fair agreements about me with [D.H.]." (*Id.*) Grano told Martin that he decided "not to be with [her] anymore," and he stated, "Now you must decide if you want to separate smoothly and that [D.H.] and I have fair conditions or if you leave straightaway and you keep messing with me like you've been doing so far with my son." (*Id.*) Martin said she could not decide at that moment. (*Id.*) Grano responded, "Very well.... I'm meeting the lawyer on Monday as well to file for divorce." (*Id.*) He was clear, however, that he was "breaking up with [Martin], not [his] son." (*Id.*) Grano concluded that he and Martin were "over," but before Martin took D.H. anywhere, she had to inform Grano where they were going and Grano would have to agree. (*Id.* Ex. I Binder 2 at 21.) Grano stated, "And here it is all in writing. So then the judge sees everything. I haven't kicked you out. And I have given you the option to agree and pay for your trip to USA if it is your wish to leave." (*Id.* Ex. I Binder 2 at 21-22.) Martin responded, "I'm not

  

staying here to live and go through everything you put me through a year ago and even less with the baby," to which Grano stated, "And if your wish is to stay, I'm willing to help with everything, what's more, I prefer it and you know it. So I have my son close and I can see him daily." (*Id.* Ex. I Binder 2 at 22.) Despite these messages, Grano and Martin did not break up or get divorced in early 2018.

[9] All subsequent citations to "P's Ex. I Binder 2" refer to Tab 4 of that Binder.

61. On April 10, 2018, Martin traveled with D.H. to New York to visit her family. (Tr. at 38:24-39:7.) While in New York, Martin registered D.H. as a Spanish citizen at the Spanish Consulate. (*Id.* at 649:6-21; P's Ex. G.) Grano pressured Martin to do this, and Martin agreed because, among other things, registering D.H. as a Spanish citizen would grant him access to Spain's public healthcare. Martin also did not want D.H. to be "illegal" while in Spain. (Tr. at 649:22-25, 652:5-14.) Just a week before the trip, Grano asked Martin if he could go out with friends while she was in New York or if he "should be locked up at home," because Grano was afraid that Martin would suspect that he was cheating on her and then not bring D.H. back to Spain or "blackmail" Grano. (P's Ex. I Binder 2 at 24.) Martin said it bothered her that Grano had to "go out to party" while she was gone, but that she would not prohibit Grano from doing so. (*Id.*)

62. While Martin was in New York, she told Grano that D.H. would have to come visit New York once or twice a year while they were living in Spain. Martin added that when D.H. was old enough to fly alone, he could spend half the summer in New York. (P's Ex. I Binder 2 at 27.)

63. A few weeks later, Martin traveled back to Spain with D.H. On May 23, 2018, Martin went to the City Hall in Sant Cugat and, using the Spanish citizenship she obtained for D.H. in New York, registered D.H. as a resident of the town. (Tr. at 41:14-20; P's Ex. F.) Under Spanish law, D.H. was a legal resident of Sant Cugat, and any removal of him from there would require the consent of Martin and Grano. (*See* Tr. at 586:1-4.)

64. In July 2018, the work on the house that Martin and Grano purchased was completed, and the pair signed the deed to the new house. (*See id.* at 48:24-49:1.) Because Martin and Grano were married under a separation-of-property regime, and because Martin did not work or otherwise have an income, Martin was unable to get a mortgage for the purchase of the house. (*Id.* at 37:24-38:12.) Thus Grano alone took out the mortgage, but under Spanish law, Martin still had to sign the mortgage documents. (*Id.* at 50:15-21.) At the signing, Martin and Grano were present, as well as Grano's father, a notary public, two people from the bank, and two people representing the seller of the house. (*Id.* at 50:22-51:1.) The notary public read the entire document aloud and explained its contents to the parties present. (*Id.* at 51:2-4, 647:20-24.) One of the lines in the contract stated that the house was to be Grano and Martin's "usual and convivial" home. (P's Ex. P; Tr. at 50:10-14.) The notary explained to Martin that usual meant everyday and convivial home meant it was a shared, family home. (Tr. at 53:1-4.) Martin signed the document. (*Id.* at 646:21-23.) Martin recalled that the document was explained to her, but she did not think that by signing it, it meant she would stay in Spain permanently. (*Id.* at 647:20-648:12.) Grano asked Martin if she would sign a document waiving all rights to the house if the couple later separated, but Martin refused to do so. (*Id.* at 861:9-16.)

***13** 65. After the signing, Grano received the loan and closed on the house, and the parties started living there as a family with D.H. (*Id.* at 60:4-9.) The electricity bill of the new home was in Martin's name. (*Id.* at 60:22-25; P's Ex. Q.)

66. The new house was farther away from the downtown area than the previous apartment in which Martin and Grano had been living, so Grano agreed to get Martin a car once they moved. (*See* Tr. at 845:8-16.) They first went to a Peugeot dealer, and then a Nissan dealership, but ultimately Grano bought an Audi, which Martin preferred. (*Id.* at 55:2-56:11, 844:1-8.)

67. From approximately August through October 2018, Grano provided Martin with about €40,000. (*Id.* at 100:9-25.) This money was used to take care of household needs, such as buying furniture or groceries, and anything beyond that could be used by Martin for discretionary spending, though Martin said that Grano did not provide enough for her to use the money on herself beyond weekly trips to the salon. (*See id.* at 645:9-24, 820:15-821:19.)

68. Throughout the period when Martin returned to Spain with D.H., she continued to have arguments with Grano regarding her not having a job, her appearance, and her failure to do chores up to Grano's standards. During the summer of 2018, Martin and Grano's arguments intensified and were occurring four or five times per week. (*See id.* at 735:8-15.) For instance, Grano screamed at Martin when D.H. spit up on the couch and when D.H. was loud and fussy at a restaurant. (*Id.* at 655:1-21, 732:17-733:8.) Martin testified that Grano was in constant fear that Martin was going to take D.H. back to the United

  

States, a fear which he often shared with his parents. (*Id.* at 552:5-16.) But despite Grano's fear and despite Grano and Martin's arguments, in the summer of 2018, Martin told Grano that she wanted to have more children, and while Grano was at first dismissive of the idea, he eventually became receptive. (*Id.* at 53:13-20, 305:8-20.)

69. At one point, Grano took D.H.'s passport because he feared that Martin was going to take D.H. to the United States. (*Id.* at 207:4-22.) But when Martin told Grano that her grandmother was sick, Grano agreed to give her D.H.'s passport back so that she could travel with D.H. to see her ailing grandmother, on the assumption that Martin and D.H. would return to Spain after the trip. (*Id.* at 268:7-269:4.)

70. Because the parties agreed that Martin was going to take a multiweek trip with D.H. to New York in the fall, and because Martin still did not have a job and could not help pay D.H.'s tuition at Agora, the parties agreed that they would not enroll D.H. in school in September 2018 as they initially planned, but instead would have him start in January 2019. (*Id.* at 57:9-58:8, 834:22-835:13.)

71. On or around September 28, 2019, Martin and Grano took D.H. to get his first haircut, but they were arguing intensely. (*See id.* at 739:7-740:1.) Grano had tasked Martin with getting some sort of refund from a maid service, but Grano did not receive the reimbursement when he expected to, so he screamed at Martin while driving at a very high rate of speed on the way to and from the barbershop. (*Id.* at 739:8-16, 740:2-11.) When they returned home, Martin was in the kitchen holding D.H. (*Id.* at 741:5-6.) Grano yelled at Martin, but Martin was not responding. Grano then grabbed Martin by the arm with which she was holding D.H., and Grano slapped Martin's arm, leaving a mark. (*See id.* at 740:24-741:15.) D.H. and Martin began crying. (*Id.* at 741:12-15.) Grano denied ever grabbing or slapping Martin's arm. (*Id.* at 231:25-232:5.) When Grano saw Martin and D.H. crying, he left the kitchen. (*Id.* at 741:23-25.) Sometime later, Grano's parents came over, and both Grano and Martin told them what happened. (*See id.* at 742:18-743:14.) When Grano's parents left, Grano got angry because he believed his parents had sided with Martin. (*Id.* at 745:2-6.) Grano started yelling at Martin and banging his hand on the kitchen island, at which point Martin ran into D.H.'s room and went into D.H.'s closet. (*Id.* at 745:6-9.) While in the closet, Martin left a voice note for her friend Baco asking what to do. (*Id.* at 745:12-15; R's Ex. S.) Martin also testified that she called a domestic violence hotline, but the hotline said she had to call back when Grano was not present. (Tr. at 747:1-19.) At some point later, Martin contacted the U.S. Embassy in Barcelona to report the abuse. (*See* R's Ex. Y.)

***14** 72. Martin testified that after the September 28 altercation, she began sleeping in D.H.'s bedroom, and she left a bag under his crib packed with some clothes and travel documents. (Tr. at 749:2-24.) Martin testified that at this time, she made up her mind that she would move back to New York. (*Id.* at 751:23-752:7.) She did not, however, share this decision with Grano.

73. Martin testified that in addition to the incident described above, Grano slapped her across the face and put his hand over her mouth on several occasions. (*Id.* at 414:15-24, 904:17-25.) Grano denied ever doing so. (*Id.* at 231:24-232:8.)

74. Martin suggested that based on the way Grano behaved toward D.H. on September 28, as well as on many other occasions, Grano is not fit to raise D.H. She testified that while she and D.H. lived in Spain from October 2017 to October 2018, Martin spent nearly twenty-four hours per day with D.H., while Grano spent only a couple of hours each day with the Child. (*Id.* at 553:22-25.) Grano never changed D.H.'s diaper while in Spain and fed and bathed D.H. only once or twice. (*Id.* at 553:10-15, 555:6-13, 556:3-8.) Martin said she left D.H. alone with Grano on only one occasion, and Grano had a difficult time taking care of the Child. (*Id.* at 554:13-16.) On three occasions, Martin had to take D.H. to a hospital, but Grano never accompanied them. (*See id.* at 558:10-559:15.)

75. On October 23 or 24, 2018, Martin traveled with D.H. to New York. (*Id.* 871:11-13.) Martin had told Grano that the purpose of the trip was to visit her sick grandmother and that she would return in late November. (*Id.* at 58:21-59:13, 835:1-4.) Grano's father drove Martin to the airport. Martin's bags were packed for a typical three-week trip, not for a permanent move. (*Id.* at 284:25-285:17.)

76. For the first three weeks that Martin was in New York, she communicated with Grano as she had on her previous trips, but as time went on, the communication became less frequent. Martin told Grano that she intended to extend her stay in New York for a few days. Grano told Martin that she could stay in New York but that she had to allow Grano to retrieve D.H. and bring him back to Spain. When Martin refused, Grano realized that Martin had no intention of returning to Spain with D.H. (*See id.* at 61:24-63:11.)

77. Martin testified that while D.H. lived in Spain, he was introverted and overly attached to her. But since moving

  

to New York, D.H. started speaking more and his demeanor changed for the better. (*Id.* at 752:20-753:6.)

78. Around March 2019, Grano filed a petition in Spain seeking a declaration that Martin illegally removed D.H. from Spain. (*Id.* at 71:17-25.) Shortly thereafter, Grano also commenced divorce and custody proceedings in Spain. (*Id.* at 76:22-23.) On July 2, 2019, the Spanish Court issued a decision that Martin's retention of D.H. in the United States violated Grano's rights under Spanish law, (R's Ex. LL), and on September 5, 2019, the Spanish court issued an order granting Grano provisional custody of D.H., (R's Ex. OO). Martin appeared in the Spanish proceedings for the limited purpose of petitioning to nullify the court's orders because, she argued, her signature had been forged on the "acknowledgment of receipt of the notification of [Grano's] claim." (P's Ex. JJ at 1.) The Spanish court denied her petition. (*Id.* at 4.)

79. Martin believes that, because of the divorce proceedings initiated by Grano, she no longer enjoys legal status in Spain. (*See* Tr. at 760:6-9.)

***15** 80. In May 2019, Martin filed a custody petition in Westchester County family court. (*See id.* at 753:7-13, 793:2-16.) Shortly thereafter, Martin learned that Grano was coming to New York to oppose Martin's custody petition, and she was afraid that Grano might hurt her, so she filed and obtained an order of protection against him. (*See id.* at 79:24-80:4, 753:7-16, 792:4-20.) On June 20, 2019, the Westchester family court stayed the custody proceedings pursuant to Article 16 of the Hague Convention.

81. The factual findings the Court has made to this point are based in part on the credibility determinations made during the hearing, which at times the Court has explained explicitly and at other times are implicit in the facts described. That said, the Court finds it necessary to expand further on the credibility of the parties in this case. Starting with Grano, he minimized his abuse of Martin, either because he was lying to the Court or because he does not understand that his behavior was abusive. As the Court will describe in greater detail below, Grano exerted coercive control over Martin – even during the hearing it at times looked like he was trying to influence her while she was on the witness stand – yet he repeatedly tried to downplay the abusive nature of their relationship and its impact on Martin. For instance, Grano said he did not, nor would he ever, pressure Martin to have doctors induce the child's birth, but messages show that he did just that. Additionally, Grano stated that he did not believe he was abusive toward Martin, despite being shown numerous messages where he viciously called her disparaging and hurtful names and told her she was worthless. Further, Grano stated that he had never seen Martin cry during an argument, which the Court finds incredible considering her credible testimony that she regularly cried when Grano yelled at or demeaned her, the fact that she regularly cried during the hearing, and human nature. Martin too, however, was not always credible during the hearing and exaggerated some of her allegations against Grano. As explained in greater detail below, the Court finds that, with one exception, she exaggerated or fabricated allegations regarding physical abuse Grano inflicted on her. Additionally, as noted above, her testimony that she and Grano did not have an agreement that she would move back to Spain while Grano was in New York for the birth of D.H. is contradicted by numerous messages she sent in July 2017 that establish she had decided to move back to Spain no later than July 22. Both Grano and Martin have thus shown a tendency to try to bend the truth or lie in judicial proceedings to benefit their positions. Additionally, as noted above, the Court found that Grano's parents, Hernandez and Font, as well as Martin's aunt, Castillo, were not credible witnesses. (*See supra* ¶¶ 51-52.)

82. Both parties retained experts who testified at the hearing. Dr. Peter Favaro, Martin's expert on intimate partner abuse and coercive control, conducted an analysis of Martin and Grano's relationship. In doing so, Dr. Favaro assumed the truth of everything Martin reported to him and did not speak with Grano, D.H., or any other witnesses. Dr. Favaro did not intend to conduct a comparative analysis, and his goal was not to assess credibility. Rather, his intent was to evaluate Martin and Grano's relationship assuming what Martin reported was accurate. On this score, Dr. Favaro determined that Grano exerted coercive control over Martin and that Martin's experience was consistent with battered wife syndrome, as she exhibited the symptoms of catastrophic stress, anxiety, depression, and low self-esteem. Dr. Favaro testified that a victim of coercive control is incapable of establishing an identity separate and apart from what the abuser says the victim's identity should be. Further, the abuser obliterates the decision-making of the victim. Dr. Favaro noted that a child who witnesses coercive control or lives in a coercively controlling environment receives the same type of emotional trauma as a child who is directly abused. In fact, even in utero, a child's brain may develop differently if his mother is the victim of coercive control.

***16** 83. Based on the evidence presented in this case, Grano did coercively control Martin. The WhatsApp messages and voice notes show that Grano called Martin degrading names and tried to make her feel worthless on a

  

regular basis. Further, he essentially admitted that he tasked her with completing housework and yelled at and insulted her if it was not done to his liking. Moreover, Martin had no family in Spain and was reliant on Grano for financial support, tipping the scales of control even greater in Grano's favor. Finally, Martin credibly testified that Grano tried to control all aspects of her life, including her employment, her appearance, and the way she raised D.H. Grano did not credibly refute any of these allegations.

84. The Court also finds by a preponderance of the evidence that on September 28, 2018, Grano grabbed and slapped Martin's arm while she was holding D.H. This incident so frightened Martin that she hid in the closet with D.H., called Baco, who is a human rights lawyer, and called a Spanish domestic violence hotline. That said, while any domestic violence is by its very nature a severe and major problem, the other physical abuse alleged here either did not happen or was exaggerated by Martin. While Martin now alleges that Grano slapped her and covered her mouth on several occasions, Grano denies the allegations, and there is no corroborating evidence supporting Martin's account. To the contrary, Martin repeatedly told medical personnel, including her doctor in New York and her expert in this case, that Grano never physically abused her. While it is not unusual for a victim to hide the abuse that she suffers, here Martin did report the emotional abuse to her doctors and her expert, but she specifically "state[d] no physical abuse," (R's Ex. E at 83), and it is unlikely that Martin would be too embarrassed to allege physical abuse while not feeling the same way about reporting Grano's degrading emotional abuse.

85. Petitioner also retained an expert for this case: Crestina Diaz Malnero Fernandez, an expert in Spanish family law and ameliorative and protective measures for victims of domestic abuse in Spain. She explained that Spanish law requires that no more than seventy-two hours can pass between a complaint of domestic abuse and the parties appearing in a specialized domestic violence court. The seventy-two-hour limit is a maximum, and often these cases are more quickly addressed. In the domestic violence courts, psychological abuse is considered the same as physical abuse. Once an allegation of domestic abuse is made, the police department will, among other things, detain the alleged abuser for questioning. After the police department collects its evidence, a specialized district attorney presents the case in front of a specialized judge in the domestic violence court. It is a civil proceeding, and if children are involved, the standard the judge applies when determining if an order of protection is appropriate is the "best interests of the child" standard. The judge has broad discretion to implement whatever measures she believes are necessary to protect the child and victim. For example, drug treatment programs or mandated therapy are often ordered by domestic violence judges.

86. Fernandez also testified that if allegations of domestic abuse are made in family court, and the family court believes that there is a chance that such allegations are credible, the family court loses jurisdiction over the case and must transfer it to the domestic violence court. Accordingly, even if there is no mention of domestic abuse until a hearing in a family court case, if the family court judge finds the allegations to be credible, she must transfer the case to the domestic violence court.

***17** 87. Here, even though Grano adjudicated his custody proceeding to the point the he obtained provisional custody, Martin could still file a new claim at the domestic violence court, and any order of protection or other ruling of the domestic violence court would supersede that of the family court.

## CONCLUSIONS OF LAW

88. The Hague Convention was adopted in 1980 "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention pmbl. "The Convention's drafters were particularly concerned by the practice in which a family member would remove a child to jurisdictions more favorable to his or her custody claims in order to obtain a right of custody from the authorities of the country to which the child had been taken." *Mota v. Castillo*, 692 F.3d 108, 112 (2d Cir. 2012) (internal quotation marks and alterations omitted). "The Convention's remedy of repatriation is designed to preserve the status quo in the child's country of habitual residence and deter parents from crossing international boundaries in search of a more sympathetic court." *Souratgar v. Lee*, 720 F.3d 96, 102 (2d Cir. 2013) (internal quotation marks omitted). To that end, "[t]he Convention does not establish substantive standards for resolving the merits of any underlying custody dispute. Rather, the Convention's focus is simply upon whether a child should be returned to her country of habitual residence for custody proceedings." *Mota*, 692 F.3d at 112 (citation omitted).

89. To prevail on a claim under the Hague Convention, a

  

petitioner must show by a preponderance of the evidence that (1) "the child was habitually resident in one State and has been removed to or retained in a different State"; (2) "the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence"; and (3) "the petitioner was exercising those rights at the time of the removal or retention." *Gitter v. Gitter*, 396 F.3d 124, 130-31 (2d Cir. 2005).[10] Here, only the first element of Petitioner's case – habitual residence – is in dispute.

[10] The Convention provides exceptions that apply even if the petitioner makes out his case, (Hague Convention art. 13), one of which will be discussed below.

**Habitual Residence**

90. "The Hague Convention, itself, does not provide any definition of 'habitually resident.' " *Id.* at 131. The Second Circuit had instructed district courts to apply the two-part test set forth in *Gitter v. Gitter*:

> "First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent."

*Hofmann v. Sender*, 716 F.3d 282, 291-92 (2d Cir. 2013) (quoting *Gitter*, 396 F.3d at 134); *see Saada v. Golan*, 930 F.3d 533, 539 (2d Cir. 2019).[11] But on February 25, 2020, the Supreme Court clarified that "a child's habitual residence depends on the totality of the circumstances specific to the case. An actual agreement between the parents is not necessary to establish an infant's habitual residence." *Monasky v. Taglieri*, —— U.S. ——, 140 S. Ct. 719, 723, —— L.Ed.2d —— (2020). The Court noted that "locating a child's home is a fact-driven inquiry," and "courts must be sensitive to the unique circumstances of the case and informed by common sense." *Id.* at 727 (internal quotation marks omitted). Accordingly, "[b]ecause children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations. No single fact, however, is dispositive across all cases." *Id.* In other words, the parents' last shared intent is a relevant consideration, but it is by no means dispositive of the habitual residence inquiry. "[A] wide range of facts other than an actual agreement, including facts indicating that the parents have made their home in a particular place, can enable a trier to determine whether an infant's residence in that place has the quality of being 'habitual.' " *Id.* at 729. "The bottom line: There are no categorical requirements for establishing a child's habitual residence – least of all an actual-agreement requirement for infants." *Id.* The Petitioner "bears the burden of establishing by a preponderance of the evidence a child's habitual residence at the time of the contested removal." *Guzzo v. Cristofano*, 719 F.3d 100, 107 (2d Cir. 2013).

[11] An analysis of acclimatization – the second prong of the *Gitter* test – is not necessarily appropriate where the child is very young. *Pignoloni v. Gallagher*, No. 12-CV-3305, 2012 WL 5904440, at *48 n.49 (E.D.N.Y. Nov. 25, 2012), *aff'd*, 555 F. App'x 112 (2d Cir. 2014) (summary order); *see Guzzo v. Cristofano*, 719 F.3d 100, 108 n.7 (2d Cir. 2013) ("When a child is younger, with less sense of the surrounding environment, courts place more emphasis on the intentions of the parents."); *Nissim v. Kirsh*, 394 F. Supp. 3d 386, 393 (S.D.N.Y. 2019) ("[A]lthough the test is two-pronged, analyzing the intention of the persons entitled to fix a child's place of residence is the most important aspect of the analysis, particularly when a child is young."). Because D.H. was an infant and toddler throughout the relevant period, and because neither party is making an acclimatization argument here, the Court finds questions of acclimatization irrelevant.

***18** 91. A child may be found to have no habitual residence, in which case the Hague Convention does not apply, and the petition must be dismissed. *See, e.g.*, *Carlwig v. Carlwig (In re A.L.C.)*, 607 F. App'x 658, 662-63 (9th Cir. 2015) (child "born under a cloud of disagreement between parents over the child's habitual residence ... had no habitual residence, [so] no further analysis of this matter under the Convention and its implementing legislation is possible, as the Convention does not apply to a child who was never wrongfully removed or retained."); *Delvoye v. Lee*, 329 F.3d 330, 333 (3d Cir. 2003) (where parents' "conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence"). But the Supreme Court's recent decision in *Monasky* has mostly undone the no-habitual-residence line of cases stemming from a lack of parental shared intent, at least for infants. The Court explained that the imposition of a "categorical actual-agreement requirement" is inappropriate because it "would leave many infants without a habitual residence, and therefore outside the Convention's domain," thus

"creat[ing] a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected," which is not what the Convention's signatories intended. *See Monasky*, 140 S. Ct. at 728.

92. Where both parents intend that a child's relocation is conditional, it will not be deemed the parents' last shared intent if the condition precedent is not met. *Mota*, 692 F.3d at 115, *see Hofmann*, 716 F.3d at 293 (no habitual residence in United States where intent to move to United States "was limited by [petitioner's] conditional agreement that the relocation was to be accomplished as a family," but respondent later unilaterally decided to move to United States without petitioner); *Gitter*, 396 F.3d at 135 (finding no clear error in district court's ruling that Israel was not child's habitual residence where respondent moved there "on a conditional basis – namely, that [respondent] would be satisfied with the new arrangements") (internal quotation marks omitted); *Ruiz v. Tenorio*, 392 F.3d 1247, 1257 (11th Cir. 2004) (*per curiam*)(mother did not abandon United States as habitual residence where, among other things, her "intention with respect to the move to Mexico was clearly conditional upon improvements in their marriage, was expressed and in the open, and was well-known to [father]"); *see also Calixto v. Lesmes*, 909 F.3d 1079, 1089-90 (11th Cir. 2018) (collecting cases where "a parent's relocation with a child from one country to another was conditioned upon the occurrence of certain events, [such that] the first country would remain the child's habitual residence if those events did not come to pass"); *Guzzo*, 719 F.3d at 111 (finding habitual residence did not change from United States to Italy where, among other things, the mother's "willingness to attempt a reconciliation in Italy was clearly premised on the understanding that, should the reconciliation prove unsuccessful," the child would continue to reside in the United States); *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009) (collecting cases where "courts have refused to find a change in habitual residence because one parent intended to move to the new country of residence on a trial or conditional basis"). Additionally, if only one party has a conditional intent to relocate, and the other party does not, "it cannot be said the parents 'shared an intent.' " *Mota*, 692 F.3d at 115. Following *Monasky*, the parties' last shared intent is still a relevant consideration, although it is not dispositive.

93. Starting from the present and moving backward, neither party argues that the United States is D.H.'s habitual residence.[12] It is also undisputed that some point prior to October 2017, the parties shared an intent to live with D.H. in Spain. What is disputed, however, is when the parties entered into that agreement, whether that agreement was conditional, and what those conditions were.

[12] Even if Martin did so argue, the Court would not find that the United States is D.H.'s habitual residence. Martin and Grano never agreed that D.H. would relocate to the United States, and while shared intent is not dispositive, it is still a relevant consideration. Also, D.H. had spent the majority of his life in Spain when Grano removed him to the United States. While it took Grano seven months to bring the petition, most of the delay is attributable to the fact that Martin had planned to be in New York for a month to visit her grandmother, and after that month passed, Martin strung Grano along regarding her return to Spain. (*See* Tr. at 68:17-24 (Martin told Grano that she would be in Spain for only a few days more in November 2018); *id.* at 69:18-70:23 (Grano testified that as late as February or March 2019, Martin told him that she would return to Spain with D.H.).) After that, legal proceedings in Spain and the United States had to be undertaken. D.H.'s presence in the United States since October 2018 is the result of Martin's unilateral decision to bring him here, which is what the Convention aims to prevent, not endorse. Accordingly, the United States is not D.H.'s habitual residence.

***19** 94. Respondent argues that the parties did not share any intent prior to September 2017, and thus D.H. has no habitual residence and the Hague Convention does not apply. But as noted, the Supreme Court has cautioned lower courts against adopting this argument. *See Monasky*, 140 S. Ct. at 728. Additionally, Martin's argument fails because the Court finds that the parties did share an intent to move to Spain as a family in July 2017. At that time, when Grano was in New York for D.H.'s birth, the parties were staying together and living as a couple, and they agreed that they would live as a family with D.H. in Spain. Despite Martin's argument that she did not start considering moving back to Spain until September 2017, Grano's testimony, as well as numerous messages, establish that the couple had agreed to Martin's relocation with D.H. in July 2017. Further, because the parties were reconciled at that time – the one-week span while Grano was in New York for D.H.'s birth – the Court finds that the parties' agreement was not conditional on any further or future reconciliation. Indeed, there is no evidence to suggest as much. Accordingly, the Court finds that the parties' shared an intent in July 2017 to live together with D.H. in Spain.

95. The parties' shared intent is further supported by the objective facts surrounding Martin and D.H.'s move to Spain that suggest that the move was indefinite in nature. Martin testified that she sent nearly all of her and D.H.'s belongings to Spain prior to the move. She bought

  

one-way plane tickets. She had no bank accounts or other financial ties to the United States. She had no property interests in the United States, and she signed documents to ensure that Grano could get a mortgage on a home that they intended to and did in fact share in Spain. Martin had an active role in renovating and decorating that home. The electricity bill for that home was in Martin's name. Grano purchased a car for Martin's use in Spain. Martin and Grano made plans to enroll D.H. in school in Spain, with an eye toward his education in future years. Martin had legal status in Spain that essentially equated to that of a Spanish citizen, and D.H. was a Spanish citizen. In fact, Martin registered D.H. as a Spanish citizen on a trip she took to New York in April 2018, after which she returned to Spain and lived with Grano. While Martin testified that she was ambivalent about registering D.H. as a Spanish citizen, and did it only because Grano pressured her to, Martin later testified that she registered D.H. because she did not want him to be "illegal" in Spain and she wanted him to have access to public benefits there. Martin further registered D.H. as a citizen of the town in which they lived after she returned to Spain. These factors overwhelmingly suggest that Martin intended her and D.H.'s stay in Spain to be indefinite. *See Feder v. Evans-Feder*, 63 F.3d 217, 219, 224-25 (3d Cir. 1995) (Australia was child's habitual residence where, among other things, parents put their house in United States on the market and sold various personal items in preparation for moving to Australia, purchased home in Australia, pursued employment in Australia, and arranged for child's schooling in Australia); *see also Maxwell*, 588 F.3d at 252 (factors to considering when determining habitual residence include, but are not limited to, where the parent's or child's belongings remain; what was said to family members and friends prior to travel; whether one-way or round-trip tickets were purchased; the location of financial accounts, property interests, or insurance; and the type of travel documents, such as temporary or long-term visas, the parent and child obtained); *Mozes v. Mozes*, 239 F.3d 1067, 1078 (9th Cir. 2001) (where parties take "steps to set up a regular household together," the country of that household is likely the child's habitual residence after an "appreciable" period) (internal quotation marks omitted), *abrogated by Monasky*, 140 S. Ct. 719.

96. As noted, the Court finds by a preponderance of the evidence that the parties did not have a conditional agreement in September 2017 – as Grano believed that Martin's relocation was indefinite – nor did Martin have a unilateral intent to move back to the United States if her marriage with Grano was not rehabilitated. Accordingly, the parties' shared intent established in July 2017 remained unchanged through September 2017. But even if the parties did share an intent in September 2017 to live in Spain conditioned on the rehabilitation of their marriage, that agreement does represent the parties' last shared intent for purposes of habitual residence, because that condition was never satisfied – *i.e.*, Martin and Grano's marriage was not rehabilitated. *Hofmann*, 716 F.3d at 293; *Mota*, 692 F.3d at 115. And even if Martin developed such a unilateral conditional intent, because Grano "did not share his wife's understanding, ... it cannot be said the parents 'shared an intent' " for Spain to be D.H.'s habitual residence in September 2017. *Mota*, 692 F.3d at 115. Accordingly, even if the parties had a conditional agreement or Martin had a unilateral conditional intention in September 2017, it would have no bearing on the parties' last shared intent from July 2017.

***20** 97. In any event, the parties' last shared intent can no longer be dispositive under *Monasky*. Thus, even if Martin had or the parties shared a conditional intent to live in Spain as a family, the evidence set forth in ¶ 95 above – *i.e.*, the objective facts suggesting D.H. would remain indefinitely in Spain – is relevant to the habitual residence inquiry. Even in the pre-*Monasky* landscape, nearly all of the conditional intent cases that Respondent cites also undertake an analysis of the parties' actions in determining whether the relocation was intended to be temporary or indefinite. *See Guzzo*, 719 F.3d at 111 (no clear error where district court found relocation to Italy temporary in nature where mother and child entered on temporary visas and registered for health care in New York); *Gitter*, 396 F.3d at 135 (no clear error in district court finding relocation to Israel temporary where only father cut ties with New York and no evidence that mother cut any of her ties); *Ruiz*, 392 F.3d at 1257-58 (no clear error where district court found Mexico was not habitual residence where mother "seems to have done nothing in Mexico, beyond taking care of the children, that would indicate that she intended to stay. To the contrary, she retained bank accounts and credit cards in the United States, and had her nursing license transferred and mail sent to Florida where her sister lived."); *see also Maxwell*, 588 F.3d at 253 ("[T]he district court appropriately determined that the following facts support the conclusion that [mother] intended that the move to Australia would be conditional. [Mother] left many possessions behind in North Carolina; [mother] reserved round trip tickets for herself and the children; [mother] and the children traveled with Australian tourist visas that limited their stay in Australia to three months; and [mother] maintained her local financial accounts, North Carolina Medicare insurance, and the lease and insurance on her vehicle."); *Nissim*, 394 F. Supp. 3d at 396 ("The family made the decision to temporarily relocate to California, as a family, to pursue the lucrative economic

  

opportunity presented to Petitioner."); *Prinz v. Faso*, No. 03-cv-6653, 2004 WL 1071761, at *5 (W.D.N.Y. May 12, 2004) (finding relocation to Germany was temporary because "[t]he parties maintained their home in New York, maintained their New York bank and investment accounts, and maintained their automobiles in the United States. Many of the family's belongings remained in the United States. While the petitioner provided plausible explanations as to why the home was not sold, why large items were not shipped, why certain accounts were kept open, and why the couple maintained their vehicles in the United States, the fact that the parties maintained such substantial holdings in the United States indicates that there was an intent, at least on behalf of [mother], that the family could return to life in the United States immediately if any family member became disenchanted with life in Germany."). Here, unlike the cases on which Respondent relies, almost all of the factors to be considered in determining whether a move a was temporary or indefinite support a finding that Martin and D.H.'s move was indefinite.[13]

[13] The other cases on which Respondent relies are also distinguishable. In *Hofmann*, the Second Circuit did not disturb a district court's findings that parents had agreed only to a conditional relocation (that they would move to the United States as a family) where the mother developed a unilateral intention to divorce and relocate to the United States without the father "before the family relocation was complete" (before the father, who had been commuting, permanently came to the United States). *Hofmann*, 716 F.3d at 293. Here, the family relocation was not only complete at the time that Martin made the unilateral decision to move to New York with D.H., but Martin took a number of steps to establish her and D.H.'s permanent residence in Spain. Again, the facts of the instant case suggest that Martin viewed the relocation as indefinite, not temporary, as opposed to the father in *Hofmann* who never actually relocated. In *Sanguineti v. Boqvist*, No. 15-CV-3159, 2015 WL 4560787, at *14 (S.D.N.Y. July 24, 2015), the court found that a parent who had conditionally agreed to a relocation "sought the return of [the child] to Quebec *as soon as she began* to feel that the condition precedent to her consent to [the child's] relocation to New York would not be met." (emphasis added). That case is also distinguishable from the instant case, as Martin stated that her rehabilitation attempt was unsuccessful after two weeks, yet she remained in Spain for nearly another year, during which time she (among other things) established a home in Spain, arranged for D.H.'s Spanish education, and traveled to the United States with him and returned to Spain.

98. As the Second Circuit instructs (and as seemingly adopted by the Supreme Court in *Monasky*), "at bottom, [the habitual residence] inquiry is designed simply to ascertain where a child usually or customarily lives." *Saada*, 930 F.3d at 539 (internal quotation marks omitted); *see also Monasky*, 140 S. Ct. at 726 ("The place where a child is at home, at the time of removal or retention, ranks as the child's habitual residence."). While intent is helpful to that determination, so too are the objective facts regarding where the child actually lives. Not only do Martin's actions while in Spain suggest that her intent was to indefinitely live there, but those facts also suggest that D.H. "usually or customarily" lived in Spain. D.H. spent less than three months of his life in New York before moving to Spain for nearly a year. While in Spain, his family built a home, discussed long-term education for him, took him to see doctors, and more generally went about living a life there that was settled, not transient. These facts all weigh in favor of finding that Spain is D.H.'s habitual residence. *See id.* ("Italy, where [child] spent almost the entirety of the first two years of his life, is the country where he 'usually or customarily lives.' ") (quoting *Guzzo*, 719 F.3d at 109).

***21** 99. Martin argues that the Court should not consider the evidence of Martin's actions while in Spain, because a court's determination regarding whether a move was conditional should primarily focus on the credibility of the parent's testimony, and only secondarily consider whether the actions the parties took suggested that the move was temporary or indefinite. (Doc. 35 ("R's Reply") at 9-10 (citing *Grau v. Grau*, 780 F. App'x 787, 795 (11th Cir. 2019)) (*per curiam*) and *Shah v. Federbush*, No. 19-CV-4485, 2019 WL 5060496, at *9 (S.D.N.Y. Oct. 9, 2019), *appeal filed*, No. 19-3713 (2d Cir. Nov. 6, 2019).) That is plainly no longer the law under *Monasky*, but even if it were, Martin's testimony was not as credible as she suggests, and thus it does not help her here. She testified (and argued in her post-hearing briefing) that she did not consider moving back to Spain until August or September 2017, despite the presence of numerous messages that clearly establish she had agreed to return to Spain in July 2017. Her testimony is largely corroborated only by her interested witnesses, who are either incredible or not supported by documentary evidence despite the voluminous record of messages sent by Martin available in this case. Moreover, Grano's testimony on the issue of Martin's agreement to return to Spain is credible in that it is largely corroborated by the messages in the record. Accordingly, Martin cannot succeed here through conclusory statements that she was more credible than Grano.

100. Martin next argues that, as a victim of coercive control, she could not have a shared intent to relocate to Spain, because coerced residence is not habitual residence

  

within the meaning of the Hague Convention. (R's Mem. ¶¶ 122-127.) Petitioner – shockingly – does not address this argument in his reply brief.

101. Some courts find that habitual residence may not be established if the removing spouse is coerced involuntarily to move to another country. *See Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001) (if one parent "so dominated decisions and controlled information in the marriage that [the other parent] lacked information regarding" the purpose of the move to a new country, any intention to move to a new habitual residence could not be considered "shared"); *In re Ponath*, 829 F. Supp. 363, 368 (D. Utah 1993) ("[C]oerced residence is not habitual residence within the meaning of the Hague Convention."). While these holdings are not binding, the Court finds their reasoning persuasive, although only on the issue of shared intent, which is no longer dispositive.

102. Despite Martin's argument, however, Grano has established by a preponderance of the evidence that Martin's agreement to return to Spain with D.H. was voluntary. While Martin was the victim of coercive control, Martin's decision making was not "obliterate[d]" at the time she agreed to move back to Spain, as Martin suggests. At that time, in July through September 2017, Martin had been living in New York without Grano for several months. While they regularly communicated, there is no indication that at that time Grano was coercively controlling Martin to the extent that her decisions were not acts of her own agency. In fact, during that span, Grano was suggesting that the parties get divorced, (*see* Tr. at 162:19-21), giving Martin an opportunity to get out of the relationship while being thousands of miles away and surrounded by her family in New York.

103. The situations that Dr. Favaro described in which a victim goes back to his or her abuser are not present here. He testified that a victim is likely to go back when it is the only life the victim knows or when the victim does not have an ability to go elsewhere. But Martin was living at home with her family, thousands of miles away from Grano, and had been living that way for months. She thus not only had the ability to get away but did in fact get away from her abuser and into a situation in which she was financially and emotionally supported without the need to rely on Grano. A finding here that Martin was unable to make any voluntary decisions would essentially mean that any time any person was the victim of coercive control, they are never again capable of making a voluntary decision relating to that relationship, which at the very least is not supported by the record here.

***22** 104. The cases on which Respondent relies for this argument are also inapposite. In *Tsarbopoulos*, the court found that the mother could not have shared an intent to relocate because the father controlled the information in their marriage and concealed certain information that would have directly impacted her decision regarding relocation. *See* 176 F. Supp. 2d at 1055. And in *In re Ponath*, the father took the mother and child on a vacation to Germany, but when the mother tried to return to the United States, the father "refused to permit her and the minor child to return." 829 F. Supp. at 366. The type of trickery and concealment present in *Tsarbopoulos* and *In re Ponath* are simply not present here. And while Grano's treatment of Martin is reprehensible, I do not find that it obliterated her decision-making power – at least not in July through October 3, 2017.

105. In sum, the parties' last shared intent was when they agreed in July 2017 for D.H. to live in Spain and that their life in Spain was to be indefinite, not temporary. Additionally, D.H. had numerous ties to Spain, including the fact that he spent the majority of his life there before he was unlawfully taken to the United States, he had a home and went to doctors there, and his parents made plans for his future there. Accordingly, Spain is D.H.'s habitual residence.

**Grave Risk Exception**

106. "While the Convention is designed, in part, to ensure the prompt return of children wrongfully removed or retained from their country of habitual residence by one parent, it also protects children who, though so removed or retained, face a real and grave risk of harm upon return." *Ermini v. Vittori*, 758 F.3d 153, 156 (2d Cir. 2014). Accordingly, even where a petitioner establishes the three elements required to prevail on a claim under the Hague Convention, the Convention provides for a "grave risk exception."

107. The Convention's grave-risk exception is an affirmative defense that the respondent must prove "by clear and convincing evidence," although "subsidiary facts need only be proven by a preponderance of the evidence." *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 404 & n.10 (E.D.N.Y. 2005); *see* 22 U.S.C. § 9003(e)(2)(A).

108. Article 13 of the Hague Convention states that, notwithstanding the other provisions of the Hague Convention,

  

> the judicial ... authority of the requested State is not bound to order the return of the child if the person ... which opposes its return establishes that ... there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Hague Convention, art. 13. Under Article 13(b), as relevant here:

> [A] grave risk of harm from repatriation arises ... in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. The potential harm to the child must be severe, and the ... level of risk and danger required to trigger this exception has consistently been held to be very high. The grave risk involves not only the magnitude of the potential harm but also the probability that the harm will materialize.

*Souratgar*, 720 F.3d at 103 (internal quotation marks, emphasis, citations, and alterations omitted). This exception is to be interpreted narrowly, "lest it swallow the rule." *Id.* (internal quotation marks omitted); *see Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000) ("The level of risk and danger required to trigger this exception has consistently been held to be very high.") (collecting cases).

109. "The Article 13(b) inquiry is not whether repatriation would place the respondent parent's safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm." *Souratgar*, 720 F.3d at 104. But "[e]vidence of prior spousal abuse, though not directed at the child, can support the grave risk of harm defense, as could a showing of the child's exposure to such abuse," though "[e]vidence of this kind ... is not dispositive in these fact-intensive cases." *Id.* (internal quotation marks, alteration, and citation omitted).

***23** 110. For the exception to apply, the child need not have "previously been physically or psychologically harmed," but the court must determine that repatriation will "expose him to a present grave risk of physical or psychological harm, or otherwise place him in an intolerable situation." *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008). "Sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk." *Souratgar*, 720 F.3d at 104 (collecting cases); *see Ermini*, 758 F.3d at 165. Under certain circumstances, however, "witnessing the abuse of [one's] mother is enough to establish the applicability of the defense." *Mohacsi v. Rippa*, 346 F. Supp. 3d 295, 320, 322 (E.D.N.Y. 2018), *appeal filed*, No. 18-3627 (2d Cir. Dec. 6, 2018); *see Davies v. Davies*, 717 F. App'x 43, 49 (2d Cir. 2017) (summary order) (finding no error in district court's grave risk finding "premised on overwhelming evidence of Mr. Davies's extreme violence and uncontrollable anger, as well as his psychological abuse of Ms. Davies over many years, much of which was witnessed by K.D.") (internal quotation marks and emphasis omitted).

111. "[T]he exercise of comity that is at the heart of the Hague Convention requires us to place our trust in [other signatories'] courts to issue whatever orders may be necessary to safeguard children who come before them." *Saada*, 930 F.3d at 539-40 (internal quotation marks and alterations omitted). Thus, even where a child is at grave risk if repatriated, the principles of comity require the Court to "determine whether there exist alternative ameliorative measures that are either enforceable by the District Court or, if not directly enforceable, are supported by other sufficient guarantees of performance." *Id.* at 541. The Court may consider, among other things, "whether [the other country's] courts will enforce key conditions" to protect the child. *Id.*

112. "At the same time, the jurisdiction of our district courts is not limitless," and while U.S. district courts "are free to enter conditional return orders," they "retain no power to enforce those orders across national borders." *Id.* at 540 (internal quotation marks omitted). Thus, "in cases in which a district court has determined that repatriating a child will expose him or her to a grave risk of harm, unenforceable undertakings are generally disfavored, particularly where there is reason to question whether the petitioning parent will comply with the undertakings and

  

there are no other 'sufficient guarantees of performance.' " *Id.* (footnote omitted)

113. Most of Respondent's grave risk argument centers on her allegation that she was the victim of coercive control. As noted, the Court finds that Martin was in fact the victim of Grano's coercive control. The Court does not, however, find that Martin has carried her burden to establish by clear and convincing evidence that Grano poses a grave risk to D.H. by virtue of his coercive control over Martin. Martin argues that Grano's abuse directed toward her, some of which D.H. observed, establishes that Grano poses a grave risk to D.H. But that is not supported by the evidence, nor is it supported by any case law holding that the type of abuse D.H. observed can establish that D.H. himself faces a grave risk if repatriated.

114. As a threshold matter, apart from Grano grabbing Martin by the arm on one occasion, Martin's allegations of physical abuse are either exaggerated or fabricated. Accordingly, the abuse alleged here is largely psychological in nature. The Court recognizes the seriousness and harm from psychological abuse, but the issue here is how a small child would perceive and be affected by such abuse and whether it would harm him. While D.H. was exposed to some of Grano's psychological abuse of Martin, and while there is a chance that he will be exposed to it in the future (though likely on a much lesser scale now that Grano and Martin are not together), D.H. is not at a grave risk of being the victim of abuse himself. First, there is simply no evidence that Grano abused D.H. While Respondent testified that Grano yelled at her while she held D.H. and that Grano even screamed at the baby "a couple of times," (Tr. at 653:6-24, 654:10-15, 731:13-732:6), these allegations do not establish "a sustained pattern of physical abuse" or "a propensity for violent abuse." *Porretti v. Baez*, No. 19-CV-1955, 2019 WL 5587151, at *9 (E.D.N.Y. Oct. 30, 2019) ("Evidence of sporadic or isolated incidents of abuse ... have not been found sufficient to support application of the grave risk exception."). Indeed, as noted, courts have "been careful to note that" even "sporadic or isolated incidents of physical discipline directed at the child ... have not been found to constitute a grave risk," *Ermini*, 758 F.3d at 165 (alteration omitted), so here, where the conduct directed against D.H. was sporadic and only verbal, it does not establish that D.H. faces a threat of severe harm if repatriated. Additionally, while Martin argues that "the scientific evidence establishes that Mr. Grano may have caused physical and psychological harm to D.H. by abusing Ms. Martin verbally, psychologically, and via coercive control while she was pregnant," (R's Mem. ¶ 139), she does not provide facts to suggest that D.H. did in fact suffer such harm.

***24** 115. Instead of providing a factual basis that D.H. has been or will be physically or psychologically harmed, Martin instead cites to a number of cases in which courts have found that a child's observation of abuse may be enough to establish grave risk. But none of those cases are analogous. Martin cites only one case in which the court held that " '[p]sychological abuse of the respondent alone, in the form of shouting or other displays of uncontrolled anger in the presence of the child, can support an Article 13(b) defense if it is substantial and pervasive.' " *Valles Rubio v. Veintimilla Castro*, No. 19-CV-2524, 2019 WL 5189011, at *22 (E.D.N.Y. Oct. 15, 2019), *appeal filed*, No. 19-3740 (2d Cir. Nov. 12, 2019); *see* R's Reply ¶ 24. But this statement is *dictum*, as the *Valles Rubio* Court ultimately found that the petitioner's abuse was not sufficiently severe to trigger the grave risk defense.[14] Respondent has failed to identify a single case in which a petitioner's psychological abuse of a respondent was, on its own, enough to establish that their child was at grave risk of future physical or psychological harm. Instead, nearly every case Martin cites that found that the child faced a grave risk included evidence that the respondent – or even the child – was physically abused, and usually severely so. *See Ermini*, 758 F.3d at 157 (petitioner had "a history of physical violence" and "was in the habit of striking the children") (internal quotation marks omitted); *Baran*, 526 F.3d at 1346 ("[Petitioner] was physically and verbally abusive toward Beaty in Sam's presence, [and petitioner] physically endangered Sam (both intentionally and unintentionally) when Sam lived under his roof...."); *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) ("The nature of abuse here was both physical (repeated beatings, hair pulling, ear pulling, and belt-whipping) and psychological...."); *Van De Sande v. Van De Sande*, 431 F.3d 567, 569 (7th Cir. 2005) ("Physical abuse of the daughter by her father began when she started wetting her bed."); *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) ("[Petitioner] has demonstrated an uncontrollably violent temper, and his assaults have been bloody and severe."); *Mohacsi*, 346 F. Supp. 3d at 321 ("Petitioner admitted to physically assaulting Respondent on more than one occasion, and his physical abuse includes one incident in which he nearly choked her to death."); *Ischiu v. Garcia*, 274 F. Supp. 3d 339, 353 (D. Md. 2017) ("[Respondent] also suffered physical abuse at the hands of her husband," including "smashing her in the face and knocking her to the ground"); *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 554 (E.D. Pa. 2010) ("Respondent testified credibly about extensive physical and emotional abuse she suffered throughout her marriage. She testified that the Petitioner beat her repeatedly and, at one point, broke her

  

nose.") (footnote omitted); *Elyashiv*, 353 F. Supp. 2d at 409 (while one of petitioner's children was not physically abused, petitioner abused his other children); *Tsarbopoulos*, 176 F. Supp. 2d at 1060 (numerous allegations of physical abuse); *Krishna v. Krishna*, No. 97-CV-0021, 1997 WL 195439, at *1 (N.D. Cal. Apr. 11, 1997) ("Ms. Krishna alleges that Mr. Krishna has regularly beat her since her son's first birthday and that Mr. Krishna beat her seriously on five separate occasions," and on at least one occasion Ms. Krishna's allegations were corroborated).

[14] The *Valles Rubio* court supported this *dictum* with a citation to *Davies*, 717 F. App'x 43, but, as discussed in ¶ 117 below, *Davies* was not a case in which psychological abuse of the other parent was sufficient to establish grave risk to the child, as it involved physical violence as well.

116. The remaining case on which Martin relies, *Davies v. Davies*, No. 16-CV-6542, 2017 WL 361556 (S.D.N.Y. Jan. 25, 2017), *aff'd*, 717 F. App'x 43, is also inapposite. In her reply brief, Martin argues that Grano's conduct closely mirrors the father's conduct in *Davies*, in which the court found that the father posed a grave risk to his child. But Martin cherry-picks analogous facts from that case while ignoring crucial ones that show why the father's conduct there is different from Grano's here. There was credible evidence in that case that the petitioner "frequently" pushed the respondent; "frequently grabbed" the child and screamed at him and called him names; aggressively overreacted to the child's misbehavior by, among other things, slamming on the car brakes if the child did not put his seatbelt on; broke the family puppy's leg, which the child witnessed; threw things at the respondent while she held the child; "acted violently towards [respondent] in front of [the child]"; keyed a stranger's car; threatened to beat and kill people who he did not like or believed crossed him; violently kicked a dog that was not his; hurled a glass at his wife; and kicked and shattered a glass door while acting "violently angry." *Davies*, 2017 WL 361556, at *3-8. Put simply, the petitioner in *Davies* exhibited far more violent, erratic, and threatening behavior than Grano did here. In sum, none of the cases that Martin cites support her argument that there is precedent to establish that Grano's behavior poses a grave risk to D.H.

117. While it is conceivable that Grano's temper, insults, and propensity for abusive behavior could be visited on D.H., the high legal bar for a grave risk defense requires significantly more. Martin has not shown that the way Grano treated her poses a grave risk that Grano will abuse D.H. under the prevailing case law. Accordingly, the Court finds that Martin has failed to establish the grave risk exception by clear and convincing evidence.

118. Because Martin has not proven that Grano poses a grave risk to D.H., there is no need to discuss Spain's ability to protect D.H. or potential undertakings and ameliorative measures. That said, the Court notes again, for the record and for the use of any court that takes up custody or divorce proceedings in the future, that it has found that Grano exerted coercive control over Martin, which is undoubtedly a serious form of domestic abuse. The Court likewise observes that Grano has almost no experience caring for D.H. without Martin or Grano's parents being present. The Court is confident that the courts of Spain will appreciate the implications of those facts.

***25** 119. Based on the foregoing, Grano's petition for the return of D.H. to Spain is GRANTED. Because the Hague Convention requires the "prompt" return of the child to the country of habitual residence, this Court will grant a stay of return until March 25, 2020, at 5 p.m. to permit a stay application to be made to the United States Court of Appeals for the Second Circuit, and otherwise denies a stay pending appeal.

**SO ORDERED.**

**All Citations**

--- F.Supp.3d ----, 2020 WL 1164800

**End of Document**

57 Misc.3d 1207(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Supreme Court, Monroe County, New York.

L.M.L., Plaintiff,
v.
H.T.N. a/k/a H.T.N., Defendant.

No. 17/7645.
|
Oct. 3, 2017.

**Attorneys and Law Firms**

Alexander Korotkin, Esq., Rochester, Attorney for Plaintiff.

Jonathan C. Trotto, Esq., Rochester, Attorney for Defendant.

Matthew D. Nafus, Esq., Rochester, Attorney for the Child(ren).

**Opinion**

RICHARD A. DOLLINGER, J.

***1** Confronting a request for exclusive use and possession of a marital residence, during the pendency of an action, is a trial for any judge. The balancing of parental interests—property rights of a titled spouse, financial costs of dislocation and the strain of two households on a family budget, uprooting a parent without a full hearing on the merits of who is responsible for the hostile environment in the home—is an Augean challenge.

But, in a state which reveres the best interest of children as the touchstone for judicial determinations in family matters, those interests must trump any other parental interests if a hostile and abusive environment persists in the home during the pendency of a divorce action and the only available remedy to quiet the turmoil is removal of a parent.

In this matter, a wife asks this court for "exclusive use and possession" of the marital residence. The residence is owned jointly by the husband and wife as tenants by the entirety. The couple have two sons, ages 12 and nine. The husband and wife, in affidavits before this court, present contrasting visions of what occurs in the home. The wife contends that she is the primary caretaker and supports the home life. The wife contends that the husband's actions "make it unsafe and inappropriate for the couple to reside together." She characterizes her husband as having a violent temper and claims he starts fights, at one point threatening her with a knife. She states her children have begun sleeping in her bedroom to protect her from the husband. She states that she "is afraid for [her] safety." In her application, the wife attaches to her affidavit a police report from more than two years ago, which details an incident at that occurred at the home. This court declines to credit any of the facts contained in it in this proceeding, as it is hearsay. *Wynn v. Motor Veh. Acc. Indem. Corp* ., 137 AD3d 779 (2nd Dept.2016) (information in a police accident report is inadmissible where the information came from witnesses not engaged in the police business in the course of which the memorandum was made, and the information does not qualify under some other hearsay exception). But, the court does give credit to the fact that it was filed as evidence that law enforcement has responded to this home in the past and that marital strife has existed in this household for some time prior to the initiation of the divorce and the two sons have been exposed to it.

The husband contests nearly every allegation made by his wife. He states that he is the primary caretaker of the sons since birth. He states that he takes the children to appointments, swim lessons, stay with them when they are sick and spends time with them on summer vacations. He alleges that his wife is an alcoholic. He admits that he has participated in verbal arguments with his wife, but he states—uncontradicted—that he never was physically violent towards her.[1] The husband recounts that his wife threatened to kill him and adds another incident in which a man took a picture of him from a drone and threatened to post the picture on Facebook. He said he was afraid that this man was following up on the wife's threat to have him killed. As if the facts were not controverted enough, the wife submitted a reply affidavit, which she denies the substantive allegations and uses the word "false" 22 times when responding to the husband's allegations.

[1] The husband does recount a bizarre incident involving sexual relations with his wife and a timer and alleges that at some point—unspecified—she kicked him.

***2** The attorney for the sons filed an affidavit in support of the wife's application, noting that his clients described their mother as their primary caretaker. The children have told their counsel that the home is a "very stressful

environment" and the situation is "unhealthy." The attorney adds that the children told him that they have seen and heard angry confrontations between their parents and at night they sometimes lock their bedroom doors due to safety concerns. The attorney comments that the sons are "very anxious about the current living conditions" and, he concludes, "a continuation of the status quo is not in their best interests." Importantly, the sons want to share time with both parents: they just oppose both parents living under the same roof while the divorce progresses. Although the attorney for the child's affidavit contains hearsay, it does corroborate the husband and wife's accounts of verbal fights and arguments in this home. *Matter of Christine TT. v. Dino UU.*, 143 AD3d 1065 (3rd Dept.2016) (noting that a child's testimony, conveyed through a *Lincoln* hearing can be utilized to corroborate a parent's version of facts); *accord Matter of Rush v. Roscoe*, 99 AD3d 1053 (3rd Dept.2012) (12–year–old child); *see Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270, 273 (1969). In short, while there are sharply contrasting views on who is responsible for what happens in this household, one undisputed fact emerges: the house is rife with arguments, verbal fights, flared tempers, threats, claims of alienation, "sexual manipulation" (according to the husband) and allegations of damage to personal property.

In considering the facts in this application, two other factors need to be considered by the court. The husband claims he wants to purchase the house and it would uneconomical for him to move from the house and then move back in when he later purchases the house. The wife makes the same argument and she also seeks to purchase the house and, because she has a higher salary than the husband, claims she can afford to do so. In a pre-motion argument over the need to separate this disputatious couple, the court suggested that one of the parents secure a significant sum, advance it to the other to allow a relocation and take that payment as a credit or partial credit against eventual equitable distribution. The wife's attorney suggested she could raise $10,000 to finance the husband's relocation and, when this motion was heard by the court, the wife's attorney confirmed that she had made these funds available to be paid over to the husband if he promptly vacated the marital residence. The second factor was that the husband, until recently and even at the time of the motion return date, worked nights. After oral argument, the husband presented the court with a statement from his employer indicating that he had been assigned to the day shift. In the court's view, this change eliminates one hurdle to resolving the pending issue, but the availability of the husband at the home, is not decisive in the court's final determination.

***3** The resolution of the wife's application requires a detailed analysis of the standards for granting exclusive use and occupancy *pendente lite* in New York and, in this court's view, a refined re-examination of those precedents in view of the compounding evidence that existence of a hostile home environment, during a divorce, runs contrary to the best interests of children. New York's Domestic Relations Law permits a court to make "such direction between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties." DRL § 234. The statute, in the second sentence of Section 234, expressly permits a court to make these "directions ... from time to time before or subsequent to final judgment." *Leibowits v. Leibowits*, 93 A.D.2d 535, 550 (2nd Dept.1983) (discussing the legislative intent in Section 234). Section 234 was derived from Section 1164–a of the now-defunct Civil Practice Act, which was designed to "prevent any injustice which might arise as a result of a spouse's continued rights as a tenant by the entirety notwithstanding a judicial decree of separation." *Kahn v. Kahn*, 43 N.Y.2d 203, 208 (1977) (explaining the history of the statute).[2] In 1960, a trial court judge who later ascended to the Court of Appeals, Bernard S. Meyer, analyzed Section 1164–a of the then Civil Practice Act, seeking guidance on whether to exclude a husband from a home he owned with his wife because he threw his glasses at his wife, chased her down their street in the middle of the night and later assaulted her.[3] Borrowing from an American Law Reports annotation, Justice Meyer concluded that a party could be excluded from the marital domicile if there was "an immediate necessity to protect the safety of persons or property." *Mayeri v. Mayeri*, 26 Misc.2d 6, 8 (Sup.Ct. Nassau Cty.1960).[4]

[2] In *Kahn v. Kahn*, the Court of Appeals held that a trial court could not order the sale of a residence, in which the divorcing couple were tenants by the entirety, until a judgment of divorce was issued. The theory of the court was the tenancy could not be dissolved, as a matter of Legislative command, until a party had proven grounds under the then current version of Section 170 of the DRL. Now, the DRL permits dissolution of a marriage upon the sworn statement of irreconcilable differences for a period of six months prior to the action's commencement. DRL § 170(7). If dissolution is inevitable as a result of a sworn declaration of irreconcilable differences, then it is also inevitable that the tenancy by the entirety will be dissolved and the property equitably distributed. While no court has considered the impact of Section 170(7) on the rule in *Kahn* regarding the sale of a residence pendente lite, this Couyrt has previously suggested that the rule in *Kahn v. Kahn* might be worthy of a re-examination. *Harlan v. Harlan*, 46 Misc.3d 1003, 1007–1009 n. 3 (Sup.Ct. Monroe Cty.2014).

  

[3] Section 1164–a was seldom cited in pendente lite matters. See e.g., *Rowley v. Rowley,* 6 A.D.2d 1049 (2d Dept.1958)(declining to award exclusive possession without a hearing). However, one court later held that "proper care of the children" and the "interests of the children" were factors in granting exclusive use while the parties awaited the sale of a home. *Carloni v. Carloni,* 38 Misc.2d 296 (sup. Ct. New York Cty.1963)

[4] He fortified that conclusion by citing a California case which, under a temporary injunction statute, held that a spouse could be excluded from a marital residence for discharging a weapon. *See Smith v. Smith,* 122 P.2d 346 (Ct.App. 1st Dist.Cal.1942). Justice Meyer suggested that New York's temporary injunction statute gave trial judges the same power to exclude a belligerent spouse during the pendency of a divorce action. Civil Practice Act § 848 (1960).

Two years later, the Legislature, perhaps reading of Justice Meyer's frustration with a lack of legislative guidance, enacted DRL Section 234. The new statute gave courts the discretion to "direct" a spouse's possession of their residence, during a divorce, but no "direction" on how to do it or what factors to consider. After Section 234 was enacted, there was a conflict about judicial authority to exclude any tenant by the entirety from property during a matrimonial matter. The Second Department adopted Justice Meyer's formulation from *Meyeri v. Meyeri*, holding that any party seeking such "direction" from a court needed to prove such possession was necessary "to protect the safety of persons and property." *Scampoli v. Scampoli,* 37 A.D.2d 614 (2nd Dept.1971). By 1978, the Second Department held that sworn factual allegations of prior incidents of violence and abuse, combined with a protective order from the Family Court, justified an exclusive use order. *Minnus v. Minnus,* 63 A.D.2d 966 (2nd Dept.1978). Subsequent cases described the precondition for "exclusive use" as "domestic strife." *JL v. AL,* 28 Misc.3d 1239(A) (Sup.Ct. Nassau Cty.2010). The Second Department later added a judicial gloss on Section 234, holding that if one spouse had an alternative residence, then the standard was somewhat less onerous to a litigant and only required proof of the "existence of an acrimonious relationship between the parties, and the potential turmoil which might result from the husband's return to the marital home." *Kristiansen v. Kristiansen,* 144 A.D.2d 441 (2nd Dept.1988). *See e.g., Amato v. Amato,* 133 AD3d 695 (2nd Dept.2015). The First Department in *Delli Venneri v. Delli Venneri,* 120 A.D.2d 238 (1st Dept.1986), said domestic "strife" was a recognized standard for an award of temporary exclusive possession. But, the case involved unique facts: the litigant refused to leave the residence, attested that if permitted to re-enter, he intended to occupy the marital bedroom, a circumstance which, the court acknowledged, "all other considerations aside, is rife with the potential for strife and turmoil." *Id.* at 241. The decision in that case hinged, in part, on proof that the excluded party has access to an "alternative residence." The court added that it "rejected any rule which would ignore other salient facts and limit the award of temporary exclusive possession to only those instances where, based on past experience, there is a verifiable danger to the safety of one of the spouses." The First Department later accepted the two-prong test—available alternative residence and avoiding domestic strife—in *Fleming v. Fleming,* 154 A.D.2d 250 (1st Dept.1989) (declining to grant exclusive possession because the offending parties actions were no more than "petty harassments"); *Kenner v. Kenner,* 13 AD3d 52 (1st Dept.2004). The Third Department expanded the notion, concluding that "marital strife"—as exemplified by a litigant breaking into the house to recover personal items—and allegations of "serious marital discord" were sufficient to justify exclusive possession pendente lite. *Grogg v. Grogg,* 152 A.D.2d 802 (3rd Dept.1989) (presence of marital strife can be a recognized standard for an award of exclusive possession).

***4** The lower courts have generally required more evidence of "strife" than the "petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce." *Dachille v. Dachille,* 43 Misc.3d 241, 249 (Sup.Ct. Monroe Cty.2014). In a 2002 case, a wife and husband obtained mutual orders of protection, but still endured police visits and the children's treating therapist concluded the shared living arrangement was harmful to the children. Yet, orders of protection had never been enforced and the husband argued there was no evidence of any verbal attacks upon the spouse. The court noted:

> The statute does not delineate any factors that the court must assess, analyze and weigh. The invocation of words such as "domestic strife" and an amorphous often times subjective standard such as "the best interest of child" as a predicate for such applications is a concept that may ultimately lead a court into awarding exclusive occupancy

  

> in every litigated matter and will provide little guidance to counsel in advising clients. It could also be said that the parties are adversarial, uncivil and less than cordial to to each other in many cases that reach the point requiring court intervention, regretfully often in the presence of their children.

*Estes v. Estes*, 228 NYLJ 66, p. 6 (Sup.Ct. Nassau Cty.2002). The court then ventured outside the record into a discussion of how divorce impacts children.

> It has been postulated that the whole trajectory of a child's life is altered by the divorce experience. (Wallerstein, Judith, The Unexpected Legacy of Divorce. Hyperion, 2000). The same author states that children who grow up in wretched families with parents that [avoid] divorce, who stay together "because of the children", grow to be the most unhappy adults of all. Other studies and our courts have found that a child who loses contact with a parent due to divorce is much more at risk than a child whose both parents remain actively involved as a resource to the child, even throughout the divorce process, and that they fare as well as a child in an intact family.

*Id.* at p. 6–7. The court provided no source for the "other studies" and citations to "our courts" and their conclusions regarding the impact of divorce and accompanying domestic violence on children. The *Estes* court, in denying exclusive use, held that the allegations did not exceed "petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce." *Id.* at p. 8. One court recently further underscored that only "sever family strife" would justify removal of a parent from the residence:

> The courts are generally reluctant to deprive one spouse of equal access to a marital residence prior to trial and recognize the unfairness that could result from forcibly evicting a spouse from his or her home on the basis of untested allegations in conflicting affidavits. The party seeking exclusive occupancy must present specific, detailed factual allegations as to incidents of violence or abuse, of police intervention or severe family strife (McKinneys DRL § 234, Practice Commentaries, Alan D. Sheinkman, p. 464 f.). The fact that violence or abusive conduct occurred does not, standing alone, mandate that the court grant a motion for temporary exclusive occupancy. The court must consider, among other things, the financial circumstances of the parties, whether one spouse or the other has available alternate residences, whether one spouse or the other has a particular need to reside in the marital residence for employment, business, geographic or other reasons, and whether there are children and, if so, what custody or visitation arrangements are required.

***5** *T.D.F. v. T.F.*, 32 Misc.3d 1205(A) (Sup.Ct. Nassau Cty.2011). In that case, the court noted there was a confrontation between the wife and her daughter ("reactive striking" as described by the court), a no-violence order of protection, and there was a "disruptive and tense environment" that was "detrimental to the children," one child was suffering from "extreme depression" and was forced to live with her grandparents and yet the court did not grant exclusive use and possession.[5] Some recent cases reflect a further judicial reluctance to grant exclusive use and possession *pendente lite*. *Gutherz v. Gutherz*, 43 Misc.3d 1225(A) (Sup.Ct. Kingsd Cty.2014) (although some discord, absence of children militated against granting it).

[5] To the extent that court in *T.D.F. v. T.F.*, in its ordering of considerations, was de facto "ranking," the factors for a court to consider, it is illustrative that the court placed the consequences to the children *after* the financial circumstances of the parents, the availability of an alternative residence and the employment

  

> considerations of the parents. These rankings, even if unintended, reflect a posture that the impact of the strife on the parents is more important than the impact of a tense and disruptive environment on a depressed and displaced child.

In this court's view, the opinion in *Estes v. Estes* and other cases cited above reflect an outdated notion that continual verbal abuse and sharply-worded verbal fights are simply "petty harassments" that are "part and parcel of actions for divorce" and ignore persuasive social science evidence that domestic turmoil can severely damage the lives of children. In that regard, more recent judicial pronouncements have recognized the dangers posed to children by unrestrained verbal assaults in the home. These recent cases also highlight the continuing debate over the quantum of proof to justify "exclusive use" during pendency. In *Skitzki v. Neal*, 149 AD3d 1604 (4th Dept.2017), the court upheld an award of temporary exclusive use because the excluded party was the "source of the domestic strife, which included one police intervention." In addition, the wife had purchased a nearby home, another factor favoring the court order. Finally, the court repeated the cure for any perceived inequities: an early trial on the issue of a final order of possession. *Id.* ln another context, a court recently ordered exclusive use, in part, because of the strife and turmoil that would accompany a parent's return to the home. *Taj v. Bashir*, 2017 N.Y. Misc. LEXIS 3668 (Dist.Ct. Nassau Cty.2017). In *Barlik v. Barlik*, 2017 MNY Misc. LEXIS (Sup.Ct. Queens Cty.2017), the court granted exclusive use finding evidence of domestic abuse, an existing order of protection and determined that the parent with whom the child resides should have possession. In these more recent cases, the cited opinions do not mention physical violence against a spouse, a factor that more-dated court opinions frequently cited as the primary justification for a grant of "exclusive use." In this court's view, the lack of references to physical violence in these recent decisions strongly suggests that physical violence—evidence of bruises, black eyes, scraps, cuts or broken limbs—no longer defines the quantum of "marital strife" sufficient to justify an award of exclusive use.

In this court's view, these recent decisions are also consistent with contemporary legislative initiatives in New York and social science research that document how even minimal levels of domestic discord impact children living in a besieged household. Recent research indicates that even "petty harassments"—name-calling and verbal "put downs," isolating a partner from family and friends, withholding money and preventing a partner from being alone with their children—when aggregated during the time a divorcing couple share a residence can easily compound into what experts would clearly characterize as a form of violence. For example, the New York Office for Prevention of Domestic Violence describes "coercive control" as including restricting daily activities, manipulating or destroying family relationships, stifling a parties' independence, controlling access to information and services, extreme jealousy, excessive punishments for violations of rules, and other inter-personal conduct. See New York State Office for Prevention of Domestic Violence website, http://www.opdv.ny.gov/whatisdv/about_dv/index.html (Last visited on 2/1/16); United State Department of Justice, Office on Violence Against Women, http://www.justice.gov/ovw/domestic-violence (Last visited on 2/1/16); see *Wheel of Power & Control, Domestic Abuse Intervention Project*, Duluth, Minn, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf (Last Visited 2/1/16).[6] These forms of abuse can also include the monitoring and/or regulation of commonplace activities of daily living, particularly those associated with women's default roles as mothers, homemakers and sexual partners and run the gamut from their access to money, food and transport to how they dress, clean, cook or perform sexually.[7]

6 The Center for Disease Control describes a child's exposure to intra-family violent and abusive behavior as a life-threatening crisis of nearly historic proportions:
Recent research by Kaiser Permanente and the Centers for Disease Control and Prevention (CDC) strongly implicates childhood traumas, or "adverse childhood experiences" (ACEs), in the ten leading causes of death in the United States. ACEs include physical violence and neglect, sexual abuse, and emotional and psychological trauma. ACEs are associated with a staggering number of adult health risk behaviors, psychosocial and substance abuse problems, and diseases. History may well show that the discovery of the impact of ACEs on noninfectious causes of death was as powerful and revolutionary an insight as Louis Pasteur's once controversial theory that germs cause infectious disease.
Larkin & Records, Adverse Childhood Experiences: Overview, Response Strategies and Integral Theory, Journal of Integral Theory and Practice, Fall 2007, Vol. 2, No. 3, p. 1.

7 Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty, Violence Against Women: Complex Realities and New Issues in a Changing World*, Les Presses de l'Université du Québec, p. 4 (2012)

  

***6** The New York Legislature embraced this expansive notion of domestic violence as it impacts children in Section 252 of the Domestic Relations Law. The legislature noted there are:

> ... few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members. We also know that this violence results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath.
>
> Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.
>
> The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.

Legislative History, Laws 1994, ch 222, §§ 1, 2, eff Jan 1, 1995. Section 240(1)(a) of the law requires a court to consider domestic violence in all matters related to the best interests of the children. DRL § 240(1)(a).[8] The recent amendments to the temporary and permanent maintenance guidelines both suggest domestic violence should be a factor in evaluating support awards. DRL § 236(5) a(e)(1)(h); DRL § 236(6)(e)(1)(g).

[8] Domestic Relations Law § 240(1)(a) requires that for domestic violence to be considered by the court as a mandatory factor in its determination of custody, two elements must be met (1) the allegation must be contained in a sworn pleading; and (2) the allegations must be proven by a preponderance of the evidence. *Joanne M. v. Carlos M.*, 2006 N.Y. Misc. LEXIS 4048, p. 35 (Sup.Ct. Suffolk Cty.2006); *Matter of Aleksander K. v. Elena K.*, 2 Misc.3d 1005(A) (Fam. Ct. Richmond Cty.2004).

The New York courts have long been on the forefront of detecting domestic violence and enforcing the strong public policy to protect children from exposure to domestic abuse. The Second Department, more than a decade ago, recognized:

> The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.
>
> Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded.

*Wissink v. Wissink*, 301 A.D.2d 36, 40 (2nd Dept.2002); *see also Matter of Jacobson v. Wilkinson*, 128 AD3d 1335 (2nd Dept.2015). Other courts have found that emotional or verbal abuse can constitute domestic violence. *Matter of Adam E. v. Heather F.*, 151 AD3d 1212 (3rd Dept.2017); *Matter of Robert K.S. (John S .)*, 121 AD3d 908 (2nd Dept.2014) (engaged in a pattern of verbal abuse and intimidation of the mother in the children's presence as a factor in neglect); *D.D. v. A.D.*, 56 Misc.3d 1201(A) (Sup.Ct.l Richmond Cty.2017) (husband asserted power and control over the wife, frequently yelled at his wife, degraded the wife in front of the children and wife feared for her safety as aspects of domestic violence, even though no evidence of a physical altercation).[9] But, in almost all of these cases, the adjudication of domestic violence occurs *after* a trial or hearing and perhaps well after the commencement of the action and years after abuse begins, when a trial has produced substantial evidence of the conduct and its harm and a final custody/residence determination is made. In this case, these children, trapped in a hostile environment during their parents's divorce apparently for several years, may not be able to—and should not have to—wait that long for relief.

[9] The conduct by the husband, as alleged by the wife in this instance, can be easily construed to create alarm or seriously annoy her and served no legitimate purpose. Penal Law § 240.26[3] ). A constant badgering by a party which causes such annoyance and the object to fear for her safety can constitute harassment in the second degree. *Matter of Lynn TT. v. Joseph O.*, 129 AD3d 1129 (3rd Dept.2015)

***7** This court cannot ignore the expert language of professionals on domestic violence and its broad articulation in the Domestic Relations Law in considering the application for exclusive use and possession in this matter. The affidavits submitted by both parents reveal substantial friction in the household: verbal abuse, name-calling, threats, fights, doors locked to insure safety, damage to property and other conduct. The

  

situation, according to the attorney for the children, has reached a boiling point. Verbal abuse, put downs, name calling, anxiety-producing turmoil and humiliation between the spouses in this case is well-established and although this court cannot, at this stage, pinpoint the perpetrator, this court must focus on the potential consequences to the children, as emotional damage—documented in countless studies—is likely to have already taken firm root on these two boys.

In this court's view, the "strife/available relocation" test, previously used by New York's courts, is based on an analysis of the conflict between the parents as it impacts the parents. The courts applying the "strife" test focus on whether the parents should be able to cope with the strife and, if parents can (or should be able to), then exclusive use and possession is not required. Merely invoking the word "strife" to describe an admitted level of domestic abuse and inappropriate behavior—and not excluding either party from the residence—may allow the "strife" to simmer into a higher level of disruptive behavior if the couple continue to be in close proximity while sharing the residence. Whether the parents can tolerate the strife or "petty harassments" ignores the more significant factor: whether the children, often without mature understandings of adult interactions and looking to their parents for examples of mature behavior, can tolerate the same level of "strife." What some characterize as "petty harassments"—caustic verbal exchanges, vulgarity, put downsmay be tolerable between two unhappy and divorce-seeking adults, but it is corrosive when overheard by children and directed against a parent they love. The deleterious impact of easily perceived intra-family verbal assaults, foul language and other demeaning behavior on children requires more discerning criteria as the standard for granting exclusive use and possession. In this case, it is undisputed that the children have already endured—and may have learned—he demeaning and destructive conduct of their parents.[10] Regardless of the party at fault, the consequence—verbal violence directed against a parent and observed by the child—erodes the child's sense of home life. By denying this application and doing nothing—sending the parties back to the neutral corner so to speak in the home—sends the wrong message to the parents and the children and, in this court's view, sends message contrary to the direction of the state Legislature. Without court intervention, the parents may assume that their behavior is permissible to the court: the children may assume that such behavior is acceptable within a family. Neither conclusion is in the best interests of the family unit.

10 New York courts have concluded that expert testimony is not required to establish the harmful emotional impact on children who witness such abuse. In *Matter of Shanayane C.*, 2 Misc.3d 887 (Fam. Ct. Kings Cty.2003)(reasonable inferences and common sense dictate that all three children are at risk for protracted impairment of emotional health, by virtue of witnessing the domestic violence); *see also Justin R. v. Niang*, 2010 U.S. Dist LEXIS 143991 (S.D.NY 2010)(expert testimony is not necessary to establish emotional harm to children as a result of domestic violence).

***8** In considering the application for exclusive use in this instance and in an attempt to avoid displacing either parent during the pendency of this matter, this court considered the concept of "nesting," in which the children would remain in the residence and the parents would rotate time as the "parent-in-residence." There is no statutory authority for this concept in New York and while discussed in other states, judicial comment seems divided.[11] *Carmen v. Carmen*, 2014 Pa.Super. Unpub. LEXIS 2716 (Sup.Ct. Pa 2014) (court cited with approval a two-year post-separation nesting arrangement); *Grass v. Grass*, 2014 Ohio Misc. LEXIS 3154 (Ct. Com. Pleas Union Cty.2014) (court rejecting a plan for nesting mas unsupported by proof in the record); *Key v. Key*, 2012 Conn.Super. LEXIS 2347 (Sup.Ct. New London Conn.2012)(court, after a hearing, rejected plan for continued "nesting arrangement" in favor of permanent parenting plan, holding the the nesting plan was "not working well"); *In re Marriage of Levinson*, 975 N.E.2d 270 (App.Ct.Ill.2012) (appeals court upholds denial of exclusive use and possession under Illinois statute and approves interim "bird-nesting arrangement" in the absence of jeopardy to physical or mental well-being of parent or child as required by statute)[12]; *Wilson v. Wilson*, 2011 Mich.App. LEXIS 1118 (Ct.App. Mich.2011) (Until the marital home was sold, the court concluded that the children should remain in the home during that rotating schedule, with each parent moving in and out as scheduled); *Londergan v. Carrillo*, 2009 Mass.App. Unpub. LEXIS 662 (Ct.App. Mass 2009)(finding the bird-nesting schedule was in the best interests of the children); *In re Graham*, 2007 Cal.App. Unpub. LEXIS 3242 (Ct.App.Cal.2007) (citing with apparent approval a nesting arrangement based on a week-in, week-out plan); *Fiddelman v. Redmon*, 656 A.2d 234 (App.Ct. Conn 1994) (affirming decision that trial court, in essence, awarded possession of the marital home to the children, giving each parent during his and her time of legal custody the right to occupy the house with the children exclusive of the other parent until the house is sold). The only New York mention of this approach, pendente lite or otherwise, is found in *A.L. v. R.D.*, 46 Misc.3d 1221(A) (Sup.Ct. New York Cty.2015) (noting that prior court order required each of the parties spend alternating weeks with in a continued nesting arrangement in the marital

  

apartment). In this instance, the court declines to consider any "nesting" arrangement as a solution to the current level of abuse. The parties need a separation to quell the tensions in the home and nesting will not solve this problem. Several other factors complicate the court's choice. First, this court acknowledges that there is no evidence of recent physical violence perpetrated by either parent against the other. If we consider domestic violence to only include physical abuse or harm, then there is insufficient evidence in this case to order any exclusive use. But, if this court reached that conclusion, it would have to ignore the reams of legislative comment and social science research that domestic violence is more than just physical harm. The harm of a hostile home environment—populated with foul words, disparaging comments, loud demeaning voices, frequent arguments and verbal fights—and the fear for safety of the mother and the children rise, in this court's view, to the level of domestic violence that mandates court intervention.Second, this court concedes that simply separating the parents may not end the torrent of verbal abuse directed at the other parent: even in new separate residences, a parent can unleashed verbal abuse and make demeaning comments about the other parent. The children will be exposed to that language, perhaps even harsher than what would be uttered in the company of both parents. But, the children will be spared the retort, the rising voices, the angry face-to-face confrontations that ensue when a parent begins a verbal argument. This difference—between the comments of separated parents living in separate residences and confrontations of parents living in the same residence—may be seem of minor importance to the judiciary, but it would seem to be easily classified as in the "better interests" of the children.

[11] See also Flannery, *Is "Bird Nesting" in the Best Interest of Children?* 57 SMU L. REV. 295 (2004)(claims bird nesting is inappropriate, ineffective and unnecessary because joint custody is "sufficient to promote positive developmental adjustment" and explains residential insecurity is only one factor affecting children and bird nesting is appropriate only when parents are not remarried, have no previous or subsequent children, can communicate about child's needs and where it is economically feasible and concludes that such situations rare and "bird nesting only tends to magnify the pre-separation conflict between parents.")

[12] The father in *Levinson* articulated the rationale for the bird-nesting arrangement:
Well, the children have the continuity of their home, what's clearly their home. And it's a very comfortable home for them. And it's the only home they've ever known. They were brought from the hospital, each of them, to this home. And they each have their own bedrooms, their playroom, their kitchen. And the nesting arrangement allows for the children to have that stability of the home. And the only difference is, which they understand, is that mommy and daddy take turns in being with them when in the home. So they're not subjected at this point to the disruption of having to pack up and move out for periods of time and to go to an inferior environment, by every measure, size, quality, just in every way. It's a small apartment compared to a large, luxurious home. So my belief is that it is best for the children to have the stability and this continuity and to minimize the disruption and the impact of our divorce. And I believe that the nesting arrangement allows for that. It also allows for the stability of the children to have substantial amounts of time with each parent and to enjoy the bond and the love that they receive from each parent. So it's my belief that it is the best—excuse me, that it is the best of the alternatives that we have available.
*In re Marriage of Levinson,* 975 N.E.2d at 280. The court appointed evaluator in that instance also testified to benefits of the nesting arrangement—"they're in one location, not packing a little bag, going back and forth. From their perspective life is consistent," but concluded that the separate residences, ultimately, were in the children's best interests. *Id.* at 277–78.

***9** Third, this court is not unmindful of the judicial gloss, adopted by several Appellate Division, that exclusive use should only be granted if there is another residence, readily available to the displaced spouse. This court acknowledges neither parent can immediately leave this residence. The displaced parent may be challenged to find close-by accommodations, to facilitate any visitation. Suitable accommodations of sufficient size to accommodate overnight visitation with children, can be tough to attain in short order. This couple's ability to finance two households—the marital residence and the new off-site lodging for the departed spouse—makes this transition difficult. But, this couple have resources, as the marital residence has no mortgage and the wife has access to financial resources both inside and outside the marriage. In an earlier discussion over the need to separate this disputatious couple, the wife's attorney suggested she could raise $10,000 to finance the husband's relocation and, when this motion was heard by the court, the wife's attorney confirmed that she had made these funds available. In this court's view, the available funds to relocate in the short term is an acceptable substitute for the "available residence" requirement that other appellate decisions have suggested must be present before granting exclusive use. Finally, this court notes that the grant of exclusive use in this instance forshadows the eventual resolution of this matter: when the divorce is

  

over, the households will be divided and the husband and wife separated. While accelerating that division through the grant of exclusive use is difficult, nonetheless the separation of parents involved in all forms of domestic abuse as soon as practically possible must be considered beneficial to the children in this instance.

In calculating the consequences of granting exclusive use, this court acknowledges that the temporary decision—resulting the eviction of one parent from the family home—might make matters worse. Siding with one party based on less than a full airing of proof seems contrary to any norms of due process and heightens the possibility of judicial error. If a full hearing occurred, then the court would have a firm factual basis to consdier this application and apply, without reservation, the standards articulated in this opinion and compansion case law.[13] But, in considering that possibility, this court determines to err on the side of reducing the children's exposure to abuse, regardless of whether it can properly and justifiably pinpoint the perpetrator at this early stage of the proceeding. If the abuse subsides, even for the few months that the divorce progresses, the litigants and the children will have a sense that a lack of abuse should be norm in their lives, regardless of whether they ultimately live with their mother or father. While awarding temporary exclusive use, the court also will not prejudice either parent in the final determination of their primary residential status. If the husband finds suitable accommodations within the same school district as the children currently attend, this court will order him to have a shared residency with his sons and equal time in his new temporary residence. In addition, the court has offered the parties to have a private auction on the house, in which they could each bid on the property. While they have not elected that approach, this court will either auction the property between the two parents or have it offered for sale and either parent can then make an offer on the property.

13 *See Wissink v. Wissink,* 301 A.D.2d at 40 (discussing that other states have a rebuttable presumption that an abuser cannot be eligible for custody). Many states hold that if there is evidence of domestic violence—of any variety—in a home with children, there should be a presumption that a non-offending parent should be granted exclusive use and possession pendente lite. *Terry v. Terry,* 154 So.3d 1002 (Ala.2013)(rebuttable presumption against perpetrator); *Caroline J. v. Theodore J.,* 354 P.3d 1085(Alaska 2015, citing AS 25.24.150(g)); *Cardoso v. Soldo,* 277 P.3d 811 (Ct.App.Ariz.2012)(statute imposes a rebuttable presumption that it is not in a child's best interests to award custody to a parent who has committed an act of domestic violence against the other parent. Ariz.Rev.Stat. § 25–403.03(D)); *Cunningham v. Cunningham,* 2006 Ark.App. LEXIS 683 (Ct.App.Ark.2006)(a rebuttable presumption of unfitness is created where there is a finding by the preponderance of the evidence that a party engaged in a "pattern of domestic abuse." Ark.Code Ann. § 9–13–101(c) (Supp.2005)); *Noergaard v. Noergaard,* 2015 Cal.App. LEXIS 1191 (Ct.App.2015)(Family Code section 3044 establishes "a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child); *January v. Div. of Family Servs.,* 91 A.3d 561 (Del.2014)(13 Del. C. § 705A(a) (establishing "a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody of any child" and 13 Del. C. § 705A(b) establishing "a rebuttable presumption that no child shall primarily reside with a perpetrator of domestic violence"); *Appolon v. Faught,* 796 N.E.2d 297 (Ct.App. 5th Dist.Ind.2003)(Ind.Code § 31–17–2–8.3 creates a rebuttable presumption of supervised visitation for a non-custodial parent who has been convicted of a crime involving domestic violence that was witnessed or heard by the child); *In re Duenas,* 2006 Iowa App. LEXIS 1286 (Ct.App.Iowa 2006)(Iowa Code section 598.41(1)(b) (2003) establishes a rebuttable presumption against joint custody if a history of domestic abuse exists, and section 598 .41(2)(c) states if a history of domestic abuse exists and is not rebutted, that outweighs any other factor considered); OPINION OF THE JUSTICES, 427 Mass. 1201, 691 N.E.2d 911(Mass.1998)(upholding constitutionality of presumption that a party who engages in domestic violence is denied custody); *Yang v. Yang,* 2003 Minn.App. LEXIS 642 (ct.App.Minn.2003)(the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse); *Brumfield v. Brumfield,* 49 So.3d 138 (Ct.App.Miss.2010)(Miss.Code Ann. § 93–5–24(9) created a rebuttable presumption against an award of custody to a parent with a history of domestic violence); *Amezcua v. Eighth Judicial Dist. Court of Nev.,* 319 P.3d 602 (Nev.2014)(rebuttable presumption that a perpetrator of domestic violence is unfit for sole or joint custody of his or children under Nev.Rev.Stat. §§ 432B.157 and 125C.230); *Mowan v. Berg,* 2015 ND 95 (N.D.2015)(N.D.C.C. § 14–09–06.2(1)(j) creates creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child); *In re J.C.,* 346 S.W.3d 189 (Ct.App. 14th Dist.Tex.2011)(the Family Code establishes a "rebuttable presumption that the appointment of a parent as the sole managing conservator ... is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by [a] parent directed against the other parent, a spouse, or a child." Tex. Fam.Code Ann. § 153.004(b)); *Jeffrey S. v. Jennifer S.,* 2013 W. Va. LEXIS 39(Sup.Ct.App.W.Va.2013)(a rebuttable presumption

  

that a parent who has engaged in domestic violence shall not be allocated custodial or decision-making responsibility. See W.Va.Code §§ 48–9–209(a)(3) and (c); *Straub v. Straub,* 703 NW2d 383 (Ct.App.Wisc.2005)(Wisconsin Stat. § 767.24(2)(d)(1) now provides that "it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody" to a party that has "engaged in a pattern or serious incident of interspousal battery or domestic abuse ..."); *Jung v. Ruiz,* 59 V.I. 1050(Sup.Ct.V.I.2013)(determination by the court that the domestic violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not the perpetrator." 16 V.I.C. § 109(a)(1), (b).)

***10** In the face of all of these complications, this court must implement New York's "zero-tolerance" policy on domestic violence in all its forms. The current standard for granting exclusive use or possession—safety of persons or property—is cast in the language and images of 1970s and even unfortunately implies that "persons" and "property" have equivalent weight to the emotional security of children. The use of the word "necessary to protect" the safety of a person suggests that physical harm—an advanced form of domestic violence—is somehow a prerequisite to granting exclusive use and ignores the impact of abusive, but not physically threatening—behavior on children. The mere suggestion that "exclusive use" should hinge, in any fashion, on the "voluntary establishment of an alternative residence" also suggests that preventing domestic violence may depend, in part, on the untenable notion that the convenience of one party's ability to secure short-term housing away from the home is somehow more important than the emotional security of the children.

In this case, the hostile home life requires this court to free these children from the continual strife between their parents. The court, relying in part on the affidavits, despite their contrary allegations, and also on the preferences of the children conveyed through their attorney, grants the wife's application and holds that the wife should be a temporary primary residential parent. To reduce the stress and strain on these children and to further their best interests, the father must vacate the residence within 15 days of this decision. The wife shall make the $10,000 available to the husband to relocate within 10 days of this decision and that sum shall be eligible to be a credit against any future equitable distribution. This court shall, within 45 days, schedule a hearing on a further award of use and possession of the residence.

New York is a "zero tolerance" zone for domestic violence of any sort and this drastic remedy—removing a parent from the home—is necessary to protect the best interests of these children and meet that goal for this family.

**SUBMIT ORDER ON NOTICE. 22 NYCRR 202.48.**

**All Citations**

57 Misc.3d 1207(A), 68 N.Y.S.3d 379 (Table), 2017 WL 4507541, 2017 N.Y. Slip Op. 51333(U)

**End of Document**

60 Misc.3d 631
Supreme Court, Bronx County, New York.

The PEOPLE of the State of New York
v.
Kareem ABDUR–RAZZAQ, Defendant.
The People of the State of New York
v.
Lemuel Skipper, Mahogany Randolph,
Defendants.

3154/13
|
Decided on May 29, 2018

**Synopsis**
**Background:** Following their indictment on sex trafficking and related offenses, defendants moved to exclude proffered expert testimony regarding trauma bonding between sex traffickers and their victims.

**Holdings:** The Supreme Court, Bronx County, Steven Barrett, J., held that:

as matter of first impression, expert testimony regarding traumatic bonding and coercive control in context of pimp/prostitute relationship satisfied *Frye* standard for admission, and

expert testimony pertaining to trauma bonding and coercive control tactics used by sex traffickers would aid average juror in understanding anomalous behavior of victims of sex trafficking.

Motions denied.

**Attorneys and Law Firms**

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**Opinion**

Steven Barrett, J.

***632 "If you want to control their bodies, you need to control their minds"**

(Man, The Deuce, HBO, S:1, E:8, My name is Ruby)

Before the Court are two separate sex trafficking indictments. In each case the People have notified defense counsel of their intention to call an expert witness regarding trauma bonding between sex traffickers and their victims and the coercive control techniques utilized by traffickers in order to explain certain paradoxical conduct of the victims.[1] Each defendant ****844** has separately moved to preclude the expert's testimony. Because this Court found no written case where a trial or appellate court in New York has ruled on this issue, and because the Court believed that the theory of trauma bonding to explain the behaviors of prostitutes and pimps may involve a novel scientific theory whose general acceptance had not yet been ruled ***633** upon, the Court ordered a *Frye* hearing. Having now completed the hearing and reviewed all of the evidence and submissions of the parties, for the reasons set forth below, each defendant's motion is denied and the proffered expert testimony will be allowed at each defendant's trial.

[1] Throughout this opinion the Court has used the terms sex traffickers and pimps as well as sex workers and prostitutes interchangeably. In addition, in compliance with Civil Rights Law 50–b, the names of the victims have been replaced with their initials for purposes of publication.

*People v. Skipper and Randolph*
Defendant and co-defendant, Mahogany Randolph are charged, having acted in concert, with kidnapping in the first degree, aggravated sexual assault in the first degree, sex trafficking and related counts.[2] The People presented legally sufficient evidence to the Grand Jury establishing that beginning in April 2015, defendant and C.Y., who was then 26–years–old, met on social media and began what she perceived as a consensual, intimate relationship. Between June 29, 2015 and July 17, 2015, C.Y.

  

represented to defendant and co-defendant Randolph that she would engage in prostitution, did so, and provided the proceeds to them. The evidence further established that, between July 18, 2015 and July 22, 2015, defendant and co-defendant sexually assaulted C.Y. by inserting a broomstick in her anus and vagina, physically assaulted her by punching her in the face and head with a cane and threatened to kill her. During this four day interval, notwithstanding the violence inflicted upon her, C.Y. continued to engage in prostitution on behalf of defendant and co-defendant and did not attempt to flee the location where she was being held by defendant and co-defendant. In addition, the People aver that in March 2015, defendant and co-defendant Randolph began a relationship that evolved into a pimp-prostitute relationship and that notwithstanding the fact that defendant assaulted her, Randolph engaged in prostitution on behalf of defendant and recruited other women to perform sex work on his behalf. (See post-*Frye* hearing Memorandum of Law at p. 44.) Moreover, the People aver that both before and after Randolph was arrested she lied for defendant's benefit and attempted to protect him from prosecution by taking the blame for his actions. (See post-Frye Memorandum of Law at p.44.)

[2] Ms. Randolph has not joined in the instant motion to preclude.

*People v. Abdur–Razzaq*

Defendant stands indicted having been charged with sex trafficking, assault in the third degree, strangulation in the second degree, abortion in the second degree and related charges in connection with his actions towards then seventeen-year-old ***634** M.N. The evidence presented to the Grand Jury established that beginning in mid-February 2013, defendant and M.N., who lived in the same apartment building as defendant, began an intimate relationship. Shortly thereafter, M.N. agreed to defendant's request to post an ad on Backpage.com and engaged in two sex acts for money. M.N. gave all of the money from the sex acts to defendant, and defendant gave her back a portion to pay her cell phone bill. After those two sex acts, M.N. told defendant she no longer wanted to engage in sex work. Defendant then punched her in the face and stomach, threatened to expose the fact that she had engaged in prostitution, and threatened to harm her physically. Between March 2013 and June 9, 2013, M.N. continued to engage in paid sexual acts on behalf of defendant and continued to have sexual relations with him despite the fact that she ****845** had been repeatedly punched, choked and threatened by him. During this period, defendant arranged for the performance of sex acts by M.N. and set the prices for these acts, and M.N. gave him all the money that she earned. In return, defendant gave her money to pay her cell phone bill and to get her hair and nails done, and he would buy her food and marijuana. M.N. referred to defendant as "Daddy." Between May 20, 2013 and May 24, 2013, M.N. informed defendant that she was pregnant. Defendant responded that she needed to get an abortion. When M.N. refused to do so, defendant punched her in the abdomen several times causing M.N. to miscarry the fetus. Throughout this time period, defendant went to work each day at a law firm.

On June 9, 2013, M.N's family discovered that she had been engaging in prostitution and that she had been advertised on Backpage. They contacted law enforcement, which resulted in defendant's eventual arrest and indictment on the instant charges. Notwithstanding a temporary order of protection requiring him to stay away from M.N., defendant and M.N. resumed a sexual relationship and M.N. recanted her Grand Jury testimony.[3]

[3] After M.N. recanted to defendant's lawyer, prosecutors contacted her and she admitted to them that her recantation was false and her Grand Jury testimony was true.

On September 11, 2017, this case was sent out to another court part for trial. The People provided the court with a witness list that included Dr. Chitra Raghavan, who was proffered as an expert in traumatic bonding and coercive control in the context of sex trafficking. When defense counsel moved to ***635** preclude such testimony and requested a *Frye* hearing, the trial court sent the case back to this Court to determine whether such evidence would be admissible at trial. After reviewing the submissions of the parties, on November 30, 2017, this Court ordered a *Frye* hearing.[4]

[4] Because defendants Skipper's and Randolph's case were pending before this Court and the People expressed their intent to call Dr. Raghavan as an expert in trauma bonding and coercive control at their trial, the Court consolidated Skipper's case with the Abdur–Razzaq case for purposes of this hearing, as they both presented the same *Frye* issue with respect to the admissibility of the proferred testimony of Dr. Raghavan.

  

*The Frye Hearing*

**"I do the best job I can do to explain it, but there are many people who just will never understand or believe that one can be so totally controlled by other people that they don't even have to have them standing right there next to them any longer with a gun directly to their head.** (Patty Hearst, The Radical Story of Patty Hearst, CNN, E:6, The Verdict)

The *Frye* hearing began on December 20, 2017 and three witnesses testified on behalf of the People—Dr. Chitra Raghavan, Dr. William Foote, and Dr. Kimberly Mehlman–Orozco. Dr. Raghavan is a tenured professor of forensic psychology at John Jay College, whose research, publications, and teaching have focused on trauma and coercive control in the contexts of domestic violence, sexual assault and harassment, and labor and sex trafficking. Dr. Raghavan is the Director of the Forensic Mental Health Counseling Master's Program at John Jay, which trains therapists, and she designed a program for master degree students who seek to specialize in victim services. Dr. Raghavan has been deemed an expert in the areas of sex trafficking and intimate partner violence in New York State courts and in Federal court and has also trained lawyers and judges who specialize in sex trafficking cases with respect to trauma bonding and coercive control. Dr. Foote is a forensic psychologist in private practice. Dr. ****846** Foote's clinical practice focuses on treating patients for trauma and he has conducted numerous evaluations of, and conducted research and published journal articles with respect to, victims of sexual abuse, particularly in the context of clergy and teacher abuse of students and interfamilial sexual abuse. Dr. Mehlman–Orozco is a researcher who has studied and written extensively on human ***636** trafficking. She has also testified as an expert witness in sex trafficking. In addition to the testimony of these three experts, numerous scholarly journal articles and books and other documents on trauma bonding and coercive control were received in evidence.

All three of the People's experts testified credibly; however, the Court found that the testimony of Dr. Raghavan was the most essential and relevant exposition of the scientific analysis that underlies the psychological theory here presented. Dr. Raghavan not only demonstrated scholarship and in-depth knowledge and experience in the field of trauma bonding and the use of coercive control as applied in the area of sex trafficking, but her testimony was free of bias and she was extremely articulate, answering often complex and sometimes convoluted questions with aplomb and in a clear and understandable way. She demonstrated conclusively the validity of the established applications of the theories of trauma bonding and coercive control and that extending these principles to the novel context of sex trafficking is warranted to explain scientifically the anomalous behavior of prostitutes within the prostitute/pimp relationship.

The testimony of the three witnesses at the hearing established that trauma bonding is the strong emotional attachment that forms between a victim and an abuser as a result of chronic interpersonal trauma in which the victim is strongly dependent on the abuser based on underlying fear. According to the witnesses, trauma bonds are formed when three main conditions are met: 1) the existence of an imbalance of power between the abuser and the victim; 2) the creation or maintenance of the power imbalance through the use of certain control tactics; and 3) a schedule of intermittent reward and punishment that the abuser metes out in the course of the relationship. Coercive control is the use of various tactics by an abuser to strip the abused target of his or her autonomy and liberty, and to create or maintain a power imbalance. Coercive control tactics include intimidation, deprivation, micro-regulation, manipulation, blackmail, degradation, isolation, or perceived isolation and are frequently tailored to the particular vulnerabilities and needs of the victim.[5] For example, a pimp may recognize the underlying fundamental needs of a prostitute, ***637** whether that is a place to sleep or a sense of family or the desire to build a future together, and will then exploit those needs to create an imbalance of power that removes her from her social network or support system. Isolation or perceived isolation of the victim by surrounding the victim with people who are allied with the perpetrator is a particularly important control tactic that helps to form the traumatic bond, as it both prevents the victim from reporting abusive conduct and leads the victim to negotiate with her abuser to end the abuse.

[5] See Exhibit 2, Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (2007). Interestingly, the Court notes that Stark was recently cited in another context to explain why allegedly abused women may stay in a relationship, notwithstanding the abuse. *See* The New Yorker, Jane Mayer and Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, May 7, 2018.

According to the witnesses, as a result of the use of these tactics, a cycle begins where the victim, in an attempt to form a ****847** human connection with her abuser, seeks to appease the abuser. The abuser then uses intermittent, arbitrary reward and punishment, which causes the victim to submit to the abuser. Over time, the victim's appeasement and submission to the abuser becomes

  

second-nature and internalized. The victim compartmentalizes her thoughts and adopts the worldview of the abuser. Once the abuser has established dominance and the traumatic bond is forged, he can diminish the frequency and severity of his coercive control techniques and use of intermittent reward and punishment. The result of the abuser's use of coercive control tactics is that the victim becomes afraid, needy, and dependent on the abuser. The victim even comes to deify the abuser and see him as omnipotent, better than anyone she has ever been with, and she feels honored to be in the relationship.

These tactics and the resulting traumatic bond with the abuser give rise to paradoxical, incongruous behavior by the victim. The victim may not leave the abusive situation, may return to the abusive situation, or may delay reporting the abuser to law enforcement. The victim also may defend the abuser, downplay the treatment she received, testify on behalf of the abuser, recant, lie to protect the abuser, or provide inconsistent responses over time. According to Dr. Raghavan, based on her own research and review of scholarly literature, within specific traumatized populations such as cults, prisoners of war, battered spouses, and sex trafficking victims, ***638** trauma bonding occurs in fifty percent of the victims (T:136).[6]

[6] See also Exhibit 10, Chris Cantor and John Price, *Traumatic Entrapment, Appeasement and Complex Post–Traumatic Stress Disorder: Evolutionary Perspectives of Hostage Reactions, Domestic Abuse and the Stockholm Syndrome*, 41 Australian & New Zealand J. Psychiatry 377 (2007).

In addition to defining trauma bonding and coercive control, Dr. Raghavan went on to provide a brief overview of the history of trauma bonding research.[7] According to Dr. Raghavan, researchers first began to notice trauma bonding though it hadn't yet been defined as such in the post WW II period, when psychoanalysts began observing that some Holocaust death camp survivors had identified with their prison guards. Then, in the early 1970s, after a bank robbery in Stockholm where four hostages were kept captive and tortured but then refused to testify against their captors, the term Stockholm Syndrome was first utilized to describe the traumatic bonds formed between captors and captives. Dr. Raghavan then briefly described another infamous case of Stockholm syndrome that involved the 1974 kidnapping of Patty Hearst, when she was kidnapped and treated brutally by the "SLA," but grew to love and identify with them and ultimately joined them in the commission of several violent crimes.

[7] Much of Dr. Raghavan's testimony is mirrored in her peer reviewed journal article which was received in evidence as Exhibit 15, *Trauma-coerced Bonding and Victims of Sex Trafficking: Where do we go from here?*, 17(2) International Journal Emergency Mental Health and Human Resilience 583 (2015).

After this brief historical overview, most of Dr. Raghavan's testimony was devoted to a chronological overview of the major research studies, peer-reviewed journal articles, and books concerning trauma bonding and coercive control across a variety of contexts, including her own research on these topics in the area of sex trafficking. Dr. Raghavan began this walk through the literature in the area of intimate partner violence, which was originally known as battered woman's syndrome. According to Dr. Raghavan, the term battered woman's syndrome was first utilized in 1979 by ****848** Lenore Walker in her highly influential book, *The Battered Woman*, where she first observed that the common thread amongst the 120 victims of domestic abuse that she had interviewed was the psychosocial factors that bonded these women to their batterers. In 1981, Don Dutton and Lee Painter coined the term trauma bonding in their oft-cited, groundbreaking journal article, *Traumatic* ***639** *Bonding: The Development of Attachments in Battered Woman and Other Relationships of Intermittent Abuse*, which they followed with a longitudinal study involving 50 women who were physically abused and 25 women who were emotionally abused who had recently left their abusers. This later study provided empirical, quantifiable support for their 1981 theory that intermittency of abuse is a strong predictive factor in the formation of traumatic bonds, chief among their findings was the existence of a strong correlation between abuse intermittency/unpredictability and the strength of emotional attachment between abuser and victim.[8]

[8] See Exhibit 6. Donald Dutton & Susan Painter, *The Battered Woman SyndromeLEffects of Severity and Intermittency of Abuse*, 63(4) Am. Jl. Orthopsychiatry 614 (1993).

Dr. Raghavan next reviewed the scholarly literature with respect to trauma bonds and the coercive control techniques that forge them in a wide variety of contexts other than intimate partner violence. She described the work of Harvard professor Judith Herman who coined the term "complex PTSD" in her highly influential book, *Trauma and Recovery*, and corresponding peer-reviewed journal article.[9] Complex PTSD arises when one experiences a prolonged or chronic trauma that results in changes in the way one regulates emotions and causes difficulty in relationships. In both her book and article, Dr. Herman cites Dutton and Painter and compares the

  

trauma bonding that occurs between a battered woman and her abuser to that of hostages and their captors and religious cult leaders and their followers. According to Herman, in all three contexts the victim is isolated and becomes increasingly dependent upon the perpetrator, not only for survival and basic bodily needs, but also for information and emotional sustenance. In these relationships, the repeated experience of terror and reprieve often results in a feeling of intense, almost worshipful dependence upon an all-powerful godlike authority. The victim may live in terror of his wrath, but may also view him as the source of strength, guidance, and life itself. Notwithstanding the abuse, the relationship may take on an extraordinary quality of specialness. ***640** Dr. Raghavan also described the findings of Nathalie de Fabrique in her seminal analysis of Stockholm syndrome.[10] De Fabrique conducted a quantitative peer-reviewed study in which she analyzed case histories of FBI files on hostage situations to try to determine what factors led to the formation of a traumatic bond between the captive and the hostage-taker. De Fabrique found that in the hostage context where there is an obvious power imbalance, the most important factors in whether a trauma bond was formed was whether the kidnappers were likable and whether they used intermittent reward and punishment. Lastly, Dr. Raghavan reviewed the work of Joan Reid, whose journal article provides a thorough summary of the empirical and clinical studies of trauma bonding to date in the contexts of Stockholm syndrome, battered ****849** woman's syndrome, and child sexual abuse syndrome.[11]

9 See Exhibits 7 and 8. Judith Herman, *Trauma and Recovery: The Aftermath of Violence* and *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5(3) Journal of Traumatic Stress 377 (1992).

10 See Exhibit 9, Nathalie de Fabrique et al, *Common Variables Associated with the Development of Stockhom Syndrome: Some Case Examples*, 2(1) Victims & Offenders 91 (2007).

11 See Exhibit 11, Joan Reid, *Contemporary Review of Empirical and Clinical Studies of Trauma Bonding in Violent or Exploitative Relationships*, 8(1) International Journal of Psych Research 37 (2013).

With respect to other contexts within which trauma bonding has been identified as a natural occurrence, the testimony at the hearing by Dr. Foote complemented that of Dr. Raghavan. Dr. Foote testified with respect to his clinical experience and research with respect to trauma bonding in the area of child sexual abuse. In his studies of clergy-child abuse, teacher-student abuse and coach-student abuse, where a power imbalance clearly exists, Dr. Foote observed that a trauma bond would form that would cause an abused to return to the abuser when the abuser used control tactics and intermittent reward and punishment.[12]

12 *See also* Exhibit 17, William Foote, *Psychological Evaluation and Testimony in Cases of Clergy and Teacher Sex Abuse*, Forensic Psychology: Advanced Topics for Forensic Mental Health Experts & Attorneys (2006).

After this chronology of trauma bonding research in contexts other than sex trafficking, Dr. Raghavan then testified with respect to the studies and articles written that focused on the traumatic bonds formed between pimps and prostitutes, which is the subject of this *Frye* hearing.[13] The first such study she described was published in 2007 and was a qualitative study in which 66 individuals were interviewed, which included ***641** prostitutes, former prostitutes, vice police officers, social workers and parents of prostitutes.[14] Drawing upon the earlier works of Lenore Walker and Dutton and Painter with respect to battered women, the researchers concluded that the key element that kept prostitutes with their pimps was the fact that many of them continued to feel emotional attachments to the very men who had betrayed and abused them. The authors further concluded that these women were demonstrating a form of trauma bonding akin to that seen in battered women. They wrote:

13 In this regard, Dr. Mehlman–Orozco's testimony mirrored Dr. Raghavan's testimony.

14 See Exhibit 12 M. Alexis Kennedy et al., *Routes of Recruitment: Pimps' Techniques and Other Circumstances that Lead to Street Prostitution*, 15(2) Journal Aggression, Maltreatment & Trauma 1 (2007).

Dutton's description of these dynamics in battered intimate relationships could also describe the prostituted woman's relationship with a lover pimp as, [in both of these relationships one sees] the development of strong emotional ties between two persons, with one person intermittently harassing, beating, threatening, abusing, or intimidating the other. Prostituted women reported having trouble giving up the fantasy of a perfect life that the pimps promised them and thinking that time on the streets was only a detour before their real future together would begin. Some women would never label the man who

  

turned them out as a pimp; to them he is the man they love and they believe that they are showing their love to him by earning money for him. These same women often justified the beatings they regularly receive from their pimps in much the same way as battered women; they reported feeling that they must have deserved the beating. (See Exhibit 12 at 7–9)

Next, Dr. Raghavan described two peer-reviewed studies and journal articles by Joan Reid.[15] The first of these articles was ****850** published in 2010 and consisted of 34 interviews of representatives from various organizations and agencies that frequently interact with sex trafficking victims who are minors. Reid ***642** concluded that the grooming process used by sex traffickers is a mixture of reward and punishment which is used to produce intense loyalty and trauma bonding to the trafficker. According to the author, these tactics, similar to those associated with domestic abusers, are designed to keep the victims in physical and psychological bondage that becomes so ingrained that the minor will continue to return, defend, and cover for the abuser until the trauma bond is severed. Reid's second study was published in 2016 after she had reviewed the social service provider case files of 79 female minors who had been trafficked. Reid again found the widespread use of coercive control tactics that closely paralleled those previously observed in the context of intimate partner violence, child abuse, hostage situations and cults, which resulted in victims developing strong emotional attachments to their abusers or captors. Thus, Reid warned, the existence of trauma bonding and its lingering impact on victims of juvenile sex trafficking should not be overlooked when responding to and providing mental health treatment to victims. *See* Exhibit 14 at 505.[16]

15 *See* Exhibits 13 and 14, Joan Reid, *Doors Wide Shut: Barriers to the Successful Delivery of Victim Services for Domestically Trafficked Minors in a Southern U.S. Metropolitan Area*, 20 Women & Criminal Justice 147 (2010) and Joan Reid, *Entrapment and Enmeshment Schemes Used by Sex Traffickers*, 28(6) Sexual Abuse: A.J. Res. And Treatment 491 (2016).

16 In addition to the extensive research described above, to further establish the widespread acceptance by psychologists of the occurrence of trauma bonding and the use of coercive control tactics by sex traffickers, the People introduced into evidence a 2014 report by the American Psychological Association Task Force on Trafficking of Women and Girls and a 2016 pamphlet put out by U.S. Department of Health and Human Services, *Look Beneath the Surface*. Both of these documents describe the coercive control tactics used by traffickers and the traumatic bonds that may form between pimps and prostitutes. *See* Exhibits 24 & 25.

Based upon all of these studies on trauma bonding and coercive control, as well as their own experience and research, all three of the People's experts opined that these concepts are generally accepted in the context of sex trafficking by the community of psychologists who specialize in trauma and that they provide a valid explanation for the often anomalous, counterintuitive behavior of victims of sex trafficking. Neither defendant called their own expert to offer a contrasting opinion.

*The Applicable Law*

With respect to expert testimony regarding new or novel scientific theories or techniques, New York still adheres to the *Frye* test of general acceptance by the relevant scientific community. *See People v. Wesley*, 83 N.Y.2d 417, 611 N.Y.S.2d 97, 633 N.E.2d 451 (1994). Once this threshold determination is made, the Court also must decide ***643** whether the proffered expert testimony is beyond the ken of the typical juror and will aid such juror in reaching a verdict. *See People v. Taylor*, 75 N.Y.2d 277, 288, 552 N.Y.S.2d 883, 552 N.E.2d 131 (1990). The *Frye* test asks not whether a particular procedure or theory is universally endorsed, but whether the analytical theory and techniques, when properly performed, generate results accepted as reliable within the scientific community. *See People v. LeGrand*, 8 N.Y.3d 449, 457, 835 N.Y.S.2d 523, 867 N.E.2d 374 (2007). Further, this test emphasizes counting scientists' votes, rather than verifying the soundness of a scientific conclusion. *Id.*

The issue of whether expert testimony regarding traumatic bonding and coercive control in the context of the pimp/prostitute relationship satisfies the *Frye* standard for admission is a matter of first impression in New York. However, the clear trend of recent decisions has ****851** been to permit expert testimony concerning complex psychological and social phenomena. *See People v. Spicola*, 16 N.Y.3d 441, 460–65, 922 N.Y.S.2d 846, 947 N.E.2d 620 (2011). For example, expert testimony regarding battered woman's syndrome has been deemed admissible since 1985 when an esteemed colleague first determined after a *Frye* hearing that such evidence had gained substantial enough scientific acceptance to warrant admissibility, and that such testimony would assist a jury in understanding "the unique pressures which are part and parcel of the life of a battered woman," and would enable the jury to "disregard their prior conclusions as being

  

common myths rather than informed knowledge." *See People v. Torres*, 128 Misc.2d 129, 134, 488 N.Y.S.2d 358 (Sup. Ct. Bx. Co. 1985)(Bernstein, J.); *see also People v. Turner*, 143 A.D.3d 582, 40 N.Y.S.3d 369 (1st Dept. 2016); *People v. Jackson*, 133 A.D.3d 474, 20 N.Y.S.3d 352 (1st Dept. 2015); *People v. Byrd*, 51 A.D.3d 267, 855 N.Y.S.2d 505 (1st Dept. 2008); *People v. Ellis*, 170 Misc.2d 945, 650 N.Y.S.2d 503 (Sup. Ct. NY Co. 1996).

Similarly, for many decades courts have allowed expert testimony with respect to rape trauma syndrome and child sexual abuse accommodation syndrome. In *People v. Taylor, supra*, 75 N.Y.2d at 288–89, 552 N.Y.S.2d 883, 552 N.E.2d 131, in allowing experts to testify about rape victims' counterintuitive behaviors, the Court of Appeals was satisfied that this type of evidence had been generally accepted in the relevant scientific community and that it would aid a lay juror by dispelling common misconceptions regarding the ordinary responses of rape victims. Likewise, In *People v. Spicola, supra*, 16 N.Y.3d at 465, 922 N.Y.S.2d 846, 947 N.E.2d 620, in allowing experts to testify about the incongruous behaviors of child sexual abuse victims, the Court of Appeals rejected defendant's attack on the scientific reliability ***644** of child sexual abuse accommodation syndrome and found that such evidence would aid the jury by explaining behaviors of child victims that might be puzzling to them. *See also People v. Carroll*, 95 N.Y.2d 375, 718 N.Y.S.2d 10, 740 N.E.2d 1084 (2000); *People v. Diaz*, 20 N.Y.3d 569, 965 N.Y.S.2d 738, 988 N.E.2d 473 (2013); *People v. Williams*, 20 N.Y.3d 579, 964 N.Y.S.2d 483, 987 N.E.2d 260 (2013).

Although the Court is unaware of any New York case addressing the admissibility of expert testimony regarding trauma bonding and coercive control to explain the behavior of the victims of sex trafficking, a number of federal courts have done so under the less stringent *Daubert* standard for admission of expert testimony. In particular, the United States Court of Appeals, D.C. Circuit, ruled that expert testimony on the pimp/prostitute subculture, the modus operandi of pimps, and the nature of the relationship between pimps and prostitutes was admissible as its relevance outweighed any prejudice to defendant. *United States v. Anderson*, 851 F.2d 384, 393 (D.C. Cir. 1988). Similarly, in finding admissible expert testimony regarding the relationship between prostitutes and pimps, the Ninth Circuit opined that the pimp/prostitute relationship is not the subject of common knowledge and that a trier of fact who is uninformed about the relationship would be unprepared to assess the veracity of a victim testifying about prostitution. *United States v. Taylor*, 239 F.3d 994, 998 (9th Cir. 2001); *see also United States v. King*, 703 F.Supp.2d 1063, 1075 (D. Hawaii 2010)(after a *Daubert* hearing, the court found that expert testimony regarding pimp/prostitute dynamics, including common ways sex traffickers use force and control over the victim, could aid the jury in understanding how prostitutes could be victims of fraud, force or coercion rather than be willing participants with free will to exit these situations).

****852** Applying these principles of law to the evidence presented at the hearing leaves no doubt that the proffered testimony of Dr. Raghavan is admissible at the upcoming Skipper/Randolph trial and the Abdur–Razzaq trial. Initially, the hearing testimony and evidence established to the Court's satisfaction that the theories of trauma bonding and coercive control are well established in both the psychological and legal communities. The People have demonstrated through Dr. Raghavan's testimony and the numerous peer-reviewed journal articles in evidence at the hearing that all three of the elements inherent in the forging of traumatic bonds—power imbalance, use of control tactics, and meting of intermittent rewards and punishment—that are present in cases of intimate partner violence, ***645** child sex abuse, and kidnapper/hostage situations, are present in cases in which sex trafficking is alleged. Thus, it is both logical and reasonable to extend the principle of trauma bonding, which has been generally accepted to explain anomalous behavior in these other contexts, to explain the anomalous behavior of victims of sex trafficking. Therefore, the Court concludes that the underlying, well established principles are fully applicable to sex trafficking, that this application, though novel, emerges from adaptation and extension of these principles, and that the proffered testimony is admissible in a sex trafficking case based upon the existing precedent cited above relating to, *inter alia*, battered woman's, rape trauma, and child sexual abuse accommodation syndrome evidence. *See People v. Foster–Bey*, 158 A.D.3d 641, 67 N.Y.S.3d 846 (2d Dept. 2018)(expert testimony regarding LCN DNA testing and the FST are admissible because they are not novel scientific techniques and also are generally accepted); *People v. Gonzalez*, 155 A.D.3d 507, 65 N.Y.S.3d 142 (1st Dept. 2017).[17]

17 To the extent that the Court could have reached this conclusion based upon the pre-hearing submissions of the parties, the *Frye* hearing was unnecessary. *See People v. Garcia*, 39 Misc.3d 482, 963 N.Y.S.2d 517 (Sup. Ct. Bx. Co. 2013)(Iacovetta, J.)(no *Frye* hearing required regarding admissibility of expert testimony regarding LCN DNA testing and the FST because not new or novel theory); *People v. Smith*, 191 Misc.2d 765, 743 N.Y.S.2d 246 (Sup. Ct. NY Co. 2002)(no *Frye* hearing required regarding expert testimony regarding eyewitness identification because not new or novel theory). Of course now that the Court has

  

conducted a *Frye* hearing, courts of coordinate jurisdiction are free to accept or reject this court's conclusions without duplicating its efforts. *See People v. Foster–Bey, supra*; *People v. Gonzalez, supra*.

Moreover, the hearing evidence also established that trauma bonding and coercive control are scientific theories that provide the most logical and persuasive explanation for often paradoxical behaviors of victims of sex trafficking, and have gained substantial and preeminent scientific acceptance to warrant admissibility.[18] Indeed, the testimony of the People's three expert witnesses and the substantial body of academic empirical and analytical literature in evidence clearly demonstrate that trauma bonding occurs between many pimps and prostitutes. Thus, the People have satisfied their burden of establishing general acceptance of these theories within the relevant scientific community. *See* ***646** *People v. Middleton*, 54 N.Y.2d 42, 49–50, 444 N.Y.S.2d 581, 429 N.E.2d 100 (1981)(expert testimony admissible where general acceptance shown by virtue of journal articles that demonstrate a majority of the experts in the field accept and ****853** approve the procedures and that all of the sister state and federal courts have accepted the reliability of the procedures).[19]

18 Given that the *Frye* test only requires general acceptance and not universal endorsement, the fact that some psychoanalysts may still cling onto some other plausible explanation, such as the Freudian theory of masochistic behavior, to explain the aberrant behavior of some prostitutes does not warrant a different conclusion.

19 To the extent that Court could have reached this conclusion based upon the journal articles and precedents cited in the People's pre-hearing submissions, the *Frye* hearing was unnecessary.

Moreover, as in the cases cited above, expert testimony pertaining to trauma bonding and coercive control tactics used by sex traffickers would aid the average juror in understanding the anomalous behavior of victims of sex trafficking. As with rape victims and child sex abuse victims, the hearing evidence established that victims of sex trafficking, who often endure daily physical, psychological, and sexual abuse inflicted by their pimp, often engage in counterintuitive conduct—such as staying with and not leaving their pimp, not reporting or even lying on behalf of their pimp, and professing their love for their pimp. Thus, the Court finds that the proffered testimony is relevant and helpful to explain these behaviors, which might appear unusual to a lay juror, and would help dispel any juror misconceptions regarding how someone would be expected to behave under these circumstances. *See People v. Spicola, supra*; *People v. Taylor, supra*; *People v. Diaz, supra*; *United States v. Anderson, supra*; *United States v. Taylor, supra*.

With respect to the two cases that are the subjects of the instant motions to preclude, the Court believes that jurors would benefit from the specialized knowledge of Dr. Raghavan.[20] With respect to *People v. Abdur–Razzaq*, the evidence presented to the Grand Jury established that defendant repeatedly assaulted and threatened M.N., yet she continued to engage in a sexual relationship with him and continued to do sex work on his behalf. Further, when defendant was faced with criminal prosecution, M.N. lied and recanted her inculpatory testimony. Thus, Dr. Raghavan's testimony will aid the typical juror in understanding why M.N. did not remove herself from ***647** the abusive situation, why she failed to report the abuse earlier, why she continued to engage in prostitution even while defendant was at work and not at home, why she returned to defendant, and why she recanted.

20 According to the People, in order not to run afoul of the caselaw which prohibits such conduct, Dr. Raghavan has not interviewed any of the parties and has no first-hand knowledge of either case and will not be asked to express her opinion on the credibility of any of the witnesses or on whether any of the victims had actually forged a trauma bond. *See People v. Williams, supra*; *People v. Diaz, supra*. With these strictures in mind, Dr. Raghavan should be forewarned not to read this Court's decision until after she testifies in the above proceedings.

Likewise, in *People v. Skipper*, the typical juror may question why C.Y. stayed with defendant although she was not physically restrained during the entire period she remained at the location where she was being held. Moreover, should co-defendant Randolph testify, jurors may question why she remained with defendant, why she engaged in prostitution on his behalf, and why, after she had been arrested, she lied on behalf of defendant. Thus, Dr. Raghavan's testimony will help the jurors understand these potentially puzzling behaviors.[21]

21 Of course any issues regarding the application of the theory of trauma bonding and coercive control to either case may be thoroughly explored through cross examination of Dr. Raghavan or through the use of a defense expert.

  

*Conclusion*

Being satisfied that the proffered expert testimony regarding trauma bonding between sex traffickers and their victims and coercive control tactics utilized by sex traffickers ****854** have the required scientific basis for admission, that it is not within the common knowledge of the average juror, and that it is relevant to the two cases at bar, this Court concludes that such expert testimony is admissible in each case. Accordingly, each defendant's motion to preclude such evidence is denied.

This is the decision, order and opinion of the Court.

**All Citations**

60 Misc.3d 631, 77 N.Y.S.3d 842, 2018 N.Y. Slip Op. 28161

**End of Document**

67 Misc.3d 408
County Court, New York,
Dutchess County.

The PEOPLE of the State of New York, Plaintiff,
v.
Nicole ADDIMANDO, Defendant.

74/2018
|
Decided February 5, 2020

**Synopsis**

**Background:** After defendant was convicted of murder in the second degree and criminal possession of a weapon in the second degree, but before sentencing, defendant filed petition for County Court to conduct a hearing pursuant to statute governing alternative sentencing in domestic violence cases to allow defendant an opportunity for imposition of a lesser sentence.

**Holdings:** The County Court, Edward Thomas McLoughlin, J., held that:

preponderance of evidence was insufficient to support determination that defendant, an alleged domestic violence victim, was statutorily entitled to a lesser sentence, and

defendant's sentence within normal statutory sentencing guidelines, rather than a more lenient sentence, as an alleged victim of domestic abuse, was not unduly harsh.

Petition denied.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection.

**Attorneys and Law Firms**

****597** Attorneys for Plaintiff: Putnam County District Attorney by CHANA KRAUSS, ESQ., LARRY GLASSER, ESQ.

Attorneys for Defendant: JOHN INGRASSIA, ESQ., BENJAMIN OSTRER, ESQ., ELIZABETH J.M. HOOD, ESQ.

**Opinion**

Edward T. McLoughlin, J.

***409** The defendant is awaiting sentencing following her conviction after a jury trial for Murder in the Second Degree, a Class A-I Felony (Penal Law § 125.25[1]) and Criminal Possession of a Weapon in the ****598** Second Degree, a Class C Armed Violent Felony (Penal Law § 265.03[1][b]).

THE CASE

On the night of September 27, 2017, Nicole Addimando fired a semi-automatic handgun, point-blank into the left temple of Christopher Grover, causing his death. The defendant and Christopher Grover had been in a relationship since 2009, and are the parents of two young children.

Over the course of several years before the homicide, the defendant alleges numerous instances of physical and sexual violence against her by Christopher Grover, culminating in the assertion of a justification defense at trial, based on her position that she acted as a result of "Battered Women's Syndrome". The People alleged that Christopher Grover was murdered while sleeping on his couch, and that there was insufficient proof that the victim abused the defendant over the course of the previous years.

The trial was conducted in the beginning of March, 2019, with both parties presenting a vigorous exposition of the facts of the murder itself, as well as extensive background information regarding events that occurred during the relationship over several years. A jury of eight women and four men found that the People disproved, beyond a reasonable doubt, the defendant's justification defense. The jury unanimously convicted the defendant of intentional Murder and Criminal Possession of a Weapon on April 12, 2019.

PROCEDURAL HISTORY

On June 20, 2018, the Dutchess County Grand Jury

  

indicted Nicole Addimando in a four count indictment charging Murder ***410** in the Second Degree, Manslaughter in the First Degree, Manslaughter in the Second Degree and Criminal Possession of a Weapon in the Second Degree. The case was presented by the Putnam County District Attorney's office by Special Prosecutor Chana G. Kraus and Larry Glasser, Putnam County Assistant District Attorneys.[1] The defendant was represented by attorneys John Ingrassia, Benjamin Ostrer and Elizabeth Hood.

[1] The Dutchess County District Attorney's Office recused itself due to a conflict regarding an Assistant District Attorney, who was a potential witness.

The trial began on March 18, 2019. At the trial, the People called nine witnesses on its direct case and four witnesses on rebuttal. The defense presented 15 witnesses, including the defendant, who testified for approximately three full days.

On April 12, 2019, the jury of eight women and four men convicted the defendant of intentional murder. The jury unanimously rejected, beyond a reasonable doubt, the defendant's battered women's syndrome justification defense.[2]

[2] Among other characteristics of the twelve individuals on the jury, eight were women ranging in age from 22 to women in their 60s. The female jurors included a 22 year old recent college graduate, a divorced mother of three, a career financial advisor, an IBM and Central Hudson manager, a writer with five children and a medical professional. The male jurors included two medical professionals, a history teacher and a technology expert, ranging in age from 30s to 60s.

After the trial, and before sentencing, the defense petitioned this Court to conduct a hearing pursuant to Penal Law § 60.12, to allow the defendant an opportunity for sentencing pursuant to the dictates of that statute. At the hearing conducted on September 9th, 10th and 11th, the defendant, as the moving party, called four witnesses. The People presented no witnesses, but submitted one exhibit that constituted a video compilation created by ****599** Christopher Grover, during the time that the defendant was pregnant with their first child.

Both parties asked the Court to consider the full transcript of the trial, as well as all trial exhibits, in making its decision pursuant to Penal Law § 60.12. Both parties submitted lengthy legal briefs in support of their position.

The Court agreed to review all of the testimony, evidence and exhibits submitted by both parties before rendering a decision and determining an appropriate and lawful sentence.

***411** THE STATUTE

PENAL LAW § 60.12

Penal Law § 60.12 as amended on May 14, 2019, one month after the jury verdict in this case, states in pertinent part:

> "....the Court, upon a determination following a hearing that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to a substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in subdivision 1 of Section 530.11 of the Criminal Procedure Law;
>
> (b) such abuse was a significant contributing factor to the defendant's criminal behavior;
>
> (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00 would be unduly harsh, may instead impose a sentence in accordance with the section. A Court may determine that such abuse constitutes a significant contributing factor pursuant to paragraph (b) of this subdivision regardless of whether the defendant raised a defense pursuant to Article 35, Article 40 or Subdivision (1) of Section 125.25 of this chapter.
>
> "At the hearing to determine whether the defendant should be sentenced pursuant to this section, the Court shall consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination. Reliable hearsay shall be admissible at such hearings."

If the Court finds in favor of the defendant's motion, § 60.12 permits the court to impose a lesser sentence. In the instant case a determinate sentence of 5 to 15 years, plus post release supervision is available, if the Court grants the application. If the Court finds the defendant has not met her burden, the Penal Law allows an indeterminate sentence of 15 to life, up to 25 to life.

  

This is a newly amended statute which has not been interpreted by judicial decisions. In the statute, certain standards and definitions are not addressed. For example, the statute does not dictate the appropriate standard of proof that the defendant must achieve. The statute also does not define "reliable ***412** hearsay". The burden of proof and persuasion is on the moving party, the defendant.

The original section of Penal Law § 60.12, signed into law in 1998, used critically different verbiage in the elements required in this section. In 1998, Penal Law § 60.12 stated as follows:

> "....the Court, upon a determination following a hearing that
>
> (a) the defendant was the victim of physical, sexual or psychological abuse by the victim or intended victim of such offense,
>
> (b) such abuse was a factor in causing the defendant to commit such offense; and
>
> ****600** (c) the victim or intended victim of such offense was a member of the same family or household as the defendant as such term is defined in subdivision 1 of Section 530.11 of the Criminal Procedure Law, may in lieu of imposing such determinate sentence of imprisonment, impose an indeterminate sentence of imprisonment in accordance with subdivisions 2 and 3 of this section."

Most notable about the amendment added by the legislature in 2019 is the addition of the following phrases: **"Having regard for the nature and circumstances of the crime"; "the history, character and condition of the defendant"** in section (c); and in section (b) that the abuse must constitute **"a significant contributing factor".** The amended statute allows for a hearing with oral and written arguments, testimony, and the opportunity to present 'reliable hearsay'. The statute was also amended to require that the alleged abuse must be inflicted by a member of the same family or household.

There is a dearth of case law to assist in the interpretation and application of the statute. In *People v. Sheehan*, 106 A.D.3d 1112, 965 N.Y.S.2d 633 (2013), the Second Department addressed the question as to whether the defendant's sentence should have been altered pursuant to Penal Law § 60.12. In *Sheehan*, the defendant was charged with Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree - the exact two charges addressed by the jury in the instant case. In *Sheehan*, the defendant was acquitted of Murder based on a justification defense, but convicted on the Criminal Possession of a Weapon in the Second Degree charge. While the *Sheehan* Court determined that Penal Law § 60.12 was applicable because the victim/defendant in that case had been the victim of domestic violence, and that violence was a factor in the defendant's commission of Criminal Possession of a Weapon, the ***413** Appellate Court, "under the particulars circumstances of this case" decided it was not an improvident exercise of discretion for the Court to decline to sentence the defendant pursuant to Penal Law § 60.12.

It is notable that although the 2009 version of the statute in *Sheehan* did not yet include the "nature of the case" consideration, the Appellate Division included that consideration in its decision. That same language, relied upon by the Appellate Division in *Sheehan* in 2013 is now included in the 2019 amendment.

The *Sheehan* decision affirmed the sentencing court's decision to not grant leniency pursuant to § 60.12, and quoted the sentencing Judge as follows: "Society certainly must be concerned with self-help, violent behavior that is not sanctioned by law."

The Appellate Division in *Sheehan* determined that "since the Court viewed general deterrence as an overriding sentencing principle, we cannot say that the emphasis was erroneous or that the interest of justice calls for a reduction in the defendant's sentence." *People v. Sheehan*, 106 A.D.3d 1112, at 1113, 965 N.Y.S.2d 633. It should be noted that the *Sheehan* decision was published approximately six years before the 2019 amendment of Penal Law § 60.12.

THE LEGAL STANDARD

Although § 60.12 of the Penal Law, either in its original 2009 version or 2019 version, does not include a standard of proof, there are other substantive sentencing sections in the Criminal Procedure Law that provide guidance.

For instance, in CPL § 400.20(5), titled "Procedure for Determining Whether Defendant Should Be Sentenced as a Persistent Felony Offender," the statute ****601** provides that matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct can be established by any relevant evidence not legally privileged, regardless of admissibility, and provides that the standard of proof with respect to such matters shall be a "preponderance of the evidence."

  

Additionally, CPL § 440.30 entitled "Motion to Vacate Judgment and to Set Aside Sentence; Procedure" dictates that at a hearing the defendant has the burden of proving "by a preponderance of the evidence every fact essential to support the motion."

***414** Therefore, this Court determines the standard of proof pursuant to Penal Law § 60.12 is a "preponderance of the evidence."[3] The burden of proof must be met by the defendant, as the moving party.

[3] It should be noted that both parties agreed to that standard at the start of the § 60.12 hearing (HT page 7, line 18; HT page 9, line 6).

"RELIABLE HEARSAY"

In § 60.12 of the Penal Law, subdivision 1, the Court is directed to consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination. The statute then dictates that "reliable hearsay" shall be admissible at such hearings. The statute does not define "reliable hearsay". The phrase "reliable hearsay" is also used in § 440.47(2)(e) in CPL Article § 440, entitled "Re-sentencing in Domestic Violence Cases."

The phrase "reliable hearsay" has been legally interpreted most often in Sex Offender Registration Act ("SORA") proceedings. For instance, Corrections Law § 168-n(3) allows consideration of "reliable hearsay evidence" as long as it is relevant to the determination.[4] Corrections Law § 168-n is titled "Judicial Determination", and provides direction to the Court in determining whether the offender is a sexual predator, sexually violent offender or predicate sex offender. (See also Corrections Law § 168-d(3)).

[4] It should be noted that the burden of proof in that particular statute is "clear and convincing evidence."

In *People v. Mingo*, 12 N.Y.3d 563, 883 N.Y.S.2d 154, 910 N.E.2d 983, the Court addressed the concept of "reliable hearsay". While rejecting certain documentary evidence that was in the form of a 'synopsis' or collected data, the Court acknowledged that at a SORA hearing, "reliable hearsay can include the Board of Examiners Sex Offender Report, a Pre-Sentence Report, a case summary, Grand Jury testimony, misdemeanor and felony complaints, and trial testimony". In *Mingo*, the Court ordered a hearing to establish the appropriate foundation of the documents submitted for consideration. The *Mingo* Court stated, "Where an unsworn statement is equivocal, inconsistent with other evidence or seem dubious in light of other information on the record, a SORA Court is free to ignore it. *Mingo* at page 577, 883 N.Y.S.2d 154, 910 N.E.2d 983.

Further, in § 370.50 of the Criminal Procedure Law, entitled "Procedure for Determining Whether Certain Misdemeanor ***415** Crimes are Serious Offenses Under the Penal Law", subdivision 3 allows for "reliable hearsay" to the determination relevant to the statute. As long as the relevant evidence has a "indicia of reliability", such evidence does not violate the defendant's right of confrontation under the Sixth Amendment (McKinney's Article 1, Section 6: ****602** *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638) (See also, *People v. Robinson*, 89 N.Y.2d 648, 657 N.Y.S.2d 575, 679 N.E.2d 1055).

Therefore, this Court deems it appropriate to consider all trial testimony and exhibits, including video taped recordings of the defendant speaking to Officer Sisilli, Detective Honkala, and Detective Hamill. The defense has also submitted certain medical records. Although the records were not permitted at trial, (such proffered notations by a medical professional in a non-diagnostic setting were not admissible hearsay) for purposes of the § 60.12 hearing, such evidence is "reliable hearsay" which the court has considered.

THE ELEMENTS OF PENAL LAW § 60.12

Penal Law § 60.12(1)(a) requires the Court to examine whether "**at the time of the instant offense**, the defendant was a victim of domestic violence, subjected to substantial physical, sexual or psychological abuse inflicted by a member **of the same family or household**, as such term is defined in subdivision 1 of section 530.11 of the Criminal Procedure Law." (emphasis added)

Penal Law § 60.12(1)(b) requires that such abuse was **a significant contributing factor** to the defendant's criminal behavior. (emphasis added)

Penal Law § 60.12(1)(c) provides that having regard for the **nature and circumstances of the crime** and **the history, character or condition of the defendant**, that a sentence of imprisonment pursuant to (the appropriate section) would be **unduly harsh**, may instead impose a sentence in accordance with this section. 60.12(1) also allows the Court to determine whether evidence of

  

domestic violence constituted a "significant contributing" factor, even if the defense did not interpose a defense pursuant to Article 35.[5] (emphasis added)

[5] In the instant case, the defendant served the appropriate notice and interposed a defense pursuant to Article 35, based on the claim that she acted under the influence of Battered Women's Syndrome.

***416** DEFENDANT'S ALLEGED HISTORY OF ABUSE

In her trial testimony, defendant related a lifelong, extensive history of abuse before and during her relationship with Christopher Grover, and by other men as well. According to the defendant, the abuse started when she was a young child and continued throughout several relationships, including abuse by individuals with whom she was not in a consensual relationship. During her trial testimony, the defendant recounted numerous abusive acts by the decedent, Christopher Grover, over the course of their relationship.

The relationship with the decedent began when both Christopher Grover and the defendant were employees at a local gymnastics business (TT page 151, line 17)[6] in 2008 (TT page 639, line 11). They moved in together in 2012 (TT page 639, line 19) and moved to a residence in Hyde Park in late 2013 (TT page 645, line 24). The Defendant testified that the sexual and physical abuse began before her first pregnancy, continued after her first child was born, continued throughout 2015, and continued during her second pregnancy (TT page 646, line 13-25).

[6] TT= trial testimony; HT = hearing testimony; HV = Honkala video; SV=Sisilli video

Defendant's allegations of abuse include forced sex (TT page 648, line 7) and other violent encounters, including beatings about the face and body (TT page 650, 655, 660, 661). The defendant described the decedent ****603** burning her around her vaginal area with a heated spoon (TT page 655, line 16). The defendant's testimony regarding the abuse by the victim with a heated spoon included her testimony that the decedent held her on the floor with one hand, pulled down her underwear, heated a spoon on a stove flame with the other hand, pulled her knees apart and repeatedly burned the defendant "over and over again" (TT page 655, line 14).

Defendant also alleged that the victim once had bound her and left her tied up for a period of time. (TT page 687, line 25). The defendant claimed that the abuse by the victim continued into 2016 (TT page 697, line 12-21) and at one point the victim raped her vaginally with a bottle (TT page 706, line 25). At the trial, numerous pictures of injuries on the defendant were submitted for the jury's consideration (TT page 650, 660, 666), purportedly as corroboration in support of her claim of abuse.

The abuse included allegations that the victim took still photos and video of the defendant, in degrading and abusive ***417** situations, and preserved the images in his camera and on his laptop computer. The defendant also alleged that the victim uploaded these images and videos to a pornographic website called "Pornhub."

The defendant also described verbal abuse by the victim, including that he told her twice on the night of the homicide that he would kill her (TT page 740, line 9). The defendant alleged that the victim would also use instruments to gag the defendant, and would use whips to assault her (TT page 1019, line 1-5). The defendant claimed that the victim once told her that he could "kill her in her sleep" (TT page 1053, line 19). The defendant also recounted that the defendant would tell her that she "didn't learn her lesson", and was told she needed to "respect him" (TT page 663, line 17).

The defendant also testified to numerous instances of abuse by other individuals throughout her life. Defendant recounted that she was abused as a child by a neighbor known to her as "Butch" (TT page 761, line 15; TT page 810, line 21). Defendant testified that she has post traumatic stress disorder due to this abuse as a child (TT page 811, line 16). One witness recalled learning from the defendant that she had been abused by a friend's father during a sleep over (TT page 1846, line 18), presumably referencing the above abuse.

Defendant also stated that she was abused for approximately one and half years by a maintenance worker at her apartment complex named "Caesar", (TT page 816, line 16) during the time that she alleges Christopher Grover was abusing her (TT page 812, line 22, TT page 817, line 7-10). This occurred in 2011 and 2012, (TT page 823, line 10) when she saw Caesar two to three times per week (TT page 816, line 22). Defendant alleged that during the year and a half that Caesar was sexually abusing her, at one point he used a power tool to vaginally penetrate her (TT page 824, line 24). At the time, Caesar was supervised by defendant's mother, who was the property manager of the apartment complex. (TT page 1909, 1910) During this period, defendant also told her close friends that Caesar had been abusing her (TT

  

page 1389, line 25). Defendant told Dr. Kirschner, the People's psychiatric expert, that there had been a multitude of situations where Caesar had abused her (TT page 1909, line 17).

Additionally, a witness recounted that the defendant told her about other individuals who had abused her, including a different individual named "Chris" (TT page 1908, line 23). The defendant had also once showed a witness physical evidence of abuse ***418** that had just occurred, including displaying a ripped shirt and scratches on ****604** her cheek, at a time when Christopher Grover was away for the weekend (TT page 1839, line 20).

Further, an individual who was a police officer, "D.T." allegedly abused her. The defendant testified that she originally moved from her mother's house to D.T.'s home to "get away" from Christopher Grover and Caesar. (TT page 827, line 9) The defendant moved into D.T.'s house approximately 1 ½ years after she began her relationship with Christopher Grover (TT page 1718, line 4). According to several friends and therapists, D.T.'s relationship with the defendant was understood to have been sexually abusive. One witness recounted that D.T., according to the defendant, had been stalking the defendant (TT page 1387, line 8; TT page 1388, line 10) by showing up at grocery stores and at other places, uninvited (TT page 1395, line 22, 24). A close confidant of the defendant understood the relationship between D.T. and the defendant as "not consensual" (TT page 1397, line 19), but not forceful (TT 1393, line 4). According to the defendant's long-time therapist and confidant, D.T. had raped the defendant (HT page 164, line 23; HT page 169, line 11). The defendant's therapist reported that D.T. had forced the defendant to perform oral sex (H.T. 167, line 16) and at the time the defendant told her this, the therapist noted a cut on the defendant's lip (HT page 167, line 23). According to the defendant's therapist, sex with D.T. was not consensual (HT page 186, line 16) and was assaultive (HT page 215, line 7). It should be noted that during the trial, when asked if D.T. ever forced himself on the defendant, the defendant told the jury "no". (TT page 829, line 5)

Defendant's therapist also referred to an account by the defendant that she was raped by a person nicknamed "Race" (HT page 240, line 18) while in her 20s, and also made reference to an abusive encounter with a person nicknamed "A-Rod" (HT page 253, line 20). At the trial, every relationship described by the defendant that occurred with a male partner or acquaintance included either physical or sexual abuse, or both.

During the trial, multiple witnesses testified to observing various wounds on numerous parts of the defendant's body over time. A friend of the defendant noticed bruises on the defendant's cheekbone in 2016 and noted that she was usually "covered up" (TT page 1247, line 24), but stated that she did not know how the wounds occurred (TT page 1250, line 14). Another witness testified that she had observed bruises and attempts to ***419** cover up bruises with makeup, on numerous occasions (TT page 1252, line 10; TT page 1253, line 10) from 2015 to 2016. Another acquaintance testified that she noted bruises on the defendant's face and arms along with burns (TT page 1258, line 6) in 2015. The same witness noted bruises on the defendant's face (TT page 1260, line 5) and noted that she had been injured almost every time she saw her (TT page 1263, line 17). The defendant's midwife noted wounds on the defendant's private parts in 2017 (TT page 1289, line 5). In addition, a midwife noted swelling and bruising to the defendant's face (TT page 1292, line 6). The midwife documented the injuries using photos (TT page 1295, line 23). Another witness testified that she observed black eyes and bruises on the defendant on several occasions in late 2015 (TT page 1364, line 1; TT page 1365, line 23). Another domestic violence professional noted injuries to the defendant's cheek, breast, thigh and private parts in 2014 (TT page 1487, line 24 et seq). At the request of the defendant, Sergeant Ruscillo of the Hyde Park Police Department was able to view pornographic pictures of abuse uploaded to "Porn Hub." Another witness testified that the defendant would often wear scarves ****605** around her neck and face, even though the weather did not require it (TT page 1539, line 3) and also noticed a bruise on the defendant's cheek in 2016 (TT page 1541, line 3).

At the Penal Law § 60.12 hearing, several witnesses were presented by the defendant, including a witness that had observed red marks and bruising on the defendant (HT page 16, line 17; HT page 19, line 18). The defendant's therapist testified at the hearing that she observed red lines on the defendant's neck (HT page 60, line 8), injuries to the defendant's face (HT page 63, line 20) and was told of burns to the defendant's private parts (HT page 73, line 22). This witness also recounted over ten sessions she had with the defendant where she observed wounds on the defendant's person (HT page 60 et seq).

The defendant's original therapist testified at the § 60.12 hearing that she was able to view a filmed, forced sexual intercourse video involving another individual and the defendant (HT page 279, line 23), who she now believes, approximately five years later, to be Christopher Grover.

Throughout these numerous encounters and reported observations by the other witnesses, the defendant

  

disclosed that Christopher Grover was her abuser to only two witnesses.

Defendant claimed at trial that throughout the time period leading up to the homicide, she was under the control of ***420** Christopher Grover. For instance, the defendant was worried that the victim would find out that she was seeing doctors and thereby reveal his identity as her abuser to them (TT page 1460, line 12). Defendant also told her therapist in an email on December 9, 2016, "I don't think there was a way I would be without him, unless one of us aren't alive anymore" (HT page 206, line 12).

Defendant's psychiatric expert, Dr. Hughes, testified at length about the nature of domestic violence. She observed that abuse can be interspersed with normalcy (TT page 1596, line 4). The doctor stated that violence usually doesn't happen in public and in front of other witnesses (TT page 1737, line 17). The defendant's mid-wife testified that often, women stay with men that abuse them and thereby give them permission to continue (TT page 1358, line 12). Dr. Hughes testified that in her opinion, Christopher Grover, was still a threat and had control of the defendant, even when the defendant possessed a gun on the night of murder (TT page 1741, line 9). The defendant's psychiatric expert testified, by a reasonable degree of scientific certainty, that the defendant was acting under the influence of Battered Women's Syndrome on the night of the homicide (TT page 1648, line 4).

PEOPLE'S POSITION

In opposition to the defendant's Battered Women's Syndrome defense at trial, and the defendant's application pursuant to § 60.12, the People contend that the defendant was not under the control of Christopher Grover during the time period before the homicide, is an unreliable historian regarding her history of abuse and the identity of her abuser, is inconsistent regarding the facts of the homicide, and had a host of resources available to her that would have enabled her to avoid murdering Christopher Grover.

With respect to Christopher Grover's control of the defendant, regarding her financial independence, the defendant testified that she and Christopher Grover had separate checking accounts (TT page 991, line 1). Also, the defendant had a joint account with her father, into which her father would sometimes deposit money (TT page 991, line 8). Defendant also stated ****606** that she had a small business creating and selling "booties" to earn a minor income (TT page 914, line 17).

Further, the defendant's Battered Women's Syndrome expert, Dr. Hughes, stated in her opinion that the defendant was not ***421** socially isolated (TT page 1708, line 9). Dr. Hughes stated that the victim was not a jealous person (TT page 1710, line 5) and did not stop her from seeing a therapist (TT page 1711, line 4). The doctor observed that Christopher Grover did not object to the defendant living with D.T., a police officer, and his family, during their relationship and during the time that Christopher Grover was allegedly abusing the defendant (TT page 1718, line 24; TT page 1719, line 6). Dr. Hughes observed that, according to the defendant, after Christopher Grover had been regularly abusing the defendant, the defendant moved from the home of a police officer into Christopher Grover's home (TT page 1720, line 19), where the abuse continued.

Dr. Kirschner, the People's Battered Women's Syndrome expert, testified that it was notable that if Christopher Grover was an abuser, it was unusual for him to allow the defendant to move in with a police officer while Christopher Grover was abusing her (TT page 1916, line 7), and thereby trust her to not reveal the abuse. Dr. Kirschner stated that a common characteristic of a batterer is to not trust his victim (TT page 1916, line 13). Dr. Kirschner also noted that the defendant had, in an earlier published article, publicly rejected marriage to the victim (TT page 1926, line 2; see also TT page 874, line 7). According to Dr. Kirschner, these were all indicia that Christopher Grover was not controlling the defendant. He also noted that, according to the defendant, she had the opportunity to leave her residence at night and go for car rides (TT page 1927, line 22).

Dr. Kirschner also noted that the defendant's admission to him that she continued an affair with D.T., including in Christopher Grover's home when he was not there, is the kind of act inconsistent with a person who claims that she is afraid and under the control of her alleged batterer. In expressing doubts about the defendant, Dr. Kirschner stated that having an affair with another man in the batterer's home is inconsistent with the actions of an abused person (TT page 1921, line 17), if the abuse allegations are true.

In a revealing series of communications between the defendant and the victim, three days before the homicide, according to the People, the defendant made a series of comments and responses to Christopher Grover in a text conversation:

"Are you this stupid?" (TT page 95, line 25)

  

"Do you remember or is something wrong with your brain?" (TT page 96, line 21)

***422** "I have full complex thoughts like a human being." (TT page 97, line 25)

"WTF is wrong with you?", the defendant observed that the victim "has some sort of mental disorder" (TT page 98, line 6)

"I have an asshole man child for a partner. That's my disorder." (TT page 99, line 16)

These quotes are contained in People's Exhibit 6 and 7.

Also, in defense Exhibit CCCC and Exhibit Y submitted at the trial, the defense offered the following text statements were made by the defendant to Christopher Grover, approximately three days before the homicide:

"What the fuck are you talking about?" (TT page 934, line 14)

"Are you this stupid?" (TT page 934, line 24)

****607** "Is something wrong with your brain?" (TT page 936, line 17)

"No, I have full complex thoughts like a human being and you can't understand them." (TT page 938, line 21)

"You might have some sort of mental disorder." (TT page 939, line 14)

"I have an asshole man child for a partner." (TT page 940, line 8)

*Defendant's* expert, Dr. Hughes, stated that these statements by defendant were "emotionally degrading" to Christopher Grover three days before the homicide (TT page 731, line 21). Also, defendant's mid-wife, who had stated that the defendant was controlling of Christopher Grover (TT page 1345, line 8), believed that both the victim and the defendant were "sick and abusive" to each other (TT page 1346, line 9).

The People's expert, Dr. Kirschner, described the defendant's texts as "berating and condescending" (TT page 1941, line 1). Dr. Kirschner described the activity by the defendant as "provocative" under the circumstances (TT page 1943, line 5). He observed that if in fact, according to the defendant, Christopher Grover found "respect" to be an important issue, normally disrespect to the abuser would be a trigger for more abuse. (TT page 1941, line 19)

Dr. Kirschner, the People's expert, conceded that often domestic violence victims do not leave an abuser's home due to concerns about children or money. However, he observed that none of those concerns existed when the defendant left police officer D.T.'s house to move in with Christopher Grover (TT page 1920, line 18), (who was allegedly already abusing her) because the defendant's children had not yet been born.

***423** ABUSE ALLEGATIONS

The People also argue there is evidence that does not corroborate the defendant's allegations of abuse. The defendant testified that abusive sex and violence continued during her second pregnancy. (TT page 646, line 13-25). However, the defendant's mid-wife testified that she performed full exams on the defendant during the pregnancy and did not document any evidence of abuse during the pregnancy (TT page 1324, line 1).

Further, one of the People's witnesses, Marissa Hart, testified that she saw no physical injuries on the defendant in 2014 (TT page 1805, line 20), and observed that the defendant dressed the same as other moms that she encountered (TT page 1809, line 13). Ms. Hart also testified that the defendant often used fabric bands on her wrists during gymnastic training (TT page 1814, line 8). The People contend this is a possible explanation for the defendant's reported wrist-binding wounds.

The People assert, most notably, that four weeks before the night of the homicide, the defendant texted a friend stating,"It's okay. I haven't figured out a way to kill him yet without being caught, so I'm still here." (TT page 52, line 18). The defense contends that the defendant followed up that text with a "grimacing" emoji approximately four seconds later, and that the statement was made in jest.

The People argue there are other facts which do not corroborate the defendant's position, but that actually highlight the defendant's inconsistencies. For instance, although the defendant testified that Christopher Grover destroyed a camera on the night of the homicide, which according to the defendant had pictures and video of her abuse, the camera memory was resurrected and no actual pictures of abuse were found on the camera (TT line 347, line 13-25). Similarly, although defendant testified that a laptop which she stated contained evidence of abuse had been broken in half and submerged under water in ****608** a bathtub, presumably by Christopher Grover, the resurrected computer memory revealed no images of

  

pornographic or sexual abuse once it was examined (TT page 387, line 1).

Also, although the defendant testified that her therapist had repeatedly told her to secure the photographic evidence on the laptop and bring it with her if she left Christopher Grover, (TT page 929, line 6), the defendant chose not to do so on the night of the homicide.

***424** ABUSER IDENTITY

The People argue that the identity of the defendant's abuser is not corroborated by any witness or pictures, but comes solely from the defendant. The defendant's expert, Dr. Hughes, acknowledged that the defendant, in recounting certain incidents, could have facts "sort of blend together" (TT page 1734, line 23), and that she may not have the precision to give details of the who, what, why, where and when (TT page 1735, line 12). Dr. Hughes also acknowledged that the defendant at one point was conflating two separate abusive situations, (TT page 1715, line 1) perhaps because she didn't want people to know it was her partner who was the abuser. When Dr. Hughes was confronted by the People as to whether the defendant was very confused about who was doing particular acts to her, meaning Christopher Grover or Caesar, she stated that she thought the defendant was confused, and that there were elements of disassociation, avoidance, compartmentalization, and suppression (TT page 1714, line 5-11).

The defendant testified at trial that for some period of the time she was being abused by Christopher Grover, Caesar was also abusing her (TT page 804, line 4-24). The defendant testified that Caesar had abused her for approximately one and a half years (TT page 816, line 16). The defendant stated her memories are fragmented regarding the abuse that occurred at the same time by Caesar and Christopher Grover (TT page 823, line 19). During this same time, the defendant was also in a relationship with D.T., from whom she had sought protection from Caesar. However, although the defendant was willing to tell D.T. that Caesar was abusing her, the defendant did not tell D.T. that Christopher Grover was also abusing her, according to the defendant's testimony (TT page 828, line 6).

The People allege that the defendant was also inconsistent about whether the contact with D.T. was forcible, abusive rape, or consensual. The defendant testified to the jury that D.T. did not force himself on her (TT page 829, line 6). However, according to her close friend, Elizabeth Clifton, the defendant told her friend that D.T. was stalking her (TT page 1387, line 8; TT page 1388, line 10), specifically at a grocery store (TT page 1395, line 22) and he would often show up places uninvited (TT page 1395, line 24). Elizabeth Clifton also testified that she had the impression that the contact with D.T. was not consensual (TT page 1397, line 18).

The defendant also told Sarah Caprioli that she did not want to have sex with D.T., but "she wasn't able to stop it" (HT page ***425** 164, line 23). Sarah Caprioli also relayed that the defendant had told her that D.T. had forced oral sex on her (HT line 167, line 16) and that at that time, the defendant was observed with a cut on her lip (HT page 167, line 23).

Sarah Caprioli testified that her understanding was that the sexual contact with D.T. was not consensual (HT page 186, line 15) and that the contact was assaultive (HT page 215, line 7). Ms. Caprioli recounted that the defendant told her that at one point D.T. attempted to have sex with her and she said no to him (HT page 94, line 23). However, the defendant told the ****609** trial jury that the sexual contact with D.T. was not forced on her (TT page 829, line 5).

Sarah Caprioli also confirmed that she was previously told by the defendant that she had been raped by a person named "Race" while in her 20s (HT page 240, line 18) and that Caesar was assaulting her at the same time D.T. was having sex with her non-consensually (HT page 241, line 10). Sarah Caprioli also recounted the defendant's statements regarding an abusive sexual contact with a person she described as "A-Rod" (HT page 253, line 20).

Further, the defendant told numerous people, including D.T., Elizabeth Clifton, Sarah Caprioli and others that Caesar had been abusing her, but did not tell any of those individuals that Christopher Grove was allegedly abusing her at the same time (TT page 1385, line 18). The defendant did tell Sarah Caprioli later.

At trial, Sergeant Ruscillo testified that in any abusive "Porn Hub" pictures that he viewed, there was never a person, besides the defendant, shown in the pictures (TT page 1532, line 24).

Dr. Kirschner, the People's expert, testified that at one point in her life, according to the defendant another person named "Chris" had been abusing her (TT page 1908, line 23). The defendant also told Dr. Kirschner, as she told the jury, that D.T. never forced her or was violent with her (TT page 1913, line 4). Dr. Kirschner also questioned why the defendant never told D.T., (TT page

  

1913, line 22), a police officer with whom the defendant had sought and received sanctuary, that Christopher Grover was abusing her, but had told him about Caesar.

Dr. Kirschner questioned why the defendant, if the victim was beating her, would move from the sanctuary of a police officer's home, into the home of her abuser (TT page 1919, line 24; et seq TT page 1920, line 10). Dr. Kirschner described D.T. as a ***426** potential "personal body guard" for the defendant (TT page 1917, line 1) and questioned her refusal to accept help from him (TT page 1917, line 5).

During his testimony, Dr. Kirschner conceded that burns and bruises can corroborate abuse, but not necessarily the identity of the abuser (TT page 2028, line 21; TT page 2029, line 3, line 20). Dr. Kirschner noted that defendant had different accounts of who abused her at various times, even when Christopher Grover was not present (HT page 248, line 8).

Initially, the defendant reported that although she had a history of sexual abuse, there was no contemporaneous reporting of abuse by Christopher Grover after an inquiry from her midwife, Susan Ranastatd (TT page 1313, line 14), during her contact with this health professional.

At the § 60.12 hearing, the defendant's therapist and confidant, Sarah Caprioli, testified that the defendant had expressed that she was upset that her mother had told Detective Hamill of the Town of Poughkeepsie Police Department that she "makes things up for attention."

In addition to the People's allegations that the defendant was inconsistent regarding the identity of who has abused her, the People allege that the defendant has been inconsistent in detailing the type of abuse that she has endured. The People posit a pattern wherein the defendant alleges to her close friends and acquaintances that she has been abused by someone, revealing injuries and some details to them. However, according to the People, each time those friends and advisors sought to introduce the defendant to actual law enforcement professionals, such as Detective Hamill, Sergeant Ruscillo, CPS and other entities, the defendant would purposely resist a forensic gathering of physical ****610** evidence and the submission of a full detailed sworn statement (TT page 1516, line 8 et seq). For instance, Sarah Caprioli testified that it was she who told a forensic nurse what had happened to the defendant and who the defendant's abuser was (HT page 76, line 11 - line 23), not the defendant.

The defendant stated that in 2014, she had been interviewed during a forensic nurse exam (FNE) and did not report that she had been abused by weapons, hard blows, bite marks, choking or burns (TT page 902, line 22 et seq. - TT page 904). However, approximately five days later, she reported to a separate entity that she had, in fact, been burned with a spoon, had been burned and bitten, and a weapon had been used against her (TT page 904, line 15; TT page 905, line 18; TT page 906, line 6, line 16).

***427** Also, the People argue that despite leaving Elizabeth Clifton with the impression that her contact with D.T. had not been consensual, (TT 1397, line 18) and that D.T. had stalked her, the defendant asked Elizabeth Clifton to request that D.T. visit her while she was incarcerated pending trial (TT page 1399, line 4).

Finally, the People argue there are inconsistent facts in the record that create questions regarding the abuse sustained by the defendant. For example, despite the defendant's statement that a camera had been used to take abusive pictures of her and a laptop computer contained images and information regarding her abuse, no such data was located on the camera (TT page 347, line 13-25) or the computer (TT page 387, line 1). The People ask why, if Christopher Grover was purportedly concerned that evidence of abuse by him was contained on the camera or the laptop, would he have made sure they were destroyed, if nothing had actually been recorded on the devices. The People also question why an alleged abuser would teach his victim to load and use a handgun (TT page 731, line 5; see also TT page 1022, line 4-16) and make sure she knew how to operate the gun safety (TT page 1022, line 15).

The defendant testified that she had been told repeatedly by Sarah Caprioli that she should take the lap top with her if she leaves the victim (TT page 929, line 3). However, according to the defendant at trial, she could not turn off her bathtub faucet (TT page 749, line 15), and she also chose not to take the laptop computer that she discovered under water, from the scene (TT page 1975, line 5; TT page 749, line 14).

DEFENDANT'S RESOURCES

Throughout the trial and hearing, the defendant and other witnesses referenced numerous individuals who knew or were aware, on various levels, of the abuse that she allegedly endured. Several of those witnesses testified at trial. The vast majority of these individuals offered the defendant help or services.

  

These individuals included her friends, including Elizabeth Clifton (TT page 800), "Nikita" (TT page 801), Lisa Whalen (TT 716), Lori Horning (HT page 40), Melanie Bailey (TT page 1262), Michelle Wolin (TT page 1243, line 25), Lisa Rosten (TT page 1251) and Noelle Todd (TT page 1535).

Also, according to the defendant, law enforcement professionals were aware and offered her help, including Officer D.T. ***428** (TT page 803); Sergeant Ruscillo of the Hyde Park Police Department (TT page 846, 1529); Detective Chris Hamill of the Town of Poughkeepsie Police Department (TT page 837); Rochelle McDonough of the New York State Police (TT page 859; HT page 46); the Dutchess County District Attorney's Office (TT page 1532, line 7-13); Melissa Massarone, Domestic Violence Advocate ****611** for the Hyde Park Police Department (TT page 1525); and Child Protective Services (TT page 974, line 14) (on the day of the homicide).

Other domestic violence trained individuals that the defendant had access to or a close connection to among her family and acquaintances include her Aunt Cathy, who was an advocate at Grace Smith House (TT page 808; HT page 212); therapist Dusty Mason (TT page 806); therapist and confidant Sarah Caprioli (TT page 847); mid-wife Susan Rannestadt (TT page 861); mid-wife Susan Condon (TT page 863); Domestic Violence Advocate Judy Lyons (TT page 1486), Debbie Falasco (TT page 856) and Dr. Woo, M.D., (TT page 889).

According to the defendant, she received specific advice on how to safely leave Christopher Grover. Defendant testified that she was very aware of various safety plans which would help her remove herself from her abusive situation (TT page 859, line 21). This advice included suggestions from her therapist and confidant advising her to remove herself from the residence while Christopher Grover was at work (TT page 928, line 24). The defendant testified she was given several reminders that when she left her abusive home, she should remove the laptop containing evidence of the abuse (TT page 929, line 3).

At the § 60.12 hearing, Sarah Caprioli confirmed that she had advised the defendant that she should leave while the victim was at work or out of the house (HT page 211, line 3). Ms. Caprioli also advised the defendant that if she could safely take the laptop that contained evidence, she should do so (HT page 211, line 18). Ms. Caprioli also testified that she discussed places the defendant could live if she left, including with Elizabeth Clifton, at Grace Smith House, at her Aunt Cathy's, at her sister's home and at her father's home (HT page 212, line 5 et seq). Ms. Caprioli also explained to the defendant that she would help her pack her belongings and leave if she needed (HT page 213, line 12). An additional witness testified that she offered the defendant a place to live after observing signs of abuse (TT page 1262, line 8; 1273, line 3).

According to the defendant, she did not follow Ms. Caprioli's advice, nor ask for help on the night of the murder. The defendant ***429** testified that she "had nowhere else to go" (TT page 746, line 21) on the night of the homicide. The defendant also testified that she had helped her sister previously get an order of protection through Dutchess County Family Court, (TT page 807, line 25).

Ms. Caprioli also acknowledged that the victim's family had given the defendant support and help before the homicide, paying for her groceries and taking care of her children on occasion (HT page 218, line 12). However Ms. Caprioli noted that "access to services" was not the problem in the defendant's situation (HT page 219, line 25). Further, Ms. Caprioli told the defendant, when she heard that CPS would be contacting her, that "CPS is the safe way out" (HT page 259, line 17). On the day of the homicide, defendant was individually interviewed by CPS in her home, but did not disclose any facts regarding her abuse (TT page 974, line 14).

The law enforcement individuals referenced above all directly approached or were available to the defendant, and offered help at some point before the homicide. For instance, Sergeant Ruscillo of the Hyde Park Police Department waited for hours to speak to the defendant at one point in 2015 (TT page 849, line 3), in an effort to offer her help. Although his efforts were initially unsuccessful on that day, Sergeant Ruscillo ran to the defendant as she was leaving the meeting to ****612** convince her to sign a statement that had been written by Sarah Caprioli on her behalf. This would have resulted in the arrest of Christopher Grover (TT page 1529, line 20-24; TT 1531, line 2). The defendant declined to sign the statement.

The defendant's confidant and therapist Sarah Caprioli confirmed that the defendant would not sign Sergeant Ruscillo's sworn statement which had been presented to the defendant (HT page 114, line 24). Ms. Caprioli confirmed that the defendant herself never actually told Sergeant Ruscillo about the abuse in her presence (HT page 134, line 11), but witnessed Sergeant Ruscillo tell the defendant, "You have options and don't have to live this way." (HT page 135, line 24).

  

Detective Hamill of the Town of Poughkeepsie Police Department also spoke to the defendant for hours in 2012, at which time the defendant declined to reveal any details of her abuse. The defendant's friend also confirmed that the defendant did not reveal her abuse to Detective Hamill in 2012 (HT page 42, line 4).

At trial, there was testimony that several medical professional and mental health experts also attempted to help the ***430** defendant. At each encounter, the defendant either refused to identify her abuser or limited the level of evidence gathering. For instance, defendant initially asked that her mid-wife not photograph her as part of the memorialization of her wounds (TT page 1295, line 2), although the mid-wife ultimately did take photos of the defendant's injuries (TT page 1295).

According to the People, a health professional had once explained to the defendant the difference between a forensic nurse exam and an evidentiary sex-assault forensic exam. The defendant was told that a forensic nurse exam was not utilized to collect evidence for criminal prosecution (TT page 1498, line 9; TT page 1504, line 23). However, the defendant was also told that if she allowed the *evidentiary* exam, it could be used in a criminal prosecution. The defendant was also told the evidentiary exam results could be preserved, but could be withheld and not be submitted unless the defendant chose to do so later (TT page 1505, line 13-22). The defendant declined the evidentiary option and chose the non-evidentiary option.

At trial, there was testimony that during a forensic examination of the defendant on September 6, 2014, the defendant disclosed some of the details of her abuse. The defendant was interviewed on September 6, 2014 during a forensic nurse exam, and although she did disclose that she had been abused, when asked that there had been weapons used, she denied that she had endured physical blows by hand or feet, that she had sustained any bite marks, choking, or had been burned (TT page 902, line 22 et seq). The defendant also stated that there had been no threats of harm (TT page 904, line 3).

However, according to the People, five days later the defendant was re-interviewed through her therapist, Sarah Caprioli and thereafter reported that she in fact had sustained burns in the last five days (TT page 905, line 15), had sustained a bite mark in the previous five days (TT page 906, line 6), and had also now endured a burn mark in the last five days (TT page 906, line 19).

On September 12, 2017, approximately two weeks before the homicide, defendant was evaluated by Dr. Woo, at which time she did not tell the doctor about her alleged abuse, nor were there any observations by the doctor of wounds on her person (TT page 889-894).

DECEDENT ABUSER PROFILE

The People argue, with the support of the People's expert, Dr. Kirschner, that ****613** Christopher Grover did not fit the profile, ***431** nor did he appear to have the characteristics of a typical domestic violence abuser.

The defendant described Christopher Grover as a person who was more like "a big kid" (TT page 931, line 3). Early on in their relationship, the defendant testified that she expressed her concerns and hesitation, based on her previous sexual abuse history, about becoming intimate with Christopher Grover. The defendant was told by Christopher Grover that he was willing to wait for "a year" to be intimate (TT page 762, line 15). As stated above, Christopher Grover accepted that the defendant chose to move in with D.T., a police officer, and his family (TT page 853, line 11-22), during their relationship.

Several days before the homicide, the victim stated to the defendant in a text message, "Maybe you'll be happier if I go, if I make you so unhappy." (TT page 910, line 6). The defendant repeatedly testified at trial that the victim was a wonderful father and loved his children very much (TT page 1080, line 9). The defendant also stated this sentiment to her mid-wife (TT page 1353, line 24).

The defendant's confidant and friend testified that she had not observed any of Christopher Grover's texts to be threatening or controlling (TT page 1453, line 13). Sergeant Ruscillo, although being told by the defendant that the victim had photographed physical and sexual abuse and then posted them to an internet website, never actually saw Christopher Grover in any of the pictures (TT page 1532, line 24).

Also, although there were internet searches discovered on the victim's phone which referenced "force in sexual encounters", an expert determined that there were no actual pictures of violent pornography on the victim's phone (TT page 624, line 13).

The defendant's expert, Dr. Hughes, acknowledged that she did not find any evidence that the victim was jealous (TT page 1710, line 5) and testified that the victim did not try to stop the defendant from seeing a therapist (TT page 1711, line 3).

  

The defendant told Dr. Kirschner that Christopher Grover started to abuse her only after she reported violent abuse by "Caesar" to Christopher Grover. (TT page 1937, line 10) Dr. Kirschner testified that it is inconsistent with a domestic violence abuser that such abuse only began after the defendant told Christopher Grover about prior abuse by another man (TT page 1937, line 5). Dr. Kirschner testified he had never heard of a ***432** situation where abuse began only after the abuser heard of abuse by a different individual (TT page 1937, line 16).

Dr. Kirschner reported that the defendant told him that the victim was great in every other way (TT page 2024, line 15). Dr. Kirschner described that the normal profile of an abuser includes tactics such as monitoring the victim's calls, following her to work, not allowing her to see her friends and otherwise ensuring control over her (TT page 1904, line 1). Dr. Kirschner testified that there is no evidence Christopher Grover did such acts. Dr. Kirschner testified that it is inconsistent with the profile of a domestic violence abuser to allow the abuser's victim to move in with a police officer during the time that the abuser is abusing his victim (TT page 1916, line 7).

There is no exhibit presented by the People or the defense, inclusive of the numerous text conversations that were submitted, where Christopher Grover can be described to be verbally abusive to the defendant. Further, there is no quotation contained in any exhibit, where the defendant complained or made reference to any ****614** physical abuse by Christopher Grover[7] to him directly.

[7] However, the defendant was able to express criticism of Christopher Grover as a father and husband during the above-quoted text conversations.

At trial, the defendant described the unexpected CPS investigation, involving an investigation of Christopher Grover for abuse of the defendant, as a triggering event for the acts that led to the death of Christopher Grover later that night. Regarding this "triggering event", the People argue that Christopher Grover's reaction to the CPS investigation and his actions on the night of the homicide are inconsistent with an abuser who is allegedly concerned that someone may learn about his abusive acts.

Christopher Grover told Melissa Hart after the visit by CPS, that CPS had come to see him. The witness described Christopher Grover as calm (TT page 155, line 8). The defendant also recalled Christopher Grover being calm regarding the CPS visit (TT page 948, line 19). The defendant quoted the victim with regard to the CPS visit as saying, "Don't worry, its about me" (TT page 987, line 16). The victim also stated to the defendant, regarding the CPS investigation, that "It's really going to be ok" (TT page 728, line 7). Defendant also told Officer Sisilli, at their roadside encounter, that Christopher Grover thought "CPS was a joke" (SV 53:18; Defense exhibits BB and CCCC).

***433** Further, the People argue that the defendant told Officer Sisilli, the first person she encountered after the homicide, that "This is the least violent he's ever been tonight. That's why I asked him to let me go" (in support of their position that the alleged abuse was not occurring "at the time" of the homicide) (SV 47:05). The defendant also told Detective Honkala that their intercourse that night was "gentle" (HV 4:12). The defendant also told Detective Honkala that the victim had said "he's sorry" after a forcible act, and observed to the detective that "he never says he's sorry". (HV 18:02). Defendant told Detective Honkola during her interview that the intimacy on the night of the homicide was "not the usual sex, he was saying sorry" (HV 24:30). Further, defendant testified that on the night of the homicide, the victim engaged in sexual intercourse that was "more gentle and not violent" (TT page 1078, line 5).

On the night of the homicide, according to the defendant, Christopher Grover showed the defendant how to load his handgun, take off the safety, and made the weapon available to her (HV 16:30).

MURDER FACTS

On September 27, 2017, shortly after shooting Christopher Grover, the defendant came in contact with Officer Sisilli of the Town of Poughkeepsie Police Department at an intersection, a short way from her home. Thereafter, in response to the defendant's statements regarding the death of Christopher Grover, Officer Murray of the Town of Poughkeepsie Police Department went to the home of the defendant and discovered the victim on his back on a couch with his legs stretched out, his hands resting on his mid-section, and his head resting on a pillow (TT page 312, line 22). Officer Murray also observed that the shower in the bathroom was running (TT page 305, line 21) and that the water in the bathtub was filling, with a laptop computer submerged under the water (TT page 317, line 12). This device was later determined to be the laptop of Christopher Grover, which had been broken in half. Additionally, a semi-automatic handgun was recovered from the scene near the victim, which was determined to contain one unexpended round in the magazine ****615** and one unexpended round in the

  

chamber (TT page 334, line 22-25). Later, an expended round was discovered in the pillow under the head of Christopher Grover, by a forensic investigator (TT page 352, line 6).

***434** Investigator Maria Rouche of the New York State Police Forensic Identification Unit, testified that for the weapon to fire, the trigger must be compressed for each bullet fired (TT page 433, line 19). A forensic pathologist, Dr. Kia Newman, testified that she determined that Christopher Grover was killed with a gun shot wound which entered the left side of his head (TT page 469, line 13) traveling left to right and slightly front to back and downward in its path, until it exited Christopher Grover's head (TT page 466, line 12). Dr. Newman described the wound as a hard contact wound (TT page 471, line 8) which required that the gun be pressed against the skin of the victim (TT page 473, line 15). Dr. Newman testified that the tip of the gun was pressed against the victim's head and left a "muzzle imprint" (TT page 472, line 10). Dr. Newman testified that the victim was laying in the position in which he was found, supine, when he was shot (TT page 479, line 4; TT page 479, line 23 - TT page 480, line 5). Dr. Newman testified that the top of the weapon was oriented towards the top of the victim's head (TT page 506, line 8).

The defendant testified for three days regarding her version of what occurred on the day of the homicide leading to the death of Christopher Grover.[8] The series of events that ended with the death of Christopher Grover began with contact between CPS and him regarding a report CPS had received about alleged abuse of the defendant (TT page 719, line 11). The defendant testified that she was very concerned about CPS being called in the days before the homicide, although CPS presented an opportunity to provide her with assistance and protection (TT page 970, line 20).

[8] The majority of the known facts regarding the events surrounding the death of Christopher Grover are offered by the defendant, as she is the sole surviving witness to the events.

On September 26, 2017, CPS came to interview the defendant and Christopher Grover separately, and did so (TT page 721, line 3). On the evening of September 26, 2017, after Christopher Grover had returned from work and the defendant had been away from her house, the defendant encountered Christopher Grover when he came home. At this time, the defendant asked the Christopher Grover how his CPS interview "went" (TT page 729, line 17).

Therein began a series of events the defendant described in her testimony, including the destruction of a camera by the victim and an encounter where the victim instructed the defendant how to load and use his handgun. Christopher Grover ***435** also instructed the defendant how to operate the weapon's safety catch (TT page 1058, line 8). The defendant testified that the victim placed four or five projectiles in the weapon. While the victim taught the defendant how to load and fire his gun (TT page 1022, line 4-16), the defendant had her phone in her hand (TT page 1044, line 3). At some point during this encounter, the defendant testified that Christopher Grover stated that he could "kill the defendant in her sleep" (TT page 1053, line 19). Christopher Grover thereafter made the weapon available to the defendant (TT page 1058, line 16).

The defendant testified that at some point before the homicide, she entered her children's room and acknowledged that while there, and in fear for her life, she did not exit the ground floor window from her ****616** children's room (TT page 1083, line 9). Defendant testified that when she returned from the children's room to the victim lying on the couch, she thought Christopher Grover was asleep (TT page 1090, line 16; TT page 1092, line 12).

At some point on this night, the defendant testified that she had encountered the victim in the shower (TT page 732, line 18). The defendant testified Christopher Grover told her, in the shower, that he could shoot her in the shower, "but it would echo" (TT 732, line 20). Thereafter the defendant testified she joined Christopher Grover on the living room couch. While laying on top of the victim, the defendant stated that the victim produced a gun from between the cushions on the couch. At that point, while the defendant was getting up from the couch, the defendant testified that she kneed Christopher Grover in the groin (TT page 742, line 5). The defendant stated that Christopher Grover then dropped the weapon on the floor. The defendant testified she then picked up the weapon, and while a few steps away (TT page 743, line 10), pointed the gun at the victim (TT page 743, line 4), as he lay on the couch. Shortly before the shooting, defendant testified that while she and the victim were conversing, the victim was laying supine and had his eyes closed while "sighing" (TT page 1115, line 11). The defendant testified that while the victim was lying on the couch (TT page 742, line 25), the victim stated that the defendant will "give him the gun, he will kill her and then the children will have no one" (TT page 743, line 23). The defendant testified that there was an ottoman to her right (TT page 744, line 5). The defendant testified the victim did not try to get off the couch (TT page 1116, line 9). The defendant testified that Christopher Grover was a

  

black belt in Taekwondo (TT page 1096, line 18). The defendant ***436** told Detective Honkala that while the victim was laying on the couch face up, he had spoken to her, and had "faced her", but then he "looked up for a second, then I shot him" (HV 31:58). Defendant also stated to Detective Honkala, "I think he closed his eyes for a second and was like 'you won't', then I ..." (HV 32:30).

Defendant testified that she "lunged forward and squeezed the trigger" (TT page 1116, line 14). Defendant told the jury that she caused a contact wound to the victim (TT page 1118, line 14), and stated that after she dropped the gun (TT page 1121, line 21), she knew the victim was dead (TT page 1123, line 11).

However, Sarah Caprioli testified that the defendant told her that she did not believe the gun had touched the victim's head (HT page 263, line 2) and also told Ms. Caprioli that the victim had made some kind of move that made her think he was about to get up (HT page 263, line 11).

Defendant then testified that, after the shooting she picked up the expended cartridge (TT page 749, line 1) and went to the bathroom, but was unable to turn off the tub faucet that was pouring water on a broken laptop (TT page 749, line 6). Defendant testified that she could not turn the shower knobs off (TT page 1132, line 3), but also did not remove the laptop from the water (TT page 1133, line 6). Alternately, defendant testified that she then removed the laptop, but put it back into the running water (TT page 1136, line 7). The defendant also stated that she couldn't turn off the water that was destroying the laptop, but also could not take the laptop from the tub (TT page 1976, line 12). Dr. Kirschner testified that the defendant told him she did not take the laptop because she didn't want to "tamper with evidence", but did take the shell casing ejected from the weapon she had fired (TT page 1976, line 24). Defendant testified that she saw ****617** an empty expended shell near the couch and picked it up, but does not recall what she did with it (TT page 1150, line 2-7).

Defendant then testified that she did not call 911 (TT page 752, line 15), but rather placed her children in her vehicle, "drove around" and then went back to her home and re-entered (TT page 753, line 20). Further, shortly after the shooting, the defendant called Elizabeth Clifton twice to tell her that the victim had been shot, but did not tell her that Christopher Grover was, in fact, deceased (TT page 1466, line 21). Defendant testified that during the encounter with the victim before the homicide, she had access to her phone and had it in her hand (TT page 1007, line 10), but testified that the victim had ordered her to shut off her phone (TT page 1009, line 24).

***437** The People argue that the defendant was inconsistent regarding her account of how she acquired the handgun before the shooting. During her original encounter with Officer Sisilli at the roadside, the first person she spoke to after the homicide, the defendant told Officer Sisilli that she kneed Christopher Grover (while they were on the couch), the gun fell on the floor, and the defendant picked it up (SV 3:32). She also told Officer Sisilli that she knocked his arm and it fell (SV 42:02). She then told Officer Sisilli that she elbowed Christopher Grover (SV 45:57). Defendant told Detective Honkala in an interview, some hours later, that she had kneed the victim, that he flinched and "dropped it" (HV 19:45). When asked by Detective Honkala why the defendant picked up the expended bullet, but left the handgun, Defendant responded that she felt that she should not take the expended shell from the scene (HV 29:33). When asked by Detective Honkala whether the safety on the gun was on, defendant testified she was not sure, that she had just "pulled it" (HV 31:35).

There were also a number of google searches on Christopher Grover's phone on the night of the homicide, reproduced in defense Exhibit Z. The searches contained phrases such as "will they know she was asleep when shot" (TT page 106, line 20); "medulla part of scull" (TT page 111, line 5); "where do you have to get shot in the head to die instantly" (TT page 110, line 9);"part of brain to shoot in suicide" (TT page 113, line 17); and finally, "how they determine I shot person was asleep when shot" (TT page 114, line 25).

The defendant, on the night she encountered Officer Sisilli and later spoke to Detective Honkala, never told the police that Christopher Grover showed her pictures of "where to shoot someone in the head" on his phone (TT page 1964, line 8), although she testified that this did happen that night, at trial.

According to the People, among the numerous unchosen options the defendant had on the evening of the homicide, was that although repeatedly being advised to secure the laptop by Sarah Caprioli, which purportedly contained evidence of her abuse, the defendant did not do so (TT page 1975, line 18).

Defendant stated to Detective Honkala at the end of her interview on the night of the homicide, "It's obviously self defense, right?" (HV 33:54).

  

ANALYSIS

This Court is keenly aware of the scourge and crisis of domestic violence in our community. Unfortunately, this Court ***438** presides over numerous cases where domestic violence has occurred. Most victims don't want to report their abuse, because they don't want to anger the abuser by reporting them. Such abuse usually occurs in private. This Court is also keenly aware that an abuser can seem normal and friendly to the outside world. Further, this ****618** Court supports the important goals and legal necessity of the battered women's syndrome defense, as well as the spirit and goal of Penal Law § 60.12.

However, the Court's determination, pursuant to § 60.12 of the Penal Law, must be fact-based and of sufficient weight to support its decision. Our system of justice must, at its core, be proof-driven, untrammeled by laudable policy or philosophy.

Under the statute, the burden of proof is on the defendant to prove that she is factually and legally eligible for relief. The People oppose the relief requested and ask that the Court to rule that the ordinary range of sentences for Murder and Criminal Possession of a Weapon permitted by Penal Law § 70.00 (2) (a) is appropriate.

The defendant presents a compelling story of abuse, with horrific allegations that include repeated, sadistic sexual violence and physical abuse, complete with pictures and eyewitnesses viewing the results of her abuse. However, the People raise critical questions about the defendant's testimony regarding her alleged abuse, the identity of her abuser and her violent acts and decisions on September 27, 2017. This factual dispute presents significant questions regarding the critical issue of the defendant's abuse.

A trial jury explicitly determined that the defendant, in murdering the victim, was not justified, beyond a reasonable doubt. The legal conclusion that can be drawn from the jury's verdict, having rejected the defendant's justification defense, was that the jury believed the murder was intentional, and not in self-defense.

The People and the defense team fully presented and argued the defendant's battered women's syndrome defense in their lengthy summations[9]. Although zealously and forcefully presented by a team of excellent defense lawyers, the jury rejected the defendant's battered women's syndrome defense. No person can fully explain the acts of the defendant on the evening of September 27, 2017, but the jury clearly weighed the defendant's ***439** non-lethal options, as against all that she had allegedly endured, and unanimously found that her decision to kill Christopher Grover was unlawful. To be clear, although the jury verdict is consistent with this Court's determination under § 60.12, the verdict is not determinative.

[9] The defense summation was 2½ hours, the People's summation was 3½ hours.

This Court makes no definitive finding as to the level of abuse the defendant endured during her life, or as to which person(s) have abused the defendant. There are significant, unresolved questions regarding the defendant's version of what occurred in her past and on the night of the homicide, as well as weighty questions regarding the nature of her relationship with Christopher Grover and the profile of Christopher Grover as an abuser, in action or by reputation.There are four factual bases that the Court identifies in support of its decision. First, due to the inconsistent statements by the defendant regarding her life-long abuse by Christopher Grover and others, the expert testimony, and questions regarding the defendant's recollection, the Court finds that the abuse history presented by the defendant is undetermined and inconsistent regarding the extent of the abuse, as well as the identity of her abuser(s).

Second, the nature of the alleged abusive relationship between the defendant and Christopher Grover is undetermined, based on the demeanor and behavior of Christopher Grover on the day of his death, as well as during the weeks prior, as recounted by the defendant and others. This question is impacted by the notable ****619** text communications occurring three days before the homicide, between the defendant and the victim.

Third, provided throughout testimony from the defendant, it is clear that the defendant had a tremendous amount of advice, assistance, support, and opportunities to escape her alleged abusive situation, and thereby avoid the decision to take the life of Christopher Grover. By her own admission, the defendant had help and options within her family as well as in the broader health care, domestic violence, and law enforcement community. The decision not to accept the advice and help of these individuals when viewed in the context of the homicide facts, significantly weakens the defendant's position in her use of deadly force. In other words, the defendant's resources and options must be viewed in the context of choosing to end Christopher Grover's life, with regard to the "nature and circumstances" of the crime committed.

***440** Finally, and most importantly, the specific facts of the homicidal act, as testified by the defendant herself, reveal a situation where the victim was supine, with his

  

eyes closed, on a couch. The defendant admitted she had a path to escape through the front door of her apartment, which was steps away, while armed with the victim's deadly weapon, which she had been shown how to operate. Instead, the defendant lunged forward and shot Christopher Grover point blank in his temple. These facts were stated under oath by the defendant. All of the above four questions and findings, in aggregate, form the factual basis for the Court's decision, but the "nature and circumstance" of the homicide facts are most weighty.

ELEMENT ANALYSIS

The above questions and findings are the factual foundation of the Court's legal decision as addressed in the three relevant Penal Law § 60.12 elements. The defendant must present sufficient facts, by a preponderance of the evidence, to be entitled to enhanced leniency.

In § 60.12(1)(a), the Court is required to determine whether at the time of the instant offense, the defendant was the victim of domestic violence and **subjected to substantial physical, sexual and psychological abuse inflicted by a member of the same family.**

As a preliminary matter, the Court does not adopt the People's analysis that the defendant is required to be enduring physical abuse during the crime. The legislature clearly intended that the defendant must be affected by physical, sexual or psychological abuse before the criminal event, and within a reasonable amount of time during which she would still be under the influence of such abuse. The defense is correct that there need not be actual physical abuse at the time of the homicide to satisfy Penal Law § 60.12. However, alleged events that occurred years earlier may be given more limited weight. As the defense argues, the spirit of the statute requires the Court to consider the culmination of the abuse endured by the domestic violence victim. Based on the above factual conclusions by the Court in this case however, it is not clear whether the alleged abuse was carried out by Christopher Grover in part or in whole, and to what degree.

§ 60.12(1)(b) requires the Court to determine that the abuse was a **significant contributing factor** to the defendant's criminal behavior.

***441** The questions and inconsistencies that remain regarding the defendant's alleged abuse and abusers, do not amount to sufficient proof that the alleged abuse was a significant contributing factor in the defendant's act of murder. The choices the defendant ****620** made on September 27, 2017, and the choices the defendant did not make on or before September 27, 2017, combined with the undetermined abuse history and the decedents personality profile, provide insufficient evidence to sustain the defendant's burden that her act was caused by abuse that was a "significant contributing factor."

Also, if there was abuse by other individuals inflicted on the defendant, such abuse by those individuals does not constitute a significant contributing factor to the defendant's criminal behavior, in her act of taking the life of Christopher Grover in the manner in which she did. Many of the abuse allegations by others would not constitute abuse by a household or family member in any case.

The factual scenario surrounding the homicide and the events within several days therein create a question as to whether the purported abuse was a significant contributing factor. In other words, because the defendant had numerous opportunities to avoid any further abuse and was capable of communicating "direct" sentiments to Christopher Grover, it is unknown what motive compelled the defendant.

Finally, § 60.12 (1) (c) requires the Court to regard the **nature and circumstances of the crime as well as the history, character and condition of the defendant.** It is critical to note that the defendant has no criminal history and has otherwise lived a law abiding life as a mother and partner. This Court also accepts that the defendant has been abused in her life by numerous individuals, as she has named several perpetrators. Further, there is nothing else about the history, character or condition of the defendant that would make her otherwise ineligible for consideration under this statute.

However, as the Court views the **nature and circumstances of the crime**, the defendant does not, by a preponderance of the evidence, sustain her burden of proof. Based upon the options and opportunities she had to avoid her decision to shoot Christopher Grover, as well as her uncontroverted ability to withdraw from her apartment while armed with a deadly weapon, the defendant does not warrant relief under this statute. The intentional murder of Christopher Grover substantially outweighs the undetermined details of the abuse and the ***442** abuser. In other words, it is presumed the defendant may have been abused in her life, but the choice she made that night, and the manner in which the murder occurred, outweighs her undetermined abusive history.

  

It must be noted that the above factual analysis is based almost entirely on the defendant's own version of what occurred. The People, of course, argue that the defendant simply executed Christopher Grover as he slept on his couch.

"UNDULY HARSH"

The purpose of Penal Law § 60.12 is to allow the Court to consider "enhanced leniency", which would allow this Court to consider sentences outside the normal statutory sentencing guidelines. However, based on the questions regarding the defendant's abuse history and the identity of her abuser, in addition to the violent and unjustified actions on the night of the murder, sentencing the defendant within the normal sentencing range would not be "unduly harsh."

Regarding the evening of the murder, defendant had a myriad of non-lethal options at her disposal. At the moment that she fired the gun at point-blank range into the victim's head, the victim was supine, initially had his eyes closed, and the defendant was armed with a loaded handgun ****621** which she knew how to operate. The defendant was only steps from her front door. Further, as detailed in the above opinion, the defendant had numerous individuals and entities who had offered her help, as well as advice and suggestions of how to extricate herself from her alleged abusive circumstances. The defendant's testimony regarding the details on the evening of the homicide, together with her questionable statements regarding contact with physical evidence, the alleged actions of the murder, and her inconsistent recounting of which individuals were abusing her, undermine her position that she should be considered for a sentence with "enhanced leniency."

This Court makes no definitive finding regarding the abuse of the defendant, as there is compelling evidence for both parties' propositions. This includes both the severity of the abuse and the identity of the abuser(s). However, according to the defendant's own testimony, the defendant had the opportunity to safely leave her alleged abuser before September 27th. The defendant had the opportunity to safely leave early in the evening of September 27th before she shot Christopher Grover. The defendant had the opportunity to safely leave her home ***443** the moment before she shot Christopher Grover. She did not choose these options.

Due to the myriad of opportunities the defendant had to avoid the murder of Christopher Grover, the defendant fails, by a preponderance of the evidence, to be considered for a sentence outside of the normal range for someone convicted by a jury of her peers, of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree.

Defendant's application pursuant to Penal Law § 60.12 is denied.

The foregoing constitutes the decision and order of the Court.

**All Citations**

67 Misc.3d 408, 120 N.Y.S.3d 596, 2020 N.Y. Slip Op. 20048

**End of Document**

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 60. Authorized Dispositions of Offenders (Refs & Annos)

McKinney's Penal Law § 60.12

§ 60.12 Authorized disposition; alternative sentence; domestic violence cases

Effective: May 14, 2019
Currentness

1. Notwithstanding any other provision of law, where a court is imposing sentence upon a person pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title, other than for an offense defined in section 125.26, 125.27, subdivision five of section 125.25, or article 490 of this chapter, or for an offense which would require such person to register as a sex offender pursuant to article six-C of the correction law, an attempt or conspiracy to commit any such offense, and is authorized or required pursuant to sections 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title to impose a sentence of imprisonment, the court, upon a determination following a hearing that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in subdivision one of section 530.11 of the criminal procedure law; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title would be unduly harsh may instead impose a sentence in accordance with this section.

A court may determine that such abuse constitutes a significant contributing factor pursuant to paragraph (b) of this subdivision regardless of whether the defendant raised a defense pursuant to article thirty-five, article forty, or subdivision one of section 125.25 of this chapter.

At the hearing to determine whether the defendant should be sentenced pursuant to this section, the court shall consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination. Reliable hearsay shall be admissible at such hearings.

2. Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title, or may fix a determinate term of imprisonment as follows:

(a) For a class B felony, the term must be at least one year and must not exceed five years;

(b) For a class C felony, the term must be at least one year and must not exceed three and one-half years;

  

(c) For a class D felony, the term must be at least one year and must not exceed two years; and

(d) For a class E felony, the term must be one year and must not exceed one and one-half years.

3. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to section 70.00 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed fifteen years.

4. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (i) of paragraph (b) of subdivision two of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed eight years.

5. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (i) of paragraph (b) of subdivision three of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed twelve years.

6. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (ii) of paragraph (b) of subdivision two of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least one year and not to exceed three years.

7. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (ii) of paragraph (b) of subdivision three of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least three years and not to exceed six years.

8. Where a court would otherwise be required to impose a sentence pursuant to subdivision six of section 70.06 of this title, the court may fix a term of imprisonment as follows:

(a) For a class B felony, the term must be at least three years and must not exceed eight years;

(b) For a class C felony, the term must be at least two and one-half years and must not exceed five years;

(c) For a class D felony, the term must be at least two years and must not exceed three years;

(d) For a class E felony, the term must be at least one and one-half years and must not exceed two years.

9. Where a court would otherwise be required to impose a sentence for a class B, C, D or E felony offense pursuant to section 70.00 of this title, the court may impose a sentence in accordance with the provisions of subdivision two of section 70.70 of this title.

  

10. Except as provided in subdivision seven of this section, where a court would otherwise be required to impose a sentence pursuant to subdivision three of section 70.06 of this title, the court may impose a sentence in accordance with the provisions of subdivision three of section 70.70 of this title.

11. Where a court would otherwise be required to impose a sentence pursuant to subdivision three of section 70.06 of this title, where the prior felony conviction was for a felony offense defined in section 70.02 of this title, the court may impose a sentence in accordance with the provisions of subdivision four of section 70.70 of this title.

**Credits**

(Added L.1998, c. 1, § 1, eff. Aug. 6, 1998. Amended L. 2019, c. 31, § 1, eff. May 14, 2019; L.2019, c. 55, pt. WW, § 1, eff. May 14, 2019.)

**Editors' Notes**

**PRACTICE COMMENTARY**

by William C. Donnino

**Introduction**

In 2019 (c. 31 and c. 55, effective May 14, 2019), the Legislature substantially revised and expanded the authorization of Penal Law § 60.12 for a court to impose an alternative, less severe, sentence for a victim of domestic violence who is convicted of certain felonies.

The statute consists primarily of three parts:

(1) a listing of the felony convictions that are eligible for an alternative sentence authorized by Penal Law § 60.12 in lieu of any other sentence;

(2) the criteria to apply in deciding whether a person who is convicted of an eligible felony is also eligible for an alternative sentence, and if so, whether to impose same; and

(3) the alternative sentences authorized by Penal Law § 60.12.

Notably, the statute took effect on May 14, 2019, and the foregoing parts of the statute applied to "offenses committed on, after and prior to such effective date where the sentence for such offense has not yet been imposed." L. 2019, c. 31, § 6. Where a sentence had already been imposed, a separate section, CPL 440.47, was enacted to authorize a resentence for those incarcerated individuals who would qualify under that section for an alternative sentence under the revised Penal Law § 60.12.

**Eligible Felony Conviction**

With exceptions, a defendant is eligible for a sentence pursuant to Penal Law § 60.12 when the defendant stands convicted of a felony for which a sentence of imprisonment is "required or authorized" by Penal Law § 70.00 [sentence for a felony]; Penal Law § 70.02 [sentence for violent felony offender]; Penal Law § 70.06 [sentence for second felony

  

offender]; or Penal Law § 70.71 [sentence for a class A felony drug offender as defined in subd. (2) [first felony drug offender], or subd. (3) [second felony drug offender].

The exceptions are for a defendant convicted of homicide, as defined in Penal Law §§ 125.26 [aggravated murder], 125.27 [murder first degree], 125.25(5) [being 18 years old or more, he or she intentionally causes the death of a person less than 14 during commission of certain sexual offenses]; or a defendant convicted of a terrorism offense [Penal Law art. 490]; or a defendant convicted of any offense which would require that person to register as a sex offender [Correction Law art. 6]; or a defendant convicted of an attempt or conspiracy to commit any of those specified offenses.

**Eligible Offender and Criteria for Alternative Sentence**

A court may impose a Penal Law § 60.12 sentence in lieu of any other sentence upon a defendant who stands convicted of an eligible felony, when that person, "following a hearing," meets three criteria:

(1) the defendant, "at the time" of the offense, was subjected to "substantial" physical, sexual or psychological abuse inflicted by "a" member of the same family or household [as defined by CPL 530.11];

(2) the abuse was a "significant contributing factor" to the defendant's criminal behavior; in making this determination, it matters not whether the defendant raised a defense of justification [Penal Law art. 35]; duress, entrapment, renunciation, or insanity [Penal Law art. 40]; extreme emotional disturbance, or the causing or aiding of suicide [Penal Law § 125.25(1)]); and

(3) upon consideration of the standard sentencing factors, it "would be unduly harsh" to impose the otherwise applicable sentence of imprisonment.

At a hearing on these issues, "reliable hearsay" is admissible. Given that hearsay that is subject to exclusion at a trial is by definition not reliable, care must be taken in determining that the offered hearsay is reliable; the source; the reason, if any, not to speak the truth; and whether there is other evidence tending to corroborate the hearsay should be considered.

Once a court determines to impose a sentence authorized by Penal Law § 60.12, it must of course then decide what the sentence should be.

**Penal Law § 60.12 Authorized Sentences**

A major change in the authorized sentences is the authorization of a determinate sentence of imprisonment rather than an indeterminate sentence of imprisonment. With the determinate sentence of imprisonment, a period of post-release supervision [PRS] was provided for by amendments in the 2019 legislation to Penal Law § 70.45(2).

**Sentence for a felony in lieu of Penal Law § 70.00**

For a class A felony, the authorized alternative sentence is a determinate term of imprisonment of not less than 5 years nor more than 15 years [Penal Law § 60.12(3)], with a PRS period of 5 years [Penal Law § 70.45(2)].

For a class B, C, D, or E felony, Penal Law § 60.12(9) sets forth the authorized alternative sentence as any sentence set forth in Penal Law § 70.70(2) for the respective class of felony. If a determinate term of imprisonment is imposed, the PRS period for a Class B or C felony is not less than 1 year nor more than 2 years; and for a Class D or E felony, 1 year. Penal Law § 70.45(a) and (b).

  

**Sentence for a violent felony offense in lieu of Penal Law § 70.02**

The authorized alternative sentences, pursuant to Penal Law § 60.12(2), are a definite sentence of imprisonment of 1 year (364 days) or less; probation; or a determinate term of imprisonment of at least 1 year and:

- for a class B felony, not more than 5 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];
- for a class C felony, not more than 3.5 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];
- for a class D felony, not more than 2 years, with a PRS period of not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)]; and
- for a class E felony, not more than 1.5 years, with a PRS period of not less than 1.5 nor more than 3 years. Penal Law § 70.45(2)(e).

**Sentence, as a second felony offender, in lieu of Penal Law § 70.06(3), except if the prior or current conviction is for a violent felony offense**

Pursuant to Penal Law § 60.12(10), the authorized alternative sentence is any sentence set forth in Penal Law § 70.70(3) for a class B, C, D, or E felony, respectively. If a determinate sentence of imprisonment is imposed, the PRS period is not less than 1 year nor more than 2 years. Penal Law § 70.45(2)(c).

**Sentence, as a second felony offender, in lieu of Penal Law § 70.06(3) where the prior felony conviction was for a violent felony offense**

Penal Law § 60.12(11) sets forth the authorized alternative sentence as any sentence set forth in Penal Law § 70.70(4) for a class B, C, D, or E felony, respectively. If a determinate sentence of imprisonment is imposed, the PRS period is not less than 1.5 years nor more than 3 years. Penal Law § 70.45(2)(d).

**Sentence, as a second felony offender, in lieu of Penal Law § 70.06(6) where the current conviction is for a violent felony offense**

The authorized alternative sentence is a determinate term of imprisonment set forth in Penal Law § 60.12(8) as follows:

- for a class B felony, the term must be at least 3 years and not more than 8 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];
- for a class C felony, the term must be at least 2.5 years and not more than 5 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];
- for a class D felony, the term must be at least 2 years and not more than 3 years, with a PRS period of not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)];
- for a class E felony, the term must be at least 1.5 years and not more than 2 years, with a PRS period of not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)].

**Sentence for a class A felony for a "first felony drug offender" in lieu of Penal Law § 70.71(2):**

  

For a class A-I felony, the authorized alternative sentence is a determinate term of imprisonment of not less than 5 years nor more than 8 years. Penal Law § 60.12(4).

For a class A-II felony, the authorized alternative sentence, is a determinate term of imprisonment of at least 1 year and not to exceed 3 years. Penal Law § 60.12(6).

The PRS period in each instance is not less than 1.5 years nor more than 3 years. Penal Law § 70.45(2)(e).

**Sentence for a class A felony for a "second felony drug offender" in lieu of Penal Law § 70.71(3):**

For a class A-I felony, the authorized alternative sentence, is a determinate term of imprisonment of not less than 5 years nor more than 12 years. Penal Law § 60.12(5).

For a class A-II felony, the authorized alternative sentence, is a determinate term of imprisonment of not less than 3 years nor more than 6 years. Penal Law § 60.12(7).

The PRS period in each instance is not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)].

**CPL 440.47 Resentence Pursuant to Penal Law § 60.12**

In addition to the "prospective" application of the revised criteria and sentences provided by Penal Law § 60.12, a separate section was enacted [CPL 440.47] to make the alternative sentences retroactive to defendants who were previously convicted and sentenced and who would meet the present criteria of Penal Law § 60.12. To the extent a resentence is ameliorative, there is no violation of the Ex Post Facto Clause. *People v. Oliver*, 1 N.Y.2d 152, 159-60, 151 N.Y.S.2d 367, 134 N.E.2d 197 (1956) ("where an ameliorative statute takes the form of a reduction of punishment for a particular crime, the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date"). *People ex rel. Lonschein, etc. v. Warden,* 43 Misc.2d 109, 119, 250 N.Y.S.2d 15 (Supreme Court, Queens County, 1964) *aff'd upon the opinion at the Supreme Court* 15 N.Y.2d 663, 255 N.Y.S.2d 876, 204 N.E.2d 206.

The initial requirement is that the defendant is in the custody of the state, serving a sentence with a minimum or determinate term of 8 years or more [CPL 440.47(1)(a)].

The statute then sets up an unusual procedure. A defendant must first submit a "request" to the judge who imposed his or her sentence "to apply" for resentencing [CPL 440.47(1(a)] on the grounds that he or she meets the initial requirements and is "eligible for an alternative sentence" pursuant to Penal Law § 60.12. If that original sentencing judge is not available, an alternate judge will be assigned [CPL 440.47(1)(b); *see also* subd. (2)(b)].

If the court finds that the defendant "has met the requirements," the court must notify the defendant that he or she may "apply" for resentence, and the defendant may in turn apply for assigned counsel [CPL 440.47(1)(c)]. The district attorney is not required to be notified of the "request" to apply for resentence and may therefore have no input on whether the defendant "has met the requirements" for a formal application. Once the request is granted and the defendant's application is filed, the district attorney must then be given a copy of the application [CPL 440.47(2)(a)].

The defendant is required to include in the application "at least" two pieces of evidence that corroborate his or her claim [CPL 440.47(2)(c)]. One piece of evidence "must be" a "court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection" [CPL 440.47(2)(c)]. The second type of evidence that must be submitted is not mandated

  

from a given list; however, the statute provides examples of the type of evidence that may be submitted [CPL 440.47(2)(c)]. By amendment of a separate section, CPL 390.50(2)(a), the defendant is entitled to a copy of his or her presentence report for use in the application for resentence.

If the court finds that the applicant "has complied with" the requirements, the court "shall" conduct a hearing and "determine any controverted issue of fact"; at the hearing, "reliable hearsay" is admissible [CPL 440.47(2)(e)].

Arguably, putting the proverbial "cart before the horse," the statute appears to have the court "consider any fact or circumstances relevant to the imposition of a new sentence," including the defendant's "institutional record of confinement" before it decides that a resentence is warranted [CPL 440.47(2)(e), second paragraph].

If the court denies the application for resentence, the defendant may appeal of right to the Appellate Division. CPL 440.47(3)(a).

If the court finds that the defendant should be resentenced, the court must notify the defendant of the decision and of the "new" sentence the court will impose unless the defendant changes his or her mind and "withdraws the application" or "appeals from such order" [CPL 440.47(2)(g)]. The appeal is "of right" to the Appellate Division, from the order with the proposed new sentence, on the grounds that the term of that sentence is "harsh or excessive." If the defendant is not successful on appeal, on remand to the trial court, the defendant is yet entitled to withdraw his or her application for resentence. CPL 440.47(3) second sentence.

A defendant is also entitled to appeal of right to the Appellate Division "from a new sentence imposed" on the grounds that the new sentence is "harsh or excessive," or "unauthorized as a matter of law." CPL 440.47(3)(b).

Providing an appeal both from a proposed sentence and from the imposition of that sentence on the grounds that it may be harsh or excessive is unusual. It may, however, be for a defendant who may wish to argue that a proposed sentence is harsh or excessive but who would not want to withdraw the application for resentence if that argument were not successful; in that case, the defendant may choose not to appeal the proposed sentence but upon imposition of that sentence, would then appeal, arguing that the imposed sentence was harsh or excessive.

The People are not entitled to appeal to the Appellate Division an order granting defendant's application for resentence; nor, as is standard, are they entitled to appeal the proposed or imposed sentence.

Either party may appeal, by permission, to the Court of Appeals from a qualifying order of the Appellate Division. CPL 450.90. A qualifying order will not, as is standard, include an Appellate Division order finding in its discretion that a new sentence is harsh or excessive.

The defendant may request that the court assign him or her an attorney for the appeal.

Notes of Decisions (4)

McKinney's Penal Law § 60.12, NY PENAL § 60.12
Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 127. Some statute sections may be more current, see credits for details.

**End of Document**

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# "Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety

**Michael A. Anderson,[1,5] Paulette Marie Gillig,[1] Marilyn Sitaker,[2] Kathy McCloskey,[3] Kathleen Malloy,[3] and Nancy Grigsby[4]**

Responses of victims at a domestic violence advocacy center indicate that barriers exist to seeking help that are often overlooked by many mental health professionals. This descriptive study retrospectively examined 485 victim surveys gathered in a domestic violence advocacy center (Artemis Center for Alternatives to Domestic Violence) in Dayton, Ohio, over 12 months. Various reasons for returning included lack of money (45.9%, $n = 184$), lack of a place to go (28.5%, $n = 114$), and lack of police help (13.5%, $n = 54$). Reasons for returning indicated that barriers prevented the victim from being safe. The Barrier Model as proposed by N. Grigsby and B. Hartman (Grigsby, N. & Hartman, B. 1997, *Psychotherapy* 31: 465–497) is used as a vehicle to explain these findings. This model incorporates four concentric rings with the victim in the center as the innermost ring. The rings in order of external to internal represent the environmental barriers, family and social role expectations, and the psychological impact of the abuse.

**KEY WORDS:** domestic violence; victim; barrier; escape.

## INTRODUCTION

Domestic violence (DV) continues to plague women of every society. Collins *et al.* (2000) found in the Commonwealth Fund 1998 Survey of Women's Health that 31% of women respondents were exposed to domestic violence, with 39% reporting exposure to any abuse or violence. Barriers in DV are not new, as Rodriguez *et al.* (1999) examined physician barriers in identification and intervention of DV. Yet, only the study conducted by Fleury *et al.* (1998) could be found in the literature quantitatively addressing victim reported barriers to escape. Their limited study only examined the victim calling the police. People ask, "If a woman is in an abusive relationship, why doesn't she just leave?" In an effort to examine the important, but unexplored area of why victims stayed in or returned to abusive relationships, victim reports gathered at an urban DV center over 12 months were reviewed.

Many myths exist concerning why women stay in abusive relationships. Most of these myths have their basis in attempting to understand the individual psychodynamics of the woman. Hagen (1993) points out that one does not have to search the previous literature deeply to encounter such terms as "codependency," "martyrdom," "learned behavior," and "adult survivors of childhood abuse" when DV is examined. However, by listening instead to those who ask for help, we may better understand where the problem truly lies.

Domestic violence is a specific strategy used to subjugate the victim for the gain of the abuser, as shown by Brown and Ballou (1992). Examining only the relationship or the victim's behavior directs attention away from the responsibility of the abuser. This may unintentionally support the abuser in his pattern of abuse. Minimization, denial, projecting, and rationalization by the batterer are further aided by the victim accepting some or all of the blame. Thus, the abuse evolves into a pattern, likely to

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escalate in intensity and/or frequency (Graham *et al.*, 1994; O'Leary *et al.*, 1989).

## METHODS

From June of 1998 to May of 1999, 485 intake surveys of women seeking services from Artemis were gathered. The intake process begins by the victim calling the Artemis Hotline, which is monitored 24 hr a day by a rotating schedule of victim advocates. The advocates at Artemis vary in their amount of professional and on-the-job training. Most are degreed, ranging from the Associate to the Master's level. Approximately 60% ($n = 15$) are licensed social workers. At the time they are hired they are trained in DV intervention for 90 days, with the first 30 days as observation time, followed by 60 days of supervision by experienced advocates. All advocates are supervised by a licensed independent social worker. The advocate gathers information from the victim to establish risk and offers further assistance, if necessary. The intake is done within 1–14 days of initial contact, depending on the nature of the assessment. Women who report that their children have been kidnapped, report an immediately dangerous personal situation, or have a pending court appearance are offered more emergent appointments.

At intake, the personal assessment is begun by the victim completing a questionnaire consisting of 20 qualitative and quantitative questions aimed at eliciting the pattern of abuse and other potentially lethal factors. The advocate then examines the form for completeness and answers any further questions about the form.

This questionnaire has been an evolutionary document, first implemented around 1988. It originally arose from the data collected in the Stockholm interviews reported by Graham and Rawlings (1991). Leaders at Artemis, who were involved in the Stockholm research, realized that free-form victim interviews were missing important information. Walker (1994) found that factors such as memory impairment and victim mistrust were barriers to fact collection. The questionnaire was formulated in a way that would "normalize" seeking help as well as to create a nonjudgmental tone (Bolger *et al.*, 1996).

Victims reported to staff that they felt more comfortable in filling out the questionnaire alone while given time to think of responses, although they can request that questions be read to them if needed. The specific content of the questions and structure has evolved as more information has indicated specific patterns of abuse. The inventory of abusive actions in the questionnaire reflects what victims have reported over the 15 years in which the center has been in operation, and is offered to jog a victim's memory as well as "normalize" answers to make the victim feel less alone. The victims are asked to "Check all of the following items that have occurred with your mate" as well as being asked "If you never left your mate or returned to your mate after separating, check those factors which affected your decision." An advocate then examines the responses to determine apparent risk potential to the victim and offers specific interventions such as assistance filing complaints to police or child protective services, providing emergency housing and food, or a number of other interventions.

In this study, the results of 485 DV intake surveys were tabulated, and are reported here as frequencies, percentages, and cumulative totals. The results are then arranged to examine specific patterns or themes according to a conceptual model by Grigsby and Hartman (1997).

## RESULTS

### Types of Abuse Encountered by Victims of DV

The physical abuse reported most often was being pushed, shoved, or grabbed (87.3%, $n = 414$). Other specific forms of physical abuse reported included destroying or damaging household items (71.2%, $n = 343$). General violence toward the victim (63.1%, $n = 298$) is quite frequent as well as physical injury (59.1%, $n = 279$) and punching or kicking the victim (58.2%, $n = 276$).

Verbal abuse, including yelling at the victim (89.6%, $n = 432$), breaking promises (88.0%, $n = 424$), lying (86.9%, $n = 419$), and name-calling (83.2%, $n = 401$) are commonly reported by victims. Blaming the victim for the abuser's problems (82.8%, $n = 399$) as well as telling the victim she's crazy (74.8%, $n = 360$) or no one else would want her (60.8%, $n = 293$) are frequent as well (see Table I).

### Reasons to Remain or Return Reported by Victims

Our data illustrate the environmental barriers encountered by victims: lack of money (45.9%, $n = 184$), lack of places to go (28.5%, $n = 114$), homelessness (18.2%, $n = 73$), and lack of support from police (13.5%, $n = 54$), courts (6.8%, $n = 27$), and medical people (2.3%, $n = 9$). More than three of four victims (77.1%, $n = 341$) in our study reported they called the police in response to an abusive incident and 60.9% ($n = 272$) reported they filed a complaint against the abuser. The most frequently reported barriers were her mate promising to change (70.5%, $n = 282$), her mate apologizing (60.0%, $n = 240$), lack of money (45.9%, $n = 184$), and nowhere to go (28.5%, $n = 114$).

**Table I.** Check the Items That Have Occurred With Your Mate ($n = 482$)

| Percentage | Items | Percentage | Items |
|---|---|---|---|
| 89.6 | Yelled at me | 58.2 | Punched or kicked me |
| 88.0 | Broke promises | 55.9 | Choked me |
| 87.3 | Pushed, shoved or grabbed me | 55.4 | Told me I could not survive without him/her |
| 86.9 | Lied to me | 51.9 | Called home unexpectedly to check up on me |
| 83.2 | Called me names like whore, slut, bitch | 51.9 | Didn't care for me when I was sick |
| 82.8 | Blamed me for his/her problems | 49.6 | Kept me from sleeping |
| 79.5 | Embarrassed me in front of others | 46.7 | Threatened to harm my family or others close to me |
| 79.5 | Criticized my family/friends/coworkers | 45.6 | Was sexual with me when I didn't want to be |
| 78.4 | Tried to control me | 44.7 | Threw objects at me |
| 76.3 | Denied incidents of abuse | 43.2 | Came home unexpectedly to check up on me |
| 74.8 | Told me I was crazy | 42.7 | Would not let me see family, friends, etc. |
| 72.2 | Was possessive of me | 42.5 | Controlled all the money |
| 71.2 | Destroyed/damaged household items | 40.4 | Kept me from getting or keeping a job |
| 71.1 | Tried to control who I talked to or saw | 38.0 | Stole my money |
| 70.5 | Blamed me for the abuse | 37.5 | Told me she/he would find and kill me if I ever left him |
| 68.3 | Threatened to hit me | 36.9 | Hit me with an object |
| 68.3 | Tried to control where I went | 35.9 | Locked me out of the house |
| 65.3 | Invaded my privacy | 35.0 | Would not let me use the phone |
| 63.5 | Made fun of me | 34.6 | Beat me |
| 63.1 | Was violent with me | 34.0 | Threatened me with a weapon |
| 62.9 | Blamed me for bad things that happened to me | 32.3 | Threatened I would never see my kids again |
| 62.4 | Controlled all the big decisions in our relationship | 28.8 | Abused my kids |
| 61.5 | Humiliated me in front of my children | 26.1 | Caused injuries that required first aid |
| 60.8 | Told me no one would ever want me | 25.0 | Threatened to abuse my kids |
| 59.1 | Made me fear for my life | 23.5 | Threatened to abuse my pets |
| 59.1 | Caused visible injury | 22.7 | Abused my pets |
| 22.7 | Tried to keep me from going to school | 13.3 | Harmed my family or others close to me |
| 20.6 | Turned off the heat, electric or phone | 11.8 | Controlled what I was allowed to read |
| 19.9 | Kept us from having food | 7.2 | Caused injuries that required I stay at the hospital |
| 19.5 | Caused injuries that required emergency medical treatment | 5.5 | Tied me up |
| 18.3 | Took my children without my OK | 4.0 | Stabbed me |
| 14.8 | Tried to kill me | 1.7 | Shot me |

Escalating abuse was reported by 74.2% ($n = 285$) of victims. Many victims (77.1%, $n = 341$) called the police in response to an abusive incident and 60.9% ($n = 272$) filed a complaint against the abuser (Table II).

## DISCUSSION

Whatever the justification used, domestic violence occurs when one person assaults another, and will only stop when the batterer stops. However, "assault" is a specific legal term and fails to fully encompass the range of abuse that victims report. Physical abuse is a very common form of DV, as seen in Table I. However, some of the most frequently reported manners of abuse were verbal in nature. As opposed to the more direct manner of physical domination by abusers, verbal abuse is aimed more at destroying the psychological identity of the victim as her own person, perhaps in an effort to render her incapable of independent thought or deed. Misinformation is one way for the abuser to ensure the victim remains. Name-calling, telling the victim she's crazy or no one else would want her becomes her only reference. As Grigsby and Hartman (1997) point out, if information were not such a powerful tool, abusers would not try to alter it.

O'Leary (1999) found that examining both verbal and physical controlling behaviors in the domestic setting is clinically important. Our data indicate that being controlled is a prevalent perception by the victim (78.4%, $n = 370$). According to Grigsby and Hartman (1997), this perception of "being controlled" may keep many victims in the abusive relationship. Control may be examined at different points in the abuse spectrum. At one point lies the control by intimidation, whereby the batterer's will is forced onto the victim, reflected in 71.1% ($n = 342$) of victims had been controlled in whom they talked to or saw, ensuring the victim no relative measure of her experiences as being unique and socially unacceptable. Unfortunately, one of the most difficult aspects of abuse is attempting to predict lethality. Almost two of three victims (59.1%,

**Table II.** If You Never Left Your Mate or Returned to Your Mate After Separating, Check Those Factors Which Affected Your Decision ($n = 400$)

| Percentage | Items | Percentage | Items |
|---|---|---|---|
| 70.5 | Mate promised to change | 22.4 | I felt I was safer with him, because I knew what he was doing |
| 60.0 | Mate apologized | 21.9 | Threats from mate to find me and kill me |
| 53.8 | Love | 18.5 | Children wanted to go back |
| 46.4 | Belief that I should try to make my marriage vows work | 18.2 | Became homeless |
| 45.9 | Lack of money | 16.5 | Couldn't get a lawyer |
| 40.1 | Fear of being alone | 14.8 | Mate found me |
| 36.7 | Fear of mate | 14.5 | Threats from mate to harm my family |
| 35.5 | Mate needed me | 13.5 | Police didn't help me |
| 35.3 | Missed my mate | 9.2 | Advice from a priest, preacher, rabbi |
| 34.7 | Belief that the children would suffer without mate | 6.8 | Courts wouldn't give me help to make mate stop |
| 32.4 | Fear of not being able to survive without mate | 6.0 | Advice from a counselor |
| 31.2 | Threats from mate to kill self | 5.3 | Mate took children from me |
| 28.5 | Nowhere to go or stay | 4.8 | Shelter was full |
| 24.9 | He continually stalked me | 2.8 | Advice from a lawyer |
| 24.4 | Fear that I might lose my children | 2.5 | Professionals didn't understand my culture |
| 22.5 | Advice from family or relatives | 2.3 | Medical people (doctor, nurse, etc.) didn't give the help to get safe |

$n = 279$) in our study reported that they have feared for their life at some point. In fact, 14.8% ($n = 70$) of victims reported that the abuser tried to kill them. Another point illustrates control as another form of abuse, which further entrenches subjugation of the victim. This seemed to be related to the batterer criticizing friends, family, or coworkers, with 79.5% ($n = 383$) of the victims reporting that this criticism has occurred on at least one occasion. Also, according to the batterer, the victim was deserving of abuse or control (62.9%, $n = 303$). Finally, by controlling resources (e.g., money, employment, etc.), the batterer ensures that the victim remains dependent upon the batterer, thus reinforcing subjugation and reducing the likelihood of escape by the victim. Isolating the victim from resources or sources of emotional support is another way of controlling the victim. A pattern of isolation indicates not only the self-centeredness or egocentricity of the abuser, but also a self-protective measure of "hiding" the abuse. By separating the victim from friends and family either physically (42.7%, $n = 201$) or emotionally (71.1%, $n = 342$), the batterer creates an atmosphere of dependence and control. Isolation from others prevents sending a "distress call" and fosters a sense of helplessness and/or hopelessness that encourages or reinforces further abuse. Despite this, almost all the victims (94.8%, $n = 420$) reported they told a friend or family member about the abuse.

### Why Doesn't She Just Leave?

The fact that the victim does not leave has led some observers to suspect merely an internal drive such as love of the mate or belief in promises of change or apologies. Indeed, many victims in this study endorsed those exact reasons, echoing previous studies. Yet, a plethora of other responses indicate that external factors also play a major part in preventing victims from escaping. External factors may affect the interpretation and implementation of those internal systems, to the point that love, values, and beliefs are no longer immutable psychological entities, but instead are subject to distortions and maladaptations resulting from longstanding abuse. For instance, community resources are weak and many times unavailable to an already subjugated victim, who has an awareness that she risks her safety even more when she tries to leave as Bailey *et al.* (1997) found in their study. It may be hypothesized that women are given messages by the unavailability of resources that their safety is not important. If the criminal justice system cannot protect them, it may appear to be colluding with the abuser's behavior. As a survival strategy, women gravitate toward compliance and conciliatory strategies. In the absence of real protection, it is rational to want to put more faith in the promises and apologies of their batterers.

The Barriers Model as proposed by Grigsby and Hartman (1997) describes the victim in the center as a psychological entity, surrounded by four concentric rings that represent layers of barriers. Focusing from an external viewpoint, the outermost ring is that of barriers in the environment; perhaps the first barrier encountered by the victim. To escape, resources are needed such as money, a place to go, support from police and courts, or even support from family, friends, or professionals. When these

resources are lacking, the message is clear that escape is impossible. Even in those communities with available resources, the perception of the victim may be that they are unavailable. Linking victims with adequate and appropriate resources of necessities and support is vital. Until the environmental barriers are breached, any more in-depth intervention is pointless. This illustrates the frustrating circle of seeking help externally and receiving too little to escape.

The next barrier encountered is that of family and social role expectations. Debold *et al.* (1993) report that female socialization in a patriarchal society relegates her to the role of primary caretaker of her relationships and her family. Other factors include individual and societal values and attitudes, and spirituality. The victim's role as caretaker squarely puts the blame on her for the failing relationship. This serves to amplify the already burdening blame her abuser puts on her. Internalizing this blame makes it difficult to escape, as she is expected to repair the damage. Victims with no other alternatives than to remain in the relationship must place a high value on the promises and apologies of the abuser to survive. The significance of this belief system is reflected in promises of change or apologies by her batterer. Individual and societal values encourage her to love her batterer (53.8%, $n = 215$), believe that her children would suffer if she leaves him (34.7%, $n = 139$) and want to return to him (18.5%, $n = 74$). Spirituality is certainly a factor when a religious leader (9.2%, $n = 37$) advises the victim to remain.

The Barriers Model also recognizes the psychological impact of the abusive relationship as its next barrier. Fear, hypervigilance, and lack of trust are hallmarks of long-standing abuse (Walker, 1994). Survival tactics are learned by the victim as a matter of necessity. Fear of mate (36.7%, $n = 147$), and fear of not being able to survive alone (32.4%, $n = 130$) are some results noted. Some victims go so far as to report that they felt safer in staying, as they knew what the abuser was doing (22.4%, $n = 90$). Victims learn that it is pointless to even try to escape because of the barriers in place and instead, adopt a stance of compliance in an effort to at least control the abuse. Unless a safe, nonjudgmental, trust-producing relationship is established outside the abuse, victims must and will adapt to their environment for survival.

## CONCLUSION

Despite all we are doing to help victims become safe, environmental, socialization, and psychological barriers stand in the way. In addition, other questions remain. What, if any, is the effect of the victim's attempt of escaping the abuse? Are there specific behaviors or patterns that indicate impending physical harm or death of the victim? Which avenues of reporting are most successful to escape the abuse? What can the community do to alter the threshold of reporting abuse or the response to a report? Ultimately, what can be done differently in the community to help the victim? The theoretical model presented here is only one of many ways to approach the problematic barriers facing the DV victim, although multidisciplinary interventions may be the most efficacious. The answer to the question "Why doesn't she just leave?" is multifaceted in nature. Prospective studies by the authors that may answer these questions and others are in progress at this time.

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# Traumatic Memories as Black Holes: A Qualitative-Phenomenological Approach

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Despite impressive scientific advances in the field, it appears that we are still far from achieving a full understanding of traumatic memory. Yet because of the strong link between posttraumatic symptoms and the nature of traumatic memory, improving our understanding of this issue is of great importance. To this end, open-ended interviews were conducted with 36 individuals who had been victims of terror attacks and afterward developed posttraumatic stress disorder (PTSD). The interviews were analyzed using the grounded theory approach, according to which the discussion remains faithful to the initial data itself. The interviews demonstrate how the autobiographical self is sucked into the traumatic memory, as if this were a center of gravity, a black hole. In this process different kinds of memories attach themselves to the traumatic memory, which is characterized by its bodily, implicit, nonsemantic, and fragmented nature. As a result, the sense of self undergoes fundamental changes as the fragmented traumatic memory becomes stronger and more central to one's identity.

*Keywords:* interviews, PTSD, terror, traumatic memories



The *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (*DSM–IV*) designates high frequency, distressing, involuntary memories—that individuals make great efforts to suppress yet are unable to forget—as a central component of posttraumatic stress disorder (PTSD). In McNally's words, "PTSD is fundamentally a disorder of memory" (2003a, p. 782) and, as such, memory must play a fundamental role in the study of trauma, and PTSD in particular (Spiegel, 1997; Sutherland & Bryant, 2008). Accordingly, understanding the nature of the traumatic memory—encoding and retrieval, remembering and forgetting—is essential to understanding the traumatic experience and the nature of the symptoms that develop as a result. One of the main disagreements regarding the nature of traumatic memory touches upon what at first glance appears to be a simple question: is the trauma remembered well or rather poorly?

## The Traumatic Memory Argument Versus the Trauma Superiority/ Superiority Argument

According to Janet (1925, 1904), the memory of traumatic events is unique: the traumatic event is neither symbolized nor properly coded/ conceptualized and thus remains outside of the autobiographical self (van der Kolk & Fisler, 1995). Indeed, the traumatic memory is encoded bodily and not conceptually; as a result it lacks context and lies outside the subject's control (Ehlers & Clark, 2000; Rothschild, 2000; van der Kolk, 1994). Moreover, because the traumatic memory is fragmented and the subject is less likely to be able to retrieve it voluntarily, traumatic memories can be automatically and involuntary evoked by unknown stimuli (Ehlers & Clark, 2000; Ehlers, Hackmann, & Michael, 2004; Terr, 1990).

This line of thought is directly connected to the *traumatic memory argument*, according to which traumatic experiences result in memory impairment. Indeed, according to some researchers, including Brewin (2001), Byrne, Hyman, and Scott (2001), Nadel and Jacobs

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(1998), and van der Kolk and Fisler (1995), a traumatic event is poorly remembered. For instance, comparing Vietnam veterans with PTSD with those not experiencing the disorder, McNally, Lasko, Macklin, and Pitman (1995) and McNally, Litz, Prassas, Shin, and Weathers (1994) found that those with PTSD experienced deficits in retrieving specific memories. In addition, Koss, Figueredo, Bell, Tharan, and Tromp (1996) found that memories of rape were less clear and vivid than other unpleasant memories (for more on this issue see Kihlstrom, 1995; Kihlstrom & Schacter, 1995; Shobe & Kihlstrom, 1997).

Contrary to the *traumatic memory argument*, James (1890) argued that sufficiently stressful events may "leave a scar upon the cerebral tissues" (p. 670). Similarly, McNally has suggested that traumatic experiences are remembered "all too well" (2003a, p. 783). This argument is known as the *trauma superiority/superiority argument* (Porter & Peace, 2007). Furthermore, Peace and Porter (2004) argue that the memory of traumatic events is neither fragmented nor impaired. Whereas the quality of traumatic memories remains steady and fixed over time, the quality of positive memories declines.

Yet there is evidence that, at least in some cases, the traumatic memory is not as strong, solid, and fixed over time as the traumatic individual feels; in fact, the opposite is true. Likewise, Brewin (2007) and Kindt, van den Hout, and Buck (2005) have demonstrated that there exists a fundamental gap between subjective reports on the one hand and objective measurement on the other.

The issue becomes yet more problematic if we accept the suggestion made by Berntsen, Willert, and Rubin (2003), Dekel and Bonanno (2013), and Ehlers and Clark (2000) that there is a relationship between the current state of the subject—with or without PTSD—and descriptions of traumatic memory given in self-reports: it appears that at least in certain cases the manner in which the posttraumatic individual relates to his traumatic memory is nothing other than a reflection of his posttraumatic symptoms (Kindt et al., 2005). On this basis, Foa, Molnar, and Cashman (1995), in agreement with McNally (2003a), argue that the coherency of a trauma narrative is in fact a measurement of successful treatment. Thus it would seem that the nature of traumatic memory can tell us more about the current state of the subject than about the traumatic event itself.

Given that traumatic memory plays a central role in posttraumatic disorders (McNally, 2003a), it is clear that the differences of opinion regarding the issue outlined above are not only semantic. Indeed, this problem touches upon our ability to understand and define posttraumatic disorders, and as a result also upon our capability to provide the right treatment to those suffering from them.

Given that the issue of traumatic memory has such far-reaching consequences in various areas, and to understand this issue better, it is necessary to define the particular features of traumatic memory.

## Particular Characteristics of the Traumatic Memory

### Fragmentation

A patient suffering from fragmentation of memory is unable to link memories with certain times or places. According to Ehlers et al. (2004), it is not clear whether fragmentation results from retrieval problems (in the present) or encoding difficulties that took place at the time of the trauma. Furthermore, one must distinguish between a failure in encoding during the traumatic event and the encoding of peripheral details rather than the central experience. Indeed, during a traumatic event "Attention narrows, enabling only certain aspects of the experience to get encoded" (McNally, 2003a, p. 783). Therefore, we must be careful not to confuse information that has not been encoded with amnesia. In addition, we must distinguish between information that has been encoded and that the person is unable to access on the one hand and information that was not encoded in the first place (an encoding deficit) on the other (McNally, 2003b). A further problem (which is not unconnected) regards the gap between sensory processing and conceptual processing of the traumatic event.

### Sensorimotor Features Versus Conceptual Encoding

According to van der Kolk and Fisler (1995), traumatic memories involve significant sensori-

motor features. The subject remembers the sensory and emotional elements of the traumatic experience yet lacks linguistic/contextual factors: "traumatic 'memories' consist of emotional and sensory states, with little verbal representation" (van der Kolk & Fisler, 1995). Moreover, it should be noted that van der Kolk and Fisler (1995), in agreement with Rothschild (2000), argue that the failure to categorize and integrate the traumatic event with other experiences lies at the very core of PTSD pathology. One of the reasons for this is the sensory memory's tendency to erupt uncontrollably in the present, causing the posttraumatic subject to feel that the trauma is taking place once more, *here and now*.

### Intrusive Memories

Intrusive trauma memories include nightmares and flashbacks (Ehlers et al., 2004). During the occurrence of an intrusive memory, the subject may lack any awareness of the current reality; in fact, the intrusive memory may have a *sense of nowness* and, as a result, posttraumatic participants feel that when they remember the trauma they are in fact reliving it (McNally, 2003b). Essentially, intrusive memories are unwanted and uncontrolled, they are rich multimodal (movie-like) mental images with highly detailed sensory impressions of the traumatic event (Krans, Näring, Becker, & Holmes, 2009).

Intrusive memories may be triggered by general traumatic memories. However, this is uncommon because intrusive memory and episodic memory are not the same; rather, each depends on different retrieval processes (Ehlers et al., 2004). Thus the cues that trigger intrusive memories are for the most part connected to the event in a temporal, not contextual, manner:

> The involuntary reexperiencing of the traumatic event is triggered by a wide range of stimuli and situations. Many of the trigger stimuli are cues that do not have a strong semantic relationship to the traumatic event, but instead are simply cues that were temporally associated with the event (Ehlers & Clark, 2000, p. 325).

Furthermore, intrusive trauma memories, even years after the traumatic event, involve physical responses (Ehlers & Clark, 2000; Ehlers et al., 2004). Although describing these memories is not an easy task, when doing so, participants use sensory terms such as seeing, hearing, smelling, and tasting (data-driven) (Ehlers et al., 2004).

Because sensory (data-driven) information is retrieved from the memory without any time-perspective it remains frozen in time, retaining a quality of nowness, and is perceived as a current threat (Ehlers & Clark, 2000). Accordingly, new information about what "really happened" during the traumatic event does not have any effect on the content of intrusive traumatic memories (Ehlers et al., 2004).

Interestingly, it appears that these same intrusive and unwanted memories frequently represent moments of explicit trauma recollection, known as hotspots. These hotspots tend to be associated with emotional peaks of the traumatic memory or with the feeling of a threat to the sense of self, the moment at which the situation "changed for the worse" (Ehlers et al., 2004, p. 411). Yet, whereas according to Holmes, Grey and Young (2005), hotspots are generally moments at which the posttraumatic individual senses some kind of threat or negative self-perception, Ehlers and Clark (2000) argue that they do not usually represent the worst moments but rather those immediately preceding the main trauma.

### Aims and Goals

As was already noted, researchers are divided over some of the most basic questions involved in the field of traumatic memory. This lack of agreement is expressed by various (competing) theories concerning the nature of traumatic memory. The goal of this study is not to test which of these theories are more acceptable. Rather, this study seeks to go beyond laboratory research examining the character of the traumatic memory among victims of trauma suffering from PTSD to reach the subjective experience, with an emphasis on the bodily experience, a dimension that has yet to be adequately explored (for a theoretical discussion see Ataria, 2013, 2014).

The quantitative approach, although advantageous in some respects, has some critical limitations, in particular its failure to present a multifaceted picture of the traumatic memory. Thus although the quantitative approach helps us to expose a number of fundamental questions, it falls short in answering them. Among these questions are the following:

1. What is the relationship between the nature of traumatic memory and the current PTSD symptoms?
2. Is the traumatic event remembered especially "well" or is the opposite the case?
3. Can the posttraumatic individual's memory be trusted?
4. What is the relationship between the nature of traumatic memory and the intensity of the current symptoms?

In a sense, some of these questions (which represent only a few examples of the many that could be raised) are in fact artificial. They result from a quantitative approach that tends to oversimplify and does not allow us to understand the subjective experience, which is at times more complicated than a collection of symptoms and problems. In-depth interviews of participants experiencing PTSD can remedy this lack, revealing the multifaceted nature of traumatic memory. Therefore the aim of this study is to go beyond the oversimplification that often characterizes quantitative studies of traumatic memory and explore the full complexity of traumatic memory.

To this end, open-ended interviews, placing the individual at the center of the research (Creswell, 2007; Moustakas, 1994), were conducted with 36 terrorized Israeli individuals (to my knowledge the broadest quantitative study of its kind conducted in Israel to date), all recognized by the Israeli Office of Social Security as suffering from PTSD.

The goal of this article is not to present new categories (with regard to PTSD), but rather to enrich the existing categories and to create a dialogue between current knowledge (surveyed in the introduction) and that arising from the interviews—which bring to the foreground the bodily level of experience. In so doing, this article seeks to clarify confusions generated by variable-based research and, as a result, reframe the questions regarding the nature of the traumatic memories among those suffering from PTSD. In this process some of the questions that have been presented above simply become redundant and some of the contradictions which seem to arise from quantitative studies turn out to be, in fact, part of the complexity that characterizes the posttraumatic individual. That is, the posttraumatic individual can be defined, in her very essence, as full of inner contradictions. In turn, these contradictions are expressed in a complexity that lies beyond quantification.

## Method

### Participants

Interviews were conducted with 36 victims of terror attacks, including suicide bombings of buses and other crowded areas, stabbings, and rockets launched from Gaza and Lebanon. The interviewees were aged 22–78 years (mean age 50.56, $SD = 12.26$), 13 male and 23 female (for more details see Table 1). All are recognized by the Israeli Office of Social Security as experiencing PTSD (recognized as having more than 20% disability), all members of the charitable organization "OneFamily" (a nonprofit organization).

The interviewees had experienced a traumatic event between two and 41 years before the interview—mean years since trauma being 10 years (2003, $SD = 6.58$)—and seven of the interviewees had experienced more than one traumatic event. All of the interviewees had undergone a course of therapy consisting of at least 12 sessions in the past, 22 of them are currently in therapy, and 31 are being treated with medications. Thirty-two of the interviewees were born in Israel and four are immigrants from other countries (three originating from the former Soviet Union and one from America).

### Procedure

After receiving all the requisite ethical approvals, 97 members of "OneFamily" filled out a number of questionnaires, including the PTSD Check List and civilian (PCL-C). The PCL is a standardized self-reported rating scale for PTSD based on *DSM–IV*. It includes 17 items corresponding to the key symptoms of PTSD and poses questions about symptoms in relation to stressful experiences (Weathers, Litz, Herman, Huska, & Keane, 1993).

In addition to the PCL the following were used: Dissociative Experiences Scale (DES): A psychological self assessment questionnaire that measures dissociative symptoms (Carlson et al., 1993); Generalized Anxiety Disorder 7-item (GAD-7) Scale: A clinical tool to screen for anxiety and used to assess its severity in clinical practice and research (Spitzer, Kroenke,

Table 1
*Information Concerning the Interviewees, Including a Brief Summary of the Traumatic Event(s) They Underwent*

| Codename | Gender | Age | Short description of traumatic event | Date of traumatic event |
|---|---|---|---|---|
| Norman | Male | 24 | Norman was at the Dizengoff Mall in Tel Aviv when a bomb exploded. | 1996 |
| Arnold | Male | 65 | During a lengthy rocket attack Arnold was outside and unable to take cover. | 1973 |
| Colin | Male | 43 | Colin was at the Likkud party branch in Beit She'an on election day when a terrorist opened fire in the building. Colin was shot at close range and seriously injured. | 2002 |
| Simon | Male | 48 | Simon was at the Likkud party branch in Beit She'an when a terrorist opened fire in the building. Simon was shot at close range. | 2002 |
| Zechariah | Male | 68 | Zechariah drove a bus that was hit by a rocket near the border with Gaza only five minutes after all the children aboard, apart from one, had left the bus. Zechariah suffered moderate injuries. | 2011 |
| Samuel | Male | 54 | Samuel worked as a tractor driver and during the course of his work was caught in a bombing attack on the Lebanon border. | 2006 |
| Mark | Male | 73 | Mark stopped his car to help another vehicle on the side of the road. The female driver of the vehicle had been murdered by a terrorist, who was hiding nearby and attacked Mark. He suffered moderate injuries. | 2002 |
| Ian | Male | 68 | A suicide bomber got onto the bus that Ian was driving and exploded only moments after it left the bus stop. | 2003 |
| James | Male | 67 | A rocket fell only meters away from him outside the school in which he worked. James suffered minor injuries. | 2006 |
| Joseph | Male | 46 | The packed bus that Joseph was driving was attacked with stones on a highway. Joseph suffered from minor injuries. | 2000 |
| Edward | Male | 60 | Edward was shot at close range while working as a repairman for the Electricity Company in Jerusalem. Edward was severely wounded. | 2002 |
| Jacob | Male | 66 | Jacob was injured by a rocket while driving a forklift truck at work. | 2004 |
| John | Male | 56 | John was at the market when a terrorist attack occurred. | 2003 |
| Emma | Female | 47 | Emma experienced four rockets landing near her, at home and while she was outside. In the most extreme case she was outside when a rocket landed only meters away from her. The rocket did not explode. | 2004 |
| Sarah | Female | 25 | Sara was at home when missiles were fired over the city she lives in, Kiriyat Shmoneh. | 1996 |
| Carole | Female | 41 | A rocket landed on her home. | 2007 |
| Georgina | Female | 40 | A rocket landed on home, entering the room where she and her two children were at the time, injuring them. | 2008 |
| Marianne | Female | 71 | A rocket damaged the wall of the room in which she was sleeping at the time. | 2008 |
| Kimberly | Female | 43 | A rocket fell in the yard of her home while her children were playing there. | 2007 |
| Zelda | Female | 55 | Experienced four rockets landing close to her, one on the room in which she was sleeping, another next to her car while she was driving in Sderot. | 2006 |

(*table continues*)

Table 1 (*continued*)

| Codename | Gender | Age | Short description of traumatic event | Date of traumatic event |
|---|---|---|---|---|
| Olivia | Female | 40 | A missile fell close to her home during the second Lebanon War. | 2006 |
| Eleanor | Female | 62 | Experienced six rockets landing close to her. In the most extreme case a rocket fell on the shop where she was shopping at the time. | 2006 |
| Amy | Female | 72 | A rocket landed next to her while she was outside. | 2008 |
| Anna | Female | 45 | A rocket fell outside her workplace. | 2007 |
| Rebecca | Female | 42 | A missile landed on her house during the Second Lebanon War while she was inside with her children. | 2006 |
| Beth | Female | 50 | She was in close proximity to a suicide bomber when he exploded while she was shopping at a mall. | 2002 |
| Ophelia | Female | 54 | Three missiles landed next to her car while she was driving. She suffered moderate injuries. | 2006 |
| Rachel | Female | 44 | A grad missile exploded in her garden while she was at home with her children. | 2008 |
| Tanya | Female | 41 | She was in close proximity to a suicide bomber when he exploded on a street. | 2002 |
| Michelle | Female | 47 | She was in close proximity to a suicide bomber when he exploded on the bus on which she was travelling, injuring Michelle. | 2003 |
| Tracey | Female | 41 | A grad missile fell on her home. | 2008 |
| Diana | Female | 44 | She was in close proximity to a suicide bomber when he exploded. | |
| Joanna | Female | 45 | A rocket fell outside her home while she was inside. Joanna suffered minor injuries. | 2006 |
| Amanda | Female | 42 | A missile fell meters away from her while she was collecting her children from school. Amanda suffered minor injuries. | 2008 |
| Zoe | Female | 46 | A rocket fell outside her house while she was inside. | 2004 |
| Deena | Female | 47 | She was in close proximity to a suicide bomber when he exploded. | 2003 |

Williams, & Löwe, 2006); Patient Health Questionnaire (MDD-PHQ-9): The PHQ-9 is the nine item depression scale of the Patient Health Questionnaire, based directly on the diagnostic criteria for major depressive disorders in the *DSM-IV* (Lamers et al., 2008).

The next stage involved a second approach to 42 participants randomly selected from those scoring above 44 (range of 17–85) on the PCL. A cutoff of 44 reveals better sensitivity (.94), specificity (.86), and overall diagnostic efficiency (.90) with motor vehicle accident victims (Blanchard, Jones-Alexander, Buckley, & Forneris, 1996). Furthermore, the National Center for PTSD (U.S. Department of Veterans Affairs) recommends that anyone scoring above 44 seek medical advice and/or therapy. Therefore it seems that there exists some agreement regarding the cutoff point of 44 in the PCL questionnaire.

Of these, 36 agreed to participate in the research and were interviewed accordingly. The interviews were conducted in Hebrew (they were recorded and later translated) by myself in the homes of the interviewees or at another location where the interviewee felt comfortable enough to speak freely (according to his or her choice) and lasted between 45 minutes and 2.5 hours.

## The Interviews

The interviews were conducted according to the phenomenological approach. Phenomenology focuses on the study of experience from the individual's perspective: taken for granted assumptions and usual manners of perception are "bracketed out." In this way pure phenomenological research seeks to describe rather than explain, and as such it begins from a standpoint without hypotheses or preconceptions. Phenomenological methods are particularly effective at drawing out the experiences and perceptions of individuals from their own perspectives (for a detailed discussion see Creswell, 2007; Moustakas, 1994). In particular, because the "phenomenological method is characterized by its ability to reach the depth of the bodily experience" (Ataria, 2013, p. 17), and because the traumatic experience is encoded bodily somatically (Rothschild, 2000; van der Kolk, 1994), using the phenomenological approach as a method is extremely useful in the case of individuals experiencing PTSD.

I conducted the interviews and presented myself as a doctoral candidate working together with the OneFamily fund, of which all the interviewees are members. In addition, I informed the interviewees about my background in working with terror victims (including former prisoners of war). I emphasized that the aim of the interview, as of previous studies I had conducted, was to let their voices be heard. Likewise, I made clear that I was well aware of the difficulties involved in describing and returning to the traumatic event and that I greatly appreciated their willingness to make this effort. Following this, the general aims of the project—to improve our understanding of the traumatic experience and how it is remembered—were explained to the interviewees.

While interviewing the posttraumatic individual one must remember that there are, in fact, two kinds of memory systems: (a) the "verbally accessible memory" (VAM), which is integrated with other autobiographical memories and thus can be retrieved deliberately as needed, and (b) the "situationally accessible memory" (SAM), which does not use verbal code. Indeed,

> the SAM system contains information that has been obtained from extensive, lower level perceptual processing of the traumatic scene, such as sights and sounds that were too briefly apprehended to receive much conscious attention and hence did not become recorded in the VAM system (Brewin & Holmes, 2003, p. 357).

It has been argued that the phenomenological approach enables us to reach, at least in a limited fashion, the SAM system (Ataria, 2014). By adopting the phenomenological approach we follow the principle that one must stop asking "why" and start asking "how" (Maurel, 2009). We are not looking for the "truth" but rather seeking out the authentic experience that can reveal the prereflective self consciousness experience, and by doing so we may be able to "bring a person, who may not even have been trained, to become aware of his or her subjective experience, and describe it with great precision" (Petitmengin, 2006, p. 229). Indeed, given that PTSD goes hand in hand with overgenerality or the existence of fewer specific memories and more general memories (Moore

& Zoellner, 2007, p. 420), cracking the "cooked-up/ready made story" is crucial.

In accordance with the phenomenological approach, it was made clear at the outset of the interview that there are no "right" or "wrong" answers and that the aim is to receive the richest possible description of the experience itself. Interviewees were also informed that they could terminate the interview at any point. Thereafter, participants were asked to describe the traumatic experience in detail. It is important to add that in most cases these interviewees feel very much forgotten, perhaps one could even say abandoned, so that they really wanted to tell their story and describe their experience in great detail. Thus the difficulty I faced was not in drawing out details but rather avoiding a situation in which interviewees sought (whether consciously or not) to please me and thus say what they thought I wanted to hear. Therefore, throughout the interview I emphasized (although not in a critical manner) how important it was to remain faithful to the authentic memory and that there are no "right" answers.

Participants were asked to describe first and foremost the bodily experience during trauma—the aim of this is to break through the autobiographical story that is usually told in an interview and reach the experience itself; to penetrate through the prepared/cooked-up story into the primary and prereflexive experience (Depraz, Varela, & Vermersch, 2003; Vermersch, 2009). Following this, the interviewee was asked once again to retell their whole story, yet focus on the bodily experience in the present, describing how the body feels when remembering the traumatic event. It is important to emphasize that in most cases this occurred naturally, without any need for special guidance: when describing the traumatic experience the interviewees repeatedly returned to the intensity of the bodily experience during the event itself as well as when retelling it. At the next stage, more specific questions were posed regarding the nature of the memory of the event itself, for example, *How would you define the traumatic event in comparison to other difficult memories in your life?*; *Are there things that you do not remember from the event?*; *How certain are you concerning your memory of the traumatic event?* (It is interesting to note that on more than one occasion the interviewees themselves raised questions of this kind). The questions were not posed judgmentally, but rather as part of the ongoing dialogue with the interviewee and in a shared attempt to clarify specific gaps that arose in his or her story.

## Data Analysis

The interviews were analyzed according to the grounded theory approach (Glaser & Strauss, 1967; Strauss & Corbin, 1994), which is rooted in a pragmatist philosophical approach (Charmaz, 1995) and helps researchers to increase the analytical power of their work. According to this approach the researcher remains as close as possible to the data and allows the data to "speak for itself," both in the presentation of the results and in their discussion (Strauss & Corbin, 1990). In this sense we remain faithful even to the words themselves: the very "language in which people communicate about trauma provides an important window into understanding the nature of PTSD" (O'Kearney & Perrott, 2006).

It is important to emphasize that this system of analysis does not involve hypotheses or categories fixed at the outset of the research. Rather, the categories arise from the data itself (Charmaz, 1995). The central principle of research of this type is to remain faithful to the initial data. As the narrative themes in the interviews are grouped into categories, the level of abstraction rises, while remaining faithful to the data. The most decisive stage of the research is the creation of the initial categories (Ryan & Bernard, 2000), and only following this do the more advanced processes of construction, deconstruction, and abstraction occur in the discussion and conclusion (Strauss & Corbin, 1990). Specifically, the discussion remains faithful to the data arising, yet enables a broader dialogue between the data and what we already know about traumatic memory. In this process, existing knowledge about traumatic memory is examined throughout in relation to the data arising from interviews (without prior assumptions). In addition, some new insights are being generated.

## Results and Discussion

### The Strongest Memory of the Traumatic Event

A majority of interviewees mentioned that they have one very strong memory of the traumatic event, one that is much stronger in comparison to other memories of the traumatic event in particular and their other memories in general. For instance, Zoe, relates that:

> Two years ago my father was staying with me . . . and then he died and I was with him all day and it was very difficult, but I remember the mortar better than I remember what happened with my father. I'll tell you what happened that day with my father but not with the same degree of detail and accuracy (Zoe).

Through an analysis of the interviews it is possible to discern two categories of the strongest memory of the traumatic event (the second of which is divided in turn into a number of subcategories):

1. "Initial moments": the moments directly preceding the traumatic event itself, when the individual becomes threatened—*The strongest memory is the first blow to my window* (Joseph); *The missile that fell in front of my eyes* (Ophelia); *There was a whistle, I won't forget that whistle. A really loud whistle* (Zelda).

2. Representation of the most distressing moment, corresponding "to the worst moments of explicit trauma recall" (Holmes et al., 2005 p. 13). These include the following:

a. Horrors, such as unbearable sights of wounded people: *I'm standing and looking at the wounded. I see a lot of blood. It's part of me. It's with me all the time* (Beth); *The boy's severed leg. That's a sight I don't want to remember . . . . His leg was . . . half of his leg was gone. And our neighbor was sitting with a towel and trying to stop the bleeding. Because it was spurting out* (Zoe).

b. Dead bodies: *I see him sitting in the same position, just dead, like someone had sat him down. That will never leave me* (Ian); *I remember her head on me covered in blood, and I think she's dead—that doesn't go away, that's imprinted on my memory* (Michelle).

c. Blood: *A madness of blood . . . . I remember it now. A madness of blood. Really, like so much blood. That's a really strong memory that also completely takes over. That's a few of the images that I really remember* (Norman); *I see the picture of the child with blood dripping from him* (Zechariah).

d. Surrealistic events:

> I am one hundred percent certain about the hand. Now, because it's so surreal to find a hand, and because it's really so intense and horrifying, in some way it affects me more than the dead people I've seen. When you see a hand on its own, without a body, there's something very sad about it, very lonely. It's horrifying. I saw a hand. It was lying there. Without a person, that is, there was no corpse. That's something that's imprinted and doesn't leave you, not even 30 years later (Arnold).

e. A family member or a close friend suffered or was injured: *I'm holding my daughter and all her organs are outside* (Eleanor); *The little girl was crying all the time. I remember crying* (Georgina); *And I remember that he sat next to me and he was shaking and . . . I stroked his head, I remember that image all the time* (Samuel). Or the (accidental/intentional) abandonment/neglect of a family member:

> I just remember that we forgot and left our youngest child outside. I just remember that all of a sudden she was knocking on the door, "Mom, you forgot me." I can't get that out of my head. I remember that clearly, like it happened now (Olivia).

This memory of the trauma that is stronger than all others either represents the initial moments of the trauma (1) or, alternatively, (2) the most horrifying image of the traumatic experience. Both are fixed (or at least the posttraumatic individual has this impression) over time and when they reemerge retain the quality of *here and now*; both are intrusive memories. It is significant that none of the interviewees reported having memories of both kinds and thus it is possible to conclude that in most cases the posttraumatic individual possesses only one very strong memory of the traumatic event, stronger than any other memories of it. In many cases the traumatic experience is eventually reduced to this one memory.

This phenomenon lies at the heart of the concept of the traumatic memory as a kind of black hole. The traumatic memory is reduced to one specific fragmented moment, a moment without a story. Indeed, this tension consolidates the posttraumatic symptoms and stands at the center of the research of traumatic events.

## The Sensory Nature of the Intrusive Memory

The intrusive memory can be categorized on the sensory levels of sight, smell, and hearing:

1. Visions, mainly of blood — *I see in front of me the wall with blood on it* (Georgina); *I see these pictures of blood all day. It comes to me during the day, it comes to me at night* (Beth).

2. Smells: Blood — *To this very day I smell the child's blood and my own* (Zechariah); Dead bodies and wounded people — *The smell of the wounded. Of the bodies. I really smell them* (Beth); *The smell of burned flesh. I remember that smell from that day* (Simon); Gunpowder — *I can be walking along now and remember the smell, for example. The smell of gunpowder* (Jacob); Smoke — *The smell of smoke. To this day it comes to me and it's overpowering, it's something that doesn't go away* (Tanya).

3. Sounds: Gunshots — *Sometimes I hear it. I feel those bursts of gunfire, the shots. Then all of a sudden I find myself running for cover in the middle of the street, and then I look back and there's nothing there, it was all in my head* (Edward); Explosions (BOOM) — *My strongest memory is of the booms* (Rachel); *The PLAK of the missile's entry, that doesn't leave me, it's a kind of hazy sound . . . it's in my ear all the time* (Samuel); The whistling of the rocket — *The sound of the rocket, that whistle, that whoosh, stays in my ear for a long time. I hear that whistle all the time* (Carole); Screams — *What I mainly hear today are their screams. Sometimes I am going up the stairs and her screams . . . Trembling*" (Georgina); *I hear the shouts* (John).

These statements support the observation by van der Kolk and Fisler (1995) that intrusive memories can appear in a variety of modalities, yet these sensory modalities do not occur mutually. Apart from Georgina and John, who described two different kinds of intrusive memories, none of the interviewees mentioned more than one kind of dominant sensory memory. Thus it appears that the sensory traumatic memory is isolated, providing further evidence that during a traumatic event the experience is not unified but rather fragmented. Furthermore, it is very clear from the interviews that intrusive memories retain the quality of *here and now*. The traumatic (intrusive) memory lacks the sense of "something from the past . . . the sensory impressions are reexperienced as if they were features of something happening right now" (Ehlers et al., 2004, p. 404). Additionally, the posttraumatic individual has the impression that the intrusive memory comes out of nowhere and remains fixed over time. These memories are experienced bodily, triggered by a wide range of stimuli, and perceived as a real and present threat. In the next section we will see how this one fragmented-somatic memory becomes a black hole.

## Inability to Forget

As Rachel says, *the traumatic memory cannot be forgotten* (Rachel). Similarly, Norman feels that he is unable to forget because the memory of the trauma is simply too strong. The posttraumatic individual remembers the traumatic experience all too well—*I have a problem forgetting, I wish I could* (Norman)—and this represents a fundamental problem, as James outlines,

> I don't want to remember it. Even the pictures that were taken and printed in the newspaper then, I don't want to keep them. I don't want to see it, don't want to remember it, don't want anything . . . . Remembering the actual event is bad for me (James).

Indeed, posttraumatic individuals long to forget but find themselves unable to do so. In the words of Kimberly and Joanna, *I don't know if I will ever forget it* (Kimberly); *I remember, how can I possibly forget? If only it were possible* (Joanna).

To understand the posttraumatic individual's inability to forget, we need to understand that to remember and to forget are not opposites: not to remember something is not the same as to forget it and forgetting is not necessarily a disruption of memory, but rather the opposite is true (Eyal, 2004). "Remembering can also prompt forgetting" (MacLeod, 2002, p. 135; see also Anderson, Bjork, & Bjork, 1994). On the basis of the interviews, it is possible to suggest that in its very essence, traumatic memory disrupts the ability to forget what *needs* to be forgotten. Thus it seems that, at least in some cases, a partial amnesia, or amnesic gaps, indicates that the structure of the posttraumatic individual's memory has not collapsed. Indeed, Yovell, Bannett, and Shalev (2003) found that memory gaps surrounding the moments of greatest emotional intensity occurred among those individuals that underwent a traumatic experience and did not

develop PTSD. Hence, it is not surprising that the interviewees in this study, all of whom developed PTSD, feel that they remember the worst moments of the traumatic experience all too well.

In turn, this inability to forget causes the fragmented traumatic memory to invade new territories of the mind, manifested in the posttraumatic individual's impression that she is haunted by it (Schiraldi, 2000). Furthermore, while other positive/constructive autobiographical memories are totally forgotten or become attached to the traumatic memory, the traumatic memory becomes continuously stronger and more central. Damásio (2003) argues that our stories define us, that one's identity is constructed by one's life stories: "memory is an action: essentially it is the action of telling a story" (Janet, 1925, p. 661). Indeed it is widely agreed (e.g., Robinson & Taylor, 1998) that the autobiographical memory is organized around narrative-like structures. Accordingly, if the traumatic memory is the main story of a subject's life, it is clear that her identity is rooted within the traumatic event itself. Indeed, the interviews demonstrate how the traumatic experience becomes constitutive for individuals experiencing PTSD: *I live that event every day. Every day it's like it's that date again . . . . Everything that happens in life takes me back to the moment of the trauma, everything reminds me of the trauma* (Colin). The posttraumatic individual reexperiences the traumatic event over and over again: *Since then I'm living it. I can't forget a thing. I experience it all the time. I feel it all the time, all the time* (Samuel).

As can be seen, the autobiographical self is sucked into the traumatic memory as if it were a center of gravity: different kinds of memories then attach themselves to the traumatic memory. It appears that the sense of self in the present adapts in accordance with the nature of the traumatic experience—traumatic memories act as a kind of magnet, resulting in substantial changes to the sense of self. Thus likening the autobiographical field to a general relativity gravitational field (metaphorically speaking), we may say that the traumatic memory acts as a black hole that sucks into it everything else.

### Physical and Emotional Experiences While Remembering (in the Current Moment)

For the posttraumatic individual, recalling the traumatic event is accompanied by negative bodily sensations such as stress: *While I am remembering it there is a feeling of stress all over my body* (Samuel). These sensations take on various forms: Seizing up—*when I talk about it, I feel like I seize up* (Sarah); Frozenness—*I feel it in my body, in my shoulders. I feel the fear . . . seizing up, frozen. I feel it. And also now, when I see all kinds of events that are connected with it, it comes to the surface . . . in the body, I get these shivers, get . . . a kind of anxiety* (Joseph); Shivering—*I return to it. Also, because my heart is not quiet at that moment . . . . Something's not right. I shiver all over, and I can't calm down* (Edward); Shaking, trembling, palpitations and sweating—*When I tell the story, while I'm thinking about it, I cry. I'm shaking, a kind of agitation, palpitations, and sweating* (Kimberly); *All my body is shaking* (Beth); *To this day when I talk about it you can see that I am shaking* (Amanda). These physical reactions in the present moment can become even more extreme.

While Zelda is remembering the traumatic event, *the physical experience is even more severe than at the time of the event itself* (Zelda), and Beth becomes hysterical: *Right away I start crying uncontrollably . . . . I'm hysterical and I'm falling apart* (Beth). Kimberly feels that when recalling the traumatic experience she is *flooded with feelings, paralyzed, out of control and eventually collapses* (Kimberly).

Furthermore, while remembering the traumatic event, some posttraumatic individuals experience once again similar bodily experiences that occurred during the trauma. As Edward describes this,

> When I am remembering I feel once again the pain of the injury, I feel the bullet entering my back. I feel the burning. Look, even now it's like you took a burning iron rod and pushed it into my back (Edward).

Ian adds: *I feel the pain . . . it burns now all over my body. Here and now, like I'm being burned now* (Ian). A unique feature of traumatic memory is the feeling of reexperiencing the trauma while remembering. Indeed, Amanda feels that when remembering the traumatic ex-

perience *I am there . . . . I'm more there than I am here* (Amanda). Likewise, Ophelia comments that *it always takes me there* (Ophelia), and Carole adds that she is *inside the picture—I'm there* (Carole).

Interestingly, a few individuals claim that when recalling the traumatic experience they feel inside the situation even more than they did during the event itself. For instance, Zoe says that *When I remember it I'm there more than I was when it happened . . . when I think about it and remember, it's more difficult than it was at the time* (Zoe). Zelda adds that, *when I remember it now I am more connected to the event than I was when it happened, I'm really there* (Zelda).

Furthermore, it seems that when posttraumatic individuals recall the traumatic event they feel as if they are reexperiencing and reliving it once again. For instance, when remembering the event, Sarah *is really there seeing everything again with my own eyes* (Sarah). Georgina provides the same description: *When I remember, it's with my own eyes. From my own perspective, like I was there. I'm there* (Georgina). It appears that this sense of returning to the physical viewpoint of the traumatic event is common to all of the interviewees: *I'm there, completely there. I see the dirt under the floor again* (Emma); *I see it like I'm there again. I see that I'm there and remember with my own eyes, exactly like when I was there, then* (Edward); *When I remember it's like I'm still standing in the exact same place* (Zoe); *When I remember today I really see it in front of my eyes now* (Tracey). Ian describes the same experience in even more radical terms: *it took me back to the exact minute that I was sitting on the seat. It's like I'm sitting in the driver's seat of the bus at that same moment* (Ian). Interestingly, Joseph, another bus driver, gives the exact same description: *Now that we're talking I feel like I am sitting in the driver's seat again, it's a nightmare, you're not sure where you really are* (Joseph).

It should also be noted that posttraumatic individuals cannot control this experience, as Edward says:

> I'm there. I'm there in the event, I can't separate myself from it. It's impossible, impossible. These things are out of my control. You're not in control, simply not in control of yourself. When it happens you're not in control (Edward).

Mark adds that:

> When I remember, I'm there straightaway, I'm just there. If only it wasn't like this, if only it was just another memory, but it isn't. Every Time I remember it's simply like being there and I don't even feel that it's a memory, rather that it's my reality (Mark).

Essentially, in this situation the posttraumatic individual loses the sense of here and now:

> When I am recalling it, I'm there, I feel it. I remember that I was there, how he said "ALLAH HU AKBAR" and then it's like I'm already there—really there, not here, not with you, not hearing and not anything. There! (Edward).

Thus it seems that the traumatized individual cannot locate herself in time; she is, in Tracey's words, *both here and there* (Tracey). In the most radical cases the traumatized individual is simply torn between the present moment and the moment of trauma and cannot tell where she really is: *I'm here and I'm there, I have no real idea of where I am* (Beth).

Essentially, this phenomenon stands at the core of dissociative symptoms in the present. Gallagher and Zahavi (2008) argue that all our experiences are characterized by a sense of egocentric-bodily and first-personal perspective upon the world. Zahavi (2006) adds that this is a precondition for a minimal sense of self. As demonstrated by the interviews, the traumatic memory can shift the egocentric bodily and first-personal perspective from the current moment to the moment of the traumatic event (in that sense it cannot be defined as a memory at all). This can, at least partially, explain the findings of Klein and Janoff-Bulman (1996), according to which there is a relationship between posttraumatic symptoms and (a) decreased use of first-person pronouns and (b) increased use of other-person pronouns. In addition, because traumatic memory is intrusive and accompanied by strong physical reactions, the posttraumatic individual feels detached from the present moment, as if she has two different viewpoints on the world: one is in the moment of the trauma, the other in the current moment. Yet the posttraumatic individual is neither here nor there/then. Thus it seems that there is a link between the intrusive nature of traumatic memory and dissociative symptoms in the present, precisely because the intrusive

memory affects the ability of the posttraumatic individual to determine where she really is.

### The Quality of the Traumatic Memory: An Inherent Tension

Posttraumatic individuals report that their traumatic memory is solid. Indeed, as we already saw, many feel that the memory of the traumatic event is in fact their strongest memory. Rebecca says that *this is the memory that I most remember from my life* (Rebecca), and Ophelia comments that *this is my strongest memory, it's imprinted in my head and remains fixed over the years* (Ophelia). Similarly, Ian insists that his memory of the traumatic event is reliable and unchanging over time:

> What I am telling you now is what I remember with great certainty. I didn't lose consciousness. It's 100% certain. More than 100% certain. It's like it's fixed in me, and I believe that in another 20–30 years, if I'll be alive, the picture of what happened won't change (Ian).

Indeed, Mark argues that his traumatic memories have not altered over the course of 40 years: *I remember it, I remember it today. That's what I remember, really, over the years, we're talking about what, 40 years now? Something like that? My memories don't change* (Mark).

The posttraumatic individual believes that her memory of the traumatic event is not only reliable but also rich in detail. For instance, Diana states that she *remembers everything* (Diana), while Georgina adds that she recalls every detail of the traumatic event: *It's impossible to forget. I feel that I remember it very well* (Georgina). Olivia agrees, relating that she remembers this event better than other moments in her life: *I remember it excellently compared to other events in my life. I know how to recall what seem like rather small details which I wouldn't remember from other situations* (Olivia). Colin provides a similar description of this as his strongest memory—*I remember every detail* (Colin)—and adds that the traumatic memory is sequential. Simon and Emma agree, claiming that it is *a continuous memory* (Simon) and *there are no gaps in the sequence* (Emma): Quite amazingly, only one of the 36 interviewees reported any doubts regarding his traumatic memory:

> I saw a hand. It was lying there. Without a person. That is, there was no corpse. There was no one around. The hand was very, sort of, perfect. And what I remember is that I wrapped it up, and I brought it back. What was very strange was that there was also an ID document, and here I am not even certain if this isn't some kind of dream or something like that, an addition. Even so I see the picture, that next to the hand was an ID document . . . so I remember the hand, and I also have some sort of image, of which I am almost certain, but I think that regarding a lot of events that I experienced during that event, I sometimes . . . I have some kind of doubt, maybe I only dreamt them . . . there's some kind of preoccupation with this, with the question of their existence, or whether they're just a dream or something like that (Arnold).

Interestingly, although posttraumatic individuals feel that their memory of the traumatic event is strong and reliable, they also report that, apart from the memory of the event itself, since the occurrence of the trauma, their memory, in general, has fundamentally deteriorated. As Simon notes, *My memory is completely messed up, but I can't forget that event* (Simon); Beth feels the same: *My memory has been totally messed up, but I remember everything from A to Z about the terror attack* (Beth). However, it should be noted that according to McNally (2003b), "although people with PTSD often complain about having a poor memory, their memories are rarely worse than anyone else's" (p. 128). Accepting McNally's insight, I would like to suggest that the problem facing individuals suffering from PTSD is not one of remembering other things but rather, as we already saw, of forgetting the traumatic event. Because they are flooded by their own fragmented traumatic memories, it appears to them that they forget many other autobiographical memories. At the same time the strength of the traumatic memory increases continuously over time (at least in their own eyes): *I forget things. But that same moment of the trauma I remember all too strongly. It's like it took over all my other memories* (Carole). Indeed, Deena describes the phenomenon in a similar manner: *Many things in life I don't remember, but that I remember very well* (Deena). As can be seen, apart from Arnold, all the interviewees were adamant concerning the quality of their traumatic memories—they are strong, continuous, and remain fixed over time. Nevertheless, an analysis of the interviews reveals that in some cases, those same interviewees who had earlier stated that their memory of the traumatic event

was complete, stable, and continuous, suddenly claimed, in a completely spontaneous manner, that they did not really remember the traumatic event at all.

For instance, Beth, who insisted that she remembers the traumatic event in great detail, also made the following statement: *I don't remember anything. I remember myself being hysterical, hysterical. I don't know what happened at all. I just remember that everything was gray* (Beth). In addition, Amy, who complained that she is unable to forget the traumatic experience, notes that *I don't remember, no, I don't remember exactly. I don't know, I have no idea. I don't know what happened at that moment. I don't know* (Amy). Similarly, although Emma initially claims that she remembers the traumatic event very well, later in the interview she says that, in fact, *it's dark, I don't remember anything* (Emma).

This is also true of Samuel, who notes that *it's something confused . . . it's completely mixed up* (Samuel). Paradoxically, then, although all of the interviewees express the view that the traumatic memory is the strongest memory of their lives, they also report amnesia or lack of memory about the traumatic event—it is hard to tell, however, whether the problem lies in encoding or retrieval; whether the event has been forgotten or simply does not exist in the memory. Anna, for instance, says, *I don't remember anything. A total black out* (Anna). Amanda adds that *there was smoke and shaking, that's it. At the bottom line that's what I remember. Nothing, I don't remember anything. Nothing* (Amanda).

Three further examples serve to demonstrate the extent of the gap between the subject's impression that traumatic memories are her strongest memory and the real state of her memory:

1. As was quoted above, Ian claimed that his traumatic memories are more than 100% reliable and that there are no time-gaps in his memory of the traumatic event. However, later in the course of the interview Ian gave a totally new and different description:

> I don't have a sequence at all, I remember certain images, I lost consciousness for prolonged periods, for example, afterward I found out that the bus rolled more than 20 m downhill and I don't remember that at all (Ian).

2. Years after the traumatic event, Norman discovered that even though he remembers seeing dead bodies, he is not quite so certain that this happened:

> For many Years I was sure that I saw bodies . . . . But recently I have talked about it a bit with my parents and they say that I didn't see them—that it couldn't have happened. I am still sure that I saw them, but now I don't know what to think. I think that they are saying this to help me but they don't understand that I need to know what really happened there (Norman).

3. Georgina's case is the most radical. Although Georgina insisted that she remembers the traumatic experience in great detail, she cannot explain her own story:

> I have a friend that lives in a building behind those houses opposite us and she called me during the event. I don't remember that. And she insists, she says that I answered her call—three times! It's terribly strange, it seems totally weird to me. She says that she asked me "Georgina, are you ok? Is everything ok?" And she says that I said "Yes, everything's fine." I don't remember myself talking [to her]. I don't remember anything about this but she insists that she spoke to me. I can't explain it . . . how is it possible that I don't remember this detail? . . . it drives me crazy (Georgina).

Thus, on the basis of the interviews it seems that the traumatic memory has several deficits:

1. It is confused, disorganized or interrupted and nonsequential: *It's all very confused . . . a fragmented memory. Everything there is pretty fragmented* (Sarah); *I don't really remember a sequence* (Mark); *I remember something really, really foggy* (Arnold); *Everything is disorganized in my head* (Olivia); *I don't remember, my head was not calibrated* (Carole); *Of the event itself I remember almost nothing* (Norman).

2. Lack of details: *Q (Me): The person who treated you and looked after you, do you remember what he looked like? A: No. Q: If I asked you about his hairstyle would you remember? A: No. Q: His face? If you saw him on the street would you recognize him? A: No.* (Ophelia).

3. The feeling that it is not *my* memory: *It's like I'm telling something that isn't mine* (Marianne); *It didn't happen to me, I wasn't there* (Norman).

4. The tendency to complete the memory with details that the subject does not really remember: *We ran home—this running was terrible, we called the emergency services, they arrived and they treated me and him. They took*

*us to the center for mental help* (Emma). Yet later in the interview, this story is repeated spontaneously with different details:

> I was shaking all over. Both of us were shaking. Both of us were hysterical. And the hysteria made us wet ourselves and then, after less than a minute, the police arrived and took us home and there they were already looking after us (Emma).

5. Encoded events that have been deleted — amnesia: *There are things that I can't remember at all. It's like they've been erased from my memory. Like someone took an eraser and erased them. Really, like that. There are things that have disappeared from my memory. Erased, because there were times that I remembered more, I know that. Also, sometimes people tell me things about the event that I told them and I have already forgotten* (Samuel); *In some way my memory of the event itself is half erased* (Arnold); *I saw that he shot them in the head, what I don't remember seeing is that he took the butt of his gun and crushed their skulls, apparently I saw it and it's been erased—it was right in front of my eyes less than two meters away. I don't know if it's been erased or not, but for me it's like I didn't see it* (Mark).

As the interviews demonstrate, on numerous occasions interviewees who claimed at the outset that they remembered the traumatic event extremely well discovered, during the reflexive process, that their memory is in fact fragmentary and lacking significant details.

This (alleged) paradox takes us to the problem at the heart of this study: the two (seemingly contradictory) arguments regarding the nature of the traumatic memory, the *traumatic memory argument* on the one hand and the *trauma superiority argument* on the other. I would like to suggest that there is no real contradiction between the two. As a constructed story, the traumatic memory is indeed poorly remembered (as in the citations from the interviews in this section, specifically in 1–5 above), yet at the same time the traumatic experience *leaves a scar* on the bodily level. Somatic memories are encoded and then stored as implicit kinds of memories which, in turn, rely "on the communication network of the body's nervous system" (Rothschild, 2000, p. 37) and thus are not easily removed (Rothschild, 2000; van der Kolk, 1994). This explains many of the phenomena described by the posttraumatic individuals interviewed in the course of this research.

Thus, it seems that there is one kind of story on the level of the autobiographical self—semantic and explicit yet poorly remembered—and a different kind of "story," remembered all too well, on the bodily level; the latter is neither a semantic nor a declarative kind of memory, but rather a "memory on a somatosensory or iconic level" (van der Kolk, 1994, p. 258). Notably, the bodily/somatic memory of the trauma can be triggered into recall when stimuli (smells, sights, sounds and more; see above, The Sensory Nature of the Intrusive Memory) similar to those that occurred during the traumatic event appear and trigger the resurfacing of traumatic memories. As Ehlers et al. (2004) emphasize, the subject is aware of some of these, but is completely unaware of others. Moreover, as we already saw, these memories are accompanied by a strong bodily experience that causes the posttraumatic subject to feel that the traumatic event is happening once again *here and now*. Therefore, based on the interviews conducted, it is possible to suggest that even though the body of the subject remembers the trauma all too well, in many cases interviewees lack an organized memory of the traumatic experience. Specifically, the narrative memory of the experience is extremely fragmentary, disassembled, and lacking central details; in extreme cases it is totally absent. This being said, it is important to understand that the posttraumatic subject feels that she remembers the trauma very well, principally because the experience always remains on the most basic bodily, primary and prereflexive level — "the body keeps the score" (van der Kolk, 1994, p. 253). The traumatic memory does not undergo high level processing (Ehlers & Clark, 2000) and thus does not develop into an autobiographical memory. Indeed, for this reason there is no real contradiction between the *traumatic memory argument* and the *trauma superiority argument*: the former reflects the absence of an explicit memory and the lack of a narrative, whereas the latter represents the bodily/somatic/implicit memory. Furthermore, this can also explain why almost all of the interviewees argue that the traumatic memory is much stronger (bodily) than any other memory and yet at the same time admit, spontaneously, that they have

fundamental gaps in their memory of the traumatic event.

## Concluding Remarks

This study seeks to shed light on the nature of traumatic memory, to which end interviews were conducted with 36 traumatized individuals, all recognized by the Israeli Office of Social Security as experiencing PTSD.

Clearly, this study has a number of limitations: (a) only one type of traumatized individuals (victims of terror attacks) were interviewed; (b) all qualitative and introspective research is limited by its very nature, and in particular research of the traumatic experience is limited by the individual's great difficulty in speaking about the traumatic event, describing it in words (Janet, 1925); (c) according to Peace and Porter (2004) it "remains unclear how the specific type of interview approach used to elicit the traumatic memory influences the reliability of the memory over longer periods" (p. 1146); (d) in the case of posttraumatic individuals there can be difficulty in intentionally retrieving a complete memory of the traumatic event; (e) the research was conducted at only one chronological point and therefore it is difficult to discern whether the memory indeed remains fixed over the course of time. At the same time, the fact that interviewees underwent traumatic events at different times (between two and 40 years prior to the interview) provides us with a wider picture, which in fact tells us what happens to the traumatic memory over the course of time; and (f) the fact that all of the interviewees have undergone some kind of therapy cannot be ignored and is likely to affect the results.

This article has revealed the collision between the bodily somatic level of the traumatic memory on the one hand and the narrative level on the other. It seems that this clash lies at the heart of posttraumatic symptomology. It is, however, the fragmented bodily memory that functions as a black hole and is responsible for the posttraumatic individual's feeling of being sucked into the traumatic experience over and over again. This article began by presenting the question of whether trauma is remembered well or rather poorly. One implication of this article is that the dichotomous phrasing of this question is obsolete and misleading. Traumatic memory is a complicated issue and therefore requires complex queries that can elicit meaningful insights regarding both the nature of the traumatic memory and the individual describing that memory. This qualitative inquiry challenges the construction of the questions frequently posed about traumatic memories and demonstrates how memory can be present on the *bodily level* yet at the same time the memory of the traumatic event may be fragmentary and lack central details as an *autobiographical memory*. Future research should further hone inquiries regarding traumatic memory, refining them to reveal its complex nature through investigation of subjective experience.

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# Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse

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## I. INTRODUCTION

Domestic abuse afflicts families across eras, cultures, and economic strata. Since the 1960s, increasing awareness, study, and advocacy have generated political, social, and legal innovations to confront violence within intimate relationships. As a result, every state now has adopted civil protection systems for victims of domestic abuse.[1]

These laws typically provide emergency injunctive relief to extricate a person from a dangerous relationship and to prevent future abuse. Defining "abuse" is central to civil protection regimes because a court may not issue a protection order without finding that abuse has occurred or is likely to occur. Most civil protection statues limit their scope by defining abuse as physical violence or by referencing criminal laws with elements of physical violence. These regimes require a predicate episode of physical violence or an imminent, tangible threat of violence before providing relief, which is usually an injunction against continued violence.

Physical violence consumes the analysis, so these statutes do not address the root cause of the problem. Domestic abuse arises from a disproportionate and imbalanced demand for power and control in an intimate relationship.[2] Violence is a result, not the cause, of this power and control dynamic. The oppressive partner will exert power by force, coercion, or manipulation to control the other's finances, freedom of movement, work, recreation, sexual activity, chores, parenting, education, relationships, and other facets of life. Actions and direction within the relationship are not the result of negotiations, shared decision making or mutual

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[1] Within domestic violence literature, most writers refer to those people subject to abuse as "victims," although some scholars prefer terms like "survivors" or "targets." This article addresses people who are in the midst of domestic abuse and are in need of greater legal recourse, so "victim" is appropriate and accurate.

[2] *See, e.g.*, EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, 91–92 (2007); *see also, e.g.,* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 38 (2007); Evan Stark, *Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975–81 (1995) (discussed more fully *infra* section III: The Reality of Domestic Abuse).

bargains, but follow the assertion of forceful, total hegemony of one over the other.[3] This imbalance often manifests and advances long before the relationship becomes physically violent. Physical violence often is a final resort for control or a reaction to the other's desire for greater independence and autonomy.[4]

Several empirical studies conclude that civil protection orders are effective in preventing renewed violence, but these orders are not necessarily successful because the victim actually receives an injunction.[5] Rather, studies suggest that civil protection orders are effective because the victim seeks the protection in the first place. By petitioning for an order, the victim shifts the power dynamic in her relationship, signaling to her abuser that she demands liberation and inviting public scrutiny of her plight.[6]

If civil protection regimes accommodated this reality, instead of relieving only symptomatic violence, they would be more effective in preventing all forms of domestic abuse. Rather than focusing on violence alone, civil protection regimes should provide relief for non-physical, oppressive coercion. By enjoining coercion, a civil protection regime could prevent the violence to which it now only reacts.

## II. THE RISE OF CIVIL PROTECTION ORDERS AS LEGAL REMEDY FOR DOMESTIC ABUSE

### *A. A Brief History of Contemporary Legal Responses to Domestic Abuse*

Domestic abuse, under other guises such as "wife beating" or "chastisement," is an ancient phenomenon, and laws have addressed it for ages.[7] The Romans limited such practices, and the English common-law gave rise to the famous "Rule

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[3] Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 743 (2005) (discussed more fully *infra* section III(A)(4) and accompanying notes 48–57.).

[4] *See id.*

[5] *See* Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, 227 227–52 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. FAM. VIOLENCE 205, 206–07 (1999); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 616–18 (2004). These studies are discussed more fully *infra* section III(B) and accompanying notes 64–92.

[6] This article refers to victims generally as women and to perpetrators as men. Although women certainly do perpetrate domestic violence on men and although domestic violence exists in homosexual relationships, the overwhelming reported incidents of domestic violence occur between men and women, with men inflicting abuse on women. *See, e.g.*, STARK, COERCIVE CONTROL, *supra* note 2, at 91–92 (2007); *Developments in the Law – Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 n.2 (1993).

[7] *See* Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 783–86 (1997) (surveying cultural and social factors that contribute to legal accommodation of domestic violence, and quoting Blackstone's Commentaries: "For as [the husband] is to answer for her misbehaviors, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children.").

of Thumb."[8] American law condoned or ignored family violence through the mid-1800s, when a few jurisdictions began to eliminate virtual immunity for wife beaters and generated some punishments for abusers. Even so, until the 1960's, courts and legislatures still were reluctant to interfere in "family matters," leaving violence behind closed doors as a purely private province and denying useful legal remedies to victims.[9]

With the emerging feminist movement, Americans began to examine and address the problem more forthrightly as a matter of criminal law and public health.[10] Initially, activists, counselors, and civil rights advocates promoted the "battered women's movement," but soon lawyers, scholars, and courts began to advocate for clearer recognition of the problem, and to propose legal innovations to overcome cultural reticence.[11] Courts became increasingly willing to inquire into marital relationships and to impose sanctions for physical violence that would be a crime in any other context.

Among these reforms, state legislatures have considered mandatory arrest policies in which police are bound to arrest someone on a domestic violence scene, and prosecutors have promoted "no drop" prosecutions in attempts to prevent

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[8] *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WISC. L. REV. 1657, 1661 (2004); *Developments in the Law*, *supra* note 6, at 1502; *see also* James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*¸ 26 ST. MARY'S L.J. 1149, 1157–60 (1995). Truss provides a useful history of common law tolerance and gradual objection to domestic violence. "[The Rule of Thumb] permitted men to beat their wives with a rod or stick 'no larger than a man's thumb' or small enough to 'pass through a wedding band' . . . as a natural and necessary right of control, incident to the man's role as head of the family." *Id.* at 1157 (citations omitted). Truss observes the cultural dynamic of gender subjugation from which the "Rule of Thumb" sprang:

> Compounding this tacit approval of violence against women were popular myths that obscured domestic abuse. The "unity of husband and wife" and the "sanctity of home" limited abused spouses' remedies to divorce or criminal actions. The "unity of spouses" fiction ratified the husband's domination and control of his wife and expressly precluded any possible tort recovery for injuries he had inflicted. Treating husband and wife as one within the context of a male-dominated society rendered women invisible from the eyes of the law. Moreover, emphasis on the sanctity of the home allowed courts to ignore domestic violence, and domination of, women as "private matters." This traditional justification for non-action in private family matters – to avoid disturbing domestic harmony or tranquility – is all the more suspect within the context of domestic violence.

*Id.* at 1159–60 (citations omitted).

[9] *See Developments in the Law*, *supra* note 6, at 1502–03.

[10] *See id.* at 1502 (discussing the tension between reformed legal remedies and continuing cultural biases against state interference in these intimate relationships); *see also* Sack, *supra* note 8, at 1666 ("Feminists, particularly women who formerly had been in abusive relationships, developed the first safe houses and shelters for battered women attempting to flee their abusers. The early battered women's advocacy movement was a grassroots effort to provide services and shelter to domestic violence victims.").

[11] *See* Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 500–03 (2003) (by the 1980s, "[t]he movement became dominated by lawyers, elected officials and courts. The work shifted from establishing shelters, safe houses, and hotlines, to drafting legislation, lobbying elected officials, and litigating cases to create and expand legal protections for battered women.").

victim-witnesses from coercion by their abusers in court. [12] States began to recognize tort actions between spouses, abolished marital rape exemptions, enhanced stalking crimes, and crafted counseling diversion programs.[13] In 1994, the federal government enacted the Violence Against Women Act of 1994 ("VAWA") which federalized some interstate domestic violence crimes and established federal grants and policy preferences for states to address legal and community responses to domestic abuse.[14]

Civil protection orders are perhaps the most popular and commonly used legal tool to emerge from this era. Before the creation of civil protection orders, abuse victims could obtain injunctive relief or restraining orders only within the context of a larger action. In 1970, Congress passed the Intrafamily Offenses Act for the District of Columbia, which included the first form of civil protection orders.[15] By 1992, every state had established civil protection statutes to provide civil and equitable remedies for people vulnerable to domestic abuse.[16]

### *B. Purposes of Civil Protection Statutes*

States intend for civil protection regimes to provide an easily accessible, free-standing civil cause of action for a victim to obtain immediate, temporary,

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[12] *See Developments in the Law*, *supra* note 6, at 1530–43 (providing a detailed review of these innovations in state law).

[13] *See id.*

[14] Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994).

[15] Pub. L. No. 91-358, 84 Stat. 546 (1970) (codified as amended at D.C. CODE ANN. § 16–1001 (2008)); *see also* Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 47 n.26 (2007).

[16] *See* Murphy, *supra* note 11, at 502. Every state and the District of Columbia provide for civil protection orders for victims of domestic violence: ALA. CODE §§ 30-5-1, (1998); ALASKA STAT. § 18.66.100, (2006); ARIZ. REV. STAT. ANN. § 13-3601, (2001); ARK. CODE ANN. § 9-15-201 (2007); CAL. FAM. CODE §§ 6320, 6340 (2008); COLO. REV. STAT. §§ 13-14-101, 18-6-800 (2008); CONN. GEN. STAT. § 46b-16 (2004 & Supp. 2008); DEL. CODE ANN. tit. 10 § 1042 (1999 & Supp. 2006); D.C. CODE ANN. § 16-1003 (2005); FLA. STAT. ANN. §§ 741.30 (2008), 741.30; GA. CODE ANN. §19-13-4 (2004); HAW. REV. STAT. § 586-3 (2005); IDAHO CODE ANN. § 39-6304 (2008); 750 ILL. COMP. STAT. 60/201, (West 1999); IND. CODE ANN. § 34-26-5-2 (LexisNexis 2007); IOWA CODE § 236.1 (West 2008); KAN. STAT. ANN. § 60-3101-3112 (2005); KY. REV. STAT. ANN. § 403.715-785 (LexisNexis 1999); LA. REV. STAT. ANN. § 46:2131, (1999 & Supp. 2008); ME. REV. STAT. ANN. tit.19-A, § 4001 (1998 & Supp. 2008); MD. CODE ANN., FAM. LAW, § 4-501 (2006); MASS. GEN. LAWS ANN. ch. 209 § 3 (Supp. 2008); MICH. COMP. LAWS §§ 600.2950, 600.2950(a) (Supp. 2008); MINN. STAT. ANN. § 518B.01 (Supp. 2008); MISS. CODE ANN. § 93-21-1 (2007); MO. REV. STAT. § 455.010 (2004); MONT. CODE ANN. § 40-15-101 (1995); NEB. REV. STAT. § 42-901 (2005); NEV. REV. STAT. § 33.017, .020 (2006); N.H. REV. STAT. ANN. § 173-B:1 (LexisNexis 2007) ; N.J. STAT. ANN. § 2C:25-17 (West 2008); N.M. STAT. ANN. § 40-13-2 (LexisNexis 2008); N.Y. FAM. LAW § 530.11; N.C. GEN. STAT. § 50B-2 (2005); N.D. CENT. CODE § 14-07.1-02 (2004); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2008); OKLA. STAT. ANN. tit. 22 § 60.2 (2006); OR. REV. STAT. § 107.718 (2007); 23 PA. CONS. STAT. § 6108 (2006); R.I. GEN. LAWS § 15-15-3 (2003); S.C. CODE ANN. § 20-4-40 (2006); S.D. CODIFIED LAWS 25-10-3 (2002); TENN. CODE ANN. § 36-3-602 (2006); TEX. FAM. CODE ANN. § 81.001 (1997); UTAH CODE ANN. § 77-36-1 (2008); VT. STAT. ANN. tit. 15 § 1103 (2006); VA. CODE ANN. § 16.1-279.1 (2008); WASH. REV. CODE ANN. § 26.50.030 (2005); W. VA. CODE § 48-27-501 (2001); WIS. STAT. § 813.123 (2006); WYO. STAT. ANN. § 35-21-105 (2000).

injunctive relief from physical violence.[17] These statutes aspire to provide victims with safety, space, time and the wherewithal to escape and to establish themselves independently and safely.[18]

Many states include express policy provisions declaring their intent to prevent physical violence in domestic relationships. For example, Kansas's Protection from Abuse Act includes this statutory direction: "This act shall be liberally construed to promote the protection of victims of domestic violence from bodily injury or threats of bodily injury and to facilitate access to judicial protection for the victims, whether represented by counsel or proceeding *pro se*."[19] Louisiana includes a statement of societal repentance, resolving to provide "immediate and easily accessible protection":

> The purpose of this Part is to recognize and address the complex legal and social problems created by domestic violence. The legislature finds that existing laws which regulate the dissolution of marriage do not adequately address problems of protecting and assisting the victims of domestic abuse. The legislature further finds that previous societal attitudes have been reflected in the policies and practices of law enforcement agencies and prosecutors which have resulted in different treatment of crimes occurring between family or household members and those occurring between strangers. It is the intent of the legislature to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection. Furthermore, it is the intent of the legislature that the official response of law enforcement agencies to cases of domestic violence shall stress the enforcement of laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.[20]

The Idaho legislature included a lengthy finding to support the statute and guide its interpretation:

> Additionally, the legislature finds that a significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families. Furthermore, research shows that domestic violence is a crime which can be deterred, prevented or reduced by legal intervention. Domestic violence can also be deterred, prevented, or reduced by vigorous

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[17] Statues refer to civil protection orders variously as no-contact orders, restraining orders, personal protection orders or protection from abuse orders, among other terms.

[18] *See* Kuennen, *supra* note 15, at 47–48; Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000).

[19] KAN. STAT. ANN. § 60-3101(b) (2005); *see also, e.g.*, KY. REV. STAT. ANN. § 403.715 (LexisNexis 1999).

[20] LA. REV. STAT. ANN. § 46:2131 (1999 & Supp. 2008).

> prosecution—by law enforcement agencies, prosecutors, and the court's appropriate attention and concern—whenever reasonable cause exists for arrest and prosecution.
>
> The purpose of this act is to address domestic violence as a serious crime against society and to assure the victims of domestic violence the protection from abuse, which the law and those who enforce the law can provide.
>
> It is the intent of the legislature to expand the ability of the courts to assist victims by providing a legal means for victims of domestic violence to seek protection orders to prevent such further incidents of abuse. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior in the home is criminal behavior and will not be tolerated. It is the intent of the legislature to presume the validity of protection orders issued by courts in all states, the District of Columbia, United States territories and all federally recognized Indian tribes within the United States, and to afford full faith and credit to those orders. The provisions of this chapter are to be construed liberally to promote these purposes.[21]

### *C. Common Features of Civil Protection Statutes*

Civil protection regimes provide standing to a narrow class of petitioners who may seek an emergency injunction. Typical civil protection regimes afford standing to spouses, cohabitating couples, couples with biological children in common, household members, minor children, and adults petitioning on behalf of minor children.[22]

Civil protection proceedings generally include two phases. First, designated courts have power to issue *ex parte* emergency orders, without a hearing or notice to the defendant, if the court finds on the face of the petition that abuse has occurred. Then, with proper notice to the defendant and after an evidentiary hearing, the court may issue a final protection order.[23]

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[21] IDAHO CODE ANN. § 39-6302 (2008); *see also, e.g.*, ALA. CODE § 30-5-101 (1998); ARK. CODE ANN. § 9-15-10 (2007); COLO. REV. STAT. §§ 13-14-101 (2008), discussed more fully *infra*; 750 ILL. COMP. STAT. 60/102 (West 1999), discussed more fully *infra.*

[22] *See, e.g.*, MICH. COMP. LAWS § 600.2950 (Supp. 2008) (in pertinent part):

> [A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner . . . .

[23] *See, e.g.*, MISS. CODE ANN. § 93-21-11 (2007) (in pertinent part):

> (1) Within ten (10) days of filing of a petition under the provisions of this chapter, the court shall hold a hearing, at which time the petitioner must prove the

Upon a finding of abuse, courts may impose a great range of relief with relatively little due process. *Ex parte* orders usually include basic injunctions on contact and continued abuse, but final orders can provide child support, evict the abuser from their common residence, provide transportation to the victim, and remove all the defendant's firearms.[24]

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allegation of abuse by a preponderance of the evidence. The respondent shall be given notice by service of process as otherwise provided by law.

(2) The court may, prior to the date set for the hearing, enter such temporary ex parte order as it deems necessary to protect from abuse the petitioner, any minor children, or any person alleged to be incompetent. Immediate and present danger of abuse to the petitioner, any minor children, or any person alleged to be incompetent, shall constitute good cause for issuance of a temporary ex parte order. A temporary ex parte order shall last no longer than ten (10) days and upon issuance of a temporary ex parte order, the respondent shall be served with a copy of the order and given notice of a hearing to be held within ten (10) days as provided in subsection (1).

[24] *See, e.g.*, IND. CODE § 34-26-5-9 (LexisNexis 2007) (in pertinent part): (b) A court may grant the following relief without notice and hearing in an ex parte order for protection or in an ex parte order for protection modification:

(1) Enjoin a respondent from threatening to commit or committing acts of domestic or family violence against a petitioner and each designated family or household member.

(2) Prohibit a respondent from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with a petitioner.

(3) Remove and exclude a respondent from the residence of a petitioner, regardless of ownership of the residence.

(4) Order a respondent to stay away from the residence, school, or place of employment of a petitioner or a specified place frequented by a petitioner and each designated family or household member.

(5) Order possession and use of the residence, an automobile, and other essential personal effects, regardless of the ownership of the residence, automobile, and essential personal effects. If possession is ordered under this subdivision, the court may direct a law enforcement officer to accompany a petitioner to the residence of the parties to:

(A) ensure that a petitioner is safely restored to possession of the residence, automobile, and other essential personal effects; or

(B) supervise a petitioner's or respondent's removal of personal belongings.

(6) Order other relief necessary to provide for the safety and welfare of a petitioner and each designated family or household member.

(c) A court may grant the following relief after notice and a hearing, whether or not a respondent appears, in an order for protection or in a modification of an order for protection:

(1) Grant the relief under subsection (b).

(2) Specify arrangements for parenting time of a minor child by a respondent and:

(A) require supervision by a third party; or

(B) deny parenting time;

if necessary to protect the safety of a petitioner or child.

(3) Order a respondent to:

(A) pay attorney's fees;

In order to grant a petition and provide relief, a court must find that the petitioner has demonstrated the requisite elements of domestic abuse.[25] Thus, defining abuse is central to every civil protection statute. Every definition of abuse in these statutes includes incidents of physical violence or threats of physical violence,[26] and most civil protection statutes define abuse with references to criminal codes that include physical violence.[27]

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(B) pay rent or make payment on a mortgage on a petitioner's residence;
(C) if the respondent is found to have a duty of support, pay for the support of a petitioner and each minor child;
(D) reimburse a petitioner or other person for expenses related to the domestic or family violence, including:
(i) medical expenses;
(ii) counseling;
(iii) shelter; and
(iv) repair or replacement of damaged property; or
(E) pay the costs and fees incurred by a petitioner in bringing the action.
(4) Prohibit a respondent from using or possessing a firearm, ammunition, or a deadly weapon specified by the court, and direct the respondent to surrender to a specified law enforcement agency the firearm, ammunition, or deadly weapon for the duration of the order for protection unless another date is ordered by the court.

[25] *See, e.g.*, MISS. CODE ANN. § 93-21-11 (2007) (quoted in pertinent part, *supra* note 23).

[26] *See, e.g.*, ALA. CODE. § 30-5-2(a)(1) (1998):

(1) ABUSE. The occurrence of one or more of the following acts, attempts, or threats between family or household members, as defined by this chapter:
a. Assault. Assault as defined under Sections 13A-6-20 to 13A-6-22, inclusive.
b. Attempt. With the intent to commit any crime under this section or any other criminal act under the laws of this state, performing any overt act towards the commission of the offense.
c. Child abuse. Abusing minor children as defined under Chapter 15 (commencing with Section 26-15-1) of Title 26, known as "The Alabama Child Abuse Act."
d. Criminal coercion. Criminal coercion as defined under Section 13A-6-25.
e. Harassment. Harassment as defined under Section 13A-11-8.
f. Kidnapping. Kidnapping as defined under Sections 13A-6-43 and 13A-6-44.
g. Menacing. Menacing as defined under Section 13A-6-23.
h. Other conduct. Any other conduct directed toward a member of the protected class covered by this chapter that could be punished as a criminal act under the laws of this state.
i. Reckless endangerment. Reckless endangerment as defined under Section 13A-6-24.
j. Sexual abuse. Any sex offenses included in Article 4 (commencing with Section 13A-6-60) of Chapter 6 of Title 13A.
k. Stalking. Stalking as defined under Sections 13A-6-90 to 13A-6-94, inclusive.

### *D. Fixation on Physical Violence*

The legislative findings, policy statements, and the scope of domestic abuse definitions in the protection statutes demonstrate an intentional fixation on physical violence. Physical violence consumes the judicial inquiry for civil protection orders. In order to obtain a civil protection order, an abuse victim must demonstrate an incident of physical violence, a threat of physical violence, or the elements of a crime requiring physical violence.[28] Once a court finds this antecedent violence, its protection orders are meant to prevent future violence by the perpetrator against his victim and to provide resources and time for the victim to establish herself independently of the abuser. [29]

The evident policy undergirding most civil protection regimes suggests that physical violence is the beginning and end of domestic abuse, or at least the only aspect of domestic abuse that the law can confront.[30] Those civil protection statutes which discuss legislative purpose and policy do not speculate on the roots of domestic abuse. Instead, these statutes respond to domestic abuse as a sort of quasi-crime to be prosecuted by the victim as civil plaintiff.

Although civil protection orders can be useful to prevent continued or future physical violence, these statutes do not address more fundamental causes of domestic abuse.[31] The focus on physical violence misses the greater dynamic

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> l. Theft. Knowingly obtaining or exerting unauthorized control or obtaining control by deception over property owned by or jointly owned by the plaintiff and another.
> m. Trespass. Entering or remaining in the dwelling or on the premises of another after having been warned not to do so either orally or in writing by the owner of the premises or other authorized person.
> n. Unlawful imprisonment. Unlawful imprisonment as defined under Sections 13A-6-41 and 13A-6-42.

[27] Federal laws addressing domestic abuse are almost wholly devoted to physical violence and reacting to physical violence within families. *See, e.g.,* 42 U.S.C. § 10421(1) (2000) (VAWA's definition: "The term 'family violence' means any act or threatened act of violence, including any forceful detention of an individual, which—(A) results or threatens to result in physical injury; and (B) is committed by a person against another individual (including an elderly person) to whom such person is or was related by blood or marriage or otherwise legally related or with whom such person is or was lawfully residing.").

[28] *See, e.g.*, MISS. CODE ANN. § 93-21-11(2007) (quoted in pertinent part, *supra*, note 23).

[29] In its recent Standards for Practice in Civil Protection Order Cases, the American Bar Association's Commission on Domestic Violence observes this limited vision with its definition for civil protection orders: "A civil court order, enforceable by law enforcement, intended to protect a victim and to stop the violent, dangerous and/or harassing behavior of a respondent." ABA COMM'N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES, § II(J) (2007) [hereinafter ABA COMM'N].

[30] A few states make some accommodation for non-violent emotional or psychological abuse, either in the predicate elements of abuse or the remedies available to victims. Section IV(D), *infra*, examines these statutes for insight into potential reforms that might capture coercive abuse in civil protection orders: Michigan, Illinois, Hawaii, Maine and Oregon.

[31] The ABA's Commission on Domestic Violence tentatively acknowledged this reality in its definition for domestic violence: "Physical abuse, alone or in combination with sexual, economic or

present in abusive, intimate relationships. Physical violence is a symptom, not the disease, of domestic abuse. The disease is a dangerous, coercive imbalance of power and control within the intimate relationship.[32] This endemic, cultural dynamic creates an escalating cycle of abuse and violence, typically increasing in frequency and severity over time to maintain and enforce control.[33]

## III. THE REALITY OF COERCION IN DOMESTIC ABUSE

Professor Evan Stark recognizes and criticizes this fixation on physical violence that permeates policies addressing domestic abuse:

> The violence definition of abuse has much to recommend it. It is easy to apply, lends itself readily to measurement and comparison, appeals to audiences beyond the women's movement, can be used across cultural and national boundaries, and bridges multiple disciplines. The focus on injury is also a useful rationing tool. It is simple to adjust the bar of injury required for real abuse so that intervention can match available resources. Given these benefits, it is a pity that it has been so hard to apply the definition in real life . . . .[34]
>
> In fact, because of its singular emphasis on physical violence, the prevailing model minimizes both the extent of women's entrapment by male partners in personal life and its consequences. . . .
>
> Viewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its

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emotional abuse, stalking or other forms of coercive control, by an intimate partner or household member, often for the purposes of establishing and maintaining power and control over the victim." ABA COMM'N, *supra* note 29, at § II(A).

[32] *See* Leigh Goodmark, *Law is the Answer? Do We Know for Sure?*, 23 ST. LOUIS U. PUB. L. REV. 7, 28–30 (2004):

> But the legal system's definition of domestic violence and the totality of battered women's experiences of domestic violence bear little resemblance to one another . . . By focusing so intently on physical violence, the legal system refuses to recognize how the other types of violence experienced by battered women affect their ability to function as parents and as people . . . . Moreover, by elevating physical violence over the other facets of a battered woman's experience, the legal system sets the standard by which the stories of battered women are judged. If there is no assault, she is not a victim, regardless of how debilitating her experience has been, how complete her isolation, or how horrific the emotional abuse she has suffered. And by creating this kind of myopia about the nature of domestic violence, the legal system does battered women a grave injustice.

[33] *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 7 (1999) (citing ANGELA BROWN, WHEN BATTERED WOMEN KILL 68 (1987), and LENORE WALKER, THE BATTERED WOMAN, 43–44 (1979)).

[34] STARK, COERCIVE CONTROL, *supra* note 2, at 64.

> major components, dynamics and effects, including the fact that its neither "domestic" nor primarily about "violence." Failure to appreciate the multidimensionality of oppression in personal life has been disastrous for abuse victims.[35]

Limiting legal remedies to the prevention and deterrence of physical violence may interrupt the course of domestic abuse, but violence in intimate relationships flows from something more fundamental and seminal: an integrated, imbalanced conquest over the victim's autonomy, independence, and personhood. The various theories of domestic abuse and empirical studies distill to this reality that physical violence is merely a symptom of oppressive, abusive coercion, not the root of domestic abuse.

### *A. Theories of Domestic Violence*

As the battered women's movement advanced, theorists have observed shifting power and control dynamics within abusive, intimate relationships.[36] The following competing theories diagnose domestic abuse across a spectrum from socio-cultural plight to psychological pathology, but they all recognize the imposition of control by force, coercion, intimidation, and other emotional, economic, and political tactics. Virtually all domestic abuse distills to a question of power, in culture or psychology, and violence is but one means of coercing responses from a victim. Stark identifies three prime theories for domestic abuse: sociological, feminist, and psychological.[37]

#### *1. Sociology*

Sociological models suggest that domestic abuse springs from community and family structures, passed from generation to generation, which value violent conflict resolution and which are steeped in religious or social norms fostering gender inequality.

> During childhood and adolescence, observations of how parents and significant others behave in intimate relationships provide an initial learning of behavioral alternatives which are "appropriate" for these relationships. If the family of origin

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[35] *Id.* at 10.

[36] *See* Kuennen, *supra* note 2, at 8–9; *see also* Stark, *Re-Presenting Woman Battering*, *supra* note 2 at 975–81.

[37] STARK, COERCIVE CONTROL, *supra* note 2, at 117–21. Some scholars classify their research into more discrete categories, such as psychoanalytic theory, social learning, social psychology, family systems, feminist theory and sociological theories. *See, e.g.*, BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE, 29–35 (Marsali Hansen & Michele Harway eds., 1993). Demie Kurz, *Social Science Perspectives on Wife Abuse: Current Debates and Future Directions*, 3 GENDER & SOCIETY 489, 489 (1989) (identifying "two major social science perspectives on wife abuse"–"family violence"and "feminist"–each having its own vocabulary, methods and interpretation).

> handled stresses and frustrations with anger and aggression, the child who has grown up in such an environment is at greater risk for exhibiting those same behaviors, witnessed or experienced as an adult.[38]

*2. Feminism*

Feminist theories propose that patriarchy and male dominance are the fundamental causes of domestic abuse, that men use violence as a means of propagating the subjugation of women *qua* women.

> Using historical and case-study data, they have concluded that male dominance—especially the *ideology* of male dominance—is the key factor underlying wife abuse . . . .Specifically, they hold that the primary source of wife abuse is the wife's failure to live up to the husband's ideals and expectations about what it means to be a good wife. Husbands experience stress in such situations. They abuse women in order to maintain dominance and control.[39]

*3. Psychology*

Psychological theories propose that abusers act violently against their intimate partners because of pathology, cognition, or attitude. Psychological studies of domestic violence perpetrators suggest that abusers may experience personality disorders such as border-line personalities and paranoia, attachment disorders, trauma, identity disturbance, shame, and neurobiological or neural-structural anomalies.[40] Psychology also has made great effort to explain why victims remain

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[38] Sharon Wofford Mihalic & Delbert Eliot, *A Social Learning Theory Model of Marital Violence*, 12 J. FAM. VIOLENCE 21, 21–22 (1997), *reprinted in* THE INTERNATIONAL LIBRARY OF CRIMINOLOGY, CRIMINAL JUSTICE & PENOLOGY, DOMESTIC VIOLENCE 303 (Mangai Natarajan ed., 2007) [hererinafter INTERNATIONAL LIBRARY OF CRIMINOLOGY].

[39] *See, e.g.*, Rhonda L. Lenton, *Power Versus Feminist Theories of Wife Abuse*, 44 CANADIAN J. CRIMINOLOGY 305, 310–12 (1995), *reprinted in* INTERNATIONAL LIBRARY OF CRIMINOLOGY, *supra* note 38, at 232; *see also* Armatta, *supra* note 7, at 779–81, 842 (citing David Levinson, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE 88 (1989)). Armatta identifies legal structures, particularly within traditional societies and developing nations, that contribute to or exacerbate domestic violence: legal sanctions for wife abuse, marriage laws and customs, legal disabilities during marriage, marital dissolution laws, child custody, economics and property laws and access to legal system and other benefits of full citizenship and suffrage. She identifies four common factors that predict domestic violence in cross-cultural studies of traditional, small-scale societies: "(1) men control the greater share of economic resources; (2) men hold decision-making power in the family, (3) availability of divorce is restricted for women; and (4) violence conflict resolution is valued," *Id.* at 781. The root of these factors lies constantly in an imbalance of power favoring men and lack of recourse for women. Domestic abuse and violence springs from values, relationships, social and institutional structures that promote male dominance and female subordination, or at least, the historic residue of these structures.

[40] *See* DONALD G. DUTTON, RETHINKING DOMESTIC VIOLENCE, 62–94 (2006). *See also, e.g.*, Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM.

in abusive relationships and the reactions of victims and abusers to each other in intimate relationships.[41]

*4. Coercive Control*

The theory of "coercive control" is a synthesis of these theories and has gained common approval among domestic abuse scholars and activists. The theory of coercive control is a framework of understanding domestic violence from the victims' standpoint:

> [A]s a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation and control. Assault is an essential part of this strategy and is often injurious and sometimes fatal. But the primary harm abusive men inflict is political, not physical, and reflects the deprivation of rights and resources that are critical to personhood and citizenship. Although coercive control can be devastating psychologically, its key dynamic involves an objective state of subordination and the resistance women mount to free themselves from domination . . . . Men deploy coercive control to secure privileges that involve the use of time, control over material resources, access to sex, and personal service. Like assaults, coercive control undermines a victim's physical and psychological integrity. But the main means used to establish control is the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually.[42]

The theory of coercive control observes that domestic abuse is not a series of discrete incidents of violence or temper. From the victim's vantage, domestic abuse is a continuous pattern of coercive and controlling behavior inflicting a range of harms in addition to physical injury.[43] A batterer's coercion does not force

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& MARY L. REV. 1843, 1901–03 (2002). Epstein identifies "special characteristics of the batterer population" as clinical diagnoses and the effect of abuser psychology on procedural justice, *id.* at 1901–02.

[41] *See* Lenore E. A. Walker, *Psychology and Violence Against Women*, 44 AM. PSYCHOL. 695, 695–702 (1989), *reprinted in* INTERNATIONAL LIBRARY OF CRIMINOLOGY, *supra* note 38, at 219–25.

[42] STARK, COERCIVE CONTROL *supra* note 2, at 5; *see also* Stark, *Re-Presenting Woman Battering*, *supra* note 2, at 975–81.

[43] STARK, COERCIVE CONTROL, *supra* note 2, at 99–100; *see also* Stark, *Re-Presenting Woman Battering*, *supra* note 2, at 976:

> The coercive control framework shifts the basis of women's justice claims from stigmatizing psychological assessments of traumatization to the links between structural inequality, the systemic nature of women's oppression in a particular relationship, and the harms associated with domination and resistance as it has

a victim's compliance by physical assault but does deprive a victim of liberty and volition by distorting her choices or perceived choices, and the price to pay for disobedience. [44]

Identifying abusive, coercive control demands close attention to individual contexts and singular relationships. Common bargaining and compromises among most couples may be healthy, but the same transactions may be coercive, abusive, and oppressive in other contexts. Mary Ann Dutton and Lisa Goodman identify eight domains of control in which a batterer makes demands, imposes coercion, and strips the victim's autonomy:

> [P]ersonal activities/appearance (e.g., demand to wear certain clothing or hairstyles), support/social life/family (e.g., refusal to allow target to seek help of counselor or talk with family members), household (e.g., demanding only specific foods be purchased), work/economic/resources (e.g., not allowing non-English speaking partner to learn English), health (e.g., not allowing target to obtain needed medications), intimate relationship (e.g., demanding target not use birth control), legal (e.g., demanding that the target engage in illegal activities), immigration (e.g., threats to report target to immigration officials) and children (threats to report target to child protective services).[45]

Dutton and Goodman describe violence within the framework of coercive control: "Violence is simply a tool . . . . that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win arguments or demonstrate dominance."[46] Dutton and Goodman then set out to promote a "tighter conceptualization" of coercive control.

They begin with an examination and application of the "social bases" of power first described by French and Raven in the 1950s.[47] Upon these bases of power an "agent" influences a "target" to act. French and Raven identified six

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> been lived. The proposed narrative identifies the extension of battering to children (either before or after a couple separates) as "tangential spouse abuse," a common stage in the pattern of coercive control that is often misinterpreted in ways that jeopardize a woman's custodial rights. Although "safety" is not abandoned as a concern, the coercive control framework shifts the emphasis to restrictions on "liberty," highlighting a class of harms that extends beyond psychological or physical suffering to fundamental human rights.

[44] *See, e.g.*, Kuennen, *supra* note 2, at 15 ("A victim may be dependent on her partner for money, health care, child care, transportation, or housing. A threat involving the loss of any of these may be just as effective as a threat of physical violence.").

[45] Dutton & Goodman, *supra* note 3, at 747.

[46] *Id.* at 743 (citing Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 71–91 (1992)).

[47] *See id.* at 744 (citing John R.P. French & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER 150–67 (1959)).

bases of power: coercive, reward, legitimate, referent, expert, and informational.[48] Dutton and Goodman then explain the constant dynamic of coercive power in domestic abuse:

> Coercive power is the most central to theorizing about coercive control in violent relationships, although the remaining bases of power may also apply. Both can be distinguished from force in that force involves a complete lack of volition on the part of the target. That is, if sufficient force is imposed, the target has no discretion in responding (e.g., being forcefully held down while being raped). However, the target's response to coercion does involve choice, although not "free choice." Coercive power is based on the target's belief that the target can and will experience negative consequences for noncompliance (e.g., getting beaten for not having dinner on the table, partner will have sex with someone else). The target can "choose" to comply (and hope to avoid threatened negative consequences) or risk punishment for noncompliance. Thus, the opportunity for resistance exists, but at a cost. Reward power also has a connection to coercive control in violent relationships since it is based on the target's belief that the agent can and will provide a reward in return for compliance. Thus, the agent's access to reward power (e.g., providing financial support, transportation, emotional intimacy) can be used to increase the target's probability of complying with the agent's coercion.[49]

An abuser coerces his victim by issuing a demand and deploying a credible threat of consequences for failure to comply.[50] Individual context and relationship culture shape coercive demands that may be explicit and obvious but also may be "integrated seamlessly into the day-to-day interactions of the partners' lives."[51] To coerce, the abuser must deliver a credible threat with the demand. Likewise, the

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[48] *See id.* at 745. Coercive control is the agent's ability to impose on the target things or actions the target does not desire or to remove or decrease desired actions or things, *see id.* Reward power is the agent's ability to give or take away things the target desires, *see id.* Legitimate power is the agent's ability to impose feelings, obligations or responsibilities on the target, *see id.* Referent power is the agent's ability to provide feelings of acceptance or approval on the target, *see id.* Expert power is the agent's ability to provide skill or expertise or the target's belief about the agent's expertise, *see id.* Informational power is the agent's ability to provide knowledge or information to the target, *see id.*

[49] *Id.* at 745 (citations omitted).

[50] *See id.*

[51] *Id.* at 749. Dutton and Goodman illustrate this dynamic for many women in abusive relationships who state, "'I just knew that I had to _____ or else he would ____.' Expectations become coercive demands when the expectation is held by the coercive partner and understood as such by the target and the price of noncompliance with those expectations is a contingent punishment or opportunity cost." *Id.* at 750.

threat may be express, implied, or understood.[52] The threat becomes credible when the abuser has "set the stage" by inflicting the consequences in the past, creating an expectation of negative consequences, exploiting the victim's vulnerabilities, wearing down her resistance and cultivating dependency on the abuser.[53] Dutton and Goodman provide plausible examples of contextual vulnerabilities which a perpetrator may exploit to coerce responses or secure control over their intimate victims:

> Illegal immigration status or legal problems increase vulnerabilities to threats involving exposure to police or other authorities. Language barriers increase vulnerability to threats that involve increased social isolation. History of childhood abuse or other dysfunctional family history can increase vulnerability to threats involving relationship termination or psychological manipulation . . . . In one case, a woman with breast cancer was exploited when her abusive partner insisted that she remain in the relationship, stating that no one would want a woman with those defects.[54]

### *B. Social Science Evidence*

Empirical social science studies consistently bear out these theories and demonstrate that abuse of power in intimate relationships begets violence. In studies examining the efficacy of civil protection orders, the dynamics of power, control and coercion determine outcomes more than any simple cause-and-effect calculus between legal remedy and compliance.

#### *1. Grau and Fagan*

In 1984, Janice Grau, Jeffrey Fagan, and Sandra Wexler conducted one of the first empirical studies of civil protection orders.[55] They interviewed 270 clients of federally funded Family Violence Demonstration programs in four states and examined three issues: who is more likely to seek a civil protection order, whether the civil protection order is effective to prevent future violence, and what other conditions influence their effectiveness.[56]

Although the researchers ultimately concluded that civil protection orders did not reduce overall violence significantly, the women who received orders believed they were effective. Civil protection orders actually were effective in reducing

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[52] *See id.*

[53] *See id* at 748.

[54] *Id.* (citations omitted).

[55] Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy, in* CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 13, 13–28 (Claudine SchWeber & Clarice Feinman eds., 1985).

[56] *See id.* at 19–21.

verbal abuse, harassment and physical violence, but only when prior physical injuries were not severe. Civil protection orders did not have a significant effect on future violence by spouses with longer and more severe histories of violence against their wives and third-parties.[57] They also found several common attributes among the women who sought a civil protection order:

> They are younger, employed women in shorter, less violent marriages, who have a history of prior separations. The presence of children in the home is also associated with receipt of a restraining order . . . . [T]he profile above suggests that restraining orders are more useful to those victims who can become fiscally independent through employment, and are less often sought by older women in more violent marriages with longer abuse histories. In other words, restraining orders are more commonly received in cases where the victim has fewer emotional and financial ties to the batterer, or where the prior violence is less severe. Recipients also tend to have previously attempted to escape violence through separation. Victims who have longer histories of violence, and are tied financially to the assailant, may be less inclined to seek help through a restraining order.[58]

In those early years when civil protection regimes were primitive and not widespread, Grau and Fagan ultimately found that civil protection orders were not significantly effective at preventing future violence. They made suggestions that largely have been adopted, and civil protection orders now are available in every jurisdiction. They proposed procedural reforms to ease access, speed relief, strengthen enforcement, and most of their suggestions appear in contemporary statutes, as described above in the Common Features section.[59]

They called for another substantive reform that has not gained sufficient ground, and which this article addresses:

> The definition of abuse must be clear. It should include all conduct which is deemed criminal, including crimes against persons, property and the public. *It should include psychological abuse, not only because restraining orders appear effective in preventing psychological abuse but also because of the interrelationship between psychological and physical abuse*.[60]

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[57] *See id.* at 19–20.

[58] *Id.* at 21–22. The authors used "restraining order" to identify civil protection orders. S*ee id.* at 15.

[59] *See id.* at 24–26; *supra* notes 21–27 and accompanying text.

[60] *Id.* at 25–26 (emphasis added).

*2. Chaudhuri and Daly*

In 1992, building on Grau and Fagan, Molly Chaudhuri and Kathleen Daly published their study of thirty women who sought civil protection orders in 1986.[61] They inquired whether batterers heeded the civil protection orders and whether police responses improved for women holding civil protection orders, and they studied women's evaluations of the legal process and actors.[62]

Chaudhuri and Daly made an observation similar to Grau and Fagan's, comparing the victims who obtained civil protection orders to the broader population of battered women:

> [T]hey are younger, have completed more years of education, have paid jobs and earn more, and are in relationships of shorter duration with a history of separations. With a measure of financial and emotional independence from abusive partners, women who obtain [temporary restraining orders] may be one step ahead of other abused women.[63]

They concluded that civil protection orders generally did increase police responsiveness, but did not increase the likelihood of arrest for the abusers.[64] Civil protection orders reduced the chance of physical violence unless the abuser had a prior criminal history, was unemployed or employed only part-time, or abused drugs or alcohol.[65]

Most important, Chaudhuri and Daly found that obtaining civil protection orders generally did empower women to end an abusive relationship, depending on the degree to which the women relied emotionally or economically on their abusers.[66] "For some women, taking the steps to obtain a TRO already reflects their commitment to leave an abusive relationship, whereas other women are hopeful that the TRO might change the man's behavior."[67] They conclude by noting that the very process of obtaining a civil protection order may be a greater benefit to abuse victims than directly deterring their abusers:

> [T]he process is (or can be) the empowerment. This occurs when attorneys listen to battered women, giving them time and attention, and when judges understand their situations, giving them support and courage. As important, though unfortunately less frequent, women's empowerment can occur when men admit to what they

[61] Chaudhuri & Daly *supra* note 5, at 227–52.
[62] *Id.* at 228–29.
[63] *Id.* at 233.
[64] *See id.* at 245.
[65] *See id.*
[66] *See id.*
[67] *Id.*

> have done in a public forum. Such conversations and admissions can transform the violence from a private familial matter, for which many women blame themselves, to a public setting where some men are made accountable for their acts . . . .
>
> If the process of obtaining a [civil protection order] is partially its own reward, law students, attorneys, and judges must be sensitive to the particular dynamics involved in battering relations and render legal advice and decisions accordingly. Attorneys cannot be expected to be friends or emotional buffers for all their physically abused clients, but many women wanted such support from their advocates. What a judge and counsel say in court and in chambers has important consequences for how a woman can redefine herself and change her situation and for how a violent man can be brought to change his behavior.[68]

*3. McFarlane et al.,*

In 2000, a group of researchers agreed with Chaudhuri and Daly and demonstrated that the civil protection process may be as important as the order itself.[69] In a notable study of 150 Black, Hispanic, and White women in Houston, Texas, the researchers strove to create a deeper, more thorough study than the relatively small studies that preceded it in early days of civil protection orders.[70] The researchers evaluated whether the women experienced less violence by their intimate partners at specific intervals after petitioning for the orders.

All of the women in the sample had applied for civil protection orders, and the researchers divided them into those who received orders and those who did not, either because the woman dropped the petition, the court could not locate and serve the defendant, or the court dismissed the petition.[71] Of the eighty-one women who received a civil protection order, thirty-six reported a violation during the eighteen months of the study, and most violations involved a breach of order to remain a distance from a workplace, stalking, threats of violence, or a combination of these factors.[72]

This study ultimately concluded that the petitioning process, not the actual receipt of an order, is the significant determinant affecting future abuse:

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[68] *Id.* at 246.

[69] Judith McFarlane et al., *supra* note 5, at 613.

[70] *See id.* at 613–14. From 2,932 women who applied for civil a protection order in the year preceding the study, 68% met qualifying criteria, and 49% received protection orders. *Id.* at 613. One-hundred and fifty women agreed to participate in the study and agreed to several follow-up interviews for eighteen months after their orders were granted. *See id.* at 614. One woman committed suicide shortly after the study commenced, so the response rate was 99% with 149 women completing the study. *Id.*

[71] *See id.* at 615. Eighty-one petitioners received civil protection orders, forty women dropped their petitions, and eighteen could not serve notice of process on their defendants, and courts dismissed eleven petitions. *Id*.

[72] *See id.* at 616.

> The 149 women who took part in this study reported significantly lower levels of intimate partner violence, including worksite harassment, up to 18 months after applying for a protection order. Whether women were granted or not granted the protection order made no significant difference in terms of the amount of violence they reported at the time of application for the order or during the subsequent 3, 6, 12 or 18 months . . . .
> Our results agree with those of others reporting significantly lower levels of violence experienced by women seeking assistance from the justice system, irrespective of the justice system outcome.[73]

They cite another qualitative study observing why women choose to seek civil protection orders, which "revealed a desire among women to regain some measure of control in their lives by making the abuse public."[74]

> They viewed the legal system as a force larger than themselves and as having power over the abuser that they themselves had lost as a result of the abuse. Moreover, they felt a need to have the legal system both approve and reinforce their decision to leave the abuser. The protection order becomes an announcement that the abused woman refused to "take it" anymore and is acting on her own behalf. Our results appear to quantify these qualitative findings. *Once a woman applied and qualified for a protection order, a rapid and significant decline in violence scores occurred and was sustained for 18 months.*[75]

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[73] *Id.*

[74] *Id.* at 617 (citing Karla Fisher & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414–29 (1995)). Professor Jane C. Murphy makes the following observations about victims' goals for civil protection orders, goals which may confound attorneys interested in ultimate legal outcomes:

> [F]or many women, not following through with the proceeding to get the final order was, to some extent, a choice. Getting the *ex parte* order alone helped them achieve some of their goals—getting the abuser to stay away, stopping the violence, or making a reconciliation possible. This data underscores an important message for advocates and state funders. When women file for a [civil protection order], they are pursuing this legal remedy as one strategy among many others—both legal and non-legal, public and private, formal and informal—to achieve their goals. They do not frame their goals in terms of the legal remedies available—for instance "to get a protective order." Rather, their goals depend upon their particular context and stage in their relationship: "to stop the violence, to get him counseling, to keep him away from the kids." If the legal remedy, whether it is an *ex parte* or a civil protection order, gets them closer to that goal, it is viewed as helpful.

*Id.*, (citing MARY ANN DUTTON ET AL., ECOLOGICAL MODEL OF BATTERED WOMEN'S EXPERIENCE OVER TIME (2005).

[75] McFarlane et al., *supra* note 5, at 617 (emphasis added).

Thus, the significant, defining factor predicting future violence was not the presence of an enforceable civil protection order, but it was the victim's decision to petition for it in the first place. The court and legal remedy have less effect on the relationship than the victim demanding back power and autonomy.

*4. Other Studies*

Empirical studies on the efficacy of civil protection orders have not rendered wholly consistent results, although later, bigger, more sophisticated studies do demonstrate some statistically significant effect on recurring violence between the intimate partners. According to one review, by 2000, nine studies analyzed civil protection orders, including Grau and Fagan, and Chaudhuri and Daly.[76] These rendered mixed results, although, as discussed above, civil protection orders were unrefined and not universally available when the studies commenced.

In addition to McFarlane et al., at least three other studies since have found that civil protection orders have a significant, positive effect on recurring physical violence. In 1999, to examine risk factors for re-abuse, researchers examined court records and police filings in Texas for 210 couples who had received civil protection orders.[77] These researchers found that prior to filing their petitions, 68% of the women reported physical violence, but only 23% reported violence after filing, determining that the number of women reporting physical violence declined by 66% after filing.[78] The study also revealed that women of very low socioeconomic status and women with children in the home are more likely to report re-abuse after obtaining a civil protection order.[79] The authors proposed possible explanations for the significance of these risk factors:

> Previous research from the social control/deterrence perspective has found that when men are arrested for abuse, the power structure of the home changes such that women report gaining power, and men report losing power. This increase in a woman's relative power is, in part, the result of her ability to make the private event public by involving law officers and thereby increasing her partner's fear of negative consequences . . . .[80]

[76] Thomas F. Capshew & C. Aaron McNeese, *Empirical Studies of Civil Protection Orders in Intimate Violence: A Review of the Literature*, 6 CRISIS INTERVENTION 151–67 (2000). These studies concerned access to civil protection orders, the process to obtain them, the risk of re-abuse after civil protection orders and victims' experiences and perceptions in the process.

[77] Carlson et al., *supra* note 5, at 205.

[78] *Id.* at 214–15.

[79] *Id.* at 220.

[80] Donald Dutton et al., *Arrest and the Reduction of Repeat Wife Assault*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, *supra* note 5, at 111, 111–128 (citing Carlson et al., *supra* note 5 at 205).

In 2003, a University of Washington study tracked 448 adult victims of domestic abuse for a year in Seattle.[81] The researchers reported that women who obtained and maintained a civil protection order were significantly less likely than victims without an order to be contacted, threatened, or abused by the perpetrator.[82]

Also in 2003, a researcher at Michigan State University published a study to determine whether the type or severity of violence affected the success of civil protection orders.[83] Burgess-Proctor drew a distinction between "patriarchal terrorism" and "common couple violence." According to the author, "patriarchal terrorism" involves more severe mental and physical abuse used primarily to control, and was identified in the study if at least one of three factors were present in the relationship: if the abuser ever had beaten or choked his partner, if the abuser ever had forced his partner into sexual activity, or if the abuser ever had used or threatened to use weapons against the victim.[84] "Common couple violence" refers to milder abuse, perpetrated by both partners in a relationship.[85] Burgess-Proctor hypothesized that civil protection orders would be less effective in cases of "patriarchal terrorism" than for "common couple violence."[86] The study, however, suggested that the severity or type of violence had no statistically significant effect on civil protection orders in preventing future violence.[87] Even if the type or severity of violence is not significant, the power and control dynamic is ubiquitous; the study found that race, employment status, and living arrangements did affect future violence significantly.[88]

> For example, this analysis indicates that employed women are less likely than their unemployed counterparts to experience a violation of their protection orders. Indeed, lower levels of reported violations among employed women seems logical given that this group likely has greater resources at their disposal (e.g. available cash, transportation, etc.) that allow them to remain apart from their partners without suffering undue financial hardship.[89]

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[81] Victoria L. Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTIVE MED. 16 (2003).

[82] *See id.* at 18. The authors suggest that civil protection orders may be more effective than Grau and Fagan had found twenty years earlier because "sanctions for [civil protection order] violations have generally shifted from civil to criminal, and police response has improved following the institution of mandatory arrest laws; thus the possibility for violence prevention related to [civil protection orders] may have increased." The authors also note methodological differences between the studies, including Grau and Fagan's failure to accommodate for various confounding factors.

[83] Amanda Burgess-Proctor, *Evaluating the Efficacy of Protection Orders for Victims of Domestic Violence*, 15 WOMEN & CRIM. JUST., Dec. 2003, at 33.

[84] *See id.* at 40–41 (citations omitted).

[85] *Id.* at 33; *see also id.* at 40–41.

[86] *Id.* at 40.

[87] *Id.* at 45.

[88] *See id.* at 48.

[89] *Id.* at 49.

*5. Consistent Conclusions*

These studies tend to show that civil protection orders are generally effective in preventing or reducing future physical violence. This positive effect, however, probably is not the result of a defendant complying with a legal injunction. Instead, civil protection regimes generate relief to violence victims by affording them a lever to demand or regain power, or to be liberated from coercive oppression, by communicating defiance, by seizing a power greater than the abuser's in the law, and by exposing her oppression publicly.

Fundamentally, the successful civil protection order is merely a manifestation of the victim's resolve to seize autonomy and rebalance power in the relationship. She gains relief from abuse because she decides to seek a protection order, not because she receives one.

Evidence suggests that many, if not most women who petition for civil protection orders do not consider the legal remedy a primary goal. In 1995, a qualitative survey of women who filed for protection orders further illustrated the actual use of civil protection orders to abuse victims.[90] "A common theme among several women who participated in the interviews was that the CPO process was a means for creating a public record of the abuse they had experienced. It was a way for them to break their silence and send a message to the batterer that his behavior would not be tolerated. Several women also indicated that filing a protection order allowed them to take some initial steps toward regaining control of their lives."[91]

In 2002, Mary Ann Dutton conducted interviews of women who received *ex parte* orders but did not return for final orders.[92] These women did not frame their goals as success or failure in court, but their goals varied with their relationship dynamics. These women reported that they did not return for a final order because they felt supported by their advocates and the law, achieved a "wake-up call" for their partner, sent a "message," and motivated him to change or raised the stakes of continued abuse.[93]

## IV. PROPOSAL: CIVIL PROTECTION ORDERS SHOULD PROVIDE RELIEF FROM COERCIVE CONTROL

### *A. Calls for Reform*

After describing these petitioners' diverse and compelling goals, Murphy called for increased access to civil protection to accommodate their relationships: "The civil protection order has an important place in the broad range of strategies women use in response to abuse from their intimate partners. Therefore, we need

[90] Waul, *supra* note 18, at 56 (citing Fisher & Rose, *supra* note 74, at 414–29).
[91] *Id.*
[92] Murphy, *supra* note 11, at 508 (citing MARY ANN DUTTON ET AL., *supra* note 74).
[93] *See* Murphy, *supra* note 11, at 513.

to remove the barriers that prevent women who desire the full protection of this remedy from getting these orders."[94]

As Kuennen explored the effect of coercion on domestic abuse victims, she called for "the development of more discriminating legal approaches, to be applied in broader contexts that would reject the reflexive practices of many judges who do not take into account the complexities of analyzing coercion."[95] "Without attention to the batterer's use of coercion—pressure, influence, or threat of force to the degree that these tactics interfere with a victim's volition—courts hear only parts of the victims' stories."[96]

Dutton and Goodman extend this call within their "tighter conceptualization" of coercion:

> Finally, and perhaps most urgently, the role of coercive control in [intimate partner violence] needs to be more thoroughly understood in the legal context. In that context, domestic violence is usually understood as a one-size-fits-all category, based on acts of assault alone without regard to the coercive context in which they occur . . . . Much work needs to be done to bring the notion of coercion in IPV into the legal arena. Without attention to this critical element of IPV, legal actors hear only parts of the stories the victims bring them every day in court. A more discriminating understanding of the nature of specific IPV crimes, including the element of coercion, would help secure more appropriate sentencing, as well as treatment for perpetrators, and more effective safety planning for victims.[97]

### *B. Enjoining Coercion*

Civil protection orders could prevent domestic abuse more effectively by providing relief from coercion as well as physical violence. By including coercion or coercive control within the scope of defined "abuse," civil protection regimes could afford relief that better matches the reality of domestic abuse. By providing a cause of action for abuse victims who have not yet, or not recently, been victims of physical violence, these victims might break the cycle of escalating violence and seek liberation before a coercive, abusive relationship becomes inevitably violent.

Every state requires evidence of physical violence or potential violence. This focus on violence is understandable because oppressive coercion or other non-violent abuse is difficult to quantify and prove. Violence is tangible and is already criminalized, with evidence and elements familiar to courts, lawyers, and police. In order to intercept and prevent abusive coercion, however, these regimes must shed the fixation of physical violence. When civil protection statutes define abuse, in

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[94] *Id.* at 514.
[95] Kuennen, *supra* note 2, at 30.
[96] *Id.* at 2.
[97] Dutton & Goodman, *supra* note 3, at 744.

addition to customary definitions of violence or references to criminal codes, the statute should include definitions to encompass non-violent, abusive coercion.

To codify coercive control, drafters must grapple with highly contextualized, subjective, discrete relationships. While seeking to extend civil protection relief to victims who suffer coercive abuse but not violence, drafters must guard against expanding the definition so far as to interfere with ordinary conflicts in non-abusive relationships. Quantified elements of coercive control might be so broad as to be indistinguishable from common arguments between aggrieved spouses, and they might dilute the promise of civil protection orders for those in legitimate need of relief.

Considering those risks, civil protections statutes could and should extend relief from coercive abuse. Such a definition might incorporate these elements:

> (1) ABUSE. The occurrence of one or more of the following acts, attempts, or threats between family or household members, as defined by this chapter:
>
> (a) Coercion:
>
> (i) willful or knowing acts, courses of action, or demands and credible threats to compel an intimate, domestic partner, relative, or household member to engage in conduct from which the person has a right to abstain, or to abstain from conduct in which the person has a right to engage;
>
> (ii) with intent to coerce or maintain coercive power and control over the life, decisions, relationships or activities of an intimate, domestic partner, relative or household member;
>
> (iii) which reasonably would cause a person in the petitioner's position to engage in conduct from which that person otherwise would abstain, or to abstain from conduct in which that person otherwise would engage.

Courts would examine proof of these elements against the preponderance of evidence standard. Petitioning victims would present proof that their abuser acted to deprive the victim of autonomy and independence against her will using coercive tactics to establish and maintain power and control.

For example, coercion codified with these elements in a civil protection statute would provide relief for victims in those relationships illustrated by Dutton and Goodman:

> The birth of a child can be exploited if, for example, an abusive partner threatens to remove the child's coverage on his medical insurance if his partner does not comply with his desire for sex immediately following the birth of the child . . . . Numerous clinical examples have shown that creating financial indebtedness by insisting that all expenses be charged on a credit card in the partner's name is not uncommon. Forcing one's partner to quit a

> job, become involved in illegal activities (e.g. fraud, elicit drugs) or engage in shameful experiences (e.g., sex with strangers, children or animals) also can create vulnerabilities such as physical or mental health effects of traumatic violence exposure, fear of future revictimization, or economic loss.[98]

Within each of these scenarios, the abuser exerts coercive control over his victims, not by threatening or perpetrating violence, but by threatening untenable, albeit often lawful, consequences on the victim for failure to acquiesce. Under existing regimes, she would not have a cause of action for protection, but adding elements of coercion to abuse definitions would afford relief before she suffered the threatened consequence or violence for refusing to be subjugated.

"Given the insidious use of pressure by a batterer to control a victim, and the goal of drafters of [civil protection orders] to prevent abuse in all its forms, defining which pressures are extraordinary is a daunting task."[99] No relationship is completely free of persuasion or influence, and civil protection orders should not substitute for marriage therapy. The great challenge is to define what actions and threats violate voluntary, ordinary compromises and bargaining in relationships, to create oppressive, abusive coercion.[100]

The elements above may capture the notions of coercion, but the greatest challenges are in proof and remedy. Courts must inquire into the relationship to identify the vulnerabilities, control structures, and threatened consequences to find coercive control. If a court finds that an abuser has deployed a demand that the petitioner reasonably would resist if not for his credible threat to exploit her personal vulnerabilities, then the court would shape a remedy to fit the petitioner's position.

Kuennen observes the importance of context and subjectivity in identifying abusive coercion: "Individuals enter abusive relationships with different levels and types of vulnerabilities. The vulnerability may not necessarily be a weakness, but merely something the batterer may exploit or take away."[101] Thus, remedies for coercion would be as individualized and situational as the relationships they address. Probably remedies will address primarily the credible threat expressed by the perpetrator, not the demand. For instance, in the case above where "an abusive partner threatens to remove the child's coverage on his medical insurance if his partner does not comply with his desire for sex immediately following the birth of the child," the judicial remedy would enjoin the abusive partner from canceling the child's medical coverage without showing some legitimate economic reason as good cause.

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[98] Dutton and Goodman, *supra* note 3, at 748.

[99] Kuennen, *supra* note 2, at 8, 11, 16, 30. Kuennen provides a thorough examination of the contextual subjective and bias problems of drafting statutes that could encompass abusive coercion without violence. She calls for more "discriminating legal approaches" but does not proposing elements and language for such a statute.

[100] *See id.*; *see generally* Dutton & Goodman, *supra* note 3 at 743–44.

[101] Kuennen, *supra* note 2, at 17–18.

### *C. Promising State Provisions*

Although no civil protection statutes encompass coercion or coercive control as articulated by the social scientists and as proposed here, a few states have made efforts to relieve abuse that is not strictly physically violent. These states' civil protection regimes accommodate limited incidents of emotional and psychological coercion.

Michigan's civil protection regime includes a promising catch-all provision within its list of acts to be enjoined, its effective definition of abuse: "Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence."[102] Although this provision might include coercive demands and threats, probably the "interference with personal liberty" refers to immediate restraint of physical movement or communication, not life decisions. It is broad, however, and follows other non-violent elements, such as "interfering" with the petitioner at her work or school and "engaging in conduct that impairs petitioner's employment or educational relationship or environment."[103] This statute does not specifically conform to the observed dynamics of coercive control, but a creative advocate and an insightful judge might find that it covers the elements proposed above to capture coercive control.[104]

Likewise, Illinois's statute could extend far enough to provide relief for oppressive coercion. Although its Domestic Violence Act defines abuse with requisite elements of physical violence and harm, it also provides for "intimidation of a dependent" and "interference with personal liberty."[105] Its remedies provisions contemplate relief for non-violent exploitation, and its Purpose section may accommodate the theory of coercive control:

> [To] support the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser's access to the victim and address any related issues of child custody and economic support, so that victims are not

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[102] *See* MICH. COMP. LAWS § 600.2950 (1)(j) (2004).

[103] *See* MICH. COMP. LAWS § 600.2950 (1)(g) (2004).

[104] No Michigan state appellate court has construed the statute specifically to include non-physical coercive control. A judge conceivably could reach this conclusion within her very broad discretion to craft custom relief, as described in Perrett v. Rhode, No. 267649, 2007 WL 914341, at *1 (Mich. Ct. App. Mar. 27, 2007):

> The granting of injunctive relief, and specifically the issuance of a PPO, lies 'within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.' The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court's judgment.

*Id.* (avoiding Pickering v. Pickering, 659 N.W.2d 649, 652 (Mich. Ct. App. 2002)).

[105] *See* 750 ILL. COMP. STAT. 60/103(1) (2008).

> trapped in abusive situations by fear of retaliation, loss of child, financial dependence, or loss of accessible housing or services.[106]

Hawaii contemplates relief for "extreme psychological abuse," defined as "intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such a course of conduct would cause a reasonable person to suffer extreme emotional distress."[107] This form of emotional abuse might provide relief for abusive coercion, but the infliction of "extreme emotional distress" is a measure of injury, not an articulation of the power and control at the root of domestic abuse.

Maine's statute includes this clause in its definition of abuse: "Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage."[108] Force is a principle in the definition of abuse, but compelling by intimidation may reach certain coercive tactics. The Maine statute does not define "intimidation." Probably, in keeping with its expressed purpose, this statute contemplates more immediate harassment and acute threats, not contextual coercion driven by discrete vulnerabilities. The purpose section of the Maine statute includes the same language as the Illinois statute set out above.[109]

While Oregon's definitions of abuse all require findings of physical violence, its remedies options reflect the situational, contextual nuance demanded by coercive relationships.[110] In its list of available civil protection remedies, Oregon's statute sets forth these flexible definitions:

> (4) "Interfere" means to interpose in a manner that would reasonably be expected to hinder or impede a person in the petitioner's situation.
> (5) "Intimidate" means to act in a manner that would reasonably be expected to threaten a person in the petitioner's situation, thereby compelling or deterring conduct on the part of the person.
> (6) "Menace" means to act in a manner that would reasonably be expected to threaten a person in the petitioner's situation.
> (7) "Molest" means to act, with hostile intent or injurious effect, in a manner that would reasonably be expected to annoy, disturb or persecute a person in the petitioner's position.[111]

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[106] 750 ILL. COMP. STAT. 60/102(4) (2008).
[107] HAW. REV. STAT. § 586-1 (2005).
[108] ME. REV. STAT. ANN. tit. 19-A, § 4002(C) (1998 & Supp. 2008).
[109] ME. REV. STAT. ANN. tit.19-A, § 4001(3) (1998 & Supp. 2008).
[110] *See* OR. REV. STAT. § 107.705 (2007).
[111] OR. REV. STAT. § 107.705(4)-(7) (2007).

Oregon courts must inquire into "the petitioner's position" and shape remedies which conform to her circumstances and relationships. This is a useful instruction to courts that they should consider individual vulnerabilities.

### *D. Other Consistent Reform Proposals*

Other scholars have recognized the need to reform legal remedies to accommodate coercive tactics. The three writers examined here each seek to answer the theoretical calls for reform with specific policy proposals. Their proposals are consistent with the proposed reform expressed here. Although these writers do not address civil protection orders directly, they do observe the dynamics of power, control, and autonomy endemic to abusive relationships. They are interesting and hopeful but likely would not create practical, accessible legal tools for victims subjected to oppressive coercion without predicate violence.

In 1995, Merle H. Weiner argued "for a *per se* standard of outrage whereby the defendant's conduct would be outrageous as a matter of law if he violated an injunction issued for a woman's protection . . . . Upon proving that the defendant had in fact willfully violated a civil protection order, the plaintiff would establish conclusively the most important element of the tort."[112] By expanding the tort of outrage, the author hopes "to provide a useful remedy to women who find the existing remedies (including the tort) inadequate. In general, the proposal may help the victims shut out of the criminal justice system, either because the abuser's conduct is not criminal, or because the criminal process is ineffective for domestic violence victims."[113]

This proposal is promising because it would expand remedies available to an abuse victim, freeing her from dependence on police and criminal courts, one of the purposes at the very heart of civil protection regimes. Weiner's proposal recognizes that abuse and violations of a civil protection order are not necessarily violent or criminal acts within themselves, although violation of an order almost always is a misdemeanor, regardless of the form of the violation. This proposal would strengthen a petitioner's options and would raise the stakes on a perpetrator by invoking tort liability and punitive damages. This proposal to expand the scope of the tort might promote obedience to a civil protection order for those defendants who were not judgment-proof. To avail herself of this cause of action, however, the petitioner still must have obtained a civil protection order and thus have suffered criminal violence already.

In 1998, Christine O'Connor sought to derive a constitutional "right to autonomy" for domestic abuse victims from the penumbras that yield the constitutional right to privacy:

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[112] Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 189 (1995).

[113] *Id.* at 189–90.

> At the core of individual autonomy is the fundamental right to make decisions important to one's destiny. The Supreme Court has found decisions as whom to marry, whether to conceive a child, whether to terminate a pregnancy and whether to refuse life-sustaining medical treatment to be constitutionally protected liberty interests. Deliberative autonomy, as established by the Court's substantive due process decisions, safeguards the privacy of individuals when deciding matters central to family structure. The victim of domestic violence must confront issues and make decisions pivotal to the survival of her family; these decisions fall within the scope of guarantees provided by the Court's substantive due process decisions.[114]

O'Connor applies this theory to no-contact protection orders issued in criminal prosecutions. Essentially she advocates for a victim's right to a voice in sentencing and prosecution. She argues that prosecutors and judges must listen to a victim and consider the many, contextual and personal factors that shape her desired outcome:

> The issuance of a criminal no-contact order, in essence, separates a family, forcing one member out of the home. The emotional and financial hardships inherent in such an action should not be ignored. In addition to these concerns, the history of violence, or lack thereof, within the relationship needs to be considered. In failing to allow for victim input in the process of defining the conditions of a pretrial release, courts ignore the victim's right to determine the structure of her family.[115]

In 2005, Joy M. Bingham called for inclusion of emotional abuse as grounds for a civil protection order.[116] She argues that civil protection regimes should include "emotional abuse" within the scope of abuse that gives rise to a cause of action. She does not provide an actual definition of emotional abuse but thoroughly discusses the problems and subjectivity inherent in the phenomenon.[117] Bingham does not equate emotional abuse to coercive control, but she quotes an expert in a Louisiana domestic case who defined "mental abuse" as "a form of domestic violence in that it is a method of controlling the actions and thoughts of one person

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[114] Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 950 (1999).

[115] *Id.* at 967.

[116] Joy M. Bingham, Note, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837, 841 (2005).

[117] *Id.* at 842–43.

for the purpose of controlling the relationship."[118] This is coercive control, and civil protection orders could and should extend relief to its victims.

## V. CONCLUSION

Civil protection orders are useful, effective tools to prevent future domestic abuse and to extricate victims from dangerous relationships. A fixation on physical violence hampers current systems, requiring incidents of physical violence or imminent threats of violence before affording victims relief and protection. Victims of domestic abuse must await violence before availing themselves of the law.

Domestic abuse does not arise from physical violence. Rather, physical violence is a manifestation of oppressive power and control dynamics within the abusive relationship. Very often, physical violence is simply another tool by which an abuser seeks to dominate and oppress his victim. Before an abusive relationship escalates into violence, the abuser typically has deployed coercive tactics to deny his victim autonomy, independence, and capital in the relationship. An abuser may seek to control his partner through emotional, psychological, social, financial, cultural, and personal means that are not physically violent and that are not illegal.

Civil protection statutes would afford more effective protection by creating causes of action and relief for abusive, oppressive coercion. By providing a tool for victims to resist coercion and to strengthen their power in an abusive relationship, civil protection statutes could prevent violence before it occurs and could support a person who would be free of her oppressor and who would insist on the liberty inherent to her humanity.

[118] *Id.* at 842 (citing Dean v. Dean, 579 So. 2d 1124, 1127 (La. Ct. App. 1991)).

# INTIMATE PARTNER ABUSE SCREENING IN CUSTODY MEDIATION: THE IMPORTANCE OF ASSESSING COERCIVE CONTROL

Connie J. A. Beck and Chitra Raghavan

The central point of this paper argues that measuring physical violence alone is insufficient to detect relational distress in child custody/parenting time mediation samples. We present empirical findings from a large study attending custody/ parenting time mediation. Results suggest that the most economical and efficient screening tool should include measures of coercive controlling behavior. Our data suggests that coercive control is able to account for other victim distress variables crucial to mediation, including victim fear, victim safety and ultimately the fairness of the mediation process. We recommend that researchers continue to refine measures of coercive control to be used in custody/parenting time mediation settings.

Within the custody/parenting time mediation context, the number of cases reported as having some type of Intimate Partner Violence (IPV) ranges from 40–80 percent (Kelly & Johnson, 2008; Newmark, Harrell & Salem, 1995; Pearson, 1997). This range is significantly higher than that found in the general population, which ranges from 5–25% (Shafer, Caetano & Clark, 1998). In addition, violence researchers and scholars have identified that IPV[1] is not a unitary phenomenon (Holtzworth-Munroe & Meehan, 2004; Johnson, 2006; Stark, 2007) and that there are different types of IPV with different etiologies and outcomes. While a complete discussion of the topic is beyond the scope of this paper, a related issue is how IPV is typically measured. Some researchers have suggested that counting specific violent acts (e.g., hitting, breaking bones) and then classifying severity of IPV based on the severity of the specific physical acts committed does not provide a complete understanding of IPV within relationships (Dutton & Goodman, 2005; Johnson, 2006; Stark, 2007). Further, indexing IPV by physical acts fails to distinguish among the different types of IPV. These researchers take a broader few of IPV and suggest that measuring elements of the relationship context in which the violent acts occur provides a better understanding of the underlying meaning of the IPV behaviors within the relationship, and accordingly, allows us to correctly identify the type of IPV. For the purposes of this paper, we use the term Intimate Partner Violence/Abuse (IPV/A) because it is clear that it includes physical abuse (e.g., pushing, shoving, hitting, punching, kicking, biting, scratching twisting skin), physical violence (i.e., physically forced sex, broken bones, choking, strangling, suffocating) and important non-physical types of abuse identified as important within the violence literature (psychological abuse; threats to life) and in particular the concept of coercive control. When referring specifically to physically violent behaviors noted above we will use the term physical violence.

Mediation scholars have considered differentiating the types or patterns (Johnston, Roseby & Kuehnle, 2009; Kelly & Johnson, 2008) of IPV/A what this might mean in the mediation context; and, they are beginning to measure the types of IPV/A more systematically (Ellis & Stuckless, 2006a; Ellis & Stuckless, 2006b;). In recent research, two scholars have provided the rationale for a more detailed assessment of the types of IPV/A found in the mediation context so that we can better understand which victims may not be best served by or benefit from mediation (Kelly & Johnson, 2008). One of Kelly and Johnson's suggestions in their research involved encouraging mediation researchers to measure and then consider the role of a particular type of IPV/A, coercive control, in the mediation context. The central point of this paper is then to do just that–to present empirical findings concerning a measure of coercive control using a large mediation sample.

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## COERCIVE CONTROL: WHAT IS IT AND WHY SHOULD WE MEASURE IT?

From the violence literature, critical elements of the controlling behaviors include an ongoing strategy of isolation of the victims from friends, family, and children; control of access to resources such as transportation, money, and food; and control of access to employment and education (Stark, 2007). In addition to these primary controlling behaviors, perpetrators gauge compliance by monitoring the victim's activities and through the occasional use of physical and sexual violence, threats of physical and sexual violence, or threats to the victim's life or victim's family (Dutton & Goodman, 2005). In this context, violence and threats of violence are then seen as tools to ensure the success of controlling behaviors, rather than viewed as constituting the key elements of IPV/A (Dutton & Goodman, 2005; Kelly & Johnson, 2008; Johnson, 2006; Stark, 2007). This type of IPV/A constitutes the denial of liberty, autonomy, and equality by micro-regulation of the victims' everyday lives and has been defined as "coercive control" (Stark, 2007). Thus, when coercive control is successful, the physical violence necessary to maintain control may be sporadic and in less severe forms. Indeed, in a prior study coercive control was found to be an important motivator for other forms of IPV/A (Tanha, Beck, Figueredo & Raghavan, 2010).

An increasing body of research suggests that coercive control may be a more accurate measure of conflict, distress, and danger to victims than is the presence of physical abuse. Because custody/parenting time mediation is conducted with clients who are in conflict and have high rates of IPV/A, there are several reasons why measuring coercive control, in addition to other types of physical, sexual and psychological abuse in the mediation context is important, namely fear of arrest, concerns of safety for victims and basic fairness of the mediation process.

*Fear of Arrests.* Because of mandatory arrest policies in many jurisdictions, both men and women are much less likely to admit to physical abuse or physical violence for fear of the spouse being arrested, fear of being arrested along with their spouse (dual arrest), fear of making the spouse angrier, and/or fear of losing critical financial support (Hovmand, Ford, Flom, & Kyriakakis, 2009; Rajah, Frye & Haviland, 2006; Smith, 2000). While victims desperately want abuse to stop, these victims do not necessarily want the spouse to be incarcerated or to be incarcerated along with the spouse (Kuennen, 2007; Smith, 2000).

*Safety for Victims.* Not only are women are at much higher risk for being assaulted after separating from a spouse (Ellis & Stuckless, 2006b; Mahoney, 1991), research also suggests that women may be at a significantly higher risk of being killed (Campbell, 1992; Campbell et al., 2003 Wilson & Daly, 1994). Women's risk of homicide (femicide) increased for women who separated from their abusers after living together, particularly when the abuser was highly controlling (Campbell et al., 2003). In addition, a significant proportion (30 percent) of these femicide victims were *not* physically assaulted prior to the fatal or near fatal incident (Campbell et al., 2003). As such, absence of reports of physical abuse does not necessarily signal that a woman is safe, but a measure of control may be able to assess risk, particularly during this period of separation.

In addition, while mediators use the presence of physical abuse to screen out of mediation couples who have IPV/A in their relationship (Beck, Walsh, Mechanic & Taylor, 2009), a small body of research suggests that some women may experience other forms of violence including physically forced sex (Bergen, 2004; Marshall & Holtzworth-Munroe, 2003; Mahoney, 1999) and threats to life, but may not be victims of physical abuse per se.

*Basic Fairness of Mediation Process.* As noted above, several scholars argue that coercive control is important and more central to understanding the dynamics of relationships that may likely require intervention at many levels (e.g., law enforcement, child protection, medical, and judicial) (Graham-Kevan & Archer, 2003) than is physical violence (Dutton & Goodman, 2005; Kelly & Johnson, in 2008; Stark, 2007). Ironically, it is in the mediation context that coercive control may be the *most* detrimental to victims. Central elements of a fair mediation process include non-coercive

negotiations in front of a neutral third party to consensually develop agreements reflecting the needs of all family members (Beck & Sales, 2001; Kelly & Johnson, 2008). If one party is being coercively controlled, non-coercive negotiations are likely impossible. Continued research developing fine-grained, specific measures of coercive control are needed to differentiate couples most in need of alternative court-based processes that insulate victims from coercive negotiations (Ellis & Stuckless, 2006a).

While several instruments have been designed to screen for IPV/A in the mediation context, (Ellis & Stuckless, 2006a; Erickson & McKnight, 1990; Girdner, 1990; Johnston et al., 2009; Maine Court Mediation Service, 1992; Neilson & Guravich, 1999; Newmark et al., 1995) only a couple of these instruments include items that measure the pattern of coercive control noted above. Moreover, very few have been empirically tested.

One instrument created by Newmark and her colleagues (Newmark et al., 1995) included a scale they titled "Decision-Making Power," which included several items similar to items found on coercive control scales (e.g., When we were together, he decided: How I spent money; If or when to have sex; My contact with my family; Who I could be friends with; How I used my free time; Where we lived; My work habits, such as where I worked, when I worked, or whether I worked at all). The instrument was tested using a sample of 422 parents from a mediation service in Portland, Oregon. Of all the women in the study (N = 210) identified as abused or not abused, over half (ranging from 52 to 81 percent) of the women responded with *often* and *sometimes* to all the items except the last (regarding work habits).

A second instrument, the Domestic Violence Evaluation DOVE, was designed specifically to discriminate the types of IPV/A (i.e., control-motivated or conflict-instigated) and determine levels of risk associated with the specific types of IPV/A (Ellis & Stuckless, 2006b). The three specific items used to measure controlling behaviors are defined as general (i.e., How often did your partner try to control you?), relational (How often did your partner try to prevent you from contacting family and friends?), and behavioral (How often was your partner physically violent or emotionally abusive because you did not do something he wanted you to do?). The instrument was tested using a sample of 147 male and female participants in divorce mediation (80 female and 67 male). Findings indicate that all three types of controlling behaviors are significantly related to assaults and emotional abuse pre-separation. Post separation, general controlling behaviors were significantly associated to serious physical harm; both general and behavioral controlling behaviors were significantly associated to emotional abuse and serious emotional harm. Thus, in this study, control items were important for determining women who are at risk for future IPV/A in the mediation context.

Taken together, the findings outlined above suggest that in addition to physical abuse and violence, there needs to be additional ways to assess if certain couple relationships are not conducive to mediation and may need more structured and organized intervention by the courts (e.g., custody evaluations, parenting coordinators, case management) (Ellis & Stuckless, 2006a). Consequently, the goal of this study is to examine the potential utility of assessing coercive control in addition to other types of abuse and physical violence in mediation settings. We were interested in the ability of a measure of coercive control to detect other potential signs of severe relationship distress that would make mediation challenging or dangerous for women. We thus wanted to use a more detailed measure of coercive control than had been used in previous studies. The instrument used in this study included a nine item subscale measuring coercive control. It was designed to be as short as possible, while still measuring important types of IPV/A and physical violence so as to be of practical value to mediators who contend with heavy case loads and limited time to make screening decisions.

Hypothesis 1 in our study is that coercive control will be able to identify a higher proportion of women experiencing physical abuse but physical abuse will not be equally able to identify women who are experiencing coercive control. Hypothesis 2 is that coercive control will be better at identifying all other indicators of relationship distress including threats of physical violence and physically forced sex with higher precision than will physical abuse. Finally, hypothesis 3 is that if coercive control is an efficient proxy of all other forms of relational distress whereas physical abuse

is not, coercive control will also be able to better identify women who report fears or concerns about being at the mediation center, whereas physical abuse will not.

## METHODS

### PARTICIPANTS

Participants in the present study were parents who were court ordered to attend mediation to resolve custody and parenting time disputes and chose to attend the cost free, in-house court mediation service in Pima County (Tucson), Arizona between May 1998 and January 2002. The sample was limited to those couples attending mediation for the first time, as a result of a pending divorce (N = 2030; 1015 cases). Excluded from this analysis were parents returning to mediation for a second attempt at pre-divorce mediation, clients returning to renegotiate issues post-divorce, clients who were never married but were mediating custody or parenting time arrangements for their children, and grandparents negotiating with parents to see their grandchildren. The sample was reduced by 38 cases that were found on follow-up to not meet study criteria. The full sample was 976 cases or 1952 individual participants. Because the focus of this paper is analyzing patterns of coercive control for women, the total sample for this study is 976.

The average age of participants was 35 years for mothers and 37 years for fathers. Generally, both parents were employed, although more fathers were employed than mothers (80 percent vs. 65 percent) and, on average, fathers earned approximately double that of mothers (median income $25,123 versus $12,300). The range of income was also larger for fathers than for mothers ($0–215,520 versus $0–109,200). Nearly 23 percent of the families fell below the 2000 federal poverty level. This was the first marriage for most of these parents, with only14 percent of the fathers and 15 percent of the mothers having had previous marriages. Average number of years married was nine. Over 80 percent of the couples in the sample were separated 12 months or less and 54 percent were separated six months or less. Ninety-four percent were separated two years or less; 98 percent three years or less. Children ranged in age from infant to 18 years old with a mean age of eight years. The number of children in the family ranged from one to six with a mean of two children per marriage. The median education level for the mothers was high school (35 percent) to some college education (31 percent). Fathers had similar education (median high school at 38 percent to some college at 27 percent). The participants were predominantly ethnically Caucasian (61 percent of fathers and mothers) and Hispanic (27 percent of the fathers; 30 percent of the mothers).

### INSTRUMENTS AND VARIABLES

The former Director of the Conciliation Court in Pima County, in consultation with the mediation staff, created an instrument using a slightly reworded and shortened version of the Partner Abuse Scales, (Attala, Hudson & McSweeney, 1994), a paper-and-pencil self-report measure of domestic abuse behaviors. The newly-created instrument was titled the *Relationship Behavior Rating Scale* (RBRS)[2] and maintained non-physical and physical subscales of the original instrument. The RBRS is comprised of 41 items that cover multiple conceptual domains and are rated on a 7 point Likert scale (0 = none to 6 = all of the time). Recently, the RBRS was successfully validated against the original scales (Beck, Menke, O'Hara Brewster & Figueredo, 2009). In addition, one question (addressing fear or concerns about being at the mediation center) was taken from the Pre-Mediation Screening Form (Beck, Walsh, Mechanic & Taylor, 2009).

*Psychological Abuse.* Seven items were used to form a psychological harm and degradation scale (e.g., My partner insulted or shamed me in front of others; My partner screamed or yelled at me.). Reliability of the scale was excellent (Cronbach's alpha = .91).

**Table 1**
Means, Standard Deviations and Percentages of Women Reporting Coercive Control, Abuse and Physical Violence

| *Subscales* | *Mean* | *Standard Deviation* | *% Reporting at least one incident in the past 12 Months* |
|---|---|---|---|
| Psychological Abuse | 21.28 | (10.60) | 98.2 |
| Coercive Control | 23.79 | (13.76) | 97.7 |
| Physical Abuse | 3.04 | (4.47) | 57.7 |
| Threats to Life | 2.42 | (4.22) | 51.9 |
| Escalated Physical Violence | 2.35 | (4.33) | 47.1 |
| Physically forced sex | 0.60 | (1.30) | 23.2 |

Note: (N = 857–888 due to missing data).

*Coercive Control.* Ten items were used to form a coercive control scale (e.g., My partner did not want me to have male/female friends; My partner controlled how much money I could have or how I spent it.) (Cronbach's alpha = .84).

For the purposes of the analyses and to identify women who are at very high risk, we further categorized participants into three groups (no to low coercive control, moderate coercive control, and high coercive control). We first examined the means and distribution of this variable. Approximately 25 percent reported a mean score of 3.4 and above, indicating that they experienced coercive control "a lot of the time" to "all of the time." Taking a more conservative cutoff, we designated any participant who endorsed 4 and above as belonging to the high coercive control group (15 percent). Similarly, the participants who endorsed a range of 0 to 1.9 ("no coercion" to "very rarely") were categorized into the no/low group (41 percent). Finally, 45 percent endorsed a range of 2 to 3.9 ("a little of the time" to "some of the time") and were categorized in the moderate coercive control group. Participants with missing data made up the remaining percent of this scale and the remaining percent of each of the following scales.

*Physical Abuse.* Five items were used to form the physical abuse scale (e.g., My partner pushed or shoved me around; my partner hit or punched me.) (Cronbach's alpha = .83). Since there was a restricted range of scores (Table 1), we formed two groups. Participants who received a mean score from 0 to 0.9 ("none" to "very rarely") were categorized as no/low abuse (90 percent). The remaining participants who other participants were categorized as moderate/high abuse (10 percent).

*Escalated Physical Violence.* Eight items were used to form the physical injury scale (e.g., My partner hurt me so badly I had to seek medical help; My partner broke one or more of my bones.) (Cronbach's alpha = .78). This scale was dichotomized because any violence is a serious matter and should be detected within high risk populations (Nicholaidis, et al., 2003). Participants who did not endorse items accounted for 53 percent of the sample. Participants who endorsed 1 ("very rarely") or above were classified as having experienced physical injury (47 percent).

*Threats to Life.* Four items were used to assess threats to life (e.g., My partner threatened me with or used a weapon against me; My partner made me afraid for my life.) (Cronbach's alpha = .80). This scale was dichotomized. Participants who did not endorse these items accounted for 48 percent of the sample. Participants who endorsed 1 ("very rarely") or above were classified as having experienced threats to life (52 percent).

*Physically Forced Sex.* Physically forced sex was assessed by one item (My partner physically forced me to have sex.) Physically forced sex is considered intimate partner violence and, while wives that are physically forced to have sex with their husbands is the most common form of this type of

abuse, it is rarely measured (Bergen, 2004). Participants who did not endorse this item accounted for 77 percent of the sample. Participants who endorsed 1 ("very rarely") or above were classified as having experienced physically forced sex (23 percent).

## RESULTS

Women reported a wide range of frequency and severity of abusive behaviors from their male partners. It is rare that women in the sample did *not* report psychological abuse and coercive control (Table 1). Somewhat surprising were the additionally high percentages of women who reported physical abuse, escalated violent behaviors and threats to life. Approximately half the women reported experiencing escalated physical violence (47.1), receiving at least one threat to life (51.9 percent) and well over have reported experiencing physical abuse (57.7) in the past 12 months. Because many of these women are living separately from their partners (46% living separately more than 6 months; 20% more than 12 months), it is alarming that the types of physical abuse/violence and physically forced sex remain so high. For example, whereas the *lifetime* rates of physically forced sex in the general population is 10–14 percent (Martin, Taft, & Resick, 2006), the *annual* rate of physically forced sex reported in this study is 23.2 percent.

Psychological abuse was included for descriptive purposes but was not included in subsequent analyses because of the presumed ceiling effect. Couples in mediation typically report an enormous amount of verbal conflict (psychological harm), therefore measuring this conflict will not accurately discriminate between those experiencing high levels of serious IPV/A versus those who are not.

We next examined hypothesis 1, which predicted that, while the experience of coercive control would be able to identify a higher proportion of women experiencing physical abuse, the experience of physical abuse would not be equally efficient in identifying women who report coercive control. We conducted a simple chi-square test to test this prediction ($\chi 2 = 143.58$, $p < .001$). Table 2 (column 2, lines 4 and 5) notes that 808 women reported no to very little physical abuse and were classified in the

**Table 2**
Coercive Control and Other Types of Violence

| *Relationship Distress* | $N_a$ | *Coercive Control* | | | *Physical Abuse* | |
|---|---|---|---|---|---|---|
| | | *None/Low N = 363* | *Moderate N = 401* | *High N = 131* | *None/Low N = 808* | *Moderate/High N = 82* |
| **Physical Abuse** | | | | | | |
| None/Low | 808 | 356(44)$_b$ | 370(46) | 82(10) | — | — |
| Moderate/High | 82 | 4(5) | 31(38) | 47(57) | — | — |
| **Coercive Control** | | | | | | |
| None | 363 | — | — | — | 356(99) | 4(1) |
| Moderate | 401 | — | — | — | 370(92) | 31(8) |
| High | 131 | — | — | — | 82(64) | 47(37) |
| **Physically forced sex** | | | | | | |
| Did not occur | 680 | 324(48) | 295(43) | 61(9) | 649(95) | 31(5) |
| Occurred once or more | 205 | 36(18) | 103(50) | 66(32) | 155(76) | 50(24) |
| **Threats to Life** | | | | | | |
| Did not occur | 426 | 268(63) | 143(34) | 15(4) | 422(99) | 4(1) |
| Occurred once or more | 465 | 92(20) | 258(56) | 115(25) | 386(83) | 78(17) |
| **Escalated Physical Violence** | | | | | | |
| Did not occur | 471 | 284(60) | 174(37) | 19(4) | 471(100) | 0(0) |
| Occurred once or more | 420 | 81(19) | 228(54) | 111(26) | 337(80) | 82(20) |

Note. $_a$ Refers to slightly different Ns because of missing data across variables.
Note. $_b$ Numbers in parentheses represent percentages. Due to rounding, sum of percents may be more than 100%.

no/low abuse group. Only 82 women reported some to high physical abuse. However, viewed from coercive control, the result is quite the opposite. Specifically, of the 808 women who report no/low physical abuse, 356 (44 percent) report low coercive control, 370 (46 percent) report moderate coercive control, and 82 (10 percent) report high coercive control. A total of 452 women were either moderately or highly coercively controlled but were not highly physically abused.

In reverse, of the 82 women who were highly physically abused, 4 (5 percent) women reported no coercive control; 31 (38 percent) reported moderate coercive control; and, 47 (57 percent) reported high coercive control. Combining the moderate and highly coercively controlled categories indicates that 78 of the 82 physically abused women reported moderate to high coercive control. Thus, focusing on high physical abuse will capture moderate to high coercive control. However, focusing only on those women that are experiencing high physical abuse will exclude 457 women who are experiencing moderate to high coercive control.

We subsequently examined hypothesis 2 to test if coercive control compared to physical abuse would be better able to identify all indicators of severe relationship distress including: a) physically forced sex; b) threats to life; and c) escalated physical violence. We ran two sets of chi-square tests with coercive control and physical abuse as the predictor variable in each set with three dependent variables. All tests were significant ($\chi 2$ ranged from 66.8–194.6, $p < .001$). The pattern of co-occurrence among severe relationship distress indicators and coercive control was similar across all three relationship distress indicators. For example, of the 205 women who were victims of physically forced sex, all but 36 (18 percent) fell into either moderate coercive control group or high coercive control group (169 or 82 percent) (Table 2). Continuing with Table 2, similarly, 80 percent of the 465 women who received threats to life, and 81 percent of women who experienced escalated physical violence fell into moderate or high coercive control group. A closer look at the differences between the moderate coercive control group and high coercive control group further indicated the moderate coercive control group accounted for roughly half percent of the women who reported physically forced sex (50 percent), escalated physical violence (54 percent) and threats to life (56 percent). While threats to life occurred in approximately 25 percent of the high coercive control group, the high coercive control group accounted for 32 percent of women who experienced physically forced sex and 26 percent of those who experienced escalated physical violence. In contrast, 76 percent of women who experienced physically forced sex, 83 percent of women who experienced threats to life, and 80 percent of women who experienced escalated physical violence experienced none/low physical abuse.

Finally, we sought to test hypothesis 3 to understand if coercive control compared to physical abuse could better account for the women who reported fears or concerns about mediation. Of the 149 women who had concerns about mediation, 115 (75 percent) fell into either the moderate or high coercive control groups. In contrast, only 27 (18 percent) of the women who had concerns about mediation fell into the moderate/high physical abuse group.

## DISCUSSION

While the results of this study are important, we want to note key limitations. First, because there are no validated coercive control measures, especially in the mediation setting, we used items drawn from an IPV/A scale that theoretically corresponded to the coercive control construct as defined by Dutton and Goodman (2005) and by Stark (2006). We defined different levels of coercive control according to the sample statistics. As a result, while our measure has good face value, its formal psychometric properties were not evaluated against a standard measure of coercive control. Further, our data were cross-sectional. Future studies should more rigorously establish the sorts of behaviors that represent coercive control, and define empirically testable cutoff points for the measure. Future research should also examine how these behaviors change throughout the mediation process to inform the costs and benefits of continuing with or discontinuing mediation. In conjunction with the ongoing assessment of coercive control, research should develop and test special procedural safeguards to protect the interests of the victims. Ellis and Stuckless (2006b; 2006a) have made strides in this regard.

With these limitations in mind, the results of this study are unique in several ways. This research addresses a long-standing question concerning the adequate measurement of power imbalances existing between partners in mediation. Specifically, scholars have asked if the concept of power imbalances is defined clearly enough to enable mediators to consistently agree on what it is (Beck & Sales, 2001) and also for mediation researchers to be able to measure it accurately and reliably. Since the 1980s, concerns have been raised about the fairness of having victims of IPV/A negotiate long-term legal decisions with their abusers arguing that the victims are at a severe disadvantage in terms of power within the relationship (Beck & Frost, 2006; Fischer, Vidmar, & Ellis, 1993; Grillo, 1991; Treuthart, 1984). This study borrows from the intimate partner violence literature a theoretical concept, coercive control (Johnson, 2006; Stark, 2007), and investigates a short screening measure to capture this important power dynamic in couples attending mediation (Ellis & Stuckless, 2006a; Kelly & Johnson, 2008).

Violence researchers Johnson and Stark have convincingly argued that violence cannot be reliably determined by incident-specific physically abusive or violent acts because the key component of any type of abusive relationship is fear-inducing control. Furthermore, once the perpetrator has established that he is a legitimate source of threat, he is unlikely to need to use high levels of physical abuse to induce compliance. An occasional broken bone or a kick to the face is likely to reaffirm the seriousness of the perpetrator's desire for control. Therefore, obtaining a snapshot of physical abuse, without regard to coercive control and sexual coercion, may misrepresent what are severe and less severe forms of intimate abuse. The findings of this study support the argument that coercive control is an efficient and accurate signal of relationship distress for women in a mediation sample. Using combined moderate and high coercive groups, we were able to capture information on physically forced sex, threats to life, and escalated physical violence in up to two thirds of women. In contrast, the physical abuse index missed the majority of women who reported severe distress.

The findings are influenced in part by the lower occurrence of physical abuse in this group. This is an extremely important point, because most partners in a mediation sample are likely to be living separately. Thus, this is likely a replicable finding across mediation populations. Paradoxically, the low levels of reported physical abuse pose a specific problem to mediation screening. If the screening begins with physical abuse and subsequently obtains other relationship distress variables, a closer look at these 85 women may erroneously convince the mediator that she or he has successfully "captured" the distressed group, since almost all of these women also report psychological abuse, escalated physical violence, threats to life and rape.

Further, if coercive control more accurately identifies women at high risk of future violence, it could possibly reduce the number of items needed to appropriately screen for IPV/A in the mediation context. A quicker measure would be beneficial because mediators are under time pressure to mediate as many cases as they can to meet the demand for their services. Finally, obtaining information on relationship dynamics as opposed to just specific acts of violence will likely better inform the mediator on who might need special procedural accommodations or who might need to be referred to a more intense court process (e.g., custody evaluation, limited evaluation, case management).

In nearly all jurisdictions, mediation cases are referred because custody and parenting time issues are in dispute. Research indicates that violent men use their children to control their partner's lives; therefore, it is critical that we understand if coercive control is occurring to ensure the ongoing safety of victims, including the children of these relationships. Mediation scholars working with violence researchers will need to continue to develop efficient standardized methods of assessing coercive control to simplify the process and set standards for the legal system.

## POLICY IMPLICATIONS

Using a measure of coercive control as the principle factor in deciding who should be screened out of mediation or provided significant alterations in the mediation process raises complex issues. In general, most criminal laws and administrative policies with regard to IPV/A are based on specific evidence of particular acts of physical violence and/or physical injury. Moving the analyses to a more

subjective notion of nonphysical power and control within a marital relationship could be seen as private family matters, as opposed to criminal acts.

In addition, there are varying degrees of coercion ranging from friendly persuasion to control of resources to force; coercion is also context-dependent and therefore applying a universal law or standard is difficult (Kuennen, 2007). A clearer definition of coercion, one that acknowledges a victim's choice to comply, resist, or both, even in the face of pressure, would greatly assist in unraveling the complex dynamics involved in coercive relationships (Kuennen, 2007). An instrument that can specifically measure elements of the concept of coercive control from the violence literature can be used more efficiently across jurisdictions and will simplify communication between courts, mediators, researchers and judges. We recommend that researchers continue to examine which measure(s) of coercion will best suit needs of mediation experts to promote communication and standardization. For example, is the DOVE sufficient when mediation experts need only basic information to make particular decisions? Alternatively, does the context require a more detailed measure of coercion, similar to the measure used in this study?

Interestingly, as the rates of self-representation have increased, so too have the expectations that mediation can resolve nearly all custody and parenting time divorce disputes, regardless of the characteristics of the couple or the marital relationship. This expectation is built on the harsh reality that there are no good alternatives to for lower socioeconomic status divorcing parents who cannot afford attorneys and other professionals. Without mediation, lower SES couples have *no* assistance with divorce-related issues. Victims without legal representation that are screened out of mediation may thus be at even *more* risk than if they stay in mediation. At least in mediation, a well-trained mediator can identify IPV/A, facilitate communication in a safe forum, and hopefully assist in designing parenting agreements that better protect the victims. Thus, given the current legal climate and the utility of mediation for many couples, it behooves us to find ways to make it as safe as possible for victims.

## NOTES

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1. Historically the terms IPV, domestic violence, and battering have been used interchangeably in the literature. More recently, however, researchers, professional and consumer agencies and state statutes have begun to define these terms very specifically. Some definitions of IPV include psychological abuse and coercion (Centers for Disease Control and Prevention, 2006; Missouri, 2004; National Women's Health Information Center, 2007; Vermont Medical Society, 2008) while others do not (Tjaden & Thoennes, 2000). The Centers for Disease Control and Prevention (CDC) defines IPV as including physical violence (hurting or trying to hurt a partner by hitting, kicking, burning or other physical force), sexual abuse (forcing a partner to participate in a sex act without consent), threats (of physical/sexual abuse using words, gestures, weapons or other means), and emotional abuse (threatening a partner or her possessions or loved ones or harming a partner's sense of self-worth through stalking, name-calling, intimidating, isolation from friends and family) (CDC, 2006).

2. Please contact the first author for further information concerning this instrument.

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# Evidencing domestic violence*, including behaviour that falls under the new offence of 'controlling or coercive behaviour'

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## Abstract

In 2015 an offence of 'controlling or coercive behaviour' was introduced under the Serious Crime Act, criminalising for the first time the non-physical abuse which so often occurs in the domestic context. This new offence implicitly recognises the psychological and emotional harm which can result from an ongoing pattern of behaviour, and the need to consider the controlling or coercive nature of this behaviour in the context of the power dynamics of the relationship in question. Unique evidential difficulties are raised by this offence, in part because of the ways in which gendered expectations can disguise the controlling and coercive nature of certain behaviours. At the same time, to increase the number of prosecutions for domestic violence offences, including under the new offence, acknowledgement of the ongoing trauma often experienced by victims, and the ways in which this may hinder their ability to safely and effectively participate in the criminal justice process, is required. We will outline recommendations to enable this participation, whilst also asserting the need for creative prosecution methods which allow these type of cases to be prosecuted without being solely reliant upon the victim's oral testimony in court.

## Keywords

coercive control, credibility, domestic violence and abuse, hearsay evidence, trauma

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Academic literature has previously highlighted concerns in the context of prosecuting perpetrators of domestic violence-related offences.[1] One long-standing difficulty has been due to the inherent limitations in the substantive criminal law itself, which predominantly focused on isolated incidents of physical violence or criminal damage (Bettinson and Bishop, 2015). Consequently, evidence relating to the context of the relationship or the serious psychological effect of ongoing and programmatic abusive behaviour was legally irrelevant (Bettinson and Bishop, 2015; Bishop, 2016). The subsequent failure of the criminal law to reflect the real lived experiences of domestic violence victims, who typically suffer psychological harm (Tagg, 2011) and experience the abuse as a process in everyday life (Robinson, 2014: 71), has contributed to a lack of victim-confidence in the criminal justice system (Cretney and Davis, 1997; Robinson and Cook, 2006). Acknowledging these obstacles, the government introduced, under s. 76 of the Serious Crime Act 2015, the offence of 'controlling or coercive behaviour within an intimate or family relationship'.[2] Building on previous work justifying the criminalisation of this behaviour (Bettinson and Bishop, 2015), the authors will provide a deconstruction of the offence to expose the evidential difficulties associated with this type of behaviour. The significance of this discussion is to highlight the unique nature of the offence in matters of evidence and proof, and to outline ways in which the anticipated evidential barriers can be overcome, thus encouraging a greater number of prosecutions for domestic violence offences overall, including under s. 76.[3] Ellison has previously written that there has been 'a lack of creativity in the prosecution of domestic violence offences in England and Wales' (Ellison, 2002: 839). We will therefore argue for increased innovative practices borrowing from initiatives employed to assist in sexual offence cases. In particular, this will involve measures enabling the complainant to participate safely and effectively in the criminal justice process, whilst at the same time gathering a wide variety of evidence and thus reducing, where possible, reliance on the testimony of complainants as the sole, or central, piece of evidence.

After outlining issues surrounding victim participation in the prosecution process in part one, part two will examine the behaviours encapsulated under the new offence, and the ways in which gendered expectations may make their controlling and coercive nature hard to recognise and discern by those involved in the criminal justice process. Second, there will be an evaluation of the harm that typically results from this type of abuse and why victims oftentimes experience even non-physical abuse as traumatic. The significance of this experience for victims may have profound implications for police and CPS decision-making based upon perceptions of complainant-witness credibility. Part three then explores aspects of evidential law and practice that can be used to enable the prosecution to build a case, based upon recognition of the potential difficulties the specific behaviour and harm encapsulated by the new offence present. It will be argued that normalising applications for special measures in appropriate cases of domestic violence-related offences to accommodate the effects of the trauma experienced by many victims is needed. It will be demonstrated how psychological injury caused by controlling or coercive behaviour may create further difficulties in terms of prosecuting the new offence. Long-term psychological and physiological effects of ongoing abuse will be shown to affect perceptions of witnesses as reliable and

1. Cretney and Davis (1997); Ellison (2002). These difficulties are found in same-sex as well as heterosexual partnerships (Hester, 2009) and the Home Office definition of domestic violence and abuse applies to those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality (https://www.gov.uk/guidance/domestic-violence-and-abuse).
2. Section 76 of the Serious Crime Act 2015; Home Office, 2014.
3. A Freedom of Information request made by law firm Simpson Millar in August 2016 found that in the first six months of the new offence being in force it had been used by police only 62 times, with 11 forces making no arrests at all (www.simpsonmillar.co.uk/news/police-and-victims-urged-to-use-new-coercive-control-laws-3818, accessed 1 August 2017). This widespread lack of awareness of when and how to use the new offence led the College of Policing to set up a new pilot in September 2016 aimed at helping to support officers to detect the signs that someone is being controlled by their partner (www.college.police.uk/News/College-news/Pages/Police-support-victims-of-coercive-control.aspx, accessed 1 August 2017) but evaluations of the impact of the training expose ongoing concerns (www.college.police.uk/News/College-news/Documents/Domestic_Abuse_Matters.pdf, accessed 1 August 2017).

credible, something which is known to influence decisions to charge and to prosecute (Roberts and Saunders, 2010; see also Fisher et al., 2009; McMillan and Thomas, 2009. O'Keefe et al., 2009; Temkin J, 1997, 2002). Increased training for legal professionals on the effects of trauma and greater use of pre-trial witness interviews as a means of countering these perceptions will be explored.

# Part one

## *Background: Victim participation*

As stated above, the offence of controlling or coercive behaviour within an intimate or family relationship was introduced to ensure criminalisation of the pattern of behaviours commonly characteristic of many abusive relationships. Views received in response to the consultation paper (Home Office, 2015a) made a strong case for introducing an offence of this kind, due to the nature and severity of psychological harm that victims of domestic violence frequently suffer as a result of this type of behaviour. The criminal law commonly used prior to the introduction of s. 76 SCA 2015 in the context of domestic violence cases often fell under the Offences Against the Persons Act 1861 (OAPA 1861) and the offences of assault and battery.[4] These did little to provide redress for psychological injuries as emphasised initially in *Chan Fook*[5] and approved in *Dhaliwal*.[6] To some extent offences created under the Protection from Harassment Act 1997 (PHA 1997)[7] ought to apply in domestic violence cases and enable the prosecution to connect a series of incidents taking place within the relationship. However, judicial interpretations of these offences in *Curtis*[8] and *Hills*[9] revealed problematic application to cases involving ongoing intimate relationships and non-physical harm (see detailed analysis in Bettinson and Bishop, 2015: 188–190). Likewise Harris's findings on the early use of the harassment offences under the 1997 Act showed the relationship between the complainant and the suspect was often as ex-partners (Harris, 2000: 9, 10). Proving offences of this kind, particularly when they took place in the ongoing domestic context, with non-physical and non-criminal behaviours, is clearly difficult. The behaviour and harm encapsulated by the s. 76 offence is therefore different from the types of incidents envisaged by the creators of the OAPA 1861 and PHA 1997. Offences under the OAPA 1861 either do not require, or even allow, any information to be given regarding the context in which they took place, whilst the harassment offences do not apply where episodes are interspersed with periods of affection between the complainant and the defendant.[10]

Conceptualising behaviour within an ongoing intimate relationship as criminal is therefore fraught with difficulties and has meant that the criminalisation of domestic violence is not universally accepted. This is particularly the case when a prosecution is carried forward against the victim's wishes and when the relationship is continuing. In arguing against mandatory criminal justice interventions in domestic violence cases, Mills notes that the law used in this way can lead to double victimisation of the vulnerable (Mills, 1999); mandatory criminal justice interventions are traumatic and can render the victim powerless (Herman, 1992). Hitchings argues that a prosecution should not be carried out against the victim's wishes as this further removes their power and denies them the ability to control their fate (Hitchings, 2005). Hirschel and Hutchinson argue that the very act of withdrawing a complaint or refusing to testify demonstrates the victim's preference of avoiding a criminal justice response to their personal situation (Hirschel and Hutchison, 2003). They advocate that the victim herself is in the best

4. Crown Prosecution Service (2015a: 29) states: 'as in previous years, offences against the person were the most frequently prosecuted offences, representing 72% of DA [sic] crimes. Criminal damage and public order offences accounted for a further 12% and 5% respectively.' See Burton, 2008.
5. [1994] 1 WLR 689 (CA)
6. [2006] EWCA Crim 1139
7. Section 1(1) and s. 4
8. [2010] 3 All ER 849
9. [2001] Crim LR 318
10. *R* v *Curtis* [2010] EWCA Crim 123.

position to assess the likelihood of her own repeat victimisation and safety, ultimately judging that prosecution will do more harm than good. However, one of the after-effects of chronic and serious trauma is a heightened sensitivity to danger and the perception of the perpetrator as being more powerful than he is (Herman, 1992; Williamson, 2010). Therefore, a successful prosecution may act to decrease these perceptions and means that threats or promises directed towards the victim by the perpetrator in return for the victim withdrawing from the prosecution process become weakened. Mills' argument was focused on mandatory arrest practices and she supported a victim-centred approach. Without such an approach, criminalisation can lead to examples of injustice, such as happened in *R* v *A*[11] where A was found to be in contempt of court for refusing to give evidence out of fear of repercussions from the perpetrator. Edwards argues that judicial assertions that the law should not force itself upon a victim who does not wish to avail herself of it[12] 'demonstrate[s] the capacity of the law in its selective myopia to be a tacit party to law's own violence against women' (Edwards, 2012: 30). The European Court of Human Rights has ruled that criminalisation is necessary to ensure that states have the means to provide sufficient protection from domestic violence. According to *Opuz* v *Turkey*,[13] requiring victims themselves to pursue their complaints through the criminal justice system does not achieve this, as intimidation by the perpetrator is used to deter victims from continuing. There is a clear distinction between compelling someone to testify, which is not appropriate and is likely to traumatise and further violate their psychological integrity, and the trial process occurring regardless of the victim's position and without their oral testimony. Criminalisation does not require the victim to end the relationship with the perpetrator. The goal of criminalisation is to reduce the behaviour and educate the public about coercive control.

'A victim-centred approach is at the heart of the National Strategy to End Violence Against Women and Girls' aim of encouraging victim confidence in the criminal justice system. The Strategy seeks to fulfil this goal, in part, by increasing domestic violence conviction rates and therefore barriers to prosecution arising from the criminal law aim of encouraging victim confidence in the criminal justice system. The Strategy seeks to fulfill this goal, in part, by increasing domestic violence conviction rates and therefore barriers to prosecution arising from the criminal law.' Victim retraction and non-attendance in domestic violence cases is considerably higher when compared with other criminal cases.[14] The literature has identified a number of factors affecting complainant decisions to withdraw from the trial process, including fear of retaliation by the defendant or their relatives, a desire to continue with the relationship, and dissatisfaction with, or fear over, the court process (Cretney and Davis, 1997; Ellison, 2002; Robinson and Cook, 2006). Initially, victim retraction proved the prime factor in prosecutorial decisions not to proceed with the charges against the defendant, based on the view that without the complainant's presence during court proceedings there was insufficient prospect of securing a conviction.[15] Before the creation of s. 76 efforts had been made to encourage victim participation in the trial process, the partial success of which are evidenced by a reduction in the high victim withdrawal rate and an increase in convictions (Crown Prosecution Service, 2015). Specialist Domestic Violence Courts, located within the magistrates' court (see Bettinson, 2016; Cook et al., 2004; Vallely, 2005), and Independent Domestic Violence Advocates (IDVAs), where available, provide a victim-centred court

11. *R* v *A* [2010] EWCA Crim 2913.
12. For example Lord Salmon in *Hoskyn* v *Metropolitan Police Commissioner* [1979] AC 474 at 495.
13. *Opuz* v *Turkey* (2010) 50 EHRR 28
14. 'Over 7,500 domestic violence cases failed to attend court or retracted their evidence; that is 1 in 3 of all failed cases. That compares with a general figure of about 10 per cent for all prosecutions.' (Crown Prosecution Service, 2011: 16). The most recent CPS Violence Against Women and Girls Crime Report (2015–16) reports that victim retraction, victim non-attendance and evidence that the victim does not support the case accounted for 13.4% of all unsuccessful domestic violence prosecutions that year, that is 1 in 3 of all failed cases. This compares with a general figure of about 10 per cent for all prosecutions' (Crown Prosecution Service, 2016a: 31).
15. Cretney and Davis (1997); Robinson and Cook (2006).

environment. Their presence serves as a reminder that prosecutors are not representatives for the victim but in fact are prosecuting on behalf of the Crown and in the public interest. In these courts, personnel are trained in domestic violence matters and delays are reduced by what is essentially a fast track approach. IDVAs have been particularly important in providing support and guidance to the complainant about the criminal justice process and beyond (Bowen et al., 2014; Taylor-Dunn, 2015).

Those located in the courthouse are beginning to use their residual knowledge of how the system works to encourage complainants to attend the courthouse on the day, even if they do not then wish to give evidence to the court.[16] Taylor-Dunn's research suggests that defence lawyer's advice to their clients is to change their plea to 'guilty', once they are aware that the complainant is present. This makes enabling safe and effective victim participation of paramount importance to securing increased domestic violence conviction rates (Taylor-Dunn, 2015).

However, these measures are insufficient on their own to overcome every complainant's legitimate fears about the trial process and the evidential issues raised by cases involving domestic violence related offences, particularly the unique ones encountered when proving a s. 76 offence, explored below. Indeed, there may be limited access to the specialist court provision and a court-based IDVA (Bettinson, 2016: 81–103; Bowen et al., 2014). Consequently, as has been highlighted by Ellison, creative measures that are more often raised in sexual offence cases can become crucial in supporting prosecutorial efforts to build cases without reliance on the complainant's testimony. The CPS have identified several examples of good practice that take into account the obstacles caused by victim non-participation in its annual Violence Against Women and Girls Crime Reports.[17] These reveal the growing recognition of the ability to build domestic violence cases without sole reliance on the victim's participation through the use of admissible hearsay evidence under the Criminal Justice Act 2003. For example, 999 calls, in either audio or transcription form, were routinely used in Norfolk, which experienced a high conviction rate in 2010 (Crown Prosecution Service, 2016a: 15). Emergency service calls have repeatedly been regarded as good practice in case studies in subsequent CPS reports. Body-worn cameras have proven useful to convey what was occurring when police arrived at the scene, as have photos of injuries and CCTV footage taken in public areas.[18] In the 2014–15 report, clear examples of hearsay applications being successfully made under s. 116 Criminal Justice Act 2003 and s. 118 were included (Crown Prosecution Service, 2015a: 30). The most recent report provides examples of successful prosecutions under s. 76, although no indication is provided as to matters of evidence and proof involved in each case (Crown Prosecution Service, 2015a: 33–34). The next section will begin to explore exactly these issues, beginning with a discussion about how controlling and coercive behaviour may be evidenced.

## Part two: Behaviour and harm

### *Evidencing the behaviour*

The offence under s. 76 is concerned with behaviour by person A that is continuous or repeated and has a serious effect on person B, either by making B fear that serious violence will be used against them, or by causing B serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.[19] Thus the offence is designed to encapsulate a *range of behaviours*, which, when taken together, seriously affect the victim due to their controlling or coercive nature. This makes background

16. Although the ideal from the criminal trial process is for the complainant to give live testimony, this is not a concern of the IDVA.
17. These can all be located on the CPS website.
18. For evaluation of current use of body worn cameras in policing see Grossmith L et al., 2015. Use of body camera evidence has been explored in other jurisdictions for example see Westara and Powell (2017) and Morrow et al. (2016).
19. Where persons A and B are 'personally connected'. This is the case if they are members of the same family; if they are, or have been, married to each other or civil partners of each other; if they are relatives; if they have agreed to marry one another (whether or not the agreement has been terminated); if they have entered into a civil partnership agreement (whether or not the

information about the relationship necessary in order to prove that the behaviour which occurred did have a serious effect on the victim due to its controlling or coercive nature. This marks a departure from other criminal offences used in the domestic context whereby the harm can be measured objectively by assessing the severity of physical injuries. In contrast to other offences, a significant difficulty is envisaged in terms of gathering sufficient evidence to prove that the specific behaviour in question did have this affect. In part, this difficulty occurs because of the gendered nature of much domestic violence, especially that which involves coercive and controlling behaviour. It is not simply that women are statistically more likely to experience violence and abuse in intimate relationships, it is that coercive control itself 'is "gendered" in its construction, delivery and consequences' (Stark, 2007: 205; see also Kelly and Johnson, 2008). This may make coercive and controlling behaviour hard to discern as it falls at the extreme end of the spectrum of power relations that exist in 'normal' family life (Hearn, 1998: 36) and within 'normal' intimate partnerships.

The Home Office's Statutory Guidance on the new offence acknowledges the issue of gender in respect of this type of behaviour, recognising that it is 'primarily a form of violence against women and girls and is underpinned by wider societal gender inequality.'[20] However, it is essential to note that structural gender inequality, as well as underpinning this form of domestic violence, also acts to normalise it, making it hard for those involved in evidence-gathering to recognise it, and, at the same time, obscuring and minimising its harmful impact. This is significant because without an acknowledgement of the ways in which gendered expectations may serve to obscure the coercive and controlling nature of certain behaviours, it may be decided that there is insufficient evidence that the behaviour of A had a serious adverse effect on B,[21] for the purposes of proving the offence. The prosecutorial guidance for the s. 76 offence does refer to the need to assess behaviour in the context of the power dynamics of the relationship in question,[22] based upon recognition that the commission of much domestic violence consists of a pattern of behaviours with related incidents which may not be harmful, or recognised as harmful, when abstracted from the relational context in which they occur. Equally significant in determining whether or not behaviour is controlling or coercive is the cultural context in which the dynamics of individual relationships play out. This includes the way in which gendered expectations operate to construct a normative framework against which the behaviours within individual relationships are understood and assessed.

## *The role of gendered expectations in the commission of controlling and coercive behaviour*

For more than 40 years, feminist academics have emphasised the role of power and control in the commission of domestic violence, asserting that its existence is a manifestation of male power in a male-dominated society (see in particular Dobash and Dobash, 1979; Hearn, 1998; Pence and Paymar, 1993). From this perspective it has been argued that the commission of domestic violence-related offending has its roots in the gender inequality apparent at the broader social and cultural level (Bishop, 2016: 59). Under this analysis, that the majority of domestic violence is commissioned by heterosexual males[23] is not merely coincidence; men who are violent towards their wives and female partners do so as

agreement has been terminated); if they are both parents of the same child, or if they have, or have had, parental responsibility for the same child (s. 76(6)).

20. The gendered nature of domestic violence has also been recognised by the European Court of Human Rights in *Opuz* v *Turkey* (2010) 50 EHRR 28.
21. Section 76(1)(c) of the Serious Crime Act 2015
22. Section 77 SCA 2015; Home Office, 2015b; Crown Prosecution Service, 2016b.
23. The CPS Violence Against Women and Girls Crime Report of 2015 reported that of the 100,930 defendants prosecuted for domestic violence offences that year, 92,852 were male and 7,992 were female. In 87 cases gender was not recorded (Crown Prosecution Service, 2015a: 30).

a result of conforming to cultural norms that support male dominance (Dobash and Dobash, 1979: 22–24). Whilst the feminist perspective linking domestic violence to male power and control has been challenged and, to a certain extent, undermined by recognition that men can be victims (Dempsey, 2013; Martin, 2016) and that domestic violence occurs within same-sex relationships (Donovan and Hester, 2011; Hester, 2009), the role of gender, particularly in the context of controlling and coercive behaviour, cannot be ignored.[24] Despite an increase in formal equality within the public sphere, pervasive violence against women persists and coercive control has emerged as a separate strategy of male power and control. Indeed, Stark places coercive control in the context of this 'newly won equality', claiming that it emerged as a strategy due to women's formal equality gains; a lack of explicit male power and control at a societal level meant individual men needed to find new ways of controlling women in their private lives (Stark, 2007: 130).

Stark identified the strategies of coercive control that are used to maintain power over the victim as centring on 'gendered enactments' because they involve the micro-regulation of everyday activities already typically associated with women in their roles as homemakers, parents and sexual partners, such as how the victim dresses, cooks, cleans, looks after children and performs sexually.[25] As a result, the strategies serve to reinforce a specific construction of feminine identity and, due to the cultural association of masculine identity with control (Connell, 2004, 2009; Crowther-Dowey et al., 2016; Dowd, 2008; Johnson, 2005), the male dominance that is typically seen in a relationship characterised by coercive control may be hard to discern because it merely falls on the extreme end of a spectrum of acceptable male control over the allocation of resources and so on. This means coercive and controlling behaviour may be hard to distinguish from the gendered behaviours that are normalised and reinforced at a societal level. In order to maintain control over the victim, the abuser's demand must be linked with a 'credible threatened negative consequence for noncompliance' (Dutton and Goodman, 2005: 747), such as the infliction of physical or sexual violence or the withholding of finances or other resources. This ensures that the victim feels compelled to comply to avoid the negative consequences that are threatened. The credibility of threats is contextually dependent and thus their ability to coerce and control a victim will be determined by social and cultural expectations of appropriate gender roles and behaviours. This is why it is 'exceptional for [a woman] to achieve the kind of dominance over her male partner that characterises [coercive control]'.[26] The manifestation of coercive control along gendered lines, alongside the limitations of assessing behaviour as controlling or coercive in the absence of a full understanding of the dynamics of the relationship in question, must all be taken into account when discussing how to evidence and prove the s. 76 offence.

The tactics of coercive control are also often confused and misinterpreted as signs of affection, caring and even love because the behaviours engaged in through a desire to control may merge with acceptable and desirable expressions of love and concern (see Crowther-Dowey et al., 2016). For example, tactics designed to isolate the victim from friends and family and the policing of behaviour and clothes may be seen as signs of love rather than jealousy or male proprietariness (Suarez, 1994). Whilst the CPS guidance does make it clear that context is important, this context may not be easily understood by criminal justice professionals and juries with relatively little understanding or experience of domestic violence and coercive control. They may see the behaviours which reinforce male dominance and proprietariness as an acceptable or 'normal' part of a heterosexual relationship and thus the victim's compliance with the demands of the perpetrator as voluntary rather than as a result of coercion and control. For example, the victim being 'forced' to do household chores in a particular way or keep a record of expenditure may be normalised due to existing gendered expectations and, even if recognised

24. For example, findings from a recent study by Myhill supported previous structural explanations for the gendered nature of coercive control established within the literature (Myhill, 2015: 369).

25. Stark (2007: 129–130). Also more generally see Stark (2007) and Anderson (2009).

26. Pence and Dasgupta (2006: 6). It is possible for women to achieve this dominance over a male partner in certain circumstances, such as when she has an advantage based on income or social class (Stark, 2012).

as abusive or controlling, the full extent of the impact on and harm to the victim may not be appreciated. Adding further complexity is the compliance of the victim with the demands of the perpetrator, giving the appearance of a voluntary response (Dutton and Goodman, 2005: 752). However, because the victim is aware, from past experience, that the abuser has the means to carry out the threatened consequences, the abuser has the means to exert coercion and the victim's 'choice' over whether or not to comply is not 'free choice'.[27] This links with the exploitation of widely accepted gender roles in that a victim may not recognise what has happened as being abusive and criminal, because the demands and rules were very close to what is expected of her in her stereotypical role anyway. Juries may be of the same perception, implicitly assuming that 'women do these things anyway' and that often it is easier 'just to get on with it'. Therefore, whilst the new offence enables the prosecution to include the context in which the behaviour took place, without acknowledgement of the gendered nature of coercive control, the potential of the s. 76 offence could be significantly limited.

## *The harm: Trauma*

To appreciate the obstacles faced by the prosecution in s. 76 cases, it is not just the behaviour of the perpetrator that needs to be understood, but also the harm it inflicts upon the victim. The offence requires that the controlling or coercive behaviour has a 'serious effect'[28] on the complainant. Serious effect is further defined as being when A's behaviour causes B to fear, on at least two occasions, that violence will be used against B, or it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to day activities.[29] It is therefore clear that the offence includes behaviours that do not threaten or cause physical injury, in clear recognition of the emotional and psychological harm that results from controlling or coercive behaviour. This is clearly of paramount importance given the substantial body of research within the social sciences emphasising that the harm of domestic violence extends beyond the infliction of physical injuries to emotional distress and psychological trauma (Dutton, 2009; Herman, 1992; Jones et al., 2001; Pico-Alfonso, 2005; Stark, 2007, 2009; Tadros, 2005; Tagg, 2011: 169; Williamson, 2010). Psychological injury falls within Article 33 of the Council of Europe Convention on preventing and combating violence against women and domestic violence requiring parties to legislate to 'ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised'. A clear obligation is also placed upon the state to protect the psychological integrity of its citizens by virtue of decisions on the scope of Articles 3[30] and 8[31] of the European Convention of Human Rights 1950. However, because domestic violence has been legally constructed as a crime of physical violence rather than an attack on the psychological integrity of the victim, the harm and impact upon the victim has frequently been misconstrued by the criminal justice system in England and Wales (Bishop, 2016) and the human rights implications not always recognised. Section 76 offers the potential for this approach to be changed by enabling a move away from a focus on physical injury and towards emotional and psychological trauma, the relevance of which is currently typically recognised only in the context

27. Dutton and Goodman (2005: 745). The damaging impact this has on a victim's autonomy in terms of reducing their capacity to exercise their options in a meaningful way is noted in Tadros (2005).
28. Section 76(1)(c) Serious Crime Act 2015.
29. Section 76(4) Serious Crime Act 2015.
30. See *Eremia* v *Moldova* [2013] ECHR 3564/11 where the European Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, the assessment of which is relative and contextual. Thus for someone who is vulnerable because they are in an abusive relationship, the level of threat required to meet the threshold is lower than for a person who is not. Moreover, the Court deemed the risk to the applicant's physical and, importantly, *psychological* well-being imminent and serious enough as to require the authorities to act swiftly.
31. It was held in *X and Y* v *The Netherlands* (1985) 8 EHRR 235 that the right to private life encompasses the right to be protected from attacks upon physical and psychological integrity.

of rape and other sexual offences.[32] Significant evidential barriers result from the ways in which trauma typically manifests, especially when that trauma results from ongoing abuse committed by an intimate, and therefore the impact, in evidential terms, of trauma in domestic violence cases cannot be underestimated. As will be shown below, trauma can result from domestic violence whether it takes the form of physical violence, psychological and emotional abuse, or coercive control. Therefore, if s. 76 is to be effective and the attrition rate of existing offences is to be reduced, it is necessary for the symptoms of trauma to be understood and taken into account in order to mitigate its effect on matters of evidence and proof.

Trauma is commonly associated with experiences such as war, terrorism and natural disasters; one-off events where the survivor experiences, objectively, a physical threat to their life. Therefore the traumatic nature of domestic violence is more commonly appreciated when the perpetrator inflicts serious physical injuries, or where there is a threat of such. Far less common is recognition that domestic violence can result in trauma for the victim even in the absence of serious or life-threatening violence. However, psychological research indicates that any event or set of enduring conditions can be traumatic for an individual (Ellison and Munro, 2017; see also Allen, 1995: 14 and Herman, 1992) if their ability to integrate their emotional experience is overwhelmed, or they experience, *subjectively*, a threat to life or integrity, whether physical or psychological (Pearlman and Saakvitne, 1995: 60). Psychological research on trauma makes it clear that severe and enduring traumatic reactions can occur even in the absence of physical violence, and thus there need not be bodily injury. Such psychological trauma is coupled with physiological upheaval and changes in the brain, which arise in the same way whether the threat is verbal, emotional, psychological or physical (Allen, 1995: 14), due to the fact that the neuroarchitecture for experiences of the former have, in effect, 'piggybacked on the already-established neuroarchitecture that evolved for the experience of physical pain' (Eisenberger and Lieberman, 2004, 2005; MacDonald and Leary, 2005; Panksepp, 2003). Although not all those who experience ongoing physical violence and psychological abuse will develop significant traumatogenic reactions, many victims do experience post-traumatic stress symptoms of some kind (Tagg, 2011: 167). Trauma may be acute, where it is a response to a single traumatic event, or it may be complex, developing as a response to ongoing and/or repeated exposure to extreme external events where the trauma is never-ending (Dutton, 2009; Tagg, 2011: 170).

The latter, known as complex-PTSD, is thought to frequently develop in the context of ongoing abuse as a result of the behaviours, and the overall relationship dynamics in which they occur. Herman's research found that the state of entrapment established through coercive control, which she likened to crimes such as political kidnappings, typically manifested as complex-PTSD due to the inescapable nature of the abuse and the fact that the victim is in a constant state of hypervigilance trying to conform to the demands of the abuser (Herman, 1992). In relationships of this kind, power and control are established through extremely controlling rules that dictate how the victim must act in all aspects of everyday life (Stark, 2007). These rules and demands become coercive because they are backed up with threatened negative consequences for non-compliance, which the victim knows, through past experience, can be carried out for resistance or perceived resistance (Dutton and Goodman, 2005). Therefore, to avoid the threatened consequences for non-compliance, the victim tries to conform to the demands and to pre-empt the expectations of the abuser, leaving her in a permanent state of hypervigilance and fear of doing the 'wrong'. This constant state of vigilance is *traumatic;* it is inescapable,[33] and, coupled with the ongoing verbal, psychological and emotional abuse – which the brain experiences as threatening

32. Victims of sexual offences are automatically entitled to apply for special measures under s. 17(4) YJCEA 1999. The Judicial College recognises that the trauma associated with rape can have an impact upon victim memory and recall (Judicial Studies Board, 2010) and the CPS recognises that rape can inflict long-lasting trauma on victims (Crown Prosecution Service, 2010: 2). Also see Smith and Heke (2010). This is not to suggest the criminal justice system's approach to investigating and prosecuting sexual offences is unproblematic, but that there is recognition of the traumatic nature of rape and sexual violence is clear.

33. Herman has compared the situation of victims of ongoing domestic abuse with the plight of victims of capture crimes such as kidnapping, because there is no escape (Herman, 1992). Stark also emphasises how difficult it is for victim's to leave an

in the same way as a physical threat to life – often causes the victim to develop significant post-traumatic symptoms which frequently manifest as complex-PTSD. Drawing upon psychological research into the effect that trauma has on an individual, it becomes clear that understanding the link between ongoing abuse in an intimate relationship and trauma is crucial in terms of evidencing and proving all domestic violence related offences.

The effect of repeated and continuous behaviour that is controlling and coercive may not be apparent to the victim at the time of the offending behaviour, especially as research indicates that many victims have a distorted perception of what is 'real' and often internally redefine their version of reality to match the version presented by the perpetrator. They may come to believe the abuse is their fault or feel there is something wrong with them for causing or allowing it to happen (Williamson, 2010). Victims may also wish to continue with the relationship and may have 'normalised' and minimised the behaviour,[34] requiring the police and CPS to build cases without the sole reliance on the victim's testimony. Where a victim has normalised the behaviour it is equally important that the judiciary appreciate the insidious nature of the behaviour and the harm it causes. Judges share the widespread misunderstanding of the affect coercive and controlling behaviours can have on a victim. For example, Judge Andrew Thomas QC noted that a complainant wished her relationship to continue with the defendant and accepted that to be a genuine wish without any pressure from him (Ankers, 2016). Arguably, the defendant no longer needed to exert pressure having engaged in 'an escalating course of conduct over a period of time' where he 'controlled her contact with other people on Facebook and her mobile phone'. Her previous 'threat' to end the relationship led to Rodgers threatening self-harm and suicide. In the judge's view, despite this background of continuous controlling and coercive behaviour, the complainant was 'robust and there is *no evidence today of long lasting psychological harm*' (Ankers, 2016). The inherent vulnerability of victims of domestic violence was again misunderstood after Judge Richard Mansell QC gave a non-custodial sentence to Mustafa Bashir, who pleaded guilty to a s. 47 offence after forcing his wife to drink bleach and hitting her over the back with a cricket bat. In sentencing, the judge refuted the victim's vulnerability on the basis that she was 'an intelligent woman with a network of friends' and a university degree (Topping, 2017). This decision has since been altered by the judge under s. 155 Powers of Criminal Courts (Sentencing) Act 2000 on the basis that Bashir misled the court by claiming he had secured a career with Leicestershire Cricket Club (BBC News, 2017). The Sentencing Council's current consultation on 'Intimidatory Offences and Domestic Abuse Guidelines' is a welcome opportunity to create sentencing guidelines that help to deal with the misperceptions of the harm caused to victims of domestic violence (Sentencing Council, 2017).

## Part three: Building the prosecution's case

Outlining both the behaviour and harm associated with coercion and control reveals several evidential barriers likely to be encountered when trying to bring cases under the new offence. This part will reflect on a number of these. Difficulties in identifying the relevant behaviour in intimate relationships and the impact of trauma upon witness credibility will be explored. Recommendations will be advanced, including specialist training and increased use of pre-trial witness interviews and the 'special measures' under the Youth Justice and Criminal Evidence Act 1999. Domestic violence complainants may not be able to overcome their vulnerability to testify at court, even with the employment of special measures and other practices, and therefore, following an analysis of the legality of hearsay applications in the context of domestic violence cases generally and s. 76 specifically, it will be argued that the prosecution should

abusive relationship as a result of the myriad tactics employed by the abuser and the context in which abuse of this kind occurs (Stark, 2007).

34. Kelly (1988); Hague and Mullender (2006). Pence and Paymar and Stark have also emphasised the role the perpetrator's denial and minimisation of the abuse has upon the maintenance of a state of coercive control (Pence and Paymar, 1993; Stark, 2007: 203).

continue to build cases without relying on the live testimony of the complainant as the sole or central piece of evidence.

## Training: Behaviours and harm

In light of the complexities associated with recognising behaviour as abusive due to the ways in which gendered expectations may serve to normalise the abuse and the victim's response to it, training of criminal justice personnel is needed to understand the elements, particularly those aspects unique to the s. 76 offence. This would increase the ability of police officers and CPS to identify coercion and control when determining whether there is sufficient evidence to charge and prosecute a case. The Home Office definition describes controlling behaviour as 'a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour'.[35] Coercive behaviour is defined as 'an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim'.[36] However, the ongoing basis of behaviours within these definitions can be difficult to recognise.[37] Certainly, prior to the enactment of s. 76, a HMIC report revealed an inadequate response by the police to domestic violence (HMIC, 2014). Domestic violence, when it consists of a pattern of emotional abuse and coercive and controlling elements, lacks the clarity of the criminal offences that police officers are used to working with. This meant that even when the new offence was introduced, such forms of domestic violence were not readily recognisable to officers and in part explained the report's finding that the 'overall police response to victims of domestic abuse . . . [was] not good enough' (HMIC, 2014: 6). Despite the introduction of s. 76, it remains apparent that more police training is required to assist with identification, particularly where there is a lack of physical violence. Robinson et al. have found that 'the use of physical violence is at the forefront of many officers' expectations about domestic abuse and that when physical violence is absent, the police response is less proactive' (Robinson et al., 2016: 205). These expectations and habits meant police were less likely to report that they would carry out a risk identification checklist or make an arrest when presented with a non-violent vignette compared to a vignette containing physical violence.[38] Another indication that the offence has yet to change police practices significantly in this early period following implementation has been revealed by a Freedom of Information request made by Simpson Millar.[39] This revealed that in the first six months of enactment there had been very few cases of s. 76 charged overall and 11 police authority areas had made no charges at all. Furthermore, evaluation of the training provided by the College of Policing in an attempt to improve the police response to domestic abuse generally found that the one-day classroom-based training course for first responders had positive effects for some indicators of knowledge and understanding of coercive control, but no effect for others, and that the training had no impact on officers' general attitudes to domestic abuse (Wire and Myhill, 2016). Against this background of concerns, this article provides a timely opportunity to raise the profile of the offence and encourage police and prosecution lawyers to use the evidential tools available to them to bring more cases to trial.

35. The Home Office definition of controlling behaviour is found at https://www.gov.uk/guidance/domestic-violence-andabuse
36. Further analysis of these terms are discussed elsewhere (Bettinson, 2016; Bettinson and Bishop, 2015; Bishop, 2016
37. As discussed above in part 1.
38. As a result of this research the College of Policing has begun a pilot, training officers in the identification of dangerous patterns of abusive behaviour. (http://www.college.police.uk/News/College-news/Pages/Police-support-victims-of-coercive-control.aspx).
39. Simpson Millar LLP. Police and victims urged to use new coercive control laws. Available at: www.simpsonmillar.co.uk/news/police-and-victims-urged-to-use-new-coercive-control-laws-3818 (2016, accessed 11 May 2017).

## Continuous or repeated

The Home Office Guidance on the application of this offence indicates that repeated or continuous behaviour is not confined to a time limited period and this approach should enable the context in which the behaviour occurred to be used in building a case.[40] An example of a relatively short time period in which the behaviour in question occurred is a case heard at Gloucester Crown Court. The defendant Lee Coleman carried out a number of tactics aimed at controlling the complainant between 15 and 22 January 2016 and, despite the short time period, the court accepted the prosecution's claim that this was continuous behaviour for the purposes of a s. 76 offence. The complainant had sought to end their 12-year relationship as she wanted to take up the tenancy of a local pub, which Coleman did not support. He called her names, threatened to damage her clothes and property at the family home if she left him, threatened to smother her to death, actually smothered her with a pillow whilst she was sleeping, and took her car keys and bank cards (Gloucestershire Live, 2016). All these factors led the jury to a guilty verdict for the s. 76 offence. From the media reports of this case it is evident that a variety of evidence was employed by the prosecution to show the continuous nature of the defendant's controlling behavior in a short time frame. The victim participated in the trial, text messages were used and Coleman's work colleagues gave evidence that he had bragged to them about smothering the complainant (This is Wiltshire, 2016). This case demonstrates how a wide variety of evidence can be used to establish continuous controlling behaviour sufficient to persuade a jury to convict. In many relationships the behaviour would have occurred over a longer period of time, enabling more evidence to be collated.

## Unpicking victim compliance

Identifying coercion and control in intimate relationships is also difficult to recognise where the victim seemingly complies with the demands of the coercer or controller. Pervasive myths and misconceptions surrounding domestic violence and the ways in which victims 'should' respond persist. One of the most prevalent stems from disbelief of the victim's story because if the violence and abuse was *that bad*, then the victim would have left the relationship. An explanation for the widespread nature of this myth can, perhaps, be sought in an unintended legacy of feminism; its construction of an individualistic discourse surrounding sexual equality which then 'disguises and displaces the power relations that continue to shape . . . people's intimate heterosexual interactions' (Chung, 2005). There is potential for this to act as a barrier preventing the behaviour from being seen as violent, abusive or coercive. In part this may occur because the individualistic discourse situates a victim's 'decision' to stay in an abusive relationship as a freely-made 'choice' because she is an individual with free will;[41] the social context of the prevailing gendered power relations and additional internal and external barriers to leaving may not be taken as fully into account as they need to be if the behaviour of victim and perpetrator is to be adequately understood. Gender inequality and Stark's concept of 'gendered entrapment', discussed above, make it possible to see how a victim may not be able to exit an abusive relationship even where there is support and protection available. Awareness of this and training on the dynamics and behaviours of domestic violence, particularly the type intended to fall under s. 76, is therefore of paramount importance in terms of building a case.

40. The basis of the case must be built upon behaviour occurring after 29 December 2015, although bad character might be considered useful by the prosecution under s. 101 Criminal Justice Act 2003
41. See above and also Kelly and Westmarland (2016) argue that reframing victims as being controlled, rather than abused, might empower others to understand why victims don't 'just leave'.

## Training and measures to overcome impact of trauma on credibility

The criminal justice process places high demands on human memory in the giving of evidence: the amount of minute, often insignificant and peripheral, detail the victim remembers, and the internal consistency of the victim account, are key criteria used by the police and prosecution to assess the veracity of a complaint, and its potential credibility in court (Hohl and Conway, 2017; see also Ellison, 2005; Fisher et al., 2009; McMillan and Thomas, 2009. O'Keefe et al., 2009; Temkin, 1997, 2002). However, memory research indicates that during a traumatic event or experience the brain undergoes profound biological changes which significantly hinder memory processes (Vasterling and Brewin, 1998), meaning that the inconsistencies which are a normal feature of human memory are exacerbated during times of trauma (Conway et al., 2014). These changes include automatically adopted psychological mechanisms and defensive strategies which affect the ways in which information about the event or experience is stored and later how it is able to be accessed. As will be outlined below, the impact trauma has upon memory processes has a detrimental impact upon the ability of an individual to recount an event in a coherent, consistent and sufficiently detailed way, with the potential to significantly impair their ability to come across as a credible and reliable witness. Despite this, police decisions to charge and CPS decisions to prosecute continue to be strongly influenced by perceptions of witness credibility (Roberts and Saunders, 2010), either in terms of not believing the victim's account themselves, or concluding that there is no 'realistic prospect of conviction' (Crown Prosecution Service, 2013: 6) because of the way the witness will come across in court.

## Trauma and memory

Research indicates that during a traumatic incident, the brain switches off the parts of the brain associated with self-awareness (Frewin and Lanius, 2015), resulting in dissociation; 'a disruption of the normal integration of experience' (Chu, 1998) where aspects of the experience, such as consciousness, memory, emotions and bodily sensations, thoughts and sensory perceptions, are split off, or dissociated, from one another (American Psychiatric Association, 1994: 477). These dissociated aspects of experience are stored separately from one another and are unlikely to be recalled as a cohesive and comprehensive memory. This explains how a victim may be able to describe an event with little evidence of distress or emotion, and may have trouble explaining how she felt at the time of the attack; the emotions may be stored separately from the details, with no thoughts or cognitions attached to them. Research into memory recall for a traumatic experience shows that the narrative of the traumatic experience when *intentionally* recalled[42] – as would be done when a witness attempts to give evidence in response to questioning during a police or CPS interview or in court – is usually disorganised, showing variability and errors in recall across time.[43] Individuals 'typically remember that the traumatic event happened but describe blanks or periods during which their memory for the details of the event is vague and unclear' (Brewin, 2014: 207). These factors make a traumatised witness the antithesis of a 'good witness', who has been described as a person who gives a clear and sufficiently detailed account of events which they repeat in court and under cross-examination (Roberts and Saunders, 2010: 125). Given the frequency of a trauma response in domestic violence victims, this approach is particularly damaging when seeking to build a case under s. 76.

In building a case, the ways in which trauma manifests may therefore lead the police and Crown Prosecutors to conclude, based upon the witnesses demeanour and account, that she is not telling the truth, or is not aware of what actually happened, because she cannot talk convincingly and clearly about

42. As opposed to involuntary recall through the individual being spontaneously triggered by exposure to a traumatic cue. See Brewin (2014: 200) for more information on the two types of recall.

43. van Giezen A et al., 2005; Foa, 1995; Harvey and Bryant, 1999. The recall of non-traumatic memories in the same individuals were not disorganised, indicating that this disorganisation occurs only with memories of traumatic events.

her experience: '[d]etails, specificity and consistency in the victim's recollection are central criteria that criminal justice agents – police, prosecutors and juries – use to assess the credibility of the victim account' (Hohl and Conway, 2017). This can perhaps be explained by the strong and pervasive belief that the more detailed and vivid memories are, the more likely they are to be accurate, and the belief that highly emotional experiences give rise to highly accurate memories, despite the fact that scientific evidence does not support either of these beliefs (Conway et al, 2014; see also Magnussen, 2006; Talarico and Rubin, 2003). In addition, very intense emotional experiences, as seen above, can lead to distorted memories and amnesia, meaning that a coherent narrative of a traumatic event or experience is often neither accessible nor an indication of witness credibility. Furthermore, the process of giving evidence or a statement may themselves trigger a traumatic flashback, panic attack or episode of dissociation where the brain becomes foggy and perceptions become distorted and unreal, causing the individual to become confused or disorientated. Consequently, the witness may become anxious or forget momentarily where they actually are or be unable to grasp and/or answer the questions (see Ellison and Munro, 2017 for a further discussion). If these reactions are not recognised and understood by those involved in the gathering of evidence, perceptions of the witness as reliable, credible and truthful enough to take a case forward may be seriously undermined. Although the British Psychological Society provided recommendations in 2008 for those involved in legal work based on research into human memory (Conway and Holmes, 2010) and The Advocate's Gateway published a toolkit for those working with traumatised witnesses, defendants and parties in July 2015, their recommendations are not found routinely in legal responses, particularly in cases of alleged domestic violence, where the link between the abuse and traumatic stress is not often acknowledged. It is therefore recommended that specialised training is needed for those involved in evidence-gathering in cases of DVA to ameliorate these potential difficulties. In addition, the use of pre-trial witness interviews, discussed below, are also thought to have an important role in reducing the number of cases not taken forward due to concerns over how the victim will come across in court.

Since 2008, crown prosecutors have been able to interview witnesses prior to trial in any criminal case in which the prosecutor considers that an interview would assist either in clarifying or assessing the reliability of the witness's evidence or in understanding complex evidence (Crown Prosecution Service, 2008a). CPS guidance outlines the purpose of these interviews as being to enable the prosecutor to reach a better informed decision about any aspect of the case and, whilst interviews will normally be of most value in serious indictable-only cases, nothing precludes the holding of an interview in either-way or summary only cases (Crown Prosecution Service, 2008b). As noted by Roberts and Saunders, this gives witnesses the opportunity to explain any apparent discrepancies or inconsistencies in their account prior to trial and their use has improved crown prosecutors' perceptions of credibility ahead of trial (Roberts and Saunders, 2010). However, they are underutilised, particularly in the context of domestic violence cases and, currently, they are often avoided where possible when witnesses are 'vulnerable' to 'prevent trauma from repetition of the account' (Crown Prosecution Service, 2008a: 5). The authors suggest that as the witness can suffer a traumatic response before and during a court appearance, it may in fact be less traumatic for them to recount evidence and be questioned about their story prior to trial. This would reduce the prospect of details coming out at trial for the first time, which, given the ways in which trauma impacts upon memory and recall, seems likely, and with the witness ill-prepared for how to respond to cross-examination. It is our view that pre-trial witness interviews be *considered* in all domestic violence cases, prior to a decision being made about how well a witness is likely to come across in court. This is something that is already possible, and, even though there are obvious time and cost implications, they could prove to be necessary for the purposes of increasing prosecutions for cases of this kind.

Despite the possibility that training and other practices could be utilised to assist in recognising and evidencing the behaviour and its serious effect on the victim, evidential difficulties persist. The trial is highly likely to be a traumatic trigger for many (see Ellison and Munro, 2017) and difficulties are also encountered because of the impact that trauma has on memory processes, making the prosecution of cases where the victim's account is the only or the central piece of evidence problematic (Hohl and

Conway, 2017). It is recommended that the increased emphasis on taking cases forward without victim testimony, or without this being the sole piece of evidence, continues, therefore inviting a reflection on the hearsay exceptions that are available for prosecutors to use in domestic violence cases.

## Hearsay: the provisions

There are several hearsay exceptions available to the prosecution in domestic violence criminal cases contained within the Criminal Justice Act 2003 (CJA 2003) and Police and Criminal Evidence Act 1984 (PACE). Section 114(d) of the CJA 2003 enables the admission of a statement not made in oral evidence where the court is satisfied that it is in the interests of justice for it to be so.[44] However, the Court of Appeal has discouraged the use of this provision where the witness is described as 'reluctant' to give evidence in person.[45] This presents an onerous challenge in domestic violence cases, where victim participation is lower compared to general criminal cases.[46] The prosecution instead can make an application for admissibility of a witness statement under s. 116, which provides exceptions for witnesses who are unavailable for specific reasons, including fear.[47] Applications can be most convincingly made when they are based upon a consequence of the defendant's own behaviour.[48] Fear is construed widely to include fear of physical injury to another person or financial loss.[49] An admissibility application under s. 116(e) requires the court to consider whether appropriate special measures under the YJCEA are available to mitigate the fear the complainant has about giving live testimony.[50] As stated in *Riat and others*,[51] 'the court should take all possible steps to enable a fearful witness to give evidence notwithstanding his apprehension. That may be impossible, but very frequently it is perfectly practicable; a degree of (properly supported) fortitude can legitimately be expected in the fight against crime.'[52] As argued below, special measures may be available for the traumatised complainant and could reduce the relevance of s. 116(e) in cases involving coercive or controlling behaviour, although there is evidence to suggest that application levels for special measures are low.[53] Given the stance in *Riat*, a failure to apply for special measures is improper, notwithstanding that they carry a financial burden on the criminal justice system.

The prosecution may alternatively submit evidence under the *res gestae* provision preserved in s118(4)(a) CJA 2003, thereby enabling a statement made by a witness who is so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded. In *Barnaby* v *DPP*,[54] the significance of the length of time between the event and the making of the statement, alongside others factors such as the demeanour of the complainant, were emphasised. Barnaby was convicted of a battery offence against the complainant, his girlfriend, on the basis that he had strangled her and bitten her cheek. The complainant had 'made a series of three emergency phone calls to the

44. Section 114(2) lists factors that the court must take into account when exercising its discretion under s. 114(d), which is in line with the jurisprudence from the European Court of Human Rights. See *Popov* v *Russia*, 13 July 2006, Application no. 26853/04 [188]; *Bocos-Cuesta* v *the Netherlands* 10 November 2005, Application no. 54789/00 [72].
45. *Z* [2009] EWCA Crim 20; *CT* [2011] EWCA Crim 2341 cf *Freeman* [2010] EWCA Crim 1997.
46. See fn 18.
47. Section 116(e); s. 116(2) states: through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence. In this regard the court must also consider the discretionary exclusion under PACE s. 78.
48. *Loveless* [2007] EWCA Crim 1041. Also see *Al-Khawaja and Tahery* v *UK* (2012) 54 EHRR 23 at [123]
49. See Spencer, 2014: 141; *R* v *Davies* [2006] EWCA Crim 2643.
50. Section 19 of the Youth Justice and Criminal Evidence Act 1999.
51. [2013] 1 WLR 2592.
52. Ibid. at para no. 16.
53. Ellison and Munro (2017). This is despite the fact that CPS research findings indicate that most applications for special measures are granted by the court (CPS, 2012).
54. [2015] EWHC 232 (Admin)

emergency services'[55] and a transcript had been prepared. During these calls she stated that Barnaby had strangled her and that she was scared as he had done it on a previous occasion. When the officers arrived at the scene, six minutes after the calls were made, they saw that she had marks around her neck consistent with strangulation and a mark on her cheek. The complainant refused to sign a statement, fearing retaliation if she did so. A transcription of the 999 calls and the out-of-court statements made by the complainant to the officers were admitted into evidence, despite the fact that the complainant 'attended court' on the day of the trial.[56] Relying on Lord Ackner's judgment in *R* v *Andrews*,[57] the appeal court accepted the magistrates' approach. In the court's view, both the 999 calls and the statements made to the police were made in circumstances so 'dramatic as to dominate the thoughts of the victim . . . giving no real opportunity for reflection' and made 'in conditions of approximate but not exact contemporaneity'. For Fulford LJ, this reasoning was grounded in the fact that 'there was clear evidence of recent attempted strangulation, and given . . . [the complainant's] emotional state throughout the conversations, the court was entitled to dismiss the possibility of concoction.'[58] Similarly, time and demeanour were also relevant factors in the case of *Ibrahim* v *Crown Prosecution Service*,[59] in which a district judge also admitted evidence of an audio recording of a 999 call made an hour after an attack under the *res gestae* principle. Despite the timeframe between the event and the statement being made, Mr Justice Cranston noted the hysterical tone of her voice on the 999 call, the fact that the police saw the injuries developing, the disarray of the flat and the complainant's demeanour when the police arrived. He reasoned that 'time is to be considered along with the other circumstances of the case.'[60] In this case the district judge had provided ample reasons which had had a bearing on his view that concoction could be negated in the case. In the same vein, the decision in *Morgan* v *DPP Divisional Court*[61] further illustrates the effective use of the *res gestae* principle in the context of a domestic violence complainant where there is a time delay between the event and the statement. The court accepted the admissibility of a 999 tape of a call made by the complainant when she was hiding outside following the incident, and also bodycam footage worn by a police officer at the scene.[62] The court considered that the judge had been correct to consider, alongside the timeframe, the demeanour of the complainant, the content of the call and bodycam footage and '[o]f note . . . [was] not only that the complainant sounded extremely distressed but that she found it difficult to speak coherently to the operator . . . '[63]

The *res gestae* provisions therefore provide a useful means for the prosecution to build cases without victim participation. These cases provide encouraging indications towards the prosecutorial use of the *res gestae* principle in domestic violence cases, illustrating that judges can and do take into account relevant factors when determining admissibility under s. 118. However, concerns over the implications that use of the *res gestae* principle may have for the fair trial rights of defendants must be considered, before a clear recommendation for the increased usage of hearsay evidence in domestic violence cases can be made.

## *Hearsay evidence and human rights*

Domestic violence cases, including those brought under s. 76, whilst preserving a fair trial through the cross-examination of oral witness testimony where possible, must have regard to humane treatment, as

55. Ibid. at [3]
56. Ibid. at [16].
57. (1987) 84 Cr App R 382 at 391–392.
58. Ibid. at [31].
59. [2016] EWHC 1750 (Admin).
60. Ibid. at [26]
61. [2016] EWHC 3414 (Admin).
62. Under s. 118 Criminal Justice Act 2003; The duration of the time delay was not specified
63. [2016] EWHC 3414 (Admin) at [24].

one of the foundational principles of the law of evidence. The issue of hearsay is very much at the fulcrum of these concerns and, despite the careful balancing exercise required to achieve harmony of these two principles of evidence, it is entirely necessary for cases such as these to embrace them. The direction of human rights legal jurisprudence suggests that in the event that a balance is unachievable, the defendant's rights should be adapted to preserve the complainant's rights.[64] These developments provide a legal framework for considering the significance of hearsay evidence and the need to consider the fair trial rights of the defendant guaranteed under Article 6 of the European Convention on Human Rights (ECHR) in light of the complainant's right to be free from inhuman or degrading treatment protected under Article 3 ECHR.

On the face of it, hearsay applications are against the ordinary principle of cross-examination as enshrined in Article 6(3)(d), which provides that an individual charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. However, the Supreme Court in *Horncastle*[65] has confirmed that the right to confront a witness is not unqualified and that where there are safeguards to protect the fairness of the trial, exceptions are permissible.[66] As Heffernan succinctly states: 'If confrontation is a right grounded in the personal dignity of the accused then it must make space for the dignity rights of others within the trial process' (Heffernan, 2016: 107; see also Redmayne, 2012). Even where the conviction secured is based solely on hearsay evidence, the court has justified its inclusion, despite the witness being available, although, for prescribed reasons[67] on the basis that the legal framework provides an inherent code of fairness.[68]

This line of jurisprudence corresponds with the European Court of Human Rights' approach towards state responses to domestic violence. Choudhry and Herring (2006) advocated that a state must take particular care to fulfil its obligations towards victims of third party actions who are vulnerable, and made it clear that domestic violence victims are vulnerable.[69] A state is under a positive obligation to respond adequately when it becomes aware that an individual is experiencing domestic violence.[70] The Court has established that harm incurred in the context of domestic violence fell initially within the right to respect for private life, guaranteed under Article 8[71] and later as meeting the threshold required under Article 3 ECHR as being inhuman or degrading treatment.[72] This threshold will be met where the harm suffered by primary victims[72] of domestic violence is characterised by physical or psychological elements.[74] Once established that this threshold has been met, the state will only fulfil its positive obligations to protect these rights where it acts with due diligence and with legal systems capable of being effective in the prevention of harm (Burton, 2010). States cannot justify inaction or inadequate criminal justice responses in domestic violence cases based on a desire not to interfere with a perpetrator's right to respect for their private and home life. This principle is mirrored in international human rights legal developments emanating from the United Nations Convention on the Elimination of All Forms of

64. For example, *Opuz v Turkey* (2010) 50 EHRR 28; Meyersfeld (2010).
65. *R* v *Horncastle* [2009] UKSC 14; now approved by the European Court of Human Rights in *Horncastle* v *UK* (2015) 60 EHRR 31
66. Applying *Luca* v *Italy* 27 February 2001, App No 33354/96[39]; Heffernan, 2016: 104.
67. Section 116 CJA 2003.
68. Under the Criminal Justice Act 2003 and s. 78 of the Police and Criminal Evidence Act 1984.
69. *A* v *United Kingdom* (1999) 27 EHRR 611; *Opuz* v *Turkey* (2010) 50 EHRR 28
70. *Kontrova* v *Slovakia* 31 May 2007, Application no. 7510/04; *Opuz* v *Turkey* (2010) 50 EHRR 28.
71. *Bevacqua and S* v *Bulgaria*, 12 June 2008, Application no. 71127/01.
72. *Opuz* v *Turkey* (2010) 50 EHRR 28, *Valiunene* v *Lithuania* 26 March 2013, Application no. 3334/07.
73. The term 'primary victim' is used to refer to the direct recipient of the harm as opposed to a 'secondary victim', who witnesses the harm directed at the primary victim. The case law itself does not make the same distinction, although this is the effect of the decisions, see for example *Eremia* v *Moldova* [2013] ECHR 3564/11.
74. *Valiuliene* v *Lithuania* (Application no. 33234/07) 2013.

Discrimination Against Women (CEDAW) Committee.[75] Whilst *Horncastle* is not a discussion on the application of hearsay in domestic violence cases, it appears logical to read the decision as an extension of these human rights decisions. The right of confrontation is not an absolute right (see Dennis, 2010), just as a defendant's right to respect for private life is not, and a state seeking to provide adequate protection of a victim's Article 3 right is in a position to depart from the ordinary rule of inadmissible hearsay evidence and the right to confrontation. Despite this stance, it is not the case that a vulnerable victim should automatically prevent the defendant from the ability to cross-examine. It is that sufficient safeguards must be in place to protect the overall fairness of the trial, whilst at the same time protecting the victim from further attacks on their psychological integrity.

The principle of balancing the rights of the defendant and the complainant were also explored by the courts in the cases referred to above concerning the *res gestae* principle. Consideration was given to Lord Ackner's cautious approach to balancing the principle of humane treatment of the witness with the right of the defendant to cross-examine them. Contrasting the facts in *Barnaby* with that of *Attorney-General's Reference (No 1 of 2003)*,[76] Fulford LJ noted that the prosecution in the former had not sought the use of the *res gestae* principle because they were concerned the witness would give untruthful evidence. Instead, they did so in light of the vulnerable position of a victim of domestic violence, showing an informed and enlightened understanding of the court on this matter:

> careful decisions need to be taken in situations of this kind if there is a real risk that a victim of domestic abuse may suffer further harm following her cooperation with the prosecuting authorities. Here the prosecution was aware from the outset that [the complainant] was frightened that providing a witness statement might provoke a violent reaction from the defendant . . . .The Crown's stance was a seemingly sensible recognition of the potentially dangerous position in which [the complainant] had been placed.[77]

This progressive approach was also expressed in *Ibrahim*, recognising that the issue of using the *res gestae* doctrine as a device to avoid cross-examination had to 'be distinguished from the situation where a victim of domestic violence is in fear of a risk of harm following cooperation with the police'.[78] This progressive judicial approach is consistent with human rights legal developments. The EU Victims' Directive,[79] whilst aimed at State responses to victims of crime generally, makes specific reference to measures targeting violence against women.[80] Combative measures guarantee procedural rights to assist victims of domestic violence.[81] Furthermore, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[82] describes a state's

75. See Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gűlen Khan and Melissa Ozdemir (descendants of the deceased), alleged victim: *Fatma Yildirim (deceased)* v *Austria*, (Decision) CEDAW Committee (views adopted 1 October 2007) Communication no. 6/2005 UN Doc CEDAW/C/39/D/6/2005; *AT (Ms)* v *Hungary*, (Decision) CEDAW Committee (views adopted 26 January 2005) Communication no. 2/2003 UN Doc CEDAW/C/32/D/2/2003. The CEDAW Committee 'underline[d] that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity'; *Fatma Yildirum* v *Austria* 6/2005 at [12.1.5] and *A.T.* v *Hungary* 2/2003 at [9.3].
76. [2003] EWCA 1286
77. Above n 55 at [34].
78. Above n 60 at [28].
79. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L315/57
80. Member States are called upon 'to improve their national laws and policies to combat all forms of violence against women and to act in order to tackle the causes of violence against women, not least by employing preventive measures.' Ibid. at para. (5).
81. Declaration 19 of the Protocols to the Treaty on the Functioning of the European Union states that: 'in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence . . . States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims.'
82. The Preventing and Combating Violence Against and Domestic Violence (Ratification of Convention) Bill 2016–17 is currently progressing through the legislative process. See Strickland and Allen (2017).

general obligation to adopt measures that 'tak[e] into consideration the rights of the victim during all stages of the criminal proceedings'.[83] The decisions in the use of *res gestae* applications support the principle that prosecutions should not be determined solely on the willingness of the victim to participate.[84] Heffernan acknowledges that the boundaries of the participatory rights of victims and vulnerable witnesses are evolving but not set. Consequently, she recognises that '[i]t cannot be doubted . . . that vindicating the entitlement of a victim or a vulnerable witness to avoid confrontation necessitates some qualification of the accused's positive confrontation right' (Heffernan, 2016: 107). Indeed, Heffernan is correct in saying that the limits to protecting the rights of victims in the criminal justice process have not been settled. In the context of domestic violence, national action plans are determined to raise victim confidence with the criminal justice system and operate on a victim-centred basis. One method that is capable of providing some balance to the predicament of victims' rights versus a fair trial is the use of special measures, although it must also be realised that these may not quite be the panacea for all cases.

## *Special measures*

The impact of trauma on sufferers of domestic violence can be addressed during the trial process in some cases. For example, the Youth Justice and Criminal Evidence Act 1999 provides for a variety of special measures to support 'vulnerable and intimidated' witnesses to give their 'best evidence' in court and relieve some of the stress associated with the giving of evidence.[85] These measures include video-recorded evidence-in-chief and the use of screens and live links so that a complainant does not need to face their alleged perpetrator in court. Victims of domestic violence are eligible to apply for special measures as 'intimidated'[86] witnesses because they are victims of the most serious crime. They may also fall into the category of 'vulnerable,'[87] if they suffer from a physical disability, a mental disorder under the Mental Health Act 1983 (MHA), or have a 'significant impairment of intelligence and social functioning.'[88] Post-traumatic stress disorder (PTSD) falls under the MHA, so a victim of domestic violence who meets the diagnostic criteria for this condition will be eligible to apply for special measures as a vulnerable witness. However, oftentimes PTSD is not diagnosed, or victims may not meet the narrow diagnostic criteria despite experiencing significant post-traumatic symptoms (Mol et al., 2005), and therefore this vulnerability may not be picked up by police at interview, particularly as research indicates that the police are particularly inept at identifying vulnerable witnesses (Burton et al., 2007).

Despite the fact that the Victim's Code (Crown Prosecution Service, 2015b ) requires prosecutors to give early consideration to making a special measures application to the court, taking into account any views expressed by the victim, evidence suggests that insufficient applications are being made (Ellison and Munro, 2017). In part this could be because the process of qualification occurs in a context in which police and prosecutors receive limited training on mental health issues (Ellison and Munro, 2017). Indeed, research by Burton et al. suggests that the police find identifying vulnerable witnesses particularly difficult (Burton et al., 2007) and a recent HMIC Thematic Report investigating the extent to which police forces identify, protect and support those who are vulnerable exposed significant areas of concern (HMIC, 2015). Ellison and Munro emphasise that the types of trauma-related symptoms experienced may be pervasive enough amongst the general population of crime victims to have become normalised (Ellison and Munro, 2017). This latter point is particularly pertinent in the context of domestic violence victims due to the high correlation between ongoing abuse and traumatic stress (Dutton, 2009).

83. Art. 49(1)
84. Art. 55(1)
85. Sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999.
86. Section 17(1) of the Youth Justice and Criminal Evidence Act 1999.
87. Section 16(2)(a)(i) of the Youth Justice and Criminal Evidence Act 1999.
88. Section 16(2)(a)(ii) of the Youth Justice and Criminal Evidence Act 1999.

To complicate matters further, different agencies within the criminal justice system use different definitions of 'vulnerability', with some being broader than others. Under the YJCEA, vulnerability is narrowly defined and, although the CPS guidance on the use of special measures imports these criteria, in its toolkit for prosecutors involved in cases with a vulnerable victim, a much wider stance on 'vulnerability' is taken (Crown Prosecution Service, 2015). Police guidance (Ministry of Justice, 2011) uses the statutory definition but elaborates by providing prompts that may assist in the identification of vulnerable witnesses (although, as noted above, there are serious difficulties with this identification at present). Therefore, it is unclear whether domestic violence victims will be eligible to apply as vulnerable witnesses, rather than intimidated, a distinction that is significant because of the emerging duties placed on judges[89] and guidance provided for barristers on how vulnerable witnesses should be treated in court (Advocacy Training Council, 2011). The authors believe that it is important for the emerging duties upon judges to control cross-examination of vulnerable witnesses – children and victims of sexual offences – to be utilised in the context of certain domestic violence cases to enhance the evidence provided and to ensure that states are not violating their duty to protect citizens from attacks upon their psychological integrity.[90] The authors support the provision of special measures to complainant-witnesses in domestic violence cases, to assist with their giving of evidence. Nevertheless, such measures still may be unable to support the complainant to provide live testimony.

In *Morgan* the district judge had taken the view that the prosecution had made a principled approach not to compel the complainant to give live testimony (see also Edwards, 2012). The police officer had reported that the complainant tearfully said that she 'did not want to go to court to "go through it" and that she was terrified at the thought of having to relive the incident.'[91] This was taken into account by the judge when considering whether the prosecution should have explored the possibility of applying for special measures. On appeal the court agreed that the context of domestic violence in this particular case meant that special measures would not address the reason for 'the witness's unwillingness to attend, namely her fear of re-living the experience at the heart of this case. Special measures, which might have given reassurance in relation to being in the presence of the accused, could not address this witness's concerns in the same way.'[92]

It is advocated that the court in *Morgan* is correct to emphasise that special measures may not be able to overcome the reasons for a complainant's fear of providing live testimony before the court.[93] Fear does not need to 'be attributable to threats or actions by … the defendant in order to constitute a good reason for the absence of the witness at trial.' What is required is that the trial court conducted appropriate enquiries to determine whether there were objective grounds for the fear and whether those objective grounds were supported by evidence.[94] The court focused on whether the prosecution was seeking to resort to unfair tactics in the context of domestic violence cases. 'It is plain that appropriate regard for the well-being of a witness in the domestic violence context may be a powerful indicator of a responsible attitude by a prosecutor. It may well mean that the prohibited improper motive for not calling a witness does not arise.'[95] This approach to the *res gestae* principle provides an opening for courts to address the common misconceptions regarding the traumatic experiences of victims that are ongoing. The method of police practices to gather a variety of evidence enables prosecutions to be brought

89. See discussion of cases, below.
90. *X and Y* v *The Netherlands* (1985) 8 EHRR 235.
91. *Morgan* at [5].
92. Ibid. at [34].
93. This approach is consistent with the decision in *Al-Khawaja* (2012) 54 EHRR 23 and was applied by the European Court of Human Rights in *Horncastle* v *UK* (2015) 60 EHRR 31.
94. *Horncastle* v *UK* (2015) 60 EHRR 31 at [145]; also *Al-Khawaja* (2012) 54 EHRR 23 at [124]
95. At [35] *Morgan*; In the *Horncastle* and *Al-Khawaja* cases the relevant provision under consideration is s. 116(2)(e) and not *res gestae* under s. 118. However, s. 78 allows consideration of the safeguards triggered under s. 116(2)(e) application and ought to raise no new argument.

without reliance upon the live testimony of the complainant. These decisions are encouraging and emphasise the need for all police officers and prosecutors to be trained in respect of ongoing domestic violence, the traumatic impact it can have and its ongoing nature. Furthermore, such practices will assist prosecutions under the controlling and coercive offence under s. 76, which will be dependent upon extensive evidence gathering beyond the live statements of the complainant.

## Conclusion

This article has provided an analysis of matters of evidence and proof with regards to the investigation and prosecution of domestic violence and abuse-related offences. It has taken as its specific focus the unique and complex issues raised by the new offence of controlling or coercive behaviour under s. 76 of the Serious Crime Act 2015. Attention has predominantly been paid to obstacles that are known to influence police and CPS decisions to charge and prosecute at the evidence-gathering stages. It is, however, acknowledged that the issues raised in this context may be equally problematic and deserving of attention once a case has gone to trial, but these are outside the scope of this article and the authors' aim of encouraging more prosecutions for these offences, where appropriate. Potential difficulties, and ways they may be ameliorated, were identified in the context of recognising behaviour that is coercive and controlling, and understanding the harm that results from this type of behaviour. Particular attention was paid to the ways in which gendered expectations may distort and hide the harmful nature of many controlling and coercive behaviours, and thus the need for specialist training in this area. It has been shown that the psychological impact of the trauma which frequently results from this type of behaviour is likely to impair the ability of complainant-witnesses to participate safely and effectively in the criminal justice process. Ways in which to minimise this effect on witness credibility were discussed, and it was emphasised that it is vital that measures are in place to educate criminal justice professionals and protect complainant-witnesses, whilst at the same time increasing the use of other forms of evidence, so that the victim's oral testimony is not the sole, or central, piece of evidence. The application of the *res gestae* principle to domestic violence cases does enable prosecutors to successfully pursue cases without reliance on the live testimony of the complainant. The combination of a wide variety of sources used in the cases discussed further highlight the need for investigative authorities to use body worn cameras and the role 999 calls can play in the case as a whole. Creative prosecution methods and progressive understandings by the courts in respect of the use of hearsay evidence have placed the rights guaranteed under the various human rights treaties owed to victims centre stage. The momentum of this progress needs to continue if the aim of greater victim confidence in the criminal justice system set out by the National Strategy to End Violence Against Women and Girls (Home Office, 2011, 2014) is to be achieved. Ensuring victim safety to participate in the trial process and enhanced training of police and prosecutors in respect of traumatic responses by complainants, is in our opinion essential in order for the offence of coercive or controlling behaviour in an intimate relationship to be effective.

### Authors' note

Throughout this article, the term 'domestic violence' is used to refer to violence and abuse (physical and non-physical) that occurs in the context of an intimate relationship, including behaviour deemed to fall under the new offence of coercive or controlling behaviour.

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# Fifty Obstacles to Leaving, *a.k.a.*, Why Abuse Victims Stay

*by Sarah M. Buel*

*It is when my head makes contact with the wall that I freeze, though his fist is coming toward me again. I have not yet taken behavior psychology and do not know that some animals flee when attacked. It would take me yet another year of planning, forgiving, calling, reaching for help, before I could leave. The Legal Aid Office told me there was a three-year wait, even for a divorce when you were getting hit. All the private attorneys wanted at least $10,000 for a retainer since he threatened to contest custody. The judge told me I needed to keep the family together. The priest told me to diversify the menu and stop cooking so much Italian food. Only the older, male marriage counselor told me that it was dangerous for me to stay. So, now I'm a single Mom, without child support and trying to go to night school and keep my job. But with minimum wage, I can't seem to pay both day care and the rent, so sometimes I think about going back, just to make sure my son has enough to eat. It hurts more to watch him eat macaroni with ketchup for the third night, than it ever did to get beaten.*[1]

That abuse victims make many courageous efforts to flee the violence is too often overlooked in the process of judging them for *now* being with the batterer. Regardless of whether I am providing training to legal, law enforcement, medical, mental health, or social service professionals, when people find out I also have been a victim of abuse, some inevitably ask, "How is it you could get a full scholarship to Harvard Law School, but you stayed with a violent husband for three years?" This question has been fueled by those who believe that remaining with a batterer indicates stupidity, masochism, or codependence. Far from being accurate, such labels prove dangerous to victims because they tend to absolve batterers of responsibility for their crimes.

Domestic violence[2] represents serious violent crime: this is *not* codependence, for there is nothing the victim can do to stop the violence,[3] nor is there anything she[4] does to deserve the abuse. Domestic violence victims stay for many valid reasons that must be understood by lawyers, judges, and the legal community if they are to stem the tide of homicides, assaults, and other abusive behavior.[5] The following represents a much-abbreviated, alphabetical list of some reasons I have either witnessed among the thousands of victims with whom I have had the honor of working over the past twenty-two years —or that reflect my own experiences.

## FIFTY OBSTACLES TO LEAVING

**1. Advocate:** When the victim lacks a tenacious advocate, she often feels intimidated, discouraged, and, ultimately, hopeless about being able to navigate the complex legal and social service systems needed to escape the batterer. Some well-intentioned advocates engage in dangerous victim-blaming with the assumption that there is *something* about the victim's behavior or past that precipitates the violence. Attorney Barbara Hart explains:

> Empowerment advocacy believes that battering is not something that happens to a woman because of her characteristics, her family background, her psychological "profile," her family of origin, dysfunction, or her unconscious search for a certain type of a man. Battering can happen to anyone who has the misfortune to become involved with a person who wants power and control enough to be violent to get it.[6]

**2. Batterer:** If the batterer is wealthy, a politician, famous, a popular athlete, or otherwise a powerful player in his community, he can generally afford to hire private counsel and pressure the decision-makers to view his case with leniency. Some wealthy abusers not only hire private detectives to stalk, terrorize, and frivolously sue their partners, but the advocates who assist them as well.[7]

**3. Believes Threats:** The victim believes the batterer's threats to kill her and the children if she attempts to leave. It is estimated that a battered woman is 75 percent more likely to be murdered when she tries to flee or has fled, than when she stays.[8] Thus, it is dangerous for counsel to advise a victim to simply leave without ensuring that a trained advocate or attorney has worked with her to conduct extensive safety planning.[9]

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**4. Children's Best Interest:** Some victims believe it is in the children's best interest to have both parents in the home, particularly if the abuser does not physically assault the children. The victims—as well as their counsel and the judge—may be unaware of the deleterious impact on children witnessing domestic violence, *whether or not they have been beaten by the abuser.*[10]

**5. Children's Pressure:** Children's pressure on the abused parent can be quite compelling, especially with those batterers capable of manipulating the children into begging the victim to "just let Daddy come home!" Children are often torn, for they want the violence to stop, but they also want the family to stay together.[11]

**6. Cultural and Racial Defenses:** Cultural defenses may be cited by offenders, victims, and other community members who may not be cognizant that, while domestic violence occurs among all races, no excuse, save self-defense, ever justifies the abuse. Some believe stereotypes about their own or other cultures, but the bottom line is that domestic violence is against the law, regardless of what behavior is permitted in the "home" country or what is tolerated here in various communities.[12]

Issues of race and culture can impact the victim's decision because she may be more worried about how the police will treat a man of color than she is about her safety. Victims of color report being forced to choose between gender and race in deciding whether to use the criminal justice system for relief. Most feel that their survival dictates siding with race, for the white-controlled criminal justice system has not attempted to address the race-based inequities reflected in the disproportionate number of men of color arrested, prosecuted, and incarcerated. In addition, too many battered women's shelters and batterers intervention programs' staffs fail to reflect the diversity of the communities they serve. This is true in spite of the knowledge that when services are race- and culture-specific, such services report both greater use and success rates.[13]

**7. Denial:** Some victims are in denial about the danger, instead believing that if they could be better partners, the abuse would stop. Victims, family members, and professionals are clear that violence perpetrated by strangers is wrong and dangerous, yet they seem to adopt a double standard when that same level of abuse is inflicted by an intimate partner. As long as those closest to the victim minimize and deny the level of the victim's danger, we should not be surprised that the victim also adopts an attitude of disbelief about her own degree of harm.

**8. Disabled:** Victims who are disabled or physically challenged face great obstacles, not only in gaining access to the court and social services, but because they also are more likely to be isolated from basic information about existing resources.[14]

**9. Elderly:** Elderly domestic violence victims tend to hold traditional beliefs about marriage. They believe they must stay, even in the face of physical abuse. Others are dependent on the batterer for care, and are more afraid of being placed in a nursing home than of remaining with a perpetrator whose abusive patterns they can more readily predict.[15]

**10. Excuses:** The victim may believe the abuser's excuses to justify the violence, often blaming job stress or substance abuse, in part because she sees no one holding the offender responsible for his crimes. Domestic violence is *not caused by* stress or substance abuse, although they can exacerbate the problem. They should not be used as excuses for violent behavior. In fact, most men when under stress *do not* batter their partners.[16]

**11. Family Pressure:** Family pressure is exerted by those who either believe that there is no excuse for leaving a marriage or have been duped into denial by the batterer's charismatic behavior.[17]

**12. Fear of Retaliation:** Victims cite fear of retaliation as a key obstacle to leaving. The acute trauma to which battered women are exposed induces a terror justified by the abuser's behavior. The batterer has already shown his willingness to carry out threats; thus, the wise victim takes seriously the batterer's promises of harming the victim or the children if the victim seeks help or attempts to flee.[18]

**13. Fear of Losing Child Custody:** Fear of losing child custody can immobilize even the most determined abuse victim. Since batterers know that nothing will devastate the victim more than seeing her children endangered, they frequently use the threat of obtaining custody to exact agreements to their liking. Custody litigation becomes yet another weapon for the abuser, heightening his power and control tactics to further terrify the victim.[19] Moreover, counsel should not provide false assurance to victims regarding the likelihood of the court awarding custody to the nonviolent parent. A Massachusetts gender bias study found that in 70 percent of the cases in which a father requested some form of custody, he was successful.[20]

**14. Financial Abuse:** Financial abuse is a common tactic of abusers, although it may take different forms, depending on the couple's socio-economic status. The batterer may control estate planning and access to all financial records, as well as make all money decisions. Victims report being forced to sign false tax returns or take part in other unlawful financial transactions.[21] Victims also may be convinced that they are incapable of managing their finances or that they will face prison terms for their part in perpetrating a fraud if they tell someone.

**15. Financial Despair:** Financial despair quickly takes hold when the victim realizes that she cannot provide for her children without the batterer's assistance. Given that welfare (officially now called Temporary Assistance for Needy Families or TANF) is the primary safety net for fleeing abuse victims, it is embarrassing that the majority of states pay less than $400 per month for a family of three, with Colorado providing just $421 per month.[22] A comprehensive Texas study found that 85 percent of the victims calling hotlines, emergency rooms, and shelters had left their abusers a minimum of five times previously, with the number one reason cited for returning to the batterer being financial despair.[23] These victims were simply unable to provide for themselves and their children without emergency assistance, and many who had such assistance were still in financial trouble. Moreover, such victims had no idea how to access emergency assistance.[24]

For those battered women sufficiently compensated by their employment, they are too often harassed or terrorized on the job by the batterer. The employer usually expects the victim to control the batterer's behavior because it is disruptive to the workplace, and, if the victim does not, she is sometimes fired or forced to quit.[25]

**16. Gratitude:** The victim may feel gratitude toward the batterer because he has helped support and raise her children from a previous relationship. Additionally, a victim who is overweight or has mental health, medical, or other serious problems often appreciates that the abuser professes his love, despite the victim's perceived faults. Many batterers tell a victim, "You are so lucky I put up with you; certainly nobody else would," fueling the victim's low self-esteem and reinforcing her




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belief that she deserves no better than an abusive partner.

**17. Guilt:** Guilt is common among victims whose batterers have convinced them that, but for the victims' incompetent and faulty behavior, the violence would not occur. Since too many victims rarely encounter anyone who holds the abusers responsible for their actions, they mistakenly assume that the *something* to stop the abuse lies in their hands.

**18. Homelessness:** Homeless abuse victims face increased danger, as they must find ways of meeting basic survival needs of shelter, food, and clothing while attempting to elude their batterers. They may be unaware of the availability of domestic violence shelters or may be unable to access them due to lack of a phone, substance abuse, mental health, or other debilitating problems.[26]

**19. Hope for the Violence to Cease:** A victim's hope for the violence to cease is typically fueled by the batterer's promises of change; pleas from the children; clergy members' admonishments to pray more; the family's advice to save the relationship; and other well-intentioned, but dangerously misguided counsel. Many victims are hopeful because they want so desperately to believe that *this* time the batterer really has seen the error of his ways and intends to change, not realizing that, without serious interventions, chances are slim that the abuse will stop.[27]

**20. Isolation:** Victim isolation is typical, although the process of cutting the victim off from family, friends, and colleagues usually happens gradually, as the batterer uses manipulation to assure compliance. Isolating the victim increases the likelihood that she will stay, for without safety plans and reality checks, it will be more difficult for her to assess her level of danger.

**21. Keeping the Family Together:** Wanting to keep the family together motivates many abuse victims to stay, believing that it is in their children's best interest to have their father or a male role model in the family. As they have not been educated about the adverse impact on children of witnessing abuse, victims often cite their desire to make a good home as a key factor in their decision to stay.

**22. Illiterate Victims:** Illiterate victims may be forced to rely on the literate batterer for everyday survival. A victim often finds that the batterer has forged her signature or forced her to sign for an array of consumer debts. Without the ability to read job applications, notices regarding rights, and other important correspondence, illiterate victims are more likely to remain unaware of resources.

**23. Incarcerated or Newly Released Abuse Victims:** Such victims often have few, if any, support systems to assist them with re-entry to the community. Parole officers may require that they return home if that appears to be a stable environment, without determining whether a batterer is present. For those incarcerated women who took the fall for the batterer, returning home carries the added danger that he will, once again, demand that she perform illegal activities if she wants to stay alive.[28]

**24. Law Enforcement Officer:** If the perpetrator is a law enforcement officer, the victim may fear, or may have had past experiences of, other officers refusing to assist her. The victim also may be aware of the Lautenberg Amendment, which prohibits the possession of a firearm or ammunition by any individual convicted of a misdemeanor domestic violence offense.[29] Thus, if the batterer-officer is contributing to the family's financial stability, the victim must choose between safety with impoverishment (if the batterer loses his job) and continuing abuse (with the children receiving adequate support).

**25. Lesbian and Gay Victims:** Such victims may feel silenced if disclosing their sexual orientation (to qualify for the protective order) could result in their losing job, family, and home. Others do not report the abuse for fear of reinforcing negative stereotypes and increasing homophobia, or because the abuser threatens to spread lies (or truth) that the victim has AIDS. Some may have had prior negative interactions with the court system or do not want to air the "dirty laundry" of the gay community.[30]

**26. Low Self-Esteem:** Victims with low self-esteem may believe they deserve no better than the abuse they receive, especially if they have grown up in families with domestic violence. Many batterers inflict high levels of verbal abuse preceding and accompanying the violence, contributing to the victim's declining sense of worthiness.

**27. Love:** A victim may say she still loves the perpetrator, although she definitely wants the violence to stop. Most people will be in an abusive relationship at some point in their lives, be it with a boss or family member who mistreats them. However, most do not immediately leave the job or stop loving the family member when treated badly; they tend to try harder to please the abuser, whether because they need or love the job or the person, or hope that renewed effort and loyalty will result in cessation of the abuse. Since many batterers are charismatic and charming during the courtship stage, victims fall in love and may have difficulty in immediately altering their feelings with the first sign of a problem.

**28. Mediation:** Mediation, required in some jurisdictions even with evidence of domestic violence, puts the victim in the dangerous position of incurring the batterer's wrath for simply disclosing the extent of the violence. Given the power imbalance, it is puzzling that anyone could assume an equitable resolution would result.[31] Since batterers will almost never negotiate in good faith, the very underpinning of mediation is sabotaged. Generally, mediation is not the appropriate mechanism by which to resolve family violence matters,[32] in part because many mediators have not received adequate training on the complicated dynamics of domestic violence. The entire process can leave the victim feeling that the batterer has controlled yet another facet of the court system, through which she may lose everything, from custody of the children to marital assets.[33] For similar reasons, "couples" counseling is also contraindicated.[34]

**29. Medical Problems:** Medical problems, including being HIV- or AIDS-positive, may mean that the victim must remain with the batterer to obtain medical services. If the abuser's insurance covers the family or he is the victim's primary caretaker, the victim knows that without adequate care, her *life* also is imperiled. Past attempts to elicit help from medical providers may have proved fruitless, in part because they often lack adequate training in identification and treatment of domestic violence victims.[35]

**30. Mentally Ill Victims:** Such victims face negative societal stereotypes in addition to the batterer's taunts that the victim is crazy and nobody will believe anything she says. Such discrimination is compounded if the victim has ever been institutionalized or is currently on a high-dose regime of anti-depressants, even if these interventions have been necessary in no small part due to the batterer's tormenting and unlawful behavior.

**31. Mentally Retarded or Developmentally Delayed Victims:** These victims are particularly vulnerable to the batterer's manipulation and are likely to be dependent on him for basic survival. Service providers may lack training in

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how to adapt safety planning for such a victim's comprehension level and often do not contact those in their community with such expertise to provide the needed assistance.

**32. Military:** If the victim or the perpetrator is in the military, an effective intervention is largely dependent on the commander's response, regardless of the Uniform Code of Military Justice ("UCMJ"), its provisions for a military protective order,[36] and the availability of assistance from the Family Advocacy Programs. Many commanders believe that it is more important to salvage the soldier's military career than to ensure the victim's safety. Other victims are unaware that they are entitled to a short-term stipend if they report the abuse and lose the soldier's financial support as a result.[37]

**33. No Place to Go:** Victims with no place to go understand the bleak reality that affordable housing is at a premium in virtually every community in this country, including our Tribal Nations. Often, there is *no shelter space*, particularly for victims with children, or the shelter policy dictates that victims must quit their jobs to be admitted. Such misguided policies are based on the premise that abusers will follow victims from their place of employment to the shelter, thus endangering not only the victim, but other residents and staff as well.[38] Instead of financially crippling the victims, intensive safety planning should be conducted with the victim and children, including notice to employers and law enforcement to ensure the perpetrator's arrest if any problems ensue.

**34. No Job Skills:** Victims with no job skills usually have no choice but to work for employers paying minimum wage, with few, if any, medical and other benefits. Thus, any medical emergency or need for prolonged care (*e.g.*, asthma, diabetes, car accident, or problems resulting from the violence) often forces the victim to return to welfare to obtain Medicaid coverage—or to return to the batterer.

**35. No Knowledge of Options:** Victims with no knowledge of the options and resources logically assume that none exist. Few communities use posters, brochures, radio and television public service announcements, and other public education campaigns to apprise victims of available resources. It is no wonder that many victims are surprised to learn that help may be available. Given the array of free and low-cost domestic violence community education materials available, every bar and civic association needs to prioritize their dispensation.[39]

**36. Past Criminal Record:** Victims with a past criminal record are often still on probation or parole, making them vulnerable to the batterer's threats to comply with all of his demands or be sent back to prison. The vast majority of convicted domestic violence victims did time for crimes related to property, drugs, or prostitution, yet are denied access to protection order assistance by some prosecutor's offices and shelters. Protection order assistance offers the victim help in filling out the necessary forms and presenting the case to the judge. Given the complexity of many state forms and the intimidation victims feel in court, such assistance can be invaluable.

**37. Previously Abused Victims:** Sometimes previously abused victims believe the batterer's accusation, "See, this is what you drive your men to do!" If the victim truly believes this, she will find it easier to blame herself for the abuse.

**38. Prior Negative Court Experiences:** Those victims with prior negative experiences with the court system may have no reason to believe that they will be accorded the respect and safety considerations so desperately needed.

**39. Promises of Change:** The batterer's promises of change may be easy to believe because he sounds so sincere, swearing that he will never drink or hit the victim again. In part because she wants so desperately to give credence to such assertions, the victim may give him another chance, even if such promises have been made repeatedly in the past. Victims are socialized to be forgiving and do not want their marriages or important relationships to fail because they refuse to forgive what has been portrayed as an inconsequential incident.

**40. Religious Beliefs and Misguided Teachings:** Such beliefs may lead victims to think they have to tolerate the abuse to show their adherence to the faith. Particularly if the batterer is a priest, rabbi, minister, or other high-level member of the faith community, the victim can feel intimidated by the status of the batterer and the likelihood that the congregation will support the perpetrator.[40]

**41. Rural Victims:** Such victims may be more isolated and simply unable to access services due to lack of transportation, or the needed programs are distant and unable to provide outreach. In smaller communities, where most people know each other and have frequent contact, victims may be reluctant to reveal the abuse because such heightened scrutiny can cause them great embarrassment among their family and friends.

**42. Safer to Stay:** Assessing that it is safer to stay may be accurate when the victim can keep an eye on the batterer, sensing when he is about to become violent and, to the extent possible, taking action to protect herself and her children. Particularly if the abuser has previously engaged in stalking and deadly threats, the victim understands that the abuser is more than capable of finding her and the children if she moves away.

**43. Students:** Students in junior or senior high school, college, or graduate university studies may fear that not only may their requests for help be stymied by untrained administrators, but worse, that their student records would reflect their involvement with unsavory criminals. If the perpetrator is also a student, the victim often does not want him to be expelled from school, nor does she want to be viewed as a "rat" for disclosing the abuse to officials.

**44. Shame and Embarrassment:** Shame and embarrassment about the abuse may prevent the victim from disclosing it or may cause her to deny that any problem exists when questioned by well-intentioned friends, family, co-workers, or professionals.

**45. Stockholm Syndrome:** The victim may experience the Stockholm Syndrome[41] and bond with the abuser, making her more sympathetic to the batterer's claims of needing her to help him.

**46. Substance Abuse or Alcohol:** Either the victim's or offender's substance abuse or alcoholism may inhibit seeking help, often for fear that the children will be removed, in spite of efforts to get treatment. To make matters worse, it is only the exceptional shelter—such as Tulsa's Domestic Abuse Intervention Program Shelter[42]—that will accept addicted abuse victims.

**47. Teens:** Teens, especially those pregnant and who are already parents, are at greater risk for abuse in their relationships than any other age group, yet are the least likely to either report or seek adult intervention.[43] Some teens are fleeing abusive homes, becoming homeless and more vulnerable to dating violent, much older men. It is not uncommon to hear teen girls say that they believe it is better to have a boyfriend who hits you than no boyfriend at all. Peer pressure, in combination with immaturity, no knowl-

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edge of resources, and low self-esteem, factors into the teen victim's decision to stay with an abuser.[44]

**48. Transportation:** For many victims, a lack of transportation condemns them to a choice between welfare and returning to their abusers. Without a car to access child care and a job, such victims may express hopelessness about avoiding further harm or dire poverty.[45] Most communities fail to address this critical issue. One successful venture is run by used car salesman Brian Menzies of Sanford, Florida. His "Charity Cars," or reduced-cost vehicles, help welfare recipients obtain and keep jobs.[46]

**49. Unaware that Abuse is a Criminal Offense:** The victim may be unaware that the abuse constitutes a criminal offense, often because family, friends, and community professionals minimize the crimes. They apply the double standard of downplaying domestic violence offenses, while taking seriously the same crimes committed against strangers.

**50. Undocumented Victims:** Undocumented victims facing complex immigration problems if they leave are often forced to stay with the batterers who may control their Immigration and Naturalization Service ("INS") status. Misguided INS regulations afford too many abusers the power to determine if a victim will be deported. Victims must come up with substantial fees to petition for residency status. Sometimes, because of a victim's lack of financial resources, only the abuser can access an immigration attorney to navigate the convoluted laws; otherwise, the victim could lose custody of her children. Even those abusers without such power are often able to convince foreign-born victims that their residency status lies in the abusers' control.[47]

## Conclusion

As attorneys and judges, we should be celebrating that domestic violence victims are increasingly turning to the courts for protection from abuse, for they offer us the opportunity to use the law to save lives. We must acknowledge that many obstacles exist for the victims fleeing such terror. Additionally, we can interrupt the intergenerational cycle of learned abuse by teaching our children that the community will not tolerate the violence. "We have a choice," a Virginia juvenile and family court judge says. "Will our children have homes they can run to or homes they must run away from?"[48]

For the adult and child victims, a competent legal system means the difference between escalating abuse and life without terror. Most of us who have done this work for decades are tremendously heartened by the interest of lawyers and judges in improving interventions with victims and offenders. It is through humility that learning takes place: a willingness to acknowledge that advocates, abuse victims, and offenders have much to teach us, just as we have much to teach them.

Many courts and communities have effective systems in place to respond to domestic violence. These must be replicated by attorneys and judges committed to enforcing our laws by making victim safety a priority and, in the process, creating peaceful communities. We have the ability to set a tone of intolerance for domestic violence in our communities; the victims, children, and batterers deserve nothing less.

Colorado Bar Association members should be proud of the leadership role the Bar has taken in addressing the role of lawyers in domestic violence matters, particularly the efforts of President-Elect Dale Harris. For more information about how you can help, please contact Kathleen Schoen, CBA Family Violence Program Director, at (303) 860-1115.

### NOTES

1. From the author's personal journal, 1977.
2. Colorado law defines domestic violence as: an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. Domestic violence also includes any other crime against a person or against property, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been in an intimate relationship.

CRS § 18-6-800.3.

3. *See* Beattie, *Codependent No More,* 31 (San Francisco, Cal.: Harper/Hazelden, 1987) (defining a codependent person as "one who has let another person's behavior affect . . . her, and who is obsessed with controlling that person's behavior"). The codependence label is contraindicated in domestic abuse cases, as the batterer's behavior is serious, violent crime. Although both parties may need to improve their communication or other relationship issues, battered women do not behave in a manner that perpetrates the violence. *See Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995) (observing that domestic violence is not caused by a victim's propensity to push a perpetrator's buttons). For literature regarding codependence in the context of domestic violence, contact the National Domestic Violence Resource Center at (800) 537-2238.

4. It is estimated that 95 percent of domestic violence is perpetrated by men against women. *See* Federal Bureau of Investigation, *Uniform Crime Report* (1990); Nat'l Inst. of Justice, U.S. Dept. of Justice, Domestic Violence, *Stalking and Antistalking Legislation: An Annual Report to Congress Under the Violence Against Women Act*, 3 (1996).

5. *See* Harris, "The CBA Addresses Family Violence," 26 *The Colorado Lawyer* 1-3 (July 1997).

6. Hart, *Seeking Justice: Legal Advocacy Principles and Practice* (Pennsylvania Coalition Against Domestic Violence, 1996).

7. Based on reports of domestic violence victim advocates from around the country, including Sandy Miller (April 29, 1999, interview in San Diego, CA) and a Houston advocate (who requested anonymity) (Oct. 12, 1998, interview in Houston, TX), reporting that her domestic violence intervention agency was forced to stop assisting a victim whose wealthy batterer repeatedly sued the agency and the advocates, forcing them to spend much-needed resources on legal counsel.

8. Hart, "National Estimates and Facts About Domestic Violence," *NCADV Voice* 12 (Winter 1989).

9. Safety plans are an essential component of representing any abused person. A safety plan constitutes an action plan for staying alive and should cover such topics as safety in an emergency, how to protect yourself at home, how to make your children safer, how to protect yourself outside the home, how to make yourself safer at work, using the law to help you, criminal proceedings, and how to be safe at the courthouse. *See Domestic Violence, Safety Tips for You and Your Family,* available from the American Bar Association Commission on Domestic Violence and the Torts and Insurance Practice Section at: http://www.abanet.org/domviol.

10. *See* the article by Dr. John Burrington on the effects of domestic violence on children in this issue at page 29. *See generally* Jaffee *et al*, *Children of Battered Women*, 55 (Newbury, Cal.: Sage Pubs., 1990) (stating that children who are exposed to domestic violence are at a greater risk of developing adjustment problems); Lehmann, "The Development of Posttraumatic Stress Disorder (PTSD) in a Sample of Child Witnesses to Mother Assault," 12 *J. Fam. Violence* 241 (1997) (examining the relationship between the development of post-traumatic stress disorder and a number of coping variables in child witnesses to mother assaults); Daley Pagelow, "Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements," 7 *Mediation Q.* 347, 348-53 (1990) (reviewing research regarding the effects of domestic violence on children); Rabin, "Violence Against Mothers Equals Violence Against Children: Understanding the Connections," 58 *Alb. L.Rev.* 1109, 1112-13 (1995) (indicating that "children who wit-

ness domestic violence demonstrate the same symptoms as physically or sexually abused children").

11. Adams, "Identifying the Assaultive Husband in Court: You Be the Judge," *Boston Bar J.* 23 (July/August 1989).

12. *See generally* Volpp, "(Mis)identifying Culture: Asian Women and the 'Cultural Defense,'" *Harv. W.L.J.* 57 (1994); Siu Chung and Orloff, "Cultural Issues and Diversity" *in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook (hereafter, "A Lawyer's Handbook")* at 11-10 to 11-13 (Washington, D.C.: ABA Commission on Domestic Violence, 1996); Rivera, "Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials," 14 *Boston C. Third World J.* 231 (1994); Agtuca, *A Community Secret: For the Filipina in an Abusive Relationship* (Seattle, WA: Seal Press, 1992); Marsh, "Sexual Assault and Domestic Violence in the African-American Community," 17 *The W. J. of Black Studies* 149-55 (1993).

13. *See* Ammons, "Rules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome," *Wis. L.Rev.* 1003, 1021 (1995) (stating that "African American women hesitate to seek help from shelters because they believe that shelters are for white women"); Rivera, *supra*, note 12 at 234-35 (emphasizing that "[r]acial and cultural differences are critical considerations in analyzing and responding to the crisis of domestic violence" and further concluding that women of Latin descent "experience and respond to domestic violence differently than other women").

14. *See generally* Guidry Tyiska, "Working With Victims of Crime With Disabilities," *Office for Victims of Crime Bulletin* at 1 (Sept. 1998); *Technical Assistance Manual for Domestic Violence Service Providers on Domestic Violence Among Women With Disabilities,* available from the National Coalition Against Domestic Violence (303) 839-1852; Haight-Liotta, "Disabled Women Rate Caregiver Abuse and Domestic Violence Number One Issue," (Sept. 24, 1996), available by calling (800) 897-0272 [(v/TDD), accessible for the hearing impaired].

15. *See* "Abused Elders or Older Battered Women?," Report on the *AARP Forum* (Oct. 29-30, 1992), documenting that more elders are abused by a partner than by caretakers or children.

16. Adams, *supra*, note 11 at 26.

17. *Id.* at 23; Harris, "For Better or Worse: Spouse Abuse Grown Old," 8 *J. Elder Abuse & Neglect* 1 (1996).

18. *See* Herman, "Chapter 2 Terror," *in Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* 33-50 (New York, N.Y.: BasicBooks, 1992).

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38. *See* Raphael, "Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency," 19 *Harvard W.L.J.* 201, 223 (1996) (stating that "some shelters require women to quit their jobs once they enter a shelter so that the abuser cannot follow them from work to the shelter").

39. The National Domestic Violence Hotline, at (800) 799-SAFE, has available free posters, brochures, lists of warning signs, and phone and bumper stickers, among other things. The Family Violence Prevention Fund has similar materials available at low cost by calling (800) END-ABUSE. For example, one Florida bar association ordered bumper stickers reading, "Florida Trial Lawyers Say: There's No Excuse for Domestic Violence."

40. For comprehensive listing of excellent faith-based resources (newsletters, books, brochures, and videos), contact the Center for the Prevention of Sexual and Domestic Violence at (206) 634-1903.

41. Dutton, *supra*, note 28 at 17. The Stockholm Syndrome refers to the phenomenon that occurred when a Stockholm bank was robbed and several hostages were taken. After several days in captivity with the robbers, all of the hostages—both men and women—had bonded with their captors, sympathizing with their cause and fully excusing their crimes.

42. Interview with Felicia Collins Correa, Executive Director, Domestic Violence Intervention Program, Tulsa, Okla. (May 24, 1999). DVIP accepts any substance-abusing victims unless they require hospitalization. Their local Mobile Outreach Crisis Services stop at the shelter to assist victims, and the shelter has certified alcohol and drug counselors ("CADC") on staff to address the inherent issues.

43. Parker and McFarlane *et al.*, "Physical and Emotional Abuse in Pregnancy: A Comparison of Adult and Teenage Women," 42 *Nursing Research* 173 (May/June 1993); Gaxmararian, Lazorick *et al.*, "Prevalence of Violence Against Pregnant Women," 275 *JAMA* 1915 (June 26, 1996).

44. *See generally* Levy, ed., *Dating Violence: Young Women in Danger* (Seattle, Wash.: Seal Press, 1991); Sousa, "Teen Dating Violence: The

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45. *See, e.g.*, Gross, "Getting to Jobs in Suburbs is Hard for Walking Poor," *The New York Times* (Nov. 18, 1997) at A1 (reporting that UCLA studies "show that car owners work more regularly, make more money, and have more job choices").

46. Mr. Menzies donates used cars from his business (sometimes having to spend up to $1,000 to bring them to driving condition), obtains the license and insurance, then offers three months of free maintenance. *See* "The Osgood File: Used Car Salesman Helps Get People Off Welfare by Giving Away Cars" (CBS radio broadcast, Sept. 22, 1997) at http://www.cbsradio.com/osgood/archives/0922c1997.html.

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48. Judge Dale Harris presides over the Juvenile and Family Court in Lynchburg, Va.

# Traumatic entrapment, appeasement and complex post-traumatic stress disorder: evolutionary perspectives of hostage reactions, domestic abuse and the Stockholm syndrome

Chris Cantor, John Price

Evolutionary theory and cross-species comparisons are explored to shed new insights into behavioural responses to traumatic entrapment, examining their relationships to the Stockholm syndrome (a specific response to traumatic entrapment) and complex post-traumatic stress disorder (PTSD). A selective literature review is undertaken examining responses to traumatic entrapment (including hostage, domestic abuse and similar situations) and the Stockholm syndrome, before examining mammalian, reptilian and other defensive responses to relevant threats. Chimpanzees, the closest relatives of humans, are closely examined from this perspective and commonalities in behavioural responses are highlighted. The neurobiological basis of defensive behaviours underlying PTSD is explored with reference to the triune brain model. Victims of protracted traumatic entrapment under certain circumstances may display the Stockholm syndrome, which involves paradoxically positive relationships with their oppressors that may persist beyond release. Similar responses are observed in many mammalian species, especially primates. Ethological concepts including dominance hierarchies, reverted escape, de-escalation and conditional reconciliation appear relevant and are illustrated. These phenomena are commonly encountered in victims of severe abuse and understanding these concepts may assist clinical management. Appeasement is the mammalian defence most relevant to the survival challenge presented by traumatic entrapment and appears to be the foundation of complex PTSD. Evolutionary perspectives have considerable potential to bridge and integrate neurobiology and the social sciences with respect to traumatic stress responses.
**Key words:** abuse, appeasement, complex PTSD, hostage, Stockholm.

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Paradoxes initially appear absurd and conflict with conventional wisdom. Two of the greatest paradoxes in mental health are the Stockholm syndrome and the cooperative behaviours often shown by abused children and adults to their domestic abusers. These victims may not only comply with their abusers but idealize them, even beyond the point of release. A number of authors have noted both Stockholm and post-traumatic stress disorder (PTSD) characteristics in victims of domestic abuse [1]. Judith Herman's landmark paper noted that '... prolonged, repeated trauma can occur only where the victim is in a state of captivity, unable to flee, and under the control of the perpetrator'. She described the result as 'complex PTSD' [2].

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Compared with ordinary PTSD, complex PTSD involves more complex, diffuse and tenacious symptoms, characteristic personality changes, and vulnerability to repeated harm, both self-inflicted and by the hands of others. The DSM-IV PTSD Field Trial referred to complex PTSD as 'disorders of extreme stress not otherwise specified' (DESNOS), its components being alterations in regulating affective arousal (e.g. anger, self-destructive and sexual behaviours), alterations in attention and consciousness (e.g. dissociation), somatization, characterological changes (e.g. chronic guilt and shame, idealization of the abuser, difficulties with trust and a tendency to revictimization) and alterations in systems of meaning [3].

This paper has two aims: first, to propose an evolutionary theory of complex PTSD specific to those trapped in traumatic subordinate relationships; and second, to illustrate the relevance of evolutionary theory and cross-species comparisons generally to PTSD research. Traumatic entrapment includes sieges (military and civilian), concentration camps, wartime prisons, torture, kidnapping, abusive cults and domestic abuse. Readers must judge, but a measure of success would be if the paradox at the start has disappeared by the end of the paper.

We proceed by setting the scene of traumatic entrapment and the Stockholm syndrome, explaining their relevance to complex PTSD, illustrating related defensive phenomena in other species, before discussing a neuroscientific model especially relevant to PTSD research and clinical practice.

## Traumatic entrapment

Recent global conflicts have increased the need to understand hostage experiences. Hostage captor relationships involve massive power imbalances. Torture may be involved and is associated with high rates of PTSD [4], particularly if victims are caught unprepared [5] and if torture involves sexual assault [6]. Domestic abuse often shares this oppressive relationship orientation.

In prolonged captivity sensory deprivation is usually induced through blindfolding and isolation. Unhygienic conditions, physical abuse, threats of impending death, powerlessness, dehumanization, general humiliation and the need to avoid incurring the further wrath of captors are also characteristic [7]. Captors cultivate hostile environments involving total domination to massively disempower their victims [8]. Threats may be vague and incomprehensible, adding to the unpredictability of the experience [9] – unpredictability being a potent inducer of anxiety in mammals generally [10].

The civilian case of Patty Hearst is illustrative. In 1974 Patty Hearst was kidnapped from her wealthy American family by the Symbionese Liberation Army (SLA), who kept her blindfolded in two small closets, subjecting her to sensory deprivation, repeated rape and threats of death [11]. In 2 months she was allowed out of the closet for two baths and on 'lucky' days the door to her closet was left open for fresh air, when she would hear her captors voicing propaganda. After 2 months she was too weak to flee from her heavily armed captors. Finally, before she appeared to capitulate, she was offered a choice: she could go free or join the SLA. She knew from former interrogations that requesting the former meant she would be killed, so she requested to join the SLA to live, at least for the present. She was then told that joining was contingent on her persuading each group member of her worthiness for acceptance into the group. Having earned acceptance she was forced to participate in lawbreaking, including her infamous bank robbery for which she was convicted (and many years later pardoned). She is said to have developed PTSD [12].

## Stockholm syndrome

The Stockholm syndrome refers to the paradoxical development of reciprocal positive feelings between hostages and their captors, which may enhance captives' coping with traumatic experiences [13]. The Stockholm syndrome originally referred to a 1973 bank robbery in Stockholm, in which four hostages were held captive for several days [14]. Following release the hostages displayed paradoxically positive feelings towards their captors, and to a lesser extent the captors to their hostages. The hostages defended their captors, condemning the police, their rescuers. One female hostage subsequently developed an intimate relationship with one of her captors, illustrating the depth of the bonds.

In another incident, criminals discovered an undercover police agent in their midst. The leader of the criminals left instructions that the agent be killed, if he (the leader) did not phone in to confirm his successful escape. The phone call followed, the agent lived, and subsequently resisted testifying against the leader for several years, feeling that the leader had saved his life [15].

In the 2002 Chechen led siege involving more than 800 hostages in a Moscow theatre, 130 hostages died when Russian Special Forces stormed the theatre. Subsequent interviews of a sample of 11 hostages found that 10 displayed Stockholm characteristics [16].

The development of the Stockholm syndrome in hostages is considered protective, with the paradoxical bonds opposing the captors' inclinations to kill their hostages. The longer the siege, the more likely it is that the syndrome will develop [15]. However, in prolonged sieges police may be unable to trust hostages who become unreliable witnesses [17].

Four conditions form the basis for the formation of the Stockholm syndrome: (i) perceived threat to one's physical or psychological survival at the hands of an abuser(s); (ii) perceived small kindnesses from the abuser to the victim; (iii) isolation from perspectives other than those of the abuser; and (iv) the inescapability of the situation [18].

In Sardinia (Italy) kidnapping is common and was associated with a 21% mortality rate for the period 1960–1980 [19]. PTSD was found in as many as 45.9% of former captives, similar to that associated with concentration camps and torture. Humiliating and deprivation experiences predicted the development of the Stockholm syndrome, but not PTSD, suggesting that the Stockholm syndrome has important differences from PTSD.

Suggested explanations for the Stockholm syndrome have included identification with the aggressor and introjection of the valued attributes of the captor [9]. Victims may regress, identifying with their captors as a child might with an abusive parent [15]. Cognitive dissonance is also involved [18]. The victim reduces emotional discomfort arising from contradictory cognitions by bending those cognitions to accommodate the situation – the "all husbands beat their wives" perspective. As is wont in cognitive psychology this may be causal or largely an echo of inner experiences. Brainwashing has been suggested as another explanation. This usually involves captives being repeatedly debased and threatened with death or other grave consequences, if they do not confess their inferior and shameful status. Termination of this torture requires compliance with the oppressors.

The Stockholm syndrome has been experimentally tested from the perspective of interpersonal theory using simulated captivity [13]. This involved two central interpersonal dimensions: control (dominance–submission) and affiliation (friendliness–hostility). The less the 'hostages' perceived the 'terrorists' as dominant and the more they perceived them as friendly, the better was the hostage adjustment.

Both the Stockholm syndrome and complex PTSD share the central characteristic of a seemingly paradoxical idealization of the abuser. It is this phenomenon on that we will now focus on from an evolutionary perspective.

## Appeasement: a mammalian defence

Anxiety and fear have been essential to survival. Further, anxiety disorder subtypes are associated with symptoms that make sense from a survival perspective [20,21]. Fear of heights is associated with freezing, making one less liable to falling. Blood phobias are associated with fainting, which helps restore blood pressure in bleeding individuals. Bracha *et al.* have recently proposed detailed and specific evolutionary origins for anxiety subtypes, including PTSD [22,23]. Nesse has also emphasized the adaptiveness of physiological defences including pain and fever [24].

Cantor proposed a comprehensive theory of PTSD suggesting that it is a disorder of mammalian defences complemented by vigilance and risk assessment, operating on high alert over extended periods [25]. The theory emphasizes that most of *Homo sapiens'* genes involved in defence evolved millions of years prior to the advent of the first hominid (upright great ape) 5 million years ago. *Homo sapiens* arrived as recently as approximately 150 000 years ago. Fundamental survival behaviours such as breathing, eating, drinking and those involved in reproduction are highly conserved throughout the animal world. They did their jobs effectively and their functions were so central to survival that major mutations affecting these functions would have tended to be fatal. Another fundamental survival behaviour (collectively) is defence.

The DSM-IV PTSD criteria include re-experiencing phenomena, which Cantor suggests represent exaggerated recall of threats: an inability to forget [25]. Heightened memory would be a prerequisite for learning a more defensive strategy [26]. Avoidance behaviours are clearly defensive even though the DSM-IV grouping confuses true avoidance, withdrawal (flight) and numbing phenomena. Similarly, DSM-IV overarousal symptoms represent hypervigilance phenomena plus aggressive defence (irritability/anger). Hypervigilance in mental health tends to be interpreted in its physiological sense, but in zoologi-

cal ecology it relates more to heightened scanning for sources of threat.

Diseases can be properly conceptualized only if their associated normal functions are understood [27]. Psychiatry has neglected the study of mammalian defences, commonly grossly oversimplifying them as 'fight or flight' [25,28]. There are six major mammalian groups of defensive behaviours, all of which are found in exaggerated states in PTSD [25]. A logical sequence for approaching defences recognizes the needs for energy conservation and minimization of injuries. Accordingly, the first defence is avoidance of threats, followed in approximate order of physical proximity and risk by attentive immobility (freezing as a prelude to more definitive action), withdrawal (including 'flight'), aggressive defence (including 'fight'), appeasement and tonic immobility. The latter is a physiologically different form of freezing to attentive immobility. It is the final defence typically used when a predator is about to eat its prey. Victims by freezing may yet deter predators by confusing them, inhibiting attack reflexes and simulating dead and possibly contaminated meat.

Traumatic entrapment situations are well beyond the avoidance stage; withdrawal may be desired but is impossible; aggressive defence is not viable because of much lesser status and the situation is not yet terminal (tonic immobility). This leaves appeasement as potentially more relevant.

Appeasement comprises pacification, conciliation and submission. It is primarily a defence strategy relevant only to conspecifics (one's own species) and mostly social species. It is generally an irrelevant response to predators, in contrast to all the other mammalian defences in which predation threat has figured prominently in their evolution [25]. If trapped subordinate individuals under serious threats from dominants attempted to use withdrawal or aggressive defence they would escalate the risks. Appeasement serves a de-escalating function [25,29]. Subordinates using appeasement suspend efforts to win the contests, but thereby decrease the costs of losing.

Studies of contemporary primates provide clues as to how affiliative tendencies may have become associated with coercive control situations in our hominid ancestors. Ethopharmacologist Michael Chance noted that, after being attacked, monkeys and apes tend to turn to the attacker for comfort and safety [30]. He called this 'reverted escape', because after fleeing from the attack the attacked animal returns, or reverts, to the attacker rather than turning to another member of the group for succour. This observation has been confirmed by recent work on 'post conflict anxiety' in chimpanzees (measured by self-directed behaviour such as scratching) [31]. After a fight both contestants show anxiety, especially the loser, and this anxiety is assuaged by affiliative behaviour (e.g. hugging and kissing) between the former combatants. If defeated animals turned to other group members for comfort, victors might interpret this as enlisting agonistic support for comebacks.

The dominant having accepted the subordinate back, may later repeat threatening behaviour causing further arousal and reverted escape, reinforcing the dominant/subordinate orientation and bonds. Male baboons herd their female baboons by neck bites, resulting in reverted escape by the female baboons and strengthening of bonds [32]. Social structures are more stable if there is acceptance of the hierarchy. Further, conflict or extrusion from the group carry costs to both the subordinate individual and the group because the group loses whatever potential resources the individual may bring [33]. The latter is the reason for taking hostages.

Different mammals manifest different appeasement behaviours. Many reduce their apparent size, signalling 'no threat'. Humans cower, bow, kneel, prostrate themselves, and doff their hats. Dogs may submit by way of infantile mimicry, rolling on their backs like puppies. Human appeasement may be expressed with the metaphor of sickness, conveying the message, 'I am a weak sick person' [34]. Somatic PTSD symptoms may reflect this. Many primates use sexual strategies. Submitting adult male primates may offer their genital regions to the dominant, conveying the message, ''I am like a weak female''. Dominants may respond by emphasizing their rank by token mounting actions [34]. In humans this expression of dominance is recognized in violent closed subcultures such as prisons and sometimes the armed forces. Newcomers may be sodomized as a means of promoting submission and acceptance of their subordinate status. Similar dominance behaviours have been documented in the recent Iraq conflict. They are understandable from a mammalian perspective, but incompatible with civilized standards.

Hunter–gatherer women have been remarkably frequently kidnapped by opposing tribes, with little likelihood of rescue. From an evolutionary perspective defiance in such circumstances carries the prospect of death and the non-transmission of related genes. Submission and defection may promote genetic survival. This has been described as 'capture-bonding' [35]. Thus the transmission of genes for appeasement may have been facilitated.

## Appeasement followed by conditional reconciliation in chimpanzees

The relationship between torturers, other oppressors and their entrapped victims can be illustrated by observations of chimpanzees, the closest relative of *H. sapiens*. While female chimpanzees tend to change groups at puberty, male chimpanzees remain for life in the same small groups (usually under 10 individuals), living in clear dominance hierarchies. Peace is interspersed with occasional aggressive challenges by subordinates for dominance. Dominant male chimpanzees are strongly motivated to protect the resources associated with dominance and may engage in savage retaliation, for example tearing off the challenger's testicles [36]. Escape is not an option for the vanquished subordinate because the natal group is the only one that will accept a male chimpanzee.

Defeated chimpanzees seek comfort from the winner because of the importance of agonistic (aggression-driven) alliances [37]. In such small closed groups if the loser sought safety and comfort from other individuals this could be misinterpreted as seeking help for a further challenge and result in the renewal of punishment; therefore the only permissible source of comfort is the chimpanzee that has just defeated the subordinate, and who therefore combines the roles of both the punisher and source of safety. Reverted escape is followed by 'conditional reconciliation', hugging and kissing each other, with reconciliation conditional on subordinates accepting their lesser rank [32]. A period of 'post-conflict anxiety', more marked in the losing chimpanzee, may be indicated by self-directed scratching [31]. Similarly, humans may bite their nails. Depression complements anxiety in post-conflict reconciliation. Anxiety motivates safety and comfort seeking [38], whereas depression demotivates the loser from regaining his former rank, fulfilling a longer-term de-escalating function. It induces an 'involuntary subordinate self-perception' (analogous to low self-esteem), reconciling the losing animal to its subordinate status [34,39].

To reproduce, the male chimpanzee confined to his group has to achieve a certain rank in the hierarchy, by forging alliances with both subordinates and dominants and intimidating those ranking below him [37]. In this highly social species the restoration of cooperation following conflict is important for group cohesion and defence against predators and out-group conspecifics [40]. Strong selection pressures have driven the evolution of these hierarchical aggressive and affiliative intra-group behaviours.

## From chimpanzees to human entrapment

If the common ancestor of humans and chimpanzees had a similar social structure to present-day chimpanzees, we can see how the infliction of punishment onto defenceless human victims is compatible with the development of affiliative relationships. Nevertheless, these chimpanzee appeasement behaviours contrast with usual contemporary human experiences whereby oppressed individuals can seek solace from others within a larger, multigenerational, dual-sex group, or from beyond the group. However, in the closed environment of a hostage situation the hostage may have only dominant oppressors to turn to (reverted escape). Being seen to seek comfort from other hostages may be perilous and interpreted as insubordination. In the closed environment of a psychiatric ward we might refer to such comfort seeking as 'splitting'.

Appeasement is also activated in situations of domestic abuse. Leaving the family group is not to be undertaken lightly. The abused child or partner, like the hostage, may be forced by circumstance to accept their subordinate status and their oppressive abusers. The battered wife may undergo conditional reconciliation with her dominant partner, perhaps by a tearful childlike flirtatious display of inferiority (a behaviour remarkably similar to that observed in chimpanzees). Furthermore, she had best not be seen turning to her friends for comfort. Herman [2] noted, 'To the chronically traumatized person, any independent action is insubordination, which carries the risk of dire punishment'.

As observed in primates, sexual offerings may be used to appease the oppressive dominant individual. Adult stalking victims may at times consent to sexual intercourse with their stalkers in desperate attempts to appease them – another manifestation of reverted escape. Submitting humans may use diverse behavioural strategies including shrinkage in size, infantile and sexual behaviours as suits the situation [34]. Self-destructive behaviour may represent a metaphor for lowering of one's status.

Appeasement is associated with the emotions fear and shame [41]. Fear motivates defence; shame facially and otherwise signals 'no threat'. Shame is an emotion that is so uncomfortable that dissociation is often involved in the context of PTSD [42]. Shame

is experienced in rape victims who blame themselves for their humiliation.

## Neurobiology, evolutionary psychology and the social sciences

Evolutionary psychology has great potential to bridge the gulf between the biological and social sciences. Neurophysiology can be related to social function [43]. The early study of PTSD was heavily socially orientated but currently is facing an unprecedented neurobiological swing. The following section demonstrates how these sciences can be simultaneously understood, with new insights. Understanding PTSD symptoms from this perspective may aid both research and therapy because it suggests answers to questions of why and how.

Paul MacLean, the developer of the well-known limbic system concept [44], also developed the concept of the 'triune brain' [45], which assists understanding the 'sociophysiology' of defence and PTSD [43]. The triune brain suggests both anatomically and functionally that brain structures evolved in three major eras: the reptilian era (originating approximately 300 million years ago), the early mammalian era (from 200 million years ago) and the new mammalian era (from 65 million years ago) [45,46]. Some features of PTSD are purely involuntary, for example the startle reflex, hence are likely to be activated by older brain structures and have been located as emanating from the brainstem [47].

MacLean's theory has been criticized, but only in matters of detail [48]. The main point is that there are at least three 'central processing assemblies' arranged rostrally/caudally in the forebrain, and that each assembly makes decisions relatively independently in dealing with the environment. This contrasts with the idea of a gradual and homogeneous accretion of brain volume during evolution. The triune concept reflects the difficulty that sophisticated humans experience in reconciling discordant emotions with logical cognitive appraisals. With fundamental survival behaviours, the neomammalian forebrain has relatively little control over the reptilian and palaeomammalian levels.

Panksepp emphasized the desirability of examining psychiatric disorders from the bottom-up by way of 'endophenotypes', primal brain functions that can be linked to neural circuits and the underlying genetic controls [49], similar to the 'psychobiological response patterns' of Gilbert [39]. We propose that appeasement is the most likely endophenotype for complex PTSD. Appeasement may be associated with changes in the chemistry and anatomy of the brain. Such work is currently being carried out on cynomolgus monkeys [50], tree shrews [51], rats [52], mice [53] and cichlid fish [54].

Appeasement may operate at any of the triune brain levels. In its most primitive form appeasement is an all-or-nothing response, as seen in some contemporary reptiles, in which appeasement takes the form of total body colour change. An adult male *Anolis carolinensis* may lose its bright colouring, reverting to the muddy brown of immature animals, but if a dominant–subordinate pair is broken up then the subordinate's colour often becomes lighter again [55]. Sometimes the colour change is irreversible, becoming progressively darker and the lizards die, reflecting pathological processes associated with status change. Interestingly this colour-changing animal cannot appease one rival while dominating another. This all-or-nothing characteristic of reptilian appeasement is one reason we allocate to the reptilian level of the forebrain the strategy selection between elevation and depression of mood, both of which have pervasive effects on behaviour. Complex PTSD entails more depressive elements than simple PTSD, consistent with our emphasis on appeasement.

The middle, or palaeomammalian level, of the triune brain involves the limbic system and emotional reactions. The subordinate rodent, canid or primate feels fear and a sense of being chastened by the dominant. Depressed emotion is context dependent, unlike the pervasiveness of depressed mood, reflecting the fact that in mammalian hierarchies most animals operate in the middle and, while being chastened from above, may be aggressive to those lower in rank. They express anxiety looking up but irritability looking down the hierarchy. Also, because sanctions may be applied by the group as well as by individuals, they feel shame when not reaching the group's standards. Human blushing forms part of this primitive appeasement display.

At the neomammalian level we have the rational, voluntary, conscious adoption of appeasement, which may require considerable social skill, as in a flowery speech of submission. Moreover, appeasement at this level may be either genuine or simulated, in which the individual appears appeasing but lacks submissive feelings and may be planning a comeback or rebellion (a possibility which Milton, an expert in appeasement or the lack of it, has Satan consider, and reject, in the first book of *Paradise lost*). Patty Hearst described during her captivity being orientated to doing whatever was needed to survive, but found herself also led

on by a deeper appeasing force she did not understand [11]. This would be compatible with triune levels of appeasement operations.

Fear responses involving flight and aggressive defence/fight require rapid processing. Neomammalian cognitions permit complexity but are slow. The more primitive brain levels provide more rapid reactions [56,57]. Bracha has even suggested specific evolutionary time-frames for the origins of the many fears humans experience, for example fears of heights, separation, darkness, snakes, drowning etc. [23]. PTSD may involve contributions predominantly from the reptilian and palaeomammalian brain levels. Patients often report surprising difficulty implementing exposure programmes. It is as if there is something unexplainable deterring the progress that otherwise logically seems readily attainable. However, the association of appeasement with complex socialization suggests that appeasement in the great apes (including ourselves) is likely to have evolved with greater neomammalian selection pressures than the other defences [25].

Finally, we suggest that PTSD research needs to pay closer attention to the context in which PTSD arises. The appeasement context of complex PTSD is highly specific. This gives rise to the possibility that PTSD may constitute a range of disorders of defences. In the evolutionary journey to the present day the sources of threat were predators, conspecifics and the environment. Might these types of threat give rise to different PTSD symptom profiles?

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# Protective Orders and Domestic Violence: Risk Factors for Re-Abuse

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*One of the few legal tools for protecting victims of domestic violence is the civil Protection Order (PO). How effective they were in preventing re-abuse was analyzed by examining court and police records from 210 couples in which female victims (or "applicants") filed POs against their violent partners. Police records for 2 years prior and two years following the issuance of a PO were reviewed. Results indicated a significant decline in the probability of abuse following a PO. Prior to filing a PO, 68% of the women reported physical violence. After filing, only 23% reported physical violence. Several risk factors were assessed and it was found that very low SES women were more likely to report re-abuse as were African-Americans.*

**KEY WORDS:** domestic violence; protective order; legal intervention; physical violence.

## INTRODUCTION

Prior to passage of Pennsylvania's 1976 Protection from Abuse Act, only two states had protective order (PO) legislation specifically for battered women (Chaudhuri and Daly, 1992). The landmark Protection from Abuse Act provided protection from spouse abuse through civil proceedings. The Pennsylvania legislation stimulated many other states to adopt similar avenues of protection for married and unmarried women (and men) experiencing abuse from their partners (Grau *et al.*, 1985; Keilitz, 1994). In 1983,

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POs (also commonly referred to as restraining orders) were available in 32 states, and by 1994 some form of protective order legislation had been adopted by all 50 states (Keilitz, 1994).

Although POs may contain several orders, including vacating the residence and paying child support, the primary function is to protect victims by prohibiting their abusive partner from: (1) committing acts of family violence, (2) directly communicating with a member of the family or household in a threatening or harassing manner, (3) going to or near the residence or place of employment of a member of the family or household. Violation of any of these orders can result in a fine, imprisonment, or both.

In theory, the PO addresses many of the limitations of traditional approaches to legal intervention in domestic violence cases. For example, prior to protective order legislation the only protection available to women was through cumbersome and usually ineffective criminal proceedings. Abusers were prosecuted infrequently, and when they were, punishment was minimal. Moreover, many women refused to participate in criminal proceedings out of fear that their abusers would retaliate (Hart, 1996).

Because the PO is a civil rather than a criminal proceeding, a woman may be more willing to take action on the belief that her abusive mate will be less likely to retaliate than with criminal proceedings (Wallace, 1996). Furthermore, from a deterrence perspective, the criminal penalties associated with violating protective orders may decrease the likelihood that the offender continues his abuse for fear of facing penalties. As Wallace (1996) puts it, "although some offenders may have had numerous contacts with the police and judicial system, most have not been involved with a direct order from a judge banning certain conduct. The specter of facing a judge after violating a judicial order may act as a deterrent for some abusers" (p. 206).

Despite the widespread use of POs, there have been very few studies examining whether they work. Just how effective are protective orders for reducing the likelihood of future violence? Only five studies were found that have addressed this question. Those investigations produced essentially similar results, despite the fact that each study comprised different lengths of follow-up (from 4 months to 2 years), as well as different types of data collection (interviews and police records).

Three of the evaluation studies, which used follow-up periods of 6 months to 2 years, found that 40% to 50% of women who filed protective orders reported no further physical abuse (Harrell and Smith, 1996; Horton *et al.,* 1987; Klein, 1996). Not surprisingly, the two studies which used shorter follow-up periods found lower rates of re-abuse. Chaudhuri and Daly (1992) and Grau (Grau *et al.,* 1985) interviewed victims 2 and 4 months (respec-

tively) after filing protective orders and found that 60% and 76% (respectively) reported no further abuse.

Whether or not the relief from violence experienced by women filing POs was a function of the court order, or would have occurred regardless of legal intervention is unclear. Grau and colleagues (1985) reported no significant difference in rates of physical abuse between women with protective orders and women without them. However, their sample consisted of women participating in a family violence demonstration program, so even the women who didn't file protective orders were still receiving some form of intervention. Other studies found little or no difference in re-abuse rates between women who filed permanent POs (in effect for 1 year) compared with women who filed only temporary POs (in effect for 30 days). Both Klein (1996) and Harrell and Smith (1996) reported that rate of re-abuse did not significantly differ for women who pursued permanent POs compared to those who obtained only temporary POs.

Risk factors for re-abuse are not well understood because so few studies have examined them. Only very recently have studies begun to assess risk factors. First, in Harrell and Smith's (1996) study, the likelihood of re-abuse was higher if the victim shared biological children with her abuser. They suggested that the presence of biological children contributed to higher rates of re-abuse due to conflict and violence which occur as a result of custody and visitation issues. A second risk factor for re-abuse is whether or not the abuser had been arrested. The evidence for the impact of a prior arrest on post-PO abuse is mixed. Harrell and Smith (1996) found that the probability of post-PO abuse was lower if the abuser were arrested at the time of the incident that led the victim to file the PO. However, Klein (1996) did not find any effect of arrests on the likelihood of re-abuse.

A third risk-factor for re-abuse is the history of prior domestic violence. Harrell and Smith (1996) examined both duration and severity of abuse which occurred in the relationship prior to filing the PO. They found no effect for the duration of prior abuse, but they did identify prior severe abuse as being predictive of more severe post-PO violence.

In this study, we sought to add to existing knowledge concerning effectiveness of protective orders by estimating the relative risk of re-abuse for women who have received protective orders. To provide a good index of effectiveness, we decided to use a 2-year follow-up period—a longer time frame than typically has been used. We also sought to examine the impact of socioeconomic status (SES) on re-abuse, which has been ignored in prior research. Below we outline our rationale for assessing certain SES, family, and legal intervention variables that may impact the likelihood of re-abuse after a PO has been issued.

## ASSESSING THE RISK OF RE-ABUSE

### Socioeconomic Status

There are compelling reasons for expecting that SES may influence the likelihood of re-abuse following a PO. First, women often remain with abusive partners out of economic necessity (Chaudhuri and Daly, 1992; Giles-Sims, 1983); similarly, many women return to abusive relationships for financial reasons (Giles-Sims, 1983). Women who are economically dependent on their abusive partner typically wield little power in the relationship, which makes them incapable of imposing costs on their abusive partner to end the violence (Gelles, 1983).

Second, economic resources outside the home are linked to the use of violence inside the home. Studies comparing men with low SES to men with relatively higher SES find that the low SES men are more likely than their higher resource counterparts to use violence in the home. The abuse may be precipitated by financial anxiety and/or frustration, or it might reflect a tactic for balancing power in the home (Gelles, 1972; O'Brien, 1971; Straus, 1990; Tauchen *et al.,* 1991). In other words, research has shown that men with low resources are more likely than their high resource counterparts to use marital violence.

A third reason why SES may be related to the effectiveness of POs is that men with low SES are also less easily deterred by legal sanctions. Research on effectiveness of arrest for reducing domestic violence reveals that employed men are more likely to discontinue abuse than unemployed men (Sherman *et al.,* 1992). Employed men are believed to have a higher "stake in conformity," meaning they have more to lose by being arrested than their unemployed counterparts.

In sum, low SES men are more likely to use violence and are less likely to be deterred than higher-SES men. Women low in resources are, by definition, more economically dependent than higher-SES women, and thus less able to leave their partners. Consequently, we hypothesized that women who were higher in SES should be less likely to report re-abuse after filing a protective order than their lower SES counterparts.

### Intervention Characteristics

Although this topic is still being debated (e.g., Buzawa and Buzawa, 1996), the experience of arrest has been shown to decrease the probability of recidivism for at least some offenders (Sherman and Berk, 1984; Sherman *et al.,* 1992). Furthermore, studies on the relation between the experience

of arrest and perceived costs of future arrest show that being arrested increases the perceived likelihood and severity of future consequences in abusive men (Dutton *et al.,* 1992). In turn, this has been shown to reduce the likelihood of engaging in domestic violence (Williams, 1992; Williams and Hawkins, 1992). This means that men who have been arrested should, on average, be less likely than their never arrested counterparts to engage in domestic violence because having experienced arrest, they have a heightened sense of fear about another arrest. Because arrest has been shown to reduce the likelihood of domestic violence, we hypothesized that men who had been arrested for domestic violence prior to the issuance of a PO should have lower rates of future violence than men who had POs only. Stated another way, prior arrest should be a significant predictor of the success of POs.

If arrest reduces domestic violence for some men because they fear the consequence of continuing their abuse, then it follows that women who file permanent POs rather than just getting temporary restraining orders may be more likely to experience relief. The primary differences between a temporary and a permanent PO are that temporary POs may be obtained "*ex parte*" (by the victim alone) without the offender appearing in court and temporary POs are only in effect for about 30 days, until a court hearing can be set and a permanent order can be obtained. Permanent orders require the perpetrator's (legally labeled as "respondent") presence in court and are typically in effect for 12 months. If going to court has the effect on the offender of increasing the perceived likelihood of punishment, and there is evidence that suggests it does (Harrell *et al.,* 1993), then we would expect the permanent order to result in lower rates of re-abuse than a temporary order alone.

Another plausible reason to expect that filing a permanent protective order may decrease re-abuse is that a victim's willingness to go through the time consuming and difficult process of going to court may be an indicator of the woman's resolve to free herself from the violent relationship. A woman's resolve to leave the relationship may be an important element in ending the abuse (Giles-Sims, 1983). If this is the case, women who go to the trouble of obtaining a permanent order may be more likely to experience relief, even if only because they are more determined to make changes in the relationship. Based on these expectations, we hypothesized that women who filed permanent protective orders should be more likely to experience relief than women who filed only temporary orders of protection.

## Family Characteristics

As discussed above, men who feel they have more to lose from continuing their abusive behavior may be less likely to continue the abuse. In

Dutton *et al.*'s (1992) research, men who had experienced arrest were more concerned that future abuse might result in damaging their relationship than never-arrested men. Men who believe that arrest might result in the loss of a spouse or partner, may be less likely to engage in future abuse (Williams, 1992; Williams and Hawkins, 1992). To the extent that an abusive man feels a sense of investment in a relationship, fear of losing that relationship may influence the likelihood of future violence. Simply put, the more invested a man is in his family, the less likely he may be to continue to abuse his partner if he feels that doing so may negatively impact the relationship. What these findings indicate is that arrest may be most effective for men who feel more investment in their families, and thus face a greater sense of loss than men who feel less investment. We hypothesized that relationship investment, operationalized as length of relationship, and presence of children should all be negatively related to the likelihood of re-abuse.

## METHOD

### Data

The data came from two sources: (1) court records were reviewed at the Travis County (Texas) courthouse, and (2) police reports were gathered from the files of the Austin Police Department (APD), which included records from the Travis County sheriff's office. Travis County, in which Austin is located, is primarily urban and has a population of approximately one million people.

A systematic sample of petitions filed between 1990 and 1992 was collected. Because of the large number of court orders filed for the 3-year period of the study (over 1400) and the time-consuming process of going through court files, the sample we collected was limited to all protective orders filed during the months of January, August, and October during each of the 3 study years. The initial sample had 348 cases, representing the total number of protective orders filed in the Travis County municipal court during the 9 target months included in the study. Of those 348 cases, 33 were excluded for one of the following reasons: (a) same sex couple; (b) men filing POs against women; or (c) parent, aunt/uncle, or sibling filing against consanguineous kin. In addition, two cases were excluded due to extraordinary circumstances. One woman was institutionalized in a mental hospital just after filing, and the second committed suicide shortly after filing. Consequently, the court sample included 313 cases in which a protective order was filed in municipal court. In 210 of those cases, the couples

also had police records before the PO was filed. Therefore, the final sample consisted of 210 couples in which police records could be examined from 2 years prior to the PO to 2 years after.

## Measures

Both the court and police records were analyzed to obtain basic demographic information, relationship histories, and histories of abuse and police involvement. Court records included demographic information, information on children, relationship history, as well as whether or not a permanent PO was obtained. Police records were analyzed to determine history of police contacts for physical abuse and arrests for domestic violence. Table I presents the descriptive statistics for the sample. In order to ensure maximum reliability, a consensus method was employed in the coding. Each police record was coded independently by two trained coders. Where inde-

**Table I.** Descriptive Statistics for the Sample ($N$ = 210)

| Variables | $N$ | Percentage[a] |
|---|---|---|
| Victims' race | | |
| White | 71 | 34% |
| Black | 66 | 31% |
| Hispanic | 72 | 34% |
| Victims' SES | | |
| Medium SES | 56 | 29% |
| Low SES | 74 | 38% |
| Very Low SES | 64 | 33% |
| Perpetrator arrested prior to PO | | |
| Yes | 149 | 71% |
| No | 61 | 29% |
| Number of years together | | |
| <1 year | 52 | 25% |
| 1–2 years | 62 | 29% |
| 3–4 years | 43 | 20% |
| ≥5 years | 34 | 16% |
| Presence of biological children | | |
| Yes | 70 | 35% |
| No | 131 | 65% |
| PO status | | |
| Permanent | 147 | 70% |
| Temporary | 63 | 30% |

[a]Percentages may not add up to 100 due to rounding or missing data.

pendent codings did not agree, the discrepant ratings were discussed and the appropriate categorization was decided on the basis of consensus.

### *Demographic Variables*

The demographic variables included in this study were the age, the race, and the SES of the victim. Because all victims were female and all perpetrators were male, no sex variable was needed. The women's SES were estimated using median family income from block level census tract data. The focus of the research was on the victims' resources, and it is the victims' addresses which were used to identify their census tract. However, because 90% of the victims lived with their partner at some point prior to filing a PO, it is likely that the measure was also indicative of their partner's SES. SES was coded into one of the following categories: (1) *Very Low SES* (annual family income <$18,000); (2) *Low SES* ($18,000 to <$28,000); or (3) *Medium SES* ($28,000 to $42,000).

### *Family Variables*

The three family variables assessed were marital status, length of relationship, and presence of biological children. Length of relationship was coded as a categorical variable indicating the number of years the victim reported being in a relationship with the perpetrator prior to filing for a PO (<1 year, 1 to 2 years, 3 to 4 years, and 5 or more years). Number of biological children that the woman and perpetrator had together was noted in the court records and a distinction was made between biological children of the couple and children brought to the relationship by either partner. Thus, the variable indicating number of children refers only to the biological children of the perpetrator and victim, not step-children.

### *Intervention Variables*

Two intervention variables were included: arrests and whether the PO was temporary or permanent. Police reports indicated whether or not an arrest was made before the PO was issued. Men were arrested for several reasons, including family violence (assault by contact or threat), outstanding traffic warrants, and public intoxication or drug possession. However, an arrest for any of the above reasons was included in the analyses as "prior domestic violence arrest" as long as it took place prior to a PO and as a

result of a domestic disturbance call. The second intervention variable, "PO status," is a dichotomous variable indicating whether or not a victim filed a temporary or permanent PO.

### *Re-abuse*

The dependent variable for this study is reported re-abuse following a protective order. Re-abuse was defined as any *physical* violence reported to police that occurred after a temporary or permanent protective order had been filed. The specific actions which constitute physical violence were determined using the Conflict Tactics Scale (Straus, 1979) and included such actions as "slapped," "kicked," "hit," "beat up," and "threatened with or used knife or gun." Because 90% of the cases of re-abuse involved two or fewer offenses, a dichotomous variable was created so as to indicate whether or not any violence was reported to police, subsequent to filing.

### *Analyses*

Given that the dependent variable was a binary variable, we used multivariate logistic regression to estimate the probability that a victim was re-abused following a protective order. Logistic regression is analogous to Ordinary Least Squares (OLS) regression, except that the coefficients are expressed as the change in log odds of Y (in this case, re-abuse) for every unit change in $X_k$, net of other predictors (see DeMaris, 1995). Log odds are difficult to interpret so the odds ratios for predictors are reported in parenthesis in order to provide a more easily interpretable measure of relative risk for re-abuse. The odds ratios, as their name implies, are the ratio of the odds of re-abuse for each category of an independent variable. For example, the odds ratio of 3.47 reported for African-Americans in Table III refers to the difference in the odds of re-abuse between blacks and whites (the omitted category) and would be interpreted as follows: Odds of re-abuse (black)/Odds of re-abuse (white) = 3.47. Thus, all else being equal, the odds that a black woman reports re-abuse is 3.47 times greater than the odds that a White woman reports re-abuse.

## RESULTS

In the following section we report results from three different kinds of analyses. Each type of analysis examines the effectiveness of protective

orders in a different light. First, we compare the rates of physical abuse reported prior to filing a PO and after filing a PO for different groups of women. Second, in order to assess the relative risk of re-abuse for various categories of women (such as racial categories), while holding other factors constant (such as SES), we report the results of multivariate logistic regression analyses. Finally, in order to examine closely race and class differences in re-abuse following a PO, we report the conditional probabilities of re-abuse for select groups.

## Physical Violence Reports Before and After POs

Table II displays the percentages of women reporting pre- and post-PO physical abuse by select categories. Police records revealed that 68% ($n$ = 142) of the women in the sample reported some form of physical violence in the 2-year period preceding acquisition of a PO. However, during the 2-year period after the PO, only 23% ($n$ = 49) of the women reported being subjected to re-abuse. Using a difference in proportion test (two-tailed), we determined that the number of women reporting physical

**Table II.** Percentage Reporting Physical Violence Before and After PO by Select Groups

| Groups ($N$) | Before PO | After PO | % Decline[a] |
|---|---|---|---|
| All Women (210) | 68% | 23% | 66% |
| SES | | | |
| Very Low (64) | 70% | 33% | 53% |
| Low/Medium (130) | 65% | 19% | 71% |
| Intervention type | | | |
| Arrest (126) | 87% | 25% | 71% |
| No Arrest (84) | 38% | 21% | 45% |
| Perm. PO (152) | 66% | 21% | 68% |
| Temp. PO (54) | 65% | 31% | 52% |
| Family Characteristics | | | |
| ≥5 years together (34) | 59% | 9% | 85% |
| <5 years together (176) | 76% | 26% | 66% |
| Children (73) | 68% | 33% | 51% |
| No Children (137) | 67% | 18% | 73% |
| Race | | | |
| Black (66) | 76% | 38% | 50% |
| White (72) | 56% | 15% | 73% |
| Hispanic (72) | 68% | 18% | 74% |

[a]All are statistically significant declines (two-tailed; $p < .05$).

abuse declined by 66% after filing a PO—a statistically significant decline ($p < .01$). For the 142 couples who reported physical violence *prior* to the PO, the average number of reported incidents was 1.58. For the 49 cases indicating violence had occurred *after* the PO, the average number of incidents was 1.59. Therefore, it appears that the PO affects whether a person chooses to be violent or not, but it does not impact the average rate of abuse for those who remain violent.

## The Impact of Risk Factors

Very low SES women were more likely than low and medium SES women to report violence both before and after filing the PO. Furthermore, Table II shows that although the proportion of low and medium SES women reporting physical violence declined by 71%, the decline in reporting was only 53% for their very low SES counterparts, a significantly smaller decline ($p < .05$).

Of the cases in which the men had been arrested, 87% of the women reported abuse prior to obtaining a PO. However, only 25% of them experienced re-abuse following a PO. This change reflected a 71% decrease in reported violence. Of the women whose partners had never been arrested, 38% reported prior abuse and 21% reported physical abuse following the PO. This difference represented a 45% decline but is significantly smaller than the decline in reported abuse among women whose partners were arrested ($p < .05$).

With regard to the type of PO obtained, analyses compared re-abuse for those women who only obtained a temporary PO versus those who obtained a permanent one. Only 21% of the women who obtained the year-long PO reported re-abuse, in contrast to 31% of the women who filed a temporary PO. When taking into account the percent of women who reported pre-PO violence, permanent POs were associated with a 68% decrease in reported violence, which is significantly greater than the 52% decrease reported by women with temporary POs ($p < .05$).

Relationship investment was measured by assessing length of time in relationship and presence of biological children. To make the comparison clearer, we collapsed length of relationship into a dichotomous variable of less than 5 years vs. 5 or more years together. For those couples who had been together for 5 or more years the decrease in reported violence was 85%, which is significantly larger decrease than for the short-term relationship women who reported a 66% decrease in abuse following a PO ($p < .05$). With regard to the impact of children, we found that women with

children experienced a significantly smaller decline (51%) in abuse than their childless counterparts (73%) following the issuance of a PO ($p < .05$).

Although we made no predictions for the effect of race on re-abuse, analyses did reveal that Blacks were significantly more likely to report physical violence than either Whites or Hispanics both *before* ($\chi^2[2] = 7.4$, $p < .05$) and *after* the PO ($\chi^2[2] = 10.8$, $p < .01$). Seventy six percent of the African-American women reported physical abuse before filing; whereas 38% reported abuse following the PO. This was a 54% decline and this was significantly smaller ($p < .05$, two tailed) than the decline observed in the White (73%) or Hispanic (74%) cases.

## Predicting Relative Risk of Re-Abuse

We hypothesized that certain demographic, family, and legal intervention variables should all be negatively related to reports of re-abuse. In Table III, Model 1, we address these hypotheses by estimating the relative effects of SES and intervention variables on reported physical abuse following POs. The coefficients reported in Table III represent the impact of each variable on the log odds of re-abuse. For example, the coefficient reported for victim's age (a continuous variable) represents the change in log odds of reporting post-PO abuse associated with a 1-unit increase in the predictor variable. So as age increases reported re-abuse decreases, albeit at a slow rate.

The possible effect of the victim's race was examined in the model by the coefficients representing the difference in the log odds of re-abuse between Blacks or Hispanics (Whites was the omitted category). The value 1.24 for Black means that, all else being equal, the log odds of re-abuse for blacks is 1.24 times higher than the log odds of re-abuse for whites. In Table III, Model 1, the odds ratio (in parenthesis) of 3.47 for Black indicates that the odds of reporting re-abuse are more than three times higher for Blacks than for Whites. Hispanics did not show a similar elevated rate of re-abuse, when compared with Whites.

Model 1 in Table III also shows that, as hypothesized, SES had a significant, estimated negative effect on reporting re-abuse. Compared with the lowest SES group, women in the highest SES group were less likely to report re-abuse ($p < .05$; odds ratio = .35). Also as predicted, women in long-term relationships (more than 5 years) were less likely to report re-abuse. The odds ratio of .117 ($p < .01$) indicates that the odds of a woman in a long-term relationship reporting re-abuse is approximately one tenth of the odds that a woman who has been with her partner for 1 year or less

**Table III.** Logistic Regression Analyses for Re-Abuse (Odds-Ratios in parentheses)

| | Model 1 | Model 2 |
|---|---|---|
| Demographic variables | | |
| Age | −.017 | −.024 |
| | (.982) | (.977) |
| Black[a] | 1.24** | 1.30** |
| | (3.47) | (3.67) |
| Hispanic | −.273 | −.182 |
| | (.761) | (.834) |
| SES | | |
| Low | −1.05* | −2.49** |
| | (.350) | (.083) |
| Medium | −.456 | −1.48* |
| | (.634) | (.228) |
| Intervention variables | | |
| PO Status | −.597 | −.592 |
| (1 = perm PO) | (.550) | (.553) |
| Prior Arrest | −.299 | −1.42* |
| | (.741) | (.242) |
| Family variables | | |
| Children | 1.34** | 1.34*** |
| | (3.81) | (3.83) |
| ≥5 years together | −2.15** | −2.10** |
| | (.117) | (.122) |
| <5 years together | −.567 | −.712 |
| | (.568) | (.491) |
| Interaction terms | | |
| Prior arrest × Low SES | — | 2.32* |
| | | (10.13) |
| Prior arrest × Med SES | — | 1.53 |
| | | (4.62) |
| Constant | −.0403 | .9123 |
| Percent correct | 78.4% | 79.5% |
| Chi-square (df) | 36.22*** (10) | 41.42*** (12) |

[a]Omitted categories are White, very low SES, and less than 1 year, respectively.
*$p < .05$.
**$p < .01$.
***$p < .001$

reports re-abuse. This supports our hypothesis that length of relationship is negatively related to reported re-abuse.

Although we hypothesized that presence of biological children should reduce the likelihood of re-abuse, the opposite was found. The odds of re-abuse for women who have biological children with their abusive partner

was nearly four times higher than for other couples ($p < .01$) as can be seen in Table II (Model 1).

Also contrary to our expectations were the findings that neither arrest nor permanent PO status were significantly related to the risk of post-PO abuse with the total sample. However, as discussed above, prior research indicated that legal intervention (e.g., arrest) might be more effective for different types of offenders (Sherman *et al.,* 1992). In order to test for this possibility, we included interaction terms in Model 2 (Table III) which allow Arrest and SES to vary independently. The significant coefficients of the interaction terms indicate that a prior arrest may lead to a decline in re-abuse for some women and not others.

Table IV provides more detail about the aforementioned differences by estimating separate models for the different categories of SES. In order to compare the experiences of women in the very low SES category with

**Table IV.** Logistic Regression Analyses for Re-abuse Within SES

| | Very low SES | Low/Med SES |
|---|---|---|
| Demographic variables | | |
| Age | −.046 | −.021 |
| | (.954)[a] | (.979) |
| Black[a] | 2.30** | 1.13 |
| | (10.0) | (3.10) |
| Hispanic | .188 | −.145 |
| | (1.20) | (.865) |
| Intervention variables | | |
| Prior arrest | −1.74* | .580 |
| | (.175) | (1.79) |
| PO Status | −1.67* | −.239 |
| (1 = perm PO) | (.188) | (1.27) |
| Family variables | | |
| Children | 1.27 | 1.51** |
| | (3.55) | (4.51) |
| ≥5 years together | −8.88 | −1.99* |
| | (.0001) | (.137) |
| <5 years together | −.419 | −.874 |
| | (.657) | (.417) |
| Constant | 1.8 | −1.74 |
| Percent Correct | 76.2% | 81.9% |
| Chi-Square(df) | 18.17 (8) | 21.08 (18) |

[a]Odds-ratios are in parentheses.
[b]Omitted categories are White, and less than 1 year, respectively.
*$p < .05$.
**$p < .01$.

all other women in the sample, low and medium SES were combined in Table IV. The two models in Table IV indicate that risk factors for re-abuse differ depending on the SES of the victim, and perhaps, the offender. For the victims in the lowest SES category, filing permanent POs and having partners who were arrested significantly reduced the odds of reporting post-PO abuse. The estimated effects of arrest and filing a permanent order of protection were quite substantial for the lowest income group (odds ratio = .175 and .188, respectively). Very low SES women whose partners were arrested or who filed permanent orders were more than five times less likely to report post-PO abuse than women whose partners had not been arrested, or women who had only temporary orders of protection. The largest difference in reporting re-abuse among the very low SES women was between Black and White women. The odds for Blacks reporting re-abuse were 10 times higher than for Whites of comparable SES ($p < .01$).

For women in the low and medium SES groups, length of relationship was negatively related and presence of children was positively related to re-abuse. Women who had been with their partners for 5 or more years were approximately seven times less likely to report re-abuse than women who had been with their partners for less than 5 years ($p < .05$; odds ratio = .137). Consistent with Model 1 in Table III, presence of children appears to increase the odds of reporting re-abuse by a factor of 4.5 ($p < .01$).

### Conditional Probabilities of Re-abuse

To further illustrate the impact of SES on the effectiveness of POs we calculated the following conditional probabilities. Using the regression model for very low SES women in Table IV we estimated the change in probability of re-abuse as a result of legal intervention. For very low SES women in the sample, legal intervention resulted in a reduction of reported re-abuse, although the difference was much greater for White than for Black women. For very low SES white women who had only temporary POs and whose partners had never been arrested, the probability that those women reported re-abuse was .83. In contrast, for those women whose partners had been arrested and who filed permanent POs, the probability of re-abuse was only .14. For the black women the likelihood of re-abuse was higher, with the corresponding probabilities being .98 and .63.

## DISCUSSION

Despite the common perception that POs are ineffective, this study provides new evidence indicating that there is indeed merit to this legal

tool for combating domestic violence. Overall, there was a 66% decrease in police contact when comparing reports of physical assaults in the 2 years prior to the PO compared to the 2 years post PO. This finding is consistent with the five studies discussed earlier (Chaudhuri and Daly, 1992; Grau *et al.,* 1985; Harrell and Smith, 1996; Horton *et al.,* 1987; Klein, 1996), which also found that POs are likely to reduce physical violence. But despite the fact that POs "worked" for a majority of the women based on the criterion of subsequent police reports, the orders of protection failed in 23% of the cases. It is essential for the safety of women who seek POs to understand why some men may violate the orders and re-abuse their partners. Because of our sample characteristics and size, we are able to provide some important new information concerning those risk factors.

## Risk Factors for Re-abuse

Three categories of risk factors for re-abuse were examined in this study: demographic, relationship, and legal intervention. Variables in each of the cagetories were found to be useful in predicting re-abuse following a PO. Socioeconomic status was consistently negatively related to re-abuse, as indicated by the fact that very low SES women were more likely to report re-abuse than their higher SES counterparts. Black women were more at risk than White or Hispanic women. With regard to relationship investment, being in a long-term relationship was associated with lower rates of reported re-abuse, but only for women in the two higher SES groups. Contrary to our hypothesis, presence of children was positively related to re-abuse. In fact, there was a rather sizable estimated effect associated with the presence of biological children. Having children with the abusive man increases a woman's estimated odds of reporting re-abuse nearly four times. Finally, perpetrator arrest before the PO, as well as the filing of a permanent PO, reduced reported re-abuse for the lowest SES women.

There are several possible explanations for why these risk factors impact rates of re-abuse. We begin with discussing the impact of the legal sanctions. Previous research from the social control/deterrence perspective has found that when men are arrested for abuse, the power structure of the home changes such that women report gaining power, and men report losing power. This increase in the woman's relative power is, in part, the result of her ability to make the private event public by involving law officers and thereby increasing her partner's fear of negative consequences (e.g., making the abuse public, losing the relationship) (Dutton *et al.,* 1992).

The reasons why arrests impact violent men may also apply to perma-

nent POs. Protective orders in effect for 1 year may heighten a victim's power in the relationship by increasing the time frame with which the negative consequences are linked to the partner's abusive behavior. In addition, acquiring a permanent PO also typically requires a court hearing in which the abusive man must face a judge. But similar to the findings of Klein (1996) and Harrell and Smith (1996), permanent POs were not uniformly more effective than temporary ones. Only when analyzed in conjunction with SES did the length of the PO have a significant effect, with the low SES women benefiting from permanent orders. There are several possible explanations. Perhaps the women who persevered and went to the trouble of acquiring a permanent order differed on some personality characteristic, severity of violence experience, or some other factor that we were unable to assess. Alternatively it is possible that going to court may increase the perceived sanctions associated with the order, such that low SES women may disproportionally gain from the increased power in the relationships. These women may achieve more safety from permanent POs than higher-SES women because of the perpetrators' perceptions about the likelihood and severity of future punishment.

Based on the deterrence perspective, it was predicted that arrests would be less effective for the poor because people of low SES have less to lose. And, in fact, the higher SES men in this study were less likely to violate POs than their lower SES counterparts. However, filing a permanent PO, as well as arresting offenders, may provide the additional threat of punishment necessary to deter men who are typically more difficult to deter.

It should be remembered though, that arrests are not a panacea. As has been shown in arrest studies, some men may become more violent following legal intervention (e.g., Schmidt and Sherman, 1996). Until more information can be obtained about the relation between arrest, PO status, and re-abuse, it would be imprudent to step up efforts to increase arrests. Another concern about arrests is that researchers have found that mandatory arrest policies result in an increase of dual arrest of both victims and perpetrators (Martin, 1997).

In addition to SES, the other demographic variable that was associated with differential re-abuse rates was race/ethnicity. Black women were much more likely to be re-victimized than White or Hispanic women. Although there were no data available to reveal the particular dynamics operating in the Black families, the magnitude of the effect indicates that differences associated with race/ethnicity should be a prime consideration in future investigations.

The two relationship variables that we examined were both associated with risk of re-abuse. Relationship investment, as measured in terms of length of relationship, turned out to be an important predictor of re-

abuse. We found that low and medium SES women who were with their partners for 5 years or more, were less likely to report re-abuse than women in new relationships (less than 1 year). Following the social control perspective, men in long-term relationships may feel they have more to lose, and thus may be somewhat more easily deterred from re-abusing their partners.

Presence of children was also significantly related to likelihood of re-abuse. In general, women with children were more likely to report re-abuse than women with no children. However, this was a function of the length of time in the relationship. When compared with women in short-term relationships, women in long-term relationships (5 years or more) were unlikely to report post-PO abuse, regardless of whether or not they had children. Of the 34 women reporting a long-term relationship with the perpetrator, 62% had borne children with the men, but only 9% reported re-abuse. However, among women in relationships for less than 5 years, those with children were much more likely to report re-abuse. Forty two percent of the women in short-term relationships with children reported re-abuse; only 19% of the women without children reported re-abuse. These data indicate that presence of children leads to greater risk of abuse for women who were in relationships for less than 5 years, but not for those women in longer relationships. This finding should be considered preliminary until it can be replicated.

Why is the presence of biological children associated with greater rates of re-abuse? For one, it is likely that there are strong emotions and conflict surrounding parenting, visitation, and custody issues. Second, in most cases, having children forces the victim to continue to have more contact with the perpetrator. Similarly, victims who are also mothers may be less able to move away from the perpetrator than other women. A third type of reason for the greater levels of re-abuse of mothers with young children could be related to the continuing affectional ties derived from a long-term relationship and perhaps desires for their children to have some relationship with their fathers. These feelings may result in some ambivalence about terminating the relationship with their partners and consequently elicit the wrath of the perpetrator more than women who do not have children.

One clear implication from this study is that greater care and attention needs to be paid to how the court deals with child custody issues in these cases. If child-exchanges and non-custodial parent visitation is the major source of contact between former partners and it leads to violence, then the practice needs to be amended. The use of supervised child exchange centers is one major way of diffusing a potentially dangerous situation.

## Directions for Future Research

One apparent limitation of this study is the reliance on police reports to determine the effectiveness of POs. Police reports or other official records to estimate the amount of violence occurring in a family has been criticized for underreporting the incidence of past abuse (Dobash *et al.,* 1992). However, we believe that police reports are useful and appropriate for at least three reasons. First, previous studies that use police reports have found that they do not bias the results. When police records are compared with data gathered from other sources (e.g., victim reports, court records), police reports "reveal the same causal factors as data from other likely sources" (Berk and Newton, 1985, p. 257). Second, comparisons of police data with victims' self-report data concerning re-abuse following arrest has shown no significant difference between the two sources nor does it change the substantive conclusions (Sherman and Berk, 1984). Finally, although police reports of violence are admittedly a conservative criterion with which to determine re-abuse, that is also the criterion that is used to inform criminal and social policy.

A limitation of this research, as well as most of the existing studies, is the lack of a control group (i.e., victims of domestic violence who received no legal intervention at all). Without comparing couples who have POs with similarly violent couples who do not have POs, the results concerning the effectiveness of POs found in this study should be interpreted with caution. For example, in order to determine the unique contribution of a PO to deterring further violence, it would be useful to track men who were arrested for domestic violence but their partners did not obtain a PO with men whose partners obtained POs. Until such a study is conducted, we cannot be certain as to the effectiveness of a PO.

Another limitation of this study was missing information that could not be found on court or police records. Because we could not determine where the victims were living after obtaining the POs, it is unclear whether some of the women continued to live with, returned to, or lived in proximity to their abusive partner. In addition, we could not ascertain whether some of the perpetrators were ordered by the court to obtain counseling (which is sometimes mandated on the PO), which may have in turn reduced the likelihood of post-PO violence. Future research should seek to determine the victim's place of residence, as well as the content of the PO in order to ascertain additional factors which may influence the likelihood of re-abuse.

It would also be useful to test some of the speculations we have made by collecting data from violent men. For example, interviews about their understanding of protective orders and reasons for either honoring or ignoring the order would be revealing. It would also be useful to learn

the perpetrators' perspective regarding the re-abuse incidents and their assessments of the costs and benefits associated with engaging in violent acts.

This study, as well as Harrell and Smith's (1996) study, found that when a woman has children with her violent partner, she is likely to experience re-abuse. There are potentially serious consequences for children who grow up in violent homes. For example, Hotalling and Sugarman (1986) found that battered women are more likely to have grown up in violent homes than nonbattered women. In addition, it may be the case that children in the homes of these violent couples may be the recipients of physical abuse themselves (Appel and Holden, 1998). Future research should examine the circumstances surrounding the re-abuse, evaluate the causes, such as those suggested above, and determine how often the children are also recipients of physical or psychological maltreatment.

## Conclusion

Protective orders are indeed associated with a reduction of abuse for many women. But at the same time, about one-quarter of the women were re-abused after obtaining a PO. Black and very-low SES women are particularly at risk for re-abuse. The differences in conditional probabilities of re-abuse revealed that legal intervention appears to substantially reduce the likelihood of re-abuse for very low SES women. Thus, it appears that going through the court system and obtaining a permanent PO helps those women who need it the most—women who are victims of both poverty and domestic violence. This study has provided evidence demonstrating that the court's relatively recent efforts at combating domestic violence through the use of protective orders is beneficial to many victims. However, this study has also shown once again that the determinants of domestic violence are complex. The criminal justice system needs to take into account demographic factors, as well as family characteristics, in its quest for effective domestic violence intervention.

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# The NO MÁS Study: Domestic Violence and Sexual Assault in the U.S. Latin@ Community

*Commissioned by the Avon Foundation for Women*
*for Casa de Esperanza: National Latin@ Network and NO MORE*

LAKE RESEARCH PARTNERS
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# Background and Partner Organizations

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Strategy Precision Impact

national latin@ network
casa de esperanza

# Partner Organizations

- **Casa de Esperanza** has over 30 years of experience working to mobilize Latin@s and Latin@ communities to end domestic violence. In October, 2011, Casa de Esperanza was awarded the Family Violence Prevention and Services Discretionary Grant from the Department of Health and Human Services, which designates the organization the National Latin@ Institute on Domestic Violence. As a national institute, Casa de Esperanza is a member of a nationwide network that works to support family violence, domestic violence, and dating violence intervention and prevention efforts across the country. The work falls under a division of Casa de Esperanza called the National Latin@ Network for Healthy Families and Communities and addresses four primary issues that include:
  - Increasing meaningful access to services and support for Latinas experiencing domestic violence
  - Producing culturally relevant tools for advocates and practitioners
  - Conducting culturally relevant research that explores the context in which Latin@ families experience violence
  - Interjecting the lived realities of Latin@s into policy making processes so that laws and policies better support Latin@ families
- The National Latin@ Network addresses these challenges through approaches that include multidimensional public policy initiatives, research studies that promote strategies that work on the ground and models proven effective through rigorous academic studies, as well as training focused on expanding the field's capacity to support Latin@s.
- **Casa de Esperanza uses "@" in place of the masculine "o" when referring to people or things that are gender neutral or both masculine and feminine. This usage reflects our commitment to gender inclusion and recognizes the important contributions of both men and women.*

# Partner Organizations

- **Avon Foundation for Women** commissioned and funded the NO MÁS Study to research domestic violence and sexual abuse among Latinos, in an effort to further support the Foundation's mission of educating people to reduce domestic violence and sexual assault.

  Avon is a global corporate leader in philanthropy focused on causes that matter most to women. Through 2014, Avon global philanthropy, led by the U.S.-based Avon Foundation for Women, has contributed nearly $1 billion in over 50 countries. Avon's funding is focused on breast cancer research and advancing access to quality care through the Avon Breast Cancer Crusade, and efforts to reduce domestic and gender violence through its Speak Out Against Domestic Violence program. Visit www.avonfoundation.org for more information.

- **NO MORE is a public awareness campaign designed to engage bystanders around ending domestic violence and sexual assault.** Launched in March 2013 by a coalition of leading advocacy groups, service providers and major corporations, NO MORE is supported by hundreds of national and local groups and by thousands of people who are using its signature blue symbol to increase visibility for these hidden issues. Learn more about NO MORE or download our free tools at www.nomore.org. And for regular updates, follow NO MORE on Twitter (https://twitter.com/nomoreorg) Facebook (https://www.facebook.com/NOMORE.org) and Instagram (https://instagram.com/nomoreorg).

# Methodology

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casa de esperanza

# Survey Methodology

- Lake Research Partners designed and administered a telephone survey that was conducted January 27th – February 10th, 2015. The survey reached a total of 800 Latin@s nationwide, ages 18 years and older, including oversamples of 100 recent immigrants (in the last five years) and 100 Latin@s ages 18 to 30 years old. The oversamples were weighed down into the base to reflect their proportion of the population.
- 30% of the interviews were conducted in Spanish. Telephone numbers for the survey were drawn using random digit dial (RDD) among census tracts and respondents were screened as Latin@.
- The data for the base sample was weighted slightly by gender, region, age, and education to reflect the attributes of the actual population. The data for the recent immigrant and under 30 oversamples were weighted slightly by gender.
- The margin of error for the total sample is +/-3.5%. The margin of error is higher for sub-groups depending on their size.

# Quantitative Research Statement of Limitations

- The survey sample was designed to ensure adult Latin@s had an equally likely chance of getting into the survey. The survey included cell phones and interviews were conducted in Spanish and English.
- Although great efforts were made to obtain a representative sample of Latin@s within the United States, it cannot be guaranteed that all sub-populations of Latin@s are represented (e.g., Latin@s who only speak indigenous languages, Latin@s without access to a phone).
- Participation is voluntary and respondents in the sample were able to decline participation.
- Respondents were allowed to give "don't know" as a response.
- Only those who were available for interviews from January 27th – February 10th, 2015 are included.
- In survey research, it cannot always be guaranteed that each individual is interpreting the item in the same way; however; definitions were provided for clarity and the survey instrument was scripted so the items were delivered the same way to all participants.

# Key Findings: THE PROBLEM

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# DOMESTIC VIOLENCE AND SEXUAL ASSAULT ARE VERY TROUBLING REALITIES IN THE U.S. LATIN@ COMMUNITY.

- More than half of the Latin@s (56%) in the U.S. know a victim of domestic violence.
  - Nearly two-thirds of Latina women (62%) know a domestic violence victim
  - Nearly half of Latino men (49%) know a domestic violence victim
- One in four Latin@s (28%) knows someone who was a victim of sexual assault.
  - More than a third of Latina women (35%) know a victim of sexual assault
  - One in five Latino men (21%) knows a victim of sexual assault
- These problems are already impacting the next generation.
  - Nearly half of Latin@s under 30 years old (49%) know a victim of domestic violence
  - 44% of Latin@s under 25 years old know a victim of domestic violence
  - One in four Latin@s under 30 years old knows a victim of sexual assault
  - 27% of Latin@s under 25 years old know a victim of sexual assault
- In the U.S. Latin@ community, domestic violence and sexual assault are serious issues affecting families and friends. Of those who knew a victim, the majority reported that the victim was a family member or friend.

# LATIN@S BELIEVE THAT THESE ISSUES ARE BIGGER PROBLEMS IN THE U.S. AT LARGE THAN IN THEIR OWN COMMUNITY.

- While there is a significant level of awareness of domestic violence and sexual assault in the U.S. Latin@ community, Latin@s believe that domestic violence and sexual assault are bigger problems in the U.S. at large than in their own community.
- Three-quarters rate domestic violence and sexual assault as a problem in the United States at large, while 55% rate it as a problem in the Latin@ community.
- An overwhelming majority of the Latin@ community believes *drugs and alcohol abuse* are the leading cause for domestic violence and sexual assault in the United States, followed by lack of good parenting and education in the home.
- *Lack of respect for the opposite sex* was seen as a bigger driver of domestic violence and sexual assault than *traditional gender roles*.
  - However, Latin@s are more likely to see traditional male gender roles as a cause of domestic violence and sexual assault within the U.S. Latin@ community than they are to see it as a cause within the United States as a whole.

# FEAR OF DEPORTATION IS A TOP REASON LATIN@ VICTIMS MAY NOT COME FORWARD.

- Latin@s believe fear is a major barrier to seeking help and fear of deportation is the top reason Latin@ victims may not come forward.
- Fear is preventing victims from coming forward to seek help.
  - 41% of Latin@s believe the primary reason Latin@ victims may not come forward is fear of deportation
  - 39% of Latin@s say the primary reason Latin@ victims may not come forward is fear of more violence for themselves and their family
  - 39% of Latin@s say the primary reason Latin@ victims may not come forward is fear of children being taken away

# Key Findings: STRENGTHS AND OPPORTUNITIES

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# LATIN@S HAVE ALREADY BEGUN TO ADDRESS THESE ISSUES.

- Nearly two-thirds of Latin@s (61%) who knew a victim of domestic violence, say that they intervened and did something for the victim. Men and women responded similarly.
- Similarly, 60% of Latin@s who knew a victim of sexual assault say they intervened and did something for the victim.
  - 56% of men 62% of women
- 57% of Latin@s report talking about domestic violence and sexual assault with their friends.
  - 53% of men 60% of women
  - Middle-aged Latin@s are more likely than younger Latin@s and those over 65 to have talked about these issues with their friends
- More than half of Latin@ parents (54%) say they have talked about the issues of domestic violence and sexual assault with their children.
- Latina mothers (55%) and Latino fathers (52%) have these conversations in near equal numbers.



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# IMMIGRATION STATUS MAKES A DIFFERENCE.

- Latin@s who immigrated during the 1980s* report knowing victims of domestic violence and sexual assault at significantly higher rates.
  - 68% of those who immigrated during the 1980s know a domestic violence victim, while 41% of recent immigrants know a victim
  - 41% of those who immigrated during the 1980s know a victim of sexual assault, while only 9% of recent immigrants know a victim
  - However, recent Latin@ immigrants, who immigrated from 2009 to the present day, are more likely to see both issues as a bigger problem compared to U.S.-born Latin@s**
- Also 59% of Latin@ immigrants report talking about domestic violence and sexual assault with their children, while only 32% of U.S.-born Latin@s report talking to their children about these issues.

*Small sample size.

**Puerto Rican respondents can be in either category. Some of them identified Puerto Rico as a country of origin.

# THE LATIN@ COMMUNITY IS READY AND WILLING TO GET INVOLVED.

- There is a solid willingness in the Latin@ community to get involved to address domestic violence and sexual assault.
- Nearly two-thirds of all Latin@s (60%) are willing to get involved in efforts to address domestic violence and sexual assault. Of those,
  - 83% are willing to talk to their children and the children in their lives about healthy relationships
  - 79% are willing to speak up or educate if they saw a boy behaving in a disrespectful way to a girl, and vice versa
  - 78% are willing to share information in conversation with family, friends, or neighbors
  - 70% are willing to provide support to a survivor
- More than half of Latin@s (58%) say that having more people talk about domestic violence and sexual assault would make it easier to step in and help.
- More than a third of Latin@s (35%) say nothing would stop them from stepping in to help a domestic violence or sexual assault victim they knew.



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# Key Similarities and Differences Between the U.S. Latin@ Community and the U.S. Population at Large

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# METHODOLOGY COMPARISON

## No Más

- Telephone survey
- Conducted January 27 – February 10, 2015
- 800 Latin@s nationwide, ages 18 and older, including oversamples of 100 recent immigrants (in the last five years) and 100 Latin@s ages 18-30 years old. The oversamples were weighed down into the base to reflect their proportion of the population.
- 30% of the interviews were conducted in Spanish.
- Telephone numbers for the survey were drawn using random digit dial (RDD) among census tracts and respondents were screened as Latin@.

## No More

- Online survey
- Conducted February 21 – 27, 2013
- 1,307 Americans nationwide, ages 15 and older, including Latin@s.
- The survey was conducted using the Knowledge Panel, a large-scale online panel based on a representative random sample of the U.S. population.



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# LATIN@S REPORT SIMILAR LEVELS OF KNOWING A VICTIM OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT COMPARED TO THE POPULATION AT LARGE.

- 56% of U.S. Latin@s report knowing a victim of domestic violence compared with 53% of the U.S. population at large.
- 28% of U.S. Latin@s report knowing a victim of sexual assault compared with 33% of the U.S. population at large.
- Of those who report knowing a victim of domestic violence and/or sexual assault, the majority of U.S. Latin@s and the U.S. population at large say it was a family member or friend.

# HOWEVER, LATIN@S ARE MORE LIKELY THAN THE POPULATION AT LARGE TO INTERVENE FOR A VICTIM.

- Latin@s are more likely to say they intervened and did something for the victim.
- Comparing to the NO MORE survey of all adults, similar numbers of Latin@s and the U.S. population at large feel that nothing would stop them from intervening. The NO MÁS survey offered more choices for Latin@s.
- Latin@s are less concerned about their safety, whereas this is a top concern for the U.S. population at large.

# WHEN IT COMES TO DOMESTIC VIOLENCE AND SEXUAL ASSAULT, LATIN@S ARE TALKING ABOUT THESE ISSUES MORE THAN THE POPULATION AT LARGE.

- Though the survey question wording was slightly different in the original NO MORE survey, comparatively, Latin@s are much more likely than the population at large to say they have talked about issues of domestic violence and sexual assault with their friends and children.
- Over half (57%) of U.S. Latin@s report talking about domestic violence and sexual assault with their friends. In comparison, only 34% of the U.S. population at large say they have had a conversation about domestic violence and/or sexual assault with their friends.

# WHEN IT COMES TO DOMESTIC VIOLENCE AND SEXUAL ASSAULT, LATIN@S ARE TALKING ABOUT THESE ISSUES MORE THAN THE POPULATION AT LARGE.

- Both Latin@ women and men are more likely to have had conversations with friends about sexual assault and domestic violence than their counterparts in the U.S. population at large.
  - 60% of Latina women have had conversations with friends about domestic violence and sexual assault, while 42% of women in the population at large have talked about domestic violence and/or sexual assault with friends.
  - Among men, 53% of Latino men have had conversations with friends about domestic violence and sexual assault, while 25% of men in the population at large have talked about domestic violence and/or sexual assault with friends.
- More than half of Latin@ parents (54%) say they have talked about the issues of domestic violence and sexual assault with their children. On the other hand, only 29% of parents in the U.S. population at large have talked about domestic violence and/or sexual assault with their children.

# NO MÁS: Detailed Findings

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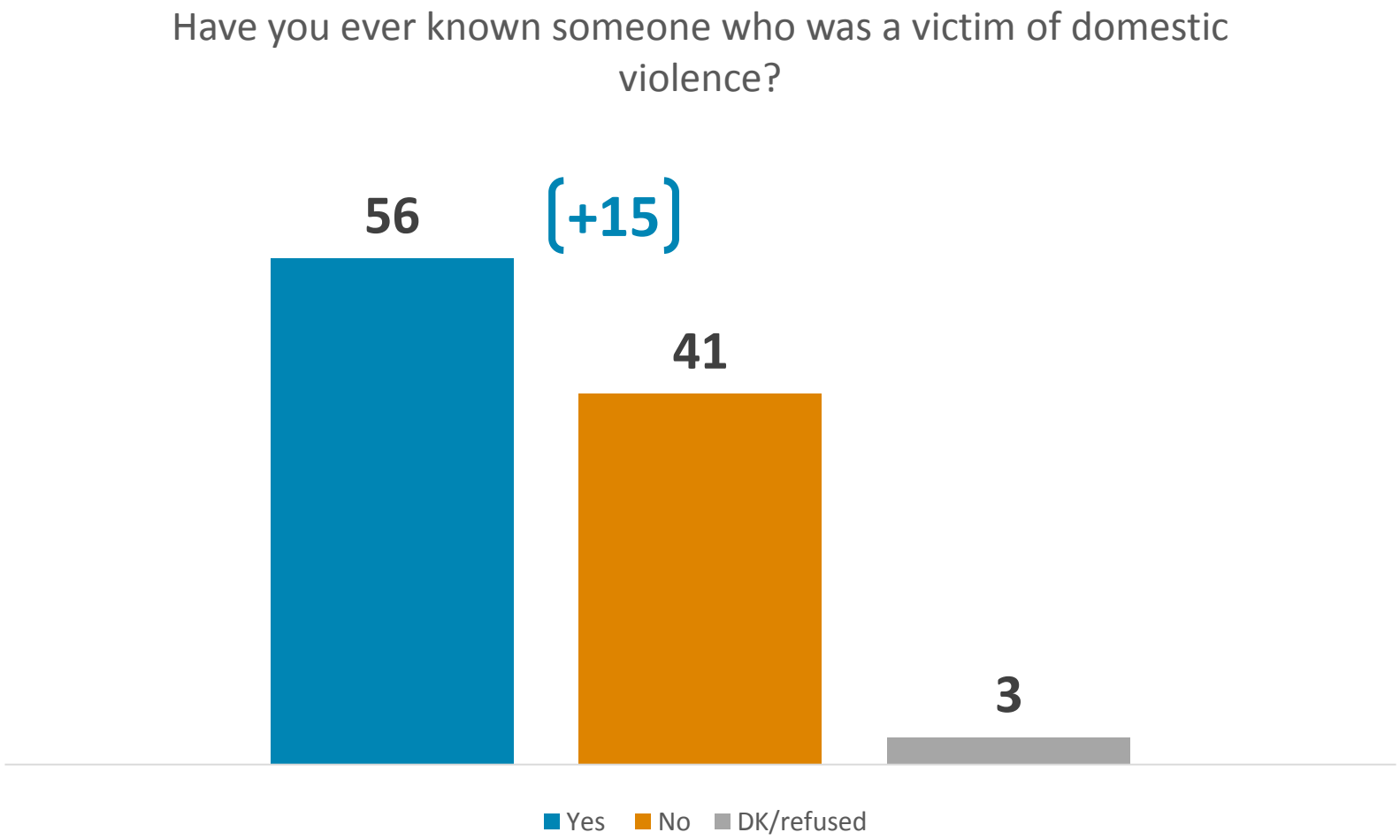
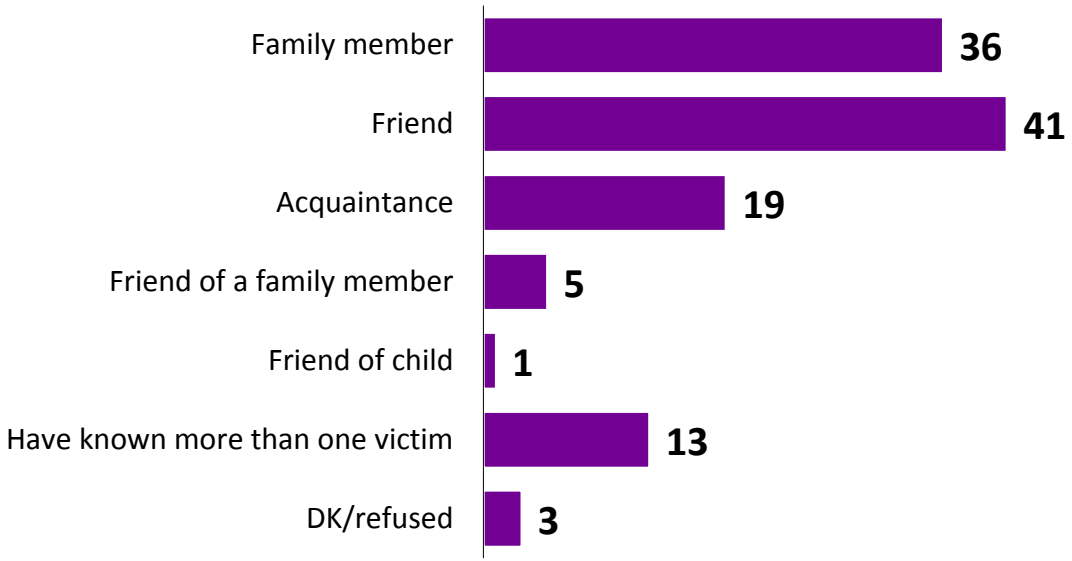
# More than half of Latin@s have known a victim of domestic violence.

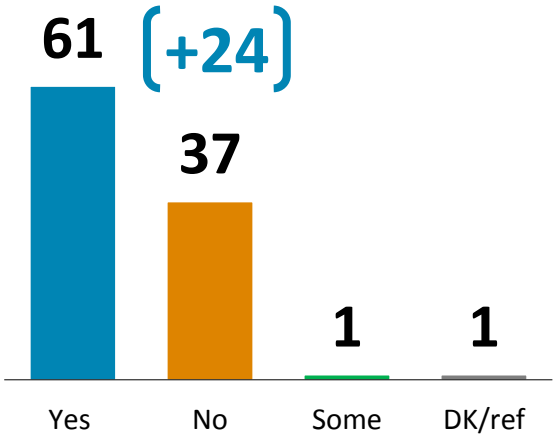


# Among those Latin@s who have known a victim of this violence, most have been friends or a family member. Nearly two-thirds of Latin@s have intervened in these cases.

What was this person's relationship to you?




Did you intervene and do something for the person you mentioned above?




[If Yes in Q25, "Have you known someone who was a victim of domestic violence?"] What was this person's relationship to you? Was it a family member; a friend; an acquaintance, but not a friend; a friend of a family member, other than your child? If you have known more than one victim, please let me know.

# Nearly two-thirds of Latina women know a victim of domestic violence. And close to half of Latino men know a victim. We see higher rates among the group who immigrated during the 1980s.

| % Yes | Have you ever known someone who was a victim of domestic violence? |
|---|---|
| Men | 49 |
| Women | 62 |
| Under 30 | 49 |
| Under 50 | 57 |
| 50 & Over | 54 |
| Born in the U.S. | 59 |
| Born in another country | 54 |
| Recent Immigrant | 41 |
| Immigrated 1990-99 | 48 |
| Immigrated 1980-89* | 68 |
| Speak English at home | 62 |
| Speak Spanish at home | 50 |
| Speak both at home | 57 |
| Northeast | 53 |
| Midwest | 55 |
| South | 56 |
| West | 57 |

**44% of Latinos under 25 say they know someone who has been a victim of domestic violence.**

*Note small sample size.

# Latin@s mostly point to a family member or friend as the victim of domestic violence they know.

| Relation to domestic violence victim | Gender | | Age | | | Country of Birth | | Language Spoken at Home | | | Region | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | F | <30 | <50 | 50+ | U.S. | Other | Eng | Sp | Both | NE | MW* | S | W |
| Family member | 32 | 38 | 31 | 37 | 32 | 42 | 31 | 42 | 32 | 34 | 24 | 46 | 33 | 40 |
| Friend | 44 | 39 | 47 | 41 | 41 | 46 | 37 | 42 | 37 | 43 | 41 | 49 | 39 | 42 |
| Acquaintance, but not friend | 16 | 22 | 22 | 20 | 16 | 17 | 21 | 13 | 21 | 22 | 28 | 8 | 24 | 14 |
| Friend of a family member, other than child | 7 | 3 | 7 | 5 | 4 | 6 | 4 | 8 | 4 | 3 | 6 | 6 | 6 | 3 |
| Friend of child | 2 | 0 | 0 | 2 | -- | 0 | 2 | -- | 2 | 1 | -- | -- | 1 | 1 |
| Have know more than one victim | 12 | 15 | 7 | 13 | 14 | 14 | 13 | 13 | 12 | 15 | 11 | 8 | 13 | 15 |

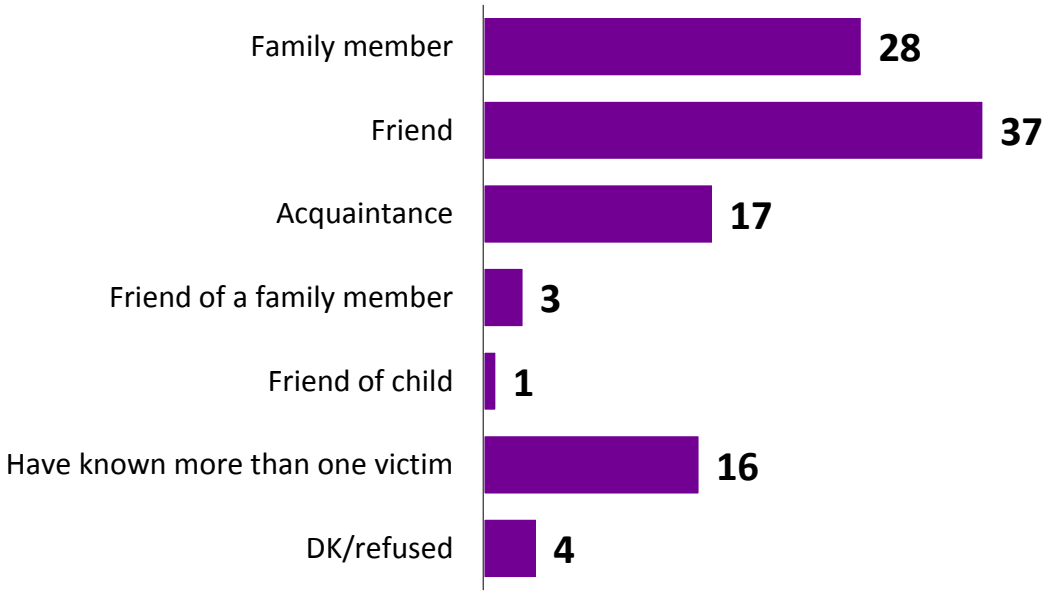
*Note small sample size.

[If Yes in Q25, "Have you known someone who was a victim of domestic violence?"] What was this person's relationship to you? Was it a family member; a friend; an acquaintance, but not a friend; a friend of a family member, other than your child? If you have known more than one victim, please let me know.

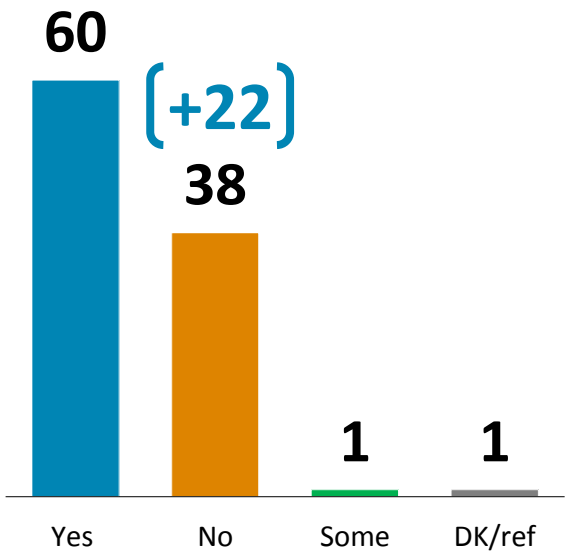
# One in four Latin@s have known a victim of sexual assault.

# Among those Latin@s who have known a victim of sexual assault, most had been a friend, and to a lesser extent a family member. Six in ten of those Latin@s said they intervened on behalf of the victim.

What was this person's relationship to you?




Did you intervene and do something for the person you mentioned above?




[If Yes in Q28, "Have you known someone who was a victim of sexual assault?"] What was this person's relationship to you? Was it a family member; a friend; an acquaintance, but not a friend; a friend of a family member, other than your child? If you have known more than one victim, please let me know.

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# More than a third of Latina women know a victim of sexual assault. The rate decreases among recent immigrants.

| % Yes | Have you ever known someone who was a victim of sexual assault? |
|---|---|
| Men | 21 |
| Women | 35 |
| Under 30 | 25 |
| Under 50 | 29 |
| 50 & Over | 27 |
| Born in the U.S. | 37 |
| Born in another country | 21 |
| Recent Immigrant | 9 |
| Immigrated 1990-99 | 12 |
| Immigrated 1980-89 | 41 |
| Speak English at home | 38 |
| Speak Spanish at home | 19 |
| Speak both at home | 29 |
| Northeast | 26 |
| Midwest | 20 |
| South | 29 |
| West | 31 |

**27% of Latinos under 25 say they know someone who has been a victim of sexual assault.**

# Similarly, their relation to a sexual assault victim is mainly a relative or friend.

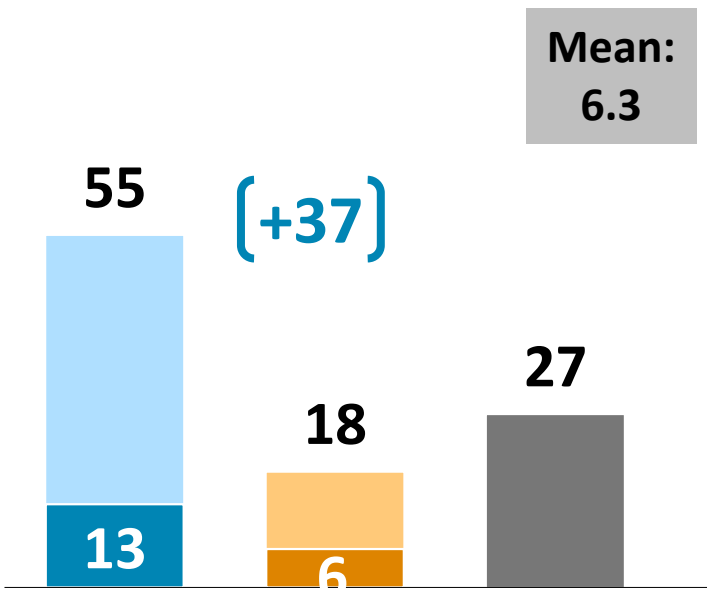
| Relation to sexual assault victim | Gender | | Age | | | Country of Birth | | Language Spoken at Home | | Region | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | F | <30 | <50 | 50+ | U.S. | Other | Eng | Both | South | West |
| Family member | 21 | 32 | 36 | 31 | 23 | 29 | 27 | 32 | 26 | 23 | 32 |
| Friend | 48 | 31 | 48 | 39 | 34 | 41 | 31 | 34 | 42 | 35 | 37 |
| Acquaintance, but not friend | 14 | 18 | 13 | 13 | 26 | 14 | 19 | 13 | 21 | 26 | 9 |
| Friend of a family member, other than child | 5 | 2 | 6 | 3 | 4 | 5 | -- | 3 | 4 | 1 | 5 |
| Friend of child | -- | 2 | -- | 1 | 2 | 1 | 2 | 1 | 1 | 2 | 0 |
| Have know more than one victim | 14 | 17 | 5 | 17 | 15 | 16 | 17 | 16 | 15 | 15 | 21 |

[If Yes in Q28, "Have you known someone who was a victim of sexual assault?"] What was this person's relationship to you? Was it a family member; a friend; an acquaintance, but not a friend; a friend of a family member, other than your child? If you have known more than one victim, please let me know.
*Northeast and Midwest regions are too small of a sample size to break out.

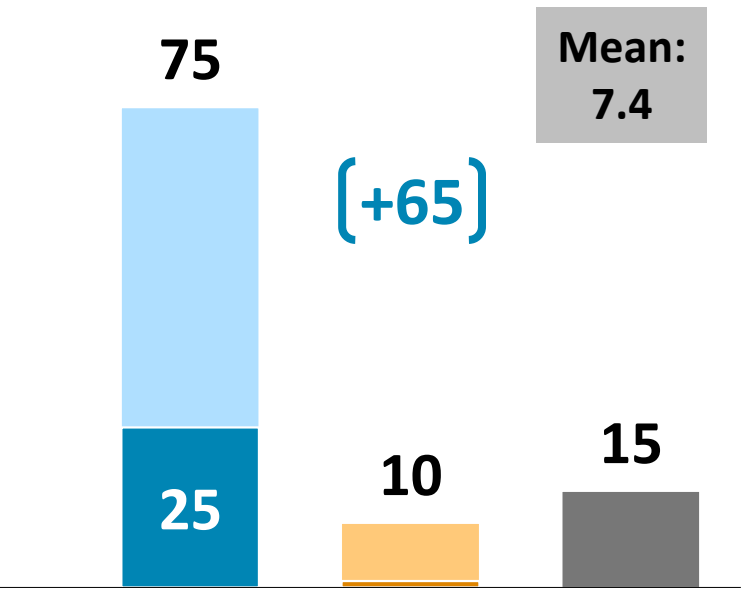
# A majority of Latin@s acknowledge domestic violence as a problem in their community, but are more likely to view it as a problem in the United States at large. However, intensity is low.

## Domestic Violence as a Problem

On a scale that goes from 0 to 10 where 0 means not a problem at all and 10 means a very big problem, how big of a problem is domestic violence **in the Latino community?**




On a scale that goes from 0 to 10 where 0 means not a problem at all and 10 means a very big problem, how big of a problem is domestic violence **in the United States?**



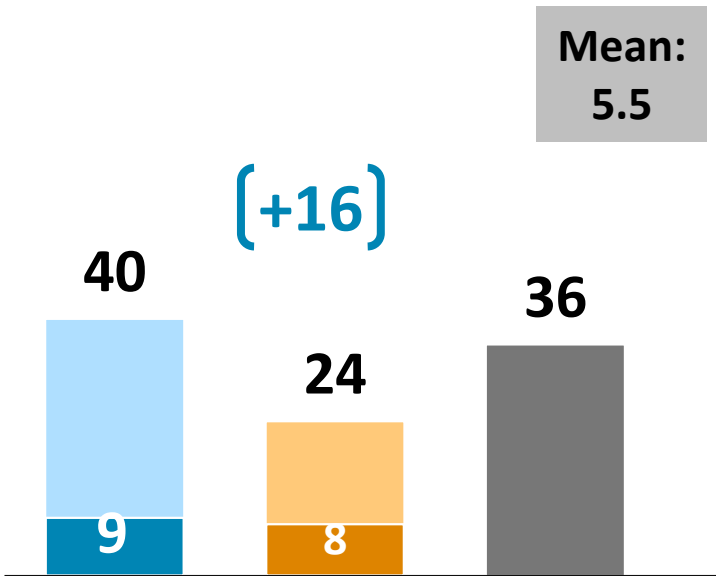


*Split Sampled Questions

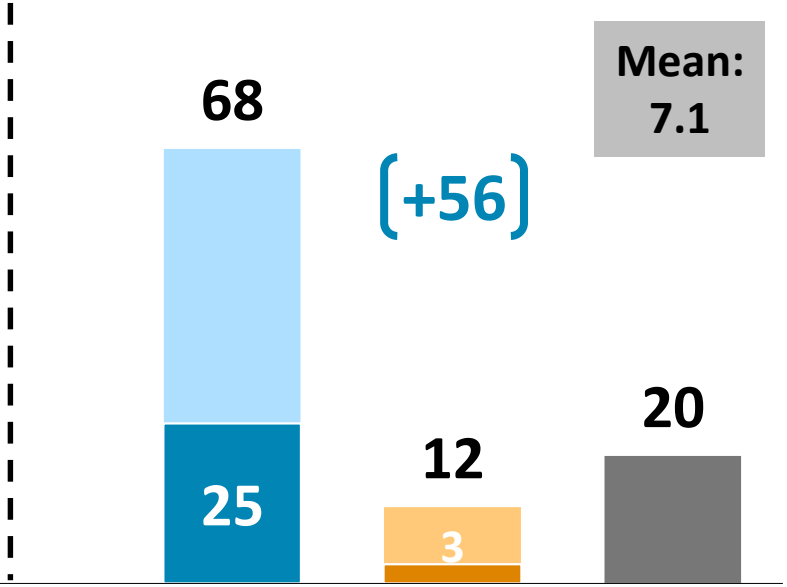
Latin@s view sexual assault as less of a problem than domestic violence in both the U.S. Latin@ community and the U.S. at large. Similar to domestic violence, Latin@s view sexual assault as a much bigger problem in the U.S. at large than within their own community, although four in ten say it is a problem within the Latin@ community.

## Sexual Assault as a Problem

On a scale that goes from 0 to 10 where 0 means not a problem at all and 10 means a very big problem, how big of a problem is sexual assault **in the Latino community?**




On a scale that goes from 0 to 10 where 0 means not a problem at all and 10 means a very big problem, how big of a problem is sexual assault **in the United States?**




10 – Very big problem
6-10 - Problem
0 – Not a problem at all
0-4 – Not a problem

*Split Sampled Questions



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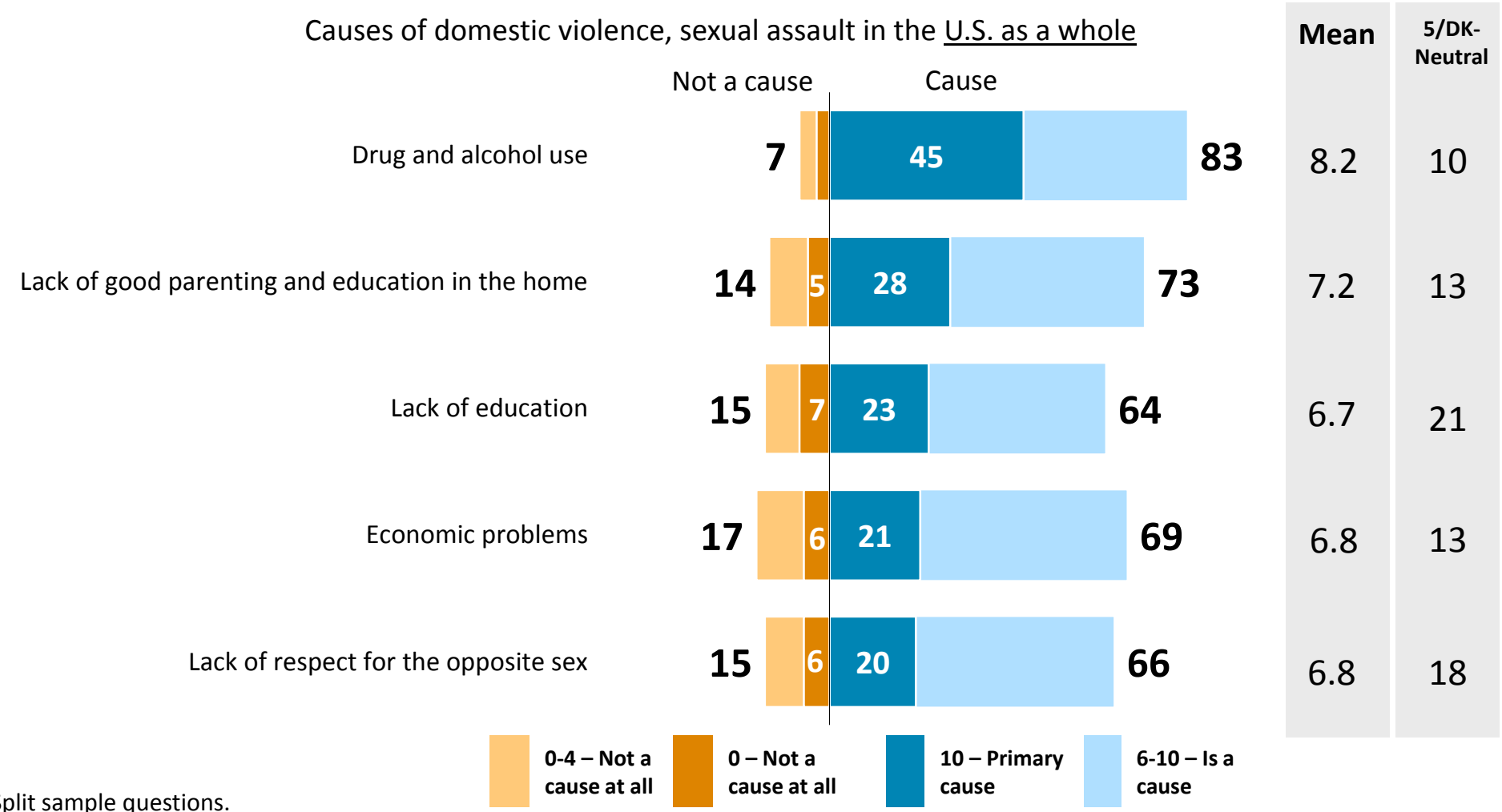
# Immigration status makes a difference. Recent immigrants are more likely to see both issues as a bigger problem compared to U.S.-born Latin@s.

| % 6-10 – A problem | Domestic Violence in Latino Community | Domestic Violence in the U.S. | Diff. | Sexual assault in the Latino Community | Sexual Assault in the U.S. | Diff. |
|---|---|---|---|---|---|---|
| All | 55 | 75 | -20 | 40 | 68 | -28 |
| Born in the U.S. | 52 | 77 | -25 | 36 | 75 | -39 |
| Immigrant | 57 | 73 | -16 | 43 | 61 | -18 |
| Recent Immigrant* | 80 | 88 | -8 | 63 | 78 | -15 |
| English | 45 | 74 | -29 | 40 | 69 | -29 |
| Spanish | 68 | 82 | -14 | 43 | 68 | -25 |
| Speak both at home | 53 | 70 | -17 | 39 | 66 | -27 |

*Note Small Sample Size

# Drug and alcohol use top the list as root causes for domestic violence and sexual assault in the United States as a whole. This is followed by a lack of good parenting.




Split sample questions.

Now let me read you a list of reasons that some people have noted as the root causes for domestic violence and sexual assault in the United States. For each, please tell me on a scale that goes from 0 to 10, where 0 is not at all a cause and 10 is the primary cause, how big of a cause that item is for domestic violence and sexual assault in this country. If you are unsure, please say so.



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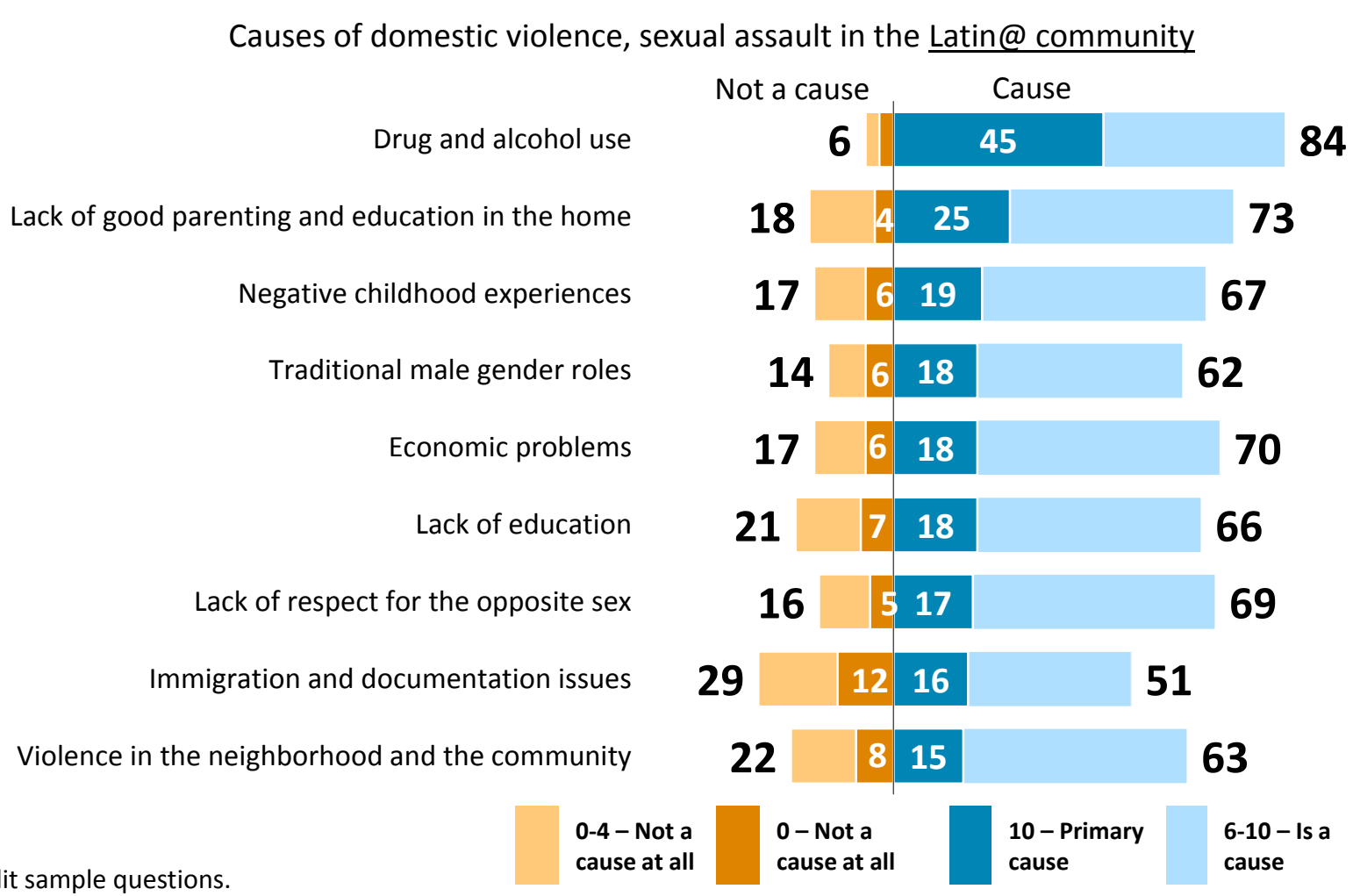
# Drug and alcohol use and bad parenting are also at the top when Latin@s think about their own community. Lack of respect for the opposite sex is seen as more of a cause than traditional gender roles.




| Mean | 5/DK-Neutral |
|---|---|
| 8.2 | 10 |
| 7.0 | 9 |
| 6.7 | 16 |
| 6.6 | 24 |
| 6.7 | 13 |
| 6.5 | 13 |
| 6.8 | 15 |
| 5.7 | 20 |
| 6.2 | 16 |

Split sample questions.

Now thinking specifically about the Latino community, let me read you a list of reasons that some people have noted as the root causes for domestic violence and sexual assault. For each, please tell me on a scale that goes from 0 to 10, where 0 is not at all a cause and 10 is the primary cause, how big of a cause that item is for domestic violence and sexual assault in the Latino community. If you are unsure, please say so.



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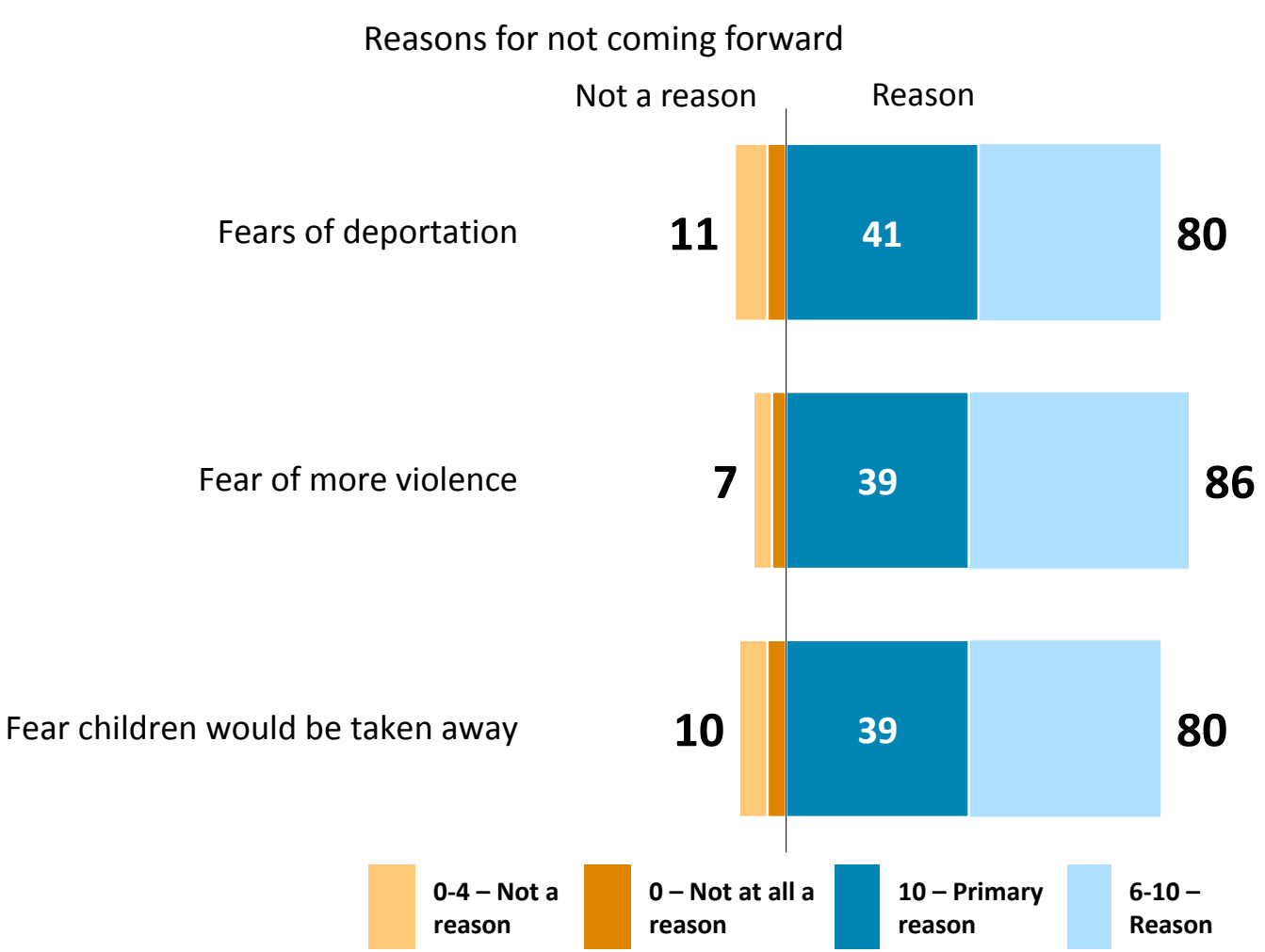
# Fears of deportation, more violence, and losing their children are the most intense reasons Latin@ victims may not come forward.




| | Mean | 5/DK-Neutral |
|---|---|---|
| Fears of deportation | 7.8 | 9 |
| Fear of more violence | 8.1 | 7 |
| Fear children would be taken away | 7.8 | 9 |

[**Now/Still**] thinking specifically about the Latino community. Let me read you some reasons why Latinas may not come forward if they have experienced domestic violence or been sexually abused. Please tell me on a scale that goes from 0 to 10, where 0 is not a reason at all for not coming forward and 10 is a primary reason for not coming forward, how much of a reason you think that is to not come forward. If you are unsure, please say so.



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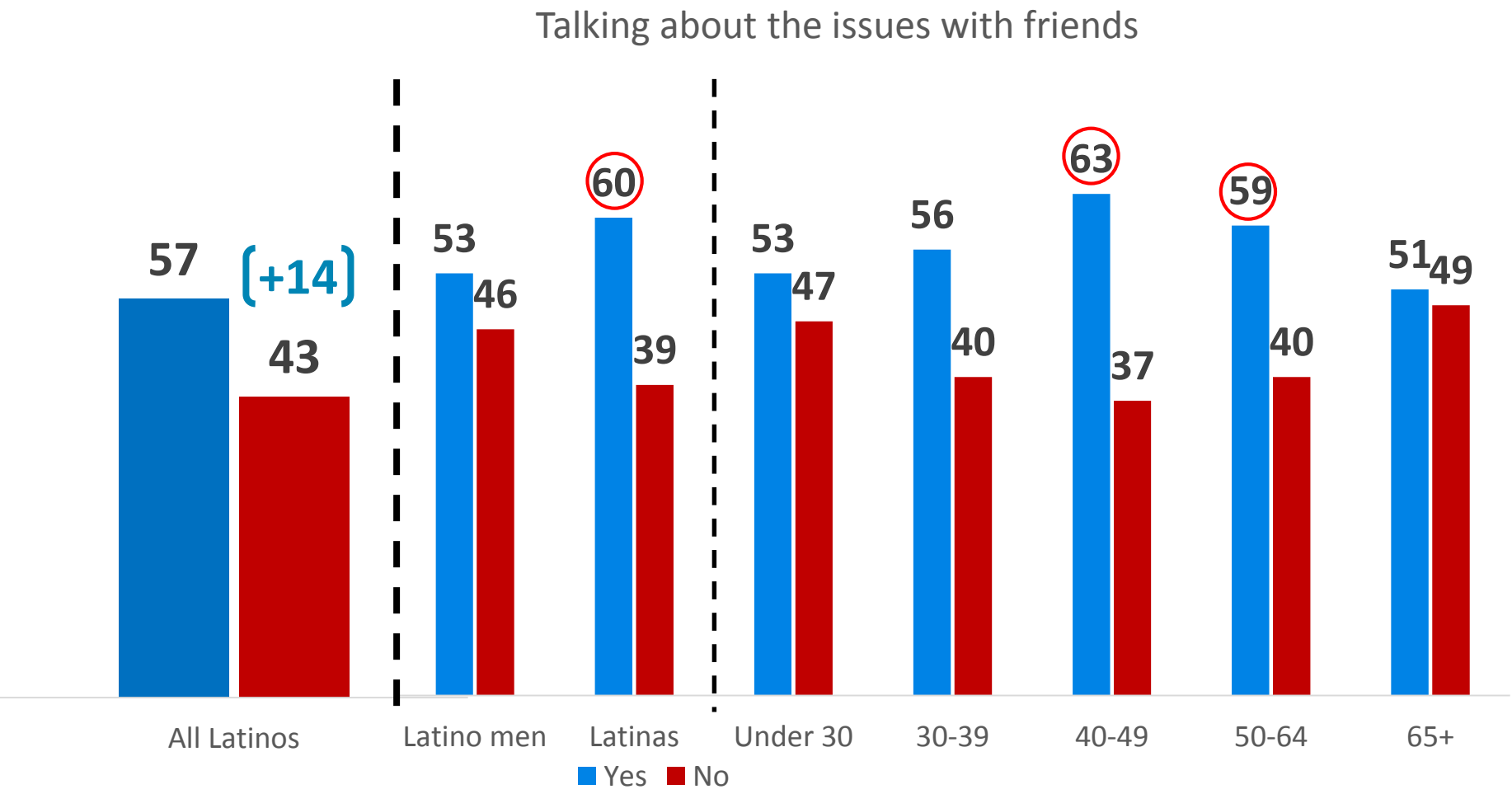
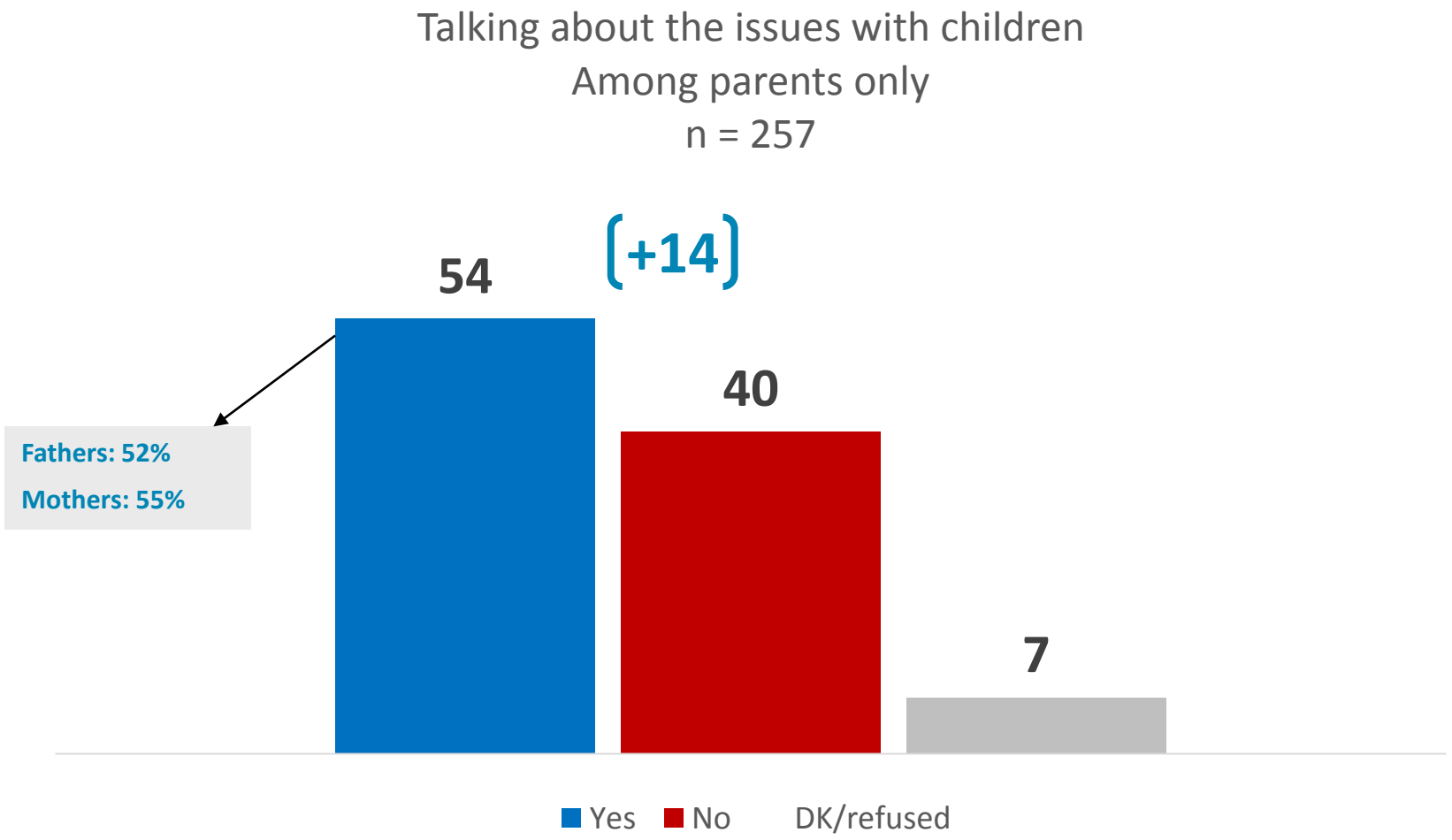
Overall, more than half of Latin@s have talked about these issues with friends. There is a gender gap, as we see throughout the data. Still, half of Latino men have talked about these issues. Middle-aged Latin@s are more likely to have talked about these issues with their friends than younger Latin@s and those over 65.



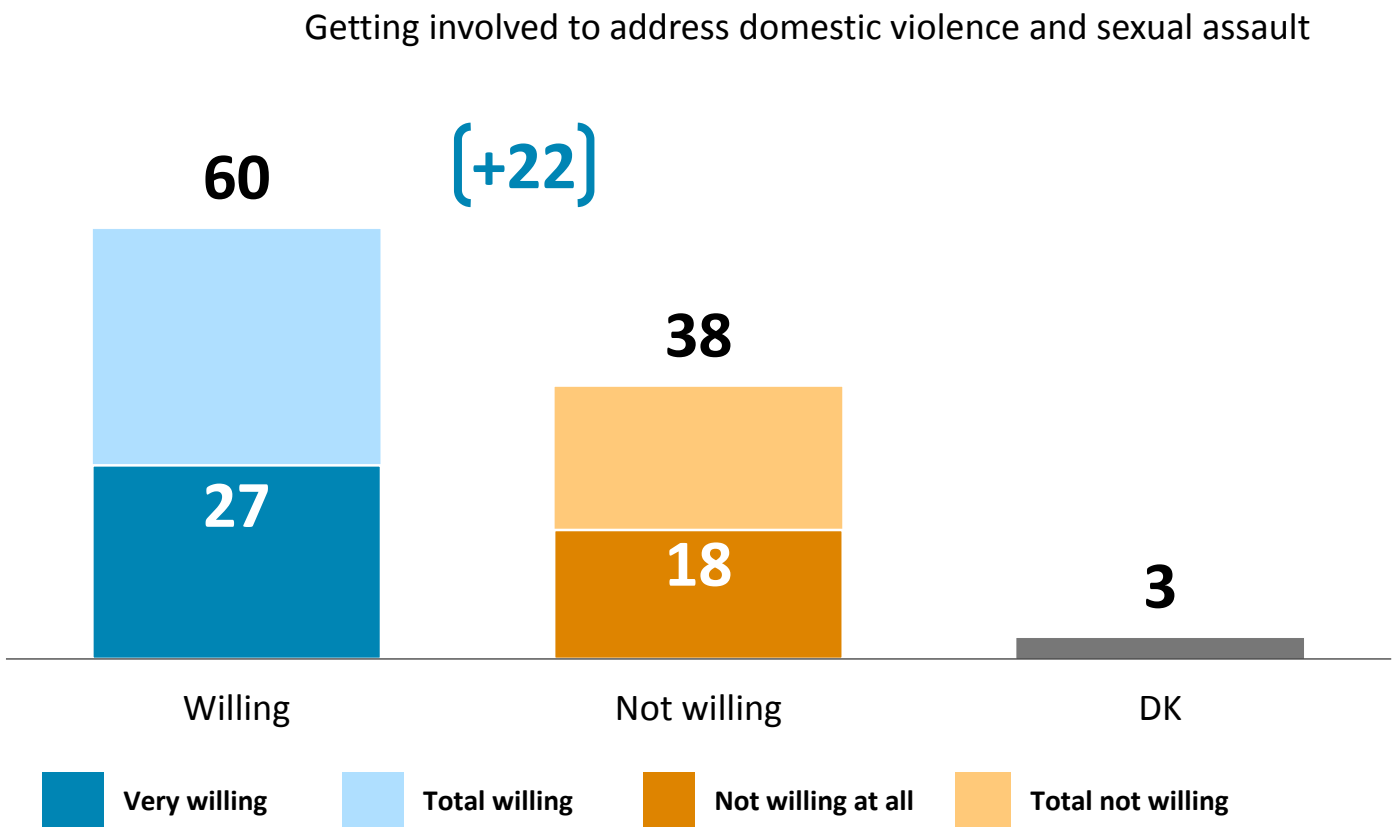

Have you talked about the issues of domestic violence and sexual assault with your friends?

# Among Latin@ parents, just over half have talked with their children.




Have you talked about the issues of domestic violence and sexual assault with your children?

# There is solid, if not intensely felt, willingness to get involved in a general effort.




How willing would you be to get involved in an effort to address domestic violence and sexual assault in your community - very willing, somewhat willing, a little willing, or not willing at all?

# Appendix: Comparing NO MÁS Data with NO MORE Data



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# NO MORE Survey Methodology

- In 2013, Avon Foundation for Women commissioned and funded the NO MORE Study, conducted by GfK Public Affairs and Corporate Communications, to research domestic violence and sexual assault among teens, ages 15-17, and adults 18 and older, in an effort to further support the Foundation's mission of educating people to reduce sexual assault and domestic violence.
- GfK Public Affairs and Corporate Communications Group conducted interviews with a total of 1,307 respondents, 15 years of age and older. The study was conducted using the KnowledgePanel, a large-scale online panel based on a representative random sample of the U.S. population.
- Equal numbers of men and women were interviewed in each quota group.
- The data was weighted to the population it represents. The margin of error for this study was +/-3.2 percentage points.
- Interviewing took place February 21 through February 27, 2013.

# Key Similarities and Differences Between the U.S. Latin@ Community and the U.S. Population at Large

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# Latin@s report similar levels of experience with domestic violence and sexual assault compared to the population at large; however, they are more likely to say they intervened and did something for the victim.

| EXPERIENCE WITH DOMESTIC VIOLENCE | Yes | No |
|---|---|---|
| NO MORE: Have you ever known someone who was a victim of domestic violence? | 53 | 47 |
| NO MÁS : Have you ever known someone who was a victim of domestic violence? | 56 | 41 |
| NO MORE: Did you intervene and do something for the person? | 51 | 42 |
| NO MÁS : Did you intervene and do something for the person? | 61 | 37 |

| EXPERIENCE WITH SEXUAL ASSAULT | Yes | No |
|---|---|---|
| NO MORE: Have you ever known someone who was a victim of sexual assault? | 33 | 66 |
| NO MÁS : Have you ever known someone who was a victim of sexual assault? | 28 | 69 |
| NO MORE: Did you intervene and do something for the person? | 29 | 67 |
| NO MÁS : Did you intervene and do something for the person? | 60 | 38 |

*Question structure different in 2015 NO MÁS survey compared to 2014 NO MORE survey.

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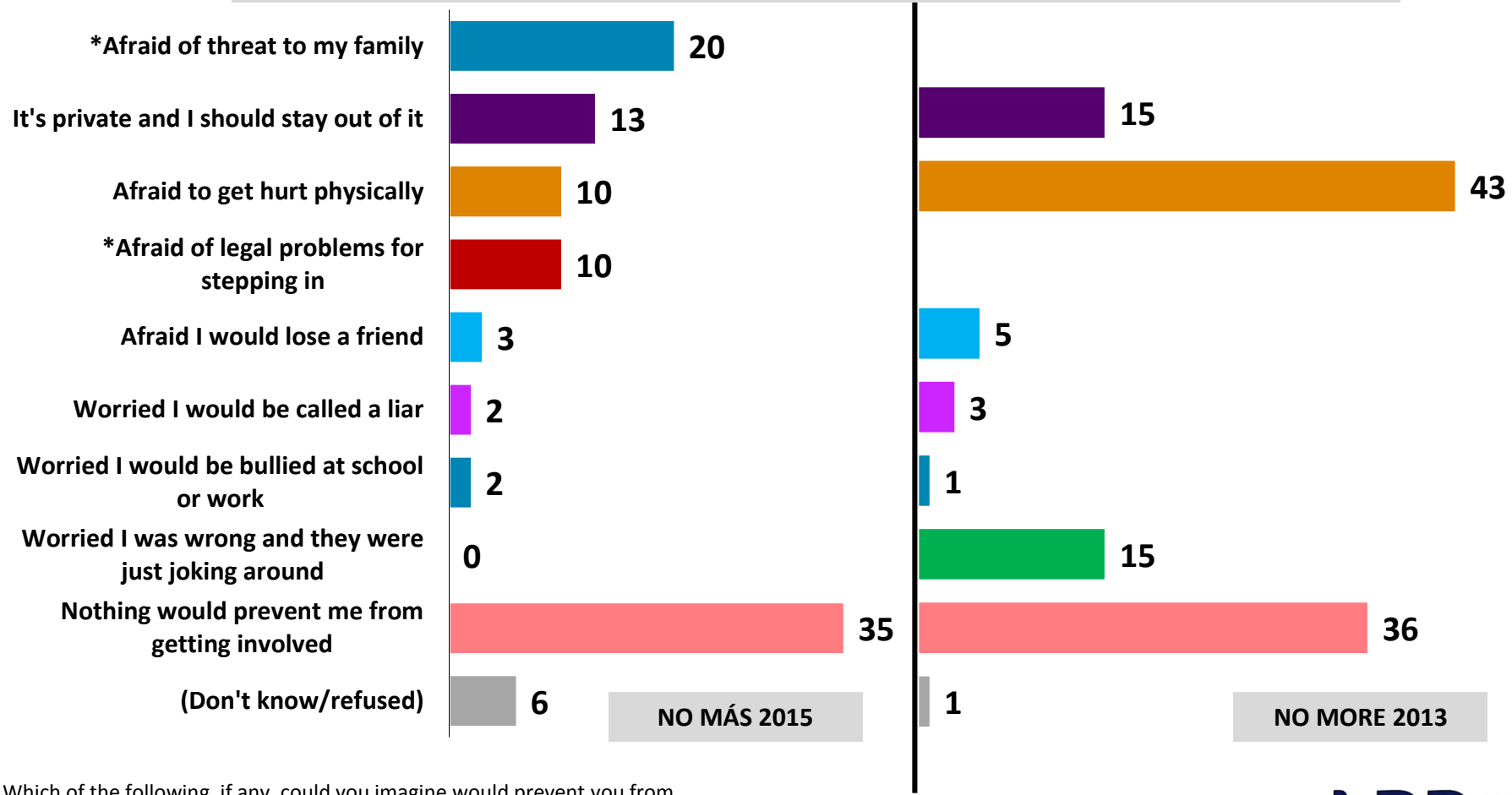
Comparing to the NO MORE survey, we see similar numbers of U.S. Latin@s and the U.S. population at large overall feeling that nothing would stop them from getting involved. The current survey offered more choices for Latin@s. Still we see fears for their safety are a top concern for the U.S. population at large, slightly less so among Latin@s.

**What would prevent you from stepping in to help a victim of domestic violence or sexual assault whom you know?**




Which of the following, if any, could you imagine would prevent you from stepping in to help a victim of domestic violence or sexual assault whom you know**? [NO MORE, with wording changes]**

***ASKED ONLY IN NO MÁS SURVEY**

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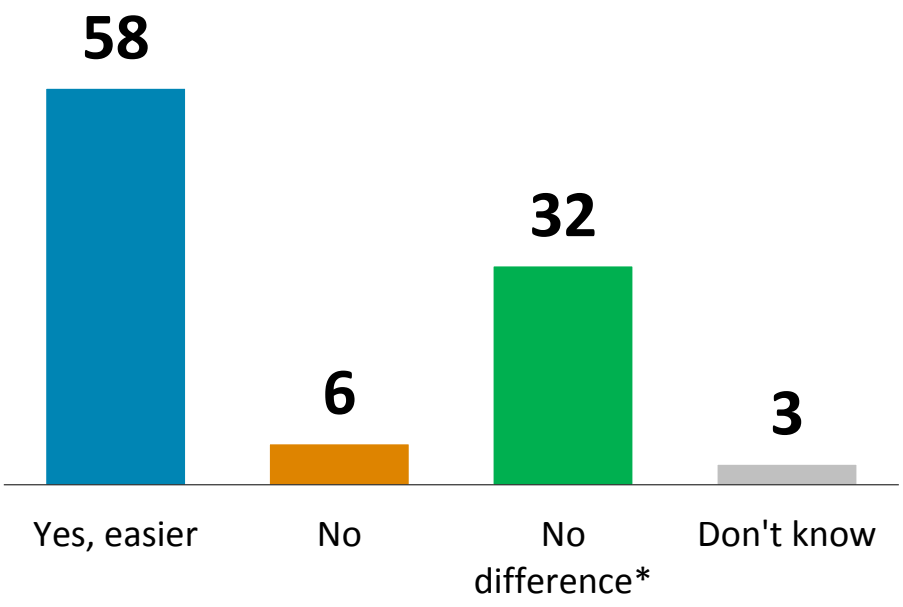
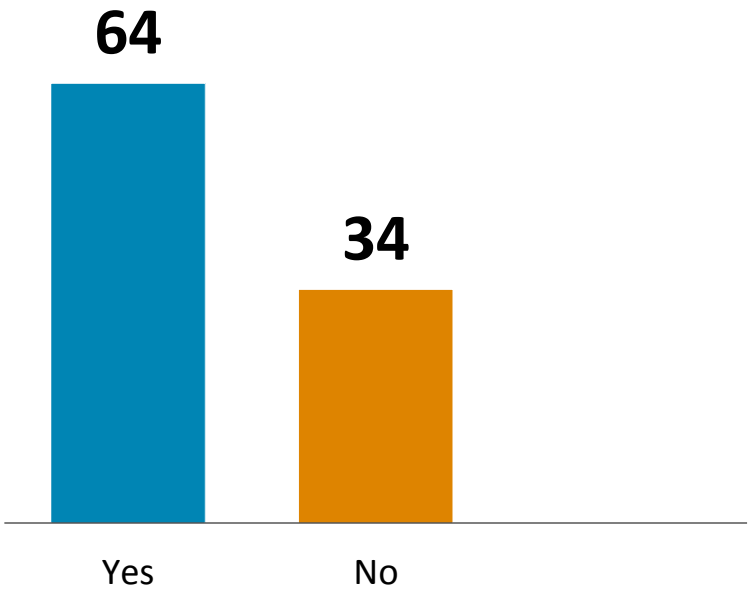
# While Latin@s are slightly less likely than U.S. population at large to say that having more people talk about these issues would make it easier to step in and help, over half say it would make it easier to step in.

NO MÁS WORDING:
If more people talked about domestic violence and sexual assault, do you think that would make it easier for you to step in and help or would it not make a difference?




NO MORE WORDING:
If more people talked about partner abuse/ sexual assault, would that make it easier for you to step in and help someone?




*No Difference option given only in 2015 NO MÁS survey, not given in 2013.

## Though question wording was slightly different in the original NO MORE survey, in comparison to the population at large (which includes Latin@s), Latin@s are much more likely to say they have talked about issues of domestic violence and sexual assault with their friends and children.

| | Yes | No |
|---|---|---|
| NO MORE WORDING: Have you talked about the issues of partner abuse/violence and sexual assault with your **friends**? (ASKED SEPARATELY) | **34** | **66** |
| NO MÁS WORDING: Have you talked about the issues of domestic violence and sexual assault with your **friends**? | **57** | **43** |
| NO MORE WORDING: Have you talked about the issues of partner abuse/violence and sexual assault with your **children**? (ASKED SEPARATELY)* | **29** | **71** |
| NO MÁS WORDING: Have you talked about the issues of domestic violence and sexual assault with your **children**?* | **54** | **40** |

* Percentages just among parents of children under 18

# Profile of the NO MÁS Survey Participants: Latin@ Community in the U.S.

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The survey was designed to reflect the population of Latin@s ages 18 and older across the United States.

## Profile of the Survey Participants

### GENDER

49% 51%

### AGE

| | |
|---|---|
| Under 30 | 30% |
| 30-39 | 21% |
| 40-49 | 17% |
| 50-64 | 21% |
| 65+ | 10% |

### EDUCATION

| | |
|---|---|
| High School or Less | 20% |
| Post-H.S. / Non-College | 39% |
| College Graduate | 17% |
| Post-Graduate | 6% |

23% College Grad or Post Grad

### PLACE OF BIRTH*

| | |
|---|---|
| United States | 45% |
| Another Country | 55% |

### REGION

| | |
|---|---|
| Northeast | 15% |
| Midwest | 9% |
| South | 37% |
| West | 40% |

### LANGUAGE AT HOME

| | |
|---|---|
| English | 27% |
| Spanish | 30% |
| Both | 43% |

### DATE OF IMMIGRATION

| | |
|---|---|
| Before 1980 | 24% |
| 1980-1989 | 19% |
| 1990-1999 | 31% |
| 2000-2008 | 15% |
| 2009 or later | 5% |

*Note: Puerto Rican respondents can be in either category. Some of them identified Puerto Rico as a country of origin.

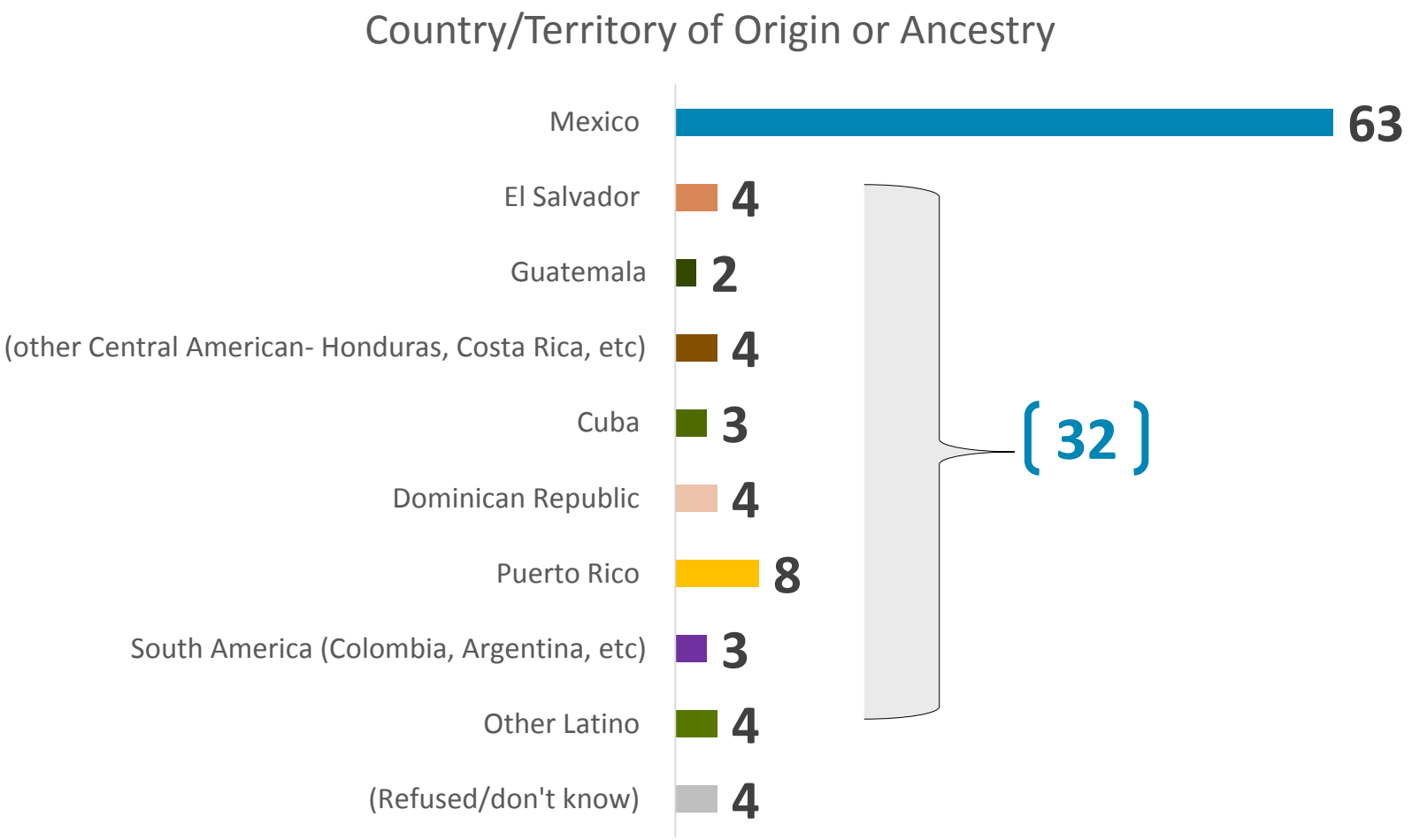
A plurality of recent immigrants surveyed (since 2009) are under 30. Those who immigrated over two decades ago tend to be middle-aged or older. While a plurality of Latin@s born in the U.S. say they speak primarily English at home, almost four in ten say they speak a combination of both. Most Latin@ immigrants report speaking Spanish or a combination of both languages at home.

| Date of Immigration | | | | |
|---|---|---|---|---|
| | Before 1980 | 1980-1989 | 1990-1999 | 2009 or Later |
| Under 30 | 8 | 6 | 25 | 43 |
| 30-39 | 20 | 18 | 13 | 18 |
| 40-49 | 15 | 31 | 31 | 14 |
| 50-64 | 33 | 42 | 24 | 17 |
| 65+ | 23 | 3 | 6 | 6 |

| Language Spoken at Home | | |
|---|---|---|
| | Born in US | Born in Another Country |
| English | 48 | 10 |
| Spanish | 13 | 44 |
| Both | 39 | 46 |

*Note 2000-2008 immigrants are too small a sample size to look at.

# A majority of Latin@s report being of Mexican descent. In terms of origin, Latin@s are comprised mostly of those from Mexico by birth or ancestry.




Latinos come from many different national origins. Which Latin American country are you or your ancestors originally from?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# A Developmental Approach to Complex PTSD: Childhood and Adult Cumulative Trauma as Predictors of Symptom Complexity

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*Exposure to multiple traumas, particularly in childhood, has been proposed to result in a complex of symptoms that includes posttraumatic stress disorder (PTSD) as well as a constrained, but variable group of symptoms that highlight self-regulatory disturbances. The relationship between accumulated exposure to different types of traumatic events and total number of different types of symptoms (symptom complexity) was assessed in an adult clinical sample* ($N = 582$) *and a child clinical sample* ($N = 152$). *Childhood cumulative trauma but not adulthood trauma predicted increasing symptom complexity in adults. Cumulative trauma predicted increasing symptom complexity in the child sample. Results suggest that Complex PTSD symptoms occur in both adult and child samples in a principled, rule-governed way and that childhood experiences significantly influenced adult symptoms.*

Individuals with a trauma history rarely experience only a single traumatic event but rather are likely to have experienced several episodes of traumatic exposure (Kessler, 2000). This phenomenon has been frequently reported among survivors of childhood abuse, domestic violence, and those who have been witnesses to or targets of genocide. Exposure to sustained, repeated or multiple traumas, particularly in the childhood years, has been proposed to result in a complex symptom presentation that includes not only posttraumatic stress symptoms, but also other symptoms reflecting disturbances predominantly in affective and interpersonal

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self-regulatory capacities such as difficulties with anxious arousal, anger management, dissociative symptoms, and aggressive or socially avoidant behaviors. These symptoms are part of Complex Posttraumatic Stress Disorder (PTSD; Herman, 1992) and are designated in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision* (*DSM-IV-TR*; American Psychiatric Association [APA], 2000) as "PTSD and its associated features." The importance of evaluating the effects of multiple traumas in their cumulative form is critical as this circumstance characterizes the experience of the majority of trauma survivors (Kessler, 2000) and accordingly has substantial implications for evaluation and treatment.

The research focus on childhood abuse as an example of a type of trauma associated with Complex PTSD results from its high prevalence (e.g., Finkelhor & Dziuba-Leatherman, 1994; Childhelp, 2005), typically recurring nature (e.g., Stewart, Livingston, & Dennison, 2008), and well-documented relationship to other types of childhood and adulthood traumas (e.g., Coid et al., 2001; Dong et al., 2004). Consequently, understanding of complex PTSD has been influenced by developmental research, which has demonstrated that childhood abuse as well as other childhood adversities (neglect, emotional abuse, absent or psychiatrically disturbed parents) result in impairment in developmental processes related to the growth of emotion regulation and associated skills in effective interpersonal behaviors (e.g., Shipman, Edwards, Brown, Swisher, & Jennings, 2005; Shipman, Zeman, Penza, & Champion, 2000). Understanding the effects of trauma as the result of disturbances or vulnerabilities in self-regulatory capacities is useful as it creates conceptual coherence to the multiple, diffuse, and apparently contradictory symptoms of complex PTSD. Disturbances in self-regulation account for both overactivation and deactivation/avoidance in emotions and interpersonal behaviors as seen in dysphoria and anger as well as dissociation; and in interpersonal behaviors that are aggressive or dependent, as well as those that are distant and avoidant. Posttraumatic stress disorder symptoms themselves have been described as a form of a chronic dysregulated emotional response to traumatic reminders as reflected in the co-occurring symptoms of hyperarousal/emotional numbing and hypervigilance/poor concentration (e.g., Frewen & Lanius, 2006; Litz, Orsillo, Kaloupek, & Weathers, 2000).

Although self-regulatory difficulties vary from person to person, the associated features of PTSD as described in the *DSM-IV-TR* (APA, 2000, p. 465) specify a core set of symptoms of particular salience. In addition, the expression of self-regulatory problems can be measured and predicted in a principle-governed way as related to trauma history. It has been proposed that an increasing number of different types of traumas is associated with an increasingly greater number of different types of symptoms experienced simultaneously (i.e., symptom complexity; Briere, Kaltman, & Green, 2008; van der Kolk, Roth, Pelcovitz, Sunday, & Spinazzola, 2005). Briere and colleagues (2008) tested this notion and found that in a community sample of young women (college students), there was a linear relationship between the number of trauma types experienced before 18 and symptom complexity.

We wished to build on and extend this research by adopting this algorithm to evaluate a clinical sample of women with histories of childhood abuse, most of whom had experienced multiple types of childhood abuse and adversity as well as a various number of adulthood traumas. This study addresses the following questions. First, we wished to replicate the findings of Briere et al. (2008) with a clinical sample of women and determine whether childhood cumulative adversity and trauma was predictive of symptom complexity. Second, we wished to test whether regardless of child cumulative adversity and trauma, adulthood cumulative trauma was associated with symptom complexity, which would suggest that the burden of repeated and multiple adulthood traumas in and of themselves may overwhelm self-regulatory systems. It is unknown and remains to be tested whether after adjustment for child cumulative trauma, adulthood trauma contributes to symptom complexity. Third, we wished to compare the impact of child cumulative trauma versus adult cumulative trauma on symptom complexity. We hypothesized that the accumulation of adulthood trauma and of childhood trauma would each play a role, but consistent with developmental theory (Pynoos, Steinberg, & Wraith, 1995), childhood trauma would contribute more strongly to symptom complexity than adulthood trauma. We also calculated the combined load of childhood and adulthood trauma to assess the impact the total lifetime accumulation of trauma on symptom complexity. Lastly, as a further test of the principled nature of the relationship between cumulative trauma and symptom complexity, we identified a sample of children presenting at a trauma-focused outpatient clinic, and evaluated the relationship between the range of experienced childhood traumas and types of symptoms similar to those of our adult population.

# STUDY 1

# METHOD

## Participants

A total of 849 women presenting for treatment of trauma-related symptoms resulting from childhood abuse were assessed as part of a series of four treatment studies over a period of approximately 12 years. No women participated in more than one study. Participants were self-referred by means of advertisements in local papers, hospital and community clinics, and word-of-mouth. Following a brief phone screen, those found eligible for the study participated in the full assessment procedure. All participants provided informed consent approved by the institutional review board of the relevant university. In general, participants enrolled in the studies did not differ from participants who did not enroll. We combined data for analysis because there were no differences in the

sociodemographic characteristics, trauma histories, or symptom characteristics across the four study samples.

For the purposes of this investigation, only women for whom both childhood and adulthood data were available were included, yielding a sample size of $N = 582$ for the reported analyses. Of the 582 participants, the average age was 36.1 ($SD = 10.6$). The sample was comprised of 45.7% Caucasian women; 24.8% African American, 10.8% Hispanic, and 3.5% Asian American, and 9.1% were of other ethnicities. Approximately 26% were either married or living with a significant other, 20.2% were either divorced or widowed, and 53.5% were single. Education varied with 12.3% having a high school diploma or less, 64.1% having finished college or some college training, and 23.7% having more than college training. Earnings of participants for the year previous to the study were as follows: 20.8% had earned less than $5,000; 22.5% had earned from $5,000 to $15,000, 26.6% had earned from $15,000 to $30,000, and 30.1% had earned more than $30,000. This group did not differ from the total group of women on any of the sociodemographic characteristics.

## Measures

Exposure to trauma and childhood adversity was assessed using two clinician-administered instruments, the Childhood Maltreatment Interview Schedule (Briere, 1992) to assess childhood events and the Sexual Assault and Additional Interpersonal Violence Schedule (Resick & Schnicke, 1992) to assess adulthood traumas. The child cumulative trauma index was the sum of five indicators of childhood adversities and trauma: sexual abuse, physical abuse, neglect, emotional abuse, and not living with mother (due to impairment or absence/abandonment). The adult cumulative trauma index was the sum of four different types of adulthood traumas: sexual assault, physical assault, repeated sexual assault (e.g., during kidnapping or captivity, by an acquaintance or partner), and domestic violence (e.g., repeated physical assault by a spouse or live-in partner). The reliability of these clinical interviews as well as detailed definitions of childhood and adult events has been reported in previous publications (Cloitre, Cohen, Edelman, & Han, 2001; Cloitre, Scarvalone, & Difede, 1997). Lifetime cumulative trauma index was defined as the sum of the child and adult measures.

The measure of complex PTSD included in this analysis was comprised of six symptoms in three domains: PTSD symptoms, emotion regulation difficulties, and interpersonal regulation difficulties. Posttraumatic stress disorder symptoms were evaluated using the Clinician-Administered PTSD Scale (CAPS; Blake, Weathers, Nagy, & Kaloupek, 1995). Emotion regulation difficulties were evaluated by (1) general emotion regulation self-efficacy as measured by the Negative Mood Regulation Scale (Catanzaro & Mearns, 1990) (2) depression as measured by the Beck Depression Inventory (BDI; Beck, Steer, & Brown, 1996), (3) anger expression difficulties as measured by the anger expression subscale (An/Ex) from the State-Trait Anger Expression Inventory (anger exp; Spielberger, 1991), and (4) dissociation as measured by the Trauma Symptom Inventory (TSI) Dissociation subscale (Briere & Runtz, 1990). Interpersonal problems were measured with the Inventory of Interpersonal Problems (Horowitz, Rosenberg, Baer, Ureno, & Villasenor, 1988), which examines difficulties (either being too high or two low) on six dimensions of interpersonal functioning (sociability, intimacy, assertiveness, submissiveness, responsibility, and control) and a total score is computed. Symptom complexity was defined as the number of symptoms a person had, that exceeded a prespecified level of severity, which were based on guidelines provided in the empirical literature. The cutoff points for the six symptoms were CAPS $\geq$80 (Weathers, Ruscio, & Keane, 1999); Negative Mood Regulation Scale $\leq$90 (Catanzaro & Mearns, 1990); BDI $\geq$25 (Beck et al., 1996); anger exp $\geq$35 (Spielberger, 1991); TSI-dissociation $\geq$1.80 (Briere, 1995); Inventory of Interpersonal Problems $\geq$1.90 (Horowitz et al., 1988).

## Data Analysis

The relationships between the potential predictors (child, adult, and total trauma indexes) and the outcome (symptom complexity) were assessed as follows. Chi-square test for independence was used to assess the association between the child and adult indexes. To test for equality of the mean of the outcome at different levels of the predictors against an ordered alternative (because the levels of the predictors were ordinal, rather than nominal factors), Jonckheere–Terpstra (J–T) test (Jonckheere, 1954) was employed. Significance of J–T tests was judged at level $\alpha = .05$, one-sided, whereas everywhere else two-sided tests were used. If the J–T test indicated that the mean of the outcome changed monotonically with the predictors, we next estimated the effect of the predictors on the outcome. Because the outcome is a count between 0 and 6 and thus could not be considered as a continuous Gaussian variable, cumulative logistic regression was used to model the odds for being at a more severe level of the outcome variable. To assess the effect of each predictor regardless of the level of the other, the odds for being at a more severe level of symptom complexity were modeled as a function of each predictor individually. To assess the additional effect of each predictor after controlling for the other, both child and adult trauma scores were included in a model to predict symptom complexity. The results are interpreted as the ratio of the odds for being at a more severe level of symptom complexity for every unit increase of the predictor variable.

# RESULTS

## Trauma Characteristics and Symptoms

Among the 582 women, the majority had experienced childhood sexual, physical, and emotional abuse; the most common adulthood trauma was sexual assault. Table 1 provides the frequency of women reporting each type of childhood and adulthood trauma.

***Table 1.*** Frequencies by Type of Trauma in Childhood and Adulthood in Adult Sample ($N = 582$)

| Childhood traumas | *N* | % | Adulthood traumas | *N* | % |
|---|---|---|---|---|---|
| Sexual abuse | 380 | 67.98 | Sexual assault | 288 | 50.94 |
| Physical abuse | 451 | 77.62 | Physical assault | 131 | 24.13 |
| Neglect | 246 | 45.56 | Domestic violence | 80 | 13.75 |
| Emotional abuse | 417 | 77.22 | Chronic sexual assault | 65 | 11.38 |
| Did not live with mother | 185 | 34.20 | | | |

***Table 2.*** Distribution of Number of Types of Traumas in Childhood and Adulthood for Adult Sample ($N = 582$)

| | Adulthood trauma % (*N*) | | | | | |
|---|---|---|---|---|---|---|
| Childhood trauma | 0 | 1 | 2 | 3 | 4 | Total |
| % (*N*) | | | | | | |
| 1 | 5.0 (29) | 2.4 (14) | 1.4 (8) | 0.0 (0) | 0.0 (0) | 8.8 (51) |
| 2 | 7.6 (44) | 8.8 (51) | 4.3 (25) | 0.2 (1) | 0.0 (0) | 20.9 (121) |
| 3 | 11.5 (67) | 12.7 (74) | 9.3 (54) | 2.4 (14) | 0.2 (1) | 36.1 (210) |
| 4 | 6.0 (35) | 7.2 (42) | 4.6 (27) | 1.5 (9) | 0.5 (3) | 19.8 (116) |
| 5 | 5.7 (33) | 4.3 (25) | 2.9 (17) | 1.5 (9) | 0.0 (0) | 14.4 (84) |
| Total | 35.8 (208) | 35.4 (206) | 22.5 (131) | 5.6 (33) | 0.7 (4) | 100.0 (582) |

*Note*. Percentages for each cell were computed relative to the total sample of 582.

***Table 3.*** Descriptive Information and Correlations among Symptom Measures in Adult Sample ($N = 582$)

| | | | | Correlations Among Symptom Measures | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Measures | *M* | *SD* | % Exceeding clinical cutoff | PTSD | BDI | Anger | NMR | SCL Dissociation | IIP |
| PTSD | 66.34 | 23.19 | 31.0 | – | .57 | .37 | −.34 | .60 | .45 |
| BDI | 21.10 | 10.05 | 35.4 | | – | .36 | −.50 | .58 | .60 |
| An/Ex | 31.10 | 9.87 | 36.8 | | | – | −.42 | .34 | .46 |
| NMR | 91.34 | 17.45 | 41.5 | | | | – | −.27 | −.45 |
| TSI Dissociation | 1.29 | 1.06 | 29.6 | | | | | – | .48 |
| IIP | 1.71 | 0.63 | 39.6 | | | | | | – |

*Note*. PTSD = Posttraumatic Stress Disorder; BDI = Beck Depression Inventory; An/Ex = Anger Expression; NMR = Negative Mood Regulation; TSI = Trauma Symptom Inventory; IIP = Inventory of Interpersonal Problems.

Table 2 identifies the proportion of women at each level of cumulative trauma in childhood (see last column) and at each level of adulthood cumulative trauma (see bottom row) as well as their joint distribution. The mean number of different types of childhood trauma was 3.1 ($SD = 1.16$) and the mean number of different types of adult trauma was 1.0 ($SD = .93$). Child and adult trauma were associated, $\chi^2$ (16, $N = 582$) = 35.1, $p < .01$. The total number of types of lifetime trauma, which is the sum of child and adult trauma, ranged from a very small percentage who had experienced only one type of trauma (5.0%) to those with as many as eight types of trauma (0.5%), whereas the majority (67.0%) experienced from three to five types. The number of lifetime trauma types was 4.1 ($SD = 1.58$).

Summary statistics are provided in Table 3 for all symptom measures as well as the percentage of women above the clinical cutoff for that symptom and the correlations among the symptom measures. Correlations among symptoms were in the moderate range (.29 to .60), suggesting that the measures are related but not highly overlapping in shared variance (i.e., a measure explains between 8% and 36% of the variability in another).

## Analyses of Symptom Complexity

The mean symptom complexity score (number of different types of symptoms above the cutoff) was 1.94 ($SD = 1.95$) with a range of 0 to 6. Table 4 provides the distribution of symptom

***Table 4.*** Symptom Complexity: Number of Symptoms above the Clinical Cutoff as a Function of Child Cumulative Trauma and Adult Cumulative Trauma ($N = 582$)

| | Adult cumulative trauma | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 0 | | 1 | | 2 | | 3 | | 4 | | Total | |
| Child cumulative trauma | *M* | *SD* | *M* | *SD* | *M* | *SD* | *M* | *SD* | *M* | *SD* | *M* | *SD* |
| 1 | 1.6 | 1.3 | 0.9 | 1.3 | 2.0 | 1.8 | | | | | 1.5 | 1.4 |
| 2 | 1.7 | 1.9 | 2.3 | 2.0 | 1.4 | 1.8 | 0,0 | 0.0 | | | 1.9 | 1.9 |
| 3 | 1.8 | 1.8 | 2.3 | 2.0 | 2.0 | 2.0 | 2.3 | 1.9 | 0,0 | 0.0 | 2.1 | 1.9 |
| 4 | 2.4 | 2.1 | 1.8 | 1.8 | 2.4 | 2.4 | 2.6 | 1.2 | 4.3 | 1.2 | 2.3 | 2.0 |
| 5 | 2.0 | 1.9 | 2.2 | 2.0 | 2.8 | 1.8 | 2.4 | 1.7 | | | 2.3 | 1.9 |
| Total | 1.8 | 1.9 | 2.0 | 2.0 | 1.9 | 2.0 | 2.6 | 2.0 | 3.0 | 2.1 | 1.9 | 1.9 |

complexity scores by levels of childhood and adulthood cumulative trauma. Cumulative childhood trauma was strongly associated with symptom complexity, $Z = 2.51$, $p < .01$, whereas the relationship between adulthood trauma and symptom complexity was not significant, $Z = 1.30$, $p = .10$. The lifetime cumulative trauma was significantly related to symptom complexity, $Z = 2.41$, $p < .01$. Given that adulthood cumulative trauma was not related to symptom complexity in the J–T test, a regression analyses was not performed. A cumulative logistic regression analysis indicated that child trauma was associated with higher symptom complexity, OR = 1.17, 95% CI = 1.04–1.33, $p < .05$, i.e., each additional type of childhood trauma increased the odds of greater symptom complexity by about 17%. Cumulative logistic regression analysis also showed that lifetime trauma (the total of child and adult trauma) was associated with higher symptom complexity, OR = 1.13; 95% CI = 1.03–1.24, $p < .01$. As expected, however, when childhood cumulative trauma was entered into the model along with the lifetime variable, the prediction of lifetime cumulative trauma became nonsignificant, but when adult cumulative trauma was entered as a control variable, the relationship between cumulative life trauma and symptom complexity remained significant ($p = .02$). Because there is evidence that racial/ethnic disparities and poverty are adversities that may contribute to negative mental health outcomes (e.g., Rutter, 2005; van Velsen, Gorst-Unsworth, & Turner, 1996), we repeated the above set of analyses controlling for race/ethnicity and earnings; these analyses yielded the same pattern of results.

Figure 1 shows the relationship between symptom complexity and both child and adult trauma together. The figure shows the results of model-fitting symptom complexity on smooth functions of the two predictors. The relationships appear linear, with a steeper slope associated with child trauma (reflecting the stronger relationship with symptom complexity) compared to adulthood trauma. The three-dimensional figure also provides a visual representation of the joint relationship of adult and childhood cumulative trauma to symptom complexity. The effects of child and adult trauma on symptom complexity seem additive (rather than, e.g., interactive).

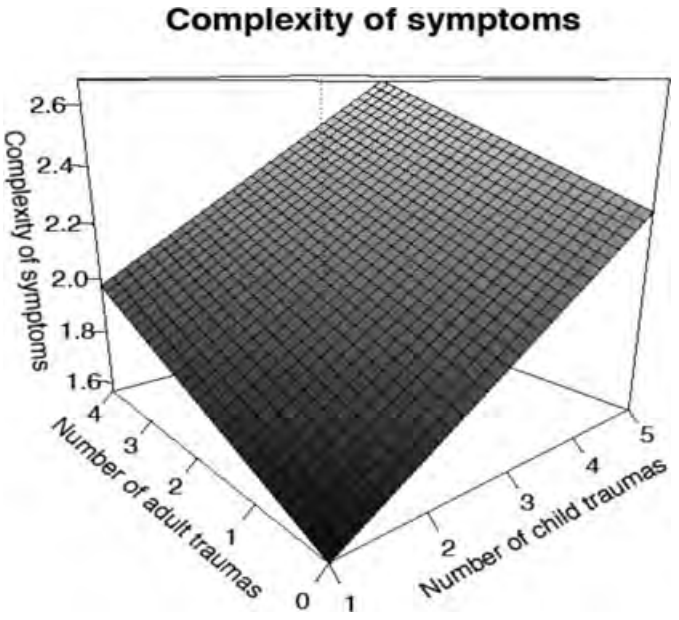


***Figure 1.*** Three-dimensional representation of relationship of child and adult cumulative trauma to current symptom complexity.

# STUDY 2

## METHOD

### Participants

Children and adolescents ($N = 152$) presenting to a child trauma clinic for trauma-focused evaluation and treatment services were

assessed. All had experienced at least one *DSM* PTSD Criterion A traumatic stressor (APA, 2000). Participants were referred by a variety of sources including children's advocacy centers, child protective service investigators, pediatricians, child welfare caseworkers, law enforcement, and word-of-mouth. Legal guardians for all participants provided informed consent approved by the institutional review board of the relevant university and the state child welfare department. Children aged 7 and above provided assent. All children were assessed by licensed clinical social workers, licensed clinical psychologists, or advanced trainees under the supervision of licensed clinicians.

## Measures

Trauma history was assessed via self- and caregiver report using two clinician-administered instruments, the UCLA PTSD Reaction Index for DSM-IV, parent version and child/adolescent version (Steinberg, Brymer, Decker, & Pynoos, 2004), and the Diagnostic Interview for Children and Adolescents PTSD and Psychosocial Stressors sections (Reich, 2000; Welner, Reich, & Herjanic, 1987). Based on information gathered from these measures, clinical interview, and when appropriate, review of child welfare, investigative, or hospital records, clinicians completed the Trauma/Loss History Profile (Pynoos & Steinberg, 2004; Pynoos et al., 2008; Stolbach, Dominguez, Rompala, & Gazibara, 2008). For the current study, the child cumulative adversity and trauma index was comprised of seven predictors: sexual abuse, physical abuse, neglect, emotional abuse/impaired caregiver, witnessing domestic violence, witnessing sexual or physical abuse, and not living with mother (due to placement in foster or other substitute care).

Symptom measures included in this analysis were selected to parallel the symptom domains in Study 1 and included child self-report (ages 7–17) and caregiver-report (all ages, completed by primary caregiver) and clinician report to enhance accuracy of symptom report. Child report was utilized for internalizing symptoms (e.g., PTSD and depression symptoms), caregiver report for externalizing and other behavioral symptoms, and an aggregate of all reporters for dissociation. Posttraumatic stress disorder symptoms were evaluated through self-report using the Child/Adolescent Version of the UCLA PTSD Reaction Index for DSM-IV (PTSD-RI; Steinberg et al., 2004). Depressive symptoms were evaluated through self-report using the Children's Depression Inventory (Kovacs, 1992). Dissociative symptoms were assessed through self-report using the Children's Dissociative Experiences Scale (Stolbach, 1997; Stolbach et al., 2007), through caregiver report using the Child Dissociative Checklist (Putnam et al., 1993), and through clinician report using the 10 Dissociation items from the Child Complex Trauma Symptom Checklist (Ford et al., 2007). These 10 dissociation items were reviewed by two leading experts in the field of dissociation (E. Nijenhuis, personal communication, November 16, 2008; O. van der Hart, personal communication, November 17, 2008). In a prior study (Stolbach et al., 2008), the Checklist's dissociation items showed good internal reliability (Cronbach's alpha = .75) comparable to that of the 17 *DSM* PTSD symptom items on the Child Complex Trauma Symptom Checklist (Cronbach's alpha = .77). Interpersonal problems and behavioral regulation were measured through caregiver report using the Child Behavior Checklist Externalizing Problems Scale (e.g., aggressive behavior, rule-breaking behavior; Achenbach & Rescorla, 2000, 2001).

Symptom complexity was defined as the number of symptoms (out of these four) that exceeded a prespecified level of severity, provided by guidelines in the manual or validation studies for each of the measures. For the Child Complex Trauma Symptom Checklist, a relatively new measure with no such guidelines, the severity level was defined as greater than one *SD* above the sample mean. The cutoff points were: PTSD-RI >40; Children's Depression Inventory >65; Child Behavior Checklist >65; Clinical dissociation was defined as meeting one or more of the following criteria: Children's Dissociative Experiences Scale >24 or Child Dissociative Checklist >11 or Child Complex Trauma Symptom Checklist Dissociation >4 or Child Complex Trauma Symptom Checklist Top 5 dissociation >1.

## Data Analysis

The data analysis approach was identical to the approach used for Study 1, except that because the sample consisted of both genders and ages ranged from 3 to 17 years, we adjusted for age and gender in the models, regardless of whether age and gender terms were significant.

# RESULTS

Of the 152 children assessed, 62.5% were girls and the remainder was boys. There were few gender differences in trauma history and none in sociodemographic, symptom severity, and symptom complexity characteristics. The mean age of the sample was 10.1 years of age ($SD = 3.5$). Race/ethnicity distribution was 76.3% African American; 11.2% Caucasian; 7.2% Hispanic; 5.3% biracial or multiracial. Children and families served at the clinic were typically at or below poverty level. The range of child cumulative adversity and trauma Index ranged from 1 through 7, with a mean of 3.4 ($SD = 1.9$). The frequency of each of the seven different types of child cumulative traumas are presented (with additional information by gender when differences emerged) are as follows: sexual abuse (60%; 44.0% of boys and 69.5% of girls), $\chi^2(1, N = 152) = 9.73$, $p < .001$; physical abuse (34%; 42.1% of boys and 28.4% of girls), $\chi^2(1, N = 152) = 2.99$, $p = .08$; neglect (47%); not living with mother (54%); emotional abuse (68%); witness to domestic violence (44%); and witness to sexual or physical abuse (32%). Of the 152 children, 19.1% had experienced one of the seven types of trauma or adversity; 22.4% two types, 11.8% three types, 17.1% four types, and 11.8% five types, and 17.9% six or

***Table 5.*** Descriptive Information for Symptom Measures and Symptom Complexity in Child Sample ($N = 152$)

| Measures | Symptom scores | | % at Clinical cutoff |
|---|---|---|---|
| | *M* | *SD* | |
| PTSD (UCLA-RI) | 28.6 | 15.6 | 23.3 |
| Depression (CDI) | 50.2 | 1.5 | 8.0 |
| Dissociation | – | – | 60.8 |
| Interpersonal problems & behavioral dysregulation (CBCL-Externalizing) | 3.7 | 11.0 | 47.2 |

| Cumulative trauma count (*n*) | Symptom complexity | |
|---|---|---|
| | *M* | *SD* |
| 1 (29) | 1.14 | 1.12 |
| 2 (34) | 1.76 | 1.52 |
| 3 (18) | 1.67 | .91 |
| 4 (26) | 1.39 | 1.02 |
| 5 (18) | 1.56 | 1.42 |
| ≥ 6 (27) | 1.87 | 1.03 |

*Note*. Posttraumatic stress disorder (PTSD) was measured with the UCLA PTSD Reaction Index (UCLA-RI). Depression was measured with the Child Depression Inventory (CDI). Interpersonal problems and behavioral dysregulation were measured by the Child Behavior Checklist (CBCL) Externalizing Symptoms Scale.

more types of trauma. Summary statistics are provided in Table 5 for all symptom measures along with the percentage of children that exceeded the clinical cutoff for that symptom.

The average symptom complexity score was 1.56 ($SD = 1.24$) with a range from 0 to 4. As among the adults, child cumulative trauma in children was associated with symptom complexity, $Z = 1.80$, $p < .05$. The cumulative logistic regression indicated that for every unit increase in childhood cumulative trauma, the odds for being at a higher level of symptom complexity increased by 17%, OR = 1.17, 95% CI = 1.00–1.37, $p < .05$. Mean symptom complexity scores by level of cumulative trauma are provided in Table 5.

## DISCUSSION

A significant relationship between cumulative trauma and symptom complexity was observed. In the adult sample, the analysis of the combined child and adult cumulative trauma index (lifetime trauma) indicated that there was an overall additive effect of the contribution of cumulative trauma to symptom complexity. However, when childhood cumulative trauma was entered into the analyses, the relationship between lifetime trauma and symptom complexity became nonsignificant, whereas the introduction of adult cumulative trauma did not change the outcome. These data suggest that lifetime cumulative trauma is related to symptom complexity due to the presence of childhood cumulative trauma. Moreover, the relationship between cumulative trauma and symptom complexity was found in a sample of children and adolescents. Thus, the results of the two studies together suggest that childhood cumulative trauma is associated in a rule-governed way to a complex symptom set and that childhood cumulative trauma significantly influences the presence of these symptoms in adulthood.

The results of these studies contribute to the growing evidence base for Complex PTSD in that they demonstrate in both children and adults a rule-governed relationship between increasing types of traumatic exposures and the presence of an increasing number of theoretically based and empirically constrained symptoms. The symptom set under study included both traditional PTSD symptoms as well as symptoms reflecting difficulties with self-regulatory functions. These latter symptoms were considered in large part because they have been associated with traumatic exposure in developmental studies of children. Thus, the definition of Complex PTSD articulated in this study represents an integration of the developmental and trauma empirical literature. Taken together, these studies suggest that exposure to multiple or repeated forms of maltreatment and trauma in childhood can lead to outcomes that are not simply more severe than the sequelae of single incident trauma, but are qualitatively different in their tendency to affect multiple affective and interpersonal domains. Recognizing the impact that cumulative trauma has on development beginning in early childhood, van der Kolk (2005) has proposed a new diagnostic category, Developmental Trauma Disorder, to account for the complex symptom profiles of chronically traumatized children, which includes all of the above symptoms (see van der Kolk, 2005).

Several cautions regarding the implications of the study results are warranted. First, the childhood cumulative index included prototypical traumatic stressors (sexual abuse, physical abuse) as well as other experiences more broadly understood as maltreatment (neglect, emotional abuse, absence of parent). We included these events as predictors of symptom complexity because they have been shown in disparate studies to be associated with risk for PTSD (e.g., Widom, 1999). In addition, such events can be argued in many cases to fulfill the prototypical characteristic of a trauma, which is that they create actual or threat of harm to the person. In childhood, traumas are comprised not only of acts of commission (such as sexual assault), but of acts of omission as well (such as neglect or abandonment) where the absence or withdrawal of certain resources may create a threat to the child's survival and physical well-being. This formulation may not include all instances of maltreatment nor sufficiently characterize the influence of maltreatment on psychological disturbances. Thus, future research is necessary in characterizing and understanding experiences of maltreatment in contributing to disorders such as Complex PTSD and Developmental Trauma Disorder.

Second, the predictor variable in this and other studies of negative outcomes (e.g., Briere et al., 2008; Follette, Polusny, Bechtle,

& Naugle, 1996; Kaltman, Krupnick, Stockton, Hooper, & Green, 2005) is a cumulative score of different types of traumas that have occurred rather than the duration or number of incidents that characterize a particular type of trauma (e.g., childhood abuse, domestic violence, prisoners of war). The empirical literature has consistently pointed to the predictive power of this variable whereas studies investigating the duration or other characteristics of sustained trauma have yielded little (e.g., Wyatt, Guthrie, & Notgrass, 1992). Thus, the impact of sustained and chronic trauma (vs. single incident events) may not be so much in the duration or the repetitive nature of a particular trauma, but rather the presence of multiple co-occurring traumatic events (e.g., childhood sexual abuse, physical abuse and neglect), which, in turn, lead to symptom complexity.

Third, the populations under study were those who had experienced childhood abuse and the range of different types of adult interpersonal traumas was restricted to the common traumas of a civilian population in peacetime. Our participants did not include, for example, refugee survivors of torture, political persecution, war zones, or concentration camps. It is possible that studies of such populations might show equally powerful effects for adult and childhood cumulative trauma. Indeed, adulthood traumas of sustained nature such as living in a war zone create a life condition that increases risk of exposure to a multiplicity of types of traumatic events (e.g., actual or threat of injury, sexual assault, witnessing injury or death to others) and the accumulation of such experiences would be expected to increase risk for symptom complexity. In addition, the current data do not rule out the possibility that the substantial burden of exposure to repeated and multiple types of trauma in such situations could lead deterioration of self-regulatory capacities in individuals without previous trauma histories or self-regulatory difficulties.

Lastly, an enduring question regarding the proposed diagnosis of Complex PTSD concerns its utility relative to the strategy of assigning the PTSD diagnosis along with several currently available DSM-IV diagnoses as comorbidities. We propose that diagnosing and labeling a patient with multiple psychiatric disorders increases the risk of the patient feeling and being stigmatized. In addition, the presence of multiple diagnoses can lead to complexity in treatment planning, difficulties in articulating a unifying treatment principle, and in establishing consensus among potentially multiple providers about prioritizing treatment targets. In contrast, a single diagnosis of Complex PTSD presents an empirically based, conceptually coherent and unified set of symptoms that may reduce the stigmatizing impact of being labeled with multiple, disparate disorder unrelated to trauma history. It may simplify clinical decision making and can guide the selection of treatment targets and interventions. Tests of these proposals would include research assessing the strength and specificity of the relationship between childhood trauma and Complex PTSD as compared to other disorders (see Herman, Perry, & van der Kolk, 1989), as well as assessing the predictive power of the single diagnosis of complex PTSD as compared to multiple diagnoses in regards to functional impairment or other important outcome variables.

The principles of treatment intervention for Complex PTSD and Developmental Trauma Disorder are driven by the interpersonal nature of most of the traumas associated with these proposed disorders. Childhood traumas associated with Developmental Trauma Disorder most often occur at the hands of attachment figures (Briere et al., 2008; Roth, Newman, Pelcovitz, van der Kolk, & Mandel, 1997) and traumas associated with Complex PTSD often emerge from a history of sustained relational or interpersonal traumas beginning with early life attachments (see Charuvastra & Cloitre, 2008). Accordingly, treatments for these disorders would seek to heal attachment-related injuries, to rehabilitate developmental competencies, and to revise ongoing emotional reactivity, maladaptive interpersonal patterns, and negative social perceptions.

In summary, this study demonstrates that both in children and adults, greater trauma exposure is associated with more complex symptom presentation. The symptom pattern observed in the child sample is consistent with the concept of a Developmental Trauma Disorder, whereas the corresponding symptom pattern observed in adult subjects is consistent with the concept of Complex PTSD. The results of this study suggest the importance and value of further research in the characterization and standardization of these proposed disorders. Further study is needed to test the relationship between cumulative trauma and measures of additional phenomena, such as somatization and disturbed belief systems, which may fall within the criterion set for developmental trauma disorder in children and Complex PTSD in adults. Comparison of the predictive power of Complex PTSD as compared to multiple comorbidities in regards to important outcomes would help evaluate the benefits of a single streamlined diagnosis. Conversely, further study is needed to demonstrate the specificity of these complex posttraumatic conditions, by delineating those symptoms that are *not* related to cumulative trauma.

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# DEFINITION OF DOMESTIC VIOLENCE

Domestic violence is a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion, that adults or adolescents use against their intimate partner.

DOMESTIC VIOLENCE IS:

- A pattern of behaviors including a variety of tactics – some physically injurious and some not, some criminal and some not – carried out in multiple, sometimes daily episodes.
- A pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion.
- A combination of physical force and terror used by the perpetrator that causes physical and psychological harm to the victim and children.
- A pattern of purposeful behavior, directed at achieving compliance from or control over the victim.
- Behaviors perpetrated by adults or adolescents against their intimate partner in current or former dating, married or cohabiting relationships of heterosexuals, gays and lesbians.

Prepared by Anne L. Ganley, Ph.D. for the Family Violence Prevention Fund

# DOMESTIC VIOLENCE STATISTICS

- One out of every three women will be abused at some point in her life.
- Battering is the single major cause of injury to women, exceeding rapes, muggings and auto accidents combined.
- A woman is more likely to be killed by a male partner (or former partner) than any other person.
- About 4,000 women die each year due to domestic violence.
- Of the total domestic violence homicides, about 75% of the victims were killed as they attempted to leave the relationship or after the relationship had ended.
- Seventy-three percent of male abusers were abused as children.
- Thirty percent of Americans say they know a woman who has been physically abused by her husband in the past year.
- Women of all races are equally vulnerable to violence by an intimate partner.
- On average, more than three women are murdered by their husbands or partners in this country every day.
- Intimate partner violence a crime that largely affects women. In 1999, women accounted for 85% of the victims of intimate partner violence.

- On average, a woman will leave an abusive relationship seven times before she leaves for good.
- Approximately 75% of women who are killed by their batterers are murdered when they attempt to leave or after they have left an abusive relationship.

# FREQUENTLY ASKED QUESTIONS ABOUT DOMESTIC VIOLENCE

### DO WOMEN WHO STAY IN ABUSIVE RELATIONSHIPS LIKE THE ABUSE?

No one wants to be hurt, beaten or made to feel inferior. Women stay in abusive relationships for a number of reasons. Women may have nowhere to go. They may believe that it is better for their children to stay in a stable home. For many women, the reason they stay is because of fear. Statistics show that 75% of women who are murdered by their batterers are killed when they leave or after they leave the relationship.

### WHY DO PEOPLE BECOME BATTERERS?

There is no single reason for abuse. Violence is a means of trying to exercise power and control over someone else. Many batterers were victims of abuse as children or came from families in which spousal abuse was prevalent. It is important to remember, however, that not all people who were victims of abuse as children will turn into batterers.

## CAN YOU IDENTIFY A POTENTIAL BATTERER WHEN YOU MEET HIM/HER?

Just as there is not one reason for abuse, there is not one type of batterer. Many batterers are highly successful professionally and in other areas of their lives. With history and society to support their beliefs, they may have little remorse or regret over battering.

## ARE VICTIMS OF DOMESTIC VIOLENCE ?WEAK? PEOPLE?

The fact that people experience domestic violence doesn?t make them inherently ?weak.? Through manipulation and coercion abusers often chip away at the victim?s self-esteem. Sometimes this process happens so subtly that the victim is unaware of the psychological, emotional and other types of abuse that often precede a physically violent attack. In addition, it is important to note that many victims grew up in homes where there was excessive violence and turbulence. They may have seen their parents abuse alcohol and drugs, and consequently blamed themselves for the dysfunction and unhappiness.

## WHAT DO ABUSED WOMEN WANT AND NEED?

The first thing that an abused woman needs is to be safe. If she is in danger it is very difficult to think beyond the immediate crisis. She does not need someone to tell her to ?snap out of it? or to insult her for being in her position. Basically, a victim needs support, someone who will listen to her, and she needs information about services. Above all, she needs respect.

## IS IT TRUE THAT MOST VIOLENT RELATIONSHIPS GO THROUGH CYCLES – FROM TENSION BUILDING TO AN ACTIVE BATTERING INCIDENT, LEADING TO THE HONEYMOON OR ?REMORSEFUL? STAGE?

This pattern, called the ?Cycle of Violence?, came from the battered women?s movement in the 1970?s. The idea has changed over the years because many women found that their relationships did not go through these phases. For some people there is no ? honeymoon? phase. Others do not see the tension building. Women?s rights activists today have changed the model, renaming it the ?Campaign of Violence.? The new name suggests that the violence is ongoing and multi-faceted, taking a variety of forms.

## ARE MEN VIOLENT BECAUSE THEY LOSE CONTROL?

No. Domestic violence is not a form of losing control; it is an attempt at gaining control. Most acts of violence are premeditated, occurring behind closed doors. It may seem as though the batterer is losing control because of his angry behavior. To that end, most batterers are very good manipulators. They know how to convince others and their victims that they are not at fault for their actions.

## IS DOMESTIC VIOLENCE LESS OF A PROBLEM BETWEEN SAME-SEX COUPLES?

Studies show that violence in same-sex relationships is as common as it is in heterosexual relationships. Sometimes the violence is less noticeable because of preconceived notions about gender roles. When men fight, people tend to view it as natural, because ?boys will be boys.? Women, because they are stereotyped as sensitive and passive, are not expected to be violent.

### DO DRUGS AND ALCOHOL CAUSE DOMESTIC VIOLENCE?

The need to exercise power and control is the cause of domestic violence. Drugs and alcohol enable people to lose their inhibitions, and cloud sound judgment. As a result, violence may be exacerbated by the use of these substances. It is important to remember, however, that it is not the cause.

### WHAT CAN I DO IF I, OR SOMEONE I KNOW IS BEING ABUSED?

There are many options available to people who need help. You can look in the local phone book or in a community services directory for the phone number of a shelter and counseling services closest to you. You can talk to someone you trust, or call any 24-hour hotline. The Florida Coalition Against Domestic Violence (FCADV) has a hotline that can direct you to services in your area. The number is 1-800-500-1119. In the Florida Keys you can reach the Domestic Abuse Shelter, Inc. (DAS) 24 hours a day, seven days a week at **(305) 743-4440 (tel:3057434440)**.

## THE POWER AND CONTROL WHEEL


(https://domesticabuseshelter.org/wp-content/uploads/2019/05/wheel6.jpg)

# WHY WOMEN STAY

A question often asked by society is: Why don?t battered women leave their abusers? According to Michael Down, Director of the Battered Women?s Justice Center at Pace University School of Law, asking this question suggests that battered women can control the violence. It also suggests, in a subtle way, that the women are to blame when they are unable to leave abusive partners. Victims cannot control this violence; the ones responsible are the abusers.

There are a number of reasons why women stay. The reasons are usually very compelling. Women who do walk away usually accomplish this through the assistance and support of friends, family, and the legal and medical community. For those who choose to stay, the reasons vary.

- **Fear:** Fear of the unknown. Sometimes leaving the abuse and being alone will be more frightening for the victim than remaining in the relationship. Also, the abuser usually tends to

threaten the victim and the children with physical harm if they try to leave. Statistics show that women who leave their batterers are at a 75% greater risk of being killed by the batterer than those who stay.

- **Children:** Being a single parent may be a terrifying experience for a battered woman. The responsibility of raising children alone can be too much to bear (even if the spouse/boyfriend has never assisted in the care taking needs of the children.) The abuser will often use the children as a pawn against the victim by threatening to take them away if the woman attempts to leave.
- **Promises of Reform:** The abuser will frequently promise that it will never happen again; the victim wants to believe that this is true.
- **Guilt:** The woman may believe that her husband is sick and needs her help. Women are trained to think that they can save their abusive mates, that they can change. Thus, the idea of leaving her spouse can produce feelings of guilt.
- **Lack of Self-esteem:** The woman may come to believe that she somehow deserves the abuse to which she has been subjected (she has been told this repeatedly by her partner). Lack of self-esteem and the belief that she doesn?t deserve anything better can be paralyzing for a battered woman. This lack of self-esteem cuts across racial, ethnic, religious and socioeconomic lines. Physicians, attorneys, judges, and professors can be, and are, battered.

- **Love:** Most people enter a relationship for love, and that emotion does not simply disappear in abusive relationships. Most women want the violence to end, but love their partner and want the relationship. According to G.L. Bundow, a South Carolina physician, ?I know that when I took my marriage vows, I meant for better or for worse.? This physician accepted the abuse, and it wasn?t until the day that the ?until death do us part? section of her wedding vows became a frightening reality that she was motivated to leave the relationship.
- **Sex-role Conditioning:** Women are still taught to be passive and dependent upon men. In addition, women generally accept the responsibility for the state of their relationships; to leave is to admit failure.
- **Societal Acceptance/Reinforcement of Marital Violence:** Many people believe that marital violence is acceptable. ?She?s there because she likes it,? or ?A little slap will keep her in line.?
- **Economic Dependence:** The economic reality for women (particularly with children) is a bleak one, especially for women who have not worked outside the home. Economic dependency on the spouse is often a very real reason for remaining in the relationship. She may not have (or know of) any other resources.
- **Religious Beliefs:** Often, religious beliefs reinforis God?s plan? may be a powerful reason for staying.

- **Cultural or Ethnic Background:** Often a person?s cultural or ethnic background may discourage revealing the fact that the person is a victim of domestic violence. As a result, the victim will remain in the relationship in order to avoid persons outside the family from finding out.
- **Stigma of a Broken Home:** Society considers that families who separate are ?broken.? This implies that something is wrong with such a family, even though the ?intact? family environment may be a violent and dangerous one.
- **Satisfaction with the Relationship between Incidents of Battering:** The abusers are often very charming and loving when not abusing the victim. The women often tend to fall for their batterer?s softer side, especially the tenderness that they show immediately following each attack.

## THE ABUSED VICTIM: REASONS FOR NOT SEEKING HELP

There are many complex reasons for not seeking help from domestic violence. The reasons vary from individual on why they do not reach out. The following are some common reasons why she/he may not reach out:

- Things are so bad
- Fear
- Abuse of a child
- Questioning relationship

- Fear of the unknown is less than fear in the relationship
- Fear of death
- Wanting to talk to someone, seeking support
- Willing to break the secret
- Act of violence/police intervention
- Acceptance of situation/admitting there is

## DOMESTIC VIOLENCE AWARENESS QUIZ

1. Domestic violence affects only a small percentage of the population.
   TRUE FALSE
2. Domestic violence occurs mostly in lower socioeconomic groups.
   TRUE FALSE
3. Women are most often the victims rather than the perpetrators of abuse.
   TRUE FALSE
4. Children who are abused often become abusers themselves.
   TRUE FALSE
5. Alcohol and other drug abuse cause violent behavior.
   TRUE FALSE
6. When two women in a same-sex relationship fight, it’s usually a “fair fight" (a fight between equals).
   TRUE FALSE
7. It’s easy to identify a batterer based on how he behaves in public.
   TRUE FALSE

8. Abuse does not stop and may even intensify when the woman is pregnant.

   TRUE FALSE

9. Children living in homes where domestic violence is present probably aren't affected emotionally unless the violence is targeted at them.

   TRUE FALSE

## ANSWERS TO QUIZ

1. **False.** Domestic and sexual violence affect a large percentage of the population, cutting across all racial, ethnic and socioeconomic boundaries. According to statistics one in three women is a victim of domestic violence. One in three girls and one in six boys are victims of sexual abuse before they reach the age of 18.
2. **False.** Domestic violence occurs at all socioeconomic levels. Financial pressures may put pressure on families that can exacerbate violence, but it is important to remember that socioeconomic pressures are NOT the cause. Domestic violence is a result of the need for one person to exercise power and control over another. The problem is prevalent in upper, middle and lower class communities alike.
3. **True.** Intimate partner violence a crime that largely affects women. In 1999, women accounted for 85% of the victims of intimate partner violence.
4. **False.** While approximately seventy-three percent of abusers were victims of violence as children, not all victims turn into batterers. Many victims grow up to be loving, healthy parents.

5. **False.** Although alcohol and/or drugs are present in almost 50% of abuse cases, they are never the cause of violence. An insatiable need for power and control is the cause for domestic violence. Alcohol and drugs may loosen inhibitions allowing batterers to unleash violent behaviors.
6. **False.** Statistics show that domestic violence is equally common in same-sex and heterosexual relationships. Stereotypes about men and women may prevent us from acknowledging domestic violence. Beliefs that ?boys will be boys? or that ? women never fight? are a way of ignoring the power and control issue that is present in all domestic violence situations. Just because the couple may be equal in strength doesn?t mean that one cannot exercise power and control over the other.
7. **False.** It is often very difficult to identify a batterer. Domestic violence is one of the most clandestine problems. Batterers are often skillful manipulators, knowing how to present a good image so that the violence remains a secret. Many people are surprised when they learn that their neighbor, friend or family member is a batterer.
8. **True.** According to statistics, women are at greater risk of being victimized by domestic abuse when they are pregnant. Batterers may feel increasingly threatened and jealous of the victim?s attention towards the unborn baby, and become more violent as a result.

# INTERNATIONAL STATISTICS ON VIOLENCE AGAINST WOMEN

In February 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women. The document defines violence against women as ?any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.?

Violence against women is a problem in every country in the world. The statistics are staggering:

- In every country where reliable, large-scale studies have been conducted, results indicate that between 10% and 50% of women report they have been physically abused by an intimate partner in their lifetime. (WHO, 2000)
- Population-based studies report between 12% and 25% of women globally have experienced attempted or completed forced sex by an intimate partner or ex-partner at some time in their lives. (WHO, 2000)
- Interpersonal violence was the tenth leading cause of death for women around the world 15 – 44 years of age in 1998. (WHO, 2000)
- Forced prostitution, trafficking for sex and sex tourism appear to be growing. Existing data and statistical sources on trafficking of women and

children estimated 500,000 women entering the European Union in 1995. (WHO, 2000)

- Among women aged 15 – 44 worldwide, gender-based violence accounts for more death and ill health than cancer, traffic injuries and malaria put together. (World Bank, 1993)
- Approximately 60 million women, mostly in Asia, are ?missing? killed by infanticide, selective abortion, deliberate under-nutrition or lack of access to health care. (Panos 1998: UNFPA)
- Based on recent studies, more than 130 million girls and women, mostly in Africa, have undergone female genital mutilation, and an estimated 2 million girls are at risk for undergoing the procedure each year. (WHO, 1998)
- In 9 Latin American countries, a rapist who marries his victim stays out of jail. (Chiarotti, 2000)
- Studies suggest that one-fourth to one-third of the 170 million women and girls currently living in the European Union are subjected to male violence. (Logar, 2000)

## COUNSELING STRATEGIES WITH VICTIMS OF DOMESTIC VIOLENCE

- Ask about the violence and the emotional coercion.

- Support her telling her story again and again. Acknowledge the courage in telling.
- Find her strengths and point them out to her.
- Build upon her hopes, dreams, and plans for the future.
- Rebuild her social-support network or create an alternative network that is trustworthy.
- Stick with her, even when you get frustrated.
- Build her knowledge of options and advocate for her.
- Provide concrete assistance.
- Take an active concern and help her plan for her safety.
- Respect her choices. Only she lives with the consequences. Let her maintain control.
- Collaborate with other services that can help her. Work actively with them.

Family Violence Prevention Fund

# THE DOMESTIC ABUSE SHELTER OFFERS

free and confidential services that are tailored to the needs of each survivor.

Please contact our 24 Hour Hotline to speak with an advocate: **(305) 743-4440 (tel:3057434440)**

# More About Coercive Control

## Why women are most likely to be victims of this type of abuse and why they stay



Oct 16, 2015 | By domesticshelters.org

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notes

In our continuing Q&A with Lisa Aronson Fontes, PhD, author of *Invisible Chains: Overcoming Coercive Control in Your Intimate Relationship,* Fontes talks about why women are especially vulnerable to being controlled.

**DS.org**: *Why are women who are in relationships with men most likely to be victimized?*

**Fontes**: Women are especially vulnerable to coercive control because of sexism. Sexism makes a relationship in which a man dominates a woman seem unremarkable. Even when we raise girls to have a career, we still usually raise them to take care of others' well being before their own. Girls and women learn to sacrifice to make those around them happy.

Society also tends to idealize romantic love as being the most important aspect of a woman's life. So you have a woman who aims to please and will do anything to make her relationship work. And then she's paired up with a man who has been raised to get his needs met. It's a recipe for coercive control. And due to sexism, women typically have less access to transportation and money, making it harder to strike out on their own. Also, because men tend to have greater access to resources, they are more likely to dominate than to be dominated by their women partners.

Finally, men's usual greater physical strength and willingness to fight physically makes women much more likely to live in physical fear of their partners than men. It only takes one bruised arm or episode of forced sex for a woman to learn that it is easier to submit than to protest.

**DS.org**: *What about when women control men?*

**Fontes**: Sometimes women use coercive control against their male partners, usually in situations where the man is disempowered because of a physical or psychological disability or because of his immigration status. The little research that exists on coercive control seems to show that when men are dominated in a relationship like this, they have an easier time leaving. We just don't hear about men being held captive by their wives, or men being forced to wear certain clothes by their girlfriends—it rarely happens. Men may feel pushed around and unhappy in their relationships with women—but the degree of oppression is not the same.

**DS.org**: *Does coercive control exist in same sex couples?*

**Fontes**: Absolutely, although it can be difficult for people to detect and name. Often people think that without the male/female dynamic, abuse cannot be present. This is incorrect. People in same sex couples can be unusually isolated, especially if they are not "out" about their sexual orientation or if they are cut off from their families, which intensifies the possibility of domination.

**DS.org**: *Why does a person who is being victimized by coercive control stay in the relationship?*

**Fontes**: The victimized partner stays because she is trying to make her life better and keep herself and her children safe. She may remember the good parts of the relationship and think that if only she could change something in herself, the relationship could be good again. She may believe her faith requires her to stay. She stays because she has nowhere else to go. And she stays because her partner may act in a loving way when she lets him know she is "done" with the relationship. He deliberately traps her with acts of love. And she stays because she may feel threatened. Her partner has threatened to kill himself, or kill her, or take the children—if she leaves. Indeed we know that women face greatest risk when they leave an abusive partner. This is why safety planning with a domestic violence advocate is so important.

Another important question is why *he* stays. Why would a man want to stay in a relationship where he is constantly jealous and frequently angry? Why would he want to stay with a woman who no longer wants to be with him? Frequently, an abusive man will stalk a woman after she has done everything she can to sever the relationship. The term for this is "persistent pursuit"—when one partner pursues and stalks another after the other has made it clear they want the relationship to be over. This can be terrifying. Abusive and controlling men are so dependent on their intimate partners, they often believe they will die without them.

*This is part 2 of 3. See part 1 and part 3.*

*Illustration by Liz Bannish*

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# Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory

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An empirical test of traumatic bonding theory, the notion that strong emotional attachments are formed by intermittent abuse, is reported. In-depth assessments (interviews plus questionnaires) were conducted on 75 women who had recently left abusive relationships (50 where physical violence had occurred). The study found support for the effect of relationship dynamic factors such as extremity of intermittent maltreatment and power differentials on long-term felt attachment for a former partner, experienced trauma symptoms, and self-esteem, immediately after separation from an abusive partner and again after a six month interim. All three of these measures were significantly intercorrelated within each time period. Each measure at Time 1 correlated significantly with each corresponding measure at Time 2. After six months attachment had decreased by about 27%. Relationship variables (total abuse, intermittency of abuse and power differentials) accounted for 55% of the variance in the attachment measure at Time 2 indicating prolonged effects of abuse suffered in the relationship.

Dutton and Painter (1981) have elaborated a theory of "traumatic bonding," whereby powerful emotional attachments are seen to develop from two specific features of abusive relationships: power imbalances and intermittent good-bad treatment. This notion that attachment is strengthened by intermittent abuse appears, at first glance, to be somewhat at odds with classic attachment theory, which proposes that attachment increases with consistent positive treatment. Bowlby (1969, 1973, 1977, 1980) argued that the human need for secure attachment was the result of a long term evolutionary development which rivaled feeding and mating in importance. Bowlby defined infant attachment as a bond developed with "some other differentiated and preferred individual who is conceived as stronger and/or wiser" (1977, p. 203). Proportional to this sense of the other having absolute and unrestricted power over the infant, however, was the corollary that in times of threat,

disruption or separation to that secure attachment would produce emotional responses that are extremely strong, and which serve to generate proximity to the caregiver. Hence, even in Bowlby's original work on attachment, the notion existed that strong emotions produced by intermittent behavior of the caregiver could enhance attachment. This notion is not limited to infant attachment; an intriguing series of studies have likened attachment in infant relationships to adult romantic attachment (Hazan & Shaver, 1987; Shaver, Hazan, & Bradshaw, 1988; Shaver & Hazan, 1988; Collins & Read, 1990). Hazan and Shaver (1987), for example, developed a self-report measure to differentiate adult analogues of infant attachment patterns designated as secure, anxious-avoidant, and ambivalent. These adult patterns are viewed as enduring characteristics, like personality traits. This research focus, however, has not yet examined the role of adult relationship dynamics in enhancing attachment.

To demonstrate that "paradoxical attachment" was a general learning phenomenon, Dutton and Painter (1981) cited animal experiments and human case studies which demonstrated that attachment could be strengthened when such alternating good-bad treatment was applied. For example, people taken hostage have been found subsequently to show positive regard for their captors (Bettleheim, 1943; Strentz, 1979), abused children have been found to have strong attachments to their abusing parents (e.g., Kempe & Kempe, 1978), and former cult members are frequently loyal to malevolent cult leaders (Conway & Seigelman, 1978).

## ATTACHMENT IN ABUSIVE RELATIONSHIPS

Dutton and Painter (1981) point out how the pathway into an abusive relationship constitutes a form of social trap. The first abusive incident appears to be an anomaly, occurring at a time of relationship novelty and optimism. This, coupled with its relative lack of severity and post-incident contrition by the man, operates to strengthen the affective attachment at a time when the belief has not yet formed that the abuse will be repetitive and inescapable. Repeated incidents of greater severity tend to shift the woman's cognitions to the belief that the violence will recur unless she does something to prevent it. Dutton and Painter (1981) discuss, at some length, the reasons for this initial introjection of blame for the abuse. By the time the woman realizes that the abuse is inescapable, the traumatically produced emotional bond is quite strong.

There are two common structural features in the apparently diverse relationships where traumatic bonding has been described. The first feature is the existence of a power imbalance, wherein the maltreated person perceives him or herself to be subjugated to, or dominated by, the other. The second is the intermittent nature of the abuse. Dutton and Painter (1981) argue that intermittency and power imbalances are quintessential features of abusive relationships.

### Power Imbalance

Attachment to a person or group larger or stronger than the self can increase feelings of personal power (Becker, 1973; Fromm, 1941; Lion, 1977; McClelland, 1975) but can also create a microcosm in which the subordinate individual feels powerless. Social psychologists have found that unequal power relationships can become increasingly unbalanced over time, to the point where the power dynamic itself produces pathology in individuals. For example,

Zimbardo, Haney, and Banks (1972) reported anxiety and depression after only four days in volunteer subjects playing the role of "prisoners" who were relegated to powerlessness in a simulated prison situation. Lewin, Lippitt, and White (1947) reported increased redirected aggression in powerless members of autocratic groups, and Bettleheim (1943) reported Jewish prisoners' compulsive copying of the behavior and expressed attitudes of their Nazi prison guards, which he described as "identification with the aggressor" (cf. Freud, 1942). Recast from its psychoanalytic mode, this concept predicts that in situations of extreme power imbalance, where a person of high power (dominator) is intermittently punitive, subjugated persons might adopt the dominator's assumed perspective of themselves, and internalize or redirect aggression toward others similar to themselves.

As the power imbalance magnifies, the subjugated person feels more negative in their self-appraisal, more incapable of fending for themselves, and is, thus, increasingly more in need of the dominator. This cycle of relationship-produced dependency and lowered self-esteem is repeated, eventually creating a strong affective bond from the low to high power person. Concommitantly, the person in the high power position develops an inflated sense of their own power (just as the low power person develops an exaggerated sense of their own powerlessness) which masks the extent to which they are dependent on the low power person to maintain their feeling of, as Fromm (1973) put it, "the transformation of impotence into omnipotence" (p. 322).

This omnipotence, however, is predicated on the dominator's ability to maintain absolute control in the dyadic relationship. When the symbiotic roles which maintain this sense of power are disturbed, the masked dependency of the dominator on the subjugated person is suddenly revealed. One example of this sudden reversal of the power dynamic is the desperate control attempts on the part of the abandoned battering husband to bring his wife back (through surveillance, intimidation, etc.). It is important to note that in romantic relationships, as well as in cults, power imbalances magnify so that each person's sense of power or powerlessness feeds on itself. In the process, both persons (or groups) become welded together to maintain the psychological subsystem which fulfills the needs created, in part, by the power dynamic itself. In battering relationships, physical abuse can serve to maintain a power differential and, when coupled with emotional abuse, including threats against the woman and her children and a generalized feeling of powerlessness felt by the victim, can serve to maintain the relationship homeostasis.

## Intermittency of Abuse

The second feature of traumatic bonding situations is the fact that abuse occurs intermittently. That is, the dominator intermittently and periodically maltreats the dominated by threats, verbal, and/or physical abuse. The offset of abuse is likely to be characterized by the onset of positive behaviors, described by Walker (1979) as the "contrition phase" of the abuse cycle, and comprised of promises to change, promises to not be abusive again, proclamations of love, etc... Thus, the victim is subject to alternating periods of aversive/negative arousal and the relief/release associated with the removal of aversive arousal. The situation of alternating aversive and pleasant conditions is an experimental paradigm within learning theory known as intermittent reinforcement/punishment, which is highly effective in producing persistent patterns of behavior that are difficult to extinguish or terminate, and which develops the strongest experimentally produced emotional bonds (see, for example, Amsel, 1958; Scott, 1963;

Seay, Alexander & Harlow, 1964; Harlow & Harlow, 1971; Rajecki, Lamb, & Obmascher, 1978)

Rajecki, Lamb, and Obmascher (1978) reviewed emotional bonding in infants, and assessed the major theories of infantile attachment, including those on both human and animal attachments (e.g., Bowlby, 1969; Lorenz, 1937). One criterion for the comparative evaluation of these theories was their relative ability to explain "maltreatment effects." In reviewing the literature on maltreatment effects, Rajecki et al. found conclusive evidence for enhanced infant animal attachment under conditions of intermittent maltreatment in birds, dogs, and monkeys. Attempts to inhibit infants' bonding to abusive attachment objects were found inevitably to fail unless: (1) they were persistent and consistently punitive, and (2) an alternative attachment object existed. Harlow and Harlow (1971) reviewed their research with infant monkeys, in which "evil surrogate mothers" were used as potential attachment objects. These surrogates exuded noxious air blasts, extruded brass spikes, hurled the infant to the floor, or vibrated so violently as to make the infant's teeth chatter. None of the above disrupted the bonding behavior of the infant monkeys. The authors concluded that "instead of producing experimental neurosis, we have achieved a technique for enhancing maternal attachment." Similarly, Seay, Alexander, and Harlow (1964) noted that, "a surprising phenomenon was the universally persisting attempts by the infants to attach to the mother's body regardless of neglect or physical punishment" (p. 353).

When the physical punishment is administered at intermittent intervals, and when it is interspersed with permissive and friendly contact, the phenomenon of traumatic bonding seems most powerful. Fischer (1955) attempted to inhibit the social responses of young dogs, and found that an indulged-punished group showed 231% of the human orientation of a consistently indulged group. As Rajecki and his colleagues concluded, "the data show that inconsistent treatment (i.e., maltreatment by, and affection from, the same source) yield an accentuation of attempts to gain proximity to the attachment object" (Rajecki, et al., 1978, p. 425).

To what extent are findings based on animal studies applicable to humans? Prima facie evidence suggests a process similar to the intermittent reinforcement used in animal studies may be the mechanism that maintains the strong bond formed by battered women for their abusers. Rounsaville (1978) speculated that "one feature that may weigh in favor of staying is the intermittent nature of the abuse... many (battered women) described highly pleasant periods of reconciliation between episodes... This pattern was conducive to ignoring the problem or thinking of it as an aberrant, exceptional part of the relationship" (p.17). Walker (1979) described a cyclical pattern of domestic violence that approximates the intermittent punishment-indulgence pattern used in animal research. Tension gradually builds (during phase one), an explosive battering incident occurs (during phase two), and a calm, loving respite follows (phase three). The battered woman's psychological reactions in each of the three phases, and the repetition of these phase-related responses, serves to "bind a battered woman to her batterer just as strongly as 'miracle' glues bind inanimate substances" (p. xvi). The emotional aftermath of a battering incident for the batterer, usually guilt and contrition, leads him to attempt to make amends via exceptionally loving treatment toward his partner. Thus, he becomes temporarily the fulfillment of her hoped-for fantasy husband and at the same time, his improved behavior serves to reduce the aversive arousal he himself has created, while also providing reinforcement for his partner to stay in the relationship.

## TRAUMATIC BONDING AND LEAVING AN ABUSIVE RELATIONSHIP

The process of detaching from, or emotionally leaving, an abusive relationship should be more difficult, since traumatic bonding is theoretically increased by relationship dynamics. Hence, intermittent abuse develops an emotional bond which interferes with leaving and remaining out of an abusive relationship. Dutton and Painter (1981) likens this attachment process to an elastic band which stretches away from the abuser with time and subsequently "snaps" the woman back. As the immediate trauma subsides, the strength of the traumatically-formed bond reveals itself through an incremental focus on the desirable aspects of the relationship, and a subsequent sudden and dramatic shift in the woman's "belief gestalt" about the relationship. This shift in phenomenology alters her memory for past abuse, and her perceived likelihood of future abuse. The point of this original formulation by Dutton and Painter (1981) is that this belief shift is attachment-derived. That is, it follows from a shift from avoidance to return at an affective-attachment level. The foreshortened future and other aspects of the woman's attachment-derived thinking are similar to the descriptions of "deconstructed thinking" described by Baumeister (1990) in his description of pre-self-destructive thinking.

Several studies have been performed to identify factors that differentiate women who leave or stay in abusive relationships or, having left, remain out (Gelles, 1976; Pagelow, 1981; Rounsaville, 1978; Peretti & Buchanan, 1978; Kalmuss & Straus, 1982; Snyder & Scheer, 1981; Smith & Chalmers, 1984; Aquirre, 1984; Strube & Barbour, 1983, 1984; Okun, 1986; Strube, 1988; Erickson & Drenovsky, 1990). These studies tend to conclude that economic, rather than psychological, variables were better predictors. Economic factors include an entire constellation of factors contributing to the woman's economic dependence on her husband. These range from macrosystem features such as male-female wage differentials to the woman's own job skills, employability, and/or number of dependents. Economic explanations view these forces as objective economic factors that are directly measurable. Psychological measures in prior studies have tended to focus on the woman's subjective perception of her life alternatives inside and outside the relationship.

Strube (1988) reviewed these studies and concluded that a variety of factors, many economic, influence that decision. Strube proposes four models to understand the decision process, including "psychological entrapment" (similar to "investment," as described by Dufton and Painter, 1981). Landenberger (1989) also describes entrapment processes and used semi-structured interviews to investigate what she calls a four stage process of entrapment: binding, enduring, disengaging, and recovering. While entrapment may explain the process of engagement in an incrementally abusive relationship, it does not explain the subsequent strength of attachment. Investment, however, as defined by length of the relationship or number of prior leavings and returnings, is a variable that may impact on post separation affect.

Some conclusions can be drawn from the few replicated results that arise from these studies. First, most studies indicate that economic independence contributes to the likelihood of women leaving abusive relationships. Second, the longer the duration of the relationship at the time of the woman being interviewed, the greater the likelihood of the woman returning to the abuser. Whether this indicates commitment, investment, or something else is not clear. Third, neither abuse in childhood nor severity of violence in the current relationship are reliable predictors of relationship breakup.

Nevertheless, these studies are not good tests of traumatic bonding theory for two reasons. First, they have not comprehensively assessed dynamic features of the

relationship such as power differentials, power changes with abuse, or intermittency of abuse, all of which are central to the establishment of traumatic bonding. Second, they have assumed that attachment was directly related to whether the women stayed in, or left, the relationship. We would argue that the woman could remain out of the relationship and still feel attachment or, conversely, return for economic reasons, and feel emotionally unattached. In this study, we assess a constellation of separation-related psychological factors. We focus on felt attachment to the partner, on self-esteem, and on experienced trauma symptoms. Our hypothesis is that all three will be affected by relationship dynamics that generate traumatic bonding. To assess these dynamics we include measures of intermittency of abuse and power differentials in the abusive relationship.

## METHOD

Recruitment of women to participate in this study was done over a six month period. To qualify for the research sample, a woman had to have left the relationship within the past six months. Women with a history of two or more incidents of severe physical abuse (on the Conflict Tactics Scale [Straus, 1979]) were recruited through two sources: transition houses and shelters in the Greater Vancouver region of British Columbia (n = 38), and women whose husbands or partners had been clients in the Assaultive Husbands Program, a treatment program for abusive men (n = 12).

A control sample of emotionally-abused-only women was sought through newspaper advertisements. Some of these women, however, had also been battered. The criterion for inclusion in the emotionally abused group was less than two incidents of physical violence, and no incidents of severe physical violence (on the Conflict Tactics Scale) during the relationship. Since our analyses were to be correlational, we were not concerned that some violence had occurred in this group. Practically, it is difficult to find control groups of women who have just left relationships where no violence occurred.

Women completed a test battery to be described below. In addition, structured interviews were conducted at Time 1. All subjects were paid for participation. All interviews were audiotaped with the subject's permission.

A total of 75 women participated in the study (50 battered and 25 emotionally abused). Their average age was 31.4, average time in the relationship was 11.5 years (range six months to 44 years), average time separated was 20.5 weeks. On average, these women had initiated 2.1 prior separations. In this sample, 22 women were childless and half had experienced some form of abuse in a previous relationship. The women in the total sample reported very high degrees of verbal aggression directed toward them in their prior relationship. For example, the mean report of verbal aggression was 55.2 on the CTS, which places this sample beyond the 99th percentiles for population norms published by Straus, Gelles, and Steinmetz (1980). Women in the battered group also reported total physical aggression scores by their male partner of 44.1, (S.D. = 16.0) and a severe physical aggression score of 13.4 (S.D. = 18.2), again beyond the 99th percentile for population norms. Women in the emotionally abused group reported total physical aggression scores of 1.2 ( S.D. = 2.0) and severe physical aggression scores of 0.

## DEPENDENT MEASURES

Dependent measures were collected at Time 1 and again at Time 2, six months later.

### Attachment

To assess attachment in this study we used a scale of attachment developed by Kitson (1982), supplemented with some items from a scale by NiCarthy (1982). The Kitson scale, which was used to assess attachment during divorce, measures the bereavement aspect of separation and contains items such as "I frequently find myself wondering what he is doing" and "I spend a lot of time still thinking about him." Kitson (1982) reports the psychometric qualities of the scale, including an alpha of .80. To supplement the assessment of attachment, 10 items from an idealization measure developed by NiCarthy (1982) were included. These include items such as "No one could ever understand him the way I do," "Without him I have nothing to live for," and "I love him so much, I can't think of being with anyone else." The NiCarthy scale added an element of continuing obsession with the partner that was not included in the Kitson scale. Since the composite scale was new, we performed an item-whole correlation for each item, and retained items that had correlations over .55 ("I feel I will never get over the breakup"). Chronbach's alpha for the entire 20 item scale was .92.

### Self-Esteem

Since self-esteem is frequently mentioned in the literature on effects of battering, we included it here. We used the Rosenberg (1965) Self-Esteem Scale. This 1 0-item self-report scale has reported alphas of .77 and .88 (Robinson, Shaver, & Wrightsman, 1991). Responses range from "strongly disagree" to "strongly agree" on a four-point scale; the higher the score, the greater the self-esteem.

### Trauma Symptoms

The Trauma Symptom Checklist (Briere & Runtz, 1989) is a brief (33-item) reliable instrument showing predictive and construct validity. It has been shown to discriminate female victims of childhood sexual abuse from non-victimized women. The TSC-33 contains five subscales: dissociation, anxiety, depression, post-sexual abuse trauma-hypothesized, and sleep disturbance. The PSAT-hypothesized includes those symptoms thought to be most characteristic of sexual abuse experiences, but which may also occur as a result of other types of trauma. Analysis of the internal consistency of the five subscales indicated reasonable reliability with an average subscale alpha of .71, and a total alpha for the TSC-33 of .89 (Briere & Runtz, 1989).

## INDEPENDENT MEASURES
## (Independent measures were collected at Time 1)

### The Conflict Tactics Scale

The Conflict Tactics Scale (CTS; Straus, 1979) is divided into three subscales: reasoning (3 items), indicating a problem solving orientation; verbal aggression (7 items), indicating verbal and nonverbal means of threatening or hurting the other, and

violence (9 items), including the use of physical force as a means of conflict resolution. Items range in severity from "pushing" to "using a weapon on the other." Respondents are asked to rate the type and number of conflict tactics used by both the self and the other person specified in the dyad during the last year of their relationship.

### Psychological Maltreatment of Women Inventory

Although the CTS is useful for studying intrafamily violence, it does not include a broad range of non-physical aggression. In order to obtain this, Tolman's (1989) Psychological Maltreatment of Women Inventory (PMWI) was included, again assessing the last year of the woman's relationship. The PMWI is comprised of 58 items (rated from 1 "never" to 5 "very frequently"), which comprise forms of emotional/verbal abuse and dominance/isolation. Dominance/isolation includes items related to rigid observance of traditional sex roles, demands for subservience, and isolation from resources. In contrast, emotional/verbal abuse includes withholding emotional resources, verbal attacks, and behavior that degrades women. Factor analyses support the inclusion of the two factors. In the present sample, Cronbach's alphas for the dominance/isolation subscale was .82, and for the emotional/verbal subscale .93.

### Intermittency of Abuse

Our measure of intermittency was designed to assess the juxtaposition of extremely positive and negative behaviors. Respondents were asked to describe the first, last, and worst incident of abuse in detail (for non-battered women these were incidents of conflict and emotional abuse). For each incident, a variety of behaviors was listed which included verbal and physical abuse items and threats. Post-abuse behavior was also assessed, including negative behaviors (threats, etc.) and positive "contrition" behaviors (see Walker, 1979). An objective measure of intermittency was created by adding negative behaviors during abuse to positive behaviors after abuse, summed across the three incidents. Subjective measures of intermittency were created by having the respondent, after she had read the objective scale items, rate on a scale of -5 "very negative" to +5 "very positive", her partners behavior before, during, and after each incident of abuse. The subjective intermittency scale was the sum of the three positive scores minus the three negative scores. Hence, the scale had a theoretical range of 30.

### Power

Three measures of the respondent's rating of her own and her partner's power were taken. First, the Decision Power Index (Blood & Wolfe, 1960), which assesses who has the final say on six issues (buying a car, having children, what apartment to take, what job either partner should take, whether a partner should work or not, and how much money to spend each week on food), was used. Secondly, because all so-called objective power measures have conceptual problems (see Huston, 1983), a subjective measure of power was used called Power Differential, which simply asked the respondent to indicate on a 10 point scale how much power both she and her partner had: 1) before the violence/abuse started, 2) after the violence/abuse started but before she left, and 3) now that she had left. The definition of power on this question was deliberately left unspecified. Finally, a variable called power shift was calculated which assessed the

change in power differentials before and after battering on a 10 point scale in order to determine the loss of the woman's dyadic power after battering.

### Investment

The investment in the relationship variables was comprised of length of time together and number of prior separations.

### Woman's History

Assessments were made of violence in each respondent's family of origin using the Conflict Tactics Scale. Also, presence of prior abusive relationships was assessed.

### Finances

Financial assessment included family income before separation, the woman's current (post-separation) income, percentage of child support paid by the male partner, likelihood of these payments being interrupted, and financial outlook.

### Socially Desirable Responding

The Marlowe-Crowne Social Desirability Scale (MC; Crowne & Marlowe, 1960) is a self-report that contains items about everyday events that are desirable but rare. Participants are required to check whether each item is true or false.

## RESULTS

On the Tolman Psychological Maltreatment of Women Inventory (PMWI), the scores for the Battered group were: domination\isolation = 79.1 (25.9) and emotional abuse = 95.5 (15.9), indicating that frequent emotional abuse accompanied physical abuse for these women. The Emotionally Abused (EA) group reported as follows: domination/ isolation 43.1 (27.5) and emotional abuse = 69.4 (20.1), indicating that considerable emotional abuse occurred for this group as well (although significantly less than for the Battered group). Social desirability measures (the Marlowe-Crowne Scale) did not correlate significantly with reports of partners' physical or emotional abuse, leading to the conclusion that these reports were uncontaminated by impression management concerns.

Three major sets of dependent measures were taken at Time 1: the Trauma Symptom Checklist (TSC-33), the Attachment Scale, and the Self-Esteem Scale. Average scores at T1 for the entire sample of 75 on the TSC-33 (theoretical range 0-99) were 44.9 (20.7) mean scores on the Attachment Scale (range 0-80) were 28.5 (18.0), average scores on the Rosenberg Self-Esteem Scale (range 10-40) were 27.3 (5.6).

A total of 66 (44/50 Battered and 22/25 EA) of the original 75 respondents were contacted at Time 2 and completed assessments. At Time 2, 51% had weekly contact and 14% had monthly contact with their partners. Seventeen percent of the Battered group and 8% of the EA group still had sexual contact with their former partner. Only 3 of the 66 respondents rated themselves as less content than they were 6 months previously. Of the battering partners, 35/44 had attempted reconciliation, and 10/44

battered women attempted reconciliation, however only 4 had returned to living with their partners. None of the EA group had returned. Only 13/44 Battered and 6/22 EA had absolutely no contact with their former partner. The most common reason for contact was children.

Overall self-esteem scores at Time 2 showed no significant improvement and Attachment scores at Time 2 were 73 % as strong as at Time 1. In other words, although attachment had begun to decrease, women at Time 2 still showed moderate attachment (21.2 out of a possible score of 80) when assessed using the attachment scale. Trauma symptoms had diminished with time as well, an average of 57% from their Time 1 level. The drop was equal across all subscales of the Trauma Symptom Checklist.

## Intercorrelations of Dependent Measures

Table 1 shows intercorrelations of the dependent variables within a time period. Significant correlations were found between all pairs of the three dependent measure scales at Time 1. Women who had lower self-esteem at Time 1 tended to have significantly more trauma symptoms, and to still feel significantly more attached to their ex-mate.

The three main dependent measures again correlated significantly at Time 2, with trauma symptoms and self-esteem even more highly correlated. Again, women who had low self-esteem at Time 2 tended to have significantly more trauma symptoms and to feel significantly more attached to their former partners.

Table 2 shows the intercorrelations of Time 1 with Time 2 measures taken six months later. Despite the lengthy interval between Time 1 and Time 2, each dependent measure taken at Time 1 correlated significantly with its counterpart measure taken at Time 2. Note that although attachment shows the largest drop in score size from Time 1 to Time 2, the Time 2 scores are still highly correlated with the Time 1 scores. In this sense, Time 2 attachment is predictably about 73% of the Time 1 attachment score.

**TABLE 1. Intercorrelations Within a Time Period**

| | attachment | self-esteem |
|---|---|---|
| **Time 1** | | |
| trauma symptoms | +.39*** | -.22* |
| attachment | | -.27* |
| **Time 2** | | |
| trauma symptoms | +.49*** | -.62*** |
| attachment | | -.36** |

*$p<.05$, **$p<.01$, ***$p<.001$

**TABLE 2. Intercorrelations of Time 1 and Time 2 Measures**

| Time 2: Time 1: | trauma symptoms | attachment | self-esteem |
|---|---|---|---|
| trauma symptoms | +.48*** | +.27** | -.36** |
| attachment | +.34** | +.68*** | -.17 |
| self-esteem | -.16 | -.07 | +.27* |

*$p<.05$, **$p<.01$, ***$p<.001$

## Relationship of Predictor to Dependent Variables

The strongest associations between individual predictor and dependent variables in this study were subjective intermittency correlated with attachment at Time 1 (+.62) and Time 2 (+.60). Both were significant ($p<.001$). Power differential correlated +.27 with attachment at Time 1 ($p < -.01$) and +.31 at Time 2 ($p < .01$). Overall CTS scores for physical violence correlated -.58 with self-esteem at Time 1 ($p < .001$), but not at Time 2. Length of relationship correlated with trauma symptoms (-.25, p.05) and self-esteem (-.33, p.01) at Time 1, and with trauma symptoms (-.23, $p < .05$) at Time 2. Dominance/isolation from the PMWI correlated with trauma symptoms (+.20, p.05) and attachment (-.33, $p < .05$) at Time 1, and trauma symptoms (+.44, $p < .01$) and self-esteem (-.27, $p < .05$) at Time 2. Emotional abuse from the PMWI correlated with trauma symptoms at Time 1 (+.29, $p < .05$), but not at Time 2.

To better estimate the overall effect of relationship, financial, and family of origin variables on post-relationship measures, composite measures of all three were constructed and entered into a multiple regression on the various dependent measures of the study. Only variables composing the composite variable were entered into the stepwise regression. Hence, relationship variables included intermittency, power shift, total physical abuse, dominance, emotional abuse, and length of relationship. Table 3 shows the relationship of these composite variables to the post-relationship measures by indicating the amount of variance in each dependent variable accounted for by each composite variable. The percentages exceed 100% because the regressions were done independently, with variables from within the composite variable only. In this analysis, family of origin variables affect only trauma symptoms, accounting for 23% of the trauma symptom variance at Time 1 and 9% at Time 2. In this case, family of origin variables were: a) total physical abuse by father to mother (beta = -.64), and b) total physical abuse by father to daughter (beta = .87). Other family of origin variables, entered into a regression, had no additional effect on trauma symptom variance.

Relationship variables accounted for more of the post-relationship variables variance. At Time 1, 41% of attachment scores were accounted for by a composite variable comprised of powershift woman (B = -.36), which measured dyadic power changes after violence, dominance/isolation (B = -.33), and length of relationship (B = -.18).

Self-esteem scores at Time 1 were 29% accounted for by relationship variables: length (B = .33), power differential (B = .24), physical abuse by the partner (B = -.58), and intermittency of abuse (B = .60). Financial variables accounted for very little variance in dependent measures at Time 1.

Relationship variables did best at accounting for attachment at Time 2 (55% of variance). This was a composite variable comprised of dominance/isolation (B = .23), power differential (B = -.21), and intermittency (B = .31). Trauma symptoms at Time 2 had 47% of their variance accounted for by current relationship variables, suggesting

**TABLE 3. Proportion of Dependent Measure Variance Accounted by Family of Origin, Current Relationship and Financial Clusters**

| | Time 1 | | | Time 2 | | |
|---|---|---|---|---|---|---|
| | TrSymp. | Att. | SE | TrSymp. | Att. | SE |
| Family of Origin | 23% | --- | --- | 9% | — | — |
| Relationship | 8% | 41% | 29% | 47% | 55% | 19% |
| Financial | 9% | 17% | 18% | 90% | 72% | 60% |

a delayed effect of relationship trauma on symptom onset. Both dominance/isolation (B = .47) and total physical abuse (B =.21) were instrumental in this regression.

Financial variables had little effect on post-relationship scores at Time 1 but a strong effect at Time 2. A composite financial variable measuring the wife's percentage of contribution to child support, likelihood of partner's financial support, employment, partner's contribution to family income and total family income accounted for 90% of the variance in trauma symptoms at Time 2. The strongest effects were for child support (B =-1.2) and partner's contribution (B = -.96). This composite financial variable also accounted for 72% of the variance in attachment scores at Time 2 and 60% for self-esteem scores.

Finally, a discriminant function analysis was run on the most-attached and least attached women in the Battered group at Time 2, using all available predictor variables. A five variable composite explained 76% of the variance in attachment and correctly classified 85.3% of the women according to strength of attachment. The main contributors to this composite variable (with beta weights) were dominance/isolation (B = .79), intermittency (B = .70), total physical abuse by partner (B = .55), emotional abuse (B = .47), and power shift (B = .41).

## DISCUSSION

While the influence of relationship variables on attachment, self-esteem, and trauma following relationship dissolution is complex, some findings did clearly emerge in the present study. First of all, the three dependent variables showed strong associations with each other at both Time 1 and Time 2. In this sense, attachment, experienced trauma and lowered self-esteem constitute a syndrome of interrelated effects of abuse. Although scores diminish on all three measures, Time 2 scores on each measure are predictable from Time 1 scores. Attachment persisted for these women despite their remaining outside the prior relationship. Finally, variables which assessed relationship dynamics, particularly intermittency of abuse and changes in power due to battering (power shift), emerged as strong predictors of post-separation attachment.

Prior studies have not attempted to assess these dynamic features of relationships. For example, Follingstad, Brennan, Hause, Polek, and Rutledge (1991) had a group of battered women rate both past relationship violence and current physical and psychological symptoms. Results indicated that the number and severity of symptoms was predicted by frequency of abuse. In the present study, the overall CTS score (frequency of abuse) again related to both trauma symptoms and attachment, but was a relatively weak contributor compared to intermittency. Follingstad et al. did not assess intermittency or changes in the power dynamic. Similarly, Strube's (1988) conclusion that economic variables are stronger predictors of leaving/staying out of abusive relationships may have to be qualified. In our study, economic variables contributed strongly to all dependent measures at Time 2, yet the discriminant function analysis of attachment revealed relationship variables as the main predictors of attachment status at Time 2. These variables included measures of intermittency and power shift, variables which had not been assessed in previous studies. Also, attachment was not directly assessed in prior studies.

Intermittency, a central concept of traumatic bonding, contributed to the composite predictor variable and correlated individually with attachment at Time 1 (+ .62) and at Time 2 (+ .60). The strongest associations at Time 1 were between partner's violence (CTS) and negative self-esteem, and between intermittency and attachment. The

association of current relationship variables to dependent variables strengthened with time. Composite current relationship variables accounted for 47% of the variance of trauma symptom scores and 55% of attachment scores at Time 2. This finding suggests a delayed reaction to relationship abuse and domination that manifests in the months following separation, supporting Dutton and Painter's (1981) "elastic band" analogy described earlier. The predictive ability of relationship variables in determining attachment and experienced trauma for the current sample reinforces Dutton and Painter's original perspective.

When all available predictor variables were used in a discriminant analysis of most-attached and least-attached women at Time 2, the main contributors to the dependent variable variance were current relationship variables, including intermittency and power shift (power shift assesses the loss of the woman's dyadic power after battering). To the best of our knowledge, this is the first time that assessment of these relationship dynamic variables has been conducted; their strength in predicting attachment underscores their importance in understanding post-relationship functioning of battered women. The current data suggest that six months after our initial interview with the women in our sample and on average ten months after the termination of their abusive relationship, intermittency was contributing to the composite of relationship variables that still strongly influenced both felt attachment and experienced trauma.

The reality of financial pressure at Time 2 in influencing attachment affect for the partner and trauma symptoms cannot, however, be underestimated. Financial variables, taken alone, accounted for 90% of the variance of trauma symptoms at Time 2 and 72% of the attachment scores. To put this in perspective, however, 100% of our sample interviewed at Time 2 said they were not contemplating returning because of economic factors and only 33% said they had ever contemplated this.

Traumatic bonding theory (Dutton & Painter, 1981) postulates that when a woman finally leaves an abusive relationship, her immediate fears may begin to subside and her hidden attachment to her abuser will begin to manifest itself. At this particular point in time, the woman is emotionally drained and vulnerable, and it was at these times in the past that the husband was present, contrite, and (temporarily) loving and affectionate. As the fear subsides and the needs previously fulfilled by her husband increase, an equilibrium point is reached where the woman may suddenly and impulsively decide to return. The present study verifies that process: current relationship variables (i.e., intermittent abuse and dominance/isolation) impact on the woman's attachment system with a delayed effect. Their impact on attachment is stronger at Time 2 that it was at Time 1. Nevertheless, in the Battered group, only 9% had returned to live with the batterer at Time 2, although 51% had some form of contact (17% had sexual contact) with him in a non-living together arrangement. It was for this reason that the present study focused on attachment rather than on the decision to remain separate. Clearly, a variety of other forms of attachment survive the process of separation.

This notion of attachment being strengthened by intermittent good/bad treatment is counterintuitive and still "beyond the ken" of the average jury member (Ewing & Aubrey, 1987). Hence, part of the role of expert witnesses who testify in battered woman self-defense cases is to clarify the role of traumatic bonding in contributing (along with threats from the batterer, financial pressures, etc.) to the overall difficulty battered women have in leaving abusive relationships.

Traumatic bonding also has implications for therapists working with battered women. Explicitly explaining the phenomenon to the woman allows her to know what to expect throughout the process, and to avoid inferring from the detachment difficulties

any special relationship features with the batterer. The increase in "undertow" back to the batterer with time from separation will be accompanied by an increase in positive memories of him, and a tendency to diminish memories of the severity of the battering. Providing consistent reminders of the factual aspects of the violence can help offset memory changes associated with delayed increases in the traumatically formed bond.

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# Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse

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The strength of the emotional ties between a woman and her battering partner is well-known to those who work with battered women. The authors review psychological explanations for the development of strong emotional bonds in intermittently abusive relationships and argue that the battered woman's decision to return to the battering relationship should not be viewed as indicative of masochism or personality defects in the victim. They propose a social-psychological explanation based upon the notion that powerful reinforcement mechanisms interact with the emotional and cognitive consequences of an imbalanced power structure within the relationship to produce a traumatically-based bond between batterer and victim similar in some respects to the bond between captor and hostage or cult leader and follower. The sudden decision of women in transition houses to return to their husbands is indicative of an emotional deprivation state combining with harsh economic and legal conditions. The tendency of some professionals in the criminal justice and helping systems to "blame the victim" for a decision to return is viewed as a manifestation of the motive to believe in a "just world" where the consequences to a victim are seen as being deserved. The ways in which traumatically produced emotional bonds and cognitive mechanisms such as self-blame reinforce one another are explored.

The strength of the emotional ties between a woman and her battering partner is well-known to those who work with battered women. Lawyers, therapists, family court counsellors, judges and police are often surprised and frustrated by the apparent loyalty of women towards the men who beat them. It is not uncommon for a woman who has been beaten severely to the point of needing police intervention to save her life, who originally has pressed charges against the man who beat her, and who initiated an exit from the relationship, to change her mind, drop the charges, and resume the relationship. This pattern repeats itself often enough that police and legal professionals, anticipating a change of heart, often attempt to discourage the initial laying of charges, and defense attorneys frequently point to the woman's unwillingness to leave the violent relationship as evidence of her culpability in contributing to her own victimization. Even therapists may become

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frustrated when a battered woman with whom they have been working suddenly discontinues therapy and rejoins her husband.

Rosenbaum and O'Leary (1981) report that, whereas nearly 70% of their sample of 52 battered women had experienced abuse from their spouses by the end of the first year of marriage (and of these, 15% experienced abuse even prior to the marriage), the women continued to live with their husbands for an average of over 12 years before they presented themselves at a clinic for problems related to marital violence. Rounsaville (1978:20–21), discussing the strength of the emotional bonds in his sample of 31 battered women, notes:

> The most striking phenomenon that arose in the interviews and in treatment with battered women was the tenacity of both partners to the relationship in the face of severe abuse sustained by many of the women. Even those who had divorced or separated from the partner stayed in contact with the partner beyond ordinary activities such as visitation of children. In all cases, this continued to lead to abuse, such that only 3 of the women had been free from abuse for more than three weeks at the time of the interview, despite 10 of the women having been separated or divorced from their partners.

Professionals and lay persons alike wonder why a woman who is physically abused by her husband or partner doesn't leave him in order to avoid being beaten again. They are at a loss to explain the battered woman's behavior because they cannot readily understand how a strong affectional tie could develop under conditions of persistent maltreatment. Observers who see the battered woman return to her abuser may conclude that battered women like to be beaten because they "keep going back for more." Or, that they possess a streak of masochism or some other character trait that contributes to their own victimization. Unfortunately, the very agencies and resources to which the battered woman might turn for assistance often reflect such beliefs. Medical professionals often attempt to deal with the battered woman by treating her symptoms (e.g., her depression or anxiety), rather than recognizing the origin of such responses to an injurious or life-threatening situation (Davidson, 1978; MacLeod, 1980). Researchers (Truninger, 1971, cited in Gelles, 1978; Dutton, 1981; Hogarth, 1979) have found that the courts are often "mired in mythology" (Truninger, 1971, cited in Gelles, 1978) about the victims of family violence, and are thus unprepared to deal effectively with a woman's attempts to protect herself through the legal system. Social service agencies are likely to provide counselling that stresses the responsibility of the woman to adjust to the situation in which she finds herself rather than assist her in leaving that situation (MacLeod, 1980). In short, those who encounter a woman who has been beaten and who returns to her partner are unlikely to respond sympathetically; on the contrary, they are likely to blame her for her plight. Lerner and his colleagues (Lerner, et al., 1976) attribute this tendency to the motive to believe in a "just world" where everyone gets what they deserve. Evidence to the contrary threatens this motive and leads to efforts to eliminate the threat, for example, by attempting to assist or compensate the victim or punish the transgressor. However, if for various reasons, people who witness an injustice are unable to redress it and

re-establish justice, they tend to persuade themselves that no injustice has occurred after all. They do this by convincing themselves that the victim "must" have done something to merit their fate, and therefore no compensation or punishment is required.

The "just world" hypothesis would predict that to the extent the criminal justice system or other social agencies fail to provide early and effective assistance for a battered woman and therefore fail to assist her to break away from a battering relationship, the professionals who work in those systems may adopt the view that the woman herself was partially to blame for the battering by remaining in the relationship. This belief serves three functions: 1) it protects the professional from recognition that their particular system is not functioning efficiently, 2) it maintains belief that the world is "just," i.e., people get what they deserve, and 3) it precludes the necessity of working for system change. It is ironic that these attitudes, when held by professionals within the medical, social and justice systems, help to create the very social and legal climate that contributes to the battered woman's inability to get out of the battering relationship, thus creating a self-fulfilling prophecy.

There are a number of possible explanations for why the battered woman remains in the battering relationship. They range from societal-level explanations, such as cultural norms that condone violence (Straus, 1977; Walker, 1979), or the lack of available social and economic resources (MacLeod, 1980), to ontogenetic or individual-level explanations, such as the woman's personality characteristics (Snell, et al., 1964), or the role models of adult behavior available to her during childhood (Fleming, 1979). Clearly no one explanation is sufficient, nor does a single explanation account for the varieties of individual experience. In this paper we wish to explore some of these explanations, to show where the data gathered by researchers support these explanations, and to develop a social-psychological framework which will help to draw the diversity of explanations together, relate the situation of the battered women to that of other victims of intermittent abuse, and generate hypotheses for future research.

We hope that two larger purposes will be served by this endeavour. First, we would like to begin integrating the theoretical explanations usually used to explain the formation of emotional attachments in general with explanations of emotional bonding under conditions of maltreatment and other traumatic circumstances. Second, we wish to elucidate the many forces at work on a woman to stay in an intermittently abusive relationship. A more comprehensive understanding of these forces will help correct our tendency to locate the cause for remaining in the abusive relationship inside the battered woman, with all the moral and legal implications that such an attribution carries (Ross, 1977; Ryan, 1971). Our legal system ascribes blame and responsibility to the extent that "mitigating circumstances" are not present. It is the argument of this paper that mitigating circumstances are present in battering relationships which serve to develop extremely strong affective bonds in battered women. The purpose of this paper is to explicate the nature and effect of the situational forces which function to bond women to their partner in intermittently abusive relationships.

*The Battered Woman: Why does she stay?*

In much of the existing literature on battered women, theoretical explanations for the persistence with which the woman returns to her partner have centered around characteristics intrinsic to the woman (her personality characteristics, psychological state, or access to resources which would help her to leave the battering relationship), or the dynamics of the couple relationship itself (Rousaville, 1978). These explanations are discussed briefly below. Another important factor may be the woman's experience with violence between intimates (husband-wife or parent-child) during her childhood.

**Family history, parental role-models and role expectation:** Parents who behave violently towards or in the presence of their children are providing role models of behavior which the children readily learn. In a now-classic series of studies on the development of aggression in children, Bandura, et al., 1961, found that children quickly learn to imitate aggressive behavior from adult models. In their families, children may experience violence as the victims of child abuse, or may witness physical violence between their parents. Both battering men and battered women report having seen their own parents engage in violent behavior. The San Francisco Family Violence project found that 60% of battering men came from violent households (San Francisco Family Violence Project, 1980), while the National Organization of Women Domestic Violence Project in Ann Arbor, Michigan reported that 49% of the male assailants had witnessed domestic violence as children (Fleming, 1979). Ganley (1980), a Tacoma, Washington psychologist whose practice consists almost entirely of wife batterers, reports that 70% of these men witnessed domestic violence in their own homes as children. The women who are victims of wife battering are also likely to have witnessed domestic violence. The Michigan project found that one-third of the battered women had seen violence between their parents (Fleming, 1979). There is also evidence that being the victim of abuse as a child is related to becoming involved in a violent relationship as an adult. In a large-scale study of family violence, Straus (1977) found that the more frequently a woman had been struck by her parents, the more likely she was to be in a domestically violent relationship. Gelles (1972) found that those who had been hit frequently as a child were more likely to fight physically with their spouse. Hilberman and Munson (1978) found that the 60 battered women in their study had often been both witnesses to the victims of violence in their families of origin. Unfortunately, the requisite incidence statistics for non-battered controls have yet to be obtained and so the role played by experiences in the family of origin is yet to be completely determined.

Children who witness violence not only learn specific, aggressive behaviors, but are also likely to acquire the belief that violence is a legitimate way to solve personal problems. They are therefore likely to expect that they will be involved in violence as a part of their adult relationships. Equally important, children who witness violence between adults may develop attitudes and sex-role orientations that predispose them to become involved in violent relationships as adults. Children

who see their mothers being beaten may develop an attitude that women are "second-class citizens" and deserve to be ill-treated. This is extremely damaging for young girls, who, in the normal developmental process of adopting the female sex-role, come to identify with their mothers as the victims of aggression (Fleming, 1979). They may begin to see themselves as powerless and deserving of scorn, and may come to see the world as a place where they have no control over what happens to them. Predisposed to enter an adult relationship where they will be treated in the same ways in which they saw their mothers treated, these women may believe that violence is simply an expected part of married life, and accept it as they saw their mothers accepting it. Consequently, they are not inclinded to believe that they deserve better, or that they would be able to survive in the world alone. They are therefore unlikely to leave their relationships, and if they do, will probably return to their husbands to resume the kind of marriage that was modeled for them by their own parents.

**Personality characteristics.** One of the traditional and most persistent explanations for the fact that battered women remain in an abusive relationship centers around the notion that they are masochistic and consciously or unconsciously invite and encourage abuse (Snell, et al., 1964). This explanation appears to be based mainly upon the high incidence of return to the abusive situation, and is not supported by psychological research that provides data attesting to masochistic tendencies in battered women. If it were the case that battered women invited or encouraged abuse, one would expect to find that these women had been involved in life-long patterns of abuse, that is, that they were involved in previous battering relationships in adulthood or other forms of self-destructiveness prior to or concurrently with the present battering relationship. The assessment of "indirect self-destructive behavior" as prima facie evidence for masochism in men and women is an area of research that is currently developing (Farberow, 1980). Unfortunately, no attempt has yet been made to connect indirect self-destructive behavior to the problem of battered women. Since much of the battering occurs later on in a relationship and involves, as we shall argue below, situational forces that diminish the control and volition of the battered woman, we would argue that battering does not constitute a form of indirect self-destructive behavior. Furthermore, one researcher who has investigated this issue has found that the majority of battered women do not fit a pattern of being abused in other relationships. In a sample of 31 battered women interviewed in hospital emergency rooms and a mental health facility, Rounsaville (1978) found that only 4 (13%) had been physically abused in previous relationships. Although Rounsaville notes that some of the women in his sample reported that they sometimes deliberately escalated arguments which they thought might lead to violence, he rejects the notion that battered women are masochistic and therefore stay in the battering relationship in order to suffer. Occasionally deliberate escalation of conflict by a woman was an action on her part to hasten the inevitable and "get it over with."

**Psychological State.** A second type of explanation often advanced for the fact that battered women stay in the battering relationship is

that they are in a state of "learned helplessness." Seligman's (1975) theory of learned helplessness states that when an individual learns through experience that he or she has no control over an unpleasant environment, i.e., that certain outcomes are independent of his or her own behaviour, the individual loses the motivation to change that environment or situation. Walker (1979) has applied the concept of learned helplessness to the battered woman's position. She proposed that women come to expect battering as a way of life because they have learned that they cannot influence its occurrence. The experiences recounted by battered women certainly support this notion, with personal recountings of being awakened and dragged out of bed in the middle of the night and beaten by their raging partners.

A corollary of the learned helplessness theory is that the feelings of helplessness learned in the primary situation generalize to other situations. Thus, the abused woman may come to believe that none of her behavior in any sphere will be effective, and her resulting sense of futility regarding alternative courses of action will preclude the possibility of her leaving the battering relationship. Furthermore, Frieze (1979) has suggested that when the battered woman internalizes the blame for the abuse (for example, blaming herself for being a poor wife), her self-esteem is additionally lowered, which leads to even greater feelings of depression and helplessness. The situation may come to constitute a particularly vicious cycle if the woman blames herself for her failure to stop the abuse and/or control the behavior of the batterer. The very occurrence of abuse is then further evidence of how helpless and incompetent she is, contributing to lower self-esteem and further unlikelihood that she will free herself from the relationship.

Rounsaville indeed found a high level of depression in his sample (80% reported symptoms of depression). However, this may be the inevitable consequence of being the victim of violence, rather than an indication that battered women are in a state of learned helplessness, since these women were not found to have generalized their feelings of helplessness and ineffectiveness to other areas of their lives and since his sample was examined after at least one battering incident. Rounsaville and his colleagues found that the battered women in their study reported themselves to be competent in their work outside the home, in their relationships with their family of origin and in their relationships with their children (Rounsaville, Lifton and Bieber, 1978). Reports of impaired functioning were specific to the spouse relationship and to leisure-time activities. These data suggest that the syndrome of learned helplessness may be a contributing factor to these women's inability to leave the battering relationship but is not an exhaustive explanation of the situation battered women find themselves in.

**Access to Social/Economic Resources.** It has been suggested that battered women fail to escape the battering relationship because of the many social/economic obstacles in their way (MacLeod, 1980). These include economic dependence on the husband due to inequitable pay (e.g., women traditionally earn about 60% of men's salaries), or unequal employment opportunities for men and women; inadequate resources such as alternative accommodation, transition houses, family and

friends nearby, lack of adequate protection from the husband by the criminal justice system (poor police response, unenforced peace bonds, etc.). Gelles (1976) found, in a sample of women who had sought police intervention or social service assistance, or had begun divorce proceedings because of their husbands' physical violence, that those women who were entrapped by a lack of formal education or job skills, or who were unemployed or had young children, were less likely to seek a divorce or outside assistance after being beaten. While such system inequities do exist as barriers to a woman's leaving the battering relationship, and should be corrected, they do not provide a sufficient explanation for the fact that women often stay in battering relationships. Rounsaville (1978) subdivided his sample of 31 into women who had left their partners and women who had stayed. He found that the availability of outside sources (fewer children to care for, better jobs, better social adjustment, higher social class) did not discriminate between those who left their partners and those who did not. Leaving the relationship seemed to be more a function of dynamics internal to the relationship (e.g., severity of abuse, fear of being killed by the husband, having called police and/or having discovered that the husband was also abusing the children). As Rounsaville pointed out, "when these circumstances prevailed, it did not seem to matter whether there were adequate resources or not. Given sufficient motivation, women even with few resources found a way to leave" (op. cit., p. 17). Gelles (1976) also found that severity and frequently of abuse were the best predictors of a woman's decision to seek help or leave the relationship.

**Dynamics of the relationship.** Several writers have suggested that the relationship of the battering couple is characterized by unmet dependency needs on the part of either or both partners (Kardiner and Fuller, 1970; Lion, 1977; Rounsaville, 1978; Shainess, 1977). The constant round of doomed attempts to satisfy one another's unrealistic needs fuels the arguments that lead to violence, and keep the couple locked in battle. For example, a high percentage of battered women report that their partners are jealous and possessive in the extreme, often to the point of obsession (Rounsaville, 1978; Walker, 1979), and that arguments about the woman's outside activities or imagined affairs are a frequent cause of violent episodes. The man attempts to restrict his partner's independent existence, which is a constant threat to his security; the woman, in hopes of avoiding arguments and reducing the accompanying violence, begins to organize her life completely around her partner and his demands. Her compliance legitimizes his demands, builds up a store of repressed anger and frustration on her part (which may surface in her goading him or fighting back during an actual argument, leading to escalated violence), and systematically eliminates opportunities for her to build up a supportive network which could eventually assist her in leaving the relationship. Her compliance makes her counter-dependent upon her partner, as she devotes herself completely to fulfilling his needs. In time, the woman's self-esteem may become wrapped up with her attempts to placate her partner and fulfill her "wifely duties" by keeping the relationship together. As Walker (1979:67) notes, "Since most battered women adhere to traditional

values about the permanency of love and marriage, they are easy prey for the guilt attendant on breaking up a home, even if it is not a very happy one." Thus, the battered woman become trapped in the relationship by both her own and her partner's expectations of her behavior and responsibilities.

To summarize, personality trait/psychological state explanations for the battered woman's failure to leave the battering relationship have received some support, although conclusive research remains to be done. Battered women are not found to be masochistic and inviting of their own abuse; however, they may be victims of the learned helplessness syndrome in which they come to believe in their own ineffectiveness to change their situation, and so continue with the relationship through the lack of motivation to find an alternative. Access to social and economic resources may be a factor in some women's inability to leave the abusive relationship, but in general even those with adequate resources appear to remain in the relationship until or unless the abuse becomes so severe as to be life-threatening, or comes to involve the children as well.

The dynamics of counter-dependency within the couple relationship may contribute to the woman's inability to extricate herself from the relationship by creating a situation in which her moves toward separation are accompanied by increasing feelings of distress at losing a relationship upon which she is psychologically dependent.

*Traumatic Bonding as a Theoretical Framework*

Each of the above explanations receives qualified empirical support, yet taken individually or together, they do not adequately account for the sudden "about-face" that often characterizes the return of a battered woman to a relationship which has a high prognosis of future violence. Most of the above explanations, in fact, attempt to say more about a woman's initial choice of a relationship, or else present a picture of an amotivational woman who has lost interest in attempting to change her situation. While ambivalence may manifest itself behaviorally in battered women, most professionals would support the view that such women experience very strong emotional states post-traumatically, and that these states serve to push her out or pull her back into the battering relationship.

The formation of strong emotional attachments under conditions of intermittent maltreatment is not specific to battered women but has been reported in a variety of studies, both experimental and observational, with both human and animal subjects. For example, people taken hostage may subsequently show positive regard for their captors (Bettleheim, 1943; Strentz, 1979); abused children have been found to have strong attachments to their abusing parents (Kempe & Kempe, 1978), and cult members are sometimes amazingly loyal to malevolent cult leaders, as illustrated in the Jonestown suicides. The relationship between battered women and their partners, then, may not be an isolated phenomenon, but might be seen as one example of what we have termed "traumatic bonding." This term is used to refer to the develop-

ment and course of strong emotional ties between two persons where one person intermittently harasses, beats, threatens, abuses or intimidates the other.

The attachments formed in such situations manifest themselves in positive feelings and attitudes by the subjugated party for the intermittently maltreating or abusive party. Hence, hostages have put up bail for their captors (Strentz, 1979), expressed a wish to marry them (Lang, 1974; Rowe, 1977) or had sexual relations with them (Rowe, 1977); abused children are often extremely loyal to their parents and resist being removed from the home (Kempe & Kempe, 1978; Grunberg, 1980); and prisoners in Nazi prison camps attempted to emulate their captors even to the extent of sewing scraps together to imitate SS uniforms (Bettelheim, 1943).

There are two common features of social structure in such apparently diverse relationships as battered spouse-battering spouse, hostage-captor, abused child-abusing parent, cult follower-leader, prisoner-guard. First is the existence of a power imbalance wherein the maltreated person perceives him or herself to be subjugated or dominated by the other. Second is the intermittent nature of the abuse.

**Power Imbalance.** Attachment to a person or group larger or stronger than the self, increases feelings of personal power (Becker, 1973; Fromm, 1941; Lion, 1977; McLelland, 1975). Social psychologists have found that unequal power relationships can become increasingly unbalanced over time to the point where the power dynamic itself produces pathology in individuals. Hence, Zimbardo, Haney and Banks (1972) reported anxiety and depression in volunteer subjects playing the role of "prisoners" who were relegated to powerlessness in a simulated prison situation. Lewin, et al. (1941) reported increased redirected aggression in powerless members of autocratic groups and Betleheim (1943) reported compulsive copying by Jewish prisoners of the behaviour and expressed attitudes of their Nazi prison guards. Of considerable aid in accounting for this paradoxical phenomenon is Anna Freud's (1942) concept of "identification with the aggressor" which postulates that in situations of extreme power imbalance where a person of high power is occasionally punitive, persons in low power will adopt the aggressors' assumed perspective of themselves, internalize aggression or redirect it toward others similar to themselves.

As the power imbalance magnifies persons in low power will feel more negative in their self-appraisal, more incapable of fending for themselves, and thus more in need of the high power person. This cycle of dependency and lowered self-esteem repeats itself over and over, and comes eventually to create a strong affective bond to the high power person. Concomitantly, persons in the high power positions will develop an overgeneralized sense of their own power (just as the low power persons develop an overgeneralized sense of their own powerlessness), and if the symbiotic roles which maintain this sense of power are disturbed, the masked dependency of the high power person on the low power person is suddenly made obvious. One example of this sudden reversal of the power dynamic is the desperate control attempts on the part of the abandoned battering husband to bring his wife back to him through surveil-

lance, intimidation, etc. It is important to note that in romantic relationships as well as in cults, power imbalances magnify so that each person's sense of power or powerlessness feeds on itself. What may have been initially benign, even attractive, becomes ultimately destructive to positive self-regard. In the process, both persons (or groups) become welded together to maintain the psychological subsystem which fulfills the needs created in part by the power dynamic itself.

**Periodicity of Abuse.** The second feature of traumatic bonding situations is the fact that abuse occurs intermittently. That is, the dominant party intermittently and periodically maltreats the submissive party by threats, verbal and/or physical abuse. The time between bouts of abuse is likely to be characterized by more normal and acceptable social behaviour. Thus the victim is subject to alternating periods of aversive or negative arousal and the relief/release associated with the removal of aversive arousal. The situation of alternating aversive and pleasant conditions is an experimental paradigm within learning theory known as partial or intermittent reinforcement, which is highly effective in producing persistent patterns of behavior that are difficult to extinguish or terminate (Amsel, 1958). Such intermittent maltreatment patterns have been found to produce strong emotional bonding effects in both animals and humans.

**Intermittent Reinforcement and Traumatic Bonding.** There is considerable evidence from both naturalistic and laboratory-based studies with animals that severe arousal, even when caused by an attachment object and especially when it is intermittently increased and reduced, provides a basis for strong emotional attachment. Scott (1963) reviewed the literature on "critical periods" for emotional attachment in animals and concluded that the evidence "indicates that any sort of strong emotion, whether hunger, fear, pain or loneliness will speed up the process of socialization." Scott (1963:189) further states:

> The surprising thing is that emotions which we normally consider aversive should produce the same effect as those which appear to be rewarding . . . an animal (and perhaps a person) of any age, exposed to certain individuals or physical surroundings for any length of time will inevitably become attached to them, the rapidity of the process being governed by the degree of emotional arousal associated with them . . . if this conclusion should apply to our species as well as other animals . . . it provides an explanation of certain well known clinical observations such as the development by neglected children of strong affection for cruel and abusive parents, and the various peculiar affectional relationships that develop between prisoners and jailers, slaves and masters, and so on.

More recently, Rajecki et al. (1978) wrote a comprehensive critical review of emotional bonding in infants, in which they assess the major theories of infantile attachment, including those on both human and animal attachments (Bowlby, 1969; Lorenz, 1937). One criterion for the comparative evaluation of these theories was their relative ability to explain "maltreatment effects." In reviewing the literature on maltreatment effects, Rajecki et al. found conclusive evidence for enhanced infant attachment under conditions of maltreatment in birds, dogs, and monkeys. Attempts to inhibit infants' bonding to abusive attachment objects were found inevitably to fail unless 1) they were persistent and

consistently punitive and 2) an alternative attachment object existed. Harlow and Harlow (1971) reviewed the research they carried out with infant monkeys, in which "evil surrogate mothers" were used as potential attachment objects. These surrogates would exude noxious air blasts, extrude brass spikes, hurl the infant to the floor or vibrate so violently as to make the infant's teeth chatter. None of the above disrupted the bonding behaviour of the infant monkeys. The authors concluded that "instead of producing experimental neurosis we have achieved a technique for enhancing maternal attachment." Similarly Seay et al. (1964:353) note: "a surprising phenomenon were the universally persisting attempts by the infants to attach to the mother's body regardless of neglect or physical punishment."

When the physical punishment is administered at intermittent intervals, and when it is interspersed with permissive and friendly contact, the phenomenon of "traumatic bonding" seems most powerful. Fisher (1955) attempted to inhibit the social responses of young dogs of which one was indulged (30 minutes of friendly and permissive contact with the experimenter each day), another punished (handled roughly or beaten for any approach response), a third intermittently indulged and punished, and a fourth kept in isolation. Using measures of "human orientation" to indicate the degree of bonding showed by the dogs at 12 to 13 weeks of age, Fisher found that the indulged-punished group showed 231% of the human orientation of the indulged group. At 16 weeks the indulged-punished group still showed the greatest amount of bonding of all four groups. As Rajecki and his colleagues conclude, "the data show that inconsistent treatment (i.e., maltreatment by an affection from the same source) yield an accentuation of attempts to gain proximity to the attachment object" (Rajecki et al., 1978:425).

**Intermittent reinforcement patterns in domestic violence.** To what extent are findings based on animal studies applicable to humans? Rajecki et al. found no conclusive studies in the child abuse literature, but these consisted mainly of descriptive case studies; none had been designed to test hypotheses regarding the nature of emotional bonds. However, prima facie evidence suggests a process similar to that found in animals may be the mechanism that maintains the strong bond formed by battered women for their batterer. Rounsaville (1978:17) speculates that "one feature that may weigh in favor of staying is the intermittent nature of the abuse . . . many (battered women) described highly pleasant periods of reconciliation between episodes . . . This pattern was conducive to ignoring the problem or thinking of it as an aberrant, exceptional part of the relationship."

On the basis of over 120 detailed interviews with battered women, Lenore Walker (1979:xvi) describes a "cyclical pattern" of domestic violence found in abusive spouse relationships that approximates the intermittent punishment-indulgence pattern used in animal research. Tension gradually builds (during phase one), an explosive battering incident occurs (during phase two), and a "calm, loving respite" follows (phase three). The battered woman's psychological reactions in each of the three phases, and the repetition of these phase-related responses, serves to bind a battered woman to her batterer just as strongly as 'miracle

glues' bind inanimate substances." The immediate reaction of the battered woman during the battering incident is "dissociation coupled with a sense of disbelief that the incident is really happening" (Walker 1962:62). This is followed by an emotional collapse indicative of extreme, aversive, prolonged arousal similar to that experienced by disaster victims. The collapse is accompanied by inactivity, depression, self-blame and feelings of helplessness.

In all, the exaggerated arousal and subsequent feelings make the battered woman extremely vulnerable and dependent for some time after the battering incident. The emotional aftermath of a battering incident for the batterer, usually guilt and contrition, leads him to attempt to "make amends" via exceptionally loving treatment toward his partner. Thus he becomes, temporarily, the fulfillment of her hoped-for fantasy husband and at the same time his improved behavior serves to reduce the aversive arousal he himself has created, while also providing reinforcement for his partner to stay in the relationship. Arousal theory in psychology (Berlyne, 1967) postulates that mid-levels of arousal are considered optimal by organisms. Overload or underload triggers homeostatic behaviors which attempt to return the organism back to a mid-level. Stimuli associated with an increase in arousal during boring circumstances or a reduction in arousal that is too high (or aversive) tend to become conditioned reinforcers. For example, Kendrick and Cialdini (1977) hypothesize that the reduction of aversive arousal builds attachments to people present during this reduction through the mechanism of negative reinforcement; that is, interpersonal or emotional associations are made stronger by the removal or cessation of an unpleasant stimulus (excessive arousal). In cases of battering, this mechanism of reinforcement could be especially strong due to the extremity of the aversive arousal in the form of pleasant contact during phase three of the cycle. When such negative reinforcement occurs intermittently over time, the reinforced response, which is for the woman to remain with the batterer, is strengthened. Hence, two powerful sources of reinforcement exist in intermittently abusive relationships: the "arousal-jag" or excitement associated with an increase in arousal prior to violence and the relative tranquility associated with the post-violence calm. Both are homeostatic in that they might operate to produce an optimal state of arousal and both occur intermittently, creating a powerful reinforcement schedule. Thus, as the cycle repeats itself over and over again, the probability that the woman will leave the relationship becomes smaller and smaller (Solomon, 1980).

Walker has noted the profound effect this series of events and behavior can have on the battered woman. In her words, ". . . as they progressed from the end of phase two into phase three of the battering cycle, the change in those women I visited daily in the hospital was dramatic. Within a few days they went from being lonely, angry, frightened, and hurt to being happy, confident and loving. . . . These women were thoroughly convinced of their desire to stop being victims, until the batterer arrived. I always knew when a woman's husband had made contact with her by the profusion of flowers, candy, cards and other gifts in her hospital room" (Walker, 1979:66). During the third phase of the bat-

tering cycle, the batterer throws himself on his victim's mercy, reversing the power relationship between them dramatically. He places his fate in her hands—he will be destroyed, lost, if she doesn't rescue him by returning to the relationship. His behavior toward her, his pleas and his promises are likely to relieve her fears and make her believe that she has control, that he will change his ways, that the violence will not recur. In other words, he reduces her aversive arousal initially caused by the build-up and battering phases of the cycle. As noted above, the psychological consequence of the power dynamics during the battering cycle serves to create and strengthen trauma-based emotional bonds between the man and woman which make long-lasting separation difficult or impossible to achieve.

**Cognitive processes in the development of traumatic bonds.** There are a number of other psychological factors that operate in domestically violent and other abusive relationships that strengthen and perpetuate the affective processes described above. Most theories relating to the development of affective bonds in abusive relationships overlook the gradual dynamic shifts that occur. Many battering incidents occur during the first year of marriage (Dutton and Painter, 1980; Rosenbaum and O'Leary, 1981) at a time when the woman is still experiencing the novelty and optimism of the new relationship. At this point the violence appears to be an anomaly, out of keeping with the husband's character. This, coupled with the relative lack of severity which usually characterizes the first violent incident (Wilt and Breedlove, 1977) and the husband's post-abuse contrition and promises that it will not happen again serve to both reinforce the belief that the violence was an isolated incident and to initiate the affective bonding processes described above.

Repeated incidents of greater severity tend to shift the woman's cognitions from the belief that the violence will never happen again, to the belief that the violence may recur unless the woman works to control it (Frieze, 1979; Walker, 1979), or that she did something to deserve the beating (Porter, 1981; Walker, 1979). The introjection of blame by the battered woman can be seen as either an ego defense mechanism (Bluhm, 1948; Freud, 1942) or a cognitive coping mechanism (Porter, 1981; Wortman, 1976). By this latter view, self-blame occurs after uncontrollable negative outcomes (accidents, beatings, catastrophes, etc.) because the victim needs temporarily to re-establish a cognitive sense of control after a psychologically cataclysmic event has destroyed his or her notion of personal control (Wortman, 1976). Beliefs of self-blame may aid coping only if they are held temporarily by a battered woman who moves on to see that her husband is responsible for his violence, not she (Porter, 1981). If she persists in the belief that she is to blame for the beatings, this belief will contribute to her inability to leave the relationship.

Self-blame is often a correlate of depression and low self-esteem. The effect of battering by an intimate is to produce post-trauma depression and lowered self-esteem in the victim as well as self-blame. Hence both cognitive and affective consequences of the beating operate to mutually reinforce each other and contribute to the woman's sense of psychological servitude.

*The Battered Woman's Journey out of the Relationship*

When a woman in the psychological state described above has to face the harsh realities of an unsympathetic justice system and scarce economic resources, the combination often proves to be insurmountable. The sudden reversal that battered women demonstrate in returning to their mates is based upon an emotional deprivation state of increasing intensity which, in tandem with the difficulties of obtaining safety, shelter and economic sustenance may "snap" a woman back into the relationship (Conway and Siegleman, 1978). As with cult members who suddenly are deprogrammed, an entire set of beliefs about both past and future events, including further likelihood of violence, responsibility for past violence, etc., may change suddenly and dramatically. These changes may either reinforce or counteract the woman's affective state, bolstering or weakening her decision to leave the relationship. Seemingly small things or issues may be enough to upset the precarious balance. At this emotionally vulnerable time, battered women need maximum support and understanding from professionals both in shelters and in the justice system. The help these professionals can provide will be more effective if they are thoroughly aware of the psychological dynamics that characterize the battering situation. Professionals can use the sort of information presented in this paper to help battered women understand more clearly what they are feeling and why they are feeling that way. Such knowledge may aid the battered woman in her struggle to extricate herself from a psychologically complex and entrapping relationship.

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# PATHWAYS LINKING INTIMATE PARTNER VIOLENCE AND POSTTRAUMATIC DISORDER

**MARY ANN DUTTON**
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*Intimate partner violence (IPV), which includes physical violence, sexual violence, and psychological or emotional abuse, is a significant public health threat. The Centers for Disease Control and Prevention (CDC) estimate that each year 1.5 million women are physically assaulted and/or raped by an intimate partner. However, because many victims of IPV are repeatedly abused, a more accurate accounting of the extent of violence suggests that approximately 4.8 million intimate partner physical assaults and rapes are perpetrated annually against women in the United States. The article discusses a survey involving 3,429 English-speaking women enrolled in a health maintenance organization (HMO) for 3 or more years. The findings are 46% of participants who were screened reported a lifetime history of any IPV and 14.7% reported a history within the past 5 years, including physical, sexual, and nonphysical types.*

**Key words:** *Intimate partner violence; Posttraumatic Stress Disorder*

## POSTTRAUMATIC STRESS AS AN OUTCOME OF INTIMATE PARTNER VIOLENCE

It is now well recognized that intimate violence victimization can lead to adverse mental health effects such as PTSD (posttraumatic stress disorder), depression, and anxiety. Although not all women who experience intimate partner violence (IPV) are affected, the level of resultant mental health problems is staggering, both in terms of its prevalence and its severity. This article addresses the multiple pathways linking IPV and PTSD as a key mental health outcome. PTSD was chosen at the focus because it is a hallmark of trauma exposure for which there is considerable extant research. PTSD, as a diagnostic category of the *Diagnostic and Statistical Manual of Mental Health Disorders* (text revision; American Psychiatric Association, 2000), involves six criteria: (1) exposure to a traumatic event that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or other that involved intense fear, helplessness, or horror; (2) at least one symptom of persistent reexperiencing (e.g., recurrent and distressing recollections of the events, recurrent distressing dreams); (3) at least three symptoms of persistent avoidance and numbing symptoms (e.g., efforts to avoid thoughts, feelings, or conversations associated with the trauma; feelings of detachment; restricted range of affect); (4) at least two persistent symptoms of increased arousal (e.g., difficulty falling or staying asleep, difficulty concentrating, hypervigilance); (5) Duration of symptoms is more than 1 month; (6) The

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**KEY POINTS OF THE RESEARCH REVIEW**

PTSD Comorbodity
- Depression
- Suicide
- Anxiety
- Reduced social functioning

Context of PTSD
- Characteristics of intimate partner violence
- Sociodemographic variables
- Coping and social support
- Physical health
- Threat appraisal of ongoing risk
- Revictimization

Gaps in Research Linking IPV and PTSD
- Complex and longitudinal models
- PTSD clusters
- PTSD treatment research

disturbance causes clinically significant distress or impairment. PTSD is relevant for IPV victims even though for many women revictimization may recur. Even so, the trauma theorists have not yet adequately addressed the potential implications for ongoing exposure to traumatic experiences that IPV typically illustrates. Nevertheless, it is still fruitful to consider the various links between IPV and PTSD, as many women live with undiagnosed PTSD and could benefit from our greater understanding of these complex relationships were they to be translated into effective interventions.

In a meta-analysis of the mental health impact of IPV, the prevalence of PTSD ranged from 31% to 84.4%, with a weighted mean prevalence estimate of 64% (Golding, 1999). These rates are significantly higher than the estimated lifetime prevalence of 10.4% in the general population of women (Kessler, Sonnega, Bromet, Hughes, & Nelson, 1995) and 25.8% among women with a history of crime victimization (Resnick, Kilpatrick, Dansky, Saunders, & Best, 1993). Other recent reviews also examined the link between PTSD and IPV (Briere & Jordan, 2004; Jones, Hughes, & Unterstaller, 2001; Woods, 2000).

### *PTSD Comorbidity*

PTSD rarely occurs alone (Kessler et al., 1995). One of the most common comorbid diagnoses among women with PTSD is major depression (Breslau, Davis, Peterson, & Schultz, 1997). Lifetime rates of depression observed in the general population range from 10.2% to 21.3% (Weissman, Bruce, Leaf, Florio, & Holzer, 1991). In general, exposure to trauma has been associated with a 10.4% prevalence rate of depression among adult women (Kessler, 2003).

In a nationally representative sample using the Violence Against Women survey database, Coker et al. (2002) found that all types of IPV were associated with depression and that the adjusted relative risk for depression among women exposed to physical violence from an intimate partner was 2.2. Two additional studies of battered women also found a high prevalence of depression. A meta-analytic review (Golding, 1999) reported a weighted mean prevalence estimate of 48% of abused women reporting depression. A more recent study of 413 predominately African American women from battered women's programs (Mechanic, Weaver, & Resick, 2008) found that most women were depressed, reporting moderate (45%) or severe (31%) depression. Among women randomly sampled in a health maintenance organization (HMO), those who had experienced partner violence within the past 5 years, compared to no violence, were 2.3 times more likely to report any and 2.6 times more likely to report severe depressive symptoms (Bonomi et al., 2006).

IPV is also a risk factor for suicide among women (Abbott, Johnson, Koziol-McLain, & Lowenstein, 1995; Bergman & Brismar, 1991; Kaslow et al., 1998). Among those women exposed to IPV, risk factors for previous attempted suicide were numerous and included severe negative life events, a history of child maltreatment, high levels of psychological distress and depression, hopelessness about the future, and alcohol and drug problems (Kaslow et al., 2002).

In spite of this body of knowledge, investigators are only beginning to examine the multiple pathways linking IPV and PTSD, and many questions remain. How does IPV lead to PTSD? Are IPV-related adverse outcomes direct or indirect through PTSD? This article examines these relationships and proposes a framework to guide future research examining PTSD as a key variable measuring impact linking IPV and other related constructs. In so doing, the

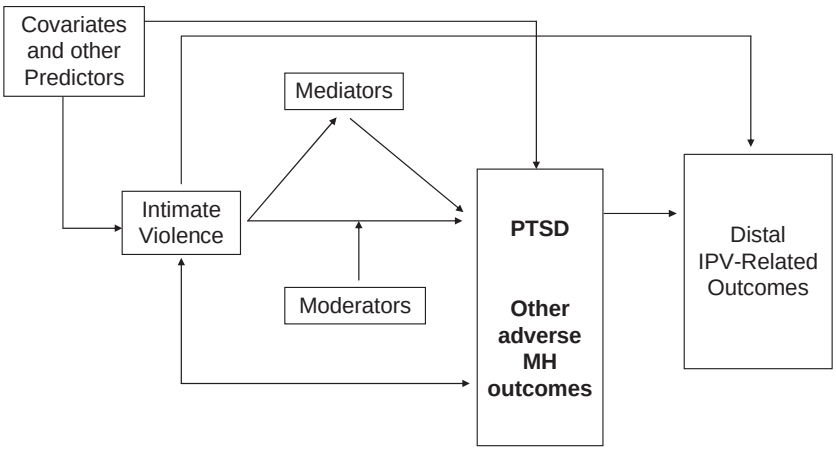


**FIGURE 1: Pathways to and From PTSD**

intent is ultimately to offer a model supporting the design of appropriate services and interventions for IPV victims. Due to its prevalence and its link to other important IPV-related variables, PTSD is a crucial target of intervention among those battered women who are experiencing its effects. Furthermore, PTSD interventions in other populations have been shown to ameliorate comorbid symptomatology as well as PTSD. For example, research has demonstrated that PTSD interventions lead to decreased depression and anxiety as well as improved social functioning (Foa et al., 1999; Jaycox, Zoellner, & Foa, 2002; Krupnick, 2002; Resick et al., 2002). Thus, interventions designed to reduce PTSD may have wide-ranging positive effects for preventing or reducing other adverse outcomes of IPV. Next, a general structural model for incorporating other variables on the pathway to and from PTSD is presented. Then selected substantive variables are discussed.

## *PTSD in Context*

A hypothesized general structural model is offered as a framework for conceptualizing the nature of relationships that need to be examined in future research on IPV and PTSD. The model presented in Figure 1 includes variable categories that involve the following relationships, which has some support in the existing empirical literature: (a) covariates with a direct relationship to both IPV and PTSD (e.g., prior trauma exposure), (b) effects of moderating variables (e.g., ethnic and other demographic variables) on the relationship between IPV and PTSD, (c) effects of mediating variables (e.g., coping) on the IPV to PTSD pathways, and (d) distal outcomes (e.g., chronic health conditions) for both direct effects of IPV and indirect effects mediated through PTSD.

Next is a discussion of select substantive variables that are hypothesized to exhibit one or more types of relationships to IPV and PTSD in this general structural model. The nested ecological model of IPV applied to battered women (Dutton, 1996; Heise, 1998) is used to identify key variables important to examine in relation to PTSD. This model provides direction for understanding interlocking substantive domains within which to select factors for understanding the multiple pathways linking PTSD and other related outcomes. The ecological model examines the phenomenon of IPV within layers of psychological, social, political, economic, and cultural contexts, and not psychological context alone. This ecological model suggests that the relationship between IPV and its mental health impact is influenced by multiple factors. Narrow, disorder-specific interventions are undoubtedly insufficient to meet the complex array of needs that battered women experience, especially when considering interventions that focus on targets along the pathway to the development or maintenance of PTSD. Indeed, the ecological model has been previously adapted to inform intervention with

pregnant, battered women (Parker, McFarlane, Soeken, Silva, & Reel, 1999). Below is a discussion of key selected variables with important relationships to PTSD among women exposed to IPV: (a) characteristics of IPV, (b) sociodemographic variables, (c) coping and social support, (d) physical health, (e) threat appraisal of ongoing risk, and (f) revictimization. The number of variables examined here is limited due to space restrictions, but many possibilities exist.

*Characteristics of IPV*. It is necessary to define IPV clearly not only to examine the role of any IPV on PTSD, but also of different types of IPV specifically. *Physical*, *sexual*, and *psychological abuse* and *stalking* have become recognized as standard definitions in the phenomenology of IPV (Saltzman, Fanslow, McMahon, & Shelley, 1999/2002). But historically, advocates recognized the central role of coercion and control in violent relationships. Indeed, IPV has been defined as "pattern of coercive control" (Pence & Paymar, 1993, 1996), a conceptualization that is still relevant, although the role of coercive control in every form of violence is a matter of some controversy and research inquiry. However, until recently, the absence of a standardized measure of coercion in intimate partner relationships has led to a dearth of research related to coercion and IPV. The recent development of a measure of partner coercive control (Dutton, Goodman, & Schmidt, 2005) provides the field with a measure of coercion (and the related constructs of demands, surveillance, and behavioral response to coercive tactics) that now makes possible the examination of coercion and its role as a component of IPV.

As expected, increased severity and intensity of physical IPV is associated with greater PTSD, and all types of IPV have been found to be associated with PTSD. For some time, it has been shown that psychological abuse has as strong or stronger relationship to PTSD and depression than does physical abuse (Arias & Pape, 1999; Dutton, Goodman, & Bennett, 1999; O'Leary & Jouriles, 1994; Pico-Alfonso, 2005). More recently, Mechanic et al. (2008) again demonstrated that psychological abuse and stalking contributed to the prediction of PTSD over and above physical abuse and injury. Notably, when psychological abuse and stalking were entered first in the multivariate prediction, physical abuse and injury were no longer significant predictors of PTSD in this study. Preliminary results using the recently developed measure of coercive control indicate that higher levels of coercion are associated with greater PTSD, but not depression, even after controlling for physical violence, injury, partner sexual abuse, and psychological abuse for both female and male victims (Dutton & Goodman, 2005).

Differences in PTSD have been found among women with different patterns of IPV identified through cluster analysis (Pattern 1 = moderate physical violence, sexual abuse, psychological abuse, stalking; Pattern 2 = severe physical violence, psychological abuse, and stalking, but low sexual abuse; Pattern 3 = severe physical violence, psychological abuse, stalking, and sexual abuse; Dutton, Kaltman, Goodman, Weinfurt, & Vankos, 2005). Probable PTSD diagnosis was met for 88% in Pattern 3, 76% in Pattern 2, and 56% in Pattern 1. Compared to Pattern 1 (moderate levels), the odds of meeting criteria for probable PTSD were 2.5 higher for women in Pattern 2 and 5.6 times higher for those in Pattern 3. Sexual IPV, in addition to physical violence in partner relationships, has been associated with worse mental health outcomes in other studies as well. This study supported that more types and the inclusion of sexual violence were both important for predicting PTSD. In a study of help-seeking battered women, Bennice and her colleagues (Bennice, Resick, Mechanic, & Astin, 2003) found that sexual violence severity predicted a significant variability in PTSD beyond that explained by physical violence severity. Taken together, these findings indicate that greater IPV severity, the inclusion of sexual abuse in the pattern of violence, psychological abuse, and coercion increase the risk for PTSD.

*Sociodemographic factors*. Following exposure to traumatic events, PTSD is more likely among some groups. Predictors of PTSD in general populations have been shown to include female gender, degree of exposure, childhood trauma, and family history and preexisting psychiatric disorders (Alim, Charney, & Mellman, 2006; Breslau, 2002; Kessler et al., 1995). Research

suggests that women from low socioeconomic strata are at a higher risk of experiencing both IPV and the negative outcomes associated with IPV (Bachman & Saltzman, 1995; Coker, Weston, Creson, Justice, & Blakeney, 2005; Sorenson, Upchurch, & Shen, 1996). Low socioeconomic status (SES), minority women are at further increased risk because they are not adequately served by traditional mental health treatment settings (Neighbors et al., 1992; Takeuchi & Uehara, 1996; U.S. Department of Health and Human Services [USDHHS], 2001).

Among women, there is little evidence for difference between African American and White women in PTSD, once controlling for SES. However, other factors may increase the risk for African American and other minority women (Alim et al., 2006), such as increased risk for exposure to violence, prejudice and stigmatization, and poverty. Although some studies find an increased risk (Greenfeld et al., 1998; Tjaden & Thoennes, 2000), others have found no differences (Griffing et al., 2006), especially when the confound between ethnicity and socioeconomic status has been accounted for (Vogel & Marshall, 2001). Yet other studies have found White women to have greater PTSD compared to ethnic minorities (Jones, Bogat, Davidson Ii, von Eye, & Levendosky, 2005), although these authors found no differences in family support measured as number of different family members providing emotional or practical support—a factor that has been found to explain differences in PTSD (Charuvastra & Cloitre, 2007; Glass, Perrin, Campbell, & Soeken, 2007)

Other demographic characteristics have also been associated with increased risk for PTSD. For example, among women recruited through an emergency department and who were identified as having IPV-related problems (Lipsky, Field, Caetano, & Larkin, 2005), those who were married (vs. not being married regardless of whether living together) were more than twice as likely to report probable PTSD (using the composite internal diagnostic interview [CIDI]), after controlling for number of different acts of violence (e.g., physical violence items on the Conflict Tactics Scale-2 [CTS-2]), partner's alcohol use, and report of any sexual IPV. However, in contrast, another study (Coker et al., 2005) found that being currently married was a protective factor for PTSD. Research that examines potential differences in PTSD among groups is needed to tailor interventions uniquely suited to different groups.

*Prior trauma history*. Evidence indicates that women with a history of childhood physical and sexual abuse are at increased risk for IPV (West, Williams, & Siegel, 2000). Furthermore, among women exposed to IPV, childhood abuse has been shown to increase the risk for PTSD. Koopman and colleagues (2005) found that child abuse and IPV severity both contributed to the prediction of PTSD symptoms. Griffing et al. (2006) found that childhood sexual, but not physical, abuse predicted PTSD hyperarousal symptoms and that witnessing maternal domestic violence uniquely predicted intrusion symptoms. These findings point to an enhanced sensitivity to adverse mental health following subsequent traumatic exposure such as IPV.

A study from the California Women's Health Survey, a probability sample, random digit-dial study of California women found that both childhood abuse and adult victimization were associated with PTSD (Kimerling, Alvarez, Pavao, Kaminski, & Baumrind, 2007). Victimization during both childhood and adulthood, however, posed an extremely high risk for PTSD with an adjusted odds ratio of 12.4, adjusting for age, ethnicity, education, and poverty. IPV victims with PTSD with and without prior trauma histories may require the development of different types of interventions to meet their different needs.

*Coping*. Coping is an important, albeit complex, factor in understanding PTSD, as coping can be understood as predicting PTSD on the one hand and as an outcome of PTSD on the other. Avoidant coping has been found to predict greater PTSD. Krause and her colleagues (Krause, Kaltman, Goodman, & Dutton, 2008) found, in a sample of low-income, predominately African American women, that avoidant coping predicted greater PTSD symptoms at 1-year using the PCL (PTSD Checklist, PCL-Civilian Version), even after controlling for baseline level of PTSD symptoms, social support, formal support, childhood sexual abuse,

and revictimization by abusive partner and others.

Coping self-efficacy refers to an individual's subjective appraisal of the ability to cope when faced with the demands of a stressful situation (Bandura, 1997). The relationship between self-efficacy and psychological distress has been well documented, although the focus has more often been on the role of self-efficacy in predicting mental health outcomes (Benight, Swift, Sanger, Smith, & Zeppelin, 1999; Maciejewski, Prigerson, & Mazure, 2000) Yet much of this work has been cross-sectional, precluding the possibility of examining the direction of influence.

In spite of the plethora of research involving self-efficacy, little research has examined its role in mediating the relationship between PTSD and associated health behaviors. Recently, Schnurr and Green (Schnurr & Green, 2004a) proposed a model linking PTSD and health behaviors via coping. Indeed, coping self-efficacy has emerged as a focal mediator of posttraumatic recovery (Benight & Bandura, 2004) Thus, coping self-efficacy may offer a potentially powerful and modifiable explanation for linking the negative psychological sequelae of violence, especially PTSD, to health behaviors.

The potential influence of PTSD on coping self-efficacy is an important one. For example, emotional dysregulation that is associated with PTSD may influence one's perception of the ability to control the subjective experience of (especially negative) emotion, particularly its intensity and duration, as well as to express that emotion to another person (Saarni, 1999). Skills of emotional regulation can contribute to an individual's sense of overall self-efficacy (Saarni, 1999). Furthermore, sexual abuse and subsequent PTSD have been posited to influence the development of self-efficacy in children (Diehl & Prout, 2002). Likewise, in adult women the experience of IPV may erode self-efficacy by challenging the belief (or supporting an existing belief) regarding one's capabilities of self-regulation. In support of this notion, Benight and Harper found that coping self-efficacy mediated the relationship between acute stress response and other posttraumatic outcomes. Finally, poor coping self-efficacy for coping with negative emotional distress that results from PTSD may extend to physical health concerns and to health behaviors associated with them. Examination of the path linking PTSD and poor health outcomes via coping self-efficacy deserves attention, especially because poor self-efficacy provides an attractive target for intervention (Benight & Harper, 2002).

Supporting the importance of a social cognitive perspective, an interesting study involving African American women recruited in an inner-city public hospital and other health care settings within a larger study focusing on IPV and suicide (Bradley, Schwartz, & Kaslow, 2005), investigators examined the relationship between religious coping (using the RCOPE [Religious Coping Scale]), self-esteem, and PTSD. They considered coping and self-esteem as a mediator of the IPV to PTSD pathway and they also examined PTSD as a mediator of the IPV to coping and self-esteem pathways in a cross-sectional design. All models demonstrated meditational effects for PTSD, negative religious coping (e.g., questioning God's power, God's abandonment), and self-esteem, but the stronger effect was found for PTSD as a mediator of negative religious coping and self-esteem. The authors interpret their results within a social cognitive perspective that would suggest that PTSD may be interpreted by victims to reflect their inability to manage their emotions with a concomitant reduction in self-efficacy and self-esteem. Social support, an important resource related to coping, has also been associated with PTSD outcomes. Coker et al. (2002) found that social support, after controlling for frequency of IPV, reduced the risk for PTSD symptoms. These findings underscore the importance of incorporating the social cognitive perspective of meaning in any intervention for IPV victims with PTSD. These findings also suggest the importance of examining the meditational relationships between PTSD and coping with longitudinal data.

Considerations of the mediating role of coping in the IPV to PTSD relationship should also consider cultural variations in coping. El-Khoury and her colleagues (2004) found that abused African American women were significantly more likely to use prayer and less likely to seek help from a mental health

counselor compared to abused Caucasian women, although there were no differences in the likelihood of seeking help from clergy or medical professionals. Furthermore, African American women rated prayer as more helpful when they used it to cope. Yoshihama (2002) also demonstrated cultural differences in choice and perceived helpfulness of coping with IPV between U.S.- and Japan-born Japanese women. She found that Japan-born women were significantly less likely to use active coping strategies; they perceived them as less effective compared to U.S.-born Japanese women. More important, the more effective Japan-born women perceived active strategies, the more psychologically distressed they were, and the more effective they perceived passive strategies, the less psychologically distressed they were. Although Yoshihama did not examine PTSD, her study illustrates the important role that culture may play in understanding the role coping may have in the relationship between IPV and subsequent psychological distress.

*Revictimization*. Research findings that suggest that greater severity or intensity of IPV is related to greater PTSD also supports the hypothesis that IPV revictimization would be associated with more severe PTSD. Indeed, in a longitudinal study, revictimization by an abusive partner predicted great PTSD symptoms at 1-year follow-up (Krause et al., 2008).

Perhaps more interesting is the hypothesis of reverse causality, that is, the implication of PTSD in the pathway to revictimization. In a prospective study of low-income, predominately African American women recruited in three community settings that provide services to IPV victims (civil protection order court, DV [domestic violence] criminal court, battered women's shelter), Krause, Kaltman, Goodman, and Dutton (2006) found that PTSD symptoms predicted reabuse by the same partner 2 year later. Interestingly, although women who were reabused reported higher avoidance and numbing (but not hyperarousal) symptoms at baseline, only numbing was significantly related to reabuse in the multivariable model, after controlling for baseline IPV severity, childhood abuse, and length of involvement in the abusive relationship. Another 1-year prospective study (Perez & Johnson, 2008) using data from the Chicago Women's Health Study found that PTSD predicted reabuse, even after considering violence severity, help-seeking behaviors, and social support. These findings highlight the importance of not only examining PTSD as a risk factor for revictimization, but also exploring different influences of distinct PTSD symptom clusters.

No only does PTSD signal a greater risk for physical reabuse but also greater likelihood of recurrence of psychological abuse. Bell, Cattaneo, Goodman, and Dutton (2008) found that higher-level PTSD symptoms increased the risk of recurrent psychological abuse by more than 1.5 times (adjusted *OR* = 1.68) for an *SD* value increase of 1 in PTSD symptoms.

*Threat appraisal of ongoing risk*. Closely linked to revictimization is appraisal of ongoing risk of reabuse. Using the Primary Appraisal Scale (Folkman, Lazarus, Gruen, & DeLongis, 1986), Tyson and colleagues (Tyson, Herting, & Randell, 2007) found that top perceived threats reported by a sample of 92 sheltered abused women were related to economic issues (financial security, 24%; housing, 20.5%) child well-being (19.7%), physical safety (16.1%), and living independently (12.2%). Among women who were separated from their abusive partner, Tyson et al. found that PTSD predicted perceived threat to both their own and their child's well-being.

In predicting the accuracy of threat appraisal, a study of low-income African American women (Cattaneo, Bell, Goodman, & Dutton, 2007) found that PTSD did not increase the likelihood that women were wrong in the accuracy of their prediction of reabuse 1 year later. PTSD did, however, predict the type of error they made if, indeed, they were wrong. That is, women who were wrong in their prediction were likely to overestimate their risk (predict reabuse, but no reabuse occurred). In findings similar to those of Cattaneo (2007), Bell et al. (2008) found that when women were inaccurate in their prediction of psychological reabuse, those with higher PTSD symptoms were more likely to be inaccurate, although again there was no overall effect of PTSD on accuracy per se.

*Physical health*. A wide array of health problems have been associated with IPV (Kramer, Lorenzon, & Mueller, 2004). Furthermore, PTSD generally has also been associated with poor health outcomes, with the pattern of results paralleling that for IPV exposure and health. Individuals with PTSD report more symptoms and have increased rates of morbidity. Furthermore, PTSD affects the course and impact of illness (Green & Kimerling, 2004; Schnurr & Jankowski, 1999). Friedman and Schnurr (1995), Schnurr and Jankowski, and Schnurr and Green (2004b) proposed that PTSD is a major pathway by which violence exposure affects physical health. Increasing evidence addresses this mediation hypothesis in populations other than IPV victims (Schnurr & Spiro, 1999; Taft, Stern, King, & King, 1999; Wolfe, Schnurr, Brown, & Furey, 1994). These studies suggest that it may be PTSD, rather than trauma exposure alone, which results in health risk behaviors and greater morbidity and mortality among trauma survivors. Yet little research has yet examined this hypothesis directly among IPV survivors.

One exception is a study of 388 help-seeking women exposed to IPV (Taft, Vogt, Mechanic, & Resick, 2007) that examined PTSD symptoms as a mediator of the relationship between IPV and physical health symptoms. Using a modified version of the PILL (Pennebaker Inventory of Limbic Languidness), the investigators found that PTSD symptoms fully mediated the relationship between both physical and psychological aggression and physical health symptoms. Similarly, Dutton, Kaltman, Krause, and Green (2007) found that PTSD, but not depression, mediated the relationship between IPV severity and health functioning measured by SF-36 (Short Form 36) among low-income African American women.

Another recent study involved 298 women recruited from VA (Veterans Affairs) clinics offering health and mental health services (Campbell, Greeson, Bybee, & Raja, 2008). This study first examined clusters of women based on their experiences of childhood sexual abuse, adult sexual assault, IPV, and sexual harassment. Analysis compared three patterns of high levels of violence to a "low-all" cluster with low levels of all four types of violence. Results demonstrated the impact of all the high-violence clusters on overall health (using the Cohen–Hoberman Inventory of Physical Symptoms—Revised Version; CHIPS-R), which was fully mediated by their levels of PTSD symptoms. Study results also examined the extent to which PTSD was differentially related to specific health symptoms. Again, PTSD symptoms fully mediated the effects of violence cluster membership fully on both pain and non-pain-related symptoms, although the relationship was stronger for pain-related health symptoms. PTSD has been shown to increase risk for yet other health-related outcomes, including nicotine-related physiological dependence (Weaver & Etzel, 2003) and pregnancy-related outcomes such as miscarriage (Morland, Leskin, Block, Campbell, & Friedman, 2008).

*Functioning*. The impact of PTSD reaches beyond health to other domains in the lives of trauma victims (Koch, Samra, Schultz, & Gatchel, 2005; Smith, Schnurr, & Rosenheck, 2005), including women exposed to IPV. For example, Kimerling found that PTSD and psychological abuse (but not physical violence) were independently associated with unemployment. Other indicators of functioning have also been implicated in the IPV and PTSD pathways, for example, including poor daily functioning (Harris-Britt, Martin, Li, Casanueva, & Kupper, 2004) and problems with parenting (Johnson & Lieberman, 2007; Samper, Taft, King, & King, 2004). These data support the potential deleterious effects of PTSD on wide areas of functioning and underscore the necessity to adopt a broad view in understanding the IPV and PTSD pathways in understanding the overall impact on the lives of IPV victims and in designed interventions to address these targets.

## Gaps in Research Linking IPV and PTSD

There is a rich literature focused on IPV, PTSD, and related outcomes. However, there remain significant gaps that require additional well-designed empirical study.

*Complex and longitudinal models*. Studies abound examining IPV, PTSD, and relevant other variables. However, with some notable

exceptions (Campbell, Greeson, Bybee, & Raja, 2008; Lee, Pomeroy, & Bohman, 2007; Taft et al., 2007), there exist few studies that utilize sufficiently large samples and complex statistical models to examine potential pathways linking the types of variables described here. In spite of a call for a more nuanced and sophisticated examination of IPV (Coker, Watkins, Smith, & Brandt, 2003), there still exists a dearth of published research using these models.

Similarly, prospective studies involving IPV and PTSD and other outcomes are lacking, again with some exceptions (Bell et al., 2008; Bell, Goodman, & Dutton, 2007; Hedtke et al., 2008; Krause et al., 2006, 2008; Perez & Johnson, 2008; Salomon, Bassuk, & Huntington, 2002). However, few studies have utilized prospective data in complex path models designed to untangle the relationships between IPV, PTSD, and related outcomes. Combining complex statistical modeling with prospective data would yield significant advances in our understanding of the causal pathways linking these variables.

*PTSD clusters*. There is emerging data concerning PTSD clusters and their differential relationship to other relevant variables (Krause et al., 2006; Sullivan & Holt, 2008; Weaver & Etzel, 2003). These data are needed to guide the development of the most effective interventions, tailored to nuances in expression of PTSD symptomatology. Furthermore, the general controversy concerning the best model of PTSD and related symptoms (Andrews, Joseph, Shevlin, & Troop, 2006; King, King, Orazem, & Palmieri, 2006; Maes et al., 1998) requires application to IPV samples (Krause, Kaltman, Goodman, & Dutton, 2007) to ensure that theoretical developments in the field are informed by IPV, as well as other trauma types (e.g., combat).

*PTSD treatment research*. There exists a paucity of randomized clinical trial involving treatment for PTSD, especially those that consider the unique context of actual and perceived ongoing threat of continuing trauma. Although some treatment models have been evaluated (Kubany et al., 2004; Resick et al., 2008), they are few and not yet subject to implementation and dissemination research to understand how these treatments transfer to community settings where mental health services are sorely needed.

In sum, although not all women who experience IPV exhibit symptoms of PTSD, not all women who experience adverse mental health consequences of IPV show signs of PTSD. PTSD appears to be involved in the central pathway involving IPV and related adverse outcomes. Thus, for some women, PTSD may play a pivotal role in the development of interventions or the prevention of recovery from a broad array of problems. For this reason, greater attention to the role of PTSD in the lives of women exposed to IPV through research employing prospective data and using complex statistical models would greatly enhance our efforts to develop tailored and individualized approaches to treatment for so many women who need it.

## IMPLICATIONS FOR PRACTICE, POLICY, AND RESEARCH

### *Research*

- Researchers are encouraged to examine more complex relationships involving IPV and PTSD to include various mediators and moderators of the IPV and PTSD relationships.
- Greater attention is needed to describe the context of victims' lived experience in such a way that captures the multiple dimensions of IPV and the multiple types of adverse outcomes that follow from IPV exposure in the social and cultural context of individuals' lives. Although qualitative methods are well suited to this task, quantitative researchers are challenged to make more relevant their assessment of abuse—not merely individual tactics.
- There is greater need for longitudinal research to capture not just repeated measures over time but also complex statistical analyses to describe the patterns over time.
- Greater attention is needed to develop and evaluate interventions focused on specific symptom clusters.

### *Practice and Policy*

- Screening for lifetime traumas including childhood abuse, sexual assault and partner violence, PTSD, and comorbid depression, including suicidality, should be incorporated as a routine for persons with chronic health conditions, such as HIV/AIDS, diabetes, and hypertension. Similar screening and appropriate intervention

should also be incorporated from the perspective of prevention of subsequent adverse health conditions.
- Assessment of IPV should incorporate the multiple dimensions that have been identified as contributing uniquely to our understanding of various adverse outcomes. These dimensions would include physical violence, sexual abuse, psychological abuse, stalking, coercive control, and threat appraisal. It is the configuration of these elements that offers a more complete picture of the IPV victims' lived experience.
- Consider how the social and cultural context may influence both the risk for IPV and the conditional risk for PTSD and depression, given exposure to IPV. Also consider how context helps to shape the victim's response to both IPV and how she deals with the psychological, social, physical, and economic aftermath. Ensure that interventions are culturally sensitive.
- Consider interventions aimed at targets along the pathway from IPV to PTSD—not just the trauma or symptoms per se. For example, interventions that address coping behavior or coping self-efficacy may be particularly effective.
- Consider that revictimization is defines many individuals' lives—both past and future. Incorporate a focus on safety to help reduce the risk of future revictimization. Consider that the impact of IPV may occur in the context of a lifetime of other types of trauma exposure. Furthermore, consider how symptoms of PTSD may themselves increase the risk for future revictimization and incorporate that perspective into interventions.
- Incorporate not only an assessment of prior trauma exposure but an assessment of the appraisal of ongoing threat, which has a strong and independent link to PTSD.
- Incorporate assessment of functioning, not just symptoms, to capture a more comprehensive perspective on adverse outcome associated with IPV and PTSD.

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Invited essay

# A cognitive model of posttraumatic stress disorder

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**Abstract**

Posttraumatic stress disorder (PTSD) is a common reaction to traumatic events. Many people recover in the ensuing months, but in a significant subgroup the symptoms persist, often for years. A cognitive model of persistence of PTSD is proposed. It is suggested that PTSD becomes persistent when individuals process the trauma in a way that leads to a sense of serious, current threat. The sense of threat arises as a consequence of: (1) excessively negative appraisals of the trauma and/or its sequelae and (2) a disturbance of autobiographical memory characterised by poor elaboration and contextualisation, strong associative memory and strong perceptual priming. Change in the negative appraisals and the trauma memory are prevented by a series of problematic behavioural and cognitive strategies. The model is consistent with the main clinical features of PTSD, helps explain several apparently puzzling phenomena and provides a framework for treatment by identifying three key targets for change. Recent studies have provided preliminary support for several aspects of the model. 

*Keywords:* Posttraumatic stress disorder; PTSD; Memory; Cognitions; Cognitive behaviour therapy

Posttraumatic stress disorder (PTSD) is a common reaction to traumatic events such as assault, disaster or severe accidents. The symptoms include repeated and unwanted reexperiencing of the event, hyperarousal, emotional numbing and avoidance of stimuli (including thoughts) which could serve as reminders for the event. Many people experience at least some of these symptoms in the immediate aftermath of the traumatic event. A sizeable proportion recover in the next few weeks or months, but in a significant subgroup the

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symptoms persist, often for years (Kessler et al., 1995; Rothbaum, Foa, Riggs, Murdock & Walsh, 1992). It is largely the subgroup of people with persistent PTSD who seek treatment. For these people social and occupational functioning are often severely impaired. The purpose of this paper is to introduce a cognitive model that was designed to explain the persistence of PTSD and to provide a framework for the cognitive-behavioural treatment of PTSD. The model draws heavily on the writings of other theorists (Brewin, Dalgleish & Joseph, 1996; Conway, 1997a; 1997b; Foa & Riggs, 1993; Foa & Rothbaum, 1998; Foa, Steketee & Rothbaum, 1989; Horowitz, 1997; Janoff-Bulman, 1992; Joseph, Williams & Yule, 1997; Markowitsch, 1996; Resick & Schnicke, 1993; van der Kolk & Fisler, 1995; van der Kolk & van der Hart, 1991). However, the model is distinct in the particular synthesis it provides.

## 1. A cognitive model of PTSD

### *1.1. Overview*

When trying to conceptualise PTSD from a cognitive perspective, one is immediately presented with a puzzle. PTSD is classified as an anxiety disorder. Within cognitive models, anxiety is a result of appraisals relating to impending threat. However, PTSD is a disorder in which the problem is a memory for an event that has already happened. We suggest that this apparent puzzle can be resolved by proposing that persistent PTSD occurs only if individuals process the traumatic event and/or its sequelae in a way which produces a sense of a serious current threat. The model proposes that two key processes lead to a sense of current threat.

1. individual differences in the appraisal of the trauma and/or its sequelae
2. individual differences in the nature of the memory for the event and its link to other autobiographical memories.

Once activated, the perception of current threat is accompanied by intrusions and other reexperiencing symptoms, symptoms of arousal, anxiety and other emotional responses. The perceived threat also motivates a series of behavioural and cognitive responses that are intended to reduce perceived threat and distress in the short-term, but have the consequence of preventing cognitive change and therefore maintaining the disorder. Figure 1 summarises the key variables in the model. Each is explained in greater detail below.

### *1.2. Appraisal of the trauma and/or its sequelae*

It is assumed that, unlike individuals who recover naturally, individuals with persistent PTSD are unable to see the trauma as a time-limited event that does not have global negative implications for their future. The model proposes that these individuals are characterised by idiosyncratic negative appraisals of the traumatic event and/or its sequelae that have the *common effect of creating a sense of serious current threat*. This threat can be either external (e.g. the world is a more dangerous place) or, very commonly, internal (e.g. a threat to one's view of oneself as a capable/acceptable person who will be able to achieve important life goals

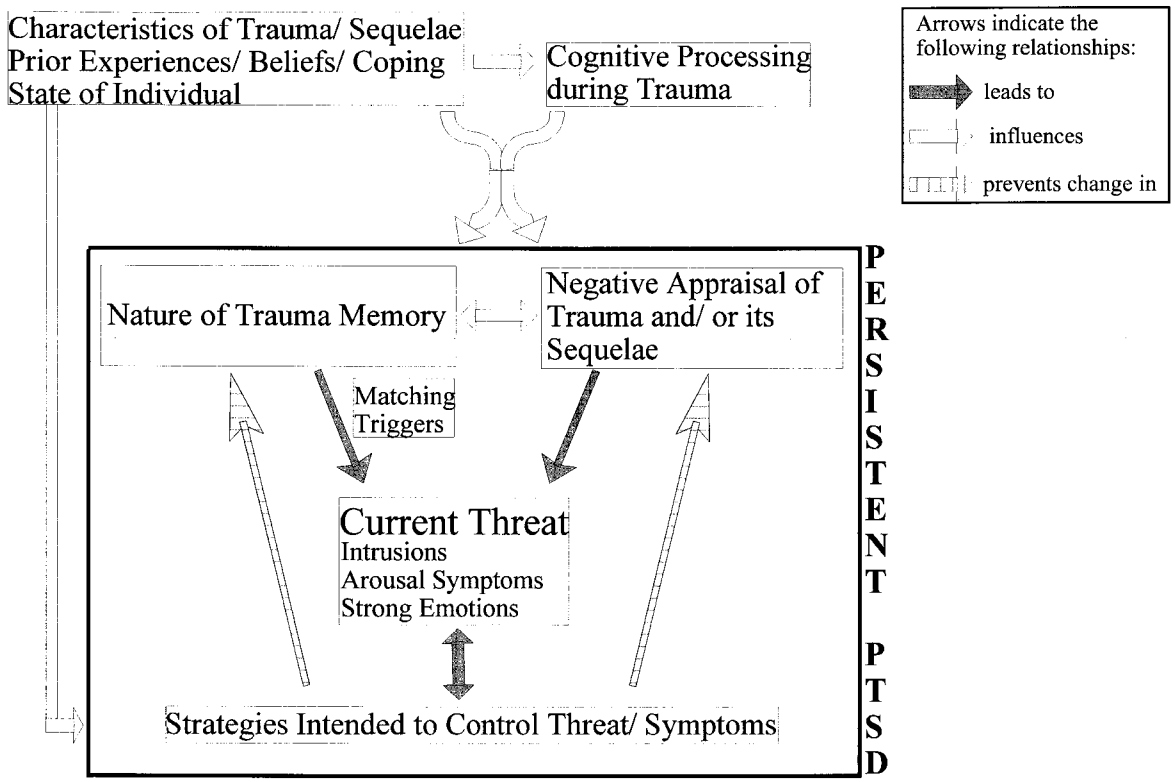


Fig. 1. A cognitive model of PTSD.

(see also Foa & Riggs, 1993; Janoff-Bulman, 1992; Joseph et al., 1997; Meichenbaum, 1997; Resick & Schnicke, 1993)). Examples are given in Table 1.

*1.2.1. Appraisal of the traumatic event*

Several types of appraisal of the traumatic event can produce a sense of current threat. First, individuals may overgeneralise from the event and as a consequence perceive a range of normal activities as more dangerous than they really are. They may exaggerate the probability of further catastrophic events in general or take the fact that the trauma happened to them, as opposed to other people, as evidence for appraisals such as "I attract disaster" or "bad things always happen to me". Such appraisals generate not only situational fear but also avoidance which maintains the overgeneralised fear. Common examples include avoiding driving after experiencing a road traffic accident because of an unrealistic belief about the likelihood of future accidents or severely restricting one's social life after a sexual assault for a similar reason.

Second, appraisals of the way one felt or behaved during the event can have long-term threatening implications. For example, a woman who experienced sexual arousal during a particularly protracted rape interpreted her response as a sign that she had secret desires that were repulsive to her. Similarly, another woman who was raped by an acquaintance interpreted

Table 1
Examples of idiosyncratic, negative appraisals leading to sense of current threat in persistent PTSD

| What is appraised? | Negative appraisal |
|---|---|
| Fact that trauma happened | "Nowhere is safe"<br>"The next disaster will strike soon" |
| Trauma happened to me | "I attract disaster"<br>"Others can see that I am a victim" |
| Behaviour/emotions during trauma | "I deserve that bad things happen to me"<br>"I cannot cope with stress" |
| *Initial PTSD symptoms* | |
| Irritability, anger outbursts | "My personality has changed for the worse"<br>"My marriage will break up"<br>"I can't trust myself with my own children" |
| Emotional numbing | "I'm dead inside",<br>"I'll never be able to relate to people again". |
| Flashbacks, intrusive recollections and nightmares | "I'm going mad", "I'll never get over this". |
| Difficulty concentrating | "My brain has been damaged", "I'll lose my job". |
| *Other people's reactions after trauma* | |
| Positive responses | "They think I am too weak to cope on my own"<br>"I am unable to feel close to anyone" |
| Negative responses | "Nobody is there for me"<br>"I cannot rely on other people" |
| *Other consequences of trauma* | |
| Physical consequences | "My body is ruined"<br>"I will never be able to lead a normal life again" |
| Loss of job, money etc. | "I will lose my children"<br>"I will be homeless" |

her inability to spot that this was likely to happen as a sign that she was much less capable of 'reading' other people than she thought and that she should therefore abandon her cherished plans for a career in clinical psychology.

### *1.2.2. Appraisals of trauma sequelae*

A variety of idiosyncratic, negative appraisals of the sequelae of the traumatic event can produce a sense of current threat and contribute to persistent PTSD. These include: interpretation of one's initial PTSD symptoms, interpretation of other people's reactions in the aftermath of the event and appraisal of the consequences that the trauma has in other life domains (e.g. physical consequences such as pain and financial or professional consequences).

Symptoms such as intrusive recollections and flashbacks, irritability and mood swings, lack

of concentration and numbing are common reactions shortly after a traumatic event. If individuals do not see these symptoms as a normal part of the recovery process, they may interpret them as indications that they have permanently changed for the worse or as indicators of a threat to their physical or mental well being (see also Ehlers & Steil, 1995; Foa & Riggs, 1993; Foa & Rothbaum, 1998; Jones & Barlow, 1990). Table 1 gives several examples of negative appraisals of initial PTSD symptoms. Such appraisals maintain PTSD by directly producing negative emotions (e.g. anxiety, depression or anger) *and* by encouraging individuals to engage in dysfunctional coping strategies that have the paradoxical effect of enhancing PTSD symptoms. For example, individuals who believe that intrusive recollections mean they are losing control of their mind are likely to try hard to push such recollections out of their mind. Unfortunately, active thought suppression of this type often makes the thought *more* likely to come to mind (Wegner, 1989).

Other people, including family and close friends, are often uncertain about how they should respond to a trauma victim and may avoid talking about the event in order not to distress the victim. This 'consideration' can be interpreted as a sign that others do not care, or, worse still, that they think the event was partly the victim's fault. Such interpretations are likely to directly produce some of the symptoms of PTSD (estrangement from others and social withdrawal) and are also likely to prevent victims from discussing the trauma with others, hence reducing the opportunity for therapeutic reliving (see below) and for feedback from others that might help correct excessively negative views about the meaning of the event. Of course some people are also objectively uncaring, rejecting or critical of victims after a traumatic event. If traumatised individuals consider these people's views important, they may interpret such reactions as a sign that they are to blame for the event, that they are unworthy, that they are unlikeable or that they will not be able to have close relationships with others.

Traumatic events can have negative long-term effects on many areas of life, including the individual's physical health, appearance, vocational and financial situation. These can be interpreted as a sign of a permanent negative change of one's life for the worse or as a sign that worse is still to come.

### *1.2.3. Appraisals and emotional responses*

The nature of predominant emotional responses in persistent PTSD depends on the particular appraisals (see Beck, 1976). Appraisals concerning perceived danger lead to fear (e.g. ''Nowhere is safe''), appraisals concerning others violating personal rules and unfairness lead to anger (e.g. ''Others have not treated me fairly''), appraisals concerning one's responsibility for the traumatic event or its outcome lead to guilt (e.g. ''It was my fault''), appraisals concerning one's violation of important internal standards lead to shame (e.g. ''I did something despicable'') and appraisals concerning perceived loss lead to sadness (e.g. ''My life will never be the same again''). Most patients with persistent PTSD experience a range of negative emotions. This is partly because different appraisals are activated at different times and partly because the degree of conviction varies from time to time. For example, the possibility that a loss may occur tends to be associated with anxiety whereas perceived certainty of a loss tends is associated with depression.

### 1.3. Memory for the traumatic event

The nature of trauma memory and its relationship to unwanted recollections is another puzzle of persistent PTSD. On the one hand, patients often have difficulty in *intentionally* retrieving a complete memory of the traumatic event. Their intentional recall is fragmented and poorly organized, details may be missing and they have difficulty recalling the exact temporal order of events (Foa & Riggs, 1993; Foa, Molnar & Cashman, 1995; van der Kolk & Fisler, 1995; Koss, Figueredo, Bell, Tharan & Tromp, 1996; Amir, Stafford, Freshman & Foa, 1998). On the other hand, patients report a high frequency of *involuntarily* triggered intrusive memories involving reexperiencing aspects of the event in a very vivid and emotional way. Models of PTSD need to explain this apparent discrepancy between difficulties in intentional recall and easily triggered reexperiencing of the event. In addition, the involuntary reexperiencing has a number of important characteristics that need to be explained. These characteristics will be described first. We will then go on to outline a possible explanation for the memory disturbance.

- Reexperiencing mainly consists of sensory impressions, rather than thoughts. The impressions can involve all modalities including physical sensations, but are predominantly visual (see Ehlers & Steil, 1995; van der Kolk & Fisler, 1995). For example, a man who experienced a head-on car crash at night kept seeing headlights coming towards him.
- The sensory impressions are experienced as if they were happening right now rather than being memories from the past and the emotions (including physical reactions and motor responses) accompanying them are the same as those experienced at the time ('original' emotions). They lack the awareness of remembering that usually characterises autobiographical memories (see also Foa & Rothbaum, 1998; and Brewin et al.'s, 1996, concept of situationally accessible memories). Reemtsma (1997) who was kidnapped and held hostage in a cellar for a month provides a good illustration. After the kidnappers set him free, the terror he experienced in the cellar kept haunting him. He describes this experience as "being back in the cellar". Note that he does not say it was *like* being back in the cellar.
- The original emotions and sensory impressions are reexperienced even if the individual later (i.e. at another time during the event or afterwards) acquired new information that contradicted the original impression or if he/she knows that these impressions did not turn out to be true. For example, a patient whose father committed suicide by shooting himself, kept reexperiencing a panicky urge to find his father and the feeling of responsibility for rescuing him that he had when he discovered the suicide note. At the time, he erroneously thought that his father had taken sleeping tablets and could be saved if he acted quickly enough.
- "Affect without recollection". Individuals with PTSD sometimes reexperience physiological sensations or emotions that were associated with the traumatic event *without* a recollection of the event (lack of source information, see also Schacter, Norman & Koutstaal, 1997). For example, a rape victim noticed that she was feeling extremely anxious while talking to a female friend in a restaurant and only subsequently realised that the feeling was probably triggered by the presence of a man on another table who bore some physical similarity with the rapist.

- The involuntary reexperiencing of the traumatic event is triggered by a wide range of stimuli and situations. Many of the trigger stimuli are cues that do *not* have a strong *semantic* relationship to the traumatic event, but instead are simply cues that were *temporally associated* with the event. Common examples are physical cues similar to those present shortly before or during the traumatic event (e.g. the shape of a person, spatial cues, smells, a pattern of light, particular phrases said in a certain tone of voice), similar emotional states (e.g. feeling helpless or trapped) or other similar internal cues (e.g. touch on a certain part of the body, proprioceptive feedback from one's own movements or posture).

It is proposed that the intrusion characteristics and the pattern of retrieval that characterises persistent PTSD (poor intentional recall, vivid unintentional reexperiencing with 'here and now' quality) is due to the way the trauma is encoded and laid down in memory.

### *1.3.1. Poor elaboration and incorporation into autobiographical memory base*

There are two routes to the retrieval of autobiographical information (see also Brewin et al., 1996). First, through higher-order meaning-based retrieval strategies (e.g. remembering the first day at school). Second, through direct triggering by stimuli that were associated with the event (e.g. particular smells or a piece of music). Much of the normal processing of autobiographical memories appears to have the function of reducing the ease with which memories of past experiences are unintentionally retrieved while we are engaging in everyday tasks. Autobiographical events are usually incorporated into an autobiographical memory knowledge base that is organized by themes and personal time periods (Conway & Pleydell-Pearce, 1997). This type of elaboration enhances the first retrieval route and *inhibits* the second (see Conway, 1997b; Markowitsch, 1995) and has the effect that when an autobiographical memory enters consciousness, it comprises both specific information about the event *and* general information about the lifetime period that the event took place in and abstracted information about the type of event in general (e.g. school days in general).

We propose that in persistent PTSD one of the main problems is that the trauma memory is poorly elaborated and inadequately integrated into its context in time, place, subsequent and previous information and other autobiographical memories (see also Siegel, 1995). This explains problematic intentional recall (weak semantic route to retrieval), the 'here and now' quality (no context in time, hence the perception of current threat), the absence of links to subsequent information (e.g. "I did not die") and the easy triggering by physically similar cues.

### *1.3.2. Strong S–S and S–R associations*

We propose that a further problem in persistent PTSD is that S–S and S–R associations are particularly strong for traumatic material. This makes triggering of memories of the event and/or emotional responses by associated stimuli even more likely (see also Conway, 1997a; Foa et al., 1989; Keane, Zimering & Caddell, 1985; Charney, Deutch, Krystal, Southwick & Davis, 1993). A good illustration of how S–S associative learning leads to involuntary reexperiencing is given by Reemtsma (1997). His most distressing intrusion after his release from the cellar was hearing a knocking sound, and he experienced great distress with this intrusion. His kidnappers had knocked at the door of the cellar when bringing him food, water, etc. When

they knocked, he had to lie down immediately with his face to the floor and make sure he did not see them, knowing he would be killed if he did. He describes that initially the intrusive knocking sound appeared to come out of the blue, but that he gradually became aware that this intrusion was often triggered by hearing footsteps. During his captivity, he had heard footsteps approaching before the kidnappers knocked at the door. The sound of footsteps had become associated with the sound of knocking.

Two aspects of S–S and S–R associative learning are of interest in explaining the persistence of PTSD. First, this form of learning helps the organism in making predictions (including those that operate outside awareness) about *what will happen next*. It appears that in PTSD distinct[1] stimuli that were present shortly before or during the traumatic event become associated with the default prediction of severe danger to self. Second, retrieval from associative memory is cue-driven and unintentional so that the individual may not always be aware of the triggers for reexperiencing (as in Reemtsma's example) and may not be aware that his/her emotional reaction is due to activation of the trauma memory (affect without recollection)[2]. Failure to spot the origin of the reexperiencing symptoms makes it difficult for the patient to learn that there is no present danger when exposed to the triggers[3].

#### *1.3.3. Strong perceptual priming*

We propose that there is particularly strong perceptual priming (a form of implicit memory) for stimuli that were temporally associated with the traumatic event, i.e. there is a reduced perceptual threshold for these stimuli. As a consequence of the reduced perceptual threshold, cues that were associated with the trauma and that consequently can directly trigger the trauma memory are more likely to be noticed. As implicit memory traces are not well discriminated from other memory traces (Baddeley, 1997), vague physical similarity would be sufficient in perceiving stimuli as similar to those occurring in the traumatic situation (poor stimulus discrimination) and thus triggering reexperiencing symptoms, even if the context in which the stimulus configuration is observed is very different. For example, a patient who had been involved in a car crash at night noticed that a patch of bright sunlight on his lawn triggered vivid intrusions of headlights coming towards him.

### *1.4. Relationship between the nature of trauma memory and trauma appraisals*

There is a reciprocal relationship between the nature of the trauma memory and the appraisals of the trauma/its sequelae. When individuals with persistent PTSD recall the traumatic event, their recall is biased by their appraisals and they selectively retrieve

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[1] With Rescorla (1988) we assume that this is an 'intelligent' process in that stimuli with a high information value (in terms of predicting the occurrence of the traumatic event) are particularly likely to become associated with danger. Note that the stimuli may not have a *meaningful* relationship with danger.

[2] In line with the hypothesis that these reexperiencing phenomena reflect strong S–S and S–R associative learning and a relative deficit in memory elaboration, Bechara et al. (1995) have demonstrated a dissociation between conditioning and declarative memory associated with amygdala and hippocampal functions.

[3] This corresponds to LeDoux's finding from animal research that involvement of the cortex is necessary to unlearn conditioned fear responses (LeDoux, 1992).

information that is consistent with these appraisals. For example, a patient who thought that the trauma (an accident) showed that nobody cared about her, recalled unfriendly responses of nurses in hospital, but did not recall that several people had tried to help her after the accident. Such selective retrieval prevents individuals from remembering aspects of the traumatic event that contradict their appraisals and thus prevents change in the appraisals. When the patient remembered during imaginal reliving that others were trying to help after the accident, her belief that nobody cared about her decreased.

On the other hand, inability to remember details of the trauma can be appraised by individuals in a way that maintains the sense of current threat, for example, that the memory problem means something is seriously wrong with them (e.g. brain damage) or that something even worse must have happened during the trauma that would be unbearable if they knew what it was. Inability to remember the exact order of events can contribute to the erroneous appraisal of being responsible for the event.

Similarly, the 'here and now' quality of the emotions that are associated with the trauma memory can contribute to problematic appraisals. For example, many people feel extremely lonely during a traumatic event and reexperiencing these feelings in the company of significant others may be interpreted as a sign that they are unable to relate to other people or that their relationships with others have permanently changed for the worse.

Furthermore, it is proposed that in those people with persistent PTSD for whom the traumatic event has seriously threatened their view of themselves (e.g. as worthy or capable), the general organisation of their autobiographical memory knowledge base may be disturbed[4] (an extreme case of a patient who developed complete retrograde amnesia for the past 6 years after a traumatic event is described by Markowitsch et al. (1998)). Such people seem unable to reorganise their previous and subsequent experiences in a way which produces a stable view of themselves and the context they live in (see Conway's idea that autobiographical knowledge grounds the self (Conway, 1997a; Conway & Pleydell-Pearce, 1997)). This will produce a sense of disorientation and will also have the effect that their retrieval from memory will be less filtered by current context and more cue-driven than the perceptions of other people with a strong sense of self in context. This is comparable to a person who has moved to a new town and keeps 'seeing' people from his previous home town by responding to vague physical similarity until he establishes a clear awareness of himself in a new environment. The disorganised autobiographical memory will therefore make cue-driven recollections of the traumatic event/affect more likely.

### *1.5. Maladaptive behavioural strategies and cognitive processing styles*

When patients with persistent PTSD perceive a serious current threat and the accompanying symptoms, they try to control the threat and symptoms by a range of strategies. The strategy selected is meaningfully linked with the individual's appraisals of the trauma and/or its sequelae and their general beliefs about how best to deal with the trauma. Further examples

[4] This may be reflected in the findings of poor retrieval of specific autobiographical memories in PTSD (Kuyken & Brewin, 1995; McNally et al., 1995).

are given in Table 2. The strategies intended to control the threat/symptoms are maladaptive because they maintain PTSD by three mechanisms:

1. Directly producing PTSD symptoms,
2. Preventing change in negative appraisals of the trauma and/or its sequelae,
3. Preventing change in the nature of the trauma memory.

An example of a maladaptive cognitive strategy that increases PTSD symptoms directly is *thought suppression*. If patients try hard to push thoughts about the trauma out of their mind, this will increase the frequency of unwanted intrusive recollection. Another common example is that *behaviours used to control* some of the *PTSD symptoms* may increase others, e.g. attempts to prevent nightmares by going to bed very late or getting up very early may increase symptoms of poor concentration, irritability and alienation. *Selective attention to threat cues*[5] is another example of a cognitive process that may increase the frequency of intrusions and trauma-related emotions.

Among the strategies that prevent a change in the appraisal of the traumatic event or its sequelae are *safety behaviours*. These are actions individuals take to prevent or minimise anticipated further catastrophes (Salkovskis, 1996). Safety behaviours prevent disconfirmation of the belief that the feared catastrophe will occur if one does not engage in preventative action. For example, individuals may be extremely vigilant for possibly dangerous situations while driving in order to decrease the probability of another accident. Individuals who were assaulted in their homes may always sleep with a knife next to their bed in order to minimise the risk of being killed by another intruder.

Among the maladaptive strategies that prevent a change in the nature of the trauma memory is actively trying *not to think* about the event. Individuals with persistent PTSD try to keep their mind constantly occupied with other things or they try to think about the event in a non-emotional way (like giving a report to the police or a journalistic description), leaving out the parts with the largest emotional impact. These efforts can take elaborate forms. For example, a lorry driver who had been involved in a fatal accident kept occupying his mind with sexual fantasies when at work to prevent memories of the accident from popping back into his mind. Another patient spent hours cleaning her house to prevent being overwhelmed by memories. Efforts to not think about the event prevent individuals from elaborating the trauma memory and linking their experience with its context in time, space, previous and subsequent information and other autobiographical memories. They also prevent changes in appraisals about what would happen if they thought about the trauma (e.g. "I will go mad").

Similarly, *avoidance of reminders of the trauma* maintains PTSD by preventing both a change in the problematic appraisals (e.g. "If I encounter..., the trauma will happen again", see also Table 2) and a change in the nature of the memory. Avoidance of the site of the trauma commonly prevents correction of appraisals about how the event could have been avoided. As reminders of the trauma often provide retrieval cues for inaccessible details, avoidance of these

[5] We talk about the dysfunctional behaviours and cognitive processes as strategies, but we do not assume that they always have an intentional quality. They may be performed in a habitual or reflexive fashion. For example, selective attention to threat and dissociation probably includes automatic as well as strategic responses. The former may represent part of the trauma memory that can be automatically triggered when reminders are present.

Table 2
Examples of appraisals with associated dysfunctional behavioural and cognitive strategies

| Appraisal | Dysfunctional strategies |
|---|---|
| If I think about the trauma<br>…I will go mad<br>…I will fall apart<br>…I will lose control and hurt someone<br>…I will have a heart attack<br>…I will seriously damage my health | try hard not think about the trauma; keep mind occupied all the time; control feelings; drink alcohol/ take drugs |
| If I do not control my feelings tightly<br>…I will not be able to work and lose my job<br>…I will lose my temper and offend people | numb emotions; avoid anything that could cause negative or positive feelings |
| If I do not find out how this event could have been prevented<br>…something similar will happen again | ruminate about how event could have been prevented |
| If I do not find a way to punish the assailant he will have won and l will not be a proper man any longer | ruminate about how to get even with assailant |
| If I go to the site of the event,<br>If I wear the same clothes again,<br>…I will have another accident<br>…I will have a nervous breakdown | avoid site of the event<br>avoid wearing similar clothes |
| If I do not take extra precaution<br>…I will be attacked again | carry weapon; vigilant for dangerous people; avoid crowded places; make sure to stay close to exit |
| If I do not check the rear mirrors<br>…someone will drive into my car again | keep checking mirrors |
| If I make plans (such as for a holiday)<br>…the next awful thing is going to happen | do not make any plans for the future |
| If I see my friends<br>…they will ask me about the trauma and they will think that I am pathetic because I am still so upset | avoid seeing friends |
| If I do things that I used to enjoy<br>…I will be punished again<br>…I will be reminded of the trauma and will not be able to cope<br>…I will be overwhelmed by emotion | give up pleasant activities |
| If I show my face<br>…people will be disgusted because of my scars | avoid other people; cover face with hands; heavy make-up; look down |

(continued on next page)

Table 2 (*continued*)

| Appraisal | Dysfunctional strategies |
|---|---|
| If I go to sleep<br>...I will have nightmares<br>...I will not notice intruders | stay up until very late |
| If I have more stress<br>...I will have a heart attack<br>...I will have a nervous break-down | avoid anything that could be stressful |

cues also interferes with the formation of a more elaborate trauma memory that links the experience to its context. Similarly, use of *alcohol or medication to control anxiety* will prevent a change in interpretations such as "I am going to lose control when I let my feelings come" and will also interfere with a change in the nature of the memory. Furthermore, it is common for people with persistent PTSD to *give up or avoid activities* that were important to them before the traumatic event, for example sports, hobbies or socialising. This prevents a change in their appraisals, e.g. that the trauma has made them a different person or that other people will respond negatively if they knew about the trauma and prevents them from reorganising their autobiographical memory knowledge base in a way that creates a continuous view of the self.

Another common example of a maladaptive cognitive processing style is *rumination* about the trauma and its consequences, for example about how it could have been prevented or about how justice/revenge can be achieved. At this stage, it is unclear what exactly the mechanisms are by which rumination maintains PTSD. It probably strengthens problematic appraisals of the trauma (e.g. "The trauma has ruined my life") and is probably similar to cognitive avoidance in interfering with the formation of a more complete trauma memory because it focusses on 'what if...' questions rather than on the experience of the trauma as it actually happened. Finally, it may also directly increase feelings of nervous tension, dysphoria or hopelessness and, because it provides internal retrieval cues, intrusive memories of the traumatic event.

Note that the present model assumes that different mechanisms underlie rumination and reexperiencing symptoms (see also Joseph et al., 1997). Clinical descriptions of intrusive thoughts in PTSD have not always made this distinction. Rumination is thought to be driven by problematic appraisals whereas deficits in the trauma memory are seen as the cause of persistent reexperiencing symptoms. However, reexperiencing may lead to rumination and rumination may provide internal cues that trigger reexperiencing symptoms.

*Dissociation* when reminded of the trauma is an as yet poorly understood cognitive response that interferes with recovery. We speculate that the derealisation, depersonalisation and emotional numbing experienced during dissociation may impede the elaboration of the trauma memory and its integration into the autobiographical memory knowledge base (see also Foa & Hearst-Ikeda, 1996).

### 1.6. Cognitive processing during trauma

The two processes that lead to a sense of serious current threat in PTSD (appraisals of the trauma/its sequelae and the nature of the trauma memory) are themselves influenced by the type of cognitive processing during the traumatic event.

#### 1.6.1. Influences on appraisal

An example of thought processes during the trauma that influence subsequent appraisals is mental defeat. Ehlers et al. (1998a); Dunmore, Clark and Ehlers (1997, 1998, 1999) and Ehlers, Maercker and Boos (in press) identified *mental defeat* as a correlate of chronic PTSD and poor response to exposure treatment. Mental defeat refers to the perceived loss of all psychological autonomy, accompanied by the sense of not being human any longer. Patients who experienced mental defeat are more likely than other victims to interpret the trauma as evidence for a negative view of themselves, for example, that they are unable to cope with stress, that they are not a worthy person or that they are permanently damaged by the trauma.

#### 1.6.2. Influences on memory

The nature of the trauma memory depends on the quality of processing at encoding (see also Krystal, Bennett, Bremner, Southwick & Charney, 1995; Schacter et al., 1997; Siegel, 1995). An important dimension of encoding is conceptual vs. data-driven processing (Roediger, 1990). Some trauma victims describe that their thinking was extraordinarily clear and that they kept analysing the situation whereas others report confusion and overwhelming sensory impressions. It is suggested here that the latter group is more likely to suffer from persistent PTSD because the degree of conceptual processing (i.e. processing the meaning of the situation, processing it in an organized way and placing it into context) during a traumatic event determines the nature of the memory and thus the ability to intentionally retrieve information from this memory. If the individual lacks conceptual processing and engages mainly in data-driven processing (i.e. processing the sensory impressions), then the trauma memory will be relatively difficult to retrieve intentionally and at the same time there will be relatively strong perceptual priming for accompanying stimuli, in line with the results of experimental cognitive psychology (reviewed by Roediger (1990)). The resulting memory trace will be poorly discriminated from other memory traces (Baddeley, 1997), thus impairing stimulus discrimination between stimuli present during the trauma and harmless stimuli that bear some similarity to these.

Besides the role of conceptual vs. data-driven processing, the unorganised memories observed in persistent PTSD may in part result from an inability to establish a *self-referential perspective* while experiencing the trauma that can be integrated into the continuum of other autobiographic memories in time (see Wheeler, Stuss & Tulving, 1997).

It has been suggested that *dissociation* during trauma explains the fragmentation of traumatic memories (Spiegel, 1991; van der Kolk & Fisler, 1995). Dissociation is a complex concept that has several different components. Some of these may overlap with the concepts of conceptual vs. data-driven processing and lack of self-referential perspective when encoding. Emotional numbing may be a further factor that interferes with the formation of an organized memory of the traumatic event (see Foa & Hearst-Ikeda, 1996).

Another problem at encoding that may explain some features of the trauma memory stems

from observations that propositions are stored in long-term memory with a *default 'true' value* (Conway, 1997b). During a traumatic event, individuals may not have enough cognitive capacity to decide that some very threatening aspects of the trauma are not true. For example, a rape victim remained convinced that she was unattractive because the rapist had repeatedly told her she was ugly. The extreme distress and anxiety she experienced during the rape made it impossible for her to appreciate that these words were untrue and instead were simply a strategy that the rapist used to manipulate and humiliate her. She thus encoded his statements as true and the appraisal that she was unattractive continued to pose a current threat to her.

### *1.7. Trauma characteristics, previous experiences and beliefs, current state*

The model takes into account several background factors that are likely to influence: cognitive processing during the traumatic event, the nature of the trauma memory, individuals' appraisals of the trauma/its sequelae and the strategies they use to control the perceived threat/symptoms (see Fig. 1). These background factors are considered neither necessary nor sufficient factors in the etiology of persistent PTSD and the examples given below are meant as illustrations rather than an exhaustive list.

Cognitive processing during a traumatic event will depend on a number of factors. *Characteristics of the trauma* such as duration and predictability may exert an influence. For example, a road traffic accident in which one is suddenly hit from the back is more difficult to conceptually process than an accident that one can see coming. Another example is that mental defeat is unlikely to be experienced during assault of very short duration (Ehlers et al., 1998a). *Previous experience of trauma* and coping styles used during these events may play a role. For example, victims of childhood sexual abuse may engage in little conceptual processing during a renewed trauma because the trauma reactivates memories of the abuse during which they primarily engaged in data-driven processing. Young children are particularly likely to engage in data-driven processing during abuse because it is difficult for them to conceptualise what is happening to them. *Low intellectual ability* may be related to a less conceptual and more data-driven processing (see McNally & Shin's, 1995, findings of an association of low intelligence and PTSD). *Prior beliefs* may play a role. For example, individuals who believe that no one could ever harm them may find it hard to understand what is going on when they are assaulted. *State factors* such as alcohol consumption, general exertion, degree of arousal and fear may influence the ability to process the situation in a conceptual and organized way (see also Foa & Riggs, 1993; van der Kolk & Fisler, 1995). The impact of high arousal and fear on trauma memory probably includes cognitive and biological pathways. For example, very high cortisol levels during extreme stress may interfere with the encoding of the memory for the event, thus impairing intentional recall (see also Newcomer et al., 1999).

*Appraisals of the trauma and its sequelae* will also in part be influenced by *characteristics* of the event and its sequelae. For example, if individuals perceived no control at all over the traumatic situation, they may interpret this situational lack of control as evidence that they have little control over their lives in general. Traumas that leave the individual with permanent health problems are more likely to lead to appraisals such as "My life is ruined" than traumas which inflicted reversible injuries. The quality of other people's reactions in the aftermath of the trauma (social support versus negative reactions) influences the probability of appraisals

such as "Nobody cares about me". *Prior beliefs* will be important in that trauma victims with prior negative beliefs about themselves may see the trauma as a confirmation of these beliefs and those with extremely positive beliefs may find that the trauma shatters their trust in themselves or the world (see Foa & Riggs, 1993; Janoff-Bulman, 1992; Resick & Schnicke, 1993). Another example of the influence of prior beliefs is that people who think that they should always be in control of their emotions and thoughts may be especially likely to interpret the intrusive reexperiencing symptoms as a sign that they are falling apart, going mad or have a brain injury. *Prior experiences* can exert an influence in that previous negative experiences and traumas may be linked with the renewed trauma and may give it additional negative meaning. For example, a victim of child sexual abuse who is raped as an adult may interpret the rape as showing that she is the type of person who deserves no better or brings out the worst in other people. A renewed trauma may also act as a powerful cue for memories of earlier trauma if some of its sensory components overlap, so that it reactivates some of the emotional responses to this earlier experience. For example, a patient who had a relatively minor car accident was reminded by the sound of the impact of an earlier accident in which his mother was killed. He blamed himself for this earlier accident, but had overcome his initial distress and had managed not to think about it for many years. The second accident brought back intrusive memories of the first accident and strong feelings of guilt and the patient developed persistent PTSD.

*Cognitive and behavioural strategies* used to control PTSD symptoms and current threat are likely to be influenced by *prior experiences and beliefs*. For example, a person who thinks that people with emotional problems are inferior is more likely to use thought suppression when distressing intrusive recollections of the trauma occur than other people who do not hold this belief. The same would be true for someone who believes that there is only so much distress that an individual can tolerate before going mad or suffering ill health. People who were criticised or ridiculed when showing fear or sadness in their childhood may try to numb their emotions and avoid talking to others about the traumatic event.

## 2. Features of PTSD explained by the model

### 2.1. Delayed onset of PTSD

So far we have presented PTSD as a syndrome characterised by common initial symptoms, which persist in some individuals. While this is generally correct, there are individuals with persistent PTSD who report that they experienced few or even no symptoms in the first few weeks or months after the traumatic event and that the onset of PTSD did not occur till months or even years after the trauma. How does the model deal with delayed onset cases? In general, we assume that the delay occurs either because some later event gives the original trauma or its sequelae a much more threatening meaning (see also the phenomenon of UCS revaluation, Davey, 1989) or because some of the stimuli that are particularly potent reminders of the traumatic event were not available until some time afterwards. A common example for the *change in meaning* process are individuals who witness horrific events as part of their profession (e.g. ambulance workers, police). They may experience delayed PTSD if the events

become relevant to their personal lives (see Clohessy & Ehlers, in press). For example, they may start reexperiencing removing the bodies of children from an accident site when their children reach the same age and shape as the dead children. A common example for the *exposure to potent reminders* process are individuals who are hospitalised for severe injuries after motor vehicle accidents. While in hospital, these individuals do not encounter reminders such as cars or the site of the accident and their minds are usually focussed on the physical injuries and medical procedures, rather than the event which caused them.

### *2.2. Anniversary reactions*

Many people with persistent PTSD experience aggravation of symptoms around the anniversary of the event. These may be explained by a combination of the presence of reminders and appraisal of the PTSD symptoms. Around anniversaries, patients are confronted with many external reminders (such as weather and light conditions or other people asking about it) and they also generate internal retrieval cues by dwelling on what their lives were like before the traumatic event and about their feelings and experiences on the day, before the traumatic event happened. Furthermore, anniversaries often are taken as landmarks for negative appraisals of PTSD symptoms such as "I am inadequate because I am still not over it". Such appraisals activate strategies (e.g. thought suppression) which prolong/intensify the symptoms.

### *2.3. Frozen in time*

Patients with persistent PTSD say that they feel locked into the past (see also Herman, 1992). They seem unable to resume their former life or to start a new life. This is illustrated by McNally's, Lasko, Macklin and Pitman's (1995) description of Vietnam veterans who decades after the war still wear their uniform and other regalia. Patients with chronic PTSD feel disconnected from their former self and their life goals.

This state of being 'frozen in time' has three sources. First, it is related to appraisals of the trauma/its sequelae. For example, patients may think that they are permanently changed for the worse by the trauma and thus 'life will never be the same again'. They may also believe that their former life goals are unimportant following such an extreme experience or irrelevant because another catastrophe is going to happen soon. Second, continually reexperiencing sensations and emotions they had at the time of the trauma in their original form, disconnects them from current reality. Third, giving up or avoiding activities that were important to the person before the traumatic event contributes to the sense that time has stood still at the point of the traumatic event.

### *2.4. Sense of impending doom*

Intrusive memories of the traumatic event are often accompanied by a sense of 'worse is to come', comparable to anticipatory anxiety, that motivates suppression of the memories. At first sight, this appears paradoxical as the individual obviously knows what the outcome of the traumatic event was. The model explains the sense of worse is to come by the nature of the

trauma memory, i.e. sensory information and emotions are retrieved from the memory without the time-perspective of 'remembered' emotions, thus leading to the perception of *future* threat. Furthermore, we have suggested elsewhere that intrusive memories are about 'warning signals' that during the traumatic event actually predicted the occurrence of the worst moments (Ehlers, Hackmann, Steil, Clohessy & Wenninger, 1999). In addition, the poor ability to retrieve details or order of events during the trauma together with the intrusive nature of the memories, may be interpreted by individuals as indicating that something even worse happened that they will find unbearable or that it will be unbearable to face all the horrible events together.

### *2.5. No benefit from talking/thinking about the trauma*

People with persistent PTSD often report that they constantly think and talk about the trauma, but that this has not helped them to feel any different. It is proposed that this is because *of the way* they think and talk about the event. First, thinking in these cases often takes the form of rumination about 'what if…' questions rather than going over in one's mind about what exactly happened and how one felt and thought during the event. Second, talking is often done in a nonemotional way, as if giving a report to the police or aspects that the individual finds most distressing are left out. This prevents proper access to the meaning of the event and its contextualisation (see also Foa & Kozak, 1986; Pennebaker, 1989).

## 3. Treatment implications

When people talk about recovering from a traumatic experience, they often use the metaphor "I have put it in the past". The current model suggests that in persistent PTSD, putting the trauma into the past requires change in three areas.

- The trauma memory needs to be elaborated and integrated into the context of the individual's preceding and subsequent experience in order to reduce intrusive reexperiencing.
- Problematic appraisals of the trauma and/or its sequelae that maintain the sense of current threat need to be modified.
- Dysfunctional behavioural and cognitive strategies that prevent memory elaboration, exacerbate symptoms or hinder reassessment of problematic appraisals need to be dropped.

A wide range of cognitive-behavioural interventions could be used to achieve change in these three areas (see, for example, Foa & Rothbaum (1998), Joseph et al. (1997), Meichenbaum (1997); Resick & Schnicke (1993)). Future research will identify which interventions are most efficient.

Below we describe the procedures that the Oxford Cognitive Therapy Trauma Group[6] have found particularly helpful in pilot work aimed at devising an efficient CBT intervention. Some of the procedures utilise techniques that are already well-known in the field. For these

[6] David M. Clark, Anke Ehlers, Melanie Fennell, Ann Hackmann and Freda McManus.

techniques, we mainly focus on how the techniques should be implemented to maximise change in the three target areas.

### 3.1. Assessment

A key aim of the assessment interview is to identify the main cognitive themes that will be addressed in therapy. Completion of the Post-traumatic Cognitions Inventory (PTCI; Foa, Ehlers, Clark, Tolin & Orsillo, in press), which covers a wide range of potentially problematic appraisals, can be helpful. In addition, patients are asked to look back at the event and consider what are the worst things about it/the most painful moments. In both the assessment interview and subsequent therapy sessions, parts of the memory that currently elicit particularly strong distress ('hot spots') are explored to identify meanings, as are intrusive images and moments when the patient dissociates or withdraws from processing. The nature of the predominant emotions (e.g. guilt, anger, shame, sadness or fear) is also an invaluable clue to cognitive themes. To identify problematic appraisals of the trauma sequelae, it is useful to ask what has been most distressing/difficult since the event and to explore patients' beliefs about their symptoms, their future and other people's behaviour. In delayed onset cases, the therapist tries to identify posttrauma events that may have changed the meaning of the original trauma or its sequelae. To identify problematic behavioural and cognitive strategies, it is useful to enquire how patients are currently trying to put the event behind them, what they think is the best way of coping with the trauma, what they avoid, how they deal with intrusions, what they think will happen if they allow themselves to dwell on the trauma or get upset about it, whether they ruminate and what their ruminations consist of.

A further aim of the assessment interview is to start to characterise the nature of the trauma memory and the spontaneous intrusions. Key issues include the extent to which there are gaps in memory, whether the sequence of events seems muddled or confused and the extent to which the memory/intrusions have a 'here and now' quality and strong sensory and motor components. Some of this information only becomes fully clear when some form of reliving has been initiated (see below).

### 3.2. Rationale for treatment

Usually, the rationale for treatment has three elements. First, it is explained that PTSD symptoms (especially intrusions, numbing and hyperarousal) are a common initial reaction to an abnormal event. This point is emphasised by reviewing the patient's symptoms in detail and explaining how some of the most puzzling aspects of the symptoms (e.g. the 'here and now'-quality of memories or becoming emotional for no apparent reason) are hallmarks of the condition. Second, that many of the ways the patient has so far used to deal with the trauma memory may have been useful for coping with other, milder stressors in their life, but paradoxically may be maintaining their symptoms in this instance. Third, treatment involves fully processing the trauma and reversing their particular maintaining factors.

A key element of treatment will involve thinking about the trauma more and discussing it in detail. Various analogies can help explain this point. The therapist may compare the trauma memory to a cupboard in which many things have been thrown in quickly and in a

disorganised fashion, so it is impossible to fully close the door and things fall out at unpredictable times. Organising the cupboard will mean looking at each of the things and putting them into their place. Once this is done, the door can be closed and remains shut. Another useful analogy is that of a jigsaw puzzle that has been scattered all over the floor so that one will unexpectedly stumble over some of its pieces. Only when all the pieces have been looked at and put together, the puzzle can be filed away. Linked to these points, the therapist explains that the reexperiencing symptoms are isolated memory fragments that are triggered by matching cues and that they are experienced as if things were happening in the 'here and now' because they are not integrated which other autobiographical information.

### 3.3. Thought suppression experiment

For many patients who attempt to deal with intrusions by pushing them out of their mind, a thought suppression experiment can be a useful way of illustrating the problematic consequences of this strategy. For example, the therapist might say to the patient "It doesn't matter what you think for the next few minutes as long as you don't think about one particular thing. It is extremely important you don't think about that thing... The thing is a fluorescent green bunny rabbit eating my hair!". Most patients find they immediately get an image of the rabbit and have difficulty getting rid of it. Discussion then helps them see that an increase in the frequency of target thoughts is a normal consequence of thought suppression. This result can then be used to set up a homework assignment in which the patient is asked to collect data to test the idea that thought suppression may be enhancing intrusions. The experiment involves not trying to push the intrusions out of the mind, but instead just letting them come and go, watching them as though they were a train passing through a station. Often patients report that this simple experiment produces a decline in both the frequency of intrusions and the belief that intrusions are a sign of impending insanity or loss of control. A similar approach can be used for rumination.

### 3.4. Education

Education about police, ambulance and hospital procedures, medication and other matters can help correct many other problematic appraisals. For example, a patient thought that his body was permanently damaged by an accident despite negative medical investigations. His evidence for this conclusion was the fact that his urine had a very dark yellow colour for a few days after the accident. He was greatly relieved to learn that this had been the effect of the medication he had received.

### 3.5. Reclaiming one's life

A corollary of the here and now sense of intrusions is that patients with persistent PTSD feel that their life is stuck at the time of the trauma (see Section Frozen in time). They often give up important activities or social contacts that used to give them a sense of meaning and well-being prior to the trauma. To help contextualise the memory and give patients the feeling that they are moving forward in their lives they are encouraged to 'reclaim' their former selves by

reinstituting activities that have dropped out of their lives. Often quite minor changes (e.g. buying a new pair of trainers and going jogging again) can help reduce the feeling of being stuck in time. If long-term physical effects of the trauma prevent taking up the original activity, similar but manageable activities are explored. When planning the reactivation of activities, it is important to identify problematic beliefs that may prevent the patient from complying. For example, a patient who had a second motorbike accident after agreeing with his family that he would not ride again, avoided visiting them because he was concerned that they would reject him. Socratic questioning helped him see that this would not be the case.

### *3.6. Reliving with cognitive restructuring*

Some form of reliving of the traumatic event is involved in most cognitive behavioural programmes for PTSD. Procedures that have been shown to be effective include reliving the experience in the presence of the therapist and putting this experience into words (e.g. Foa & Rothbaum, 1998) or writing a detailed account of the event (e.g. Resick & Schnicke, 1993). From the point of view of the present model, reliving has several important functions. First, it promotes the elaboration and contextualisation of the trauma memory (see also Foa & Riggs, 1993). Second, identifying and discussing hot spots during reliving is useful in identifying the idiosyncratic appraisals of the trauma. Third, for those patients who believe that they will go crazy, fall apart, lose control or die when thinking about the trauma in detail, imaginal reliving in itself is a powerful behavioural experiment to test this interpretation (see also Foa & Riggs, 1993).

Following careful explanation of the rationale for reliving (see overfull cupboard and other metaphors above), we have tended to follow the general style of reliving recommended by Foa and Rothbaum (1998), with some variants. Patients are instructed to relive the trauma in their mind's eye, making the image as realistic as possible and including their thoughts and feelings as well as what was happening. At the same time, they are asked to verbally describe the reliving and to do so in the present tense. To help patients to stay with the memory, the therapist asks questions such as "What do you see?", "How does that feel?", "Where do you feel that?", "What is going through your mind?". To help identify hot spots, patients rate their distress levels at different points during the reliving. Initially, reliving usually involves the whole event, starting just before the event and continuing until patients knew they were safe. As therapy progresses, reliving focuses more exclusively on hot spots and other problematic aspects of the memory.

After a reliving exercise, therapist and patient identify and discuss problematic thoughts and beliefs that are associated with the key moments of the trauma, using the relevant cognitive restructuring techniques. Once an alternative perspective has been identified, efforts are made to incorporate this information into the next reliving. This can be achieved by carefully reviewing the alternative interpretation before restarting reliving and practising answering one's own thoughts during the reliving. In some cases, special techniques may be required. For example, a patient who was devastated by the sexual response she experienced during a protracted rape by a stranger was helped to see that although involuntary, this response was probably the main reason why she was not killed and so could return to her husband and their normal life. She had difficulty incorporating this information at the relevant point during

reliving as she tended to dissociate. To get around this problem, she recorded her reappraisal on tape and played it back through headphones at the relevant moment.

As therapy progresses, the nature of the trauma memory often changes. The narrative tends to become more coherent, sensory components (e.g. smells, tastes and vivid images) and motor components (e.g. involuntary movements) tend to fade and the memory loses its here and now quality and becomes more like a normal recollection. For some patients, these changes occur simply as a function of repeated reliving with the relevant rationale. For others, considerable additional cognitive restructuring is required. Integrating reliving and cognitive restructuring can be a challenge but, in our experience, can substantially reduce the amount of reliving required for recovery. When integrating the two procedures, it is important to strike a balance between sensitively spotting and changing appraisals and ensuring enough reliving to fully activate the emotional components of the memory. Reliving is emotionally draining and care needs to be taken to ensure that restructuring is not conducted when the patient is too exhausted to benefit.

Patients who are particularly likely to require extensive verbal and imagery cognitive restructuring are those who: (1) experience anger, guilt or shame as a predominant emotion, (2) interpret their behaviour or emotions during the event as showing something negative about themselves (e.g. perpetrators of crime (Foa & Meadows, 1997), rape victims who experience mental defeat (Ehlers et al., 1998a)) or (3) experienced violence over a prolonged period of time. The latter group sometimes cannot help but assume the perpetrators' negative views about them to some extent, viewing themselves as criminals or deserving maltreatment (Saporta & van der Kolk, 1992; Reemtsma, 1997; Ehlers et al., in press). For some individuals in these categories, extensive cognitive restructuring may be required before imaginal reliving can be beneficial.

At this stage, it is unclear why reliving works. However, there are several ways in which it is likely to facilitate elaboration of the trauma memory. First, it links previously unconnected parts of the traumatic experience, thus giving them a context. This will reduce the probability that isolated parts of the memory are triggered. A woman whose young daughter died in a house fire while she was out, had frequent intrusions of seeing the curtains burning when she approached the house. At the time, she had thought that the daughter was burning alive and was in tremendous pain. However, the daughter had actually been upstairs at the time and the fire had not reached her (she had died from the fumes), a fact that the patient took great comfort in. She had for years avoided thinking about the event and had never connected the fact that the daughter was upstairs with the image of the curtains burning. When she connected the image of the curtains burning with the image of the daughter in the upstairs bedroom in imaginary, her intrusions of the burning curtains ceased.

Second, reliving (as well as in vivo inspection of the site of the trauma) facilitates the retrieval of elements of the trauma memory that are difficult for the patient to access otherwise. In some cases accessing the previously unretrieved information leads to immediate changes in the problematic appraisals. For example, a patient was extremely angry with the paramedics who rescued her from her car after an accident because they did not answer her question of whether she was going to be paralysed. At the time, she had interpreted this as meaning they did not regard her as a human being. During reliving, she realised that the paramedics were probably concerned about upsetting her because she had been very agitated

before and they had only just managed to calm her down as to try to get her out. Once she had accessed this information and changed her interpretation, her distress ratings during reliving changed dramatically and her intrusions of being trapped in the car ceased.

Third, patients may link information they received after the trauma to correct their impression and thoughts during the trauma so that the event poses less current threat to the self. For example, a bus driver who had run over an elderly lady and felt very guilty became increasingly aware during reliving that the lady had intended to commit suicide by stepping out in front of the bus and his intrusions of seeing the lady look at him shortly before the impact decreased.

Fourth, reliving facilitates the discrimination between the 'then' and 'now', i.e. discrimination of how the stimulus configuration during the traumatic event differed from those during other safe events (see also Foa & Rothbaum, 1998). Thus, with the elaboration a closer match between the original traumatic situation and current situations will be required for a memory to be triggered.

Fifth, the verbalisation of visual and other sensory cues may also make it more difficult to retrieve the original sensory impressions from memory[7].

### *3.7. In vivo exposure*

In vivo exposure to avoided reminders of the trauma (e.g. the site, similar situations, activities, feelings, smells and sounds) is a powerful way of helping patients to emotionally accept that the traumatic event is in the past. When revisiting the site of the event, discussion of similarities and differences between what the scene looked like during the trauma and what it looks like now helps the patient in establishing a time perspective and helps in discriminating the harmless stimuli that happened to coincide with the trauma from the dangerous stimuli encountered during the traumatic event. Revisiting the site can also provide new information which helps correct problematic appraisals (e.g. seeing the road layout and discovering that one could not have prevented an accident).

Overgeneralisation of danger (e.g. never going out at night or drinking alcohol after being raped on a night out) can be effectively challenged by setting up exposure to avoided activities as a behavioural experiment (see also Clark, 1999). Patients are asked to specify what is the worst they think could happen and how likely it seems before entering the avoided situation/engaging in the avoided activity. In order to maximise the possibility of disconfirmation, patients are also encouraged to drop any relevant safety behaviours. For example, a driver who repeatedly looked in the mirror, turned off the radio (to facilitate hyperattention to the road) and firmly gripped the steering wheel in order to prevent future accidents would be encouraged to drop all of these behaviours and return to a pre-accident driving pattern.

Appraisals of trauma sequelae can also be challenged by setting up in vivo exposure as a behavioural experiment. For example, a patient who found herself becoming emotional and irritable for no apparent reason after a severe road traffic accident in which she had been

[7] Experiments have shown that giving verbal descriptions of pictures decreases the ability to identify the pictures (verbal overshadowing: Schooler & Engstler-Schooler, 1990).

trapped in her car, interpreted her reactions as meaning that she would go crazy if she put herself under stress again and, as a consequence, would become like her sister who suffered from schizophrenia. A behavioural experiment was set up that involved thinking about the accident in an emotional way while in a car wash (a strong reminder of being trapped in her car). Before the behavioural experiment, the patient believed 100% that thinking about the accident in the car wash would make her go crazy. Her belief changed dramatically when she found that the experience was tolerable and that there were no signs of her going crazy.

### *3.8. Identifying triggers of intrusive memories and emotions*

The model suggests that one way by which the elaboration of the trauma memory reduces the probability of reexperiencing symptoms is by promoting a better discrimination between those stimuli that occurred around the time of the trauma and those encountered currently. This process can be enhanced by direct interventions aiming at better discrimination. First, patients may benefit from training in spotting triggers of intrusive memories or negative affect and physical sensations related to the trauma. This requires careful monitoring of occasions when intrusions occur and information about the likely nature of the triggers (e.g. physical cues that were temporally associated with the trauma, but may not have a strong semantic relationship to the trauma: lights, smells, touch, movement, etc). Once the patient has identified triggers, detailed discussion of the similarities and differences between the present and past (trauma-related) context of the triggers can be used to facilitate stimulus discrimination. For example, a rape victim reported that she had been feeling very uneasy when having sex with her husband, even though she was not recalling the rape at the time. Therapist and patient discussed in detail the way the rapist had behaved and her husband's behaviour during sex. It emerged that their were quite a few sensory similarities, e.g. the way both men touched certain parts of her body, both events taking place in the dark and being accompanied by talking. Next, they discussed the differences, with particular emphasis on the men's intentions and their attitude to her. In this way, the patient was able to see that the similar sensory cues had very different meanings in the two contexts. To help further promote discrimination between the two events she was instructed to pay particular attention to things that were dissimilar from the rape when having sex with her husband and to change some of the stimulus conditions (e.g. leaving light on) to facilitate discrimination.

### *3.9. Imagery techniques*

Imagery techniques are also useful in elaborating and changing the meaning of the trauma memory. For example, a person whose friend was blown up was unable to mentally say goodbye to the friend until he visualised him dead but whole again. A man who was hit head-on by another car felt guilty because he believed that the other driver must have been in tremendous protracted agony in the awareness of impending death, outweighing any distress that he had experienced. When he visualised the accident from the other driver's perspective he became aware that she must have only seen his car very shortly before the impact and must have died immediately. Imagery also allows patients to explore the possible consequences of

actions that were not taken and to incorporate a spiritual viewpoint (Layden & Hackmann, in preparation).

## 4. Summary and empirical support

It is suggested that PTSD becomes persistent when individuals process the trauma in a way which produces a sense of serious, current threat. The sense of threat arises as a consequence of: (1) excessively negative appraisals of the trauma and/or its sequelae and (2) a disturbance of autobiographical memory characterised by poor elaboration and contextualisation, strong associative memory and strong perceptual priming. Change in the negative appraisals and the trauma memory are prevented by a series of problematic behavioural and cognitive strategies.

The proposed model is consistent with the main clinical features of PTSD, helps explain several apparently puzzling phenomena (the 'here and now' quality of the memory and intrusions; 'affect without recollection', delayed onset PTSD, problems in intentional recall and easily triggered reexperiencing) and provides a framework for treatment by identifying three key targets for change.

Many propositions in the model remain to be tested. However, it is encouraging to note that recent studies have provided support for several central features. In particular, (1) negative appraisals of the trauma (Dunmore et al., 1997, 1998, in press; Foa et al., in press), negative interpretations of initial PTSD symptoms (Ehlers & Steil, 1995; Dunmore et al., 1997, 1998, 1999; Ehlers, Mayou & Bryant, 1998; Clohessy & Ehlers, in press; Steil & Ehlers, in press) and negative interpretations of other people's posttrauma responses (Dunmore et al., 1997, 1998, 1999; Ehlers et al., in press) been have shown to predict PTSD persistence; (2) Foa and colleagues found that degree of improvement during cognitive-behavioural treatment is related to the extent to which the trauma narrative becomes more organized and coherent (Amir et al., 1998; Foa et al., 1995); (3) Murray, Ehlers and Mayou (submitted) found that memory fragmentation predicted PTSD persistence; (4) analogue experiments demonstrated enhanced perceptual priming for stimuli that occur in a traumatic context (Ehlers, Michael & Chen, in preparation) and (5) several strategies highlighted in the model (thought suppression, rumination, safety behaviours and avoidance) have been shown to predict persistence (Dunmore et al., 1998, 1999; Ehlers et al., 1998a, 1998b; Clohessy & Ehlers, in press; Steil & Ehlers, in press; Murray et al., submitted for publication). It is hoped that future studies will further investigate the model and its implications for treatment.

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The Washington Post
*Democracy Dies in Darkness*

# The scientific research shows reports of rape are often murky, but rarely false

By **Max Ehrenfreund** and **Elahe Izadi**

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The past year has featured a wrenching national discussion about sexual assault in America -- from debates over how to address the problem in the military, to the allegations against Bill Cosby, to the recent Rolling Stone article examining an alleged gang rape of a female freshman at the University of Virginia. That latter story has faced intense criticism after The Washington Post, in two in-depth articles, reported on significant factual discrepancies in the story. The magazine has since apologized for publishing it.

Separate from the details of the UVa situation or any other, the national dialogue has raised many questions about how victims of sexual assault remember details and how police and other authorities respond to allegations. Largely missing from that discussion, however, have been extensive references to the scientific research done on these topics, which has shown that sexual assault, like other kinds of traumatic experiences, has a powerful effect on memory -- sometimes in unpredictable ways.

This post reviews a few critical questions researchers in this field have sought to answer:

1. How well do rape victims remember the details of their sexual assaults?
2. Why exactly does a trauma such as rape affect memory?
3. What happens to those memories in the long term?
4. What is happening in the brain that can make those memories unstable?
5. What do these effects on memory mean for criminal investigations?
6. How often does it turn out that the reports of rape are false?

1) How well do victims remember the details of sexual assaults?

Experts say rape exacts a toll on a victim's memory similar to other traumas -- from other violent crimes to car wrecks to warfare. People who endure these traumatic experiences often are unable to remember what happened to them accurately.

"We have a societal expectation that both the victim of a major crime and any witnesses to that crime ought to be able to remember with perfect clarity exactly what happened," said Rebecca Campbell, a psychologist at Michigan State University who studies sexual assault. "It is not an expectation that has any scientific merit."

In a 1996 study, researchers interviewed by questionnaire slightly more than 1,000 women at medical centers and 2,142 women at universities. The women were asked if they had been raped and to describe it, and if they had not suffered a sexual assault to describe another "intense life experience," marking whether it was

positive or negative.



The researchers then conducted a statistical analysis of the responses and found that the results contradicted the widely held view that a major event that arouses strong emotions would be clearly remembered, since "the neural mechanisms underlying emotional memory suggest that any event that evokes intense arousal, positive or negative, could result in vivid and persistent memories."

To the contrary, they found that rape did not.

> The rape memories reconstructed for the purpose of responding to the survey . . . were rated as less clear and vivid, less visually detailed, less likely to occur in a meaningful order, less well-remembered, less talked about, and less frequently recalled either voluntarily or involuntarily; with less sensory components including sound, smell, touch, and taste. . . . Memories of events that were unexpected and highly negative both in their emotional valence and in their consequences were differentiated from memories of pleasant life events.

2) How exactly does a trauma such as rape affect memory?

There may be a number of reasons rape victims don't always remember the details of an assault.

One, according to experts, is that the body may focus on the direct source of a threat rather than contextual details, such as the time and place, that could later complete the picture of an attack. "Everything around trauma basically comes down to the biological drive," said Elana Newman, a psychologist at the University of Tulsa.



No readily available studies have looked at this in the context of sexual assault specifically. In one study, unsuspecting witnesses to a fictional crime saw only the criminal's weapon and were unable to correctly identify his face. Subjects in a famous 1978 study were asked to look at images of a traffic accident. Many of them couldn't remember whether a sign said "stop" or "yield" and would remember one or the other depending on what they were told about the accident afterward.

The stress hormone cortisol, in particular, can affect the parts of the brain responsible for recording new information. People, for instance, will do worse on tests of memory after taking cortisol, depending on the dose.

A 1999 study looked at 29 people in serious motor vehicle accidents within a week or two of the trauma. Fourteen of the participants showed signs of acute stress disorder in the days following the accident -- a precursor to post-traumatic stress disorder -- while 15 were more readily coping. Researchers asked each person to give a detailed account of what happened.

Those participants showing signs of acute stress used more than 1,300 words to describe the accident. But those without acute stress spoke in a concise 500 words. The lengthier accounts did not reflect greater detail but greater "disorganization" and "disassociation."

**3) What happens to these memories in the long term?**

For some people, the immediate effects of trauma on the brain don't go away, and they develop PTSD.

About 1 in 3 victims of rape develops PTSD at some point, compared with about 1 in 20 people who have never been victims of a crime, according to the National Violence Against Women Prevention Research Center at Medical University of South Carolina.

In one 1995 study, researchers examined victims of rape with PTSD who sat for 90-minute sessions with therapists. Over the course of nine sessions, the researchers found not only that PTSD rates declined but narratives of the trauma also "tended to become longer, perhaps reflecting the victims' increased ability or willingness to engage in the processing of the trauma as anxiety decreases over the course of treatment," the researchers wrote.

However, in this particular study, the longer discussion was the result of patients talking more freely about their emotional response to the assault, rather than the "actions and dialogue."

But some experts say they believe that with the passage of time, memories often become more coherent and elaborate. "They have time to sit down, really go through that desk, find all of the Post-It notes and put them in order," Campbell said, comparing the mind to an office.

For some patients, the process makes the memory more accurate. But for others, people may be eliminating old memories and inventing new ones, with the hope of creating order of a chaotic event. "It's with an intent to make sense of what happens to you," Campbell said.

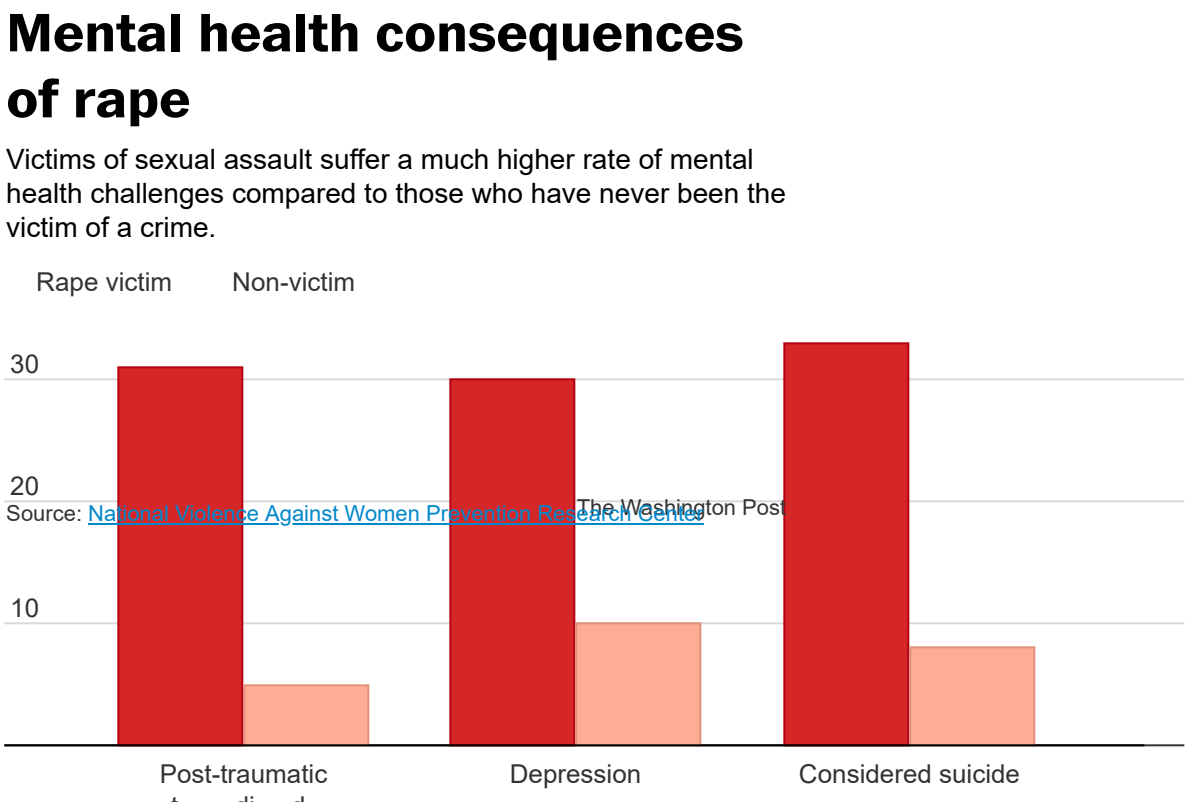
PTSD also affects memories that aren't related to the traumatic event itself. One 1998 study found that a third of rape victims with PTSD had trouble remembering words from a list, compared with 5 percent of the control group. Others with PTSD have demonstrated similar symptoms -- including veterans, war refugees and Holocaust survivors.

4) What is happening in the brain that can make those memories unstable?



One explanation is that PTSD damages the brain's recording device, a structure called the hippocampus.

Levels of depression are also much higher, with 30 percent of rape victims suffering from the disorder at one point in their lives, compared with 10 percent of non-victims. A third of rape victims also said they had contemplated suicide, compared with 8 percent of non-victims.




Experts say these effects on rape victims' mental health may be worsened by legal and medical systems that, as one study put it, "exacerbate victims' distress." Victims undergo invasive examinations and receive what they have told researchers feels like "cold, impersonal, and detached" treatment.

How a victim of rape remembers the assault can change with time as the mind works to organize its memories.

On average, a person with PTSD has a hippocampus that is about 7 percent smaller than a healthy person's. It's possible that people born with a smaller hippocampus might be predisposed toward PTSD, but researchers say it's also possible that the hippocampus atrophies as a result of trauma. As a 1995 study put it, "Extreme stress results in increased release of glucocorticoids, excitatory amino acids, serotonin, and other neurotransmitters and neuropeptides that could be associated with damage to the hippocampus."

Here's a chart from that study, showing how well Vietnam veterans with different-size hippocampuses fared on tests of memory. Participants with a smaller hippocampus found it much harder to complete basic short-term-memory tests.

5) What do these effects on memory mean for criminal investigations?

The typical fact-based approach used by law enforcement during interviews is unlikely to work with a victim of sexual assault, experts say.

"If you go in with, 'Who? What? When? Where? Why?' you're not going to get much, because that's not how memory is organized," Campbell said. Instead, she said, psychologists, doctors and law enforcement will get more-reliable information if they allow victims to tell their stories in a freewheeling way, starting with the things they remember most clearly -- not with the things that happened first.

The advice contrasts with the way police are trained, which is to make establishing the facts a priority and to look for discrepancies as an indicator that a subject might be untrustworthy.

"In theory, I would say that someone who has been raped is going to stick quite rigidly to the account that they give," one British police officer told researchers in a survey. "Those that have made a false allegation, the story may well change, and sometimes they might come out and say things that you know couldn't be possible."

In a recent study of the Los Angeles Police Department, officers explained to researchers how the police handled people whom they believed were lying about having been raped. The goal was to "have them write it down; get them caught in discrepancies and have them tell the story left, right and center," one officer said.

As a result, police interviews can be counterproductive and harmful. Research suggests that victims of rape who feel they were incoherent in talking with police are less likely to continue with a criminal investigation. One of Campbell's studies found that if law enforcement or medical personnel received victims' stories with skepticism, they were more likely to develop PTSD.

The chemicals the body triggers in an effort to neutralize the pain of any traumatic event can also interfere with police investigations. Many people who have experienced trauma can recount what happened with a lack of emotion that causes others to doubt their version of events.

"When a victim of any major trauma is reporting to the police or to friends and family, and [the victim is] not a reactive hot mess, they think they're lying," Campbell said. "They see this person who is just totally flat, who is describing absolutely horrific things."

A group of psychologists at the University of Oslo confirmed that this can be a problem.

They filmed actresses giving scripted statements about a fictional rape with varying levels of emotion and then showed the tapes to several dozen police officers. The officers found the more emotional statements more credible.

6) How often does it turn out that reports of rape are false?

Researchers have struggled to determine the percentage of sexual allegations that are false but say the evidence suggests that demonstrably false allegations make up less than 10 percent of cases.

Much of the research into false allegations examines police cases. A 2010 peer-reviewed study published in the journal Violence Against Women reviews the scholarship to date, while assessing the flaws in existing studies.

The authors estimate the prevalence of false allegations of rape is 2 to 10 percent of cases reported to police.

The researchers also examined 136 rape cases at a major university in the northeast that had been filed between 1998 and 2007. The process took about two years, said lead author David Lisak. They classified complaints as false if there was "a thorough investigation" that resulted in evidence showing the assault never occurred -- such as video evidence.

Of the 136 cases on that college campus, eight were deemed false, or a rate of 5.9 percent.

False allegations differ from unfounded reports. The latter category also includes unsubstantiated cases in which law enforcement decides there isn't enough evidence to support the allegation and move ahead, perhaps because there is no physical evidence, or the victim was intoxicated and isn't able to precisely recall what happened. A rape still could have happened.

In the study of the Los Angeles police, researchers reviewed a random sample of

401 cases from 2008, examining case files and department detectives. They estimated the false-report rate was 4.5 percent.

It's also worth noting that cases reported to police represent only a fraction of the cases nationwide. A massive survey conducted by the Centers for Disease Control and Prevention has estimated that nearly 1 in 5 adult American women have been raped. Many of those women have been assaulted multiple times.

"However they end up being classified, a lot of these reports are never brought to court or never prosecuted, simply because there is a long-standing reluctance in the criminal justice system to take these cases," said Lisak, a clinical psychologist who retired from the University of Massachusetts. Rape cases are "labor intensive, difficult, not easy to win -- and for a whole host of reasons."

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Max Ehrenfreund wrote for Wonkblog and compiled Wonkbook, a daily policy newsletter. He left The Washington Post in July 2017. Follow

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# Strategies of Distancing from Emotional Experience Making Memories of Domestic Violence

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## Strategies of Distancing from Emotional Experience: Making Memories of Domestic Violence


Guy Enosh and Eli Buchbinder



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ARTICLE

# Strategies of Distancing from Emotional Experience

## Making Memories of Domestic Violence

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**ABSTRACT**

Through autobiographical memory people give meaning to what has happened to them. When people are involved in traumatic events, they are faced with essential and existential questions regarding their identity and relation with others and the world. On the one hand, they have the need to recollect and process those memories; on the other hand, they feel a need to distance themselves and forget or detach from the pain and threat involved in such memories. Data was collected from in-depth interviews of 20 couples involved in domestic violence. Data analysis revealed that the reconstruction of narrative memory serves as a tool for positioning oneself vis-a-vis the violent experience. We describe and analyse the ways by which interviewees regard their emotional processes, values, and identities as vehicles by which they construct the recollection and the narrative of a violent event.

**KEY WORDS:**

distance from experience

domestic violence

identity

identity construction

reconstruction of experience

## STRATEGIES OF DISTANCING FROM EMOTIONAL EXPERIENCE: FROM KNOWLEDGE TO ALIENATION

Through autobiographical memory, people give meaning to what has happened to them. Understanding the construction of memory becomes even more important when dealing with the memory of trauma and violence. When people are involved in traumatic events, they are faced with essential and existential questions regarding their identity and relation with others and the world. In their need to integrate the experiences, they are torn between the need to recollect and process the memories and the need to distance themselves and forget or detach from the pain and threat involved in these memories. The aim of this article is to explore the reconstruction of memory of participants in domestic violence.[1] In this article, we describe and analyse the manner in which interviewees regard their emotional processes, values and identities as tools they use to construct the recollection of a violent event.

Narrative conceptualization of memory emphasizes that personal identity and personal memory are independent processes in the service of creating a meaningful self-identity (Ochs and Capps, 1996). Brunner (1994: 53) states: 'Self is a perpetually rewritten story. What we remember from the past is what is necessary to keep that story satisfactorily well formed.' The memory represents our attempt to control what has happened to us and our commentary on those events. When we remember an event, we include not only information about it but also our mental states, that is, information about information (Barclay, 1993).

Researching the memory of events is a powerful tool for discovering, exploring and evaluating the way in which people's attempts to make sense of their past become part of their present, and how people use memory to interpret their lives and the world around them (Plummer, 2001). Autobiographical memories are represented at different levels of abstraction or hierarchical structure, ranging from specific representations of experienced events and activities to representations of generic themes and goals that were associated with extended periods of time (Conway, 1990). These levels of abstraction can be referred to as 'schemas' (Schank and Abelson, 1995), mental representations that organize our experience and sum it up. Schemas are often a condensation of knowledge that omits details in order to preserve those elements of experience that are deemed essential (Schank and Abelson, 1995). The way a person narrates an experience is determined by the skeleton-schema one has for the specific type of event (Schank and Abelson, 1995).

Understanding the construction of memory becomes even more important when dealing with the memory of trauma and violence. When people are involved in traumatic events, they are faced with essential and existential questions regarding their identity and relation with others and the world. In their

need to integrate the experiences in their memory systems or schemas, they are torn between two conflicting goals: the need to recollect and process those memories and the need to distance themselves and forget or detach from the pain and threat involved in these memories (Christianson, 1992).

### Memory and Narrative in Domestic Violence

Although most research related to domestic violence is based on self-report by the participants, there are almost no studies related directly to the process of remembering the violent event per se – despite the fact that several lines of inquiry overlapped with memory research, including the study of minimization, forgetting, redefining, and denial of violent events (the so-called 'partial-memory'; Eisikovits and Winstok, 2002; Kelly, 1988); the study of narratives of domestic violence (e.g. Hyden, 1994, 1995; Riessman, 1994); and the study of the ways by which couples involved in domestic violence represent themselves to self and others (accounts and attributions, e.g. Bograd, 1988; Stamp and Sabourin, 1995). The following review summarizes in brief these divergent lines of research and presents an integrative perception based on schema theory, relating it to the specific context of remembering violent events.

The phenomenon of minimizing and 'forgetting' violence has been studied extensively in the past two decades of domestic violence research, and has been found to characterize both abusive men and abused women (e.g. Billingham and Sacks, 1987; Dutton et al., 1994; MacKay, 1989; Mitchell and Hudson, 1983). Early studies did not attempt to explain these phenomena but merely mentioned their existence (e.g. MacKay, 1989; Mitchell and Hudson, 1983). Later studies have placed them within clinical-theoretical frameworks, such as 'denial' or post-traumatic stress disorder (e.g. Harvey and Martin, 1995; Dutton et al., 1994), where the minimization, denial and forgetting of the violent event are explained as methods by which women cope with ongoing trauma in a threatening context (e.g. Dutton et al., 1994), and men attempt to deny and minimize their responsibility, thereby reconstructing their self-representation and redefining their identity (e.g. Holtzworth-Munroe and Hutchinson, 1993; Miller, 1995).

Similarly, the use of attributions and accounts serves as a means for both men and women to deflect blame from self and partner so that the violent event can change its meaning and become understandable and even sufferable, if not outright acceptable. Attribution is discussed together with such concepts as accounts, justifications and excuses (e.g. Eisokovits et al., 1999; Harvey and Martin, 1995; Viano and Bograd, 1994).

The narrative study of domestic violence, although seldom attempted, supplies detailed descriptions and analysis of the manner in which couples organize their memories; it also takes into account the interaction between interviewer and interviewee as the context within which the interviewee uses the

researcher as an audience (e.g. Enosh and Buchbinder, in press; Hyden, 1995; Lempert, 1994, 1997; Riessman, 1994).

Although the three lines of research have been carried out separately, and often with no reference to each other, they overlap, as each takes into account the need of the participants in domestic violence for meaning-making actions (Brunner, 1990) to place the violence in a broader context that makes it understandable and liveable. Moreover, each line of research, either explicitly or implicitly, takes into account the fact that stories and memories of violence do not occur in a vacuum but in a context that includes among others the interviewer representing the ultimate audience of the 'generalized other'. For most participants in domestic violence research, there is an inherent need to reconstruct the experience of violence in ways that are coherent with their perceived identity and with a 'normalized' life story, and in a manner that has both meaning and its own internal logic.

The current study is an attempt to carry such lines of research one step further. Its main purpose is to remedy the inconsistency inherent in a method that relies on self-report (remembrance) in domestic violence research while there is no adequate knowledge regarding the processes by which such memories are constructed. The study focuses on the ways in which interviewees tell the stories of violence in order to define the experiential distance between themselves and the remembered violent event. The major focus is on the role played by emotional and discursive techniques, such as emotional reflection and focusing on identity issues, in constructing distance from the experience.

## METHOD

The study is based on a reanalysis of interviews conducted in Israel as part of a larger research programme on family violence (for a detailed description of the programme and method see Eisikovits and Buchbinder, 1997). The interviewers were trained social workers working on their research theses. Four out of the six interviewers were women. All interviewers used an interview-guide that directed the process from general topics such as homemaking and child-rearing practices, family decision making, and the couple's relationships to more specific issues involving the couple such as conflicts and conflict resolution, as well as the occurrence and perception of violence within the relationship.

The interviewees were 20 couples living together, who had reported to social workers and/or the police at least one violent event in their relationship over the year prior to the interview. Men ranged in age between 21–51 ($M = 33$); women between 21–43 ($M = 30$). Of the men, 65% ($n = 13$) were Israeli born, of the women, 85% ($n = 17$). All the women and men had high school education; 75% ($n = 15$) of the men worked full time, 25% ($n = 5$) were unemployed; 40% ($n = 8$) of the women worked full time; 50% ($n = 10$) of the women reported

leaving home temporarily following violent events, 15% ($n$ = 3) to a shelter; 45% ($n$ = 9) of the women reported that they called the police and filed a complaint at least once after being physically attacked by their husbands; 40% ($n$ = 8) of the women and 25% ($n$ = 5) of the men have filed for divorce at the time of the study. 35% ($n$ = 7) of the couples (men and women alike) have reported mutual acts of violence, of which, in two cases, the women were the initiating party.

### Procedures and Consent Procedures

The consent of both partners to participate in the study was obtained before the interviews. Couples were interviewed simultaneously, each partner by a different interviewer, in separate rooms. All interviewees received referral addresses of family-violence intervention agencies.

### Analysis

When analysing narratives of interviewees, the researcher may either focus on the interaction between interviewer and interviewee, using discourse analysis or conversation analysis (e.g. Edwards and Potter; 1992; Enosh and Buchbinder, in press; Riessman, 1994), or perform a thematic analysis, focusing on major themes emerging from the interviews and integrating them into the overall story and meaning-making project of the narrator (Brunner, 1990; Schank and Abelson, 1995). The two approaches are not mutually exclusive. As Enosh and Buchbinder (in press) have shown, both interviewer and interviewee bring explicit or implicit objectives to the interview, which are part of their personal meaning-making agendas. The outcome of the interview is co-constructed, but it is affected mostly by the interviewee's agenda and willingness to consider alternative formulations of reality and self. The dominant role of the interviewees is the necessary outcome of the fact that they hold a monopoly on their recollection of events. Thus, Enosh and Buchbinder (in press) recommend that even when conducting a thematic analysis, the researcher should be alert to variations in themes that may arise from the interaction between interviewer and interviewee.

The interviews were analysed thematically using content cross-case analysis, a procedure similar to the one described by Tesch (1990). Whenever the impact of the interaction between interviewer and interviewee, or lack thereof, was relevant, the analysis took it into account. After an initial process of deconstruction of individual descriptions related to violent events, 'instances' were collected and reduced, and core themes were identified and coded (Strauss, 1987). The core themes were then reordered conceptually and placed back in the context (Tesch, 1990). This made possible both analysis and integration of large amounts of data and the generation of abstractions and interpretations (Miller and Crabtree, 1992). One drawback of presenting excerpts of interviews is in loosing the richness of information available to the interviewer or even

the analyst, through the interviewee's use of tone of voice, body language, or even the richness available from the complete interview as compared to a mere excerpt. Thus, at certain points, a reference was made to the emotional tone of voice of the interviewees.

The analysis was conducted on both partners, but this does not imply moral equality between batterers and victims. Although the majority of couples in our sample reported male-to-female violence, several couples reported mutual acts of violence and in two cases women were the initiators. Moreover, analysis of the data made it clear that both men and women used similar reflective strategies in the process of reconstructing their memories. The following analysis presents the accounts of both men and women. This form of presentation is used to emphasize the generality of the findings. As researchers and practitioners in the field of domestic violence, we make a clear and distinct moral judgment against the use of violence in the family, regardless of who is the perpetrator and who is the victim.

## FINDINGS

In the process of remembering, the interviewee might recall a sensitive event in detail, reliving it to the fullest and re-experiencing the feelings felt during the event. At other times, interviewees might narrate events at various levels of distance, taking the position of an outsider or of an observer witnessing the experience. The level of relating to the experience may be described as existing on a plane defined by two axes: the level of emotional reliving of the experience and the level of abstraction one uses.

To describe this range of ways of reconstructing experience, from full reliving of the experience to its disowning, we use the terms 'knowledge', 'focus of awareness' and 'alienation'. Knowledge describes narration emanating from total recall and reliving of the experience; focus of awareness describes various levels of observation and reflection; and alienation describes total denial of the experience.[2] Analysis of the data yielded four broad categories:

1. 'Knowledge', defined as direct remembering and reliving, with complete details of the event;
2. 'Awareness of mental processes', including awareness of emotions and of cognitive processes;
3. 'Awareness of identity', including awareness of values and the construction of personal characteristics of each partner and of the couple as a unit; and,
4. 'Alienation', characterized by a refusal to observe, reflect or remember.

These processes might be directed to the self or to other people. In other words, during the process of remembering, interviewees may choose to observe

not only themselves but also their partner in order to construct the story of the violence within the all-encompassing life story. Nevertheless, the categories are somewhat arbitrary and represent the authors' attempt to categorize conceptually what may appear as a complex continuum defined by many parameters. For the simplicity of the text, we defined two such parameters: 'emotional relatedness to the experience' and 'level of abstraction'. As will be seen, although we see those categories as existing on a continuum, they may not keep an ordinal order on all parameters. Furthermore, it is possible to argue that certain examples, which incorporate characteristics of two bordering categories (e.g. knowledge and awareness of emotions), belong in one or the other.

### 1 Knowledge

As defined here, knowledge refers to the observation of an event from the past and the process of connecting to the experience of the event fully or almost fully. At this level of recollection, the distinction between the current self as observer or subject and the past self as observed or object disappears and the interviewee becomes one with the recollected experience. When the interviewees are in a position of knowledge they remember the details of the event and are at the same time overwhelmed emotionally:

> Participant: So what did he take? He took the phone. Not only did he break it, he threw it on the floor three times. Broke it completely, to pieces. He took the cord of the phone, he went to choke himself. When he wants to do these things, he takes my keys, puts them in his pocket, closes all the shutters and windows so I can't shout. [All quotations have been translated from the Hebrew original.]

In this description, the violence of the man is not directed at first against the woman but against objects around him and against himself. Nevertheless, the violence threatens her. In the second phase, the violence is directed against her as well, not necessarily in the form of direct physical violence (such as hitting) but as imprisonment, denying her the ability to call for outside help. The woman's fear is emphasized by the repetition of the motif: 'took the phone', 'took the telephone cord', 'takes the keys'. The shift from the past to the present tense illustrates the change from knowledge that has an element of awareness to knowledge that becomes a relived experience in the present. The woman is flooded with her emotions and is not able to report or reflect on them because she is reliving the event. Her feelings are expressed in the tone of her voice and in the text by the rushing sense that is broadcast in the short, quick-paced description of events as if they were occurring here and now.

The following description illustrates a different type of reliving of the experience, in which a woman is keeping some distance between herself as

subject in the present and as object in the past. This use of the past tense creates a sense of a time lag and makes possible some awareness of her feelings:

> P: He pushed me. He wanted to take the child. And he was a baby one day old, or a few days. And I was afraid, I was just after giving birth, breast feeding, and . . . he started to argue with me in the house that he will call the child this name, and I told him 'You will not', 'I will decide', 'You will decide' – arguments. So he entered the room in such a savage way, wanting to take the child. And I was afraid. And then I entered, pushed, so he couldn't take the child, so he pushed me on the bed and slapped me on the face.

Again, the use of short sentences creates a fast, rhythmic sense of re-enacting the physical urgency and emotionally overwhelming experience the woman had during that confrontation. The description delineates the event in minute detail and is focused mainly on the actions of the participants. Like in the previous example, here too there is almost no mention of the associated feelings, except the short, underdeveloped 'I was afraid'. The description of actions however is fully developed and follows the quick pace of the original event.

To describe one's feelings one must be aware of them, able to serve as an observer (subject) of the emotions that are the object of awareness. However, while this woman distances herself from the actual event by keeping it in the past, she relives her emotions and expresses them directly through the structure of her sentences and by nonverbal communication, which is not apparent in the text. Because she is re-experiencing these emotions, she cannot stop to reflect on them at the same time.

### 2 Awareness of Emotional Processes

The next level of recollection, characterized by yet another step away from the emotional experience, is enacted by assuming the status of observer of emotional processes associated with the past event. As observers (subjects), of their own or of their partner's emotions (objects), the interviewees can reflect and construct some explanation of their own and of their partners' emotional processes. One woman described a state of feeling great shame, pain and humiliation:

> Participant: Look, the moment there is violence it is shameful, I will not tell you that it is not, it's not . . .
>
> Interviewer: Shameful to whom?
>
> P: You are most certain they hear you. You live in an apartment building so they hear; it's not that they don't hear. At first . . . it's not, it's not the hitting and that. It is the situation in general that you have come to violence; that the husband comes to physical violence.

I: What do you feel? Humiliated, full of pain, hurt?

P: Hurt, humiliated, and pain . . . all the words, everything. Not feeling good. It's all, it is all that.

Focusing awareness on shame and pain serves as a mechanism of distancing the person from the original experience while remembering the event. The consciousness drifts from the relived experience to the realm of meaning making, enabling one to redefine the situation and reconstruct it: 'It's not the hitting and that. It is the situation in general that you have come to violence . . .'.

It is not only women who used psychological explanations in attempting to reflect on the experience. Men also focused their awareness on emotional processes in order to explain their actions:

P: Look, it . . . of course that if a guy is angry in one place [he] takes this thing everywhere with himself. If I am angry at home, so I get to work and I am angry at work. It also gets home that [if] a person is . . . when he is stressed out and angry, every word upsets him and it doesn't matter where he brings his anger from, from home to work or from work home.

The man, instead of recollecting his violent outburst, shifts his awareness to reflect on the general process of being angry. In this respect, the processes he demonstrates are similar to those that appear in previous quotations: an attempt to create one's own psychological theory regarding the meaning of the emotion at hand. The woman in the previous quote clearly identified 'shame' as emerging from her thoughts about the way in which she would be perceived by her neighbours. Similarly, the man in the current example is delineating his own psychological theory of how anger is being transferred from one context to another. The common thread running through these examples is the use of awareness of emotional states as a means of avoiding the need for attachment to the experience, the need to relive it. In other words, the more one is focused on reflection about internal states and processes and their explanation, the less involved one is with the experience itself.

The examples above evidenced the construction of a psychological reasoning on a personal level in order to reflect on the experience. In some cases, contemplation of this type was used in a somewhat more complicated way to reflect on the spouse's emotions, and by focusing on the 'other' to take one more step toward distancing oneself from reliving the unwanted experience:

P: If she doesn't cry? If she doesn't cry and I see that she didn't give me the answer which would satisfy me, where did the thing, or what did she do at that

moment or . . . or don't know what, in order to find out what really she didn't, so . . . I continue with the argument. Continue because she doesn't carry a dialogue. Do you understand?

I: So how do you do it, have a dialogue? If she doesn't have a dialogue?

P: By shouting. I make her angry.

I: What do you say [to her]?

P: Getting her angry, all kinds of things, 'fat', or here or there, starts to hurt her so she gets mad, when the person gets mad he usually responds a lot.

I: So what does she say when she gets mad, how does she get angry, how does she get mad, in short?

P: When someone gets angry, so he says the truth. Then he lets out everything. He is not afraid.

I: Is this also happening to her?

P: So . . . when she gets angry, I tell her 'you went here, you went there', with great anger. I know that is true, more or less. It could be that here too, it is a matter of a game if she lies, but, I figure out the anger and then I see that it is not true. That she told the truth and after that when we are a little more relaxed, I explain to her one more time, that it . . . can no longer continue.

As in previous examples, this interviewee maintains a complicated mental theory about the relation between emotion and behaviour. When asked about arguments and fights between him and his wife, he expounds upon that theory rather than relive and recollect a specific incident. Once again, the process of focusing one's awareness on emotions serves to distance oneself from the actual memory of the arguments and the violence that ensued. Such focus of awareness serves also as a justification for his verbally abusive behaviour, which is given a theoretical context that justifies it. In fact, he distances himself twice from the event, first by focusing on his theory of emotions, second by using his theory to reflect on his wife's emotional processes rather than his own. The use of this mode of awareness rather than a lively recollection of events distances him from the experience and raises a barrier of justification that enables him not to be aware of (let alone know) the events that actually took place. To achieve this distancing, he generalizes his experience rather than describe a specific event.

His wife also has a psychological model that allows her to reflect upon and understand the processes her husband is going through, and at the same

time serves as a distancing mechanism that helps her avoid the actual memories of violence:

> P: So, no I never stand near him when he is angry, because he is really angry. Always within secure range, or with the little girl in my arms. No, because he doesn't control his temper. He regrets it afterwards. Let's say, if we argue and he hits me, after that he will stand up and say 'I am sorry, why are you making me angry . . .' Sometimes all the pressure of the workday stresses him out, he comes, takes out all his madness at home. Do you understand? So what is happening? I never answer. I never answer, because I don't like it. I have nothing to say. If I respond, there will be a worse fight about it. If I reply it will just be another worse fight, so it is better that I shut up so he can calm down. I'll talk to him quietly and that's it.

To summarize, by narrating their reflections on the emotional process that they and their partners had undergone, interviewees achieved two goals. First, they gain a certain distance from the actual, unpleasant memory. By simultaneously recalling and not recalling the unwanted memory, they keep it at a convenient distance that makes it bearable. The second goal is to construct a meaningful explanation for such events, which places them within a broader meaning-structure, a construction that includes one's personal psychological theory. Such a theory may serve as an explanation of one's own emotions or focus on the partner's, both of which act to distance the interviewee even more from the actual event.

### 3 Awareness of Identity: Values and Characteristics

Some interviewees took additional steps to separate themselves from the actual experience by building up further their perception of self, of their partner and of the nature of their relationship. These perceptions may be understood as a means for interviewees to construct their self-identity, the identity of the partner, and the identity of the couple. Directing one's awareness to identity issues creates a framework for the process of remembering, which serves as a model for explaining behaviours and feelings and for constructing the level of readiness needed to recognize the violence. For the purpose of analysis, a distinction has been made between two main facets of the awareness of identity: (1) values motivating the couple, and (2) understanding the characteristics of each partner and of their relationship.

#### *3.1 Awareness of Values*

By focusing on the values that directed their actions, the interviewees reflected on the 'rules of the game', which form a higher level of abstraction. Values are an important ingredient in the construction of self-identity and of the identity of others; without them such identity has no meaning.

Most of the interviewees, men and women alike, have expressed basic values objecting to violence. However, this value was limited by other values that were presented as more meaningful or more important than the objection to violence; disowning those other values served to justify the use of violence.

For women, expressing objection to violence served as a framework that allowed them to reject the violence without having to directly relive it:

> P: I told him 'I am going back home on one condition. If you ever raise your hand at me one more time you will never see me again . . . ' and it was really a long period that he didn't . . .
>
> I: Raise his hand?
>
> P: . . . and after that again . . . a blow, a blow here, a blow there, but in any case even this should not happen.
>
> I: Yes, how do you feel in these situations of 'a blow here and a blow there'?
>
> P: Of course, I . . . feel that in his eyes . . . eh . . . still, do laundry for him, do laundry by hand, uh, cook for him, nothing lacking, so zero, nothing. He has no reason to beat me up any more. So if he raises his hand at me, so what should I think . . . So I don't, I don't feel like cooking for him or I don't feel like doing laundry for him . . .

The rejection of violence does not exist as an absolute value, but is part of a broader concept or vision of the world that includes mutuality in marriage. The right not to experience violence is not guaranteed by itself but it is earned by hard labour. From this woman's perspective, there is no justification for her husband's use of violence because she met her responsibilities in the partnership. The actual memory of violence is reconstructed into a vague recollection that becomes part of the broader construct of breach of the marriage contract. The violent events become blurred and generalized memories of traces of violence, 'a blow here', 'a blow there'. This form of recollection, viewed in the 'larger' context of breach of mutuality, intensifies the feeling of injustice. The rules of the game are being formulated from a broader perspective of patriarchal values and norms to which both partners are supposed to adhere. The woman is focused on some internal court of justice that weighs the behaviour of each partner and by means of which she is vindicated. Therefore, she is not reflecting on the actual event and she is not aware of feelings and thoughts that accompany the experience.

Men, even when expressing rejection of violence, found it important to emphasize that there were values that are more important:

> P: What do we argue about? I'll give you an example. There are arguments over lies. If she lies to me regarding certain issues, then I . . . get pissed off, since I hate lies. I cannot live if there are lies. Outside [the home] I can forgive lies, cuz no one owes you anything. But when you live with a person at home and she lies to you, then you . . . that's the way I am, anyway. Then she would tell me . . . [Unclear mumbling] which is lies, although not important ones.
>
> I: What are lies?
>
> P: Lies regarding financial issues, for example, regarding 'where have you been'? Then she tells me 'this' and later she tells me 'that'. Such little things, but, irritating . . . that the lie . . . then . . . then a serious argument with shouts, sometimes I get back at her so she won't do it, so she won't cry . . .
>
> I: How do you get back?
>
> P: I get back with shouting, and, and, letting her believe I was very hurt, and, and, I can really hurt her badly if she lies to me, do you understand?

He presents the value of 'not being lied to' as the most important one in his life. He would do anything to reify this value, including hurting his wife. The violence is not mentioned at all, but rather lurks at the background, and the awareness in the recollection process is focused on the role of adhering to values of truth rather than risking the vivid memory of how he has beaten his wife.

The following quote, from another man, summarizes and highlights the crucial role assigned to values and principles:

> P: In my opinion, this is not good either. One should compromise but up to a certain level of compromise. At a certain level, a person has his own ideas and about those, he should not compromise. There are principles that should not be compromised even if the price is an argument or a fight . . . it is forbidden to compromise on principles because the person could lose his personality, otherwise what is he? A door-mat . . .

From the interviewees' perspective, certain values are the cornerstone of his identity, of his 'personality', and breaching them justifies violence. The violence itself becomes merely a necessary and the unavoidable outcome of maintaining a moral ground and, as such, is undeserving of vivid recollection in itself. It happened in the context of protecting sacred values and one's identity; it has no independent existence but only as a legitimate outcome within the value context. One may assume that this is true only for perpetrators, but some of the battered stated clearly that certain behaviours on their part may justify violence against them. Thus, both perpetrators and victims may focus their

awareness on value systems that marginalize the violence and make it justifiable under certain circumstances, within a well-structured value system.

*3.2 Awareness of Characteristics*

The other method of relating to identity issues rather than to the actual events is focusing one's awareness on the construction of personal characteristics and the construction of identity per se. By constructing the characteristics of the self, of the partner and of the couple, each interviewee creates a schema that further distances oneself from the actual memory and renders the memory of violence merely a vehicle for the main issue: the construction of identity and image. When constructing identities through characterization, the level of abstraction increases and the distance from the vivid memory becomes even greater. Most characterizations of this type use comparisons of self to the partner, to other persons and to other families.

> P: Look, between me and her there are such contrasts, if I say 'day' . . . she says 'night' . . . however it comes out, if I say, let's go out . . . I am just giving an example, but there are no decisions made together in anything . . . I think the only difference is, really from the day I got married is, that I have two main points . . . in a crisis in marriage . . . she is from a religious house! . . . and I am secular, I am a simple labourer, she is a teacher . . . that's what I think, these are the points . . .

By emphasizing the contrasts between himself and his wife, and by exaggerating them, the man creates a framework that can serve as a justification for violence while he maintains his distance from the actual memory of the violence. The contrasting of the couple emphasizes his perceived inferiority to his wife (a labourer vs a teacher), which provides her with an unbridgeable advantage over him. This way, the man constructs an identity of himself as a victim. Although the violence is not discussed, and the man has distanced himself from it by constructing a characterization of himself and of his partner, the characterization allows for the possibility of conflict and even violence, for what can be expected from a situation in which two such extremes meet? By presenting himself as the true victim, he leaves no room for his violence and for his wife's victimization. Should such a memory surface, its justification is already constructed – the two are extreme opposites and the true victim is the man:

> P: I will give you an example . . . she came and told me at the beginning of the year 'I am switching our son to a religious school' . . . I said: 'First we have to discuss that, you cannot decide such a thing alone' . . . 'No, I went and registered him already'. I said: 'He will not go to a religious school until we discuss it' . . . 'You don't make decisions, your place at home is so small . . . you, your role at home is just to bring the paycheque, and don't interfere with my life.

> Education, I decide the education at home' . . . and all in front of the children. [She made me] such a small zero . . . so at that moment I couldn't control myself.
>
> I: Ah, tell me exactly what happened, that time.
>
> P: That I raised my hand? I felt that I exploded, at that moment . . . and I tell you that I g . . . gave her a blow, believe me I could have killed her . . . so angry I was.
>
> I: What do you mean by 'I exploded?' What did you feel?
>
> P: It is something internal that you cannot stop, can't control myself . . . at that moment I couldn't control myself, I could give it to her in the head, and I could give it to her in the stomach.

The construction of the self as a victim of his wife ('such a small zero', 'your role at home is just to bring the paycheque'), combined with the presentation of the two partners as having opposite characteristics, serves as a framework that justifies the violence, makes it acceptable and negligible (it could have been worse). Thus, the process of remembering the violence becomes meaningless. The violence has meaning only when understood within the broader context of the relationships, the type of person *I am*, the type of person *she is*, and the type of relationship *we have*. This form of shifting awareness away from the violence and focusing it on the identities and relationships of the couple is not peculiar to men. One of the women said:

> P: My husband? He doesn't help. He, what can I tell you, my husband he comes from a home where they spoiled him, his mother was bringing him everything to bed, he was not used to cleaning and to working so he doesn't pick up after himself, he doesn't dirty things and he doesn't clean.

The husband is portrayed as spoiled and the woman, as a result, becomes a slave of his whims. The tyranny and capriciousness of the husband, a central characteristic in the experience of many of the women interviewed, is perceived by them as requiring further justification and cannot exist on its own. So other justifications are presented, such as spoiling by the family of origin. This deflects the blame onto the husband's family of origin that is not under his control. The couple, in most cases, creates shared identity patterns that serve as a co-constructed couple identity.

### 4 Alienation

At previous levels of distancing from the violent event, the violence retained some presence, even if only as the justified outcome of more dominant

processes, such as the conflict of identities or values. However, in the case of alienation, as defined here, there is total disengagement from the experience and its memory. This level of distancing is characterized by the refusal to know, to remember and to recognize. Women tend to lean toward 'knowledge', while 'alienation' is characteristic mainly of men; however, neither trend is exclusive.

I: Let's try to go back to the fight in which she threw the garbage from the window. How did you feel at that moment . . . Try to remember what went through your head?

P: Nothing was going through my head. I simply got angry and . . . that's it.

I: How did you push her? Do you remember?

P: Pushing. What how?

I: Did she fall?

P: It is not something you should make a show of.

I: No, I am asking you. Did she fall?

P: No. She didn't fall.

I: What did she do?

P: What did she do? She got angry.

I: And . . .

P: What and?

I: What did you feel?

P: I didn't feel anything. Come on, what can I feel, do I have to philosophize about it? That's all.

I: Were there other occasions when you had to somehow get closer to her and do something by force?

P: Don't know, no.

I: Try to remember.

P: I can't recall any such time.

The refusal to remember is characterized by the total denial of the event through expressions like 'do I need to philosophize about it?' and its justification by the breach of the value of cleanliness, which is so important to him. An additional element expressed here and emphasized in the next quotation is the refusal to show awareness of the emotional processes following the violent event:

> I: What went through your head? In the moment before, or while it happened?
>
> P: Don't remember. Don't know. I did it and that's it. End of story and out. I talked, and we kind of made up, and that's it . . .

Although more characteristic of men, this denial was also apparent with some of the women who adopted the non-reflective position that characterizes alienation:

> I: Let's assume that the last time it happened was in the last six months; something like that?
>
> P: I don't remember.
>
> I: Can you remember such occasions and describe to me what happened, how did it turn out this way, the business of the fight?
>
> P: Nothing is coming into my head.
>
> I: Do you remember the most difficult argument you had or . . . the fight, the most difficult fight in this matter that you had?
>
> P: Don't know.
>
> I: Does 'don't know' mean let's not talk about it?
>
> P: No it's because there is nothing difficult, everything is bullshit, really stupid things that make everything . . .
>
> I: Which means that . . .
>
> P: Don't know, the fights between us are really stupid, things are very stupid, really nothing, I don't even remember, and I cannot even give you an example of stupid things.

Throughout the interview, the woman was prepared to assume a reflective position of awareness regarding various events in the couple's life. However, when the questions addressed the violence itself, the memory of the violence

was so threatening that she denied it and alienated herself from it. Even when the interviewer asked whether she was 'not prepared to talk about it', she denied it and claimed no knowledge of the event. Alienation, in this case, became a general position that encompassed the violent event and the couple's relationship; it disowned the experiences of the interviewee and of the partner, and of course denied them to the audience, that is, the interviewer.

Paradoxically, alienation may appear to be similar to 'knowledge' in that it is very concrete. However, at the same time, it is detached from the experience – a property that may be clearer to the interviewer and analysts from the tonality of the speakers, their body language and the total context provided by the complete interview. Further, those interviewees may deny the existence of violence and any affective implication of violence while describing violent actions. Thus, the essence of the state of mind we referred to as alienation is being a detached outsider to one's experience, a stranger to oneself.

## DISCUSSION

Participants in domestic violence, be they batterers, victims or involved in mutual violence, are faced with a choice of the level of experiential distance they want to maintain with respect to the original experience and the manner in which they wish to arrange the perception of violence in their lives. We have categorized the ways of approaching and distancing from the experience into four levels, as shown in Figure 1.

The four levels of relating to the experience can be classified along two axes: the axis of emotional involvement and the axis of linguistic abstraction used by the interviewees. At the level of knowing the experience, interviewees are fully attached to their feelings, to the degree of being emotionally overwhelmed and unable to describe and discuss their emotions – mental operations that demand a certain degree of distance. This degree is achieved through the process of focusing their awareness on emotions and through other cognitive processes. By describing, labelling and naming emotions and cognitive processes, the interviewees achieve a reflective mode and gain awareness of the emotional processes, and at the same time become capable of acting as observers of themselves. At the level of constructing identities, interviewees achieve an even higher level of abstraction at the cost of discarding the actual memories and the emotions directly related to them. Finally, and perhaps paradoxically, at the most emotionally detached level of refocused awareness (or lack thereof), the level of alienation, interviewees use very concrete language while emotionally distancing themselves completely from the experience.

Each level, except that of 'knowing' and almost fully reliving the experience, serves as a constructed 'schema' (Holmes and Murray, 1995; Schank and Abelson, 1995) that fulfils several functions for the interviewee. First, it makes

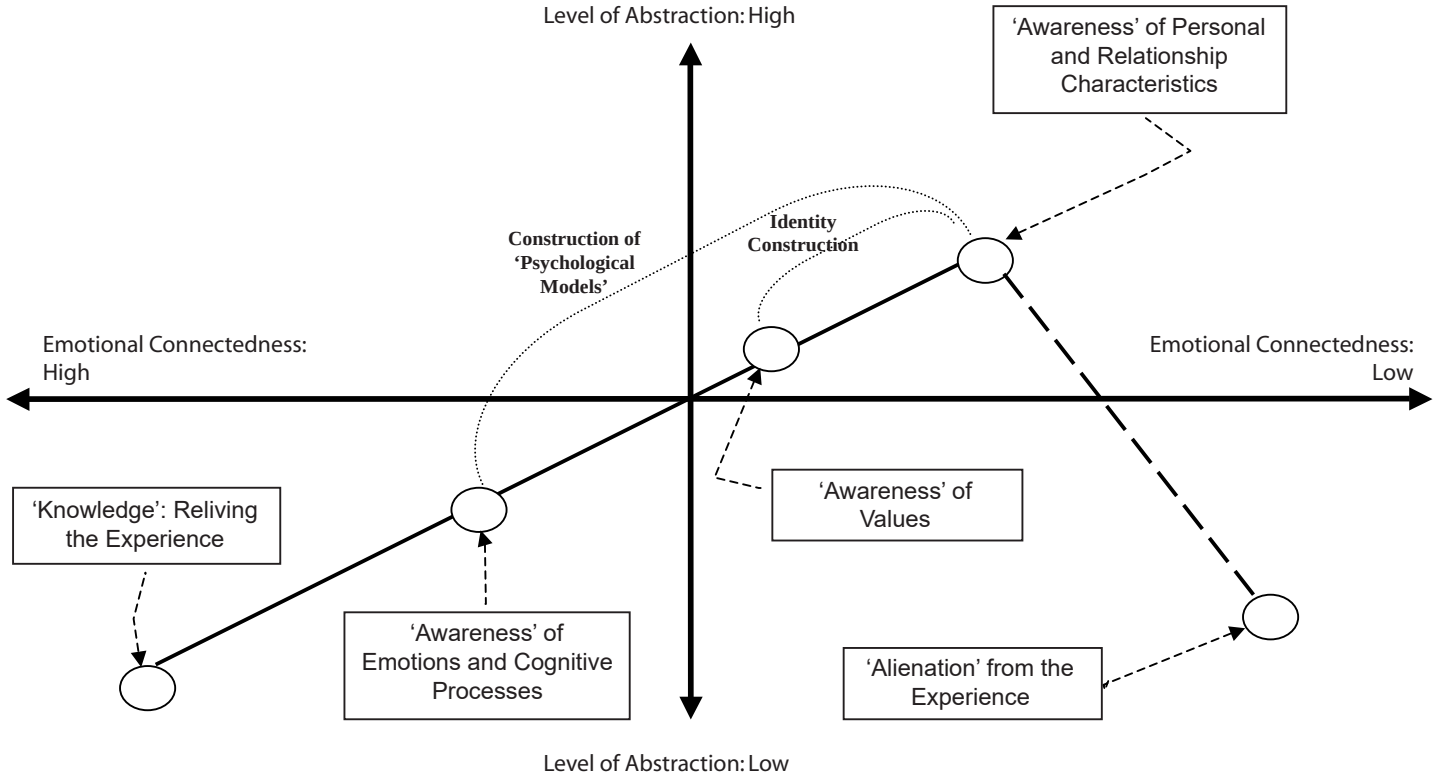


**Figure 1 LEVELS OF ABSTRACTION AND CONNECTEDNESS TO EMOTIONAL EXPERIENCE**

possible the abstraction of events and the distancing of the actual experience. Second, by redefining the borders of the reality, it creates an account that serves as an inner logic for the violent events and supplies coherence for the life story of the interviewee (Brunner, 1990, 1992, 1994). Finally, it constructs a story that would be acceptable to immediate and imaginary audiences: the interviewer and the potential readers of the study (Enosh and Buchbinder, in press; Middleton and Edwards, 1990).

In creating and narrating their stories of past violence, the interviewees construct more than just a story: they construct a framework that includes a theory of how people (themselves, their partners or people in general) think and behave. In the process, they unfold their own value systems, which are based on a distinct hierarchical value structure. These 'theories' give meaning to their lives, to their living with the specific partner, and even to the violence itself. Further, they construct identities – their own identity, the identity of the partner and that of the couple. Thus, the construction of a story, whether a life story, the story of couplehood or the story of the violence, is interrelated with the construction and use of 'folk-psychology' (Brunner, 1990, 1994). As such, it becomes what Brunner (1990) calls an 'act of meaning'.

What is the role of such acts of meaning and construction of the self and the other in the lives of the interviewees? One major function of this endeavour is the definition and creation of an experiential distance between the narrator and the remembered experience. A second function is the construction of an account of the 'why' – a justification for the parts of the story that may be censured by the interviewees' actual or imaginary audience.

Understanding the need of interviewees to construct and reconstruct the self, the partner and their relationships, while defining their emotional and experiential distance from specific memories, is crucial to both researchers and social workers. By creating an experiential distance between themselves and their remembered experience, the interviewees not only reconstruct their own experience and their relations with it, but also indicate to the interviewer, whether a researcher or practitioner, their willingness to relate to the actual memory, their ways of making sense of what happened and their way of giving meaning to their lives in general. As such, it is crucial for the interviewer to be sensitive to the message put forward by the narrator, which may be important both to research and to the choice of intervention.

The process of approaching or distancing oneself from the experience through the construction of elements of theories of mind and of the identities of the participants in the story is only one facet of a much wider and unmapped domain – the means by which both perpetrators and victims redefine their experiences of violence in a manner that fits their schemas of themselves and of their lives. The current article is but one step toward the mapping of these facets and processes.

To summarize, remembering life events is rarely a function of merely recalling the event as it happened. Rather, it is frequently a process of reconstructing those events in ways that correspond to the current formulation of the interviewee's life story. The way in which interviewees are retelling the experience is crucial for understanding the meaning of the experience for them. This issue is even more important when the interviewees are dealing with sensitive issues, like the recollection of violent events that occurred between them and their spouses. The purpose of the present study was to map the ways in which interviewees choose the level to which they relive the experience they are narrating.

Qualitative researchers dealing with sensitive issues should be aware that the more sensitive and stressful the issue is, the more interviewees seek to distance themselves from the event by dwelling on the construction of psychological models that account for their behaviours and psychological processes as well as for those of others, and on the construction of the identities of all persons involved in the event. As compelling and fascinating as these processes may be, they come at the cost of avoiding actual remembrance and true reflection.

## Notes

1 We chose the term 'participants' rather than 'batterers' and 'battered women' because several of the couples interviewed reported mutual violence and two couples reported violence initiated by the woman.

2 The choice of terms is based on their meanings in Hebrew. The word 'knowledge' (YEDI'A, from the root YDA) denotes a process of coming together (a *unification* of subject and object into one). The word 'awareness' (HACARA, from the root NCR) denotes some separation between subject and object, and a process of observation from the *outside*. The term 'alienation' (NICUR) comes from the same root as awareness (NCR) but denotes a *total* disengagement and denial.

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ARTICLE

# DISCOUNTING WOMEN: DOUBTING DOMESTIC VIOLENCE SURVIVORS' CREDIBILITY AND DISMISSING THEIR EXPERIENCES

DEBORAH EPSTEIN† & LISA A. GOODMAN††

*In recent months, we've seen an unprecedented wave of testimonials about the serious harms women all too frequently endure. The #MeToo moment, the #WhyIStayed campaign, and the Larry Nassar sentencing hearings have raised public awareness not only about workplace harassment, domestic violence, and sexual abuse, but also about how routinely women survivors face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories. This pattern is particularly disturbing in the justice system, where women face a legal twilight zone: laws meant to protect them and deter further abuse often fail to achieve their purpose, because women telling stories of abuse by their male partners are simply not believed. To fully grasp the nature of this new moment in gendered power relations—and to cement the significant gains won by these public campaigns—we need to take a full, considered look at when, how, and why the justice system and other key social institutions discount women's credibility.*

*We use the lens of intimate partner violence to examine the ways in which women's credibility is discounted in a range of legal and social service system settings. First, judges and others improperly discount as implausible women's stories of abuse,*

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*based on a failure to understand both the symptoms arising from neurological and psychological trauma, and the practical constraints on survivors' lives. Second, gatekeepers unjustly discount women's personal trustworthiness, based on both inaccurate interpretations of survivors' courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance. Moreover, even when a woman manages to overcome all the initial modes of institutional skepticism that minimize her account of abuse, she often finds that the systems designed to furnish her with help and protection dismiss the importance of her experiences. Instead, all too often, the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse.*

*Two distinct harms arise from this pervasive pattern of credibility discounting and experiential dismissal. First, the discrediting of survivors constitutes its own psychic injury—an institutional betrayal that echoes the psychological abuse women suffer at the hands of individual perpetrators. Second, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within survivors' experience that it becomes a potent, independent obstacle to their efforts to obtain safety and justice.*

*The reflexive discounting of women's stories of domestic violence finds analogs among the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus. For these women, too, credibility discounts both deepen the harm they experience and create yet another impediment to healing and justice. Concrete, systematic reforms are needed to eradicate these unjust, gender-based credibility discounts and experiential dismissals, and to enable women subjected to male abuses of power at long last to trust the responsiveness of the justice system.*

## INTRODUCTION

We are at something of a feminist watershed moment in our society. For months, women have been coming forward in large numbers to share their stories about sexual harassment and assault in the workplace; stories of events that occurred over the course of decades, stories that survivors kept private until now.[1] It is both painful and exhilarating.

But as we hear this slow drip of horror stories, many of us struggle with the acute awareness that we've been here before. Back in 1991, during the Anita Hill–Clarence Thomas hearings,[2] the whole country confronted the ugly dynamic of sexual harassment—most particularly, how men use their power in the workplace hierarchy to subordinate women. (Some of us still have our "I believe Anita" buttons.) And yet here we are today, more than twenty-five years later, experiencing a similar sense of abrupt revelation and shock.

How can we still be surprised by these stories? It's not that workplace assault took a hiatus in the intervening quarter century. There were women all around us, women reading this essay right now, who continued to be sexually harassed. Women seeking legal protection from this kind of discriminatory abuse filed hundreds of thousands of complaints of sexual harassment and assault with the Equal Employment Opportunity

1 *See, e.g.*, Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, Dec. 18, 2017; Anna Codrea-Rado, *#MeToo Floods Social Media With Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?_r=0.

2 When she was in her mid-twenties, Anita Hill worked for Clarence Thomas at the Equal Employment Opportunity Commission. When President George H.W. Bush nominated Thomas to replace Justice Thurgood Marshall on the U.S. Supreme Court, Hill testified that Thomas had subjected her to sexual harassment on the job. Millions watched the televised broadcast of the confirmation hearings, as members of the Senate Judiciary Committee, all male and all white, questioned Hill. Ultimately, Thomas was confirmed, with a vote of 52–48. *See, e.g.*, JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994).

Commission during that time.[3] But the broader culture stopped listening, relapsing into a long-standing tendency to trivialize women's experiences of abuse at the hands of powerful, predatory men.

Today's stories pouring out of Hollywood, Congress, and the media are just one facet of this long-simmering public scandal. After experiencing an initial victimization, many women also face a societal gauntlet of doubt, dismissal, or outright disbelief.

As more and more women stepped forward in all spheres of life to offer new testimonials to the #MeToo movement, we began to wonder about how this credibility discounting phenomenon plays out in the context of intimate partner violence[4]—another category of abuse that women primarily suffer at the hands of men.

The parallels are dramatic. Story after story demonstrates how, despite a substantial increase in public awareness of the problem, accompanied by improvements stemming from four decades of activism, scholarship, and training, women survivors of domestic violence face a persistent skepticism regarding both their accounts of abuse and their recitations of harm. Women find their credibility discounted[5] by the partners who abuse them, by the larger society in which they live, and by the gatekeepers of the justice and social service systems to which they turn for help.[6] This skepticism and suspicion compound the pre-existing, myriad harms inflicted via domestic abuse itself. And, perhaps even more important, the pronounced, nearly instinctive penchant for devaluing women's testimony is so deeply embedded within women's experience that it constitutes its own distinct obstacle to their ability to obtain safety and justice. Philosopher Alison Bailey captures, in part, the harm to which we refer: "Imagine living in an epistemic twilight zone, a world

3 *See, e.g.*, Danielle Paquette, *Not Just Harvey Weinstein: The Depressing Truth About Sexual Harassment in America*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/12/not-just-harvey-weinstein-the-depressing-truth-about-sexual-harassment-in-america/?utm_term=.5ecb78df70a9.

4 We use the terms *intimate partner violence* and *domestic violence* interchangeably throughout this Article to describe a wide range of abuse—psychological, physical, sexual, or economic—inflicted by a partner or former partner.

5 The term "credibility discount," used frequently in this essay, was originally coined by Deborah Tuerkheimer, in a thoughtful analysis of women's experiences of sexual assault. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017). We use the same term here in part to advance a dialogue about the universality of credibility discounting across contexts where women attempt to resist male abuses of power.

6 This essay focuses on the credibility of straight women survivors in particular. We recognize, of course, that other survivor groups experience serious challenges in terms of achieving credibility. Male survivors, both in heterosexual and same-sex intimate relationships, are often dismissed or even ridiculed. Genderqueer survivors also face major credibility challenges. Our main objective here is to bring to light the persistent and particularized story of our cultural refusal to credit *women as women*, and especially those who have experienced relationship abuse at the hands of men. We also address the ways in which women's intersecting identities, on dimensions such as race, class, and sexual orientation, profoundly affect the likelihood that they will be discredited, as well as their experience of discrediting.

where many of your lived experiences are regularly misunderstood, distorted, dismissed, erased, or simply rejected as unbelievable."[7] But even this capacious understanding fails to capture the full dimensions of the problem. Women also face a legal twilight zone; laws meant to protect them, compensate them, and deter further abuse often fail in application, because women telling stories of abuse by their male partners are simply not believed.

This experience—the reflexive discounting of women's stories of domestic violence—offers a useful vantage point into the kindred diminutions and dismissals that harm so many other women who resist the abusive exercise of male power, from survivors of workplace harassment to victims of sexual assault on and off campus.[8] For all of these women, credibility discounts both deepen the harm they experience and create yet another obstacle to healing and justice.

This Article critically examines how the justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence. Our analysis is based on a wide range of legal, psychological, philosophical, and cultural sources, including the more than twenty-five years of experience each of us has had, individually and in collaboration, representing survivors in civil protection order cases, conducting empirical research with survivors of intimate abuse, and consulting with local and national domestic violence organizations.[9]

A central focus here is on the civil justice system, with particular attention paid to women's efforts to secure safety and a measure of redress in the form of civil protection orders—the legal remedy most commonly utilized by

7 Alison Bailey, *The Unlevel Knowing Field: An Engagement with Dotson's Third-Order Epistemic Oppression*, 3 SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE 62, 62 (2014).

8 *See infra* text accompanying notes 244–219.

9 Author Deborah Epstein has represented or closely supervised the representation of over 750 petitioners in civil protection order cases in D.C. Superior Court. She served as Co-Chair of the effort to create and implement the D.C. Superior Court's integrated Domestic Violence Unit, Co-Director of the D.C. Superior Court's Domestic Violence Intake Center, and Chair of the D.C. Domestic Violence Fatality Review Commission. She is the author of the D.C. Superior Court's *Domestic Violence Benchbook*, has trained hundreds of police officers, worked in close collaboration with prosecutors on intimate partner violence cases, and written numerous articles addressing domestic violence issues. She has been a member of the D.C. Mayor's Commission on Violence Against Women, and the National Football League Players' Association Domestic Violence Commission, and has served on the Board of Directors of the D.C. Coalition Against Domestic Violence and the House of Ruth. Author Lisa Goodman has published over one hundred peer-reviewed articles based on her extensive research on the experience of intimate partner survivors as they move through systems designed to help them, including social service and justice systems. She has also supervised scores of domestic violence advocates working in a residential setting; conducted numerous evaluations of domestic violence programs; led workshops on trauma-informed approaches to domestic violence services, survivor-defined approaches to advocacy, and evaluating domestic violence programs; and consulted to the National Domestic Violence Resource Center, The National Domestic Violence Hotline, Futures Without Violence, The Full Frame Initiative, and The Second Step.

domestic violence survivors.[10] Because the civil justice system offers no right to counsel, only those who can afford an attorney, or find a pro bono lawyer, are represented. These cases are quite different than those in the criminal courts, where the prosecution commands the investigative resources of the police and wields the full power of the state to subpoena corroborative evidence and compel witnesses to testify. In contrast, in approximately eighty percent of civil protection order and related family law cases,[11] neither the survivor nor the accused perpetrator has a lawyer, discovery is limited,[12] and virtually no one has the resources to retain a private investigator.[13] As a result, few survivors have access to potentially powerful corroborative evidence. Moreover, they lack the benefit of legal advice about what types of more easily available evidence would be useful to bring to court.[14]

These forces all but guarantee that most civil protection order cases end up in the "he said/she said," or "word on word" realm. It's the survivor's testimony against that of her intimate partner. This testimonial structure places enormous pressure on individual credibility. In the end, most protection order cases boil

10 Caroline Vaile Wright & Dawn M. Johnson, *Encouraging Legal Help Seeking for Victims of Intimate Partner Violence: The Therapeutic Effects of the Civil Protection Order*, 25 J. TRAUMATIC STRESS 675, 675 (2012).

11 *See, e.g.*, Amy Barasch, *Justice for Victims of Domestic Violence: One Thing They Really Need Is Lawyers*, SLATE (Feb. 19, 2015, 9:30 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_courts_and_lawyers.html ("[Eighty] percent of people in our civil courts do not have a lawyer . . ."); *see also* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 52 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/KZL3-RGUD] ("Low-income survivors of recent domestic violence or sexual assault received inadequate or no professional legal help for 86% of their civil legal problems in 2017."); STATE OF MD. ADMIN. OFFICE OF THE COURTS, DOMESTIC VIOLENCE MONTHLY SUMMARY REPORTING (2017), http://jportal.mdcourts.gov/dv/DVCR_Statewide_2017_1.pdf [https://perma.cc/4HCC-APE6] (demonstrating that, in Maryland, 82.5% of petitioners were pro se in protective order cases during 2017) Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RIGHTS L. REV. 557, 567 (2006) (noting that in Illinois, neither party was represented in 83.4% of protective order cases).

12 In a recent survey of chief judges in courts across the United States, thirty-three percent reported that pro se litigants faced challenges related to discovery issues that were sufficiently problematic that they could affect the case in most or all cases. DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 21-23 (2011), https://www.fjc.gov/content/assistance-pro-se-litigants-us-district-courts-report-surveys-clerks-court-and-chief-judge-1 [https://perma.cc/3WWE-N6RG].

13 Many survivors of domestic violence, and thus many petitioners in protection order cases, are low income. *See infra* text accompanying note 141.

14 A survivor may have access to some corroborative evidence, typically in the form of voice mails, photographs, texts, and social media posts. In many cases, however, a survivor no longer has access to such evidence; particularly in the absence of legal advice, she may have deleted the relevant files, either inadvertently or because they were too upsetting to retain. And because these cases are scheduled as emergency litigation, they typically move from filing to trial in two to three weeks—insufficient time to subpoena useful evidence in the absence of focused legal advice, even in jurisdictions providing nonlawyers with subpoena power.

down to this: if a survivor is believed, the judge will award her protection. If she is not believed, the judge will deny it. This fact—the central importance of a survivor's credibility in the protection order and broader civil justice system—led us to focus on that system as a core area of inquiry.

We examine credibility discounting from a variety of perspectives. In Part I, we analyze the two essential ways in which justice and social service system gatekeepers discount the credibility of women survivors seeking safety. First, judges and others *improperly discount as implausible women's stories of abuse*, due to a failure to understand the symptoms arising from neurological and psychological trauma as well as the practical realities of survivors' lives. Second, gatekeepers *unjustly discount women's personal trustworthiness*, based on inaccurate interpretations of survivors' courtroom demeanor, as well as negative cultural stereotypes about women and their motivations for seeking assistance.

In Part II, we explore how these credibility discounts are reinforced by the broader context of legal and social service systems that are willing to tolerate the harmful impact of laws, policies, and practices on survivors. Even when a woman makes it through the credibility discount gauntlet, she often finds that the systems to which she turns for help *dismiss her experiences and trivialize the importance of her harms*, adopting and enforcing policies with little or no regard for the ways in which they operate to her detriment.

In Part III, we examine the harms inflicted by this combination of discounting women's credibility and dismissing women's experiences. First, these harms can be measured as an additional psychic injury to survivors, an institutional betrayal that echoes the psychological abuse imposed by individual perpetrators. Second, the pervasive nature of these harms creates a distinct obstacle to survivors' ability to access justice and safety, in addition to the many, more concrete stumbling blocks with which domestic violence victims are all too familiar.

Finally, in Part IV, we offer suggestions for initial efforts to eradicate these unjust, gender-based credibility discounts and experiential dismissals. Adopting these reforms would allow women subjected to male abuses of power to trust the responsiveness of the justice system and our larger society.

## I. TYPES OF GATEKEEPER-IMPOSED CREDIBILITY DISCOUNTS

Women survivors of abuse inflicted by their intimate partners encounter doubt, skepticism, or disbelief in their efforts to obtain justice and safety from judges and other system gatekeepers.[15] First, their stories of abuse appear less plausible than other stories told in the justice system. We tend to believe stories

15 The most complete exploration of credibility-based obstacles to date can be found in the brief but insightful essay by Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 42.

that are internally consistent—they have a linear thread and are emotionally and logically coherent. But domestic violence often results in neurological and psychological trauma, both of which can affect a survivor's comprehension and memory. The result is a story that, to the untrained ear, sounds internally inconsistent and therefore implausible. In addition, we tend to believe stories that are externally consistent—that fit in with how we believe the world works. But many aspects of the domestic violence experience are foreign, and therefore incomprehensible, to most nonsurvivors. The result is a story that appears on its surface to lack external consistency, and therefore—again—to be less plausible. Second, our assessments of women's personal trustworthiness suffer from skepticism rooted in perceptions of survivors' apparent "inappropriate" demeanor, prejudicial stereotypes regarding women's false motives, and the long-standing cultural tendency to disbelieve women simply because they are women.

### A. *Story Plausibility*

Narrative theorists and cognitive scientists agree that human beings are hard-wired to organize facts into "meaningful patterns."[16] This "need for narrative form is so strong that we don't really believe something is true unless we can see it as a story."[17] And storytelling is central to the justice system as well;[18] it is the primary method judges and juries use to assess the reliability of facts presented at trial. Accordingly, any time a survivor needs to go through a gatekeeper to access resources or justice or safety, she has to tell some sort of story about her domestic violence experience. And if she is to succeed, her story must be a plausible one. So what makes a story plausible?

#### 1. Internal Consistency

First, we believe stories that are *internally consistent*. That is, we grant credibility to stories that make logical and emotional sense, have a continuous,

16 CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 15-16 (2017); *see also* DAVID CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 93-94 (2002); LISA CRON, WIRED FOR STORY: THE WRITER'S GUIDE TO USING BRAIN SCIENCE TO HOOK READERS FROM THE VERY FIRST SENTENCE 185–199 (2012); Kay Young & Jeffrey Saver, *The Neurology of Narrative*, SUBSTANCE, Mar. 2001, at 74.

17 H. PORTER ABBOTT, THE CAMBRIDGE INTRODUCTION TO NARRATIVE 44 (2d ed. 2008). "For anyone who has read to a child or taken a child to the movies and watched her rapt attention, it is hard to believe that the appetite for narrative is something we learn rather than something that is built into us through our genes." *Id.* at 3.

18 "[T]he law is awash in storytelling." ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).

linear thread, form a coherent whole, and contain no significant, unexplained gaps in time or action.[19]

But for many domestic violence survivors, telling the truthful story of their abusive experience involves a narrative that is more impressionistic than linear, and that appears somewhat illogical or emotionally off-kilter. The tension between our desire for internal consistency and the realities of survivor stories can be explained in part by some of the neurological and psychological consequences of domestic violence itself, such as traumatic brain injury and posttraumatic stress disorder.

a. *Neurological Trauma: Traumatic Brain Injury*

Traumatic Brain Injury (TBI) can result from either blunt-force trauma to the head (for example, being hit by an object, having your head smashed against something, or being violently shaken), or from reduced oxygen to the brain (for example, through strangulation).[20] Blows to the head can cause cranial bleeding or damage cranial blood vessels and nerves. A lack of oxygen can result in the decreased function or death of brain cells.[21]

In domestic violence cases, both blunt force trauma and strangulation are relatively common. One study of women in three New York domestic violence

19 GROSE & JOHNSON, *supra* note 16, at 16. These correlations apply in the courtroom as well; research demonstrates strong correlations between courtroom credibility determinations and the internal consistency of stories. Numerous studies reveal a strong belief that inconsistencies indicate inaccuracies, and this perception guides juror decisionmaking. *See, e.g.*, Garrett L. Berman, Douglas J. Narby & Brian L. Cutler, *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability, and Verdicts*, 19 LAW & HUM. BEHAV. 79 (1995); Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170 (1996); Neil Brewer et al., *Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony*, 13 APPLIED COGNITIVE PSYCHOL. 297 (1999); Neil Brewer & R.M. Hupfeld, *Effects of Testimonial Inconsistencies and Witness Group Identity on Mock-Juror Judgments*, 34 J. APPLIED SOC. PSYCHOL. 493 (2004); Sarah L. Desmarais, *Examining Report Content and Social Categorization to Understand Consistency Effects on Credibility*, 33 LAW & HUM. BEHAV. 470 (2009); Rob Potter & Neil Brewer, *Perceptions of Witness Behaviour–Accuracy Relationships Held by Police, Lawyers and Mock Jurors*, 6 PSYCHIATRY, PSYCHOL. & L. 97, 101 (1999). The centrality of internal consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. *See, e.g.*, PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 58 (5th ed. 2013).

20 OR. DEP'T OF JUSTICE, TRAUMATIC BRAIN INJURY AND DOMESTIC VIOLENCE, http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic_brain_injury_and_domestic_violence.pdf [https://perma.cc/7ZVD-XBWJ] (last visited Jan. 23, 2018); PARTNERS FOR PEACE, *Understanding Traumatic Brain Injury, Concussion and Strangulation in Domestic Violence* (Oct. 11, 2016), http://www.partnersforpeaceme.org/understanding-traumatic-brain-injury-concussion-strangulation-domestic-violence/ [https://perma.cc/D7CX-V9F9].

21 NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, *Traumatic Brain Injury: Hope Through Research: How Does TBI Affect the Brain*, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Hope-Through-Research/Traumatic-Brain-Injury-Hope-Through#3218_2 [https://perma.cc/C8HD-SBEL] (last modified June 28, 2017).

shelters found that ninety-two percent of the women questioned had been hit in the head by their partners more than once; eighty-three percent had been hit in the head and shaken severely; and eight percent had been hit in the head over twenty times in the preceding year.[22] Forty percent of these women lost consciousness as a result of at least one of the assaults they endured.[23] In another study, emergency room data indicated that sixty-seven percent of women treated for intimate partner violence–related injuries reported problems consistent with a diagnosis of head injury.[24]

Even mild TBI—which can occur after only a short period without oxygen to the brain—can result in a significant and profound impact on memory and behavior, inducing symptoms such as confusion, poor recall, inability to link parts of the story together or to articulate a logical sequence of events, uncertainty about detail, and even recanting of stories (i.e., renouncing them as untrue after accurately reporting them to friends, family, police, or even judges).[25] In many ways, this is hardly surprising; people with an impaired sense of the consistency of their own experience are unlikely to produce consistent narratives of that experience on demand.

Because research demonstrating the frequency of TBI in the domestic violence context is relatively new, however, few justice system gatekeepers are aware of its potential neurological effects.[26] Even in hospital emergency rooms, where medical professionals now routinely perform TBI screens when

22 Helene Jackson, Elizabeth Philp, Ronald L. Nuttall & Leonard Diller, *Traumatic Brain Injury: A Hidden Consequence for Battered Women*, 33 PROF. PSYCHOL.: RES. & PRAC. 39, 41, 42 (2002) (showing that correlations between frequency of being hit in the head and severity of cognitive symptoms were statistically significant).

23 *Id.* at 41.

24 John D. Corrigan et al., *Early Identification of Mild Traumatic Brain Injury in Female Victims of Domestic Violence*, AM. J. OBSTETRICS & GYNECOLOGY, May 2003, at S71, S74. Yet another sampled women from both shelter and non-shelter populations who all had sustained at least one physically abusive encounter and found nearly seventy-five percent of the entire sample reported a domestic violence–related TBI. Eve M. Valera & Howard Berenbaum, *Brain Injury in Battered Women*, 71 J. CONSULTING & CLINICAL PSYCHOL. 797, 799 (2003).

25 Valera & Berenbaum, *supra* note 24, at 801; Eve Valera, *Increasing Our Understanding of an Overlooked Public Health Epidemic: Traumatic Brain Injuries in Women Subjected to Intimate Partner Violence*, 27 J. WOMEN'S HEALTH 735, 735 (2018) ("[T]he greater the number and more recent . . . the TBIs, the more poorly women tended to perform on measures of memory, learning, and cognitive flexibility, and the higher . . . the levels [of PTSD symptoms]."); *see also* Gwen Hunnicut, Kristine Lundgren, Christine Murray & Loreen Olson, *The Intersection of Intimate Partner Violence and Traumatic Brain Injury: A Call for Interdisciplinary Research*, 32 J. FAM. VIOLENCE 471, 474 (2017); Maria E. Garay-Serratos, *A Secret Epidemic: Traumatic Brain Injury Among Domestic Violence Victims*, L.A. TIMES (Oct. 12, 2015), http://beta.latimes.com/opinion/op-ed/la-oe-1012-garayserratos-tbi-domestic-abuse-20151012-story.html; Rachel Louise Snyder, *No Visible Bruises: Domestic Violence and Traumatic Brain Injury*, NEW YORKER (Dec. 30, 2015), https://www.newyorker.com/news/news-desk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence.

26 *See* Kevin Davis, *Brain Trials: Neuroscience Is Taking a Stand in the Courtroom*, 98 A.B.A. J. 37, 37-38 (2012).

a patient presents with certain kinds of athletic injuries, partner abuse victims are rarely screened.[27] And because most injuries caused by strangulation are internal, patients admitted in the absence of such screens are unlikely to be considered for a TBI diagnosis.[28] As a result, survivors themselves are unlikely to know that they are at risk for TBI, unlikely to get treatment, and unlikely to know about the possible symptoms they may later experience.[29] This creates a perfect storm of ignorance: a survivor is more likely to tell justice system gatekeepers a story that lacks internal consistency; the survivor herself is unlikely to be able to understand or explain this apparent failing; and those gatekeepers, in turn, are more likely to hear her story as less plausible and, accordingly, impose an unjust credibility discount on her narrative.

The following true story illustrates the problem.[30] Grace Costa[31] was diagnosed with mild TBI, caused when her ex-boyfriend strangled her with a telephone cord. She's inconsistent when she tries to tell the story: the date changes; sometimes she remembers the assault taking place in one year; other times, another. Her memory varies as to which of her adult children were present. Sometimes she thinks they were about to eat dinner, sometimes that they were talking about a half-eaten apple on the kitchen floor.

Grace can't tell her story with a linear narrative. She says memories of the incident come to her in flashes, one image at a time—apple, blood, cord—but the disparate pieces never fit together as a whole.

Grace's explanation of events is confused. Pieces of her story hang untethered in her mind. She remembers being inside, then outside; being down, then up, and maybe down again. The police weren't there, then they were. Half the time, she says, she doesn't "remember much of anything."

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27 *See* Eve Valera & Aaron Kucyi, *Brain Injury in Women Experiencing Intimate Partner-Violence: Neural Mechanistic Evidence of an "Invisible" Trauma*, 11 BRAIN IMAGING BEHAV. 1664, 1664 (2017) ("TBI treatments are typically absent and IPV interventions are inadequate."); *see also* Garay-Serratos, *supra* note 25; Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 308 (2001).

28 This challenge is illustrated by a study of 300 nonfatal domestic violence strangulation cases, where researchers found that only fifteen percent of victims had injuries that were sufficiently visible for police officers to photograph; they further found that even where the injuries were visible, they were often minimized in police descriptions with terms such as "redness, cuts, scratches, or abrasions to the neck." Strack et al., *supra* note 27, at 303, 305-06.

29 *See* Jacquelyn C. Campbell et al., *The Effects of Intimate Partner Violence and Probable Traumatic Brain Injury on Central Nervous System Symptoms*, 27 J. WOMEN'S HEALTH 761, 762 (2018) (noting that "for many abused women, head injuries occur multiple times, in an escalating pattern, and cognitive or psychological effects are often viewed within the context of abuse rather than as a specific medical injury" (i.e., cognitive effects are attributed to mental health conditions resulting from the abuse, rather than a TBI)); Valera & Kucyi, *supra* note 27; Valera, *supra* note 25, at 735 (majority of abuse-related TBI's in study sample "were considered to be mild TBIs for which medical attention [was] almost never sought").

30 This story relies heavily on the account written by Rachel Louise Snyder, *supra* note 25.

31 This is not her real name. *Id.*

To a trauma expert, the way Grace tells her story strongly indicates that she was, indeed, strangled and deprived of brain oxygen that night. The disjointed, incoherent way she tells her story makes it all the more plausible.[32]

But the opposite is true when Grace is telling her story to justice system gatekeepers. To the untrained ear, her story's disjointed, inconsistent nature makes it sound *im*plausible, and therefore she is likely to incur a credibility discount if she tells it to the police, deciding whether to make an arrest; to prosecutors, deciding whether to bring a criminal case; or to a judge, deciding whether to issue a protection order. The more Grace tries to remain faithful to what she actually remembers, the more likely she is to be denied assistance and protection.

b. *Psychological Trauma: Post-Traumatic Stress Disorder*

Psychological trauma can operate similarly to neurological trauma in undermining the internal consistency of a survivor's story; like TBI, it commonly produces memory lapses or dissociative states.[33] Research shows that a majority of survivors meet diagnostic criteria for Post-Traumatic Stress Disorder (PTSD),[34] and many more women exhibit serious symptoms of psychological trauma, though not enough to reach the threshold of a formal diagnosis. These symptoms are another common source of internal inconsistency in survivor accounts provided to police, judges, and other system gatekeepers.

The symptoms that comprise PTSD include avoidance, hyperarousal, and intrusive destabilizing experiences such as dissociative flashbacks and intense or prolonged emotional responses to reminders of the original traumatic event.[35] These reminders are commonly known as "triggers."[36] For many survivors, being in a courtroom, in close proximity to an abusive partner—particularly while being instructed to review his abusive behavior in detail—constitutes a potent trigger.[37] Instead of providing the judge with a clear, logical narrative, a

32 *See supra* text accompanying notes 20–25.

33 *See, e.g.*, Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 DIALOGUES CLINICAL NEUROSCIENCE 263, 263 (2011) ("Several pathological features found in PTSD patients overlap with features found in patients with traumatic brain injury . . . .").

34 A meta-analysis of eleven studies investigating the prevalence of PTSD among IPV survivors demonstrated a weighted mean prevalence of 63.8%. *See* Jacqueline M. Golding, *Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis*, 14 J. FAM. VIOLENCE 99, 116 (1999); *see also* Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA, VIOLENCE, & ABUSE 99, 100 (2001).

35 AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271-72 (5th ed. 2013) [hereinafter DSMD].

36 *See, e.g.*, BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 182 (2014).

37 NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA AND MENTAL HEALTH, PREPARING FOR COURT PROCEEDINGS WITH SURVIVORS OF DOMESTIC VIOLENCE: TIPS FOR CIVIL LAWYERS

survivor may have flashbacks or feel overwhelmed by emotion. The predictable result is that she will skip, or forget, certain parts of her story—or, indeed, be unable to speak key elements of it out loud.[38] Again, this disconnected, inconsistent testimony is in fact evidence of the truth of her narrative; to the untrained ear, however, it makes her story suspect.

Psychological trauma, or even extreme stress, can affect the memory as well. As Judith Herman puts it: "Traumatic memories have a number of unusual qualities. They are not encoded like the ordinary memories of adults in a verbal, linear narrative that is assimilated into an ongoing life story."[39] Instead, these memories often lack verbal narrative detail and context; they are encoded in the form of sensations, flashes, and images, often with little or no story.[40] And as with neurological trauma, psychologically traumatic memories encode the physical and psychic harms that generate them in a way that is prone to create a steep credibility discount based on the seeming implausibility of a survivor's story.

The tendency to discount survivors' stories based on internal inconsistencies is not restricted to police and judges alone. Courthouse clerks, for example—whose essential function is to create and maintain case files—often take on the role of credibility-assessors and system gatekeepers.[41] This happens even though clerks have no formal authority to determine whether a complaint has merit; such power is reserved to members of the judiciary, through Article III of the Constitution. Here is one example, from attorney and law professor Jane Stoever:

> I recall waiting in a Domestic Violence Unit clerk's office . . . and seeing a clerk confront an unrepresented abuse survivor about the lack of specific dates in her

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AND LEGAL ADVOCATES 1 (2013), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH-2013-Preparing-for-Court-Proceedings.pdf [https://perma.cc/2UDK-JPRL].

38 Jerrell Dayton King & Donna J. King, *A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post-Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System*, 6 DEPAUL J. WOMEN, GENDER & L. 1, 29 (2017) (testifying in court can cause a survivor to reexperience trauma and dissociate); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1313 (1993) (noting that dissociation can make testimony appear "'plastic' or 'fake' while hyperarousal can make survivors appear overly excitable").

39 JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 37 (1997).

40 *Id.* at 38. An inability to recall key features of the trauma is one criterion of the posttraumatic stress disorder diagnosis. *See* DSMD, *supra* note 35, at 271. As Dr. Jim Hopper explains: "Remembering always involves reconstruction and is never totally complete or perfectly accurate . . . . [G]aps and inconsistencies are simply how memory works – *especially* for highly stressful and traumatic experiences . . . where the differential encoding and storage of central versus peripheral details is the greatest. Such gaps and inconsistencies are never, on their own, proof of *anyone's* credibility, innocence, or guilt." Jim Hopper, *Sexual Assault and Neuroscience: Alarmist Claims Vs. Facts,* PSYCHOL. TODAY (Jan. 22, 2018), https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/201801/sexual-assault-and-neuroscience-alarmist-claims-vs-facts [https://perma.cc/RG6P-EX38].

41 This observation is based on the first author's twenty-seven years of experience representing survivors in hundreds of civil protection order cases. *See supra* note 9.

> petition. The clerk insisted that the litigant had to plead with specificity, which included identifying specific calendar dates. When the *pro se* survivor was unable to remember exact dates for the years of abuse she had endured, the clerk tore up her petition [and refused to let her file a protection order case].[42]

### 2. External Consistency

In addition to crediting stories based on their degree of *internal* consistency, we are far more likely to credit stories that are *externally* consistent—i.e., chronicles of abuse that resonate with our pre-existing and publicly sanctioned narratives about how the world works.[43] An example taken from Professors Carolyn Grose and Margaret Johnson underlines this dynamic:

> A narrative that tells of a person entering a home and closing a wet, dripping umbrella while exclaiming, "I just walked through a fire!" would not fit with our sense of normal. To be externally consistent, she should have burnt clothes, not a dripping wet umbrella, or be coughing from the smoke.[44]

The demand for external credibility, however, is complicated by the unconscious process of "false consensus bias"—the tendency to see one's "own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, or inappropriate."[45] In other words, we tend to assume that our own personal experiences are universal: what *we* would likely do, say, and feel is what *all others* would do, say, and feel.[46]

In reality, of course, these assumptions are misleading. Passengers who have survived a serious car crash tend to react quite differently to a driver's sudden slamming of the brakes than those who have experienced only unremarkable

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42 Interview with Jane Stoever, Clinical Professor of Law, Univ. Cal., Irvine Sch. of Law (Jan. 6, 2018).

43 GROSE & JOHNSON, *supra* note 16, at 15-16. As with internal consistency, the importance of external consistency in courtroom credibility determinations is reflected in treatises advising litigators about how to attack and undermine the credibility of a witness for the opposing side. *See, e.g.*, BERGMAN, *supra* note 19, at 62–63.

44 GROSE & JOHNSON, *supra* note 16, at 16.

45 Lee Ross, David Greene & Pamela House, *The "False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1976); *see also* Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987) (noting that over a ten-year period, "over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others"); Leah Savion, *Clinging to Discredited Beliefs: The Larger Cognitive Story*, 9 J. SCHOLARSHIP TEACHING & LEARNING 81, 87 (2009) ("People tend to over-rely on instances that confirm their beliefs, and accept with ease suspicious information"); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268 (2008).

46 *See* Marks & Miller, *supra* note 45; Ross, Greene & House, *supra* note 45; Solan, Rosenblatt & Osherson, *supra* note 45.

car rides.[47] Veterans who have spent time in military conflict tend to react quite differently to loud, unexpected noises than do civilians leading peaceful lives.[48] In each of these examples, a profound difference in experience results in fundamentally different expectations about how the world works. And such expectations tend, in turn, to provoke diverse behaviors.

The most consequential experiential gap that separates domestic violence survivors from gatekeepers of the justice system involves, of course, the behaviors that stem from suffering abuse at the hands of an intimate partner. Despite decades of activism and research, the experiences of women survivors fall into what philosopher Miranda Fricker calls a persistent "gap in collective interpretive resources" that prevents the dominant culture from making sense of a particular kind of social experience.[49] In the intimate abuse context, this gap prevents most nonsurvivors from being able to make sense of how survivors might actually behave.

a. *Women Who Stay*

To see the real-world impact of this interpretive gap, consider a quandary that has assailed survivors since the early days of the anti–domestic violence movement.[50] We know that many women stay with their abusive partners in the aftermath of violent episodes. This tends to occur in the context of relationships characterized by coercive control, a pattern of domination that

47 *See* J. Gayle Beck & Scott F. Coffey, *Assessment and Treatment of PTSD After a Motor Vehicle Collision: Empirical Findings and Clinical Observations*, 38 PROF. PSYCHOL. RES. & PRAC. 629, 629 (2007) (explaining that survivors of motor vehicle accidents are at heightened risk of post-traumatic stress disorder and may experience intrusive symptoms or avoid driving altogether).

48 *See, e.g.*, Anke Ehlers, Ann Hackmann & Tanja Michael, *Intrusive Re-Experiencing in Post-Traumatic Stress Disorder: Phenomenology, Theory, and Therapy*, 12 MEMORY 403, 407 (2004).

> [M]any of the trigger stimuli are cues that do not have a strong meaningful relationship to the traumatic event, but instead are simply cues that were temporally associated with the event, for example physical cues similar to those present shortly before or during the trauma (e.g., a pattern of light, a tone of voice); or matching internal cues (e.g., touch on a certain part of the body, proprioceptive feedback from one's own movements). People with PTSD are usually unaware of these triggers, so intrusions appear to come out of the blue.

*Id.* (emphasis omitted) (citation omitted). For a vivid visual/aural exposition of the triggers veterans face in daily life, see David Lynch Found., *Sounds of Trauma*, YOUTUBE (Apr. 11, 2017), https://www.youtube.com/watch?v=bgpRw92d1MA.

49 MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007).

50 *See, e.g.*, Nancy R. Rhodes & Eva Baranoff McKenzie, *Why Do Battered Women Stay?: Three Decades of Research*, 3 AGGRESSION AND VIOLENT BEHAV. 391 (1998).

includes tactics to isolate, degrade, exploit and control the survivor.[51] The perpetrator creates and enforces a set of "rules" governing numerous aspects of his partner's life—"her finances, clothes, contact with friends and family, even what position she sleeps in."[52] Once a perpetrator of abuse has appropriated the power to verbally restrict his partner's day-to-day life choices, physical violence then serves as both the abuser's means of enforcing that control and the punishment for attempts to resist it.[53] Many of us, but perhaps especially those privileged enough to live lives untouched by violence and with easy access to supportive resources, respond to stories of women who stay by focusing obsessively on the question "Why didn't she leave?"[54] The question is really more of an accusation: "In her shoes, I would most definitely have left." Or, in the words of a judge presiding over a civil protection order case: "[S]ince I would not let that happen to me, I can't believe that it happened to you."[55]

In recent years, judges are less likely to make such explicit statements on the record, but many continue to perceive a woman's decision to stay as externally inconsistent.[56] Judges tend to express their belief in the connection between women staying and story plausibility in less formal contexts, such as judicial training sessions and casual conversations outside of the courtroom.[57] And this failure of understanding affects case outcomes. In 2015, for example, one of the first author's clinic clients lost her civil protection order suit based on a judge's discrediting the woman's story. The judge explained that her credibility determination derived from photographs, introduced by the perpetrator boyfriend, showing that, not long after a particularly serious violent episode and just a few days after she obtained a temporary protection order, the woman had

51 Evan Stark, Re-Presenting Battered Women: Coercive Control and the Defense of Liberty (2012) (unpublished manuscript), http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf [https://perma.cc/DJK3-LVW7].

52 Deborah Epstein & Kit Gruelle, *Should an Abused Wife Be Charged in Her Husband's Crime?* N.Y. TIMES (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/opinion/noor-salman-vegas-shooting-trial.html.

53 Scholar Michael Johnson has developed a widely used typology of intimate partner violence, based on the extent to which coercive control is involved. Relationships that take the form of "intimate terrorism" are characterized by one partner's use of coercive control to exert power over the other. In contrast, "situational couple violence" is not embedded within a broader pattern of controlling behaviors. Survivors who tend to seek help from social services and the justice systems are more likely to be involved in relationships of coercive control than are survivors in the general population. *See* Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322, 323-24, 347 (2005).

54 *See infra* text accompanying notes 60–66.

55 Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1275 (1993).

56 This observation is based on the first author's twenty-seven years of experience representing survivors in hundreds of civil protection order cases. *See supra* note 9.

57 The first author has observed or participated in several such conversations at judicial training sessions, conferences, and in informal social settings over the last ten years.

gone to a Red Lobster restaurant with him.[58] The judge was not interested in hearing about why the woman had decided to have dinner with her abusive partner—whether it was because she believed that the best way to ensure her immediate safety was to comply with her boyfriend's requests, because she was struggling with the challenges of ending a long-term relationship, or because she wanted her children to be able to see their father. Instead, the judge simply concluded that the photographs proved her incredibility.[59]

This persistent interpretive gap separating survivor and nonsurvivor understandings of the world was a powerful theme of the recent #WhyIStayed movement. In the fall of 2014, Baltimore Ravens running back Ray Rice assaulted his then-fiancée Janay Palmer in an elevator, knocking her unconscious. The video of the incident, which also showed Rice dragging Palmer's limp body out of the elevator, was made public.[60] Both the media and the general public focused their attention disproportionately on variations of the victim-blaming question, "Why didn't she leave?" Far more ink was spilled discussing whether Janay provoked the assault (she slapped Rice in the face) and on Janay's longer-term response to the incident (electing to stay with Rice and eventually marrying him) than was devoted to Rice's knock-out punch to her head.[61]

Frustrated with the media response to the Rice–Palmer story, survivor Beverly Gooden decided to share with her family and friends, for the first time, the abusive conduct that had besieged her own marriage.[62] She did so by sending out the following three tweets under the hashtag #WhyIStayed:

> I tried to leave the house once after an abusive episode, and he blocked me. He slept in front of the door that entire night - #WhyIStayed.
>
> I stayed because my pastor told me that God hates divorce. It didn't cross my mind that God might hate abuse, too - #WhyIStayed.
>
> He said he would change. He promised it was the last time. I believed him. He lied - #WhyIStayed.[63]

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58 Interview with Gillian Chadwick, Assoc. Professor, Washburn Univ. Sch. of Law (Jan. 1, 2018).

59 *Id.*

60 *See, e.g.*, Charles M. Blow, *Ray Rice and His Rage*, N.Y. TIMES (Sept. 14, 2014), https://www.nytimes.com/2014/09/15/opinion/charles-blow-ray-rice-and-his-rage.html.

61 *See, e.g.*, Greg Howard, *Does the NFL Think Ray Rice's Wife Deserved It?*, DEADSPIN (July 31, 2014), https://deadspin.com/does-the-nfl-think-ray-rices-wife-deserved-it-1612138248 [https://perma.cc/7DMH-22R4]; Mel Robbins, *Lesson of Ray Rice Case: Stop Blaming the Victim*, CNN (Sept. 16, 2014), http://www.cnn.com/2014/09/08/opinion/robbins-ray-rice-abuse/index.html [https://perma.cc/EV9Y-MF24].

62 *Hashtag Activism in 2014: Tweeting 'Why I Stayed'*, NAT'L PUB. RADIO (Dec. 23, 2014), https://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed [https://perma.cc/XT7G-99MX] [hereinafter *Hashtag Activism*].

63 *Id.*

Much to Gooden's surprise—she had previously used Twitter only to make relatively mundane comments about the details of her day[64]—the hashtag was soon trending; it remained steadily active for weeks and continued to receive daily contributions for over a year.[65]

The numbers are telling here. Within hours, #WhyIStayed had unleashed thousands of tweets, with an avalanche of more than 100,000 in the first four months.[66] The sheer scale of the response is a strong indication of a pent-up sense among survivors that their stories are simply not understood by the larger culture.

b. *Physical Versus Psychological Harm*

The pronounced disconnect between survivor and nonsurvivor understandings of the world also strongly shapes common judicial expectations about experiences of harm. Most judges in our courts are men[67] and presumably—based on statistical probabilities alone—most are also nonsurvivors.[68] Anyone working in the justice system (including the first author) knows that many nonsurvivor judges in civil protection order cases tend to assume that, if they were to find themselves in an abusive relationship,

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64 *Id*.

65 Melissa Jeltsen, *The Ray Rice Video Changed the Way We Talk About Domestic Violence*, HUFFINGTON POST (Sept. 8, 2015), https://www.huffingtonpost.com/entry/ray-rice-janay-video-domestic-violence_us_55ec7228e4b002d5c07646cb [https://perma.cc/R92T-F4FH]. The top three reasons cited by survivors in the first year of #WhyIStayed posts were: a desire to keep the family intact, love of the abusive partner, and fear of the dangers inherent in leaving. *Id.* Early responses to the hashtag included:

> @HToneTastic #WhyIStayed - Because his abuse was so gradual and manipulative, I didn't even realize what was happening to me.
>
> @BBZaftig #WhyIStayed - Because he told me that no one would love me after him, and I was insecure enough to believe him.
>
> @MonPetitTX - Because I had watched my mother stay and she had watched hers before that.

*Hashtag Activism*, *supra* note 62.

66 *Hashtag Activism, supra* note 62; Lizzie Crocker, *Harsh Truths about Domestic Violence: Why Voicing Terrible Experiences Can Help Others*, THE DAILY BEAST (Sept. 20, 2014), https://www.thedailybeast.com/harsh-truths-about-domestic-violence-why-voicing-terrible-experiences-can-help-others [https://perma.cc/5Q5B-AUES].

67 Thirty percent of judges in U.S. state courts (where domestic violence cases typically are heard) are women. NAT'L ASS'N OF WOMEN JUDGES, 2016 U.S. STATE COURT WOMEN JUDGES (2016), https://www.nawj.org/statistics/2016-us-state-court-women-judges [https://perma.cc/LV2M-W9EF].

68 National survey data show that nearly one in three women and one in four men will experience domestic violence at some point in their lives. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL & CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 2 (2010).

the most troubling aspect would be the physical, not the psychological, violence.[69] This prioritization of physical over psychological harm is reflected in the written law: criminal law, most of tort law, and civil protection order statutes all focus heavily on physical assaults and threats of violence, rather than emotional abuse or threats of psychological harm.[70] For judges and other justice system actors, the law tends to dictate psychic reality: what the law prohibits *must* be what is harmful. The end result is that most judges assume that the way the world works, and therefore what is externally consistent, is that physical violence is far worse than psychological abuse. [71]

How does this assumption translate into courtroom expectations? A common judicial expectation is that a "real" victim will lead with physical violence in telling her story on the witness stand.[72] But in fact, many survivors tell their stories quite differently. For many women, abusive relationships are characterized by episodic, sometimes relatively infrequent, outbursts of physical violence and threats.[73] The day-to-day, routine abuse often occurs solely in the psychological realm.[74] Psychologists explain that in many abusive relationships victims are subjected to their partners' coercive control through a wide variety of psychological tactics, including, for example, "fear and intimidation[,] . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles."[75] An abusive partner might effectively isolate a woman and increase his control over her life by sabotaging her efforts to find or keep a job or to attend a job-training session by refusing to allow her to

69 This prioritization of physical over psychological harm is reflected in the written law: both criminal statutes and civil protection order laws focus on heavily on physical assaults and threats of violence rather than emotional abuse or threats of psychological harm. *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1143-44 (2009).

70 *Id*. at 1134-38

71 *Id*. at 1143. This assumption may well vary depending on the particularities of a survivor's identity. The stereotype of women as especially frail and vulnerable, for example, derives primarily from cultural images of white, heterosexual women.

72 This observation is based on the first author's twenty-seven years of litigating hundreds of civil protection order cases. *See supra* note 9.

73 *See* NAT'L CTR. FOR VICTIMS OF CRIME, INTIMATE PARTNER VIOLENCE (2017) (on file with authors) (demonstrating that emotional and psychological abuse more prevalent than physical violence); WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN: INTIMATE PARTNER VIOLENCE (2012), http://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=72E1B41F23450EB8BFA1B9A66985F90E?sequence=1 [https://perma.cc/4M79-8R8M] (showing lifetime reported prevalence rate of emotional abuse higher than rate of physical abuse).

74 In one study of 1443 women, 86.2% of those who had experienced physical violence also reported emotional abuse without physical/sexual violence. Ann L. Coker et al., *Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering*, 90 AM. J. PUB. HEALTH 553, 557 (2000).

75 Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000).

sleep the night before a job interview, hiding or destroying her work clothing, inflicting noticeable injuries to create a disincentive to appear in public, hiding car keys or disabling her family car, threatening to kidnap the children if she leaves them with a babysitter or at day care, and harassing her at work.[76]

These pervasive, abusive experiences lead an overwhelming number of survivors to feel that the emotional harm inflicted by their partners is far more damaging than the physical injuries.[77] And this response is consistent with what we know from research; women report that psychological abuse is by far the greatest source of their distress,[78] regardless of the frequency or severity of the physical harm they've experienced.

So when a judge in a civil protection order court says to a woman: "tell me what happened," she may well focus on the harm that is most salient to her—the constant derogatory name calling, the way he made her feel that everything was her fault, the way he always checked her phone to see who she was talking to. The physical violence and threats may take a back seat; she might not even mention them unless specifically asked.[79] Thus, survivors often frame their courtroom stories in a way that fails to fit the expectations of most judges, and even of the law itself: what may feel to victims like the most insidious and intimate brand of abuse can come across to legal gatekeepers as something that really doesn't count as abuse at all.

The result is what philosophers call a serious "epistemic asymmetry" between marginally situated survivors and the judges who serve as their audience.[80] I (the first author) have frequently been in courtrooms and

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76 Jody Raphael, *Battering Through the Lens of Class*, 11 J. GENDER, SOC. POL'Y. & L. 367, 369 (2003); *see also* Postmus, *supra* note 75, at 246. For an excellent discussion of the failure of the legal system to incorporate the full range of survivor harms, see generally Johnson, *supra* note 69.

77 The authors have observed this prioritization throughout their over fifty years of combined experience talking to women survivors.

78 *See, e.g.*, Mary Ann Dutton, Lisa A. Goodman & Lauren Bennett, *Court-Involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse,* 14 VIOLENCE & VICTIMS 89, 101-02 (1999) (finding that symptomatic responses to abuse, including PTSD and depression, were largely predicted by psychological abuse, rather than by physical violence); Mindy B. Mechanic, Terri L. Weaver & Patricia A. Resick, *Mental Health Consequences of Intimate Partner Abuse*, 14 VIOLENCE AGAINST WOMEN 634, 649-50 (2008). In addition, the psychological component of intimate partner violence appears to be the strongest predictor of posttraumatic stress disorder. *See* Maria Angeles Pico-Alfonso, *Psychological Intimate Partner Violence: The Major Predictor of Posttraumatic Stress Disorder in Abused Women*, 29 NEUROSCIENCE & BIOBEHAV. REVS. 181, 189 (2005) ("When the role of psychological, physical, and sexual aspects of intimate partner violence were considered separately, the psychological component turned out to be the strongest predictor [of PTSD].").

79 This has been a consistent experience of the first author in representing many hundreds of women survivors, and watching thousands more, not represented by counsel, tell their stories in civil protection order court.

80 *See, e.g.*, Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 167, 170 (Ian James Kidd et al. eds., 2017) [hereinafter ROUTLEDGE HANDBOOK].

witnessed judges, presiding over protection order cases, get frustrated with women who testify at length about their mental anguish at their partner's hands. These survivors—more than eighty percent of whom proceed without the benefit of legal representation[81]—have no idea that this part of their stories will not trigger legal relief. It is often only after aggressive judicial questioning that survivors volunteer information about physical abuse or threats, and when they do, they may sound—to the judges, at any rate—less concerned about those aspects of their stories than about the day-to-day psychic harms they have endured. In this context, the admission of physical abuse can sound to judges like something of an afterthought. Because so many judges do not understand survivors' frames for their experiences, they may suspect that women's too-little, too-late testimony about physical violence is either exaggerated or fabricated out of whole cloth; that they are adding it only after belatedly realizing that the law demands such facts.

This profound gap in understanding—assuming a woman survivor's story is less plausible when it fails to meet her judicial audience's expectations about how the world works—creates real obstacles for survivors. The survivor has tried her best to faithfully recount her story as she experienced it, and thus with actual fidelity to the truth. But the judge has a fundamentally different understanding of how the world works, and he may well assume his is a universal one. As a result, the woman may well suffer a credibility discount based not on a fair assessment of her case, but rather on a fundamental failure of understanding.

As the above discussion illustrates, even after nearly five decades of anti-domestic violence advocacy, many justice system gatekeepers still lack a sophisticated understanding of what constitutes a truly plausible story about women's experiences of intimate partner abuse. Extensive and often high-profile media coverage, radical changes in the civil and criminal laws, the creation of specialized domestic violence courts, support for a massive proliferation of shelters and advocacy programs, and millions of dollars' worth of research[82] have not realigned the way many officials go about making sense of plausible survivor behavior.

The dominant culture's persistent failure to absorb the different experiences shared among a marginalized group may well derive from what philosopher Gaile Pohlhaus calls a "willful hermeneutical ignorance."[83] Pohlhaus describes how our culture's asymmetrical authority systems essentially downgrade women into a status of less competent "knowers" than men.[84] Men, in contrast, are:

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81 *See* Barasch, *supra* note 11.

82 *See, e.g.*, Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3-4 (1999).

83 Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 17.

84 *Id*.

> [E]ncouraged to develop a kind of epistemic arrogance in order to maintain that their experience of the world is generalizable to the entirety of reality, a close-mindedness to the possibility that others may experience the world in ways they cannot, and an epistemic laziness with regard to knowing the world well in light of those [who are] oppressed . . . .[85]

The result here is that members of the predominantly male, nonsurvivor culture place too much weight on their own—uninformed, inexperienced—perceptions about key features of domestic violence, and too little on the perceptions of survivors with firsthand experience. When male authority figures are made aware of how their perceptions conflict with the stories of women survivors, they resolve the conflict by doubting women's articulated experience.[86] Cognitive scientists refer to this phenomenon as "belief perseverance"—the process by which people tend to hold onto a set of beliefs as true, even when ample discrediting evidence exists.[87]

Women victimized by domestic violence often fail to offer narratives that are recognized as internally consistent, due, paradoxically enough, to symptoms of neurological and psychological trauma that *are themselves the effects of abuse*. Such women also fail to tell stories that fit the way nonsurvivors believe the world operates, resulting in the appearance of external inconsistency and, as an all-too predictable outcome, the reflexive dismissal of their experience within the justice system and the broader culture. Together, these apparent—but not real—inconsistencies in survivors' stories cast doubt on the stories' plausibility. And the real-world costs are steep indeed: judges, police officers, and other justice system gatekeepers are likely to impose credibility discounts that interfere with a woman's ability to obtain justice, safety, and healing.

### B. *Storyteller Trustworthiness*

In addition to obstacles rooted in story plausibility, survivors face serious challenges in convincing justice system gatekeepers to accept them as personally trustworthy storytellers. In other words, regardless of the *content* of her story, a woman may be considered an unreliable reporter of her own experiences. In the philosophy literature, this is referred to as "testimonial injustice": a discriminatory disbelief of the storyteller herself, independent of the story she tells.[88]

Three of the most critical factors that contribute to our assessments of storyteller trustworthiness are (1) the storyteller's demeanor;[89] (2) the

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85 *Id.* at 17.

86 McKinnon, *supra* note 80, at 170-71.

87 *See, e.g.*, Savion, *supra* note 45, at 81.

88 FRICKER, *supra* note 49, at 4.

89 *See infra* text accompanying notes 912–111.

storyteller's motive;[90] and (3) the storyteller's social location.[91] All three of these factors are particularly salient in the experiences of women domestic violence survivors trying to establish credibility in the eyes of justice system gatekeepers.

### 1. Demeanor

As discussed above,[92] when a survivor tells the story of the abuse she has experienced, her demeanor may be symptomatic of psychological trauma induced by extended abuse. Three core aspects of PTSD—numbing, hyperarousal, and intrusion[93]—can influence demeanor in obvious ways. And despite the proliferation of police and judicial training, many gatekeepers continue to misinterpret—and, as a result, discount—the credibility of women who display each set of symptoms when telling their stories of abuse.

A survivor can respond to overwhelming trauma by becoming emotionally numb, a compensating psychic response that often manifests as a highly constrained affect.[94] This symptom can profoundly shape the way a woman appears in court and, in turn, how a judge or other justice system gatekeeper perceives her. Numbing may cause many survivors to testify about emotionally charged incidents with an entirely flat affect or render them unable to remember dates or details of violent incidents.[95] A woman may tell a story about how her partner sexually assaulted her as if she is talking about the weather outside. The disconnect between expectations about affect and story can be jarring and can result in the imposition of a credibility discount.

PTSD also alters demeanor via hyperarousal—that is, an anxious posture of alertness and reactivity to an imminent danger.[96] This "[h]yperarousal can cause a victim to seem highly paranoid or subject to unexpected outbursts of rage in response to relatively minor incidents."[97] In the courtroom, for example, an accused abusive partner may give the survivor a particular look or adopt a particular tone of voice. The judge may not notice anything out of the ordinary, but the partner does: She knows that the abuser is communicating a message of intimidation or threat. As a result, she may suddenly break down on the witness stand, gripped by fear, frustration, fury, or all three. But to the judge, who has no window into the triggering event, the survivor is likely to sound

90 *See infra* text accompanying notes 112–141.

91 *See infra* text accompanying notes 143–165.

92 *See supra* text accompanying notes 33–40.

93 DSMD, *supra* note 35, at 271-72.

94 *Id.* at 272.

95 *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221 (1993); *see also* HERMAN, *supra* note 39, at 45.

96 DSMD, *supra* note 35, at 272.

97 Epstein, *supra* note 82, at 41.

out of control, even a bit crazy.[98] The survivor now fits the stereotype of a classic hysterical female—an image commonly associated with exaggeration and unreliability.[99] The judge is therefore more likely to apply a credibility discount in such settings and assume that, regardless of the content of her story, the survivor is not a fully trustworthy witness.

Finally, as discussed in the context of story plausibility, PTSD symptoms affect demeanor through *intrusion*—reliving the violent experience as if it were occurring in the present, often through flashbacks.[100] Such unbidden re-experiencing of traumatic events may badly impair a witness' ability to testify in a narratively seamless—or indeed, even a roughly sequential—fashion.[101]

Once more, domestic violence complainants can find themselves in a double bind. The symptoms of their trauma—the reliable indicators that abuse has in fact occurred—are perversely wielded against their own credibility in court. Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to credibility discounts that may be imposed by police, prosecutors, and judges.[102]

Even demeanor "evidence" that is not symptomatic of trauma but that is a "normal" response to stressful courtroom circumstances can lead judges to discount a survivor's credibility. In a 2017 Boston trial court proceeding, for example, a woman seeking a one-year extension of her existing protection order testified about her abiding fear of her former partner. Following a contested trial, the judge awarded her the extension. Sitting next to her attorney as she listened to the court's ruling, she smiled and slumped in her seat, her torso sagging with relief. A few days later, the trial judge, sua sponte, set a reconsideration hearing. He told the woman that, in his view, she had appeared "too celebratory" when he had ruled in her favor at the previous hearing. As a result, he realized that she was not, in fact, a credible witness. The judge then vacated his previous decision to extend her protection order.[103]

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98 *See* Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1078 (2011).

99 *See id.* at 1079 ("Female jurors, according to one study, already believe that women are generally 'less rational, less trustworthy, and more likely to exaggerate than men.'").

100 DSMD, *supra* note 35, at 275.

101 Epstein, *supra* note 82, at 41.

102 *See, e.g.*, *id.*; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996); Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim–Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 742 (2003).

103 Interview with Community Advocate, Transition House, in Cambridge, Mass. (Dec. 18, 2017). The classic example of the justice system's misuse of affective evidence is Albert Camus's novel, *The Stranger*. The protagonist, Meursault, is sentenced to death for a murder based in part on a condemnation of his unrelated, "inappropriate" actions in the days following his own mother's death. Witnesses testified that Meursault did not cry but smoked a cigarette and drank coffee as he sat near his mother's coffin, and that the day after her funeral he swam in the ocean, saw a comedy film, and then made love with a woman he'd long been romantically interested in. This behavior, inconsistent

Credibility discounts based on presumed inappropriate demeanor are imposed by other justice system gatekeepers as well. One attorney recalls a recent California case as follows:

> In my county, domestic violence cases involving children may be referred to court evaluators to meet with the parties and provide the judge with an assessment as to the veracity of the allegations. One client went to her appointment with the evaluator and reported that her ex-boyfriend had been texting her in violation of an initial, temporary protection order. She showed her phone to the evaluator, who saw that she had saved her ex-boyfriend's phone number under an expletive, instead of using his actual name. Based on this evidence of the woman's anger, the evaluator determined that she was not afraid of the respondent (a fact irrelevant to the applicable legal standard), and for this reason deemed her domestic violence claim inconclusive.[104]

At the same time, abusive men often provide a sharp credibility contrast; they tend to excel at presenting themselves as self-confident and in control, are adept at manipulation, and "are commonly able to lie persuasively, sounding sincere," all of which tends to trigger assumptions that they are in fact credible.[105] A 2015 study of survivors conducted by the National Domestic

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with society's image of a grieving son, led the community to despise him and a jury to condemn him for a murder to which he had no connection. *See* ALBERT CAMUS, THE STRANGER 8, 20-21, 64 (Matthew Ward trans., Vintage Books 1988) (1942). The tendency, in both the public and the justice system, to discount credibility and assume guilt persists today, as demonstrated by the case of Amanda Knox, a young woman from Seattle who went to Perugia, Italy, and was twice convicted in Italian courts—and, years later, fully exonerated—of murdering her housemate. *See* Martha Grace Duncan, *What Not to Do When Your Roommate Is Murdered in Italy: Amanda Knox, Her "Strange" Behavior, and the Italian Legal System*, HARV. J.L. & GENDER-CREATIVE CONTENT, Sept. 19, 2017, http://harvardjlg.com/2017/09/what-not-to-do-when-your-roommate-is-murdered-in-italy-amanda-knox-her-strange-behavior-and-the-italian-legal-system-by-martha-grace-duncan/ [https://perma.cc/VBS7-P23B]. Amanda's initial conviction was heavily dependent on her "inappropriate" actions in the days following the murder, including kissing her boyfriend not far from the scene, cuddling with him at the police station, turning a cartwheel—at a police officer's request—while waiting to be interviewed, and shopping for underwear not long after the murder (because she had no access to her apartment, which was locked down as a crime scene). *Id.* at 10-23. Similarly, Lindy Chamberlain was convicted of murdering her infant daughter while camping in the Australian outback. Clyde Haberman, *Vindication at Last for a Woman Scorned by Australia's News Outlets*, N.Y. TIMES (Nov. 16, 2014), https://www.nytimes.com/2014/11/17/us/vindication-at-last-for-a-woman-scorned-by-australias-news-media.html. Public sentiment condemned Chamberlain early on, based largely on her attire and affect in the courtroom. Lindy described feeling "trapped in a no-win situation. 'If I smiled, I was belittling my daughter's death . . . . If I cried, I was acting.'" *Id.* Forensic evidence subsequently exonerated Chamberlain, confirming the accuracy of her report that a wild dog pulled her daughter out of a tent and killed her. *Id*.

104 Interviews with Jane Stoever, Clinical Professor of Law, Univ. of Cal., Irvine Sch. of Law (Jan. 6 & 9, 2018).

105 LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT 15-16 (1st ed. 2002); *see also* Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 174

Violence Hotline is full of examples of this profoundly damaging credibility gap, including this one from a female survivor: The police made "things worse and act[ed] like I was the bad guy because I came in crying, but my abuser was calm after 2 years of hell—duh[,] I was scared and he was fine."[106]

The skeptical reactions of justice system gatekeepers to survivor demeanor can trigger a vicious cycle of credibility discounts. The more a police officer or judge appears to doubt a survivor's credibility, the more likely she is to feel upset, destabilized, or even (re)traumatized.[107] This reaction may trigger an increase in the intensity of her emotionally "inappropriate" demeanor, making her appear even less credible.[108] In other words, the testimonial injustice that women experience as they seek to be recognized as credible witnesses to their own abuse can become a self-fulfilling phenomenon: they internalize the court's image of themselves as unreliable narrators of their own experience.[109]

Social psychologists have coined the term "stereotype threat" to explain such harm. Stereotype threat arises when a person feels that she is at risk of conforming to a cultural stereotype about her particular social group. The existence of negative stereotypes—regardless of whether an individual herself accepts them—can make that individual anxious, and harm her ability to perform.[110] Thus, the existence of

(2009)("[B]atterers tend to be self-confident and ultra-controlled in their outward appearance and thus testify in a way that is traditionally perceived as truthful.").

106 TK LOGAN & ROB VALENTE, NAT'L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 9-10 (2015), http://www.thehotline.org/resources/law-enforcement-responses [https://perma.cc/CC5Z-Z56H] [hereinafter National Hotline Survey]. Two national studies, both conducted in 2015, help us understand what is happening on the ground in terms of police refusal to credit survivor stories. One study, conducted by the ACLU, surveyed more than 900 domestic violence service providers about their clients' experiences with police. ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE AND POLICING (2015), www.aclu.org/responsesfromthefield [https://perma.cc/3CKD-6J9E] [hereinafter Responses from the Field]. The other, conducted by the National Domestic Violence Hotline, surveyed survivors themselves. National Hotline Survey, *supra* note 106, at 2. In the National Domestic Violence Hotline survey, just over half of the 637 women surveyed reported that they had never called the police for help when they experienced domestic violence. *Id.* at 2. When asked for the reason, fifty-nine percent of these participants said that their decision was based on either their fear that the police would not believe them or—and this is where we get to consequential credibility—that they would do nothing in response to their reports of abuse. *Id.* at 4. Much the same perceived deficit in consequential credibility hampered the reporting efforts of the remaining 309 women interviewed in the National Hotline Survey who *had* in fact interacted with the police: two-thirds of these women reported that they were "somewhat or extremely afraid" to call again in the future, based on the same sets of concerns. *Id.* at 8.

107 *See* Jennifer Saul, *Implicit Bias, Stereotype Threat, and Epistemic Injustice*, in ROUTLEDGE HANDBOOK, *supra* note 80, at 236-38.

108 *See supra* text accompanying notes 91–107; *infra* notes 109–110.

109 Saul, *supra* note 107.

110 *See, e.g.*, Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997); Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 389 (2002).

such stereotypes, and women's concern about conforming to them, can diminish survivors' ability to effectively communicate their experiences.[111]

### 2. Motive

To assess the trustworthiness of a woman's account of domestic violence, judges and other gatekeepers are inevitably (though perhaps unconsciously) influenced by stereotypical beliefs about women, particularly in the context of intimate relationships.[112] Although such beliefs vary by the individual, certain fundamental cultural tropes about women's motives to lie and manipulate tend to resonate here. Two of the most persistent and crude stereotypes about women's false allegations about male behavior are the grasping, system-gaming woman on the make and the woman seeking advantage in a child custody dispute.

A recent review of the first twenty websites to appear in a Google search of the term "domestic violence false allegations" underlines the power of these stereotypes in the legal context. The vast majority of the "hits" in response to this search were websites maintained by small firm and sole practitioner defense attorneys; in other words, lawyers available to represent those accused of domestic violence, typically in the face of criminal prosecution. These lawyers post advice for potential clients, and most explain that "false allegations" of domestic violence tend to derive from women scheming for some sort of material payday or other advantage, such as a leg up in a child custody case.[113] Each of these stereotypes, and their implications for women's credibility, is explored below.

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111 *See* Saul, *supra* note 107, at 238.

112 Philosopher Kristie Dotson calls this "testimonial quieting." Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236, 242-43 (2011).

113 *See* Memorandum Analyzing First Twenty Hits for "Domestic Violence False Allegations" (Nov. 15, 2017) (on file with authors). The twenty websites are: https://www.breedenfirm.com/domestic-violence/defending-false-accusations-domestic-violence; https://billingsandbarrett.com/new-haven-criminal/domestic-violence-lawyer/false-accusations; https://www.adamyounglawfirm.com/Criminal-Defense/Violent-Crimes/False-Allegations-Of-Domestic-Violence.shtml; https://criminallawdc.com/dc-domestic-violence-lawyer/false-accusations; https://www.bajajdefense.com/san-diego-domestic-violence-attorney; https://www.jonathanmharveyattorney.com/Domestic-Violence/False-Allegations.shtml; https://www.lafaurielaw.com/Criminal-Defense/Domestic-Violence-Order-of-Protection-in-Family-IDV-Courts/False-Domestic-Violence-Accusations.shtml; https://chicagocriminaldefenselawyer.com/false-accusations-domestic-violence; http://www.amcoffey.com/Criminal-Defense-Overview/False-Domestic-Violence-Allegations.shtml; https://criminallawyermaryland.net/maryland-domestic-violence-lawyer/false-accusations; http://www.lnlegal.com/blog/2017/february/have-you-been-falsely-accused-of-domestic-violence; http://www.scottriethlaw.com/blog/2017/06/how-false-allegations-of-domestic-violence-can-ruin-your-life.shtml; https://www.weinbergerlawgroup.com/domestic-violence/false-allegations/defending-faqs; https://www.dworinlaw.com/false-domestic-violence-austin-texas; https://stearns-law.com/family-law-services/domestic-violence/false-accusations; http://www.inlandempiredomesticviolence.com/Domestic-Violence/Falsely-Accused-of-Domestic-Violence.aspx; https://www.carlahartleylaw.com/Domestic-Violence-And-Criminal-Law/False-Accusations-Of-Domestic-Violence.shtml; http://www.bosdun.com/Blog/2017/March/What-To-Do-if-You-Have-

a. *The Grasping Woman on the Make*

The grasping woman stereotype flourished in the Reagan era, when legislators portrayed poor women as "welfare queens," whose family planning decisions were solely dependent on a desire to expand their monthly benefit check by a few dollars. Though factually discredited,[114] the welfare queen image continues to have an impact on the law: to this day, fifteen states prohibit families from receiving higher benefit levels if a baby is born while the household is on assistance, in an effort to ensure that cash aid will not serve as a putative incentive for poor women to have more children.[115]

This same stereotype is reflected in our contemporary obsession with women as "gold diggers," based on the 1933 movie of that name.[116] This stereotype imbues the lyrics of the eponymous hip hop song about women who target wealthy men, falsely claim that these men are the fathers of their children, and then soak them for child support.[117] It is readily apparent in Silicon Valley,

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Been-Wrongly-Accused-of-D.aspx; http://www.flowermoundcriminaldefense.com/domestic-violence; https://www.kefalinoslaw.com/miami-domestic-violence-defense-lawyer.

114 *See* Stephen Pimpare, *Laziness Isn't Why People Are Poor. And iPhones Aren't Why They Lack Health Care*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/08/laziness-isnt-why-people-are-poor-and-iphones-arent-why-they-lack-health-care/?utm_term=.59f65871be13; Eduardo Porter, *The Myth of Welfare's Corrupting Influence on the Poor,* N.Y. TIMES (Oct. 20, 2015), https://www.nytimes.com/2015/10/21/business/the-myth-of-welfares-corrupting-influence-on-the-poor.html.

115 Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 249 (2014).

116 GOLD DIGGERS OF 1933 (Warner Bros. 1933) (portraying aspiring actresses experiencing financial hardship who conspire to find wealthy husbands).

117 Kanye West's song, *Gold Digger*, contains the following lyrics:

> Eighteen years, eighteen years
> She got one of your kids got you for eighteen years
> I know somebody payin' child support for one of his kids
> His baby mama car and crib is bigger than his
> You will see him on TV, any given Sunday
> Win the Super Bowl and drive off in a Hyundai
> She was supposed to buy your shorty Tyco with your money
> She went to the doctor, got lipo with your money
> She walkin' around lookin' like Michael with your money . . .
> If you ain't no punk
> Holla "We want prenup! We want prenup!" (Yeah!)
> It's somethin' that you need to have
> 'Cause when she leave yo' ass she, gon' leave with half
> Eighteen years, eighteen years
> And on the eighteenth birthday he found out it wasn't his?!
> . . . Now I ain't saying she a gold digger . . .
> But she ain't messin' with no broke n* . . .

KANYE WEST, *Gold Digger*, *on* LATE REGISTRATION (Roc-A-Fella Records & Def Jam Recordings 2005).

where tech magnates swap warnings about women they refer to as "founder hounders."[118] These gender stereotypes are, of course, shaped by race, class, and other identity-based assumptions. The image of the welfare queen, as one example, was purposefully designed to draw its power from racialized narratives;[119] at the same time, it operates more broadly to negatively affect societal perceptions of all women, perhaps especially those who are also poor or low income. As with all stereotypes, those that affect women as women are not monolithic in their impact: gender stereotypes are racialized (the unrapeable black woman, for example), and racial discounts are gendered (blackness in women is stigmatized in ways specific to black women in particular). Despite this diversity of impact and complexity of harm, the bottom line is that we tend to discount the trustworthiness of all women who appear to be motivated by a desire to get something, either from the government or from their male partners.

This social myth is particularly lethal for women seeking safety from intimate partner violence, especially those who are trying to exit their abusive relationships. Most survivors need concrete resources to bring about this fundamental change in their living situation. Although a woman's informal network of support, made up of family and friends, may be able to help by providing a place to stay, transportation, childcare, or financial assistance,[120] these resources may well not be sufficient and are often stop-gap or finite in nature. Eventually, many abuse survivors need to secure additional resources, frequently by turning to the social welfare system or the safety furnished by a civil protection order.[121] This quest for some sort of subsidized autonomy is, once again, a reflection of the underlying dynamics of domestic abuse.[122]

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118 *See* Emily Chang, *"Oh My God, This Is So F---ed Up": Inside Silicon Valley's Secretive, Orgiastic Dark Side*, VANITY FAIR (Feb. 2018), https://www.vanityfair.com/news/2018/01/brotopia-silicon-valley-secretive-orgiastic-inner-sanctum ("Whether there really is a significant number of such women is debatable. The story about them is alive and well, however, at least among the wealthy men who fear they might fall victim.").

119 Premilla Nadasen, *From Widow to "Welfare Queen": Welfare and the Politics of Race*, 1 BLACK WOMEN, GENDER & FAMILIES, 52 (2007), 69-70.

120 Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women's Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 339 (2006); Lisa A. Goodman & Katya Fels Smyth, *A Call for a Social Network-Oriented Approach to Services for Survivors of Intimate Partner Violence*, 1 PSYCHOL. OF VIOLENCE 79, 81 (2011); Stephanie Riger, Sheela Raja & Jennifer Camacho, *The Radiating Impact of Intimate Partner Violence in Women's Lives*, 17 J. INTERPERSONAL VIOLENCE 184, 198–200 (2002).

121 *See, e.g.*, ELEANOR LYON, SHANNON LANE & ANNE MENARD, NAT'L INST. JUSTICE, MEETING SURVIVORS' NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES iv (2008) (noting that "domestic violence shelters address compelling needs that survivors cannot meet elsewhere"); PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf [https://perma.cc/3TSQ-6PKY] (noting that a substantial percentage of women survivors of intimate partner violence seek a civil protection order).

122 *See supra* text accompanying notes 112, 114.

An all-too-common strategy of abusers is to force women into social isolation, thus limiting their access to those family and friends who might have been willing to provide them with help.[123] The law in most states authorizes system officials to provide survivors assistance such as priority in shelter access, or a protection order provision ordering their abusive partner to vacate a home in which they share a legal interest.[124] Again, these resources for survivors are built into our law and policy for good reason—survivors need them to stave off repeat violence.[125] But when women actually pursue such concrete, practical assistance, they often suffer an immediate credibility discount; their trustworthiness is now colored by the suspicion that they are motivated by a desire to obtain shelter or sole access to a residence, rather than by the urgent need to protect themselves from violence.[126]

I (the first author) have participated in numerous judicial training sessions with judges in the D.C. Superior Court's Domestic Violence Unit. Year after year, I have listened as veteran judges warn those who are more junior, cautioning that "so many times I hear these stories and something seems wrong; then I realize the woman is just here to get shelter, or to kick her ex out of the house without having to go through a divorce. Keep an eye out for that." These judges are encouraging their colleagues to discount the personal trustworthiness of women based on their efforts to seek legally authorized resources on their path to safety.[127]

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123 LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 107 (2009); *see also* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1021-22 (2000) ("[Battered women] frequently become estranged from family and friends who might otherwise provide them with material aid."); Jody Raphael, *Rethinking Criminal Justice Responses to Intimate Partner Violence*, 10 VIOLENCE AGAINST WOMEN 1354, 1357 (2004) ("Women are not allowed to talk on the telephone, visit their friends, attend church, decide on their own what to wear, or go to school or work.").

124 SUSAN L. KEILITZ, PAULA L. HANNAFORD & HILLERY S. EFKEMAN, NAT'L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE, 12-14 (1997), https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf [https://perma.cc/3SXH-SJ6E].

125 *See, e.g.*, MONICA MCLAUGHLIN, NAT'L LOW INCOME HOUS. COAL., HOUSING NEEDS OF VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING, 1 (2017), http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch06-S01_Housing-Needs-of-Victims-of-Domestic-Violence.pdf [https://perma.cc/SJT7-2DBX] (explaining that "safe housing can give a survivor a pathway to freedom").

126 As noted above, women of color may be especially likely to experience such credibility discounts due to the racialized nature of the stereotypes that drive them.

127 One more example: In a 2012 Baltimore protection order case, Judge Bruce S. Lamdin listened to Heather Myrick-Vendetti testify about her husband's abuse, including the following statement: "He pinned me to a shelf, busted my arm open, left a gash in my forearm. He then threw me down on the floor and stomped me in the ribs so hard that I peed my pants. My oldest, who was 12 years old, got my son and hid in a closet with a hammer and called someone to come get us." *Judge Bruce Lamdin Interrogates Woman Seeking Restraining Order*, WASH. POST (Sept. 9, 2012), https://www.washingtonpost.com/opinions/judge-bruce-lamdin-interrogates-woman-seeking-

And attorneys representing survivors pick up on the power that these unfair stereotypes can exert in the courtroom. Until recently, I (the first author) had often joined the ranks of many other victim advocates in doing just that: when representing a client who is privileged enough not to need much assistance from the court (perhaps she doesn't have children with her abusive partner, she doesn't live with him, or their relationship was relatively limited so she was more easily able to cut him out of her life), I have argued that the court should find my client especially credible *for this reason*. In other words, because my client is seeking only narrowly limited, safety-based remedies, rather than requesting the full range of relief legally available to her, the court should view her as particularly credible. I've done this for the same reason lawyers use to make every strategic decision: because my audience—the court—is likely to buy the argument. My lawyering instincts tell me that a judge will, in fact, understand a more limited request for relief as a real indication of a survivor's credibility.[128]

But I have belatedly come to realize that in pursuing this approach I am helping one client but simultaneously lending support to a prejudicial, gender-based credibility discount. Logically, the flip side of my argument must also be true: judges view survivors who seek more extensive remedies as *less* credible—as women who may be fabricating or exaggerating their allegations in order to obtain resources such as shelter and financial support.[129]

It is worth noting here that these judicial suspicions—discounting credibility when a woman asks for the full scope of available relief—simply do not arise in contexts that are not dominated by women litigants. It is laughable to imagine a judge suspecting the credibility of a business owner if, after presenting a colorable legal claim, that owner sought to recover an

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restraining-order/2012/09/09/614fd664-faae-11e1-875c-4c21cd68f653_video.html?tid=areinl; *see also Baltimore County Judge Bruce Lamdin Faces Complaint* (WBAL TV television broadcast Sept. 4, 2012), https://www.wbaltv.com/article/911-dispatcher-responds-to-call-at-his-own-home-i-just-handled-it-like-any-other-call/25239609 [https://perma.cc/PP3K-83BB]. Ms. Myrick-Vendetti then described her husband's attempt to burn down their house a few days later. *Id.* When she told the judge that her husband constituted a threat to her safety and requested that he be ordered to leave the home they shared, Judge Lamdin responded, "Ma'am there are shelters," and "It confounds me that people tell me they are scared for their life and then they stay in a situation where they can remove themselves and go to a shelter." *Id.* Although this story is an extreme one, it reflects a deeply held suspicion that woman seeking resources are operating from false motives and cannot be trusted.

128 Other lawyers representing survivors report doing the same. *See, e.g.*, Interview with Megan Challender, Supervising Attorney, Md. Ctr. for Legal Assistance (July 12, 2017) (reporting that she has observed lawyers making these arguments in court on multiple occasions); Interview with Margo Lindauer, Assoc. Teaching Professor & Dir. of the Domestic Violence Inst., Ne. Univ. Sch. of Law (Jan. 21, 2018).

129 One survivor attorney recently shared an experience where the judge in a Washington, D.C., civil protection order case explicitly ruled that the survivor was credible because "she was not asking for anything other than to be left alone." Interview with Megan Challender, *supra* note 128; *see also* Interview with Courtney K. Cross, Assistant Clinical Professor of Law & Dir., Domestic Violence Clinic, Univ. of Ala. Sch. of Law (July 12, 2017).

extensive range of statutorily enumerated remedies. Why are women subjected to male violence held to a different standard?

Credibility discounts based on the grasping woman stereotype extend beyond the judicial realm to other gatekeepers. In Washington, D.C., for example, court-appointed attorney negotiators meet with unrepresented parties in civil protection order cases and attempt to resolve matters without the need for a contested trial. Several of these negotiators have, on many occasions, shared the view that petitioners are not "real" victims of domestic violence, but instead are there to get housing and other resources.[130] These suspicions about survivors' motives color the work of the D.C. Superior Court's Crime Victim's Compensation ("CVC") program as well. The CVC provides a variety of material and housing-related resources to local victims of crime. A survivor is entitled to obtain emergency shelter based on an initial, emergency judicial determination that she is entitled to a short-term temporary protection order. CVC officials then monitor her actions. If the court docket reveals that she ultimately has dropped her request for a permanent order—regardless of whether this decision was made because she was reassaulted and intimidated into doing so, she decided to move to another jurisdiction to better protect herself, or she was unable to accomplish the necessary service of process—the CVC will peremptorily terminate her request for assistance.[131]

This grasping woman stereotype puts survivors in a terrible bind. We know that victims of domestic violence frequently are unable to successfully handle the violence in their lives without seeking outside help.[132] Many, if not most, need the full set of remedies permitted in civil protection order statutes, such as shelter, financial support, and other assistance. By superimposing stereotype-based credibility assessments onto women's requests for relief, we are forcing these women to make an untenable choice: they may either seek the full range of assistance they actually need to achieve safety, but risk suffering a court-imposed credibility discount; or they may make a bid to appear more credible by forgoing essential resources needed for protection. And, of course, the women who are most disadvantaged, and thus need the greatest amount of help, are the ones who are least likely to be believed.

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130 This observation is based on the first author's extensive experience litigating hundreds of civil protection order cases. *See supra* note 9. Other D.C. domestic violence advocates confirm the routine nature of such comments. *See, e.g.*, Interview with Gillian Chadwick, *supra* note 58; Interview with Courtney K. Cross, *supra* note 129.

131 *See* Interview with Janese Bechtol, Chief, Domestic Violence Section, Office of the Attorney General for the District of Columbia (Aug. 17, 2018). For an overview of the Washington, D.C., crime victim compensation program, see *Crime Victim Compensation & Services in Washington, D.C.*, Interview by Len Sipes with Laura Banks Reed, Dir., Crime Victims' Compensation Program of the D.C. Superior Court (Mar. 3, 2014), https://media.csosa.gov/podcast/transcripts/category/audiopodcast/page11/ [https://perma.cc/LYK5-8H5V].

132 *See* LYON, LANE & MENARD, *supra* note 121.

b. *The Woman Seeking Unfair Advantage in a Child Custody Dispute*

Women seeking to escape violent relationships often must turn to the family courts to resolve custody and other issues with their abusive partners. And virtually every state custody statute requires family court judges to consider intimate partner abuse as a factor weighing against an award of custody to the parent-abuser.[133] Indeed, the U.S. House of Representatives recently passed a concurrent resolution urging state courts to determine family violence claims and risks to children before turning to the consideration of any other custody factors.[134]

The rationale for such legal provisions is that parent-on-parent violence harms not only the victim-parent, but also the children, who may witness the violence or its aftermath.[135] But women's experience in these courts defies the sense of the law as written: in fact, mothers' allegations of domestic violence are discounted or even fully discredited by family court judges.

Recent studies of family court custody decisions reveal that mothers who allege intimate partner violence are actually *more* likely to lose custody than mothers who do not make such assertions.[136] In other words, a claim of parent-on-parent violence operates to *undermine, rather than strengthen*, custody requests made by survivor-mothers. Judges tend to conclude, typically with no evidence other than the perpetrator-father's uncorroborated assertion, that women are fabricating abuse allegations as part of a strategic effort to alienate the children from their father.[137] The mother's experience of abuse is turned on its head to support the perpetrator's claim that he is the better parent.

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133 AM. BAR ASS'N, *Custody Decisions in Cases with Domestic Violence Allegations*, https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/domestic_violence_chart1.pdf (demonstrating that Connecticut is the sole exception to this rule).

134 H.R. Con. Res. 72, 115th Cong. (Sept. 25, 2018).

135 *See* Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 797 (2008) ("This review finds that children and adolescents living with domestic violence are at increased risk of experiencing emotional, physical and sexual abuse, of developing emotional and behavioral problems and of increased exposure to the presence of other adversities in their lives.").

136 *See* Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311, 328 (2017) ("Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly *more* than when they were *not* accused of abuse (67%)."); *see also* Janet R. Johnston, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 290 (2005).

137 Meier & Dickson, *supra* note 136, at 318. This credibility discount is particularly disconcerting in light of studies examining the reliability of domestic violence allegations in the context of family law proceedings. Such studies have found that the allegations of women-mothers are substantiated—in other words, corroborated by sources in addition to the testimony of the woman who asserted them—in a high percentage of cases. *See, e.g.*, Johnston et al., *supra* note 136, at 290 (finding corroboration rate of sixty-seven percent). Although the remainder of these allegations lack independent corroboration, this does not mean that they are false; instead, it simply means that insufficient additional information exists beyond the parent's testimony.

Family court studies further reveal that when a father alleges that a mother has engaged in "parental alienation,"[138] his chances of being awarded custody increase *even when his allegations are not credited or are left unresolved by the court*.[139] The judicial assumption that women falsely allege or exaggerate domestic violence in an effort to obtain custody runs so deep that family court judges appear to cling to it even in cases where they themselves determine that such a claim is untrue.[140]

The credibility discounting operates in the reverse direction as well. At a 2016 "Bench–Bar" social event, two judges involved with the D.C. domestic violence court commented that they were well aware that women who file for protection orders after having already initiated custody proceedings are trying to "pull the wool over [the judge's] eyes."[141]

The result is that survivor-mothers often leave family court having been wrongly denied custody of their children, and may be unfairly discredited and denied relief in their civil protection order hearings as well. A judicial willingness to discount their trustworthiness can have repercussions that will last throughout their own lives and those of their children.

### 3. Social Location

Cognitive psychology teaches us that our wider culture—as translated by the media, authority figures, family members, etc.—transmits stereotypes to individuals that we then adopt on a deep, unconscious level.[142] Our most

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138 Parental alienation syndrome is a hypothesized disorder first proposed by psychiatrist Richard Gardner in 1985. Gardner believes that the disorder arises primarily in the context of child custody disputes and involves a child being manipulated by one parent into internalizing the unjustified denigration of the other parent. In the more than thirty intervening years, the diagnosis has yet to be accepted in the mental health community. *See* Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 64 (2016). Instead, a great deal of psychological and legal literature has critiqued the construct, and both leading researchers and most professional institutions have renounced the concept as lacking in empirical basis or objective merit. *See* Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 236 (2009) ("The critiques of Gardner's PAS are legion . . . "). Despite all of this, claims of parental alienation syndrome have come to dominate custody litigation in family court, especially in cases involving allegations of abuse. *Id.* at 233.

139 Meier & Dickson, *supra* note 136, at 331 ("[W]hen courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25-50% of the time.").

140 This refusal to accept facts that contradict a person's theory of how the world works is explained in part by the concept of confirmation bias. *See supra* text accompanying note 41.

141 Interview with Andrew Budzinski, Graduate Teaching Fellow, Georgetown Univ. Law Ctr. Domestic Violence Clinic (Jan. 22, 2018).

142 *See, e.g.*, RACHEL D. GODSIL ET AL., PERCEPTION INST., 2 SCIENCE OF EQUALITY : THE EFFECTS OF GENDER ROLES, IMPLICIT BIAS, AND STEREOTYPE THREAT ON THE LIVES OF WOMEN AND GIRLS 12 (2016), https://equity.ucla.edu/wp-content/uploads/2016/11/Science-of-Equality-Volume-2.pdf [https://perma.cc/5Q62-R9U7 ]("Popular culture plays an important part in

commonly held derogatory stereotypes include those that devalue the words of women, people of color, those living in poverty, and other marginalized groups. Once formed, these stereotypes tend to be highly resistant to counterevidence.[143] As philosopher Miranda Fricker explains, "If we examine stereotypes of historically powerless groups such as women, African Americans, or poor/working-class people, they often are associated with attributes related to poor truth-telling in particular: things like over-emotionality, lack of logical thinking, inferior intelligence, being on the make, etc."[144]

Although it is outside our scope to make a full case for each of these social categories, we will examine one of them in detail here: the practice of discounting *women's* credibility *as women*. In Rebecca Solnit's compelling essay, *Cassandra Among the Creeps*,[145] she describes the myth of Cassandra, daughter of the king of Troy. When the god Apollo tried to seduce her, Cassandra rejected him. In retribution, Apollo cursed Cassandra so that, although she could accurately foresee the future, her people always disbelieved her and shunned her as a crazy liar. Solnit notes,

> I have been thinking of Cassandra as we sail through the choppy waters of the gender wars, because credibility is such a foundational power in those wars and because women are so often accused of being categorically lacking in this department. Not uncommonly, when a woman says something that impugns a man . . . or an institution . . . the response will question not just the facts of her assertion but her capacity to speak and her right to do so.[146]

This refusal to listen to women's stories of male abuses of power runs so deep that it may have played a significant role in Sigmund Freud's early decision to upend his entire psychoanalytic theory.[147] Early in his career, Freud listened as his female patients told him story after story of their experiences of childhood sexual abuse, often at the hands of their fathers.[148] Freud believed these stories and, in the late 1880s developed his "seduction theory," arguing that early childhood

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reinforcing these gendered associations. Implicit biases are not the result of individual psychology—they are a social phenomenon that affects us all.").

143 Jeremy Wanderer, *Varieties of Testimonial Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 28.

144 *See* FRICKER, *supra* note 49, at 32; *supra* text accompanying note 41 (discussing confirmation bias).

145 Rebecca Solnit, *Cassandra Among the Creeps*, HARPER'S MAG., Oct. 2014, at 4.

146 *Id.* Professor Catharine MacKinnon, the theorist who created the term "sexual harassment" notes: "I kept track of . . . cases of campus sexual abuse over decades; it typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person." Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html.

147 *See, e.g.*, SIGMUND FREUD, AN AUTOBIOGRAPHICAL STUDY 62-65 (James Strachey trans., W. W. Norton & Co. 1963) (1925).

148 *Id.* at 62.

sexual abuse constituted the root cause of his patients' neuroses.[149] Later, however, Freud abandoned this idea, proclaiming instead that his patients' stories were not based in actual experience, but instead on fabricated, wishful fantasies that all women experience.[150] Freud's shift from crediting to discrediting women eventually led him to develop his profoundly influential theory of psychosexual development.[151]

For almost a century, conventional psychoanalytic wisdom held that Freud's shift represented an appropriate course correction—an important move toward greater accuracy in analyzing his traumatized patients. In the early 1980s, however, Jeffrey Masson, a former Sanskrit professor who had subsequently trained as a psychoanalyst and become Projects Director of the Freud Archives, turned this assumption on its head. Based on correspondence between Freud and a contemporary, Willhelm Fliess, Masson argued that Freud did not abandon his belief in his original observation—that girls were being abused in huge numbers by male relatives—based on factual evidence.[152] Instead, Freud was unable to accept the disturbing truth he had uncovered; he also may have been unwilling to risk the disapprobation of the conservative medical establishment.[153] Ultimately, Freud decided to abandon his original idea[154] and create a new theory based on the premise that women's stories of sexual violence were not fact, but fantasy.[155] In the words of psychiatrist Judith Herman, "[t]he dominant psychological theory of the next century was founded in the denial of women's reality."[156]

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149 *Id.*

150 *Id.* at 63.

151 *Id.* at 63-64. Freud's theory of psychosexual development rests on the idea that from birth, human beings possess an instinctual sexual energy (libido) that develops in five stages. According to Freud, a person who experiences frustration during any one of these developmental stages experiences a resulting anxiety that can persist into adulthood in the form of neurosis. During the third stage, called the phallic phase, which occurs between the ages of two and five, a child focuses libidinal energy or sexual wishes on the opposite sex parent and experiences feelings of jealousy and rivalry toward the same sex parent. 7 SIGMUND FREUD, *Three Essays on the Theory of Sexuality*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1975).

152 JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 107-13 (1984).

153 *Id.*

154 *Id.*

155 *Id.* at 110.

156 HERMAN, *supra* note 39, at 14. It should be noted that Masson's claim provoked a good deal of controversy in the psychiatric community, where Freud is still largely revered. *See, e.g.*, Judith Herman, *The Analyst Analyzed*, NATION (Mar. 10, 1984), at 293 (reviewing JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984)) (arguing that Masson is "right and courageous"); Charles Rycroft, *A Case of Hysteria*, 31 N.Y. REV. BOOKS 3 (1984) (reviewing JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984)) (accusing Masson of ignoring evidence contrary to his theory and presenting flimsy evidence to support it); Anthony Storr, *Did Freud Have Clay Feet?*, N.Y. TIMES, Feb. 12, 1984, at 3 (reviewing JEFFREY M. MASSON, THE ASSAULT ON

Contemporary culture continues to impart strong lessons about women's lack of trustworthiness. Our teenagers watch TV shows like *Pretty Little Liars*, *Don't Trust the Bitch in Apartment 23*, and *Devious Maids*; younger children watch animated movies like *Shark Tale*, which features a catchy tune that describes women as scheming.[157] Rap lyrics are full of stories of women deceiving and taking advantage of men.[158]

The same insidious stereotype of women as unreliable-to-hysterical distorters of the truth has quietly overtaken the justice system, where women witnesses tend to be disbelieved more than their male counterparts. In one study in which a group of "credibility raters" assessed the believability of actual witnesses testifying in trials in a mid-sized Southern city, researchers found that male witnesses were considered more credible than female witnesses.[159] Similarly, the available evidence indicates that, as a general rule, judges view women as less credible witnesses and advocates than they do men.[160] And recent studies show that the police routinely discredit female survivors of intimate partner abuse. In the 2015 National Domestic Violence Hotline Survey, for example, a substantial percentage of women reported that the police did not believe their stories of intimate partner abuse because they were women.[161]

In addition, as no end of literary and cultural texts manifest, when women—such as victims of domestic violence—are burdened with the cultural script of acting other-than rationally, or permit themselves to succumb to expressions of emotional intensity, our tendency to discredit them as individuals gains new momentum.[162] In a recent study, researchers asked a diverse group of college

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TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY) (arguing that "[e]verything we know about [Freud's] character makes Mr. Masson's accusation wildly unlikely").

157 Soraya Chemaly, *How We Teach our Kids that Women Are Liars*, ROLE REBOOT (Nov. 19, 2013), http://www.rolereboot.org/culture-and-politics/details/2013-11-how-we-teach-our-kids-that-women-are-liars [https://perma.cc/3N2E-RCEM].

158 Terri M. Adams & Douglas B. Fuller, *The Words Have Changed but the Ideology Remains the Same: Misogynistic Lyrics in Rap Music*, 36 J. BLACK STUD. 938, 945, 948 (2006).

159 Jacklyn E. Nagle, Stanley L. Brodsky & Kaycee Weeter, *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCI. & L. 195, 195, 203 (2014).

160 Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 61 (1996); *see also* Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 629 (2000)("[W]omen, more than men, are stereotyped as liars even though men and women are equally adept at telling lies."). It should be noted that existing data on judicial gender bias in credibility determinations are somewhat outdated; however, no evidence exists to indicate that the relevant findings have changed in recent years.

161 NATIONAL HOTLINE SURVEY, *supra* note 106, at 7.

162 "[I]t's also a common view, particularly in many Western patriarchal societies, that emotionality is at odds with rationality." McKinnon, *supra* note 80, at 169. For example, consider just one of many Internet memes: A young boy asks, "Dad can you explain women's logic?" His father replies, "You're grounded!" When the boy asks for the reason, the father replies with the non-sequitur: "Peanut Butter." Image, PINIMG.COM, https://i.pinimg.com/474x/73/6b/43/736b43231b83b92e7f55b22e0a386ca9.jpg [https://perma.cc/KJH7-AHYY].

students to take on the role of mock jurors, and review a condensed version of a murder trial transcript. The researchers charged the students with making a preliminary decision as to how they would vote—guilty or not guilty. They were then asked to deliberate electronically with participants whom they believed to be their fellow jurors. The other participants, however, were actually the researchers themselves—an approach designed to ensure that there was always a single "holdout" on the jury, whose messages would sound increasingly angry over the course of deliberations. Participants whose holdout was assigned a clearly male-identified name began doubting their initial opinions; in contrast, those for whom the holdout was assigned a clearly female name became significantly more confident in their initial opinions, at a statistically significant level.[163] In sum, the tendency to discredit women *because they are women* is deeply embedded in our broader culture—and clearly influences the way credibility is assessed in the legal system.

People of color, particularly Black people, have the same experience. As many legal scholars have noted, American courts have a long history of discrediting African American witnesses on the basis of their blackness. Such discrediting can occur based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest.[164] Based on all of the above, it stands to reason that black women risk being doubly disbelieved.

Poor people are also vulnerable to stereotypes about their trustworthiness, as in the earlier example of welfare queens, who cheat the system to take what is not theirs. Because so many survivors live at the intersection of all three of

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163 Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 581 (2015).

164 *See, e.g.*, Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 467 (2016) (quoting Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000)). In one striking study of judicial racial bias, 133 state and local trial judges from multiple jurisdictions were given an Implicit Association Test in which they were asked to categorize photos of white and black faces with positive attitude words (like pleasure), or negative attitude words (like awful), as quickly as possible. As hypothesized, the judges responded consistently with the general population, associating black with bad and white with good. Next, the judges engaged in a nonconscious "priming" task, in which the experimenters flashed coded words on participants' computer screens, too rapidly to be consciously processed. For example, the black prime consisted of flashed words like dreadlocks, hood, and rap; the control group prime consisted of words like summer, trust, and stress. After being primed, the judges were asked to make various determinations regarding a hypothetical case involving two juvenile defendants. Judges with higher implicit bias scores rendered harsher judgments when primed with the black racial category. *See* Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198-99 (2009). Similarly, a recent study of 239 federal and state courts found that judges held strong to moderate implicit biases against both Asians and Jews relative to Caucasians and Christians, respectively, and that on a scenario-based task, they gave slightly longer prison sentences to Jewish defendants compared to identical Christian defendants. Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017).

these identities—they are poor women of color—these stereotypes feed into each other to further undermine assumptions about their trustworthiness.[165]

And as one might expect, a woman who is mentally ill or abusing substances may experience even further credibility discounts. When a judge talks to a jury about how to assess credibility, the standard instruction emphasizes how important it is for witnesses to articulate strong and clear memories of the events they are relating, as well as their ability under the particular circumstances to have perceived—to have seen and heard—the events in question.[166] A survivor who has abused substances to cope with her partner's violence is less likely to meet this standard. So is a survivor struggling with a mental illness, regardless of whether that illness contributed to her original vulnerability, or was a consequence of it.

Each of these credibility discounts—story plausibility and individual trustworthiness—operate in a distinct fashion, but they are not necessarily independent of each other; in fact, they are often intertwined. As philosopher Karen Jones explains, "Testifiers who belong to 'suspect' social groups and who are bearers of strange tales can thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know."[167]

Indeed, a wide array of women may be viewed as untrustworthy because of who they are—women, Black women, poor women, women who exhibit trauma symptoms that are easily conflated with a lack of credibility, and women who

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165 Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, *in* SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 164-65 (Claire M. Renzetti et al. eds., 2001) (noting that African-American women are three times as likely as white women to be killed by an intimate partner). Women receiving public financial assistance are significantly more likely to experience domestic violence than are other women. Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 663 (2000). Moreover, intimate partner abuse pushes many women into homelessness. Across the United States, between twenty-two and fifty-seven percent of homeless women identify domestic violence as the immediate cause. GOODMAN & EPSTEIN, *supra* note 123, at 107; INST. FOR CHILDREN & POVERTY, THE HIDDEN MIGRATION: WHY NEW YORK CITY SHELTERS ARE OVERFLOWING WITH FAMILIES (2002), https://rhyclearinghouse.acf.hhs.gov/library/2002/hidden-migration-why-new-york-city-shelters-are-overflowing-families [https://perma.cc/9F6E-XPYE]; Rebekah Levin, Lisa McKean & Jody Raphael, *Pathways to and From Homelessness: Women and Children in Chicago Shelters*, CTR. FOR IMPACT RESEARCH (Jan. 2004), http://www.http://advocatesforadolescentmothers.com/wp-content/uploads/homelessnessreport.pdf [https://perma.cc/PG8A-H2LA]. In addition, African American women are thirty-five percent more likely to experience intimate partner violence than are white women. Women of Color Network, *Facts & Stats: Domestic Violence in Communities of Color*, DEP'T OF JUSTICE (June 2006), https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf [https://perma.cc/6ZU3-6ATL].

166 *See, e.g.*, John L. Kane, *Judging Credibility*, 33 LITIG. 31, 32 (2007); *Model Civil Jury Instructions for the District Courts of the Third Circuit, Rule 1.7* (2010), http://federalevidence.com/pdf/JuryInst/3d_Civ_Ch1-3_2010.pdf [https://perma.cc/69AN-F2QJ].

167 Karen Jones, *The Politics of Credibility*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 154, 158 (Louise M. Antony & Charlotte Witt eds., 2002).

are many or all of the above. This distrust, in turn, creates a broader hermeneutics of suspicion, through which the listener interprets the substance of her story. In other words, once a listener has discounted a woman's trustworthiness, he will be hyperalert for signs of deception, irrationality, or narrative incompetence in her story. He will tend to magnify inconsistencies and overlook the ways in which any inconsistencies might be explained away. In this way, Jones observes, "a low initial trustworthiness rating . . . can give rise to *runaway* reductions in the probability assigned to a witness's story."[168] Because women survivors tend to spark hermeneutic suspicion, both in terms of personal trustworthiness and story plausibility, they are particularly vulnerable to this kind of doubly disadvantaging credibility discount.

## II. GATEKEEPER-IMPOSED EXPERIENTIAL DISCOUNTS

The discounts women survivors face are not limited to the credibility arena. All too frequently, system gatekeepers also discount the importance of women's actual experiences and of the ways in which the system itself exposes women to additional harms. Such experiential discounting occurs when, regardless of the plausibility of a survivor's story and regardless of her personal trustworthiness—in other words, *even when system actors believe her*—they nonetheless adopt and enforce laws and policies that, in practice, revictimize her.[169]

These issues—credibility discounting and experiential discounting—cannot be considered in isolation. Such an approach would fail to capture the way that each relies on and reinforces the other, both in practical reality and through the personal lens of survivor experience. As Catherine MacKinnon explains, in the sexual harassment context:

> Even when [a woman survivor] was believed, nothing [a male perpetrator] did to her mattered as much as what would be done to him if his actions against her were taken seriously. His value outweighed her . . . worthlessness. His career, reputation, mental and emotional serenity and assets counted. Hers didn't. *In some ways, it was even worse to be believed and not have [his actions] matter. It meant she didn't matter*.[170]

Experiential discounting does not entail total disregard for harms inflicted on women, just as credibility discounting does not entail total disbelief of women's stories. Instead, gatekeepers impose experiential discounts when, in the pursuit of objectively worthy policy goals, they choose to ignore or trivialize

168 *Id.* at 159.

169 Lynn Hecht Schafran calls this women's "consequential credibility." Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, 34 JUDGES' J. 5, 40-41 (1995).

170 Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html (emphasis added).

the attendant harm to survivors. Women receive the message that system actors are relatively indifferent to the realities of their lives and the risks that shape their experiences. For an individual woman survivor, this experiential (or ontological)[171] discounting of the law's impact on her life exponentially increases the negative power of the credibility discounts she also must face.

The tendency to discount women's experiences permeates our society, including the social service and justice-based systems to which so many survivors turn for help in their efforts to be safe. The following examples illustrate this phenomenon.

### A. *Criminal Justice System*

Despite enormous improvements in the responsiveness of police and prosecutors to domestic violence over the past several decades,[172] the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors. As one example, we have known for decades that participation in a criminal prosecution can increase a woman's risk of retaliatory violence: studies show that twenty to thirty percent of perpetrators reassault their targets before the criminal court process is over.[173] Data also show that women are at greater risk of homicide at the time of separation from their abusive partners (and prosecution, indeed, creates such separation).[174] It is hardly surprising that a major reason survivors cite for withholding cooperation from prosecutors is fear of future harm.[175]

Nonetheless, prosecutors around the country often subpoena, arrest, and even jail survivors in an effort to ensure that they will testify against their abusive partners at trial.[176] The intent of these government lawyers is far from malicious;

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171 This type of discounting could be conceptualized in philosophical terms as "ontological injustice," operating alongside the above-described categories of hermeneutic and epistemic injustice.

172 *See, e.g.*, Epstein, *supra* note 82, at 13-16.

173 *See, e.g.*, Lauren Bennett Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, VIOLENCE & ABUSE 141, 143, 159 (2005).

174 Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 AGGRESSION & VIOLENT BEHAV. 514, 519 (2006).

175 Lauren Bennett, Lisa A. Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761, 768-69 (1999); Sara C. Hare, *Intimate Partner Violence: Victims' Opinions About Going to Trial*, 25 J. FAM. VIOLENCE 765, 771 (2010).

176 Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 387 (2001); Betty Adams, *Battered Wife Jailed After Refusing To Testify Against Husband*, PRESS HERALD (June 3, 2014), https://www.pressherald.com/2014/06/03/maine-domestic-violence-victim-jailed-after-refusing-to-testify/; *Domestic Violence Victims Could Be Arrested if They Don't Show Up for Court To Face Accuser*, WSMV.COM (Apr. 25, 2013), http://www.wsmv.com/story/22081502/domestic-violence-victims-in-rutherford-county-could-be-arrested-if-they-dont-show-up-for-court [https://perma.cc/TWVZ-XZEP].

they hope to use the power of their office to put an end to intimate partner abuse, and they believe that mandating victim participation is—regardless of an individual survivor's own analysis of her situation—the best way to accomplish this goal. But in the process, the secondary harms visited on victims are too often ignored. As Professor Jane Stoever notes, "[j]ail sentences for defendants in domestic violence cases are typically only several days long, and most offenders receive only probation, but abuse victims have been jailed for contempt for much lengthier periods for refusing to comply with subpoenas to testify."[177] To obtain testimonial compliance, prosecutors threaten to refer victims to child protection agencies, where they could risk losing custody of their children, and they institute perjury prosecutions against women who have recanted prior statements, often obtaining lengthy jail sentences for survivors.[178] As one example, a 2016 investigation in Washington County, Tennessee, showed that women were routinely imprisoned for as long as a week for failing to testify against their abusive partners.[179] In the words of defense counsel representing one of the women: "I mean, it's kind of chilling. Here's a woman that called the police, because she needed help and now a couple months later she gets a voicemail that says now you might be the one that's going to jail. Think about that."[180] The local prosecutor refused to apologize for the practice, claiming that "I think we were doing the right thing."[181]

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Prosecutorial use of coercive tactics increased in the aftermath of U.S. Supreme Court decisions that made it far more difficult to engage in the practice of "victimless prosecutions." *See* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 585-86 (2010).

177 Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 870-71 (2017).

178 For an extensive compilation of stories of women subjected to such harms, see *id.*

179 Nate Morabito, *Advocates Horrified After Domestic Violence Victims Jailed in Washington County, TN*, WJHL.COM (Sept. 11, 2016), http://wjhl.com/2016/09/11/advocates-horrified-after-domestic-violence-victims-jailed-in-washington-county-tn/ [https://perma.cc/KM36-5EXL].

180 *Id.*

181 *Id.* Prosecutorial dismissal of women's risk of harm also can be seen in Honolulu Prosecuting Attorney Ken Kaneshiro's 2016 decision to restrict access to the city's Family Justice Center shelter to victims who promised to testify against their abusive partners in a criminal trial. Kaneshiro claimed that the victims who declined to testify "did not know what's good for them." Rebecca McCray, *Jailing the Victim: Is It Ever Appropriate to Put Someone Behind Bars to Compel Her to Testify Against Her Abuser?*, SLATE (July 12, 2017, 12:07 PM), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/07/is_it_ever_appropriate_to_put_an_abuse_victim_in_jail_to_compel_her_to_testify.html. Honolulu's approach to domestic violence prosecution sends a clear message to survivors: we discount the realities of your safety concerns and your risks of future harm. Unsurprisingly, during the first eight months the Honolulu shelter was open, sixteen of its twenty beds remained empty. *Id.* This example is, of course, an extreme one: no other Family Justice Center has a similar policy. *Id.* But extreme examples can offer a window into the less dramatic and more routine discounts women suffer in terms of their consequential credibility. In October 2015, a Florida judge jailed a victim of domestic violence who indicated that she would not appear to testify in the criminal prosecution of her abusive partner. She had endured terrifying violence at her husband's hands: he had strangled her, threatened her with a kitchen knife, and smashed her head into a microwave. She told the judge that the abuse had caused her to struggle with depression and anxiety. In addition, her husband was the father of her one-year-

A similar theme sounds in the actions of police officers responding to domestic violence calls across the country. The 2015 ACLU survey reveals a serious lack of police concern regarding the harms experienced by survivors: eighty-three percent of polled service providers reported that their clients called the police only to find that they "sometimes or often" did not take allegations of domestic violence seriously.[182]

The 2015 National Hotline Survey echoes this finding. In the words of one respondent, "I think [the police] feel that I do not matter, that as an ex-wife, I have to withstand the harassment and stalking." Another woman put it this way: "They sympathized with him and said he [just] needed to stay away from me. Then they pointed me in the direction of [name of city withheld] and said to call someone when I got there . . . . [They] left me by the side of the road alone in my car with my daughter and afraid." Yet another said: "The cops acted as if they did not care . . . . They sat in the drive while my ex poured gas all over my decks to my home and took what he wanted. Even though I had an [order of protection] and told them he could not enter the home."[183] Another: "[The police] have threatened to arrest me more than once. I am the victim! They blame me for taking him back."[184]

Police officers also use their power to coerce victim testimony at trial. In the spring of 2018, a police sergeant in Buncome County, North Carolina, told an advocate, "When I get to a domestic [violence call], if I get a sense that she's not going to cooperate, I drive away." [185] A minute later he added, "But when I go to my misdemeanor B&E's [breaking and entering cases], I stay until I've got all the evidence."[186]

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old daughter, and she was concerned about her ability to support her child if he went to jail and lost his job. She cried in open court as she explained, "I'm homeless now. I'm living at my parents' house . . . I had to sell everything I own," and added, "I'm just not in a good place right now." The judge responded by mocking her, saying, "You think you're going to have anxiety now? You haven't even seen anxiety," and ordered police to handcuff the woman, sending her to jail for three days. Kate Briquelet, *Judge Berates Domestic Violence Victim—and Then Sends Her to Jail*, THE DAILY BEAST (Oct. 9, 2015, 1:00 AM), https://www.thedailybeast.com/judge-berates-domestic-violence-victimand-then-sends-her-to-jail.

182 RESPONSES FROM THE FIELD, *supra* note 106, at 12.

183 NATIONAL HOTLINE SURVEY, *supra* note 106, at 6, 10.

184 *Id.* at 10. Additional police coercion may be imposed on women in jurisdictions utilizing lethality or danger assessment protocols. These protocols are comprised of a series of questions, posed by police on the scene of a domestic violence call and designed to determine a survivor's risk of future harm. In situations where this (relatively new) tool indicates "highest risk," the protocol directs officers to manipulate women into separating from their abusive partner, by refusing to accept a woman's decision to take no action, or by pressuring an unwilling victim to speak to a National Domestic Violence Hotline counselor. Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 536, 566-67 (2010). Lethality assessment programs are being used in counties in states including Delaware, Florida, Georgia, Indiana, Maryland, Missouri, and Vermont. *Id.* at 539.

185 Interview with Kit Gruelle, domestic violence advocate (June 6, 2018).

186 *Id.*

By discounting the importance of survivors' experiences and their risks of harm, police officers discourage women from seeking police assistance in subsequent emergency situations. As the ACLU Survey concluded, "Clients often do not call the police because they have had experiences in the past . . . in which they have received a negative response . . . in which the incident is minimized, the client is blamed, or the police simply take no action."[187] In all of these ways, the criminal justice system tends to dismiss its policies' effects on women's lives as relatively inconsequential, at least as compared to their effects on offender accountability.

In addition, the criminal justice system tends to devalue violence that is inflicted by an intimate partner as compared to a stranger. A 2005 Department of Justice report on Family Violence Statistics reveals that seventy-seven percent of those incarcerated for non-family assaults received sentences that were longer than two years.[188] In sharp contrast, this was true of only forty-five percent of those incarcerated for family assault.[189] Thus, the criminal justice system discounts the importance of women's experiences and, further, devalues the meaning of the harms they suffer at the hands of their partners.

### B. *Subsidized Housing and Public Shelters*

This tendency to discount the impact of laws and policies on the lives of domestic violence survivors extends well beyond the justice system. The public housing system provides an important case in point, in part because the availability of affordable housing is essential to many women's ability to both escape abuse and to remain safe after leaving an abusive relationship.[190] Despite this fact, substantive discounting of survivors' experience is readily apparent in the already intense and bureaucratically intimidating struggle for public housing.

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187 RESPONSES FROM THE FIELD, *supra* note 106, at 16.

188 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (June 2005), https://www.bjs.gov/content/pub/pdf/fvs.pdf [https://perma.cc/TD25-2HYZ].

189 Similar results were reached in a recent study conducted in Australia, where domestic violence offenders were compared to those who committed violent crimes outside of a familial/intimate relationship context. Moreover, domestic violence assaults were less likely to result in a prison sentence and, if incarcerated, intimate offenders received significantly shorter terms. Christine E. W. Bond & Samantha Jeffries, *Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases*, 54 BRITISH J. CRIMINOLOGY 849, 849 (2014).

190 Survivors who cannot remain in public housing often are forced to choose between homelessness and returning to their abusive partners. "'When we ask survivors why they had to stay [in their violent relationships], one of the top answers is always lack of access to housing,' said Karma Cottman, executive director of the D.C. Coalition Against Domestic Violence. 'They stay because they can't afford to go anywhere else.'" Elise Schmelzer, *Gentrification Eats Away at Shelter Options for Domestic-Abuse Victims*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/local/dc-politics/gentrification-eats-away-at-shelter-options-for-domestic-abuse-victims/2016/07/10/0470d18c-43c0-11e6-8856-f26de2537a9d_story.html?utm_term=.ad4ce2d6365a.

At the state and local levels, crime control or nuisance ordinances require public housing landlords to evict tenants for "disorderly behavior" if, within a specified time period, three calls are made to 911 about a particular apartment unit.[191] Fifty-nine counties, cities, and other localities have such ordinances in place today.[192] In 2013, Illinois alone had adopted more than 100 such ordinances;[193] in 2014, Pennsylvania had passed thirty seven.[194] The geographic areas these laws cover include the twenty largest cities in the country.[195] A landlord who fails to comply can be fined and have his rental license suspended. Accordingly, landlords have no discretion in enforcing this draconian measure—tenants have no realistic opportunity to appeal to their human empathy. To stay in business, a landlord *must* evict after three 911 calls.[196] To be clear, the underlying goal of these laws is the reduction of crime and the resulting safety of all residents; any impact on women survivors of domestic violence is solely incidental.

Despite this fact, these ordinances have a sizable negative impact on survivors of domestic violence. Thirty-nine of them explicitly include calls to 911 from domestic violence *victims* as a basis for prohibited activities that can result in eviction; only four explicitly exclude such calls.[197] And who ends up getting evicted? It's not just the perpetrators; it's the victims, too. The ordinances make no effort to distinguish between abusers and victims—if a victim chooses to use 911 emergency services to protect herself and her children on three or more occasions, she'll lose her home.[198]

A study conducted by Matthew Desmond and Nicole Valdez in Milwaukee found that close to one-third of the "excessive" 911 call citations over a two-year period were based on emergency reports of domestic violence; fifty-seven percent of these calls resulted in the victim being evicted, and another twenty-

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191 PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 135 (2017).

192 *Id.* at 141.

193 Emily Werth, *The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances*, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW 1 (2013), http://povertylaw.org/files/docs/cost-of-being-crime-free.pdf [https://perma.cc/K4XE-CFYS].

194 News Release, *Executive Director Dierkers Praises Legislators for Shielding Domestic Violence Victims from Eviction*, PA. COAL. AGAINST DOMESTIC VIOLENCE (Oct. 16, 2014), http://www.pcadv.org/Resources/HB1796_PR_10162014.pdf [https://perma.cc/TS8P-MRFB].

195 EDELMAN, *supra* note 191, at 141.

196 *Id.*

197 *Id.*

198 *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL, GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY SERVICES 4 (2016), https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF [https://perma.cc/YW5F-SNKL].

six percent received formal threats of eviction.[199] Similarly, a 2015 ACLU study of two upstate New York ordinances found that domestic violence comprised the largest category of incidents resulting in nuisance enforcement, with citations frequently resulting in eviction of the victim.[200] Peter Edelman describes the experience of one victim, Rosetta Watson, in St. Louis: "She called the police several times to ask for protection to keep her safe from her former boyfriend. They did not protect her and she was attacked by the man, and then she was literally banished from the city for six months . . . ."[201]

Similarly, Lakisha Briggs of Norristown, Pennsylvania, was abused by her boyfriend, and her adult daughter called the police.[202] Before leaving, one of the officers warned Briggs that this was her first strike. After that warning, Briggs, who also had a three-year-old daughter, was reluctant to call the police when her boyfriend beat her up.[203] But one night, he stabbed her in the neck with a broken ashtray.[204] When she regained consciousness she found herself in a pool of blood, but knew she could not dial 911.[205]

"The first thing in my mind is let me get out of this house before somebody call," she says. "I'd rather them find me on the street than find me at my house like this, because I'm going to get put out if the cops come here."[206] Just as she feared, a neighbor saw her bleeding outside and called the police.[207] Briggs was airlifted to the hospital, and when she returned home

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199 Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 132-33 (2012). Racial bias influences police decisions regarding enforcement of these laws: tenants living in predominantly black Milwaukee neighborhoods were three times as likely to receive a nuisance citation as women living in predominantly white neighborhoods. *Id.*

200 ACLU, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 22-23 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisance ord-rel3.pdf [https://perma.cc/7EML-ETV3].

201 EDELMAN, *supra* note 191, at 143. Nancy Markham had a similar experience in Surprise, Arizona. After making multiple calls to 911 because of abuse at the hands of her boyfriend, the local police department pressured her landlord to evict her—even though they had finally arrested her former partner for his violence against her. Sandra S. Park, *With Nuisance Law, Has "Serve and Protect" Turned Into "Silence and Evict"?*, MSNBC (Mar. 25, 2016), http://www.msnbc.com/msnbc/nuisance-laws-has-serve-and-protect-turned-silence-and-evict [https://perma.cc/LF9D-TPV2]. It took a federal lawsuit, filed by the ACLU Women's Rights Project, for the city to repeal the nuisance ordinance. *Id.*

202 Pam Fessler, *For Low-Income Victims, Nuisance Laws Force Ultimatum: Silence or Eviction*, NATIONAL PUBLIC RADIO (June 29, 2016), https://www.npr.org/2016/06/29/482615176/for-low-income-victims-nuisance-laws-force-ultimatum-silence-or-eviction [https://perma.cc/W2RC-ZWZQ.

203 *See* Complaint at 10, 12, Briggs v. Borough of Norristown, No. 13-02191 (E.D. Pa. Apr. 24, 2013).

204 *Id.* at 15.

205 *See* Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911,* GUARDIAN, Sept. 11, 2015, https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911.

206 *See* Fessler, *supra* note 202.

207 Briggs, *supra* note 205.

several days later, she was evicted from her apartment.[208] The ACLU sued, and the Norristown law was eventually repealed.[209]

But similar measures continue to be enacted as local communities try to get a handle on crime and safety. And despite a series of federal lawsuits challenging the plainly discriminatory impact of these ordinances, hardly any of the affected communities have voluntarily created an exception for domestic violence victims. Nor have they sought out ways to accomplish the overall goal of crime control without imposing new and additional harms on survivors, such as barring repeat perpetrators from the building or the housing complex. Such systemic discounting of women's needs and experiences is—of course—devastating to survivors of intimate partner abuse. It is difficult to comprehend how a legal system that takes survivors' experiences seriously could permit itself to visit on them the casually brutal choice between emergency police protection and affordable housing.

Such apparent disregard for survivors' risks and needs also exists in the closely related access-to-shelter context. In 2014, for example, the mayor of Washington, D.C., requested (for the second time in two years)[210] emergency authority to limit access to shelter for local families. Specifically, the mayor proposed that applicants be permitted to stay in a public shelter only on a provisional, two-week basis; during that time caseworkers would contact applicants' friends and relatives in an effort to assess whether they had any alternate housing option.[211] Those who did would be given twenty-four hours to vacate the shelter. In the words of the mayor's office: "Our goal is to get people out of shelters . . . or never into shelters in the first place, even if that means living with a grandmother, a sister, whatever."[212] But such a policy turns a blind eye to the risks facing domestic violence survivors, where "whatever" might mean a denial of shelter and being forced to return to the home of an abusive partner.[213] Although the mayor ultimately withdrew his request,[214] a similar rule was again proposed in 2017, as an amendment to the

208 *Id.*

209 *See* Fessler, *supra* note 202.

210 *The Homeless Services Reform Amendment Act of 2014: Hearing Before the Washington, D.C., Comm. on Human Servs.* (D.C. 2014) (statement of Marta Beresin, The Washington Legal Clinic for the Homeless), available at https://www.legalclinic.org/wp-content/uploads/2018/09/Testimony-MB-DHS-oversight-hearing.pdf [https://perma.cc/UMY9-2V6X].

211 Aaron C. Davis, *D.C. Mayor Asks for Emergency Legislation to Deal with Surge of Homeless into Shelters*, WASH. POST (Feb. 19, 2014), http://wapo.st/1giNpOH?tid=ss_mail&utm_term=.31cabe14e6ed.

212 *Id.*

213 Patty Mullahy Fugere, *There Is a Family Homelessness Crisis and Provisional Placement Is Not the Answer*, HUFFINGTON POST: THE BLOG (Feb. 21, 2014) (updated Apr. 23, 2014), https://www.huffingtonpost.com/patty-mullahy-fugere/there-is-a-family-homeles_b_4827364.html.

214 Aaron C. Davis, *Gray Steps Back on Unpopular D.C. Homeless Legislation*, WASH. POST (Feb. 25, 2014), https://www.washingtonpost.com/local/dc-politics/gray-steps-back-on-unpopular-dc-homeless-legislation/2014/02/25/803bcf66-9e53-11e3-9ba6-800d1192d08b_story.html?utm_term=.e28673d02941.

city's Homeless Services Reform Amendment Act, this time requiring applicants to city shelters to prove, by clear and convincing evidence, that they had no other housing options.[215] Advocates testified, once again, that victims of domestic violence were "routinely being denied shelter" if their names were on a current lease with, for example, their abusive partner.[216]

After intensive advocacy efforts, a domestic violence exception was added to the statute.[217] But the reintroduction of shelter laws with such draconian provisions, year after year, demonstrates a deep-seated tendency to discount the importance of survivors' lived experiences and to trivialize the harmful impact these policies will inflict on large numbers of women, in service of other policy priorities.

In sum, even when a woman survivor, seeking help from the criminal justice, subsidized housing, or public shelter systems, finds that her story of intimate partner abuse *is actually believed*, gatekeepers are likely to communicate some degree of indifference about her experiences, and to accept with apparent unconcern the harms that laws, policies, and practices impose on her. Many women experience this substantive, experiential discounting as directly connected to the credibility discounting they also face. Together, these discounts create a gauntlet of disbelief and dismissal that women must overcome in order to be safe from the first-order abuse they suffer at the hands of their intimate partners.

## III. THE IMPACT OF CREDIBILITY DISCOUNTS ON WOMEN SURVIVORS

Survivors suffer a wide range of credibility and experiential discounts when they seek emergency help from the police, *and* when they try to convince judges to award them a civil protection order, *and* when they struggle to obtain a safe place to live, *and* when they try to get custody of their children. They may suffer these discounts because their true stories of abuse don't sound plausible, because they are perceived as personally untrustworthy, or because their stories just don't matter much to system gatekeepers.

All of this may feel like déjà vu for a survivor. Institution-based discounting closely replicates the dynamics of abuse she endures at home. Perpetrators of intimate partner violence, like system actors, often discredit both the plausibility of a survivor's story and her trustworthiness as a truth teller. It is all too common for a survivor to be subject to a constant barrage of: "No, that's

215 Wash. Legal Clinic for the Homeless, *Requiring that Families Show "Clear and Convincing Evidence" of Homelessness*, PUBLIC (Aug. 22, 2017), http://www.publicnow.com/view/F8B804EF4654FB4D115F7E08715D8867B561EF7B?2017-08-22-22:30:10+01:00-xxx9517 [https://perma.cc/3H8Y-79WT].

216 *Id.*

217 D.C. CODE § 4–753.02.a-4 (2018).

not what happened"; or "I would never have touched you if you didn't keep provoking me"; or "You're the only one who makes me this angry."[218]

Abusive partners often discredit the woman based on her personal trustworthiness. Frequent comments tend to sound like: "You always exaggerate"; or "You're hysterical and over-emotional"; or "You're crazy; I didn't hurt you"; or "No one would believe you. Even *I* don't believe you."[219] Finally, perpetrators often dismiss the weight or consequences of the abuse: "Why do you always make such a big deal out of everything?"[220]

In other words, the credibility discounts imposed on a woman by the justice system and other institutions often echo those imposed by her abusive partner. These institutional and personal betrayals operate in a vicious cycle, each compounding the effects of the other. That web can cause women to doubt their power to remedy their situations and—in more extreme cases—the veracity of their own experiences.

System actors are not privy to that broader web of experience. A judge who doubts a survivor's story in court is not likely to be aware that he is reinforcing other discrediting messages from her abusive partner and from that partner's defense attorney. An advocate who perceives with indignation that a survivor's credibility is being discounted in family court may not know that this experience mirrors an earlier one with a police officer, and yet another with her public housing landlord. In other words, for system gatekeepers, it is almost impossible to see the whole picture. But from the perspective of a survivor, on the receiving end of one credibility discount after another, these experiences coalesce into a single, interwoven fabric. Credibility discounts become as pervasive as the air these women breathe.

So what does it mean for a survivor to be caught within a web of credibility discounting? The consequences include two major categories of harms: (1) those related to psychological wellbeing; and (2) those related to accessing justice and safety.

### A. *Psychological Harms and Institutional Gaslighting*

When a survivor undertakes the considerable risks involved in seeking help, she is looking for resources and safety, to be sure. But she is also hoping

218 *See, e.g.*, *Hashtag Activism*, *supra* note 62.

219 As survivor and activist Beverly Gooden explains: Such statements are "easy to believe when it's just the two of you." *Id*.

220 The National Domestic Violence Hotline website, for example, provides the following examples of gaslighting: "Your abuser might call you 'too sensitive' or raise a skeptical eyebrow when you try to complain about his or her behavior, asking you why you would get upset over 'something so dumb.'" *What Is Gaslighting?*, NAT'L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), http://www.thehotline.org/what-is-gaslighting/ [https://perma.cc/64K3-PYTA].

for validation of the harm she has endured—in other words, to have her experience credited. As Rebecca Solnit puts it: "To tell a story and have it and the teller recognized and respected is still one of the best methods we have of overcoming trauma."[221]

Research provides ample evidence for this proposition. When Judith Herman interviewed twenty-two victims of violent crimes of all sorts on the meaning of justice, she found that wherever her interview subjects sought justice, their most important goal was to gain validation or "an acknowledgment of the basic facts of the crime and an acknowledgment of harm."[222]

In the domestic violence context, a recent qualitative study of women in a Massachusetts family court has several women noting the importance of being credited. As one woman said: "Well, validation [from the court] is huge. It really is huge. When you've got someone telling you on a constant basis that you're bad, you're wrong, [you need the courts to say you are right] . . . ."[223]

But when the institutions to which the survivor turns for help (often at great personal risk)[224] refuse to acknowledge this harm, and instead echo a woman's abusive partner by discounting her credibility, the effort to report and remedy abuse instead works to replicate the denial of a survivor's experience that takes place at home—only, this time, at an institutional level. And the institutions involved are those purportedly charged with hearing victims' stories and meting out justice. It's no wonder that survivors find the experience of systemic discrediting in our police districts and courthouses particularly crippling.

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221 Solnit, *supra* note 145, at 4.

222 Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 585 (2005). Herman goes on to explain:

> Whether the informants sought resolution through the legal system or through informal means, their most important object was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgment of harm. Although almost all of the informants expressed a wish for the perpetrator to admit what he had done, the perpetrator's confession was neither necessary nor sufficient to validate the victim's claim. The validation of so-called bystanders was of equal or greater importance. Many survivors expressed a wish that the perpetrator would confess, mainly because they believed that this was the only evidence that their families or communities would credit. For survivors who had been ostracized by their immediate families, what generally mattered most was validation from those closest to them. For others, the most meaningful validation came from representatives of the wider community or the formal legal authorities.

*Id*.

223 Ellen Gutowski & Lisa A. Goodman, Intimate Partner Violence Survivors' Subjective Experiences of Probate and Family Court: A Qualitative Study (2018) (unpublished manuscript) (on file with authors) [hereinafter *Massachusetts Family Court Study*].

224 *See, e.g.*, Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 467-68 (2003).

Survivors suffer a range of harms when they find that their experiences are repeatedly discredited and invalidated. We conducted a focus group outside of Boston with twelve advocates who shared extensive experience working with survivors in a variety of systems. Participants described three distinct outcomes.

First, survivors develop *a sense of powerlessness and futility*, expressed in statements such as: "I have taken this enormous risk to share my most vulnerable experiences in public—and they can't/won't hear/see me. I can't find the right words to make them help me. There is nothing I can do." This is a feeling akin to how numerous survivors eventually come to feel in their abusive relationships; there is nothing they can say or do that will make the perpetrator of violence hear or really "see" me.[225]

Second, survivors develop *a sense of personal worthlessness*. "Maybe they believe my story and still—if no one does anything in response to my story, then my experience must not have worth or merit. My pain doesn't matter. I myself must have no value."[226] This too replicates abuse dynamics: He has no empathy for me as a human being. I am worthless in his eyes.

Finally, survivors develop *a sense of self-doubt*, as the machinery of credibility discounting lurches into gear: "They are twisting my story, casting doubt, maybe I didn't remember it right, maybe it didn't happen as I think it did. I must be crazy."[227] This dynamic is well illustrated by the 1944 film

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225 Platt, Barton & Freyd describe the experience of institutional betrayal for domestic violence survivors as follows:

> [W]hen this same woman seeks assistance from the police, child protective services (CPS), or health care providers, she enters a world in which her agency cannot be taken for granted. She has no personal role with respect to decisionmaking by police, CPS, or the hospital and so is particularly vulnerable to objectification or betrayal. . . . When these institutions betray victims of domestic violence, the 'secondary trauma' from this experience can amplify the feelings of helplessness and loss of control elicited by abuse . . . . Betrayal in these situations may be more abstract than the betrayal by an intimate partner. But the violations of promises implied by their standing in the community—the promise to protect, or heal, or provide for children's welfare—are no less devastating than a partner's betrayal.

Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *A Betrayal Trauma Perspective on Domestic Violence*, *in* VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: VICTIMIZATION AND THE COMMUNITY RESPONSE 185, 201-02 (Evan Stark & Eve S. Buzawa eds., 2009).

226 In the Massachusetts Family Court Study, one participant described her experience of betrayal by the family court judge: "You think that somebody's coming, is going to enter the picture that will help you. You're so desperate and when you're let down, it's. And I you know, there's some that are like, 'I don't even want to live anymore. I don't want to live anymore.'" *Massachusetts Family Court Study*, *supra* note 223.

227 The National Domestic Violence Hotline website warns survivors to pay attention to this sort of dynamic:

> "You're crazy—that never happened."
>
> "Are you sure? You tend to have a bad memory."

*Gaslight*,[228] in which a man manipulates his wife's routine experiences in a concentrated effort to create opportunities to discredit her and convince her that she is insane. He does this so effectively that she eventually comes to doubt her own perceptions and memory, and ultimately accepts his story that she is delusional and mentally unsound.[229]

Abusive men gaslight their women partners when they express love and affection on the heels of a violent episode, or deny that certain promises or commitments were ever made, or simply deny that events took place. Over time, these small incidents build until, like the wife in *Gaslight*, survivors may come to doubt their own memory, perception, and experience.[230]

Judy Herman explains:

> After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it on herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and deny reality, and the more completely his arguments prevail.[231]

A quote from the Massachusetts Family Court study illustrates this phenomenon:

> It's always that you're overreacting, you're too emotional. He'd do something like the night I woke up with him with his hands around my neck and I was like, "What are you doing?" I start crying, and he started laughing. And he said, "I was dreaming." . . . "I wasn't going to do anything. I was just

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> "It's all in your head."
>
> Does your partner repeatedly say things like this to you? Do you often start questioning your own perception of reality, even your own sanity, within your relationship? If so, your partner may be using what mental health professionals call "gaslighting."
>
> Gaslighting typically happens very gradually in a relationship; in fact, the abusive partner's actions may seem harmless at first. Over time, however, these abusive patterns continue and a victim . . . can lose all sense of what is actually happening. Then they start relying on the abusive partner more and more to define reality, which creates a very difficult situation to escape.

*What is Gaslighting?*, NAT'L DOMESTIC VIOLENCE HOTLINE (May 29, 2014), http://www.thehotline.org/2014/05/29/what-is-gaslighting/ [https://perma.cc/64K3-PYTA].

228 The film is based on a 1938 Patrick Hamilton play of the same name, *Gaslight*. GASLIGHT (Metro-Goldwin-Mayer 1944).

229 *Id.*

230 Darlene Lancer, *How To Know if You're a Victim of Gaslighting*, PSYCHOL. TODAY (Jan. 13, 2018), https://www.psychologytoday.com/blog/toxic-relationships/201801/how-know-if-youre-victim-gaslighting.

231 HERMAN, *supra* note 39, at 8.

> dreaming." He was laughing, and then he says, "Stop overreacting. I wouldn't hurt you. Stop overreacting." And I would believe that I was overreacting: Right?. [Maybe] he didn't really hurt me. I mean really?[232]

As one of the first author's clients put it:

> He found my most vulnerable point, a tiny kernel of insecurity in my soul, and he exploited it to trap me in a painfully confusing state of nearly total self-doubt. I spent more than a year working so hard to regain trust in my own perceptions and my own humanity. But now I find that the legal system doubts me too, even as I share my more painful and personal story. I get hurt again and again. It is painfully confusing and I find that it has caused a significant regression in my overall healing.[233]

These individual experiences are reinforced by the institutional gaslighting women experience in the form of system-based credibility discounts and experiential trivialization. When our official bodies of justice and law enforcement effectively collaborate in the same patterns utilized by perpetrators of abuse, survivors may be even more likely to doubt their own abilities to perceive reality and understand their own lives.

### B. *Harms Related to Access to Justice and Safety*

The sense of institutional gaslighting that commonly accompanies the progress of abuse claims through the justice system has immediate and baleful consequences for survivors: the system itself becomes an impediment to, rather than a conduit toward, justice. Indeed, credibility discounts are analogous to other, more tangible obstacles that are already all too familiar to those who work in the domestic violence field, such as economic dependence, isolation, and fear.

First, as we've already seen, credibility discounting may discourage women from continuing to pursue justice or other forms of support. Having their claims met with system-wide denial and disbelief gives women ample cause to distrust, and then possibly avoid, the institutions ostensibly there to help them.[234] As the Gender Bias Study of the Court System in

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232 *Massachusetts Family Court Study*, *supra* note 223.

233 Communication from client to Deborah Epstein (July 28, 2017).

234 Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575, 575 (2014). The secondary victimization of women seeking legal services in the aftermath of interpersonal violence is described by researcher Rebecca Campbell, who found that when survivors reach out for help, often at a time of great vulnerability and need, "they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help." Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 703 (2008); *see also* Platt et al., *supra* note 225, at 202; Heidi Grasswick, *Epistemic Injustice in Science*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 313.

Massachusetts explains: "The tendency to doubt the testimony of domestic violence victims and to 'blame' them for their predicament not only hampers the court's ability to provide victims with the protection they deserve, it also has a chilling effect on the victims' willingness to seek relief."[235]

A woman in the Massachusetts Family Court study captured this fatalistic process in heartbreaking detail:

> [The court] didn't believe [the abuse] . . . so I felt like it didn't matter . . . . The way my case was handled, I am very afraid of [the government in] this state now . . . . I'm so afraid of all he needs to do is just file a motion and bang! He'll get, he'll prove me wrong, you know, I'll get discredited again. So I just always keep a watchful eye.[236]

Perhaps most perniciously, each individual woman's experience can have a large-scale chilling effect. As one advocate described it, "A judge discredits one woman, and it's like a bomb that goes off in the community, affecting a hundred women. Within many communities, these stories spread like wildfire."[237]

A woman in the Massachusetts Family Court study voiced much the same criticism:

> [My advice to other women is:] Just don't say anything about it. The way the system is now . . . you've got to talk to your priest, talk to your family, tell them your story of woe and you know, the fact that you've been abused. Have the support, get therapy if you need therapy, do talk to them. But don't, don't, don't bring it into the courtroom, because . . . [the judge will think] 'oh, that couldn't have happened to you.'[238]

Such advice—editing one's speech so that it includes only what the listener is ready or able to hear—is described in the philosophy literature as "testimonial smothering."[239]

In the 2015 National Domestic Violence Hotline study,[240] both women who had called the police and those who hadn't shared a strong reluctance to turn to law enforcement for help. One in four women reported that they would not call the police in future, and more than half said doing so would

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235 FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL & GENDER BIAS IN THE JUSTICE SYSTEM 405 (2003).

236 *Massachusetts Family Court Study*, *supra* note 223. In addition, women who do not receive the support they need from law enforcement are less likely to turn to law enforcement in the future. *See* Ruth E. Fleury et al., "*Why Don't They Just Call the Cops?*": *Reasons for Differential Police Contact Among Women with Abusive Partners*, 13 VIOLENCE & VICTIMS 333, 342 (1998).

237 Interview with Ronit Barkai, Assistant Dir., Transition House (Dec. 20, 2017).

238 *Massachusetts Family Court Study*, supra note 223.

239 Dotson, *supra* note 112, at 249.

240 NATIONAL HOTLINE SURVEY, *supra* note 106, at 9.

make things worse.[241] Why? Two-thirds or more said they were afraid the police would not believe them—or would do nothing, if they called.[242]

Credibility discounts and experiential trivialization harm women in an abundance of ways—up to and including the supremely destabilizing process of prompting women to question the truth of their own experience. Women are devalued and gaslighted from every direction, discouraging them from continuing to seek systemic support. Ripple effects discourage the broader community of women from seeking the help they need. And our entire society suffers from the failure to fully understand, credit, and value a substantial portion of the human experience. Together, these harms operate to form a formidable obstacle to women's healing, safety, and ability to obtain justice.

## IV. MOVING FORWARD: INITIAL STEPS TOWARD ERADICATING CREDIBILITY DISCOUNTS IN THE JUSTICE SYSTEM

At this point, we have a fairly comprehensive sense of how the justice system and influential actors in related social service networks unfairly discredit women and their stories of abuse, and devalue their most difficult experiences. How can we recalibrate these core institutions to tear down the gauntlet of doubt, disbelief, and dismissal women face in their efforts to be safe and achieve justice?

Several forms of credibility discounting may be amenable to fairly straightforward interventions—specifically, those that derive from listeners' failure to understand a woman's experience of intimate partner violence. For example, gatekeepers within the justice system often lack information about the effects of violence-based neurological and psychological trauma on information processing and memory, about the way that potent courtroom triggers can affect witness demeanor, and about the ways survivors understand their options and prioritize their harms.[243] The best way to cure these knowledge gaps is—of course—improved understanding. Intensive training could, in theory, allow individual judges, police officers, prosecutors, clerks, and social service providers to better understand the medical, mental health, and experiential correlates of domestic violence. Such education should help to eradicate those credibility discounts that are rooted in incomplete understandings.

A cautionary note, however, is in order here. For decades, antidomestic violence activists have engaged in intensive judicial training efforts throughout the country. Some individuals have absorbed this learning and are far more adept at avoiding knowledge-based pitfalls in assessing survivor credibility. For others, however, knowledge gaps persist despite exposure to

241 *Id.* at 5.

242 *Id.* at 4.

243 *See supra* text accompanying notes 19–95.

high quality training, raising doubts that training alone may be enough. Training must be accompanied by a genuine commitment to absorbing new and sometimes complex understandings about the world.[244]

Other forms of credibility discounting described above—particularly those rooted in negative stereotypes and bias—are more resistant to change and may require a more complex set of interventions. The cultural assumption that women tend to be improperly motivated by an outsized concern for financial, material, or child custodial gain—and the related assumption that women simply lack full capacity as truthtellers—are longstanding and deeply held.[245]

Regardless of the type of credibility discount in question, change will not come easily; it will require a combination of motivation, awareness, and effort. The responsibility here lies with the listening audience—justice and social service system gatekeepers—to intentionally, consciously shift their assumptions. In Fricker's words, the listener must adopt "an alertness or sensitivity to the possibility that the difficulty one's [witness] is having as she tries to render something communicatively intelligible is due not to its being [a] nonsense or her being a fool, but rather to some sort of gap in [the existing interpretive] resources."[246]

The crucial first step is to shift away from an automatic, uninformed disbelief of women's stories—to begin, in other words, to distrust one's own distrust. Philosopher Karen Jones proposes the imposition of a "self-distrust rule": gatekeepers should allow "the presumption against . . . believing an apparently untrustworthy witness [to] be rebutted when it is reasonable to distrust one's own distrust or [one's own] judgments of implausibility."[247]

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244 These conclusions are based on the first author's extensive experience in conducting trainings with judges, police officers, and prosecutors, as well as numerous conversations with other trainers in the field of intimate partner violence.

245 *See supra* text accompanying notes 112–168. A central challenge here is that many system gatekeepers are unaware of the gender-based stereotypes that are, in fact, shaping their perceptions and decisions. As long as these biases remain unconscious, change is unlikely. Psychologists interested in challenging unconscious prejudicial perceptions, also called "implicit biases," have shown that participants who develop both a strong negative attitude toward prejudice and a strong belief that they themselves are indeed prejudiced, are able to reduce the manifestations of their implicit bias. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2007). One of the most prominent and well-researched approaches to bias reduction is called the "prejudice habit-breaking intervention." Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012). Once participants achieve awareness of their own biases and of the damage such biases can cause, they use cognitive strategies to accomplish behavioral change, such as stereotype replacement, perspective-taking, and counter-stereotypic imaging. One notable study based on such strategies demonstrated that habit-breaking interventions produced long-term changes in key outcomes related to implicit racial bias, increased concern about discrimination, and greater reported beliefs that there could be bias present in participants' thoughts, feelings, and behaviors. These changes endured two months following the intervention. *Id.*

246 FRICKER, *supra* note 49, at 169.

247 Jones, *supra* note 167, at 164.

Let us be clear: We are in no way arguing that by distrusting one's instincts to distrust a survivor, state actors must go to the other extreme and automatically credit all survivor stories. Instead, system actors need only resist the reflexive presumption *against* crediting women's stories, make an effort to avoid false assumptions, overcome hermeneutic gaps, and open their minds to accepting a broader range of stories and storytellers. We might call this process one of cultivating a capacity for "virtuous listening."[248]

System gatekeepers can build this openness into their traditional approaches to assessing credibility. Contributing factors such as the internal and external consistency of story, as well as witness demeanor, can easily expand to accommodate new understandings. For example, a judge who notices temporal gaps in a survivor's story can resist the urge to automatically discount her credibility. Instead, the judge can ask follow up questions in an effort to obtain more concrete factual information and avoid making unjustified assumptions. Such questions might include:

- What kinds of injuries did you sustain?
- Did you ever feel unable to breathe for any period of time?

Additional questions might focus on obtaining information about the impact of trauma on the witness. For example:

- Are you able to remember the full story of what happened, from beginning to end?
- It's fine if you can't tell me what happened in complete detail; just tell me any specific part of this experience that you *do* remember.
- How would you describe your ability to remember what happened here? Do you remember some pieces, like visual images, smells, sounds, or anything like that? Tell me about those.
- Is your memory of what happened consistent over time? How does it change?
- Is this a good or a bad day for your memory of what happened? Do you sometimes remember more or less than what you've been able to recall today?
- Is your memory of what happened similar to or different from your memory of other events in your life? How so?

A gatekeeper listening to a woman describe her experience of abuse with either a flat affect or a tone overwhelmed with hysteria or fury might ask:

- I notice you seem completely calm right now. Does that reflect how you felt at the time of the events you're describing?

248 Jose Medina, *Varieties of Hermeneutical Injustice*, *in* ROUTLEDGE HANDBOOK, *supra* note 80, at 48.

- (If not): What do you think explains the difference?

or:

- I notice you seem extremely upset/angry right now. Can you help me understand what you're feeling, and why?

When receiving testimony focused on psychological, rather than physical abuse, listeners can use a prompt along these lines:

- You've talked about the psychological harm you experienced in your relationship. Was there ever physical violence? Can you help me understand why you have focused primarily on the emotional aspects of your experience?

When suspecting that a woman is improperly motivated by a desire to access housing/shelter, or to gain an advantage in a custody case:

- You've spent a lot of time explaining that you need to have a safe place to live. Can you help me understand why you've focused more on this issue than you have on the violence you've described?
- I see that you filed a permanent custody case a few weeks ago. Can you help me understand why you have filed your protection order case now? I need you to explain to me why you didn't file this case first.

To help counter the more general tendency to discredit women *as women*, a judge might take the issue on directly:

- One of the most basic things a judge has to do is to decide whose story to believe. In this case, like so many others, each of you is telling me a different story. Can you help me see the reasons I should credit, or believe, your side of the story, as well as the reasons I should not credit the story told by the other party?

The judge may ultimately find a woman's story implausible, or find her personally untrustworthy. But by engaging in a systematic reorientation of their beliefs, judges can begin to reverse unfair and automatic presumptions of distrust and thus avoid inflicting testimonial and hermeneutic injustice.

In addition, in cases where a judge or other system gatekeeper concludes that a survivor is, indeed, telling the truth, the gatekeeper should explicitly communicate that to her. In light of the frequency with which women face credibility discounts and the psychological harm such discounts impose, a counter-message of belief and support (where warranted) can be deeply cathartic.[249]

249 *See supra* text accompanying notes 218–223. Being believed is critical to a survivors' ability to heal. A judge's explicit statement that a survivor is credible can serve as a stark counter narrative

And judges must be held accountable for instituting such changes. Court watch programs should expand to include observations about individual judicial efforts (and failures) to look beyond surface indicators of credibility and ask questions targeted at more accurate assessments. Court watch reports, shared with the local judiciary and made available to the public, would create much-needed pressure to follow through with a change in existing credibility assessment tools.

Still, experience has taught us that judicial training has its limits; accordingly, suggestions for changing gatekeeper behavior are not enough. Reform efforts also must focus on improving survivors' access to powerful forms of corroborative evidence. The story of White House staff secretary Rob Porter serves as a potent reminder that a picture—there, one that showed his ex-wife's black eye—can dramatically reduce the initial credibility discounting imposed on women's stories of abuse.[250] But survivors often lack such evidence. Many perpetrators routinely look through their targeted victim's phones, deleting any incriminating photos, texts, or voice mails that are stored there. Many women are afraid to maintain such evidence in the first instance, due to fear that discovery will lead to further abuse.

Recent technological innovations have created safe spaces for women seeking to maintain corroborative evidence. The SmartSafe+ mobile app, developed by the Domestic Violence Resource Centre in Victoria, Australia, enables survivors to create an online diary containing written, photographic, video, and audio entries that are stored on a cloud account, rather than on their phones.[251] It also contains guidance about the most important forms of corroborative evidence that can be useful in a courtroom.[252] On the phone itself, the app looks like a routine news feed. It can be downloaded, free of charge, at domestic violence advocacy organizations, where service providers have been trained to ascertain whether a survivor's phone is being monitored and ensure that the download cannot be detected.[253]

Efforts also are underway to develop online programs that use plain language to improve survivor access to justice.[254] Such efforts could be expanded to educate

to her abusive experiences, reinforcing the validity of her own perceptions and helping to restore the sense of self-worth she may have lost.

250 *See, e.g.*, Maggie Haberman & Katie Rogers, *Rob Porter, White House Aide, Resigns After Accusations of Abuse*, N.Y. TIMES (Feb. 7, 2018), https://www.nytimes.com/2018/02/07/us/politics/rob-porter-resigns-abuse-white-house-staff-secretary.html.

251 *Family Violence App Wins Inaugural Premier's iAward*, CIVIL VOICES (June 30, 2016) https://probonoaustralia.com.au/news/2016/06/family-violence-app-wins-inaugural-premiers-iaward/ [https://perma.cc/3PV9-5L4X].

252 *See, e.g.*, SmartSafe+ Mobile App, https://www.youtube.com/watch?v=09tdxEr1nww (last visited Oct. 16, 2018).

253 *Id.*

254 Brigitte Lewis, Lisa Harris & Georgina Heydon, *The Conversation We Need to Have: Victoria Has Made Progress on Tackling Domestic Violence, But There Is Still Much to Be Done*, ASIA & PAC.

survivors about the importance of focusing courtroom storytelling around applicable legal standards. Community education focused on storytelling could prompt women to highlight their experiences of physical harm, for example, helping them to focus on what is most important for their legal case, rather than what might be most emotionally salient to them on a personal level. In addition, online programs and in-person advocates could help women think through how to effectively communicate how trauma might be impairing their ability to effectively tell their story in court, or to any system gatekeeper.

Together, these initial reforms could have a substantial individual and institutional impact, with a concomitant diminution in discounting women's credibility. But, as noted above, two prerequisite conditions—whether in reducing the "willful interpretive gap" in understanding women's experiences, in eradicating cultural stereotypes of women as inherent untrustworthy, or in taking women's experiences seriously—are the *acknowledgement of gender-based bias, and the will to change*.

Progress is possible. The #MeToo moment represents the beginning of a shift in cultural understanding and good will. The floodgate of stories from blue collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women in the American workplace. Similarly, the #WhyIStayed campaign brought into sharp relief the ways that women are often trapped in abusive relationships. And the January 2018 sentencing hearing in the criminal prosecution of Larry Nassar, a sports therapist at Michigan State University who sexually assaulted more than 150 female students over two decades, raised national awareness about women's experiences of sexual assault.[255]

Perhaps most importantly, the Nassar case represents an initial effort to break crucial barriers directly related to credibility discounting. The women Nassar exploited told the court and the wider world, explicitly and in painful detail, their stories of being discredited by the institutions ostensibly designed to help them. Over 150 women from Michigan State University ("MSU") came forward with story after story of how they

> told MSU administrators, explicitly and more than once, that Nassar was sexually abusing them during medical appointments. [The administrators] listened to women describe the rubbing back and forth, the digital penetration that sometimes lasted 15 minutes, the ungloved hands. But when

POL'Y SOC'Y (Sept. 6, 2016), http://www.policyforum.net/the-conversation-we-need-to-have/ [https://perma.cc/5AQA-697Z].

255 Caroline Kitchener, *Larry Nassar and the Impulse to Doubt Female Pain*, ATLANTIC (Jan. 23, 2018), https://www.theatlantic.com/health/archive/2018/01/larry-nassar-and-the-impulse-to-doubt-female-pain/551198/.

> those women said there was a problem—that this didn't feel right, that they were hurt—*the administrators didn't believe them*.[256]

Instead, school administrators consistently discounted the credibility of Nassar's victims, telling them: "He's an Olympic doctor"; or "No way"; or "[You] must be misunderstanding what was going on."[257] When asked about the women's reports of abuse, the university's Title IX investigator, Kristine Moore, said "the women likely did not understand the 'nuanced difference' between proper medical procedure and sexual abuse."[258]

The sentencing hearing in this case was a groundbreaking opportunity for women to share both their experiences of sexual assault and, in painful detail, their experiences of credibility discounting. The seven days of hearings were cathartic for the survivors; they also shone a light on the institutional gaslighting that women routinely experience.[259] It is time to build on the momentum of this new awareness and take concrete steps to implement meaningful reform in the justice and social service systems.

## CONCLUSION

Women experience credibility discounts in their homes and in the systems they turn to for help. As the torrent of #MeToo stories have made clear, these same discounts pervade workplaces where women are sexually harassed. The Larry Nassar case further shows that these discounts are rampant among campus administrators responsible for handling sexual assaults. The routine experience of credibility discounting indeed is an integral part of male abuses of power, making those experiences far more painful and difficult for women to surmount.

But assaults on women's credibility also exist independently of those abusive contexts. In fact, women routinely face credibility discounting in multiple spheres of their lives. As we have worked on this essay, we've started to notice credibility discounting in our own lives everywhere we turn. When we've talked to colleagues and friends about this project, they too reliably respond with a story of their own, typically from the past few days.

For example, one colleague—an extremely well-known legal theorist—exclaimed, "That happens to me, all the time!"[260] She told us the story of a dinner party she had just attended, where the conversation turned to the question of who would succeed to the presidency if Donald Trump, Mike Pence, and Paul Ryan were all somehow removed from office. Our colleague

256 *Id.* (emphasis added).

257 *Id.*

258 *Id.*

259 Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/.

260 Thanks to Professor Robin West for providing us with this story.

(a woman) volunteered that she'd been thinking about this quite a bit, and that the next person in line was Orrin Hatch—the President Pro Tempore of the Senate. The other guests responded with deep skepticism: "That can't be right," etc. She insisted that she was certain, but she was ignored. Several guests pulled out their phones and started to Google the question; others brainstormed possibilities among themselves. Eventually, the group concluded that the next in line was . . . Orrin Hatch.[261] No one acknowledged that our colleague had ever even suggested this answer. Not only was there no apology for doubting her; it was as though she had never spoken at all.

Other friends and colleagues shared experiences where they reported unusual physical symptoms to male medical professionals. They were concerned, in advance, that they might be dismissed as "hysterical" or as exaggerating their experiences, and, in fact, they often were told that the problem was likely "all in their heads."[262] Gender-based credibility discounting is a serious concern in the medical field: among emergency room patients complaining of abdominal pain, women are thirteen to twenty-five percent less likely than men to receive high-strength "opioid" pain medication; in addition, women wait an average of sixteen minutes longer than men to receive treatment.[263]

Indeed, credibility discounting stands on its own as an essential aspect of the female experience. Doubt, skepticism, and trivializing are familiar phenomena to women. In other words, credibility discounting and experiential trivializing are distinct injuries women experience, as part of, and *in addition to*, other forms of gender-based, discriminatory harms.

It is time for a credibility-discounting #MeToo movement. Women need to come forward in massive numbers to tell their stories of discounts based on

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261 This story has a sharp ironic edge. Orrin Hatch took a leading role in the Clarence Thomas confirmation hearings before the Senate Judiciary Committee. *See, e.g.*, *Thomas Hearing Day 1, Part 1*, C-SPAN, at 48:37–57:02 (Oct. 12, 1991), https://www.c-span.org/video/?21974-1/thomas-hearing-day-1-part-1. Reflecting on these hearings nearly twenty years later, in an interview with CNN, Hatch reasserted his view that Anita Hill fabricated her story about Thomas' harassment, but "talked herself into believing it." Hatch explains:

> I believe that Anita Hill was an excellent witness. I think she actually believed, and talked herself into believing, what she said. There was a sexual harasser at that time, according to the sources I have, and he was her supervisor. He just wasn't Clarence Thomas. And I think she transposed that to where she believed it . . . .

*Why Ask for Anita Hill's Apology Now?*, CNN (Oct. 20, 2010), https://www.youtube.com/watch?v=6Og0LRu028Q.

262 For a more in-depth look at this type of credibility discount, see Jennifer Brea, *They Told Me My Illness Was All in My Head. Was It Because I'm a Woman?*, BOS. GLOBE (Dec. 27, 2017), https://www.bostonglobe.com/magazine/2017/12/27/they-told-illness-was-all-head-was-because-woman/47zuihgBfZqPdNe7S40hSJ/story.html.

263 Esther H. Chen et al., *Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain*, 15 ACAD. EMERGENCY MED. 414, 414 (2008).

story plausibility and storyteller trustworthiness, as well as ways in which their experiences have been minimized and dismissed, in an effort to force society to see with clarity this distinct form of gender-based harm.[264] And perhaps once the scale of this injustice is made manifest, we can, at long last, enact a body of genuine institutional remedies, so that women already victimized by abuse, sexual assault, and harassment need not fear that the legal system and the broader culture is set up to perpetuate, rather than alleviate, their harms.

264 Playwright Timberlake Wertenbaker puts it well:

> What the #MeToo moment is besides sexual harassment is the end of women being quiet. And that is almost more important—that is, the ability and the right of women to speak up about what's happened to them or what they think in general, without being told to shut up I hope that's what lasts forever."

Nelson Pressley, *Second Women's Voices Theater Festival Arrives as #MeToo Is in the Spotlight*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/entertainment/theater_dance/second-womens-voices-theater-festival-arrives-in-metoo/2018/01/04/bfadec08-e66e-11e7-833f-155031558ff4_story.html?utm_term=.fed8f623d01b.

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# Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma

**Judith Lewis Herman**[1]

*This paper reviews the evidence for the existence of a complex form of post-traumatic disorder in survivors of prolonged, repeated trauma. This syndrome is currently under consideration for inclusion in DSM-IV under the name of DESNOS (Disorders of Extreme Stress Not Otherwise Specified). The current diagnostic formulation of PTSD derives primarily from observations of survivors of relatively circumscribed traumatic events. This formulation fails to capture the protean sequelae of prolonged, repeated trauma. In contrast to a single traumatic event, prolonged, repeated trauma can occur only where the victim is in a state of captivity, under the control of the perpetrator. The psychological impact of subordination to coercive control has many common features, whether it occurs within the public sphere of politics or within the private sphere of sexual and domestic relations.*

**KEY WORDS:** complex PTSD.

## INTRODUCTION

The current diagnostic formulation of PTSD derives primarily from observations of survivors of relatively circumscribed traumatic events: combat, disaster, and rape. It has been suggested that this formulation fails to capture the protean sequelae of prolonged, repeated trauma. In contrast to the circumscribed traumatic event, prolonged, repeated trauma can occur only where the victim is in a state of captivity, unable to flee, and under the control of the perpetrator. Examples of such conditions include prisons, concentration camps, and slave labor camps. Such conditions also

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exist in some religious cults, in brothels and other institutions of organized sexual exploitation, and in some families.

Captivity, which brings the victim into prolonged contact with the perpetrator, creates a special type of relationship, one of coercive control. This is equally true whether the victim is rendered captive primarily by physical force (as in the case of prisoners and hostages), or by a combination of physical, economic, social, and psychological means (as in the case of religious cult members, battered women, and abused children). The psychological impact of subordination to coercive control may have many common features, whether that subordination occurs within the public sphere of politics or within the supposedly private (but equally political) sphere of sexual and domestic relations.

This paper reviews the evidence for the existence of a complex form of post-traumatic disorder in survivors of prolonged, repeated trauma. A preliminary formulation of this complex post-traumatic syndrome is currently under consideration for inclusion in DSM-IV under the name of DESNOS (Disorders of Extreme Stress). In the course of a larger work in progress, I have recently scanned literature of the past 50 years on survivors of prolonged domestic, sexual, or political victimization (Herman, 1992). This literature includes first-person accounts of survivors themselves, descriptive clinical literature, and, where available, more rigorously designed clinical studies. In the literature review, particular attention was directed toward observations that did not fit readily into the existing criteria for PTSD. Though the sources include works by authors of many nationalities, only works originally written in English or available in English translation were reviewed.

The concept of a spectrum of post-traumatic disorders has been suggested independently by many major contributors to the field. Kolb, in a letter to the editor of the *American Journal of Psychiatry* (1989), writes of the "heterogeneity" of PTSD. He observes that "PTSD is to psychiatry as syphilis was to medicine. At one time or another PTSD may appear to mimic every personality disorder," and notes further that "It is those threatened over long periods of time who suffer the long-standing severe personality disorganization." Niederland, on the basis of his work with survivors of the Nazi Holocaust, observes that "the concept of traumatic neurosis does not appear sufficient to cover the multitude and severity of clinical manifestations" of the survivor syndrome (in Krystal, 1968, p. 314). Tanay, working with the same population, notes that "the psychopathology may be hidden in characterological changes that are manifest only in disturbed object relationships and attitudes towards work, the world, man and God" (Krystal, 1968, p. 221). Similarly, Kroll and his colleagues (1989), on the basis of their work with Southeast Asian refugees, suggest the need for an "expanded con-

cept of PTSD that takes into account the observations [of the effects of] severe, prolonged, and/or massive psychological and physical traumata." Horowitz (1986) suggests the concept of a "post-traumatic character disorder," and Brown and Fromm (1986) speak of "complicated PTSD."

Clinicians working with survivors of childhood abuse also invoke the need for an expanded diagnostic concept. Gelinas (1983) describes the "disguised presentation" of the survivor of childhood sexual abuse as a patient with chronic depression complicated by dissociative symptoms, substance abuse, impulsivity, self-mutilation, and suicidality. She formulates the underlying psychopathology as a complicated traumatic neurosis. Goodwin (1988) conceptualizes the sequelae of prolonged childhood abuse as a severe post-traumatic syndrome which includes fugue and other dissociative states, ego fragmentation, affective and anxiety disorders, reenactment and revictimization, somatization and suicidality.

Clinical observations identify three broad areas of disturbance which transcend simple PTSD. The first is symptomatic: the symptom picture in survivors of prolonged trauma often appears to be more complex, diffuse, and tenacious than in simple PTSD. The second is characterological: survivors of prolonged abuse develop characteristic personality changes, including deformations of relatedness and identity. The third area involves the survivor's vulnerability to repeated harm, both self-inflicted and at the hands of others.

## Symptomatic Sequelae of Prolonged Victimization

### *Multiplicity of Symptoms*

The pathological environment of prolonged abuse fosters the development of a prodigious array of psychiatric symptoms. A history of abuse, particularly in childhood, appears to be one of the major factors predisposing a person to become a psychiatric patient. While only a minority of survivors of chronic childhood abuse become psychiatric patients, a large proportion (40-70%) of adult psychiatric patients are survivors of abuse (Briere and Runtz, 1987; Briere and Zaidi, 1989, Bryer *et al.*, 1987, Carmen *et al.*, 1984; Jacobson and Richardson, 1987).

Survivors who become patients present with a great number and variety of complaints. Their general levels of distress are higher than those of patients who do not have abuse histories. Detailed inventories of their symptoms reveal significant pathology in multiple domains: somatic, cognitive, affective, behavioral, and relational. Bryer and his colleagues (1987), studying psychiatric inpatients, report that women with histories of physical

or sexual abuse have significantly higher scores than other patients on standardized measures of somatization, depression, general and phobic anxiety, interpersonal sensitivity, paranoia, and "psychoticism" (dissociative symptoms were not measured specifically). Briere (1988), studying outpatients at a crisis intervention service, reports that survivors of childhood abuse display significantly more insomnia, sexual dysfunction, dissociation, anger, suicidality, self-mutilation, drug addiction, and alcoholism than other patients. Perhaps the most impressive finding of studies employing a "symptom check-list" approach is the sheer length of the list of symptoms found to be significantly related to a history of childhood abuse (Browne and Finkelhor, 1986). From this wide array of symptoms, I have selected three categories that do not readily fall within the classic diagnostic criteria for PTSD: these are the somatic, dissociative, and affective sequelae of prolonged trauma.

### *Somatization*

Repetitive trauma appears to amplify and generalize the physiologic symptoms of PTSD. Chronically traumatized people are hypervigilant, anxious and agitated, without any recognizable baseline state of calm or comfort (Hilberman, 1980). Over time, they begin to complain, not only of insomnia, startle reactions and agitation, but also of numerous other somatic symptoms. Tension headaches, gastrointestinal disturbances, and abdominal, back, or pelvic pain are extremely common. Survivors also frequently complain of tremors, choking sensations, or nausea. In clinical studies of survivors of the Nazi Holocaust, psychosomatic reactions were found to be practically universal (Hoppe, 1968; Krystal and Niederland, 1968; De Loos, 1990). Similar observations are now reported in refugees from the concentration camps of Southeast Asia (Kroll *et al.*, 1989; Kinzie *et al.*, 1990). Some survivors may conceptualize the damage of their prolonged captivity primarily in somatic terms. Nonspecific somatic symptoms appear to be extremely durable and may in fact increase over time (van der Ploerd, 1989).

The clinical literature also suggests an association between somatization disorders and childhood trauma. Briquet's initial descriptions of the disorder which now bears his name are filled with anecdotal references to domestic violence and child abuse. In a study of 87 children under twelve with hysteria, Briquet noted that one-third had been "habitually mistreated or held constantly in fear or had been directed harshly by their parents." In another ten percent, he attributed the children's symptoms to traumatic experiences other than parental abuse (Mai and Merskey, 1980). A recent

controlled study of 60 women with somatization disorder (Morrison, 1989) found that 55% had been sexually molested in childhood, usually by relatives. The study focused only on early sexual experiences; patients were not asked about physical abuse or about the more general climate of violence in their families. Systematic investigation of the childhood histories of patients with somatization disorder has yet to be undertaken.

### *Dissociation*

People in captivity become adept practitioners of the arts of altered consciousness. Through the practice of dissociation, voluntary thought suppression, minimization, and sometimes outright denial, they learn to alter an unbearable reality. Prisoners frequently instruct one another in the induction of trance states. These methods are consciously applied to withstand hunger, cold, and pain (Partnoy, 1986; Sharansky, 1988). During prolonged confinement and isolation, some prisoners are able to develop trance capabilities ordinarily seen only in extremely hypnotizable people, including the ability to form positive and negative hallucinations, and to dissociate parts of the personality. [See first-person accounts by Elaine Mohamed in Russell (1989) and by Mauricio Rosencof in Weschler (1989).] Disturbances in time sense, memory, and concentration are almost universally reported (Allodi, 1985; Tennant *et al.,* 1986; Kinzie *et al.,* 1984). Alterations in time sense begin with the obliteration of the future but eventually progress to the obliteration of the past (Levi, 1958). The rupture in continuity between present and past frequently persists even after the prisoner is released. The prisoner may give the appearance of returning to ordinary time, while psychologically remaining bound in the timelessness of the prison (Jaffe, 1968).

In survivors of prolonged childhood abuse, these dissociative capacities are developed to the extreme. Shengold (1989) describes the "mind-fragmenting operations" elaborated by abused children in order to preserve "the delusion of good parents." He notes the "establishment of isolated divisions of the mind in which contradictory images of the self and of the parents are never permitted to coalesce." The virtuosic feats of dissociation seen, for example, in multiple personality disorder, are almost always associated with a childhood history of massive and prolonged abuse (Putnam *et al.,* 1986; Putnam, 1989; Ross *et al.,* 1990). A similar association between severity of childhood abuse and extent of dissociative symptomatology has been documented in subjects with borderline personality disorder (Herman *et al.,* 1989), and in a nonclinical, college-student population (Sanders *et al.,* 1989).

### *Affective Changes*

There are people with very strong and secure belief systems, who can endure the ordeals of prolonged abuse and emerge with their faith intact. But these are the extraordinary few. The majority experience the bitterness of being forsaken by man and God (Wiesel, 1960). These staggering psychological losses most commonly result in a tenacious state of depression. Protracted depression is reported as the most common finding in virtually all clinical studies of chronically traumatized people (Goldstein *et al.,* 1987) Herman, 1981; Hilberman, 1980; Kinzie *et al.,* 1984; Krystal, 1968; Walker, 1979). Every aspect of the experience of prolonged trauma combines to aggravate depressive symptoms. The chronic hyperarousal and intrusive symptoms of PTSD fuse with the vegetative symptoms of depression, producing what Niederland calls the "survivor triad" of insomnia, nightmares, and psychosomatic complaints (in Krystal, 1968, p. 313). The dissociative symptoms of PTSD merge with the concentration difficulties of depression. The paralysis of initiative of chronic trauma combines with the apathy and helplessness of depression. The disruptions in attachments of chronic trauma reinforce the isolation and withdrawal of depression. The debased self image of chronic trauma fuels the guilty ruminations of depression. And the loss of faith suffered in chronic trauma merges with the hopelessness of depression.

The humiliated rage of the imprisoned person also adds to the depressive burden (Hilberman, 1980). During captivity, the prisoner can not express anger at the perpetrator; to do so would jepordize survival. Even after release, the survivor may continue to fear retribution for any expression of anger against the captor. Moreover, the survivor carries a burden of unexpressed anger against all those who remained indifferent and failed to help. Efforts to control this rage may further exacerbate the survivor's social withdrawal and paralysis of initiative. Occasional outbursts of rage against others may further alienate the survivor and prevent the restoration of relationships. And internalization of rage may result in a malignant self-hatred and chronic sucidality. Epidemiologic studies of returned POWs consistently document increased mortality as the result of homicide, suicide, and suspicious accidents (Segal *et al.,* 1976). Studies of battered women similarly report a tenacious suicidality. In one clinical series of 100 battered women, 42% had attempted suicide (Gayford, 1975). While major depression is frequently diagnosed in survivors of prolonged abuse, the connection with the trauma is frequently lost. Patients are incompletely treated when the traumatic origins of the intractable depression are not recognized (Kinzie *et al.,* 1990).

## Characterological Sequelae of Prolonged Victimization

### *Pathological Changes in Relationship*

In situations of captivity, the perpetrator becomes the most powerful person in the life of the victim, and the psychology of victim is shaped over time by the actions and beliefs of the perpetrator. The methods which enable one human being to control another are remarkably consistent. These methods were first systematically detailed in reports of so-called "brainwashing" in American prisoners of war (Biderman, 1957; Farber *et al.*, 1957). Subsequently, Amnesty International (1973) published a systematic review of methods of coercion, drawing upon the testimony of political prisoners from widely differing cultures. The accounts of coercive methods given by battered women (Dobash and Dobash, 1979; NiCarthy, 1982, Walker, 1979), abused children (Rhodes, 1990), and coerced prostitutes (Lovelace and McGrady, 1980) bear an uncanny resemblance to those hostages, political prisoners, and survivors of concentration camps. While perpetrators of organized political or sexual exploitation may instruct each other in coercive methods, perpetrators of domestic abuse appear to reinvent them.

The methods of establishing control over another person are based upon the systematic, repetitive infliction of psychological trauma. These methods are designed to instill terror and helplessness, to destroy the victim's sense of self in relation to others, and to foster a pathologic attachment to the perpetrator. Although violence is a universal method of instilling terror, the threat of death or serious harm, either to the victim or to others close to her, is much more frequent than the actual resort to violence. Fear is also increased by unpredictable outbursts of violence, and by inconsistent enforcement of numerous trivial demands and petty rules.

In addition to inducing terror, the perpetrator seeks to destroy the victim's sense of autonomy. This is achieved by control of the victim's body and bodily functions. Deprivation of food, sleep, shelter, exercise, personal hygiene, or privacy are common practices. Once the perpetrator has established this degree of control, he becomes a potential source of solace as well as humiliation. The capricious granting of small indulgences may undermine the psychological resistance of the victim far more effectively than unremitting deprivation and fear.

As long as the victim maintains strong relationships with others, the perpetrator's power is limited; invariably, therefore, he seeks to isolate his victim. The perpetrator will not only attempt to prohibit communication and material support, but will also try to destroy the victim's emotional ties to others. The final step in the "breaking" of the victim is not com-

pleted until she has been forced to betray her most basic attachments, by witnessing or participating in crimes against others.

As the victim is isolated, she becomes increasingly dependent upon the perpetrator, not only for survival and basic bodily needs, but also for information and even for emotional sustenance. Prolonged confinement in fear of death and in isolation reliably produces a bond of identification between captor and victim. This is the "traumatic bonding" that occurs in hostages, who come to view their captors as their saviors and to fear and hate their rescuers. Symonds (1982) describes this process as an enforced regression to "psychological infantilism" which "compels victims to cling to the very person who is endangering their life." The same traumatic bonding may occur between a battered woman and her abuser (Dutton and Painter, 1981; Graham *et al.,* 1988), or between an abused child and abusive parent (Herman, 1981; van der Kolk, 1987). Similar experiences are also reported by people who have been inducted into totalitarian religious cults (Halperin, 1983; Lifton, 1987).

With increased dependency upon the perpetrator comes a constriction in initiative and planning. Prisoners who have not been entirely "broken" do not give up the capacity for active engagement with their environment. On the contrary, they often approach the small daily tasks of survival with extraordinary ingenuity and determination. But the field of initiative is increasingly narrowed within confines dictated by the perpetrator. The prisoner no longer thinks of how to escape, but rather of how to stay alive, or how to make captivity more bearable. This narrowing in the range of initiative becomes habitual with prolonged captivity, and must be unlearned after the prisoner is liberated. [See, for example, the testimony of Hearst (1982) and Rosencof in Weschler, 1989.]

Because of this constriction in the capacities for active engagement with the world, chronically traumatized people are often described as passive or helpless. Some theorists have in fact applied the concept of "learned helplessness" to the situation of battered women and other chronically traumatized people (Walker, 1979; van der Kolk, 1987). Prolonged captivity undermines or destroys the ordinary sense of a relatively safe sphere of initiative, in which there is some tolerance for trial and error. To the chronically traumatized person, any independent action is insubordination, which carries the risk of dire punishment.

The sense that the perpetrator is still present, even after liberation, signifies a major alteration in the survivor's relational world. The enforced relationship, which of necessity monopolizes the victim's attention during captivity, becomes part of her inner life and continues to engross her attention after release. In political prisoners, this continued relationship may take the form of a brooding preoccupation with the criminal careers of

specific perpetrators or with more abstract concerns about the unchecked forces of evil in the world. Released prisoners continue to track their captors, and to fear them (Krystal, 1968). In sexual, domestic, and religious cult prisoners, this continued relationship may take a more ambivalent form: the survivor may continue to fear her former captor, and to expect that he will eventually hunt her down; she may also feel empty, confused, and worthless without him (Walker, 1979).

Even after escape, it is not possible simply to reconstitute relationships of the sort that existed prior to captivity. All relationships are now viewed through the lens of extremity. Just as there is no range of moderate engagement or risk for initiative, there is no range of moderate engagement or risk for relationship. The survivor approaches all relationships as though questions of life and death are at stake, oscillating between intense attachment and terrified withdrawal.

In survivors of childhood abuse, these disturbances in relationship are further amplified. Oscillations in attachment, with formation of intense, unstable relationships, are frequently observed. These disturbances are described most fully in patients with borderline personality disorder, the majority of whom have extensive histories of childhood abuse. A recent empirical study, confirming a vast literature of clinical observations, outlines in detail the specific pattern of relational difficulties. Such patients find it very hard to tolerate being alone, but are also exceedingly wary of others. Terrified of abandonment on the one hand, and domination on the other, they oscillate between extremes of abject submissiveness and furious rebellion (Melges and Swartz, 1989). They tend to form "special" dependent relations with idealized caretakers in which ordinary boundaries are not observed (Zanarini *et al.*, 1990). Very similar patterns are described in patients with MPD, including the tendency to develop intense, highly "special" relationships ridden with boundary violations, conflict, and potential for exploitation (Kluft, 1990).

### *Pathologic Changes in Identity*

Subjection to a relationship of coercive control produces profound alterations in the victim's identity. All the structures of the self—the image of the body, the internalized images of others, and the values and ideals that lend a sense of coherence and purpose—are invaded and systematically broken down. In some totalitarian systems (political, religious, or sexual/domestic), this process reaches the extent of taking away the victim's name (Hearst and Moscow, 1982; Lovelace and McGrady). While the victim of a single acute trauma may say she is "not herself" since the event, the victim of chronic trauma may lose the sense that she has a self. Survivors

may describe themselves as reduced to a nonhuman life form (Lovelace and McGrady, 1980; Timerman, 1981). Niederland (1968), in his clinical observations of concentration camp survivors, noted that alterations of personal identity were a constant feature of the survivor syndrome. While the majority of his patients complained, "I am now a different person," the most severely harmed stated simply, "I am not a person."

Survivors of childhood abuse develop even more complex deformations of identity. A malignant sense of the self as contaminated, guilty, and evil is widely observed. Fragmentation in the sense of self is also common, reaching its most dramatic extreme in multiple personality disorder. Ferenczi (1933) describes the "atomization" of the abused child's personality. Rieker and Carmen (1986) describe the central pathology in victimized children as a "disordered and fragmented identity deriving from accommodations to the judgments of others." Disturbances in identity formation are also characteristic of patients with borderline and multiple personality disorders, the majority of whom have childhood histories of severe trauma. In MPD, the fragmentation of the self into dissociated alters is, of course, the central feature of the disorder (Bliss, 1986; Putnam, 1989). Patients with BPD, though they lack the dissociative capacity to form fragmented alters, have similar difficulties in the formation of an integrated identity. An unstable sense of self is recognized as one of the major diagnostic criteria for BPD, and the "splitting" of inner representations of self and others is considered by some theorists to be the central underlying pathology of the disorder (Kernberg, 1967).

### Repetition of Harm Following Prolonged Victimization

Repetitive phenomena have been widely noted to be sequelae of severe trauma. The topic has been recently reviewed in depth by van der Kolk (1989). In simple PTSD, these repetitive phenomena may take the form of intrusive memories, somato-sensory reliving experiences, or behavioral re-enactments of the trauma (Brett and Ostroff, 1985; Terr, 1983). After prolonged and repeated trauma, by contrast, survivors may be at risk for repeated harm, either self-inflicted, or at the hands of others. These repetitive phenomena do not bear a direct relation to the original trauma; they are not simple reenactments or reliving experiences. Rather, they take a disguised symptomatic or characterological form.

About 7-10% of psychiatric patients are thought to injure themselves deliberately (Favazza and Conterio, 1988). Self-mutilization is a repetitive behavior which appears to be quite distinct from attempted suicide. This compulsive form of self-injury appears to be strongly associated with a his-

tory of prolonged repeated trauma. Self-mutilation, which is rarely seen after a single acute trauma, is a common sequel of protracted childhood abuse (Briere, 1988; van der Kolk *et al.,* 1991). Self-injury and other paroxysmal forms of attack on the body have been shown to develop most commonly in those victims whose abuse began early in childhood (van der Kolk, 1992).

The phenomenon of repeated victimization also appears to be specifically associated with histories of prolonged childhood abuse. Widescale epidemiologic studies provide strong evidence that survivors of childhood abuse are at increased risk for repeated harm in adult life. For example, the risk of rape, sexual harassment, and battering, though very high for all women, is approximately doubled for survivors of childhood sexual abuse (Russell, 1986). One clinical observer goes so far as to label this phenomenon the "sitting duck syndrome" (Kluft, 1990).

In the most extreme cases, survivors of childhood abuse may find themselves involved in abuse of others, either in the role of passive bystander or, more rarely, as a perpetrator. Burgess and her collaborators (1984), for example, report that children who had been exploited in a sex ring for more than one year were likely to adopt the belief system of the perpetrator and to become exploitative toward others. A history of prolonged childhood abuse does appear to be a risk factor for becoming an abuser, especially in men (Herman, 1988; Hotaling and Sugarman, 1986). In women, a history of witnessing domestic violence (Hotaling and Sugarman, 1986), or sexual victimization (Goodwin *et al.,* 1982) in childhood appears to increase the risk of subsequent marriage to an abusive mate. It should be noted, however, that contrary to the popular notion of a "generational cycle of abuse," the great majority of survivors do not abuse others (Kaufman and Zigler, 1987). For the sake of their children, survivors frequently mobilize caring and protective capacities that they have never been able to extend to themselves (Coons, 1985).

## CONCLUSIONS

The review of the literature offers unsystematized but extensive empirical support for the concept of a complex post-traumatic syndrome in survivors of prolonged, repeated victimization. This previously undefined syndrome may coexist with simple PTSD, but extends beyond it. The syndrome is characterized by a pleomorphic symptom picture, enduring personality changes, and high risk for repeated harm, either self-inflicted or at the hands of others.

Failure to recognize this syndrome as a predictable consequence of prolonged, repeated trauma contributes to the misunderstanding of survi-

vors, a misunderstanding shared by the general society and the mental health professions alike. Social judgment of chronically traumatized people has tended to be harsh (Biderman and Zimmer, 1961; Wardell *et al.*, 1983). The propensity to fault the character of victims can be seen even in the case of politically organized mass murder. Thus, for example, the aftermath of the Nazi Holocaust witnessed a protracted intellectual debate regarding the "passivity" of the Jews, and even their "complicity" in their fate (Dawidowicz, 1975). Observers who have never experienced prolonged terror, and who have no understanding of coercive methods of control, often presume that they would show greater psychological resistance than the victim in similar circumstances. The survivor's difficulties are all too easily attributed to underlying character problems, even when the trauma is known. When the trauma is kept secret, as is frequently the case in sexual and domestic violence, the survivor's symptoms and behavior may appear quite baffling, not only to lay people but also to mental health professionals.

The clinical picture of a person who has been reduced to elemental concerns of survival is still frequently mistaken for a portrait of the survivor's underlying character. Concepts of personality developed in ordinary circumstances are frequently applied to survivors, without an understanding of the deformations of personality which occur under conditions of coercive control. Thus, patients who suffer from the complex sequelae of chronic trauma commonly risk being misdiagnosed as having personality disorders. They may be described as "dependent," "masochistic," or "self-defeating." Earlier concepts of masochism or repetition compulsion might be more usefully supplanted by the concept of a complex traumatic syndrome.

Misapplication of the concept of personality disorder may be the most stigmatizing diagnostic mistake, but it is by no means the only one. In general, the diagnostic concepts of the existing psychiatric canon, including simple PTSD, are not designed for survivors of prolonged, repeated trauma, and do not fit them well. The evidence reviewed in this paper offer strong support for expanding the concept of PTSD to include a spectrum of disorders (Brett, 1992), ranging from the brief, self-limited stress reaction to a single acute trauma, through simple PTSD, to the complex disorder of extreme stress (DESNOS) that follows upon prolonged exposure to repeated trauma.

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*Observations*

# How Reliable Are the Memories of Sexual Assault Victims?

The expert testimony excluded from the Kavanaugh hearing

By Jim Hopper on September 27, 2018

Credit: Drew Angerer Getty Images

*Editor's note: If Jim Hopper had been permitted to provide his expert testimony at the September 27, 2018 Senate Judiciary Committee hearing on Judge Kavanaugh's confirmation, these would have been his remarks. This is the first article in a series on the memory science relevant to Christine Blasey Ford's report of being sexually assaulted and Brett Kavanaugh's confirmation process. The second is here.*

Incomplete memories of sexual assault, including those with huge gaps, are *understandable*–if we learn the basics of how memory works and we genuinely listen to survivors.

Such memories should be expected. They are similar to the memories of soldiers and police officers for things they've experienced in the line of fire. And a great deal of scientific research on memory explains why.



I'm an expert on psychological trauma, including sexual assault and traumatic memories. I've spent more than 25 years studying this. I've trained military and civilian police officers, prosecutors and other professionals, including commanders at Fort Leavenworth and the Pentagon. I teach this to psychiatrists in training at Harvard Medical School.

As an expert witness, I review videos and transcripts of investigative interviews. It's like using a microscope to examine how people recall – and don't recall – parts of their assault experiences. I've seen poorly trained police officers not only fail to collect vital details, but actually *worsen* memory gaps and *create* inconsistences.

Ignorance of how memory works is a major reason why sexual assault is the easiest violent crime to get away with, across our country and around the world.

Yet when I teach military service members and police officers, it's mostly about making light bulbs go on in their heads and helping them connect the dots from their own traumatic memories to those of sexual assault survivors.

Soldiers and police know that traumatic memories often have huge gaps. They know it can be difficult or impossible to recall the order in which some things happened. They know they'll *never forget* some things from that alley in Ramadi where their best friend died—even though they *can't* remember many details of the battle, or which month of their third Iraq rotation it was.



That's why soldiers and police often approach me after trainings to say, "You get it," or "now I understand how it's no different for people who've been sexually assaulted."

In short, what I'm talking about here today are *realities*, not theories or hypotheses—realities known all too well by our nation's defenders and its millions of sexual assault survivors.

The science helps us understand why people have incomplete and fragmentary memories, including the brain structures and processes involved, while revealing complexities we would not otherwise discover. And science gives us conceptual tools—mental spotlights, if you will—that help us to see reality more fully and clearly.

Now, briefly, I will use scientific knowledge and concepts to shed light on how memory works, and to inform your understanding of other testimony you are hearing today.

*********



Researchers divide memory processing into three stages: encoding, storage, and retrieval.

*Encoding* refers to the temporary registration of sensations and thoughts into short-term memory, a kind of "buffer" or RAM that can hold information up to 30 seconds.

For *any* event we experience, including this one, we're not taking in every detail. From moment to moment, what our brain encodes is a function of what we're paying attention to, and what has emotional significance to us. Those details are called central details.

In contrast, what we're *not* paying attention to, or has little or no significance to our brain at the time, are called peripheral details. Those are encoded poorly or not at all.

Just a moment ago, was your attention on me, or someone or something else? Did that question I just asked have an emotional impact on you? Those factors are shaping what's being encoded into short-term memory right now.



Critically, whether it's an IED attack or a sexual assault, just because *we*—or an investigator, or even the survivor herself looking back later—believe some aspect of an event would or should be a central detail, that does not mean it was a central detail for the survivor's brain at the time. Many who have been sexually assaulted don't remember whether certain things were done to their body because, at that point, they were focused on the perpetrator's cold eyes, or traffic sounds on the street below. That tells us nothing about the reliability of the details they do recall, and nothing about their credibility.

*Storage* is the next stage.That's the transformation of encoded information so it can be *retained* in the brain, and the brain processes that keep things from being lost.

From the outset, storage of central details is stronger than storage of peripheral ones. Those peripheral details fade quickly, and if not remembered and re-encoded, are mostly gone within a day. We all know this: What we pay attention to and has significance to us is what we're more likely to remember over time.

Even as we sleep, our brains are filtering stored details and *prioritizing* for *continued* storage only some of them—those central details. That's why all memories are incomplete and fragmentary. That's why all memories lack details that were initially encoded, even details that were stored for some time afterward.

Here's another factor that affects storage strength: Whether a detail's emotional significance to us is negative or positive. Evolution has selected brains that are biased to encode the negative more strongly, to enable survival in a world with predators and other grave dangers.



If you go on a Sunday morning show, which of the things you say will those watching be more likely remember? Which of the President's tweets? That "negativity bias" is shaping what our brains are right now working on storing—or not—as memories of this experience.

Most important of all, when it comes to what will remain stored in our brains, is this: How emotionally activated, stressed, or terrified we were during the experience. Decades of research have shown that stress and trauma increase the differential storage of central over peripheral details.

Soldiers know the tunnel-vision that can kick in during combat, the effects it has on their memories and what they can report to commanders in after-action reviews. They train to automate the habit of forcing themselves to move their head and upper body from side to side to escape the tunnel.

Whether it's an enemy ambush in an alley or a sexual assault in a bedroom, our brain will encode and retain what were—for us, moment-by-moment as the attack unfolded—the central details of our experience. Seeing an enemy suddenly appear and fire at us from 10 feet away, and fearing we will die. Struggling to breath with a hand over our face, and fearing we will die. Seeing the enemy's face as our bullets enter his chest. Seeing the face of a boy we know as he holds us down and tugs at our clothes. Such details can be *burned into our brains* for the rest of our lives.

Most of the other details will be lost, and over enough time, that includes even relatively central ones – at least if they haven't been retrieved and re-encoded.

Which brings me, finally, to memory *retrieval*. I only have time to say a few important things.

Yes, memories generally fade. That's partly because what starts out as a relatively detailed memory becomes more abstract over time. We remember the *gist* of what happened and a few of the most central details. When we remember or tell the story, our brain is literally piecing it together on the fly.

That's another reason why, as memory researchers love to say, memory is not like a videotape. Sometimes we get confused. Sometimes other people, or even movies we watch, supply inaccurate details that are inadvertently re-encoded into the overall memory and its abstract story.

But memories of highly stressful and traumatic experiences, at least their most central details, *don't* tend to fade over time. And while people may have the superficial abstract stories they tell themselves and others about their worst traumas, that's not because the worst details have been lost. It's often because they *don't want* to remember them, and don't (yet) feel safe to remember them.

What if that soldier is asked by a friend back home, “Did you ever kill someone close-up in Iraq?” If he doesn’t ignore the question, he may just say, “Yeah, once some guy jumped out in front of me and started firing but I blew him away.” He won’t describe the look on that man’s face as he died – and he may succeed at keeping it out of his mind’s eye, at least that time.

The same is true for many victims of sexual assault. They have bland abstract descriptions they tell themselves and others, for example, their husband early in the marriage, before they feel safe enough to share the painful details, and that sharing some of those is necessary for other reasons. They might not have retrieved the horrific central details for months or years. But that doesn’t mean those vivid sensory details and wrenching emotions aren’t still there, never going away, ready to be retrieved under the right (or wrong) circumstances.

Yes, peripheral and less central details can get distorted more easily than many people realize. But decades of research have shown that the most central details are *not* easy to distort, which typically requires repeated leading questions from people in authority or a very strong internal motivation for doing so.

But without compelling evidence of such influences, there is no scientific or rational basis for *assuming* that such distortions have occurred, especially for those most central and horrible details the person has been both tormented by and trying to avoid, sometimes successfully and sometimes not, for years or even decades.

Thank you for your attention, and I am happy to answer any questions about how the science of memory can help you understand and evaluate the memories reported by the people involved in this matter.

*The views expressed are those of the author(s) and are not necessarily those of Scientific American.*

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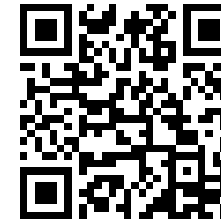

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EXTRAIT

PIERRE JANET

## L'AMNÉSIE ET LA DISSOCIATION DES SOUVENIRS PAR L'ÉMOTION

FÉLIX ALCAN, ÉDITEUR
*108, boulevard Saint-Germain, Paris, 6e*

A mon vieil ami Leudet
avec tous mes remerciements et mes
félicitations.
P. Janet

Janet, P.M.F.

# L'AMNÉSIE

ET LA

# DISSOCIATION DES SOUVENIRS

## PAR L'ÉMOTION[1]

Il n'est pas inutile de recommencer une étude déjà ancienne à propos de nouvelles observations, c'est un moyen de vérification et de correction. J'ai eu l'occasion, il y a quelques années, d'étudier les phénomènes de l'amnésie rétrograde et de l'amnésie continue déterminées par l'émotion sur une malade qui a acquis quelque célébrité[2]. Mme D... présenta à la suite d'une violente émotion une amnésie rétrograde de plusieurs mois et, ce qui est plus étrange, une amnésie continue tout à fait complète qui la rendait tout à fait incapable de conserver même quelques instants le souvenir des divers événements de la vie.

Dans plusieurs études j'ai cherché à montrer le rapport de cette amnésie remarquable avec l'idée persistante de l'accident initial et avec l'émotion du début que cette idée contribuait à entretenir. J'ai pu montrer les métamorphoses singulières de cette amnésie qui a pris à la longue la forme peu connue de la mémoire rétroactive : le sujet semble oublier tous les événements de sa vie au fur et à mesure

1. Un extrait de cette étude a été communiqué à l'Académie de médecine dans sa séance du 26 juillet 1903.

2. Sur cette malade Mme D..., voir les études suivantes : — Charcot, Sur rétro-antérograde, *Revue de Médecine*, fév. 1892, p. 41. — Souques, le rétro-antérograde, dans l'hystérie, les traumatismes cérébraux *Revue de Médecine*, mai 1892, p. 367. — Pierre Janet, de psychologie expérimentale pendant [illegible] Sciences, 30 mars 1899, p. 467-472.

qu'ils se produisent, mais il finit toujours par en retrouver nettement le souvenir au bout d'un certain temps, huit jours ou deux mois suivant son état. Tout en retrouvant en définitive tous les souvenirs, il conserve toujours une amnésie des dernières périodes de la vie : ce trouble persiste en grande partie encore aujourd'hui après douze ans de maladie. Une perturbation aussi profonde de la mémoire et de l'organisation des souvenirs survenant subitement et persistant douze ans après une seule violente émotion me paraît un fait des plus remarquables qu'il faut étudier pour essayer de comprendre le mécanisme de l'émotion. Un phénomène de ce genre me semble bien plus grave, bien plus considérable dans la constitution même de l'émotion que les quelques troubles respiratoires et les quelques palpitations cardiaques que l'on veut trop souvent considérer comme l'essentiel de l'état émotif. Quoique les amnésies émotionnelles se présentent assez souvent sous des formes imparfaites, des cas aussi remarquables que celui de M^me^ D... sont rares, et dans la première étude je ne pouvais rapprocher de celui-ci que quatre cas assez incomplets. J'ai eu l'occasion dans ces dernières années d'étudier un cas nouveau d'amnésie émotionnelle très comparable dans ses grandes lignes à celui de M^me^ D..., quoique présentant des différences intéressantes de détail. C'est à propos de ce cas que je voudrais reprendre l'étude de certaines modifications de la mémoire que peut déterminer l'émotion.

I. Antécédents. — Irène est une jeune fille de vingt-trois ans, qui a présenté pendant deux ans, à la suite des émotions causées par la mort de sa mère, un état hystérique très grave caractérisé essentiellement par des crises de somnambulisme avec hallucinations et par une amnésie très profonde. Ce sont ces deux phénomènes que je désire étudier particulièrement: aussi je me borne à signaler rapidement les antécédents et les autres troubles qui évidemment prédisposaient cette personne aux accidents névropathiques.

Le père était un abominable ivrogne qui se faisait entretenir par sa femme et par sa fille et qui certainement a contribué à la mort de l'une et au délire de l'autre ; il a fini par mourir il y a peu de temps d'une pneumonie qui s'est ajoutée à un état de délirium pour lequel il était traité dans un asile. La mère était une psychasténique tout à fait typique : elle a présenté pendant toute sa vie de la claustrophobie de la manière la plus singulière. L'agitation mentale déterminait chez elle une représentation très vive, tout à fait imagée des

dangers qu'elle courait en restant dans sa chambre : il lui semblait que l'eau ou la neige envahissait la pièce et qu'elle était forcée de grimper sur les meubles, de nager, enfin qu'elle était étouffée contre le plafond[1]. Vers l'âge de quarante-neuf ans, cette femme a été atteinte de tuberculose pulmonaire à marche rapide.

J'ai déjà eu l'occasion d'insister à ce propos sur un fait curieux, très important à mon avis, pour la théorie des phénomènes psychasthéniques. Quand la tuberculose détermina chez elle cette excitation particulière que l'on observe dans cette maladie et surtout quand elle amena un petit état de fièvre presque continue, les obsessions et les phobies qui avaient rempli constamment toute la vie de cette femme disparurent définitivement et pendant les six derniers mois de sa vie, celle-ci fut au point de vue mental à peu près complètement normale[2].

Sous cette double influence héréditaire, il n'est pas surprenant que l'enfant ait présenté de bonne heure toutes espèces de troubles nerveux : il paraît que dès ses premières années elle avait perdu le sommeil normal : incapable de dormir correctement, ou bien elle restait éveillée toute la nuit, ou bien elle dormait les yeux grands ouverts, ou bien elle entrait dans des crises de somnambulisme... De même elle n'a jamais su manger correctement, refusant presque toujours toute nourriture, ou bien, principalement quand elle était à la campagne, dévorant toutes les deux heures sans jamais se rassasier. La puberté aggrava ces dispositions et chaque époque menstruelle était l'occasion de grands évanouissements. Enfin, on peut signaler un singulier trouble de la nutrition : cette jeune fille au milieu d'une abondante chevelure noire présente deux mèches blanches, un peu au-dessus du front, du côté gauche. On prétend dans sa famille que ces mèches seraient apparues subitement à l'âge de dix-huit ans, un matin après une nuit de cauchemars dans laquelle elle aurait rêvé à la mort de sa mère ; détail curieux, la peau qui supporte les cheveux blancs est encore aujourd'hui anesthésique sur la surface de deux pièces d'un franc, tandis que le reste de la peau du crâne et du front reste presque toujours sensible.

Le caractère de cette jeune fille était également anormal : toujours triste, inquiète, mécontente d'elle-même, elle avait constamment le sentiment qu'elle n'arrivait au bout de rien, que ses émotions

1. *Obsessions et psychasthénie*, obs. de Nae, I, p. 205, II, p. 206. (Paris, F. Alcan.)
2. *Obsessions et psychasthénie*, I, p. 529, 650, II, p. 650.

comme ses actions restaient incomplètes et insuffisantes, « la tête comme remplie d'affaires qu'on n'arrive jamais à finir ». Très intelligente et très travailleuse, elle était cependant incapable de rien faire, quand elle se trouvait en présence de quelques personnes ; timide au point de ne pouvoir manger devant quelqu'un, elle souhaitait « de n'avoir jamais besoin de personne, de pouvoir vivre toute seule dans un coin ». Comme toutes les personnes qui présentent cette aboulie sociale, elle avait en même temps par suite de cette contradiction que nous avons si souvent étudiée le besoin d'être dirigée et d'être aimée. Mais comme elle redoutait que l'on s'occupât d'elle, comme elle ne pouvait se décider à laisser voir son affection pour les gens, ses sentiments et son besoin même d'affection ont toujours pris un aspect très étrange qui mériterait une longue étude psychologique, si nous n'avions à considérer sur elle d'autres phénomènes.

Ces insuffisances et ces sentiments d'incomplétude se rattachaient plutôt au début à la série des symptômes psychasthéniques, tels que les présentait sa mère à un si haut degré et, si la maladie avait évolué dans ce sens, Irène serait parvenue comme celle-ci aux phobies et aux obsessions. Mais, lorsqu'elle fut parvenue à l'âge de vingt ans, elle eut à soigner pendant un an sa mère gravement atteinte de tuberculose pulmonaire. Cette maladie dans un pauvre ménage d'ouvriers avec un père constamment ivrogne, une malade d'un caractère et d'une exigence intolérables fut pour la pauvre fille l'occasion du plus grand épuisement. Elle resta soixante nuits de suite sans se coucher, travaillant à la machine à coudre dans les rares instants de liberté que lui laissaient les perpétuelles réclamations de sa mère ou les scènes faites par le père, et soutenant par son travail tout le ménage. Les derniers jours et l'agonie dans cette famille de névropathes en désordre, furent épouvantablement dramatiques. Ces fatigues et ce bouleversement émotionnel semblent avoir changé la direction de la névrose et avoir définitivement constitué l'hystérie dont il nous reste à étudier les principales manifestations.

II. Délire hallucinatoire avec hypermnésie. — L'observation d'Irène, d'après ce que je viens de dire au début, doit être rapprochée des grandes amnésies émotionnelles, et cependant en constatant les symptômes les plus bruyants que cette jeune malade présente tous les jours, on serait plus disposé à croire à une exagération de la mémoire. Plusieurs fois par jour, en effet, et souvent pendant plusieurs heures consécutives, Irène a des crises de somnambulisme

spontané avec bavardages pendant lesquelles elle joue et elle raconte constamment tous les détails de la mort de sa mère. Il est important tout d'abord d'insister sur cette crise et sur la précision des souvenirs qu'elle semble manifester.

La malade qui sent un bourdonnement dans la tête et des suffocations s'étend sur son lit ; elle ne tarde pas à perdre connaissance et reste étendue, immobile, les paupières frémissantes. Bientôt elle a quelques mouvements convulsifs qui semblent être surtout des expressions émotionnelles de l'horreur qu'elle ressent et elle commence à parler. Au début, elle parle tout bas, bientôt elle s'anime, gesticule, crie et son visage présente des expressions d'une intensité et quelquefois d'une beauté remarquable : « Oh, c'est fini, je ne ferai plus de concessions, non j'en finirai moi aussi... Si l'on savait comme on souffre quand on n'a plus sa mère... J'irai la retrouver comme elle me le demande... N'est-ce pas ma petite maman, il vaut mieux que je meure, tu me l'as bien dit que nous devions mourir ensemble... Ah ! te voilà, tu viens me chercher, tu vas mieux, tu as repris ta bonne figure et tes joues roses, tu as mis ta grosse écharpe noire pour aller avec moi à la Place Royale, emmène-moi vite... (elle fait un effort pour sauter du lit). Tu sais bien que je ne peux pas rester seule avec mon père... C'est une chose qu'on ne peut pas lui pardonner de se saouler le jour où elle est morte... Non, c'était trop horrible, il a vomi sur le lit... Et ses yeux à elle qui s'ouvrent... Et cette bouche qui s'ouvre, je l'ai déjà fermée dix fois, et ces jambes qui reviennent en l'air, il faut que je monte sur le lit pour les étendre... Oh ! elle tombe par terre... Il faut que je travaille à la machine, voilà soixante nuits que je ne me suis pas couchée... Oui, maman, je vais finir ce corset pour le donner demain, je dois déjà deux cent cinquante francs, il faut encore que je passe cette nuit... Et si je m'endors sur ma machine, cet homme qui est là, que le père a amené pour boire avec lui... Quand je me suis endormie sur la descente de lit, il a dégraffé ma robe, ah ! ce que je l'ai giflé, ce sale gascon... Et quand je pense qu'il faut à mon père quatre litres par jour et des petits verres... Il a juré hier qu'il ne me laisserait pas tout payer, qu'il aurait de l'argent, allons donc il ne serait pas rentré s'il en avait... Irène, ma fille, il vaut mieux que tu meurs, la vie ne fait que commencer pour toi et tu en as déjà trop vu... La voilà, la locomotive... (elle se lève de son lit, fait quelques pas dans la salle et se couche par terre tout de son long), là je suis sur les rails.... La voilà qui approche, elle s'arrête, il n'avance donc pas le train... Ah !

cela va être bientôt fini, quelle chance ! le voilà !... (elle pousse des cris aigus et a sur son visage une expression d'horreur vraiment tragique, puis elle retombe les yeux fermés et le corps raidi. Cette immobilité ne dure qu'un instant, bientôt elle se relève assise, les yeux ouverts, et recommence son bavardage). Papa fait donc chauffer la chemise à maman... Il ne comprend pas, il est saoul. Oh, c'est épouvantable... ses yeux se sont ouverts et sa bouche aussi, personne n'a voulu l'embrasser, et moi je n'ai pas peur... Elle me faisait bien manger dans la cuiller où elle avait craché pour voir si je l'aimais... Oh, son ventre est devenu tout bleu... Je ne dirai pas au médecin que j'ai bu une bouteille de laudanum et que cela m'a fait vomir... Mais cette mort ne vient donc pas. »

Des scènes de ce genre se répètent incessamment avec toutes sortes de détails nouveaux : elles sont très remarquables et à bien des points de vue, mais elles nous intéressent, surtout ici, à cause de la mémoire qu'elles manifestent. On constate, en effet, dans toutes ces hallucinations un certain nombre de souvenirs des plus précis.

D'abord l'image de la mère, sa figure, son costume même, soit pendant la maladie, soit même pendant l'état de santé antérieur se représentent avec la plus grande netteté. Le son de la voix, les diverses conversations, les dernières paroles sont parfaitement remémorées et reconnues. Autour de ces images prédominantes on peut grouper un grand nombre de faits dont le souvenir est constaté par les paroles et par les actes que je note pendant les crises : l'agonie et la mort du 7 juillet 1900, bien des événements antérieurs, les exigences cruelles de la mère, ses promenades quand déjà malade elle allait au Palais Royal (mai et juin 1900), l'accident de la passerelle de l'Exposition sur laquelle Irène s'est trouvée et dont elle parle fréquemment dans son délire (juin), la tentative du gascon dans sa chambre (début de juillet), la vue d'un homme qui s'est tiré un coup de revolver devant elle rue Mouffetard (juin). Puis on note des événements postérieurs à la mort de la mère, son enterrement, les rires d'Irène en allant au cimetière qui ont fait scandale, son premier essai de suicide, en absorbant une bouteille de laudanum (10 juillet 1900), la venue de ses oncles à Paris, les visites fréquentes de l'Exposition faites avec eux, la soirée qu'elle a absolument voulu passer au théâtre malgré son deuil (août et septembre), son second essai de suicide (octobre), la locomotive de la gare de Lyon qui lui a fait une si vive impression (novembre), son entrée à l'hôpital (12 décembre 1900). Elle se figure que c'est sa mère qui l'y a con-

duite et elle raconte dans son délire son entrée à l'hôpital, les questions qu'on lui a faites, les malades qu'elle a vues. Tous ces récits qu'elle fait ainsi dans son délire ont pu être vérifiés et sont rigoureusement exacts.

Ces hallucinations et ces souvenirs se présentent encore dans d'autres circonstances, sans qu'il y ait une crise ou un délire proprement dit. Irène fait des tentatives absurdes de suicide : elle s'élance contre une fenêtre qui est grillée, elle cherche à prendre une bouteille de médicaments, ou à s'étrangler. Quand on lui demande pourquoi elle fait ces absurdités, c'est, dit-elle, parce qu'une voix qui est celle de sa mère et qu'elle reconnait très bien le lui commande brutalement. De même, elle cesse de manger « parce que sa mère le lui défend »; si elle enfreint cet ordre, elle voit la tête de sa mère dans son assiette et elle a l'idée qu'elle mange sa mère. D'ailleurs cette image de la mère apparaît à tout propos : « si je parle à quelqu'un, je suis troublée, parce que maman apparaît à sa place... ; je n'ose écraser ou toucher aucune mouche, aucune petite bête, parce qu'il me semble que c'est elle, que je marche sur elle... C'est idiot, je vais finir par ne plus bouger du tout et par me laisser mourir comme cela... Le robinet d'eau criait, j'ai entendu comme si c'était maman qui criait, l'eau était son sang et mes mains étaient toutes rouges. »

Ces hallucinations lui apparaissent subitement comme un éclair au travers des actions normales qu'elles troublent. Elles ne sont nullement influencées par la volonté de la malade, qui ne peut ni les évoquer, ni les faire disparaître. Elles laissent à peine un souvenir vague pendant quelques instants : souvent nous jugeons par l'attitude d'Irène, par ses soubresauts, qu'elle éprouve un phénomène de ce genre, tandis qu'un instant après elle affirme n'avoir été dérangée par rien. Ces diverses hallucinations qui ont lieu pendant la veille, s'ajoutent donc à tous les phénomènes qui ont été observés pendant les crises pour nous montrer que le souvenir du visage de la mère, de ses paroles, de sa mort, de tous les petits faits qui ont précédé et suivi cet événement est conservé avec une précision qui semble plutôt exagérée.

Des crises et des hallucinations de ce genre se rattachent évidemment à l'hystérie et doivent être en rapport avec d'autres phénomènes de la névrose. Cependant, au moins dans la première période de la maladie, pendant le grand développement des crises, les autres accidents hystériques étaient rares. Ainsi, pendant près d'un an, Irène

n'a présenté aucun trouble bien notable dans le mouvement des membres, ni paralysies, ni contractures. Ce n'est qu'à la fin de la maladie, quand les troubles mentaux eurent été supprimés, qu'elle a eu assez souvent des contractures surtout à la jambe droite.

Il en est de même pour les troubles de la sensibilité qui furent rares et peu marqués pendant la première période de la maladie et qui n'apparurent de temps en temps, d'une manière toujours peu accentuée, qu'à la fin en même temps que ces quelques contractures.

En effet, l'examen des diverses sensibilités a été fait avec soin à bien des reprises dans les intervalles qui séparaient les grandes crises délirantes. Ainsi j'ai fait sur cette malade quelques recherches sur la précision des mouvements en rapport avec la sensibilité kinesthésique, recherches que je ne puis étudier ici en détail. Le sujet devait enfiler avec une aiguille des trous de plus en plus fins percés dans une plaque métallique (filière des sondes de Charrière) sans en toucher les parois : le contact de l'aiguille contre les parois faisait résonner un timbre électrique. Chaque trou étant numéroté suivant son diamètre, on peut marquer un chiffre pour le dernier trou enfilé correctement et la moyenne de dix expériences peut servir à exprimer la précision des mouvements. Je m'étais servi autrefois de ce petit appareil en 1889, dans mes cours sur l'anesthésie hystérique : je l'avais construit pour mettre en évidence les modifications du mouvement en rapport avec l'anesthésie. Chez Irène cette mesure me donne comme moyenne dans une série d'expériences les chiffres de 8, 5, 10, 11, 9, ce qui ne montre guère de troubles bien nets, car les individus les plus normaux arrivent très difficilement sans une étude spéciale aux chiffres de 6 et de 5. Si on répète cette même expérience sur Irène quand elle est émotionnée, par exemple quand elle vient de recevoir une mauvaise nouvelle de son père, elle n'obtient plus que les moyennes de 15, 14 ou 16. On retrouve le même changement chez d'autres sujets sains ou malades : c'est une des expériences dont je me suis servi dans mon cours de l'année dernière pour montrer les modifications des mouvements dans l'émotion.

Comme cette étude de mouvement le fait prévoir il y a peu de troubles de la sensibilité. Quand le sujet est bien calme et qu'il n'a pas eu de crises délirantes depuis quelques heures, on ne peut mettre en évidence aucune altération de la sensibilité kinesthésique. On constate aussi que, à peu près sur tout le corps, le tact est bien conservé ; les mesures avec divers aesthésiomètres donnent partout, sur les bras, sur la poitrine, sur le front, sur la nuque, des chiffres

à peu près normaux. Il n'y a que la région épigastrique qui présente une diminution notable de la sensibilité et à de certains moments une véritable anesthésie tactile. Les sens spéciaux sont également à peu près intacts : l'ouïe n'est pas altérée, la vue est ou semble être normale, car les diverses mesures ne montrent pas d'altérations appréciables ni pour l'acuité visuelle, ni pour le sens des couleurs, ni pour le champ visuel ; l'odorat est conservé, le goût est peut-être un peu diminué, mais il distingue encore les saveurs principales. Dans ces périodes de calme, il n'y a guère que la sensibilité à la douleur qui présente une altération permanente, car il y a constamment un degré marqué d'analgésie surtout sur le côté droit.

Il n'en est plus de même, si on examine Irène immédiatement après les grandes crises, ou pendant les périodes de fréquentes hallucinations. L'anesthésie cutanée augmente alors surtout à droite sans jamais devenir complète, elle se développe sur la jambe droite, le tronc et le bras droit, la figure et le front ont toujours paru conserver une sensibilité à peu près normale, sauf un certain degré d'analgésie. Ce qui est frappant, c'est que la sensibilité musculaire qui était auparavant bien conservée a également diminué à droite, au point que la malade oublie son bras quand on le met en l'air et présente à un faible degré le syndrome de Lasègue. Après certaines crises, j'ai observé un fort rétrécissement du champ visuel surtout pour l'œil droit, mais cela est rare et dure peu. Les sensibilités viscérales sont évidemment modifiées, car la malade refuse souvent de manger et ne sent plus la faim d'une manière correcte. Cela est à rapprocher de son anesthésie hypogastrique, quoique je ne sois pas convaincu, comme je l'ai dit souvent, que l'anorexie soit exclusivement en rapport avec l'anesthésie de l'estomac. De temps en temps, la malade se plaint d'une sensation d'étouffement et dit que sa poitrine se glace ; mais j'ai toujours constaté, même en employant l'appareil de Bloch qui mesure le moment où le sujet sent que sa respiration est gênée, que cette sensibilité respiratoire était à peu près normale. Les sensibilités abdominales, autant qu'on peut le constater par les dires de la malade qui affirme sentir les divers besoins, sont restées correctes.

En résumé nous trouvons évidemment quelques stigmates d'hystérie, une analgésie presque permanente et diverses anesthésies passagères, mais ces stigmates sont assez légers et ne semblent pas en proportion de la gravité des crises somnambuliques. Et surtout, comme on les rencontre semblables dans toutes les formes d'hystérie, ils ne semblent guère en relation spéciale avec ce délire particulier,

cette exagération de la mémoire, ces hallucinations qui remplissent les crises si fréquentes. L'hypermnésie semble jusqu'à présent le phénomène essentiel de la maladie.

III. Les amnésies. — Après avoir constaté ces hallucinations et cette exagération apparente des souvenirs, on éprouve un étonnement quand on entend les personnes qui conduisent la malade se plaindre d'un symptôme tout à fait inverse : « C'est, dit-on, qu'elle a oublié sa mère d'une manière invraisemblable. » Cet oubli n'est pas très évident au premier abord, car Irène, à qui on l'a reproché et qui en a honte, cherche à le dissimuler : « Je sais bien, dit-elle, que ma mère est morte au mois de juillet, on me l'a dit, et cela doit être vrai, puisque je suis en deuil et que je ne la vois pas auprès de moi... Parbleu je sais bien que je devais avoir une mère et qu'elle devait me ressembler, être brune comme moi... » C'est là une mémoire verbale, intellectuelle qui dissimule un oubli véritable.

En premier lieu on constate que cette jeune fille ne pense guère à sa mère qu'elle aimait tellement auparavant et pour laquelle elle s'est dévouée d'une manière vraiment folle. Il faut insister pour l'amener à y penser d'une manière volontaire et alors on constate qu'elle ne réussit pas à se représenter sa mère, à évoquer son image visuelle : « Autrefois, dit-elle, je me représentais très bien la figure des gens, et quant à maman, je pouvais l'imaginer devant moi presque comme si elle y était réellement... Maintenant je ne sais plus ce qu'elle est devenue, je n'y pense pas et, quand on me le fait remarquer, j'essaye de me la représenter, je ne le peux pas... De quelle couleur était-elle ? Comment est-ce qu'elle était coiffée ? Comment est-ce qu'elle était habillée ?... C'est drôle, je ne puis la revoir... C'est presque pareil pour les autres figures, pour mon père, pour ma tante..., et pour vous c'est pareil, je crois toujours que vous êtes blond et que vous n'avez pas de barbe... »

Si on l'interroge en second lieu sur la mort de sa mère, on voit qu'elle sait la chose comme un événement historique, mais qu'elle ne la sent pas, qu'elle n'en a pas la conviction : « Je ne me suis jamais mis dans la tête que maman soit morte... Que voulez-vous, je dis qu'elle est morte pour dire comme tout le monde, mais moi je n'en sais rien... Il me semble qu'elle voyage, qu'elle va revenir, qu'il n'y a pas lieu de s'en préoccuper et je n'y pense plus... Si on frappe à la porte, si la porte s'ouvre je sursaute, je crois toujours que c'est elle qui entre... D'ailleurs, si elle était vraiment

morte, j'en aurais un chagrin énorme, car je ne l'ai jamais quittée et je l'adorais... et cela ne me fait rien... » Il y a là une curieuse séparation de la mémoire intellectuelle et de la représentation sensible et profonde.

Ce défaut de conviction se joint à une amnésie véritable qui d'ailleurs en est la raison d'être. La notion de la mort de la mère n'est dans son esprit qu'une idée tout à fait abstraite, réduite à son squelette et tout à fait dépourvue de ce cortège de souvenirs, de représentations de toute espèce qui forme dans notre esprit les croyances et les sentiments. « Ma mère est morte de phtysie, répète Irène, le médecin l'a dit... Elle a dû mourir chez elle dans son lit... Je ne sais pas si j'y étais... J'ai dû pourtant la soigner... Papa a dû être insupportable comme toujours... » C'est tout ce qu'on peut en tirer sur un événement qu'elle décrit d'une manière si dramatique, quand elle est en délire. Sur toutes les scènes invraisemblables qui se sont passées pendant cette nuit, on ne peut obtenir aucun détail : l'oubli en est absolu.

Il en est exactement de même, si on remonte en arrière et si on interroge la malade sur les événements qui ont rempli le début de juillet, les mois de juin et de mai. Les soins donnés à sa mère, les inquiétudes, les nuits passées à travailler auprès d'elle, les dettes, l'inconduite du père, etc., tout cela lui est absolument inconnu. Le gascon était un ami de son père, qui se saoulait avec lui, et qu'elle n'aimait guère, c'est tout ce qu'elle en sait.

L'ouverture de l'Exposition, la rupture de la passerelle sont des choses dont elle a peut-être entendu parler, mais qu'elle ne connaît pas autrement. En un mot, si l'on excepte les souvenirs surajoutés parce qu'elle en a entendu parler depuis, on ne peut lui faire retrouver la mémoire d'aucun des événements qui ont eu lieu pendant les deux mois qui ont précédé la mort de sa mère. Quand on remonte plus haut, l'amnésie est moins nette : Irène retrouve évidemment quelques souvenirs relatifs au mois de mars et au mois de février. Mais encore faut-il que ces souvenirs n'aient que très peu de rapport avec sa mère, car alors ils sont oubliés également. Ainsi elle ne sait pas si sa mère se levait ou si elle restait couchée à cette époque, elle ne se souvient pas des premiers vomissements de sang survenus pourtant en janvier à la suite d'une scène assez caractéristique avec le père... La limite de cette amnésie rétrograde n'est donc pas absolument nette, comme on l'a observé dans certains cas : l'amnésie est complète pendant deux mois et demi à peu près, puis elle devient

plus vague, mais elle s'étend encore en arrière au moins sur trois mois d'une manière incomplète et systématique.

Si nous examinons maintenant les faits postérieurs à la mort de la mère, nous constatons exactement le même trouble : Irène ne sait pas si on l'a emmenée à l'enterrement ; l'arrivée de ses oncles à Paris, les visites faites avec eux à l'Exposition sont oubliées ; en un mot, les mois d'août, de septembre et d'octobre n'existent pas pour elle. Sur les événements postérieurs elle garde quelques souvenirs très confus. D'ailleurs on constate facilement la raison de ces derniers oublis, car on note constamment chez elle à un haut degré ce trouble de la mémoire que j'ai décrit sous le nom d'amnésie continue. Irène est entrée à l'hôpital en décembre et elle a paru sur le moment très bouleversée par cet internement. Mais au bout de peu de jours, elle était tout à fait indifférente, et maintenant, elle ne sait plus du tout quand elle est entrée, à quel propos, qui l'a conduite, si elle a été affligée oui ou non. Il lui semble qu'elle a toujours été ici et qu'elle n'a été émue par rien. Les différents événements du service ne l'impressionnent guère, elle ne parvient pas à retenir les noms des personnes qui l'approchent, ni leur figure, en un mot les premiers mois de son séjour à l'hôpital sont remplis par une amnésie continue qui s'ajoute à l'amnésie rétrograde précédente. A côté de l'hypermnésie qui remplit les crises, il faut donc faire place à une amnésie non moins grave qui remplit la veille.

Suivant une convention dont je me suis déjà servi dans plusieurs ouvrages, je représente cette amnésie par le schéma de la figure 1. Le triangle inférieur ombré représente le développement de la mémoire et son accroissement régulier, les taches noires représentent les amnésies : leur date d'apparition est indiquée par la coordonnée horizontale qui représente le cours du temps et les souvenirs.

IV. La Restauration des souvenirs. — Le fait intéressant sur lequel je désire appeler ici l'attention c'est la coïncidence singulière de l'hallucination avec hypermnésie et de l'amnésie. Il est évident que les deux troubles opposés portent exactement sur les mêmes pensées. Ce sont tous les événements relatifs à la mort de sa mère qui sont oubliés, ainsi que les faits environnants survenus à la même époque et en réalité intimement mêlés avec cette mort, et ce sont exactement les mêmes événements dont l'image extrêmement

1. *Névroses et idées fixes*, 1898, I, p. 125, 148 (Paris, F. Alcan).

détaillée et précise devient envahissante pendant les crises. La figure de la mère si complètement oubliée pendant la veille est celle qui réapparaît avec une telle intensité dans les délires, dans les terreurs et dans toutes les hallucinations.

Il semble qu'il y ait une étroite dépendance entre ces deux faits et je l'avais déjà notée dans des observations précédentes. Mme D... cette

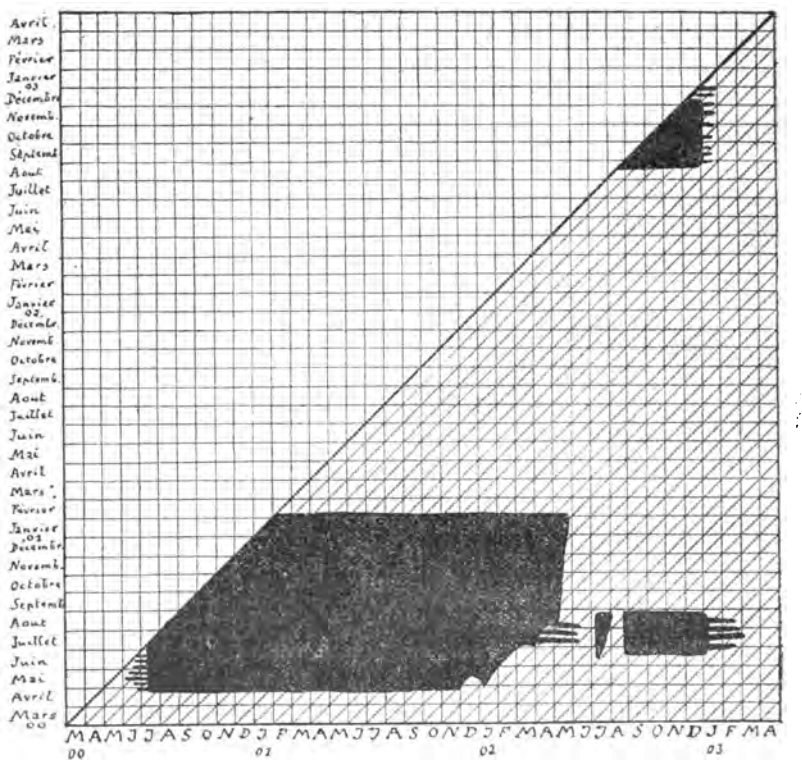


Fig. 1.

femme bouleversée par un mauvais plaisant qui lui avait annoncé brusquement la mort de son mari, avait complètement oublié cet événement et avait même présenté à ce propos une amnésie rétrograde de plusieurs mois [1]. Mais j'ai pu mettre en évidence chez elle des hallucinations extrêmement fréquentes et difficiles à connaître, car la malade les oubliait immédiatement et ne pouvait les signaler elle-même à l'observateur. A tout instant elle voyait réapparaître

1. L'amnésie continue, *Revue générale des Sciences*, 1893, p. 167. *Névroses et idées fixes*, 1898, p. 109, 116.

l'individu et l'entendait lui dire avec le même ton : « Madame D..., préparez un lit, car on va vous rapporter votre mari qui est mort. » Dans beaucoup d'autres observations que j'ai présentées à ce propos, la relation était identique.

Pour bien établir la dépendance de ces deux faits, il faut essayer de faire varier l'un d'entre eux pour voir si l'autre présentera des modifications parallèles. Quand j'ai étudié ce problème sur Mme D..., j'ai cherché à modifier le premier élément, l'idée fixe entretenant l'émotion, j'ai cherché à décomposer cette idée, à diminuer son importance et son caractère émotionnant ; le résultat a été fort net, l'amnésie a diminué dans la même proportion. A propos de ce cas nouveau, présenté par Irène, je me suis proposé de faire l'expérience inverse, de modifier uniquement l'amnésie pour voir si l'hallucination se modifierait de la même manière.

Irène était depuis trois mois à l'hôpital sans que les traitements ordinaires, les toniques, l'hydrothérapie, quelques exercices gymnastiques, l'électricité statique et l'isolement de son milieu aient amené aucune modification dans son état : les crises délirantes semblaient plutôt augmenter de fréquence et de durée, l'amnésie rétrograde était complète et l'amnésie continue presque complète. Préoccupé à ce moment d'une autre catégorie de malades, les psychasthéniques, je ne m'étais occupé de cette jeune fille que pour faire le diagnostic de son état et pour prendre l'observation à son entrée. Pour réaliser l'expérience que je me proposais de faire, je ne m'occupai aucunement ni des crises, ni des hallucinations, je ne dirigeai aucunement l'attention de la malade ni sur les mouvements, ni sur la sensibilité qui du reste était peu atteinte, je considérai Irène uniquement comme une amnésique et je cherchai seulement par une éducation dirigée dans ce sens à raviver ses souvenirs.

Chez une malade hystérique, ayant déjà des crises de somnambulisme naturel, il était tout indiqué de rechercher les souvenirs pendant les périodes de sommeil hypnotique ou de somnambulisme artificiel si analogue au premier. Il ne fut pas difficile, comme on le prévoit, d'hynoptiser cette jeune fille : son état psychologique très instable se laissait facilement modifier. Elle entrait dans des états psychologiques différents de son état de veille habituelle, pendant lesquels elle présentait une activité mentale suffisante pour comprendre les questions et y répondre, pour être facilement suggestionnée, mais dont elle ne conservait aucun souvenir; quand elle revenait à son état précédent : ce qui est pour moi la définition d'un

état hypnotique. Cette amnésie du sommeil hypnotique était plus complète et plus rapide que son amnésie ordinaire des événements de la veille, elle disparaissait dans un nouveau somnambulisme, car Irène suivant la loi commune retrouvait alors nettement le souvenir du somnambulisme précédent, ces états présentaient donc tous les caractères essentiels des états hypnotiques.

Je dois dire que l'examen de ces premiers états hypnotiques me causa une déception : dans ces états Irène ne retrouvait pas du tout les souvenirs perdus pendant la veille. Peut-être la dernière partie de l'amnésie, celle qui portait sur les événements récents était-elle un peu moins complète, mais l'amnésie localisée et rétrograde de la mort de la mère et des deux mois précédents n'avait subi aucune modification.

La constatation de cette amnésie persistant pendant le somnambulisme provoqué donne lieu à deux remarques intéressantes. D'abord il est curieux de voir que de tels souvenirs réapparaissent d'une façon si complète pendant la crise délirante et qu'ils sont tout à faits absents pendant le somnambulisme provoqué. Ce fait se rattache aux remarques que j'ai déjà faites autrefois sur le nombre et la variété des états somnambuliques. Il y a chez ces malades instables, dont la conscience est toujours incomplète, d'innombrables formes d'existence psychologique ou si l'on préfère des formes variées de l'activité cérébrale. Leur vie dite normale n'est d'ailleurs qu'une de ces formes aussi incomplète que les autres, tout au plus un peu plus stable [1]. Il suffit que ces formes d'équilibre mental soient assez distinctes les unes des autres pour déterminer des différences de mémoire et elles formeront autant de somnambulisme ou d'existences psychologiques. Dans le cas de notre malade il était facile de voir que le somnambulisme déterminé par des pratiques hypnotiques différait du somnambulisme de la crise par un point très important. Pendant sa crise Irène ne m'entendait aucunement, ne me répondait pas, et n'avait aucune conscience du monde extérieur. Dans son état hypnotique elle était encore très isolée puisqu'elle ne voyait rien et n'entendait aucune des personnes étrangères, mais elle avait son attention dirigée sur ce que je lui disais, elle me répondait et m'obéissait. Cette différence semblait être suffisante pour empêcher pendant l'hypnose la réapparition des souvenirs de la période oubliée.

1. *L'automatisme psychologique*, 1889, p. 125.

La deuxième remarque que nous suggère l'oubli pendant l'hypnose des souvenirs atteints par l'amnésie rétrograde est relative au diagnostic de ces amnésies rétrogrades et continues chez les hystériques. Quand Charcot étudiait le cas remarquable de Mme D., il voulait établir comme caractère essentiel de ce syndrome la réapparition immédiate des souvenirs pendant l'hypnose. Il refusait d'assimiler au cas de Mme D., le cas d'une de mes malades, Marcelle, parce que chez elle les souvenirs ne revenaient pas immédiatement pendant l'hypnose. Nous allons voir en étudiant le somnambulisme d'Irène que ce caractère est très variable, que par des légères modifications de l'hypnose, par une éducation du sujet on peut le modifier et qu'il n'y a pas lieu de s'en servir pour établir une distinction entre ces malades.

En effet, comme il était plus facile d'isoler le sujet et de diriger son attention rendant l'état hypnotique, je forçai Irène pendant cet état à rechercher tel ou tel souvenir, je dirigeai les associations d'idées, j'excitai l'effort de toute manière. Il y a là à la fois suggestion et excitation de la tension psychologique par l'effort que faisait le sujet, par l'attention, par la confiance qu'on essaye de lui inspirer. La restauration des souvenirs dans ces conditions est un phénomène très complexe.

Ces expériences de restauration des souvenirs chez les amnésiques étant toujours intéressantes, il faut noter avec soin les différentes circonstances qui accompagnent les modifications de la mémoire. J'étudierai particulièrement ici les sentiments du sujet, l'ordre de réapparition des souvenirs, et les oscillations du niveau de la mémoire. Au premier point de vue je constate un fait, qui confirme d'une manière intéressante mes anciennes observations, ce sont les sensations de douleur cérébrale, au moment du changement de la mémoire. Ces douleurs avaient été autrefois chez Mme D., tout à fait remarquables et caractéristiques, et il était très important d'éviter de les suggérer à ce nouveau sujet. Je ne crois pas que cette expérience de la restauration des souvenirs ait été refaite à l'hôpital depuis plusieurs années, ni qu'Irène ait pu jamais en entendre parler; je suis certain d'avoir pris toutes les précautions moi-même pour n'y faire jamais aucune allusion. Aussi la réapparition de ces souffrances exactement de la même manière, me porte-t-elle à croire qu'il y a là un phénomène important qui accompagne la modification cérébrale. Pendant qu'Irène fait des efforts pour se souvenir, quand elle commence à retrouver des lambeaux de mémoire, on la voit palir.

elle porte les mains à la tête, elle gémit, et, au milieu de quelques secousses convulsives et de rires spasmodiques, elle répète : « cela me casse la tête, c'est comme si on la déchirait, comme si on sortait tout ce qu'il y a dedans, ma tête se fend en deux... » Il faut remarquer que ce sont les mêmes expressions que chez Mme D : « Ma tête s'ouvre en deux... » Si on insiste trop, la malade a des vertiges et des vomissements et très souvent elle s'évanouit. Il est très difficile d'analyser ces douleurs cérébrales, et même d'indiquer exactement leur place. Une fois ou deux la malade désignait le front, mais une dizaine de fois elle se plaignait de l'occiput et y portait les mains; le plus souvent la douleur m'a paru siéger au vertex : « Il y a quelque chose qui se tord dans ma tête en arrière et au-dessus... on dirait qu'on me prend la tête, qu'on l'ouvre, qu'on tire tout ce qu'il y a dedans en arrière et au-dessus... ça craque, en haut dans ma tête, quand un souvenir revient... » Ces douleurs si peu explicables d'ailleurs sont particulièrement graves, quand on réveille le sujet après une séance d'efforts pour retrouver les souvenirs. Tandis que le réveil est d'ordinaire parfaitement facile et calme, il devient difficile après ce travail de restauration de la mémoire : le sujet se plaint de maux de tête, il a quelquefois des vomissements et des syncopes. Quoi qu'il en soit, les souvenirs se rétablissaient ainsi au moins pendant le sommeil hypnotique et quand la malade avait traversé ces maux de tête ils restaient persistants. C'est-à-dire qu'à moins d'accidents intercurrents et de rechutes en arrière, comme on en verra, on les retrouvait sans difficulté dans la prochaine séance de sommeil hypnotique. Le sujet revenait alors au type de Mme D., avec souvenirs pendant l'hypnose et amnésie seulement pendant la veille.

Il fallut plus tard une seconde éducation pour réacquérir même pendant la veille ces souvenirs devenus nets et faciles pendant l'hypnose, mais ce second travail fut loin d'être aussi difficile que le premier.

Il n'était guère possible au début de constater l'ordre dans lequel réapparaissaient les souvenirs, car ils semblaient revenir confusément et pour ainsi dire tous à la fois : « Il y a trop de choses qui arrivent à la fois. . Je ne puis pas me rendre compte de ce que je pense... Il me semble que je revois tout ensemble, que je mêle le tout... Les souvenirs sont trop bizarres, cela vient vite et cela disparaît... Cela saute d'un bout de phrase à un autre, je ne peux même pas vous les dire... »

Cette période de confusion dura peu et Irène exprima des souvenirs précis; voici d'une manière générale l'ordre dans lequel ces souvenirs ont réapparu avec précision. Nous constatons d'abord l'application de la loi de M. Ribot, c'est-à-dire la réapparition des souvenirs en commençant par les plus anciens. Irène retrouve d'abord les souvenirs du début de l'Exposition au mois de mai, puis l'accident de la passerelle, sur laquelle elle se trouvait en juin, les premiers signes de la maladie de sa mère en janvier, mars et avril. Ces souvenirs relatifs à la mère sont loin de réapparaître complets, même quand ils sont anciens, car il est impossible de préciser les faits ni d'évoquer la figure de la mère. Puis nous obtenons non sans peine le souvenir des événements qui ont rempli les premiers jours de juillet, c'est-à-dire qui ont eu lieu quelques jours avant la catastrophe Mais ici la loi cesse de s'appliquer correctement et il est impossible de continuer l'évocation des souvenirs suivant l'ordre du temps. Malgré tous les efforts possibles, les souvenirs des derniers jours, de la mort, de l'enterrement ne peuvent réapparaître consciemment. Le sujet souffre trop, il tombe en syncope ou commence des crises d'hystérie dans lesquelles les souvenirs cherchés se manifestent automatiquement d'une toute autre manière. Au milieu de ces efforts, le sujet commence à retrouver le souvenir des événements postérieurs à cette époque, il semble que la conscience a sauté involontairement une dizaine de jours. Voici les querelles avec le père ivrogne qui ne voulait pas mettre un crêpe à son chapeau, voici la visite des oncles, les promenades à l'Exposition, la maladie qu'Irène commence à avoir elle-même, les diagnostics bizarres des médecins, ses consultations à l'hôpital, enfin tous les faits des mois d'août, de septembre et d'octobre. Mais voici de nouveau une pierre d'achoppement : je ne puis lui faire retrouver le souvenir de son entrée à la Salpêtrière, ni celui d'un cours de M. Raymond dans lequel elle a été présentée, ce qui l'a fort émotionnée. Elle passe encore par-dessus pour en arriver facilement aux événements postérieurs.

Un peu plus tard il y a encore le souvenir d'un changement momentané de salle qui lui a été très pénible et qu'elle ne peut pas retrouver. Puis elle arrive assez vite à tous les événements récents que d'ailleurs depuis quelque temps elle retenait plus facilement. En un mot il y a une exception fort remarquable à la loi de réapparition des souvenirs suivant l'ordre du temps : les événements qui ont déterminé de violentes émotions ne réapparaissent pas à leur

place. Ce n'est que lorsque la malade est beaucoup plus avancée dans la restauration qu'elle peut revenir en arrière et attaquer la restauration de ces pensées émotionnantes. Depuis deux mois déjà, Irène pouvait raconter tout l'hiver 1901 et même son entrée à l'hôpital en décembre 1900 quand elle réussit à peine et très péniblement à retrouver pendant l'état hypnotique la mémoire des derniers jours de sa mère en juillet 1900 : « Je vois son ombre, je vois ce qu'elle faisait, quand elle devenait méchante avec moi, mais je ne la vois pas bien ; il faut encore que je lui compose une tête... » Puis, après bien des malaises et des petites crises avortées, voici qu'apparaissent tous les souvenirs de l'agonie et de la mort. La pauvre fille recommence à raconter toute cette nuit dramatique qu'elle avait si souvent décrite et même jouée dans ses crises; mais pour la première fois elle la raconte en conservant une certaine conscience d'elle-même et en pouvant en même temps parler à une personne auprès d'elle. Les rires convulsifs reviennent quand elle « aide sa mère à cracher son poumon, en retirant quelque chose de rose qui l'étouffe dans sa bouche ». Puis le progrès continue : « Tenez, je l'enferme papa, il ne viendra plus me déranger, il est saoul..., maman avait froid elle demandait tout le temps l'heure qu'il était... oh, ma tête, je suis trop fatiguée, j'ai mal au cœur. » Puis elle passe au souvenir de l'enterrement, se rappelle qu'elle était au premier rang, riant comme une folle et refusant de rentrer ou de monter dans une voiture pour faire cesser le scandale : « Je ne pouvais pas comprendre, je ne sentais pas que c'était maman qu'on enterrait, je ne pouvais pas penser qu'elle était morte et quand j'essayais de le penser, cela m'agitait, me faisait rire à me tordre... J'ai pourtant suivi à peu près comme tout le monde, mais je n'y étais pas. » C'est après l'enterrement, elle peut l'expliquer maintenant, que l'agitation a augmenté, qu'elle courait dans l'escalier malgré ce qu'on lui disait et qu'elle a vu sa mère lui apparaître pour la première fois, lui parler et lui conseiller de mourir. « C'est depuis ce moment qu'elle a tout oublié et qu'elle a cessé de faire des efforts pour comprendre et pour retenir... » Enfin un dernier progrès s'obtient très difficilement, c'est l'évocation de l'image visuelle de sa mère. Cette image se formait évidemment peu à peu, Irène voyait déjà depuis quelque temps l'ombre, l'attitude et même le costume de sa mère, mais elle ne parvenait pas à voir sa figure : « c'est comme si elle était voilée, comme si elle n'avait pas de tête... » Tout d'un coup, elle pousse un cri, elle sanglote et se met à pleurer, ce qu'elle ne pouvait pas faire depuis un an : « Ah ! j'ai

vu maman, je peux la revoir, cela me fait drôle, j'en ai eu chaud dans tout le corps de l'avoir revue un moment. » Après quelques jours d'efforts de ce genre elle put tout retrouver sans difficulté et cette grande amnésie était entièrement effacée.

Il s'en fallait de beaucoup cependant que la mémoire fût immédiatement reconstituée d'une façon définitive : ces souvenirs rétablis d'abord pendant le somnambulisme, puis pendant la veille étaient au début très instables. Il suffisait de laisser écouler un certain temps sans une séance nouvelle de somnambulisme et d'excitation de la mémoire pour voir les souvenirs récemment acquis s'effacer de nouveau. Pendant qu'elle garde les souvenirs, elle a à peu près constamment ce mal de tête du début; puis, quand le mal de tête s'en va, les souvenirs disparaissent et, presque toujours, quand les souvenirs conscients se sont effacés, les hallucinations, au moins celle du visage de la mère, recommencent. Souvent cette rechute se fait graduellement, Irène qui était à son aise au début, se sent plus fatiguée et de plus mauvaise humeur les derniers jours, puis au milieu de la nuit elle est réveillée par un cauchemar et se sent tout autre, les souvenirs sont de nouveau disparus et elle ne peut plus se rendormir si ce n'est d'un sommeil incomplet et fatigant. On reconnaît ici tous les faits que j'ai décrits autrefois à propos de l'influence somnambulique et du besoin de direction chez les hystériques[1]; le sujet retombe rapidement dans sa faiblesse qui est ici une amnésie, et il a besoin d'être remonté de nouveau.

A côté de cette descente régulière, ce qui est surtout caractéristique, ce sont les rechutes déterminées régulièrement par les émotions. Celles-ci amenaient toujours de la manière la plus nette un retour en arrière et une perte de ces souvenirs qui avaient été récemment retrouvés et qui avaient été les plus difficiles à conquérir.

Ainsi, quelques semaines après ce retour complet des souvenirs que je viens de décrire, la pauvre fille fut encore tourmentée par son père qui, pour trouver quelque argent, se mit à vendre les quelques meubles et les objets qui avaient appartenu à sa femme. Irène, à ce propos, perdit non seulement l'image de sa mère, mais encore le souvenir de sa mort, et il nous fallut un mois d'efforts pour réparer cette nouvelle amnésie. Le même accident se reproduisit un peu plus tard d'une manière moins grave à propos de la mort d'un petit garçon qui était son filleul. Au mois de septembre 1902, trois mois après sa sortie de l'hôpital, quand elle semblait être complètement rétablie, elle apprit assez brusquement que son père avait fini par mourir

lui aussi dans un asile à la suite d'un accès de delirium tremens et d'une pneumonie. Irène eut de nouveau une de ses anciennes crises avec hallucinations et l'état amnésique se rétablit aussitôt. Cette nouvelle émotion détermina une certaine amnésie relative au père et une amnésie rétrograde du mois précédent, mais ce qui est remarquable, c'est qu'elle ramena d'une façon complète l'amnésie précédente presque aussi étendue : on peut voir cette rechute de l'amnésie sur le schéma (fig. 3). Comme cette amnésie s'accompagnait de nouveau des mêmes crises hallucinatoires, la malade a dû rentrer à l'hôpital en novembre 1902. Le même traitement dirigé uniquement contre l'amnésie, la fait disparaître plus facilement et plus rapidement que la promière fois et eut les mêmes effets thérapeutiques.

V. L'HALLUCINATION ET L'AMNÉSIE. LA DÉSAGRÉGATION DES SOUVENIRS. — Cette excitation de la mémoire semble avoir une action des plus nettes sur tous les accidents et sur tous les stigmates de la névrose : je ne relève pour le moment que ce qui a rapport aux phénomènes de la mémoire. Depuis le moment où Irène fut capable de penser volontairement à sa mère, elle cessa d'y penser involontairement, depuis qu'il n'y avait plus d'amnésie, il n'y eut plus d'hypermnésie. Les crises hystériques cessèrent complètement, les hallucinations, toutes les terreurs subites d'origine subconsciente disparurent absolument.

Ces accidents semblaient ne pouvoir réapparaître que quelque temps après le retour de l'amnésie elle-même pour disparaître de nouveau quand elle cessait. On a vu, en effet, que dans le début de ces progrès la mémoire ne restait pas stable : Irène gardait ces souvenirs à sa disposition quelques jours, puis elle se les représentait moins nettement et un changement se produisait en elle ordinairement pendant la nuit. Elle se réveillait en sursaut comme après un cauchemar et ne pouvait plus se rendormir aussi bien. A partir de ce moment elle était de nouveau amnésique. Dans la journée suivante, elle avait des soubresauts, des terreurs inexplicables, puis des hallucinations, elle voyait la tête de sa mère soit par terre sous ses pieds soit dans son assiette ; et deux ou trois jours après tout au plus les grandes crises avec délire recommençaient. Une séance d'excitation de la mémoire, soit pendant un sommeil hypnotique,

1. *Névroses et idées fixes*, 1898, I, chapitre XII : L'influence somnambulique et le besoin de direction.

soit même pendant la veille amenait le retour net des souvenirs et de nouveau la disparition de tous les accidents.

Il me semble que cette constatation tout à fait expérimentale apporte une réponse assez nette à la question que je m'étais posée au début de cette étude à propos des relations de l'hallucination et de ces diverses amnésies. Je me demandais si ces deux phénomènes que les malades nous présentent si souvent juxtaposés dépendaient l'un de l'autre. Dans une première étude sur M^me^ D., j'ai montré que la suppression de l'idée fixe amenait la suppression de l'amnésie. Nous constatons ici que le traitement de l'amnésie sans qu'aucun effort ait été dirigé contre des crises remplies par l'idée fixe amène également la suppression de celles-ci. Je peux donc dire que ces deux phénomènes en apparence opposés constituent un syndrome, qu'ils sont liés ensemble et que la maladie consiste en deux choses simultanées: 1° l'incapacité où est le sujet d'évoquer consciemment et volontairement les souvenirs ; 2° la reproduction automatique irrésistible et inopportune de ces mêmes souvenirs. Sans entrer dans la théorie on peut dire que cliniquement la maladie consiste dans l'émancipation de certains souvenirs que la conscience générale ne gouverne plus et qui se développent indépendamment d'une manière exagérée.

Ainsi entendu ce syndrome est beaucoup plus fréquent qu'on ne le croit et il constitue véritablement une des formes que l'hystérie peut revêtir à la suite d'un accident émotionnel. Aux cas que j'ai déjà décrit il faut en ajouter quelques autres. Je rappelle l'observation d'une jeune fille de dix-huit ans Lie... que j'ai déjà étudiée dans un autre travail[1]. Elle présente depuis deux ans des crises d'hystérie dans lesquelles elle a toujours le même rêve, elle se défend contre des voleurs et appelle à son secours un certain Lucien. Comme elle répète dans toutes ses crises la même histoire, je lui demande, quand elle est éveillée, de quoi il s'agit et qui est Lucien. Il est impossible d'obtenir d'elle aucun renseignement : elle raconte que l'on s'est déjà moqué d'elle à propos de ce Lucien qu'elle appelle la nuit pendant son sommeil comme dans ses crises, sans savoir qui il est. Tout ce qu'elle peut dire c'est que depuis quelque temps elle est préoccupée par l'argent et songe sans cesse au moyen de conserver les quelques sous qu'elle possède tandis qu'elle n'avait autrefois aucun sentiment de ce genre. Ce n'est que plusieurs mois après que, ayant reçu des renseignements de sa famille pour me guider, j'ai pu lui faire retrou-

1. *Névroses et idées fixes*, II, p. 234.

ver les souvenirs pendant l'état hypnotique. A l'âge de seize ans, elle avait été domestique dans une maison de campagne qui avait été réellement incendiée et pillée par des cambrioleurs et Lucien était un domestique qui l'avait aidée à se sauver. L'oubli était tel que cette jeune fille venue à Paris quelque temps après chez d'autres personnes n'avait jamais pu raconter l'accident qui l'avait rendue malade, car c'est depuis ce moment qu'elle avait ces crises à forme de somnambulisme spécial. Chez elle aussi comme chez Irène, j'ai travaillé à la restauration des souvenirs qui fut d'ailleurs obtenue beaucoup plus facilement et qui amena immédiatement d'une façon beaucoup plus simple la disparition des crises.

Je retrouve dans mes anciennes observations le cas de Gib... jeune femme bouleversée par le suicide de sa nièce tombée d'une fenêtre devant elle. Elle a oublié tout ce qui concerne sa nièce ainsi que les journées qui précèdent l'aventure, mais elle a constamment des somnambulismes spontanés dans lesquels elle cherche à se précipiter par les fenêtres et des écritures automatiques dans lesquelles elle dessine constamment des fenêtres.

Dans l'observation remarquable de Marceline que j'espère reprendre un jour complètement on observe une quantité de faits de ce genre : amnésie rétrograde de quinze jours avec images obsédantes et subconscientes d'un cheval, parce qu'elle a failli être écrasée en traversant une rue, amnésie rétrograde de deux ans avec terreur automatique et image obsédante, parce qu'elle a rencontré dans la rue une personne qui lui rappelle un laboratoire où elle ne veut pas aller, etc. He... que j'ai présentée dans un précédent travail a en même temps l'hallucination et l'amnésie de la lionne qui lui a fait peur.

Quand j'ai présenté un résumé de l'observation d'Irène à la Société médico-psychologique, M. Briand a bien voulu ajouter un cas très net du même genre qu'il venait d'observer : une jeune femme a commencé des troubles hystériques après avoir vu le cadavre de son père à la salle des morts d'un hôpital. Elle a des crises délirantes et hallucinatoires dans lesquelles elle répète tous les détails de la scène ; en même temps elle a une amnésie complète de tout ce qui a rapport à la maladie et à la mort de son père.

En dehors de l'hystérie, dans les états psychasthéniques le même syndrome existe, mais il prend alors une forme particulière à cause de la différence du terrain. Une femme de trente-six ans, Bre.[1], est

1. *Obsessions et psychasthénie*, II, p. 314.

très bouleversée par la mort de son mari qu'on lui apprend très brusquement. Elle a exactement comme Irène une amnésie de la figure de son mari : « elle en a seulement le souvenir intellectuel, elle peut en parler, elle peut raisonner sur lui, elle peut même le décrire : il était assez mince, nous dit-elle, très grand, le nez était fort, etc.. ». Mais cette description est théorique, Bre. est incapable de se représenter aucun de ses traits, elle ne peut pas non plus évoquer le souvenir de sa voix, en un mot, elle prétend ne plus avoir aucune représentation sensible relative à son mari. En même temps, c'est une obsédée et elle est précisément obsédée par cette figure de son mari. Il y a comme une sorte de délire de l'interrogation qui vient se greffer sur une amnésie, elle a constamment la pensée dirigée vers ce mari dont elle ne se souvient pas. Les caractères psychologiques sont ici transformés, l'amnésie est incomplète, il n'y a pas d'hallucination véritable, et surtout il y a des manies d'interrogation, des sentiments de besoin, d'insuffisance qui n'existent pas dans l'hystérie : la lacune de la mémoire est sentie d'autant plus douloureusement qu'elle est plus incomplète. Nous n'avons pas à étudier ces formes diverses que prend le syndrome en dehors de l'hystérie, il nous suffit d'avoir constaté que cette association des deux phénomènes est fréquente et qu'elle constitue un syndrome clinique important.

VI. Les modifications de la conscience personnelle et de l'action. — L'interprétation psychologique de ces faits est beaucoup moins avancée que leur interprétation clinique, il ne faut pas songer dans notre ignorance du fonctionnement du système nerveux central à en chercher une explication complète, il suffit de relever peu à peu quelques caractères psychologiques qui serviront de base aux explications futures. Un certain nombre de ces caractères ont déjà été mis en lumière dans ma première étude sur cette question. Comme ils me semblent encore être restés exacts il suffit maintenant de les rappeler brièvement pour insister sur quelques points nouveaux que l'on peut y ajouter aujourd'hui. 1° Les troubles ne portent aucunement sur les événements antérieurs de la vie qui sont évoqués normalement dans le souvenir et qui ne se transforment pas en hallucinations ; 2° Les événements sur lesquels porte l'altération sont ceux qui ont été l'occasion d'une violente émotion, ceux qui s'y rattachent par association ou ceux qui les précèdent immédiatement dans le temps ; 3° Ces faits en apparence oubliés ne sont pas complètement effacés, leur trace subsiste dans le cerveau, puisque le souvenir peut

en réapparaître après la guérison et puisque pendant la maladie ils se manifestent avec exagération dans les crises ; 4° La reproduction de ces événements par association d'idées persiste et serait même plutôt exagérée ainsi qu'on l'a vu par toutes les hallucinations d'origine subconsciente que présentait Irène. En un mot, toutes les opérations inférieures relatives à ces souvenirs paraissent intactes.

5° Le trouble n'existe que dans des opérations supérieures de la conscience, l'évocation volontaire ainsi que l'inhibition volontaire, en un mot dans la conscience personnelle de ces souvenirs[1]. « Il ne suffit pas, pour que nous ayons conscience d'un souvenir que telle ou telle image soit reproduite par le jeu automatique des associations d'idées, il faut encore que la perception personnelle saisisse cette image et la rattache aux autres souvenirs aux sensations nettes ou confuses, extérieures ou intérieures, dont l'ensemble constitue à ce moment notre personnalité. Qu'on appelle cette opération comme l'on voudra, que l'on forge pour elle le mot de personnification, ou que l'on se contente des termes vulgaires que nous avons toujours employés « perception personnelle des souvenirs », ou « assimilation psychologique des images », il faut toujours constater son existence et lui donner une place dans la psychologie des souvenirs comme dans celle des sensations. « Qu'une pareille fonction soit altérée dans ces cas d'amnésie, cela est trop évident d'après l'observation précédente, où l'on voit les souvenirs réapparaître toujours dans les états d'inconscience et disparaître toutes les fois que le sujet doit les exprimer consciemment. Les choses se passent donc comme si ces malades étaient devenus incapables d'avoir la perception personnelle de leurs souvenirs, comme si leur personnalité arrêtée définitivement à un certain point ne pouvait plus s'accroître par l'adjonction, l'assimilation d'éléments nouveaux. Ces notions qui semblaient autrefois singulières sont aujourd'hui devenues banales et l'anatomie même semble leur donner un point d'appui quand elle distingue dans l'écorce cérébrale des centres primaires pour les images et des centres secondaires hiérarchiquement plus élevés pour l'association et probablement pour ce que j'appelle l'assimilation des images.

6° Enfin la précédente étude mettait en évidence le rôle considérable de l'émotion pour produire cette dissociation de la synthèse mentale : « l'émotion, disais-je autrefois[2], a une action dissolvante sur l'es-

1. *Névroses et idées fixes*, I, p. 135.
2. *Automatisme psychologique*, 1889, p. 457.

prit, elle diminue sa synthèse et le rend momentanément misérable. » Je montrais à ce propos ce pouvoir dissolvant de l'émotion sur les résolutions volontaires, sur les sentiments, sur la conscience des sensations et je faisais rentrer cette dissociation des souvenirs dans le groupe plus général de la dissociation des synthèses par les émotions[1]. Ces dernières remarques sont encore confirmées par nos observations récentes dans lesquelles nous voyons l'émotion conserver ce même rôle. Dans tous les cas que j'ai cités ce sont des émotions graves qui ont déterminé tous les troubles et nous voyons que de nouvelles émotions déterminent toutes les rechutes d'une manière absolument régulière. Ces caractères sont donc des faits acquis dont il nous suffit de constater la confirmation.

Peut-on faire aujourd'hui un pas en avant, c'est-à-dire peut-on analyser davantage ces troubles qui se produisent sous l'influence de l'émotion, et parvenir grâce à eux à des faits plus élémentaires. Il me paraît intéressant de faire remarquer que cette perturbation porte en apparence uniquement sur la mémoire et sur la conscience des souvenirs, mais, qu'elle est en réalité beaucoup plus profonde et plus générale. Il y a chez ces malades un trouble de l'action tout aussi bien qu'un trouble de la mémoire et celui-ci ce fait que dissimuler le trouble le plus grave de la volonté. D'abord ces malades ont évidemment une inertie générale, ils sont devenus incapables de rien faire d'utile. S'il ne s'agissait réellement que d'un oubli de trois ou quatre mois, si Irène avait uniquement oublié sa mère, elle n'en devrait pas moins être active, continuer son travail, assurer sa vie. Il est étrange, après tout, qu'un oubli, fut-il très grave, supprime toute activité raisonnable : c'est qu'il y a plus et c'est que ces malades sont avant tout incapables d'agir volontairement. « J'ai la sensation de ne pas vivre, dit Irène, je marche au hasard, je fais tout machinalement. Vous me demandez pourquoi je ne fais rien, je ne le sais pas, je ne sais plus aider personne, je ne m'intéresse à rien, j'aimais les fleurs autrefois, je jette maintenant celles que l'on me donne, j'aimais beaucoup ma tante et des amis, je ne les aime plus... Je m'ennuie, rien ne m'intéresse comme cela devrait faire, je ne ressens pas les choses telles qu'elles sont, il me faudrait quelque chose d'impossible pour m'exciter, j'en suis à souhaiter la mort des gens pour que cela me fasse une distraction... Ce qui m'énerve c'est de vivre ainsi sans but, sans savoir quoi faire,

1. *Névroses et idées fixes*, 1898, I, p. 145.

ni s'il faut faire quelque chose, c'est de vivre dans l'espace, où il n'y a rien à voir, rien à faire, dans un temps interminable. » Il y a là une aboulie profonde, un défaut d'adaptation au présent que nous n'avions pas assez remarqué dans nos précédentes études sur cette amnésie.

Mais il y a plus à dire, c'est qu'il y a chez elle une aboulie systématique très caractérisée, une incapacité totale pour faire les actions qui ont un rapport quelconque avec sa mère. Il faut étudier à ce propos comme un fait très curieux la conduite de cette jeune fille le lendemain de cette nuit terrible dans laquelle elle a assisté à l'agonie et à la mort.

Une personne raisonnable dans ces circonstances aurait à faire une foule d'actions pressées, ne fut-ce que pour avertir les parents, pour préparer l'enterrement, etc... Irène, dès l'aube, quitte la chambre mortuaire, et, sans chercher à se reposer, va se promener au hasard dans tout Paris ; quelques heures après, comme elle est fatiguée, elle monte chez une de ses tantes et se borne à dire en entrant : « J'ai très faim, donnez-moi quelque chose à manger. » On la satisfait et on lui demande comment va sa mère : « Bien, répond-elle, elle a passé une bonne nuit. » Après avoir erré de nouveau quelques heures, elle entre chez une autre personne, chez qui elle répète exactement la même chose, demande à manger et donne de bonnes nouvelles de sa mère. C'est parce qu'on est inquiet de son attitude, qu'on la garde et qu'on va chez elle constater ce qui s'est passé.

Ainsi, elle est absolument incapable de dire à ses tantes chez qui elle entre que sa mère est morte ; c'est pourtant la première action qu'elle avait à faire. Cette conduite s'explique-t-elle par l'amnésie ? En aucune façon, l'amnésie retrograde ne sera constituée que dans quelques jours, après l'enterrement, après les premières hallucinations visuelles. Irène, quand elle retrouve la mémoire de ces singulières démarches, sait fort bien qu'elle avait à ce moment le souvenir de la mort de sa mère, mais « il lui semblait inutile d'en parler... tout le monde devait le savoir sans qu'elle ait rien à en dire... » C'est là une explication surajoutée, une de ces agitations de la pensée qui généralise nos propres sentiments. Le fait principal qui reste ici manifeste est l'incapacité absolue de faire un acte utile en rapport avec la mort de sa mère.

Non seulement elle ne peut s'occuper de rien pour l'enterrement, mais elle est incapable de prendre même la tenue convenable. J'ai

accompagnée par une perception beaucoup plus claire de la situation réelle dans laquelle se trouve le sujet : Irène sait que son père et sa mère sont morts, elle le comprend maintenant et en éprouve un réel chagrin. Elle se rend compte de son isolement et se demande en pleurant s'il n'aurait pas mieux valu conserver les illusions qu'elle avait pendant sa maladie : « C'est la première fois que je me trouve aussi seule, aussi abandonnée depuis la mort de maman... Je ne peux plus me décider à rester seule chez moi ce que je faisais très bien auparavant. » En outre, elle sait prendre les résolutions pratiques, utiles, choisir une chambre pour elle seule, établir son petit budget ; en un mot, elle n'attend plus la direction de ses parents comme elle faisait auparavant.

Telles sont les modifications de toute l'activité qui, jointes sans doute au développement des fonctions élémentaires de la sensibilité et de la mémoire, déterminent ces sentiments particuliers de force et de bonheur. Il est assez curieux de remarquer que ces sentiments de joie sont cependant en rapport avec des phénomènes douloureux. Non seulement elle se sent à ce moment courbaturée et comme brisée, non seulement elle a d'affreux maux de tête, mais encore, comme on vient de le voir, elle a de grands chagrins moraux. Tout cela n'empêche pas qu'elle n'éprouve une joie infinie au moment de ces restaurations douloureuses des fonctions supérieures et qu'elle ne jouisse de ses souffrances. Ce petit fait joint à bien d'autres du même genre pourrait nous montrer qu'il ne faut pas trop confondre la joie et la tristesse, fonctions supérieures avec le plaisir proprement dit et la douleur.

Quoi qu'il en soit, nous constatons non seulement des modifications de la conscience personnelle, mais des changements remarquables de l'action, surtout de l'action présente et adaptée, et nous voyons que ces changements de l'action sont exactement parallèles à ceux que nous avons notés dans les fonctions de la mémoire.

VII. L'abaissement de la tension psychologique. — Ces deux phénomènes de l'aboulie systématique et de l'amnésie systématique sont loin d'être indépendants l'un de l'autre : d'abord, en fait, on voit qu'ils se développent presque simultanément, ou l'un à la suite de l'autre. Irène, dès le matin qui suit la mort de sa mère, n'est plus capable d'agir, elle est plus du tout adaptée à la situation : elle a [illegible] mémoire des choses, mais c'est déjà une mém[illegible]ité, qu'elle est incapable d'exprimer au

qu'éprouvent les hystériques et les psychasthéniques dans ce que j'appelais « leurs somnambulismes complets, ou leurs instants clairs », je ne puis revenir ici sur leur interprétation et je me borne à une seule remarque. Sans doute, il est vraisemblable que dans de tels changements qui portent sur toutes les fonctions nerveuses, il y a une augmentation des phénomènes psychologiques élémentaires, des sensations, des mouvements et des images, que ces éléments doivent être plus nombreux et surtout se succéder plus rapidement. Sans nier la vérité de cette remarque, j'ai toujours insisté pour montrer qu'il fallait aussi admettre aussi des modifications dans les fonctions centrales de coordination et de synthèse, que les sentiments d'élévation, d'ascension mentale, étaient dus surtout à une exaltation de ces fonctions supérieures. Le cas présent est plutôt favorable à cette interprétation : dans son état antérieur la malade avait à peine des traces d'anesthésie et le changement survenu dans l'état de la sensibilité, quoique réel, était si petit que l'on ne pouvait pas le mettre en évidence par des mesures. On ne peut pas dire non plus que les images élémentaires des souvenirs aient été excitées et augmentées puisque avant tout traitement elles étaient déjà beaucoup trop fortes et déterminaient de grandes crises d'hallucination. La véritable métamorphose, expérimentalement appréciable, était la modification de la largeur de la conscience, du nombre des souvenirs dont elle disposait, de la puissance plus grande de l'attention et de la volonté.

Voici, en effet, les modifications vraiment importantes qui accompagnaient ces sentiments d'élévation. La conduite a complètement changé : Irène redevient active et pratique, elle travaille, elle reprend son métier sans ennui et même avec intérêt, elle est capable de combiner ce qui lui est nécessaire et d'organiser sa vie, tandis que dans l'état précédent elle restait indéfiniment inerte.

Un autre changement, en apparence assez singulier, a été bien remarqué, c'est qu'elle devient sociable. Elle est capable maintenant de rester avec d'autres personnes et de leur parler sans avoir ces accès de timidité ou de colère qui survenaient à tout moment et qui la rendaient incapable de frayer avec personne. L'aboulie sociale si caractéristique de cette jeune fille tend à disparaître dans ces moments où son niveau mental est relevé.

Enfin, ce que nous avons appelé la conduite spéciale, celle qui est particulièrement en rapport avec la mort de sa mère, devient aussi beaucoup plus correcte. D'abord la réapparition des souvenirs est

accompagnée par une perception beaucoup plus claire de la situation réelle dans laquelle se trouve le sujet : Irène sait que son père et sa mère sont morts, elle le comprend maintenant et en éprouve un réel chagrin. Elle se rend compte de son isolement et se demande en pleurant s'il n'aurait pas mieux valu conserver les illusions qu'elle avait pendant sa maladie : « C'est la première fois que je me trouve aussi seule, aussi abandonnée depuis la mort de maman... Je ne peux plus me décider à rester seule chez moi ce que je faisais très bien auparavant. » En outre, elle sait prendre les résolutions pratiques, utiles, choisir une chambre pour elle seule, établir son petit budget ; en un mot, elle n'attend plus la direction de ses parents comme elle faisait auparavant.

Telles sont les modifications de toute l'activité qui, jointes sans doute au développement des fonctions élémentaires de la sensibilité et de la mémoire, déterminent ces sentiments particuliers de force et de bonheur. Il est assez curieux de remarquer que ces sentiments de joie sont cependant en rapport avec des phénomènes douloureux. Non seulement elle se sent à ce moment courbaturée et comme brisée, non seulement elle a d'affreux maux de tête, mais encore, comme on vient de le voir, elle a de grands chagrins moraux. Tout cela n'empêche pas qu'elle n'éprouve une joie infinie au moment de ces restaurations douloureuses des fonctions supérieures et qu'elle ne jouisse de ses souffrances. Ce petit fait joint à bien d'autres du même genre pourrait nous montrer qu'il ne faut pas trop confondre la joie et la tristesse, fonctions supérieures avec le plaisir proprement dit et la douleur.

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dehors, et par conséquent d'utiliser. Les jours suivants, l'aboulie va en augmentant, mais, en même temps, les souvenirs sont de moins en moins réels, elle ne peut pas plus se les exprimer à elle-même qu'elle ne pouvait les exprimer à autrui et l'amnésie ne tarde pas à se constituer.



Entre l'amnésie et l'aboulie que nous constatons en loute, il y a is, qui est à raite, désin- utiliser pré- tte mémoire nt conservée écisément les ue nous étu- est la vraie, isée par elle, rise l'homme e au secours portent, mais t en lui en se tiles ou indif- ir actif qu'on ce moment la e personnelle, e mémoire qui plus dans l'in- lade a perdu la ntain avec une ifficulté qu'elle relatifs à cette

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1. Bergson: *Matière et Mémoire*, p. 166.

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Cette relation entre l'amnésie et l'aboulie que nous constatons en fait peut d'ailleurs parfaitemeut se comprendre. Sans doute, il y a une certaine mémoire, la seule que l'on étudiait autrefois, qui est à peu près indépendante de l'action. C'est la mémoire abstraite, désintéressée, celle qui récite simplement pour réciter, sans utiliser présentement cette reproduction des événements. Mais cette mémoire là, nous venons justement de voir qu'elle est parfaitement conservée chez Irène et chez tous ces malades. Elle constitue précisément les crises : ce n'est pas elle qui est troublée dans les cas que nous étudions. A côté de cette mémoire, il y en a une autre qui est la vraie, c'est la mémoire engagée dans l'action présente, utilisée par elle, celle dont M. Bergson disait justement, « ce qui caractérise l'homme d'action, c'est la promptitude avec laquelle il appelle au secours d'une situation donnée tous les souvenirs qui s'y rapportent, mais c'est aussi la barrière infranchissable que rencontrent en lui en se présentant au seuil de la conscience, les souvenirs inutiles ou indifférents[1] ». Nous savons que c'est en rendant un souvenir actif qu'on le fait entrer dans le groupe des états qui constitue à ce moment la personnalité. Ce qui manque à Irène, c'est la conscience personnelle, actuelle des souvenirs, c'est-à-dire tout justement cette mémoire qui est liée à l'action. Nous pouvons donc faire un pas de plus dans l'interprétation de ces singuliers états, en disant que la malade a perdu la faculté de faire les actes qui ont un rapport même lointain avec une certaine situation et que c'est là ce qui détermine la difficulté qu'elle rencontre dans l'évocation consciente des souvenirs relatifs à cette même situation.

Dans une étude récente, j'ai essayé de grouper tous les faits qui ont rapport à cette insuffisance de l'action présente. En examinant chez un très grand nombre de malades l'ordre de fréquence et de rapidité avec lequel se perdent les fonctions psychologiques, j'ai pu mettre en évidence cette notion que les phénomènes psychologiques se disposent en une hiérarchie de difficulté et de complexité croissante suivant qu'ils ont un rapport de plus en plus étroit avec la réa-

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lité donnée dans le présent. Il se peut que cette série d'opérations correspondent à des organes, à des centres hiérarchiquement superposés et de plus en plus difficiles à mettre en fonction; il se peut aussi que cette gradation de fonctions dépende d'une modification dans la tension du courant qui doit circuler dans le système nerveux central. Beaucoup de ces études ont mis en évidence ce fait remarquable que la perfection d'un fait psychologique semble dépendre de l'état général de tout le système nerveux comme si toute la force du courant nerveux jouait un rôle dans chacun de ces faits.

Quoi qu'il en soit, au plus haut degré de la hiérarchie se trouve l'action présente, l'attention présente, la jouissance du présent, au-dessous l'action et la pensée désintéressée, sans préoccupation exacte de la réalité donnée et présente, puis le jeu des images, la mémoire inutilisée du passé, la représentation imaginaire, les mouvements incoordonnés des viscères ou des membres[1].

Un grand nombre de maladies de l'esprit nous ont paru consister dans un abaissement de la tension psychologique et nerveuse telle que ces études nous permettent de la comprendre. Certains phénomènes supérieurs, fonction du réel, action volontaire avec adaptation nouvelle, avec sentiment de liberté et de personnalité, perception de la réalité, croyance, certitude, douleur et jouissance du présent, notion exacte du présent vont devenir impossibles, tandis que les autres groupes d'opérations, action et perception désintéressée ou avec distraction, et à plus forte raison, raisonnement, rêverie et émotion mal coordonnée vont rester parfaitement faciles[2].

Les faits précédents rentrent évidemment dans cette catégorie et on peut dire que ce sont aussi des cas d'abaissement brusque du niveau mental par diminution de la tension psychologique et nerveuse. Comme je l'ai montré cet abaissement détermine à la fois une aboulie générale et des aboulies systématiques. Toutes les actions, en effet, ne présentent pas pour un individu donné la même difficulté, et quand plusieurs hommes s'affaiblissent ce n'est pas la même action qui disparaît le plus complètement chez tous. Sans doute les actions sociales sont les plus difficiles pour tous les hommes, mais il y a des actions, la parole, la marche, la nourriture qui, suivant les cas, sont particulièrement difficiles pour tel et tel. C'est pourquoi nous voyons avec étonnement la même circonstance, la fatigue par exemple déter-

1. *Obsessions et psychasthénie*, 1903, I, p. 487.
2. *Op. cit.*, I, p. 499.

miner chez l'un l'impossibilité de parler, chez l'autre l'impossibilité de marcher ou de manger. Chez Irène, jeune fille timide à l'excès, incapable d'actions sociales, constamment dirigée et excitée par sa mère qui, précisément parce qu'elle était elle-même une bizarre, l'occupait plus constamment, l'acte le plus difficile c'est de s'adapter à la vie sans sa mère, c'est de prendre son parti de cette mort et de se conduire en conséquence. Aussi c'est ce qu'elle cesse de faire d'une manière complète : l'amnésie, du moins, je le répète, l'amnésie d'assimilation en est la conséquence.

On peut ajouter cette remarque c'est que l'épuisement, l'abaissement de la tension cérébrale prend ici la forme hystérique, c'est-à-dire la forme exagérée et localisée par excellence. Le rétrécissement du champ de la conscience est chez l'hystérique le grand procédé qui lui permet de ne pas trop souffrir de son abaissement du niveau mental. Mais il en résulte que les lacunes sont infiniment plus nettes que chez le psychasthénique.

Dans le cas présent l'oubli porte d'une manière tranchée sur un morceau de la vie au lieu de porter vaguement sur la figure du mari, sur sa voix et ses actes comme dans le cas de Br... que j'ai cité. L'oubli porte sur les souvenirs récents, il est rétrograde en vertu d'une loi que j'ai déjà souvent étudiée, c'est que les souvenirs récents sont les plus intéressés, ceux qui interviennent avec le plus de précision dans l'action présente, ceux qui n'ont pas encore perdu par l'éloignement leur haut degré de tension... La réapparition des souvenirs en commençant par les plus anciens, la mémoire retardante de M^me^ D... mettent en évidence cette loi bien connue qui trouve encore ici son application.

Si nous passons à l'étude d'un autre phénomène nous voyons qu'il y a souvent dans ces amnésies des agitations de diverses espèces : les malades ont de violentes crises convulsives, des besoins de crier, de marcher indéfiniment. M. Féré signalait un cas d'amnésie rétrograde chez une jeune fille de vingt-quatre ans à la suite d'une émotion : elle avait des impulsions à crier, à injurier, et elle avait de la chorée.

Chez Irène ces agitations sont surtout mentales : elles sont représentées par les crises de somnambulisme avec développement automatique des souvenirs sous forme de rêve joué et parlé. Ces phénomènes se comportent chez les hystériques comme des suggestions à cause du rétrécissement du champ de la conscience qui permet le développement complet et automatique des éléments contenus dans

les idées isolées, mais ce n'est là qu'une forme que prend le phénomène de l'agitation.

Chez les psychasthéniques qui ne présentent pas la suggestion sous cette forme, l'agitation mentale existe aussi sous forme d'interrogations, d'efforts pour se représenter complètement les souvenirs effacés, etc. J'ai été amené à considérer ces agitations qui se présentent chez tous les malades comme une sorte de dérivation. « Quand un phénomène psychologique est très supérieur à un autre, la tension qu'il exige pour se produire, pourrait être suffisante si on l'employait autrement pour produire cent fois le phénomène inférieur... Quand la tension psychologique qui n'est pas employée pour les phénomènes supérieurs qu'elle ne peut plus produire se dépense en phénomènes inférieurs, elle donne alors naissance à une véritable explosion de phénomènes infiniment nombreux et puissants, mais toujours inférieurs dans la hiérarchie[1]. »

On pouvait constater très nettement ces dérivations en examinant chez Irène les accidents qui accompagnaient les efforts pour retrouver les souvenirs. Le sujet raconte assez facilement les souvenirs relatifs aux derniers jours qui ont précédé la mort et qu'il a déjà acquis précédemment, il va arriver à la journée de la mort. Le voici qui s'arrête, il ne peut plus retrouver ces souvenirs et le voici qui remue, qui se lève, qui se roule par terre en convulsions que je dois à chaque instant arrêter. Si j'empêche les convulsions, la malade a des étouffements, des palpitations de cœur ou des syncopes ou bien elle m'échappe et entre en crise de délire et alors se met à débiter avec une extrême intensité d'expression, mais d'une manière automatique et isolée ces mêmes souvenirs que je lui demandais d'exprimer modérément en conservant la conscience personnelle et la conscience du monde extérieur. Une agitation motrice viscérale ou mentale vient remplacer le phénomène qui manque. Les choses se passent exactement comme dans les phobies, où à la place d'un acte, le plus souvent d'un acte social de tension élevée, se développent d'innombrables dérivations viscérales. D'ailleurs Irène a souvent le même sentiment que les phobiques : à plusieurs reprises j'ai été surpris de l'entendre crier : « J'ai peur, quand vous voulez me faire souvenir de cela, c'est une peur que je ne peux pas dépasser... » Cette agitation contraste avec le calme du sujet, quand il est parvenu à reconquérir le souvenir et à l'exprimer correctement.

1. *Op. cit.*, I, p. 559.
2. *Obsessions et psychasthénie*, p. 559.

Les modifications qni se sont présentées au cours de la guérison sont également intéressantes et jusqu'à un certain point intelligibles de la même manière. Il y a d'abord une première raison pour que les souvenirs effacés aient réapparu plus facilement après quelque traitement, c'est l'éloignement du temps. Nous avons déjà vu fréquemment chez les abouliques scrupuleux une conduite singulière : ils aiment à agir en retard; ils consentent à faire deux mois trop tard l'action qu'ils n'ont pas su faire quand elle était utile. Une malade incapable de faire les comptes de son ménage à la fin du mois remarque qu'elle calcule très bien des comptes anciens relatifs à l'année précédente. Il en est de même pour l'évocation des souvenirs. C'est un fait bien connu que les souvenirs anciens sont plus faciles à évoquer et à assimiler que les souvenirs récents : c'est à mon avis que le souvenir ancien est devenu graduellement plus désintéressé, qu'il est de moins en moins mêlé à la nécessité d'actions présentes. Depuis un an, la situation créée à Irène par la mort de sa mère s'est simplifiée et surtout a été simplifiée par les autres personnes. Il n'y a plus à faire à propos de ce fait une aussi grande modification des sentiments et de la conduite ; l'effort d'adaptation réclamé par lui est donc en un mot beaucoup moins grand et je ne suis pas étonné de voir que l'évocation et l'assimilation des souvenirs relatifs à cet événement soient devenues beaucoup plus faciles.

En outre le traitement que j'ai fait subir à la malade est non seulement une suggestion, c'est encore une excitation. On n'a pas toujours assez distingué dans les traitements psychologiques la part de la suggestion et la part de l'excitation qui essaye de faire remonter le niveau mental. J'exige de la part d'Irène de l'attention et des efforts, j'exige la conscience de plus en plus nette des sentiments, toutes choses qui sont comme je l'ai souvent montré, des moyens d'augmenter la tension nerveuse et mentale, d'obtenir si l'on veut le fonctionnement des centres supérieurs. Bien souvent j'ai constaté avec elle, comme avec tant d'autres malades, que les séances vraiment utiles étaient celles où j'étais parvenu à l'émotionner. Il faut souvent lui faire des reproches, découvrir les côtés où elle est restée impressionnable, la secouer moralement de toutes manières pour la remonter et lui faire retrouver les souvenirs et les actes. Toutes les rééducations des névropathes dont on parle beaucoup aujourd'hui sont toutes soumises à la même loi, qu'il s'agisse de gymnastique, d'éducation des mouvements, d'excitation de la sensibilité, de recherche des souvenirs, il faut toujours que l'ascendant du directeur

réveille l'attention, l'effort, excite l'émotion et détermine la tension plus grande. Quand ce fonctionnement supérieur est obtenu, le sujet sent une modification de toute sa conscience qui se traduit par cette augmentation de la perception et de l'activité. Mais surtout nous voyons disparaître les phénomènes de dérivation et de suggestion qui n'ont plus lieu de se produire puisque les activités supérieures fonctionnent et que le champ de la conscience n'est plus aussi rétréci.

Conclusion. — Pour résumer cette curieuse observation nous pouvons dire que nous avons assisté à une modification remarquable de tout l'esprit sous l'influence d'une émotion. En présence des discussions actuelles sur le caractère de l'émotion, il était intéressant de constater ces changements et leur évolution. Une théorie qui a longtemps régné admettait comme phénomène essentiel de l'émotion des troubles viscéraux; ceux-ci ont existé probablement au début, ils n'ont pas été bien considérables et ils n'ont pas duré longtemps. A côté d'eux nous voyons beaucoup d'autres phénomènes d'agitation musculaire et mentale, les convulsions et les délires. Mais ce qui a été le principal, ce qui domine toutes ces agitations, c'est l'abaissement du niveau mental, la diminution de toutes les opération supérieures de volonté, d'attention, d'assimilation personnelle. L'émotion déprimante s'est comportée ici, et je suis disposé à croire que c'est la règle générale comme un épuisement, une fatigue. Elle rentre dans la classe générale de tous ces phénomènes semi-normaux, semi-pathologiques qui comprennent les fatigues, les sommeils, les intoxications, les névroses et qui sont toujours caractérisés par l'abaissement des fonctions supérieures d'adaptation et par une exagération due à la dérivation des fonctions inférieures plus ou moins automatiques.

Pour comprendre l'émotion, il faut se placer au point de vue de la psychologie objective et voir l'individu du dehors en même temps que le groupe des circonstances dans lequel il est placé, au lieu de donner toute son attention aux sentiments plus ou moins incomplets que l'on éprouve soi-même quand on est ému. Les phénomènes de l'émotion se produisent quand un être vivant et conscient est exposé brusquement à une modification du milieu physique et surtout du milieu social dans lequel il est plongé, quand il n'est pas préparé par une éducation antérieure à s'y adapter automatiquement et quand il n'a pas soit la force vitale nécessaire, soit le temps suffisant pour s'y adapter lui-même au moment présent. Il y a alors une

dépense nerveuse incoordonnée, inutile, qui a tous les caractères de l'épuisement et qui se retrouve exactement la même dans les autres phénomènes d'épuisement, les fatigues, les sommeils, les intoxications. L'émotion ne se distingue de ces autres faits que par la brusquerie du phénomène et par les circonstances extérieures qui le déterminent.

Une conception analogue de l'émotion a été exposée par M. G. Dumas dans un chapitre de son livre sur la tristesse et la joie[1] ; depuis longtemps j'essaie de rattacher ces diverses études sur l'émotion aux notions que l'examen des malades nous révèlent sur les oscillations du niveau mental. Peut-être pourra-t-on tirer quelque jour de ces recherches une théorie de l'émotion plus compréhensive que celles qui sont enseignées aujourd'hui. Il nous suffit de signaler ici de quelle manière cette conception de l'émotion résume notre observation de troubles curieux de la mémoire avec hypermnésie et amnésie déterminées chez une jeune fille par la mort de sa mère.

Pierre JANET.

1. G. Dumas, *La Tristesse et la Joie*, 1900, Chap. IV : Mécanisme originel de la tristesse et de la joie.

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# Learning and Memory in Rape Victims With Posttraumatic Stress Disorder

**Melissa A. Jenkins, Ph.D., Philip J. Langlais, Ph.D., Dean Delis, Ph.D., and Ronald Cohen, Ph.D.**

*Objective:* *Studies have shown memory deficits among combat veterans with posttraumatic stress disorder (PTSD); however, high rates of comorbid conditions, including alcoholism, make it difficult to definitively associate these findings with the PTSD diagnosis. In this study the authors examined memory functioning among rape survivors without alcoholism or substance abuse but with PTSD.* *Method:* *Rape victims with (N=15) and without (N=16) PTSD were compared to age- and education-matched nontraumatized comparison subjects (N=16) on measures of learning and memory.* *Results:* *The subjects with PTSD performed significantly worse than the other groups on delayed free recall. The deficits were ameliorated by cueing and recognition testing.* *Conclusions:* *Recall deficits in noncombat PTSD patients strengthen the theory that memory deficits are associated with the PTSD diagnosis. The deficits were mild and were not attributable to comorbid depression, anxiety, or substance abuse.*

(Am J Psychiatry 1998; 155:278–279)

Impaired memory for elements of the traumatic experience is a core feature of posttraumatic stress disorder (PTSD), and clinical complaints of memory impairment for non-trauma-related stimuli are common. Several studies (1–6) have documented generalized memory impairment among patients with combat-related PTSD. The underlying mechanism is unknown, but some investigators (7, 8) have implicated stress-induced damage to limbic-temporal lobe structures. However, the etiologic role of stress in learning and memory impairments is clouded by high rates of comorbid psychiatric illness and substance abuse. Ultimately, the relationship between PTSD and memory functioning may be best understood by studying alternative patient groups with fewer comorbid disorders. In this study we examined the hypothesis that patients with rape-related PTSD would demonstrate memory impairments similar to those of patients with combat-related PTSD.

## METHOD

Three groups of subjects participated in the study: treatment-seeking rape survivors from a rape crisis center, either with PTSD (PTSD-positive patients, N=15) or without PTSD (PTSD-negative patients, N=16), and nontraumatized comparison subjects (N=16). After complete description of the study to the subjects, written informed consent was obtained. A diagnosis of current PTSD was made if the symptoms met the diagnostic criteria of the Structured Clinical Interview for DSM-III-R (SCID) (9) and the subject received a score higher than 107 on a modified version of the Mississippi Scale for Combat-Related PTSD (10). The comparison subjects were matched to the PTSD-positive patients on age, education, handedness, and gender on a case-by-case basis. The exclusion criteria were history of head injury, blackouts, seizures, hallucinations, delusions, use of antipsychotic or stimulant drugs, or prerape treatment for psychiatric illness or substance abuse.

Comorbid anxiety disorders, depression, and substance abuse were assessed with the SCID (9), Beck Depression Inventory (11), and modified Michigan Alcoholism Screening Test (MAST) (12), respectively. The California Verbal Learning Test (13) was used to quantify immediate free recall over five trials (amount learned), slope of the learning curve (learning efficiency), short-delay (3-minute) and long-delay (20-minute) recall (ability to retrieve newly learned information

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with or without category prompts), number of words discriminated from distractors (recognition memory), and semantic (category- or meaning-related) and serial (order of presentation) clustering measures of encoding strategy.

The average subject was 27.7 years old (SD=6.9, range=19–44) and had 14.9 years of education (SD=1.8, range=12–18), and there were no significant between-groups differences. All but one of the sexually assaulted subjects were female. The average time since assault was 6.2 years (SD=5.3, range=1–20). Bidirectional hypotheses were tested by analysis of variance (ANOVA), and a conservative 0.01 alpha level was used to help control for the effect of testing multiple dependent variables. When appropriate, Tukey post hoc analysis followed the ANOVA procedure. The scores on the Beck Depression Inventory were treated as a covariate to assess the impact of depressive symptoms on memory.

## RESULTS

The PTSD-positive group reported more depressive symptoms than the other two groups, and over one-half of the PTSD-positive group (53%, N=8) had moderate or severe levels of depression, compared to about 6% of the PTSD-negative group (N=1) and 0% of the nontraumatized subjects (N=0) ($F=14.3$, $df=2, 44$, $p<0.01$). No between-groups difference was noted in scores on the modified MAST ($F=0.96$, $df=2, 44$, $p=0.39$). The PTSD-positive and PTSD-negative groups did not differ in rates of anxiety disorders. Thus, the current design controlled for comorbid anxiety disorder (by including a comparison group with equivalent rates) and for alcohol use (all groups reported very low rates). The groups did differ in level of depressive symptoms, which was addressed statistically.

On the California Verbal Learning Test indices, the performance of the PTSD-positive group was worse than that of the other two groups on number of words learned ($F=4.82$, $df=2, 44$, $p=0.02$) and short-delay free recall ($F=3.63$, $df=2, 44$, $p=0.03$). While these differences did not attain the adjusted alpha level of statistical significance, they do represent a clear trend toward worse performance by the PTSD-positive individuals on these measures of short-term memory. This interpretation is consistent with the significant impairment of the PTSD-positive subjects in long-delay recall ($F=5.74$, $df=2, 44$, $p<0.01$). Post hoc analysis indicated that the PTSD-positive subjects recalled fewer list items than did the PTSD-negative and comparison groups. When category cues were provided to the subjects, the recall difference declined to a nonsignificant level ($F=3.75$, $df=2, 44$, $p=0.03$). No between-groups difference was observed in recognition hits ($F=0.63$, $df=2, 44$, $p=0.54$). No differences in learning strategy were apparent, as the three groups had similar scores on the semantic and serial clustering indices.

Beck Depression Inventory scores treated as a covariate did not account for a significant proportion of the variance in delayed-recall scores ($F=0.05$, $df=1, 43$, $p=0.83$), and significant group differences remained ($F=4.69$, $df=2, 43$, $p<0.01$). The depression scores accounted for only 5.9% of the variance in recall scores. Thus, concomitant depression explained an insignificant proportion of the variance in delayed recall.

## DISCUSSION

Memory disruption in combat veterans with PTSD is difficult to interpret owing to high rates of other psychiatric disorders and substance abuse. The current study demonstrated that PTSD-positive subjects without comorbid alcohol abuse have impaired free recall. This is similar to the results reported for veteran groups (5, 6, 8).

Compared to normative standards for age and education, one-third of the PTSD-positive group fell at least two standard deviations below the mean for delayed free recall; fewer than 5% of the members of the other two groups were this impaired. Overall, the PTSD-positive group scored in the mild to moderately impaired range when compared to normative standards. It is unclear whether poor memory for personally irrelevant information is related to the loss of memory for elements of the traumatic experience; this issue should be the focus of future studies.

Another issue is whether the memory impairment is secondary to attentional impairment. Poor immediate free recall suggests attentional deficits, which have been documented in combat veterans (2–5). Further study of the relationship between attentional and memory functioning in groups with rape-related PTSD and with combat-related PTSD is needed.

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# Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law

*Margaret E. Johnson*[*]

*Civil domestic violence laws do not effectively address and redress the harms suffered by women subjected to domestic violence. The Civil Protective Order ("CPO") laws should offer a remedy for all domestic abuse with an understanding that domestic violence subordinates women. These laws should not remedy only physical violence or criminal acts. All forms of abuse — psychological, emotional, economic, and physical — are interrelated. Not only do these abuses cause severe emotional distress, physical harm, isolation, sustained fear, intimidation, poverty, degradation, humiliation, and coerced loss of autonomy, but, as researchers have demonstrated, most domestic violence is the fundamental operation of systemic oppression through the exertion of power and control. Because CPOs are effective in rebalancing the power in a relationship and decreasing abuse, this remedy should be available to all women subjected to all forms of domestic violence. This Article proposes recrafting the civil law to provide a remedy for all harms of domestic violence and its operation of systemic power and control over women. Re-*

[*] Assistant Professor, University of Baltimore School of Law. I thank Dean Phillip Closius for his generous support of this Article through the University of Baltimore Summer Research Fellowship. I gratefully acknowledge helpful comments from Professors Leigh Goodmark, Deborah Epstein, Matthew Fraidin, Carolyn Grose, Dionne Koller, Marcia McCormick, Michele Gilman, James Kelly, Constance O'Keefe, Amy Sloan, Adam Todd and the participants of the Potomac Valley Writer's Workshop, the University of Baltimore faculty scholarship roundtable August 2007, the Southeastern Association of Law Schools Conference August 2008, and the Clinical Law Review Writing Workshop October 2008. I thank Paras Shah, Heather Bennett, Elizabeth Janelle, Ashley Bosché, Allison Mulford, and Rebecca Sheppard for their able research assistance. In addition, I am indebted to the University of Baltimore School of Law librarians, especially Elizabeth Rhodes and Bijal Shah. And I thank Matt Fraidin and Max and Maya Johnson-Fraidin for their support. All errors are, of course, mine.

*centering the narrative of domestic violence on this oppression rather than merely physical violence and criminal acts underscores the critical role of women's agency and autonomy in legally remedying domestic violence. Too often, outside actors choose to save women's lives to the exclusion of effectuating women's choices about their abusive relationships.*

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VANESSA

*Mark restricts Vanessa's access to money and employment. At home, Mark keeps all household supplies and toiletries under lock and key. If Vanessa or her three children need anything they must prove it is necessary; and only then will he unlock a cabinet and provide them with it. This includes tooth paste. Tampons. Laundry detergent. At dinner, Mark tells the children to ignore their mother because Vanessa is too stupid to be able to understand their conversations. Instead, Mark tells them she is there simply to make the food and serve it. Privately, Mark often tells Vanessa that if they ever separated, the children would never choose to live with her because they do not respect her.*[1]

KIM

*For years, Eddie has subjected Kim to name calling and degrading insults on a daily basis. "Kim says she has often wished it would get so bad that Eddie would turn physically violent — so she'd have 'a reason to get out.'"*[2]

SUSAN

*Susan stands at attention. Her husband Ulner reclines in a living room chair. Ulner has ordered their son to videotape the entire encounter. Ulner tells Susan, "Look at me bitch. You play those stupid games with me, I'll knock your teeth outta your face. You act like a **** in front of the kids. You little slut. If I see a dog chewing your ass up I won't stop it. I won't stop it. I don't want to see your stupid ass crooked self. You stupid*

[1] Vanessa is a fictional name but her experiences are based on real women I have represented.

[2] The Oprah Winfrey Show, Emotional Torture, http://www.oprah.com/tows/slide/200410/20041005/slide_20041005_101.jhtml (last visited July 22, 2008).

*ass heifer." He directs his son, "Zoom in on that heifer. Zoom in. Do you see a tear?" Ulner then yells at Susan, "You don't know what to do. Look at your stupid ****. Look at the way you look!" What prompted Ulner to say these things? Susan had come in to ask Ulner what he wanted for lunch and Ulner accused Susan of provoking him. Later, he threw her on the bed in their room and slapped, hit, and attempted to strangle her while still demanding their son to videotape.*[3]

## INTRODUCTION

Vanessa, Kim, and Susan were all subjected to domestic violence, including systematic hitting, degradation, humiliation, threats, coercion, and financial deprivation. Nonetheless, the law fails to recognize much of the brutality of their experiences. As a result, women like these often will not seek a legal remedy.[4] Kim believes there is no remedy for Eddie's emotional abuse without physical violence. And without a civil remedy, Mark's control over the monetary resources and his control of Vanessa's ability to seek

[3] Kristin Pisarcik, *Behind Closed Doors, Abuse Caught on Tape*, ABC NEWS, July 31, 2007, http://abcnews.go.com/Primetime/story?id=2608738&page=1 (language excluded from original source). On October 26, 2006, the ABC News show 20/20 originally aired Susan's story. 20/20 reported that for years, a 47-year-old woman identified only as Susan had been subjected to abuse by her husband, Ulner, with whom she had three children. *Id.* In the videotape Ulner forced his son to film, Ulner engaged in "verbal flogging" of Susan for a prolonged period of time. ABC News obtained this videotape and showed it on the air along with interviews of Susan. For perhaps the first time, systematic emotional and psychological abuse were seen and undeniable to the American public. And although Ulner had also subjected Susan to physical abuse, Susan only told the authorities about all of the abuse to which Ulner subjected her after this videotaping incident because he had involved the children in his humiliation of her. *See also* notes regarding the posted video of the original broadcasted story (on file with author).

[4] This paper focuses on women subjected to male-perpetrated domestic violence because the research shows that it is the most prevalent type of domestic violence. *See* Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 481-82 (2008) (identifying women more often harmed than men by "Coercive Controlling Violence," which is physical and emotional violence characterized by power and control). This focus should not serve to ignore the fact that women also perpetrate domestic violence and that domestic violence occurs in same-sex relationships. *Id.* In addition, this Article draws on early feminist thought regarding domestic violence. The inclusion of this theory is intended to highlight the broad theories of subordination and not to maintain an essentialist view of women as white, middleclass, and straight. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

employment will continue, further entrenching Vanessa's economic dependence on him. In addition, Mark will continue to alienate the children from their mother. In most states, only Susan has legal systematic recourse under the civil domestic violence laws, known as civil protective order ("CPO") laws. While Susan may obtain a CPO for the physical abuse to which she is subjected, in most jurisdictions Susan will have no remedy for the emotional and psychological abuse. She cannot obtain an order requiring the return of the videotape, enjoining the name calling, degradation, and future video recordings, nor receive other relief necessary to address the wide range of her husband's abusive behavior. A comprehensive civil legal system that tackles the fundamental harms of domestic violence must provide Vanessa, Kim, and Susan with equal access to the potential benefits of the CPO laws to address serious multifaceted abuse.

CPO laws, which exist in all fifty states and the District of Columbia, permit petitioners to obtain orders addressing the abuse in their relationships.[5] These statutes provide expedited hearings and relief.[6] The relief available includes injunctive relief, such as ordering the cessation of abuse, counseling, or limitations on physical or other contact between the parties; family relief, such as custody and child support; and monetary relief, including compensation for resulting medical or psychological treatment.[7] CPO hearings also aid women simply as a forum where women may hold their abusers accountable.[8] In addition, CPOs can provide evidence for legal actions seeking more permanent relief, such as permanent custody and visitation.[9] In addition to actually decreasing abuse, studies have shown that women believe protective orders are effective tools in their relationships.[10] The civil system thus enables the petitioner to rearrange her relationship with the person abusing her.[11] That rearrangement has

[5] The CPO laws are discussed in more depth *infra* Part I.D. Although individual state laws differ, generally all contain a definition for actionable domestic violence or abuse and provide various remedies to address the abuse. *Id.*

[6] *See infra* text accompanying notes 106-13.

[7] The remedies available under CPOs are explained at length *infra* text accompanying notes 111-13.

[8] *See infra* Part I.C.

[9] *See infra* Part II.C.

[10] *See, e.g.*, Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 J. GENDER, SOC. POL'Y & L. 499, 513 (2003) (noting protective order petitioners cite satisfaction with temporary protective orders); *infra* Part I.C.

[11] PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 33 (1990) (stating that judges find CPOs effective

legal authority and legal ramifications if disobeyed. This allows the woman to avoid the harm of abuse while deciding whether and how to maintain her relationship with her abuser.

Unfortunately, two-thirds of the states limit CPO remedies to those who are subjected to physical violence[12] or other criminal acts under state law. This narrow view of actionable domestic violence deprives women like Vanessa and Kim of a remedy. Although they were subjected to serious nonphysical abuse,[13] including psychological, emotional, and economic abuse, the laws generally make a meaningful civil remedy unavailable to them.[14]

The law's narrow focus on physical violence even deprives women subjected to comparatively nonsevere physical abuse of a remedy. For example, women like Susan, who have a legal remedy for their physical abuse under the plain language of the statute, may be de facto excluded from relief because the court does not classify the domestic violence as life threatening.[15] If physical violence is not considered severe enough, some courts are wary to provide any remedy at all, preferring not to meddle in private relationships.[16] The courts'

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if order includes all statutorily permitted relief petitioner needs to protect against future abuse given her particular situation).

[12] For a discussion of the CPO laws' fixation on physical violence, see Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 8, 43-44 (2008).

[13] Rather than using the term "battered women" or "abused women," I am using the construction "women subjected to abuse" which I take from Ann Shalleck's important work, Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1023-28 (1997). As Shalleck discusses, labeling any woman who has been abused as a "battered woman" reduces her to a unidimensional view, defined by what happened to her. *Id.* at 1023. The same is true for the terms "abuser" or "batterer" that reduce that person to what he did alone. These labels remove the complexities of their relationship, of which the violence and abuse may be a large or small part — a constant background or an intermittent piece. With a narrow focus, the solutions or remedies for the harms resulting from the abuse are driven only by that focus rather than the broader reality of the woman's life.

[14] This Article discusses and critiques the current regime of CPO laws in the 50 states and the District of Columbia and their underinclusion of the types of domestic violence that should be actionable.

[15] *See infra* Part II.B.3. In a related discussion of courts acting based on their own assumptions about violence, see Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 65 (2007) (discussing how courts deny women petitioners' motions to vacate protective orders thus treating them wholly differently from other civil injunction matters due to courts' assumptions and biases about violence and their focus on saving lives).

[16] *See, e.g.*, Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner*

reluctance to pry and limited remedies mean that courts often will refuse to hear testimony of the full context of abuse, including nonsevere physical abuse, psychological abuse, emotional abuse, and economic abuse.

If the CPO system allowed them, however, women like Vanessa and Kim, who are subjected to exclusively psychological, emotional, and economic abuse, and like Susan, who are subjected to all forms of abuse, might satisfactorily address their complex abuse. Research shows that the systematic operation of power and control is at the center of most abuse and that all forms of abuse are interrelated.[17] CPO laws provide an important offset to an abuser's power with injunctive relief. Injunctions are court remedies intended to reorder "'a relationship in conflict' in which the authority and power of the court are placed at the service of the *victim* to compel someone else — the violator — to respect the victim's rights."[18] Accordingly, when allowed, women subjected to abuse have used CPOs to satisfactorily decrease their physical, psychological, and emotional abuse.[19]

Decreasing psychological abuse is important for two reasons. First, research shows that women who are abused find psychological abuse more painful than physical abuse.[20] Second, some research has shown that psychological abuse, when effectuated by a controlling partner, often leads to physical abuse.[21] Because CPOs are potentially effective in decreasing nonphysical abuse, CPOs can also potentially change the dangerous power dynamics of a relationship before physical abuse is inflicted. As a result, women subjected to the fundamental harms of psychological, emotional, and economic abuse should be able to seek a CPO.

The current CPO laws are particularly well situated to permit petitioners to construct a remedy that redefines a relationship that is tainted by abuse but nonetheless is meaningful — connected by

*Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 754 (2005) (arguing for psychological research to study domestic violence as coercion and thereby to move beyond "accounting of specific assaultive acts"); *infra* Part II.B.

[17] *See infra* Part I.A.

[18] Kuennen, *supra* note 15, at 54-55 (citing Timothy Stoltzfus Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1101 (1986)) (emphasis added).

[19] Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, 4 WOMEN & POL. 13, 19, 21-25 (1984).

[20] ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 66 (2000) (noting women "frequently describe the threats and verbal abuse as more devastating than the physical"); LENORE WALKER, THE BATTERED WOMAN 34 (2d ed. 2000).

[21] *See* Kelly & Johnson, *supra* note 4, at 483.

children, economics, emotional, and psychological ties.[22] Accordingly, CPO laws should provide for remedies that permit a multidimensional reordering of the relationship, from the terms of the legal relationship to a recalibration of the power dynamic.[23] Permitting women to reconstruct relationships in which there is multifaceted abuse fulfills the goal of decreasing abuse by advancing women's ability to self-direct and self-define, otherwise known as their agency or autonomy.[24] By exerting agency, women subjected to abuse rebalance the power in their relationship and decrease future abuse.[25]

Accordingly, CPO laws should provide redress for all forms of domestic abuse to attack the oppression of women. This Article expands on existing scholarly assessment of the law's influence on domestic violence.[26] This Article focuses on the need for the civil law

[22] *See* ALYCE D. LAVIOLETTE & OLA W. BARNETT, IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY 145 (2d ed. 2000); NAT'L DOMESTIC VIOLENCE HOTLINE, DECADE FOR CHANGE REPORT 8, 15 (2007); SCHNEIDER, *supra* note 20, at 77-78; Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489, 1501 n.83 (2008) (noting women subjected to abuse "want the relationship to continue but the violence to stop" (citing ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 203 (2000))); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1161 n.42 (1995).

[23] *See* Baker, *supra* note 12, at 57 (explaining that studies show "civil protection regimes generate relief to violence victims by affording them a lever to demand or regain power or to be liberated from coercive oppression, by communicating defiance, by seizing a power greater than the abuser's in the law and by exposing her oppression publicly"); Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 565-66 (2006) (focusing on only physical violence, Professor Balos states that CPO remedies support women's autonomy in decisionmaking about children and otherwise provide structure and organization to family relationships while addressing safety for plaintiff and her family).

[24] *See generally* Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 112-14 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing agency as "capacity for self-definition and self-direction" despite subordination based on gender); Goldfarb, *supra* note 22, at 1501-02, 1523 (stating CPOs that permit woman to continue relationship with someone while addressing abuse is valuable to woman's autonomy within relationship).

[25] Baker, *supra* note 12, at 57.

[26] *See generally* EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (2007) (examining coercive control involved in domestic violence); Baker, *supra* note 12 (arguing that CPO laws should enjoin coercion); Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007) (proposing coercive domestic violence criminal law statute); Goldfarb, *supra* note 22 (exploring dual CPO goals of safety and autonomy); Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure? Questioning The Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004)

to go beyond remedying physical abuse and crimes,[27] beyond recognizing only discrete acts of violence, and beyond approaching domestic violence from the system actor's goals rather than the woman's goals. A broader approach will allow the CPO laws to better assist women seeking to change abusive relationships.

Part I of this Article identifies how women experience the harms of domestic violence and how the CPO laws designed to address and redress domestic violence fail to address some of its most fundamental harms. Part II examines how a limited recognition of selected harms as domestic violence hurts women subjected to abuse and underscores the importance of redefining domestic violence in CPO laws to best address women's goals in addressing the abuse. Part III proposes guidelines for how states can reform their CPO laws to address and redress all forms of domestic violence. In discussing this proposal, Part III explores both concerns and benefits of the proposal while maintaining a focus on the critical role of women's agency and autonomy in legally remedying domestic violence.

## I. CIVIL DOMESTIC VIOLENCE LAW'S GENERAL FAILURE TO REMEDY THE FAR-REACHING HARMS OF ABUSE

Women experience domestic violence in a variety of forms, including physical violence, psychological abuse, emotional abuse, and economic abuse. These forms of abuse inflict enormous harm. Despite these fundamental harms, the nation's CPO laws largely fail to provide a remedy to all of them.

### *A. Domestic Violence as Experienced by Women*

Various researchers, advocates, and theorists who have studied and worked with women subjected to abuse have catalogued the many types of abuse.[28] Social science research recognizes that women are

(analyzing limitations of legal responses to domestic violence); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2 (2007) (examining resulting challenges from courts considering coercion); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004) (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but also as pattern of power and control being exerted).

[27] Jeannie Suk's article, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006), provides an interesting discussion and critique of the criminal law overreaching by criminally prohibiting intimate relationships in the home.

[28] *See infra* Part I.A.

subjected to domestic violence that is complex and multifaceted. In social work scholarship, domestic violence is defined as

> a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics . . . . These tactics may include fear and intimidation, physical and/or sexual abuse, psychological and emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.[29]

Tactics that qualify as psychological and emotional abuse as well as economic abuse include

> sabotag[ing] a woman's efforts to find a job or attend a job training . . . [by] turning off her alarm clock so she will be late for work, cutting off her hair to cause her great embarrassment, inflicting visible injuries or creating conflicts before crucial events, and hiding or destroying her books, homework, or clothing.[30] Once employed, the abuse may continue with the abuser "disrupting her transportation or child care arrangements or harassing her at work."[31]

[29] Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000); *see also* LENORE E. A. WALKER, ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST 56 (1994); Dutton & Goodman, *supra* note 16, at 743. It should be noted, however, that such broad notions of domestic violence did not always exist. Traditionally, although feminists had a broad view of domestic violence that included all forms of abuse, social scientists defined domestic violence as only physical violence. SCHNEIDER, *supra* note 20, at 65. More social science research today, however, reflects an increasingly complex view of domestic abuse that looks at multifaceted methods of control. Nonetheless, Drs. Dutton, Goodman, and Walker, among others, have recently critiqued the psychology research for having failed to research adequately the emotional abuse, psychological abuse, and coercive control. WALKER, *supra* note 20, at 34 (noting that psychologists have never effectively quantifiably measured psychological abuse); Dutton & Goodman, *supra* note 16, at 743 (noting lack of empiricism regarding coercive control).

[30] Postmus, *supra* note 29, at 246.

[31] *Id. See generally* Diane R. Follingstad et al., *Lay Persons Versus Psychologists Judgments of Psychologically Aggressive Actions by a Husband and Wife*, 19 J. INTERPERS. VIOLENCE 916, 924-25 (2004) (using Follingstad and DeHart Psychological Abuse Survey (2000), authors studied perceptions of following categories of psychological abuse: "(a) treatment as inferior, humiliation/degradation; (b) isolation, restriction, or monopolization of mobility, information, or social activity; (c) emotional or sexual withdrawal or blackmail; (d) verbal attacks/criticism; (e) economic deprivation; (f) threats of physical harm or to physical health; (g) destabilizing the woman's perception of reality; (h) use of male privilege and/or rigid gender role; (i) control of

Social science researchers Joan Kelly and Michael Johnson identify "coercive controlling violence"[32] as the use of patterned power and control including the tactics identified in the social work literature.[33] As they state,

> Abusers do not necessarily use all of these tactics, but they do use a combination of the ones that they feel are most likely to work for them. Because these nonviolent control tactics may be effective without the use of violence (especially if there has been a history of violence in the past), controlling violence does not necessarily manifest itself in high levels of violence.[34]

Psychologists have also catalogued many forms of abuse. One study utilized various scales and other measurement tools to determine whether women were subjected to domestic abuse.[35] That study covered physical, psychological, emotional, and economic abuse.[36] Its researchers used two scales of psychological abuse: dominance-isolation and emotional-verbal to measure its prevalence and effect on women.[37] They used scales to measure the harm of stalking and job

personal behavior; (j) jealousy/suspicion; (k) intimidation or harassment; (l) failure to live up to role expectations"); Felicity W. K. Harper et al., *The Role of Shame, Anger and Affect Regulation in Men's Perpetration of Psychological Abuse in Dating Relationships*, 20 J. INTERPERS. VIOLENCE 1648, 1651-53 (2005) (studying role of anger, shame, and affect regulation in psychological abuse, defined pursuant to Psychological Maltreatment of Women Inventory ("PMWI")); Vivian Zayas & Yuichi Shoda, *Predicting Preferences for Dating Partners from Past Experiences of Psychological Abuse: Identifying the Psychological Ingredients of Situations*, 33 PERSONALITY SOC. PSYCHOL. BULL. 123, 123-24 (2007) (exploring relationship between past abuse and preferences for dating partners).

[32] Another scholar argues that the interrelationship of the emotional, psychological, economic, and physical abuse discussed by scholars and activists when addressing domestic violence can be encapsulated in the term "coercive control." Baker, *supra* note 12, at 58-60. Yet another scholar discusses at length the failure of the legal system to agree on a definition of "coercive control," thereby causing further harm. Kuennen, *supra* note 26, at 2. Because this paper argues that psychological, emotional, and economic abuse need to be surfaced, acknowledged, and remedied by the civil law, a global term, such as "coercive control," is not used herein.

[33] *See* Kelly & Johnson, *supra* note 4, at 481.

[34] *See id.*

[35] MARY ANN DUTTON ET AL., ECOLOGICAL MODEL OF BATTERED WOMEN'S EXPERIENCE OVER TIME, FINAL REPORT TO NATIONAL INSTITUTE OF JUSTICE 19-20 (2005).

[36] *Id.* Recently, researchers published a Scale of Economic Abuse. Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 569 (2008). The researchers found that economic abuse is a "significant component of the broad system of tactics used by abusive men to gain power and maintain control over their partners." *Id.* at 580.

[37] DUTTON, *supra* note 35, at 19-20. The Tolman PMWI (1995) "asks whether

interference, as well as threats and danger of fatality.[38] Psychologists have found these scales to be successful measures to identify battered women, as opposed to women not subjected to abuse.[39] Accordingly, these scales can distinguish domestic abuse from mere nagging or unpleasantness.

In related work, Drs. Mary Ann Dutton and Lisa Goodman explore the role of coercion in domestic violence.[40] They define coercion as "a dynamic process linking a demand with a credible threatened negative consequence for noncompliance."[41] They studied nine areas of control in which the agent (person causing the abuse) made demands on the target (the person subjected to abuse): "[P]ersonal activities/appearance," "support/social life/family," "household," "work/economic/resources," "health," "intimate relationship," "legal," "immigration," and "children."[42] The abuser followed up his demands with a credible threat to induce compliance. The credible threats included threat of physical injury, removing the children, interfering with immigration applications, revealing private information, embarrassing the target, and having sex with another person.[43] They found that while all of the coercion was psychologically harmful, only some was physically harmful.[44]

Dr. Lenore Walker measures the following as components of psychological abuse: harassment, controlling the woman's life, controlling how she spends her time, questioning her, keeping her under surveillance, depriving her of sleep at night by making demands, and issuing orders.[45] Recently, Walker has drawn parallels between Amnesty International's definition of psychological torture

participants have experienced a variety of acts of forms of psychological abuse, ranging from 'he swore at me' to 'he watched over my activities and insisted I tell him where I was at all times.'"

[38] DUTTON, *supra* note 35, at 20-21 (citing Tjaden & Thoennes Survey (2000); The Job Interference Scale, stating that scale was based in part on work by Jody Raphael (1996) and Raphael and Tolman (1997), which measured employment interferences among welfare recipients and others; Threat Appraisal, stating that this scale, which measures violent and nonviolent threats, was based on batterer-generated risks developed by Jill Davies and others, Davies, Lynn, and Monti-Catania (1998); and Danger Assessment Scale, developed by Dr. Jacquelyn Campbell (1995)).

[39] *Id.* at 20 (identifying that PMWI Scale can identify battered women).

[40] Dutton & Goodman, *supra* note 16, at 743-44; *see also* MARY ANN DUTTON ET AL., DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE: FINAL TECHNICAL REPORT 15-16 (2005) (on file with author).

[41] Dutton & Goodman, *supra* note 16, at 746-47.

[42] *Id.* at 747.

[43] *Id.*

[44] *Id.* at 748.

[45] WALKER, *supra* note 29, at 58-59.

and domestic violence.[46] Under Amnesty International's definition, there are eight areas of abuse: (1) "isolation of the victims;" (2) "induced debility producing exhaustion such as limited food or interrupted sleep patterns;" (3) "monopolization of perception including obsessiveness and possessiveness;" (4) "threats such as death of self, death of family and friends, sham executions, and other indirect threats;" (5) "degradation including humiliation, denial of victim's powers, and verbal name calling;" (6) "drug or alcohol administration;" (7) "altered states of consciousness produced through hypnotic states;" and (8) "occasional indulgences which, when they occur at random and variable times, keep hope alive that the torture will cease."[47]

Walker shows how these forms of psychological torture apply to battered women.[48] For instance, batterers consciously isolate women from others; women also withdraw from society to protect others from harm and themselves from embarrassment.[49] Three times as many battered women as nonbattered women are isolated financially because they have "no access to cash."[50] And twenty-two percent of women in abusive relationships (versus only thirteen percent in nonabusive relationships) have no access to a car.[51] Regarding other controlling behaviors, Walker states that whereas battered women were not permitted to go places three-quarters of the time, nonbattered women were not permitted to go places only one-quarter of the time.[52] Also, batterers, unlike nonabusive partners, knew where their victims were at almost all times.[53]

A broad view of the violence to which women are subjected is consistent with the advocacy against domestic violence as well. The "power and control wheel" is almost a required text for service providers who work with women who are subjected to abuse.[54] The wheel identifies domestic violence as the exercise of power and control through the "interrelated dimensions of physical abuse, economic abuse, coercion and threats, intimidation, emotional abuse (using isolation, minimizing, denying, and blaming), and abusing

[46] WALKER, *supra* note 20, at 35.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 36.
[52] *Id.*
[53] *Id.*
[54] STARK, *supra* note 26, at 13.

male privilege."[55] Therefore, when advocates work with women who are abused, a discussion of the various forms of abuse helps the women identify if and how they have been abused. That assessment is also part of the process of continuing self-empowerment.

Moreover, the advocacy community similarly has translated the theory of power and control into the concrete actions and behaviors that result in oppression. For example, one advocacy group's website identifies domestic violence as "a pattern of abusive behavior which keeps one partner in a position of power over the other partner through the use of fear, intimidation and control."[56] This advocacy group's website is similar to many others.[57] The group identifies the following forms of abuse: physical, sexual, economic, emotional, and psychological.[58] The group defines physical abuse as "[g]rabbing, pinching, shoving, slapping, hitting, hair pulling, biting, etc. Denying medical care or forcing alcohol and/or drug use."[59] It defines sexual abuse as "[c]oercing or attempting to coerce any sexual contact without consent, e.g., marital rape, forcing sex after physical beating, attacks on sexual parts of the body or treating another in a sexually demeaning manner."[60] The group defines economic abuse as "[m]aking or attempting to make a person financially dependent, e.g., maintaining total control over financial resources, withholding access to money, forbidding attendance at school or employment."[61] It

[55] SCHNEIDER, *supra* note 20, at 12.

[56] WomensLaw.org, What is Domestic Violence?, http://www.womenslaw.org/simple.php?sitemap_id=39 (last visited Mar. 26, 2009).

[57] *See, e.g.*, House of Ruth, Domestic Violence Dynamics, http://www.hruth.org/domestic-violence-dynamics.asp (last visited Mar. 26, 2009) (providing depiction of power and control wheel, which shows power and control in hub; emotional abuse, economic abuse, sexual abuse, intimidation, using children, using male privilege, threats and isolation in spokes; and physical abuse on rim); Iowa Commission Against Domestic Violence, Questions About Domestic Violence, http://www.icadv.org/faq.asp (last visited Mar. 26, 2009) ("Domestic violence is not an isolated, individual event, but rather a pattern of repeated behaviors . . . . These assaults occur in different forms: physical, sexual, psychological."); North Carolina Coalition Against Domestic Violence, Domestic Violence Information, http://www.nccadv.org/domestic_violence_info.htm#Definition%20of%20Domestic%20Violence (last visited Mar. 26, 2009) ("Domestic Violence is when two people get into an intimate relationship and one person uses a pattern of coercion and control against the other person during the relationship and/or after the relationship has terminated. It often includes physical, sexual, emotional, or economic abuse."); Ohio Domestic Violence Network, Power & Control, http://www.erie-county-ohio.net/victim/pdf/wheel.pdf (last visited Mar. 26, 2009).

[58] WomensLaw.org, *supra* note 56.

[59] *Id.*

[60] *Id.*

[61] *Id.*

defines emotional abuse as "[u]ndermining a person's sense of self-worth, e.g., constant criticism, belittling one's abilities, name calling, damaging a partner's relationship with the children."[62] Finally, the group defines psychological abuse as "[c]ausing fear by intimidation, threatening physical harm to self, partner or children, destruction of pets and property, mind games or forcing isolation from friends, family, school and/or work."[63]

The notion of domestic violence as the operation of power and control has largely become part of mainstream consciousness.[64] Contemporary theorists and battered women's advocates underscore the fact that power and control can be exercised not only by a pattern of physical violence, but also through a pattern of psychological, economic, sexual, and other abusive acts.[65] Physical violence may not even be the most significant form of abuse.[66] Rather, a woman in a relationship marked by serious power imbalances and a dangerously controlling partner is "subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a

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[62] *Id.*

[63] *Id.* To identify emotional abuse, the National Domestic Violence Hotline asks whether the partner does the following things:

> Calls you names, insults you or continually criticizes you. Does not trust you and acts jealous or possessive. Tries to isolate you from family or friends. Monitors where you go, who you call and who you spend time with. Does not want you to work. Controls finances or refuses to share money. Punishes you by withholding affection. Expects you to ask permission. Threatens to hurt you, the children, your family or your pets. Humiliates you in any way.

National Domestic Violence Hotline, What is Domestic Violence?, http://www.ndvh.org/get-educated/what-is-domestic-violence (last visited Mar. 26, 2009).

[64] Gael Strack & Eugene Hyman, *Your Patient. My Client. Her Safety: A Physician's Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence*, 11 DEPAUL J. HEALTH CARE L. 33, 35 (2007). For provocative and well-documented articles discussing the significant problems with a monolithic and stark view of the operation of power and control on women subjected to abuse, see Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L & SOC. CHANGE 191, 198 (2008) and Kuennen, *supra* note 26, at 2.

[65] Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 57 (1999) (noting batterers' behavior includes physical violence, emotional abuse, psychological abuse, economic coercion, and other controlling actions); Rhonda L. Lenton, *Power Versus Feminist Theories of Wife Abuse*, 37 CAN. J. CRIMINOLOGY 305, 310-12 (1995).

[66] Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995) [hereinafter, Stark, *Re-Presenting Woman Battering*]. Evan Stark's book, COERCIVE CONTROL, *supra* note 26, provides an extensive exploration of coercive control.

woman's life, including sexuality; material necessities; relations with family, children, and friends; and work. Sporadic, even severe, violence makes this strategy of control effective."[67] The woman's experience of domestic violence is defined by the coercion and deprivation of liberty as much as it is by the violence.[68]

In the current legal theory literature, commentators also have highlighted the breadth of abuse that constitutes domestic violence as well as the importance of contextualizing incidents within the broader dynamic of systemic coercive and abusive conduct. For instance, one scholar asserts that although explanations for domestic violence are divergent, empirical data supports the common explanation "that abuse is a method of gaining and exercising power and control over a partner."[69] This theory about domestic violence is rooted in systemic and political issues of gender subordination and coercive control.[70] Accordingly, many legal commentators argue that it is the operation of power and control that must define the domestic violence rather than any specific incidents of physical violence.[71] The physical,

[67] Stark, *Re-Presenting Woman Battering*, *supra* note 66, at 986; *see also* Coker, *supra* note 65, at 57 (defining domestic violence as pattern of behavior to control victim).

[68] Stark, *Re-Presenting Woman Battering*, *supra* note 66, at 986.

[69] Goldfarb, *supra* note 22, at 1493.

[70] SCHNEIDER, *supra* note 20, at 5.

[71] Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 695 (1998) (arguing exertion of power should be focus of domestic violence study rather than number of physically violent episodes (citing Joan S. Meier, *Notes from the Underground, Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1318 (1993))); Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247, 255 (2007-08) (acknowledging that communities of same sex and opposite sex couples similarly define domestic violence as one partner coercing, dominating, or isolating other partner). Stapel states that

> [i]t is the exertion of any form of power that is used to maintain control in a relationship. The violence can be physical, emotional, sexual, psychological, or economic. Same-sex batterers use tactics of abuse similar to those of heterosexual batterers. However, some forms of battering are unique to the LGBT communities . . . . Same-sex batterers are able to successfully exploit their victims' internalized, or the community's externalized, homophobia, biphobia, or transphobia, simply by threatening to "out" their partners' sexual orientation or gender identity to family, friends, employers, landlords, or other community members.

*Id.* at 255; *see* Baker, *supra* note 12, at 58-60; Kuennen, *supra* note 26, at 2; Strack & Hyman, *supra* note 64, at 33 (stating domestic violence includes emotional, sexual, economic, and physical abuse).

psychological,[72] emotional, or economic[73] acts are merely the tools that manifest the dynamics of power and control that are present in domestic violence. Domestic violence "exists along a continuum that includes emotional, financial, physical, and sexual violence. The continuum of violence is unique to each person. To some, emotional abuse is more severe than sexual abuse. To others, sexual abuse is the ultimate human violation."[74] Given the legal theory's understanding of the dynamics of power and control in domestic violence, criminal justice scholars recently have argued to expand the criminal law's definition of domestic violence to incorporate such dynamics.[75]

As seen above, social scientists, advocates, and legal theorists increasingly have recognized the many harms of domestic violence. Social science catalogues the concrete harms resulting from domestic violence. In addition to the physical injuries that can result from physical assaults, psychological abuse influences mental health, with increased depression, suicide ideation, post-traumatic stress disorder, and a decreased sense of power and self-esteem. Psychological abuse also affects physical health, with increased substance use and increased susceptibility to long-term diseases.[76] Economic abuse often results in economic dependence, lack of resources, uncertain economic future, poverty, homelessness, and decreased physical and mental health.[77]

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[72] Similar to the other disciplines discussed above, the legal theory discusses psychological abuse as including threats, humiliation, destruction of property and pets, harassment, and forced confinement in the home. *See, e.g.*, Goldfarb, *supra* note 22, at 1492 (discussing various forms of harm from domestic violence).

[73] *Id.* (stating domestic violence includes economic abuse as well (citing Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER & SOC. POL'Y & L. 367, 368 (2003))).

[74] LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 23 (2003). Mills further states that each person needs to be reflective in identifying what forms of behavior are playful and which are coercive. *Id.* In addition, Mills exhorts society to learn about each person's individual experience of interconnected acts of violence so that society does not continue to misperceive behaviors out of context. *Id.*

[75] Burke, *supra* note 26, at 556 (building on Tuerkheimer's work and arguing for domestic violence criminal statute that would prohibit defendant engaging "in a pattern of domestic violence with the intent to gain power or control over the victim"); Tuerkheimer, *supra* note 26, at 960-62 (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but pattern of power and control being exerted). For a response to Burke's proposal, see Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 616-25 (2007).

[76] Adams, *supra* note 36, at 563-64.

[77] *Id.* at 568.

With this understanding of the actual scope of domestic violence, it is clear that Vanessa, Kim, and Susan have all been subjected to domestic violence. Mark has subjected Vanessa to coercive economic abuse by precluding her from access to financial resources. Mark has also emotionally abused Vanessa by systematically belittling and degrading her in front of her children. Eddie has subjected Kim to emotional abuse by daily degrading, insulting, and calling her names. And Ulner subjected his wife Susan to many forms of abuse designed to control Susan through fear, intimidation, and denial of her own power. Ulner's pattern of abuse included subjecting Susan to physical abuse, when he hit, choked, and slapped her; emotional abuse, when he engaged in a pattern of undermining Susan's self-worth by constantly criticizing her, belittling her, calling her names, and damaging her relationship with her son; and psychological abuse, when he intimidated Susan, threatened her with physical harm, and isolated her.[78]

### *B. The Importance of Women's Agency in Responding to Domestic Violence*

Throughout all the domestic violence research discussed above, there is a consistent narrative that domestic violence is the operation of power and control, manifested in various forms of abuse. In the late 1960s, the United States movement against domestic violence organized around this same principle: the connection between domestic violence and women's societal subordination.[79] Feminists saw domestic abuse as part of a social order organized around male privilege.[80] Feminists saw "[b]attering . . . [as] an integral part of women's oppression; women's liberation its solution."[81]

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[78] *See supra* note 3 and accompanying text.

[79] Goldfarb, *supra* note 22, at 1496; Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

[80] Linda Gordon, *Women's Agency, Social Control, and the Construction of 'Rights' by Battered Women*, *in* NEGOTIATING AT THE MARGINS 122 (Sue Fisher & Kathy Davis eds., 1993); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 254 (2005). In fact, for the prior two centuries, feminists had been arguing that "women's legally sanctioned subordination with the family denied them equality and citizenship." Gordon, *supra* at 4.

[81] SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 34 (1982); *see also* SCHNEIDER, *supra* note 20, at 87. As Susan Schechter wrote:

In their campaign to attack domestic violence, feminists highlighted the broad range of violence against women.[82] Feminists sought eradication of not merely discrete acts of physical violence but also of sexual, emotional, and economic abuse. These acts, which are ultimately about the abuser's power and control, systemically oppressed women.[83]

Accordingly, feminists saw women's exertion of their autonomy as the best response to the domestic violence. The battered women's movement in the early 1970s created resources to address the systemic subordination of women.[84] Feminists, including formerly abused women, founded shelters focused on "egalitarianism, autonomy and self-determination."[85] The shelters valued and respected women's choices.[86] The principle that women "need to be free to make choices without coercion or undue persuasion by anyone" is central to the feminist abuse treatment philosophy.[87] Feminists clung to these foundational principles because they believed the shelters should remedy any harm, including the loss of autonomy that results from

> All men learn to dominate women, but only some men batter them. Violence is only one of the many ways in which men express their socially structured right to control and chastise . . . . In . . . other cases men may not need to use violence to dominate. Verbal abuse, withholding affection, or withdrawing resources may suffice.

SCHECHTER, *supra* at 219. Schechter further stated, "Since male supremacy is the historical source of battering, and class domination perpetuates male privilege, a long-range plan to end abuse includes a total restructuring of society that is feminist, anti-racist, and socialist." *Id.* at 238. Put another way, Professor Elizabeth Schneider states: "Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economical isolation of women, is also common." SCHNEIDER, *supra* note 20, at 4. It should be noted as seen throughout this discussion that all of the terms "domestic violence," "intimate partner violence," "battering," and "abuse" are imperfect and do not provide one unified definition. For purposes of this Article, the terms "domestic violence" and "abuse" are used interchangeably.

[82] WALKER, *supra* note 29, at 56 ("The goal of woman abuse is usually to exert power and control over the victim. Most physical and sexual abuse is accompanied by psychological intimidation and bullying behavior used to maintain power and control over the woman. The pattern of abuse usually has an obsessional quality to it rather than a lack of control by the batterer.")

[83] Kuennen, *supra* note 26, at 2 (citing, among others, Stark, *Re-Presenting Woman Battering*, *supra* note 66, at 973-74).

[84] Miccio, *supra* note 80, at 257.

[85] *Id.* at 286.

[86] *Id.*

[87] Angela Moe Wan, *Battered Women in the Restraining Order Process: Observations in a Court Advocacy Program*, 6 VIOLENCE AGAINST WOMEN 606, 611 (2000).

abuse.[88] A study supporting this treatment approach shows that women who received autonomy-respecting "support and assistance" during a CPO proceeding "thought more positively about the proceedings" and reported "having good social support networks, fewer feelings of isolation, and better access to child care after receiving assistance."[89]

Current-day feminists and battered women's advocates continue to identify domestic violence as the exercise of power and control in a relationship by one intimate or formerly intimate partner against another.[90] Knowing how domestic violence operates is important in understanding how women might succeed in decreasing it. Because domestic violence is the operation of power and control over the woman, it makes sense that the woman's ability to exercise agency and autonomy within the abusive situation is related to her ability to address the abuse. Feminist scholarship demonstrates that women subjected to domestic violence are capable of making decisions for themselves. Because they are in the best position to determine their goals and the options to obtain those goals, their decisions are critical to responding to the abuse.[91] This theme is addressed most

[88] Miccio, *supra* note 80, at 286.

[89] Wan, *supra* note 87, at 611.

[90] Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 958 (2004) (noting that if partner not "sufficiently solicitous, obedient, loyal or compliant," perpetrator uses pattern of abuse to gain such compliance (citing David Adams, *Treatment Program for Batterers*, 5 CLINICS FAM. PRAC. 159 (2003))); Dutton & Goodman, *supra* note 16, at 743 (stating that "[f]or decades now, battered women's advocates have placed the notion of coercive control squarely at the center of their analysis of intimate partner violence . . . . Violence is simply a tool, within this framework, that the perpetrator uses to gain greater power in the relationship to deter or trigger specific behaviors, win arguments, or demonstrate dominance. Other tools might include isolation, intimidation, threats, withholding of necessary resources such as money or transportation, and abuse of the children, other relatives or even pets") (citation omitted).

[91] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19-21 (1991) (analyzing decision of leaving as being complicated by multiple goals of battered women and their experiences of violence). For instance, even if the woman's sole goal is to not be subjected to violence, she may appropriately remain in the relationship because battered women experience leaving as the most violent and dangerous time. Yet battered women also have multiple goals beyond merely avoiding the violence, and that is economic security for themselves and their children, love for their partner, lack of available options once they leave the relationship, and perhaps a sense that the outside world is more violent than the relationship itself. As an example, Professor Laurie Kohn states, "While a woman may not want to be hit, she may want and need the abusive partner to remain at home to assist with child care . . . ." Kohn, *supra* note 64, at 216.

consistently in the discourse regarding whether or not a battered woman should be forced, persuaded, or steered toward leaving her abusive partner. The early battered women's movement literature discusses the importance of focusing not on what society thinks is best for the woman (usually exiting the violent relationship) but instead on what the woman thinks is best given her situation:

> The advocate should not decide for a woman whether she should leave or whether she should return to her batterer. Only a victim herself can reach a decision on custody or on trying counseling. Your demonstrated belief that she is responsible, that she can work to change her own circumstances, not merely benefit from your work, combined with your legal skills, will help her more than will your imposing your beliefs, desires, or schedule upon her.[92]

The emphasis on recognizing that the woman is the decisionmaker, based on her own goals, is important because research shows women are best able to determine the safest course of action for them.[93] For instance, the research on separation assault shows women subjected to abuse may be physically safer living with the abuser because leaving may increase stalking, harassment, and may decrease the woman's ability to influence him.[94] The important component in addressing

[92] NAT'L CTR. IN WOMEN AND FAMILY LAW, INC., LEGAL ADVOCACY FOR BATTERED WOMEN 9 (1982).

[93] *Id.* at 6 (noting women hope or believe that their partner, who often apologizes and promises to change, will in fact stop abuse; are willing to endure abuse to preserve relationship; believe that their children's ability to maintain relationship with their father is more important than abuse; feel or believe that they are to blame for abuse and believe that they need to care for their partner to help end abuse; feel frustrated with their attempts to find service providers who will assist their partner in addressing abuse and, therefore, believe there is no alternative to continuing being subjected to abuse; find relocating away from their partner to be financially and logistically impossible; fear being subjected to heightened violence if they leave based on their prior attempts to leave; fear that they would not be able to manage their lives without their partner); Goldfarb, *supra* note 22, at 1499 (citing that "[w]omen have many reasons for staying with or returning to violent partners, including financial dependency, fear of retaliation, social isolation, community pressure and concern about losing custody of children . . . a deep emotional bond with her partner and want[ing] to preserve and improve the relationship"). And some women do not believe the violence inside the relationship is any worse or more dangerous than the systemic violence against women in the broader society. Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1288 (1992).

[94] WALKER, *supra* note 29, at 55.

abuse, then, appears to be the autonomy and agency of women subjected to abuse.

### *C. The Benefits of CPO Laws*

Choosing to petition or not to petition for a CPO is an act of agency by women subjected to abuse. Social science research indicates that CPOs can be beneficial to women seeking to address domestic violence in their relationships. Studies show that seeking a CPO often helps to decrease subsequent violence.[95] One study shows that many women who obtain CPOs are more successful in preventing subsequent psychological and emotional abuse.[96] That study shows that women with no injuries or nonsevere injuries who obtained CPOs believed they were effective in decreasing abuse and curtailing verbal abuse, harassment, and physical violence.[97] Yet while CPOs might be most effective in dealing with psychological and emotional abuse, few CPO laws address those aspects of abuse. Other studies show that a CPO is an effective remedy in addressing the physical violence that courts permit petitioners to address.[98] Studies show that when courts failed to grant valid requests for CPOs, those women were subjected to more abuse and threats of abuse than women who received CPOs. Still, the women whose valid requests for CPOs were denied experienced less subsequent abuse than those women who did not seek CPOs at all.[99]

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[95] Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women?*, 15 AM. J. FAM. L. 59, 67 (2001); Carol E. Jordan, *Intimate Partner Violence and the Justice System*, 19 J. OF INTERPERS.VIOLENCE 1412, 1425 (2004); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18 Month Study of 150 Black, Hispanic and White Women*, 94 AM. J. OF PUB. HEALTH 613, 617 (2000). *But see* Jordan, *supra* at 1425.

[96] Grau, *supra* note 19, at 21-25. It should be noted that there are some research limitations with the studies on CPO effectiveness and therefore, any generalizations are undertaken cautiously. McFarlane, *supra* note 95, at 613.

[97] Grau, *supra* note 19, at 24.

[98] Balos, *supra* note 23, at 566 (citing study showing that women reported decrease in violence for two years following obtainment of CPO); Gist, *supra* note 95, at 67; McFarlane, *supra* note 95, at 617 (noting that after women applied and qualified for CPO, "a rapid and significant decline in violence occurred"); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER, SOC. POL'Y & LAW 501, 513 (2003) (finding that women determined that temporary protective order met some of their goals in addressing abuse to which they were subjected by "getting the abuser to stay away, stopping the violence, or making a reconciliation possible").

[99] Gist, *supra* note 95, at 67-68.

A CPO proceeding also benefits women subjected to abuse by providing a forum to tell their stories, telling the abuser they object to the abuse, making a public record of the abuse, and regaining some control over their lives.[100] Women experience healing, validation, and empowerment from having a forum to air the abuse.[101] Whereas before her abusive partner defined her relationship, the CPO process provides the woman with an opportunity to restructure how the couple interacts between themselves and with their children, and how they maintain their real and personal property, thereby changing the power dynamics.[102]

### *D. Overview of CPO Laws*[103]

As discussed above, domestic violence is the use of patterned power and control through many forms of abuse. It is important for women to be able to exercise their autonomy in responding to domestic violence, whether or not that includes seeking a CPO. For those women who choose to obtain a CPO, there are benefits to having the CPOs address all of these forms of abuse. Yet, as discussed below, the vast majority of jurisdictions' CPO laws do not remedy domestic violence unless it is physically abusive or a criminal act. Moreover, most states do not address domestic violence as the operation of coercive control or oppression, focusing instead on discrete acts.

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[100] Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 56 (2000) (citing Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection,* 41 CRIME & DELINQ. 414, 420-23 (1995)).

[101] *See, e.g.*, Buel, *supra* note 90, at 996-97 (explaining system that permits women subjected to abuse to tell their stories and to witness abusers being found responsible offers healing); Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 756-57 (2005) (discussing benefits of women's narratives, including fact that one woman subjected to abuse stated that being able to tell her story literally saved her life).

[102] Karla Fischer & Mary Rose, *When "Enough Is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 425 (1995).

[103] It should be noted that states provide CPOs under various names, such as final protective orders, civil protection orders, and injunctions. For ease of reference, I will refer to all such orders as "civil protective orders" or "CPOs." Similarly, almost all states identify domestic violence as the ground for CPOs, but sometimes call domestic violence by other names such as domestic abuse, family violence, dating violence, and interfamily offense. Again, for ease of reference, I refer to this ground as "domestic violence" although domestic abuse is perhaps a better, more inclusive term.

1. Common Features

A woman subjected to abuse can petition the court for an expedited order addressing the abuse in her relationship.[104] Most states permit an ex parte hearing for a temporary CPO, which remains in force for only a few weeks until the final protective order hearing.[105] If a final CPO is issued, it usually is also of limited duration, such as one year.[106] But to qualify for a protective order, the petitioner usually needs to show that she is in a qualifying relationship,[107] subjected to abuse,[108] and what remedies would best address the abuse in the relationship.[109]

[104] *See, e.g.*, D.C. CODE § 16-1005(c)(10) (2008) (providing that relief ordered by Court may include "directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter").

[105] Klein & Orloff, *supra* note 79, at 1031-42; *see, e.g.*, D.C. CODE § 16-1004(d)(1) (2008) (providing for 14-day ex parte temporary protective order if court finds "the safety or welfare of a family member is immediately endangered by the respondent"); MD. CODE ANN., FAM. LAW § 4-505(a)(1) (West 2008) (stating if "a judge finds that there are reasonable grounds to believe that a person eligible for relief has been abused, the judge may enter a temporary protective order to protect any person eligible for relief from abuse"). The order can last for seven days after service. *Id.* § 4-505(c)(1).

[106] *See* Klein & Orloff, *supra* note 79, at 1085-88 (identifying duration of different states' CPOs, including several that permit orders to last indefinitely, few that last three years, couple that last for two years, and over half lasting for year).

[107] Such qualifying relationships may include a relationship by marriage, blood, adoption, and cohabitation. *See* Klein & Orloff, *supra* note 79, at 814-42; *see, e.g.*, D.C. CODE § 16-1001(6)(A)-(D) (2008) (defining qualifying present or past relationship as one by "blood, legal custody, marriage, domestic partnership, having a child in common, or with whom the offender shares or has shared a mutual residence"). In addition, if jurisdictional requirements are met, the relationship may also be or have been "a romantic relationship." And finally, if the person is stalked by the offender, even without one of the above relationships, the person may qualify. MD. CODE ANN., FAM. LAW § 4-501(l) (West 2007) (defining qualifying relationship as "(1) the current or former spouse of the respondent; (2) a cohabitant of the respondent; (3) a person related to the respondent by blood, marriage, or adoption; (4) a parent, stepparent, child, or stepchild of the respondent or the person eligible for relief who resides or resided with the respondent or person eligible for relief for at least 90 days within 1 year before the filing of the petition; (5) a vulnerable adult; or (6) an individual who has a child in common with the respondent").

[108] *See* Klein & Orloff, *supra* note 79, at 845-76 (itemizing various criminal acts, sexual assaults, interferences with personal liberty, threats, attempts to harm, harassment, emotional abuse, damage to property, and stalking that constituted domestic violence for purposes of differing states' CPOs as of 1993); *see, e.g.*, D.C. CODE § 16-1001(5) (stating domestic violence, called intrafamily offense, includes any act punishable as criminal offense); MD. CODE ANN., FAMILY LAW § 4-501(b)(1) (stating "abuse" includes: "(i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree; (iv) rape or sexual offense . . . or attempted rape or sexual offense in

As discussed in detail below, states differ as to how they define abuse warranting a protective order.[110] The various remedies available also vary by state and may include an order that the respondent not further abuse or threaten to abuse the petitioner; the respondent stay away from the petitioner and/or her residence, school, and place of employment; the respondent not contact or attempt to contact the petitioner; the respondent vacate a joint residence with the petitioner; the respondent and/or petitioner participate in certain counseling or domestic violence programs; the respondent pay for any medical expenses resulting from the abuse; detailing safe custody and visitation arrangements for any minor children in common; the respondent pay any necessary child or spousal support to the petitioner; awarding use and possession of jointly owned vehicles and/or other personal property; the respondent surrender any firearms; the respondent pay any necessary filing fees or court costs; and granting any other relief that would address the domestic violence.[111] If the respondent violates the orders, the petitioner may ask the court to find the respondent in criminal or civil contempt.[112] In addition, many jurisdictions make the violation of a CPO itself a crime.[113]

### 2. All States Remedy Physical Violence and Most States Remedy Criminal Acts

All of the states have statutes that provide for a CPO as a remedy for domestic violence that involves a battery, assault, bodily injury, threat of bodily injury, or placing a person in fear of physical injury.[114] Most

any degree; (v) false imprisonment; or (vi) stalking"). For a full 50-state survey of the definition of domestic violence in CPO laws, see *infra* Part I.D.

[109] *See, e.g.*, Klein & Orloff, *supra* note 79, at 910-1006 (describing remedies available under state CPO laws).

[110] *See infra* Part I.D.

[111] *See, e.g.*, D.C. CODE § 16-1005(c) (2008) (providing multiple CPO remedies, including catch-all remedy "directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter"); MD. CODE ANN., FAM. LAW § 4-506(d) (West 2007) (providing several CPO remedies but not including catch-all remedy).

[112] Klein & Orloff, *supra* note 79, at 1101-06; *see, e.g.*, D.C. CODE § 16-1005(f) (mandating violation of protective order is subject to contempt); MD. CODE ANN., FAM. LAW § 4-508(b) (West 2007) (same).

[113] Klein & Orloff, *supra* note 79, at 1142; *see, e.g.*, D.C. CODE § 16-1005(g) (mandating violation of protective order shall be chargeable with misdemeanor crime); MD. CODE ANN., FAM. LAW § 4-508(a) (mandating violation of protective order may result in criminal prosecution).

[114] ALA. CODE § 30-5-2 (2008); ALASKA STAT. § 18.66.990(3) (2008); ARIZ. REV.

state statutes explicitly cross-reference the criminal code to define these physically violent acts and other acts, like sexual assault, as constituting actionable domestic violence.[115] Others reference acts that constitute crimes, without explicitly cross-referencing the criminal statutes.[116] In general, these states offer the CPO as a remedy for such acts whether or not there is coercive control or oppression.

STAT. ANN. § 13-3601 (2008); ARK. CODE ANN. § 9-4-102(3) (2008); CAL. FAM. CODE § 6203(a) (West 2008); COLO. REV. STAT. § 13-14-101(2) (2008); CONN. GEN. STAT. § 46b-38a (2008); DEL. CODE ANN. tit. 10, § 1041(1) (2007); D.C. CODE § 16-1001(5) (2008); FLA. STAT. § 741.28 (2008); GA. CODE ANN. § 19-13-4 (2008); HAW. REV. STAT. § 586-1 (2008); IDAHO CODE ANN. § 39-6303(1) (2008); 750 ILL. COMP. STAT. 60/103 (2009); IND. CODE § 31-9-2-42 (2008); IOWA CODE ANN. § 236.2 (2008); KAN. STAT. ANN. § 60-3102(a) (2007); KY. REV. STAT. ANN. § 403.720 (West 2007); LA. REV. STAT. ANN. § 2132(3) (2008); 19-A ME. REV. STAT. ANN. § 4002(1) (2008); MD. CODE ANN., FAM. LAW § 4-501 (West 2007); MASS. GEN. LAWS ch. 209A, § 1 (2007); MICH. COMP. LAWS § 600.2950(1) (2007); MINN. STAT. § 518B.01(a) (2008); MISS. CODE ANN. § 93-21-3(a) (2008); MO. REV. STAT. § 455.010(1) (2009); MONT. CODE ANN. § 40-15-102 (2007); NEB. REV. STAT. § 42-903(1) (2009); NEV. REV. STAT. § 33.018 (2009); N.H. REV. STAT. ANN. § 173-B:1(I) (2009); N.J. STAT. ANN. § 2C:25-19(a) (2005); N.M. STAT. § 40-13-2(C) (2008); N.Y. FAM. CT. ACT § 821(1) (2009); N.C. GEN. STAT. § 50B-1(a) (2009); N.D. CENT. CODE § 14-07.1-01(2) (2009); OHIO REV. CODE ANN. § 3113.31(A)(1) (West 2007); OKLA. STAT. tit. 22, § 60.1(1) (2008); OR. REV. STAT. § 107.705(1) (2007); 23 PA. CONS. STAT. ANN. § 6102(a) (2008); R.I. GEN. LAWS § 15-15-1(2) (2009); S.C. CODE ANN. § 20-4-20(a) (2007); S.D. CODIFIED LAWS § 25-10-1(1) (2007); TENN. CODE ANN. § 36-3-601(1) (2009); TEX. FAM. CODE ANN. § 81.001 (2009); UTAH CODE ANN. § 30-6-1(1) (2007); VT. STAT. ANN. tit. 15, § 1101(1) (2007); VA. CODE ANN. § 16.1-228 (2009); WASH. REV. CODE § 26.50.010(1) (2009); W. VA. CODE § 48-27-202 (2008); WIS. STAT. § 813.12(am) (2008); WYO. STAT. ANN. § 35-21-102(a)(iii) (2008).

[115] ALA. CODE § 30-5-2; ALASKA STAT. § 18.66.990(3); ARIZ. REV. STAT. ANN. § 13-3601; COLO. REV. STAT. § 13-14-101(2); DEL. CODE ANN. tit. 10, § 1041(1); D.C. CODE § 16-1001(5); GA. CODE ANN. § 19-13-1; HAW. REV. STAT. § 586-1; IND. CODE § 31-9-2-42; IOWA CODE ANN. § 236.2; LA. REV. STAT. ANN. § 2132(3); 19-A ME. REV. ST. ANN. § 4002(1); MD. CODE ANN., FAM. LAW § 4-501; MINN. STAT. § 518B.01(a); MISS. CODE ANN. § 93-21-3(a); MONT. CODE ANN. § 40-15-102; NEB. REV. STAT. § 42-903(1); N.H. REV. STAT. ANN. § 173-B:1(I); N.J. STAT. ANN. § 2C:25-19(a); N.C. GEN. STAT. § 50B-1(a); OHIO REV. CODE ANN. § 3113.31(A)(1); 23 PA. CONS. STAT. ANN. § 6102(a); S.C. CODE ANN. § 20-4-20(a); S.D. CODIFIED LAWS § 25-10-1(1); VT. STAT. ANN. tit. 15, § 1101(1); WASH. REV. CODE § 26.50.010(1); W. VA. CODE § 48-27-202; WIS. STAT. § 813.12(am).

[116] CONN. GEN. ST. § 46b-38a; FLA. STAT. § 741.28(2); MO. REV. STAT. § 455.010(1); NEV. REV. STAT. § 33.018; N.Y. FAM. CT. ACT § 821(1); N.D. CENT. CODE § 14-07.1-01(2); TEX. FAM. CODE ANN. § 71.004.

### 3. Only One-Third of the States Remedy Coercive Control, False Imprisonment, or Restraint on Liberty

Only sixteen states recognize coercive behavior, false imprisonment, or interference with personal liberty as abuse.[117] These states, however, differ in whether they remedy coercive control if there is no physical violence or a threat of physical violence. For instance, in Nevada and Missouri, the laws require that coercion must result from force or a threat of force to qualify as abusive coercion.[118] In Alabama,

[117] ALA. CODE § 30-5-2(a)(1)(d) (recognizing criminal coercion); DEL. CODE ANN. tit. 10, § 1041(1)(g) (recognizing false imprisonment and coercion, defined as compelling or inducing person to engage in or abstain from conduct which victim has legal right to abstain or engage in by instilling fear of physical injury, property damage, criminal conduct, accusation of having committed crime, subjecting person to hatred, contempt or ridicule, participating or not in legal claim or defense, interfering with person's official duties as public servant, or intending to harm another person materially regarding person's health, safety, business, calling, career, financial condition, reputation, or personal relationships); *Id.* tit. 11, §§ 791-92 (2007); FLA. STAT. § 741.28(2) (recognizing false imprisonment); IDAHO CODE ANN. § 39-6303(1) (recognizing forced imprisonment); 750 ILL. COMP. ST. 60/103(9) (recognizing "'[i]nterference with personal liberty' means committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage"); IND. CODE § 34-6-2-34.5 (2008) (coercion actionable when intended through beating, mutilating, torturing, or killing of vertebrate animal); 19-A ME. REV. ST. ANN. § 4002(1)(C), (D) (recognizing "compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage . . . knowingly restricting substantially the movements of another person without that person's consent or other lawful authority"); MD. CODE ANN., FAM. LAW § 4-501(b)(1)(v) (recognizing false imprisonment); MO. REV. STAT. § 455.010(1)(C) (defining coercion as "compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage"); MONT. CODE ANN. § 40-15-102(1)(b)(ix) (recognizing unlawful restraint); NEV. REV. STAT. § 33.018(1)(c), (f) (recognizing "[c]ompelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform" and "false imprisonment"); N.H. REV. STAT. ANN. § 173-B:1(I)(d) (recognizing interference with freedom); N.J. STAT. ANN. § 2C:25-19(a)(6) (recognizing false imprisonment); 23 PA. CONS. STAT. ANN. § 6102(a)(3) (same); VA. CODE ANN. § 16.1-228 (recognizing forced detention); W. VA. CODE § 48-27-202(5) ("Holding, confining, detaining or abducting another person against that person's will."); *see also* COLO. REV. STAT. § 18-6-800.3(1) (2007) (defining domestic violence as including coercion for legislative declaration purposes but not including coercion as ground for relief).

[118] MO. REV. STAT. § 455.010(1)(C) (defining coercion as "compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage"); NEV. REV. STAT. § 33.018(1)(c) ("Compelling the other by force or threat of force to

the law permits a remedy only for criminal coercion.[119] The laws of Indiana and New Hampshire permit coercive control to be actionable without physical violence to the petitioner only when there is the torturing, mutilating, or killing of animals — actions that convey a strong message of control and inflict emotional distress.[120] Finally, many states permit petitioners to obtain a protective order on the grounds of restraint of physical liberty, false imprisonment, or interference with freedom.[121] This demonstrates that some states do recognize that coercive domestic violence should be remedied. Yet, these states by and large do not remedy coercion that is linked to a "credible threatened negative consequence" that is psychologically harmful but not physically harmful such as removing children, interfering with immigration applications, revealing private information, or humiliation.[122]

4. Only One-Third of the States Remedy Psychological, Emotional, or Economic Abuse

Only one state, Michigan, provides a civil law remedy for economic abuse.[123] Seventeen other jurisdictions (sixteen states and the District of Columbia) provide a remedy for domestic violence that is composed of psychological or emotional abuse other than fear of physical injury; those states' remedies fall into a few different categories.[124] Some of the laws limit the nonphysical abuse that can be

perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform.").

[119] ALA. CODE § 30-5-2(a)(1) (stating that abuse includes criminal coercion, which is defined as threats to "confine, restrain, or to cause physical injury to the threatened person or another, or to damage the property or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an unlawful act or refrain from doing a lawful act." (quoting ALA. CODE § 13A-6-25(a) (2008))).

[120] IND. CODE § 34-6-2-34.5 (2008); N.H. REV. STAT. ANN. § 633:3-a (2008).

[121] *See supra* note 118.

[122] *See supra* text accompanying notes 118-22. *But see* 750 ILL. COMP. ST. 60/103(9).

[123] MICH. COMP. LAWS § 600.2950(1) (2007).

[124] ALASKA STAT. § 18.66.990(3) (2009) (including harassment, defined under ALASKA STAT. § 11.61.120(a)(2)-(4) (2009)); CAL. FAM. CODE § 6203(a) (West 2008) (including harassment, which is defined in CAL. PENAL CODE § 646.9(e) (West 2008)); DEL. CODE tit. 10, § 1041(1)(d) (2007); D.C. CODE § 16-1001(5) (2008) (including stalking, which is defined under D.C. CODE § 22-404(b) (2008)); FLA. STAT. § 741.28 (2009) (identifying stalking, which is defined under FLA. STAT. § 784.048 (2009)); HAW. REV. STAT. § 586-1 (2008); 750 ILL. COMP. STAT. 60/103(7) (2009); IND. CODE § 31-9-2-42(4) (2008) (including harassment, defined under IND. CODE § 35-45-2-2

remedied to acts governed by criminal law.[125] Under three of the statutes, repeated acts, identified under the law as a "course of conduct," are not required.[126] In those states, conduct that objectively

(2008)); MICH. COMP. LAWS § 600.2950(1) (2008) (including prohibiting impairment of petitioner's employment and education and stalking, which is defined under MICH. COMP. LAWS § 750.411h (2008)); MO. REV. STAT. § 455.010(1)(d) (2009); NEV. REV. STAT. § 33.018(1)(e) (2009) (course of conduct intended to harass); N.J. STAT. ANN. § 2C:33-4 (2005); N.M. STAT. § 40-13-2(C)(2) (2008); N.Y. FAM. CT. ACT § 821(1) (2008) (including harassment, defined under N.Y. PENAL LAW § 240.25 (McKinney 2008)); N.C. GEN. STAT. § 50B-1(a) (2009); N.C. GEN. STAT. § 14-277.3(c) (2009); OHIO REV. CODE ANN. § 2903.211(A)(1) (West 2007); R.I. GEN. LAWS § 15-15-1(8) (2009); VT. STAT. ANN. tit. 12, § 5131(6) (2007). Interestingly, Oklahoma makes stalking and harassment actionable grounds for a CPO but explicitly carves them out from its definition of domestic violence. OKLA. STAT. tit. 22, § 60.1 (2008). Under the Oklahoma statute, stalking requires fear of death or great bodily injury. *Id.* But harassment does not require physical violence. If there is a "knowing and willful course or pattern of conduct" that "seriously alarms or annoys the [targeted] person, and which serves no legitimate purpose" then the act constitutes actionable harassment if the targeted person both objectively and subjectively suffers "substantial emotional distress." *Id.*

One state, Colorado, officially recognizes that domestic violence manifests in various types of control but fails to provide a remedy for nonviolent abuse. The Colorado General Assembly as recently as 2007 amended its CPO statute to include a legislative declaration that "Domestic violence is not limited to physical threats of violence and harm but includes financial control, document control, property control and other types of control that make a victim more likely to return to an abuser due to fear of retaliation or inability to meet basic needs." COLO. REV. STAT. § 13-14-102 1(b)(I) (2008). Unfortunately, the legislature did not amend the "domestic abuse" definition of its CPO statute to make actionable these forms of domestic violence. *Id.* § 13-14-101(2) (2008). Rather, the Colorado law limits "domestic abuse" to "any act or threatened act of violence." *Id.*

[125] For instance, under the CPO statute in the District of Columbia, domestic violence is any act punishable as a criminal offense. D.C. CODE § 16-1001(5). Such criminal offenses include stalking, which is engaging on more than one occasion "in conduct with the intent to cause emotional distress to another person . . . by . . . harassing that person." *Id.* § 22-404(b). And harassing is defined as "engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person or . . . would cause a reasonable person to be seriously alarmed, annoyed, frightened or tormented." *Id.* § 22-404(e); *see* Richardson v. Easterling, 878 A.2d 1212, 1217 (D.C. 2005) (defining actionable stalking as domestic violence for CPO purposes). Similarly, Maine includes a stalking-like ground for a CPO but does not require fear of serious bodily injury or emotional harm. 19-A ME. REV. STAT. ANN. § 4002(1)(F) (2008).

[126] *See, e.g.*, 750 ILL. COMP. STAT. 60/103(7)(i) (creating disturbance at petitioner's employment or school is enough to constitute harassment); *see* Shields v. Fry, 703 N.E.2d 921, 923 (Ill. App. Ct. 1998) (upholding CPO grounds of harassment because respondent's acts caused petitioner emotional distress by making her uncomfortable, upset, and angry); *see also* ALASKA STAT. § 18.66.990(3)(H) (including harassment, defined under ALASKA STAT. § 11.61.120(a)(2)-(4) (2008)); IND. CODE § 31-9-2-42(4)

and subjectively causes emotional distress is actionable under the civil laws remedying domestic violence.[127] The rest of the states that remedy nonphysical domestic violence require a course of conduct, but make different types of conduct actionable. For instance, eight states remedy domestic violence that actually results in emotional distress.[128] Three states require that the domestic violence both subjectively and objectively result in emotional harm.[129] The District

(including harassment, defined under IND. CODE § 35-45-2-2 (2008)).

[127] 750 ILL. COMP. ST. 60/103(7) (stating that "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner" constitutes form of domestic violence worthy of CPO); *see Shields*, 703 N.E.2d at 922-23.

[128] *See, e.g.*, N.M. STAT. § 40-13-2(C)(2) (2008) (stating that domestic violence includes acts causing "severe emotional distress"); N.C. GEN. STAT. § 50B-1(a) (2009) ("[C]ontinued harassment . . . that rises to such a level as to inflict substantial emotional distress" constitutes domestic violence). Further, under the North Carolina law, harassment is conduct "directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.* § 14-277.3(c) (2009); *see* Wornstaff v. Wornstaff, 634 S.E.2d 567, 569-70 (N.C. 2006) (upholding CPO on basis of harassment, including banging of stapler, throwing water bottle, and refusal to leave, which caused substantial emotional distress). Causing mental distress is sometimes included in the scope of domestic violence. OHIO REV. CODE ANN. § 2903.211(A)(1) (stating that "pattern of conduct [that] knowingly cause[s] . . . mental distress" meets definition of domestic violence as well); *see* Dunkin v. Ireland, No. 04AP-1175, 2005 Ohio App. LEXIS 3110, at *14-15, *17 (Ct. App. June 30, 2005) (upholding CPO on grounds of stalking when appellant threatened appellee she would lose kids, took photos of her house, and sorted through her trash, because he had engaged in pattern of conduct that caused appellee mental distress); *see also* CAL. FAM. CODE § 6203(a) (including harassment, which is defined in CAL. PENAL CODE § 646.9(e) (West 2008)); FLA. STAT. § 741.28 (identifying stalking, which is defined under FLA. STAT. § 784.048 (2008)); N.Y. FAM. CT. ACT § 821(1) (including harassment, defined under N.Y. PENAL LAW § 240.25 (McKinney 2008)). In Rhode Island, cyberstalking that results in emotional distress is grounds for a CPO as it is domestic violence. R.I. GEN. LAWS § 15-15-1(7). Under Rhode Island law, "'cyberstalking' means transmitting any communication by computer to any person or causing any person to be contacted for the sole purpose of harassing that person or his or her family." *Id.* And in Vermont, stalking that results in substantial emotional distress constitutes domestic violence for CPO purposes. VT. STAT. ANN. tit. 12, § 5131(6) (stating domestic violence includes stalking, which is course of conduct of "following or lying in wait for a person, or threatening behavior directed at a specific person . . . [and] would cause a reasonable person to fear for his or her safety or would cause a reasonable person substantial emotional distress").

[129] Hawaii makes actionable "extreme psychological abuse" as a form of domestic violence, and defines it as a course of conduct that both subjectively and objectively results in emotional distress. HAW. REV. ST. § 586-1. The statute defines "extreme psychological abuse" as "an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the

of Columbia permits the course of conduct to result in either subjective or objective emotional harm.[130] New Jersey provides a remedy for domestic violence that either causes or is intended to cause emotional distress.[131] And Delaware remedies conduct that is likely to lead to emotional harm, regardless of whether the conduct actually results in such harm.[132] Therefore, while sixteen states and D.C. provide a cause of action for emotional and psychological harm, there is little consistency as to what is actually required to obtain a remedy. Moreover, the statutes' definitions of emotional and psychological

individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress." *Id.*; *see* Kie v. McMahel, 984 P.2d 1264, 1266-67 (Haw. Ct. App. 1999) (upholding CPO, with minimal analysis, on basis of extreme psychological abuse). Michigan and Missouri also remedy a course of conduct that results in subjective and objective emotional distress. MICH. COMP. LAWS § 750.411h(1)(c) (2007) (defining domestic violence to include "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress"). In addition, under the Michigan civil domestic violence law, "'[e]motional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." *Id.* § 750.411h(1)(b); MO. REV. STAT. § 455.010(1)(d) (stating that domestic violence includes "engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to another . . . and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable adult to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner"); *see* Beckers v. Seck, 14 S.W.3d 139, 145 (Mo. 2000) (upholding renewal of CPO based on respondent's actions that led to plaintiff's substantial emotional distress).

[130] In the District of Columbia, the CPO law permits a CPO to be granted when there is a course of conduct that results in either subjective or objective emotional harm if it meets the criminal definition of stalking. D.C. CODE §§ 16-1001(5), 22-404(b), (e).

[131] N.J. STAT. ANN. § 2C:33-4 (2006) (stating actionable domestic violence includes communication or alarming course of conduct causing or with purpose of causing annoyance or alarm, or subjects other to offensive touching); *see, e.g.*, D.V. v. A.H., 926 A.2d 887, 890 (N.J. Super. Ct. Ch. Div. 2007) (granting CPO for harassment caused by offensively coarse language in phone calls at inconvenient times causing petitioner alarm); Tribuzio v. Roder, 813 A.2d 1210, 1215 (N.J. Super. Ct. Ch. Div. 2003) (upholding CPO on grounds of harassment and stalking for defendant's repeated approaching of plaintiff, yelling at her, insistence on communication, and blocking in her car).

[132] Delaware's CPO remedies a course of "alarming or distressing conduct . . . which is likely to cause fear or emotional distress" but does not require actual emotional distress. DEL. CODE tit. 10, § 1041(1)(d) (2005); *see* M.B. v. H.B., CS02-04668, 2003 Del. Fam. Ct. LEXIS 15, at *5-6 (Fam. Ct. May 2, 2003) (discussing this statutory provision).

harm are not explicitly linked to the previously cited domestic violence theories of coercive control and oppression.

5. Summary of the CPO Remedy

All states recognize crimes such as assault and acts resulting in bodily harm as domestic violence and provide a corresponding remedy. Most state laws recognize threats of bodily harm as domestic violence as well. But only one-third of the states recognize emotional, psychological, or economic abuse without a threat of physical violence as domestic violence worthy of a civil law remedy.[133] Indeed, Connecticut's civil law explicitly requires physical violence and threat of physical violence for actionable domestic violence, stating that "[v]erbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur."[134]

## II. HOW A LIMITED DEFINITION OF DOMESTIC VIOLENCE HARMS WOMEN

There are three broad categories of negative consequences that result from the failure of the civil laws to remedy all fundamental harms of domestic violence. The first is the most obvious. With a limited view of domestic violence, anyone who has been subjected to various forms of domestic violence not covered under the CPO statutory definition of domestic violence cannot file a cause of action or obtain a remedy. Women suffer great harm from psychological, emotional, and economic abuse. These harms include severe emotional distress, physical harm, isolation, sustained fear, intimidation, poverty, degradation, humiliation, and coerced loss of autonomy.[135] And CPOs have successfully decreased abuse and attacked power imbalances.[136] Therefore, a CPO could potentially remediate the harms of emotional, psychological, and economic abuse. Moreover, given the research that psychological and emotional abuse can lead to physical abuse, providing a CPO remedy before this

[133] Indeed, under Connecticut's civil law, it explicitly requires physical violence and threat of physical abuse for actionable domestic violence when it states that "[v]erbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur." CONN. GEN ST. § 46b-38a(1) (2008).

[134] *Id.*

[135] Adams, *supra* note 36, at 563-68.

[136] *See supra* Part I.C.

happens may also prevent physical abuse.[137] The second broad category of the consequences of the law's failure to remedy domestic violence is the loss of the woman's agency in decisionmaking about how best to address the abuse in her relationship. Because increased autonomy is linked with a decrease in abuse, loss of agency is detrimental to women.[138] The third category is the limit on women's ability to obtain other remedies because certain civil laws are linked to actionable domestic violence under CPO laws. Each of these consequences are discussed below.

### *A. Some Women Subjected to Domestic Violence Have No CPO Remedy*

Due to the states' failure to remedy all forms of domestic violence, Vanessa and Kim are not able to bring a claim or obtain a remedy in two-thirds of all states. And while Susan would have an action in all jurisdictions for the physical abuse to which Ulner subjected her, she would not be eligible for a remedy in most states for the other acts Ulner committed, including the act that caused her the most pain — Ulner's demand that their son videotape Ulner's degradation and humiliation of her. If Susan does not have a cause of action for certain forms of abuse, she might be unable to remedy them. For instance, she may want Ulner to turn over all copies of the videotape, but if the taping is not seen as part of the domestic violence, this relief might be denied. Many states have included in their legislative histories the goal of attacking the type of oppressive power and control demonstrated by Ulner even without physical abuse.[139] But amending the CPO statutes to reflect this goal is the only way women can be ensured a forum to air their abuse and to seek a remedy for it. Research shows that the mere act of petitioning for a CPO can decrease subsequent violence.[140] Accordingly, if CPO laws were to recognize all of the fundamental harms of domestic violence, more women could file petitions and perhaps experience a decrease in abuse.

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[137] *See supra* Part I.C.

[138] *See supra* Part I.C.

[139] *See, e.g.*, Murphy v. Okeke, 951 A.2d 783, 790 (D.C. 2008) (stating CPO statute was intended to "counteract the abuse and exploitation of women").

[140] McFarlane, *supra* note 95, at 616.

### *B. Women Are Often Deprived of Autonomy in the Decisionmaking Regarding a CPO Remedy*

As identified above, all legislatures have enacted CPO laws that focus on physical violence and most have enacted CPO laws that primarily redress domestic violence that is an explicit criminal act.[141] An early reason for linking the civil domestic violence definition to crimes, in part, was that activists for battered women saw the CPO laws as a response to the failings of the criminal justice system to protect women subjected to abuse.[142] Some legal commentators have classified the CPO as a hybrid between civil and criminal laws, which further blurs the line between the two systems.[143] Many system actors, such as judges, clerks, and lawyers, therefore, believe that all domestic violence should be interchangeable with their understanding of criminal acts.[144] As a result, even petitioners can become confused about the differences between the civil legal system and the criminal justice system.[145] Yet the civil system is available to private parties with a dispute while the criminal system is reserved for the state to enforce the criminal laws. When the line is blurred between these two systems, women subjected to abuse can suffer numerous negative consequences within the civil legal system. As a result, when domestic violence law remedies only

[141] *See supra* text accompanying notes 114-15.

[142] Balos, *supra* note 23, at 564.

[143] In part, this characterization results from the fact that CPO violations can be criminally enforced through criminal contempt or prosecution of a misdemeanor crime. *See* 17 AM. JUR. 2D *Contempt* §§ 147-48 (2008) (stating criminal contempt is available for many violations of civil court orders); Waul, *supra* note 100, at 54; *see also* Goldfarb, *supra* note 22, at 1509 (citing Waul, *supra* note 100, at 53 (calling CPO "criminal justice system interventions")); Klein & Orloff, *supra* note 79, at 1102-20, 1142-48.

[144] *See* FINN & COLSON, *supra* note 11, at 10 (stating that domestic violence is crime that needs CPOs because criminal justice system is not always best system in which to address domestic violence).

[145] Many petitioners seek a CPO because when the police responded to their 911 call, the police told them to go to court and file a "CPO." *See, e.g.*, Metropolitan Police Report, The Police Can Help in Domestic Violence Situations, http://mpdc.dc.gov/mpdc/cwp/view,a,1232,q,541117.asp (last visited Mar. 26, 2009) (stating police responding to 911 call can make referrals to CPO proceedings). Accordingly, because a criminal justice system actor is telling them to file for an order, petitioners often think that the CPO process is related to the criminal justice system. Unified intake centers, where petitioners meet with prosecutors and civil advocates and attorneys in the same physical location, and unified courts that handle both criminal and civil domestic violence cases in the same unit may heighten this confusion. *See generally* Thomas F. Capshew & C. Aaron McNeece, *Empirical Studies of Civil Protection Orders in Intimate Violence: A Review of the Literature*, 6 CRISIS INTERVENTION AND TIME-LIMITED TREATMENT 151, 163 (2000) (stating that women who participated in civil legal system found it to be intertwined with criminal justice system).

physical violence, women suffer additional negative consequences. These consequences are discussed below.

1. Psychological, Emotional, and Economic Abuse Are Not Addressed or Redressed

When the civil system is deeply intertwined with the criminal justice system, it tends to restrict the domestic violence narrative to criminal acts and physical violence. Psychological, emotional, and economic abuses are not addressed nor listened to unless they somehow meet the definition of a crime that is recognized by the court.[146] Accordingly, society tells women like Kim[147] that nonphysical violence is unworthy of a response or remedy. Many legal theorists have written about the importance of "giving a name" to domestic violence.[148] One commentator states, "[t]he development of legal process can shape social consciousness by identifying and redefining harm, breaking down the public-private dichotomy, and legitimizing the seriousness of the problem."[149] Feminists similarly believe that individual experience influenced and was influenced by the collective.[150] That is to say that the individual woman's ability to name the domestic violence impacts society's broader understanding of the systemic nature and influence of the power and oppression that is domestic violence.[151] Therefore, while it is important to label domestic violence as criminal and physical violence, it is equally important that domestic violence also include the labels of emotional, psychological, and economic abuse as manifestations of the oppression.[152] As one study shows, the

> CPO process was a means for creating a public record of the abuse [women] had experienced. It was a way for them to break their silence and send a message to the batterer that his behavior would not be tolerated. Several women also

[146] Burke, *supra* note 26, at 570.

[147] *See supra* note 2 and accompanying text.

[148] SCHNEIDER, *supra* note 20, at 46; Miccio, *supra* note 80, at 288.

[149] SCHNEIDER, *supra* note 20, at 46.

[150] Miccio, *supra* note 80, at 301.

[151] *Id.*

[152] *Id.* at 288 ("Adrienne Rich understood the power of naming. She recognized that empowerment of a people is derived, in part, through the act of naming — naming the source of oppression and the site of pain. The power of naming gives voice to social phenomenon, while making visible the invisible. And it constructs how we interpret certain experiences.").

> indicated that filing a protective order allowed them to take some initial steps toward regaining control of their lives.[153]

Accordingly, the naming and narrative of domestic violence is unjustly constrained when co-opted as criminal law or physical violence alone. This constraint ignores many of the harms to women subjected to abuse.

### 2. The Quasi-Criminal Nature of the CPO Undermines Women's Own Goals

Negative consequences also result from the fact that the criminal justice system has different goals than the civil system. In the criminal justice system, states, not private parties, are the actors entitled to a remedy. That remedy is driven by the states' view of justice. When the civil legal system is seen as quasi-criminal, however, there is a risk that outside actors' views (such as those of the courts and petitioners' attorneys) regarding the relevant harm and remedy will control, rather than the CPO petitioners' view of the relevant harm and remedy. The criminal justice system is focused primarily on the protection from and eradication of severe physical violence for the benefit of society, while the civil system's goal is to provide the petitioner with a remedy that addresses her harms from domestic violence.[154] As a result, when judges, clerks, advocates, or lawyers blur the lines between the civil and criminal justice systems, they often fail to permit the petitioner to include her entire experience of the violence as it exists within her relationship.[155]

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[153] Fischer & Rose, *supra* note 102, at 414.

[154] Shazia Choudhry, *Righting Domestic Violence*, 20 INT'L J. L. POL'Y & FAM. 95, 96 (2006) (discussing state's interest and its interventionist strategy as opposed to woman's privacy interest).

[155] It should be noted that certain jurisdictions do permit the court to inquire into the entire "mosaic" of the violence in CPO proceedings. *See* Cruz-Foster v. Foster, 597 A.2d 927, 930 (D.C. 1991). However, even in those jurisdictions, the ability to explore the mosaic does not actually permit the addressing of the fundamental harms of psychological, emotional, and economic abuse. This is because courts do not explore the mosaic unless the petitioner states an actionable claim of domestic violence based on the statute's definition. *Id.* Therefore, for women who suffer nonphysical violence, courts cannot address their abuse if the statutes only permit physical abuse to be addressed. In addition, the exploration of the mosaic is intended to permit past acts of actionable violence to be included to help corroborate the current act of violence. *See id.* (arguing mosaic of past violent conduct should be explored to help predict future conduct). There is no remedy offered for the violence included in the mosaic, and what is permissible as mosaic information is also shaped by the statute's definition of domestic violence. Finally, for women like Kim (discussed at the beginning of this Article) who do not know that they can seek a

Instead, system actors often limit testimony to their own view of the most worthy criminal act. Courts often view crimes through a hierarchical lens. For that reason, courts sometimes convey that a CPO should be sought only for a "worthy" incident of physical violence, one where the court can feel it is actually saving a life, such as an assault or battery. Courts often place crimes such as stalking and harassment, which are crimes that sometimes address psychological abuse, at the bottom of their hierarchical ranking. As a result, courts are less inclined to grant a CPO based on these crimes because courts do not perceive them as worthy enough. For example, one judge denied a CPO for cyberstalking, despite the fact that the CPO law included cyberstalking in the definition of domestic violence. In denying the CPO, the trial judge stated:

> In this domestic violence area, there are many crimes. At the top of the line is assault. Then there is threat of serious bodily injury. There is stalking, which is above harassment. Stalking is a course of repeated conduct that places the plaintiff in reasonable fear of bodily injury to plaintiff or a third person. Here, the course of conduct includes repeated calls that involve vulgarity or intent to upset another person, in addition to a threat to injure plaintiff and plaintiff's car. There is evidence of an extensive course of such conduct, but no one got hurt. Twelve years ago [before enactment of the stalking criminal law],[156] the court could not intervene in people's lives, where they go and how they contact others. Courts should be reluctant to do so unless the plaintiff can meet the burden of proof. I wish you had worked this out by yourselves. The court is powerless to do anything meaningful except to make this worse. A protection order wouldn't protect anyone. The only protection would be against insults. My responsibility is to protect lives. Therefore, I am denying plaintiff's protection order.[157]

remedy for the harms to which they are subjected, there is a great benefit and power when they can name domestic violence under the statutes, making it clear that their abuse is illegal and they are entitled to a remedy. *See supra* note 2 and accompanying text (stating Kim did not know domestic violence could include nonphysical abuse).

[156] Note that Maryland only recently added stalking as an actionable form of abuse under the CPO law, on October 1, 2005. *See* Effect of Amendments, MD. CODE ANN., FAM. LAW § 4-501 (West 2007).

[157] This is a slightly modified version of a Maryland court ruling in a 2007 domestic violence CPO case, altered slightly to focus on the most relevant issues to this Article. It is an approximation rather than a transcription because it is based on

As seen above, despite the statute, the court saw the CPO as only necessary to save lives. Because the alleged acts of domestic violence, cyberstalking, were not life-threatening, the court refused to grant the CPO. Such a limited view of a CPO's goals hurts women by excluding those who suffer abuse that is not life threatening but is still extremely harmful and in need of a legal remedy.

3. Desensitization to Other Forms of Domestic Violence

When CPO statutes rely on criminal law and severe physical violence to define what is actionable domestic violence, judges and other system actors, such as clerks, attorneys and advocates, may become desensitized to all forms of domestic violence except those involving extreme criminal battery.[158] Therefore, the narrative becomes more restricted. The discourse of domestic violence excludes even that domestic violence that is actionable under the CPO laws but does not involve severe physical violence.

For example, there is a range of intentional, offensive touching that can meet the criminal act of assault. Yet despite a CPO law's inclusion of any assault as domestic violence, many courts will discount acts that do not result in severe physical injury or that they do not see as seriously violent. In a troubling illustration of this, a husband hit his wife with an electrical cord on numerous occasions and locked her in a closet for several hours. When the wife requested a police escort at the end of her CPO hearing to retrieve her personal belongings from their joint residence, the judge refused and stated: "This is pretty trivial . . . .This court has a lot more serious matters to contend with. We're doing a terrible disservice to the taxpayers here. You want to gnaw on her and she on you, fine, but let's not do it at the taxpayer's expense."[159]

The courts' desensitization to domestic violence is also seen in those jurisdictions where the CPO laws encompass threats of violence and nonviolent crimes, such as harassment and stalking. For instance, even when the CPO statute permits threats as actionable domestic violence,

> Some judges are reluctant to exercise their authority to issue an order when threats are alleged but no actual battery has

my notes rather than the hearing transcript. *See* notes on file with author.

[158] *See* Wan, *supra* note 87, at 623.

[159] Buel, *supra* note 90, at 968 (citing Joan Meier, *Battered Justice*, WASH. MONTHLY, May 1987, at 38).

> occurred. For example a judge in a state that authorizes protective orders on the basis of threats grants orders only if there have been several threats and the abuser has the ability to carry out his menaces.[160]

Therefore, judges are not exercising their full statutory authority in addressing as broad a spectrum of domestic violence as is permitted under their existing CPO laws. Rather, courts and others tend to credit only extreme criminal physical violence and discount comparatively minor physical abuse or other domestic violence.

4. Women's Stories of Abuse Are Limited

When courts limit actionable domestic violence to decontextualized criminal events of severe physical abuse, courts and other system actors alter or silence women's stories of domestic violence told in public court proceedings. When judges minimize or justify such forms of abuse, women are even more reluctant to use the civil legal system to address their needs.[161] Women's ability to have a public forum to air the abuse to which they have been subjected can offer healing, validation, and empowerment.[162] When advocates, lawyers, and courts limit women's ability to have this necessary and appropriate public forum to address serious harms, they negatively affect women subjected to abuse. One study shows that the failure of courts to grant CPOs to qualified women subjected to abuse harms them further because they are subsequently subjected to more abuse and threats of abuse than women who were qualified for CPOs and received them.[163] To avoid this harm, the law and the courts need to permit women to seek CPOs for all forms of abuse. This will empower women subjected to abuse to address their abuse effectively.[164]

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[160] FINN & COLSON, *supra* note 11, at 11. The authors do not know why the judges fail to do so but posit that perhaps they are uncertain about whether the threats met the additional requirements of the stalking statute. *Id.* at 10-11. Although unclear, this tends to indicate that any CPO law amendments need to be specific about the criteria so that judges do not add extra elements unintended by the statute.

[161] *See* Buel, *supra* note 90, at 968.

[162] *See, e.g.*, *id.* at 996-97 (noting that when prevented from telling their stories, women subjected to abuse are precluded from opportunity for healing and witnessing offenders be held accountable); Goodmark, *Telling Stories, Saving Lives*, *supra* note 101, at 756-57 (sharing narratives of women who are abused offers validation and increases system actors' empathetic understanding).

[163] Gist, *supra* note 95, at 67-68.

[164] Buel, *supra* note 90, at 1020 (arguing for new tort of domestic violence to offer credibility and empowerment to victims of domestic violence).

It is important to note that it is not only courts that preclude women who are abused from seeking a remedy, even though they are otherwise qualified under the CPO statute. Silencing by other actors was documented by a commentator who observed the domestic violence intake center in the District of Columbia. She found that when resources were limited, petitioner's attorneys decided that "only the most *severe* cases are assigned an attorney."[165] Therefore, qualified petitioners only received the assistance of an attorney if they were subjected to severe physical abuse, thus perpetuating the misperception of domestic violence. Linda Mills asserts that "mainstream feminists exert power by defining who women in abusive relationships are and therefore what they should do about the violence in their lives."[166] It is important that feminists, along with other advocates, lawyers, and courts, critically analyze the stories of domestic violence that we have constructed and examine why they focus on physical violence and exclude the other fundamental harms of domestic violence.

It is common, of course, to equate domestic violence with physical violence. When women are killed, newspapers publicize the stories of courts failing to help these women. The more gruesome the violence, the more prominent the story. These stories should be front-page news and should be greeted with public outrage and sadness. Yet other women's stories also need to be heard. By excluding the fundamental harms of psychological, emotional, and economic abuse and focusing on physical abuse, we exclude many women who want to seek legal redress but cannot, or do seek legal redress but are denied.

For instance, twenty-year-old Anna Bergman sought a CPO in Catonsville, Maryland, on Friday, July 27, 2007.[167] When Bergman went to court seeking a protective order, she was concerned because Ryan Butler, her ex-partner and the father of her children, had threatened to harm her new boyfriend.[168] A court commissioner explained later that Bergman was unsuccessful in seeking a protective

[165] Waul, *supra* note 100, at 64 (emphasis added). Of course, such a decision is even more problematic in its determination of who is worthy of a valuable resource. Given the fact that the legal system expects to grant CPOs to women who are subjected to severe physical abuse, women subjected to abuse that does not fit the court's assumptions about "real" abuse might actually have a greater need for an attorney to be successful in their claim.

[166] MILLS, *supra* note 74, at 50.

[167] Suzanne Collins, *Family: Murdered Mom Was Denied Protective Order*, WJZ (Catonsville, Md.), Aug. 1, 2007, *available at* http://wjz.com/topstories/Anna.Bergman.murder.2.429044.html.

[168] *Id.*

order because she only described a threat against her boyfriend but said nothing about threats against herself.[169] Bergman most likely perceived the threat against her boyfriend as a threat against herself. Nonetheless, she left the courthouse without any court-ordered relief.[170] Three days later, Bergman was murdered by Butler, who also abducted their three-year-old son.[171] This brutal murder made the news, which is how everyone learned about what Ms. Bergman had experienced in the court three days earlier.

After Bergman's horrific murder, the press blamed clerks' offices and judges for their failure to encourage victims of domestic violence to fill out detailed forms asking about the history of abuse, including stalking and harassment.[172] Experts justifiably criticized clerks, commissioners, and judges for not asking enough questions to learn about the prior physical abuse between Bergman and Butler.[173] Critics asked why the system failed to explore the entire context of Ms. Bergman's relationship with Mr. Butler. The answer may be that the questions were not asked because society has limited the scope of domestic violence in the legal system so that few ever ask these questions or try to learn the full story. In fact, when legally relevant information is included, clerks or judges often state that only the most important and egregious crimes should warrant a CPO remedy. A judge in Wisconsin expressed his disdain for actionable but nonphysical domestic violence by stating,

> These cases aren't anything compared to how it used to be. I've been here in family court for over 30 years and I never used to see this kind of crap . . . women used to come in with real abuse cases . . . broken arms and bloody noses.[174]

Because so many judges and courts have decided that severe physical violence is the most important, often the only actionable goal in court is saving lives. Any other goal, such as the broader goal of trying to rearrange one's relationship with the abuser to remediate the

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* (citing Dorothy Lennig, Legal Dir., House of Ruth, who stated, "'Clearly she was afraid of something and as it turns out she had a real reason to be afraid. Had the commissioner listened to her testify and read her petition, it may have shown a different story'").

[173] *Id.*

[174] Wan, *supra* note 87, at 623.

multifaceted abuse and harms thereto, is more often than not precluded from being aired and litigated.

For example, Ms. Bergman unsuccessfully sought a remedy for the threat against her boyfriend. Ms. Bergman's goal, which the court understood as protecting her boyfriend from a threat without any prior physical harm toward him, was inconsistent with the court's goal of saving her from physical harm. Yet, Ms. Bergman's testimony, in fact, was enough to state a claim under the Maryland statute because the threat was really aimed at her. Her testimony was sufficient to begin a conversation with the court about domestic violence. Broadly defined, domestic violence included her ex-husband's exercise of power and control that led to various forms of physical, emotional, psychological, and economic abuse. No court will pursue these important inquiries, however, until judges start looking beyond incidents of crimes and severe physical violence and "saving" women's lives.

In Ms. Bergman's case, the court should have responded to her claim with inquiries of how her ex-husband was exerting power and control over her and how she wished to reorganize her relationship with him to address the oppressive control. The court could then have explored whether and how her ex-husband attempted to control and intimidate Ms. Bergman in a patterned and oppressive way, such as the presence of physical violence, other threats of physical violence, any economic coercion, and any and all patterns of derogatory behavior, isolation, humiliation, or other psychological or emotional abuse. This would have allowed Ms. Bergman to share her experience of abuse and would have contextualized the threat against Ms. Bergman's boyfriend. Research shows that such an approach by the court improves the woman's satisfaction with the legal process and permits the woman to exert her autonomy, thus best redressing the violence in her life.[175]

### 5. State Becomes De Facto Decisionmaker, Which Undermines Women's Agency

In the criminal justice system, the state, through the prosecutor and the court, is the decisionmaker as to how the criminal case will proceed by determining what charges to bring, what plea to accept, and what to

[175] *See id.* at 615-31 (describing Wan's various typologies based on similar ones created by James Ptacek); *see also* James Ptacek, Disorder in the Courts: Judicial Demeanor and Women's Experience Seeking Restraining Orders (1995) (unpublished Ph.D. dissertation, Brandeis University) (on file with author). In Wan's typology, "good-natured" system actors who understood their role as permitting the autonomy of the petitioner provided women better experience and greater autonomy. Wan, *supra* note 87, at 615.

try.[176] Because courts often view CPOs as quasi-criminal, judges may take a "more interventionist, rather than deferential, approach."[177] For instance, judges presiding over CPO hearings much more frequently intervene and deny petitioners' motions to vacate than judges who decide plaintiffs' motions to dismiss in other civil litigation.[178] As a result, CPO judges often "are substituting their judgment for that of the victims who are seeking assistance in their courtrooms."[179] The judges end up controlling the woman through their official power. In effect, the legal system allows the state and other outside actors to be the decisionmakers to save the woman because the system actors believe she is ill-suited to address the abuse.[180] However, since the petitioner brings a civil CPO case, it should be governed by her judgments and goals, not those of the judges.

By depriving a woman subjected to abuse of her decisionmaking role, the civil legal system undermines her ability to self-direct and define how best to address the abuse in her relationship.[181] Hence, the legal system inhibits her agency.[182] Many women subjected to abuse are skeptical of resolution through the criminal justice system because mandatory arrest[183] and no-drop prosecution[184] policies have resulted in a system that overrides victims' interest for society's interest.[185]

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[176] Miccio, *supra* note 80, at 266 (discussing marginalization of women subjected to abuse in criminal justice system and specifically in no-drop prosecution jurisdictions).

[177] Kuennen, *supra* note 15, at 44-46 (discussing failure of judges to treat CPO cases as they treat other civil injunction cases).

[178] Kohn, *supra* note 64, at 234.

[179] LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 81 (2008).

[180] *Id.* at 82-83.

[181] MILLS, *supra* note 74, at 31 ("[T]he idea that intimate violence is best addressed by silencing the victim and letting the state take the initiative against the batterer, ignores the significance of a woman's agency when she is threatened by intimate violence."); Goldfarb, *supra* note 22, at 1510, 1514-15.

[182] *See* Goldfarb, *supra* note 22, at 1499; Kohn, *supra* note 64, at 244-45 (stating research shows that women subjected to abuse are in best position to predict future violence and that criminal justice systems that exclude such women from decisionmaking fail to enhance their safety).

[183] Miccio, *supra* note 80, at 265, 278-79 (noting by 1994 most states incorporated mandatory arrest policies, requiring police to arrest someone in response to any 911 domestic-violence-related call).

[184] *Id.* at 265-66 (discussing no-drop prosecution policies that require prosecutors to pursue prosecution of domestic violence related crimes even if victim fails to cooperate in prosecution).

[185] Kohn, *supra* note 64, at 202-03 n.53. For other reasons why women are skeptical of the criminal justice system, see Deborah M. Weissman, *The Personal Is*

Because most CPO laws rely on criminal statutes to define domestic violence, many women believe that the CPO system will treat them in the same manner as the criminal justice system. As a result, these women often believe that once they file a civil case, they will lose control over the outcome as they would in a criminal matter.[186] Sadly, that belief is supportable. In addition to the courts' refusal to grant women's motions to dismiss, a 1990 U.S. Department of Justice report on CPOs underscores the common view that CPOs are for judges' use, not women's, to address domestic violence. The report states, "Civil protection orders . . . offer *judges* a unique additional tool for responding to the special difficulties of domestic violence cases."[187]

Women lose their control as a party to the litigation when the judge and other system actors view the case as one controlled solely by the legal system. If, for instance, the woman's goal for the CPO is to continue her relationship with the abuser with an injunction against future abuse but the judge's goal is to separate the woman from her abuser, the judge may be contemptuous of the woman and of the judge's role in sanctioning her decisionmaking. One Wisconsin judge stated derisively, "My job is to hand out [CPOs] to women and then watch couples kiss and make up."[188] That comment reveals a belief that women should not be able to make decisions because they are not making the right decisions, despite the research on separation assault.[189] Alternatively, when women subjected to abuse make their own decisions regarding how to address the abuse in their life, it provides greater empowerment and prevention against future domestic violence.[190]

*Political — and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 401. The study is consistent with the experience of a client of one of my clinic students. The client had been subjected to abuse, and wanted to hold her husband accountable, but did not want to involve the police in such a way as to trigger mandatory arrest and no-drop prosecution. Therefore, rather than calling the 911 number for emergencies, she called 311, which was the nonemergency police telephone number in the District of Columbia. *See* notes from clinic supervision session on file with author.

[186] Waul, *supra* note 100, at 53.

[187] FINN & COLSON, *supra* note 11, at 1 (emphasis added). *But see* Kuennen, *supra* note 15, at 67 (citing New Jersey court decision in which court acknowledged that criminal and civil legal systems are different and that, therefore, petitioners should have "'complete autonomy of decisionmaking'" in civil cases) (internal citation omitted).

[188] Wan, *supra* note 87, at 623.

[189] WALKER, *supra* note 29, at 55-56.

[190] *See supra* Part I.B; *see also* Deborah Epstein, Margaret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER, SOC.

When courts override women's decisions in a civil proceeding as to how to address the abuse in their relationship, the result is problematic. "[A]n important element of responding to the problem [of domestic violence] is to restore a victim's fundamental rights of freedom, choice and autonomy."[191] Expanding options for women subjected to abuse, including civil legal options that such women can control, can promote women's agency. By expanding the recognition of all harmful domestic violence in CPO statutes, women subjected to multifaceted abuse are able to enter a courthouse and seek a legally enforceable redefinition of their relationship with the person perpetrating the abuse. Studies confirm that when women subjected to abuse encounter system actors who "listen, consider and respond to their needs," the women are less at risk of re-assualt.[192]

Unsurprisingly, the importance of autonomy and agency is almost self-evident once we return to a definition of domestic violence that is based on a series of actions taken to dominate another and to eradicate one's agency.[193] As Professor Martha Fineman has written, "we must begin to think of autonomy as possible only in conjunction with the meaningful and widespread attainment of equality."[194] The civil legal system should strive to provide a forum for women seeking equality. One study shows that women sought CPOs to regain control in their lives and equality in the relationship, by making the abuse public and placing the abuser on notice that the behavior was under public scrutiny.[195] According to that study, women turned to the legal system to regain some of the power they felt they had lost as a result of the abuse.[196]

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POL'Y & L. 465, 469 (2003); GERALD T. HOTALING & EVE S. BUZAWA, VICTIM SATISFACTION WITH CRIMINAL JUSTICE CASE PROCESSING IN A MODEL COURT SETTING 32 (Apr. 2003) (noting whether or not women were satisfied with domestic violence criminal justice system depended on control: control over criminal justice system; batterer and what he would do in future; and stopping violence when it happened)); Waul, *supra* note 100, at 65 (finding that women "use the CPO process to send a message to the offender that his behavior will not be tolerated").

[191] Kuennen, *supra* note 26, at 30.

[192] Kuennen, *supra* note 15, at 43.

[193] Goldfarb, *supra* note 22, at 1494 ("In order to counteract the harm of domestic violence, the law's response should focus on shifting power and control back to the victim." (citing Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 597-609 (1999))).

[194] MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 29 (2004).

[195] Strack & Hyman, *supra* note 64, at 42.

[196] *Id.* ("'The protection order becomes an announcement that the abused woman refuses to "take it" anymore and is acting on her own behalf.'") (internal citation omitted).

If, however, domestic violence is defined as only physical harm or crimes, then domestic violence is firmly situated in a realm where society is satisfied with a societal interventionist approach, dictated by society's goals and values rather than the women's. In the early battered women's movement, advocates believed that

> [b]attered women's rights to self-determination, including the decision to leave or stay with their husbands, were to be respected; if sexism robbed women of control over their lives, Women's Advocates[, an early shelter in St. Paul, MN,] would work on methods for returning it, even if no one quite knew how.[197]

This ultimate goal of empowerment was needed to counteract the undermining of agency that is at the core of all domestic violence. The original drafters of CPO laws intended to provide vehicles that would promote victim autonomy.[198] And although commentators have stated that CPO laws "have proven to be tools that can significantly facilitate the achievement of the [goal of autonomy],"[199] as discussed above, this goal is often undermined by the failure to recognize all forms of abuse to which women are subjected.

Accordingly, by recognizing domestic violence as including all forms of abuse as part of the complex dynamics of intimate relationships, the civil legal system may be able to address more fully the entire spectrum of domestic violence and provide a remedy to all women subjected to it.

### *C. Women Subjected to Abuse Are Excluded from Other Legal Remedies*

The third broad category of negative consequences from the narrow CPO recognition of domestic violence is the domino effect it has in the area of other civil laws. The misperception that domestic violence is limited to severe, physically violent crimes has been adopted by other civil laws that reference CPO laws. The incorporation of CPO law extends the exclusion of legal recognition of all fundamental domestic violence harms. As discussed above, the CPO domestic violence definition fails to remedy all forms of domestic violence. As a result, women who are subjected to abuse that falls outside the statutory definition or are otherwise excluded from seeking a remedy are unable to seek and/or obtain a CPO. Without the CPO, these same women

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[197] SCHECHTER, *supra* note 81, at 63.

[198] Kuennen, *supra* note 26, at 7 n.30.

[199] *Id.*

can be denied other forms of legal relief affecting their family status, immigration status, and welfare status, among other effects. This is because some civil laws that address domestic violence simply cross-reference the protective order statute to define domestic violence or rely upon the CPO itself to prove domestic violence.[200]

For instance, many states consider domestic violence as a factor in custody and visitation determinations.[201] In the District of Columbia, for example, there is a rebuttable presumption that joint custody is not in the best interest of the child if a court finds that domestic violence, as defined in the CPO statute, has occurred.[202] Also, in making certain custody or visitation determinations, the court is required to make written findings related to the allegations of domestic violence.[203] If the court finds that one parent has committed domestic violence, a court may only grant custody or visitation to the abusive parent with specific, written findings.[204] And the court may only award visitation to the abusive parent if the court finds that the child and other parent will be protected from harm.[205] The abusive parent must prove that visitation will not harm the child.[206] But whether there was domestic violence in the relationship rests upon the CPO's definition of domestic violence. Looping back to the civil law is common and makes the CPO laws' view of actionable domestic violence even more influential. Although many states follow the District of Columbia and appropriately consider domestic violence in custody determinations, only a limited strand of domestic violence is usually taken into account. This, of course, undermines the purpose of considering the domestic violence in the first place.

Other civil laws may provide their own definition of domestic violence, but allow evidence of a CPO to prove the necessary domestic violence. Therefore, a CPO can also control a plaintiff's ability to meet her burden of proof under such laws.[207]

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[200] *See, e.g.*, D.C. CODE § 32-131.01(1) (2008) (providing use of accrued leave for domestic-violence-related leave cross-references CPO law for definition of domestic violence).

[201] *See* Klein & Orloff, *supra* note 79, at 954.

[202] D.C. CODE § 16-914(a)(2) (2007) (labeling domestic violence as "intrafamily offense").

[203] *Id.* § 16-914(a-1).

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *See, e.g.*, 8 C.F.R. § 204.2(c)(2)(iv) (2007) (providing that in immigration self-petition cases, CPO is helpful evidence of necessary domestic violence).

## III. PROVIDING A REMEDY TO WOMEN SUBJECTED TO ALL FUNDAMENTAL HARMS OF DOMESTIC VIOLENCE

To limit the negative consequences to women, states need to reform their CPO laws to address all forms of domestic violence. This Part discusses guidelines for how states can make such reforms, including models that exist in other laws addressing a broader range of domestic violence. This Part also addresses concerns about providing a CPO cause of action for women subjected to all forms of abuse.

### *A. Recognizing All Fundamental Domestic Violence Harms*

The CPO laws should be amended to address systemic oppression of women through the use of power and control that includes physical violence, sexual abuse, psychological abuse, emotional abuse, and economic abuse. Once the laws adequately provide a cause of action for all forms of abuse, the laws also need to provide a range of remedies that the petitioner can craft to address the abuse in the specific context of the petitioner and respondent's relationship.

As stated earlier, scholars have argued recently for certain amendments to the criminal law and the civil law.[208] Those suggested amendments address the need for the law to recognize the pattern of violence, the context of domestic violence, the intent of power and control behind the domestic violence, and coercive control as a unique form of domestic violence. The proposals, however, fall short in providing legal recognition and a cause of action for those persons who are not subjected to physical violence or a crime, such as stalking or harassment, and yet are subjected to the fundamental harms of oppression through psychological, emotional, and/or economic means alone.

The current failings of CPO laws could be addressed by defining abuse as physical, sexual, psychological, emotional, and/or economic abuse. The laws could then incorporate some of the various tactics of abuse as explored in psychological scales and measurements[209] and by advocates in their screening for domestic violence.[210] For instance, examples of qualifying psychological abuse could include repeated acts of intimidation; threats of physical harm to self, partner or

[208] *See generally* Baker, *supra* note 12 (proposing new CPO statutory language that includes coercive control); Burke, *supra* note 26, at 555-56 (addressing need for criminal law to require showing of power and control in criminal law); Tuerkheimer, *supra* note 26, at 959-63 (discussing new domestic violence crime that considers pattern of violence within relationship).

[209] *See supra* notes 35-53 and accompanying text.

[210] *See supra* notes 56-63 and accompanying text.

children; withdrawal of immigration application; destruction of pets and property; forced isolation from friends, family, school, and/or work; sleep interruption; limiting food; controlling petitioner's movement because of obsessiveness and possessiveness; degradation through humiliation; and repeated name-calling.[211] In addition, statutes should make clear that domestic violence involving nonsevere physical violence and crimes such as harassment and stalking should be taken as seriously as domestic violence that includes severe physical violence and crimes of battery. The same type of targeted remedy should be available for all forms of domestic violence. Moreover, as discussed below, states can look to other civil laws that recognize psychological, emotional, and economic abuse and use those domestic violence definitions, such as extreme cruelty or excessively vicious conduct, as models.[212] In addition, the statutory language, and not just legislative intent, should identify that the law is aimed at abusive behavior that keeps one person in a position of power over the other person through the use of control, intimidation, or fear.

In terms of remedy, the CPO statutes need to provide additional remedies that are targeted at the petitioner's actual experience of multifaceted abuse in her life. For instance, monetary damages should be available for the injuries to which women are subjected from their abuse.[213] Such monetary damages are not only important for the resulting harm from physical injuries and the emotional and psychological abuse, but also can be tailored to address the harm from economic abuse, which should include preclusion from seeking employment, as in Vanessa's case.

It is also important to provide a range of CPO remedies so that they can be context specific. CPO laws will offer the greatest benefit, therefore, if they provide a remedy that includes a catch-all phrase, such as "any other relief that would address the domestic violence," that permits the woman to seek a remedy crafted to her particular

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[211] *See supra* notes 40-63 and accompanying text.

[212] *See infra* Part III.B.

[213] Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REV. 1, 52-53 (1994) ("The average monthly cost to New York City domestic violence victims in just medical, counseling and legal expenses was $575. New York City spends at least $500 million annually as a result of domestic violence — half of the cost born by New York City employers from reduced work productivity, greater absenteeism, and high turnover. The average employed battered woman misses work 18 full days per year and is late for work 60 days a year because of the violence . . . .").

situation, her knowledge of the abuse, and her understanding of the best way to address it.[214]

### *B. Models from Other Civil Laws*

Protective orders are not the only civil laws that deal with domestic violence; a sampling of some other laws follows. Immigration, welfare, tort, and divorce laws recognize domestic violence that is broader than only severe physical violence and crimes. Many of these laws recognize that domestic violence is usually situated in a relationship permeated with oppressive power and the exercise of control. These laws do provide civil remedies for domestic violence that occurs within a relationship and is comprised of any combination of psychological, emotional, economic, sexual, and/or physical abuse. This demonstrates that it is therefore possible to reframe our understanding and remedying of domestic violence in the legal system.

These laws, however, are applicable in only very discrete areas and provide targeted relief toward that area, such as immigration or welfare. They do not provide the same type of expedited and flexible injunctive, family, and monetary relief that CPOs are intended to provide. Accordingly, this section discusses these other laws as examples of broader standards that can be imported into CPO laws so that all women subjected to domestic abuse are able to obtain a comprehensive and expedited CPO remedy to assist in rearranging relationships that contain abuse.

#### 1. Immigration and Welfare

The Violence Against Women Act ("VAWA"),[215] enacted in 1994, is federal legislation that addresses violence against women in a large spectrum of areas. One of the provisions focusing on immigrant women is the self-petition mechanism that provides an alternative to the more common family-based, spouse-sponsored petition to become a legal permanent resident.[216] The self-petition process permits a spouse of a U.S. citizen or lawful permanent resident to petition without a sponsoring spouse if she can demonstrate that she has been subjected to domestic violence.[217] This process implicitly recognizes

[214] Klein & Orloff, *supra* note 79, at 912-14 (discussing catch-all provisions in CPO statutes).

[215] VAWA of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[216] 8 U.S.C. § 1154(a)(1)(A)(iii)(I) (2008); *id.* § 1154(a)(1)(B)(ii)(I).

[217] *Id.* § 1154(a)(1)(A)(iii)(I)(bb).

the need to provide autonomy to such spouses due to the power and controlling nature of domestic violence.[218] To qualify for self-petition, one needs to show that she is the spouse of a U.S. citizen or lawful permanent resident and "has been battered or has been the subject of extreme cruelty perpetrated by the spouse."[219] "Extreme cruelty" has been interpreted through regulations, decisions by the Board of Immigration Appeals, and the federal courts as including psychological abuse.[220]

Similar to the self-petition immigration law, federal welfare law has included various waivers to certain eligibility requirements if an individual can show that she was subjected to domestic violence. For instance, under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, "states [may] adopt the Family Violence Option (FVO), which would allow them to exempt a family from the act's sixty-month cap on state benefits 'if the family involves an individual who has been battered or subjected to extreme cruelty.'"[221] In Maryland, for example, the domestic violence necessary for the FVO includes mental abuse.[222] Accordingly, using the language of

[218] *See* Kelly, *supra* note 71, at 695 (stating that VAWA fundamentally recognizes that domestic violence is about control and therefore battered immigrant women need petitioning power to escape control).

[219] 8 U.S.C. § 1154(a)(1)(A)(iii)(I); *id.* § 1154(a)(1)(B)(ii)(I); 8 C.F.R. § 204.2(c)(1)(i)(E) (2008); *id.* § 204.2(c)(1)(vi).

[220] Hernandez v. Ashcroft, 345 F.3d 824, 839 (9th Cir. 2003) (noting that "extreme cruelty" encompasses acts that may not appear violent but are nonetheless part of pattern of domestic violence, such as husband's continued pattern of controlling behavior by promising to seek marriage counseling and to end violence and pleading for her to leave her safe haven in United States); BIA decision, Case No. A75900716 (Jan. 20, 2006) (on file with author) (discussing and adopting "extreme cruelty" standard under self-petition law as meaning extreme mental cruelty despite case being cancellation of removal under 8 U.S.C. § 1229(b)(2)). Prior to such interpretations, it is important to note that early critics of VAWA were concerned that "in qualifying for VAWA, public record evidence of physical abuse is recognized as the most credible documentation." Further, early critics noted that "[w]hile VAWA allows a battered woman to seek relief based on 'mental cruelty,' there is no articulation in the regulations as to what evidence or standard will support a 'mental cruelty' claim. Such an omission compounds the risk of limiting VAWA to claims of physical abuse." Kelly, *supra* note 71, at 695. It is important to note that the regulations indicate that CPOs constitute helpful evidence in proving the domestic violence. 8 C.F.R. § 204.2(c)(2)(iv). Accordingly, as noted earlier, this is another place in which the narrow definition of domestic violence in CPO laws circumscribes women subjected to domestic violence in accessing other legal remedies.

[221] SCHNEIDER, *supra* note 20, at 198 n.67 (citing 42 U.S.C. §608(a)(7)(C)(i) (1996)).

[222] COMAR 07.03.03.02(17) (2008) (defining domestic violence to include "mental abuse").

extreme cruelty, immigration and welfare laws provide women subjected to abuse a possibility of a remedy for nonphysical abuse in these very specific legal areas.

2. Tort

Tort law also recognizes a remedy for the broad spectrum of domestic violence, including physical harm, battery, threat of physical harm, and assault, as well as emotional harm, such as intentional infliction of emotional distress.[223] Courts, under equitable powers, have ordered injunctions against harassing, molesting, assaulting, battering, embarrassing, and/or humiliating behavior between intimate partners.[224] Abusive actions do not need to rise to the level of criminal activity or physical harm for a court to take jurisdiction over a restraining order case resting on tort.[225] Even the Restatement (Second) of Torts recognizes that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[226] Yet even though tort law recognizes the broad spectrum of

[223] DAN B. DOBBS, THE LAW OF TORTS § 302, at 821 (2000) ("Courts have long recognized that tortfeasors should be responsible for causing distress, emotional harm, anxiety, diminished enjoyment, losses of autonomy, and similar intangible harms.").

[224] ANN MARIE BOYLAN & NADINE TAUB, ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES pt. 2, at 5 (Wash., D.C., Legal Servs. Corp. Research Inst. Sept. 1981) (citing study that documented these court actions).

[225] *Id.* at 7 (citing Galella v. Onassis, 353 F. Supp. 196, 226-27 (S.D.N.Y. 1972)) (internal citations omitted). For general discussions about intentional infliction of emotional distress cases between spouses, see Brandi Monger, Case Note, *Family Law — Wyoming's Adoption of Intentional Infliction of Emotional Distress in the Marital Context.* McCulloh v. Drake*, 24 P.3d 1162 (Wyo. 2001)*, 2 WYO. L. REV. 563, 571-75 (2002); Tiffany Oliver, Note and Comment, *Intentional Infliction of Emotional Distress Between Spouses: New Mexico's Excessively High Threshold for Outrageous Conduct*, 33 N.M. L. REV. 381, 384-86 (2003); Meredith Taylor, Comment, *North Carolina's Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage*, 32 WAKE FOREST L. REV. 1261, 1267 (1997).

[226] RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The tentative draft for the *Restatement (Third) of Torts* keeps this language. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 45 (Tentative Draft 2007) (stating in its tentative draft that "[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm"). In addition, the *Restatement (Third) of Torts* further evidences the modern trend to remedy emotional harm, even absent physical harm, by stating that

abuse as actionable and compensable, there are difficulties in bringing these claims, making it all the more important that the CPO law recognize all forms of abuse.[227]

3. Divorce

Traditional divorce laws, with their fault grounds of cruelty and excessively vicious conduct, also provide a helpful model of laws that recognize the multifaceted nature of domestic violence.[228] For

> [a]n actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct: (a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.

*Id.* § 46.

[227] *See* Buel, *supra* note 90, at 945-46, 982-93. It should be noted that there are some reforms being enacted that provide greater hope for the tort cause of action. *Id.* at 1023. Specifically, in California the legislature found that there should be tort liability and the full panoply of legal and equitable remedies for abuse perpetrated by a domestic partner. *Id.* Similarly, the Illinois Gender Violence Act, which includes physical aggression, sexual assault, and threats, provides a civil cause of action and relief against a perpetrator. *Id.* at 1023-24.

[228] *See, e.g.*, MD. CODE ANN., FAM. LAW § 7-103(a)(7), (8) (West 2007). For an amicus brief that was cited favorably by the Ninth Circuit in *Hernandez v. Ashcroft*, see Brief for National Immigration Project, NOW Legal Defense and Education Fund, and Family Violence Prevention Fund as Amici Curiae Supporting Appellants, Luis-Hernandez v. Immigration and Naturalization Service, 345 F.3d 824 (9th Cir. 2003) (No. 02-70988), *available at* http://www.nationalimmigrationproject.org/DVPage/Laura_Hernandez_9th_Cir_extreme_cruelty_2002.DOC (citing following examples of "extreme cruelty" as defined in divorce cases: McFall v. McFall, 136 P.2d 580, 582 (Cal. Ct. App. 1943) (social isolation as cruelty); Veach v. Veach, 392 P.2d 425, 429 (Idaho 1964) (domination as course of conduct as cruelty); Christenson v. Christenson, 472 N.W.2d 279, 280 (Iowa 1991) (high speed car chase is "domestic abuse"); Perret v. Saacks, 612 So. 2d 925, 926-27 (La. Ct. App. 1993) (alarming spouse by falsely reporting illness of family member); Knuth v. Knuth, 1992 Minn. App. LEXIS 696, at *2 (Ct. App. 1992) (stalking as cruelty); Boniek v. Boniek, 443 N.W.2d 196, 197-98 (Minn. Ct. App. 1989) (same); Robinson v. Robinson, 722 So. 2d 601, 603 (Miss. 1998) (limiting social interactions as cruelty); Richard v. Richard, 711 So. 2d 884, 886 (Miss. 1998) (untrue and insulting accusations as cruelty); Muhammad v. Muhammad, 622 So. 2d 1239, 1241-42, 1248-49 (Miss. 1993) (forcing religion on spouse as cruelty); Keller v. Keller, 763 So. 2d 902, 904 (Miss. Ct. App. 2000) (demanding custody of child as cruelty); Rakestraw v. Rakestraw, 717 So. 2d 1284, 1286 (Miss. Ct. App. 1998) (cruelty finding on basis of stalking behavior); Gazzillo v. Gazzillo, 379 A.2d 288, 291 (N.J. Sup. Ct. 1977) (limiting family interactions as extreme cruelty); Pompa v. Pompa, 259 A.D.2d 338, 338 (N.Y. App. Div. 1999) (untrue and insulting accusations as cruelty); Fuchs v. Fuchs, 216 A.D.2d

instance, one case stated that "'cruelty' . . . encompass[es] mental as well as physical abuse [and] . . . includes any conduct . . . which is calculated to seriously impair the health or permanently destroy the happiness of the other."[229] In *Das v. Das*, for example, the court found that the husband subjected the wife to cruelty when he made her stay up all night, controlled her, taunted her, isolated her from friends and family, and subjected her to physical violence.[230] *Das* and other cruelty cases around the nation[231] show that courts in the divorce context are able to identify and remedy domestic violence in forms other than simply physical violence. Not all women who are abused, however, are married. Even if married, not all women who are abused seek a divorce. Therefore, divorce laws alone are insufficient; the CPO potentially provides an invaluable legal cause of action for all women subjected to abuse.

4. Summary of Other Civil Laws

As seen above, immigration, welfare, torts, and divorce laws recognize abuse other than physical abuse or crimes. By including a broad definition of domestic violence, these laws provide more women in varying types of abusive relationships with the ability to seek a civil remedy specific to their situation. They recognize that all forms of abuse are harmful to women and should be remedied. But none of these laws provide the expedited and targeted range of remedies that a CPO does to address abuse. As such, the laws described above provide useful models for how a broader definition of domestic

648, 648 (N.Y. App. Div. 1995) (stalking is cruelty); Gascon v. Gascon, 187 A.D.2d 955, 955 (N.Y. App. Div. 1992) (illegally monitoring spouse); Richardson v. Richardson, 186 A.D.2d 946 (N.Y. App. Div. 1992) (regularly prohibiting spouse to sleep with lengthy arguments as cruelty); Harshbarger v. Harshbarger, 1993 Ohio App. LEXIS 3125, at *3 ( Ct. App. 1993) (isolating spouse by limiting telephone access part of cruelty finding); Hybertson v. Hybertson, 582 N.W.2d 402, 405 (S.D. 1998) (forcing religion on spouse as cruelty); Osman v. Keating-Osman, 521 N.W.2d 655, 657 (S.D. 1994) (breaching marriage contract and making false promises)); *see also* Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 463 n.99 (2008) (citing Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 911 ch. 4 (2000) (identifying that at least 32 states continue to have fault grounds, including cruelty)).

[229] Das v. Das, 754 A.2d 441, 458-59 (Md. Ct. Spec. App. 2000) (citing Scheinen v. Scheinen, 89 A.2d 609, 612 (1952) (citations omitted)).

[230] *Id.* at 461-62.

[231] *See supra* note 228.

violence in CPOs can be successful while underscoring the necessity of the CPO remedy.

### *C. Confronting Concerns*

This Article has addressed how the narrow definition of domestic violence in CPO laws has perpetuated a narrative of domestic violence as only severe physical violence or crimes and how this limited narrative hurts women. Despite the fact that one-third of the state laws and other civil laws, like immigration, welfare, torts, and divorce, address broader forms of abuse, there are concerns about expanding the CPO domestic violence definition to include all women subjected to abuse.[232]

Perhaps the most pressing concern about expanding the civil legal recognition of domestic violence to include psychological, emotional, and economic abuse is that it might make actionable the nagging of one's partner.[233] And because CPOs can be used as proof in divorce, custody, and visitation cases, there is a concern that abusive partners might bring unjustified nagging claims as a way to further control their spouses by obtaining custody of their children. This concern should be taken very seriously and should be appropriately addressed in the statutory language. It would disserve women to harm them further with a revision of the CPO law. The concern of nagging as actionable may be addressed, at least in part, by the success of psychological researchers in using scales and measurements to distinguish between women who are subjected to psychological abuse and those who are not.[234] With those tools, legislatures can similarly craft statutes that exclude routine conflict while making the serious harms of psychological, emotional, and economic abuse actionable. In addition, it might be helpful if social science research could study whether and to what effect nagging-type claims are brought in those states where CPO laws cover some form of psychological or emotional abuse or where divorce laws include emotional abuse in a cruelty fault ground. Such research could actually inform a discussion of the risks of false claims from this Article's proposal.

In addition to the "actionable nagging" issue, there is a concern that batterers might further abuse women by obtaining unwarranted protective orders against victims with unsupported claims of

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[232] Email discussion with various domestic violence advocates (on file with author).

[233] *Id.*

[234] *See supra* text accompanying note 39.

psychological, emotional, and economic abuse.[235] As a result, victims would be revictimized by batterers and courts.[236] This is a real concern. It is certainly possible that more women could be dragged to court by allegations of emotional or psychological abuse, with the risk of unwarranted CPOs being issued against them and possible arrests for CPO violations. An understanding of these risks could be enhanced with research about whether and how claims of psychological, emotional, and economic abuse are made in those jurisdictions where such claims are permitted. The prevalence of and reasons for any misuse of these causes of action that can be learned through research could then be weighed against the potential benefits of an expanded recognition of domestic violence. Currently, this information is not generally available in published caselaw.

Another concern is that broadening the definition of domestic violence might delegitimize or trivialize all forms of domestic violence.[237] As discussed above, judges and other system actors already discount actionable forms of domestic violence and such discounting hurts women who suffer from domestic violence. Including additional forms of abuse that the courts do not want to hear about or that courts see as interference in private relationships could exacerbate this problem. One possible way to address this concern is to ensure that the new CPO laws explicitly address the equality of all forms of abuse, as they are all tools of the exerted power and control. Another way is to have the new laws clarify that because of the harmfulness of all forms of abuse, all types of domestic violence need to be remedied based on the woman's experience of the abuse. By recognizing and remedying all forms of domestic violence, a new discourse may emerge regarding the many interconnected fundamental harms of domestic violence and the importance of remedying all of them.

There is also a concern that state legislatures will be reluctant to pass new laws that fail to link domestic violence to crimes, physical harm, or fear of physical harm, believing it will lead to imaginary, but actionable, harms.[238] It is true that physical violence, with its visible injuries, such as cuts, scrapes, wounds, and bruising, is more verifiable than emotional or psychological abuse, which tends to rely on either petitioner's word or respondent's. It is also true that going outside the

[235] Email discussion, *supra* note 232.

[236] *Id.*

[237] *Id.*

[238] *Id.*

realm of crimes places the courts in the seemingly private realm of the family. Nonetheless, it is possible that by raising the issue in the legislature, society could begin an educational process about all fundamental harms of abuse, commit to redress its harms, and construct a new narrative about domestic violence.

As a whole, the concerns addressed above need to be weighed against the continuing negative consequences that occur from the current limited legal narrative of domestic violence. By maintaining a focus on severe physical violence alone, advocates, lawyers, and judges perpetuate the exclusionary narrative that prioritizes resources for victims of severe physical violence.[239] More often than not, the severely beaten woman, as opposed to the emotionally abused woman, is seen as more worthy of time and effort, despite the real harm the latter also suffers.

Perhaps the continued narrative of severe physical violence feeds into our collective consciousness about the worthiness of saving the victims that society has defined as victims.[240] Severe physical violence, underscored by bruises, cuts, and other injuries, seems undeniable and indisputable. In contrast, the legal system has historically discounted the credibility of psychological and emotional harm claims because "if we can't see it, it can't be true." Society also feels more comfortable labeling physical violence as outside the permissible boundaries — clearly wrong and therefore "domestic violence." On the other hand, we are uncomfortable drawing a line of impermissible emotional, psychological, and economic abuse because we fear labeling "good" citizens as perpetrators of domestic violence.[241] When we fear a broad legal recognition of domestic violence because it might create another tool for batterers and the courts to revictimize the victims, perhaps we construct a false sense of control over the phenomenon of domestic violence. That is, there is a sense that if we can rein in the definition of abuse, we can altogether eradicate the abuse. We might believe that controlling remote possibilities of battering is more important than providing a remedy for victims. Or perhaps we distrust the legislature and courts to draft and enforce legal standards that could be discriminating and keep out mere nagging complaints. In the end, the

[239] In addition, Kohn has documented that service providers see a victim of domestic violence as worthy of services if she was a victim of a crime and cooperates in the system's efforts to protect her. Kohn, *supra* note 64, at 203 n.55 (citing Reneee Romkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265, 286 (2001)).

[240] Goodmark, *supra* note 26, at 28-30.

[241] SCHNEIDER, *supra* note 20, at 65.

concerns about a broad recognition of domestic violence seem to be as related to how we as a society perpetuate the exclusion of women subjected to nonphysically violent abuse as they are to how we as a society might assist all women who suffer abuse.

## CONCLUSION

Currently, the domestic violence civil legal system fails women subjected to certain forms of abuse. In general, the system has constricted its recognition to primarily crimes and severe physical abuse. As a result, many women have no CPO cause of action to address and seek redress for the real and harmful abuse to which they are subjected. Women like Kim do not believe they have any right to a remedy for emotional abuse because it differs from the physical abuse that is labeled "domestic violence." Yet, social science research indicates that domestic violence is harmful in all of its many forms because it effectuates the abuser's exertion of power and control. The forms may be physical, sexual, psychological, emotional, or economic. All of these should bear the name of domestic violence and should be remedied under the CPO laws.

A broader and more accurate definition of domestic violence would allow the civil legal system to be a better tool for fostering the agency of women subjected to abuse. Petitioners would be able to use the civil legal system to craft the best remedy to address the abuse in their relationship and counter the power and control of all forms of domestic violence. If the CPO laws were to effectuate women's goals, the civil law and the legal system could assist women to cope with the domestic violence in their lives.[242] With reform, CPO laws' purpose of addressing abuse and issues of equality might actually be fulfilled for all women subjected to abuse.

[242] GOODMAN & EPSTEIN, *supra* note 179, at 94-95 ("[P]articipants who reported feeling in control of the process of working with service providers were far more likely to rate the services they received as helpful and to use them again. (Zweig, Burt, & Van Ness, 2003). Similarly, a study within the criminal justice system found that victims who chose not to report recidivist abuse to officials were those who felt they had 'no voice' in a previous prosecution (Hotaling & Buzawa, 2003) . . . . Women . . . will be safer if given the opportunity to maximize their own agency . . . ."); *see also* Baker, *supra* note 12, at 50-57 (citing few studies showing CPOs' effectiveness in decreasing physical abuse).

# POST-TRAUMATIC STRESS DISORDER (PTSD) IN VICTIMS OF DOMESTIC VIOLENCE

## A Review of the Research

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*The objectives of this research were to analyze data from literature based on studies of battered women to determine (a) the correlation of domestic violence and post-traumatic stress disorder (PTSD), (b) the best treatment strategies for PTSD, and (c) the evidence of PTSD treatment effectiveness with battered women. Findings were (a) symptoms of battered women are consistent with PTSD symptoms; (b) certain populations are at higher risk of developing PTSD symptoms; (c) intensity, duration, and perception of the battering experience is a significant factor in the severity of the PTSD symptoms; (d) demographic variables influence PTSD severity; (e) standardized PTSD assessment is needed by professionals working with women experiencing domestic violence; (f) there is a need for greater public health involvement for prevention, identification, and medical treatment of domestic violence and PTSD; and (g) certain treatment strategies are recommended for PTSD but lack rigorous testing of their efficacy.*

**Key words:** *post-traumatic stress disorder, domestic violence, battering*

AN INCREASING AWARENESS has developed among mental health professionals that an outcome for women who have been physically assaulted is post-traumatic stress disorder (PTSD) (Crowell & Burgess, 1996). However, the typical treatment strategies for battered women are not those developed for PTSD. Battered women are likely to be treated just for depression or some other psychological disorder. The mismatch of treatment with disorder might not only be ineffective, it may make matters worse.

This article examines previous research on this topic and the actual treatment regimes employed to develop suggestions on how social workers could better assist in the treating of PTSD that women experience after victimization from domestic violence. Specifically, the article addresses the following questions: What does the academic literature tell us about the PTSD syndrome for women as a result of domestic violence against them? What are the best treatment strategies for this condition? What evidence of treatment effectiveness (or lack

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## KEY POINTS OF THE RESEARCH REVIEW

- Available research indicates that the symptoms exhibited by battered women are consistent with the major indicators of post-traumatic stress disorder (PTSD) as currently defined by the *DSM-IV*. A consistent finding across varied samples (i.e., clinical samples, shelters, hospitals, community agencies, etc.) is that a substantial proportion of victimized women (31% to 84%) exhibit PTSD symptoms.
- The domestic violence shelter population is at a higher risk for PTSD than victimized women who are not in shelters. Estimates of victimization among the shelter population range from 40% to 84%.
- Having multiple victimization experiences (childhood abuse, particularly sexual abuse, and adult sexual abuse) increases the likelihood of PTSD and many other types of psychiatric disorders.
- The extent, severity, and type of abuse is associated with the intensity of PTSD. Severity refers to how life threatening the abuse is. The more life threatening the abuse is, the more traumatic the effect. Sexual abuse, severe physical abuse, and psychological abuse are associated with an increase in trauma symptoms among victims. Women need not experience severe violence to experience PTSD symptoms, but experiencing severe violence exacerbates symptoms. Psychological abuse may be as damaging as physical violence.
- Other forms of emotional distress that accompany PTSD, particularly depression and dysthymia, are noted among domestic violence victims. A history of depression may be a risk factor for victimization.
- Suicide is a risk among domestic violence victims who exhibit PTSD symptoms. PTSD may mediate the link between partner abuse and suicidal ideation.
- Substance abuse was reported in a high percentage of victimized women. Women who reported being victims of child abuse and adult abuse had significantly more lifetime drug and alcohol dependence than women not reporting abuse.
- In addition to PTSD, depression, and substance abuse, other mental health problems have been noted in victimized women.
- The empirical evidence does suggest that younger, unemployed women with a relatively large number of children, low income, and low levels of social support are more at risk for experiencing PTSD symptoms and other mental health problems than women without those characteristics.

thereof) is there for treating post-traumatic stress syndrome in women?

## METHOD

Systematic research synthesis (SRS) was used to answer the research questions. SRS is a form of structured inquiry that uses structured protocols reflected in meta-analysis together with the integrative qualities of the traditional literature review. SRS is used to make sense of massive and disorderly research evidence. The outcome is to create a conceptual synthesis of disparate research findings. The synthesis identifies where the consensus is in the literature on how to treat a particular phenomenon such as domestic violence. The goal of the synthesis is to develop empirical statements that would aid in the development of practice strategies as well as to accumulate new knowledge (Rothman & Thomas, 1994).

**Battered women are likely to be treated just for depression or some other psychological disorder. The mismatch of treatment with disorder might not only be ineffective, it may make matters worse.**

### *Steps in SRS Process*

Computerized databases, hard copy sources, and unpublished sources were all compiled for the SRS. The databases include Psychlit, Mental Health Abstracts, Social Work Research and Abstracts, Sociofile, and Medline. Research-based articles published in the past 10 years reporting on domestic violence, PTSD, domestic violence treatment/intervention, domestic violence and mental health, cultural differences and domestic violence, domestic violence and welfare reform, and domestic violence and undocumented women were all sought from the databases.

A coding instrument was developed to guide the review of the literature. Each source was reviewed in systematic fashion to identify the following: theme addressed (from descriptors,

e.g., domestic violence and welfare reform); study methodology (variables, social context, participants, design, and instruments used); theoretical perspectives, conceptual framework, and hypothesis; and quality of study (evaluation of study methods, limitations, relationships to other studies, and information used to weight study findings in relationship to the literature). Assessing a study for its appropriateness for inclusion in the synthesis pool included considering validity, reliability, sample representativeness, logic of the design, and match between the form of the data and the statistical techniques. If the study was found to be scientifically sound, findings and implications for policy were recorded.

Uniformities and tendencies in the data were identified to form consensus findings called *empirical generalizations*. Action guidelines parallel the consensus findings and are a restatement of the empirical generalizations that emphasize the practice, policy, and program implications of each finding.

## FINDINGS

### *Limitations of Research*

Forty-three studies published in the past 10 years on PTSD and domestic violence were identified and included in this article (for a summary, see Table 1). Several other studies were identified and discarded as empirically weak. It is important to note that the concept of trauma-related mental illness goes back as far as the American Civil War, having been called such things as *shell shock* and *battle fatigue*. However, the recognition by the mental health community of PTSD is quite recent. PTSD was first introduced as a diagnostic category in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-III*) published in 1980 (D. L. Roth & Coles, 1995). The newness of PTSD as a formal disorder has meant that rigorous efficacy and effectiveness studies of the treatment of PTSD are lacking. This deficit in the research is even more acute with victims of domestic violence. Rubin reported in 1991 that there was limited support for the various interventions provided to battered women. The situation has not changed much in the past decade. Although assessment has been studied extensively, the longitudinal course of PTSD and its treatment effectiveness has not been addressed. As of yet, the literature has not turned to efficacy practice research with domestic violence victims. Carlson and colleagues (Carlson, Chemtob, Rusnak, Helund, & Muraoka, 1998) asserted that despite the clinical and social effect of PTSD in a variety of problems areas (combat, torture, natural disaster, child abuse, etc.), there are few controlled studies investigating its treatment. Foa and Meadows (1997), in a literature review of controlled studies on the PTSD treatment with a variety of populations (veterans and victims of rape and childhood sexual abuse), suggested that deficits in the research methodologies of those studies only allow us to draw preliminary conclusions. Pfefferbaum (1997) drew the same conclusion from a review of 10 years of PTSD treatment in the children's literature. Most researchers do provide suggested practice and policy implications from the descriptive research that is reported in this article. These implications are no substitute for field tests with randomized clinical trials. However, a body of literature has developed over the past decade that describes PTSD with battered women, and some researchers have begun to explore the treatment of PTSD in abused women. This literature does allow us to reach some conclusions about the nature of PTSD in battered women, and preliminary suggestions for treatment can be inferred from those conclusions. These suggestions should be accompanied by field testing. The following is a discussion of some of the limitations of that research.

The samples of battered women who are studied are almost exclusively made up of women who came forward and sought help or shelter. These samples are probably not representative of battered women. They might be the most troubled of battered women, who sought help because of their distress, or they may be the healthiest of battered women, who have the emotional resources to seek services. The most distressed may not have requested help because

*(text continues on p. 110)*

**TABLE 1: Summary of Studies and Findings Regarding Domestic Violence and Post-Traumatic Stress Disorder (PTSD)**

| *Study* | *Sample Description* | *Instruments* | *Variables Studied* | *Findings* |
|---|---|---|---|---|
| | | *Research with large probability samples* | | |
| Duncan, Saunders, Kilpatrick, Hanson, and Resnick (1996) | *N* = 2,009 adult women selected in a national random sample | Survey screening questions | Physical assault, depression PTSD, substance abuse, and childhood trauma | Women reporting victimization in childhood experienced more lifetime and current episodes of depression, PTSD, and psychopathology. 2.6% of women reported serious assault in childhood. |
| Gelles and Harrop (1989) | 3,002 female respondents from a national probability sample of 6,002 households (Second National Family Violence Survey) who lived with their male partner or had been separated less than 12 months | Conflict Tactics Scale, Psychiatric Evaluation Research Interview, Perceived Stress Scale, Marital Conflict Index, and two composite measures of distress (developed by authors) | Domestic violence, partner abuse, psychological distress, marital conflict, and women's health | Women who reported experiencing violence and abuse also reported higher levels of moderate and severe psychological distress. Multivariate analysis indicated that violence made an independent and nonspurious contribution to the psychological distress experienced by women. |
| Tjaden and Thoennes (1998) | *N* = 8,000 women and 8,000 men; comparison to general population as measured by the Census Bureau's 1995 current population survey; study period November 1995 to May 1996 | Survey screening questions and modified version of the Conflict Tactics Scale | Demographics, physical assault, rape, and stalking | 52% of women and 66% of men were physically assaulted as a child and/or as an adult. Rape is a crime primarily committed against youth: 22% of raped females were younger than the age of 12; 32% of raped males were between 12 and 17 years old. American Indian/Alaska Native women were most likely to report victimization, whereas Asian/Pacific Islander women were least likely to report victimization. 25% of women experienced partner violence compared to 8% of men. 76% of women victimized after age 18 were abused by partners compared to 18% of men. 32% of women and 16% of men who were raped after age 18 were injured during their most recent rape. 8% of women and 2% of men were stalked at some time in their life |
| | | *Quasi-experimental research design* | | |
| Astin, Ogland-Hand, Coleman, and Foy (1995) | *N* = 87 women; 50 battered women from five Los Angeles area shelters (residents and community clients) and 37 nonbattered women from community clinics, therapists, and self-help groups in the Los Angeles area | Structured Clinical Interview for *DSM-III-R* (SCID-R), Conflicts Tactics Scale-Form N + added items, and screening section on the SCID-R for trauma other than domestic violence | Physical violence/some form of distress by an intimate partner, PTSD symptoms, childhood sexual and physical abuse, and overall prebattering traumatic experiences | Battered women exhibited significantly higher rates of PTSD than maritally distressed women. Women with a PTSD-positive status were significantly more likely to have experienced self-reported childhood sexual abuse and a higher overall number of previous traumas than those with a PTSD-negative status. Battering exposure and childhood sexual abuse predicted 37% of the variance in overall PTSD intensity levels. |
| Campbell (1989) | *N* = 193 women; 97 battered women and 96 women having serious problems in an intimate relationship | Tennessee Self-Concept Scale, Beck Depression Inventory, Denyes Self-care Agency Instrument, Symptom Checklist-90 Modification, Conflict Tactics Scale, and 4-point Likert scale for blame operationalization | Grief model: stressors, powerlessness, perceived loss, depression, and grief-related physical symptoms; learned helplessness model: perceptions of control in relationship, personal attributions, negative self-evaluation, depression, and difficulty in problem solving | Both groups scored significantly below normative groups in self-esteem. The battered women had more frequent and severe physical symptoms of stress and grief and had thought of or tried more solutions to the relationship problems. |

| | | | | |
|---|---|---|---|---|
| Cascardi and O'Leary (1992) | *N* = 97 women; 49 abused women, at least two acts of physical aggression in the previous year; 23 maritally discordant, nonabused women; and 25 maritally satisfied, nonabused women (community control group) | Structured Clinical Interview for *DSM-III-R*, Modified Conflict Tactics Scale, Lock-Wallace Short Marital Adjustment Test, Psychological Maltreatment of Women Scale, Spouse-Specific Fear Measure, and Child Abuse Assessment | Abuse by an intimate partner, childhood physical and sexual abuse, coerciveness of spouses, being fearful of spouses, and psychological symptomatology | Abused women reported significantly more fear of their spouses and reported that their spouses were significantly more coercive and psychologically aggressive. Abused women and maritally discordant women reported higher rates of emotional abuse in childhood than maritally satisfied nonabused women. Abused women reported higher rates of PTSD than women in the discordant only and community control groups. |
| D. G. Dutton and Painter (1993) | *N* = 75 women; recruited over a 6-month period; 50 battered women, left the relationship in the past 6 months, two or more incidents of severe physical abuse; and 25 emotionally abused women, fewer than two incidents of physical abuse, no severe physical abuse | Kitson Scale, Rosenberg Self-Esteem Scale, Trauma Symptom Checklist, Conflict Tactics Scale, Psychological Maltreatment of Women Inventory, Subjective Intermittency Scale (developed by authors), and Marlowe-Crowne Social Desirability Scale | Attachment, self-esteem, trauma symptoms, aggression/ violence, maltreatment, intermittency of abuse, power, investment, women's history, and finances | The study found support for the effect of extremity of intermittent maltreatment and power differentials on long-term felt attachment for a former partner, experienced trauma symptoms, and self-esteem immediately after separation from an abusive partner and again after a 6-month period. After 6 months, attachment had decreased by about 27%. Total abuse, intermittency of abuse, and power differentials accounted for 55% of the variance in the attachment measure at Time 2. |
| Follette, Polusny, Bechtle, and Naugle (1996) | *N* = 210 women; 72 women with a history of child sexual abuse, adult sexual assault, or physical partner abuse; and 138 women recruited from the undergraduate pool of a university, nonclinical | Personal Data Survey, Conflict Tactics Scale, and Trauma Symptom Checklist-40 | Child sexual abuse, adult sexual assault, physical partner abuse, and trauma symptoms | Victimization and revictimization are frequent. The level of trauma-specific symptoms is significantly related to the number of different types of reported victimization experiences. |
| Gleason (1993) | *N* = 62 battered women receiving services in Florida; 30 battered women living in a shelter and 32 battered women living at home sometimes with or without the batterer | Diagnostic Interview Schedule | Physical partner abuse and mental disorders | Extremely high prevalence was found for psychosocial dysfunction, major depression, PTSD, generalized anxiety disorder, and obsessive compulsive disorder. |
| Launius and Jensen (1987) | *N* = 57 women; 19 female students, 19 battered women who are in counseling, and 19 non-battered women | Beck Depression Inventory, State-Trait Anxiety Inventory Form Y, Revised Beta Examination, and three general and three abusive interpersonal problem situations based on the Interpersonal Problem Solving Assessment Technique | Battery experience, depression, anxiety, and problem-solving skills | No significant difference was found between the groups for intelligence, but the counseling women were significantly more depressed and anxious than the battered and control women. Battered women (a) generated fewer total options, (b) generated fewer effective options, and (c) chose fewer effective options for use in the situation than both counseling and control women. |

*(continued)*

**TABLE 1 Continued**

| Study | Sample Description | Instruments | Variables Studied | Findings |
|---|---|---|---|---|
| | | *Quasi-experimental research design* | | |
| Nurius, Furrey, and Berliner (1992) | *N* = 106 women; 26 women whose partners are abusive to them, 30 women whose partners are sex offenders of children for whom the woman is a parent, 23 women whose partners are sex offenders of children for whom the woman is not a parent, and 27 women whose partners do not engage in abuse | Index of Self-Esteem, Mastery Scale, Generalized Contentment Scale, Family Environment Scale, Dyadic Adjustment Scale, and Index for Victimization History | Quality levels of relationship: abuse by partners toward partners or children linked with vulnerability factors; coping responses (cognitive, emotional, and behavioral reactions to the abuse); and coping resources | There were significant differences in coping capacity profiles across the four groups. These appeared to be a continuum of coping capacity, with women who were most directly threatened showing the lowest and women who were least directly threatened showing the highest levels of coping capacity. |
| O'Keefe (1998) | *N* = 76 self-identified battered women convicted of various criminal offenses; 50 Incarcerated women for homicide/serious assault of their partners and 26 incarcerated women for other offenses | Conflict Tactics Scale-Violence Subscale, Los Angeles Symptom Checklist, Childhood Violence Scale, Likert scales for childhood trauma variables and perceived social support, and questionnaire for demographics | Physical/sexual partner abuse, killing/serious assault of partner, PTSD symptomatology, social support, time elapsed since living with partner, and receiving counseling in prison | Battered women who killed/seriously assaulted their batterers experienced more frequent and severe spousal abuse than those in the comparison group. No significant group differences were found for present PTSD symptom levels. Predictors for present PTSD symptomatology included childhood sexual abuse, childhood physical abuse, past PTSD symptomatology, length of time elapsed since living with partner, and receiving counseling in prison. |
| Riggs, Kilpatrick, and Resnick (1992) | *N* = 143 women; 47 female victims of completed rape or an aggravated sexual assault, including (a) marital rape only group (*N* = 14), (b) stranger rape only group (*N* = 10), (c) marital assault only group (*N* = 12), (d) other assault only group (*N* = 11); and 96 women who had not been the victim of a rape, other sexual assault, aggravated assault, robbery, or burglary | Structured interview, Symptom Checklist-90-R, and Impact of Event Scale | Marital rape, stranger rape, marital assault, other assault, and symptoms of psychological distress | Crime victims reported higher levels of psychological distress than did the nonvictimized women across a variety of symptom areas. There were no group differences among the four victim groups on any of the measures. Women assaulted by their husbands were more likely to report that the assault was one of a series of similar attacks. Victims of aggravated assault were more likely than rape victims to report that they feared for their lives during the assault. |
| S. Roth, Newman, Pelcovitz, van der Kolk, and Mandel (1997) | *N* = 234 treatment-seeking individuals (189 women, 45 men); study period 1991 to 1992; *N* = 106: clinical sample, recruited from various psychiatric clinics across five sites; *N* = 128: community sample, recruited through random digit dial | Potential Stressor Events Interview, Structured Clinical Interview for *DSM-III-R* (Patient Version), Diagnostic Interview Schedule, and Structured Interview for Disorders of Extreme Stress | Type of abuse, duration of abuse, onset of abuse, PTSD, and complex PTSD (CP) | Sexually abused women, especially those who also experienced physical abuse, had a higher risk of developing CP, although CP symptoms occurred at a high base rate among physically abused women. |

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|---|---|---|---|---|
| | telephone. Sample divided into the following three groups: (a) sexual abuse only, (b) sexual and physical abuse, and (c) physical abuse only | | | |
| Saunders (1994) | *N* = 192 battered women; 159 women who had obtained help at a shelter-based program (DVP) and 33 women who had obtained help elsewhere (NDVP) | Diagnostic Interview Schedule,Impact of Event Scale, Posttraumatic Stress Scale for Family Violence, Marks Fear Questionnaire, Beck Depression Inventory, Rosenberg Self-Esteem Scale, Characteristics of Partners, Expanded Conflict Tactics Scale of Aggression, and Injury Scale | Domestic violence, PTSD symptoms, depression, self-esteem, social phobia, and agoraphobia | 66% of the women in the DVP group and 62% in the NDVP group met criteria for a diagnosis of PTSD. The most common symptoms were nightmares, intrusive memories of the abuse, avoiding reminders of it, and hyperarousal. DVP women experienced a variety of symptoms more frequently. Group differences in PTSD symptomatology were not present after statistically controlling for severity and frequency of the violence and length of time since the abusive relationship. |
| Schlee, Heyman, and O'Leary (1998) | *N* = 84 married couples seeking treatment for marital conflict (64 couples dropped out, 34 couples completed the program); random assignment to Physical Aggression Couples Treatment (PACT), 7 groups; Gender Specific Treatment (GST), 5 groups | Structured Clinical Interview of the *DSM-III-R*, Modified Conflict Tactics Scale, Psychological Maltreatment of Women Scale, two-item fear scale, Dyadic Adjustment Scale, Beck Depression Inventory, and Consumer Satisfaction Scale | Mild to moderate spouse abuse, PTSD symptomatology, PACT, and GST | Across all women, avoidance symptomatology significantly differentiated treatment completers from dropouts. Although women with PTSD began treatment in worse condition, postassessment revealed they achieved positive treatment gains parallel to those of women without PTSD. Women with PTSD improved on each outcome variable measured, including a reduction in fear of spouse. Women with PTSD also did not differentially drop out of either treatment condition. |
| Scott-Gilba, Minne, and Mezey (1995) | *N* = 30 women; 15 women who had experienced at least one abusive relationship, current or previous residents of shelter; comparison group: recruited from an immunization clinic, matched sample in age and status | Semistructured interview; General Health Questionnaire; Irritability, Depression, and Anxiety Scale; Rosenberg Self-Esteem Scale; and Impact of Event Scale | Domestic violence, personal history, physical and mental health, and self-esteem | The battered women were found to have lower self-esteem, higher rates of depression, generalized anxiety and fearfulness, increased stress-related symptoms, irritability, and suicidal ideation. The level of psychosocial and behavioral disturbance in the women who had been battered was not present in the comparison group. |
| Thompson et al. (1999) | *N* = 204 women; 119 women who presented to the hospital following a nonfatal suicide attempt and 85 women who presented to the hospital for nonemergency medical problems with no history of suicidal behavior | 2-hour questionnaire in a face-to-face interview format included Rapid Estimate of Adult Literacy, revised version of the Traumatic Stress Schedule, Index of Spouse Abuse, and National Women's Study PTSD Module | Partner abuse, PTSD symptomatology, and suicidal behavior | Physical partner abuse but not nonphysical partner abuse was associated with an increased risk for PTSD. PTSD mediated the link between physical partner abuse and suicidality such that when PTSD was statistically controlled, the association between physical partner abuse and suicide attempt status was reduced to nonsignificance. |

*(continued)*

**TABLE 1 Continued**

| *Study* | *Sample Description* | *Instruments* | *Variables Studied* | *Findings* |
|---|---|---|---|---|
| | | *Quasi-experimental research design* | | |
| Vitanza, Vogel, and Marshall (1995) | $N = 93$ women in "bad" or "stressful" relationships recruited through newspaper ads, public service announcements, and flyers; no violence ($N = 31$); moderate violence ($N = 30$); and severe violence ($N = 32$) | Severity of Violence Against Women Scales, Private Self-Consciousness Subscale of the Private and Public Self-Consciousness Scale, Cognitive Failures Questionnaire, Symptom Checklist 90-Revised (SCL-90-R), Crime-Related PTSD subscale of SCL-90-R, and Impact of Event Scale | Intrusive thoughts, avoidance, PTSD scores, cognitive failure, and private self-consciousness | All groups reported serious emotional distress on the SCL-90-R dimensions. Psychoticism was the highest subscale for all groups. Most women (56%) suffered PTSD according to a subscale of the SCL-90-R. Difficulties with perception, memory, and motor functions more consistently predicted intrusive thoughts, PTSD scores, and attempted suicide than did women's attention to their inner thoughts and feelings, which was important for the sample and the subgroup that had sustained severe violence. |
| Wileman and Wileman (1995) | $N = 16$ female victims of domestic violence; Group A: partners not attending a men's group; Group B: partners attending a men's group | Profile of Mood Stats, Index of Spouse Abuse, and Eysenck Personality Inventory (EPI) | Domestic violence (frequency and intensity) and vulnerability | In both groups, violence and vulnerability decreased significantly. Group A had the larger decrease. Fear decreased continuously through all four measures. Neuroticism decreased significantly. |
| | | *Survey—cross-sectional* | | |
| Andrews and Brewin (1990) | 70 women who had experienced marital violence from the inner-city area of London | Semistructured interview, Present State Examination, Life Events and Difficulties Schedule, Straus's Severe Violence Index, and 3-, 4-, and 7-point scales | Marital violence, childhood abuse, depression, attributions of responsibility for violence, and social network involvement | Women currently living with violent partners reported the highest rate of self-blame, and women no longer living with such a partner reported a significant change from past self-blame to current partner blame. Characterological self-blame was shown to be most highly associated with repeated physical or sexual abuse in childhood, lack of social support concerning the violence, and a high rate of depression once out of the relationship. |
| Astin, Lawrence, and Foy (1993) | 53 battered women from three Los Angeles area shelters and one counseling center | Impact of Event Scale, PTSD Symptom Checklist, Conflict Tactics Scale-Form N, Social Support Questionnaire, Life Experience Survey, Age Universal Religious Orientation Scale, and self-report questionnaire designed by authors | Physical partner abuse, PTSD symptomatology, social support, intercurrent life events, religiosity, and developmental family stressors | A significant proportion of battered women was diagnosed as PTSD positive. Violence exposure severity, recency of the last abusive episode, social support, intercurrent life events, intrinsic religiosity, and developmental family stressors predicted 43% of the variance in PTSD symptomatology. |
| Bowker and Maurer (1987) | $N = 1{,}000$ battered women who responded to a national magazine solicitation, nonprobability sample; quantitative data from 334 participants; qualitative data from 146 participants | Questionnaire designed by the authors, letters with case histories, supplementary letters, and in-depth interviews | Domestic violence, population characteristics, and women's satisfaction with medical services | In comparison with other help sources, medical personnel were found to have been used fairly frequently, but they were seen by the battered women as less effective than any other group. |

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|---|---|---|---|---|
| Cascardi and O'Leary (1992) | 33 battered women, help-seeking | Modified Conflict Tactics Scale, Injury Index, Blame Scale, Beck Depression Inventory, and Rosenberg Self-Esteem Scale | Physical abuse (frequency, severity, and duration), depressive symptomatology, self-esteem, and self-blame/partner blame | As the number, form, and consequences of physically aggressive acts increased and/or worsened, the women's depressive symptoms increased and self-esteem decreased. Only 12% of the sample blamed themselves for causing their partner's violence. Neither self-blame nor partner blame was associated with length of abuse or the frequency and severity of physical aggression. |
| M. A. Dutton, Burghardt, Perrin, Chrestman, and Halle (1994) | 72 battered women from an urban specialized family violence outpatient clinic | Traumatic Stress Institute Belief Scale-Version D, Attribution to Violence and Appraisal of Violence Questionnaire, Global Symptom Index, CR-PTSD Scale (derived form SCL-90-R), Minnesota-Multiphasic-Personality-Inventory-derived PTSD subscale, and Intrusion and Avoidance subscales from the Impact of Event Scale | Physical abuse, cognitive schemata, psychological distress, PTSD, and childhood sexual abuse | The meaning of the violence was found to explain variance in cognitive schemata about safety, self, and other. All measures of cognitive schemata were significantly related to various global and specific measures of post-traumatic stress. No differences were found for cognitive schemata based on histories of sexual victimization. |
| Follingstad, Brennan, Hause, Polek, and Rutledge (1991) | 234 women with some history of abuse; volunteers | Questionnaire (designed by the authors), 2- to 3-hour over-the-phone interview | Moderating variables of physical and emotional abuse (frequency, severity, predictability, controllability, and social support) and psychological and physiological symptoms | Frequency is a strong predictor of the number and severity of symptoms. Those women who could predict abuse experienced more symptoms. Severity of physical and psychological symptoms was predicted by a model including women with more injuries requiring medical attention, women adhering to traditional sex-role values, and the presence of one type of emotional abuse. Battered women perceived their physical and emotional health as deteriorating during the relationship and during the abuse but as getting healthier after the abuse ended. |
| Hattendorf, Ottens, and Lomax (1999) | 18 battered women who had killed their male abusive partners; study period spring 1996 | Clinician-Administered PTSD Scale-Form, Modified PTSD Symptom Scale-Self Report, and Severity of Violence Against Women Scale | Physical partner abuse and PTSD symptomatology | Before killing male partners, battered women suffered moderate to high levels of PTSD symptom frequency and severity, except for an inability to recall important aspects of the trauma. There were significant canonical correlations between the frequency and severity of PTSD symptoms and the severity of types of abuses inflicted. |
| Houskamp and Foy (1991) | 26 women who had been in a physically violent relationship, recruited through two Los Angeles area domestic violence clinics; 6-month study period | Conflict Tactics Scale, Structured Clinical Interview (SCID), Symptom Checklist, and Impact of Event Scale | Physical partner violence and PTSD symptomatology | Results indicated that 45% of those participants interviewed met full *DSM-III-R* criteria for PTSD on the SCID and that exposure to violence was significantly associated with PTSD symptomatology. When divided into high- and low-exposure groups based on degree of life threat, 60% of those in the high-exposure group met criteria for diagnosable PTSD in contrast to a 14% rate in the lower exposure group. |
| Kemp, Rawlings, and Green (1991) | 77 battered women from shelters in a Midwestern city | Impact of Event Scale (IES), Symptom Checklist 90-R, Interview Schedule for PTSD, and Demographic Questionnaire Inventory | Battery experiences (extent, length, and distress) and PTSD symptomatology | 84% of the sample met the *DSM-III-R* criteria for PTSD according to self-report. The reported subjective distress resulting from the battery experience was positively correlated with presence and degree of PTSD, intrusion, depression, anxiety, and general psychopathology. Extent of abuse was positively related to presence and degree of PTSD, depression, anxiety, and overall symptom distress. Length of the abusive relationship was least related to the outcome variables. |

*(continued)*

**TABLE 1 Continued**

| *Study* | *Sample Description* | *Instruments* | *Variables Studied* | *Findings* |
|---|---|---|---|---|
| | | | *Survey—cross-sectional* | |
| Khan, Welch, and Zillmer (1993) | 31 battered women (residents in a shelter); 18-month study period | Minnesota Multiphasic Personality Inventory-2 and questionnaire on the length and types of abuses (developed by the authors) | Length and type of domestic violence and psychological disturbances | Significant relationships were found between length and severity of psychological forms of abuse and overall levels of psychological distress. Length of abuse is the best single predictor for psychological distress. Severity of psychological abuse is the only predictor of the overall average score. Age and physical severity of abuse did not show significant results. |
| Perrin, Van Hasselt, Basilio, and Hersen (1996) | 69 battered women who were clinically referred to an outpatient clinic; assigned to PTSD-positive or PTSD-negative groups | Minnesota Multiphasic Personality Inventory, Keane PTSD Scale, Symptom Checklist-90-Revised, Impact of Event Scale, Veronen-Kilpatrick Modified Fear Survey, Interpersonal Support Evaluation List, and Structured Clinical Interview for DV | PTSD status, PTSD symptomatology, trauma-related fears, psychological distress, and history of abuse | The PTSD-positive group scored significantly higher across all measures of PTSD and distress. The two groups differed only for the frequency of death threats. Lower levels of perceived social support were found in the PTSD-positive more than the PTSD-negative group. |
| Rollstin and Kern (1998) | 50 women with a history of physical or emotional abuse in a domestic relationship | Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and Conflict Tactics Scale | Physical and emotional abuse (frequency, severity, duration, and time of determination) and psychological distress | MMPI-2 scores were significantly correlated with both types of abuse but not with duration of time since the abusive relationship was terminated. |
| Rosen (1999) | 35 teenage mothers at high risk for partner abuse; recruited through adolescent health clinic | Life History Interview, Conflict Tactics Scale, Psychological Maltreatment of Women Inventory, and Composite International Diagnostic Interview-Short Form plus PTSD Module | Teenage status and pregnancy and partner abuse | 64% had experienced partner violence in their lifetime. 40% were diagnosed with severe depression, 33% with dysthymia, and more than 59% with PTSD. 63% of total sample had one of these mental disorders in their lifetime. |
| Varvaro (1991) | 23 battered women recruited through a shelter-based resident support group and a community support group | Grief Response Assessment Questionnaire (developed by the author) | Stages of grief and need for support groups | Women in different stages have different needs, described as follows: (a) attachment stage: need for safety, security, community living, housing, food, clothing, financial, and legal resources; (b) attachment/detachment stage: need for socialization, discovery of hopes, dreams, and feelings; and (c) detachment stage: need for achievement of goals and problem-solving and decision-making skills. |
| West, Fernandez, Hillard, Schoof, and Parks (1990) | 30 physically abused women from a protective shelter in Ohio; study period February to October 1989 | Inventory to Diagnose Depression, Hamilton Psychiatric Rating Scale for Depression, Structured Clinical Interview for *DSM-III-R*-PTSD Module, and Modified Conflict Tactics Scale | Psychiatric disorders | High prevalence of major depression disorder (37%) and PTSD (47%) were determined. These disorders were found to be positively associated. |

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|---|---|---|---|---|
| | | *Survey—longitudinal/retrospective* | | |
| Bergman and Brismar (1991) | 117 battered women seeking help in an emergency room in Sweden; 117 women selected from the population register; study period November 1983 to June 1984; data collection from period of 10 years before and 5 years after the battering | Data from County Council's computer files and from medical records | Battering, somatic hospital care, psychiatric care, and sociodemographic data | During the 5 years following the battering, the women did not show any signs of reducing their use of hospital care. |
| Roberts, Lawrence, Williams, and Raphael (1998) | *N* = 335 women recruited from the Royal Brisbane Hospital Emergency Department (Australia) through the Primary Care Section (*N* = 238), the Acute Overnight Stay Section (*N* = 84), acute referrals in the Emergency Department (*N* = 6), and referrals from community agencies (*N* = 7); study period September 1995 to June 1996 | Screening questionnaire, Composite Abuse Scale, Composite International Diagnostic Interview, PTSD-Checklist, and Alcohol Use Disorders Identification Test | Child abuse only, adult abuse only, child and adult abuse, and no abuse | Women who reported lifetime adult intimate abuse received significantly more diagnoses of generalized anxiety, dysthymia, depression, phobias, current harmful alcohol consumption, and psychoactive drug dependence than those who reported no abuse ever. Of women tested for lifetime PTSD, those who reported lifetime abuse received significantly more diagnoses than those who reported no abuse. Crude prevalence rates of psychiatric diagnoses for women who reported double abuse as child and adult were significantly higher than for women who reported adult intimate abuse only. Adjusted rates showed that doubly abused women had significantly greater risk of current harmful alcohol consumption and lifetime drug dependence than women who reported adult abuse only. A significant independent factor for lifetime psychiatric diagnoses was reporting abuse between a woman's parents. Measurement of the population-attributable risk found that one third of the psychiatric diagnoses was attributable to domestic violence. |

they are immobilized. Depending on the formulation of whom the current samples represent, the psychological distress of battering may be over- or underestimated in the literature.

**The samples of battered women who are studied are almost exclusively made up of women who came forward and sought help or shelter. . . . They might be the most troubled of battered women, who sought help because of their distress, or they may be the healthiest of battered women, who have the emotional resources to seek services. . . . Depending on the formulation of whom the current samples represent, the psychological distress of battering may be over- or underestimated in the literature.**

Samples for the most part, with some notable exceptions, are small, nonrandom, and drawn from a single site. Not all studies use comparison groups, and those that do often assess only differences between battered and nonbattered women without controlling for other possible controlling factors. The ability to generalize from these studies is limited. Only one study compared the victims of domestic violence with other violent crime victims. The failure to compare victims of domestic violence with women assaulted by strangers reinforces the idea that partner violence is inherently different from criminal assault (Riggs, Kilpatrick, & Resnick, 1992). Some writers ask whether the research captures the minority or the middle-class experience. Available studies are disproportionately made up of White low-income or working-class women. Studies also tend to be retrospective in nature rather than longitudinal, which limits determining the temporal ordering of effects. Furthermore, because most studies chose their samples from among distressed battered women, the method of sample selection is likely to confound the relationship between PTSD and battering. Imprecise and different definitions of *violence* and *psychological distress* have also been a problem. The evidence offered to date has been largely clinical and descriptive in nature. Research in the past 10 years has made great strides. It has empirically verified the assertions of clinicians of PTSD in domestic violence victims and has described various other forms of distress.

The generalizations reported next represent the consensus findings. Studies supporting a generalization are reported with the consensus finding.

## *Empirical Generalizations*

1. Available research indicates that the symptoms exhibited by battered women are consistent with the major indicators of PTSD as currently defined by the *DSM-IV* (American Psychiatric Association, 1994). A consistent finding across varied samples (i.e., clinical samples, shelters, hospitals, community agencies, etc.) is that a substantial proportion of victimized women (31% to 84%) exhibits PTSD symptoms (O'Keefe, 1998; Perrin, Van Hasselt, Basilio, & Hersen, 1996; Roberts, Lawrence, Williams, & Raphael, 1998; Rollstin & Kern, 1998; Rosen, 1999; S. Roth, Newman, Pelcovitz, van der Kolk, & Mandel, 1997; Saunders, 1994; Thompson et al., 1999; Vitanza, Vogel, & Marshall, 1995; West, Fernandez, Hillard, Schoof, & Parks, 1990).
   An expansion of research using standardized measures in the past 10 years to assess for the presence of PTSD has documented its presence. A national sample of adult women was screened for a history of serious assault in childhood, major depressive episode, post-traumatic stress disorder, and substance abuse. Women who reported partner abuse experienced more lifetime and current episodes of depression, posttraumatic depression, and substance abuse (Duncan, Saunders, Kilpatrick, Hanson, & Resnick, 1996). One study that examined a sample of women receiving welfare found 15% had reported a recent incidence of violence and 38% reported having experienced at least one physical assault in their lifetime. PTSD symptoms were found in 39% of the women who had experienced violence. The rate of symptoms among women who had never experienced an assault was 5%. Fifteen percent of the women who were assaulted at least once exhibited PTSD symptoms (Kalil, Rosen, Gruber, & Tolman, 1999). These data suggest implications for welfare reform because victimized mothers may need treatment to remain in the workforce.
   PTSD is a normal reaction to abnormal events. The diagnosis occurs most commonly as a stressful reaction to a catastrophic event involving actual or threatened death/injury. Symptoms include increased physiological arousal, persistent reexperiencing of the trauma (intrusive thinking), trouble sleeping, irritability, trouble concentrating, being watchful, arousal, feeling jumpy, fear, avoidance, hypervigilance, and psychic numbing includ-

ing dissociation. There is no support for the belief that violence toward a woman that is perpetrated by her husband is less traumatizing than violence by others.

2. The domestic violence shelter population is at a higher risk for PTSD than victimized women who are not in shelters. Estimates of victimization among the shelter population range from 40% to 84% (Gleason, 1993; Kalil et al., 1999; Khan, Welch, & Zillmer, 1993; O'Keefe, 1998; Roberts et al., 1998; Rollstin & Kern, 1998; Rosen, 1999; S. Roth et al., 1997; Saunders, 1994; Scott-Gilba, Minne, & Mezey, 1995; Thompson et al., 1999; Vitanza et al., 1995; West et al., 1990).
   A high prevalence of psychiatric problems, including PTSD, is found among shelter populations. Not only have they been battered, but they are also homeless. They may lack other forms of social support, and they disproportionately have low income. Women who receive shelter services are in crisis and differ from their nonshelter counterparts in not having other options in seeking safe haven. The precipitating violent event is rarely the only time these women have sustained violence. PTSD could be expected in response to earlier acts of violence that culminated in the women's decision to leave home and seek shelter (Vitanza et al., 1995).
3. Having multiple victimization experiences (childhood abuse, particularly sexual abuse, and adult sexual abuse) increases the likelihood of PTSD and many other types of psychiatric disorders (Astin, Lawrence, & Foy, 1993; Astin, Ogland-Hand, Coleman, & Foy, 1995; Cascardi, O'Leary, Lawrence, & Schlee, 1995; Duncan et al., 1996; M. A. Dutton, Burghardt, Perrin, Chrestman, & Halle, 1994; Follette, Polusny, Bechtle, & Naugle, 1996; Hattendorf, Ottens, & Lomax, 1999; Nurius, Furrey, & Berliner, 1992; Roberts et al., 1998; S. Roth et al., 1997; West et al., 1990).
   Symptoms of recent traumas may not only be distressing in themselves, but they may also exacerbate symptoms related to earlier victimization. Symptoms of PTSD fall in three categories. The first category is reexperiencing the traumatic event. Nightmares and flashbacks have been considered a prime indicator of PTSD (Foa & Rothbaum, 1992). The second category consists of avoidance and numbing. Avoidance of trauma-related stimuli is considered a distinguishing feature of PTSD (Foa & Meadows, 1997). The final category includes hyperarousal and includes such symptoms as sleeplessness, hypervigilance, and irritability (Rosen, 1999; Thompson et al., 1999).
   Exposure to multiple types of trauma experiences affects a person's capacity to recover from subsequent traumatic events (Follette et al., 1996). Early trauma may be especially damaging because it may interfere with the mastering of developmental tasks and place the person at greater risk to additional victimization.
4. The extent, severity, and type of abuse is associated with the intensity of PTSD. Severity refers to how life threatening the abuse is. The more life threatening the abuse is, the more traumatic the effect. Sexual abuse, severe physical abuse, and psychological abuse are associated with an increase in trauma symptoms among victims. Women need not experience severe violence to experience PTSD symptoms, but experiencing severe violence exacerbates symptoms. Psychological abuse may be as damaging as physical violence (Astin et al., 1993; Cascardi & O'Leary, 1992; Hattendorf et al., 1999; Houskamp & Foy, 1991; Khan et al., 1993; O'Keefe, 1998; Rollstin & Kern, 1998; Vitanza et al., 1995).
   The collective research suggests that the intensity of exposure to violence is a major factor in the development of PTSD in victimized women. This relationship has been found with combat veterans and rape victims (Butler, Foy, Snodgrass, Hurwicz, & Goldfarb, 1988).
5. Other forms of emotional distress accompany PTSD. A high prevalence of mental disorders, particularly depression and dysthymia, are noted among domestic violence victims. A history of depression may be a risk factor for victimization (Andrews & Brewin, 1990; Bergman & Brismar, 1991; Campbell, 1989; Cascardi & O'Leary, 1992; Cascardi et al., 1995; Follingstad, Brennan, Hause, Polek, & Rutledge, 1991; Gelles & Harrop, 1989; Gleason, 1993; Kalil et al., 1999; Kemp, Rawlings, & Green, 1991; Launius & Jensen, 1987; Riggs et al., 1992; Roberts et al., 1998; Rosen, 1999; Saunders, 1994; Scott-Gilba et al., 1995; Thompson et al., 1999; Varvaro, 1991; Vitanza et al., 1995; West et al., 1990).
   A consistent finding across varied clinical samples (i.e., women in a shelter, those seeking services from community agencies, and victimized women in the community) is that abused women have elevated symptoms of depression at the time of assessment. Depression as a correlate of PTSD was strongly supported, as it has been in studies of Vietnam veterans (Silver & Iacono, 1984) and other PTSD populations (Armsworth, 1984; Krupnick & Horowitz, 1980; Titchener & Kapp, 1976). A common criticism of clinicians unfa-

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miliar with PTSD is that they will overlook the trauma symptoms and treat the depression only.

6. Suicide is a risk among domestic violence victims who exhibit PTSD symptoms. PTSD may mediate the link between partner abuse and suicidal ideation (Bergman & Brismar, 1991; Kalil et al., 1999; Scott-Gilba et al., 1995; Thompson et al., 1999; Vitanza et al., 1995).

**Exposure to multiple types of trauma experiences affects a person's capacity to recover from subsequent traumatic events**

PTSD has been shown to be strongly associated with suicidal behaviors (Bullman & Kang, 1994; Davidson, Hughes, Blazer, & George, 1991; Kramer, Lindy, Green, Grace, & Leonard, 1994; Warshaw, Massion, Peterson, Pratt, & Keller, 1995). Data from a probability sample in North Carolina ($N = 2,985$) indicated that PTSD sufferers were 15 times more likely than nonsufferers to have attempted suicide (Davidson et al., 1991).

7. Substance abuse was reported in a high percentage of victimized women. Women who reported being victims of child abuse and adult abuse had significantly more lifetime drug and alcohol dependence than women not reporting abuse (Bergman & Brismar, 1991; Duncan et al., 1996; Gleason, 1993; Kalil et al., 1999; Roberts et al., 1998; West et al., 1990).

   Douglas (1987) interpreted the use of alcohol as an effort by battered women to self-medicate their anxiety. None of the researchers assert a causal relationship between substance abuse and battering, but they do note that there is a strong association.

8. In addition to PTSD, depression, and substance abuse, other mental health problems have been noted in victimized women, including but not limited to cognitive difficulties (Kemp et al., 1991; Riggs et al., 1992; Saunders, 1994; Vitanza et al., 1995), somatization (Bergman & Brismar, 1991; Follingstad et al., 1991; Roberts et al., 1998; Vitanza et al., 1995), anxiety disorders (Khan et al., 1993; Roberts et al., 1998; Rosen, 1999; Scott-Gilba et al., 1995; Vitanza et al., 1995), phobias (Gleason, 1993; Roberts et al., 1998; Saunders, 1994; Scott-Gilba et al., 1995; Vitanza et al., 1995), sleep disorders (Kemp et al., 1991; Thompson et al., 1999), fearfulness of spouse (Cascardi & O'Leary, 1992; Wileman & Wileman, 1995), and obsessive compulsiveness (Gleason, 1993; Riggs et al., 1992).

**A common criticism of clinicians unfamiliar with PTSD is that they will overlook the trauma symptoms and treat the depression only.**

The published research indicates that battered women show a significantly higher percentage of mental health difficulties than nonvictimized women. None of the studies claim a cause-and-effect relationship between being victimized and having a mental illness, but there is a strong associational relationship. All of the aforementioned symptoms are consistent with PTSD.

Cognitive problems include a tendency to have perception and memory failures and engage in ineffective and self-defeating problem solving (Vitanza et al., 1995). Cognitive difficulties result from repeated batterings that lead to the development of perceptions that the victim is unable to successfully resolve her current life situation. The resulting sense of helplessness leads to increased feelings of depression and anxiety and produces a debilitating effect on problem-solving ability. Obsessive compulsiveness is viewed as an effort on the part of women to defend themselves against overwhelming anxiety through various repetitive ruminations and/or activities (Gleason, 1993).

Fear plays a crucial role in women's conditioning as victims. It is postulated that the more fear is experienced, the more powerless a woman experiences herself to be and the less likely she is to take any action to defend herself. Similar to victims of other trauma, women often identify with persons exercising power over them. This phenomenon was called *traumatic bonding* by M. A. Dutton and colleagues (1994) and is responsible for why many victims find it difficult to leave batterers.

Other problems noted included permanent injury, hyperarousal (Saunders, 1994), psychoticism, paranoid ideation (Riggs et al., 1992), and psychosexual dysfunction (Gleason, 1993). Additional reported problems of battered women are that they are more likely to divorce and to use more medical and mental health services than the general populations (Bergman & Brismar, 1991). Two studies of female prisoners who killed their abusive partners experienced PTSD as a result of the victimization, which may have been related to the homicides (Hattendorf et al., 1999; O'Keefe, 1998).

Stressed victims of domestic violence may also abuse their children. Walker (1984) reported that victims were more likely to hurt a child when battered than when they are safe. Straus's (1983) data from a nationally representative sample of 2,143 families showed that the more violent husbands are toward their spouses, the more violent the wife is to their children. Wives who were victims of violence severe enough to be labeled as spousal abuse had the highest rates of child abuse. Women who were subjected to what Straus (1983) described as *minor violence* (pushes and slaps) had more than double the rates of physical assaults on children than did women not experiencing that kind of abuse. Victims may abuse out of stress from being battered. Holden and Ritchie (1991) reported that battered women felt more highly stressed as parents than a control group of women who did not experience abuse. Jouriles and colleagues (Jouriles, Baring, & O'Leary,

1987) found in their research that parental aggression directed toward children was more likely to occur in families where domestic violence took place. One rationale proposed for this finding is the victim may be attempting to keep the children "in line" to avoid giving the perpetrator an excuse to batter.

9. Demographic and socioeconomic factors have been found to have some effect on PTSD and other mental health symptoms in victimized women. Despite the fact that none of the published research indicated that ethnicity is a factor in exhibiting PTSD, other research indicates ethnicity is a factor in experiencing violence. One national representative probability sample ($N$ = 8,000) found that among women of different racial and ethnic backgrounds the difference in the prevalence of reported rape and physical assault is statistically significant. Native Americans were the most likely to report victimization. Hispanic women were less likely to report rape or physical assault than non-Hispanic women (Tjaden & Thoennes, 1998). More research is needed to determine how much of the difference can be explained by the respondents' willingness to report information to researchers and how much is influenced by sociocultural factors (McGee, 1997).
The empirical evidence does suggest that younger, unemployed, low-income women with a relatively large number of children and low levels of social support are more at risk for experiencing PTSD symptoms and other mental health problems than women without those characteristics. The risk of battering is greatest from the teen years through the 30s. Low socioeconomic status (SES) is related to differential exposure to spousal abuse, with abuse being more prevalent in lower SES groups (Sorenson, Upchurch, & Shen, 1996; Sullivan & Rumptz, 1994). An added cost of poverty may be an increased risk of violence against women. Studies have identified income as a strong predictor of leaving or staying in an abusive relationship (D. G. Dutton & Painter, 1993; Strube, 1988).
Other factors that may increase adverse reactions such as PTSD are having a traditional sex-role orientation, witnessing the destruction of personal property (Follingstad et al., 1991), attributions of self-blame for the victimization (Andrews & Brewin, 1990), poor health prior to victimization (Gelles & Harrop, 1989), single and not cohabiting (Thompson et al., 1999), and experiencing other family stressors and negative life events (Astin et al., 1993).

## *Empirical Action Guidelines*

These guidelines represent consensus implications identified by the researchers cited earlier or were inferred from the research by the authors of this report.

### A General Statement About PTSD and Domestic Violence Intervention

1. The high numbers of victimized women experiencing PTSD suggest it is a useful construct in treatment of battered women. The trauma of battery should be a central focus of intervention with abused women and not other symptoms. Clinicians who lack knowledge of the link between PTSD and domestic violence may focus on the intrapsychic symptoms and misinterpret symptoms as chronic psychopathology. This focus may not only be ineffective but can be experienced by survivors as blaming the victim, which reinforces feelings of worthlessness and a sense of lack of control over their own mental status (Saunders, 1994).
The PTSD construct is a simple and direct one with implications for helping victims understand the effects of trauma. The diagnosis may remove some stigma and self-blame by linking the women's experience to other trauma victims such as Vietnam veterans and disaster survivors (Kemp et al., 1991). PTSD emphasizes that victims' difficulties come from external sources (Saunders, 1994) and provides a diagnosis that is usually more benign than others such as paranoid schizophrenia or personality disorder (Rosewater, 1985). Practitioners who share information with battered women on the prevalence and origin of PTSD may reduce anxiety and a sense of powerlessness arising from the disorder itself.

**Clinicians who lack knowledge of the link between PTSD and domestic violence may focus on the intrapsychic symptoms and misinterpret symptoms as chronic psychopathology. This focus may not only be ineffective but can be experienced by survivors as blaming the victim, which reinforces feelings of worthlessness and a sense of lack of control over their own mental status.**

### Macro-Level Interventions

2. Providers of medical, mental health, and substance abuse services need to be aware of the possibility of domestic violence as a significant contributing factor to the current physical and mental health problems (Roberts et al., 1998). Professionals who work with domestic violence victims might benefit from training in treating trauma used in victim assistance with such problems as natural disasters, rape, torture, and war refugees (Gleason, 1993). At the same time, practitioners must recognize the unique dy-

namics of domestic violence where victimization comes at the hand of intimate partners.

A domestic violence prevention program should reduce the cost of social service delivery. Women experiencing domestic violence need extensive social services including medical, mental health, legal, relocation, employment, and economic assistance. There are also the hidden costs incurred when the violence is transferred to the next generation. An extensive literature has documented the mental health effects on children, including but not limited to symptoms of depression, increased aggressiveness, delinquency, truancy, posttraumatic stress, and other behavioral problems (Echlin & Marshall, 1995; Hershorn & Rosenbaum, 1985; Holden & Ritchie, 1991; Kilpatrick & Williams, 1997; Sternberg et al., 1993). Exposure to domestic violence in childhood increases the likelihood that victims may become perpetrators and victims of spousal abuse (O'Keefe, 1994).

**The most common recommendation for practice in the literature is that practitioners need assessment methods that accurately identify domestic violence and they need to know how to develop intervention strategy that addresses the safety needs of victims.**

3. Screening for victimization should become a standard of mental health practice so referrals to appropriate agencies can be made. This guideline should not be interpreted as to suggest that all women with mental health problems have been victimized. It is just an added safety and diagnostic measure. With adequate screening, referrals to appropriate support services can be made.
4. Mental health outreach to the shelters seems warranted. Studies indicate that there is a high prevalence of what are ordinarily treatable mental health conditions among victimized women, particularly those in shelters. In addition, shelter staff members should be trained in how to recognize PTSD symptoms and how to make appropriate referrals for treatment.
5. The treatment of substance abuse ought to be an integral part of the recovery from battering.
6. In addition to mental health services, women would need additional concrete assistance (medical, financial, housing, child care, legal, etc.).
7. Effective multidisciplinary practice and coordination of services are needed with this population. Domestic violence providers need to know about substance abuse, mental health, and child abuse issues. Substance abuse, mental health, and child protective service providers need to incorporate a focus on domestic violence into their interventions. They need to know how to assess for the presence of PTSD and how to make appropriate referrals. The number of services required for these families is daunting and may have overwhelmed many, especially given the fact they were almost certainly required to receive them from a variety of specialty providers, each of which most likely was not prepared to collaborate with the others in service delivery. Cross-disciplinary training in how to work together and coordinate service delivery is needed.
8. Medical personnel must ask women directly whether they have been abused. Both asking and reporting should be mandatory in all jurisdictions. A major recommendation of the literature is that medical services are key in the treatment of battered women because medical providers may be the first service providers to encounter battered women. Medical personnel must be aware of sources of help for abused women so they can make appropriate referrals. A viable alternative is to include social workers or other professionals trained in the diagnosis of family violence in hospitals, clinics, and shared practice (Bowker & Maurer, 1987; Tjaden & Thoennes, 1998).
9. Low-income and younger women, including teens, are especially vulnerable to abuse and symptoms. This vulnerability suggests they need to be the targets of prevention and treatment programs.

### Mezzo-Level Interventions

10. The most common recommendation for practice in the literature is that practitioners need assessment methods that accurately identify domestic violence and they need to know how to develop intervention strategy that addresses the safety needs of victims.
11. It is important to assess a battered woman's family background for a history of psychological trauma and family dysfunction so that sources of potential vulnerability can be evaluated. Those working with the battered women must also assess the battered women's history of relationships. Practitioners need to know how to intervene in relationships where violation of trust by an intimate is an issue.
12. The research indicates that clinicians need to distinguish between severity (levels) and types of violence because the psychosocial effects of domestic violence will vary according to severity and type. Domestic violence often occurs over an extended period of time and tends to increase in frequency and severity. This characteristic makes it much different from many other types of trauma. Child abuse and combat may be similar in their extension over time. In the past, women have been faulted for not walking away from the abuse sooner, and therefore symptoms have been minimized (Walker, 1984). The crucial link between exposure to the events of abuse provides an additional way of conceptualizing domestic violence that does not blame the victim (Houskamp & Foy, 1991). Familial child abuse may be a more similar trauma than combat because it occurs at the hand of intimates and in a supposed place of safety.

13. Given the cognitive deficits that are found in battered women, cognitive interventions would seem appropriate (Gleason, 1993; Vitanza et al., 1995). Cognitive-behavioral therapy treatment strategies are the most commonly recommended in the literature. These approaches have been recommended for children exhibiting PTSD symptoms as a result of sexual abuse (Deblinger, Lippmann, & Steer, 1996). It is also the treatment that has the most empirical support for treating PTSD victims in general (Foa & Meadows, 1997). Other studies with PTSD patients have indicated that stress management and stress inoculation are effective in reducing short-term PTSD symptoms once safety has been established (Foa, Hearst-Ikeda, & Perry, 1995; Foa, Rothbaum, Riggs, & Murdock, 1991).
Skill training in alternative coping responses and problem solving is needed by abused women whose fear, depression, cognitive problems, and lack of social support make it difficult for the woman to plan for her own safety. There is a need to help women reconstruct their view of self (e.g., attitudes about themselves as worthy in their own right) as well as their capacity to assess risk and take protective action and skills to get and keep sources of social support (Launius & Jensen, 1987; Nurius et al., 1992). Empowerment is thought to be an outcome of strategies of teaching battered women to identify and attack self-defeating cognitions with action and skill building (Gleason, 1993).
14. Effective therapy for battered women offers a focus on safety and supportive relationships, focuses on the abuse, validates the women's perceptions, encourages self-determination, and provides a safe setting to work through the residue of years of trauma. Therapy should focus on the traumatic event and help the woman obtain new skills to guarantee her safety. Inner-psychic theories that focus on such issues as why she chose an abusive partner are regarded as inappropriate and possibly damaging. Treatment for the underlying depression is also needed so that the women can mobilize resources on behalf of their own safety, but treatment has to go beyond the depression to address the PTSD (Houskamp, 1994; Kemp et al., 1991).
15. Domestic violence service providers, mental health staff members, medical personnel, and other relevant professionals need to be sensitized to the increased suicide risk noted among abused women with PTSD. Suicidal women should be scrutinized for ongoing intimate partner violence. Abused women should be questioned about active suicidal ideation and intent (Thompson et al., 1999).

## IMPLICATIONS FOR PRACTICE, POLICY, AND RESEARCH

- The high numbers of victimized women experiencing post-traumatic stress disorder (PTSD) suggest it is a useful construct for treatment of battered women.
- Providers of medical, mental health, and substance abuse services need to be aware of the possibility of domestic violence as a significant contributing factor to the current physical and mental health problems, and they need to know how to intervene with domestic violence victims.
- Screening for victimization should become a standard of mental health practice so referrals to appropriate agencies can be made.
- Mental health outreach to the shelters seems warranted.
- The treatment of substance abuse ought to be an integral part of the recovery from battering.
- In addition to mental health services, women would need additional concrete assistance (medical, financial, housing, child care, legal, etc.).
- Effective multidisciplinary practice and coordination of services are needed with this population.
- Medical personnel must ask women directly whether they have been abused. Both asking and reporting should be mandatory in all jurisdictions.
- Low-income and younger women, including teens, are especially vulnerable to abuse and symptoms. This vulnerability suggests they need to be the targets of prevention and treatment programs.
- Practitioners need assessment methods that accurately identify domestic violence, and they need to know how to develop an intervention strategy that addresses the safety needs of victims.
- It is important to assess a battered woman's family background for a history of psychological trauma and family dysfunction so that sources of potential vulnerability can be evaluated.
- The research indicates that clinicians need to distinguish between severity (levels) and types of violence because the psychosocial effects of domestic violence will vary according to severity and type.
- Cognitive-behavioral treatment approaches seem to be particularly relevant for the cognitive deficits found to occur in battered women. Skill training in alternative coping responses and problem solving is needed by abused women whose fear, depression, cognitive problems, and lack of social support make it difficult for the women to plan for their own safety.
- Effective therapy for battered women offers a supportive relationship, focuses on the abuse, validates the women's perceptions, encourages self-determination, and provides a safe setting to work through the residue of years of trauma.

- Domestic violence service providers, mental health staff members, medical personnel, and other relevant professionals need to be sensitized to the increased suicide risk noted among abused women with PTSD.

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# Enduring Love: A Grounded Formal Theory of Women's Experience of Domestic Violence

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**Abstract:** Using a grounded formal theory approach, 13 qualitative research reports were analyzed with the goal of synthesizing a middle-range theory of women's responses to violent relationships. The combined sample numbered 282 ethnically and geographically diverse women ages 16–67. Within cultural contexts that normalized relationship violence while promoting idealized romance, these women dealt with the incongruity of violence in their relationships as a basic process of enduring love. In response to shifting definitions of their relationship situations, many women moved through four phases, which began with discounting early violence for the sake of their romantic commitment (''This is what I wanted''), progressed to immobilization and demoralization in the face of increasingly unpredictable violence that was endured by the careful monitoring of partner behavior and the stifling of self (''The more I do, the worse I am''), shifted to a perspective that redefined the situation as unacceptable (''I had enough''), and finally moved out of the relationship and toward a new life (''I was finding me''). Variations in the manifestation and duration of these phases were found to be linked to personal, sociopolitical, and cultural contexts.  Res Nurs Health 24:270–282, 2001

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Each year 1.5 million women are physically or sexually assaulted by an intimate partner (Tjaden & Thoennes, 1998). In addition to increasing 10-fold the risk of physical injury, intimate partner violence triples women's hospitalization rates for mental health disorders, substance abuse, and suicidality (Kernic, Wolf, & Holt, 2000). Nonlethal intimate violence results in financial losses to women conservatively estimated at $150 million per year (Greenfield, 1998). Qualitative and quantitative health researchers have been persistent in seeking to understand domestic violence and women's responses to it, but no systematic synthesis of qualitative work on this topic has appeared. The purpose of this study was to construct a theory of women's experiences in violent relationships that would be grounded in diverse qualitative reports and relevant across geographic and sociocultural contexts.

## BACKGROUND

Qualitative researchers have described women's experiences of violent relationships in a range of settings. Women reported that they became involved with their abusers in response to cultural

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and personal expectations for romance, service, and commitment (Bartle & Rosen, 1994; Mills, 1985). Women in the United States and Canada were found to experience a changed perception of self and reality when embedded in violent relationships, whether short-term dating relationships (Bartle & Rosen) or longer partnerships (Kelly, 1988; Lempert, 1994; Mills; Riessman, 1989).

Six rationalizations for staying in the relationship were identified by U.S. women: the salvation ethic (need to care for the abuser); a commitment to the higher loyalties of religion or tradition; denial that abuse was controllable, that their injuries were real, or that they were blameless victims; and the inability to see practical or emotional alternatives (Ferraro & Johnson, 1983). Women in the United States, Canada, United Kingdom, and New Zealand stayed with or returned to abusers when they continued to feel an emotional bond and hoped to return to a better time in the relationship (Farrell, 1996; Kelly, 1988; Smith, Tessaro, & Earp, 1995; Towns & Adams, 2000). Immobilization resulting from isolation, depression, substance abuse, and economic control in violent relationships was seen in both qualitative and quantitative studies (Davis, 1997; Farrell; Lempert, 1994; Rumptz, 1995).

Contrary to stereotypes of passivity, abused women in Israel and the United States described active strategies to minimize harm to themselves and their children (Draucker, 1999; Eisikovits & Buchbinder, 1999; Langford, 1996, 1998). Women in the United States and Nicaragua attributed their ability to leave violent relationships to shifts in their perspectives on the relationships and themselves (Draucker, 1997; Ferraro & Johnson, 1983; Ulrich, 1993; Wessel & Campbell, 1997). Economic self-sufficiency, shelter, and social support helped women to leave when ready (Ulrich) but were not predictors of leaving in quantitative analyses (Rumptz, 1995; Stackman, 1996).

Although concordance is seen in these findings, no two studies were focused on the same aspects of the experience in the same populations. A narrative summary of qualitative research has appeared (Sleutel, 1998), but no systematic synthesis was found. The purpose of the present study was to synthesize findings of a subset of this literature, grounded theory reports and other studies whose findings contain theoretical elements, so as to develop a formal theory that would integrate common threads across studies that varied in focus and context.

## METHOD

### Design

Grounded formal theory analysis was chosen for the present study because in a conservative manner, it applies like methods to like materials: that is, substantive grounded-theory studies are synthesized to develop a higher-level grounded theory (Glaser & Strauss, 1967; Kearney, 1998). The components of grounded theories produced by constant comparison and theoretical sampling in the original works are subjected to the same type of analysis and criteria for validity in the larger synthesis process. Grounded-theory studies are focused on portraying the range of influences on human action and the process of change in response to context, a goal well suited to understanding women's varied and changing responses to domestic violence.

### Sampling Criteria and Process

Qualitative study reports were sought using computerized, manual, and reference list searches in the English-language literatures of nursing, medicine, sociology, psychology, anthropology, education, social work, and criminal justice. Computerized databases searched included CINAHL, Medline, Sociofile, Social Work Abstracts, Psyclit, and Dissertation Abstracts. Reports were included that contained qualitative descriptions of women's experiences being in and/or leaving physically, emotionally, and/or sexually violent domestic or dating relationships. Studies of single-episode violent encounters were excluded. Studies retained in the sample used constant comparative techniques and demonstrated building of concepts or theories from original data (rather than testing of predetermined theories or concepts). Reports were excluded that did not describe an analytic approach or employed only nontheoretical descriptive techniques. Their resemblance to the formal theory was examined in a post hoc fashion (as is reported in the Discussion section).

A total of 13 studies presented in 15 reports produced between 1984 and 1999 formed the sample for analysis (Table 1). Two were dissertations for which no subsequent publications were located, and the remainder were published reports. Although the search was not restricted by geography, no grounded-theory studies meeting inclusion criteria were from outside North America. The disciplines of the authors included

**Table 1. Studies Included in Sample**

| Authors, Discipline | Date | Method | Interview Sample | Ages, Race/ Ethnicity | Economic Status | Abuse Status | Recruitment Setting | Topical Focus |
|---|---|---|---|---|---|---|---|---|
| Clarke et al. (nursing) | 1997 | Thematic, content analysis | 7 | 24–51, 4 Black[1] 3 White[2] | 1 homeless, 4 employed | In shelter | 2 shelters, southeast U.S. | Phases of violent relationships |
| Fiene (social work) | 1995 | Grounded theory (GT) | 8, plus 7 observed | 20s–almost 60, all White | Low income, mountain culture | In shelter | Shelter in rural Appalachia, U.S. | Disclosure in relationship |
| Germain (nursing) | 1994 | Phenomenology | 18 writers in journals | Not described | Not described | In shelter | Suburban eastern U.S. shelter | Changes during shelter, transition to new life |
| Hilbert (criminal justice) | 1984 | GT | 30 | 20–67, 15 Black 14 White 1 Hispanic | $\frac{1}{3}$ were employed, 47% of partners employed | Current, seeking help | Justice Center, Midwest U.S. city | Definitions of situation in help-seeking encounters |
| Landenburger (nursing) | 1989 | GT, phenomenology, ethnography | 30 | 16–40, 29 White 1 Black | 13 employed full-time, 11 part-time, 73% had some college | 3 current, 27 prior abuse | Shelter, support group, ads, northwest U.S. | Entry into through recovery from relationship |
| Langford (nursing) | 1996, 1998 | GT | 30 | 21–65, 22 White 3 Black 3 Hispanic 2 Native Am. | 37% with income less than $13,000/year | 9 of 30 living with abusers | Northern CA, community-based, male researcher | Strategies for handling danger in relationship |
| Lempert (sociology) | 1996 | GT | 32 | 21–57, 23 White, 9 ''of color'' | Most had college education, working class to professionals | 8 of 32 living with abusers | Northern CA support group linked to shelter | Survival strategies in relationship |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Merritt-Gray & Wuest (nursing) | 1995, 1999 | Feminist GT | 13 (1995), 15 (1999) | 26–59 | Most had high school, most were employed | All had left abusers | Community in rural eastern Canada | Process of leaving abusive relationship |
| Moss et al. (nursing) | 1997 | Feminist, constant comparison | 30 | 20–64, 15 Black, 15 Anglo | 13 with income under $10,000 | All had left abusers | Support group & college, Midwest U.S. | Experiences of ending relationships, cultural variation |
| Newman (nursing) | 1993 | GT | 7; confirmed with 49 others | 18–65 | Not described | Planning return to abuser | Shelter, Southeast U.S. | Common experiences of sheltered women |
| Pilowsky (education) | 1993 | GT | 8 | 20s–40s, Hispanic from Central America | Range of educational levels, income | All had left abusers | Eastern Canada city | Entry through recovery from relationship |
| Rosen, Stith (family studies) | 1995 | GT | 11 | 16–28, 10 White, 1 Black | Middle class families of origin | All had left abusers | Eastern U.S. | Process of ending abusive dating relationship |

[1]African American.
[2]European American.

nursing, education, social work, sociology, criminal justice, and family studies. The total number of women in the samples was 282; they were recruited from a variety of rural and urban settings across the United States and Canada, including a courthouse; homeless and battered women's shelters in rural, suburban, and urban areas; community services; support groups; and directly from their communities. Ages ranged from 16 to 67 years, and the pooled sample included 126 (45%) women described as Caucasian or European American; 39 (14%), African American; 12 (4%), Hispanic; 9 (3%), described as "of color"; and 2 (<1%), Native American; with the race or ethnicity of the remaining 94 (33%) unspecified. Relationship types included dating, cohabitation, and marriage. All studies were of women who suffered both psychological and physical abuse. Same-sex relationships and female-to-male violence were not represented in these studies.

## Data Collection and Analysis

Following procedures described elsewhere for grounded formal theory development (Kearney, 1998; Strauss, 1987), data were collected systematically from each report. Categories of data extracted from the research reports included but were not limited to the year, source, and disciplinary and theoretical orientations of the report; methodological components (presence and adequacy of theoretical sampling, constant comparative analysis, and theory development); size, origins, recruitment source, social context, and other characteristics of the sample; scope and components of the findings, including concepts, relationships, stages, and substantiation; author conclusions; and critique by the formal theory analyst. Each report was characterized using these categories, and the data were summarized in an extensive grid to facilitate cross-case comparison.

Descriptive and theoretical analyses of these data were conducted using a constant comparative analysis. This involved grounded-theory techniques (Strauss & Corbin, 1998) of substantive coding, in which concepts across studies were identified and clustered into new categories, such as types of study origins, contexts, and stages or influences within the findings; axial coding, in which the nature of the categories was fleshed out and the relationships between categories within and across studies were tested in the data; and selective coding, in which the core category that linked all other categories and explained movement through phases was refined and substantiated by returning again to original study reports and their exemplar data. Theoretical sampling was conducted by returning repeatedly to the study reports to answer each analytical question. The analysis was documented in memos with specific links to source text.

In the course of this analysis, the quality of the constituent studies was addressed in several ways. Beyond the minimal level of quality screening in the sampling process, data and findings from individual reports were analyzed and synthesized with different degrees of confidence based on the methodological integrity and completeness of the studies (Wilson & Hutchinson, 1996). Concepts and theoretical relationships that were not convincingly substantiated were only included if strong support was seen elsewhere in the pooled data. Reports in which theoretical sampling was not fully realized or encounters with participants were relatively limited showed limited variation in the experiences portrayed. Several well-constructed studies provided rich data but with a narrow focus, such as the disclosure or management of violence within relationships. Certain phases of the experience—particularly, very early in the relationship and after leaving the abuser—were addressed by only a few authors. Nonetheless, an advantage of pooling studies for synthesis was the ability to offset to some degree the limited scope of single reports.

The final theory was scrutinized using criteria for validity of a grounded theory as described by Glaser and Strauss (1965). These are: *fitness*, accurate representation of what is going on, so that a person familiar with the phenomenon would be able to recognize her experience; *understanding*, the richness and sensitivity of the final theory, reflecting a deep and participatory grasp of the subtleties of interaction within the phenomenon; *generality*, applicability or adaptability to a range of situations; and *control*, indication within the theory of ways in which persons might be able to affect the process or outcomes. As might be expected in a synthesis, the fitness and generality of the findings were judged stronger than their understanding or control. Fitness was enhanced by strong agreement across studies on the nature of the domestic violence experience. Generality was strengthened by the breadth of geographic and cultural settings. The richness of the findings (understanding) was restricted by the goal of parsimony and by space

restrictions in presentation, and discovery of possible influence on the process (control) was hampered by limited contextual data and explanation of variation within the studies sampled. As with any qualitative report, validity will be further elucidated as readers respond to the relevance and usefulness of the material.

## FINDINGS

### Basic Process and Sociocultural Contexts

***The problem of normalized intimate partner violence.*** Across sociocultural contexts, violence against women was invisible and accepted by the women themselves, the couple, their families of origin, and their acquaintances and community in order to preserve the values of commitment and social stability. All faced shame, guilt, and familial and cultural ostracism if they broke up their families. In these social contexts the basic social-psychological problem faced by women in violent relationships was the incongruity—both in women's self-definitions and their lives—of their partners' unpredictable, unjustifiable claims to love them and to deserve their love with the men's simultaneous acts of violence. Emotional demoralization, immobilization, shame, loss of selfhood, and fear of catastrophic injury rooted them in abusive relationships.

***Enduring love.*** The basic process by which women sought to reconcile these internal and external conflicts within violent relationships was *enduring love*, a continual struggle to redefine partner violence as temporary, survivable, or reasonable by adhering to values of commitment and self-sacrifice in the relationship and by using strategies to survive and control the psychic and physical harm of unpredictable abuse. Enduring is used here simultaneously as an adjective and as a verb. As an adjective, connoting persisting or lasting, enduring reflects women's attachment to their partners or to their obligation or commitment despite ongoing abuse. In the verb form of enduring (Morse & Carter, 1996), connoting an intense focus on surviving in the present, women focused on surviving each episode of violence for the sake of the hoped-for relationship, which they glimpsed or recalled periodically in the relative tranquillity between periods of violence, and out of love for their children. The focus and strategies for enduring changed over time.

*Love* is defined here as a complex emotional attachment and commitment to relationship and family unity. Women held deeply internalized desires for romantic love, commitment, and the security of economic shelter and a two-parent family for their children, and they accepted the accompanying social and cultural expectations of care giving and self-sacrifice even when their romantic feelings for their partners were beyond repair. Distinctions blurred between love for the abuser as an individual and a deeply-felt commitment to, or longing for, the relationship or family as it once was or should had been. As women's perceptions of the relationship shifted over time, they redirected their love away from the abusive partner and toward children and self. The components and phases of the enduring love process are depicted in Table 2.

### Phases of Enduring Love in Violent Relationships

***"This is what I wanted."*** Women had entered relationships because romantic involvement fulfilled their dream of loving and being loved, and they were propelled by culturally defined expectations of a loyal, homemaking, love-sustaining role in their new family. As a European American woman from the Midwest of the United States reported, "I married him with the idea . . . that it would last forever. . . . All I wanted in my life was to be a mom . . . and a wife, a mom and a homemaker" (Moss, Pitula, Campbell, & Halstead, 1997, p. 442). An Hispanic woman recalled the first violent incident: "I just could not believe he had punched me . . . I was in a nightmare. I guess I really loved him at the time" (Pilowsky, 1993, p. 99). A woman in California described how she responded to early violence:

> I didn't really . . . consider that it was his fault . . . And I wasn't the type of person, you know, [to] just walk out and leave . . . I'd rather do a lot of things to sort out the problem and work it out . . . The husband comes first, to please the man that you're married to 'cause you committed yourself. (Lempert, 1996, pp. 274–275)

Early in relationships, women endured what at the time seemed unreal or aberrant incidents of violence out of romantic love and ideals of commitment. A Hispanic woman reflected, "We, *las* Latinas, put up with so many things because of the way we were raised, to be and remain married. Only whores or women nobody

**Table 2. Enduring Love in Violent Relationships: Phases and Components of Process**

| Phase | Definition of Situation | Strategies | Consequences |
|---|---|---|---|
| All I wanted | Realization of goal of lasting relationship | Committing to and investing in relationship despite seeds of doubt | Dependence<br>Deepened commitment |
| The more I do, the worse I am | Partner's love and violence seen as unpredictable, incongruent, and inconsistent<br>Help unavailable or unacceptable<br>Salvaging relationship as woman's role | Shrinking of self<br>Rationalizing<br>Monitoring | Demoralization<br>Immobilization<br>Acceptance of trade-offs<br>Hiding abuse |
| I had enough | Violence unacceptable<br>Relationship not salvageable<br>Self, children more important | Resistance<br>Divestment<br>Withdrawal<br>Building resources | Anger<br>Emotional disengagement<br>Start of regrowth of self |
| I was finding me | Depleted resources<br>Uncertainty<br>Vulnerability | Restructuring safe environment<br>Redefining self and goals<br>Letting go of love | Personal growth<br>Increasing self-sufficiency |

wants are not married'' (Pilowsky, 1993, p. 110). Across all cultures represented in these samples, it was considered a normal part of love to make sacrifices and accept disappointments, while developing more and more inclusive strategies to try to fix the problems. The consequence of this phase was emotional, social, and often economic dependence, fueled by women's work to demonstrate their commitment and willingness to sacrifice. The few women whose personal resources enabled them to retain independence, or whose sociocultural contexts did not support self-effacement, held a less self-sacrificing definition of love and were more likely to end the relationship at early signs of violence.

***"The more I do the worse I am."*** As abuse became a regular part of the relationship, women's definition of the situation shifted to one in which their sacrifices and accommodations were no longer effective in pacifying their partners. Over time rewards and punishments from the partner were seen as not only incongruent but unpredictable, making it increasingly difficult to avoid abuse. As one California resident described, ''He's . . . punching me, telling me to get away from him, then . . . I'm the only woman he wants'' (Langford, 1998, p. 173). Women's commitment—often cemented at this point by children and economic dependence—was reinforced by the lack of acceptable alternatives or assistance, especially for women in rural or minority communities. An African American woman explained, ''He'd say to me, 'Are you going to put the man on me? How you going to bring white folks into our stuff?' It was . . . unthinkable that you betray your own'' (Moss et al., 1997, p. 444).

The hope for the relationship amid this redefinition of love was preserved by a shrinking of self. In this critical strategy, well named by Landenburger (1989), women submerged their individual worth for the sake of the relationship. They relinquished once-valued parts of their identities, such as profession, physical attractiveness, intelligence, and membership in family of origin or community, in interactions with the violent partner and eventually in their own self-estimations. Shrinking of self involved restraining one's emotional responses in order to avoid flare-ups, perform unwanted tasks, or accept undeserved punishment. A rural Canadian woman recalled, ''I had taken his ways into me. I molded myself into the situation instead of still keeping my own self'' (Merritt-Gray & Wuest, 1995, p. 403). A woman from the southeastern United States explained,

> The more I do, it's like the worse I am. That's what I just can't understand . . . ..He's yelling. You don't know where your head is gonna lie. So you just sit there going, 'Anything you say.' (Clarke, Pendry, & Kim, 1997, p. 496)

Enduring in this phase was enabled by shrinking of self and consisted of intentionally turning off awareness of the incongruity and seriousness of the situation in order to survive in the immediate present. This differed from the classic definition of denial, in which suppression of awareness is an unconscious process. Enduring was used during beatings or emotional abuse and also on a broader level in blocking awareness of the level of danger in the overall situation.

Rationalizing was another cognitive strategy of enduring, in which women sought logical explanations for their partners' abusive behavior and the woman's inability to control it. A woman from the U.S. Northwest remembered, ''I know I didn't deserve it but then why was it happening? I mean I must have been contributing somehow'' (Landenburger, 1989, p. 217). This cognitive strategy could function only in the context of the diminished sense of self. Women who did not resort to shrinking of self ended the relationship rather than using rationalizing to make sense of it.

Monitoring (Langford, 1996) was an important strategy, in which women were continually watchful for early signs of impending abuse. The intensity of this activity is revealed in the level of detail they observed, as indicated by a California woman: ''It's one of the warnings you get is the eyes. 'Cause he could change . . . from sweet to 'I don't give a shit about you bitch' '' (Langford, p. 376). Monitoring enabled the next strategy, which was anticipatory maneuvering. Women went to great lengths to make arrangements and behave in ways that would minimize the risk of provoking the partner, as this women from the U.S. Northeast explained:

> I'd fly down the highway coming from work, almost having an accident, hurrying to get the kids and get home and get dinner for this man who'll say, ''You're five minutes late.'' (Germain, 1994, p. 215–216)

The consequences of this phase were central to the perpetuation of the violent relationship. Demoralization occurred: ''You are just totally lost. It was like my soul was gone'' (Germain, 1994, p. 404). Substance abuse and depression were sequelae of demoralization for some women. Immobilization, by terror, isolation, control by their partners, and social pressure, was another important consequence: ''I could not move and I used to think, 'My God! I am going crazy, this is crazy, my life is crazy, and there is nothing I can do about it' '' (Pilowsky, 1993, p. 92). Acceptance of trade-offs was the third consequence, in which women accepted current abuse as not as bad as the effect of leaving the relationship. A Hispanic woman in Canada reported, ''I wanted the children to have a home. . . . Even if there were fights, they still had a family . . . the support of a father'' (Pilowsky, 1993, p. 108). A fourth consequence was the development of skills of hiding the abuse from children, parents, other family, neighbors, and strangers to avoid outside interference and subsequent retaliation from the abuser.

***"I had enough."*** The third phase of enduring love was a turning point, when what had previously been defined as within the bounds of a loving relationship could no longer be seen as such. An internal process of redefinition began, and the kind of enduring necessary to reach one's goals became increasingly seen as self-preserving rather than self-effacing. In the enduring love paradox, however, this phase of increasing realization of the intolerability of the situation was permeated by emotional pain, as women considered losing security and family status. For many women the old ideal of love endured despite the necessity of self-preservation.

This turning point could be subtle or sudden and was associated with one or more of the following: deliberate intervention from the outside; inadvertent exposure of the abuse, leading to framing the situation in a new way; an act by the partner so egregious that its wrongness became undeniable; an internal accumulation of hurt and disillusionment that finally outweighed the hope of improvement; or an increase in self-worth because of outside experiences that made independence seem possible. A Canadian woman described a subtle shift:

> I really liked what I was doing [job]. . . . I got to the point where I could almost see that he was taking everything away from me. He owned me, controlled me and the job was the only thing I had. (Merritt-Gray & Wuest, 1995, p. 407)

An eastern U.S. woman reported an abrupt realization: ''He . . . would always choke me. The last two times everything went black and I just figured one of these times I'd go into laryngospasm and that would be the end. I had enough'' (Germain, 1994, p. 203). Threats to children were a common prompt to redefine the situation. A Hispanic woman recalled, ''I told myself, 'My children cannot grow up like this. . .cannot develop themselves in normal ways. . . . He will

never change.' . . . I had to leave him'' (Pilowsky, 1993, p. 112).

As the old kind of love, with its endless submission and self-sacrifice, was redefined as unacceptable, women began to use strategies of resistance (standing up to the violence and the control of their behavior), divestment (reducing hope of a romantic resolution and decreasing emotional commitment to the violent partner), and withdrawal from the relationship (spending time outside the home, pursuing personal goals, or creating new friendships or romantic liaisons). They began to build psychic resources and instrumental skills. This was a new kind of enduring: persisting in going through the motions of the relationship and steeling themselves to the persuasive force of now-questioned definitions of love while considering an independent life. To varying degrees women began to pursue alternatives, such as employment, education, and outside emotional support, along with leaving the violent relationship altogether, all of which had seemed invisible, impossible, or unacceptable before this point.

Even when women were ready to seek assistance, help was not always forthcoming. Professionals, clergy, and family often encouraged women to stay with the abuser or were blind to their requests for support. Women's resolve sometimes wavered when they faced frightening obstacles and/or revived their commitment to earlier ideals of love. Some women required many attempts before their strength and resources were adequate for leaving. The greater the degree of psychic and practical preparation for independent living, the greater was the likelihood a woman would stay away permanently. The consequences of having had enough were anger, increasing emotional disengagement, and gradual regrowth of self.

***"I was finding me."*** The fourth phase, in which women ventured to establish a life outside the relationship, brought new difficulties that threatened women's perseverance and led some to return to the violent partner. Enduring love took on a new meaning outside the relationship. The persistent bond with the abuser and the dream of an intact family were gradually relinquished, and new strategies were developed to hold on and persevere for the sake of a new, fragile kind of love, a love of what was morally right and healthy for children and self.

Outside the relationship, the social and personal landscape was barren and dangerous. Abusers became less predictable; their desire for vengeance and retaliation escalated the risk of homicide, while the women were no longer there on a daily basis to monitor or pacify them. Children became difficult to manage as they reacted to their insecure situation with behaviors learned in violent homes. Personal and socioeconomic resources for rebuilding their lives were depleted by the emotional traumas of leaving in a state of still-diminished selfhood and removing children from their home, usually to a type of context such as a shelter in which women had very little autonomy, money, or confidence. Sources offering help such as shelters and public assistance sometimes brought new restrictions and disappointments: ''The lady at the food stamp office wanted information on my husband. She said I had to count his income 'cause we were still married. She didn't understand. . . . She just wouldn't listen'' (Newman, 1993, p. 111). The hurt of the past was long-lasting and included effects on the children. Moreover, the children served as a permanent bond to the abuser, requiring ongoing emotional and physical self-protection. Some women found their abusive relationships less frightening or oppressive than the outside world and returned to their abusers, perhaps to leave again at a later time.

Women's self-definitions at this time revealed the lasting impact of the abuse. A European American woman explained, ''If I had to, I would work 24 hours a day. I was finding me, 'cause . . . you lose yourself'' (Moss et al., 1997, p. 442).

> I . . . have no sense of myself functioning in the world 'cause it's really terrifying. Sometimes I want to run to a mirror to look to see if I'm still there, but I can't stand to look at myself. (Langford, 1998, p. 175)

Strategies in this phase included restructuring a new safe environment, redefining self and goals, and letting go of old love. An African American woman redefined her racial solidarity: ''If you are a sister, you don't tell on the Black man . . . but . . . I don't want to choose between am I Black or am I a woman. I am both and I won't choose'' (Moss et al., 1997, p. 446). Women took stock of their losses and gains and began a search for meaning and a new understanding of their authentic self. For women who remained away from their abusers, growth in sense of self and their independent potential gradually outpaced their emotional pain. A woman in an eastern U.S. shelter remarked, ''I've learned what it means to be and feel human again'' (Germain, 1994, p. 210).

In the continuing paradox of enduring love, fragments of the original attachment sometimes

endured and caused women ongoing pain and doubt as they embarked on their solo paths. Consequences of ''finding me,'' of enduring hardship for the love of self and children, evolved over the long term. They included dramatic personal growth despite ongoing grief for losses, a long climb toward economic self-sufficiency, and, for some, a realization of the need for therapies to counteract self-destructive processes such as addiction that had resulted from enduring abuse.

## DISCUSSION

Enduring love is a model of women's experience in violent relationships that draws from a variety of contexts and integrates psychological, sociocultural, and practical conditions. The contribution of the present analysis is the consolidation of conceptual components from different studies and the bringing together of a broad spectrum of data in support of this analysis. Enduring love should not be viewed as a new or original theory, in that it was built from the concepts of its constituent studies and other qualitative work (Morse, 2000). The forms of enduring described here show little difference between ''enduring to survive'' when faced with physical harm and ''enduring to live'' when faced with unbearable psychological stress (Morse & Carter, 1996). These parallels may represent common human responses to extreme threat.

The novelty of this grounded formal theory approach invites challenge or refutation. The findings are limited by the nature of qualitative synthesis, in that details of the individual women's circumstances were not fully portrayed, and undetected influences of the original investigators were unavoidably folded into the analysis. Another drawback is the risk of mixing experiences that are culturally or historically incomparable for reasons undetectable to the subsequent analyst (Sandelowski, Docherty, & Emden, 1997). Any theory is a generalization and cannot claim to address the experiences of women not yet heard from or of those minimized in the original reports. It could not be determined with any certainty how the degree of acculturation of immigrant women affected their experience of abuse, whether responses of friends or health professionals were causes or corollaries of women's shifting perspectives on their abuse, whether societies outside North America differ in their expectations of a woman's commitment to a violent partner, or whether popular awareness of the dynamics of domestic violence in recent years has increased women's ability to recognize abuse and leave relationships. Important cultural perspectives are still unreported, including those of immigrant Asian women (Lee, 2000).

Nonetheless, the theory is echoed in many qualitative and quantitative reports beyond those analyzed. In a review of qualitative studies of women's experiences of abuse that included some of the studies analyzed here, Sleutel (1998) noted a striking consistency of descriptions across studies. Abusive relationships were described as prisonlike. Abuse was devastating to women's self-identity and led to feeling numb, confused, degraded, and betrayed. Women rationalized the abuse using denial, minimization, and redefinition of violence as a sickness. They redefined their situations in response to catalytic events or changes that shattered prior rationalizations, and in the process of leaving they grieved the loss of a dream while strengthening their resolve to survive outside the relationship. Sleutel's observations strongly parallel the description of the abuse experience in the present analysis. The model presented here goes beyond this descriptive level to theorize about conditions and mechanisms by which women invest in and detach from violent relationships to varying degrees.

The presence of love in violent relationships, along with its culturally sanctioned manifestations of violence and control, is supported in qualitative studies from a range of disciplines in New Zealand (Towns & Adams, 2000), Britain (Kelly, 1988), and the United States (Farrell, 1996; Reissman, 1989). Support also is strong across nursing, family therapy, public health, and social work research for women's self-redefinition and situational redefinition within abusive relationships (Bartle & Rosen, 1994; Kelly; Lempert, 1994; Riessman; Smith, Tessaro, & Earp, 1995). Support for women's strategies of enduring, monitoring, and rationalizing within abusive relationships is found in phenomenological studies of sexual and physical violence (Draucker, 1999; Hage, 1998) and in an Israeli study (Eisikovits & Buchbinder, 1999).

Validation of the shifts in self-concept and situational definition that led women to leave violent relationships is found in anthropological (Birns, 1997), nursing (Curnow, 1997; Wessel & Campbell, 1997), and social work research (Davis & Srinivasan, 1995). Allen (1997) described the Stages of Unbonding Scale, which includes the subscales Immersion with Partner, Questioning Affectional Attachment, Imaging

Oneself Without Partner, and Reclaiming the Self, all of which are represented in the present study. Relationships among these subscales and other situational predictors support the links outlined in the present theory. Cross-ethnic similarities in Hispanic and European American women's experiences have been supported by studies in social work and human development (Acevedo, 2000; Fernandez-Esquer & McCloskey, 1999).

These findings provide health professionals with insights into abused women's views and strategies. Many abused women have chosen to conceal their abuse from health care providers, not only because of fear of retaliation from their abusers but also because of perceived time pressure and provider lack of interest or sympathy (Gerbert et al., 1996; McMurray & Moore, 1994). Providing safe places for disclosure through routine sensitive screening and response can reduce the incidence of subsequent violence (Parker, McFarlane, Soeken, Silva, & Reel, 1999). Health professionals can pay increased attention to women's depression and substance use as correlates of intimate partner violence (Curry, 1998; McFarlane, Parker, & Soeken, 1996) that may increase women's immobilization (Davis, 1997), which in turn may lead to lack of self-care agency, a strong predictor of health risk for battered women (Campbell & Soeken, 1999). Future research should include further investigation of shrinking of self, demoralization, and immobilization as increasing women's health risks in violent relationships, with the eventual testing of interventions to reduce these high-risk conditions.

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# DIFFERENTIATION AMONG TYPES OF INTIMATE PARTNER VIOLENCE: RESEARCH UPDATE AND IMPLICATIONS FOR INTERVENTIONS

Joan B. Kelly
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A growing body of empirical research has demonstrated that intimate partner violence is not a unitary phenomenon and that types of domestic violence can be differentiated with respect to partner dynamics, context, and consequences. Four patterns of violence are described: Coercive Controlling Violence, Violent Resistance, Situational Couple Violence, and Separation-Instigated Violence. The controversial matter of gender symmetry and asymmetry in intimate partner violence is discussed in terms of sampling differences and methodological limitations. Implications of differentiation among types of domestic violence include the need for improved screening measures and procedures in civil, family, and criminal court and the possibility of better decision making, appropriate sanctions, and more effective treatment programs tailored to the characteristics of different types of partner violence. In family court, reliable differentiation should provide the basis for determining what safeguards are necessary and what types of parenting plans are appropriate to ensure healthy outcomes for children and parent–child relationships.

***Keywords:*** *domestic violence*; *differentiation among types of intimate partner violence*; *coercive controlling violence*; *situational couple violence*; *gender and violence*; *implications for interventions and family court*

## INTRODUCTION

When violence between intimate partners emerged as a recognizable issue in our society in the mid-1970s (Straus, Gelles, & Steinmetz, 1981; Walker, 1979), empirical knowledge of this social, psychological, and legal phenomenon was very limited. As advocates for women organized shelters across the nation to provide safety and assistance for abused women, clinical information emerged that described patterns of severe physical and emotional abuse. The victims were most notably described by Walker (1979) and others as "battered women," and the male perpetrators were labeled "batterers." This early and important recognition and conceptualization of intimate partner violence has guided policy, law, education, and interventions to date. The term "domestic violence" was adopted by women's advocates to emphasize the risk to women within their own family and household, and over time the term became synonymous with battering. Family sociologists also studied violence in families and between intimate partners in the 1970s and 1980s, typically in large nationally representative samples, and this information diverged significantly from shelter, hospital, and police data with respect to incidence, perpetrators, severity, and

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context. In particular, large-scale studies seemed to indicate that women were as violent as men in intimate relationships (Archer, 2000). Domestic violence advocates and service providers largely ignored or strongly rejected these studies because they were so at odds with their experiences in the shelters, hospitals, and courts. Advocates also feared that what they viewed as misinformation (that women were as violent as men) would dilute society's focus on and funding of services and education for battered women (Pleck, Pleck, Grossman, & Bart, 1978). Thus, until recently, the two groups most concerned with intimate partner violence, feminist activists/practitioners and family sociologists, have rarely intersected, and misunderstanding and acrimonious debate have interfered with a more constructive and unified approach to what remains a serious societal problem for intimate partners and their children.

Over the past decade, a growing body of empirical research has convincingly demonstrated the existence of different types or patterns of intimate partner violence (Graham-Kevan & Archer, 2003; Holtzworth-Munroe, Meehan, Herron, Rehman, & Stuart, 2000; Johnson, 1995, 2006; Johnson & Ferraro, 2000; Johnston & Campbell, 1993; Leone, Johnson, Cohan, Lloyd, 2004). This information has far-reaching implications for court processes, treatment, educational programs for professionals, and for social and legal policy. Among some social scientists, it is no longer considered scientifically or ethically acceptable to speak of domestic violence without specifying the type of partner violence to which one refers (Johnson, 2005a). Among women's advocates, as well, there are those who recognize that long-term adherence to the conviction that all domestic violence is battering has hindered the development of more sophisticated assessment protocols and treatment programs that may identify and address problems of violence for both men and women more effectively (Pence & Dasgupta, 2006).

This article first discusses the value of differentiation among types of intimate partner violence, concerns raised by advocates about such differentiation, and the various terminologies used under the canopy of domestic violence. It then describes the underlying reasons for the confusion and heated controversy regarding gender and violence and focuses on empirical research that supports differentiation among four types of intimate partner violence (Coercive Controlling Violence, Violent Resistance, Situational Couple Violence, and Separation-Instigated Violence). The ongoing controversy regarding the prevalence of female violence will be considered in these contexts. A fifth type of violence, Mutual Violent Control (between two coercive controlling violent partners), has been described by Johnson (2006), but little is known about its frequency, features, and consequences, and it will not be described here. Implications of the overall body of knowledge are discussed, in particular the need to rethink current one-size-fits-all policies, and the need for more sophisticated assessment and treatment interventions utilized by criminal, civil, and family courts. There is consideration as well of the meaning of violence differentiation research for custody and access disputes, parenting plans, and parent–child relationships, and whether violence is likely to continue or cease after parents separate and divorce.

## POTENTIAL VALUE OF DIFFERENTIATION

The value of differentiating among types of domestic violence is that appropriate screening instruments and processes can be developed that more accurately describe the central dynamics of the partner violence, the context, and the consequences. This can lead to better

decision making, appropriate sanctions, and more effective treatment programs tailored to the different characteristics of partner violence. In family court, reliable differentiation of intimate partner violence is expected to provide a firmer foundation for determining whether parent–child contact is appropriate, what safeguards are necessary, and what type of parenting plans are likely to promote healthy outcomes for children and parent–child relationships (Jaffe, Johnston, Crookes, & Bala, 2008). It is possible, as well, that increased understanding and acceptance of differentiation among types of domestic violence by the broad spectrum of service providers, evaluators, academics, and policy makers will diminish the current turf and gender wars and lead to more effective partnerships and policies that share the common goal of reducing violence and its destructive effects on families.

Although social scientists understand that humans and their circumstances are inherently messy and that there will always be individuals, couples, and situations that do not fit into major identified patterns, this fundamental understanding can sometimes be lost in the translation to practice. Thus, a central concern of women's advocates is that research differentiating among types of intimate partner violence will lead to the reification or misapplication of typologies and that battering will, as a result, be missed—with potentially lethal results. Advocates also fear that typical information available to the court for decision making is too limited to make effective distinctions and that effective screening processes and appropriate assessment tools are not available or in place.

## TYPES AND TERMINOLOGIES: SEARCHING FOR ACCURATE DESCRIPTORS

When practitioners, researchers, and policy makers gather together, the term domestic violence has been observed to mean different things to different participants. On the one hand, gender-neutral laws have been enacted that identify any act of violence by one partner against another as domestic violence and, for many social scientists as well, the term refers to any violence between intimate partners. On the other hand, for many in the field, domestic violence describes a coercive pattern of men's physical violence, intimidation, and control of their female partners (i.e., battering). The terms domestic violence and battering have been used interchangeably by women's advocates, domestic violence educators, and service providers for three decades, based on their belief that all incidents of domestic violence involve male battering.

We will use the term Coercive Controlling Violence for such a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners. This pattern is familiar to many readers through the Power and Control Wheel (Pence & Paymar, 1993) (see Figure 1), a model that is used extensively in women's shelters and support groups. Many women's advocates use the term domestic violence for this pattern. For example, the National Domestic Violence Hotline (USA) defines domestic violence as follows: "Domestic violence can be defined as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner" (http://www.ndvh.org/educate/what_is_dv.html). This is probably the pattern that comes to mind for most people when they hear terms such as wife beating, battering, spousal abuse, or domestic violence. In one of the early typologies of intimate partner violence, Johnson (1995) used the term Patriarchal Terrorism for this pattern. This label was later changed to "Intimate Terrorism" in recognition that not all coercive control was rooted in patriarchal


**Figure 1** The Power and Control Wheel.

structures and attitudes, nor perpetrated exclusively by men (see Johnson, 2006, p. 1015, note 2, for larger discussion). In a discussion of domestic violence terminology at the Wingspread Conference (2007)[1], some participants expressed reluctance to adopt or use the term Intimate Terrorism in courts, and in this and a companion article, the term Coercive Controlling Violence has been adopted (Jaffe et al., 2008).

Violent Resistance (to a violent, coercively controlling partner) has been described elsewhere as Female Resistance, Resistive/Reactive Violence, and, of course, Self-Defense (Pence & Dasgupta, 2006). Until recently, many women's advocates and clinical researchers have characterized all violence perpetrated by women in intimate relationships as female resistance (e.g., Walker, 1984; Yllö & Bograd, 1988). They have been reluctant to acknowledge that some women's violence occurs in the context of nonviolent partners or in mutual violence that does not have coercive control as a central dynamic. The term Violent Resistance posits the reality that both women and men may, in attempts to get the violence to stop or to stand up for themselves, react violently to their partners who have a pattern of Coercive Controlling Violence.

Johnson's term, Situational Couple Violence, is used here to identify the type of partner violence that does not have its basis in the dynamic of power and control (Johnson & Leone, 2005). Johnson (1995) originally used the term Common Couple Violence, but abandoned it because many readers reacted to it as minimizing the dangers of such violence. This violence is similar to Male-Controlling Interactive Violence (described by Johnston & Campbell, 1993) and Conflict Motivated Violence (Ellis & Stuckless, 1996; Ellis, Stuckless, & Wight, 2006).

To describe violence that first occurs in the relationship at separation, the term Separation-Instigated Violence is used. Johnston and Campbell (1993) called it Separation-Engendered Violence, but some participants in the Wingspread Conference felt that "engendered" might

be confusing in an area in which the role of gender is central to some explanations of intimate partner violence. It is important to differentiate this type of violence from *continuing* violence that occurs in the context of a separation. It is often the case that Situational Couple Violence continues through the separation process and that Coercive Controlling Violence may continue or even escalate to homicidal levels when the perpetrator feels his control is threatened by separation.

Until recently, regardless of the label used, the majority of research on domestic violence has focused on male violence and the women victims of this violence. The results of large survey studies were used to point to the prevalence and consequences of intimate partner violence. However, research methodologies have not, by and large, asked the questions that might distinguish among types of intimate partner violence. The original and revised Conflict Tactics Scales (CTS; Straus, 1979; Straus, Hamby, Boney-McCoy, & Sugarman, 1996) have been the most common research measures of domestic violence, and the 1996 version includes separate measures of psychological dimensions (cursing, demeaning, isolating, coercion, threats, stalking, etc.), physical violence (slapping, shoving, kicking, biting, choking, mutilation, etc.), sexual violence (raped, forced unwanted sexual behaviors), and financial control (controlling purchases, withholding funds, etc.). The most common use of these scales, however, has been to identify specific violent acts rather than more general patterns of behavior, and the physical violence items of the CTS are still the most widely used approach to assessing levels of domestic violence.

## CONTROVERSIES REGARDING VIOLENCE AND GENDER

For over two decades, considerable controversy has centered on whether it is primarily men who are violent in intimate relationships or whether there is gender symmetry in perpetrating violence. Proponents of both viewpoints cite multiple empirical studies to support their views and argue from different perspectives (e.g., see Archer, 2000; Dutton, 2005; Holtzworth-Munroe, 2005; Johnson, 2001, 2005a, 2006; Kline, 2003; Straus, 1999). More recently, efforts have been made to build bridges between the research and interpretations of the feminist sociologists and the family violence researchers, including family sociologists (e.g., Anderson, 1997). These two viewpoints can be reconciled largely by an examination of the samples and measures used to collect the contradictory data and the recognition that different types of intimate partner violence exist in our society and are represented in these different samples. Johnston and Campbell (1993) and Johnson (1995) argued that domestic violence was not a unitary phenomenon and that different types of partner violence were apparent in different contexts, samples, and methodologies. This observation was also made by Straus (1993, 1999), who asserted that researchers were studying different populations and that most likely these different forms of violence had different etiologies and gender patterns. Other researchers (e.g., Holtzworth-Munroe & Stuart, 1994; Babcock, Green, Webb, & Yerington, 2005) have come to a similar conclusion.

Based on hundreds of studies, it is quite apparent that both men and women are violent in intimate partner relationships. There is gender symmetry in some types of intimate partner violence, and in some relationships women are more frequently the aggressors than their partners, including with their nonviolent partners. It is also the case that men and women are injured and experience fear in situations where the violence is frequent and severe, although the extent of symmetry in severity of injuries and fear is disputed based on different studies.

Data in samples obtained primarily from women's shelters, court-mandated treatment programs, police reports, and emergency rooms are more likely to report the type of physical and emotional violence that we are calling Coercive Controlling Violence. It is characterized by power and control and more often results in injuries to women. In these samples, the violence is asymmetric and perpetrated largely by men against their partners, although critics argue that coercively controlling violent women are either ignored, not recognized, infrequently arrested, or not ordered to treatment programs (Dutton, 2005).

In contrast, large-scale survey research, using community or national samples, reports gender symmetry in the initiation and participation of men and women in partner violence. This violence is not based on a relationship dynamic of coercion and control, is less severe, and mostly arises from conflicts and arguments between the partners (Johnson, 2006). These partners are most likely involved in Situational Couple Violence; are less likely to need the services of hospitals, police, and shelters; and therefore are a relatively small minority of individuals in studies using shelter and agency samples. However, Situational Couple Violence is generally more common than Coercive Controlling Violence and therefore dominates the violence in large survey samples. Incidence of Coercive Controlling Violence may be further lowered in surveys due to a high refusal rate among such partners, because both perpetrator and victim are reluctant to admit the violence for fear of discovery or retribution (for a larger discussion of this sampling issue, see Johnson, 2006).

Using a 1970s data set and a control tactics scale to distinguish controlling violence from noncontrolling violence, Johnson (2006) found that 89% of the violence in a survey sample was Situational Couple Violence and 11% was Coercive Controlling Violence. The Situational Couple Violence was roughly gender symmetric. In contrast, in the court sample, only 29% of the violence was Situational Couple Violence, and 68% was Coercive Controlling Violence which was largely male perpetrated. Similarly, in the shelter sample, 19% of the violence was Situational Couple Violence and 79% was Coercive Controlling Violence, which again was largely male perpetrated.

Thus, when family sociologists and/or advocates for men claim that domestic violence is perpetrated equally by men and women, referring to the data from large survey studies, they are describing Situational Couple Violence, not Coercive Controlling Violence. As will be discussed, these two types of violence differ in significant ways, including causes, participation, consequences to participants, and forms of intervention required.

## COERCIVE CONTROLLING VIOLENCE

Researchers identify Coercive Controlling Violence by the pattern of power and control in which it is embedded (Johnson, 2008; Graham-Kevan & Archer, 2003). The Power and Control Wheel (see Figure 1) provides a useful graphical representation of the major forms of control that constitute Coercive Controlling Violence: intimidation; emotional abuse; isolation; minimizing, denying, and blaming; use of children; asserting male privilege; economic abuse; and coercion and threats (Pence & Paymar, 1993). Abusers do not necessarily use all of these tactics, but they do use a combination of the ones that they feel are most likely to work for them. Because these nonviolent control tactics may be effective without the use of violence (especially if there has been a history of violence in the past), Coercive Controlling Violence does not necessarily manifest itself in high levels of violence. In fact, Johnson (2008) has recently argued for the recognition of "incipient" Coercive Controlling Violence (cases in which there is a clear pattern of power and control

but not yet any physical violence), and Stark (2007) has argued, even more dramatically, that the focus in the law should shift from the violence itself to the coercive control as a "liberty crime."

Coercive Controlling Violence is the type of intimate partner violence encountered most frequently in agency settings, such as law enforcement, the courts (criminal, civil, and family), shelters, and hospitals. Johnson, using Frieze's Pittsburgh data, found that 68% of women who filed for Protection from Abuse orders and 79% of women who contacted shelters were experiencing Coercive Controlling Violence (Frieze & Browne, 1989; Johnson, 2006). This predominance of Coercive Controlling Violence in agencies probably accounts for the tendency of agency-based women's advocates to see all domestic violence as Coercive Controlling Violence, but it is important to note that a great many cases even in these agency contexts involve Situational Couple Violence (29% and 19% in the courts and shelters, respectively, for the Pittsburgh data).

In heterosexual relationships, Coercive Controlling Violence is perpetrated primarily by men. For example, Johnson (2006) found that 97% of the Coercive Controlling Violence in the Pittsburgh sample was male-perpetrated. Graham-Kevan and Archer (2003) report that 87% of the Coercive Controlling Violence in their British sample was male-perpetrated. The combination of this gender pattern in Coercive Controlling Violence with the predominance of Coercive Controlling Violence in agency settings accounts for the consistent finding in law enforcement, shelter, and hospital data that intimate partner violence is primarily male-perpetrated (Dobash, Dobash, Wilson, & Daly, 1992). However, it is important not to ignore female-perpetrated Coercive Controlling Violence. Although it may represent only one-seventh or so of such violence (if you accept Graham-Kevan and Archer's numbers, or 3% if you accept Johnson's numbers), it is necessary that we recognize it for what it is when we make decisions about interventions.

While there is very little systematic research on women's Coercive Controlling Violence, there are a few qualitative studies that clearly identify it in both same-sex (Renzetti, 1992) and heterosexual relationships (Hines, Brown, & Dunning, 2007; Migliaccio, 2002). For example, Hines et al. (2007) found that 95% of the men calling the Domestic Abuse Helpline for Men reported that their partners tried to control them. And the tactics used by these women included all of the tactics identified in the Power and Control Wheel (with "use of the system" substituted for "assertion of male privilege"). Renzetti's (1992) findings for lesbian relationships are similar, with the addition of some control tactics that are unique to same-sex relationships, such as threats of outing. Because of the paucity of research on women's Coercive Controlling Violence, the quantitative data reviewed next will focus on men.

Although Coercive Controlling Violence does not *always* involve frequent and/or severe violence, on average its violence is more frequent and severe than other types of intimate partner violence. For example, for the male perpetrators in the Pittsburgh data, the median number of violent incidents was 18. In 76% of the cases of Coercive Controlling Violence the violence had escalated over time, and 76% of the cases involved severe violence (Johnson, 2006). The combination of these higher levels of violence with the pattern of coercive control that defines Coercive Controlling Violence produces a highly negative impact on victims.

A number of recent studies considering injuries resulting from different types of partner violence show a high likelihood that a victim will be injured or even severely injured by men's Coercive Controlling Violence (Johnson, 2008; Johnson & Leone, 2000; Leone, Johnson, Cohan, & Lloyd, 2004). For example, Johnson (2008) reports that 88% of women experiencing Coercive Controlling Violence in the Pittsburgh study had been injured in the

most violent incident and 67% had been severely injured. Using data on only one incident (the most recent), Johnson and Leone (2000) found that 32% of women experiencing Coercive Controlling Violence in the National Violence Against Women Survey (NVAWS) had been injured, 5% severely. Campbell and Soeken (1999) report in their literature review that nearly half of physically abused women also report forced sex and others report abusive sex. In addition to the injuries produced directly by abusive and violent sex, there is increased risk of sexually transmitted diseases, including HIV, and abused women who have been sexually assaulted report higher incidence of gynecological problems (Campbell & Soeken, 1999).

It is well established that homicide rates are higher for women who have separated from their partners than for women in intact relationships (Hotton, 2001; Wilson & Daly, 1993), and this heightened risk of homicide following a separation is not found for men (Johnson & Hotton, 2003). Thus, in the family courts, one major concern is the potential for further injury—or death.

Research on dangerousness and lethality has established that for violent male partners control issues are an important predictor of continued or increased violence. The question addressed in this research is: Given the fact that a woman has already been attacked by her intimate partner, what predicts the likelihood that she will be attacked again or even killed? One of the major predictors of continued violence is the presence of the controlling behaviors that define Coercive Controlling Violence. For example, one study comparing victims of intimate partner femicide with a control group of nonlethally abused women found that 66% of the femicide victims had high scores on a scale of partner's controlling behaviors, compared with 24% of the abused control group (Campbell et al., 2003). A qualitative study of 30 women who had survived an attempted intimate femicide found that 83% "described examples of their partners using stalking, extreme jealousy, social isolation, physical limitations, or threats of violence" as a means of controlling them (Nicolaidis et al., 2003, p. 790). It is also important to note that, although 10 of these women had no history of repeated physical abuse by their partners, 8 of those 10 did have partners who *had* been controlling. It is clear that coercive control must be considered a major risk factor for continued or increased violence.

It is not unusual for victims of Coercive Controlling Violence to report that the psychological impact of their experience is worse than the physical effects. The major psychological effects of Coercive Controlling Violence are fear and anxiety, loss of self-esteem, depression, and posttraumatic stress. The fear and anxiety are well documented in many qualitative studies of Coercive Controlling Violence (e.g., Kirkwood, 1993; Dobash & Dobash, 1979; Ferraro, 2006), and quantitative studies confirm that fear and anxiety are frequent consequences of intimate partner violence (Sackett & Saunders, 1999; Sutherland, Bybee, & Sullivan, 1998).

There is considerable evidence establishing the effects of Coercive Controlling Violence on self-esteem, much of it derived from the qualitative data collected from women using the services of shelters. Kirkwood devotes large parts of her research report to issues of self-esteem, reporting that "all of the women expressed the view that their self-esteem was eroded as a result of the continual physical and emotional abuse by their partners" (Kirkwood, 1993, p. 68). Chang (1996) saw this loss of self-esteem as so central to the experience of psychological abuse that she used a quote from one of her respondents as the title of her book, *I Just Lost Myself*.

Depression is considered by many to be the most prevalent psychological effect of Coercive Controlling Violence. Golding's (1999) analysis of the results from 18 studies of

battering and depression found that the average prevalence of depression among battered women was 48%. However, because none of these studies distinguished between Coercive Controlling Violence and other types of partner violence, this number most certainly understates the effects of Coercive Controlling Violence. When Golding separated out studies done with shelter samples (likely to be dominated by Coercive Controlling Violence), the average prevalence of depression was 61%.

Nightmares, flashbacks, avoidance of reminders of the event, and hyperarousal (i.e., the major symptoms of posttraumatic stress syndrome) have more recently been recognized as consequences of domestic violence. In a study of survivors of domestic violence who were receiving services from shelters or other agencies, 60% of the women met criteria for a diagnosis of posttraumatic stress syndrome (Saunders, 1994). Johnson and Leone (2000), using the NVAWS data, found that victims of Coercive Controlling Violence were twice as likely as victims of Situational Couple Violence to score above the median on a scale of posttraumatic stress symptoms.

## VIOLENT RESISTANCE

The research on intimate partner violence has clearly indicated that many women resist Coercive Controlling Violence with violence of their own. For example, Pagelow's (1981) early study of women who had sought help in shelters in Florida and California found that 71% had responded to abuse with violence of their own. Although in the early literature such violence was generally referred to as "self-defense," we prefer the term Violent Resistance because self-defense is a legal concept that has very specific meanings that are subject to change as the law changes and because there are varieties of violent resistance that have little to do with these legal meanings of self-defense (Johnson, 2008).

Nevertheless, much Violent Resistance does meet at least the common-sense definition of self-defense: violence that takes place as an immediate reaction to an assault and that is intended primarily to protect oneself or others from injury. This was the largest category of violence identified by Miller (2005) in a qualitative study of 95 women who had been court mandated into a female offenders program after arrest for domestic violence. Miller classified an incident as "defensive behavior," which constituted 65% of her cases, if the woman had been responding to an initial harm or a threat to her or her children.

Much of women's Violent Resistance does not lead to encounters with law enforcement because it is so short-lived. For many violent resistors, the resort to self-protective violence may be almost automatic and surfaces almost as soon as the coercively controlling and violent partner begins to use physical violence himself. But in heterosexual relationships, most women find out quickly that responding with violence is ineffective and may even make matters worse (Pagelow, 1981, p. 67). National Crime Victimization Survey data indicate that women who defend themselves against attacks from their intimate partners are twice as likely to sustain injury as those who do not (Bachman & Carmody, 1994). Although there is little data on men's Violent Resistance, one study substantiated its possible existence. In that study of men calling an abuse hotline, the following comment was reported: "I tried to fight her off, but she was too strong" (Hines, Brown, & Dunning, 2007, p. 66).

The Violent Resistance that gets the most media attention is that of women who murder their abusive partners. The U.S. Department of Justice reports that, in 2004, 385 women murdered their intimate partners (Fox & Zawitz, 2006). Although some of these murders may have involved Situational Couple Violence that escalated to a homicide, most are

committed by women who feel trapped in a relationship with a coercively controlling and violent partner. In comparing women who killed their partners with a sample of other women who were in abusive relationships, Browne (1987) found that there was little *about the women* that distinguished them from those who had not murdered their partners. What distinguished the two groups was found in the behavior of the abuser. Women who killed their abusers were more likely to have experienced frequent attacks, severe injuries, sexual abuse, and death threats against themselves or others. They were caught in a web of abuse that seemed to be out of control. Seventy-six percent of Browne's homicide group reported having been raped, 40% often. Sixty-two percent reported being forced or urged to engage in other sexual acts that they found abusive or unnatural, one-fifth saying this was a frequent occurrence. For many of these women, the most severe incidents took place when they threatened or tried to leave their partner. Another major factor that distinguished the homicide group from women who had not killed their abusive partners is that many of them had either attempted or seriously considered suicide. These women felt that they could no longer survive in this relationship and that leaving safely was also impossible. These findings are confirmed in a recent study of women on trial for, or convicted of, attacking their intimate partners (Ferraro, 2006).

The dominant image of women who kill their partners presented by the media is one in which a desperate woman plans the murder of a brutal husband in his sleep or at some other time when she can catch him unawares. In reality, most of these homicides take place while a violent or threatening incident is occurring (Browne, Williams, & Dutton, 1999, p. 158). Although a few of Browne's (1987) cases involve a plot to murder the abuser, or a wait following an assault for an opportunity to attack safely, the vast majority took place in the midst of yet another brutal attack (see also Ferraro, 2006). A few were women using lethal violence in reaction to a direct threat to their child.

## SITUATIONAL COUPLE VIOLENCE

Situational Couple Violence is the most common type of physical aggression in the general population of married spouses and cohabiting partners, and is perpetrated by both men and women. It is not a more minor version of Coercive Controlling Violence; rather, it is a different type of intimate partner violence with different causes and consequences. Situational Couple Violence is not embedded in a relationship-wide pattern of power, coercion, and control (Johnson & Leone, 2005). Generally, Situational Couple Violence results from situations or arguments between partners that escalate on occasion into physical violence. One or both partners appear to have poor ability to manage their conflicts and/or poor control of anger (Ellis & Stuckless, 1996; Johnson, 1995, 2006; Johnston & Campbell, 1993). Most often, Situational Couple Violence has a lower per-couple frequency of occurrence (Johnson & Leone, 2005) and more often involves minor forms of violence (pushing, shoving, grabbing, etc.) when compared to Coercive Controlling Violence. Fear of the partner is not characteristic of women or men in Situational Couple Violence, whether perpetrator, mutual combatant, or victim. Unlike the misogynistic attitudes toward women characteristic of men who use Coercive Controlling Violence, men who are involved in Situational Couple Violence do not differ from nonviolent men on measures of misogyny (Holtzworth-Munroe et al., 2000).

Some verbally aggressive behaviors (cursing, yelling, and name calling) reported in Situational Couple Violence are similar to the emotional abuse of Coercive Controlling

Violence, and jealousy may also exist as a recurrent theme in Situational Couple Violence, with accusations of infidelity expressed in conflicts. However, the violence and emotional abuse of Situational Couple Violence are not accompanied by a chronic pattern of controlling, intimidating, or stalking behaviors (Leone et al., 2004). Babcock et al. (2004) identified one group of men in batterer treatment groups and a community sample that appears to be men involved in Situational Couple Violence (the "family-only" group). These men had low scores on a scale that assessed violence to control, violence out of jealousy, and violence following verbal abuse compared to two other groups that appeared to be involved in Coercive Controlling Violence. Their reported violence was less severe and less frequent compared to the other two groups. Significantly, the men engaged in Situational Couple Violence did not differ from the nonviolent control group on measures of borderline and antisocial personalities or general violence outside of the family.

Situational Couple Violence is initiated at similar rates by men and women, as measured by large survey studies and community samples. Using the Conflict Tactics Scales, Straus and Gelles (1992) found male rates of violence toward a partner of 12.2% and female rates of 12.4%. In a Canadian survey of cohabiting and married respondents, males reported 1-year rates of husband-to-wife violence of 12.9% and female respondents reported wife-to-husband violence of 12.5% (Kwong, Bartholomew, & Dutton, 1999).

In the Canadian survey, men's and women's rates for each of nine specific types of violence were similar except for "slapping" and "kicked/bit/hit," where significantly more women than men reported perpetrating these acts. More than half of those reporting any violence in the past year reported violence perpetrated by both partners (62% men, 52% women). Eighteen percent of men and 35% of women reported female-only violence, and 20% of men and 13% of women reported male-only violence. The majority of violence reported did not result in injury to either men or women. The incidence of severe husband-to-wife violence reported by males and females was 2.2% and 2.8%, and wife-to-husband severe violence was 4.8% as reported by males and 4.5% as reported by females. Injuries were reported by a small number of both men and women (Kwong et al., 1999).

In samples of teenagers and young adults (dating, cohabiting, married), rates of physical violence toward partners are considerably higher than in general survey populations, and several studies find females more frequently violent than males. Magdol et al. (1997) reported that women perpetrated violence 37.2% of the time toward their partners and men 21.8% in a community-representative sample of young adults. In a sample of antisocial aggressive teenagers and young adults, women acknowledged higher rates of perpetration of violence than men (43% vs. 34%) (Capaldi & Owen, 2001). Douglas and Straus (2006) found that, among dating couples in 17 countries, females assaulted their partners more often than did males (30.0% vs. 24.2%).

Situational Couple Violence is less likely to escalate over time than Coercive Controlling Violence, sometimes stops altogether, and is more likely to stop after separation (Babcock et al., 2004; Johnson & Ferraro, 2000; Johnson & Leone, 2005; Johnston & Campbell, 1993). It may involve one isolated incident, be sporadic, or be regularly occurring. The time frame can involve the past only, throughout the relationship, or only currently (e.g., in the several months prior to separation). Using the NVAWS data, 99% of the women experiencing Situational Couple Violence reported no violence in the past 12 months (vs. 78% of the Coercive Controlling Violence group) (Johnson & Leone (2005). While more minor forms of violence are typical of Situational Couple Violence, it can escalate into more severe assaults with serious injuries. Thirty-two percent of perpetrators (men in the NVAWS data set) had committed at least one act of severe violence (Johnson & Leone, 2005). Comparable

data were not available for women. Severe violence in Situational Couple Violence is particularly likely when violence occurs more frequently (daily or weekly). With a community sample of at-risk teenagers or young adults, frequent and bidirectional physical aggression was associated with higher scores on antisocial behavior by both men and women, and women were at much greater risk for injuries than the men (Capaldi & Owen, 2001). When violence was frequent and injuries were sustained, both men and women were more likely to be fearful of each other. However, this study lacked dyadic measures of power and control, so it is not possible to determine if this was Situational or Coercive Controlling Violence, or a combination of both.

Situational Couple Violence results for women in fewer health problems, physician visits, and psychological symptoms, less missed work, and less use of painkillers, compared to women who are victims of Coercive Controlling Violence (Johnson & Leone, 2005). A large representative study in New Zealand found that depression and suicidal ideation were related to higher levels of partner violence victimization in both men and women. Thus one would expect to see more severe health and psychological symptoms in Situational Couple Violence that is very frequent (Magdol et al., 1997).

Overall, these and other survey data support claims that women both initiate violence and participate in mutual violence and that, particularly in teenage and young adult samples, women perpetrate violence against their partners more frequently than do the men. Based on knowledge available, this gender symmetry is associated primarily with Situational Couple Violence and not Coercive Controlling Violence. It is hoped that future research will enable clearer distinctions between violence that arises primarily from partner conflicts in contrast to violence that is embedded in patterns of coercion and control.

## SEPARATION-INSTIGATED VIOLENCE

Of special relevance to those working with separating and divorcing families is violence instigated by the separation where there was no prior history of violence in the intimate partner relationship or in other settings (Johnston & Campbell, 1993; Kelly, 1982; Wallerstein & Kelly, 1980). Seen symmetrically in both men and women, these are unexpected and uncharacteristic acts of violence perpetrated by a partner with a history of civilized and contained behavior. Therefore, this is not Coercive Controlling Violence as neither partner reported being intimidated, fearful, or controlled by the other during the marriage. Separation-Instigated Violence is triggered by experiences such as a traumatic separation (e.g., the home emptied and the children taken when the parent is at work), public humiliation of a prominent professional or political figure by a process server, allegations of child or sexual abuse, or the discovery of a lover in the partner's bed. The violence represents an atypical and serious loss of psychological control (sometimes described as "just going nuts"), is typically limited to one or two episodes at the beginning of or during the separation period, and ranges from mild to more severe forms of violence.

Separation-Instigated Violence is more likely to be perpetrated by the partner who is being left and is shocked by the divorce action. Incidents include sudden lashing out, throwing objects at the partner, destroying property (cherished pictures/heirlooms, throwing clothes into the street), brandishing a weapon, and sideswiping or ramming the partner's car or that of his/her lover. Separation-Instigated Violence is unlikely to occur again and protection orders result in compliance. In Johnston and Campbell's (1993) sample of 140 high-conflict custody-disputing parents, 21% of the parents reported Separation-Instigated

Violence. Another study (not restricted to custody-disputing families) indicated that 14% of violence reported began only after separation, although there was no assessment of whether violence with coercion and control had characterized the prior intimate partner relationship (Statistics Canada, 2001).

For professionals in family court or the private sector, it is critical to use assessment instruments that ask discerning questions to distinguish Separation-Instigated Violence from the chronic patterns of emotional abuse and intimidation of Coercive Controlling Violence. A partner's decision to leave may unleash potentially lethal rage, harassment, and stalking in borderline/dysphoric men with a history of Coercive Controlling Violence, where jealousy, impulsivity, and high dependence on the partner are central (Babcock et al., 2004; Dutton, 2007; Holtzworth-Munroe et al., 2000; Jacobson & Gottman, 1998). Unlike perpetrators of Coercive Controlling Violence, men and women perpetrating Separation-Instigated Violence are more likely to acknowledge their violence rather than use denial and are often embarrassed and ashamed of their behaviors. Some have been caring, involved parents during the marital relationship, with good parent–child relationships. Their partners (and often the children) are stunned and frightened by the unaccustomed violence, which sometimes leads to a new image of the former partner as scary or dangerous. Trust and cooperation regarding the children become very difficult, at least in the shorter term (Johnston & Campbell, 1993).

## INTIMATE PARTNER VIOLENCE IN CUSTODY AND ACCESS DISPUTES

The research discussed above has not focused specifically on intimate partner violence reported by parents with custody and access disputes. Because there is little research regarding this population, it is not known if the frequency, severity, context, or type of violence observed in custody-disputing parents is more similar to that seen in large-scale surveys (i.e., Situational Couple Violence) or the Coercive Controlling Violence more characteristic of shelter and police samples. However, the number of family law cases in which domestic violence allegations are made is quite high, and multiple and mutual allegations (e.g., substance abuse, child abuse, neglect) are common. In a California Family Court study of cases with custody and access disputes entering mandated (and early) custody mediation, intimate partner violence was reported by at least one parent in 76% of the 2,500 cases (Center for Families, Children, and Courts, 2002). Most of the violence did not occur in the prior 6 months. In 47% of the cases, neither parent had raised the issue of violence before or during mediation (either in separate screening interviews or separate sessions), suggesting that Situation Couple Violence was characteristic of some partners, may have occurred only in the past or episodically during the relationships, may have been mutual, and was not deemed important enough to be an issue in their mediated discussions about the children. It is also possible that victims of Coercive Controlling Violence were fearful of raising the history of violence, even in a separate session (it should be noted that parents are mandated to attend one session, and those unable to reach agreement then move into litigated and judicial processes). Further research will be needed to clarify what types of violence are characteristic or predominant in child custody disputes.

In two Australian samples of parents with custody or access disputes, 48–55% of cases (general litigants sample) and 63–79% (judicial determination sample) contained allegations of partner violence. Approximately half of the allegations in the general litigants sample and 60% of the judicially determined sample were of a particularly serious nature.

Allegations of child abuse were less than half that number, but allegations of child abuse were almost always accompanied by allegations of spousal violence (Moloney, Smyth, Weston, Richardson, Ou, & Gray, 2007). In a California sample of parents disputing custody or access who were undergoing child custody evaluations, domestic violence was substantiated for 74% of the mothers' allegations against fathers and 50% of fathers' allegations against mothers. More child abuse allegations by fathers against mothers were substantiated (46%) than allegations by mothers substantiated against fathers (26%), and in 24% of cases, child abuse allegations were substantiated for both mother and father within the same family (Johnston, Lee, Olesen, & Walters, 2005). Interpretation of research findings to date is confounded by different samples, measures, and legal definitions of domestic violence and child abuse, but it is clear that the percentage of parents reporting intimate partner violence and child abuse is higher among separating and divorcing parents than in the general population.

Only one study (comprising two samples) to date has differentiated among types of intimate partner violence in custody and access disputes (Johnston & Campbell, 1993). In this extremely high-conflict group of parents who were chronically relitigating parenting and access disputes, three fourths of the separating/divorcing couples had a history of violence. Twenty-six percent were not violent, 10% involved minor violence, 23% moderate, and 41% severe violence. Men and women were mostly in agreement about who perpetrated minor acts of violence and women's moderate acts of violence, but substantial gender disagreement existed about severe violence perpetrated by men, with women reporting substantially more severe violence from their partners than the men reported. Except for cuts sustained by both genders, women's injuries were more frequent and severe than men's. Johnston and Campbell (1993) identified five categories of intimate partner violence: male battering (what we are calling Coercive Controlling Violence), female initiated violence, male-controlling interactive violence (similar to Situational Couple Violence), separation-engendered violence, and violence that arises from mental illness, in particular, the disordered thinking of psychotic and paranoid disorders. In this small group (5%) are individuals who often do not repeat their violence if they are treated with medication. Situational Couple Violence (20% of all couples) and Separation-Instigated Violence with no prior history of violence (21% of all couples) were most common and generally involved less serious violence. Johnston notes that these findings should not be generalized to the larger divorcing population of parents or even parents disputing custody because of the chronic history of repeated litigation and continuing high conflict between these parents and the size of the sample.

## INTIMATE PARTNER VIOLENCE AND CHILDREN'S ADJUSTMENT

The effects of intimate partner violence on children's adjustment have also been well documented (Bancroft & Silverman, 2004; Graham-Bermann & Edleson, 2001; Fantuzzo & Mohr, 1999; Holtzworth-Munroe, Smutzler, & Sandin, 1997; Jaffe, Baker, & Cunningham, 2004; Wolak & Finkelhor, 1998). Violence has an independent effect on children's adjustment and is significantly more potent than high levels of marital conflict (McNeal & Amato, 1998). Much of this research has not differentiated among types of partner violence when describing the outcomes for children and has been conducted in samples of children whose mothers were in shelters where Coercive Controlling Violence was more likely to predominate. Behavioral, cognitive, and emotional problems include

aggression, conduct disorders, delinquency, truancy, school failure, anger, depression, anxiety, and low self-esteem. Interpersonal problems include poor social skills, peer rejection, problems with authority figures and parents, and an inability to empathize with others. Preschool children traumatized by the earlier battering of their mothers had pervasive negative effects on their development, including significant delays and insecure or disorganized attachments (Lieberman & Van Horn, 1998). School-age children repeatedly exposed to violence are more likely to develop posttraumatic stress disorders, particularly when combined with other risk factors of child abuse, poverty, and the psychiatric illness of one or both parents (Ayoub, Deutsch, & Maraganore, 1999; Kilpatrick & Williams, 1997). Threats to use or use of guns and knives is associated with more behavioral symptoms in 8–12-year-olds, when compared to youngsters where there was intimate partner violence without knives and guns (Jouriles et al., 1998). There are also higher rates of both child abuse and sibling violence in violent, compared to nonviolent, high-conflict marriages.

Further research that differentiates among types of violence is likely to demonstrate that children's exposure to Coercive Controlling Violence, as compared to Situational Couple Violence or Separation-Instigated Violence, is associated with the most severe and extensive adjustment problems in children. Early support for this was provided by Johnston (1995) who reported that boys experiencing Coercive Controlling Violence were significantly more symptomatic than boys in families with Situational Couple Violence, and boys in families with Separation-Instigated Violence, or no violence, were least symptomatic.

## IMPLICATIONS FOR INTERVENTIONS

### BATTERER INTERVENTION PROGRAMS

Batterer programs come in many forms but the general experience with them is that they have minimal success. For example, one recent review of experimental and quasi-experimental studies of the effectiveness of such programs estimates that with treatment 40% of participants are successfully nonviolent; without treatment 35% are nonviolent (Babcock et al., 2004). Unfortunately, studies of program effectiveness do not, in general, make any distinctions among types of violence or types of so-called batterers. It is possible that treatment programs are generally effective with some participants (such as those involved in Situational Couple Violence), but not with others (such as those involved in Coercive Controlling Violence). Another possibility is that different types of intervention work for different types of violent men or women. Although very little research has been done on this issue to date, there is already some evidence for differential effectiveness. For example, one recent study of almost 200 men court mandated to an intervention program found that men involved in Situational Couple Violence were the most likely (77%) to complete the program, with two groups involving Coercive Controlling Violence falling far behind them at 38% and 9% completion (Eckhardt, Holtzworth-Munroe, Norlander, Sibley, & Cahill, in press). Another study found that, in a 15-month follow-up, only 21% of men involved in Situational Couple Violence were reported by their partners to have committed further abuse, compared with 42% and 44% of the two groups of Coercive Controlling Violence (Clements et al., 2002).

This research suggests that tailoring interventions to the type of violence in which the participants are engaged may greatly improve the effectiveness of interventions. In fact,

existing versions of so-called batterer intervention programs are already well-suited to differentiating among types of intimate partner violence. The feminist psycho-educational model that is the most common approach is quite clearly based on an understanding of intimate partner violence as Coercive Controlling Violence (Pence & Paymar, 1993). The approach involves group sessions in which facilitators conduct consciousness-raising exercises that explicate the Power and Control Wheel, explore the destructiveness of such authoritarian relationships, and challenge men's assumptions that they have the right to control their partners. Participants are then encouraged to approach their relationships in a more egalitarian frame of mind.

Some men report that they are insulted by these feminist programs that assume that they are determined to completely control their partner's life (Raab, 2000). If, in fact, they are involved in Situational Couple Violence and not Coercive Controlling Violence, then the second major type of batterer program, cognitive behavioral groups, may be what they need. Cognitive behavioral groups focus on interpersonal skills needed to prevent arguments from escalating to verbal aggression and ultimately to violence. These groups teach anger management techniques, some of which are interpersonal (such as timeouts), others cognitive (such as avoiding negative attributions about their partner's behavior). They also do exercises designed to develop their members' communication skills and ability to assert themselves without becoming aggressive. Although these are techniques that are also used by marriage counselors in the context of couples counseling, couple approaches are almost never recommended for batterer programs because of the threat they might pose to victims of Coercive Controlling Violence. Thus, these techniques are typically used with groups composed only of violent men or women, without their partners.

One relatively new development in intervention is a consequence of dramatic increases in the number of arrests of women for intimate partner violence in jurisdictions that have implemented mandated arrest policies. Although on the surface many of these groups appear to function much like the groups for men, research into how they actually function suggests that at least some of them assume that many of their participants are involved in Violent Resistance (Miller, 2005). They function much like the support groups for victims of Coercive Controlling Violence that are found in shelters, encouraging the development of safety plans and providing skills for coping with their partners' violence within the relationship. This focus does not address those women who have perpetrated Situational Couple Violence, where cognitive behavioral approaches might be more effective.

Given that these different approaches appear to be targeted to the major types of intimate partner violence, it seems reasonable to develop an effective triage system by which different types of violent men and women would be provided different types of interventions. It may be useful to differentiate even more finely. For example, for some men and women involved in Situational Couple Violence, the problem is poor communication skills, impulsivity, and high levels of anger, while for others it may be alcohol abuse. Similarly, for some involved in Coercive Controlling Violence the problem is rooted in severe personality disorders or mental illness and may call for the inclusion of a more psychodynamic approach to treatment. For others the problem is one of a deeply ingrained antisocial or misogynistic attitude that would be more responsive to a feminist psycho-educational approach. In all cases, of course, holding violent men and women accountable for their violent behavior in the criminal justice system and family courts provides essential motivation for change. Many perpetrators and victims would benefit if all courts mandated and implemented reporting requirements regarding attendance and completion of violence and substance abuse treatment programs.

## IMPLICATIONS FOR MEDIATION

Advocates for abused women have long been opposed to the use of custody and divorce mediation, whether voluntary or mandated. Their criticism is based on the view that power imbalances created by violence cannot be remedied regardless of the skill of the mediator and that abused women will not be able to speak to their own or their children's interests out of fear, intimidation, and low self-esteem (Grillo, 1991; Schulman & Woods, 1983). Despite this opposition, many jurisdictions in the United States have implemented custody mediation programs and mandates. In contrast, others have passed legislation automatically excluding mediation for custody disputes where domestic violence occurred at any point in the marriage or separation.

Court-based mediation programs have become increasingly responsive to the legitimate challenges and questions raised by women's advocates and incorporated a variety of new screening and service procedures to protect the victims of partner violence, including separate sessions, different arrival and departure times, metal detectors, referrals to appropriate treatment agencies, presence of support persons, and monitoring of no-contact orders. Empirical research indicates that mediation has certain advantages for women when compared to the adversarial process (Ellis & Stuckless, 1996), and women report high levels of satisfaction with mediation where there was physical or emotional abuse during marriage or separation (Davies, Ralph, Hawton, & Craig, 1995; Depner, Cannata, & Ricci, 1994). It has been noted that the adversarial system often fails to protect victims of Coercive Controlling Violence and that, when mediation is provided in safe settings, victims of intimate partner violence may have more opportunities to be heard and feel empowered with respect to addressing the needs of their children (see Newmark, Harrell, & Salem, 1995).

The research that supports differentiation among types of domestic violence provides valuable indicators for the use of mediation in custody and access disputes. In order to benefit from the identification of different patterns of partner violence, it is imperative that screening instruments have questions that identify not only intensity of conflict, frequency, recency, severity, and perpetrator(s) of violence, but also patterns of control, emotional abuse and intimidation, context of violence, extent of injuries, criminal records, and assessment of fear. Screening instruments should be focused on risk assessment (e.g., DOVE scale; Ellis, Stuckless, & Wight, 2006), be gender neutral in choice of language, and include questions about both partners' violence to be answered by both partners.

Based on the research descriptions of different types of partner violence (and the reported experiences of many mediators in family courts), it is likely that the majority of parents who have a history of Situational Couple Violence are not only capable of mediating, but can do so safely and productively with appropriate safeguards. These men and women appear to be quite willing to express their opinions, differences, and entitlements, often vigorously (Ellis & Stuckless, 1996; Johnston & Campbell, 1993). It is also likely that parents with Separation-Instigated Violence will benefit from mediation, again, with appropriate safeguards and referrals to counseling for the violent partner to help restabilize psychological equilibrium. What is needed, in addition to appropriate screening, are mediators whose domestic violence training has included attention to differentiation among types of intimate partner violence (rather than an exclusive focus on battering and the Power and Control Wheel). A model of mediator behavior that employs good conflict management skills to contain parent anger and rules describing contained and civilized communications between the parties is also essential. It is anticipated that, with Situational Couple and Separation-Instigated Violence, parents would engage in mediation with protection

orders in place and that transfers of the children between parents would take place in either neutral and public settings or using supervised exchanges until there was no further risk of violence.

The use of custody mediation where Coercive Controlling Violence has been identified is more problematic. When screening indicates fear for one's safety, a history of serious assaults and injuries, police intervention, or severe emotional abuse, including control and intimidation, alternatives to mediation should be considered. If both parties prefer that mediation proceeds, it should be in caucus, with separately scheduled times, a support person present, and protection orders in place. This increases opportunities to discuss safety planning, what type of parenting plans and legal decision making will protect the parent and children (e.g., supervised access and exchanges, no contact), and referrals to appropriate treatment interventions and educational programs for both parents (see Jaffe et al., 2008).

## IMPLICATIONS FOR FAMILY COURT

### INTIMATE PARTNER VIOLENCE AND CHILD ABUSE

Although intimate partner violence is often an issue even in divorces that do not involve children, the major policy concerns regarding such violence in family courts have focused on matters of child custody and access. The central policy question is most often "Should any parent who has been violent toward his or her partner have unsupervised access to or custody of his or her children?" Behind this view of the issue are two concerns: (1) What is the impact of intimate partner violence on children in cases in which neither parent is violent toward the children? and (2) What is the likelihood that someone who is violent toward his or her partner will also be violent toward the children? From our perspective, the answer to both questions is that it depends upon what type of violence you are talking about.

What is generally unstated in the arguments about the link between intimate partner violence and child abuse is that authors are generally referring to Coercive Controlling Violence, not Situational Couple Violence, without so specifying. Studies seem to show that the risk of child abuse in the context of Coercive Controlling Violence is very high (Appel & Holden, 1998). However, the extent to which there is or is not a link between Situational Couple Violence and child abuse (as opposed to child hitting/slapping/shoving that does not rise to the legal threshold of abuse) is still unknown. It seems likely that the sampling biases of various studies account for the different estimates of the overlap between intimate partner violence and child abuse—from 6% to 100% according to one discussion of that literature (Appel & Holden, 1998). It may be that the lower 6% findings involve Situational Couple Violence, Separation-Instigated Violence, or Violent Resistance, while the 100% findings involve Coercive Controlling Violence. If research establishes that Violent Resistance and Situational Couple Violence are not strongly linked to the risk of child abuse, then the courts and child protective services will have additional support for the usefulness of making such distinctions in deliberations about child custody in specific cases (Jaffe et al., 2005; Johnston, 2006; Johnston & Kelly, 2004; Johnston et al., 2005; Ver Steegh, 2005). It should be pointed out that the detrimental effects of high levels of parent conflict during marriage and after separation, independent of partner violence, on quality of parenting and children's adjustment have been well established (see Kelly, 2000 for a review).

## CHILD CUSTODY ASSESSMENTS

It is important that child custody assessments be conducted carefully, with an underlying empirical basis for conclusions and recommendations whenever possible. Allegations and evidence of women's violence, as well as men's, must be treated seriously and investigated rigorously. Most importantly, distinctions should be made among types of violence whenever possible. Custody assessors must hold multiple hypotheses when conducting an evaluation (Austin, 2001). Allegations of intimate partner violence, child abuse, neglect, and substance abuse are often very challenging, both professionally and personally. Gendered assumptions, inadequate training, and incomplete or biased social science data can interfere with the full development of the information necessary to protect children and parent(s) and to develop appropriate parenting plans and treatment interventions.

In cases in which there is a custody battle between a violent, coercively controlling parent and a partner who is resisting with violence, the primary risk to the children is most likely the parent perpetrating Coercive Controlling Violence. In such cases, it is likely that the Violent Resistant parent needs not only safe custody and access arrangements, but also relevant parent education to restore appropriate parenting practices. In cases in which the violent relationship between the parents involves Situational Couple Violence or Separation-Instigated Violence, there may not be increased risk to children in all cases, particularly if either type of violence is singular and mild. If the Situational Couple Violence is chronic or severe, what is needed is a more nuanced analysis of the situational causes of the violence and whether it is only one or both of the parents who escalate to physical aggression. If one partner has an anger management problem, then he or she is the parent most at risk for child abuse. If the problem is one of couple communication or chronic conflict over one or several relationship issues, generalization to child abuse is unlikely.

The issues are complicated and differ depending on the type of violence, but one thing is clear: The assessment of the violence must include information about its role in the relationship between the contesting parties. A narrow focus on acts of violence will not do. There is a need to err on the side of safety in these matters, particularly when information about the parents' violence is limited and the court's response is inadequate because of lack of appropriate personnel and screening procedures. Once sufficient court resources are invested in individual cases, more nuanced responses can be considered.

Jaffe and his colleagues (2008) suggest an approach that combines attention to types of violence with other information. They recommend an assessment in terms of potency (severity of the violence), pattern (essentially a differentiation among types), and primary perpetrator. Their discussion makes it clear that some courts are already recognizing a variety of nuanced choices regarding child custody. They distinguish among five different possible outcomes: co-parenting generally involving joint custody in which both parents are involved in making cooperative decisions about the child's welfare; parallel parenting with both parents involved, but arrangements designed to minimize contact and conflict between the parents; supervised exchanges of the child from parent to parent in a manner that minimizes the potential for parental conflict or violence; supervised access, when one or both parents pose a temporary danger to the child, provided under direct supervision in specialized centers and/or by trained personnel with the hope that the conditions that led to supervised access will be resolved and the parent can proceed to a more normal parent–child relationship. In the most serious cases, in which a parent poses an ongoing risk to the child, all contact with the child would be prohibited.

## CONCLUSION

Current research provides considerable support for differentiating among types of intimate partner violence, and such differentiations should provide benefits to those required to make recommendations and decisions about custody and parenting plans, treatment programs, and legal sanctions. As indicated, there is a need for continuing research on partner violence that will expand and refine our understanding of these men and women who engage in violence within the family. Among other things, little is known about the precipitants of female violence, the types of emotional abuse and violent acts they perpetrate, and the impact on children's adjustment, particularly with emotionally abusive, controlling women who are violent with their nonviolent partners. The significant role of substance abuse in intimate partner violence has been observed, but not with respect to differentiation among types of violence. Treatment programs that focus on the causes and contexts of different types of violence are more likely than one-size-fits-all approaches to address the major issues underlying the violence and, therefore, to develop recommendations that achieve more positive results.

## NOTE

1. Wingspread Custody and Domestic Violence Conference. Cosponsored by the Association of Family and Conciliation Courts and the National Council of Juvenile and Family Court Judges. February 15–17, 2007.

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# LOVE MATTERS

Tamara L. Kuennen*

*Love matters to women in abusive relationships. Consequently, matters of love should mean something to both the legal regime redressing intimate partner violence ("IPV") and to feminist legal scholars seeking to reform the same. Currently the law ignores matters of love by conditioning legal remedies on the immediate termination of the intimate relationship by the victim.*

*Feminist legal scholars unwittingly ignore love by failing to be sufficiently specific about the type of abuse we most wish to eradicate: coercive control. This is a pattern of acts—both violent and nonviolent—in which one partner seeks to control and dominate the personhood and liberty of another. In addition, IPV scholars contribute to binary notions of what constitutes IPV (physical violence versus no violence) and intimate relationships generally (abusive versus nonabusive) when we fail to be discerning. These dichotomies mystify, rather than illuminate, the complexity of intimate love as a context in which harm can occur, making the coexistence of love and abuse something "other," distant from us, our relationships, and the law.*

*This Article explores where the line should be drawn between abusive and nonabusive relationships so that the love many women experience, even in the context of abuse, can be taken seriously. Moving the line from zero tolerance sheds light on the normalcy of love in the context of abuse, by allowing for a more expansive view of "normal" relationships—as often involving some use of physical and nonphysical aggression. With a more nuanced view of the coexistence of love and "abuse," we can better understand love even in the context of the most serious type of intimate partner violence: coercively controlling violence. Many women experiencing coercive controlling violence describe the love they feel as a source of strength and as a survival mechanism. Until feminist legal scholars expose and accept the coexistence of love and violence in intimate relationships, our denial of it will continue to have a profound impact on the development of explanations of women's experience and behavior that reflect reality, and that can fit within the conceptual structure of the law.*

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## INTRODUCTION

Love matters to women in abusive relationships.[1] Consequently, matters of love should mean something to both the legal regime redressing intimate partner violence ("IPV") and to feminist legal scholars seeking to reform the same.

Currently, the regime ignores matters of love by conditioning legal remedies on the immediate termination of the intimate relationship by the victim.[2]

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1. *See infra* Part I.C. and accompanying notes.

2. *See* LEIGH GOODMARK, A TROUBLED MARRIAGE, DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 81 (2012) (describing the evolution of domestic violence law and policy and documenting the "demand that women subjected to abuse separate from their intimate partners" as a "litmus test for determining whether a victim is worthy of assistance"); *see also* Jeannie Suk, *The Criminal Law Comes Home,* 116 YALE L.J. 2, 8 (2006) (arguing generally that separation of the parties is the ultimate goal of the criminal response to domestic violence

If the victim says she loves her partner, the legal system often responds: you must not really be abused; you are partially to blame for the abuse; you are crazy; we cannot help you.

Although feminist legal scholars have unearthed the many rational reasons women experiencing abuse may choose to preserve, rather than sever, their intimate relationships, we (feminist legal scholars) have ignored love as a reason for staying. Previously, I have argued that we have done so deliberately, for strategic and political reasons.[3] This Article, however, argues that we unwittingly ignore love when we fail to be sufficiently specific about the type of abuse we most wish to eradicate: a pattern of acts—both violent and nonviolent—in which one partner seeks to control and dominate the personhood and liberty of another.

The pattern is called coercive control.[4] It bears little resemblance to most states' statutory definitions of IPV, which center on discrete acts of physical violence. Both its prevalence and its consequence—"entrapment" of women in their relationships—are widely misunderstood. Coercively-controlling violence accounts for only a fraction of IPV, yet it is the image that comes to mind for most people when they think of IPV. Women become entrapped in coercively controlling relationships because of societal institutions that reinforce gender discrimination, yet the public image of women experiencing abuse is that as individuals they are too weak, passive, or helpless to leave.

The thrust of this Article is thus threefold. First, by failing to be specific about the type of IPV we wish to target, and instead conflating coercive control with all forms of IPV, feminist legal scholars contribute to binary notions of what constitutes IPV (physical violence versus no violence), who is a deserving victim (one who leaves versus one who stays), and intimate relationships generally (abusive versus nonabusive). Second, these dichotomies mystify, rather than illuminate, the complexity of intimate love as a context in which harm can occur, making the coexistence of love and abuse as something "other"—distant from us (feminist legal scholars), our relationships, and our legal system. Finally, as a result, we have crafted a legal response that views women who wish to preserve relationships with partners they love as incredible, blameworthy, and masochistic.

Part I of this Article demonstrates that many women and men in "nonabusive"[5] relationships think long and hard before ending their relationships.

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and specifically that "prosecutors use the routine enforcement of misdemeanor DV to seek to end (in all but name) intimate domestic relationships").

3. Tamara L. Kuennen, *"Stuck" on Love*, 91 DENV. U. L. REV. 171, 178–81 (2014) [hereinafter Kuennen, *Stuck*].

4. The term was coined by Susan Schechter, SUSAN SCHECHTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987), and expanded by Evan Stark, with whom it is now most associated. EVAN STARK, COERCIVE CONTROL AND THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (2007). Coercive control is discussed in detail *infra* Part II.B.2.

5. I believe the term "nonabusive" to be a fiction—a black-and-white demarcation of the nature and character of relationships with which I disagree. Until I argue

Despite having doubts, people often persist in relationships that are dissatisfying or even hurtful; experience anguish in decision-making; hold onto hope of reconciliation long into the breakup process; leave the relationship, return, and then leave again; and experience prolonged feelings of attachment well after the relationship has ended.[6] This Part demonstrates that women in abusive relationships experience much of the same. Yet, in nonabusive relationships, when people are deciding whether to stay or leave, love is considered a legitimate factor in decision-making—in abusive relationships, it is not.

In Part II, the Article asks where the line should be drawn between a nonabusive relationship and an abusive one, so that the love felt by women in abusive relationships can be seen as a legitimate factor in stay–leave decision-making. Should the line be drawn where the law currently draws it—where *any* act of physical aggression between partners constitutes an abusive relationship—thereby diminishing, if not negating, love as a legitimate reason for staying? Or are there certain amounts or types of violent acts that must occur in order for the line to be crossed? For that matter, what constitutes violence? Is it *any* use of physical force against a partner? What about destroying a partner's property in front of her? As observed by Martha Mahoney more than two decades ago: "It is, relatively speaking, normal for a woman to watch a man smash up the furniture. Many of the women in the room have seen something like it—and called it 'marriage' and not 'staying.'"[7]

I argue that the line cannot remain where the law places it, currently making any use of physical force the litmus test for abuse.[8] The line must be moved away from a zero-tolerance point on the continuum and toward coercively controlling violence. I do not mean to suggest that serious, physical assaults between intimate partners should be excused; rather, I argue that coercive control is a different and more serious type of aggression, and as such it deserves to be measured by a different yardstick. Currently, the law of IPV treats minor fights and coercive control the same: a woman who slaps her partner once is as guilty of the crime of IPV as a man who both slaps his partner once *and* controls her finances, employment, access to friends, and every other aspect of her day-to-day life.[9]

Other scholars have argued for a more nuanced definition of IPV that would move the line. For example, several scholars have argued that the crime of domestic violence should include proof that the perpetrator intended to or did exert power and control over the victim.[10] The thrust of this Article is to illustrate how

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this point explicitly in Part II, *infra*, I use the term nonabusive to describe relationships in which no physical violence occurs.

6. *See infra* Part I.B. and accompanying notes.

7. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 16 (1991).

8. STARK, *supra* note 4, at 83–84.

9. GOODMARK, *supra* note 2, at 30 (arguing that very few states prosecute nonphysical violence such as these types of coercive tactics).

10. *See, e.g.*, GOODMARK, *supra* note 2 at 139; Alafaire S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of*

moving the line allows the law, feminist legal scholars, and the public at large to acknowledge love as a legitimate factor in stay–leave decisions for women experiencing types of IPV shy of coercive control. Moving the line also allows us to meaningfully discuss the significance of love to women experiencing coercive control. Unidirectional love within a context of domination and subjugation is unlikely how most of us would define healthy, intimate love.[11] It does not necessarily follow, however, that the love women feel is crazy or masochistic. Here, I rely on the work of Catharine Donovan and Marianne Hester, who argue that women experiencing coercively controlling violence construct themselves as strong, and that they view their love as a source of strength.[12] In this way, love can be a survival mechanism. The authors also argue, however, that the love women feel may be a response to the coercive control itself, in which the abusive partner's "practice of love" is a form of emotional violence.[13] Their careful examination sheds light on the experience of love in the context of coercive control, without diminishing it.

Part III demonstrates how feminist legal scholars, and other scholars researching IPV, use the terms "IPV" and "coercive control" interchangeably, rather than distinguishing between the two.[14] I wonder whether this lack of discernment has a snowball effect. When we fail to distinguish coercive control from other forms of IPV, we overstate its prevalence. By overstating its prevalence, we may, albeit inadvertently, imply that all women who experience IPV are entrapped in their relationships. And this notion—that women are entrapped—contributes to a public story that victims of IPV would leave if only they could, if only they were not trapped. Accordingly, legal and social-service systems designed to address IPV view their jobs as helping women leave. Their perception, then, is that women are aberrant when they love their partners and do not want to leave them.

Finally, Part IV draws upon the work of a handful of scholars who forge paths that show us how legal and social interventions might change if love were taken seriously. Legally, protection orders would allow contact between parties, but prohibit abuse; stalking might be criminalized without requiring the parties to formally breakup; and new remedies that facilitate women's safety while preserving their partnerships might be envisioned. Socially, women would be provided counseling to decrease the current shame and stigma surrounding loving a partner who has been abusive, and to educate women that they, like people in nonabusive relationships, may feel love long after the breakup; shelters and other social services

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*Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004); Joan Erskine, Note, *If it Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 BROOK. L. REV. 1207 (1999).

11. These are the remarks of Evan Stark made to me in a telephone conversation on February 27, 2014 (notes on file with author).

12. Catherine Donovan & Marianne Hester, *'I Hate the Word "Victim"': An Exploration of Recognition of Domestic Violence in Same Sex Relationships*, 9 SOC. POL'Y & SOC'Y 279, 283 (2010), discussed *infra* Part II.C.

13. Donovan & Hester, *supra* note 12, at 283.

14. For example, and as will be discussed *infra* Part III.A., a scholar might argue that IPV is perpetrated to obtain or maintain power and control. But, only a fraction of IPV —what sociologists call "coercively controlling" IPV—is perpetrated for this purpose.

would not require women to leave their partners to get help; and constructivist modalities of service provision designed to empower women who choose to stay would strike a better balance between their needs, desires, and rights.

In addition to offering pragmatic remedies, Part IV weighs the pros and cons of acknowledging love in the context of abuse on theoretical, strategic, and political levels. As summed up by Christine Littleton: "How could we possibly take seriously women's accounts of love and hope without undermining the little protection from male violence women have been able to wrest from the legal system, without indeed increasing our already overwhelming vulnerability?"[15] While acknowledging the risks, I argue that until feminist legal scholars expose and accept the coexistence of love and aggression in intimate relationships, our denial of it will continue to have a profound impact on the developing explanations of women's experiences and behaviors.[16] Further, by denying the coexistence, we are less likely to construct law that responds to this reality. Unless the law, and the judges, jurors, and attorneys tasked with applying it, recognize the coexistence of love and violence, stereotypical beliefs about women will continue to eclipse women's actual experiences; women's decisions to preserve their relationships will never be fully understood; and the law will continue to insist on severing the intimate partnership as the only solution to IPV.

## I. LOVE, AND HOW IT MATTERS

### *A. The Concept of Love*

Love is a complicated thing. The struggle to define it has been taken up by countless parties across history, from the ancient Greeks[17] to contemporary psychologists.[18] The conundrum is one that has fascinated poets, philosophers, scientists, and the popular imagination.

In a recent TED-Ed video lesson, Wisconsin high school educator Brad Troeger posed the question thusly: "What is love? Is it a verb? A noun? A universal truth? An ideal? The common thread of all religions? A cult? A neurological phenomenon?"[19] An experiment conducted by *The Huffington Post* via Twitter and Facebook challenged readers to define love in a single word. The responses ranged from "happiness" and "loyalty" to "work," "uncontrollable," "sacrifice," and

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15. Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 47.

16. Mahoney, *supra* note 7, at 13.

17. *See* Donald Levy, *The Definition of Love in Plato's Symposium*, 40 J. HIST. OF IDEAS 285 (1979) (discussing and comparing the definitions of love provided by Aristotle, Socrates and Plato).

18. *See* Arthur Aron & Elaine N. Aron, *Love and Sexuality*, *in* SEXUALITY IN CLOSE RELATIONSHIPS 25–26 (Kathleen McKinney & Susan Sprecher eds., 1991) (discussing and reviewing the social science research on love).

19. Brad Troeger, *What is Love?*, http://ed.ted.com/lessons/what-is-love-brad-troeger#watch (last visited Sept. 29, 2014).

"elusive."[20] Daniel Jones, editor of *The New York Times*'s column "Modern Love," published *Love, Illuminated*—a book drawing upon his professional experience with "read[ing] other people's love stories for a living."[21] He notes (and queries):

> Love is unrivaled in its power to thrill, crush, and sustain. No subject in human history has been more thoroughly examined. And yet, as desperately as we have tried to unlock love's mysteries—to "decode" it through scientific experimentation, philosophical inquiry and even mathematical algorithms—do we really understand love any better today than Shakespeare did nearly five hundred years ago?[22]

Jones's question is apt. In the scientific literature, love has been identified as a biological response,[23] a set of neurological phenomena,[24] a cognition,[25] an

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20. *What is Love? 40 Words That Define It*, HUFFINGTON POST (May 30, 2013), http://www.huffingtonpost.com/2013/05/30/what-is-love-40-words-tha_n_3361909.html.

21. DANIEL JONES, LOVE ILLUMINATED: EXPLORING LIFE'S MOST MYSTIFYING SUBJECT (WITH THE HELP OF 50,000 STRANGERS) 1 (2014).

22. *Id.* (front flap of book cover).

23. *See, e.g.*, William R. Jankowiak & Edward F. Fischer, *A Cross-Cultural Perspective on Romantic Love*, 31 ETHNOLOGY 149, 149–50 (1992) ("[E]volutionary-oriented anthropologists and psychologists have explored the possibility that romantic love constitutes a human universal . . . . In this view romantic love centers on a biological core that is expressed as love and enacted in courtship . . . . [This view] draws upon biochemical research that suggests the giddiness, euphoria, optimism, and energy lovers experience in early stages of infatuation is caused by increased levels of phenylethylamine, an amphetamine-related compound . . . . This evolutionary perspective suggests that romantic love arises from forces within the hominid brain that are independent of the socially constructed mind.") (citations omitted).

24. Arthur Aron et al., *Reward, Motivation, and Emotion Systems Associated With Early-Stage Intense Romantic Love*, 94 J. OF NEUROPHYSIOLOGY 327, 327 (2005) (study in which participants were asked to think of their romantic partners). Although functional magnetic resonance imaging scans showed a diverse array of activation patterns, all participants demonstrated activation of the dopamine-rich areas of the brain which are generally associated with deep need, focus, and addiction. *Id.*

25. *See generally* Beverly Fehr, *Prototype Analysis of the Concepts of Love and Commitment*, 55 J. PERSONALITY & SOC. PSYCHOL. 557 (1988).

emotion,[26] a behavior,[27] an attitude,[28] and a social construct.[29] Social scientists have identified multiple subtypes: sexual, platonic, passionate, romantic, familial, puppy, true, unrequited, unconditional, to name but a few; the number is indefinite.[30] In addition, love is contextually dependent—any definition of it varies across culture, class, and time.[31]

Given the multiple layers of love, and the multiple lenses through which one might view it, social scientists, similar to readers of *The Huffington Post*, concede that the concept is "elusive."[32] Many side-step the challenge of defining it;[33] others agree-to-disagree about it;[34] and some candidly abandon altogether any attempt to explain it.[35]

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26. *See generally* Phillip R. Shaver et al., *Emotion Knowledge: Further Exploration of a Prototype Approach*, 52 J. PERSONALITY & SOC. PSYCHOL. 1061 (1987); *see also* Beverly Fehr & James Russell, *The Concept of Love Viewed From a Prototype Perspective*, 60 J. PERSONALITY & SOC. PSYCHOL. 425, 426 (1991) ("Love can be studied as a relationship, as an attitude, as an experience, and so on. In this article, we focus on love as an emotion. Indeed, love is a prototypical emotion . . . .").

27. *See* Clifford H. Swensen, Jr., *The Behaviors of Love*, *in* LOVE TODAY (A. Otto ed., 1972).

28. Fehr & Russell, *supra* note 26, at 427 (reviewing divergent perspectives on love and observing that some have "defined love as an attitude held by one person toward another, involving a predisposition to think, feel, and behave in certain ways toward that person") (citation omitted); *see also* Stephen B. Levine, *What Is Love Anyway?*, 22 J. SEX & MARITAL THERAPY 191, 198 (1996) ("Loving the partner, which originally began as an ambition, is now closer to an attitude forged by commitment to values and persona discipline that to mere emotion.").

29. *See generally* Anne E. Beall & Robert J. Sternberg, *The Social Construction of Love*, 12 J. SOC. & PERS. RELAT. 417 (1995).

30. Fehr & Russell, *supra* note 26, at 426 ("Again, the number of subcategories of love is indefinite.").

31. *See* Beall & Sternberg, *supra* note 29, at 420 ("With respect to love, the social constructionist perspective is that societies differ in their understanding of the nature of love. Cultures in different time periods have defined love quite differently. In some time periods, people have believed that love includes a sexual component, whereas in other eras people have believed that it is a lofty, asexual experience. In the past two centuries, love has become a foundation for marriage, which is a new development.") (citations omitted).

32. Fehr & Russell, *supra* note 26, at 425 (describing love as an elusive concept).

33. Aron & Aron, *supra* note 18, at 25 ("There is now a fair amount of systematic work on love, yet . . . most researchers and theorists have side-stepped defining it.") (citation omitted).

34. *See, e.g.*, SHARON S. BREHM, INTIMATE RELATIONSHIPS 90 (1985) ("Social scientists have had as much trouble defining love as philosophers and poets. We have books on love, theories on love, and research on love. Yet no one has a single, simple definition that is widely accepted by other social scientists.").

35. *See* Beall & Sternberg, *supra* note 29, at 417 ("[I]t is difficult, if not impossible, to answer the question: 'What is love?' because any answer must reflect its time period and place, and in particular, the functions that romantic love serves there. More useful questions are: 'Why does love differ across time periods or cultures?' or perhaps, 'What is the function of love for a given culture?'"); *see also* Levine, *supra* note 28 ("The same word [love] is used to describe our pleasure in wearing a favorite sweater and our complex synthesis

Arthur Aron and Ellen Aron argue that one common point found in social science literature is that "love has to do with wanting to be intimate with some individual," and thus operationalized love as "the constellation of behaviors, cognitions, and emotions associated with a desire to enter or maintain a close relationship with a specific other person."[36] Professor Stephen Levine, co-director of the Center for Marital and Sexual Health and Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine, likewise stresses the importance of mutuality of this desire.[37] He also describes love as:

> [A] grand, culturally reinforced ambition energized by an arrangement that is made between two people who make a moral commitment to one another and then privately struggle with the vagaries of their perceptions of the partner and the growing dimensions of their previous commitment.[38]

This Article acknowledges that love is not a single feeling, cognition, or attitude, but rather a complex interaction of often conflicting feelings informed by culture (and subculture within that culture), the intent of the speaker, the perception of the listener, and the relationship between the two. Further, this Article recognizes that the interplay between, the importance of, and the very presence of passion, friendship, commitment, understanding, and other factors that make up what people may commonly understand as love are constantly in flux and variable. The relationship and feelings between two people that can be labeled as "love" are probably always evolving and changing.

Even if one's definition of love is significantly vague, subjective, and idiosyncratic, people report feeling "love"—however one defines it—in their intimate relationships. And they report that falling out of love is a primary factor in determining whether to leave these relationships, as demonstrated in the next Subpart.

### *B. Love Matters in Nonabusive Relationships*

Recently, in *The New York Times*, Daniel Jones observed:

> As the editor of the Modern Love column for nearly a decade, I have sifted through roughly 50,000 stories that have crossed my desk. I have noticed people wrestling with two questions above all others.

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of experience with a spouse of 50 years: we say we love a particular musical group and we label the rush of emotions at our child's wedding ceremony with the same word. It is useless to try to delineate a singular meaning for 'love' in our language.").

36. Aron & Aron, *supra* note 18, at 26.

37. *See* Levine, *supra* note 28, at 192 (discussing significance of mutual respect); *id.* at 194 ("Reciprocity between two people is required to create the full intensity of falling in love."); *id.* at 198–99 ("Loving the partner rests upon our appraisal of the degree to which mutual respect . . . exist[s] in our relationship."). Even Plato understood the importance of a "reciprocal exchange." *See* Beall & Sternberg, *supra* note 29, at 425.

38. Stephen B. Levine, *What is Love Anyway?*, 31 J. SEX & MARITAL THERAPY 143, 145 (2005).

> From the young: "How do I find love?" And from those wallowing through marital malaise: "How do I get it back?"[39]

When intimate relationships become less than ideal, or less desirable than when they were entered into, people naturally begin to question their involvement in the relationship.[40] Both women and men think long and hard before leaving their relationships.[41] Despite having doubts, people often: persist in relationships that are dissatisfying or even hurtful;[42] stay in unhappy relationships for the long-term;[43] experience anguish in decision-making;[44] hold hope long into the breakup process;[45]

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39. Daniel Jones, *"Good Enough? That's Great."* N.Y. TIMES, Feb. 2, 2014, at ST1.

40. Ximena B. Arriaga et al., *Individual Well-Being and Relationship Maintenance at Odds: The Unexpected Perils of Maintaining a Relationship with an Aggressive Partner*, 4 SOC. PSYCHOL. & PERSONALITY SCI. 676, 676 (2013) ("Romantic involvements entered by choice typically have desirable qualities. When desirable relationships become undesirable, however, people who chose to be together may question their involvement.").

41. *See* Gay C. Kitson et al., *Withdrawing Divorce Petitions: A Predictive Test of the Exchange Model of Divorce*, 7 J. DIVORCE 51, 55 (1983) (reviewing literature and stating couples knew their relationships were beginning to sour about three years prior to filing for divorce, which some have called the "emotional divorce" period); *see also* Paul R. Amato & Stacy J. Rogers, *A Longitudinal Study of Marital Problems and Subsequent Divorce*, 59 J. MARRIAGE & FAMILY 612, 622 (1997) (observing that couples' awareness of problems precipitating divorce occurs 9–12 years before filing for divorce); Larry W. Taylor, *The Transition to Mid-Life Divorce*, 9 REV. ECON. HOUSEHOLD 251, 254 (2011) (analyzing the results of a web-based survey of 581 men and 566 women who divorced at least once and finding that the median interval for divorce deliberations is 1–2 years).

42. Arriaga et al., *supra* note 40, at 676 ("Despite having some doubts, individuals often persist in relationships that are dissatisfying or even hurtful.") (citations omitted).

43. Robert H. Lauer & Janice C. Lauer, *Factors in Long-Term Marriages*, 7 J. FAMILY ISSUES 382, 385 (1986) (nonrandom sample of 351 couples married 15 years or longer surveying reasons people happily and unhappily stay in long-term marriages, finding that for those reporting unhappy marriages the belief in marriage as a long-term commitment was the primary reason for staying together).

44. Miriam R. Hill, *Dreams to Cherish, Dreams to Grieve: An Intervention for the Decision-Making State of Divorce Therapy*, 10 J. FAMILY PSYCHOTHERAPY 49, 50 (2008) (describing the process of deciding to divorce as filled with ambivalence, stress, inner turmoil, power struggles, and soul searching).

45. Alan J. Hawkins et al., *Reasons for Divorce and Openness to Marital Reconciliation*, 53 J. DIVORCE & REMARRIAGE 453, 458 (2012) (surveying 886 individual divorcing parents after mandated parenting class, finding 26% of respondents still hoped for reconciliation and believed the marriage could be saved even at a late stage in the process).

separate and reunite before deciding to stay[46] or to leave;[47] and experience prolonged feelings of attachment,[48] grief, and mourning.[49]

Large-scale longitudinal studies demonstrate that, despite the presence of conflict and violence in relationships, neither conflict nor violence is necessarily the primary reason that people decide to terminate their relationships. For example, in one longitudinal study of divorcing couples in the mid-1980s, out of a 27-factor list, the two most commonly cited reasons for divorce were "gradual growing apart, losing feelings of closeness," and "not feeling loved and appreciated."[50] Additionally, while a clear majority of respondents reported high levels of conflict and tension during their marriage, "feelings of emotional barrenness and boredom with the marriage" were cited far more frequently as a primary causes of divorce.[51]

As the authors noted, these finding bore a striking similarity to two other large-scale studies conducted 5 and 15 years prior, in which "growing apart" and "feeling unloved" were frequently mentioned factors in divorce decision-making.[52] The earlier large-scale studies concluded that:

> Whereas before, divorce was a solution more often limited to such stark and specific circumstances as desertion or chronic alcoholism, in the mid-[19]80s, divorce appears to be most commonly sought because of a more general dissatisfaction with the emotional or affective deficiencies and tenor of the marital relationship. As indicated elsewhere, a substantial number of these divorces were not

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46. Regina L. Donovan & Barry L. Jackson, *Deciding to Divorce: A Process Guided by Social Exchange, Attachment and Cognitive Dissonance Theories*, 13 J. OF DIVORCE 23, 24 (1990) (noting that "[m]any people who are dissatisfied or unhappy in marriage or who separate from their spouses do not ultimately divorce. More than 20% of the divorce petitions filed are retracted each year . . . . And finally there are an untold number of informal separations in which the spouses simply cease to live as a married couple. Such informal separations are considered to be quite frequent.") (citations omitted).

47. Kitson et al., *supra* note 41, at 52 (finding that 44% of a court record-based survey (N=209) withdrew their petitions).

48. William H. Berman, *Continued Attachment After Legal Divorce*, 6 J. FAMILY ISSUES 375, 375 (1985) ("[A]t least 25% of the divorced population have significant difficulty completing the psychological divorce and remain attached to their ex-spouses for significant periods of time.").

49. Cathleen A. Gray & Joseph J. Shields, *The Development of an Instrument to Measure the Psychological Response to Separation and Divorce*, 17 J. DIVORCE & REMARRIAGE 43, 44 (1992) (describing mourning for the loss of the relationship).

50. Lynn Gigy & Joan B. Kelly, *Reasons for Divorce: Perspectives of Divorcing Men and Women*, 18 J. DIVORCE & REMARRIAGE 169, 173 (1993).

51. *Id.* at 183.

52. *Id.* at 184 (citing Koch-Nielsen & Lone Gundelach, *Women at Divorce*, *in* THE AFTERMATH OF DIVORCE: COPING WITH FAMILY CHANGE: AN INVESTIGATION IN EIGHT COUNTRIES 99–121 (Akademiai Kiado ed., 1985); Joan B. Kelly, *Divorce: The Adult Perspective*, *in* HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY 734–50 (Benjamin B. Wolman & George Stricker eds., 1982)).

> characterized by extreme anger, retaliatory behaviors, or a serious breakdown in communication and cooperation.[53]

Recent data indicate the same. For example, in 2012, after reviewing the body of research on reasons people file for divorce, Hawkins et al. concluded that "most divorces are initiated because of problems such as falling out of love, changing personal needs, lack of satisfaction, and feelings of greater entitlement, especially for more educated individuals, whereas severe problems such as abuse and addiction are noted less frequently."[54] The authors concluded that a number of breakups might be prevented without threat to the health and safety of the couple, and that there is more potential to repair relationships than is often assumed.[55]

Indeed, a number of researchers suggest that we as a society might do more through social policy and public education to encourage intimate partners—particularly those who are married—to work things out and to stay together.[56]

Paul Amato, a leading sociologist in the study of marital quality and causes of divorce, advocates for the preservation of "good enough" marriages.[57] He argues that, where conflict is at a low- or even medium-level but is not abusive, such partnerships are good enough, from the point of view of the children involved.[58]

Daniel Jones[59] also explores the concept of good enough marriages.[60] Jones advocates for good enough marriages from a spouse's perspective rather than a child's; accordingly, good enough requires distinguishing between the loss of passion and the loss of love.[61] When love remains, the relationship is good enough. And, as the title of Jones's column indicates, good enough is, actually, great.[62]

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53. *Id.* at 186.

54. Hawkins et al., *supra* note 45, at 453.

55. *Id.* at 454.

56. *Id.* (arguing that the results of their literature review and data showed that the most common factors that contribute to seeking a divorce are the ones most amenable to intervention, and citing three additional sources finding the same, and advocating for policies encouraging couples to work things out) (citations omitted).

57. Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71 (2001).

58. *Id.* at 71 ("Children's adjustment to divorce depends upon the level of discord between parents prior to disruption. When discord is high, divorce appears to benefit children, but when discord is low, divorce appears to harm children. Low discord marriages that end in divorce represent 'good enough' marriages from a child's perspective. Because relations between spouses in these marriages are generally positive, the potential for reconciliation is considerable. Attempts should be made to screen these couples prior to marital dissolution and provide appropriate educational and support services.").

59. Jones's quotation began this Subpart. *See* JONES *supra* note 21.

60. The concept of "good enough" love is similarly discussed by Professor Levine. *See* Levine, *supra* note 28, at 193 ("When the buffering system [defense mechanisms for distress in relationships] works, one's love, while not continuously or completely harmonious, may be felt as good enough.").

61. Jones, *supra* note 39.

62. *Id*.

In sum, both popularly and scientifically, there is a large and growing body of data illustrating that when love exists, intimate relationships should not be abandoned, if those relationships are nonabusive.

### *C. Love Matters in Abusive Relationships*

In stark contrast, both popularly and scientifically, the question "why does she stay?" is the most pervasive question asked in the context of abusive relationships.[63] Indeed, "battered women who stay" are viewed as a deviant group.[64]

The question "why does she stay?" might seem rhetorical at first blush. If a partner is causing physical and emotional pain, it is intuitive to think that leaving the partner would end that pain. Alas, for years social scientists have documented that leaving puts many women[65] at risk for heightened, and even lethal, violence at the hands of their former partners.[66] We know this because women do not, in fact, always stay. To the contrary, around 80% of women leave abusive partners at least once.[67] Statistics show that women living apart from their abusive partners are more likely to be abused than married or cohabiting women.[68]

Yet researchers continue to be preoccupied with the question of why women stay, and with figuring out how to get them to leave. For example, a 2013

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63. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 77–79 (2000) (concisely explaining how the question is asked popularly); *see also* Mahoney, *supra* note 7, at 15 (arguing that most of us do not think of ourselves as "staying" in our current relationships; rather, we think of ourselves as "being" in our current relationships and discussing the problems with the word "stay" to describe women in abusive relationships versus women, and men, generally in their relationships, and asking: "Do we 'stay' or are we simply married?"). For an excellent discussion of how the question of staying has influenced the collection of empirical data amongst social scientists, see Einat Peled, et al., *Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model*, 45 SOCIAL WORK 9, 10–11 (2000) (critiquing three themes in the literature that purport to explain the "so-called problem of battered women who stay" as: (1) the inaccurate assumption that separation from the abuser terminates the violence; (2) theories that women's psychological makeup, relationship skills, and personal and situation factors contribute to their entrapment in destructive and dysfunctional relationships; and (3) theories that patriarchal notions regarding gender roles and nonsupportive formal and informal social networks, along with economic dependency and lack of alternative housing explain women's entrapment).

64. Peled et al., *supra* note 63, at 9 (arguing there exists a category of women called "battered women who stay" and observing that these women "often are characterized as incompetent, weak, and lacking coping skills, which further engulf them in the victim role and contribute to their powerlessness.") (citation omitted).

65. But not *all* women experiencing violence in their relationships are at heightened risk when they leave their partners. It depends upon the type of violence. For example, women involved in "fights" may not be at the same risk as women involved in "coercive control." *See infra* Part III.A (discussing the varying types of IPV).

66. Martha Mahoney coined the term "separation assault" to describe this phenomenon. *See* Mahoney, *supra* note 7, at 6.

67. STARK, *supra* note 4, at 115.

68. *Id.* at 91 (noting that men are also more likely to be assaulted by female partners if they are living separately rather than cohabiting).

study ultimately concluded: "Perhaps when an abused woman feels understood about her love for her abusive partner she will be more perceptive to learning about mutual mature love, thus increasing her likelihood of leaving the relationship."[69]

The misconceptions that women always stay, and are in more danger by staying, along with the preoccupation with victims' conduct rather than with perpetrators' conduct, long have been the subjects of IPV-related feminist scholarship. Evan Stark's observation concisely captures the general tone of this body of work: "It's the Men, Dummy . . . . [I]t is the men who *stay*, not their partners. Regardless of whether their dependence on their partner is primarily material, sexual, or emotional, there is no greater challenge in the abuse field than getting men to exit from abusive relationships."[70]

Putting the question of whether it is physically safe for a woman to leave an abusive relationship aside momentarily, data show that a primary reason women stay in abusive relationships is for love.[71]

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69. Marilyn Smith et al., *Intimate Partner Violence and the Meaning of Love*, 34 ISSUES IN MENTAL HEALTH NURSING 395, 400 (2013).

70. STARK, *supra* note 4, at 130 (emphasis in original).

71. *See* Donovan & Hester, *supra* note 12, at 283 (conducting a national community survey in Great Britain, obtaining 746 useable questionnaires; conducting focus groups and interviewing 67 respondents, 44 of whom self-identified as lesbian/gay/bisexual or queer and 23 heterosexual; and not naming "domestic violence" as the topic of the study but rather "what happens when things go wrong in relationships"; finding "love for a partner and hope for the future of the relationship are amongst key reasons given by people in heterosexual and same sex relationships for staying in or returning to domestically violent relationships"); *see also* Sascha Griffing et al., *Domestic Violence Survivors' Self-Identified Reasons for Returning to Abusive Relationships*, 17 J. INTERPERSONAL VIOLENCE 306, 313 (2002) (conducting structured interviews of 90 female residents of an urban domestic violence shelter, with all respondents identifying as African American, Latina or Caribbean; finding that 73.3% of the respondents who previously left their partners in the past reported that emotional attachment would be an influential factor in their decision-making about whether to return in the future); Margaret H. Kearney, *Enduring Love: A Grounded Formal Theory of Women's Experience of Domestic Violence*, 24 RESEARCH IN NURSING & HEALTH 270, 271 (2001) (reviewing 13 qualitative studies between 1984 and 1999, which created a sample of 282 ethnically and geographically diverse women between ages 16–67, hypothesizing the concept "enduring love" and illustrating a primary reason women stayed or returned to violent relationships was a "continued emotional bond and hope for a return to a better time in the relationship"); Jennifer Langhinrichsen-Rohling, *Top 10 Greatest "Hits": Important Findings and Future Directions for Intimate Partner Violence Research*, 20 J. INTERPERS. VIOLENCE 108, 114 (2005) (reviewing literature of the past decade and finding that "one of the main reasons that physically victimized married women give for staying is love – rather than fear or obstacles for leaving such as money or children"); CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 77 (1992); Anna Aizer & Pedro Dal Bo, *Love, Hate and Murder: Commitment Devices in Violent Relationships*, 93 J. PUBLIC ECON. 412 (2009); Arriaga et al., *supra* note 40; Ola W. Barnett, *Why Battered Women Do Not Leave, Part 2: External Inhibiting Factors – Social Support and Internal Inhibiting Factors*, 2 TRAUMA VIOLENCE ABUSE 3, 9 (2001); Pamela Choice & Leanne K. Lamke, *A Conceptual Approach to Understanding Abused Women's Stay/Leave Decisions*, 18 J. FAMILY ISSUES 290 (1997); James C. Roberts et al., *Why Victims of Intimate Partner Violence*

Notably, these data suggest that women in abusive relationships care a lot about the same things that women, and men, in nonabusive relationships care about. Like people in nonabusive relationships, women who experience abuse feel a deep sense of commitment to their partners[72] and, like people in nonabusive relationships, women in abusive relationships feel hope that their relationships can work out even during late stages of the emotional and psychological breakup period.[73]

### *D. Matters of Love are Illegitimate in Abusive Relationships*

Leigh Goodmark persuasively makes the case that there is a paradigmatic domestic-abuse victim that exists in legal actors' (police, judges, and jurors) psyches, and that victim desperately wants to leave her intimate relationship but is powerless to do so.[74]

When the justice system comes across a woman who does not fit this mold, it offers almost no solutions. Restraining orders, the most widely used civil legal remedy, prevent any contact between the parties and thus are practicable only if the woman wants to separate.[75] If a woman calls the police for help, most state statutes strongly encourage, if not require, the police to arrest the perpetrator.[76] If criminal charges are filed, the court issues a criminal restraining order that prohibits contact between the parties.[77] If a district attorney decides to move forward with criminal charges, many jurisdictions follow policies that assure that cases will be prosecuted regardless of the woman's wishes.[78] In short, separation *is* the justice system's solution to the problem of IPV.[79]

Women experiencing abuse are considered blameworthy or masochistic when they want to preserve their intimate relationships.[80] Particularly when their

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*Withdraw Protection Orders*, 23 J. FAM. VIOL. 369 (2008); Caryl E. Rusbult & John M. Martz, *Remaining in an Abusive Relationship: An Investment Model Analysis of Nonvoluntary Dependence*, 21 PERSONALITY SOC. PSYCHOL. BULL. 558 (1995); Smith et al., *supra* note 69, at 395.

72. *See* Aizer & Dal Bo, *supra* note 71.

73. *Id.*; Donovan & Hester, *supra* note 12, at 282; *see* Kearney, *supra* note 71, at 275.

74. GOODMARK, *supra* note 2, at 63–70 (2012) (Goodmark titles this subsection of her book *The Paradigmatic Victim and Her Non-Conforming Sisters*).

75. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008).

76. GOODMARK, *supra* note 2, at 110.

77. Suk, *supra* note 2.

78. Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 592 [hereinafter *Relational Contracts*] (discussing appendix setting forth jurisdictions claiming to follow no-drop prosecution policies).

79. Suk, *supra* note 2, at 8.

80. Kuennen, *Relational Contracts*, *supra* note 78, at 587 (citing the feminist legal literature on point).

desire is based, even partially, on love, it is viewed as maladaptive and even pathological.[81]

These views, combined with empirical data indicating the importance of love to abused women, would lead one to think that feminist legal scholars would be interested in constructing a legal response to IPV that accounts for love. Yet by and large, this is not the case.[82] In past decades, feminists dismissed love in the context of abuse as a product of false consciousness or gender-role socialization.[83] Even cultural feminists, who controversially argue that relationships and connections are uniquely important to women, have supported a legal regime that dismisses love.[84]

There are important strategic and political reasons for these feminist responses, as discussed *infra* Part V. In this Part, I am interested in the body of legal scholarship that argues in favor of legal reform that accounts for the many pragmatic reasons women choose to stay with abusive partners (putting aside the strategic and political). This body of work avoids love as a reason for staying.[85] On the rare occasions when we (and I include myself specifically) as legal scholars acknowledge the concept of love, we rarely use the word *love* in our writing. Rather, we opt for more clinical, sanitized terms. Instead of love, scholars use terms such as "connection" and "emotional attachment."[86] Previously I have observed:

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81. GOODMARK, *supra* note 2, at 98 ("Love becomes pathology . . . a problem to solve so that women subjected to abuse can be cast in a sympathetic light . . . and so that her problems can be addressed in the legal system's preferred manner, through separation. Because, of course, if a woman stays with her partner out of love, the domestic violence service system has very little to offer her."); *id.* at 99–100 ("Love as pathology reaches its apex with the concept of traumatic bonding.").

82. *See* Kuennen, *Stuck*, *supra* note 3, at 171. There are a handful of exceptions where love *is* meaningfully explored as a reason for staying in a violent relationship. *See* GOODMARK, *supra* note 2, at 63–70; Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1474–75 (2001) ("[Women] do not necessarily want to be in a position where they can just leave. They want to be in relationships in which they forgive. They may even want to be in relationships that involve some relinquishment of self, autonomy, and power. And what is more, they are not alone. Women who are not in battering relationships and men who do not batter want these kinds of relationships too.") (footnotes omitted); Mahoney, *supra* note 7, at 19–21 (observing that women's response to violence in a relationship relies on numerous goals: their experience of the violence, economic security, love of partner, and view of life outside of the relationship, among others). *See generally* Cheryl Hanna, *Rethinking Consent in a* Big Love *Way*, 17 MICH. J. GENDER & L. 111 *passim* (2010).

83. Kuennen, *Stuck*, *supra* note 3, at 176.

84. Aya Gruber, *NeoFeminism*, 50 HOUS. L. REV. 1325, 1354 (2013) ("Yet it seems that when it comes to how the state should deal with violent men, even cultural feminists reject caring and cooperation. They do not universally or even generally support continued intimacy with abusers . . . .") (citations omitted).

85. I wonder if our feminist legal scholars' discomfort with love has as much to do with our inability to explain it in the context of coercive control as it has to do with politics and strategy. I discuss love in the context of coercive control in Part II.C., *infra.*

86. *See, e.g.*, Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence*

> To fully appreciate the degree of discomfort such sanitized words display, one need only imagine saying, "I feel emotionally attached to you," or "I am deeply connected to you," rather than, "I love you," to one's spouse or partner before hanging up the phone or turning in for the evening. Or imagine explaining to someone outside of the relationship how you feel about your partner by saying: "I feel very emotionally connected to her."[87]

Our scholarship tiptoes around, and even apologizes for, the fact that women in abusive relationships may love their partners,[88] suggesting that we resign ourselves to "accept" the reality that the women we are advocating for do, indeed, love their partners.[89]

In nonabusive relationships, it is a norm for women (and men) to make decisions about their intimate relationships based on love, particularly when deciding whether to end their intimate relationships.[90] The question, then, is how do we as a society draw the line between abusive and nonabusive relationships so as to

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*Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 476–79, 493 (2003) (describing in detail the multiple "[r]elational [f]actors" that go into a woman's decision-making regarding whether to preserve the relationship, using "emotional connection" and "emotional attachment," though mentioning the word *love* one time, "a woman may love her partner but also be afraid of him"); Goldfarb, *supra* note 75, at 1500 (describing "*mutual emotional commitment*, companionship, intimacy, and sharing," but never using the word *love*) (emphasis added); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1113–14 (2009) ("The current [civil protection order] laws are particularly well situated to permit petitioners to construct a remedy that redefines a relationship that is tainted by abuse but nonetheless is meaningful—connected by children, economics, *emotional, and psychological ties*.") (emphasis added) (footnote omitted); Kuennen, *Relational Contracts*, *supra* note 78, at 537 ("A victim may choose to stay in a relationship that she knows is dangerous because the *intimate connection* is worth the risk.") (emphasis added).

87. Kuennen, *Stuck*, *supra* note 3, at 175.

88. *See* GOODMARK, *supra* note 2, at 98 ("The domestic violence literature tiptoes carefully around the concept of love. The literature accepts the idea that some women subjected to abuse do, in fact, continue to say that they love their partners despite the abuse. But the literature explains this love away, almost apologizing for the desire of women to continue their relationships.").

89. *See, e.g.*, LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 90 (2008) ("We need to ensure that every battered woman has the opportunity and ability to leave her relationship, receives sufficient counseling to make the most independent choice possible, and is fully informed about available alternatives. But *we also need to understand and accept that some women will decide to continue a connection* with an abusive partner . . . .") (emphasis added); Goldfarb, *supra* note 75, at 1500–01 (describing the multidimensional emotions that abusive relationships produce, such as "mutual emotional commitment, companionship, intimacy, and sharing," and thus concluding that the aspiration of many women to remain with their partners "*should not be dismissed as naïve or misguided*") (emphasis added).

90. *See* discussion *supra* Part I.B; *see also* notes 50–55.

recognize staying for love as a legitimate reason to stay, rather than writing it off as maladaptive?

## II. DRAWING THE LINE BETWEEN ABUSIVE AND NONABUSIVE RELATIONSHIPS

This Part explores a continuum of aggression in intimate partnerships and analyzes the usefulness of lines that have been drawn regarding what types or levels of aggression are deemed acceptable, versus not. Subpart A provides a specific definition of the word "abusive," which I have used loosely thus far in this Article. Subpart B relies heavily upon the work of two leading sociologists in the field: Evan Stark[91] and Michael Johnson,[92] both of whom discern among different types of aggression that occur in intimate relationships.

Both view coercive control as qualitatively different from other forms of IPV, and both estimate the prevalence of coercive control to be significantly lower than other forms of aggression in intimate relationships.

Relying on the work of Stark and Johnson, I argue in Subpart C that if the line between abusive and nonabusive relationships were moved away from a zero-tolerance point on the continuum—where law and policy currently draw it—and toward a type of IPV that Stark and Johnson call "coercive control," law and policy could acknowledge love as a legitimate factor in stay–leave decisions for the majority of women who report IPV, i.e., those who report types of aggression in their relationships far shy of coercive control. It also allows us to discuss the significance of love to women experiencing coercive control, which I do in the conclusion to this Part.

### *A. Nomenclature*

So far in this Article I have used the terms "intimate partner violence" and "abuse" loosely to describe any act or array of aggression that might come to mind when one thinks of these concepts. From here on out, I will be more precise in my terminology.

For the purposes of this Part, and in the rest of the Article, I will continue to use the term "intimate partner violence" (or IPV) to mean the same: any form of aggression, physical or nonphysical,[93] between intimate partners. However, I will

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91. Stark's breakdown of the types of aggression used by people who are or have been in intimate relationships employs terminology that I find to be accessible because of its lay, rather than clinical, nature. As I will discuss, once a "zero tolerance" for *any* physical aggression in relationships is abandoned, which I argue it should be, we can—and Stark does—discern between "fights," "assaults," and "coercive control" in relationships.

92. Michael Johnson's typologies of intimate partner violence are more clinical in nature, but because they are increasingly used in the field and are gaining traction, I briefly review them. I then summarize the points upon which Johnson's and Stark's works diverge before focusing on two critical points where they agree.

93. Nonphysical aggression might include verbal degradation, threats, intimidation, the "silent treatment," and any other imaginable act of aggression shy of the use of physical force.

use the word "abusive" to mean a level of aggression that is a tipping point between what is acceptable conduct in a relationship and what is not, i.e., "abusive conduct" refers to unacceptably aggressive conduct.

As we shall see, there are many types of aggression, both physical and nonphysical, that may fall under the umbrella of IPV, but whether one interprets them as abusive is a point of controversy and confusion.

### *B. Places We Could Draw the Line*

#### *1. Zero Tolerance for IPV*

In society and in scholarship, "zero tolerance" is a prevalent view for how to treat IPV. Politicians exclaim this.[94] Public agencies tout this.[95] Advocates for battered women make this their mission.[96] Some feminist scholars argue this: "*Too* many people do not know that the *only* sharp line that matters, and should matter, in domestic relations, is between violence and nonviolence, not between bad violence and okay violence. No level of violence is acceptable; none should be tolerated."[97]

An initial, analytical problem with zero tolerance for IPV is the lack of clarity regarding what counts as violence. In accord with a common dictionary

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94. *See, e.g.*, G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 238 (2005) ("With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the 'zero tolerance' bandwagon."); John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance As they Support Bill, Revamp Laws*, ROCKY MTN. NEWS, May 15, 1994, at 5A (statement of Rep. Diana DeGette, Colo.) ("We've basically completely revamped domestic-violence laws in Colorado . . . . The message to citizens is 'We're taking a zero tolerance in this type of activity.' People who beat up their spouses, girlfriends or boyfriends are going to be punished swiftly and severely.").

95. *See, e.g.*, Jay R. Rooth, *Credibility Strategies for an Incredible Defense*, *in* STRATEGIES FOR DEFENDING DOMESTIC VIOLENCE CASES 50 (2012) ("Many local agencies in Florida have a zero tolerance policy, i.e., if law enforcement responds to a 911 call and it involves domestic violence, they must make an arrest."); *see also* Contra Coast County Board of Supervisors, ZERO TOLERANCE FOR DOMESTIC VIOLENCE, http://www.contracostazt.org/ (last visited Sept. 29, 2014) ("'Zero Tolerance for Domestic Violence,' an initiative of the Contra Costa County Board of Supervisors, is a public/private partnership designed to reduce domestic violence, family violence, elder abuse, and human trafficking in Contra Costa County. Authorized by the California Legislature as the first Zero Tolerance for Domestic Violence County . . . the initiative is aligning policies, practices and protocols, coordinating services, and creating a climate where violence and abuse are not tolerated.")

96. *See, e.g.*, SANCTUARY FOR FAMILIES ZERO TOLERANCE BENEFIT, http://www.probono.net/ny/family/calendar/event.427815-Sanctuary_for_Families_Zero_Tolerance_Benefit_2012 (last visited September 23, 2014) (naming its annual benefit after zero tolerance).

97. *See* ROBIN WEST, CARING FOR JUSTICE 209 (1997) (emphases in original); *see also* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 120 (South End Press 2d ed. 2000) ("Viewing male violence against women in personal relationships is one of the most blatant expressions of the use of abusive force to maintain domination and control.").

definition, violence is "the use of physical force to harm someone, to damage property, etc."[98] At first blush, the definition appears to be straightforward. Advocates of a zero-tolerance approach argue that any use of physical force is abusive.[99] The law currently draws the same line.[100]

But let us return to the question posed by Martha Mahoney in this Article's Introduction: is smashing up furniture in the presence of one's partner an act of violence? Proponents of zero tolerance would argue that it is, and the common dictionary definition would support this position as well. But, if that is the case, and if Mahoney's observation that "it is, relatively speaking, normal for a woman to watch her husband destroy the furniture"[101] is correct, are not most women in this country victims of IPV?

Perhaps zero-tolerance policies are meant to address only violence directed at a person, so that smashing the furniture would not count as violence. But if that is the case, what if the furniture smashing were done for the purpose of intimidating the witness? Surely the intent of the perpetrator and the effect on the witness are important factors.

Finally, a zero-tolerance policy's emphasis on violence underappreciates nonphysical conduct, such as intimidation or coercion. Is a woman *not* a victim of IPV if her partner has never laid a hand on her but instead controls her money, limits her access to her family, and/or degrades her on a daily basis? "Violence is a distinctive behavior with a special link to injury, pain, and other forms of suffering. By subsuming all forms of abuse to violence, we conflate the multiple layers of women's oppression in personal life, making nonviolent abusive acts seem highly subjective or soft core."[102]

While zero tolerance has the strategic advantages of any sound bite, it is more confounding than clarifying as a social policy. It does not sufficiently move forward our understanding of the tipping point between behaviors that we might deem abusive. Martha Mahoney argued that abuse should be defined as a continuum of domination, in which the focus should be the perpetrator's intent.[103] Sociologist

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98. This is the first full definition of violence in the Merriam-Webster online dictionary. MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/violence (last visited March 11, 2014).

99. *See supra* text accompanying note 8.

100. GOODMARK, *supra* note 2, at 40 (observing that the law prohibits the use of physical violence and criticizing it for not including other types of aggression; only Nevada and Rhode Island define criminal domestic violence more broadly but even in these states the focus is on physical violence).

101. Mahoney, *supra* note 7.

102. STARK, *supra* note 4, at 86.

103. Mahoney, *supra* note 7, at 56 (describing "battering" as a (violent) point on a continuum of domination in relationships; she argues that the intent of the perpetrator should be the focus).

Evan Stark comes closest to doing just that in his discernment between fights, assaults, and coercive control.[104]

*2. Stark's Typologies: Fights, Assaults, and Coercive Control*

**a. Fights**

Large-scale national surveys show that respondents report very high rates of IPV when they are asked to catalog *any* instances of force used to resolve conflicts in their relationships.[105] In addition, these surveys find that "mutual violence,"[106] where both men and women use force in relationships, is the most common dynamic in couples.[107]

Many people in relationships believe that some use of physical force is not only an acceptable way to resolve conflict, but that it is a *legitimate* way to resolve conflict.[108] Stark defines a "fight" as force that is used between relative equals, does not exceed community norms or the scope of the grievance, and does not cause serious injury.[109] On that basis, Stark argues that fights have been mistakenly and problematically equated with abuse.[110] To distinguish abuse from fights, Stark argues, "it is necessary to know not merely *what* a party does—their behavior—but its context, its sociopolitical as well as its physical consequence, its meaning to the parties involved, and particularly to its target(s) and whether and how it is combined with other tactics."[111]

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104. Though I note that Stark views coercive control as qualitatively different from fights and assaults, he does not exactly provide us a "continuum."

105. STARK, *supra* note 4, at 89.

106. *Id.* at 92.

107. *Id.* (noting that it is "incontrovertible that large numbers of women use force in relationships" and that the type of force women use includes the types of force classified as severe or abusive).

108. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–09 (2000) (arguing that the average juror believes that some amount of violence within an intimate relationship is acceptable, and thus might be disinclined to convict in the case of intimate partner violence, and calling this a sticky norm that is not going to be easily changed by feminist law reforms reflecting values not yet adopted by society at large).

109. STARK, *supra* note 4, at 105 (describing fights as: (1) occurring between "relative equals"; (2) having some element of reciprocity; (3) bearing proportionality to the grievance; and (4) not violating what the community regards as a legitimate way to address differences).

110. *Id.* at 85 ("The equation of abuse with physical force in relationships has helped the domestic violence revolution access a range of professional and political agendas. But it has failed victimized women in critical ways . . . . Although everyone purports to be measuring the same phenomenon, the picture that emerges . . . differs dramatically depending on whether persons are asked about conflict, crime, or safety concerns . . . . One source of confusion is indecision about whether any and all use of force in relationships should be counted as violence.").

111. *Id.* at 104.

Turning again to Mahoney's scenario, perhaps smashing up furniture is an acceptable way to resolve a conflict in a relationship. Applying Stark's definition, it does not necessarily exceed community norms—as stated by Mahoney, many women have witnessed it. Other examples may include the slamming of a door or the smashing of dishes. Or perhaps screaming an insult at another. None of these occurrences between partners causes bodily injury. But, without more information, we do not know the consequence on the witness, or whether it exceeded the scope of the grievance.

Let us assume first that the person doing the smashing struck out in anger or exasperation rather than to intimidate or control his partner, or that the witness did not feel threatened or fearful. This situation would be, according to Stark, analytically distinct from a second situation, one in which the nonviolent partner was afraid to move or respond.[112]

Mahoney observes that feminists' accounts of lesbian battering make precisely these distinctions. Situations in which someone struck out in anger but did not hit hard, or in which they hit again but there was no effective intimidation, would not rise to the level of "battering."[113] However, "battering" would include "the times the furniture was smashed up and threats uttered, and the nonviolent partner was afraid to move or respond."[114] Adding these factors—the purpose of the use of force and the effect on the target—advances our ability to discern between abusive and nonabusive aggression in relationships.[115]

**b. Assaults**

Unlike fights, which are used to resolve conflict, assaults are used to suppress conflict.[116] In assaults, "dominance is accomplished through raw power alone, forcing a partner to apply a calculus of physical pain and suffering to reassess

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112. I rely here upon Stark's general analytical framework for distinguishing fights, assaults, and coercive control, which is most succinctly captured in *Id.* at 104–06.

113. Mahoney, *supra* note 7, at 33.

114. *Id.*

115. In addition to the work of Stark and Mahoney, a number of judges, lawyers, and scholars have recognized the importance of a contextual approach to understanding aggression between partners. S*ee generally* Nancy Ver Steegh & Claire Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts,* 46 FAM. CT. REV. 454 (2008); *id.* at 456–57 ("Consider the situation where partner A slaps partner B. First imagine that when the incident takes place there is no prior history of physical violence or of other abusive behaviors between A and B. Then imagine that, although this incident is the first instance of physical violence, A has previously undermined B's efforts to seek employment, denigrated B's parenting in front of the children, and isolated B from her family and friends. Then imagine a situation where A broke B's nose the week before and A is threatening to kill B and harm their children. The act of slapping is the same in each situation but the impact and consequences are very different."). For a concise summary of this body of literature, see Jane Wangmann, *Different Types of Intimate Partner Violence–An Exploration of the Literature,* AUSTRALIAN DOMESTIC & FAMILY VIOLENCE CLEARINGHOUSE ISSUES PAPER 22 (October 2011).

116. STARK, *supra* note 4, at 377.

the benefits of past or future behavior, including resistance. In assaults, only one party can win."[117] Additionally, unlike in fights, assaults' "targets *feel* assaulted, and their means, consequence or frequency are so disproportionate to the grievances involved that they violate what the community regards as a legitimate way to address differences."[118]

Stark again cites the longitudinal, national surveys to support his distinction between fights and assaults. In those surveys, when asked about being hit, almost none of the men and only a tiny proportion of the women indicated that they required outside assistance.[119] These folks are talking about fights.[120]

Stark argues that people who indicate that they have sought outside assistance in crime and safety surveys are likely talking about assaults. Their partners' actions violated their community norms to the extent that they anticipated that outsiders would view their grievance as legitimate, and would help them.[121] "As a practical matter," Stark argues, "applying a sheer calculus of means and harms to a history of force in relationships can usually distinguish fights from assaults."[122]

Both women and men assault their partners. While the body of research on women's assaults of men is small, it shows that women assault their partners in the same context, and with similar motives and consequences, as men.[123]

Are assaults abusive? It depends upon the purpose of the perpetrator and the effect on the victim. In discussing his female clients, Stark noted that many "see violence as a legitimate way to stand up for themselves, maintain their self-respect, and to demonstrate that assaulting them has a cost."[124] In this scenario, the intent of the perpetrator is one of leveling rather than controlling.

On the other hand, what if the victim felt controlled, even if this was not the perpetrator's intent? Or what if the effect of the assault was a very serious injury? Stark concedes that differentiating between assaults and the next category of aggression—coercive control—is tricky business.[125] According to Stark, the key is the intent of the perpetrator to dominate and control his or her partner. If a specific

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117. *Id.* at 105.
118. *Id.* (explaining why distinguishing fights from assaults is straightforward).
119. *Id.*
120. *Id.* (concluding that, in the large, national surveys, "a good number of these [reported] assaults occur in the context of fights, a possibility that is supported by the extent to which couples report mutual violence").
121. *Id.* (arguing that the "majority of those who report abuse to crime or safety surveys have sought outside assistance, suggesting they are primarily victims of assault or worse").
122. *Id.* at 106.
123. *Id.* at 99.
124. *Id.*
125. *Id.* at 105.

assault is part of a larger pattern of ongoing tactics used coercively to control another, it tips for him into the realm of abusive.[126]

**c. Coercive Control**

The aim of coercive control is dominance, not to cause physical harm. This point is fundamental. Coercive control targets autonomy, liberty, and personhood.[127] Its tactics are broad and insidious, well beyond the use of physical aggression alone. The tactics, as observed by women's advocates and Stark, include: restricting access to money, family, and friends; threatening to commit suicide; putting a partner down and calling her names; making her think she is crazy; controlling what she does, who she talks to, what she reads, where she goes; treating her like a servant; inhibiting her from being involved in making any big decisions; acting like the "master of the castle"; and other tactics that exploit male privilege.[128]

These tactics create a condition of "unfreedom"—that is, "gendered in its construction, delivery and consequence."[129] This state of unfreedom is called entrapment.[130] Importantly, physical violence may be used, but coercive control does not require an element of physical violence.[131] If violence is used at all, it is typically minor violence.[132] But because minor violence typifies both fights and coercive control, these patterns can only be distinguished in a historical context where the frequency of force over time is weighted alongside its interplay with tactics to intimidate, isolate, or control.[133] Stark concludes that "[w]omen's experience of feeling entrapped in a coercively controlling situation is elicited from something other than violence, because the experience of feeling abused is

126. *Id.* at 106 (explaining how professionals, including law enforcement, must inquire about minor violence within "a historical context where the frequency of force over time is weighed alongside its interplay with tactics to intimidate, isolate or control a partner . . . [B]ut prevailing emphasis on discrete incidents makes these distinctions impossible . . . and the most dangerous cases are then left at bay").

127. *Id.* at 369 ("Violations of liberty are the central moral wrong in coercive control, regardless of whether violence is their means.").

128. These are taken from the "Power and Control Wheel" of the Domestic Abuse Intervention Project. *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROJECT, http://www.theduluthmodel.org/pdf/PowerandControl.pdf (last visited March 15, 2014).

129. STARK, *supra* note 4, at 205.

130. *Id.* ("The result [of coercive control] is a condition of unfreedom (what is experienced as *entrapment*) that is 'gendered' in its construction, delivery and consequence."); *see* Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice,* 21 HOFSTRA L. REV. 1295, 1318 (1993) (observing that Stark coined the term "entrapment" and arguing it best summarizes the experience of battered women).

131. STARK, *supra* note 4, at 367.

132. *Id.* at 106 ("[M]inor violence typifies both fights and coercive control.").

133. *Id.* at 106–07

independent of the frequency of abusive episodes, and is shared by women who suffer relatively few assaults as well as by those who suffer hundreds."[134]

Stark refers to entrapment as an enigma: "[W]omen who are no different from any of us to start, who are statistically normal become ensconced in relationships where ongoing violence is virtually inevitable." He eloquently lays out the case that it is the confluence of societal institutions that supports male privilege, sexism, *and* an individual man who uses coercively controlling tactics.[135] Entrapment is "the unique experiential effect when structural exploitation, regulation, and other controls are personalized."[136] As a result "entrapment . . . can be significantly reduced only if sexual discrimination is addressed simultaneously."[137]

*3. Johnson's Typologies of IPV*

Sociologist Michael Johnson also discerns between types of aggression used in intimate relationships. Like Stark, Johnson recognizes a category of coercive control that he calls "Coercively Controlling Violence,"[138] and defines it quite similarly to Stark. Johnson distinguishes three other typologies: (1) "Violent Resistance," which is violence that both men and women use in reaction to partners who have a pattern of Coercive Controlling Violence for the purposes of getting the latter to stop or to stand up for themselves;[139] (2) "Situational-Couple Violence," the type of "partner violence that does not have its basis in the dynamic of power and control";[140] and (3) "Separation-Instigated Violence," a type of violence that first occurs in the relationship at separation, related to the tensions and emotions that arise in that context, but is not ongoing.[141]

Johnson and Stark disagree on two points germane to this Article. First, Stark argues that Johnson's category of situational violence does not sufficiently distinguish between two dynamics with very different significance: the "ordinary

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134. *Id.* at 100 (citing Page Hall Smith et al., *Women's Experiences with Battering: A Conceptualization from Qualitative Research*, 5 WOMEN'S HEALTH ISSUES 173 (1995)); *see also* Page Hall Smith et al., *Measuring Battering: Development of the Women's Experience with Battering (WEB) Scale*, 4 WOMEN'S HEALTH: RESEARCH ON GENDER, BEHAVIOR & POL'Y 273 (1995).

135. STARK, *supra* note 4 at 113–14.

136. *Id.* at 370.

137. *Id.* at 14.

138. Sometimes Johnson calls this type of IPV "intimate terrorism." *See, e.g.*, Michael P. Johnson, *Differentiating Among Types of Domestic Violence*, *in* MARRIAGE AND FAMILY 282 (H. Elizabeth Peters & Claire M. Kamp Dush eds., 2009).

139. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 479 (2008).

140. *Id.*

141. *Id.* at 479–80. With regard to situational violence Johnson elaborates: "It is often the case that Situational-Couple Violence continues through the separation process and that Coercive Controlling Violence may continue or even escalate to homicidal levels when the perpetrator feels his control is threatened by separation." *Id.* at 480.

fights that many couples view as legitimate ways to settle their differences, and frank assaults where violence is used to hurt, frighten or subordinate a partner, but control tactics are not."[142] Second, Stark emphasizes that targets of coercive control experience entrapment; Johnson acknowledges, but does not emphasize, the phenomenon of entrapment.[143]

Nonetheless, Johnson and Stark clearly agree upon several important points. First, coercive control is a qualitatively different thing than the other forms of aggression; they do not exist on a continuum.[144] Thus, coercive control should be measured on a different moral yardstick than other forms of aggression.[145] Second, in heterosexual relationships, men are the primary perpetrators of coercive control.[146]

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142. STARK, *supra* note 4, at 104.

143. *See, e.g.*, Kelly & Johnson, *supra* note 139 (neglecting to use the word "entrapment" in the text, but acknowledging elsewhere that women enduring coercively controlling violence become entrapped). I rely more heavily on Stark's typologies because to my mind they are a degree more discerning, and because I believe that the experience of entrapment, as I argue later, is critical to, and is critically misunderstood by society and law and policy, changing attitudes and responses to IPV.

144. Kelly & Johnson, *supra* note 139, at 485; STARK, *supra* note 4, at 104 (agreeing with Johnson, Stark writes: "A key implication of Johnson's terminology is that situational violence and intimate terrorism have different dynamics and qualitatively different outcomes and so should be judged by different moral yardsticks. They also require a different response. Abuse should no more be considered a simple extension of using force than a heart attack should be treated as an extreme instance of heartburn").

145. STARK, *supra* note 4, at 104.

146. *Id.* at 102 ("[T]he pattern of intimidation, isolation, and control . . . is unique to men's abuse of women and . . . is critical to explaining why women become entrapped in abusive relationships in ways that men do not and experience abuse as ongoing. These tactics do not typify all forms of abuse."); Kelly & Johnson, *supra* note 139, at 481–82 (discussing the results of various surveys and stating that coercively controlling violence is largely male perpetrated). Regarding coercive control in same-sex relationships, STARK, *supra* note 4, at 396–97, discusses how, in his practice, he has worked with same-sex couples where "perpetrators combined physical abuse with rituals of dominance, exploitation, isolation, and humiliation that resembled the patterns evident in coercive control, relationships in which there are rules for behavior in public, where one partner is forbidden to work or visit his or her family, or where child care and/or homemaking are regulated", and notes that stalking and "other forms of intimidation used in coercive control are also common" but is careful to note that there is no evidence in the literature yet that illuminates whether, if coercive control occurs among same-sex couples, it has "the same dynamics, consequences, or spatial dimensions or whether and how abusive dynamics are affected when race, class or age differences form its core rather than differences in gender identity" because there is a dearth of research. For recent empirical work regarding coercive control in same-sex relationships see Andrew Franklin & Jac Brown, *infra* note 158 (describing dynamics similar to those stated by Johnson) and Donovan & Hester, *supra* note 12, at 283–86 (describing dynamics similar to those stated by Stark, adding that "outing" is used as a control tactic, and describing expectations of people in first-time same-sex relationships who are at particular risk for IPV).

Finally, and most importantly, large-scale, general population surveys have not accurately captured the prevalence of coercive control.[147] For example, Stark observed that the National Violence Against Women Survey ("NVAWS") fails to distinguish between prevalence and incidence of abuse, and thus there is no way to know for certain which cases of abuse identified in the study are ongoing.[148] His rough approximation, based on the data collected by the NVAWS and based upon his own empirical research, is that somewhere between 6.6%–8.8% of women in the U.S. experience coercive control.[149] This number is much lower than what is oft argued: that "one in five women" experience coercively controlling violence in their relationships.[150]

Johnson also finds fault with the NVAWS, and recently re-analyzed its results.[151] He focused specifically on the data regarding ex-husbands' (rather than current husbands') aggression.[152] He predicted, and found, that when looking at this group in particular, there was considerably more violence reported and especially more coercively controlling violence.[153] Specifically, he found that in the "ex-spouse data," 30% of ex-husbands were violent, and 7% of the reported violence by ex-husbands qualified as Situational-Couple Violence and 22% qualified as Coercively Controlling Violence.[154] Johnson clarified that we "certainly would not want to assume that [these rates] represent the relative prevalence of violence of various types in intact marriages."[155] However, he argued that the little to no coercively controlling violence reported by respondents in intact marriages might be a result of the fact that "female victims of intimate terrorism in a current relationship would be especially unlikely to agree to participate in survey research on violence."[156]

While Stark and Johnson do not agree on precise numbers, both are clear that large-scale surveys such as the NVAWS fail to accurately capture the prevalence of coercive control. This is important because, as will be discussed in Subpart D, most people think of intimate partner violence as having to do with power

147. Kelly & Johnson, *supra* note 139, at 481; STARK, *supra* note 4, at 88–90.

148. Email from Evan Stark, February 26, 2014 (on file with author).

149. Though he is careful to qualify that this estimation is very rough given other methodological problems with the NVAWS. *Id.*

150. *See infra* note 196 (discussing the number of scholars, including myself, who have overgeneralized the prevalence of coercive control based on the National Violence Against Women Survey).

151. Michael P. Johnson et al., Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required, 20 VIOLENCE AGAINST WOMEN 186 (2014).

152. *Id.* at 189.

153. *Id.* at 192, 196.

154. *Id.* at 196.

155. *Id.* at 197.

156. *Id.* at 201.

and control,[157] when in fact this dynamic refers to coercive control, which comprises only a fraction of the reports of aggression between intimate partners.[158]

### *C. Conflating All IPV with Coercive Control is a Barrier to Understanding Love Matters in the Context of IPV*

Practitioners, researchers, policymakers, and the law use the term "IPV" to mean different things.[159] As this Article has demonstrated, there is a wide array of conduct that qualifies as IPV, ranging from any use of physical force, to fights, to assaults, to coercive control. Also, in nonabusive relationships, love is deemed a legitimate factor in decisions to stay in relationships, but in abusive relationships, love is not considered to be a legitimate factor.

Based on the work of Stark and Johnson, I join those scholars who argue that the line between abusive and nonabusive relations should be drawn at coercive control, or at least closer to it. When discrete assaults are viewed in context, with an examination of the intent of the perpetrator and the effect on the target, a distinction can be drawn between episodic assault and coercive control.

This is not to argue, as a normative matter, that an episodic assault—particularly one in which there is a serious injury and in which the victim feels violated—should not be deemed criminal.[160] Rather, an episodic assault is distinct in kind and degree from an assault that is part and parcel of an ongoing pattern of tactics designed to diminish the autonomy and personhood of an intimate, or formerly intimate, partner. The latter is more severe and, as a number of scholars have persuasively argued, should be treated differently by the law.[161]

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157. Kelly & Johnson, *supra* note 139, at 478 (describing the National Domestic Violence Hotline definition, which discusses a pattern of behavior used to gain power and control, and stating that this is the definition "that comes to mind for most people when they hear terms such as wife beating, battering, spousal abuse, or domestic violence.").

158. Very recent research does indeed support the conclusion that Situational-Couple Violence is far more common than coercive control. *See, e.g.*, Andrew Franklin & Jac Brown, *Coercive Control in Same-Sex Intimate Partner Violence*, 29 J. FAMILY VIOLENCE 15, 20 (2014) (finding very low rates of intimate terrorism—4.6%—consistent with Johnson's research with regard to heterosexual couples); *see also* Janele M. Leone et al., *Women's Decisions to Not Seek Formal Help for Partner Violence: A Comparison of Intimate Terrorism and Situational Couple Violence,* 29 J. INTERPERSONAL VIOLENCE 1850, 1858 (2014) (finding of the sample of women labeled "abused," 34% were characterized as victims of intimate terrorism and 66% as victims of Situational-Couple Violence).

159. *See* Kelly & Johnson, *supra* note 139, at 477–78.

160. Assaults are crimes, whether perpetrated on an intimate partner, a family member, or a stranger. But an assault on a partner that is situational in nature and not part of a pattern of coercive control may not merit treatment as a crime of IPV, which would include the issuance of a mandatory criminal protection order and application of no-drop prosecution policies. *See supra* discussion Part II.B.2.

161. *See infra* Part IV and *infra* text accompanying note 210 (discussing Alafair Burke's and Deborah Tuerkheimer's definitions).

Moving the line from any use of physical force toward coercive control would allow people[162] who consider themselves to be in nonabusive partnerships some emotional and cognitive space. Space to acknowledge that their relationships might not be so different from many intimate relationships that could be classified (as a legal matter) as relationships marked by IPV. Martha Mahoney argued that, when we view others' relationships and hear about incidents of violence, we are shocked and consider those women to be battered women.[163] Yet when we think of instances of aggression in our own relationships, we think of them as normal parts of the relationship and, accordingly, oft implicitly, do not (or would not) consider ourselves victims of IPV.[164] If coercive control was the litmus test for what is and is not abusive, instead of the use of physical force, this might allow us the space to conceptualize love as a legitimate factor in the majority of abused women's decisions to stay.

But, what about love in the context of coercive control? When women are coercively controlled, and hence entrapped, as Stark argues, is what these women feel for their partners love?

Donovan and Hester argue that love, which is usually positively experienced, can serve to confuse victims about how to make sense of and name their experiences as abusive.[165] If, as in the case of coercive control, the abusive partner makes all of the rules in the relationship—this relationship serves me, and you are responsible for this relationship and for me[166]—the love women feel may be a response to the coercive control itself, in which the abusive partner's "practice of love" is a form of emotional violence.[167]

In these instances, and in the context of coercive control, "love" is not the same as most of us would define it. Recall that, although defining love has proven difficult to both the public at large and to social scientists in particular, one of the points upon which there is agreement is the notion of mutuality.[168] A unidirectional love in a context of domination and subjugation is a type of love that most of us question.

Stark does not. He explicitly views the capacity to love an abusive partner as a strength and not a weakness, and the cultivation of the capacity for love as a way to liberate oneself, at least emotionally.[169] "The 'love' women feel may have as much to do with them, keeping their positive emotions and possibilities alive, their

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162. By people, I mean to include the general public as well as the same in their roles as judges, lawyers, jurors, policymakers, and law enforcement personnel.

163. Mahoney, *supra* note 7, at 15–16.

164. *Id.*

165. Donovan & Hester, *supra* note 12, at 282.

166. *Id.* at 282–83 (describing the rules of relationship set forth by perpetrators of coercive control).

167. *Id.* at 283.

168. *See supra* Part I.A.

169. Email from Evan Stark, March 13, 2013 (on file with author) ("I see a woman loving an abusive partner as a strength, not a weakness, a 'test' of love if you will—isn't this what 'for better or worse' also means (not just in 'sickness and health')).").

autonomy, as with the person they're attached to, and, to this extent, is an example of what I call 'control in the context of no control.'"[170] Donovan and Hester similarly argue, based upon their empirical data, that victims of coercive control use the love they feel to construct themselves as strong and to view their love as a source of strength.[171] Love, in the ways that both Stark, and Donovan and Hester describe, is not merely a strength but a survival mechanism.

Whether one views love as a source of strength, with a more expansive view of the multiple and distinct contexts within which violence between partners and love coexist, we can better consider, assess, and understand the value and meaning of love in all contexts. Acknowledging the existence and complexity of love, and victims' experience of love, across contexts affords the opportunity that the law currently misses. At the very least, acknowledging the complexity of love in a continuum of relationships (from nonabusive to coercively controlling) tempers a knee-jerk reaction to love in the context of abuse as crazy or masochistic.

## III. HOW FEMINIST LEGAL SCHOLARS UNWITTINGLY CONTRIBUTE TO BINARY NOTIONS

### *A. Errors Caused by Conflating IPV with Coercive Control*

For several years now, sociologist Michael Johnson has argued that it is critical to discern between the types of force and violence we are talking about. In 2008, he wrote: "[I]t is no longer considered scientifically or ethically acceptable to speak of domestic violence without specifying the type of partner violence to which one refers."[172]

There are two primary groups of researchers who are interested in quantifying the prevalence of intimate partner violence. One group is comprised of family sociologists, while the other is comprised of feminist researchers.[173] These two groups measure IPV quite differently. Family sociologists focus on discrete episodes of physical force, finding that men and women commit acts of violence in intimate relationships at largely the same rate.[174] Feminist researchers, on the other hand, focus on the context and intent of the use of violence, finding that women are overwhelmingly the victims of violence used to secure power and control in relationships—the type that most closely resembles what Stark and Johnson call coercive control.[175]

Failure to be discerning results in significant errors—when researchers lump together differing types of IPV they "produce data that are an 'average' of the

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170. *Id.*
171. *See supra* Introduction.
172. Kelly & Johnson, *supra* note 139, at 477.
173. *Id.*; STARK, *supra* note 4, at 84.
174. Kelly & Johnson, *supra* note 139, at 477.
175. *Id.*; STARK, *supra* note 4, at 103–04 (noting that feminist researchers insist the problem requiring public attention involves female victims almost exclusively); *id.* at 104 (crediting Johnson for first observing that the two groups were measuring different phenomena).

characteristics or correlates of the types that are aggregated."[176] Johnson gives the example of studies on the effect of intergenerational transmission of IPV.[177] It is commonly claimed that if IPV occurs in a man's home when he is a boy, he learns that using violence against one's partner is appropriate.[178] Johnson notes that researchers have yet to distinguish between types of violence when conducting their studies.[179] Thus the "average" violent relationship, in "most survey research, dominated by situational-couple violence, does not represent the relationship that is usually of most interest, the effect of childhood experiences on the likelihood of a man becoming a wife-beater [a coercively controlling violent partner]."[180]

Second, Johnson argues, "[S]ometimes research that deals with one type of [IPV] is used to draw conclusions about quite a different type."[181] Here he gives the example of a researcher who based her finding—that as many women are coercively controlling as men—on data from general survey samples that measured situational violence.[182] Of this mistake he observed: "This is the error that produced decades-long and continuing debate over the gender symmetry of domestic violence. We need to differentiate among types of IPV if we want to advance our understanding of such violence and to intervene effectively."[183]

### *B. Examples of Errors in Feminist Legal Scholarship on IPV*

Turning to the legal scholarship regarding IPV, a number of scholars, including myself, are guilty of lumping together rather than discerning amongst types of aggression in intimate partnerships.[184]

As one recent example, in *Breakups,* Deborah Tuerkheimer brilliantly argues that the law fails to recognize many women who are in abusive relationships as victims of ongoing abuse; rather it imposes a prerequisite of geographic and emotional distance between parties—a breakup—before condemning stalking as a crime.[185] Her article is the first to examine how relationship status (pre- or post-breakup) is dispositive of whether stalking will be deemed a crime. I could not agree more with the main thrust of the article, which questions why a pattern of harassing, intimidating, and threatening conduct is criminalized only *after* the parties have separated, when in fact this conduct most commonly predates physical separation.

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176. Johnson, *supra* note 138, at 283.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id*.
182. *Id.* (discussing the research conducted by Suzanne Stenmetz in the late 1970s).
183. *Id.* at 284.
184. *See* GOODMARK, *supra* note 2, at 146, 146–50 (after describing the lumping-together, or essentializing of victims, Goodmark poignantly argues that feminist legal scholars have also essentialized IPV by characterizing IPV as always revolving around power and control, and that by essentializing both IPV and the men who perpetrate it, the legal system endangers women who are likely to stay with or return to their partners).
185. Deborah Tuerkheimer, *Breakups*, 25 YALE J.L. & FEMINISM 51, 72 (2013).

But the article also contributes to the problems previously highlighted: (1) the assumption that there is a commonly shared definition of IPV, which she identifies as coercive control;[186] (2) the implication that most victims of intimate partner violence experience coercive control; and (3) the use of statistics that describe one type of IPV to draw conclusions about another.

Tuerkheimer begins her article by asserting that the "most commonplace violence" is violence between intimate partners, and cites the first National Intimate Partner and Sexual Violence Survey ("NIPSVS") for the premise that "more than one in three women in the United States has 'experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.'"[187] She then argues, "[u]nlike other violence, intimate partner violence is not episodic, nor is it limited to the realm of the physical. Incidents of acute battering are connected by dynamics of power and control."[188] The implication is that "more than one in three" women found to have experienced rape, physical violence, and/or stalking are currently victims of coercively controlling violence.[189]

But this is not the case. This particular measure (of "rape, physical violence, and/or stalking") does not necessarily reveal a *pattern* of behavior, but episodes or incidents of behaviors—precisely what Tuerkheimer argues is not a proper measure of abuse.[190] Surveys, like NIPSVS, confuse incidence with prevalence of IPV.[191] In addition, they focus on physical aggression, rather than the nonphysical control tactics that define coercive control.[192]

As evidence of the latter point, the survey found that one in four men in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.[193] We know, based on the work of Stark and of Johnson, that this statistic cannot represent the number of men who are coercively controlled; indeed, Stark reports knowing of no documented case in which a woman coercively controlled a male intimate partner.[194]

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186. *Id.* at 55 ("Domestic violence, also known as battering, intimate partner violence, intimate partner abuse, or simply abuse, is a pattern of violent conduct predicated on power and control."). Tuerkheimer distinguishes this definition from the "common usages of the terms stalking and domestic violence, which the criminal law perpetuates." *Id.* at 54.

187. *Id.* at 52, n.1.; According to 2011 figures from the first National Intimate Partner and Sexual Violence Survey, more than one in three women in the United States has 'experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.' MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2 (2011).

188. Tuerkheimer, *supra* note 185, at 52.

189. *See* BLACK ET AL., *supra* note 187, at 2.

190. *Id.* ("When it is embedded in a relationship, violence spans time. Unlike other violence, intimate partner violence is not episodic, nor is it limited to the realm of the physical.").

191. STARK, *supra* note 4, at 107–08.

192. Kelly & Johnson, *supra* note 139, at 481–82.

193. BLACK ET AL., *supra* note 187, at 2.

194. STARK, *supra* note 4, at 377. *But see* Johnson et al., *supra* note 151, at 202 (finding that "[d]ata regarding ex-spouses show that intimate terrorism is primarily but not

Prior to the NIPSVS survey, the most recent large-scale national survey was the National Violence Against Women Survey.[195] In my prior work, based on this survey, I have misstated statistics about coercive control.[196] I am in good company.[197]

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exclusively male-perpetrated"); *see also* Kelly & Johnson, *supra* note 139, at 482 (noting that there may be some cases in which women coercively control men, but that as of the date of this observation, the paucity of research could not lead to any conclusive evidence).

195. PATRICIA TJADEN & NANCY THEONNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (2000), *available at* http//ncjrs.gov/pdffiles1/nij/181867.pdf.

196. *See* Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837, 839 (2012) (citing to the NVAWS, I argued that the "vast majority of [IPV] victims do not report the violence to the police" without differentiating amongst types of IPV. In fact, victims of coercive control versus victims of other types of IPV are more likely to call the police); Leone et al., *supra* note 158, at 1862 (finding that "70.2% of intimate terrorism victims sought some type of formal help versus 44.4% of situational couple violence victims").

197. *See* Joanne Belknap et al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER L. & POL'Y 373, 384–85 (2012) (citing the NVAWS and arguing that most victims do not call the police, without differentiating amongst types of IPV); Alafair S. Burke, *Domestic Violence As A Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 569 (2007) (citing to the NVAWS and arguing that generally, domestic violence is often driven by coercive control); Michelle Byers, *What Are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, 46 NEW ENG. L. REV. 551, 554 (2012) (citing to the NVAWS and arguing that both men and women who are victims of IPV are continually abused by the same perpetrator, without differentiating amongst the types of IPV); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 48 (2004) (citing to the NVAWS, arguing that the majority of intimate partner assaults are not reported to authorities because a majority of victims thought that the police "would not or could not do anything on their behalf," without differentiating amongst types of IPV); Angela M. Killian, *Mandatory Minimum Sentences Coupled with Multi-Facet Interventions: An Effective Response to Domestic Violence*, 6 U. D.C. L. REV. 51, 69 (2001) (citing to the NVAWS, stating that a "victim of intimate partner violence is nothing more than a prisoner of her abuser[,]" without differentiating amongst types of IPV); Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 868 (2009) (discussing control as a primary motive behind IPV and citing the NVAWS to show that women who are victims of IPV tend to suffer at the hands of repeat offenders); Tanya M. Marcum & Catherine Davies Hoort, *Alert: Be on the Lookout for Protection Orders in the Educational Setting*, 30 T.M. COOLEY L. REV. 39, 49 (2013) (citing to the NVAWS, stating that "many victims of intimate partner violence do not obtain protection orders[,]" without differentiating amongst types of IPV); Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1067 (2014) (citing to the NVAWS, arguing that "[a]lthough protection order holders generally experience an overall decrease in violence, multiple studies have still found high rates of protection order violations by abusive partners[,]" without differentiating amongst types of IPV); *Lawyers and Domestic Violence: Part I*, 24 WYO. LAW. 36, 37 (Oct. 2001) (citing to the NVAWS, stating that most violence is never reported to law enforcement and "remains shrouded behind the veil of family privacy[,]" without differentiating amongst types of IPV).

I fear that these overestimations have a snowball effect because when we fail to discern coercive control from other forms of IPV we overstate its prevalence. By overstating its prevalence, we inadvertently imply not only that all women who experience IPV are coercively controlled but also that all women are entrapped in their relationships. This is particularly problematic because of the connotations of the word "entrapment."

For Stark, entrapment is about the *confluence* of a sexist society *and* the control tactics of an individual man.[198] For the public, however, entrapment connotes an individual woman who is frozen, paralyzed, and helpless.[199] She would leave her partner if only she could, if only she had the resources and the strength. Police, judges, lawyers, advocates, social workers, friends, neighbors, and family can provide her the necessary support, resources, and strength.[200] They can help entrapped women by helping them leave.[201] Leaving, then, is the only solution. When women love their partners and do not want to leave, they are not only viewed as aberrant, they are also not believed.[202] This act of denying them their own agency and autonomy would seem to conflict with feminist principles.

In sum, the importance of discerning the type of IPV that feminist legal scholars and advocates in the field wish to eradicate cannot be overstated. As eloquently put by Stark:

> Accurate numbers are imperative not merely to retain support from an increasingly skeptical public but because a vast service infrastructure is in place that cannot function properly without them. If before it made little difference if we were standing in empirical quicksand . . . today accurate numbers are needed to determine how many personnel to enlist, what resources to allocate, whom to target for service and interdiction, and when, where, and how to intervene to maximize effectiveness. No one is harmed more seriously by the absence of agreement on the what, who, and how much of battering than its victims. If once talking about an anonymous mass, we now bear responsibility for millions of real people for whom a range of public or quasi-public institutions must be held accountable, billions in public and private dollars that could arguably be spent with greater effect elsewhere, and the investment of millions of person hours

198. *See supra* Part II.B.2.c.

199. GOODMARK, *supra* note 2, at 33 (describing the lingering influence of Lenore Walker's theory of learned helplessness and the damage it has wrought).

200. *Id.* at 81 (describing in detail the conflation of separation with successful termination as having oriented domestic-violence policy and law since the early days of the Battered Women's Movement and arguing how law and policy development within the legal system unequivocally prioritizes separation as the only clear remedy to ending domestic violence).

201. *Id.* at 59 (describing Walker's theory of learned helplessness as the first step toward defining women as passive and ineffectual, and too fearful to act to stop the violence).

202. *Id.* at 66–69 (describing skepticism of professionals when women do not act in conformity with stereotypes of victims as passive and desirous of leaving).

annually by real advocates, police, judges, physicians, psychologists, and social workers.[203]

## IV. IF MATTERS OF LOVE REALLY MATTERED

### *A. Advantages*

To avail themselves of the law's current protection, abused women are required to sever their intimate relations.[204] If the law valued love more, and separation less, both the criminal law governing IPV and the civil legal remedies available to women could be profoundly impacted.[205]

Currently, the criminal law fails to recognize many women who are in abusive relations as victims of abuse. As discussed earlier, in *Breakups,* Deborah Tuerkheimer compellingly argued this point.[206] If a woman has not broken up with her partner, she is perceived to be consenting to, if not desirous of the calls, texts, following, and other forms of communication that constitute stalking.[207] If the law placed a higher premium on protection within the context of love, rather than separation, a pattern of harassing, intimidating, and threatening conduct would be deemed criminal regardless of whether the parties had separated. Given that stalking conduct tends to predate physical separation, removing the separation requirement would also better protect victims.

Civil restraining orders, called "protection orders," prohibit a respondent from assaulting, harassing, and menacing the petitioner. These orders are the most widely used legal remedy by victims of IPV. As a practical matter, victims can only obtain such orders if they have broken up with their partners, because these orders typically prohibit any contact whatsoever from the respondent. Therefore, these orders are not a viable remedy if the petitioner is not ready or does not want to

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203. STARK, *supra* note 4, at 87.

204. As I have observed previously, the law provides a one-size-fits-all approach to IPV: separation of the parties. *See* Kuennen, *Relational Contract*, *supra* note 78, at n.418 and accompanying text. *See also* GOODMARK, *supra* note 2, at 81 (arguing that separation is a litmus test for determining whether a victim is worthy of assistance, and quoting Christine Littleton, *supra* note 15: "[The legal system] does not blame *all* battered women for their plight, only those who do not immediately sever their relationships and leave their batterers.").

205. Baker, *supra* note 82, at 1478 (arguing that if the law took seriously the value of intimacy and relationships, this could have a concrete doctrinal impact for women experiencing abuse).

206. Tuerkheimer, *supra* text accompanying note 185.

207. *Id.* at 72 (observing that "[t]hough the violent exercise of power and control occurs in virtually seamless fashion throughout the stages of relationship, women must leave in order for criminal law to take note. In functional terms, what this means is that prosecutors, perhaps anticipating the reaction of jurors to more imaginative charging decisions, charge defendants with stalking for exclusively post-separation conduct, despite the technical applicability of stalking laws to domestic violence").

terminate her relationship. If the law valued love more, and separation less, these orders could be tailored to allow contact but prohibit abuse.[208]

Similarly, criminal protection orders should be tailored to value love as well. These are injunctions that are automatically issued against defendants criminally charged with committing an act of IPV.[209] As with most civil protection orders, criminal protection orders prohibit all contact between the alleged perpetrator and victim. As Jeannie Suk argued, the issuance of these orders constitutes state-imposed, *de facto* divorce, wreaking havoc in the lives not just of women who love their partners and want to preserve their relationships, but of men who want the same but are subject to criminal conviction for remaining in contact with the victim. [210]

Finally, a number of scholars have argued for a more discerning definition of IPV that would target coercive control.[211] Rather than viewing IPV as discrete episodes of violence that occur between current and former intimate partners, the criminal law should instead condemn the pattern of ongoing threats and intimidation—both physical and nonphysical—that comprise coercive control. For the reasons stated in Part III, such a definition acknowledges the distinction between an ongoing strategy of subjugation that is not consistent with community norms versus sporadic fights which frequently occur in the context of intimate love.

Social-service interventions could also be impacted by acknowledging the existence of love in the context of IPV, rather than ignoring it. If love, and not financial, housing, or other external needs, prevents women who would otherwise leave their relationships from doing so, then perhaps the social-service interventions available may not be entirely sufficient.[212] For example, women experiencing abuse could be counseled about the fact that feelings of love are normal. This would help women decrease feelings of shame and secrecy about the fact that love is a salient factor, particularly for many women who have recently left their partners.[213] As one woman commented, social-service providers "[d]on't tell you how to go back and deal with the person and I bet you nine out of ten of them go back, end up seeing the person again because you're not learning how to deal with it at the time, you're learning how to run away."[214]

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208. Goldfarb, *supra* note 75.

209. *See* Suk, *supra* note 2, at 48.

210. *Id.* at 56.

211. GOODMARK, *supra* note 2, at 139; Burke, *supra* note 10; Erskine, *supra* note 10; Tuerkheimer, *supra* note 10.

212. Griffing et al., *supra* note 71, at 307 ("Despite the increasing availability of concrete services such as shelter and economic assistance, the frequency with which women still return to abusive relationships is considerable. This suggests that in some cases these resources, although necessary, may not be an entirely sufficient component of intervention programs for battered women.").

213. *Id.* at 314–15.

214. GOODMARK, *supra* note 2, at 99 (citation omitted) (quoting a woman who sought outside assistance).

More broadly, social-service providers could measure their success in terms of empowering women to make the choices that are right for them, rather than encouraging separation as the only solution.[215] "Some battered women wish to maintain the relationships' positive attributes while finding a way to stop or lessen the abuse. Facilitating women's freedom of choice as a mechanism for empowerment implies accepting and respecting their choice to stay with their abuser as a viable alternative."[216] Thus far, social-service interventions give lip service to empowerment as an important guiding principle, but the concept "seldom is carried out beyond the ideological and prescriptive levels."[217]

### *B. Risks*

It is indisputable that there are risks involved when asking the law to consider love in the context of intimate partner violence. Any such movement must be cautiously approached, particularly at a time when the State seems willing to restrict women's choices about terminating pregnancy, about sexual orientation, and about marriage—though the latter appears to be changing.[218] There is the question of a retreat by the state to the notion that IPV is a private, family matter that the state has no business interfering with.[219] There is fear of "modernized masochism"[220]—if women love their abusive partners, how do we explain this? And there is resistance to the notion of condoning any violence on any level between any parties.[221]

In addition, there is the possibility that the law will not get it right:

> [A] central concern of women's advocates is that research differentiating among types of intimate partner violence will lead to the reification or misapplication of typologies and that battering will, as a result, be missed—with potentially lethal results. Advocates also fear that typical information available to the court for decision making is too limited to make effective distinctions and that effective screening processes and appropriate assessment tools are not available or in place.[222]

For all of these reasons, as stated in the Introduction to this Article: "How could we possibly take seriously women's accounts of love and hope without undermining the little protection from male violence women have been able to wrest

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215. *Id.* at 26 (arguing that social-service providers have, because of government grant requirements, changed their mission from helping women develop their own strategies for coping with abuse to encouraging women to leave their relationships).

216. Peled et al., *supra* note 63, at 13.

217. *Id.* at 12.

218. *See* STARK, *supra* note 4, at 364 (discussing proceeding with caution, but encouraging the act of proceeding).

219. *See* Kuennen, *Relational Contracts*, *supra* note 78 (discussing the historical treatment of domestic violence as a private, family matter in which the law has no business intervening).

220. *See* Tuerkheimer, *supra* note 185, at 94.

221. *See, e.g.*, BELL HOOKS, *supra* note 97, at 118 (advocating for the elimination of *all* violence).

222. Kelly & Johnson, *supra* note 139, at 478.

from the legal system, without indeed increasing our already overwhelming vulnerability?"[223]

But we must remember that a fundamental tenet of feminism, if not *the* fundamental tenet, is listening to women's voices.[224] Catharine MacKinnon described listening to and believing what women say as the "methodological secret" of feminism.[225] If women are saying loud and clear that they value love, that what they want is to be safe *in* their relationships, and that what they do *not* want is to "just leave" their relationships,[226] how could feminist scholars *not* take women's accounts of love seriously?

## CONCLUSION

In this Article, I demonstrated that love matters to women in abusive relationships. I argued that, consequently, matters of love should mean something to both the legal regime redressing IPV and to feminist legal scholars seeking reform of IVP as a legal concept. But that currently love does not matter.

Specifically, I attempted to connect some dots. I argued that feminist legal scholars fail to be sufficiently specific about the type of IPV we wish to target. Instead, in our scholarship and arguments, we conflate coercive control with all forms of IPV, when in fact coercive control is but a fraction of what the law calls IPV. As a result, feminist legal scholars have contributed to: binary notions of what constitutes IPV, the unsettled question of who is a deserving victim, and the constitution and dynamics of intimate relationships generally (nonabusive versus abusive).

These dichotomies mystify, rather than illuminate, the complexity of intimate love as a context in which harm can occur. They make the coexistence of love and abuse something "other," distant from feminist legal scholars our relationships, and the law.[227] And as a result, the legal response feminists have crafted views women who wish to preserve relationships with partners they love as not credible, blameworthy, and masochistic.

Currently, abused women who love their partners have no meaningful access to civil legal remedies and no voice in criminal prosecution. Unwittingly, feminist legal scholars and activists contributed to this problem. It is understandable why, 30 years ago, consideration of love might have been a barrier to enactment of

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223. *See* Littleton, *supra* note 15, at 47.

224. SCHNEIDER, *supra* note 63, at 71–73 (discussing the importance of accounting for women's particular experiences when crafting law and policy).

225. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 5 (1987).

226. Baker, *supra* note 82, at 1472 ("[Women] do not necessarily want to be in a position where they can just leave. They want to be in relationships in which they forgive. They may even want to be in relationships that involve some relinquishment of self, autonomy, and power.") (internal citations omitted).

227. This was the thrust of Martha Mahoney's ground-breaking article. *See* Mahoney, *supra* note 7, at 15 (explaining how we view fights, conflicts, and even abusive incidents in our own relationships as part of the throes of the relationship, whereas when we hear a client tell us of an incident, we think of the client as "abused").

legal remedies that would be responsive to the problem of IPV. Now, however, when women are consistently and repeatedly expressing desire for love *and* safety, there is a clear call for feminist legal scholars and activists to account for love.

# GOOD STORYTELLING: A TRAUMA-INFORMED APPROACH TO THE PREPARATION OF DOMESTIC VIOLENCE-RELATED ASYLUM CLAIMS

*Annie S. Lemoine, LMSW* [1]

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## INTRODUCTION

*Jessica sighs in frustration as Marie, her attorney, asks for the third time, "So, okay, when did you first call the police?"*

*"I can't remember. Maybe in 2012, around the holidays."*

*"But you told me that happened the first time he choked you, which you said was on your birthday. Your birthday is in June, right?"*

*Jessica shakes her head and looks down as Marie continues to press for details. Her palms are sweaty, her heart is pounding, and she worries that her toddler playing in the next room can hear every word.*

The American asylum application process is long and arduous; applicants must discuss in exhaustive detail the circumstances that compelled them to flee their homes for the safety of the United States. These events are often deeply traumatic and have lasting psychological consequences. This is particularly true in regard to domestic violence-based asylum claims, which are complicated by the unique challenges presented by the effects of trauma, cultural barriers, and the asylum adjudication process itself. Though changes in policy are often suggested as an effective way to combat these challenges,[2] the implementation of a trauma-informed approach to lawyering that focuses on a collaborative relationship between applicant and attorney is the most practical and easily implemented solution to combat these challenges and increase the likelihood of an asylum grant.

This comment demonstrates how a trauma-informed approach may help both attorneys and applicants in navigating the specific hurdles that make domestic violence-based asylum claims difficult to prove. Part I presents a brief summation of asylum law and refugee protection in the United States, as well as the current asylum application process. Part II addresses the challenges that present unique barriers to domestic violence-based asylum claims by examining two factors: (1) the relative newness of such claims, which so far has resulted in inconsistent case law and ambiguous standards, and (2) the credibility issues that arise due to the effects of trauma and the asylum process itself. Part III discusses solutions proposed by legal scholars and practitioners, namely

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[2] *See, e.g.*, Linda Lam, *The REAL ID Act: Proposed Amendments for Credibility Determinations*, 11 HASTINGS RACE & POVERTY L.J. 321 (Summer 2014); Aubra Fletcher, Article, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST., no. 1, 111, 131 (Sept. 2013).

changes in policy, and why the implementation of a trauma-informed approach to lawyering is a more practical and effective solution. Part IV also includes a proposed model for a trauma-informed approach to asylum lawyering, complete with helpful resources to apply this model.

## I. FRAMEWORK FOR REFUGEE PROTECTION

To many individuals, "[t]he image of the United States as a place of humanitarian refuge is etched deeply in this nation's history and on its identity."[3] However, the United States had few provisions to impart legal status to asylum seekers until the aptly named Refugee Act of 1980.[4] The laws that did exist tended to define refugees by their geographic location or the political ideology of their nation, criteria crafted around trends in foreign affairs.[5] The Refugee Act of 1980 was passed to create a more uniform framework for determining the admission of persecuted individuals through grants of asylum.

The Refugee Act defines a refugee as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[6] This definition is nearly identical to the universal definition of refugee created by the United Nations 1967 Protocol Relating to the Status of Refugees, [7] and allows an individual to be eligible for asylum even without experiencing past persecution in her nation of origin if she is able to prove a reasonable fear of future persecution.[8] Neither the 1967 Protocol nor the Refugee Act explicitly defined the level of harm necessary

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[3] Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 254 (1992).

[4] *See id.* at 255-56, 257 n.25.

[5] *Id.* at 259. For example, the 1957 Refugee-Escapee Act passed during the Cold War allowed for the admission of "persons fleeing persecution in Communist countries or countries in the Middle East." *Id.* at 259 n.34 (quoting JOYCE C. VIALET, CONG. RESEARCH SERV., 91-141 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 16 (1991)).

[6] *Id.* at 259 (alteration in original) (quoting 8 U.S.C. § 1101(a)(42) (2012)).

[7] The 1967 Protocol defines a refugee as an individual who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." Lauren N. Kostes, *Domestic Violence and American Asylum Law: The Complicated and Convoluted Road Post Matter of A-R-C-G-*, 30 CONN. J. INT'L L. 211, 214-16 (2015).

[8] Beyer, *supra* note 3, at 259.

to constitute "persecution," but it is generally understood to be "a threat to the life or freedom, or the infliction of suffering or harm . . . that [goes] beyond mere harassment."[9]

The humanitarian implications of the Refugee Act of 1980 were vast. Though earlier laws allowed persecuted individuals to remain in the United States, their effects were limited. For example, the Immigration and Nationality Act of 1952 contained a provision that allowed for "Withholding of Removal" for an individual at risk of persecution in his nation of origin.[10] However, this status imparts only limited and temporary protection, whereas a grant of asylum provides indefinite legal status in the United States and allows grantees to apply for legal permanent residence status after one year, among other advantages.[11] The benefits of asylum are so great that it is perhaps foreseeable that the process of achieving such a status would be laborious, burdensome, and often overwhelming.

To be eligible for a grant of asylum, an individual must show that she meets the definition of a refugee, which requires that the individual prove three main elements: first, that she suffered past persecution or has a well-founded fear of future persecution; second, that she possesses a protected characteristic; and third, that the persecutor is motivated to harm her because of that characteristic.[12] The protected characteristics are "race, religion, nationality, membership in a particular social group, or political opinion." [13] The causal relationship between the protected characteristic and the persecution is a nexus requirement; "the applicant must establish that [a protected ground] was or will be at least one central reason for persecuting the applicant."[14]

There are two types of asylum applications: affirmative and defensive. Affirmative asylum applicants are those who are not currently in removal proceedings and have not been removed from the United States in the past.[15] Conversely, defensive asylum applicants are those against whom the government has begun removal proceedings; this includes both individuals already present in the United States without lawful immigration status

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[9] 3A C.J.S. *Aliens* § 955 (2017).

[10] Kostes, *supra* note 7, at 216.

[11] Beyer, *supra* note 3, at 282.

[12] *See* 8 U.S.C.A. § 1158(b)(1)(A)-(b)(1)(B)(i) (West 2017).

[13] 8 U.S.C.A. § 1158(b)(1)(B)(i) (West 2017).

[14] *Id.* The protected characteristic need not be the only motivation for persecution, but it must "be at least one central reason for persecuting the applicant." *Id.*

[15] Nicholas R. Bednar, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications*, 100 Minn. L. Rev. 355, 360 (2015); *See generally* 8 C.F.R. § 208.2 (2017) (General explanation of different types of asylum applications).

and those who are deemed inadmissible by Customs and Border Patrol (CBP) when attempting to cross the U.S. border.[16] Defensive applicants are in asylum proceedings as a result of a positive finding in a credible or reasonable fear interview with an Asylum Officer.[17] Credible and reasonable fear interviews occur when individuals who are subject to removal express to a CBP officer a fear of returning to their country of origin.[18]

Affirmative and defensive applicants are subject to the same burden of proof and evidentiary standard;[19] each must prove that she experienced persecution in the past or that it is "more likely than not" that she will be persecuted if returned to her nation of origin and that this persecution is motivated by a protected characteristic that the applicant possesses.[20] All applicants submit the same application, a form called an I-589, often with a written declaration and supporting documents.[21] If an applicant lacks corroborating evidence, she must "satisf[y] the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts."[22] Affirmative applicants, however, have the benefit of a non-adversarial interview conducted by an Asylum Officer (AO), who is tasked with an affirmative duty to "elicit all relevant and useful information bearing on the applicant's eligibility for asylum."[23] Defensive applicants receive an adversarial hearing in front of an Immigration Judge (IJ).[24] Decisions for both types of applicants may be appealed with the Board of Immigration (BIA) and then with the federal Courts of Appeals.[25] However, such appeals are rarely fruitful: one study of over 400 asylum claims brought before the Courts of Appeals found that the court affirmed 96% of the denials to grant.[26] Notably,

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[16] Bednar, *supra* note 15, at 360; *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (2012); 8 C.F.R. § 208.2(b).

[17] *See* 8 U.S.C.A. § 1225(b)(1)(A)(ii) (West 2017); 8 C.F.R. § 208.2(b) (2017).

[18] *See* 8 U.S.C.A. § 1225(b)(1)(A)(ii) (West 2017); 8 C.F.R. § 208.2(a) (2017).

[19] *See generally* 8 U.S.C.A. § 1158(b)(1)(B) (West 2017) (stating the burden of proof for all asylum applicants).

[20] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

[21] 8 C.F.R. § 208.3(a) (2017).

[22] 8 U.S.C.A. § 1158(b)(1)(B)(ii) (West 2017).

[23] 8 C.F.R. § 208.9(b) (2017). This affirmative duty means that AOs must investigate all potential claims for asylum, including those not raised by the applicant.

[24] Bednar, *supra* note 15, at 360; *See also* 8 C.F.R. § 208.2(b); § 208.2(c)(3)(i) (2017). In these adversarial hearings, the applicant is cross-examined by a government attorney, who may seek to impeach witness credibility through inconsistent or implausible statements. Bednar, *supra* note 15, at 360.

[25] Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 472-73 (2016).

[26] *Id.* at 475-76.

there is no constitutional right to indigent representation in removal proceedings.[27]

Under the current asylum application process, an affirmative applicant will "tell her story" a minimum of three times: first, when consulting with her attorney; second, when completing the I-589 and composing the written declaration; and third, when testifying before an AO. A defensive applicant may have to "tell her story" five times or more: when apprehended by CBP; during intake at a detention facility; in a credible or reasonable fear interview with an AO; when consulting with attorney to complete her application, and finally, when testifying before an IJ. Unsurprisingly, such a repetitive and extended process often results in inconsistent statements, which can ruin an applicant's credibility in the eyes of the adjudicator. This process is especially problematic for domestic violence survivors; the private nature of this type of harm means that there is rarely external evidence to corroborate domestic violence claims and the adjudicator must rely on applicant testimony as the cornerstone of the asylum application. It is easier to find media reports supporting testimony of persecution by ISIS in Mosul than it is the violence that occurs within one's own home.

## II. UNIQUE CHALLENGES OF DOMESTIC VIOLENCE-BASED CLAIMS

The complexity of this process can be frustrating for both applicants and their attorneys, particularly when discussing traumatic issues like domestic violence. Compounding this complexity is the novelty of domestic violence-based asylum claims and the inconsistent ways in which these claims are being granted. The Department of Homeland Security (DHS) implicitly recognized the possibility of domestic violence-based claims in a 1995 memorandum to Asylum Officers that provided specific guidelines for analyzing victims' claims of gender-related harm.[28] However, both Congress and the BIA were hesitant to add gender-

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[27] *See* 8 U.S.C.A. § 1229a(b)(4)(A) (West 2017); *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) ("[T]here is no Sixth Amendment right to counsel in deportation hearings . . . ."). As a result, fewer than 40% of individuals in removal proceedings have legal representation. Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1002 (2015). For those held in detention, the number drops to approximately 14%. *Id.*

[28] Memorandum from Phyllis Coven, Office of Int'l Affairs, to All INS Asylum Officers & HQASM Coordinators (May 26, 1995), *in* 8 Immigr. L. Serv. 2d (West) Selected DHS Document 800.

related harm as a new protected ground.[29] Asylum adjudicators and federal courts have addressed the issue by granting asylum on the basis of particular social groups (PSGs), the definition of which has evolved over several decades.

### A. Novelty of Domestic Violence-Based Asylum Claims

PSGs were intended to serve as a catch-all for victims of persecution that do not fit within the narrowly drawn protected grounds of race, religion, nationality, and political opinion.[30] *Matter of Acosta* provided the first guidance regarding requirements for the formulation of PSGs.[31] In *Acosta*, the BIA asserted that members of a particular social group must share a "common immutable, characteristic."[32] This characteristic must be so fundamental that it is impossible or unreasonable to expect an individual to change it.[33] In *Matter of S-E-G-*, the BIA declared "particularity" and "social visibility" to be required components for a PSG;[34] this standard was further clarified in *Matter of M-E-V-G-* and *Matter of W-G-R-*.[35] To satisfy particularity, a group must "have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective."[36] There must be a "clear benchmark" by which the group can be defined.[37] Social visibility became "social distinction," which requires a particular social group to "be perceived as a group by society" rather than literally seen.[38] Then, in 2014, this new interpretation of the requirements for PSGs

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[29] Stephanie Robins, Note, *Backing It Up: REAL ID's Impact on the Corroboration Standard in Women's Private Asylum Claims*, 35 WOMEN'S RTS. L. REP. 435, 445 (2014). This reluctance is often attributed to fear of the "floodgates opening" and overwhelming the asylum system. *Id.*

[30] *See* Bednar, *supra* note 15, at 356.

[31] *Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985); *See* Bednar, *supra* note 15, at 368.

[32] *Acosta*, 19 I. & N. Dec. at 233.

[33] *Id.* at 232. In *Acosta*, the BIA rejected the proffered particular social group of "COTAXI drivers and persons engaged in the transportation industry of El Salvador" on the grounds that the common characteristic shared by group members was not immutable, i.e., it could be changed. *Id.* at 234.

[34] *S-E-G-*, 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008). The BIA found that "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities and [their] family members" lacked social visibility because they were not "'perceived as a group' by society." *Id.* at 581, 587-88.

[35] *See M-E-V-G-*, 26 I. & N. Dec. 227, 228, 239-44 (B.I.A. 2014) (rejecting "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs" for lacking social distinction); *W-G-R-*, 26 I. & N. Dec. 208, 209, 222 (B.I.A. 2014) (rejecting "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" for lacking social distinction).

[36] *M-E-V-G-*, *supra* note 35, at 239.

[37] *Id.*

[38] *Id.* at 240.

played a key role in *Matter of A-R-C-G-*, in which the BIA first recognized a PSG based upon domestic violence.[39]

Prior to *A-R-C-G-*, there were two cases in which the BIA declined to recognize domestic violence-based PSGs: *Matter of R-A-* and *Matter of L-R-*.[40] In *Matter of R-A-*, the BIA rejected the proffered social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" on the basis that it lacked social visibility because R-A- did not show the articulated group was "recognized and understood to be a societal faction . . . within Guatemala."[41] In *Matter of L-R-*, the IJ rejected the PSG formulation "Mexican women in an abusive domestic relationship who are unable to leave."[42] DHS submitted a brief in support of L-R- that suggested two potential PSGs for domestic violence victims: "Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[43] The brief was notable not for the originality of the formulations, which mirrored that of *L-R-* and *R-A-*, but because DHS endorsed these groups on the grounds of social distinction and also "asserted that its proposed definitions were viable because they identified *why* the persecutor targeted the victim."[44] Though L-R- eventually did receive a grant of asylum, the decision was not precedential because the grant was a result of "a stipulation of both parties" rather than the BIA's recognition of the PSG.[45]

In *Matter of A-R-C-G-*, the BIA recognized "married women in Guatemala who are unable to leave their relationship" as a

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[39] *See* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).

[40] *See* Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 235-36 (2011).

[41] R-A-, 22 I. & N. Dec. 906, 917-18 (B.I.A. 1999). The BIA also held that the applicant failed to prove the nexus element, that is, "that her husband ha[d] targeted and harmed [her] because he perceived her to be a member of this particular social group." *Id.* at 920.

[42] Barreno, *supra* note 40, at 245.

[43] Kostes, *supra* note 7, at 228-29 (quoting Department of Homeland Security's Supplemental Brief at 14, Matter of L-R- (B.I.A. Apr. 13, 2009), *Our Work: Matter of L-R*, Ctr. for Gender & Refugee Studies, http://cgrs.uchastings-.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf). It is not unusual for DHS to file supplemental briefs in order to clarify the government's position on specific policies. *See also L-E-A-*, 27 I. & N. Dec. 40, 42 (B.I.A. 2017), in which DHS submitted a brief in support of certain family units constituting PSGs.

[44] Johanna K. Bachmair, *Asylum at Last?: Matter of A-R-C-G-'s Impact on Domestic Violence Victims Seeking Asylum*, 101 CORNELL L. REV. 1053, 1063 (2016).

[45] Kostes, *supra* note 7, at 230.

cognizable PSG.[46] The BIA found that the group, which was nearly identical to the DHS suggestions, met each prong of the analysis: (1) it contained common immutable characteristics of gender, marital status, and inability to leave; (2) the group was described with requisite particularity, in terms that "have commonly accepted definitions within Guatemalan society based on the facts in this case"; and (3) it was socially distinct as it was "perceived as a group by society."[47] The BIA based its finding of social distinction upon factors such as whether the society offers protection to victims of domestic violence and how effective that protection is, as well as "other sociopolitical factors," such as Guatemala's "culture of 'machismo and family violence.'"[48] Evidence to support a social distinction finding would include "documented country conditions, law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information."[49] The BIA was careful to clarify that although this specific PSG is valid, "the issue of social distinction will depend on the facts and evidence in each individual case."[50]

*A-R-C-G-* created a precedent for the BIA, federal judges, and asylum adjudicators to grant domestic violence-based asylum claims when the protective grounds are formulated as a particular social group that fits within the framework set forth in *A-R-C-G-*.[51] Despite these advances, applicants must overcome significant barriers to have such a claim granted; this is primarily due to the ambiguities of PSG formulation and the credibility issues that are exceptionally problematic for survivors of domestic violence.

While *Matter of A-R-C-G-* marked definitive progress for domestic violence-based asylum claims, "important questions about *which* victims of domestic violence will qualify for asylum" remain.[52] The BIA acknowledged this ambiguity when it emphasized that the *A-R-C-G-* holding should not be construed as an approval of all domestic violence-related PSGs; instead, it

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[46] A-R-C-G-, *supra* note 39, at 388-89. The applicant in this case suffered severe physical, sexual, and psychological abuse at the hands of her husband, to whom she had been married since the age of seventeen and with whom she had three small children. Attempts to escape and to seek assistance from the police were futile, often worsening the abuse and prompting threats of death. *Id.* at 389.

[47] *Id.* at 392-93.

[48] *Id.* at 394.

[49] *Id.* at 394-95.

[50] *Id.*

[51] *See* 8 C.F.R. § 1003.1(g) (2017) (explaining that all BIA decisions are binding on DHS officers and immigration judges and that BIA decisions designated as precedents are binding "in all proceedings involving the same issue").

[52] *Asylum Law-Membership in a Particular Social Group-Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement-Matter of A-R-C-G-*, 128 HARV. L. REV. (2015) 2090, 2093.

"provides a framework" for "women in many types of intimate relationships and from many different countries" to establish PSGs.[53] However well intentioned, this broad framework leaves a lack of "sufficient guidance to decisionmakers to avoid the arbitrary and inconsistent outcomes" for domestic violence-based PSGs that occurred prior to *A-R-C-G-*.[54] The primary issues are the vague formulations of immutable characteristics (namely domestic relationship and inability to leave), social distinction, and nexus.

There are a number of significant factors that the BIA declined to clearly define in *A-R-C-G-*; for example, while the BIA found that A-R-C-G-'s marital status and inability to leave the relationship did qualify as immutable characteristics, it provided no explicit guidelines to aid adjudicators in determining whether applicants actually possessed these characteristics.[55] In 2015, the BIA asserted in *Matter of D-M-R-* that official marriage is not necessarily required; "[r]ather, we look to the characteristics of the relationship to determine its nature."[56] The BIA did not publish *D-M-R-*, however, so it is not a binding decision, and other adjudicators have interpreted *A-R-C-G-* in a much more literal fashion, "declin[ing] to apply *A-R-C-G-* even in cases where women were in long-standing relationships with their abusers, had children together, and held themselves out as husband and wife in the community."[57] The broad discretion given to immigration adjudicators leaves this immutable factor open to vast differences in interpretation.

The social distinction element of domestic violence PSG formulation is similarly amorphous and fact-dependent.[58] In *A-R-C-G-*, the social distinction analysis focused on external "evidence of whether and to what extent a society offers legal protections to domestic violence victims," such as what laws are currently in place, whether those laws are enforced, and what resources are available to victims.[59] In the absence of further clarification on this evidence, adjudicators "could require that applicants prove that their government officially recognizes domestic violence via criminal laws . . . and that they have sought protection through those laws."[60] This strict interpretation would exclude women who

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[53] *Id.* at 2094-96.

[54] Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 9 (2016).

[55] *See id.* at 14-15.

[56] D-M-R-, at 3 (B.I.A. June 9, 2015), http://www.scribd.com/document/271354416/D-M-R-BIA-June-9-2015.

[57] Bookey, *supra* note 54, at 14.

[58] Recent Adjudication, *supra* note 52, at 2095.

[59] *Id.* at 2096-97.

[60] Bachmair, *supra* note 44, at 1071.

had good cause not to seek protection, such as the fear that it would simply make the abuse worse.

The private nature of domestic violence makes establishing nexus a particularly difficult task; again, the formulation depends upon "the facts and circumstances of an individual claim."[61] In one 2015 case, an immigration judge found the applicant failed to prove nexus despite external evidence (country conditions indicating domestic violence was rampant and uncontrolled by the state) and statements made by the abuser that communicated a belief that the abuser held all of the power in their relationship.[62] "Rather, the judge found that the abuse was 'related to his own criminal tendencies and jealousy."[63] This refusal to consistently recognize domestic violence as a form of persecution, motivated by the victim's immutable characteristics and membership in a socially distinct group, is the type of outcome asylum advocates hoped would cease after *A-R-C-G-*.

Though *A-R-C-G-* was considered a major victory for applicants with domestic violence-based claims, it left many questions unanswered and many applicants without relief. This section explained that applicants with domestic violence-based PSGs have a distinctly complex claim to prove. The following section will describe why trauma-informed lawyering will be especially helpful to applicants with domestic violence-based claims.

### B. Credibility Challenges

Due to the private nature of the harm in domestic violence, there is often little corroborating evidence outside of the applicant's own testimony. Therefore, it is essential that applicants present consistent, plausible, and detailed information to be found credible. This is no easy feat for applicants attempting to disclose personal trauma to a stranger in a position of power. Research has shown that the factors adjudicators use to determine credibility are often inaccurate when applied to survivors of severe trauma; the psychological effects of trauma, which include distorted or fragmented memories, can result in applicant accounts that are inconsistent and/or lacking in detail. These effects may prevent applicants from providing reliable and plausible testimony, as well as from communicating it with the "appropriate

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[61] A-R-C-G-, *supra* note 39, at 395.

[62] Bookey, *supra* note 54, at 17. The applicant testified that her abuser made statements indicating a sense of ownership over her, such as, "You know you're mine." *Id.* at 16.

[63] *Id.* at 17.

demeanor," thus placing them "at risk of being erroneously deemed not credible."[64]

Although many other asylum applicants struggle with the effects of trauma, applicants with domestic violence-based claims are victims of a harm that is prolonged, pervasive, and akin to that of individuals held in political captivity for long periods of time.[65] This type of harm amplifies the effects of trauma: memory disorders are exacerbated and symptoms of Complex Post-Traumatic Stress Disorder (CPTSD) are likely to develop. [66] Applicants with domestic violence-based claims are also more likely to experience issues with credibility because the private nature of the harm makes corroboration via external evidence nearly impossible, heightening the weight and scrutiny adjudicators will place upon their testimony. [67]

### *1. Credibility in the Absence of Corroborating Evidence*

The credibility standard disproportionately affects domestic violence-based asylum seekers due to the nature of private claims, claims in which the persecutor is not a government actor but a private actor, such as a family member.[68] Obtaining corroborating documents is impossible if, as in nations where domestic violence is largely accepted, the incident was never documented. Survivors of domestic violence may also be afraid to make attempts to obtain corroborating documentation, even from the safety of the U.S., as it could potentially inflame the abuser and result in violence against family who remain in the country of origin.

An applicant's testimony is sufficient in the absence of corroborating evidence only if that testimony is found to be credible. Credible testimony is described as "believable, consistent, and sufficiently detailed." [69] The private nature of domestic violence makes it unlikely that external corroborating evidence will exist, thus making "the applicant's credibility . . . the linchpin of the judge's analysis." [70] When an applicant does not submit

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[64] Katherine E. Melloy, Note, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 640 (2007).

[65] *See* JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 86-87 (1992).

[66] *See id.*; Sabina Palic et al., *Evidence of Complex Posttraumatic Stress Disorder (CPTSD) Across Populations with Prolonged Trauma of Varying Interpersonal Intensity and Ages of Exposure*, 246 PSYCHIATRY RES. 692, 693 (2016).

[67] *See* Robins, *supra* note 29, at 436.

[68] *Id.*

[69] Paskey, *supra* note 25, at 474; *See also* 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

[70] Paskey, *supra* note 25, at 474.

external evidence, the adjudicators rely primarily upon Department of State (DOS) Country Condition reports and "other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions"[71] to corroborate testimony. An adjudicator who finds an applicant's testimony to be inconsistent with external resources has the discretion to find an applicant not credible.[72] This is true "even though some governments fail to document certain human rights abuses,"[73] making it difficult for such reports to accurately capture the scope of the abuse. For example, "[g]ender-related harms often receive less public attention than other types of harms, especially where a society deems harms such as domestic violence to be private matters."[74] For this reason, the ability to testify consistently and plausibly is even more crucial for applicants with domestic violence-based asylum claims.

Asylum adjudicators enjoy considerable discretion in determining the credibility of an applicant's testimony; adjudicators are able to consider "the totality of the circumstances, and all relevant factors, [including] demeanor, candor, or responsiveness [and] the inherent plausibility of the applicant's or witness's account." [75] Adjudicators may factor in a host of inconsistencies, both internal (between the applicant's own statements and evidence) and external (between outside sources such as DOS reports or any other credible resource), "and any inaccuracies or falsehoods in such statements," regardless of the importance these inconsistencies or inaccuracies hold as to the substantive facts of the applicant's claim.[76] Once an applicant has received an adverse credibility determination from an immigration judge, this finding may be overturned only upon a showing that the determination was "clearly erroneous."[77]

### *2. Effects of Trauma on Credibility*

The vast majority of asylum seekers are survivors of trauma struggling with a system that disadvantages the individuals it was created to protect. While adjudicators are encouraged to keep the psychological effects of trauma in mind, particularly when making credibility determinations, the simple fact is that "the deck is stacked against [trauma] survivors because key traits of the adjudications process greatly increase the chances

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[71] 8 C.F.R. § 208.12(a) (2017).
[72] *See* Fletcher, *supra* note 2, at 126.
[73] *Id.*
[74] *Id.*
[75] 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2017).
[76] *Id.*
[77] Paskey, *supra* note 25, at 475 (quoting 8 C.F.R. § 1003.1(d)(3)(i) (2017)).

a survivor will tell inconsistent versions of her story."[78] Further, research indicates that an initial adverse credibility determination is effectively damning: "[i]n a remarkable 96% of the cases, an appeals court affirmed the immigration judge's negative credibility finding and the decision denying asylum."[79] This underscores the importance of working closely with an applicant to ensure she presents the best possible claim, especially because it may be her only chance. An applicant's story is quite literally the heart of her claim; without convincing and congruent testimony, there is no hope of an asylum grant.

Credibility standards clearly present a significant challenge to survivors of domestic violence, and the effects of trauma play an integral role in this problem. Extensive research has shown that the unique way in which traumatic memories are stored affects both the individual's reaction to such memories and also the memories themselves. [80] Consequently, survivors of trauma often have memories of the events that are vague, inaccurate, or even completely absent.[81] The repetitive nature of the asylum process combined with the deficiency of traumatic memories and the symptoms of PTSD are a recipe for disastrous discrepancies, and it is understandably difficult for adjudicators to "resis[t] the natural reaction that the slightest inconsistency or inability to recall equates to willful misrepresentation."[82]

Domestic violence is a type of persecution that incorporates several forms of harm: physical, verbal, sexual, and psychological abuse are the most common examples.[83] The trauma is prolonged and cyclical while simultaneously unpredictable because the abuser's process of instituting total control is "based upon the systematic, repetitive infliction of psychological trauma." [84] Repetitive exposure to such psychological trauma makes survivors of domestic violence prone to developing a number of mental health issues, the most common of which is Post-Traumatic Stress Disorder (PTSD).[85]

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[78] *Id.* at 495.

[79] *Id.* at 476.

[80] *See* Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J., 235, 253-55 (2007).

[81] *See* Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. HEALTH & BIOMED. L. 37, 46 (2010); Suzuki, *supra* note 80, at 261.

[82] Chaudhary, *supra* note 81, at 40.

[83] *See generally* HERMAN, *supra* note 65, at 77.

[84] *Id.*

[85] *Id.* at 32.

The symptoms of PTSD can be divided into three main categories: "hyperarousal," "intrusion," and "constriction." [86] Hyperarousal is a state of constant vigilance in which "the human system of self-preservation seems to go onto permanent alert."[87] Individuals experiencing hyperarousal may be perceived as skittish or irritable; hyperarousal serves as a protective barrier against further harm, but it is also physically and emotionally exhausting.[88] Intrusion occurs in the form of unwelcome memories of the traumatic event, often triggered by "[s]mall, seemingly insignificant reminders." [89] Having to continually re-experience these painful memories "provokes such intense emotional distress, traumatized people go to great lengths to avoid it."[90] Constriction, or numbing, manifests as "a state of detached calm, in which terror, rage, and pain dissolve." [91] Trauma survivors often experience all of these symptoms, and the resulting effects "can profoundly affect the ability" to assemble a successful asylum claim.[92]

An applicant with a domestic violence-based claim has an idiosyncratic relationship with her persecutor; often he is the partner who fathered her children, shared her bed, and apologized tearfully after bouts of rage. He has also beaten, burned, and raped her, threatening to do worse if she dared leave him. This complex relationship, "the tyranny of private life," results in a complex trauma.[93] An abusive relationship consists not of separate episodes of trauma but one continuous wave; the violence itself may spike but the fear is omnipresent.[94] This chronic type of harm is both repetitive and severe, eliciting stronger fear and arousal responses than a single traumatic event.[95] Research has confirmed that the "extent, severity, and type of abuse is associated with the intensity of PTSD."[96]

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[86] *Id.* at 35.
[87] *Id.*
[88] *Id.* at 35-36.
[89] *Id.* at 37.
[90] *Id.* at 42.
[91] *Id.*
[92] Suzuki, *supra* note 80, at 239.
[93] HERMAN, *supra* note 65, at 28.
[94] *Id.* at 77.
[95] Debra Kaysen, Patricia A. Resick & Deborah Wise, *Living in Danger: The Impact of Chronic Traumatization and the Traumatic Context on Posttraumatic Stress Disorder*, 4 TRAUMA, VIOLENCE & ABUSE, no. 3, 247, 261 (2003).
[96] Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA, VIOLENCE & ABUSE, no. 2, 99, 111 (2001).

Further, this type of "repeated exposure to traumatic stressors" has been linked to CPTSD.[97] The disorder was initially applied only to victims of severe childhood abuse, but recent research indicates growing support of its validity as a more comprehensive diagnosis. [98] A 2016 study of CPTSD across populations with various types of prolonged trauma indicated that CPSTD is also associated with "exposure to adulthood trauma of severe interpersonal intensity." [99] "[U]nlike the intrusive symptoms after a single acute trauma, which tend to abate in weeks or months," effects of such chronic trauma may persist for potentially years without treatment.[100] Many asylum applicants, lacking legal status, are unable to obtain the benefits needed to secure treatment for these symptoms and continue to suffer even after escaping the abuse.

Traumatic events cause the brain to experience what is colloquially referred to as a "flight, fight, freeze." [101] As a result of this response, the traumatic event is encoded as a memory by way of the amygdala, the emotional part of the brain, rather than the pre-frontal cortex, the "key to decision-making and memory," which is temporarily paralyzed by stress. [102] In addition to affecting the formation of memories, trauma also impacts an individual's ability to discuss such memories: "[r]ecall, either intentional or through inadvertent exposure to internal or external stimuli related to the trauma, leads to the release of stress hormones."[103] Trauma-related mental health issues like PTSD and CPTSD often exacerbate such memory problems. Additionally, a person who has experienced pervasive and repetitive harm such as domestic violence is more likely to mesh the traumatic memories together, conflating central facts and forgetting details.[104]

Medical professionals recognize that the asylum adjudication process does not account for the distorted memories and other psychological effects caused by trauma.[105] A 2002 study of thirty-nine Kosovan and Bosnian individuals who had already received asylum grants in the United Kingdom affirmed this

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[97] Palic et al., *supra* note 66, at 693.

[98] *Id.* at 692.

[99] *Id.* at 693.

[100] HERMAN, *supra* note 65, at 87.

[101] Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 366 (2016).

[102] *Id.*

[103] *Id.*

[104] Suzuki, *supra* note 80, at 263.

[105] *See* Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers Be Taken as Proof of Deceit?*, 16 TORTURE, no. 2, 2006, at 81, 82 (2006); *See also* Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 308 (2001).

problem.[106] Participants were interviewed twice about traumatic events; the interval between meetings varied from three to thirty-two weeks.[107] None of the participants provided entirely consistent accounts, and "[t]he length of time between interviews had a significant effect on discrepancy rates."[108] Notably, "[f]or refugees with high PTSD, more discrepancies [occurred] with longer times between interviews." [109] The researchers concluded that "[d]iscrepancies therefore cannot be taken as automatically implying fabrication."[110] The scientific finding that discrepancies increase with both the severity of the effects of trauma and the passage of time reinforces the particular need for trauma-sensitive lawyering for asylum applicants with domestic violence-based claims.

Despite the growing medical knowledge that inconsistencies and lack of detail do not necessarily indicate that an applicant is lying, adjudicators of domestic violence-based claims continue to make credibility determinations based on these factors. In a recent study, researchers compiled and analyzed the rationale behind 369 adverse credibility findings and found that "*nearly all* of the criteria used to assess credibility are unreliable when applied to the stories told by trauma survivors." [111] The research emphasized that the defining features of "trauma narratives" are also the hallmarks of incredible testimony: disjointed timelines, contradictory facts, and a lack of peripheral details.[112]

The same study found that when immigration judges make adverse findings of credibility, "they *overwhelmingly* rely on inconsistencies within or among the various versions of the applicant's story, and especially inconsistencies between the testimony and declaration." [113] Therefore, the credibility of an applicant's story is usually undermined not by contradictory external sources but by the applicant's own admissions. As shown in the study of Kosovan and Bosnian refugees, it is nearly impossible for victims of trauma to tell completely consistent accounts over a period of time, even a relatively short one. Yet, in

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[106] Herlihy & Turner, *supra* note 101, at 81.

[107] *Id.* at 87. The report does not discuss the type of traumatic events experienced by these refugees but does note one participant described being physically abused by military police. *Id.* at 89.

[108] *Id.* at 88-89.

[109] *Id.* at 89.

[110] *Id.*

[111] Paskey, *supra* note 25, at 463, 494. Stephen Paskey, a professor at SUNY Buffalo Law School, surveyed 369 asylum claims from 2010 in which the applicant was found not credible by an immigration judge. *Id.* at 463.

[112] *Id.* at 461.

[113] *Id.* at 463.

roughly half of the adverse credibility findings studied, IJs found applicants not credible due to differences in their own testimony.[114]

One remarkable instance of such internal inconsistencies is the case of Roselyne Marikasi, an applicant who fled her abusive husband, a government agent in Zimbabwe, for the safety of the United States.[115] The Sixth Circuit affirmed the BIA's finding of adverse credibility due to several inconsistencies between the written testimony in Marikasi's application and her testimony at the hearing; these inconsistencies concerned the frequency of abuse, the number of times she sought medical aid or police assistance, the specific month that she went into hiding from her husband, and even "the reason or reasons why her husband would abuse her."[116] It is not difficult to understand how asking a victim of domestic violence "what caused her husband to beat her so badly she had to go to the hospital" might distress the victim and result in an inaccurate response.[117] All of these inconsistencies can be attributed to the altered nature of traumatic memories and the psychological effects of trauma; indeed, Marikasi had submitted into evidence "a letter from an American psychologist reporting anxiety related to domestic abuse and a diagnosis of Post-Traumatic Stress Disorder."[118]

*Marikasi v. Lynch* is just one demonstration of how inaccurate indicators of credibility can negatively impact applicants with domestic violence-based claims. Granting the adjudicator wide latitude to factor demeanor into credibility determinations may result in the adjudicator making adverse assumptions about credibility when the applicant does not respond as the adjudicator might expect.[119] The importance of demeanor is arguably greater for female asylum applicants than for males because of biased cultural beliefs; for example, "[i]n American culture, women are presumed to communicate through their emotions and men through their ideas. Thus, immigration judges are more likely to find a woman not credible if she does not react emotionally to past torture, persecution, or grave conditions in her country."[120] This is true despite knowledge that "both men and women can experience and project a flat affect in the aftermath of

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[114] *Id.* at 477. "In 56% of cases, the immigration judge's negative credibility finding relied on inconsistencies between the applicant's oral testimony and her written declaration. In 47% of cases, judges relied on inconsistencies within the applicant's testimony itself." *Id.*

[115] *Marikasi v. Lynch*, 840 F.3d 281, 284-85 (6th Cir. 2016).

[116] *Id.* at 284-86.

[117] *Id.* at 285.

[118] *Id.* at 286.

[119] Fletcher, *supra* note 2, at 121.

[120] Melloy, *supra* note 63, at 654.

torture or trauma."[121] Another cultural issue that may affect credibility in domestic violence-based claims is the fact that many survivors of domestic violence feel uncomfortable talking to men about their experiences. As a result, they may avoid disclosing details or events regarding domestic and sexual abuse during initial interviews, such as those with CBP and ICE. These interviews may be used to question the applicant's credibility, so failure to disclose at any point in the process could result in a fatal inconsistency.

Problems with credibility may also arise when attorneys struggle with symptoms of vicarious trauma. Unlike "burnout," an attorney cannot treat vicarious trauma by simply taking a personal day. It is "a state of tension or preoccupation with clients' stories of trauma. It may be marked either by an avoidance of clients' trauma histories (almost a numbness to trauma) or by a state of persistent hyperarousal."[122] Either of these extremes presents serious barriers to effective legal representation of asylum applicants. An attorney numbed to the pain of others will have difficulty establishing trust and rapport with clients and may miss key pieces of information in the applicant's testimony. An attorney with heightened anxiety may unintentionally avoid inquiring about specific kinds of trauma, potentially harming the applicant's claim. Inconsistencies such as these, regardless of whether they are central to the claim, may harm the applicant's credibility.

## III. TRAUMA-INFORMED APPROACH TO ASYLUM LAWYERING[123]

The unique nature of domestic violence-based asylum law necessitates an equally unique approach. The importance of providing trauma-informed services to asylum applicants cannot be overstated because trauma plays such an important role in the outcome of their applications. If denied the proper investment in building a relationship and constructing a declaration together, an attorney may harm an applicant's case in a variety of ways: failing to report the entirety of the harm suffered, damaging credibility by presenting the claim in a vague, inconsistent fashion, or neglecting

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[121] *Id.*

[122] *Id.*

[123] The trauma-informed approach advocated in this comment was strongly influenced by the work of Professor Sarah Katz of Temple University, James E. Beasley College of Law and Professor Deeya Haldar of Drexel University Thomas R. Kline School of Law. Katz & Haldar, *supra* note 101, who developed a model for teaching trauma-informed lawyering practices to students in law clinics.

to prepare the applicant for testimony. Facilitating a trauma-informed approach with the central goals of (1) understanding the effects of trauma, (2) modifying the attorney-client relationship and litigation strategy, and (3) instilling self-care practices to alleviate the effects of vicarious trauma will enhance the quality of representation for asylum applicants and increase the likelihood of an asylum grant.

### A. Previously Proposed Policy and Practice Solutions

The majority of proposed solutions for this issue focus on the adoption of statutory changes that would lessen the burden on asylum applicants with domestic violence-based claims. Generally, these changes would increase the ability of individuals with valid claims of gender-based persecution to obtain asylum. It has been suggested that gender be added as an additional protected characteristic, just like race or religion, as well as a cognizable particular social group.[124] The "gender-plus" particular social group, a combination of "gender plus some sort of geographic or tribal identity," has been proposed multiple times.[125] There are concerns as to whether these formulations would meet the BIA's stringent requirements for PSGs. In *Paloka v. Holder*, for example, the Second Circuit indicated that while "young Albanian women" is not an acceptable PSG, "young Albanian women between the ages of 15 and 25" may be.[126] This suggests that adjudicators have yet to recognize "gender-plus" PSGs without additional immutable characteristics, such as age, marital status, or inability to leave.

Immigration scholars have recommended that the United States implement statutory changes that would effectively adopt the UNHCR (the United Nations Refugee Agency) framework for particular social group, which relies on an either/or formula in regard to proving a common, immutable characteristic or social distinction. [127] Some recommend eliminating the nexus requirement altogether, "in order to mitigate issues of inconsistency in adjudication and to effectively accommodate problems of proof that are particular to domestic violence victims."[128] Others have suggested creating a "presumption of credibility" for victims of sexual trauma in order to "give a woman

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[124] Barreno, *supra* note 39, at 245.

[125] *See* Kostes, *supra* note 7, at 232; Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 Yale L.J. 2512, 2544-46 (2014).

[126] Paloka v. Holder, 762 F.3d 191, 198-99 (2014). The claim was remanded to the BIA to determine if "young Albanian women between the ages of 15 and 25" is a cognizable PSG, and it is currently pending.

[127] Barreno, *supra* note 39, at 245.

[128] Bachmair, *supra* note 44, at 1081.

asylum seeker the benefit of the doubt."[129] One creative solution focuses specifically on equipping immigration adjudicators with the tools to engage in trauma-informed interviewing and analysis in an effort to lessen the negative impact of trauma on asylum outcomes. [130] At a time when immigration regulations are tightening rather than expanding, it seems unlikely that amendments such as these will occur.

Numerous programs throughout the country have combined legal service agencies with mental health professionals in an effort to provide holistic, trauma-informed care. There are clear advantages to working in tandem with mental health clinicians on asylum claims: for example, they can facilitate the application process by assisting the applicant during interviews.[131] A noteworthy example of such a team is the Harvard Immigration and Refugee Clinical Program, where clinic attorneys and social workers collaborate with other professionals, such as forensic psychologists and medical doctors, to provide holistic, client-centered immigration legal services.[132] Social workers are present to provide support as applicants deal with the re-traumatization that often accompanies the discussion of traumatic events, as well as to ensure that applicants' basic needs are met, thus improving the likelihood that applicants will be able to maintain a baseline level of functionality in order to attend all court dates and meetings with attorneys. [133] Forensic psychologists and psychiatrists conduct "forensic evaluations that attorneys can use to corroborate asylum seekers' claims." [134] The mental health professionals serve both to directly encourage and validate applicants and to find tools to bolster their claims.

Undoubtedly, many asylum applicants struggle with the trauma they experienced in their nation of origin, and the availability of clinicians allows attorneys to focus on their role as legal service providers. Issues arise, however, in regard to the combination of multiple disciplines working with one client. Attorneys and mental health professionals have markedly different perspectives, training, and methodologies.[135] Attorneys

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[129] Melloy, *supra* note 63, at 673.

[130] *See* Kate Aschenbrenner, *In Pursuit of Calmer Waters: Managing the Impact of Trauma Exposure on Immigration Adjudicators*, 24 KAN. J.L. & PUB. POL'Y 401, 450 (2015) ("[E]motional intelligence and managing trauma exposure response are equally as important as the other skills such as legal research and writing and legal and factual analysis that are more commonly accepted as necessary for an adjudicator's job performance.").

[131] Ardalan, *supra* note 27, at 1034-35.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 1034.

[135] *Id.* at 1023-25.

are tasked with zealously advocating for their clients, whereas mental health clinicians have a different approach that focuses more on the client's individual experience, both in and out of the immigration proceedings. [136] A social worker assisting in the interview process could become displeased with an attorney who continues to press the applicant for details regarding the harm she suffered.

Another important issue with multidisciplinary programs is the fact that the variety of professionals involved will "have different and conflicting ethical obligations." [137] Mandatory reporting is the clearest instance of this. For example, an applicant may become overwhelmed during an interview with a social worker and attorney and disclose how her recurring symptoms of PTSD recently resulted in the applicant losing control and beating her son with a belt. The social worker may be mandated to report that information to the appropriate authorities, whereas the attorney has no such responsibility. Further, non-profit agencies that provide free asylum representation are rare and receive little funding, making it unlikely that many would be able to retain mental health professionals as staff members.[138]

While these approaches may indeed alleviate the issues presented by ambiguous case law, inconsistent holdings, and credibility concerns, they fail to present a practical solution that may be implemented immediately rather than perish on the floor of the House of Representatives.

### B. Trauma-Informed Asylum Lawyering

Even with the assistance of other professionals, the attorney herself must embrace a trauma-informed approach in order to truly serve as a zealous advocate for asylum applicants with domestic violence-based claims. Possessing a rudimentary understanding of trauma and its effects, along with the ability to integrate that understanding into the attorney-client relationship and litigation, is an essential part of the "legal knowledge, skill, thoroughness, and preparation" required to provide competent representation to domestic violence-based asylum clients.[139] This practice "can be particularly salient . . . because traditionally attorneys are trained to separate emotions from the law in order

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[136] *Id.*

[137] *Id.* at 1024.

[138] *Id.* at 1011. Due to restrictions put in place by Congress in 1996, there is no federal funding for asylum representation; "[l]egal services providers representing asylum seekers must therefore pursue private, local, and state funding sources, which can be quite limited." *Id.* at 1009-11.

[139] MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

to competently analyze legal problems."[140] Acknowledging the emotional aspect of domestic violence asylum work is essential to good lawyering.[141] It is what enables an attorney to patiently draw coherent facts from an applicant's collage of traumatic events.[142] This approach accepts the limitations presented by the applicant's traumatic experiences and "asks [the applicant] not, 'What is wrong with you?' but instead, 'What happened to you?'"[143]

This trauma-informed approach to domestic violence-based asylum claims has three main objectives: 1) to understand trauma and its effects, 2) to promote an attorney-client relationship and legal strategy that is adapted to account for the effects of trauma, and 3) to impress upon attorneys the need for sufficient self-care practices to avoid vicarious trauma.[144] To accomplish these goals, attorneys must be educated on the effects of trauma and how to incorporate that into building client rapport as well as shaping legal strategy in order to provide effective services that are likely to produce the desired outcome. One of the most important facets of the asylum process is the written declaration and the applicant's ability to testify consistently with it. To accomplish this, attorneys must form a close relationship with the applicant, be responsive to her needs, and employ a collaborative approach to the development of the claim.[145] Finally, attorneys must create and maintain self-care plans to minimize the effects of vicarious trauma.[146] These plans include education on vicarious trauma, as well as tools like self-evaluations and staff debriefings.[147]

### *1. Understanding Trauma and Recognizing Its Effects*

Like many attorneys who work with survivors of trauma, those providing asylum legal services should be informed of the physiological effects of trauma and the manifestations of those

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[140] Katz & Haldar, *supra* note 101, at 371. Professors Katz and Haldar developed a model for teaching trauma-informed lawyering practices to students in law clinics. One significant aspect of this pedagogy is "teaching students how to integrate being lawyers with the rest of their lives" by preparing them to handle their own emotional reactions to their clients' traumatic stories. *Id.* at 382.

[141] *Id.* at 383.

[142] *Id.*

[143] *Id.* at 363.

[144] *Id.*

[145] *See* Stacy Caplow, *Putting the "I" in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 249, 265-66 (2008). This collaborative, trauma-informed approach advocated by Professor Stacy Caplow of Brooklyn Law School incorporates these ideas by addressing both the discourse and the content throughout the course of the client-attorney relationship. *Id.*

[146] Katz & Haldar, *supra* note 101, at 392.

[147] *Id.* at 391-92.

effects. One does not need a license in mental health to recognize when an individual is experiencing the effects of trauma; the key is to be attuned to such behavior.[148] For example, a client who shuts down and effectively stops communicating when the issue of sexual abuse is raised likely has an undisclosed history of trauma that will require further inquiry. Understanding that a client's tangential thought pattern is attributable to her inability to discuss her trauma in a linear manner will help an attorney remain patient and focused rather than become frustrated with the client's apparent lack of cooperation.[149] There are many instances in which an individual's response during discussions of trauma may be puzzling, alarming, or overwhelming. Educating attorneys on the effects of trauma exposure will better equip them to build and preserve the attorney-client relationship as well as adjust case strategy.[150]

An initial training with periodic refreshers on traumatic memories, PTSD, the symptoms of trauma, and strategies to avoid aggravating such symptoms when they are present would suffice to prepare attorneys for working with survivors of chronic trauma. Multiple resources are available, including practice advisories regarding work with domestic violence survivors and refugees that address the effects of trauma and what attorneys can do to alleviate them. The National Center for Domestic Violence, Trauma & Mental Health has a publicly available practice advisory titled "Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys."[151] The Substance Abuse and Mental Health Services Administration (SAMHSA), has a program called the National Center for Trauma-Informed Care & Alternatives to Seclusion and Restraint, which provides trainings to a variety of professionals on the "trauma-informed approach and trauma-specific interventions [to] address trauma's consequences" in the individual.[152] There is also the more collaborative approach of seeking assistance from local government agencies and non-profit organizations that provide similar trainings for their own staff.

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[148] *Id.* at 382.

[149] *Id.* at 379-80.

[150] *Id.* at 388.

[151] MARY MALEFYT SEIGHMAN, ERIKA SUSSMAN & OLGA TRUJILLO, NAT'L CTR. FOR DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, REPRESENTING DOMESTIC VIOLENCE SURVIVORS WHO ARE EXPERIENCING TRAUMA AND OTHER MENTAL HEALTH CHALLENGES: A HANDBOOK FOR ATTORNEYS, (Carole Warshaw ed., 2011), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/AttorneyHandbookFINAL2Jan2012.pdf.

[152] *Programs & Campaigns, NCTIC*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/nctic (last updated Sept. 15, 2017).

### 2. *Modifying Attorney-Client Relationship and Litigation Strategy*

If an attorney is able to recognize when a client is experiencing the effects of trauma, that attorney can respond appropriately by "exhibit[ing] patience and affirmation for the client that [will ultimately enable] the client to develop a trusting relationship."[153] Once this relationship is established, the attorney can utilize trauma-specific interviewing skills in order to obtain information from the client while maintaining respect for the client and her story. An essential aspect of engaging in such an intense attorney-client relationship is the ability to discern the best strategy to use given the client's current emotional state. Attorneys must be prepared to respond to the client in an individualized manner rather than employing a one-size-fits-all approach.

> For example, with the withdrawn client, the client may feel more in control . . . if the [practitioner] affirms how difficult it is to share the information. With the flooding client, it can be valuable to be upfront and transparent about the goals and focus of the interview. With the angry or suspicious client, it can be beneficial to validate the client's frustration while not getting defensive.[154]

This skill can be refined through group trainings and personal development; practitioners can role play various scenarios with one another, discuss particularly difficult past experiences, and provide feedback and insight to one another.[155]

While building a strong attorney-client relationship is key, the approach an attorney takes to interviewing the client and constructing the claim is equally important. This requires a collaborative approach to the process of writing the declaration with the eventual goal of producing a document that accurately reflects the applicant's story and with which the applicant may testify consistently.[156] Most attorneys are very comfortable with writing, so the true challenge of composing an effectively written declaration lies in surrendering a certain amount of control. The most beautifully drafted declaration is useless if an applicant cannot provide consistent testimony to an adjudicator. The objective must be to create a document that accurately describes

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[153] Katz & Haldar, *supra* note 101, at 372.

[154] *Id.* at 387.

[155] *Id.* at 387-88.

[156] Caplow, *supra* note 144, at 258-59. The approach Caplow advocates is an amalgam of testimony therapy and the trauma-informed approach presented by Katz and Haldar.

the applicant's personal interpretation of her experiences while also making a strong legal argument.[157] The attorney's role is to "shape the raw material of the story into a narrative text" while maintaining authenticity and using "language, phrasing, and imagery [suitable] to the education, articulation, and imagination of the client."[158] Because the rhetorical skills used in this approach to declarations are complex and go beyond the scope of ordinary legal writing, [159] attorneys adopting this method will need to consult resources specific to this field in order to familiarize themselves with the process.[160]

In order to produce effective declarations, attorneys must invest a significant amount of time and energy in building the relationship and establishing a legal strategy. A critical aspect of this is the ability to eschew the traditional notions of brief and efficient client meetings in favor of sessions in which the attorney "will let the client talk, establish a relationship, answer questions, and take the first of many steps toward formulating a final case theory."[161] Over a series of meetings, attorney and client engage in an exercise that "usually resembles a looping conversation—forward movement, circling back, occasional tangents, reiteration, verification, elaboration, explanation—until finally, a full factual cycle is completed."[162] Allowing the client to speak freely and have this degree of agency gives the attorney the ability to build the case while the client experiences the cathartic process of owning her narrative. Practice speaking about the traumatic events will also increase the applicant's confidence and transform her into a "more comfortable storyteller."[163]

This cycle of meetings and interviews incorporates a form of testimony therapy into the preparation of the asylum application in order to enhance the quality and consistency of the

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[157] *See* Paskey, *supra* note 25, at 504.

[158] *Id.* at 506-07.

[159] Caplow, *supra* note 144, at 256-57. This method emphasizes the difference between the "story," the actual narrative told by the applicant, and the "discourse," the way the drafter tells the story, e.g., which details the drafter decides to include in that particular version of the story. Paskey, *supra* note 25, at 479-80.

[160] Caplow, *supra* note 144, at 257-58. Professor Caplow cites several articles, which may be useful resources for practitioners in this regard: Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative*, 93 MICH. L. REV. 485 (1994); Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Read and Writer, Text and Context*, 49 LEG. EDUC. 155 (1999). *Id.* at 261 nn.40 & 46, 262 n.50.

[161] *Id.* at 272.

[162] *Id.* at 272-73.

[163] *Id.* at 265.

application as well as to prepare the applicant for testifying.[164] Testimony therapy is a treatment method that was coined by psychologists working with former political prisoners in Chile.[165] In this treatment, the survivor is "gradually exposed to the traumatic memories," a technique that can help to decrease the survivor's avoidance of memories and enable her to participate fully in the preparation of testimony.[166] Attorneys should consult articles about the methodology of testimony therapy and tailor their lawyering accordingly. This methodology includes asking open-ended questions, inquiring about discrepancies with more curiosity than contradiction, and knowing when to simply let the client lead the way.[167]

To engage in trauma-informed lawyering, an attorney must accept the ambiguity and uncertainty that accompanies the discussion of traumatic events with trauma survivors. The incorporation of aspects of testimony therapy into work with a survivor of domestic violence will assist the survivor in forming a coherent narrative of her story that will be communicated both via the written declaration and during testimony in front of an Asylum Officer or Immigration Judge. Attorneys must learn to embrace this practice as part of the "messy, arduous, and lengthy" nature of asylum application.[168] These repeated meetings and long-winded conversations are an investment of time that accomplishes multiple purposes: strengthening the attorney-client relationship, building the facts of the case, and providing the client with a "cycle of rehearsals" through which she becomes gradually more confident discussing the trauma.[169]

### *3. Instilling Self-Care Practices to Alleviate Vicarious Trauma*

Dissecting the claims of persecution put forth by asylum applicants is a protracted, repetitive process that is difficult for both the applicant and attorney in distinct ways. Vicarious trauma is a common problem among attorneys who work with vulnerable

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[164] The practitioners employing Caplow's methods "are not therapists, but it is not an exaggeration to suggest that their work with a client may be no less therapeutic than the work performed by a trained counselor during testimonial therapy." Paskey, *supra* note 25, at 506.

[165] Janie A. Van Dijk et al., *Testimony Therapy: Treatment Method for Traumatized Victims of Organized Violence*, 57 AM. J. PSYCHOTHERAPY, no. 3, 361, 361 (2003).

[166] *Id.* at 369. In testimony therapy, the survivor works with a therapist to construct a document narrating the traumatic events. The therapist "never calls the testimony into question, but may ask for clarifications when there are contradictions or historically incorrect facts in the story." *Id.* at 365.

[167] *Id.*

[168] Caplow, *supra* note 144, at 257.

[169] *Id.* at 265.

populations, such as victims of abuse, neglected children, and asylum applicants. It is a byproduct of working in these fields, which can result in "harmful changes [to] professionals' views of themselves, others, and the world."[170] The trauma-exposed asylum attorney then faces the task of "re-integrating" the trauma into her world-view.[171] A failure to put protective factors in place in order to process traumatic events leaves an asylum attorney vulnerable to the symptoms of vicarious trauma.[172]

Also known as "traumatic countertransference," vicarious trauma may cause individuals to actually experience symptoms of PTSD, including intrusive imagery, avoidance of triggers, and hyperarousal. [173] They may absorb an applicant's feelings of hopelessness and vulnerability,[174] which can become problematic. For example, "as a defense against the unbearable feeling of helplessness, the therapist may try to assume the role of a rescuer." [175] This is counterproductive to the collaborative relationship necessary for trauma-informed asylum lawyering; it is not solely the skill of the lawyer that leads to success, but also the empowerment and confidence of the applicant.[176] As discussed earlier, vicarious trauma can also result in symptoms of hyperarousal or numbing. This is challenging in regard to most stages of the asylum process: client interviews, legal analysis, drafting of declaration—all may be negatively affected by an attorney's struggles with vicarious trauma.

Therefore, an essential aspect of trauma-informed lawyering is preventing vicarious trauma through ongoing training and the regular practice of self-care. It is essential that immigration attorneys understand the effects of vicarious trauma and the ways in which it may manifest and ultimately affect their practice. This can be accomplished through learning opportunities on the risks and effects of vicarious trauma and how to protect oneself against it, such as Continuing Legal Education courses and workshops for various types of professionals at risk of vicarious trauma. Fortunately, there are many tools available to self-assess for symptoms of vicarious trauma and overall life satisfaction.[177]

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[170] Katz & Haldar, *supra* note 101, at 368.
[171] *See* Aschenbrenner, *supra* note 129, at 452.
[172] *See* Katz & Haldar, *supra* note 101, at 392.
[173] HERMAN, *supra* note 65, at 140-41.
[174] *Id.* at 141.
[175] *Id.* at 142.
[176] *See id.* at 136.
[177] *See, e.g.*, B. Hudnall Stamm, *Professional Quality of Life Scale: Compassion Satisfaction and Compassion Fatigue*, PROQOL (5th ver. 2009) http://www.proqol.org/uploads/ProQOL_5_English_Self-Score_3-2012.pdf.

In agency or group practices, supervising attorneys can encourage self-care by incorporating it into agency policy; for example, proper self-care could be part of performance evaluations and long-term goals.[178] Self-care serves as a "protective factor" against the effects of further vicarious trauma, and it comes in many forms[179]; common examples of self-care include exercise, spiritual practice, engaging in a hobby such as baking or woodwork, providing community services, and many others. Attorneys in supervisory roles can maintain their own self-care practice to serve as models for other practitioners, as well as arrange spaces and times where practitioners can share their experiences, reflect, and provide one another with support.[180] Attorneys who work individually should seek out like-minded practitioners to form similar groups for peer supervision and support. Determining and adhering to an appropriate self-care plan is an essential part of providing trauma-informed asylum lawyering.

## CONCLUSION

While *Matter of A-R-C-G-* was a milestone in regard to the recognition of domestic violence-based particular social groups, significant obstacles make proving these claims uniquely difficult. These obstacles include the ambiguous formulation of domestic violence-based particular social groups and the heightened importance of credibility in the absence of corroborating evidence. Additionally, domestic violence survivors experience high levels of trauma due to the prolonged and complex nature of domestic abuse, and the psychological effects of this often cause significant issues with credibility.

Unlike policy-related solutions, trauma-informed lawyering is a time- and cost-effective solution that may be implemented as soon as foundational trainings and readings are complete. It is more accessible and practical than multi-disciplinary programs, which provide excellent services from legal and medical professionals but are not a realistic option for most non-profit legal aid agencies serving asylum applicants.

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[178] *See* Aschenbrenner, *supra* note 129, at 451-52.
[179] *See* Katz & Haldar, *supra* note 101, at 392.
[180] *See* Aschenbrenner, *supra* note 129, at 451.

Equipping immigration attorneys with the skills to engage in truly trauma-informed lawyering will improve the client's experience with both the attorney and the legal system as a whole; decrease the likelihood of vicarious trauma negatively affecting practitioners; and increase chances of asylum grants for domestic violence-based claims.

# LEGAL IMAGES OF BATTERED WOMEN: REDEFINING THE ISSUE OF SEPARATION

*Martha R. Mahoney**

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> . . . /I found an
> announcement/not the woman's
> bloated body in the river/floating
> not the child bleeding in the
> 59th street corridor/not the baby
> broken on the floor/
> "there is some concern
> that alleged battered women
> might start to murder their
> husbands and lovers with no
> immediate cause"[1]

## INTRODUCTION

I am writing about women's lives. Our lives, like everyone's, are lived within particular cultures that both reflect legal structures and affect legal interpretation. Focusing on domestic violence, this article describes an interrelationship between women's lives, culture, and law. This relationship is not linear (moving from women's lives to law, or from law to life) but interactive: cultural assumptions about domestic violence affect substantive law and methods of litigation in ways that in turn affect society's perceptions of women; both law and societal perceptions affect women's understanding of our own lives, relationships, and options; our lives are part of the culture that affects legal interpretation and within which further legal moves are made. Serious harm to women results from the ways in which law and culture distort our experience.

The courtroom is the theater in which the dramas of battered women have been brought to public attention. Trials like that of Francine Hughes, whose story became the book and movie *The Burning Bed*,[2] create a cultural and legal spotlight that has in some ways benefited women by increasing public knowledge of the existence of domestic violence. However, the press has emphasized sensational cases that have a high level of terrorism against women and a gro-

1. Ntozake Shange, *With No Immediate Cause, in* FAMILY VIOLENCE: POEMS ON THE PATHOLOGY 66, 67 (Mary McAnally ed., 1982).

2. FAITH MCNULTY, THE BURNING BED (1980).

tesque quality of abuse.[3] These cases come to define a cultural image of domestic violence, and the women in these cases define an image of battered women.

These images disguise the commonality of violence against women. Up to one half of all American women — and approximately two thirds of women who are separated or divorced — report having experienced physical assault in their relationships.[4] However, litigation and judicial decisionmaking in cases of severe violence reflect implicit or explicit assumptions that domestic violence is rare or exceptional.[5]

For actors in the courtroom drama, the fiction that such violence is exceptional allows denial of the ways in which domestic violence has touched their own lives.[6] Perhaps most damagingly, the fiction of exceptionality also increases the capacity of women to deny that the stories told in the publicized courtroom dramas have anything to do with our own lives. Therefore, it limits the help we may seek when we encounter trouble, the charges we are willing to file, our votes as jurors when charges have been filed by or against others, and our consciousness of the meaning of the struggles and dangers of our own experience.

Although domestic violence is important in many areas of legal doctrine, including family law and torts, the criminal justice system places the greatest pressures on cultural images of battered women. The self-defense cases in which women kill their batterers are small in number compared to the overall universe of domestic violence,[7] yet they are highly emotionally charged as well as highly publicized. In many states, the right to expert testimony on behalf of these defendants has been won through much dedicated feminist litigation.[8] The justification for admitting expert testimony is determined in large part by cultural perceptions of women and of battering; therefore, many points made by experts respond to just these cultural perceptions.[9]

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3. *See* Julie Blackman, *Emerging Images of Severely Battered Women and the Criminal Justice System*, 8 BEHAVIORAL SCI. & L. 121 (1990). Women who kill their batterers are likely to have experienced extremely severe violence during the course of their marriages. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987).

4. For discussion of the estimates of the incidence of domestic violence in the United States, see *infra* text accompanying notes 36-44.

5. *See, e.g.*, quotations given in text and cases cited at notes 153-69 *infra*.

6. *See infra* notes 58-61 and accompanying text (discussing influence on courtroom participants of their own experiences of violence).

7. *See infra* note 140 and accompanying text.

8. *See, e.g.*, State v. Kelly: *Amicus Briefs*, 9 WOMEN'S RTS. L. REP. 245 (1986).

9. *See, e.g.*, State v. Kelly, 478 A.2d 364, 378 (N.J. 1984) ("[Expert testimony] is aimed at an area where the purported common knowledge of the jury may be very much mistaken . . . an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge."); *see infra* text accompanying notes 153-69

Yet the expert testimony on battered woman syndrome and learned helplessness can interact with and perpetuate existing oppressive stereotypes of battered women.[10]

Academic expertise on women has thus become crucial to the legal explanation of women's actions and the legal construction of women's experience. Psychological analysis, in particular, has responded to the sharp demand for explanation of women's actions in the self-defense cases.[11] Yet the sociological and psychological literature still reflect some of the oppressive cultural heritage that has shaped legal doctrines.[12] Even when expertise is developed by feminists who explain that women act rationally under circumstances of oppression, courts and the press often interpret feminist expert testimony through the lens of cultural stereotypes, retelling a simpler vision of women as victims too helpless or dysfunctional to pursue a reasonable course of action.[13] These retold stories affect other areas of law, such as custody cases, which share the problems of professional evaluation of women and the incorporation of cultural stereotypes.[14] The portrait of battered women as pathologically weak — the court's version of what feminists have told them — therefore holds particular dangers for battered women with children.

Legal pressures thus distort perceptions of violence in ways that

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(expert testimony based on issue being beyond jury's ken). A telling example of the relationship between the *need* for expert testimony and the *points* made by experts is the issue of women's "failure" to leave violent relationships. Many cases review the jury's common-sense belief that women can and will leave violent relationships freely. The experts explain the women's incapacity and failure as a function of many factors, especially the psychology of abused women and traditionalism about the family. *See, e.g.*, People v. Torres, 488 N.Y.S.2d 358, 361-62 (Sup. Ct. 1985); State v. Kelly, 478 A.2d 364, 370-73.

10. *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Lenore Walker, *A Response to Elizabeth M. Schneider's* Describing and Changing, 9 WOMEN'S RTS. L. REP. 223-25 (1986).

11. For example, see three recent books on this subject: JULIE BLACKMAN, INTIMATE VIOLENCE (1989); CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE (1989); LENORE WALKER, TERRIFYING LOVE (1989).

12. *Compare* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES 193-99 (1979) (describing traditional psychological approaches) *and* EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 13-15 (1988) (describing psychological views of women as masochistic) *with* DOBASH & DOBASH, *supra*, at 211-26 (criticizing the legal system).

13. Schneider, *supra* note 10, at 198.

14. In contested custody decisions, for example, women are also at risk that either too little strength *or* too much strength may be held against them. *See generally* PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY (1986). Therefore, the portrait of battered women as pathologically weak — the courts' version of what feminists have told them — may disserve battered mothers seeking custody. Myra Sun & Elizabeth Thomas, *Custody Litigation on Behalf of Battered Women*, 21 CLEARINGHOUSE REV. 563, 570 (1987); Laura Crites & Donna Coker, *What Therapists See That Judges May Miss*, JUDGES J., Spring 1988, at 8, 13 (1988). *See infra* text accompanying notes 223-25.

create real problems for women. Many of us cannot recognize our experience in the cultural picture that develops under the influence of legal processes. The consequence is that we understand ourselves less, our society less, and our oppression less, as our capacity to identify with battered women diminishes ("I'm not like *that*"). Before the feminist activism of the early 1970s brought battering to public attention, society generally denied that domestic violence existed.[15] Now, culturally, we know what it is, and we are sure it is not us.

Recent feminist work on battering points to the struggle for power and control — the *batterer's quest for control* of the woman — as the heart of the battering process.[16] Case law and the popular consciousness that grows from it have submerged the question of control by psychologizing the recipient of the violence[17] or by equating women's experience of violence with men's experience.[18] We urgently need to develop legal and social explanations of women's experience that illuminate the issue of violence as part of the issue of power, rather than perpetuating or exacerbating the images that now conceal questions of domination and control.

As one example of a strategic effort to change both law and culture, this article proposes that we seek to redefine in both law and popular culture the issue of women's separation from violent relationships.[19] The question "why didn't she leave?" shapes both social and legal inquiry on battering; much of the legal reliance on academic expertise on battered women has developed in order to address this question. At the moment of separation or attempted separation — for many women, the first encounter with the authority of law[20] — the batterer's quest for control often becomes most acutely violent and

15. *See infra* text accompanying note 94 (discussing the role of feminist activists in bringing national attention to domestic violence).

16. *See infra* text accompanying notes 131-35.

17. *See* GONDOLF & FISHER, *supra* note 12, at 1-3 (describing "psychologizing" of domestic violence).

18. *See* Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985); *see also* GILLESPIE, *supra* note 11, at 115-17 (discussing women's and men's differing experiences of violence in layperson's terms).

19. Redefining separation must include rethinking many assumptions — that it is the woman's job to separate from a battering relationship, that separation is the appropriate choice for all women when violence first occurs within a relationship, that appropriate separation is an immediate and final break rather than the process of repeated temporary separations made by many women — as well as identifying the violent assault on women's attempts to separate.

20. These encounters may take many forms, including the attempt to have a violent partner arrested, the filing of a temporary restraining order or legal separation, or the rush to find legal counsel because the partner has threatened to take custody of the children. *See, e.g., infra* text accompanying notes 200-01 (discussing custody litigation).

potentially lethal.[21] Ironically, although the proliferation of shelters[22] and the elaboration of statutory structures facilitating the grant of protective orders[23] vividly demonstrate both socially and legally the dangers attendant on separation, a woman's "failure" to permanently separate from a violent relationship is still widely held to be mysterious and in need of explanation, an indicator of *her* pathology rather than her batterer's. We have had neither cultural names nor legal doctrines specifically tailored to the particular assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation. I propose that we name this attack "separation assault."

Separation assault is the common though invisible thread that unites the equal protection suits on enforcement of temporary restraining orders, the cases with dead women that appear in many doctrinal categories,[24] and the cases with dead men — the self-defense cases. As with other assaults on women that were not cognizable until the feminist movement named and explained them,[25] separation assault must be identified before women can recognize our own experience and before we can develop legal rules to deal with this particular sort of violence. Naming one particular aspect of the violence then illuminates the rest: for example, the very concept of "acquaintance rape" moves consciousness away from the stereotype of rape (assault by a stranger)[26] and toward a focus on the woman's volition (violation of her will, "consent"). Similarly, by emphasizing the urgent control moves that seek to prevent the woman from ending the relationship,

21. *See* Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors,"* 10 INTL. J.L. & PSYCHIATRY 403, 408 (1987). Many authors note the dangers of this period. *See, e.g.*, GILLESPIE, *supra* note 11, at 150-52; ANN JONES, WOMEN WHO KILL 298-99 (1980).

22. GONDOLF & FISHER, *supra* note 12, at 1.

23. *Id.*

24. These cases are often concerned with the mental state or sentences of the murderer. *See, e.g., infra* text accompanying notes 325-26, 351-57 (discussing provocation and manslaughter). Another example appears in several Ninth Circuit cases on competency to plead guilty, including Darrow v. Gunn, 594 F.2d 767, 771 n.6 (9th Cir.), *cert. denied*, 444 U.S. 849 (1979) (wife murder); Sailer v. Gunn, 548 F.2d 271, 273 (9th Cir. 1977) (attempted murder of estranged wife); de Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976), *cert denied*, 429 U.S. 1075 (1977) (wife murder).

25. The example I discuss below is "date rape." *See infra* text accompanying notes 304-05. Sexual harassment is another such example. In her book *Sexual Harassment of Working Women*, Catharine MacKinnon defined sexual harassment in terms of power and inequality ("sexual harassment . . . refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power") and argued that sexual harassment was sex discrimination. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1, 4 (1979). Within a decade, this argument had transformed both sex discrimination law and cultural understanding of sexual harassment.

26. SUSAN ESTRICH, REAL RAPE 3-4 (1987).

the concept of separation assault raises questions that inevitably focus additional attention on the ongoing struggle for power and control in the relationship.

Because of the interactive relationships between law and culture in this area, law reform requires such an approach to simultaneously reshape cultural understanding. Separation assault is particularly easy to grasp because it responds to prevailing cultural and legal inquiry ("why didn't she leave") with a twist emphasizing the batterer's violent quest for control. However, meaningful change requires rethinking the entire relationship of law and culture in the field of domestic violence and developing many approaches to revealing power and control. Otherwise, since separation assault is so resonant with existing cultural stereotypes, it may be understood as justifying or excusing the woman's failure to leave rather than challenging and reshaping legal and social attitudes that now place this burden on the woman.

To illustrate the contrast between women's lives and legal and cultural stereotypes, and to accomplish a translation between women's lives and law, this article offers narratives and poems from the lives of survivors of domestic violence, and a few from the stories of non-survivors, as part of its analysis and argument.[27] Seven women's stories have come to me through their own accounts.[28] Five of these have

27. Conversations with women are cited several times in the footnotes of this article. Particularly thoughtful input has come from Kim Hanson and Donna Coker. This citation form is deliberately chosen and consistent with the method of the article. Each citation credits the woman with an original thought or contribution that has not appeared in a form suitable for conventional citation as this article goes to press.

There are three reasons for my choice of citation form. The first is honesty: when other women who have not yet published scholarly work have offered me so much of their best thought — and it has become so deeply part of my own best thought — I must either falsely claim their ideas as my own or credit them as they spoke. The second reason is methodological: much of feminist theory, and much of the strength women draw upon for survival, grows out of conversations with each other. This is, for example, the fundamental method of consciousness-raising. *See, e.g.*, Ronnie Lichtman, *Consciousness Raising — 1970, in* THE FEMALE EXPERIENCE 456 (Gerda Lerner ed., 1977). For a discussion of consciousness-raising and its role in feminist method, see, *e.g.*, Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989) (reviewing CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987)).

Finally, the third reason for citing women's conversations is political: women may not have published their thoughts because of constraints on their time and effort imposed by uniquely womanly responsibilities. This article had its roots in conversations between Kim Hanson and myself, neighbors in family student housing, when I was a first-year and she a third-year law student at Stanford. Our children played together, and we talked around them over the back fence, encountering each other while hanging laundry, while carrying groceries in from the car. This work is in part the product of that shared work and thought. Since then, Kim has litigated for a major law firm, started her own firm, become known as a battered women's advocate, and remarried. She has had two more babies since we first met. I hope some day she writes her own articles. Until then, I acknowledge her thought in my work as a way of acknowledging her *work* as part of my own.

28. These are women who talked with me or sought me out for help over the past several years. One was my next-door neighbor at Stanford; another sought me out during my second

at some time identified themselves as battered women.[29] Three of these women were Stanford Law School students or graduates; another was an undergraduate student at Stanford. One was an acquaintance in a support group. One is black, the rest are white. All but two were mothers when the violence occurred. Though our class backgrounds vary, only one was a highly educated professional before the battering incidents described, but several have acquired academic degrees since the marriages ended. The other women's voices in this paper are drawn from identified published sources.

One of these stories is my own. I do not feel like a "battered woman."[30] Really, I want to say that I am not, since the phrase conjures up an image that fails to describe either my marriage or my sense of myself. It is a difficult claim to make for several reasons: the gap between my self-perceived competence and strength and my own image of battered women, the inevitable attendant loss of my own denial of painful experience, and the certainty that the listener cannot hear such a claim without filtering it through a variety of derogatory stereotypes.[31] However, the definitions of battered women have broad contours,[32] at least some of which encompass my experience and the experiences of the other strong, capable women whose stories are included here.

In fact, women often emphasize that they do not fit their own stereotypes of the battered woman:

> The first thing I would tell you is that very little happened. I am not one of those women who stayed and stayed to be beaten. It is very important to me not to be mistaken for one of them, I wouldn't take it. Besides, I never wanted to be the one who tells you what it was really like.

The rejection of stereotypes, the fear of being identified with these ste-

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year of law school, six months after I gave a talk for incoming women students about emotional reactions to the materials in casebooks. When I relate these women's stories, I do not include specific citations.

29. Most did not generally use the term when describing themselves.

30. *See infra* text accompanying notes 86-92 (this term labels the woman instead of the process or the man), and *infra* note 93. I would prefer some term that lets us discuss stereotyping without hopelessly dooming the discourse from the start. However, I think it is important to overcome our fear of the stigma and stereotype that come with the term "battered woman," so I accept it for this paper.

31. I fear derogatory stereotypes of myself and of my ex-husband and of that marriage. *See generally infra* text accompanying notes 86-93; *see also* Liz Kelly, *How Women Define Their Experiences of Violence, in* FEMINIST PERSPECTIVES ON WIFE ABUSE 114, 116 (Kersti Yllo & Michele Bograd eds., 1988) (meaning of terms like "rape" and "battering" often taken for granted).

32. *See infra* text accompanying notes 110-36 (critique of definitions of battering and battered women).

reotypes, is expressed by lesbian women as well as heterosexual women:

> First I want you to know that I am an assertive and powerful woman. I do not fit my stereotype of a battered woman. I am telling you this because I *never* thought it could happen to me. Most lesbians I know who have been battered impress me with their presence and strength. None of them fit my stereotype. Do not think that what happened to me could not happen to you.[33]

Although there is relatively little published material on lesbian battering, this literature can shed light on the ways in which we conceptualize the battering process. Although lesbian battering is similar to heterosexual battering, the analysis of lesbian battering is unique in two ways that are significant for this paper: it has been generated entirely by feminist activists, and it has developed in isolation from the legal system. Therefore, it provides one clue to the question, "[W]hat would this . . . landscape look like if women had constructed it for ourselves?"[34]

Part I of this article discusses violence in the ordinary lives of women, describing individual and societal denial that pretends domestic violence is rare when statistics show it is common,[35] and describing the ways in which motherhood shapes women's experience of violence and choices in response to violence. Part II examines definitions of battering and evaluates their effectiveness at disguising or revealing the struggle for control at the heart of the battering process. I then describe in Part III the pressures that self-defense and custody cases place on legal and cultural images of battered women and contrast the development of an analysis of lesbian battering, an analysis generated outside the legal system. In Part IV, I discuss battering as a struggle for power and control and show how legal analysis can help reveal the control issue by naming separation assault and building litigation

33. Arlene Istar, *The Healing Comes Slowly, in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 163, 164 (Kerry Lobel ed., 1986) [hereinafter NAMING THE VIOLENCE].

34. Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 30 (1989) (paraphrasing Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 75 (1985) ("In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation?")).

35. Denial is a potent force that operates on at least four levels: at a broad societal level that shields the institution of marriage (we do not recognize the pervasiveness of violence and its normal occurrence within marriage), among men who wish to protect their privilege or deny their own battering, among individual women who are not currently battered or who believe they are not ("I wouldn't be like that"), and in women who admit experiencing domestic violence but minimize their estimates of its harm to themselves as part of survival and coping mechanisms. *See generally infra* text accompanying notes 47-73.

strategies to redefine the issue separation. Finally, in Part V, I identify separation assault in the cases where women have been killed or harmed, as well as cases in which women killed in self-defense, and explain how the concept of separation assault is consistent with the particular needs of expert testimony in the self-defense cases. I demonstrate how naming separation assault can intervene in the interrelationship between law and culture in the field of domestic violence to change both the questions asked and the answers found by courts in several areas of law.

## I. VIOLENCE AND THE ORDINARY LIVES OF WOMEN

### A. *The Prevalence of Violence and the Phenomenon of Denial*

> Most people I have known who have been abused in marriage have come out — once burned, twice shy. But that doesn't mean fire's not hot. But people treat marriage and relationships and love, in our society, as if fire's not hot.

Statistics show that domestic violence is extremely widespread in American society. Exact figures on its incidence are difficult to come by. Some studies have counted incidents of violence by or against either spouse regardless of context and found a nearly equal incidence of violence by men and women.[36] Other studies show that women are far more frequently victimized than men,[37] and that women's violence is almost always in self-defense and generally less severe than their partner's.[38] The most conservative figures estimate that women are physically abused in twelve percent of all marriages,[39] and some scholars estimate that as many as fifty percent[40] or more[41] of all women will

36. MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980).

37. In New Jersey, wives or girlfriends were victims in 85% of all reported domestic violent offenses. Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies, in* U.S. DEPT. OF JUSTICE REP. (1986).

38. Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31, at 90, 103-08.

39. STRAUS ET AL., *supra* note 36, at 36.

40. LENORE WALKER, THE BATTERED WOMAN 19 (1979) [hereinafter LENORE WALKER]. The 50% estimate is weighed and accepted by Christine A. Littleton. Littleton, *supra* note 34, at 28 n.19. For the reasons articulated by Littleton, and from the stories told to me by women, the 50% figure seems reasonable to me as well.

41. JENNIFER B. FLEMING, STOPPING WIFE ABUSE 155 (1979), *quoted in Achieving Equal Justice for Victims of Domestic Violence, in* ADVISORY COMM. ON GENDER BIAS IN THE COURTS, CALIFORNIA JUDICIAL COUNCIL, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS pt. 6, at 3 (draft Mar. 23, 1990) [hereinafter *Achieving Equal Justice*] (estimating 60% of married women experience domestic violence at some time during their marriages); SISTERHOOD IS GLOBAL, 703 (Robin Morgan ed., 1984) (50%-70% of women experience battering during marriage).

be battering victims at some point in their lives. Accurate estimates are difficult,[42] in part because of the likelihood of underreporting.[43] However, using any of these estimates, marriages that include violence against the woman represent a relatively widespread phenomenon in our society.[44]

Although these statistics are widely reproduced, there is little social or legal recognition that domestic violence has touched the lives of many people in this society and must be known to many people. Judicial opinions, for example, treat domestic violence as aberrant and unusual: "a unique and almost mysterious area of human response and behavior,"[45] "beyond the ken of the average lay [person]."[46] This radical discrepancy between the "mysterious" character of domestic violence and repeatedly gathered statistics reflects massive denial throughout society and the legal system.

Denial is a defense mechanism well recognized in psychology that protects people from consciously knowing things they cannot bear to reckon with at the time.[47] A powerful if undiscussed force affecting

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42. The incidence of domestic violence is hard to determine, in part because it takes place within the home, and in part because the many studies in the field present statistical information that is not directly comparable with that in other studies. Some focus on the number of women who are victims of spouse abuse: estimates of women physically abused by husbands or boyfriends in the United States range from 1.5 million, BROWNE, *supra* note 3, at 5, to 3-4 million, Mary Pat Bryger, *Domestic Violence: The Dark Side of Divorce*, FAM. ADVOCATE, Summer 1990, at 48. Straus, Gelles, and Steinmetz studied violence against spouses of either gender and found that more than 1.7 million Americans at some time faced a spouse wielding a knife or gun. STRAUS ET AL., *supra* note 36, at 34.

43. BROWNE, *supra* note 3, at 4-5 (citing studies by Straus, Gelles, and Steinmetz and the Louis Harris organization). Self-reports may undercount significantly. *See generally* DIANA E. RUSSELL, RAPE IN MARRIAGE 96-101 (1982) (reviewing statistical techniques and results of several surveys on domestic violence).

44. Stating violence is normal does not mean it is normative or culturally accepted, as it once was. See DOBASH & DOBASH, *supra* note 12, at 48-74, for a discussion of violence that was historically part of control of women within marriage. Violence against women was an early focus of feminist protest and efforts at reform. By the mid-nineteenth century, contrary to some popular stereotypes, wifebeating was already considered "a disreputable, seamy practice"; it was illegal in most states by the 1870s. LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 255 (1988). Although today domestic violence is indeed "disreputable," that does not mean that it has disappeared in fact — only that the commonality of its occurrence in normal marriage is widely denied.

45. *See, e.g.*, Sinns v. State, 283 S.E.2d 479, 481 (Ga. 1981) (explaining Smith v. State, 277 S.E.2d 678 (Ga. 1980)).

46. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1983).

47. The American Psychiatric Association defines denial as "[a] defense mechanism operating unconsciously used to resolve emotional conflict and allay anxiety by disavowing thoughts, feelings, wishes, needs, or external reality factors that are consciously intolerable." AMERICAN PSYCHIATRIC ASSN., A PSYCHIATRIC GLOSSARY 28 (5th ed. 1980). The emphasis here is on what is *consciously* tolerable for an individual. This is the sense in which I use the term "individual denial." I use the term "societal denial" to mean an ideology that protects us from knowing that which our culture finds intolerable. *Cf.* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 607 (1984) ("Legal thought is a form of

the evolution of the law and litigation on battered women, denial exists at both the societal and individual levels. Societal denial amounts to an ideology[48] that protects the institution of marriage by perpetuating the focus on individual violent actors, concealing both the commonality of violence in marriage and the ways in which state and society participate in the subordination of women.

"Societal" denial — albeit within a smaller, more consciously self-defined society — also slowed recognition of lesbian battering. Although many lesbian activists helped start the battered women's movement, battering did not emerge as an internal problem in the consciousness of the lesbian community until years after the movement had begun.[49] This collective denial of internal violence was based, in part, on the reluctance to let go of an ideal of lesbian relationships and community, a "lesbian utopia — a nonviolent, fairly androgynous, often separatist community struggling for social justice and freedom for ourselves and other oppressed people."[50]

However, there are important differences between the ideological defense of marriage and the defense of lesbian utopia. The differences lie in the way power is vested in one partner of a marriage at the time of marriage by society, law, and tradition, fitting heterosexual battering into a historic framework of oppression and domination *of* women *by* men. Marriage is an institution which underlies many — perhaps most — other social, political, and economic relations, and to that end many elements of society have a stake in defending it. Because of oppression of lesbians and exclusion from many social structures — for example, lesbians *cannot* marry in the United States — the dream at stake was less central to the surrounding society but, poignantly, at least equally central to lesbian self-definition and community.

The ideology that protects the institution of marriage and the state's participation in subordinating women is consistent with the findings of James Ptacek's study of batterers.[51] Ptacek found that

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denial, a way to deal with perceived contradictions that are too painful for us to hold in consciousness.").

48. JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 311 (Jeremy J. Shapiro trans., 1971), *quoted in* James Ptacek, *Why Do Men Batter Their Wives?, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31, at 155 ("From everyday experiences we know that ideas serve often enough to furnish our actions with justifying motives in place of the real ones. What is called rationalization at this level is called ideology at the level of collective action.").

49. *See, e.g.*, Lydia Walker, *Battered Women's Shelters and Work with Battered Lesbians, in* NAMING THE VIOLENCE, *supra* note 33, at 73 (describing her work in a battered women's project, her work with battered lesbians, and her difficulty in facing the violence she had experienced in her own relationships with women).

50. Barbara Hart, *Preface* to NAMING THE VIOLENCE, *supra* note 33, at 9, 13.

51. *See generally* Ptacek, *supra* note 48. A New York judge told the state's Task Force on Women in the Courts that, when a woman gives up an attempt to separate, judges either smile

both batterers and the criminal justice system tended to blame women for their abuse and deny or trivialize the violence involved.[52] These excuses and justifications are ideological in nature: "At the individual level, they obscure the batterer's self-interest in acting violently; *at the societal level, they mask the male domination underlying violence against women.* Clinical and criminal justice responses to battering are revealed as ideological in the light of their collusion with batterers' rationalizations."[53]

This ideology pervades the courtroom as well as other areas of the criminal justice system. It shapes legal events in several ways: it affects the individual consciousness of the actors in the courtroom,[54] the doctrinal questions that are the legal framework of each action,[55] and the options to avoid legal confrontation and the resources individuals bring into the courtroom.[56] Especially troublesome, this ideology which denies oppression has had a profound impact on the development of explanations of women's experience and behavior that can fit within the conceptual structure of the law.[57]

It is likely that a number of people present in any court will have some personal experience of domestic violence.[58] Using the conservative estimate that domestic violence occurs in one quarter of house-

(thinking they have brought the couple back together), or snicker. The snickering response is based on their perception "that the woman who accepts this violent behavior and reconciles with the man[,] even if she reconciles in a split but doesn't pursue the case, isn't worthy of our respect because she does not respect herself . . . ." New York Task Force on Women in the Courts, *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 36-37 (1986-1987) [hereinafter *New York Task Force Report*].

52. Ptacek, *supra* note 48, at 141-49 (batterers), 154-55 (criminal justice system).

53. *Id.* at 155 (emphasis added).

54. *See infra* text accompanying notes 58-61 (discussing experience of battering among courtroom participants).

55. *See, e.g., infra* text accompanying notes 371-78, 410-24 (discussing the question of the imminent danger of death or grave bodily harm in cases in which women assert they have killed their batterers in self-defense).

56. *See, e.g., infra* text accompanying notes 195-210 (discussing the relative power of men and women in custody actions).

57. For example, if the batterers' position is essentially identical with the perspective of the criminal justice system, and both fit with an ideology that protects marriage, then the "commonsense" position in any courtroom will tend to favor men. Therefore, women will need experts to explain their lives; men will not. *See, e.g.*, Littleton, *supra* note 34, at 35 (all women, not only battered women, may appear alien from a male perspective).

58. Violence in our personal lives has existed for everyone in varying degrees. The magnitude of the damage and turmoil is the real crux of the problem. If individuals on the panel are afraid of their own feelings about having been battered, then perhaps they will not be open to the battered woman's feelings. Some will have battered someone themselves and will struggle to justify their own actions.

Roberta K. Thyfault et al., *Battered Women in Court: Jury and Trial Consultants and Expert Witnesses, in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 55, 62 (Daniel J. Sonkin ed., 1987) [hereinafter DOMESTIC VIOLENCE ON TRIAL].

holds,[59] at least four of the fifteen or more actors in an average criminal action — jurors, judge, and attorneys — probably will have experienced or committed at least one domestic assault.[60] Similarly, in custody suits, the judge and the attorneys — *and* the social workers and psychologists who are performing evaluations of the parents — have this statistical likelihood of having experienced or committed violence. Therefore, the atmosphere in the courtroom will not reflect mere ignorance, nor merely the broad social stereotypes which courts generally recognize can be a problem.[61] Rather, the response to and evaluation of the case before them will also include the unseen and unspoken ties that bind these participants to the fabric of their own lives, their parents' lives, and their children's.

Social workers and psychologists play an important role in this process. Our legal system — like the rest of society — has to a large extent entrusted these professionals with the definition of what is normal and functional.[62] Despite the statistics on the epidemic incidence of domestic violence, there is almost no legal or social science scholarship that describes an author's experience of violence[63] or even indicates that the author has had any such experience.[64] It is unlikely that a disinterested body of social scientists is doing all this research. However, scholars may be reluctant to indicate their own experience because they fear intellectual marginalization[65] or familial repercussions. Scholarly fears of marginalization probably reflect some acceptance of stereotypes of battered women; certainly, they reflect caution about the power and danger of stereotyping by others.

This silence among professionals and scholars is one intersection between individual denial and an ideology of societal denial. This is where one of the lenses through which we see the world is constructed:

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59. *See supra* notes 36-44 and accompanying text.

60. Overrepresentation of the middle class in the courtroom would not change this estimate. Domestic violence occurs across class lines. LENORE WALKER, *supra* note 40, at 19.

61. *See, e.g.*, State v. Kelly, 478 A.2d 364, 378 (N.J. 1984) (jurors may hold "common myths").

62. *See, e.g., infra* text accompanying notes 213-22 (discussing the role of social workers in custody disputes).

63. The exceptions here are Robin West, who discusses her own experience of battering, Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 98-99 (1987); and Terry Davidson, who discusses being the child of a wife beater, TERRY DAVIDSON, CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFEBEATING PATTERN 14-15, 131-54 (1978).

64. *But see* Jan E. Stets' preface to her excellent study, JAN E. STETS, DOMESTIC VIOLENCE AND CONTROL v (1988) (research on domestic violence brought understanding of violence she witnessed and experienced while growing up).

65. *See, e.g.*, West, *supra* note 63, at 99 (describes grappling with this anxiety but goes on to discuss her own experience).

if scholars are silent for "personal" reasons, their "professional" silence then perpetuates the social stereotypes that construct battered women as different, exceptional, "other." Ultimately, the denial of personal experience of domestic violence in social science literature and forensic testimony permits continued societal blindness to the implications of the statistics these same experts gather and employ.[66]

Individual denial protects the images of self and marriage held by individual women and men, as well as being the mechanism through which much societal denial operates. This is true elsewhere as it is in the courtroom: people need to know that their own marriages are sound, therefore it is important to know that they (or their wives) do not "stay" in the relationship; they "are" in the relationship. Their own relationships define what is normal and appropriate; it is appropriate for their own relationships to continue. The battered woman *must* be different. Therefore, the question "why did she stay?" commonly finds answers that attempt to explain difference: "because she had children" or "because she was frightened" or "because she became pathologically helpless" — not, significantly, because I/you/we "stayed" too.

Do we "stay," or are we simply married? Writing this article forced me to grapple with my own image of battered women, my "credentials" in claiming this identity, and my experience of marriage. As I worked, I found similar conceptions of self and marriage in several of the women who spoke with me. These women described their marriages as "bad" or "unhappy" and then went on to recount attacks that were almost murderous — threats with guns and knives, partial strangling, deliberately running into a woman with a car:

> I tried to nurse John [her colicky baby], but Ed screamed that I was trying to poison him. I said, "OK, I'll get you a bottle." I had to kneel down by the microwave, and Ed pushed me over, so that I fell over. So I put the bottle in the micro and stood up, and finished microwaving the bottle, put the nipple on, and gave it to Ed. . . . Ed began screaming almost incoherently, and grabbed John, and started to storm back out to the car with him.
>
> At this point I got worried. The first time [earlier that night, when her husband first stormed out and drove around with the baby] I thought he was angry because I had yelled, and I felt guilty . . . it didn't seem that aberrant. But screaming about poison when I tried to nurse him, knocking me over . . . it just seemed like there was something wrong. I said, "You're welcome to leave, but you can't take John. I don't think you're all there."

66. Conversation with Kim Hanson, 1989 ("As long as you don't speak out, you're part of the conspiracy of silence.").

> He pushed past. I stood in front of the car. He drove into me. I tried to go over the hood of the car, hit the pavement quite hard, and blacked out for a minute. When I came to, he had turned the car around, he was like a foot from me, and he was saying "get up, or I'll drive over you."
>
> [Her husband had "scared himself . . . realized he had gone too far" and gave her the baby to nurse. They finally fell asleep.] Next morning, Ed had gone to work. I couldn't move, I couldn't move my legs. I remember thinking, I'm going to die. [The baby] is going to wake up next to a corpse . . . . When I look back, there was so much rage in that thought [at the colicky baby as well as the husband] . . . . I had a very hard time functioning. I was able to make it to the bathroom, but the tunnel vision seemed worse.

Women often discussed the relationship at length before they mentioned any violence. Finally, I began to understand that the violence against these women seemed shocking to me — and the violence against me seemed shocking to them — precisely because we heard each others' reports of violence isolated from the context of the marriages. For ourselves, on the other hand, the daily reality of the marriages — none of which included daily or even weekly violent episodes — defined most of our memories and retrospective sense of the relationship: these were "bad" marriages, not ordeals of physical torture. We resisted defining the entire experience of marriage by the episodes of violence that had marked the relationship's lowest points. Our understanding of marriage, love, and commitment in our own lives — as well as our stereotypes of battered women — shaped our discussion.

This question of the line between "normal" marriage and violent marriage is a common one. One activist social worker recounts that when she speaks on domestic violence in any forum, someone *always* asks why women "stay." She says, "When should she have left? At what point? Maybe the time she watched while he smashed up the furniture?" A silence, a shock of recognition, falls over the audience. It is, relatively speaking, *normal* for a woman to watch a man smash up the furniture. Many of the women in the room have seen something like it — and called it "marriage," and not "staying."[67]

Denial conditions women's perceptions of our own relationships and need for assistance. An extreme example is a woman who founded a shelter for battered women; although her husband was beating her during this period, she never identified with the women she sought to help:

> I just thought that the incidents of violence that I — in order to be a

67. Conversation with Donna Coker, 1989 (discussing four years of activist feminist social work with battered women in Honolulu).

> battered woman you had to be really battered. I mean OK, I had a couple of bad incidents, but mostly it was pretty minor, in inverted commas, "violence." I didn't see myself in that category, as a battered woman at all.[68]

Similarly, women may fail to perceive armed attacks that do not result in injury as physical abuse — or indeed fail to so perceive anything other than an archetypal brutal beating:

> I don't know what I'd have done if I had to live with what [I assume] you did. My marriage wasn't physically abusive, but there was emotional abuse. My husband had a pistol . . . he did pull his gun on me . . . .

This may happen even when the woman calls for help:

> When I finally called the Battered Women's Center for help, I was just looking for advice — my husband had threatened to move back in without my consent while I was recovering from a Cesarian section . . . . He said "you can't stop me" . . . . I told the counselor that I was just looking for a referral, as I didn't qualify for their help because my marriage had not been violent, although I had left after he attacked me with a loaded shotgun. There was a tiny pause, and then she said gently: "We classify that as extreme violence."

Other aspects of women's denial of oppression within ordinary marriage also affect our perception of battered women. Battered women interviewed by social workers often say they felt a responsibility to support their children's relationship with their father because "he's really good with the children."[69] This is not dissimilar to statements by women in nonviolent relationships — or relationships they do not perceive as violent. Women often admit when pressed that they are actually describing a father who is loving with a child when he chooses to interact with it, even if that interaction happens seldom, yet insist on the value of his presence in the children's lives. However, this is a parallel that makes many women uncomfortable: how could a batterer be like their husband? Similarly, although sexual abuse is often a part of domestic violence, many battered women who did not experience sexual abuse describe sex as having been "the only good thing about the marriage."[70] Women who are in relationships of unequal power that are not violent must also find sexual pleasure under conditions of inequality, yet they may not wish to recognize the similarity in experience.

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68. Kelly, *supra* note 31, at 114, 123-24.

69. Conversation with Donna Coker, *supra* note 67.

70. *Id.; see also* Lenore Walker's discussion of her difficulty understanding the reports of sexual pleasure among the battered women she interviewed. LENORE WALKER, *supra* note 40, at 108-12.

The literature on battering notes, clinically and sometimes with condescending undertones, that women tend to "perceive" the onset of violence as atypical.[71] Of course, the *onset* of violence *is* atypical, and therefore our perceptions are in many ways appropriate.[72] Yet we may ignore danger signals and early attacks because we believe that the "battered-ness" is a characteristic of the woman — a characteristic we do not have — rather than a characteristic of her partner or a symptom of a dynamic in the relationship. Denial creates and reinforces the perceptions (1) that battered women are weak, (2) that we are not weak, and (3) that therefore we are safe.

Finally, individual denial leads women to minimize the pain and oppressiveness of our experiences while we continue to live with them. This is also a familiar dynamic in women's relationships; yet if violence is what we are minimizing, we face great costs and dangers.

> That session in the hospital when I had been married one month, and the nurse came and sat on the bed and said she had heard I didn't care if I went home for Christmas . . . . The truth was, I couldn't face what I was going home to. I instinctively knew it was very bad to lie about this but I couldn't bear to tell the truth. It was too humiliating. I didn't tell her anything. To my friends, I said I fell down. I did not intend to cover for him but for myself . . . for the confusion and humiliation . . . for finding myself in this unbelievable position.

This woman's images of battered women and herself make her position "unbelievable." Her response, based on these images, is to disguise her experience. She allows her husband to avoid the censure of family and friends in order to protect *herself* from their opinions, setting up the possibility of more such lies in the future because the image itself has not been confronted, and making it likely that she will minimize her own pain in order to maintain silence.[73]

The cumulative effect of this denial has been very destructive for women. We have difficulty recognizing ourselves and our experience on the continuum of violence and power in which we actually live. To the extent that we cannot recognize ourselves, we are hindered in for-

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71. BROWNE, *supra* note 3, at 85.

72. The initial violent episode is not treated as though it signals the beginning of a violent relationship. It is treated as an isolated, exceptional event, which is what one would expect it to be treated as. Only in retrospect does the woman begin to examine the first violent act more broadly, seeking signs that "she should have noticed. . . . " The evidence is that there has never been any violence before, that the husband rejects this behavior in principle. . . . There is no reason to expect the violence to be repeated.

DOBASH & DOBASH, *supra* note 12, at 95-96.

73. Battered women tend to minimize the history of assault against them and the pain they have suffered. *See* Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 228-29 (1986).

mulating an affirmative vision in which our integrity is protected. Although much of this article emphasizes legal aspects of the related forces of law, society, and academia at work in the field of battered women, I believe that the ways in which women are divided from each other — and deprived of the capacity to understand our own experience in relation to other women — are ultimately most important.

### B. *Motherhood: Connectedness and Violence Against Women*

> Look at me, a voodoo doll,
> stuffed with hair, toenails, and fear,
> stuck with pins radiating like hatred
> from my pincushion body.
> You've held me in your hands,
> a wooden fetish —
> female figure carved out of heartwood
> and studded with nails.
> Each nail driven in is a desire, a wish,
> is somebody's want driven into me.[74]

One of the most pervasive fictions in the case law is that women with children are individual actors. Even much feminist legal literature has tended to pretend all women's notions of self and autonomy will be the same.[75] In fact, mothers continually make decisions on the basis of extended, collective, multiple self-interest (their children's as well as their own, their husbands' as well as their children's).[76] The connectedness of mothers is not simply biological — it is existential, social, and extremely practical. Most simply, what makes my children's lives harder makes my life harder. If they are ill or sleepless, I do not sleep.[77] It goes both ways: what hurts me, or terrorizes me, often hurts them as well. Also, anything that made their father's life harder made my life harder, in both emotional and economic dimensions. Finally, as the safest outlet for emotional expression and the source of consolation for our unequal loved ones of greater or lesser

74. Harryette Mullen, *Veteran of Domestic Wars, in* FAMILY VIOLENCE: POEMS ON THE PATHOLOGY, *supra* note 1, at 51.

75. *See generally* Stephanie Wildman, *The Power of Women*, 2 YALE J.L. & FEMINISM 435 (1990) (book review) (criticizing Catharine MacKinnon and other feminist scholars for their inattention to the particular situations of women with children).

76. On women's intimate connection with our families, and the identity built on this connection, see generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 18-22, 40 (1988).

77. I do not mean that these roles are purely biologically defined. To the extent that some men fill this role with children, they can be seen as also engaged in mothering. Christine Littleton has pointed out that gender is in many ways socially constituted. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987). Men who interact at this primal caregiving level with their children are carrying out conduct Littleton calls "socially female." *Id.* at 1308-09.

power,[78] women are uniquely bound to weighing the needs of others as our own. These needs have, in fact, become our own in many significant ways — our "selves" simply are not single.

The ordinary lives of women leave us vulnerable to violence and oppression both because of our commitments and because of the lack of understanding and protection within the law. Despite the many responsibilities and connections of women's lives, courts and legal scholars widely assume that it is a woman's responsibility to leave the relationship.[79] When women tell the stories of their commitment to relationships, stories which may include love and hope, the legal system often has no way to hear them.[80] In order to recognize women's attempts to forge families and the complex attendant pressures on decisions about domestic violence, we need to increase social understanding of women's commitments as well as of women's fear. In fact, the onset of violence often occurs *after* commitment deepens. This may occur soon after the couple is married:

> He beat me up on our wedding night. I wound up with a black eye, a very bad black eye, and split lip. He was almost arrested that night.... I ran out of the house in my nightgown and flagged down a passing car and got them to take me to my father-in-law's house. When my father-in-law came back, the neighbors had called the police and the police were there. My father-in-law talked them out of taking him in.

Pregnancy, which also increases commitment, is also often an onset point for violence.[81] Women who experience this violence have had their emotional and economic needs transformed by the pregnancy itself; it is a very poor time for them to respond. Since mothers bear much of the responsibility for the emotional ties between the fathers and children in our society, the new family structure changes her responsibilities to all parties: if the children are not physically

78. *See* West, *supra* note 76, at 26 (women exist in a web of natural *inequality* that involves continual care for dependent children).

79. This assumption is questioned by Littleton, *supra* note 34, at 29, 53-54 ("Why should the woman leave? It's her home, too — in fact, often it's her home, period.").

80. *Id.* at 43-44, 46-47 (discussing Smith v. State, 277 S.E.2d 678, (Ga. 1981)).

81. The accounts of pregnancy triggering men's violence against women are virtually universal. *See, e.g.,* LENORE WALKER, *supra* note 40, at 105-06. This is generally interpreted as the man's competition with the fetus for his wife's attention and affection. *Id.* It is true that our emotional lives and daily practical lives are transformed by children; men often want this attention, have received it, fear its loss, show resentment and anger. People who have problems with control may react badly to change and stress. *See* RICHARD A. STORDEUR & RICHARD STILLE, ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS: ONE ROAD TO PEACE 101-03 (1989). Interestingly, pregnancy is not on the list of stressors listed by Stordeur and Stille that therapists see most in treating batterers. This may be a function of the point in the relationship at which men enter treatment: the top stressors (divorce, marital separation, jail term, marital reconciliation) all refer to later points in the relationship than marriage or pregnancy. *Id.*

harmed, the woman may hesitate to deprive the children of his companionship, even at substantial danger to herself.[82] However, our social and legal doctrines increase the cost of her loyalty by viewing her attempt to fulfill this responsibility as problematic "staying" in the relationship.

From the viewpoint of the woman in a violent marriage, "staying" may look very different. One of the women in my support group was strikingly strong and serene. She worked as a legal secretary, earning a good salary for a working woman. She was attractive, intelligent, thoughtful. I simply could not reconcile this woman's presence, composure, and depth with my image of a battered woman. Finally, after a meeting, I took her aside and said, "I know this question must sound just awful, but what on earth are you doing here? You're so strong. . . ." She said:

> Well, my husband is an alcoholic. Things have been really bad these past few years. But we've been married thirteen years. And I have three children. For nine of those years, he was the best husband and father anyone could have asked for. The way I look at it, he has a disease. I *know* that when he's not drinking, he's not like this. I may have to leave. But if I do, I'm giving up on a father for the children, and I'm giving up on him. And I can't just throw away those nine years. So I go to Al-Anon, and I come here. I get the support I need. And I may have to decide to go. But I'm not going to do it lightly.

The wearing, repetitious labor of motherhood becomes part of the cycle of survival in ways we have had trouble recognizing. The constant work and need create a wearing down of the self, an erosion of borders that represents not confusion but exhaustion — a thirst for solace and protection as well as individuation. The constant demands of children, especially in an unstable situation, may prove exhausting. Women experience this blurring of borders, this need to subject their own needs to others, even when violence is not present. Question: Was it a battered or nonbattered wife who wrote this poem?

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82. Even after divorce, most women place high value on their children's relationship with the father. LENORE WEITZMAN, THE DIVORCE REVOLUTION 230 (1985). In fact, the woman is essentially required to be responsible to these broad familial emotional and developmental needs when she goes into court to pursue her claim to custody. Martha Fineman notes that social workers are suspicious of individuals who seek sole custody and seem to want to break ties with the other parent; social workers tend to want to punish these individuals by awarding custody to the other parent. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 766 (1988).

A Woman's Work is Done (on the Run)

Mama, I'm hungry
So get up and feed me
my diapers are dirty
it's your job to clean me.

Baby, I'm hungry
you know I got to eat
You've got a way w/cookin
that just can't be beat.

Mama, I'm happy
and I want to play
Do you really have
something
else to do anyway?

Baby, I'm happy
and I want to play
A little of your love
goes a long way.

Mama, I'm angry
and I want to fight
Sometimes it seems like
you can't do nothing right.

Baby, I'm angry
coz you want your "rights"
You know you're *just(l)* a
woman
so go fly a kite.

Mama, I'm hurting
you gotta make me better.
Cure my cold, wipe my
nose
and make me wear a
sweater.

Baby, I'm hurting
and need your gentle touch
Just hold me close and rock
me
it doesn't take that much

Mama, I'm tired
so rock me off to sleep.
Just give me the best
of your life and don't
weep.

Baby, I'm tired
so let me go to sleep
Don't bother me with your
needs
just make my life complete.

Answer: It was a nineteen-year-old woman in the midst of a battering relationship,[83] but like the furniture smashing example above, there seems little to distinguish this woman's daily concerns from a nonviolent marriage. The skills common to women in dealing with these demands easily convert to battlefield skills of compartmentalization and an emergency mode of coping with only immediate present demands; while extremely functional in times of crisis, these skills are wearing over time and may later cause her to be defined — or to define herself — as dysfunctional.

> Two days after he broke the glass in the door, it was the middle of a hot summer afternoon. My son was asleep in his crib in my room, my daughter was taking a nap in hers. I was lying in bed reading. Suddenly, I heard a popping noise, and glass started crashing to the floor. Someone was shooting through my windows. There were no bullets flying around — I remember wondering if it was an air rifle. The windows kept shattering, and I didn't know what would happen if anything hit the baby.

83. I thank Kim Hanson for sending the poems by J.C. Clark, as well as portions of her own journals I drew on extensively for this article.

> I grabbed him out of the crib, got down toward the floor, and half-crawled out of the room. I took him downstairs. Of course, he was only three-months-old, when he woke up he had to nurse. Then I had to change his diaper. Then my daughter started crying — she had waked up from her nap. Then I had to change her diaper. Then she was hungry. Then I had to change his diaper again. By then he had to nurse again . . . .
>
> At 5:30 when I took them upstairs for their baths, I noticed the glass all over the floor. That was when I remembered what had happened. It was the worst moment of all of it . . . because I couldn't even rely on myself any more. I started crying and I called my mother long-distance. I said, "Mama, it finally got to me, I've finally lost my mind. If your window is shot out and you crawl out of the room with your baby in your arms, you're not supposed to forget about it. It should at least be the main event of the day!"

Ironically, this particular attack ultimately proved to be teenage vandalism, coincidentally following by two days a violent episode in which the woman's ex-husband broke a pane of glass in her door and lay bleeding on her floor until the police arrived. She described an initial unwillingness to call the police again so soon after the previous events, and her conviction at the time that the attacks must be related. The blurring of borders, so frightening at the time, is in fact part of women's experience of motherhood and daily life — of her daily duty to lay aside her own needs for her children's. In many cases, the emotional changes of motherhood may combine with the pressures of violence to push women toward at least temporary compliance with a batterer's demands — while in the long run impelling her toward whatever choice (leaving, staying, seeking family or professional intervention) seems to best protect both herself and her children.

Finally, the sense of physical responsibility to the children — inevitably, economic responsibility — is a major constraint. Women and children suffer severe economic losses upon divorce.[84] Mothers must be very desperate to walk out without knowing how they will all survive. A large number of homeless women and children today have fled violent situations, and women often balance the possible harm to the children through inadequate housing with the harm from maintaining the relationship. Unless the children are threatened directly or indirectly, the woman may well choose for them rather than herself. In a very real way, she is choosing between known and unknown dangers, blurred borders under familiar conditions and those under unfamiliar conditions.

> Our building was very roach-infested. In winter, the children needed

84. WEITZMAN, *supra* note 82, at x.

> real shoes instead of sneakers, and I put together the money to get them good high-tops. My son's shoes had an unusually strong smell of leather. One morning I picked up his shoe and it erupted . . . a volcano of baby roaches, with a few big roaches as well. They loved that shoe. Every night they tried to move in. Powder didn't help. I couldn't afford more shoes.
>
> To me, this is what all of it was like, the marriage and what followed. I just remembered to pick up and hide the baby's shoe every night or . . . remembered to get there first every morning, when he couldn't see me, and shake out the hundreds of nesting roaches. Or, because eventually it happened, I forgot, and heard him scream in terror. And felt terrible because I had failed to protect him from knowing that shoes can explode into insects, that everything can change to nightmare in a second.

Whether the woman is trying to maintain a relationship or trying to leave it, her particular life circumstances will affect the dangers she faces and the choices she makes. Women are entitled, as Christine Littleton says, to "safe connection" — to the measures that protect us in this effort as well as to social recognition of our values and needs.[85] We are also entitled to legal doctrines that respect our circumstances and responsibilities by recognizing that every aspect of our experience of assault and response to it may be shaped by the experience of motherhood, including the times at which we are attacked, the nature of the attacks, the methods by which we cope, and our judgment of whether the pain of relationship outweighs its value.

## II. Definitions of Battering and Battered Women

### A. *Identification as a "Battered Woman"*

"Battered woman" is not a simple term.[86] It focuses on the woman and defines her through the battering experience. While the term has some value for understanding women and our experience, both of these qualities might also reinforce stereotypical notions of women's experience. This section describes problems women encounter in identifying ourselves as "battered," the ways in which definitions of battered women reflect changing social consciousness, and the way descriptions of battering have moved from a focus on control toward a focus on incidents of violence.

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85. *See* Littleton, *supra* note 34, at 49-53. "If battered women seek to maintain connection in the face of enormous danger, perhaps the key to accessing the legal system on their behalf lies in taking seriously *both* the connection they seek *and* the danger they face in that quest." *Id.* at 52. Littleton suggests four basic approaches: changing the batterer, decreasing the costs of rupture to women, increasing the perceived costs of battering, and expanding the options for community. *Id.* at 53-56.

86. *See* Stordeur & Stille, *supra* note 81, at 18-20 (providing brief recent review of many positions on the terminology of "*wife assault, battering, abuse, violence, family violence,* and *domestic violence*" (emphasis in original)).

Women resist applying the term "battered woman" to ourselves. This is often true even when we approach hotlines and shelters,[87] even when we seek temporary restraining orders against our abusers, even when we talk to each other. I believe that we do this *not only* because of the denial discussed above, but because the stereotypical implications of the term fail to correlate with our self-images in ways that reflect *correct* self-assessment on our parts.

It is a deadly combination, this mixture of (negative) denial and (positive) self-respect that makes women reject an image of degradation and incapacitation. As a woman interviewed at a shelter in England said, "It's difficult to accept yourself as a 'battered wife' as the term isn't right. I have had a lot of marital troubles, which have included violence. Despite all my attempts to make the marriage work, I had no choice but to get away."[88] She defines herself as active, working to solve her problems, reaching out for solutions.[89] These actions conflict with her sense of what a "battered wife" is. Yet her story told of frequent beatings and otherwise fit the stereotypical picture of a battering relationship reasonably well.[90] Her self-esteem and insistence on her own competency may have been double-edged: a woman's rejection of the stereotype may slow her perception of her problems or available resources, or postpone her decision to seek help, since she may not turn immediately to agencies targeting "battered women."

Because the term "battered woman" focuses on the woman in a violent relationship rather than the man or the battering process, it creates a tendency to see the woman as the problem. There are other options: at one conference, several women described themselves with the phrase "a woman who used to be married to a battering man."[91] However, many feminists insist on using "battered woman" in preference to terms such as "spouse abuse" which are not gender specific in order to emphasize that women, not men, are almost always the target of intraspousal abuse.[92] The very substantial psychic damage done

87. Conversation with Donna Coker, *supra* note 67 (recounting stories of several clients at a battered woman's program who doubted whether they were "really" battered women).

88. Joy Melville, *Some Violent Families, in* VIOLENCE AND THE FAMILY 10 (J.P. Martin ed., 1978).

89. *Id.* at 10-11.

90. This woman had been hit frequently. Her husband did not permit her to leave the house, even to go to social security or the doctor. *Id.* at 11.

91. Conversation with Donna Coker, *supra* note 67.

92. Studies that equated all forms of violence by all actors, whether or not provoked, have generated concern for "battered husbands." This methodology has been extensively criticized. *See* RUSSELL, *supra* note 43, at 102-09. Debate on this point continues. *See generally* 11 RESPONSE TO THE VICTIMIZATION OF WOMEN AND CHILDREN No. 3 (1988); Susan Schechter,

through the experience of violence may be minimized or denied through less woman-focused terminology. Although the term "battered woman" is unfortunate in its potential for stigma, no less specific term can capture this damage; the search for different language may lose a sense of the harm.[93]

### B. *Evolution of The Definition of the Problem*

The current debate over terminology reflects differences in the backgrounds and approaches of feminist activists, scholars in sociology and psychology (some feminist, some not), and professionals such as social workers active in the field of domestic violence. Social awareness of violence against women grew out of the activism of the feminist movement of the late 1960s and early 1970s. In *Women and Male Violence,* Susan Schechter traces the evolution of the "women's rights" and "women's liberation" wings of the feminist movement and places the roots of public consciousness of domestic violence in the early women's liberation literature.[94] Other groups were also active in the field. Women from Al-Anon, the organization for families of alcoholics, founded the first shelters for battered women in the 1960s.[95] The first Boston shelter was also a self-help project: two battered women opened their home as a haven and rapidly found support from radical feminists.[96]

Social workers had dealt extensively with battered women since the early days of social service agencies. Over time, historian Linda Gordon has shown, women clients began to create out of their own complaints a right not to be beaten.[97] Until the 1930s, the women were more likely to receive social work assistance for their charges of nonsupport by husbands than for charges of brutality; however, from

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*Building Bridges Between Activists, Professionals, and Researchers, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31, at 299.

93. Conversation with Kim Hanson, *supra* note 66. We need definitions that do not inherently blame women. For the past decade, I have often reluctantly applied the term to myself in order to help break down stereotypes and overcome the strong pressures toward silence. To the extent that I do not "really" feel like a battered woman but like a bit of an imposter, I know this puts me in line with battered women everywhere. For the similar perspective of a woman who chose to use the terms "batterer" and "battered" when she had been violently struck once by her partner, see BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 88 (1989).

94. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 32-33 (1982) (citing the anthology SISTERHOOD IS POWERFUL (Robin Morgan ed., 1970) and the discussion in consciousness-raising groups). Schechter reviews the different ideologies within the women's movement that contributed to the battered women's movement.

95. The Al-Anon women were concerned that women who fled abusive alcoholic husbands were sleeping in cars. *Id.* at 5, 55-57.

96. Schechter, *supra* note 92, at 302.

97. GORDON, *supra* note 44, at 257-61.

the 1930s on, women increasingly insisted on their right to physical integrity.[98] Heavily influenced by Freudian thought, social workers in the 1940s and 1950s were likely to interpret women's complaints as indicating frigidity or a need to undermine their husbands' authority.[99] This victim-blaming mentality contributed to family violence becoming less visible until the new emphasis and political mobilization grew out of the feminist movement of the 1970s.[100]

Recently, several feminists have written about the split between social scientists and feminist activists on domestic violence issues.[101] Some psychological and sociological studies of domestic violence are deeply antiwoman. Most of the early studies focused on the psychopathology of the female victims, not the aggressors;[102] such approaches tended to reinforce batterers' defenses and denial, since the psychiatric problems under consideration appeared outside their control.[103] Although some studies of domestic violence focus on the oppressive societal structures that vest power in men,[104] those written from the family systems perspective most widespread in social work today[105] tend to portray the partners as equally responsible for violence[106] and ask the woman who describes experiencing violent attacks to consider how she provoked them.[107] The gender-neutral approach adopted by many sociologists minimizes the importance of male domination and power. Division between activists and professionals, social scientists and funding sources has also affected how issues were explored and what research was conducted in the field of domestic violence,[108] since

98. *Id.* at 258-59.

99. *Id.* at 282.

100. *Id.* at 22-25.

101. Michele Bograd, *Feminist Perspectives on Wife Abuse: An Introduction, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31, at 11, 19; Schechter, *supra* note 92, at 299; Kersti Yllo, *Political and Methodological Debates in Wife Abuse Research, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31; *see also* DOBASH & DOBASH, *supra* note 12, at 193-99; GONDOLF & FISHER, *supra* note 12, at 1-2; Edward W. Gondolf, *The State of the Debate: A Review Essay on Woman Battering,* 11 RESPONSE TO THE VICTIMIZATION OF WOMEN AND CHILDREN No. 3, *supra* note 92, at 3-8; *cf.* Lee Ann Hoff, *Collaborative Feminist Research and the Myth of Objectivity, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31, at 269.

102. MILDRED D. PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCE 20 (1981) (citing several studies).

103. STORDEUR & STILLE, *supra* note 81, at 24-25.

104. *See generally* DOBASH & DOBASH, *supra* note 12 (discussing wife beating that is consistently placed in the context of a critique of both patriarchy and capitalism).

105. Fineman, *supra* note 82, at 744 & n.77.

106. *See generally* Michele Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique,* 54 AM. J. ORTHOPSYCHIATRY 558-68 (1984) (family systems theories can perpetuate gender bias by blaming the victims of wife abuse).

107. STORDEUR & STILLE, *supra* note 81, at 26; *see also* LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 96-97 (1986) (dicussing Straus' application of systems theory).

108. Feminist activists first raised the issues of wife beating as part of their struggle against

conscious use of feminist methodology in research is rare.[109] Our conceptions of battering reflect this mixed intellectual and political background.

### C. *The Attempt To Define the Battered Woman*

The most widely known definitions of battering tend to be incident-focused, looking to the types of assaultive or coercive incidents and the number of times these occurred. This makes it possible to bring a woman and her history into court with objective indicia of her status as a battered woman. However, this type of definition tends to direct attention away from the source of the violence — the struggle for power and control — and has the additional problem of emphasizing the very incidents women tend to minimize and fortifying an image women seek to deny.

Lenore Walker, author of three books and many articles on battered women, is also one of the leading forensic psychologists in the field.[110] By 1986, she had introduced expert testimony on battered woman syndrome in sixty-five cases in which battered women had killed or hurt their abusers.[111] In Walker's first book, her definition of "battered woman" emphasized the batterer's control of the woman: "A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."[112] However, the very next sentence moves from a focus on control to the issue of repetition of violence and whether the woman has remained in the relationship:

> Battered women include wives or women in any form of intimate

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the oppression of women; professionals, researchers, and funding sources then recast and transformed the way these issues were seen and developed, casting shelter residents and program participants as "clients" rather than inclusively defining them as experiencing an extreme form of oppression faced by all women. Schechter, *supra* note 92, at 302. Schechter believes the differences between activists and professionals are growing more complicated as "more professionally trained women join the movement at the same time that more battered women try to assume power within it." *Id.* at 309.

109. For a general discussion, see descriptions of applied feminist methodology in Hoff, *supra* note 101, at 270-77 (describing process of developing questions and focus for research through helping and working with the women she would study until they trusted and spoke with her, before developing her questions, thus overcoming severe mistrust of academics and professionals among shelter staff and residents).

110. *See, e.g.*, LENORE WALKER, *supra* note 40; LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter WALKER, SYNDROME]; WALKER, *supra* note 11. Walker's description of a three-stage cycle of battering and application of the psychosocial theory of learned helplessness to battered women had great influence on the field of domestic violence and proved especially significant in law.

111. Walker, *supra* note 10, at 224.

112. LENORE WALKER, *supra* note 40, at xv.

> relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. *If it occurs a second time, and she remains in the situation, she is defined as a battered woman.*[113]

By 1984, in her second book, Walker had elaborated her description of battered women and developed another definition, now also cited by courts. This definition was not related to control but defined by incidents of violence: "A *battered woman* is a woman . . . who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse. . . . 'Repeatedly' means more than one assault [at least two 'acute battering incidents']."[114] Physical abuse is "any form of a coercive physical act, with or without resultant injury."[115]

Walker articulated her first, more control-focused definition of battered women based on an interest in women's lives growing out of her feminist consciousness.[116] However, the elaboration of "battered woman's syndrome" led away from an emphasis on power and toward a focus on incidents and behavior. Even Walker's first study showed some ambivalence about the implications of recognizing the issue of control. Walker found that as her women clients in psychotherapy became more assertive, they encountered more physical and psychological abuse.[117]

> My first fear was that critics of the women's movement might be right. Perhaps violence erupted because women began to make their own decisions to control their lives. Feminism was indeed having a profound impact on the family by changing power relationships. Would strong, assertive women be able to live in harmony and equality with those men whom they loved? Fortunately, a further investigation proved these fears to be groundless; in those relationships where battering was occurring, coercion between the partners had existed from the beginning of the relationship.[118]

Walker flinched from the prospect that changes in power in relationships may generate violence or that men would resist changes in women's empowerment. This distinction between existent "coercion"

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113. *Id.*

114. WALKER, SYNDROME, *supra* note 110, at 203.

115. *Id.* at 202. Psychological abuse consists of eight elements, including periods of contrite, loving behavior that keep alive hope that the abuse will stop. *Id.*

116. See her account of the commencement of her work in LENORE WALKER, *supra* note 40, at xi-xiii. Walker has also done extensive work to further feminist goals in psychotherapy through the Feminist Therapy Institute, of which she was a co-founder and the first chairperson. Conversation with Jeanne Adleman, Chair, Feminist Therapy Institute, 1988-1990 (1988).

117. LENORE WALKER, *supra* note 40, at xi.

118. *Id.* at xi-xii.

and "strong, assertive women" is somewhat stereotyping and fails to account for the existence of battered feminists.[119] I believe that this psychological approach — not unique to Walker — also reflects white middle-class norms about the family: women are either strong and assertive *or* coerced. Some of us may be both — a lot may depend on the level and type of coercion involved. Especially, women who are not white or middle class may not fit these generalizations;[120] they may have less difficulty reconciling the simultaneous experience of strength and oppression.[121]

However, Walker's definition is useful when women's experience must be described to a court. First, the definition is incident-focused: incidents can be asserted and often proven as objective support for the woman's perceptions and feelings. Second, the "repeatedly" requirement is a sorting mechanism that allows the judge or jury to consider the woman before them without accepting that any woman who has been struck even one time — a figure that may be familiar from their own relationships in ways they still deny — is susceptible to the development of battered woman syndrome.[122]

The various attempts by feminist scholars to define battering show some tension between breadth — reaching to include the many ways women are harmed — and precision in describing particular experience, which generally leads toward focus on incidents. Mary Ann Douglas gives a broad definition:

> A battered woman is any woman who has been the victim of physical, sexual, and/or psychological abuse by her partner. . . . Physical abuse is assault that ranges from hitting or slapping at one end of the continuum to homicide at the other [citing Pagelow]. Physical abuse may or may not be accompanied by physical injury and/or by the victims' attempts

119. Feminists and nontraditional women are also battered, and one author states it is questionable whether feminists have even a diminished tendency to be battered. OKUN, *supra* note 107, at 86.

120. *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612-13 (1990) ("Feminist theory at present, especially feminist legal theory, tends to focus on women as passive victims. . . . At the individual level, black women have had to learn to construct themselves in a society that denied them full selves.").

121. *See* Schneider, *supra* note 10, at 216 n.146 (discussing the possibility that white women and their perspective have formed the basis for much of the literature on battering). I believe these descriptions poorly capture the discrepancy between how women appear to others and how they appear to themselves. In Walker's later study, *The Battered Woman Syndrome*, she found higher levels of self-esteem than she had in her previous study. WALKER, SYNDROME, *supra* note 110, at 80-82, 114.

122. For further discussion of battered woman syndrome, see *infra* text accompanying notes 148-89. The "repeatedly" requirement also raises the issue of inquiry into the woman's "failure" to leave that expert testimony is designed to address; there may be less expectation that a woman would leave a marriage over only one incident of violence, which then in hindsight becomes *the first* such incident.

to defend themselves.[123]

Douglas' definition has the advantage of being broad and inclusive, and explicitly rejecting any requirement that the woman have suffered physical injury. However, people may see one incident of violence as insufficient to distinguish "battering" from any ordinary relationship.[124] Also, women do not always recognize being physically restrained from moving as a form of physical abuse when it is not mentioned specifically, and therefore this definition lacks some of the inclusiveness of Walker's "any physically coercive act."

Angela Browne's definition of battered women is *more* specific in its attention to incidents of assault:

> "[B]attered women" are those who have been struck repeatedly, often experiencing several different kinds of physically violent actions in one incident, and usually, by the time they are identified, having experienced a series of such incidents, each consisting of a cluster of violent acts.[125]

If closely examined, Browne's definition reveals some of the other problems. It plays into women's denial by its specificity and its focus on "striking." Women who have been threatened with deadly weapons may fail to recognize their experience in this definition if they were not physically injured, as may women who have experienced other types of assault such as sexual abuse.

Mildred Pagelow defines battered women without requiring striking in a way that allows her to reconsider the question of repetition of violence:

> *[B]attered women* refers to adult women who were intentionally physically abused in ways that caused pain or injury, or who were forced into involuntary action or restrained by force from voluntary action by adult men with whom they have or had established relationships, usually involving sexual intimacy, whether or not within a legally married state.[126]

Pagelow separates battering into "primary battering" (the first attack)

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123. Mary Ann Douglas, *The Battered Woman Syndrome, in* DOMESTIC VIOLENCE ON TRIAL, *supra* note 58, at 39.

124. *See supra* text accompanying note 113 (Lenore Walker stating: "Any woman may find herself in an abusive relationship with a man once.").

125. BROWNE, *supra* note 3, at 13. Since Browne's material was gathered in the Walker study, *id.* at ix, 196 nn.1-2, the works had identical underlying criteria despite the difference in language of their definitions. The emphasis on physical striking and patterns of repetition in Browne's definition is similar to that offered by Deschner: "a series of physically injurious attacks on an intimate or family member that form part of a repeated, habitual pattern." JEANNE P. DESCHNER, THE HITTING HABIT: ANGER CONTROL FOR BATTERING COUPLES 2 (1984), *quoted in* STORDEUR & STILLE, *supra* note 81, at 19. Obviously Deschner goes further than Browne in requiring physical injury.

126. PAGELOW, *supra* note 102, at 33. This definition may screen out women who have experienced such attacks as the pointing of a loaded gun or a knife held against the skin; some women who spoke with me identified such experiences as "emotional" rather than physical abuse. Diana Russell mentions a similar phenomenon in which many women fail to recognize marital rape as rape. RUSSELL, *supra* note 43, at 63.

and "secondary battering" (everything that follows).[127] She views the *woman's* "acceptance" of the primary battering incident as the key to whether secondary battering will develop, because the woman's reaction to the first episode may in some way provide incentives for the man to continue, and thus move the relationship toward secondary battering.[128] In this view, women reinforce battering through compliance with batterers' demands, giving them "feelings of increased control and power."[129] While this description identifies power and control as issues, it obscures them again by indirectly holding the woman responsible for the batterer's continued control efforts;[130] it remains incident-focused with the second incident decisive for categorization.

Most of these definitions are essentially incident-focused, not control-focused. Falling into this conceptualization in describing their experiences, some women describe clear cut control struggles as separate from "battering":

> The way it came out for me was not a battered woman's thing. I wanted to go out with my girlfriends, and that triggered possessive jealousy .... He wouldn't let me go do the things I wanted to do, therefore the marriage wouldn't work. The problem didn't start with his beating me up. After I made my stand on that ground, then the violence started. That led to a lot of self-blame — if only I had been a better wife, this wouldn't have happened.

This woman has completed therapy, participated in a battered woman's group, obtained a bachelor's degree in sociology and a law degree. She is doing pro bono work with battered women. I would argue that the information she has been given, and her interpretation of it above, show a functional definition of battering as based on male violence that is *not* about control, and a "battered woman's thing" that is about the *woman's* "thing," rather than the batterer's pursuit of power.

Lesbian battering, in contrast, considers the victim of domestic vi-

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127. PAGELOW, *supra* note 102, at 42-51.

128. "The responsibility for taking decisive action at the first occurrence of battering appears to fall almost entirely on the woman. If ... this behavior appears to be accepted by his spouse because of lack of negative feedback, he is most likely to continue it." *Id.* at 44.

129. *Id.* at 45. Pagelow does not explain what actions by women *other than* leaving at the first incident would be sufficient to avoid secondary battering, although she recognizes that in some relationships violence occurs only once.

130. Similarly, Pagelow says she rejects a focus on what "types" of women are battered as opposed to another type who are not. *Id.* at 223. Yet she formulates the "most important question" as "what are the characteristics (social and personal) that distinguish among women who are never battered, never battered a second time, or battered repeatedly?" *Id.* at 42. This is merely another formulation of essentially the same focus.

olence within the framework of continued attempts by the batterer to achieve and maintain dominance and control in the relationship:

> Lesbian battering is that pattern of violent and coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate partner or to punish the intimate for resisting the perpetrator's control over her.
>
> Individual acts of violence, by this definition, do not constitute lesbian battering. Physical violence is not battering unless it results in the enhanced control of the batterer over the recipient. If the assaulted partner becomes fearful of the violator, if she modifies her behavior in response to the assault or to avoid future abuse, or if the victim intentionally maintains a particular consciousness or behavioral repertoire to avoid violence, despite her preference not to do so, she is battered.[131]

Several elements of this definition merit discussion. Battering is a "pattern of violent and coercive behaviors" defined by the batterer's purpose. The state of being battered is defined by the woman's response. This would seem to exclude situations in which someone struck out in anger but did not hit hard, or in which they hit again but there was no effective intimidation; it would seem to include the times the furniture was smashed up and threats uttered, and the nonviolent partner was afraid to move or respond.

At first, the emphasis on the battered woman's response seems superficially similar to Pagelow's definitions of primary and secondary battering. However, the difference is crucial: the lesbian battering definition emphasizes a woman's *experience* of the violence, which may include either her feelings or her behavior; Pagelow targets her *responsive behavior* to emphasize her success or failure at nonrewarding the batterer.[132] In essence, this defines the woman by her success at controlling the partner who is attempting to control her. This focus on the woman's experience does not automatically resolve problems of denial: women may not recognize how much our thoughts, feelings or actions are determined by the violence until a period of time has passed, or until the relationship is over. However, this approach does help the battered woman overcome denial: she need only recognize that she has modified her behavior or "intentionally maintain[ed] a particular consciousness or behavioral repertoire to avoid violence." These elements imply little stigma and help reveal the context of power and control within which the violence took place.

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131. Barbara Hart, *Lesbian Battering: An Examination, in* NAMING THE VIOLENCE, *supra* note 33, at 173.

132. I believe that this definition is useful and possible in part because lesbian battering is so seldom litigated. As a result, few if any of the power and control moves between lesbians wind up in the courtroom.

Feminist activists writing about heterosexual battering have also defined power and control, rather than incidents of violence, as the heart of the question. Ellen Pence and Michael Paymar's training manual, which grew out of a treatment program for batterers in Minnesota developed by activists, is entitled *Power and Control: Tactics of Men Who Batter.*[133] Pence and Paymar treat violence as *a form of control*[134] and explicitly reject theories that focus on "some flaw in the abuser, the victim, the relationship, or all three of these."[135]

Incident-focused definitions have advantages in court which they lack if we look to them as a way to explain women's experience to ourselves and each other, support women, and fight oppression. For example, Pagelow's emphasis on traditional ideology in women may be very appealing to traditionalism in some jurors or in judges, who are mostly male: this woman was hurt and became so desperate *because* she was so determined to be a good wife and mother. Control-based definitions may be more comprehensible to many women in regard to our own lives. However, women who resist types of control that have general societal acceptance (for example, women who resist traditional roles in their lives) may evoke less sympathy in judges or jurors who hold traditional values. If women are hurt for resisting domination, it may also be more difficult to explain the nature of the struggle in court simply because so many aspects of domination may appear normal and are subsumed under the label "traditionalism."[136] In order to resolve the tensions inherent in the effort to define battering and battered women, we need to understand the pressures of the legal system and create solutions that change cultural consciousness as well as law.

## III. PRESSURES OF THE LEGAL SYSTEM

### A. *Self-Defense, the Battered Woman Syndrome, and Learned Helplessness*

On the Defensive

Four a.m.
Watching his headlights
pan across the walls.
Listening to the familiar
engine's drone.

133. ELLEN PENCE & MICHAEL PAYMAR, POWER AND CONTROL: TACTICS OF MEN WHO BATTER (1986).

134. *See, e.g., id.* at 64-83.

135. *Id.* at 64.

136. *See infra* text accompanying notes 250-57.

The car door slam.
His keys.
His footfall on the stair.
I have this baby bottle.
Loaded, cocked, aimed and ready
to dash his skull to bits.[137]

Ironically, the most complete description of women's suffering from domestic violence has entered our case law and legal literature at the point where violence against women finally harms men — when battered women kill in self-defense.[138] These are also the cases that have had the greatest impact on public consciousness of battered women. Francine Hughes, whose story became the book and movie *The Burning Bed,* killed her sleeping husband after years of extremely violent abuse. Although Hughes was acquitted on grounds of temporary insanity rather than on grounds of self-defense, her story became the paradigm for the image of battered women who kill their abusers.[139]

Although only a fraction of battered women kill their abusers,[140] feminists and legal scholars put a great deal of energy into the self-defense cases, which comprise a large portion of the legal literature on battering.[141] Of course, the stakes are terribly high for the women involved in these cases: many women who are jailed for the murders of their abusers have been brutally and repeatedly abused.[142]

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137. Linda Bart, *On the Defensive, in* FAMILY VIOLENCE: POEMS ON THE PATHOLOGY, *supra* note 1, at 15.

138. *See* Cynthia L. Coffee, Note, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome,* 25 J. FAM. L. 373 (1986-1987).

139. *See, e.g.,* Thyfault et al., *supra* note 58, at 68 (suggesting that attitudes of potential jurors toward battered woman syndrome may be elicited by asking whether they saw *The Burning Bed*).

140. An estimated 1.5 to 4 million women are battered in the United States each year. *See supra* note 42. In 1984, approximately 477 husbands or boyfriends were killed by women. Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense,* 33 UCLA L. REV. 1679, 1680-81 & n.10 (1986).

141. *See* Schneider, *supra* note 10, at 196 n.5 (citing 38 articles and Notes in law reviews and legal journals). Five more articles on the subject appeared in the issue of the *Women's Rights Law Reporter.* A review of the categories covering battered women and self-defense in "Infotrac" reveals that in the ensuing three years, at least a dozen additional pieces appeared, totaling at least 50 to 60 published pieces on the subject. In 1987, two more books on the subject were published: BROWNE, *supra* note 3, and CHARLES P. EWING, BATTERED WOMEN WHO KILL (1987). In 1989, three more new books appeared. *See* BLACKMAN, *supra* note 11; GILLESPIE, *supra* note 11; WALKER, *supra* note 11.

142. Angela Browne's study brought together statistical findings based on a large sample of women and explored in depth the stories of eleven couples. The women in these couples had been severely, even grotesquely, abused over a period of years. Seven of them served sentences from one year to life in prison. Two received suspended sentences or probation. In one case, the district attorney's office finally agreed that the slaying was justifiable and dropped charges. One woman was tried for first-degree murder, pled self-defense, and was acquitted. BROWNE, *supra* note 3, at 187-90.

Last year, the governor of Ohio released 25 women who had been serving prison terms after

When a woman is tried for killing her abuser, she encounters not only the problem of the jury's ability to understand her experience,[143] but the problem of articulating her experience in court in the first place. Lenore Walker argues that the rules of evidence prevent the explanation of women's experience:

> There is a fundamental difference between the way women tell of their battering experiences and what is permitted under the male-identified rules of evidence. Women tend to tell of the events in question rooted in their context, by weaving a tale of patterns of events and feelings in the context of how they happened. Rules of evidence call for the recitation of discrete events separated from feelings or opinions. Facts out of context may be acceptable, but they do not convey the battered woman's experience. Expert witnesses can tie together what the current evidentiary rules do not allow the defendant to say. Until feminist legal scholars argue for and attain reform in the rules of evidence, a battered woman will be constrained from putting her case in front of the trier of fact.[144]

The conditions of women's lives — the children needing sweaters or needing noses wiped,[145] or the constant demands of breastfeeding or diapers[146] — may not be seen as relevant to the explanation of the violent marriage or even to the question of why women "stayed." Similarly, a statement that a husband's drinking problem developed after many happy years is not adequate to capture the keen, passionate consciousness of love and responsibility for *both* husband and children articulated by the woman who was in my support group.[147] Finally, a woman's perception of danger and her decisions to act are dependent on the context of that particular relationship. Therefore, these "male-identified" rules constrain the categories within which the legal image of battered women has evolved.

Expert testimony on battered woman syndrome was developed by feminist litigators and psychologists to explain the experiences of abused women and the way women were affected by abuse.[148] Battered woman syndrome is "a collection of specific characteristics and

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reviewing their records carefully. The women presented evidence of abuse. More than one hundred women's records were reviewed. Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at 1, col. 1.

143. *See supra* text accompanying notes 58-60; *see also* Littleton, *supra* note 34, at 35 ("Not only battered women but all women" are alien from a male perspective, and therefore beyond the ken of laymen.).

144. Walker, *supra* note 10, at 223-24.

145. *See supra* discussion of children's needs in poem in text accompanying note 83.

146. *See supra* narrative in text following note 83.

147. *See supra* narrative in text following note 82.

148. Schneider, *supra* note 10, at 198.

effects of abuse on the battered woman."[149] While it does not affect all battered women, it makes women who do suffer from the syndrome unable to respond effectively to violence and therefore entrapped in the violent relationship.[150] Testimony on battered woman syndrome includes a description of Walker's three-stage battering cycle,[151] the concept of "learned helplessness," and may also include descriptions of the objective economic and social difficulties women face in leaving their relationships.[152]

In most states,[153] testimony on battered woman syndrome is admitted under the rule of evidence that allows expert testimony when the jurors could not understand the issue without it.[154] "[A] battering relationship is a subject beyond the understanding of an average juror."[155] Jurors are particularly unable to grasp for themselves why the woman failed to leave the relationship.[156] Judges may have grasped the need for expert testimony through motives of justice, empathy, recognition of the need to cope with prejudices and stereotypes held by jurors, or similar reasons. Yet judges and jurors will inevitably hear this testimony filtered through cultural stereotypes which are *of necessity enforced* by the claim of exceptionality, of incomprehensibility, required by the requirement that the issue be "beyond the layman's ken." The result may often tend to perpetuate stereotypes:

> [T]he expert testified that those who suffer from the battered woman syndrome, *because of certain characteristics in their personalities,* do not leave their husbands, even after numerous beatings, do not inform police or friends of their husbands' violence, and, under certain circumstances, believe that they are in present danger that their husbands will kill them, although some time has elapsed since the husband's last assault against them.[157]

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149. Douglas, *supra* note 123, at 40.

150. *Id.*

151. Walker divides battery into three stages: the tension building phase, the explosion or acute battering incident, and the calm, loving respite. LENORE WALKER, *supra* note 40, at 55. The periods of loving remorse are essential in cementing bonding between the couple and renewing hope for change.

152. Schneider, *supra* note 10, at 202-03.

153. For a discussion of state and federal rules, see *id.*

154. *See, e.g.*, Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981) ("Expert . . . testimony . . . is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman").

155. *See, e.g.*, Kansas v. Hodges, 716 P.2d 563, 567 (Kan. 1986).

156. *See, e.g.*, People v. Torres, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) ("[T]he proffered expert [testimony] would . . . serve to dispel the ordinary lay perception that [the] woman who remains in a battering relationship is free to leave her abuser at any time . . . . [T]he jury's 'commonsense' conclusions [would be] that the beatings and threats . . . could not have been at all that bad or else she would have left long before.").

157. Chapman v. State, 367 S.E.2d 541, 543 (Ga. 1988) (emphasis added) (reversing for ex-

Feminist litigators grapple with the difficulties presented by portraying women in a complex life situation, both acting and being acted upon — what Elizabeth Schneider has called a contrast between agency (the woman as actor and agent in her own life) and victimization (the woman as acted upon by her batterer).[158] As Schneider points out, however, even if litigators tell a more complex story, the legal and cultural pressures at work in this area contribute to the judges hearing and retelling a story of dysfunctionality.[159] Courts describe a battered woman who is "financially dependent on the batterer," which may cause her to "feel partly responsible for the batterer's violence, [also,] she may believe that her children need a father, or fear reprisal if she leaves."[160] She is powerless, lacks self-esteem, and has few close friends.[161] Her "self-respect is very low and she believes she is a worthless person."[162] Her primary emotion is fear.[163] She undergoes a personality change and is "unable to project her thinking into the future. She lives her life from one beating to the next and her thoughts relate solely to her efforts to avoid the next beating."[164]

Significantly, this description explains her continued presence in the relationship, her failure to separate: her emotional paralysis and inability to think clearly are the reasons she cannot think clearly about escape.[165] She has "traditional beliefs about the sanctity of home and family and . . . false hopes that things will improve."[166] Among the most important aspects of her problem is the condition of "learned helplessness," described with varying degrees of sophistication as a de-

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clusion of testimony regarding victim's reputation for violence). In another Georgia case the discussion of *Smith* also reinforced this perception of battered women:

> We reasoned that a jury could not ordinarily draw certain conclusions for themselves, such as; "why a person suffering from battered woman's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself. . . ." [citing Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981)] Testimony regarding the battered woman syndrome assists the jury in understanding the defendant's unusual *behavior and conduct,* which are vital issues in the battered woman's defense. . . . [which is] beyond the ken of the jury . . . .

State v. Butler, 349 S.E.2d 684, 687-88 (Ga. 1986).

158. Schneider, *supra* note 10, at 220-22. Victimization can also include trying to describe the woman's life in the context of a male-dominated system.

159. *Id.* at 198-99.

160. Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985).

161. Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1983).

162. Smith v. State, 277 S.E.2d 678, 680 (Ga. 1981).

163. *Smith,* 277 S.E.2d at 680.

164. People v. Emick, 103 A.D.2d 643, 654 (N.Y. App. Div. 1984).

165. People v. Torres, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985) ("Numbed by a dread of imminent aggression, these women are unable to think clearly about the means of escape from this abusive family existence.").

166. *Torres,* 488 N.Y.S.2d at 361.

ficiency in perceiving escape possibilities[167] or a psychological adjustment to economic dependence, love, and the failure of the legal system to respond adequately to the problem.[168]

These opinions present an image of utterly dysfunctional women. "Such testimony generally explains the 'phenomenon' as one in which a regular pattern of spouse abuse creates in the battered spouse low self-esteem and a 'learned helplessness,' *i.e.*, a sense that she cannot escape from the abusive relationship she has become a part of."[169]

> A conversation between two friends who had violent marriages:
> R: They say we have this thing called "learned helplessness" . . . .
> Y: Really? I always thought it was when I was getting too *much* power.

Martin Seligman developed the psychological theory of "learned helplessness" based on laboratory experiments conducted on animals.[170] Caged dogs subjected to repeated random electrical shocks that they could not control eventually "ceased any further voluntary activity and became compliant, passive and submissive."[171] Even when it was possible for dogs to leave the cages, they "remained passive, refused to leave, and did not avoid the shock."[172] In 1979, Lenore Walker applied the theory of learned helplessness to the battered women she studied:

> Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, "helpless." They allow things that appear to them to be out of their control actually to get out of their control. When one listens to descriptions of battering incidents from battered women, it often seems as if these women were not actually as helpless as they perceived themselves to be. However, their behavior was determined by their negative cognitive set, or their perceptions of what they could or could not do, not by what actually existed. The battered women's behavior appears similar to that of Selig-

167. "[A] feeling of surrender and a failure to realize or know options available to escape the relationship." State v. Kelly, 685 P.2d 564, 567 (Wash. 1984).

168. "[A] condition in which the woman is psychologically locked into her situation due to economic dependence on the man, an abiding attachment to him, and the failure of the legal system to adequately respond to the problem." State v. Allery, 682 P.2d 312, 315 (Wash. 1984).

169. State v. Leidholm, 334 N.W.2d 811, 819 (N.D. 1983) (footnote omitted).

170. *See, e.g.*, discussion in GONDOLF & FISHER, *supra* note 12, at 13 ("The prevailing notion of learned helplessness is drawn from the extensive laboratory research of Martin Seligman of the University of Pennsylvania . . . . During the late sixties, Dr. Seligman led a team of researchers experimenting with dogs in studies that would raise the ire of today's animal rights activists.") (citation omitted).

171. Walker describes Seligman's experiments in LENORE WALKER, *supra* note 40, at 45-47. The hidden question of captivity in Seligman's experiments and Walker's interpretation is discussed further, *infra* notes 364-66 and accompanying text.

172. LENORE WALKER, *supra* note 40, at 46.

man's dogs, rats, and people.[173]

Although Walker later cautioned against overgeneralizing about women's responses to violence, learned helplessness and its attendant images of submissiveness and passivity underlie much of the expertise on battered woman syndrome and much of the legal literature.[174] Even in Walker's 1984 study, which in some ways revealed a more complex portrait of battered women,[175]the discussion of battered women's "coping skills" revealed the ongoing importance of the concept of learned helplessness:

> [B]attered women develop survival or coping skills that keep them alive with minimal injuries. There is also some evidence that such skills are developed at the expense of escape skills. [It is] consistent with [learned helplessness] theory to narrow one's perceptions and focus only on survival, causing misperception of other important information. . . . I interpret their behavior as a basic coping mechanism, much like Seligman's dogs, who used passivity as their way to stay alive. The analogy is in the failure for both the dogs and the battered woman to develop adequate escape skills.[176]

Feminists have cautiously criticized the way learned helplessness emerges in court both for failing to fully explain the many aspects of battered women's behavior[177] and for creating a double bind in which women must prove helplessness in court after they have killed an abusive partner and therefore do not appear helpless as the term is ordinarily understood:[178] "[A] defendant may be considered a battered woman only if she never left her husband, never sought assistance, and

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173. *Id.* at 48.

174. For example, the following passage from the *Journal of Family Law* makes passivity and submissiveness an integral part of the syndrome:

> The battered woman syndrome is a term used to describe the stages of a physically and psychologically abusive relationship with a mate and the effects of each stage of the relationship on the battered woman. Three stages of a battering relationship have been identified by Dr. Lenore E. Walker in her book entitled *The Battered Woman.* . . . Due to the repetition of this pattern, the woman develops certain learned responses. The batterer's false promises of reform in the third stage result in repeated disappointments and cause the woman to develop *a learned helplessness evidenced by extreme passivity and submissiveness.*

Coffee, *supra* note 138, at 373 n.1 (emphasis added).

175. In her later work, Walker found battered women often held liberal rather than traditional attitudes and had higher self-esteem than she expected to find. WALKER, SYNDROME, *supra* note 110, at 143.

176. *Id.* at 33.

177. *See generally* Littleton, *supra* note 34; Schneider, *supra* note 10.

178. For example, in Mullis v. State, 282 S.E.2d 334 (Ga. 1981), testimony on battered women was excluded. Although the court offered no specific grounds for excluding the testimony on battered women, the evidence had clearly demonstrated the defendant's ability to fight back and may have made her seem less "helpless." *Mullis,* 282 S.E.2d at 336-37. Georgia courts had earlier accepted testimony on the battered woman's syndrome in a case where the defendant had never resisted. *See* Crocker, *supra* note 18, at 146 (interpreting *Mullis* as showing an implicit requirement that the woman never fight back).

never fought back."[179] To the extent the theory of learned helplessness is based on repeated violence, women may have trouble establishing the appropriateness of expert testimony if they strike back after experiencing one severe prior incident of abuse.[180]

It is difficult to communicate the cumulative effect of a violent marriage. A great deal of the literature on battering develops themes and conclusions through presentation of women's stories. While in part this reflects a feminist methodology of working from women's experience,[181] it also may be the only way to describe a complex reality for which we have few names.[182]

If the woman does need expert testimony, how can her reality be described? Elizabeth Schneider has expressed concern over the tendency of testimony on learned helplessness to promote stereotypes of women and undermine examination of the woman's particular circumstances,[183] as well as the way carefully framed feminist testimony on learned helplessness may be distorted in the courtroom.[184] Some authors find the term "learned helplessness" misleading because "helplessness" is only one coping tactic among many that change over time.[185] Most important, women's stories as well as much social science literature indicate that many battered women seek energetically to protect themselves and their families. In this vein, the most socially situated description of learned helplessness describes it as a product of the interaction of frustrations women meet as they energetically pursue safety.[186]

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179. Crocker, *supra* note 18, at 144. Crocker points to a conflict with the "reasonable man" standard in self-defense cases: "If the defendant has tried to resist in the past, the court accepts this as evidence that rebuts her status as a battered woman. On the other hand, if the defendant has never attempted to fight back, the prosecution argues that the defendant did not act as a 'reasonable man.' " *Id.* at 145; *see also id.* at 152-53 (discussing the tensions between sex-neutral standards, male definitions of "objectivity," and individualization theories).

180. *See id.* at 147 (discussing State v. Griffiths, 610 P.2d 522 (Idaho 1980)). "[T]he defendant shot her husband after seeing a look in his eyes which she had seen only once before when he choked her to near insensibility." *Id.*

181. *See generally* Littleton, *supra* note 27 (discussing feminist methodology of working from women's experience); *see also* West, *supra* note 63 (discussing need for phenomenological critique based on women's stories of their own experiences, and employing this method).

182. *See generally* Kelly, *supra* note 31, at 114-17 (on importance of naming women's experience).

183. Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 646 (1980).

184. Schneider, *supra* note 10, at 198 ("Even if lawyers are not emphasizing [the woman's learned helplessness rather than the circumstances,] judges are hearing it this way.").

185. *See* Kelly, *supra* note 31, at 114; *see generally* GONDOLF & FISHER, *supra* note 12, at 27-39 (describing many types of helpseeking behavior by battered women).

186.The battered woman who meets with failure in [all her] tactics to create her own safety experiences a series of lessons in the reality that neither her behavior, nor that of any other woman[ ], is able to stop the violence against her . . . she cannot control the actions of her

I do not mean to criticize here the psychological theory underlying battered woman syndrome, or even the particular theory of learned helplessness. First, the collection of experience and perception summed up in battered woman syndrome are descriptively true of many women.[187] Lenore Walker's defense of expert testimony is also correct: it helps women's stories be brought into court by bringing together fragments that women experience as part of a whole relationship.[188] Finally, I would not choose to discard such a major tool in the effort to explain women's experience in court, just because it has proved vulnerable to distortion in culture and law — we need more, not less, explanation. However, as long as explanation emphasizes "helplessness" in the psychology of individual women, it runs into the danger of contributing to stereotyping.

Therefore, a profound irony marks this expert testimony: Domestic violence is beyond the layman's ken (even though we know it is fairly common) because some jurors will interpret their *own* experience through cultural perceptions that distort understanding and make it difficult for all of us to talk about the subject, and because cultural stereotypes will shape the vision of battered women held by jurors who have *no* personal experience of such violence as well. Expert testimony, designed to overcome these stereotypes and help show the context for the woman's actions, has through the pressures of the legal system contributed to a focus on victimization that is understood as passivity or even pathology on the part of the woman.[189] This image further promotes many cultural stereotypes, and may contribute to further stigmatizing of battered women and further denial by women of the dangers they face through domestic violence. In a particular legal action, an individual battered woman's experience is at least partly explained, but the cultural perceptions that limit broader social understanding may remain untouched, and go on to shape legal action again.

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partner. Learned helplessness in battered women refers to the low rate of behaviors that could potentially increase safety, based on her decreased ability or on her judgment that these behaviors are also unsafe. [Since her judgment of the dangers of helpseeking may be realistic,] the presence of certain behaviors associated with learned helplessness is not necessarily irrational or unreasonable. . . . They may be what kept her alive.

Douglas, *supra* note 123, at 42-43.

187. See also the support for battered woman syndrome theory discussed in the amicus briefs of the American Psychological Association and American Civil Liberties Union in *State v. Kelly, reprinted in* 9 WOMEN'S RTS. L. RPTR. 245 (1986).

188. *See supra* notes 143-47 and accompanying text.

189. Schneider, *supra* note 10, at 207 ("[T]he term 'battered woman syndrome' has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting 'normally.' ").

Therefore, one result of the highly publicized legal focus on battered woman syndrome and learned helplessness has been to inappropriately increase cultural attention to the battered woman's psychological makeup. Evidence suggests that the batterer's behavior, rather than the battered woman's characteristics, determines her response and predicts whether she will kill in self-defense.[190] Yet placing courtroom emphasis on the *batterer's conduct* has its own pitfalls: for example, cases in which violence took nonstandard forms may prove confusing, and much domestic violence might not be comprehensible to the jury without a simultaneous exposition of the context and history of the relationship.[191] Also, the explanation of the woman's experience and interpretation of violence may again be lost by too much focus on the batterer.

In the past, we have lacked explanatory language and litigative strategies for exposing the batterer's quest for power and control — the link between the conduct of the batterer and the experience of the woman. Evidentiary rules and courtroom bias therefore continue to skew the image of women in the self-defense cases, and these cases continue to contribute to cultural images that in turn shape law. Below, I propose a collateral attack on this problem. By identifying those violent power and control moves that target the woman's separation, we can begin to bridge the gap between self-defense and other battering cases. Because of the interrelatedness of the legal rules and cultural attitudes in this area, we need law reform that illuminates the nature of power and control in all areas of battering.

### B. *Custody and the Professional Evaluation of Women*

> A custody battle is *the* quintessential power struggle between men and women. It's about who controls a woman's mind and body. It's also about who gets to control the future. Children are the future. Men think of children as the necessary chains to keep wives from flying away. If we fly away anyway, they transfer their needs to their children.[192]

Women fear losing our children upon divorce.[193] During mar-

190. BROWNE, *supra* note 3, at 127. Browne found seven predictors of homicide in a battering relationship. Only one of these (the woman's threats of suicide) is based on the woman's behavior; all the other predictors (frequency of abusive incidents, extent of woman's injuries, frequency of forced sexual acts by man, man's drug use, and frequency of his intoxication) are based on actions by the man. *Id.*

191. This problem is symmetrical to the dangers that helplessness theories pose for women who fight back against violence.

192. Anonymous quotations from mothers on custody battles, from the chapter, *Mothers' Voices, Written on the Wind, in* CHESLER, *supra* note 14, at 449.

193. WEITZMAN, *supra* note 82, at 311 (stating that men see custody as part of a total package of divorce issues; women "are more likely to consider custody on an altogether different level

riage, women are usually primary caregivers for children, even when both father and mother work full time.[194] In Lenore Weitzman's study of divorce, one third of the women interviewed reported their husbands threatened to seek custody as a ploy in postseparation negotiations, usually because they sought financial gains.[195] Women routinely sacrificed support to which they would otherwise be entitled in order to avoid even the risk of losing their children.[196] Other studies have observed a dynamic with regard to domestic violence that parallels the financial bargaining Weitzman recounted: rather than face custody suits, women accept mutual orders of protection, which are inappropriate if the woman has not been violent and can hinder the effectiveness of the protective order.[197] In both instances, women lose protection they need and to which they are legally entitled, because they fear the treatment they are likely to receive in court.[198]

These fears are realistic.[199] First, since so many divorcing women report they have experienced violence, the problem is common. Second, violent men will likely seek new means of control when old ones fail. Batterers use the legal system as a new arena of combat when they seek to keep their wives from leaving.[200] Of the women whose stories are in this paper, all but one who had children at the time of divorce have either fought a custody action or were threatened with one.[201]

Men who pursue custody have a better than even chance of gaining

— it is something they simply cannot negotiate about because it is too important — it is worth any price").

194. Fineman, *supra* note 82, at 769 & n.166; *see also* WEITZMAN, *supra* note 82, at 240 (noting that husbands spend even less time with their children when their wives are employed).

195. WEITZMAN, *supra* note 82, at 310.

196. *Id.* at 311-12.

197. *New York Task Force Report*, *supra* note 51, at 40 n.84.

198. One woman obtained a temporary restraining order when her husband threatened to move back in without her consent or to take away the children if she refused to reconcile. See narrative regarding fear of opinion of therapist, text following *infra* note 217. After being served with the order, her husband offered to drop the threat of a custody suit if she would agree not to obtain a permanent protective order. She agreed and allowed the temporary order to expire without seeking a permanent order. She was pleased, in part because she believed that permanent orders would be difficult to enforce. In actuality, however, she had agreed to less legal protection solely in order to protect her relationship with her infant children.

199. For a discussion of the problem of domestic violence in custody decisions, including cases in which courts awarded custody to violent or even murderous fathers, see Naomi Cohen, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Determinations*, VAND. L. REV. (forthcoming).

200. Lenore E.A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, *in* DOMESTIC VIOLENCE ON TRIAL, *supra* note 58, at 130.

201. The one woman who reported no such threat had a husband disabled by mental illness who was not working steadily at the time of divorce.

custody.[202] Even violent men are frequently successful in custody suits. In one study, fifty-nine percent of the judicially successful fathers had physically abused their wives; thirty-six percent had kidnapped their children.[203] A recent article estimated that at least one half of all contested custody cases involved families with a history of some form of domestic violence; in approximately forty percent of those cases, fathers were awarded the children irrespective of their history of violence.[204] Another study reported many awards of custody to battering fathers, including one case in which the judge made his decision after walking past the shelter to which the mother and children had fled. The judge found the shelter to be an inappropriate living arrangement and concluded the father provided the better home.[205]

The past two decades have seen major changes in child custody litigation.[206] Martha Fineman has explained how the advent of gender-neutral rules in custody decisionmaking created a situation that actually disfavors women, since factors that would favor women, such as nurturing, are defined as gender-biased.[207] In devaluing past caregiving and seeking decisionmaking factors that would not inherently prefer women, courts have wound up relying on factors such as financial resources that usually favor men.[208]

With the advent of no-fault divorce, fault became relevant only in custody proceedings.[209] This contributes to a critical evaluation of mothering and holds particular problems for women leaving violent marriages. Violence against women is less likely to be raised at all in a no-fault action. It may be dangerous for women to raise the issue of domestic violence, since it invokes stereotypes that judges or social

202. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 120 & n.37. In one study, 70% of 37 judges ordered children into paternal custody. CHESLER, *supra* note 14, at 80-81. In Weitzman's study, men who requested custody received it 63% of the time in negotiated cases. Weitzman found that in many cases where fathers received custody there was some explicit or implicit agreement by the mother. However, the "agreement" sometimes appeared to have been coerced by threats against the woman's safety, reputation, or financial security. WEITZMAN, *supra* note 82, at 233-34. Men won 33% to 38% of the cases that were fully contested in court. *Id.* at 234.

203. CHESLER, *supra* note 14, at 81.

204. Walker & Edwall, *supra* note 200, at 127, 130.

205. *New York Task Force Report*, *supra* note 51, at 42.

206. *See, e.g.*, Fineman, *supra* note 82, at 738-39; Fineman & Opie, *supra* note 202, at 113-21. Beginning in the 1970s, feminists sought to construct a notion of woman not tied to the idea of mothering. Simultaneously, in a reaction to women's liberation, father's rights groups challenged the assumption of maternal custody that had characterized the preceding period. *See id.*

207. Fineman & Opie, *supra* note 202, at 121.

208. *Id.*

209. WEITZMAN, *supra* note 82, at 223.

workers may hold. It may not even be helpful: in the absence of physical harm to a child, violence against the mother might not be seen as relevant to the welfare of the children.[210] Women therefore must decide whether to describe the violence against them — and risk judicial stereotyping — or keep silent, and allow the violence of their spouse to be judicially invisible.

The difficulties here have been exacerbated by the simultaneous development of several liberal legal reforms. Feminist litigation on battered women's syndrome occurred contemporaneously both with the attempt — as part of some feminist visions of equality — to make motherhood less central to women's identity, and with the advent of no-fault divorce. The evolution of a dysfunctional portrait of battered women therefore occurred simultaneously with the changes wrought by no-fault and joint custody. Indeed, by making violence against women less visible at divorce, no-fault divorce laws may have indirectly contributed to cultural stereotypes of battered women by removing public blame of the perpetrator of the violence. Once the man as bad actor disappears, it is easy to shift the focus to the woman. Rather than asserting his harm to her from the beginning, the woman must raise battering as an issue defensively, while she is being clinically evaluated, with greater attendant risk of stereotyping.

The resulting legal dangers appear in many women's stories. Angela Browne tells of a woman who left her husband after the third "physically assaultive incident" had endangered their infant son. She went into hiding with relatives and consulted an attorney to file protective orders and obtain a divorce. The husband sought custody and claimed that his wife's disappearance from the family home proved her instability. Because the woman had left before the violence became grotesque, she was not treated as having been seriously endangered. The state placed the child with the abuser's family because they were considered stable; his family then fought to restrict the mother's visitation. The welfare department finally recommended the baby remain with its grandparents since they had been taking care of it, noting "the fact that their stories [were] so contradictory makes both parents seem unreliable."[211] Christine Littleton tells a similar story: a

210. Walker & Edwall, *supra* note 200, at 140.

211. BROWNE, *supra* note 3, at 112-13.

This woman's story provides one answer to the question: "Why don't battered women leave?" The woman acted independently and rationally: She left the situation when she began to realize that it would not improve; she refused to tolerate victimization; she sought legal remedies. She escaped her abuser before the violence was serious. She may also have lost her child.

*Id.* at 113.

woman who had obtained a restraining order against her husband awoke one night to find him wielding a knife in her bedroom; after she fled into the night, he claimed she had abandoned the children, and she was unable to regain custody.[212]

No-fault divorce and the widespread adoption of the "best interest of the child" standard for resolving custody disputes also put more power in the hands of professionals such as social workers.[213] Judges follow the recommendations in evaluations ninety percent of the time.[214] The increased reliance on these professionals created problems for battered women with children. Even before separation, it may be dangerous to place much trust in a counselor who may later be called on to testify regarding the qualities of the parents:

> The problem is, I feel as if the therapist likes him better. She took it seriously the day he had attacked me. But then I decided I wanted a separation, and I asked him to leave. She told me that "the person who wants the separation should be the one who leaves." It's student housing — it's my apartment. But I'm afraid to argue with her. I don't know what she'll do if he tries to take the children.

This woman was right to perceive the marriage counselor as a hazard.[215] Therapists can prove susceptible to the charm of batterers.[216] The battered woman often believes she is a less attractive figure than her spouse. "Who would like me? Can't think straight, crying, depressed . . . ugly . . . tired, twenty years old, with two kids to support. . . ." Therapists may justify the batterer during the counseling process, or break the wife's confidence to inform the batterer of the wife's complaints of violence, as well as posing a danger in the event of later custody disputes.[217]

The woman's unwillingness to compromise may be penalized as well. A woman may manage to drag the man into marriage counseling, yet despair after continued problems and seek a separation. Both

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212. Littleton, *supra* note 34, at 54.

213. Fineman, *supra* note 82, at 740-44.

214. Sun & Thomas, *supra* note 14, at 573.

215. Family systems theory has great influence in the field of social work today. Fineman, *supra* note 82, at 744-45 & nn.77-81. The family systems approach strongly protects the status quo. When a woman describes her husband's violence, social workers following family systems theory often ask the woman to focus on what she did to provoke the man. STORDEUR & STILLE, *supra* note 81, at 26.

216. Walker & Edwall, *supra* note 200, at 141; *see also* LOUISE ARMSTRONG, THE HOME FRONT: NOTES FROM THE FAMILY WAR ZONE 37-62 (1983) (describing how psychiatrists misconstrue or even ignore the realities of abuse); LENORE WALKER, *supra* note 40, at 248-50 (discussing sexist attitudes among psychotherapists).

217. *See, e.g.*, Anonymous, Letter to the Editor, *Why Battered Wives Don't Leave Home*, N.Y. TIMES, Dec. 29, 1983, at A18 (describing the counselor's violation of confidences in order to establish "trust and communication").

the charm of the batterer and the therapist's desire for an evenhanded, unifying solution may lead to problems.

> My husband threatened to try to take the children from me, to tell the court I was unfit, that my friends were a bad influence. The therapist had always liked him better, and for several months I had been afraid she would be biased against me if she testified. But by the time he made the threat I wasn't as scared as I had been, because I knew I had won. He had finally lost the therapist as an ally — not by pulling a gun on me, not by being proud of it later and scaring her so badly that day — but by failing appointments when I continued to make them.

The battered woman fearing a custody action therefore faces powerful forces that may be hostile or difficult to control. Mothers generally fare poorly in the professional literature used by social workers.[218] Battered women face additional difficulties from court reliance on social workers and other professionals in evaluating contested custody issues, since few evaluators have much training at understanding the impact of battering on the child as well as the woman.[219] Also, the background of Freudian psychology, with its emphasis on women's masochism, still affects some of the psychological and sociological expertise in the field of domestic violence.[220] Feminist scholars have particularly criticized family systems theory, widespread in the field of social work today, for its tendency to equalize responsibility for the violence:[221] the family systems view of battering as an interaction between family members tends to blame the victim for failing to stop the violence, and to define success as reconciling the partners in the relationship rather than as stopping the abuse.[222]

Finally, battered women with children face an image problem. We need to be strong, resourceful, effective as a parent, meeting the needs of the children when we appear in court. On the other hand, if we do that too well, the court may disbelieve our stories because of stereotypes held by judges or psychologists.[223] If the court will consider

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218. Fineman, *supra* note 82, at 767 n.161 (noting that in 125 articles studied, mothers were blamed for 72 psychological disorders in children; no mother-child relationships were described as healthy, though some father-child relationships were described as healthy).

219. Walker & Edwall, *supra* note 200, at 140; Sun & Thomas, *supra* note 14, at 573.

220. *See* ARMSTRONG, *supra* note 216, at 16-36.

221. Family systems theory tends to view the divorcing family as a whole rather than looking at individuals and to seek to accommodate the entire family's transition to a new set of relationships. Fineman, *supra* note 82, at 744-45 & nn.77-81.

222. STORDEUR & STILLE, *supra* note 81, at 25-26.

223. Crites & Coker, *supra* note 14, at 13. One such story was recounted by a social worker, whose client had been evaluated by a therapist as too strong to have been a battered woman and too upset about her ex-husband, considering that two years had passed, to be a stable parent. The ex-husband had continued his attacks for two years, including such calculated violence as cutting the brake lines on her car. Conversation with Donna Coker, *supra* note 67.

violence as a factor at all in custody decisions, we may be seen as — or in effect be *required* to appear as — having been weak, helpless, and economically dependent to have "stayed" with the man all these years.

The hazards are obvious. In self-defense claims, we have pressed upon judges and juries a portrait of induced dysfunctionality. In custody cases, we must prove functionality — or at least recovery.[224] The concept of "learned helplessness" is a factor that may influence negative custody decisions.[225] The needs of battered women in custody cases seem almost directly inverse to self-defense cases: women must prove our *subjective* reasonableness for self-defense claims, our *objective* rationality and competence as parents; learned helplessness may "explain" why a woman "stayed" in the self-defense context, but may be interpreted as making her a poor model in childrearing and possibly a poor caregiver as well when custody is in question. The cases may not always be tried before the same judges, but they work within the same legal system and popular culture. To the extent that our psychological literature has been focused on "battered women" rather than the violent power and control moves against these women, it perpetuates stereotypes that damage us in our other encounters with the legal system.

Therefore, fear of the law controls some of the behavior of battered women with children. A woman who leaves her husband may wind up on the defensive regarding custody, subject to rules that disfavor her which are then interpreted through negative cultural images. Through this interaction of the power of the legal system and the man's violent moves for control, women are hindered in simultaneously protecting ourselves and our relationships with our children. In this impossible bind, we may end temporary separations under pressure from social workers[226] or from fear of custody actions,[227] or make concessions over needed financial support or the level of protection we demand or receive from the state. We may also reluctantly accept dangers we can observe and respond to personally — the threat of violent men we know — to avoid the uncertainties of custody suits.

### C. *Lesbian Battering: Defining a Problem Outside the Legal System*

Lesbians are excluded from most constraints of the courtroom.

224. Battered women's adjustments to the separation may bring stress and emotions that can harm her on evaluation. Walker & Edwall, *supra* note 200, at 140-41.

225. Sun & Thomas, *supra* note 14, at 569.

226. *See* STORDEUR & STILLE, *supra* note 81, at 26.

227. Sun & Thomas, *supra* note 14, at 574.

This is not a fact that should be idealized; it grows out of oppression. They cannot marry. While they do confront custody litigation by former male partners, lesbians have not historically been able to sue each other for custody of children they coparented.[228] Lesbians may also find it difficult to assert legal rights in shared property on separation.[229] Homophobia in society deters many battered lesbians from invoking the legal system by calling the police for help or attempting to arrest the batterer.[230] Even when lesbians seek protection through law, restraining orders may be unavailable against same-sex partners in some states.[231] Because of this exclusion, the analysis of battered lesbians has developed in less direct relation to legal pressures than has analysis of heterosexual battering.

There are a few reported differences between lesbian and heterosexual battering.[232] Lesbians report physically fighting back more often than women who are battered by men.[233] Since heterosexual women also report fighting back against physical assaults,[234] this difference in reporting may show a difference in what it is acceptable for women to discuss, or it may reflect an actual difference in women's responses to battering.[235] The virtual absence of self-defense killings in lesbian relationships[236] has also helped keep battered lesbians outside the legal system: battered woman syndrome is less emphasized in materials on lesbian battering in part because lesbians have not been raising claims of self-defense in court.

Lesbians have not only been excluded from the courtroom. Their stories *as stories of women's lives* have also often been excluded from

228. In three very recent cases, lesbians sought custody or visitation rights in court; in each case, however, no parental rights were recognized in the partner who was not the biological mother. Nancy S. v. Michele G., 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991); Curiale v. Reagan, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990); *In the Matter of* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

229. Nancy Hammond, *Lesbian Victims and the Reluctance to Identify Abuse, in* NAMING THE VIOLENCE, *supra* note 33, at 190, 196.

230. Hammond, *supra* note 229, at 190, 196.

231. Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory,* 20 GOLDEN GATE U. L. REV. 567, 576-81 (1990).

232. Walker, *supra* note 49, at 75-76.

233. *Id.*

234. *See generally* Saunders, *supra* note 38, at 90, 103-08 (self-defense is most common reason women exhibit violence).

235. Lydia Walker notes that possible explanations include "less size differential, less acceptance from the community to not fight back, [and] *more permission from the community to talk about fighting back* . . . ." Walker, *supra* note 49, at 76 (emphasis added).

236. Recently, a Florida court allowed the first use of expert testimony on battered woman syndrome in the defense of a lesbian who killed her batterer. *See* Robson, *supra* note 231, at 574-75. The jury convicted Annette Green of first degree murder despite *the prosecution's* acknowledgement that she had been battered and shot at in the past. *Id.* at 575.

the legal,[237] psychological, and sociological literature.[238] Despite the hard work of some lesbians in the battered women's movement, including staffing agencies and shelters, lesbians have often been excluded from shelters and from the support of the battered women's movement.[239] Although this lack of recognition and scarcity of resources has caused harm to many lesbians, it left lesbian battering to be defined within an activist tradition close to the grassroots shelter movement and dedicated to supporting women.

*Naming The Violence,* the first book on lesbian battering, includes the stories of many battered lesbians. Compared with *published* narratives of heterosexual women's battering relationships, the lesbian narratives place more emphasis on the positive aspects of the relationship; the battered women seem more willing to explain, or possibly more in touch with, the positive feelings that drew them in and kept them involved:

> I look back and can see that there was something good. It didn't start with violence and ugliness. It started with summer nights, two women in their early twenties trying to find a way to see each other. Both lived in households where it wasn't possible to be open about the relationship. Meeting at movies and bars until early in the morning — until finally one left her home. Nights of lovemaking, not enough sleep and feeling fine at work the next day — being relaxed and happy. I had found something that I never even knew existed. I never thought that there would be some one person for me, and I had now found her. I think neither of us doubted that we had found a lifetime relationship. The feeling of rightness was there. . . .
>
> And who is the monster in the next room who did this? She's just a woman like you who is feeling as upset as you are and is temporarily full of remorse. She is the only friend you have, the only one who seems to

237. *See generally* Leigh M. Leonard, *The Missing Voice in Feminist Legal Theory: The Heterosexual Presumption,* 12 WOMEN'S RTS. L. REP. 39 (1990).

238. The stories of lesbians have been excluded from most fictional treatment of women's lives as well. In "Listening," the final story in Grace Paley's most recent book, the narrator, Faith, is in a car, stopped at a light, watching a man crossing the street and thinking warmly about his body. She speaks to Cassie, a friend sitting next to her who has not previously appeared in the book of stories, and asks, "He's nice, isn't he?" Cassie refuses to accept Faith's statement that the man is returning to "everyday life":

> To whose everyday life, she said, goddamnit, whose?
>
> She turned to me. . . . Listen, Faith, why don't you tell my story? You've told everybody's story but mine. I don't even mean my whole story, that's my job. You probably can't. But I mean you've just omitted me from the other stories and I was there. In the restaurant and the train, right there. Where is Cassie? Where is *my* life? It's been women and men, women and men, . . . . Goddamnit, where the hell is my woman and woman, woman-loving life in all this? . . . You let [our other friends] in [to your stories] all the time; it's really strange, why have you left me out of everybody's life?

GRACE PALEY, LATER THE SAME DAY 209-10 (1985).

239. *See* Hammond, *supra* note 229, at 190, 195-96 (on problems for lesbians in shelters and the shelter movement).

> care. The idea of leaving seems worse than if you try to stay and make it work and make sure it doesn't happen again. Bruises heal and resentment fades back into the routines of work, shopping, watching reruns of *All Creatures Great and Small,* and driving her to church on Sunday morning.[240]

In these stories, lesbians seem more willing to face the *current* duality of their memories and feelings. This does not necessarily represent a difference between lesbian and heterosexual battering. These stories are more like those I heard from heterosexuals whose stories are included in this article, which emphasized the complexity of the marriage relationship while trying to analyze the violence, than they are like most of the stories in the published material on heterosexual battering.[241] Lesbians do not seem less hurt by battering relationships than heterosexual women. Rather, it seems likely that the editors simply excised less of this quality than do the editors of most social science research:

> I fell in love with her because she was warm and loving and open. Her brilliance and clear political thinking dazzled me, as did her creativity — her artwork, her cooking, her carpentry, her ideas about raising children. Like me, she was Jewish and radical and understood the importance of making one's home in the country. She was responsive to our class differences in ways that surprised and delighted me. We had similar dreams of family and commitment, and fantasies of how we wanted to live. We often had hot, passionate sex. She bought me flowers, and chocolate, and crystals, and wool socks. She played a mean game of Pac-Man. She sang me love songs, and slow-danced with me in the living room. She did not do these things only at the beginning but throughout our relationship. Even when the violence was most frequent, she also expressed caring tenderness toward me.
>
> I want you to understand that I stayed with her for the same reasons any woman stays with her lover — because I honestly and deeply loved her, and was honestly and deeply loved by her.
>
> I also stayed because I had nowhere else to go . . . .[242]

The second major difference in this lesbian battering literature is the absence of blaming the victim. Historically, lesbians have at least at times shared the cultural stereotype of battered women as weak. Therefore, *Naming the Violence* and articles on lesbian battering recount an initial resistance to recognizing the problem and show early

240. Lisa, *Once Hitting Starts, in* NAMING THE VIOLENCE, *supra* note 33, at 37-39.

241. Donna Coker suggests that battered heterosexual women also tell complex stories that mix love, happiness, pain, and unhappiness, but that professionals working with battered women are often uneasy with the complexity of these stories. Conversation with Donna Coker, 1990.

242. Istar, *supra* note 33, at 164-65.

acceptance of myths about lesbian abuse.[243] Some women initially believed that only "bar dykes" engaged in violence, that feminist lesbians were not involved in battering relationships, and that only couples "strictly locked into butch/femme roles ha[d] a problem with violence."[244]

So stereotypes have indeed existed among lesbians. Yet when these attitudes emerged within activist, feminist communities they were promptly confronted. They do not define the literature, and therefore do not create more ongoing stereotyping of battered lesbians. Traditional stereotypes are largely absent: the voice of the conservative social scientist, the Freudian analyst, and the professional who blames the battered woman for failing to control her batterer, have been left behind. The analysis generated by a grassroots, feminist, activist community presents a more nuanced, less stereotyping, and less victim-blaming view than any other literature in the field.

## IV. POWER, CONTROL, AUTONOMY, AND SEPARATION

### A. *Identifying Domination in Violence Against Women*

Battering is about domination: "Violence is a way of 'doing power' in a relationship,"[245] an effort by the batterer to control the woman who is the recipient of the violence.[246] This is not news. A review of the literature shows that the conception of battering as about power — rather than about incidents of violence or about the psychology of women who experience violence — has been present in some of the psychological and sociological literature for some time.[247] A decade ago, Dobash and Dobash placed battering in the context of patriarchy and described it as domination: "The fact that violence against wives is a form of a husband's domination is irrefutable in the light of historical evidence."[248] However, the emphasis on power comprised only one

243. Barbara Hart reported that when lesbian battering was first brought to light, battered lesbians were perceived as "weak sisters." Hart, *supra* note 50, at 14. This obviously reflects some influence of cultural stereotypes.

244. Ann Strach et al., *Lesbian Abuse: The Process of the Lesbian Abuse Issues Network (LAIN), in* NAMING THE VIOLENCE, *supra* note 33, at 88, 89.

245. STETS, *supra* note 64, at 110 ("The men want to direct and determine how their partner behaves, and the way they do this is through violence. . . . [T]he men use violence to dominate, control, and force the women to conform to what they want."). *Id.* at 109.

246. LEE H. BOWKER, BEATING WIFE-BEATING 7-9 (1983) (discussing the balance of power in families); SCHECHTER, *supra* note 94, at 219-24 (describing battering as a way to maintain control).

247. *See generally* DOBASH & DOBASH, *supra* note 12 (patriarchy and domination key framework of study); Bograd, *supra* note 101, at 559 ("Violence such as rape and battering is a form of male control over women."); *see also* STORDEUR & STILLE, *supra* note 81, at 20 (noting recent emphasis on power and control in writings of some authors).

248. DOBASH & DOBASH, *supra* note 12, at ix.

thread in the literature and was intermixed with much work psychologizing battered women.[249] Legal literature, in particular, has often ignored the interplay of power and control, domination and subordination in the battering relationship.

The quest for control underlying the enforcement of women's social roles is often hard to perceive. In a heterosexual marriage, if one partner does all the dishes and the other does all the driving — that is, if one is assigned all responsibility for household work and spends a substantial amount of time on this work, and the other has virtually all the mobility — this may not strike observers as the result of an exercise of power but merely as a "traditional"[250] attitude in the relationship. A researcher describing such a relationship might perceive "traditionalism" on the part of the woman. If the researcher is already looking for indicia of "traditionalism" in the woman's behavior or life circumstances,[251] the terms of the inquiry may construct the findings. The woman's apparent "traditionalism" might mask a more fundamental issue. For example, domestic work, or large numbers of children, will represent "traditionalism" in a *woman* only to the extent that they are not the *man's* choice. If they are his choice, both factors might indeed represent the man's attempt to control the woman.

Dobash and Dobash treat battering as part of a context and history of patriarchy in which violence and disapproval inflicted by society as a whole, as well as by individual men, enforced women's roles.[252] In fact, batterers often justify their violence with complaints describing

249. GONDOLF & FISHER, *supra* note 12, at 1-2; SCHECHTER, *supra* note 94, at 20-24 (discussing theories of victim provocation).

250. In her 1979 study, Lenore Walker called battered women "traditionalists" who "readily accept[] the notion that 'a woman's proper place is in the home.'" LENORE WALKER, *supra* note 40, at 33. Walker stated that battered women give up careers *to make the batterer happy* or accede to his need to possess her. The battered woman turns her money over to her husband, feels that income belongs to her husband, and goes out of her way to make the man feel he is head of the home even while she holds it together. Some women secretly save money and leave when they have enough to go. *Id.* at 33-34. Although Walker describes this as the woman's traditionalism, all these actions except the belief that her income belongs to the husband seem to reflect the *man's* traditionalism and ability to control the woman rather than establishing *her* traditionalism. In her 1984 study, Walker found battered women more liberal and batterers the "traditionalists." WALKER, SYNDROME *supra* note 110, at 148.

251. For example, PAGELOW, *supra* note 102, at 105-44 first hypothesizes "traditionalism" in *both* men and women in battering relationships. She then goes on to interpret even contradictory data as "traditionalism." Variables presumed to show "traditionalism" include: "numbers of children" and "secondary battering cohabitation" (continuing to live with the batterer after the first incident of violence). *Id.* at 127. When Pagelow's data show that women with more children, and especially more young children, stayed in relationships longer than other women, she interprets this as evidence of a belief in the importance of two-parent homes, rather than as a reflection of the difficulties of leaving or the low earning power relative to child care costs of these women. *Id.* at 141-42. The researcher's *hypothesis* of "traditionalism" is subtly transformed to support a *finding* of traditionalism.

252. DOBASH & DOBASH, *supra* note 12, at 47-96.

the woman's insufficient fulfillment of household responsibilities and social role.[253] The energy required to maintain that division of labor may go unnoticed when the expectations are most shared and enforced by social norms, and even by the actions of the state.[254]

> Then we went to get the wedding license.
>
> We took our blood tests and identification down to the big state office building . . . , filled in some forms, and handed them to the clerk. She . . . showed us what the minister would sign and gave us a little pamphlet on the "Louisiana Community Property Law."
>
> Then she turned to me and said, "And these are for you." She handed me a nylon mesh bag with a tag attached that said, "For the Bride." It had samples of Tide, Joy, Spray'n Wash [detergent for clothes, detergent for dishes, stain remover for clothes], Windex, PAM . . . and other household products I don't remember. I said, "You've got to be kidding." And she said, sweetly, "No, these are for the bride."

The congruence of expectation by *heterosexual* batterers and society in general may be one reason *lesbian* battering has been understood as concerned with power. The expenditure of energy that goes into controlling a loved one may be more perceptible as an exercise of power when the control that is sought is less completely in accord with social expectation.[255]

While early studies assumed — and looked for — "traditional" attitudes in battered women, other studies found that battered women were likely to have *less* traditional attitudes regarding women's roles in the family, but that battering men had *more* "traditional" attitudes.[256] Consistent with this, Bowker found that men's participation in male networks increased the likelihood that the men would have rigid attitudes regarding male dominance and enforce these attitudes with

253. OKUN, *supra* note 107, at 69-70 (batterers justify assaults with criticisms of wives' household tasks); STETS, *supra* note 64, at 71, 95-98.

254. State actions enforcing women's roles include refusal to enforce TROs and returning women to abusive situations, generations of home economics education for girls and not for boys, and giving out cleaning supplies as in the narrative below. Additional examples are public housing policies that define women fleeing abusive relationships *outside* the category of those homeless "through no fault of [their] own," *see* LEE ANN HOFF, BATTERED WOMEN AS SURVIVORS 195-201 (1990), and public housing policies that give the battering man possession of the apartment if his wife leaves. Conversation with Kim Hanson, 1990.

The following incident took place in Louisiana in 1976. I have heard of other women who were given with their wedding licenses either actual cleaning supplies or coupons for cleaning supplies in California during the late 1970s and in the midwest at various times. (It is not obvious which gift the women considered more offensive).

255. This would not necessarily link "role-playing" in lesbian relationships with violence; in fact, no such correlation emerges in the reports on lesbian battering. Barbara Hart, Violence in Lesbian Relationships 2 (unpublished manuscript in materials on lesbian battering distributed by W.O.M.A.N., Inc.) (on file with author); *id.* at 3 (denial fed by idea that only violent lesbians are those "who hang out in bars or are into playing butch").

256. *See, e.g.*, WALKER, SYNDROME, *supra* note 110, at 8.

violence.[257]

Focusing on the struggle to control the woman that lies at the heart of battering makes sense of many apparently discrepant research findings. Questions of money, status, and education could trigger acute insecurities regarding power in relationships. In many violent relationships the woman has a higher educational level and comes from a higher social status than the man.[258] Kersti Yllo found battering highest in states where women's power and status were *highest* relative to men's.[259] On the other hand, Bowker's study of women in formerly violent marriages showed that women with higher current incomes were less likely to have been severely beaten or beaten while pregnant, and found no correlation of violence with the woman's higher or lower social class.[260] In lesbian relationships, some experts have found that the battered lesbian is more likely to be the breadwinner or primary supporter of the household,[261] however, another commentator observed higher educational and social status among batterers.[262]

If the central question in battering were the woman's acceptance of violence, it would be difficult to explain both the widespread finding of women's higher education and status, and the inconsistency in some of this data. However, if we emphasize the batterer's struggle for control and look at battering as a (violent) point on a continuum of domination in relationships, then these findings make sense in two ways: first, factors that increase the woman's independence and autonomy might

257. BOWKER, *supra* note 246, at 54. Bowker had expected to find greater social isolation among battered women — reflecting some assumption that society disapproves violence as well as the assumption that battered women have been isolated from society — but instead found increased social embeddedness among the men, with concomitant support for male dominance.

258. WALKER, SYNDROME, *supra* note 110, at 11, 16, 156, 158, 160; *see also* Molly Chaudhuri & Kathleen Daley, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE (Eve Buzawa & Carl Buzawa eds., forthcoming 1992) (tentative title) (stating that violent men had fewer years of education than their wives). Walker notes that it is said most women marry at or above their own social class, while most men marry at or below theirs. She therefore finds this a sharp break from the usual pattern in marriage and a noteworthy characteristic of battering relationships. LENORE WALKER, *supra* note 40, at 11, 17.

259. Yllo, *supra* note 101, at 28, 31 (noting that this finding contradicted her assumptions about traditionalism in relationships).

260. Women with higher current income also were less likely to have suffered marital rape. BOWKER, *supra* note 246 at 50-51. None of Bowker's findings permitted a comparison with marriages in which the husbands had higher status. His findings did not support the theory that battering was a form of compensation for other forms of maintaining power in a relationship. *Id.*

261. *Domestic Violence By and Against Women: An Interview About Lesbian Violence,* excerpts from an interview by KALX, Berkeley, California, with Susan Jan Hornstein, Exec. Dir. of Western Center on Domestic Violence, and Naomi Porat, Administrative Coordinator at W.O.M.A.N., Inc. and facilitator of a battered lesbian support group, in materials on lesbian battering collected by W.O.M.A.N., Inc., *supra* note 255, at 2.

262. *See* Hart, *supra* note 255, at 3 (noting battering lesbians of more privileged background).

make additional control moves, including violence, more likely; second, power and control struggles may be triggered by many factors within a relationship and therefore could also be consistent with dominance by the partner with greater resources.

James Ptacek, who worked with batterers, and Jan Stets, who worked with couples, found control an ongoing issue in battering relationships. Both Ptacek and Stets describe men as using violence to control the woman.[263] The instrumental goal of control is made excused or made invisible by the fact that the man appears to be out of control himself: both men and women perceive violence as caused by the man's loss of control over his actions.[264] However, both Stets and Ptacek questioned the man's apparent loss of control. Ptacek emphasized that batterers' actions were selective, and that their descriptions of their own actions reflected conscious choices.[265] Stets found that the men selectively "lost" control *in order to achieve the goal of controlling the women,* but differed from Ptacek in emphasizing the role of the woman's response as minimizing the negative results for the man of his loss of control.[266] Other scholars also have emphasized that "a major reason for the use of marital violence is to increase one's power over a mate."[267]

Recognizing the batterer's attempt at domination as the key to battering relationships allows a focus on his motivations rather than the psychology of the victim. A study of the effectiveness of temporary restraining orders in relation to several different goals[268] found success

263. Ptacek, *supra* note 48, at 147-49; STETS, *supra* note 64, at 101-11, 121-31.

264. To both the man and the woman in the relationship, the man's loss of control over his actions appears to cause his violence. Ptacek, *supra* note 48, at 153-54. *See generally* STETS, *supra* note 64, at 54-68. Indeed, the idea that the man cannot control his anger appears throughout sociological and psychological literature. *Id.* at 11-12 (discussing literature); Ptacek, *supra* note 48, at 152-54 (discussing literature). The man will use this apparent lack of self control to carry out his domination of the woman, and will also use it to "excuse" his domination.

265. Ptacek sees violence as instrumental. "[This] loss of control is substantially contradicted by the batterers' own testimony. While the men claim that their violence is beyond rational control, they simultaneously acknowledge that the violence is deliberate and warranted." Ptacek, *supra* note 48, at 153.

266. *See generally* STETS, *supra* note 64, at 101-11. Stets criticizes Ptacek's instrumentalism for neglecting to ask what makes batterers discontinue particular violent incidents. *Id.* at 61. In her discussion of battering relationships, Stets emphasizes the woman's responses as well as male control goals. *Id.* at 95-100 (emphasizing woman's acts as cues). This brings her somewhat closer to family systems theorists and to Pagelow's emphasis on the woman's response to violence. Stets sees instrumental violence as emerging over time in the course of a battering relationship. *Id.* at 103.

267. BOWKER, *supra* note 246, at 134. Power and control were also central contested issues in the majority of the formerly violent marriages in Bowker's study. The cessation of violence was associated with decreased male dominance in many of the relationships. *Id.*

268. The orders are more effective for some goals than for others. Chaudhuri & Daley, *supra* note 258.

in reducing the likelihood that the man would batter again dependent on the *man's* circumstances and motivation, not the woman's.[269] Similarly, a study of interspousal homicide revealed that the men could not cope with their bondedness with women. Unable to face their dependence on the women they loved, the men struck out against the women when they felt abandoned. Spouse homicide resulted from "individuals attempting to solve by their action the riddles of culture that the events of life force on them."[270] As men, they could not be dependent on their women, yet they could not face abandonment. This finding emphasizes the importance in battering relationships of the *man's* capacity to confront his own feelings and the danger of his need for control.

The focus on the batterer's need for control also reconciles another discrepancy in battering studies. Bowker reports that a threat to leave the batterer may be very effective at ending the violence.[271] However, other studies show that separation often triggers escalated violence.[272] The same behavior — threatening to leave the relationship — might prove extremely effective or tremendously dangerous for women. The difference will depend on the men with whom they are involved. If the key to whether the violence escalates lies in the *man's* capacities, then any system examining the *woman's* behavior and psychology will poorly track the danger she faces — unless we consider her the best judge on this issue.[273] Courts are ill-equipped to measure retrospectively the man's capacity to "solve . . . the riddles of culture" without homicide, or the persuasiveness of his threats to the woman.[274]

A focus on control also makes sense of the particular situations of

269. *Id.* Several attributes made it more likely that the man would abuse the woman again: prior criminal history, unemployment or part-time employment, and drug or alcohol abuse.

270. George Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 279 (1982).

271. BOWKER, *supra* note 246, at 65-67, 123.

272. Ellis, *supra* note 21, at 408.

273. Therefore, we need to vest evaluation of the man's violent potential in the woman. Her understanding of the process of violence and the man's motivation may not be perfect: violence may appear out of control to the women even when men actually retain some ability to control their actions; women also may perceive men's actions after violence as contrition or determination to reform which the men either do not experience or will not admit openly. STETS, *supra* note 64, at 127. However, the instrumental nature of his violence makes her, the target, the closest observer. She has more resources to measure his violent potential than any outside observer and the woman is best placed to assess the man's potential dangerousness, because she is most aware of the times and manner in which violence may occur. Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 31, at 234, 240.

274. This is true whether the legal issues relate to her injury or death, or his. Barbara Hart has therefore drafted a lethality assessment questionnaire that aims to help professionals elicit from the battered woman information relevant to her informed assessment of her own situation, rather than replacing her assessment with their own. *See id.*

women with children. Women with children often give their children as the reason for their action — whether they have acted to stay, leave, or return to a relationship.[275] With the focus on control, difference makes sense: different male tactics, different types or frequency of violent episodes, might work to keep a woman with no children in a relationship than would work with a woman with children,[276] since women often leave when they perceive either physical or emotional danger to their children from the violence.[277] Controlling a woman with a disability — or whose child has a disability — may also have its own particularities of action within relationships. Fear of custody actions may also facilitate the control of women who believe a court might be unsympathetic to them.

Perhaps most important, identifying power and control as the struggle within a relationship enables women to make sense of our own experiences.

> I don't even talk baby talk to my kid like I did to my first husband. It reduced me — I was not supposed to think. I was not supposed to have any ideas. I was not supposed to be a person.
>
> One thing that made it so difficult was that before hooking up with him, I was a leader in the community. I was doing a lot of anti-war organizing work. I had my own apartment, my own life. I was an independent person, I'd been on my own for years. I had not moved from being dependent on my family to the marriage. I was a person who knew how to take care of myself, who had made it on my own.
>
> To this day, I don't understand it. I'm usually not a person who's lost for words, I'm usually not a person who falls to pieces. I get ambushed by the Klan, and I have the clearest head of anybody around. But that certainly wasn't the case in that marriage.

This woman recognizes her own strength and independence, and finds it hard to reconcile these qualities with the degree of control her husband succeeded in exercising through a few violent episodes followed by explicit and implicit threats. In fact, these could have been the qualities that made her husband feel threatened and turn to violence as a means of control. For years, she described the unhappiness of the marriage to friends without describing her husband's violence. She described personal problems frankly but could not communicate the experience of violence without diminishing her own self-esteem. She

275. DOBASH & DOBASH, *supra* note 12, at 148.

276. Pagelow notes that the presence of young children can be a very strong factor that keeps women in their relationships; most women waited to leave until their children were at least past infancy. PAGELOW, *supra* note 102, at 142.

277. "Her decision to terminate the relationship is more often motivated by concern for her children than by any real appreciation of the unacceptability of the abuse she has experienced." Anne McGillivray, *Battered Women: Definition, Models and Prosecutorial Policy,* 6 CAN. J. FAM. L. 15, 22 (1987); *see also* DOBASH & DOBASH, *supra* note 12, at 148.

could have described his actions as inappropriate attempts at controlling her without incurring the same humiliation.

Focusing on control lets women understand our lives without stigma by describing battered women's experience as part of all women's experience. A focus on control places the sensational, severely violent cases on a continuum of violence that makes sense whether the woman or the batterer is the defendant, whether it is a criminal or a civil case, whether or not the case appears likely go to court. Therefore, a focus on control provides the link between the woman's experience in her relationship and the experience of other women she learns of through the press or other media — an essential step toward her informed decisionmaking and toward remaking women's cultural concepts of domestic violence. Finally, by sorting and explaining women's experience in ways that apply across the varied legal postures in which domestic violence comes to public attention, a focus on power and control provides a coherent understanding of the experience of women in different situations: women experiencing varying kinds of attack by batterers in the attempt to exercise power and control; women of varying social status; women with or without children; women perceived as "leaving" or "staying."

To bring women's experience into law and make it more comprehensible to women ourselves, we need litigation strategies aimed at exposing the power and control at the heart of battering. One example of such litigation is the lawsuits brought since the 1970s that expose the failure of police to enforce temporary restraining orders.[278] We need more such creative approaches that expose the complicity of the state and society in the control of women in violent marriages. After being physically threatened and emotionally attacked for my failures at housework, I have often longed to sue the state actor — the clerk processing paperwork for marriage licenses — who by handing me cleaning supplies put the state's imprimatur on my husband's conception that this would be my job. Joyce McConnell describes battering relationships as involuntary servitude in violation of the Thirteenth Amendment — an analysis consistent with an emphasis on power.[279] Below, I develop an example of such a strategy, emphasizing the attacks on women's attempts to separate from violent relationships to help expose issues of power and control in both law and culture.

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278. *See, e.g.*, Bruno v. Codd, 393 N.E.2d 976 (N.Y. 1979); Balistreri v. Pacifica Police Dept., 855 F.2d 1421 (9th Cir. 1988), *amended on other grounds*, 901 F.2d 696 (9th Cir. 1990); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984).

279. Joyce McConnell, *Beyond Metaphor: Battered Women and Involuntary Servitude*, 4 YALE J.L. & FEMINISM (forthcoming).

### B. *"Who Says She Didn't Leave?":*[280] *Challenging Perceptions of Separation and Autonomy*

The "shopworn question"[281] persists in the cases, legal scholarship, and social science literature. It reveals several assumptions about separation: that the right solution is separation, that it is the woman's responsibility to achieve separation, and that she could have separated. The question "why didn't she leave" is actually an objectifying statement that asserts that the woman did *not* leave. Asking this question often makes actual separations disappear.

If we ask the woman, "What did you do?" the answer very often turns out to be, "I sought help." Edward Gondolf, who studied women's helpseeking behavior, found that women responded to abuse by seeking help from both formal and informal sources.[282] The more apparent it became that the batterer would not change, or the worse the abuse became, the greater diversity the women showed in their efforts to find help.[283] Gondolf concluded that it was the helping professions, rather than battered women, that were afflicted with "helplessness." He described battered women as "survivors" who developed self-transcendence to allow them to go on.[284]

When we ask the woman, "Exactly what did you do in your search for help?" the answer often turns out to be that she left — at least temporarily. In Gondolf's study, more than seventy percent of the women had left home at some time in response to violence, though only fourteen percent had gone to shelters.[285] Of the women Walker studied, about one quarter left temporarily after each battering incident.[286] Walker does not indicate whether the *intention* of these women as they left was temporary or permanent separation or whether they were in fact uncertain when they left.

Some social scientists have criticized the assumption that the woman has a responsibility to — on her own — successfully accomplish a separation in her family on her first attempt to do so.[287] This assump-

280. This is my paraphrase of Lewis Okun's phrase, "Who says she does stay?" OKUN, *supra* note 107, at 56.

281. Ann Jones, *The Burning Bed and Man Slaughter,* 9 WOMEN'S RTS. L. REP. 295, 296 (1986) (book review).

282. GONDOLF & FISHER, *supra* note 12, at 18, 27-28 (describing several studies showing helpseeking); *see also* WALKER, SYNDROME *supra* note 110, at 26 ("As the violence escalated, so did the probability that the battered woman would seek help.").

283. GONDOLF & FISHER, *supra* note 12, at 92-93.

284. *Id.* at 22-23, 99.

285. *Id.* at 77-78.

286. WALKER, SYNDROME, *supra* note 110, at 26.

287. OKUN, *supra* note 107, at 56; GONDOLF & FISHER, *supra* note 12, at 82-83.

tion ignores the woman's substantial ties to her current family structures. Her initial goal in separating may have been to improve her family structure rather than end it. Participation by the batterer in a counseling program is a very significant factor in predicting a woman will end a separation, since his participation tends to increase her hope for safe return.[288] Therefore, some experts recommend the credible threat to leave or attempt to separate as a measure for women who seek to end the violence against them but wish to preserve their relationships.[289] Finally, the assumption that the woman's first separation should be permanent ignores the real dangers that the man will seek actively — and sometimes violently — to end the separation.[290]

When the woman is asked, "what happened to you when you left?" we discover the lack of available resources. Shelters are unable to fill all the women's needs; when shelters make referrals to social service agencies, the agencies are often inadequate. Gondolf therefore identified "learned helplessness" among the helping professionals to whom women turned for assistance.[291] Neighbors, friends, and family may be sources of help, but often they too leave the separated woman without assistance:

> It was a day he was supposed to visit the children, but he didn't come. About nine o'clock at night, I heard a pounding noise downstairs. I heard him shout that he was bleeding, "Help me, help me."
>
> He had broken one of the glass panes in the door and wouldn't stop hitting it. When I opened the door, he fell part way through and lay there on the floor, moaning. He had been in a bar fight around the corner from my house, 10 miles from his own. He had broken a glass door at the bar and come back to the house. He said the police were after him. I thought he was crazy.
>
> I went to the phone — I didn't want to leave the room or take my eyes off him, and called my closest friends, a couple who lived a few blocks away. The man answered the phone. I said urgently that my husband was there and that I needed this friend to come over right away. He said OK and hung up. Fifteen or twenty minutes passed, and then his wife showed up. She said, "Allan wasn't going to come. He didn't see why you were bothering us. But I figured, if you had called, someone ought to check up and see what was going on."
>
> The police arrived. They had traced his car to our house and followed a trail of blood to our door. They weren't going to arrest him.

288. GONDOLF & FISHER, *supra* note 12, at 87.

289. BOWKER, *supra* note 246, at 65-67, 123 (husband's fear of divorce ended violence); *see also* Littleton, *supra* note 34, at 52 (criticizing the current legal system for offering actual separation as the only remedy against violence).

290. *See infra* text accompanying notes 295-302.

291. GONDOLF & FISHER, *supra* note 12, at 22-23.

> When I asked, they waited for his brother-in-law to come pick him up. . . . Finally everyone went home.
>
> It was so frightening that a man I had known for five years, who knew how my ex-husband had been, had actually lied to me and said he was coming, then been willing not to show up. They lived four blocks away! My mother told me I should talk to the neighbors, try to line up more help for next time. So I went to my next door neighbor the next day and began, "About the noise last night . . . ." He looked at me very fiercely. "What noise? We didn't hear *anything!*" For a minute, I thought he had been running his air conditioner and really couldn't hear. It was a small quiet street in a family neighborhood. I said, "When the police came . . . ." He glared at me again and interrupted. "We didn't hear a thing!"

Finally, we ask the woman herself about the key behavior of the violent partner whose behavior actually defines her state as a "battered woman." We say, "What did he do when you left?" At that moment, we will hear the story of the attacks on her autonomy; all we need to do is listen. Often, a woman has left several times before she finally ends a marriage.[292] Or, she may have been restrained from leaving by violent or coercive means: by being held prisoner in her home, by being threatened with custody suits, by having her savings taken away before she could depart.[293] One feminist writer in the field recently wrote without apparent irony,

> [He] always found ways to get her to come back. He would come and tell her how sorry he was and how much he loved her; he would promise never to do it again. And she wanted to believe him . . . . When she wavered and it appeared his pleas and promises might not work, he would threaten to kill her if she refused to come home, threats which his past behavior gave her every reason to take seriously.[294]

There are many aspects to redefining separation: we need to comprehend the related power and control issues common to continuing relationships and to separation, rethink the implicit burden on the woman to leave her home and risk losing her family, and change our perceptions of what it means for her to separate. Finally, we need to reckon with the dangers she faces. The rest of this article discusses the assault on women's attempts to separate. The story of the violent pursuit of the separating woman must become part of the way we understand domestic violence to help eliminate the question "Why didn't she leave?" from our common vocabulary.

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292. *See, e.g.*, DOBASH & DOBASH, *supra* note 12, at 144-47 (discussing the woman's leaving, returning, and leaving again as a process of pulling away from the commitment of marriage and establishing an autonomous life despite insufficient resources to support a family).

293. *See, e.g.*, OKUN, *supra* note 107, at 69 (citing several studies describing women's secret savings to allow them to leave abusive relationships).

294. GILLESPIE, *supra* note 11, at 2.

### C. *Strategies for Change and the Redefinition of Separation*

How can we bring the issues of power and control into the courtroom? Can we explain how differently men and women may perceive control?

> I once told a man in a bar that if I was attacked by a man and could somehow fight him off enough to run away, I would consider that I had won the encounter — that I had beaten him. The man said, "No, no, you had to run away, therefore you lost." I said, "No, I was safe, I was unviolated, and therefore I won, I preserved myself." That's what we have to deal with: the way we cope may be very successful, useful, and good — as women — and you can count that as a success. A man could not count refusal to show fear as success. Because he was able to control you as he saw it, show rage, he may think he was successful in that situation as well.

This reflection on the ways men and women perceive control has important implications for the concept of separation assault. The woman defines successful flight from attack as a victory. The man insists that this is not victory but defeat. The persistent accounts of the difficulty women encounter on separation, especially condemnation from their families and employers, suggest society's perceptions track men's interpretations: leaving a violent relationship is widely perceived as an admission of defeat rather than victory. The ways in which separation is similar to the escape from impliedly sexual assault discussed in the quotation above are generally not cognizable at all in law or social discourse. The dangers women face in the effort to separate make separation a victory. These dangers need a name.

Law assumes — pretends — the autonomy of women. Every legal case that discusses the question "why didn't she leave?" implies that the woman *could* have left. We need to challenge the coercion of women's choices, reveal the complexity of women's experience and struggle, and recast the entire discussion of separation in terms of the batterer's violent attempts at control.

Although it is still focused on successful and final separation as the key event, the recently developed term "postseparation woman abuse" begins to grapple with the problem of revealing the issue of power and control in women's experience of violence.[295] At least half of women who leave their abusers are followed and harassed or further attacked by them.[296] In one study of interspousal homicide,[297] more than half

295. *See, e.g.*, Ellis, *supra* note 21, at 410.

296. BROWNE, *supra* note 3, at 110.

297. Until we begin gathering on a broad scale statistics that speak to separation, we are more likely to know if women kill spouses than if men do, since the status of a woman victim as a former partner of the man may or may not appear in police reports and statistics. Since women

of the men who killed their spouses did so when the partners were separated; in contrast, less than ten percent of women who killed were separated at the time.[298] Power and control are crucial here in several ways. Men who kill their wives describe their feeling of loss of control over the woman as a primary factor; most frequently, the man expresses the fear that the woman was about to abandon him, though in fact this fear may have been unfounded.[299] The fact that marital separation increases the instigation to violence[300] shows that these attacks are aimed at preventing or punishing the woman's autonomy. They are major — often deadly — power moves.

However, the term "postseparation woman abuse" fails to capture the many cases where violence occurs in response to the decision itself: the essential attack is on the woman's autonomy. Barbara Hart notes that "[t]he *decision* by a battered woman to leave is often met with escalated violence by the batterer."[301] When the decision, rather than actual separation, triggers the attack, the circumstances of the violence may not reveal the assault on separation: the couple may still have been living together, and the attack may have taken place inside their mutual home — yet the attack may have been a direct response to her assertion of the will to separate or her first physical moves *toward* separation.

### *Defining Separation Assault*

To expose the struggle for control, we should recognize the assault on the woman's separation as a specific type of attack that occurs at or after the moment she decides on a separation or begins to prepare for one. I propose that we call it "separation assault." The varied violent and coercive moves in the process of separation assault can be termed "separation attacks."

*Separation assault* is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain,

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kill partners with whom they are still living, this is more likely to be detected as interspousal violence.

298. Barnard et al., *supra* note 270, at 274; *see also* Franklin Zimring et al., *Intimate Violence: A Study of Intersexual Homicide*, 50 U. CHI. L. REV. 910 (1983).

299. Barnard et al., *supra* note 270, at 224.

300. Ellis, *supra* note 21, at 408.

301. Hart, *supra* note 273, at 240 (emphasis added).

or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.

Attacks on separation pervaded the stories of the women who spoke with me. The announcement of intent to separate may be fraught with grave danger:

> He was on strike for the second time in a year. I was pregnant with the second baby in a row. There was absolutely no money. Every day, he yelled at me for a long time — an hour, two hours — about how awful I was. . . . I remember how desperate I felt and how much I needed it to stop.
>
> [One day, when he seemed receptive, she told him it had to stop.] He wouldn't listen. *I said I couldn't live like that anymore and would leave if he didn't stop. He kept saying I couldn't leave because we didn't have enough money to support two households. I said that only his failure to listen could make me leave — I couldn't live like that anymore . . . .*
>
> Suddenly he lost his temper . . . . He stormed upstairs, and I heard him pushing around in the closet. I thought, "That's funny. It sounds like he's getting the gun." And I didn't sit down or move — I stood in the middle of the living room floor and waited. He came down the stairs shouting and I saw that he really did have the shotgun. I knew it was fully loaded. I remember making the conscious decision that this was different than waiting through other outbursts, and that any argument would be deadly.
>
> I turned around and ran out the front door screaming that I was pregnant and ran up the landlady's front steps. I was going to call the police. But I realized that I had heard the baby crying upstairs. All the noise had wakened her from her nap. I couldn't believe he would shoot his child, but I didn't know why he'd gotten the gun, how well he actually knew what he was doing . . . how irritating her crying might be. I turned around and went back into the house. I could hear him putting the gun away in the closet. We got to the baby at the same moment.
>
> I dressed her, put on my own clothes, and left. I had $1.60 and no more money coming for several days. I took the better car. I drove away without knowing where I was going to go. (Emphasis added.)

Although women's stories recount many attacks triggered by separation, the nature of the attack *on separation itself* generally goes unrecognized. Similarly, women describe coercive violence escalating after separation — violence clearly aimed at denying their autonomy — in terms that show they may internalize self-blame rather than clearly identifying the man's attempt at control:

> We had been separated nine months. I came home late one night with a date. I was sitting in the living room playing backgammon with this man, when I saw the car drive up. I thought of sending [my date] home, but I didn't, maybe because I knew I needed help. Maybe I was just defiant.
>
> He knocked. I kept the chain lock on the door, and I told him to go

home. He wouldn't leave. He rang the bell for fifteen minutes without stopping. I woke up my roommate, and she disconnected the doorbell.

He started pounding on the door. He broke it in and started a fight with this man. I'm sitting there in horror, watching it — the door broken down, them crashing around the living room . . . . The kids woke up. I sat them on the couch with me.

Then — he was *very* drunk — the fighting stopped. It was pretty short. But it took two hours to try to get him to leave. He ran around with a butcher knife . . . he left the house with it. Finally, I could call the police. Then I don't know if he came back in with the knife — I think he came back after the police were called. The kids were on the couch screaming and crying, I was trying to take care of them.

The police saw the door leaning in the middle of the room, the room trashed and crashed. [They refused to arrest him because "his name is still on the lease."] They told me to get a TRO the next day.

I was left to put the pieces back together. And you know what I did? I went and made love to that guy who was there. I had to — anything to not think. I feel kind of whorish about that — I hardly knew him. I didn't even want to, it was 6 a.m., my whole body hurt, I was just exhausted. It seems bizarre.

So I went and got the TRO. Now when I talk about it, I feel like I should be more upset about it.

No, nobody in the building heard anything. They're afraid to. They didn't hear him break down the door, or even ring the doorbell for fifteen minutes in the middle of the night . . . . None of them heard anything!

This woman's sexual choice seems at least partly explicable as a reassertion of control over her body, over her choice in men, and as a specific denial of power to the ex-husband who had put her through so much pain. Her husband might break down the door, but she could affirm her separation again.

Women describe protracted and inventive attacks on their moves to separate:

Well, leaving took months. When I first left, I really didn't even know I was leaving the marriage. I was just going to California to get the car that he had left there. But being on my own again, and away from him, I began to regain some of my self-confidence, and I liked it. And people liked me.

But then he came out to California to reclaim me. And totally humiliated me in front of my friends. ["Humiliation" including forcing her to have sex — essentially committing marital rape — in the back of a Volkswagen van while two other men were in the vehicle.] I was scared of him, I was still scared of his violence. As strong as I had been when he wasn't around, as soon as he came around, I would fall back into the baby talk, I would fall back into the patterns.

Then we got back to Michigan, and I left again and went to stay with my friends. I was in Ann Arbor, and I had a fever. And he came to check on me . . . . He got my heirloom ring off my finger that night. The

> ring that all my life I felt separated me from poor white trash. The ring that my great-great-grandmother brought over from Germany when she fled the failed revolution of 1848. I never saw that ring again. He threatened to burn down the house I was staying in, but he was satisfied when I gave him the ring because he knew I would come back for it.
>
> I went back again [because he promised to return the ring]. I never got it. And then when it was time for my friends to leave town, they came to our house in Detroit, en masse, and said it was time to go. And I picked up, and I walked out. "Well, it's time to go, we're leaving." And I went.

Some of these attacks on separation will go unnoticed until we begin identifying them specifically:

> I felt guilty, so I went back. That lasted a month, until Valentine's Day . . . . Finally, on Valentine's Day, he was throwing things. He was throwing glass — I was barefoot — it was totally absurd. I was being held prisoner in my bed by glass!
>
> I picked the kids up, scrunched my feet so they were under the glass, dragged my feet over the floor so they weren't getting cut too much, and made it out of the house.

One of the best-known battered women in America is Francine Hughes, whose story was told in *The Burning Bed.* The trial and movie brought the atrocities against her to public attention, but there was little cultural attention to the lessons of her search for autonomy:

> Hughes' entire marriage — and her life after divorce — was a search for the exit. [Family], in-laws, friends, social services, police, sheriff's office, county prosecutor — she tried them all. And even when Mickey Hughes came within moments of choking her to death or cutting her throat, no one helped.[302]

We already recognize the danger of the attack on separation pragmatically and intuitively. This is a major reason for the existence of shelters, which protect women against attacks while giving them a place to live. It is the main reason that shelter numbers and addresses are not listed in telephone directories. It is the main reason women seek protective orders. It fills the pages of our newspapers with accounts of attacks on women by their separated husbands. Although we see this attack everywhere, we cannot analyze it until it has a name.

### *Naming Separation Assault and Understanding Battering*

Naming women's experience is an important component of feminist struggle for social and legal change.[303] Naming separation assault has the potential to change consciousness in a manner comparable to

302. Jones, *supra* note 281, at 296.

303. Kelly, *supra* note 31, at 114-17.

the concept of "date rape." "Date rape" and "separation assault" name phenomena women know from our own experience, but which remain invisible without names.[304] These terms do more, however, than merely identify hitherto unnamed experience. Each term identifies one aspect of a common attack on women in a way that illuminates the whole picture. Date rape is not all rape; separation assault is not the whole story of battering. Yet in each case, the act of identifying and describing the formerly invisible part transforms our understanding of the formerly misunderstood whole.

"Date rape" was a term women recognized when we heard it. It helped popularize a redefinition of the concept of rape: "Acquaintance rape is forced, manipulated or coerced sexual intercourse by a friend or an acquaintance. It is an act of violence, aggression and power."[305] Naming date rape helped move discussion of rape past its old starting point, an image of sexual violence committed by a stranger. The concept of date rape thereby allowed women to recognize that the assault they had experienced was, in fact, rape.

Naming and recognizing separation assault will make women's experience more comprehensible to ourselves as well as to the legal system: We know it when we hear it. Attacks on our autonomy are one point at which women can — without stereotyping or invoking the likelihood of denial — locate our own experiences and those of our sisters and friends on a continuum of control attempts that includes those extremes of violence that become known through the sensational cases covered by the press. Women may find the current terminology of battering stigmatizing or alienating, yet be willing to admit that they have experienced inappropriate control attempts by their partners, including assaults on their capacity to separate from "bad" marriages. Exposing control attempts reveals the woman's struggle, rather than defining her according to the behavior of her assailant.

The name "separation assault" also helps women understand our own long-term reactions to violence or to the threats accompanying the end of relationships. Shelters and counseling provide short-term separation assistance, but the impact of separation assault goes on: Fear of an ex-husband becomes part of a woman's life.

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304. That which has no name, that for which we have no words or concepts, is rendered mute and invisible; powerless to inform or transform our consciousness of our experience, our understanding, our vision, powerless to claim its own existence.
Barbara DuBois, *Passionate Scholarship: Notes on Values, Knowing and Method in Feminist Social Sciences, in* THEORIES OF WOMEN'S STUDIES 105, 108 (Gloria Bowles & Renate Duelli Klein eds., 1983), *quoted in* Kelly, *supra* note 31, at 114. Another example of an assault we must come to recognize is "sexual harassment." *Id.* at 115.

305. AMERICAN COLLEGE HEALTH ASSOCIATION, ACQUAINTANCE RAPE: IS DATING DANGEROUS? (1987).

> The first year I was at Stanford, I saw *The Burning Bed.* I couldn't *not* watch it, and I couldn't stop watching. I was so scared when it finished. I started calling my ex-husband. It was the middle of the night there. I kept calling him frantically for over an hour. He wasn't home. I became convinced he was on his way there with a gun on a plane. I was sure he would kill me.
>
> I locked the door and got in bed with the kids and shook all night, waiting for him. It was two and a half years later. I was two thousand miles away.

This woman had withstood physical attacks before and after separation, as well as poverty, the indignities inflicted by welfare workers, and the threat of a custody suit. Naming the phenomenon that renewed her fear will allow her to recognize her experience and weigh the dangers of her particular situation.[306] When women blame ourselves for the difficulties we face, this internalized fear becomes part of the culture of women, part of advice mothers give to daughters and friends give each other, as marriages fray and when women are threatened. Naming the assault on separation may begin to pull loose the threads of intimidation from the fabric of feminine wisdom, and to legitimate women's perception of danger while directing our attention toward the resources and support we will need, rather than to our own deficiencies or inadequacies.[307]

Popularizing the concept of separation assault is not without hidden dangers, however. Separation assault is effective in part because, rather than *directly* confronting existing stereotypes of battered women, it provides a partial explanation of women's actions that redirects attention toward the batterer. It works in part through its very resonance with existing stereotypes that ask why the woman didn't leave. Therefore, this concept alone cannot remake our understanding of domestic violence; by itself, separation assault becomes merely another explanation of the woman's apparent "failure" to separate — at worst, subtle reinforcement of existing stereotypes. Without further cultural redefinition of battering as a process of power and control, naming separation assault may not deeply challenge oppressive ideology regarding women and domestic violence. However, on a broader scale, separation assault should help the larger goal of shifting cultural perception because it helps change "objective" judgment — that is, shared cultural perceptions and wisdom — about what is normal in

306. Hart, *supra* note 273, at 240-49.

307. Women often blame themselves and internalize responsibility for the violence. DOBASH & DOBASH, *supra* note 12, at 119; OKUN, *supra* note 107, at 73. Gondolf and Fisher report studies showing women most likely to blame themselves for the first incident; after that, they increasingly blame the batterer and seek to change him. GONDOLF & FISHER, *supra* note 12, at 16.

relationships. In the next part of this article, I explain how the redefinition of separation described above can help change legal doctrine in several areas by shifting both cultural expectation and judicial inquiry.

## V. THE USES OF A NAME: SEPARATION ASSAULT AND LEGAL DOCTRINE

Naming separation assault is an attempt to use a social definition, a cultural concept, to resolve doctrinal problems in law. It should not articulate a new test for women's behavior ("did this woman in fact leave and how shall we judge the energy with which she attempted separation?") but rather promote a new understanding of violence against women. As it intervenes in cultural consciousness, separation assault allows legal actors (including attorneys, prosecutors, judges, jurors, social workers, and legal scholars) to reconceive many legal questions that depend on an understanding of women's lives and experiences. Our understanding of "objective" reasonableness depends on our cultural intuitions about normal experience and normal response. By reflecting a consciousness of power and control, and by emphasizing the dangers attendant on separation, separation assault helps make women's experience comprehensible in law.

In the following sections, I show how separation assault can be identified in cases in many areas of legal doctrine, and then explain how understanding separation assault can help resolve troubled areas in law. My review of the cases and doctrines is necessarily partial and suggestive, rather than comprehensive. It is a beginning. It is intended both to invite more discussion of the ways in which litigation can help expose in both law and culture the power and control at the heart of battering, and to invite further analysis of the particular dangers to women at separation.

### A. *Recognizing Separation Assault in the Cases: The Problem of the Dead Woman's Voice*

> *exit* n . . . *1:* a departure from a stage
> *2a:* . . . going away *b:* DEATH[308]

There is a two-layered problem in seeing through the criminal cases involving abuse of women. First, these cases appear in various doctrinal guises, and few explicitly acknowledge that they concern domestic violence at all. Second, on closer examination, many of the "wife-murder" cases turn out to be "ex-wife murder," the most ex-

308. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 435 (1988) (capitalization in original).

treme violence turned against women at separation. Many of the women killed by their husbands are killed after they have separated.[309] Ironically, since those women are not alive to tell their stories, their voices disappear into the narrative voices of the courts, where the women are not usually identified as battered:

> On a day in early September in 1977, the petitioner and his wife of 28 years had a heated argument in their home. During the course of this altercation, the petitioner, who had consumed several cans of beer, threatened his wife with a knife and damaged some of her clothing. At this point, the petitioner's wife declared that she was going to leave him, and departed to stay with relatives. [This was not the first time that he and his wife had been separated as a result of his violent behavior.] That afternoon she went to a Justice of the Peace and secured a warrant charging the petitioner with aggravated assault. A few days later, while still living away from home, she filed suit for divorce. [A court hearing date was set and several efforts to persuade the wife to return home were rebuffed.] At some point during this period, his wife moved in with her mother . . . . [Several angry phone calls were exchanged, while she refused to reconcile.]
>
> At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.[310]

*Godfrey v. Georgia* presents an almost perfect picture of the dangers for women at separation: Mrs. Godfrey had resolutely separated from her husband and energetically sought the protection of the law. However, her story does not enter the criminal law casebook[311] as a domestic violence case. Rather, *Godfrey* is a death penalty case presenting the issue of whether this murder was unambiguously "outrageously or wantonly vile, horrible or inhuman," or whether the case revealed ambiguity and vagueness in the death penalty statute. The Supreme Court essentially found Mrs. Godfrey's death to be quite an

309. No one has counted how many women are killed at the moment they announce that they are leaving. However, the fact that more than half of women who leave their husbands are violently harassed was noted by BROWNE, *supra* note 3, at 110. The tendency for separation to actually *increase* the incidence of violence has also been noted. *See* Ellis, *supra* note 21, at 408 (citing several studies).

310. Godfrey v. Georgia, 446 U.S. 420, 424-25 (1980).

311. See, *e.g.*, JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW (2d ed. 1991), which considers *Godfrey* in its section on capital murder. *Id.* at 412. In fact, most casebooks have no category for domestic violence, though "battered woman's syndrome" may enter discussions of the duty to retreat or of diminished capacity defenses.

ordinary murder.[312] I believe the majority was correct — this *was* an ordinary murder — but the facts were even more ordinary than the majority realized.

Mary McNeill has shown that several torts cases on duty are actually domestic violence cases in disguise.[313] However, once the domestic violence is perceived, separation assault appears to be a further hidden issue in at least one of the cases.[314] In *Jablonski by Pahls v. United States,*[315] Melinda Kimball had repeatedly approached the psychologists who examined the man she lived with, telling his doctors that she was afraid of him.[316] They failed to commit him or to seek his medical records, which would have revealed that he had ten years earlier been diagnosed as schizophrenic and had then had homicidal ideas about his wife.[317] One doctor told Kimball that she should avoid Jablonski if she feared him. Kimball left after a priest also urged her to separate from Jablonski. She was murdered when she returned to the apartment to pick up some baby diapers.[318] Since there is no record of any attempt to kill her before she left, separation appears to be at least a precipitating factor in Kimball's death.

In *Garcia v. Superior Court,* Grace Morales was killed by Napoleon Johnson, Jr., the man from whom she had recently separated.[319] According to the complaint, Johnson's parole officer was aware that Johnson had killed his first wife after she left him.[320] Although he was

312. "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428-29.

313. Mary McNeill, *Domestic Violence: The Skeleton in* Tarasoff's *Closet, in* DOMESTIC VIOLENCE ON TRIAL, *supra* note 58, at 197.

314. In one of the cases McNeill describes, Hedlund v. Superior Court, 669 P.2d 41 (Cal. 1983), facts in the opinion are insufficient to reveal whether the couple was together or separated when he shot her. Stephen Wilson and La Nita Wilson had sought counseling and psychotherapy together, though the opinion notes that they were not married and that the identity of their last names was in fact coincidental. 669 P.2d at 42-43 & n.4. Stephen had informed his therapists that he intended to "commit serious bodily injury upon" La Nita. 669 P.2d at 43. When Stephen shot her, La Nita saved her three-year-old son Darryl by throwing her body across the child's. 669 P.2d at 46. The questions in the case were whether the psychologists were negligent in failing to diagnose Stephen's dangerousness and warn La Nita, and whether Darryl should recover because of his close relationship with his mother. 669 P.2d at 46, 46 n.7. Some cases McNeill discusses are ambiguous: in Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976), the dead woman had not in fact been in a relationship with her murderer, but he had imagined that a relationship existed and that she had left him. McNeill, *supra* note 313, at 199. *Tarasoff* is therefore a separation assault from the man's point of view — from the woman's, it is a story of a stranger's obsession, a more general lesson in vulnerability to the male imagination.

315. 712 F.2d 391 (9th Cir. 1983).

316. 712 F.2d at 393-94.

317. 712 F.2d at 393-94. Apparently, this was a first wife, given the long time period and different city in which the first events took place. *See* 712 F.2d at 393.

318. 712 F.2d at 394.

319. 789 P.2d 960, 961-62 (Cal. 1990).

320. 789 P.2d at 962.

notified that Johnson had threatened to kill Morales and that Morales was filing a temporary restraining order, the parole officer advised Morales that Johnson would not come looking for her.[321] Johnson kidnapped Morales and killed her; her children sued.[322] The court distinguished the parole officer's "negligent representations" from a failure to warn for which the officer might have been liable under *Tarasoff v. Regents of the University of California,*[323] and held that the plaintiffs must allege that Morales reasonably relied on the parole officer's advice.[324]

The California case of *People v. Berry,* doctrinally significant for its holding on cooling off periods when killers claim provocation by their victims, also concerns a hidden separation assault.[325] The only account of the marriage is the one Berry gave the police and at trial. According to Berry's story, his wife, Rachel Pessah, had gone to Israel within days of their marriage; on her return, she taunted him about her love for another man and her plans to leave Berry.[326] After repeated arguments and threats or attempts to separate, he tried to strangle her.[327] He called a cab to take her to a hospital, and she later filed a police report that resulted in a warrant for his arrest.[328] He told her he was leaving their home and going to stay with a friend. Two days later, he returned to the apartment and waited overnight. She returned the next day and said she supposed he had come to kill her. He was indecisive, but said he had. She screamed. He strangled her.[329]

Even feminist literature on battering may overlook the particularity of attacks on women's autonomy. For example, the feminist newsletter *Response* cites the 1988 case of *Balistreri v. Pacifica Police Department*[330] in a short article entitled "Court Rules in Favor of Abused Wife." The one-paragraph article describes Balistreri as

> an abused wife who sued police for not protecting her. . . . Police had refused to arrest the batterer when summoned following a beating, failed to offer medical assistance, and did not protect the woman over a 3-year

321. 789 P.2d at 962.

322. 789 P.2d at 961.

323. 551 P.2d 334 (Cal. 1976), *distinguished in Garcia,* 789 P.2d at 963.

324. 789 P.2d at 963.

325. 556 P.2d 777 (Cal. 1976).

326. 556 P.2d at 779. The expert testimony on Rachel's provocative behavior was based entirely on Berry's account of Rachel's words.

327. 556 P.2d at 779.

328. 556 P.2d at 778-79.

329. 556 P.2d at 779. His previous marriage had also ended violently. Reporter's Transcript at 245-53 (on file with the author).

330. 855 F.2d 1421 (9th Cir. 1988), *amended on other grounds,* 901 F.2d 696 (9th Cir. 1990).

period during which she reported incidents to police and obtained a restraining order.[331]

Most of the facts of *Balistreri* concern attacks after separation. When Balistreri's husband beat her severely in February 1982, officers failed to help her.[332] She divorced her husband — apparently promptly, because "throughout 1982" she complained to police of vandalism and harassing phone calls by the husband "from whom she was now divorced."[333] In November that year, her "former husband" crashed his car into her garage, and in March 1983, a firebomb was thrown through the window of her house.[334] From 1983 to 1985, telephone harassment and vandalism continued.[335] Balistreri emerges as a woman of great strength — resisting her ex-husband's repeated attacks and pursuing her complaint within the legal system when her lawyer would go no further.[336] "Abused wife," the term used by *Response,* captures neither her determined resistance nor her separation as the keys to the repeated violence she suffered.

### B. *Recognizing the Danger to Women at Separation*

Recognizing the assault on separation can help disentangle a number of complex legal issues in cases in which women have been killed or harmed. In some areas of substantive law, identifying separation assault will change the questions posed by the court in its decisionmaking process. In other doctrinal areas, the shift in time frame made possible by highlighting the assault on separation can change judicial comprehension of the assault on the woman or of the probability that more assaults may occur. Separation assault may also, as in contested custody actions, help reveal underlying motivations in the legal action itself.

#### *Restraining Orders*

In some jurisdictions, when women seek orders of protection

331. *Court Rules in Favor of Abused Wife,* 11 RESPONSE TO THE VICTIMIZATION OF WOMEN AND CHILDREN No. 3, 19 (1988).

332. *Balistreri,* 901 F.2d at 698. It seems (from dates given for violent episodes) that the first beating mentioned in the complaint may have taken place in close connection with separation, but the facts in the opinion do not demonstrate this clearly.

333. The second amended opinion in *Balistreri* uses the present tense here — "from whom she is now divorced," 901 F.2d at 698 — but the first opinion used the past tense, 855 F.2d at 1423. The past tense is likely correct here, since both opinions refer to her "former husband" during this period.

334. 901 F.2d at 698.

335. 901 F.2d at 698.

336. Balistreri won her appeal pro se; her lawyer had refused to continue working on the case after the initial dismissal for failure to state a claim. 855 F.2d at 1423.

against violent men, courts routinely grant mutual orders of protection rather than orders specifically protecting the women.[337] Mutual orders of protection direct each party not to assault, endanger, or threaten the other.[338] If mutual orders are violated, police officers believe they must either arrest both parties or do nothing. The New York Task Force on Women in the Courts concluded that a woman with a mutual order of protection is in a worse position than a woman with no order at all, since the mutual order makes her look equally violent in the eyes of the courts, and the husband may not be held responsible if there is another violent incident. Also, it may be harder for her to obtain a more restrictive order if the violence recurs.[339] The Task Force concluded that this was particularly dangerous if the mutual order was granted when the woman had requested protection for herself at the same time she filed an action to end the marriage — an especially dangerous period.[340] Even in jurisdictions that do not routinely grant mutual orders, battering men may make cross-accusations of violence against battered women. While many battered women do fight back against their husbands, their violence is largely defensive and less severe than the men's violence — yet since it is also described as "violence," these allegations can prove troubling and confusing to judges.[341]

If we understood better the particular attacks women face at separation, courts could sort both cross-accusations of violence and requests for mutual orders of protection by examining the nature of current threats and the history of violence in relation to the issue of separation. The question then becomes: "Which of these people needs her [or his] capacity to separate protected?" Answering this question will help sort the dangers and should result in the grant of appropriate protective orders.

*Duty to Warn*

Recognizing the common occurrence of separation assault may also clarify professionals' duty to warn potential victims. For example, the *Jablonski* court upheld the district court's finding that the psychiatrists committed malpractice in failing to get Jablonski's records and failing to warn Kimball of his potential for violence.[342] Applying

337. *New York Task Force Report, supra* note 51, at 38.

338. *Id.*

339. *Id.* at 39.

340. *Id.* at 40.

341. Saunders, *supra* note 38, at 103-08.

342. Jablonski by Pahls v. United States, 712 F.2d 391, 398 (9th Cir. 1983).

the concept of separation assault does not disturb this holding. Her foreseeability as a victim would be even clearer. However, the clergyman and doctors who advised Kimball to leave Jablonski might also have had a duty to warn her about extra care to be exercised in *separating* from a homicidal man, as well as a duty to warn her of his dangerousness.

In *Garcia v. Superior Court,*[343] Johnson's murder of his first wife was a separation assault of exactly the type that Johnson had threatened against Morales. The parole officer misrepresented Johnson's danger to Morales with respect to the very issue of measures regarding *separation.* Although the parole officer was legally barred from telling anyone the exact crime for which Johnson had previously been imprisoned,[344] the court fails to reckon with the implications of the outright falsehood embodied in the parole officer's statement that Johnson's prior conviction was not for anything that endangered Morales' children.[345]

A telling quote in the *Garcia* dissent shows that judges may inappropriately assume that separation assaults will inevitably culminate in murder: the court below had concluded "it [was] highly speculative to assume that [Morales] could have accomplished any improvement in her security. The frightening reality is that for one in Morales's position there is frequently nothing she can do to protect herself."[346] When courts rely on their own intuitions to state "truths" regarding violence against women, the dangers of cultural stereotyping are severe.[347] A sense of the dangers of separation should have led the court to emphasize the need not to mislead Morales as to her safety and to recognize the implications of consciously identifying the assault on separation.

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343. 789 P.2d 960 (Cal. 1990).

344. 789 P.2d at 962 n.2.

345. The children are suing for the loss of their mother; both the possibility of her murder and the possibility of harm to themselves in the course of a murderous attack were "danger" shown by Johnson's prior conviction.

346. Garcia v. Superior Court, 249 Cal. Rptr. 449, 454 (Cal. Ct. App. 1988), *quoted in* 789 P.2d 960 (Cal. 1990) (Mosk, J., dissenting). The dissent criticized the majority opinion for essentially adopting the same view the intermediate appellate court had held. 789 P.2d at 970 (Mosk, J., dissenting).

347. *See, e.g.,* Susan Mann, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader,* 41 STAN. L. REV. 959, 1004 (1989) (describing oral argument during which a judge in the Third Circuit Court of Appeals noted that violent couples usually reconciled, regarding a case in which a man killed his *separated* partner). Mann argues for the attempt to reach judges emotionally (through use of narrative). This has some conceptual similarity to my suggested use of a cultural concept to convince judges of the danger to women.

### *Custody Determinations: Understanding Dominance and Time-Framing Assault*

The concept of separation assault provides insight into the difficult bargains women strike during custody determinations. Women may accept mutual orders of protection, rather than orders that specifically protect them against their batterers, in exchange for the husband's agreement not to contest custody.[348] Courts often award joint custody to batterers, and some courts that do not perceive violence against the mother as an aspect of the custody determination may even award them sole custody.[349] The problem is exacerbated for battered women by the professional analyses of the social workers in whom the court vests the power to evaluate women, and by the possibility that the judge will share a stereotypical, stigmatizing image of battered women.

Separation assault provides a link between past violence and current legal disputes by illuminating the custody action as *part of* an ongoing attempt, through physical violence and legal manipulation,[350] to force the woman to make concessions or return to the violent partner. It reveals the potential for continuing danger from a batterer who may not have struck out physically in the recent past. Threats against the woman's separation attempts may reveal that the "domestic" violence has outlasted the marriage. Recognizing separation assault can therefore help judges understand the relevance of past violence and threats, and the relevance of the nature of present attacks, to custody cases. Also, when there is evidence of violent separation assault, a judge could give more intense scrutiny to the motives behind custody disputes and reconsider the appropriateness of joint custody awards or liberal visitation decrees. This would help diminish "legal separation assault" in custody cases. Finally, by remaking the cultural concept of separation, we may hope to affect positively the evaluation of women by the social workers in whom the legal system places so much power.

### *Judging the Wife-Killer: Time-Framing, Provocation, and the Nature of the Assault*

In *Berry,* the defendant's arguments for a jury instruction on provocation depended entirely upon his statements that his wife had taunted him sexually and provoked her own murder.[351] In fact, he did

348. *New York Task Force Report, supra* note 51, at 40 n.84.

349. *Id.* at 41-42; *Achieving Equal Justice, supra* note 41, at 37 (less than half of judges surveyed viewed spousal abuse as a reason not to award joint custody).

350. Batterers may seek custody as part of an overall attempt to continue controlling the woman and to punish her for separating. Walker & Edwall, *supra* note 200, at 140.

351. People v. Berry, 556 P.2d 777, 778-80 (Cal. 1976).

not kill her when she taunted him, but when she left him.[352] Recognizing separation assault expands the relevant time frame to show his behavior was consistent with numerous prior assaults that seem at least as responsive to her departure as to sexual provocation. He had violently assaulted his first wife as well.[353] *Berry* is cited for its holding that twenty hours of waiting in the apartment — some days after his wife's last "provocative" conduct — was not as a matter of law too long a period to permit an instruction on provocation. The court might have viewed the case differently had the assault on separation been as cognizable as his response to her alleged sexual taunts: it is difficult to find "heat-of-passion" in a repeatedly attempted assault carried out over a period of time.[354]

A short time frame favors men in these cases, as it does in many types of cases, by removing violence from a context of power and struggle.[355] Prior attacks on the woman's attempts to separate may essentially be rehearsals for the final killing.[356] Alternatively, the long-term assault on her separation may be perceived as one ongoing attack. If only the final, deadly assault is cognizable, the nature of the assault as an attack on separation, rather than on the woman's sexual provocation, may remain disguised.[357] Separation assault can therefore change the time frame within which the man's mental state is to be evaluated by changing the perception of the ways in which the woman's autonomy is under attack.

### C. *Live Women and Dead Men: The Self-Defense Cases*

The self-defense cases, which often have an extraordinarily high level of violence against women, have exercised a powerful influence on the literature on battering. Expert testimony on battered woman syndrome and learned helplessness was first introduced to explain the

352. 556 P.2d at 780-81.

353. He stabbed her with a kitchen knife. Berry's account of his assault on his first wife shows that both sexual jealousy and fear of separation were present in that relationship as well. Reporter's Transcript, at 252-53 (on file with author).

354. In *Terrifying Love,* Lenore Walker describes a case in which the judge found the woman's act of separation to have been provocation for the man's murderous attack. The case was later reversed, however. WALKER, *supra* note 11, at 66-69.

355. *See supra* text accompanying note 350 (custody cases); *infra* notes 371-77 and accompanying text (self-defense cases).

356. I am indebted to Donna Coker for suggesting this possibility. Conversation with Donna Coker, *supra* note 67.

357. This is a similar process to the criticism of sociological studies that only examine an accretion of acts of violence stripped of context and thereby distort the severity and meaning of acts of domestic violence. *See* Hoff, *supra* note 101, at 271-72.

woman's actions and mental state in these cases.[358] The idea that the woman should have left the relationship, and especially the idea that she failed to leave, shapes the courts' analyses of many aspects of self-defense cases, including the reasonableness of the woman's perceptions and reactions, the imminence of the threat of death or great bodily harm, and her duty to retreat from the confrontation. In this section I first examine the relationship between the concepts of separation assault and learned helplessness. I then illustrate the relevance of the concept of separation assault to the issues of imminent danger and the reasonableness of the woman's perception that self-defense is necessary.

*Learned Helplessness Revisited: The Bars of the Cage*

Expert testimony on battered woman's syndrome often notes the danger of women's moves to separate from violent relationships. In a recent case,[359] a California appellate court summarized Lenore Walker's testimony on battered woman's syndrome, describing the syndrome as the natural result of trauma to women. The court set forth an analysis of why women "stay in the abusive relationship," including some emphasis on the dangers of separation:

> Terminating the relationship usually has adverse economic consequences. Separating from a battering partner may be very dangerous, and the battered woman is aware of the danger. The batterer may have threatened to kill the battered woman or to abscond with the children if she leaves. Many battered women have tried to leave and been unsuccessful. In a battering relationship, the woman loses self-esteem, is terrified, and does not have the psychological energy to leave, resulting in "learned helplessness" and "a kind of psychological paralysis."[360]

The court described a woman's "learned helplessness" as caused by random and unpredictable violence, which led her to believe that she was "incapable of doing anything to prevent the abuse." This court received a sophisticated explanation of the impact battering has on women. Yet, as the court in turn explains the woman's situation, the objective difficulties of leaving and subjective fear and helplessness are both present, but seem unrelated.

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358. *See, e.g.*, State v. Kelly: *Amicus Briefs*, *supra* note 8; *supra* notes 138-48 and accompanying text.

359. *People v. Aris*, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989). In *Aris*, the defendant had shot and killed her sleeping husband. She appealed the exclusion of portions of proffered expert testimony on battered women and the refusal to offer jury instructions on perfect self-defense. 264 Cal. Rptr. at 171.

360. 264 Cal. Rptr. at 178. Other factors listed by the court included periodic positive reinforcement during the "loving contrition" stage of the battering cycle, and cultural training of all women to be peacekeepers, playing optimistic and hopeful roles in relationships. 264 Cal. Rptr. at 178.

Despite its generally sympathetic attention to Walker's testimony on battered woman syndrome, the court found harmless error in excluding her further testimony, which would have linked battered woman syndrome with "the psychological symptoms and the psychological impact on the person's state of mind at the time of the homicide."[361] According to the court, no jury could have found that the defendant was in imminent danger of harm from her sleeping husband at the time she shot him.[362] Although separation assaults had occurred,[363] the court did not weigh these past assaults on her capacity to leave when finding no imminent danger from his threat to kill her.

Learned helplessness is in essence a theory of deficiency at perceiving exit. Separation assault confirms the difficulties of exit. Separation assault does not contradict the possibility of developing learned helplessness; the woman's subjective belief could still overestimate the difficulties of leaving. Naming separation assault implies no attempt to measure the accuracy at any particular moment of a particular woman's belief in the possibility or practicality of separation. Rather, by supporting the woman's rational perception of danger, the concept of separation assault supports that aspect of battered woman's syndrome which emphasizes the woman's reasonableness and the normal character of her reaction to violence.

Separation assault is also consistent with the behavioral psychology experiments underlying learned helplessness theory.[364] Walker's discussion of Seligman's dog experiment barely mentions the cages in which the dogs were held.[365] Yet if the dogs had not been trapped, the shocks could not have had the same debilitating effect. Walker also described a less famous learned helplessness experiment in which baby rats were repeatedly held until they ceased struggling: when placed in water, the rats drowned because they sank immediately or gave up swimming soon. The rats were not shocked — it was essentially an experiment in captivity.[366] Captivity is an important though under-

361. 264 Cal. Rptr. at 178.

362. 264 Cal. Rptr. at 181. The night of the killing, he said he did not think he would let her live until morning. 264 Cal. Rptr. at 171.

363. The defendant had repeatedly left her husband, but "[b]y a mixture of threats and cajoling, he invariably convinced her to take him back." 264 Cal. Rptr. at 171.

364. LENORE WALKER, *supra* note 40, at 45-47.

365. In derivative descriptions of learned helplessness, the cages may virtually disappear as a factor in creating helplessness. *See, e.g.*, GONDOLF & FISHER, *supra* note 12, at 13 ("The animals after a series of intermittent electric shocks, eventually became immobilized. They could not escape from their cages even when an open route was provided for them.").

366. LENORE WALKER, *supra* note 40, at 46-47.

emphasized component of learned helplessness — not merely the result of a psychological process that makes a woman unable to get out.

The question "why didn't she leave?" reflects a cultural failure to recognize the bars that imprison the woman in a violent marriage. Since separation assault appears in the cases where women are killed or harmed as well as the self-defense cases, the concept of separation assault helps reveal the real and deadly constraints within which learned helplessness develops. The concept of separation assault thus does not challenge the concepts of battered woman's syndrome and learned helplessness. Rather, it explains the experience of many women who may not fit well with the phenomena that distinguish learned helplessness.[367] For example, in *Fennell v. Goolsby,*[368] a federal district court described Karen Anne Fennell as an atypical battered woman because she had obtained a court order to have her husband ejected from the home and had been separated for six months.[369] She had suffered incessant threats and harassment during the separation.[370] The concept of separation assault would have helped refute the court's assumption that typical battered women do not seek court orders and emphasized the need for expert testimony to explain to the jury the link between Karen Anne Fennell's experience and that of other battered women.

Finally, naming separation assault cannot end the need for expert testimony on the subject of battered woman's syndrome and learned helplessness. Collectively, the jury can only "know" what it is possible for them to discuss. Women will still find it impossible to incorporate our own experience in the jury room unless the lens through which we perceive battered women has been entirely transformed. Men will also remain unable to discuss their experience as witnesses to violence against women or their capacity to seek control violently. As long as we have no way to discuss or understand the violence many of us have experienced — or to sort out what we have heard from others — there remains a critical need for expert testimony to explain to the jury things beyond their capacity for collective knowledge and discussion, even if these things are within their individual personal experience.

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367. Blackman, *supra* note 3, at 127-28 (noting that even severely battered women may not fit the images described by battered woman syndrome and learned helplessness descriptions).

368. 630 F. Supp. 451 (E.D. Pa. 1985).

369. 630 F. Supp. at 459-60 & n.4.

370. 630 F. Supp. at 457. The court found it had been error to exclude battered woman's syndrome testimony, but not constitutional error for purposes of habeas corpus. 630 F. Supp. at 460-61. Even if it were constitutional error, it was harmless beyond a reasonable doubt because two psychiatrists testified to her mental state. 630 F. Supp. at 461.

*Questions of Timing, Captivity, and "Objective" Perception*

The concept of "separation assault" brings the ghosts of dead women — women slain by their abusers — into court to stand beside the woman accused of killing an abusive spouse. The facts behind many, perhaps most,[371] self-defense cases reveal that the woman's separation has been repeatedly and successfully attacked before she finally kills her abuser.[372] With its implicit reminder of women killed during separation attacks, the concept of separation assault makes sense of the woman's fear of death and her compliance in the face of the violence that ended her previous separations. Further, by describing an assault that by its nature takes place over time, the concept of separation assault extends the time frame weighed by the court and expands the relevance of past attacks on the woman.[373] Finally, of crucial impor-

371. We will not know how many are separation attacks until we ask question designed to elicit information about the various types of assault leveled against the woman's moves to separate. The facts that appear in court opinions may include some — but not all — of the ways the woman's separation was attacked.

372. Ann Jones vividly describes the assaults on the efforts to separate of many women who ultimately killed battering men, either during or after the separation attack, often after being held prisoner or prevented from leaving at all in a variety of ways:

> Homicide is a last resort, and it most often occurs when men simply will not quit. As one woman testified at her murder trial, "It seemed like the more I tried to get away, the harder he beat me." Gloria Timmons left her husband, but he kept tracking her down, raping and beating her; finally when he attacked her with a screwdriver, she shot him. Patricia Evans filed for divorce, but her husband kept coming back to beat her with a dog chain, pistol-whip her, and shoot at her. At last, after she had been hospitalized seven times, she shot him. . . . Janice Strand was forced to return to her husband when he threatened her parents' lives. Patricia Gross' husband tracked her from Michigan to Mississippi and threatened to kill her relatives there to force her to return to him. . . . Mary McGuire's husband, teaching submission, made her watch him dig her grave, kill the family cat, and decapitate a pet horse. When she fled he brought her back with a gun held to her child's head. . . . Agnes Scott's husband found her and cut her up seven years after she left him. There are cases on record of men still harassing and beating their wives twenty-five years after the wives left them and tried to go into hiding. If researchers were not quite so intent upon assigning the pathological behavior to the women, they might see that the more telling question is not "Why do the women stay?" but "Why don't the men let them go?"

JONES, *supra* note 21, at 298-99.

373. Shifting the time frame may also be useful in jurisdictions that impose a duty to retreat before using deadly force in self-defense. Retreat can be reconceptualized as a question of the scope of the attack. First, the prevalence of separation attack means that retreat may only stimulate the man's violence. Second, by expanding the description of the time period involved in the assault on the woman, the concept of separation assault helps move toward dynamic portrayal of the power and control in the relationship. Finally, recognizing separation assault would permit us to argue that a woman need only fulfill her duty to retreat once — that she need not retreat an unlimited number of times from dangerous assaults — and that any woman who has had her separation violently attacked has already fulfilled her duty to retreat. For this question, at least, the proof of past separation assault could itself be taken as the answer to a legal question.

Although only a minority of states impose a duty to retreat when an individual is attacked in the home by another legal resident of that home, see Thomas Katheder, Case Note, *Lovers and Other Strangers: Or, When Is a House a Castle,* 11 FLA. ST. U. L. REV. 465, 473-74 nn.40-41 (1983), the question "why didn't she leave" is, subtextually, a question of retreat any time it is posed in relation to the period directly preceding the assault, rather than to the woman's role in the entire relationship. *See* Walker, Thyfault & Browne, *Beyond the Jurors' Ken: Battered Women,* 7 VT. L. REV. 1, 5 (1982). Retreat is a hidden question in cases like *Stewart* and *Norman,*

tance in women's self-defense claims, this reconceptualization of the assault on the woman helps clarify the existence of imminent danger of death or great bodily harm.

Imminence has proved crucial in cases involving the death of sleeping husbands. Two states have recently held that women who shot sleeping husbands were not entitled to jury instructions on self-defense because the woman faced no *imminent* danger of death or grave bodily harm.[374] This meaning of imminent harm is not universal. "Imminent" is often distinguished from "immediate," and courts and scholars have criticized decisions that confuse the two.[375] The Model Penal Code does not require that the danger actually be immediate: rather, the actor must believe that the defensive action is immediately necessary and that the force against which she defends will be used on the present occasion, "but he [sic] need not apprehend that it will be immediately used."[376] Some states have overturned jury instructions that required that the attack on the woman pose an "immediate" danger of death or great bodily harm, and have upheld statutory standards that require only that the harm be "imminent," a term that broadens the context to include more of the facts and circumstances of the woman's experience in the relationship.[377] Even when a statute required "immediate danger," one court has required an overall consideration of the woman's circumstances and described as "imminent," rather than immediate, the threat necessary to justify the use of deadly force.[378] Therefore, the recent decisions construing imminence as virtually equivalent to immediacy place significant limits on the ability of women to raise claims that they acted in self-defense.

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in which the woman's ability to leave the house rather than shoot her abuser is explicitly raised by the majority opinions. State v. Stewart, 763 P.2d 572, 578 (Kan. 1988); State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989). By shifting the lens to emphasize prior assaults on separation, women who have fled in the past can be shown to have fulfilled a duty to retreat — whether this duty is explicitly imposed by law or implicitly read into a situation by the way a judge perceived the facts.

374. *Stewart*, 763 P.2d at 573; *Norman*, 378 S.E.2d at 8-9; *see also* People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

375. *See, e.g., Norman*, 378 S.E.2d at 13 (noting that interpreting "imminent" to mean "immediate" effectively denies a woman the right to self-defense); GILLESPIE, *supra* note 11, at 64-77, 185-87; *see also* State v. Hodges, 716 P.2d 563, 570-71 (Kan. 1986). *But see* Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 29 n.107 (common law usually equated imminence with immediacy, though Model Penal Code does not).

376. MODEL PENAL CODE § 3.04 cmt. 2(c)(1985), *quoted in Norman*, 378 S.E.2d at 19 n.1 (Martin, J., dissenting).

377. *See* GILLESPIE, *supra* note 11, at 185-87; *see also Hodges*, 716 P.2d 563; State v. Osbey, 710 P.2d 676 (Kan. 1985), State v. Hundley, 693 P.2d 475 (Kan. 1985).

378. State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986); *see also* State v. Wanrow, 559 P.2d 548 (Wash. 1977). The jury instruction using an immediacy standard was held to overly restrict the inquiry into the defendant's circumstances. 559 P.2d at 555-56.

*State v. Stewart*[379] is the latest in a line of Kansas cases to grapple with the meaning of "imminent" and the relevant context for evaluating the woman's action. *Stewart* marks a return to a requirement of immediacy despite a factual background that strongly suggested an expanded contextual approach was relevant. Peggy Stewart married Mike Stewart in 1974.[380] She had two young daughters, Carla and Laura, from previous marriages. Mike was abusive from the beginning. Peggy soon developed severe psychological problems and was treated for schizophrenia.[381] Mike tampered with her medication, forcing her to take too much at times and to do without her medication at other times.[382] Mike severely abused Peggy's daughter Carla. When he ordered Peggy to kill and bury Carla, Peggy filed for divorce,[383] but the case does not indicate that she followed through with the divorce action. When Carla was twelve years old, Mike threw her out of the house with "no coat, no money, and no place to go."[384] He forbade Peggy to have any contact with Carla.[385] Laura left home as soon as she could.[386]

Both the majority and dissenting opinions in *Stewart* chronicle an extraordinarily violent and abusive marriage in which Peggy's life was repeatedly threatened. Mike shot Peggy's cats and then held the gun to Peggy's head, threatening to shoot;[387] another time, he threatened her with a loaded shotgun. She told her friends she believed he would kill her one day.[388] Finally, Peggy ran away to Laura's house in another state.[389] Peggy was suicidal, and Laura had her admitted to a mental hospital, where she was diagnosed as having reacted to an overdose of her medication.[390] Though Peggy told a nurse that she felt like she wanted to shoot Mike, the nurse noted that Peggy's main emotion seemed to be hopelessness.[391] Mike telephoned the hospital

379. 763 P.2d 572 (Kan. 1988).

380. 763 P.2d at 574.

381. 763 P.2d at 574.

382. 763 P.2d at 574 (made her take more than prescribed medication); 763 P.2d at 581 (Herd, J., dissenting) (overdosed her on medication and then cut it off).

383. 763 P.2d at 574.

384. 763 P.2d at 574.

385. 763 P.2d at 574.

386. 763 P.2d at 581 (Herd, J., dissenting).

387. 763 P.2d at 575.

388. 763 P.2d at 575.

389. The court states that this was the first time she left Mike without telling him. 763 P.2d at 575. However, it could not have been her first attempt to separate, since the facts reveal that a divorce action was at least undertaken at some earlier time.

390. 763 P.2d at 575.

391. 763 P.2d at 581 (Herd, J., dissenting).

to say he was coming to get her, and she agreed to leave with him.[392] At trial, she testified that she decided to go with him because the hospital did not provide the medical help she needed.[393]

Mike drove Peggy back to Kansas. He told her that "if she ever ran away again, he would kill her."[394] He "forced Peggy into the house and forced her to have oral sex several times"[395] with such force that the inside of her mouth was bruised[396] — that is, he raped her repeatedly — while telling her how much he preferred other women. She discovered bullets and a loaded gun, which frightened her because he had promised to keep his guns unloaded.[397] She hid the gun.[398] Mike made repeated remarks indicating that "she would not be there long, and could not take her things where she was going," which led her to think that he meant she would soon be dead.[399] He ceased the abuse for a brief period while his parents came over to visit, then forced her to perform oral sex again and demanded that she come to bed with him. As he slept, she heard voices telling her "kill or be killed." Peggy got the gun she had found and hidden earlier, and she shot Mike as he slept.[400]

The Kansas Supreme Court held Peggy was not entitled to a jury instruction on self-defense, since she was in no imminent danger when she shot Mike. "Under such circumstances, a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse."[401] The court distinguished three of its prior cases in which abused women had killed violent husbands. In *State v. Hundley,*[402] *State v. Osbey,*[403] and *State v. Hodges,*[404] the Kansas Supreme Court had held that the statutory requirement of imminence permitted consideration of the history and gradual build-up of violence within a relationship as well as the immediate acts of the batterer. Although

392. 763 P.2d at 581 (Herd, J., dissenting).

393. 763 P.2d at 575.

394. 763 P.2d at 581 (Herd, J., dissenting).

395. 763 P.2d at 575.

396. 763 P.2d at 581 (Herd, J., dissenting).

397. 763 P.2d at 575.

398. 763 P.2d at 575.

399. 763 P.2d at 575.

400. 763 P.2d at 575.

401. 763 P.2d at 578. The court also overruled an earlier holding that measured the reasonableness of perception of harm from the subjective viewpoint of the battered woman. 763 P.2d at 579 (overruling in part State v. Hodges, 716 P.2d 563 (Kan. 1986)). *See infra* text accompanying notes 425-27.

402. 693 P.2d 475 (Kan. 1985).

403. 710 P.2d 676 (Kan. 1985).

404. *Hodges,* 716 P.2d 563.

none of these had directly confronted the question of the propriety of giving a self-defense instruction,[405] they had rejected the use of the term "immediate" in explaining the imminence standard.[406] The *Stewart* court did not directly overrule its prior holdings but distinguished the previous imminence cases as "involv[ing] a threat of death to the wife and a violent confrontation between husband and wife, contemporaneous with the shooting."[407] As the *Stewart* dissent pointed out, however, this holding effectively replaced the state's prior definition of "imminent" with an immediacy standard.[408]

In holding that there was no "imminent" threat to Peggy, the majority ignored the imprisoning effect of Mike's bringing her back from another state after her effort to separate and his threat to kill her if she left again. In contrast, the dissent emphasized Mike's threat to kill Peggy if she separated from him again.[409] The concept of an assault on separation continued over time may help courts appreciate the crucial distinction between imminence and immediacy in self-defense cases such as *Stewart.*

Separation assault can help reveal captivity. In *Hundley,* the Kansas Supreme Court drew an analogy between battered women and hostages or prisoners of war.[410] The *Stewart* dissent repeated this analogy and argued the *Stewart* holding would preclude finding imminence in "a hostage situation where the armed guard inadvertently drops off to sleep and the hostage grabs his gun and shoots him."[411] This could be a persuasive analogy: If a hostage were told, "you will be killed in three days," the danger would still appear imminent even if not immediate.[412] The question of imminence therefore appears to be affected by an assessment of the nature and degree of the hostage's captivity; the persuasive power of the hostage analogy depends on the recognition that the woman in an abusive relationship is not free to leave. At issue is our understanding of the woman's functional autonomy. The key difference between the analysis of the majority and dissent in *Stew-*

405. 763 P.2d at 578. *Hodges,* for example, dealt with the language of the self-defense instruction. 716 P.2d at 570-71. The state apparently did not object to the giving of a self-defense instruction in that case.

406. 763 P.2d at 584-85 (Herd, J., dissenting).

407. 763 P.2d at 578.

408. 763 P.2d at 584-85 (Herd, J., dissenting).

409. 763 P.2d at 581 (Herd, J., dissenting).

410. State v. Hundley, 693 P.2d 475, 479 (Kan. 1985).

411. 763 P.2d at 584 (Herd, J., dissenting).

412. I am indebted to Mary Coombs for this discussion. Conversation with Mary Coombs, (Sept. 1990); *see also* M.J. Willoughby, Comment, *Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?,* 38 U. KAN. L. REV. 169, 184-85 (1990) (comparing battered women to hostages).

*art* is how seriously each takes the constraints Mike imposed on Peggy's capacity to separate.

Had the *Stewart* majority been able to perceive Mike's successful assault on Peggy's separation, they could have found a common thread of separation assault linking *Stewart* with *Hundley, Osbey,* and *Hodges.*[413] In *Hundley,* the wife shot her husband as he attacked her in the motel room to which she had moved after leaving him.[414] In *Osbey,* the wife had insisted on a separation after a history of substantial abuse.[415] The husband was in the process of moving out when he changed his mind, telling a friend he had put too much time into his wife's house and that "it would be either [him] or her."[416] He had [previously] threatened her with a gun.[417] She shot him when she thought he reached for a weapon as he attempted to return some of his belongings to the apartment.[418] In *Hodges,* the wife had continually left her husband early in their marriage only to have him pursue her and brutally fetch her back. On one such occasion

> [H]e took her to a wooded location where he beat her, broke her jaw, and said she was either going to live with him or she wasn't going to live. He left her there unconscious, but eventually returned, took her to the hospital, and told her to tell the hospital staff she fell down. She returned home with him because he had her children.[419]

She finally succeeded in divorcing him but reunited thirteen years later because he promised he had changed.[420] When the beatings did not stop, she left again; however, when he again brought her back, she gave up trying to leave him. He had also threatened her family if they ever helped her leave him.[421] She shot him as he engaged in yet another bout of violence.[422]

The concept of separation assault thus bridges the difference between cases like *Stewart* that involve sleeping husbands and those like *Hundley, Osbey,* and *Hodges* that involve waking husbands. In

413. Unsuccessful separation attempts are also present in many other cases on self-defense and battered woman's syndrome. For example, in State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986), the woman told the man in the midst of a long day of violence that she was tired of being hurt and that she would leave him. He "pulled out his gun and threatened to kill her if she left." 719 P.2d at 1272. Similarly, in Smith v. State, 277 S.E.2d 678 (Ga. 1983), Jo Smith tried to flee before her attacker slammed the door on her; finally, she shot him. 277 S.E.2d at 679.

414. 693 P.2d at 476.

415. 710 P.2d at 677-78.

416. 710 P.2d at 678.

417. 710 P.2d at 678.

418. 710 P.2d at 678.

419. 716 P.2d at 566-67.

420. 716 P.2d at 566-67.

421. 716 P.2d at 567.

422. 716 P.2d at 567.

*Hodges,* expert testimony on battered women was allowed in part to "help dispel the ordinary layperson's perception that a woman in a battering relationship is free to leave at any time."[423] This same "perception" clearly underlies the majority opinion in *Stewart,* which, in deciding that Peggy was not in imminent danger, specifically noted that Peggy had access to the car keys — without reviewing the threat to her life if she used them to escape.[424]

Finally, the *Stewart* opinion emphasized a requirement of objective reasonableness in the battered woman's self-defense claims. In *Hodges,* Kansas had held that "the jury must determine, from the viewpoint of the defendant's mental state, whether defendant's belief in the need to defend herself was reasonable."[425] *Stewart* overruled *Hodges* on this point, holding that after determining whether the defendant subjectively sincerely and honestly believed it necessary to kill in self-defense, "We then use an objective standard to determine whether defendant's belief was reasonable — specifically, whether a reasonable person in defendant's circumstances would have perceived self-defense as necessary."[426] The objective standard to be applied is how a "reasonably prudent battered wife" would have perceived the aggressor's demeanor.[427] Separation assault is important here as well. The cultural redefinition of the dangers of separation goes beyond the individual woman's "subjective" perception of danger; it does not merely bolster her argument that under her particular, individual circumstances, her subjective perceptions (though unreasonable for a "normal person") persuaded her of danger. Rather, separation assault helps shift what judges and jurors "objectively" know as truth: To the extent that objective standards embody in law the shared cultural norms of society, separation assault helps restructure those norms to allow "objective" perception itself to track more closely the painfully accrued understanding of women who have lived with violent partners.

A recent North Carolina self-defense case involving a sleeping husband exemplifies perhaps even more dramatically than *Stewart* the urgent need for a better judicial understanding of separation assault. In *State v. Norman,*[428] a North Carolina court of appeals held that a woman who had shot her sleeping husband was entitled to a jury instruc-

423. 716 P.2d at 567.

424. State v. Stewart, 763 P.2d 572 (Kan. 1988).

425. State v. Hodges, 716 P.2d 563 (Kan. 1985).

426. 763 P.2d at 579.

427. 763 P.2d at 579.

428. 366 S.E.2d 586 (N.C. Ct. App. 1988), *revd.,* 378 S.E.2d 8 (N.C. 1989).

tion on perfect self-defense. The North Carolina Supreme Court reversed, holding that there was no imminent danger to the wife.[429] Judy Norman had been subjected to vicious torture and degradation over a period of twenty years. Her husband, John Thomas (J.T.) Norman, had beaten her, thrown objects at her, put out cigarettes on her skin, and broken glass on her face. He forced her to prostitute herself daily to support him and then ridiculed her to family and friends. He called her a "dog," forced her to bark like a dog, eat pet food out of pet dishes, and sleep on the floor.[430] He deprived her of food for days at a time and had "often stated both to defendant and others that he would kill [her] . . . [and] threatened to cut her heart out."[431] She left him several times, but each time he found her, took her home, and beat her.[432]

The thirty-six hours before Judy Norman shot her husband were marked by incredible violence, which escalated after her husband was arrested for drunken driving. He beat her almost continuously, refused to eat food that her hands had touched, refused to let her eat for a period of days, threatened to cut off her breast and "shove it up her rear end,"[433] and put out a cigarette on her chest.

On the first evening after the drunken driving arrest, Judy called the police for help. An officer told her they could only help if she filed a complaint ("[took] out a warrant on her husband").[434] She replied that "if she did so [her husband] would kill her."[435] An hour later, she swallowed a bottle of "nerve" pills,[436] and her family called for help. Her husband told the paramedics to let her die and repeatedly obstructed their attempts to save her.[437] The police did not arrest him for attempting to block her rescue: "When he refused to respond to the officer's warning that if he continued to hinder the attendants, he would be arrested, the officer was compelled to chase him back into the house."[438] At the hospital, Judy Norman spoke to a therapist and discussed filing charges against her husband and having him committed for treatment.[439] She seemed depressed and said she should kill

429. State v. Norman, 378 S.E.2d 8, 12 (N.C. 1989).
430. 378 S.E.2d at 9-10.
431. 366 S.E.2d at 587.
432. 366 S.E.2d at 589.
433. 366 S.E.2d at 588.
434. 378 S.E.2d at 19 (Martin, J., dissenting).
435. 378 S.E.2d at 19 (Martin, J., dissenting).
436. 366 S.E.2d at 588.
437. 366 S.E.2d at 588.
438. 378 S.E.2d at 19 (Martin, J., dissenting).
439. 378 S.E.2d at 10 (Martin, J., dissenting).

him for what he had done to her. She stayed at her grandmother's that night.[440]

The next day, she went to the mental health center to discuss charges and the possibility of her husband's commitment and "confronted [him] with that possibility."[441] Her husband told her that if he saw them coming to take him away, he would cut her throat before he could be committed.[442] She went to apply for welfare benefits,[443] but her husband followed her there, interrupted her interview, and forced her to return home with him.[444] He continued to beat her and abuse her physically and would not permit her to eat or feed her children.[445] He later lay down to take a nap, but made her lie on the concrete floor next to the bed, because "dogs" couldn't lie on beds.[446] While he slept, her infant grandchild began to cry. She took the baby to her mother's house for fear it would awaken him. Judy's mother had placed a gun in her purse from fear of Judy's husband. At her mother's house, Judy asked for an aspirin, found the gun, returned home, and shot him.[447]

The North Carolina Supreme Court held that

> *all* of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband. There was no action underway by the decedent from which the jury could have found that the defendant had reasonable grounds to believe either that a felonious assault was imminent or that it might result in her death or great bodily injury. Additionally, no such action by the decedent had been underway immediately prior to his falling asleep.[448]

It is hard to know where to begin to discuss *Norman.* In the face of all the grave danger and murderous violence the opinion overlooks,[449] it seems presumptuous to claim that the concept of separa-

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440. 378 S.E.2d at 20 (Martin, J., dissenting).

441. 378 S.E.2d at 11.

442. 378 S.E.2d at 11.

443. 378 S.E.2d at 11. This may have been another separation attempt.

444. 378 S.E.2d at 11.

445. 378 S.E.2d at 11.

446. 378 S.E.2d at 20 (Martin, J., dissenting).

447. 378 S.E.2d at 20 (Martin, J., dissenting).

448. 378 S.E.2d at 13.

449. In *Norman,* so much disappears from *both* the majority and dissenting opinions. Forced prostitution — essentially, third-party rape — must by the terms of the discussion have been considered something other than "great bodily harm." Or, perhaps, since she had experienced this particular bodily harm for many years, it no longer amounted to "great" harm. The *Norman* court indicated that the type of harm required was "life-threatening" injury and denied that her husband had inflicted any such harm on her, "even during the 'reign of terror.'" 378 S.E.2d at 15. In addition, the facts of the case show that he had prevented her from eating for three days and had given no indication of when he might permit her to eat again. Surely this also

tion assault could have remade the *Norman* holding. Yet the idea that Judy Norman was *not* captive is crucial to the majority's finding that she faced no imminent threat. The dissent is clearly groping for just such a concept in its attempt to describe what had happened to her. The dissent first quotes a psychologist, an expert witness, who compared Judy Norman to a brainwashed prisoner of war and described her as "a woman incarcerated by abuse, by fear, and by her conviction that her husband was invincible and inescapable . . .":[450]

> Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. There was no place to go . . . . [S]he had left before; he had come and gotten her. She had gone to the Department of Social Services. He had come and gotten her. The law, she believed the law could not protect her, no one could protect her, and I must admit, looking over the records, that there was nothing done that would contradict that belief.[451]

The concept of separation assault addresses a major problem with sleeping husband cases like *Norman* and *Stewart*. These cases look to courts like executions; judges express concern over the specter of homicidal self-help for battered wives.[452] Separation assault replaces this image — as the dissenting judges in *Stewart* urged — with the paradigm of hostages resisting their captors. We believe the danger to a hostage is imminent *both* because the force used to hold them there is apparent *and* because our cultural knowledge includes the memory of the many hostages who have been harmed in the past. Courts might see Judy Norman very differently if they understood that she could as easily be Mrs. Godfrey (shot to death in her mother's trailer), or Rachel Pessah (the dead wife in *Berry*), or Grace Morales (the murdered mother in *Garcia*). By emphasizing the similarities between past and current uses of force, by emphasizing that force which holds the woman captive, and by persuasively invoking the shadow of many past

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threatened great bodily harm. Also, the day before he died, her husband had essentially attempted her murder: rather than fulfilling his duty to save her life when she attempted suicide, he had done all he could to cause her to die and prevent others from saving her. He had sworn persuasively to her and to others that he would kill her in the future. Her whole family was convinced that he would kill her, and would kill them if they intervened. 378 S.E.2d at 19-20 (Martin, J., dissenting).

450. 378 S.E.2d at 17 (Martin, J., dissenting).

451. 378 S.E.2d at 17 (Martin, J., dissenting). The dissent concludes that a juror could have found "that defendant believed that her husband's threats to her life were viable, that serious bodily harm was imminent, and that it was necessary to kill her husband to escape that harm . . . [a] juror could find defendant's belief in the necessity to kill her husband not merely reasonable but compelling." 378 S.E.2d at 20 (Martin, J., dissenting).

452. *See, e.g., Norman*, 378 S.E.2d at 15 ("Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem."); *see also* State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) ("To hold otherwise in this case would in effect allow the execution of the abuser for past or future acts and conduct.").

assaults that have resulted in the death of women, separation assault helps shift the paradigm from the image of vigilantism to the image of a hostage resisting her own death. Here, at the intersection of legal standards and cultural perception, separation assault helps to reveal that by its very nature battering implicates questions of both violence and power, and to make possible a greater cultural understanding of the lives and experience of women.

## CONCLUSION

Violence is a way of "doing power" in a relationship;[453] battering is power and control marked by violence and coercion. A battered woman is a woman who experiences the violence against her as determining or controlling her thoughts, emotions, or actions, including her efforts to cope with the violence itself. Many, many women experience such violence in our society. The precise response of any woman is likely to be determined by her life circumstances and family situation.

We should know this. Nothing in the preceding paragraph should make women ashamed of being battered. However, the interrelationship among cultural images, legal images, litigation, and substantive law has made it difficult for women to understand our experience of violence. The stereotypical image of a battered woman — dysfunctional, helpless, dependent — is alien to the self-image and self-knowledge of most women who encounter violence from our partners. Attempts to counter these stereotypes have interacted with other contemporary social and legal developments: each block of legal reform (such as the development of expert testimony on battered women) has interacted with the rest of the legal structure (such as the advent of no-fault divorce, or the evidentiary rules governing the admission of expert testimony) to pose continued difficulties in recognizing women's experience in law.

These reciprocal, mutually reinforcing forces of popular perception, law, and litigation have made it difficult for women to identify ourselves and our experience as part of a continuum of power and domination affecting most women's lives. The challenge is to identify legal and social strategies that will allow us to change law and culture simultaneously, by illuminating the context of power and control within which a woman lives and acts. Naming separation assault can help reveal the overall struggle for power that is the heart of the battering process: it describes a particularly dangerous attack hitherto hidden in the phrase "*domestic* violence," emphasizes the assault on

453. STETS, *supra* note 64, at 109.

the woman's autonomy and volition, and offers insights that can help resolve several troubled areas of law. This intervention is both legal and cultural, a way to rewrite legal doctrine by changing the way we understand the questions and categories involved.

I offer the theory of separation assault as part of a feminist approach to law reform in this area: working from women's experience, we must develop legal and cultural strategies that more clearly reveal the struggles we face. We need many such interventions. The key to more widespread change lies in the way transformed legal and social images of women will in turn affect women's experience and understanding of our lives, allowing women to recognize our experience as part of a larger system of subordination so that we can structure our understanding of our needs in relation to those of other women facing oppression. Women's recognition of our own oppression has been slowed by the images that law has helped create. As we come to recognize our experiences as oppression, rather than personal insufficiency, weakness, or "unhappiness" in marriage — for example, recognizing separation assault rather than "failure" to leave a relationship — we will be better able to address the dangers we face and realize our individual and collective capacity for change.

# Psychological Mechanisms in Acute Response to Trauma

Richard J. McNally

*Traumatic events are common, but posttraumatic stress disorder (PTSD) is relatively rare. These facts have prompted several questions: What variables increase risk for PTSD among trauma-exposed people? Can we distinguish between pathologic and nonpathologic responses to traumatic stressors? If so, what psychobiological mechanisms mediate pathologic responses? Prospective studies have identified certain individual difference variables as heightening risk (e.g., lower intelligence, negative personality traits). Studies on peritraumatic and acute-phase response have identified certain dissociative symptoms (e.g., time slowing, derealization) and cognitive appraisal (e.g., belief that one is about to die) as harbingers of later PTSD. Negative appraisal of acute symptoms themselves may foster chronic morbidity (e.g., that symptoms signify shameful moral weakness or prefigure impending psychosis). Further attempts to elucidate pathologic mechanisms in the cognitive psychology laboratory and via biological challenges are warranted.* Biol Psychiatry 2003;53: 779–788 © *2003 Society of Biological Psychiatry*

**Key Words:** Acute stress disorder, dissociation, posttraumatic stress disorder, trauma

## Introduction

Exposure to trauma is common, but posttraumatic stress disorder (PTSD) is relatively rare. In the National Comorbidity Survey, 60.7% of American adults reported experiencing at least one traumatic event during their lives, but only 8.2% of the men and 20.4% of the women ever developed PTSD (Kessler et al 1995). The marked discrepancy between the rate of trauma exposure and the prevalence of PTSD has raised two questions. First, what are the risk factors and protective factors that influence whether a person develops PTSD? Second, what are the psychobiological mechanisms that mediate acute responses, especially pathologic ones, to traumatic events? Research addressing the first question has begun to yield some answers (Brewin et al 2000; Yehuda 1999; Yehuda and McFarlane 1995). Research addressing the second question has scarcely begun.

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My review of risk factors is brief and perforce selective. I concentrate on mechanisms mediating acute (peritraumatic and short-term) responses to traumatic events and provide suggestions for future inquiry. As will become apparent, this review raises more questions than it answers.

An important unanswered question is whether we can distinguish between normal, expectable reactions to these events and abnormal, pathologic reactions to them. By definition, traumatic events are extremely upsetting, but if emotional distress per se does not necessarily signify mental illness, then we must find some way of distinguishing pathologic from nonpathologic reactions.

One approach is suggested by the work of Wakefield (1992). According to Wakefield, disorder amounts to harmful dysfunction. Ascriptions of disorder are warranted only when harm (e.g., emotional pain) arises from dysfunction in evolved psychobiological mechanisms that regulate cognition, emotion, and behavior. If extreme distress following exposure to trauma arises from mechanisms that are functioning as natural selection has shaped them to function, then there is no internal dysfunction and therefore no disorder.

Applying his harmful dysfunction criteria, Wakefield (1996) has criticized the concept of acute stress disorder (ASD). He does not, of course, deny that people who qualify for ASD are suffering intensely. Rather, he questions whether this suffering reflects derangements in underlying, evolved mechanisms for coping with overwhelming events. Diagnosing ASD may amount to pathologizing normal, human reactions to extreme events.

Unfortunately, Wakefield's framework requires psychopathologists to distinguish evolved adaptations from other features of the human phenotype, and this task can be daunting (McNally 2001a). Nevertheless, his work points to an important challenge facing the trauma field: How do we tell the difference between acute reactions to trauma arising from properly functioning mechanisms from those arising from dysfunction in these mechanisms?

## Psychological Risk Factors for PTSD

A risk factor is associated with an increase in the likelihood of disorder emergence. Some risk factors are directly linked to underlying causal mechanisms, whereas others



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are merely correlated with them, as smoke is to fire (McNally 2001b). Identifying risk factors may provide clues to mechanism and may offer hope of preventing disorder. Risk factor research, however, can be controversial. Some people are offended when scientists uncover risk factors for PTSD, mistakenly believing that such work entails blaming sufferers for their plight. This view conflates moral and scientific discourse. Identifying variables that increase risk for PTSD no more blames the victim than does identifying variables that increase risk for heart disease, cancer, or any other disorder. Eschewing risk factor research for ideological reasons is unwise. The alternative is to remain in the dark about the causes of PTSD, and ignorance provides a suboptimal basis for prevention and treatment of the disorder.

Trauma-exposed people with either personal (Breslau et al 1991; Smith et al 1990) or family (Breslau et al 1991; Davidson et al 1985) histories of anxiety or mood disorders are more likely to develop PTSD than those without such histories. Retrospective reports of instability in one's family of origin (King et al 1996) and of childhood sexual (Engel et al 1993; Nishith et al 2000) or physical abuse (Bremner et al 1993; Breslau et al 1999) have been linked to increased likelihood of PTSD among those exposed to trauma in adulthood. These variables point to possible mechanisms that might mediate enhanced risk for PTSD later in life. For example, people with anxiety disorders are characterized by pathologic information processing biases (McNally 1996) that may render them especially susceptible to developing PTSD, should they be exposed to traumatic events. Individuals with histories of childhood sexual and physical abuse may have failed to acquire adaptive methods of coping with stress that later render them vulnerable to develop PTSD in adulthood.

Other candidate risk factors have been identified among people who already have PTSD. Unfortunately, cross-sectional research findings are often difficult to interpret; a putative risk factor may merely be a consequence of the disorder, not one of its causes. For example, Vietnam combat veterans with PTSD report lower levels of social support than do combat veterans without the disorder (e.g., Boscarino 1995; Keane et al 1985). It is unclear, however, whether low social support impedes recovery from trauma, or whether acute symptoms (e.g., irritability) alienate possible sources of social support, or both.

Other cross-sectional research has uncovered correlates of PTSD that are plausible candidates for being antecedent risk factors. For example, McNally and Shin (1995) found that lower intelligence was associated with higher levels of PTSD symptoms among Vietnam combat veterans, even after they controlled statistically for self-reported levels of combat exposure. This finding has been replicated several times (Kaplan et al 2002; Macklin et al 1998; Silva et al 2000; Vasterling et al 1997, 2002). For example, Silva et al (2000) found that intelligence quotient (IQ) was the best predictor of resilience against PTSD among inner city children and adolescents who had been exposed to a range of traumatic events (e.g., sexual abuse, witnessing violence). For those with above average scores, 67% had neither PTSD nor subthreshold PTSD. For those with below average scores, only 20% had no PTSD symptoms. These data suggest that whatever IQ tests are measuring, it protects against PTSD when trauma strikes. The mechanisms mediating this phenomenon are unclear. One facet of intelligence is problem-solving ability, and recovering from exposure to trauma is most certainly a problem to be solved. Another possibility is that individuals with higher IQ and superior language skills may be those most likely to impose meaning on their traumatic experiences, thereby fostering their recovery from them. Ehlers and Clark (2000) believe that trauma survivors with lower IQ may process perceptual features of traumatic events at the expense of semantic (meaning) features, thereby increasing risk for later PTSD. Suffice it to say, more research is needed to elucidate how higher intelligence protects against PTSD.

Consistent with the cognitive ability studies are findings showing that neurologic soft signs are more common in trauma-exposed people with PTSD than among trauma-exposed people without PTSD (Gurvits et al 2000). These nonspecific indicants of central nervous system abnormality, although assessed in adulthood, often emerge during childhood long before the individuals have been exposed to the traumatic events that incited their PTSD.

Finally, neuroticism, a personality trait reflecting proneness to experience negative emotional states, is associated with PTSD (e.g., Breslau et al 1991; McFarlane 1989). Unfortunately, questionnaire measures of neuroticism have been administered to people who already have the disorder. Accordingly, it is unclear whether elevated scores reflect trauma exposure, PTSD, or antecedent risk for PTSD. About 40% of the variance in neuroticism is attributable to genetic variance (Plomin et al 1997, p. 198). This implies that elevated scores in PTSD patients are unlikely to be wholly a result of exposure to trauma.

The best method for identifying psychological variables that increase risk for PTSD is to administer a battery of measures on many individuals before their exposure to trauma and determine whether any predict subsequent PTSD. This approach rules out the possibility that alleged risk factors are consequences of the disorder.

Such prospective, longitudinal studies are very expensive to conduct. Accordingly, researchers have examined archival data, collected pretrauma, to determine whether any of these variables predict subsequent PTSD. Pitman and his colleagues consulted the military records of

Vietnam veterans and found that trends for lower arithmetic aptitude, self-reported school problems, and lower heart rate distinguished those who later developed combat-related PTSD from those who did not (Pitman et al 1991).

Others have identified personality variables, measured pretrauma, that have predicted PTSD symptoms. Schnurr et al (1993) obtained collegiate Minnesota Multiphasic Personality Inventory (MMPI) scores of Dartmouth College graduates who later served in the Vietnam War. They found that elevations on the Paranoia, Hypochondriasis, Psychopathic Deviate, Paranoia, and Masculinity-Femininity scales predicted PTSD symptoms even after they had controlled statistically for extent of combat exposure. Bramsen et al (2000) found that elevations on a personality measure of "negativism" (akin to neuroticism) predicted subsequent PTSD symptoms among Dutch soldiers who had served as peacekeepers in the former Yugoslavia.

In a follow-up to our cross-sectional study on intelligence and PTSD (McNally and Shin 1995), our research group obtained predeployment intelligence test scores for men who had served in Vietnam (Macklin et al 1998). The mean predeployment IQ for those who later developed PTSD was in the average range (m = 106.3), whereas the mean predeployment IQ for those who did not develop PTSD was well above average (m = 119.0). Lower predeployment intelligence predicted current severity of PTSD symptoms, even after we controlled statistically for extent of self-reported combat exposure. Severity of current PTSD symptoms was unrelated to differences between predeployment and current intelligence. Therefore, lower predeployment intelligence increases risk for PTSD rather than PTSD lowering current performance on intelligence tests. Taken together, these findings suggest that above-average intelligence buffered combat veterans against developing PTSD.

### *Limitations of Extant Prospective Studies*

One problem with prospective, longitudinal studies of intelligence, personality, or other variables is that they do not disclose with any precision the psychological mechanisms that mediate pathologic response to trauma. For example, what is it about people who score high on self-report questionnaires of neuroticism that makes them more likely than other people to develop PTSD following exposure to stressful events? Likewise, what is it about above-average intelligence that enables this trait to buffer trauma-exposed people against PTSD? Granted, intelligence has something to do with problem solving, but what precisely do these individuals do that diminishes their likelihood of PTSD? Questionnaire-based prospective studies can identify statistical risk (and protective) factors for PTSD, but they are suboptimal for identifying the psychobiological mechanisms that mediate response to trauma.

## Peritraumatic Predictors of PTSD

Another approach to studying risk for PTSD is to examine peritraumatic responses that might function as harbingers of later PTSD. These studies are quasi-prospective. Measures are taken after people have been exposed to trauma but long before PTSD has had a chance to develop.[1] Of course, it is impossible to study peritraumatic responses "on-line" as the trauma is unfolding. Accordingly, researchers have done retrospective assessments of the responses of subjects shortly after the trauma.

Peritraumatic dissociative responses have predicted subsequent PTSD in several studies. Assessing Israeli citizens exposed to trauma, Shalev et al (1996) found that derealization and time distortion predicted PTSD status 6 months later. Studying survivors of motor vehicle accidents in Australia, Harvey and Bryant (1998a) identified several peritraumatic predictors of later PTSD: emotional numbing, depersonalization, motor restlessness, and a sense of reliving the trauma reported shortly after the event. Peritraumatic time distortion and a sense of bodily distortion predicted PTSD among French victims of violent crimes (Birmes et al 2001). Peritraumatic dissociative symptoms, especially a sense of time slowing down or speeding up, increased risk of PTSD by nearly a factor of 5 among American survivors of motor vehicle accidents (Ursano et al 1999). Shalev et al (1998) reported that elevated heart rate among civilian trauma survivors, assessed shortly after the event in the emergency room, was associated with the subsequent development of PTSD; however, Blanchard et al (2002) obtained precisely the opposite result: the higher the survivor's heart rate in the emergency room, the less likely the survivor was to develop PTSD. Clearly, more work is needed to ascertain the connection between acute physiologic reactions and later illness.

## Appraisal of Threat and Appraisal of Symptoms

Psychologists have vigorously debated how to define *stressor*. Although some scholars believe that stressors must be defined as pure environmental events uncontaminated by the appraisals of individuals exposed to them (e.g., Dohrenwend and Shrout 1985), others question

[1] According to DSM-IV, PTSD cannot be diagnosed until 1 month has elapsed; however, among those who develop the disorder, PTSD symptoms will almost always be evident immediately after the event. Therefore, any adequate theory of mechanism will need to explain the emergence of symptoms that emerge in the immediate wake of trauma.

whether this is even possible (Lazarus et al 1985). Skeptics believe that events are always mediated by subjective appraisal.

Many PTSD researchers have emphasized that peritraumatic appraisal of threat is a key determinant of whether an event triggers PTSD. Subjective measures of distress or perceived threat (belief that one is about to die) have often been better predictors of PTSD symptoms than have objective measures of danger among combat veterans (King et al 1995), torture survivors (Başoğlu et al 1994), burn victims (Perry et al 1992), and accident survivors (Blanchard et al 1995; Ehlers et al 1998; Schnyder et al 2001).

Varied appraisal of threat may explain surprising findings in the PTSD literature. For example, stressful, but seemingly noncatastrophic, events such as a panic attack (McNally and Lukach 1992), discovering spousal infidelity (Helzer et al 1987), getting divorced (Burstein 1985), having a miscarriage (Engelhard et al 2001), and giving birth (Czarnocka and Slade 2000) have been linked to PTSD onset. Other cases are surprising because PTSD did not develop despite seemingly horrific trauma. For example, 61.1% of American Air Force aviators captured and tortured by the North Vietnamese said that they benefited from their ordeals (Sledge et al 1980). Subjective reports of personal growth during captivity were positively correlated with the brutality of their treatment. Remarkably, very few of them ever developed PTSD (Nice et al 1996). Başoğlu et al (1997) found that left-wing political activists tortured during Turkey's military regime had lower rates of PTSD than did nonactivists who had also been arrested and tortured by the police. The activists scored higher on a scale of psychological preparedness for arrest and torture than did the other torture victims, thereby implying that ideological commitment to a political cause plus psychological stoicism buffered the activists against developing PTSD.

Appraisal of threat, such as believing that one is about to die, is itself a peritraumatic risk factor for PTSD. But pathogenic appraisal is not confined to that occurring solely during the trauma itself. For example, Ehlers and Clark (2000) have proposed that not only does appraisal of the stressor itself influence later PTSD, but that appraisal of acute symptoms likewise affects subsequent morbidity. Occurrence of common acute stress symptoms, such as nightmares and visual flashbacks, may, in turn, be misinterpreted as signs of impending psychosis or moral weakness, further compounding problems (Dunmore et al 1999). Negative appraisal of acute symptoms may motivate cognitive avoidance and attempts to suppress thoughts about the trauma (Harvey and Bryant 1998b), which may, in turn, backfire, causing the symptoms to increase in frequency. This vicious circle may impede recovery from the acute response to trauma.

Global, negative self-relevant appraisal may increase risk for PTSD. For example, Andrews et al (2000) found that shame predicts emergence of PTSD symptoms among victims of attempted or completed sexual or physical assault; however, Delahanty et al (1997) found that survivors of motor vehicle accidents who considered themselves responsible tended to experience less long-term distress than did those who blamed others for the accident. Taken together, these studies suggest two countervailing risk factors. On the one hand, shame, guilt, and self-blame might increase risk for long-term pathology. On the other hand, blaming others for trauma might attenuate the pathogenic effects of self-blame but might render the world more unpredictable, uncontrollable, and dangerous from the standpoint of the survivor, thereby increasing the chances that he or she may develop PTSD.

## Encoding of Traumatic Experience

Unlike other anxiety disorders where the focus concerns future threat, PTSD is fundamentally a disorder of memory (McNally 2003a, 2003b). A prerequisite for any experience to affect memory (and later symptoms) is for it to be encoded. Hence, how traumatic experience gets encoded affects how it will be remembered, thereby determining whether a person recovers from trauma.

Psychologists have tested two theories about how emotional stress affects memory. One theory is based on the work of Yerkes and Dodson (1908), and the other is based on that of Easterbrook (1959). The first theory, popular among some traumatologists (e.g., Joseph 1999), holds that stress enhances memory but only up to a point of optimal arousal. After this point is reached, additional stress begins to undermine encoding, thereby impairing subsequent memory for the experience. Theorists who believe that the relation between arousal and memory is captured by an inverted-U function often invoke the work of Yerkes and Dodson (1908) as providing support for their view; however, its relevance to the encoding and retrieval of traumatic experience is tenuous, at best.

Yerkes and Dodson (1908) investigated how intensity of punishment influences rate of discrimination learning in mice. Mice were exposed to two passageways leading to a nest box. One passageway was white, and the other was black. If a mouse attempted to reach the nest box via the black passageway, it received electric shocks of either weak, medium, or strong intensity. Sooner or later, the mouse learned to take the white passageway, thereby avoiding any further shocks. Yerkes and Dodson found that the rate of learning was a linear function of shock intensity: the stronger the intensity of shock, the faster the mouse learned to discriminate between the passageways.

In subsequent research described in their classic article, Yerkes and Dodson made the task more difficult by having mice learn to discriminate between two passageways that barely differed in brightness (e.g., white vs. gray). When the discrimination was difficult, an inverted-U function described the relation between shock intensity and rate of learning: mice more easily learned to discriminate between passageways that scarcely differed in brightness when shock was of moderate intensity than when shock was either of mild or severe intensity. Suffice it to say that these experiments on visual discrimination learning in mice have doubtful relevance for how people encode traumatic experience. Indeed, there is scant evidence that extremely intense emotional stress blocks the encoding (and therefore later retrieval) of traumatic experience (McNally 2003a).

The preponderance of evidence, clinical as well as experimental, indicates that people encode and remember traumatic experience all too well (McNally 2003a). For example, field studies of witnesses to fatal shootings and other crimes have confirmed that people easily retain these events (Christianson and Hübinette 1993; Cutshall and Yuille 1989; Yuille and Cutshall 1986). Of course, because attentional capacity is always limited and because memory does not operate like a video recorder, only some aspects of a traumatic event will be encoded. This will be especially true for events that unfold very quickly (e.g., an automobile accident vs. an earthquake). If the trauma begins and ends in a matter of seconds, there will be less time for information uptake.

As Christianson (1992) among others have observed, what gets encoded often follows Easterbrook's principle (Easterbrook 1959). This principle holds that the central features of an experience receive encoding priority, often at the expense of peripheral features. For example, a person robbed at gunpoint is more likely to encode features of the robber's weapon at the expense of encoding what kind of shoes he was wearing. If attention is riveted on the most salient and central features of the experience, there may be insufficient attentional capacity to permit encoding of other aspects of the experience. The Easterbrook hypothesis does not preclude the possibility that someone might also encode and retain peripheral details of the traumatic experience. Rather, the hypothesis states that if something fails to get encoded, it will be peripheral details, not the central gist of the experience.

Ehlers et al (in press) have reported data relevant to this hypothesis. They had witnesses and survivors of various traumatic events (e.g., automobile accidents, sexual abuse) complete questionnaires designed to assess the character of their intrusive traumatic recollections. Ehlers et al found that involuntary recollections of the trauma were most often visual; bodily sensations, smells, and sounds were less common. The intrusive visual recollections, such as the headlights of an oncoming car for a survivor of a head-on collision, often pertained to those stimuli that preceded the most traumatic aspect of the experience, such as the collision itself. Ehlers et al interpreted this fact within a Pavlovian conditioning framework: stimuli that preceded (predicted) the most traumatic aspect were engraved vividly on memory. This finding, of course, does not run counter to the Easterbrook hypothesis. Only if the person remembered the headlights without remembering the crash itself would the Easterbrook hypothesis be refuted.

Traumatologists have occasionally claimed that traumatic memory differs from nontraumatic memory in that traumatic memory is allegedly fragmented (van der Kolk and Fisler 1995). This unfortunate term is highly misleading. All memories are fragmented for the simple reason that the brain does not operate like a video recorder. Attentional capacity is limited and selective, and not everything that gets into working memory makes it into long-term storage. The illusion that memories of trauma are fragmented is likely a consequence of Easterbrook encoding. Attention narrows, enabling only certain aspects of the experience to get encoded. Unfortunately, selective encoding has been misinterpreted as amnesia: "inability to recall an important aspect of the trauma" — a DSM-IV PTSD symptom (American Psychiatric Association 1994, p. 428). The term amnesia presupposes that information has been encoded and the person is unable to access it. If aspects of the traumatic experience was not encoded in the first place, then it is a mistake to say the person has amnesia for this information.

Related to the topic of fragmented memories are several studies on the coherence and complexity of trauma narratives among people with PTSD. Foa et al (1995) examined rape narratives in 14 female sexual assault survivors before and after cognitive-behavior therapy. Therapy required patients to describe what had happened during the assault and to do so repeatedly until their distress subsided. Foa et al defined narrative fragmentation as speech fillers, repeated phrases, and unfinished thoughts that disrupted the flow of the narrative. Decreases in fragmentation over the course of therapy predicted improvement in PTSD symptoms.

In a subsequent study, Amir et al (1998) examined the complexity of sexual assault narratives and its relation to PTSD. Using a computer program that counts the number of syllables per word and the number of words per sentence, Amir et al (1998) calculated a "reading level" that reflected narrative complexity. They found that narrative complexity was inversely related to severity of PTSD symptoms 3 months later; however, in a replication of this study, Gray and Lombardo (2001) found that the

inverse relation between narrative complexity and PTSD severity disappeared after they controlled statistically for the effects of verbal intelligence. That is, trauma survivors who have greater levels of verbal intelligence are more likely to provide complex, articulate trauma narratives and to have greater cognitive resources to enable them to overcome the effects of trauma. Moreover, researchers have yet to compare the complexity of trauma narratives with the complexity of nontrauma narratives. Survivors who provide inarticulate narratives of trauma might provide equally inarticulate narratives of neutral and positive experiences. There may be no direct connection between narrative complexity or coherence and trauma.

Many trauma theorists have reported a link between dissociative symptoms and exposure to traumatic events. For example, van der Kolk and Kadish actually went so far as to say that, "Except when related to brain injury, dissociation always seems to be a response to traumatic life events" (van der Kolk and Kadish 1987, p. 185). But as Kihlstrom (1997) has stressed, such inferences are unjustified because van der Kolk and others have failed to appreciate that a $2 \times 2$ matrix (trauma-exposed vs. not exposed and dissociative symptoms present vs. dissociative symptoms absent) is essential for establishing a link between trauma exposure and dissociative symptoms. We cannot assume a close tie between trauma and dissociation without examining how often trauma occurs and dissociation is absent and how often a history of trauma is absent among those who dissociate.

Perhaps because so many students of dissociation work with trauma patients, they have overlooked the fact that dissociation can occur (often occurs?) in the absence of trauma. Moreover, even when people report severe peritraumatic dissociation (e.g., derealization, time slowing) during terrifying experiences, posttraumatic psychopathology if far from inevitable. For example, Noyes and Kletti (1976, 1997) and Roberts and Owen (1988) recruited and interviewed individuals who had near-death experiences (e.g., falling off mountains, nearly drowning), yet few, if any, seemed to have had any lasting psychopathological effects.

Sterlini and Bryant (2002) found that novice skydivers reported intense dissociation and intense fear before their first jump. The fact that both dissociation and fear happened at the same time is inconsistent with the notion that dissociation protects people against overwhelming emotion.

## Encoding Trauma in the Absence of Awareness?

Common sense suggests that a survivor must be conscious to encode and remember traumatic experience. If someone is knocked unconscious during the event (as sometimes happens in automobile accidents), then there should be a failure to encode and therefore remember the event. If the experience is not encoded, how can it possibly resurface later in the form of intrusive memories, flashbacks, and nightmares?

Surprisingly, however, there have been reports of individuals developing PTSD, despite their being unconscious during the traumatic event (usually an accident). Bryant et al (2000) found that 26 out of 96 accident survivors who had received a severe brain injury developed PTSD, even though none of them could remember the accident. Apparently, some people seem to develop psychophysiologic reactivity to stimuli associated with traumatic experiences they cannot remember.

There are two explanations for why survivors who are unconscious during the trauma might re-experience it later. In accordance with Brewin's dual representation theory of PTSD (Brewin 2001; Brewin et al 1996), these individuals may have acquired Pavlovian conditioned fear responses established subcortically in the absence of awareness. Brewin posits two memory systems: a verbally accessible memory (VAM) system and a situationally accessible memory (SAM) system. Information stored in the VAM system was first processed consciously in working memory before its transfer to long-term memory. VAM memories require conscious attention and encoding, and they can subsequently be accessed voluntarily. In contrast, SAM memories contain sensory information (e.g., visual, autonomic, kinesthetic) that received extensive perceptual, but little or no conscious, processing during the trauma. SAM memories can be triggered by stimuli that match those present during the trauma, but they cannot be accessed through voluntary effort. Brewin proposes that the SAM system underlies sensory flashbacks, nightmares, and physiologic reactivity to stimuli associated with the traumatic experience.

Dual representation theory requires that Pavlovian fear conditioning occur in the absence of awareness; however, studies adduced as evidence that people can acquire conditioned emotional responses in the absence of awareness have been convincingly criticized by Lovibond and Shanks (2002) (see also Shanks and Lovibond 2002). Indeed, most laboratory demonstrations of the phenomenon appear to rest on insensitive measures of awareness. On the other hand, unconditioned stimuli in genuine traumatic events (a severe car crash) is far more severe than unconditioned stimuli in the laboratory. Accordingly, it remains possible that a survivor might develop conditioned emotional responses while unconscious. For example, one man developed apparent conditioned fear responses despite having lost consciousness while buried alive during a work accident (Krikorian and Layton 1998).

In another case, a pedestrian was knocked unconscious when a truck careened onto the sidewalk, knocking a lamppost into him (King 2001). He could not remember the accident, but he later exhibited fear reactions to trucks of the same size and color as the one that nearly killed him.

The second explanation does not require postulation of Pavlovian fear conditioning in the absence of awareness. Some patients may subsequently learn about the horrific details of their accidents, and this knowledge may provide the basis for their intrusive thoughts, nightmares, and psychophysiologic reactivity. Even though they cannot literally remember their trauma, they know what has happened, and this terrifying knowledge furnishes the content for their re-experiencing symptoms. They suffer from a "false" memory that corresponds to a genuine event. For example, one accident survivor saw photographs of his demolished car, and another learned how his passenger had been killed during the accident (Bryant 1996). This knowledge furnished the content of their terrifying intrusive memories. PTSD patients who are amnesic for the accident experience intrusive images that differ in detail from how other witnesses, who never lost consciousness, describe what happened (Bryant and Harvey 1998).

## Directions for Future Research

Several studies have identified peritraumatic dissociation as a predictor of subsequent morbidity. But "dissociation is a creaky and imprecise 19th century metaphor that is much in need of an overhaul" (Perry 1999, p. 367). Part of the problem is that diverse phenomena are subsumed under the vague and global rubric of dissociation. Consider the psychological phenomena often characterized as dissociative: derealization, flashbacks, depersonalization, out-of-body experiences, a sense of time slowing down (or speeding up), emotional numbing, and an inability to remember otherwise presumably memorable aspects of the traumatic event (amnesia). The abstract, global, and vague character of the concept of dissociation is evident in how DSM-IV defines it: "a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment" (American Psychiatric Association 1994, p. 477). Defined in this abstract, global way, dissociation cannot possibly count as a "mechanism" for anything. The term undoubtedly embraces diverse psychobiological processes. For example, it seems inconceivable that the subjective experience of time slowing down can possibly be related to the mechanisms of an out-of-body experience. Progress in understanding acute response to trauma will come by splitting the global concept of dissociation into its constituents, not by lumping diverse phenomena under the same label.

One important avenue for further research would be to provoke dissociative responses in the laboratory. Just as scientists have examined the mechanisms of panic disorder via biological challenges (e.g., carbon dioxide challenge) (McNally 1994, pp. 43–70), they should explore various methods to provoke and study derealization, depersonalization, and subjective time-slowing in the laboratory by using ketamine or other agents that can mimic the phenomenology of peritraumatic dissociation (e.g., Anand et al 2000). For example, to deepen understanding of specific dissociative symptoms, it would be helpful to elucidate the functional neuroanatomy of the phenomenology of derealization, time-slowing, and other dissociative symptoms (via positron emission tomography [PET] or functional magnetic resonance imaging [fMRI]). This method has already been applied to elucidate correlates of traumatic recollection (e.g., Shin et al 1999).

Another important line of research would be to explore connections between variables that affect risk for PTSD (intelligence, neuroticism) to understand how they play out in terms of mechanism. For example, do people with elevated levels of neuroticism acquire conditioned emotional responses in the laboratory easier than those with lower levels of neuroticism? Do those with high scores experience greater difficulty inhibiting negative information from gaining access to working memory (Myers et al 1998). With regard to intelligence, does its buffering capability arise from the way brighter people encode traumatic events, process them later via language, or mobilize coping resources? Are measures of emotional intelligence (Goleman 1995) better predictors of resilience than measures of general intelligence?

Finally, researchers have begun to study cognitive functioning in individuals with ASD relative to trauma survivors who do not qualify for this diagnosis. For example, Harvey et al (1998) found that ASD patients exhibited abnormalities in retrieving specific autobiographical memories in response to positive cue words — abnormalities similar to those exhibited by people with chronic PTSD (McNally et al 1994, 1995). Importantly, Harvey et al found that this abnormality predicted PTSD 6 months later. Moulds and Bryant (2002) found that ASD patients exhibited a superior ability to forget disturbing, negative words relative to trauma-exposed people without ASD in a directed forgetting laboratory study. Interestingly, this finding runs counter to data showing that women with PTSD related to childhood sexual abuse exhibit a relative inability to forget trauma words (McNally et al 1998) and that women who report either repressed or recovered memories of childhood sexual abuse exhibit neither superior nor inferior ability to forget trauma words (McNally et al 2001). The reasons for these similarities and differences across trauma populations and

between ASD and PTSD remain unclear. But Bryant and his colleagues have broken new ground regarding how to investigate mechanisms that may predict later PTSD, by studying ASD patients in the cognitive psychology laboratory. Although such studies obviously cannot disclose mechanisms operating peritraumatically, they can be informative regarding those at work in the acute phase following exposure to overwhelming trauma.

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# DOMESTIC VIOLENCE, CHILD CUSTODY, AND CHILD PROTECTION: UNDERSTANDING JUDICIAL RESISTANCE AND IMAGINING THE SOLUTIONS

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* Professor of Clinical Law, *George Washington University Law School.* The seeds of this Article were initially planted ten years ago when "Case 2" was litigated; a preliminary version of it was presented at the 1991 Annual Meeting of the American Association of Law Schools. I am grateful to Liz Schneider for publishing her powerful and invaluable book and to Ann Shalleck for organizing this Symposium, which provided me the motivation and opportunity to more fully develop the piece. I am especially grateful to Ann Freedman, who supported this Article's difficult birth in ways too numerous to list, and whose nuanced and deep thinking about these issues has informed much of my thinking in this piece. Thanks also to Evan Stark for his ever-present willingness to read drafts and offer incisive comments, as well as his brilliant expositions on the problem of battering and mothering. I also owe thanks to research assistants Lynn Eisinger and Anjali Kapur, and to the George Washington University Law School for for its support in the form of a summer stipend. Finally, I thank my clients for their remarkable strength in withstanding their ordeals both in and out of court, and their generosity in sharing their stories.

## INTRODUCTION

In much of Liz Schneider's work, she provides a powerful critique of our culture's patriarchal legal and social responses to women as mothers. Noting that "motherhood is critical to women's subordination,"[1] she points out that mothers are "likely to be held primarily or even exclusively responsible for any harm [to a child]. . . . Male violence in the family, even when it is extreme and lethal, seems like a natural extension of male patriarchal authority in general; women's failure to mother makes them monsters."[2] The invisibility in our society of both male violence and women's mothering makes fair judgments about women (and men) as parents difficult at best. While acknowledging that mothers in some cases do deserve to be held responsible for harm to children, Schneider nevertheless concludes:

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1. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 149 (2000).

2. *See id.* at 152-54.

> [i]t is difficult to determine the contours of maternal responsibility in a culture that blames mothers for all problems relating to children, gives mothers so little material and social support, and absolves fathers of all responsibility. Unless we place problems of motherhood and battering within a framework of gender socialization and subordination, we cannot fully and fairly assess the contours of responsibility.[3]

Schneider's feminist critique, with which I agree,[4] is important to bear in mind as the national conversation about children in families experiencing domestic violence heats up. In the last several years, the federal government,[5] national judicial bodies,[6] state legislatures,[7] the American Bar Association,[8] and individual judges, along with child welfare and domestic violence experts have finally[9] turned their

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3. *See id.* at 178.

4. *But see infra* note 26.

5. For example, in 1990 Congress passed a Resolution expressing the sense of the Congress that "for purposes of determining child custody, credible evidence of physical abuse of one's spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse." H.R. Con. Res. 172, 101st Cong. (1990). During the past decade, the Department of Health and Human Services has sponsored a number of initiatives. *See* LAUDAN ARON & KRISTA OLSON, URBAN INST., EFFORTS BY CHILD WELFARE AGENCIES TO ADDRESS DOMESTIC VIOLENCE: THE EXPERIENCES OF FIVE COMMUNITIES (1997), *available at* http://aspe.hhs.gov/hsp/cyp/dv/intro.htm. In addition, the federal government was a primary sponsor of the seminal "Green Book" and its subsequent pilot projects discussed below. *See infra* note 10. In June 1999, the federal government sponsored a national conference on the impact of witnessing violence on children. *See* OFF. OF JUV. JUST. & DELINQ. PROGRAMS, U.S. DEP'T OF JUST., SAFE FROM THE START: TAKING ACTION ON CHILDREN EXPOSED TO VIOLENCE (2000).

6. The National Council of Juvenile and Family Court Judges ("NCJFCJ") has led the way on this issue. *See* NAT'L COUNCIL OF JUV. & FAMILY CT. JUDGES FAMILY VIOLENCE PROJECT, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 25 (1990). In particular, as is discussed further below, the NCJFCJ has pioneered the development of the collaborative approach to the overlap of child abuse and domestic violence, which has inspired this Paper. *See infra* note 10.

7. In addition to amending state custody statutes, see *infra* note 18 and accompanying text, some states have recently (and controversially) created an independent crime of child abuse for causing a child to *witness* adult domestic violence. *See generally* Laurel A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337; Audrey Stone & Rebecca Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205 (1997); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1 (2001).

8. A.B.A., THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (1994).

9. Until approximately the mid-1990s, the implications of adult battering for children were virtually ignored by child welfare advocates and governmental entities addressing domestic violence. Excellent research has been done on this subject in the last decade. *See, e.g.*, DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION AND SOCIAL POLICY (Sandra A. Graham-Berman & Jeffrey Edleson eds., 2001); BETSY MCALLISTER GROVES, CHILDREN WHO SEE TOO MUCH (2002); PETER JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990). This attention to

attention to this issue in national reports, conferences, workshops and national policy development initiatives.

The most significant development in this area to date has been the 1999 publication of the so-called "Green Book," a set of joint recommendations developed over approximately two years of organized discussion and debate among child welfare and domestic violence experts, advocates and judges.[10] The collaboration which spawned the Green Book was radical; it was the first time that domestic violence and child welfare advocates had systematically sought (at a national level) to actively bridge their profound gulfs and mutual mistrust.[11] This process, designed to assist the government in improving child abuse and neglect proceedings, created a model of collaboration for child protection, domestic violence and court officials. The Green Book (and projects it has spawned)[12] represents a paradigm shift with the potential for transforming the practice of child protection agencies. At root, it seeks to replace such agencies' conventional perspective, which typically treats any harm to children as the fault of mothers,[13] with a more domestic violence-savvy perspective, which places responsibility on male abusers when appropriate, recognizes that children's interests require the safety of their mothers, and forms alliances with battered women to protect both their children and themselves.[14]

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children's interests by researchers, and more recently policymakers, has not penetrated many court adjudications of custody, for the reasons discussed further below.

10. *See Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*, in RECOMMENDATIONS FROM THE NAT'L COUNCIL OF JUV. AND FAMILY CT. JUDGES FAMILY VIOLENCE DEP'T 12 (1999) [hereinafter Green Book]. The "Green Book" nickname derives from the color of the book's cover.

11. Regarding the history of mistrust between domestic violence advocates and child welare advocates, see, e.g., Susan Schecter & Jeffrey Edleson, *In the Best Interest of Women and Children: A Call for Collaboration between Child Welfare and Domestic Violence Constituencies* (1994), *available at* www.mincava.umn.edu/papers/wingspr.htm.

12. Since the Green Book's publication, six "pilot projects" funded by a consortium of federal agencies [hereinafter Green Book Initiative] have been launched around the country. Participants are attempting to implement the Green Book's recommendations for collaborative practice and to develop some learning about what does and does not work. For further information regarding this Initiative, visit the website, http://www.thegreenbook.info.

13. In *Nicholson v. Williams*, a groundbreaking class action lawsuit filed by battered mothers, the New York City child protection agency's policy of treating mothers as neglectful and removing their children on the grounds that the victimized mothers were "engaging in domestic violence," was successfully challenged and held unconstitutional. *See generally* Nicholson v. Williams, 203 F. Supp. 2d 153, 171, 193, 208 (2002). Comparable practices are not uncommon around the country.

14. Green Book, *supra* note 10, at Ch. 3. This "re-frame" is profoundly needed: conventional child protection practice has not only blamed battered women for both their own victimization and their children's, but has failed to provide services and

While reform of child protection practice is critically important, the flurry of attention to this arena also highlights how little attention has been paid to the parallel problem of child welfare dispositions in *private* litigation concerning domestic violence. Children's safety and well-being are often just as much at stake in litigation for civil protection orders, custody and divorce awards, all of which frequently determine the terms of child visitation or custody for an adult batterer.[15] Yet, far less policy or research attention has been directed to this arena.[16]

In fact, a clear understanding of what is happening in private custody/domestic violence litigation is a necessary extension of the Green Book process, and will shed light on the thought processes that contribute to woman-blaming where children are concerned. Unlike the child protection arena, where state policies have been either untouched by domestic violence awareness or blatantly victim-blaming,[17] state statutes governing custody and visitation have already been revised to reflect some recognition of the relevance of domestic violence to custody and visitation dispositions. Most states now

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interventions that could meaningfully assist both the children and their mothers, and then compounded children's suffering by depriving them of their non-violent mothers. The disturbing case histories documented in *Nicholson v. Williams* demonstrate the extent to which many children (as well as mothers) have suffered unnecessarily from these misguided, and too often traumatic, state interventions. *Id.* at 163, 207-12, 252-53; *see also* Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996); Evan Stark, *A Failure to Protect: Unravelling "The Battered Mother's Dilemma"*, 27 W. ST. U. L. REV. 29 (2000).

The Green Book Initiative seeks to reform child protection practice without explicitly naming the patriarchal social and cultural context within which these norms have flourished. It is thus a pragmatic, non-ideological attempt to transform patriarchy in this area; it remains to be seen how effective it will be in changing the cultures of child protection and the courts. While the pilot projects are still in the early stages, an initial "Evaluation Summary" will soon be available. *See* GREENBOOK INITIATIVE, FAQS (last visited May 3, 2003), *available at* http://www.thegreenbook.info.

15. *See* Case 1 *infra* Part I.A.

16. In 2002 a groundbreaking book appeared, which has charted a new course for those who work on the overlap of custody litigation and domestic violence. LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002). Written by two mental health professionals with extensive background in batterers' counseling, this book not only marshals previous data on the impact of battering on children, but also draws on the authors' clinical experience to provide a powerful analysis of the reasons batterers pose emotional, as well as physical risks to children even after the parents separate. In addition, this book analyzes how batterers are able to be so successful in custody litigation. *See id.* at 115-28. Previously, Evan Stark was one of the first scholars and mental health professionals to identify how batterers use custody litigation to continue their abuse of the mother. *See* Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1018 (1995) [hereinafter Stark, *Re-presenting Woman Battering*].

17. *See supra* note 13.

require, at minimum, consideration of domestic violence in custody adjudications; approximately seventeen states have adopted a presumption of some kind against custody to batterers.[18] It is all the more striking, then, to realize that trial courts, even in these states, appear to be granting custody to alleged batterers more often than not.[19]

This pattern is also striking for another reason: The failure of many courts to apply new understandings of domestic violence in cases concerning custody actually contrasts sharply with the demonstrable increases over the past ten years in judicial awareness and sensitivity to domestic violence in more standard "domestic violence" cases, such as civil protection orders or criminal prosecutions. At the least, it is no longer "politically correct" or conventional wisdom in these settings to disbelieve battered women's claims or trivialize them as petty family matters.[20] In contrast, the unreconstructed hostility of

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18. *See* Nancy Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective are They?*, 28 WM. MITCHELL L. REV. 601 (2001); *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 199, 225 app. (1995) [hereinafter *Family Violence in Child Custody Statutes*]; Pauline Quirion et al., *Commentary: Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 519 n.119 (1997).

19. It is difficult to be sure what is happening in trial courts since only a small percentage of cases are appealed, but recent studies have identified a disturbing trend. *See* Kristen Lombardi, *Custodians of Abuse*, BOSTON PHOENIX, Jan. 9, 2003, at Part 1 (reporting on a variety of cases and studies indicating that, where abuse is alleged, a majority of courts award sole or joint custody to the abuser), *available at* http://www.bostonphoenix.com/boston/news_features/top/features/documents/02643516.htm. In 1989, the Supreme Judicial Court of Massachusetts' Gender Bias Study found that more than 70% of fathers received sole or joint custody regardless of whether there was a history of abuse. *See* Lombardi, *supra* (citing AM. JUDGES ASS'N, DOMESTIC VIOLENCE AND THE COURTROOM (1996)); BANCROFT & SILVERMAN, *supra* note 16, at 115; *see also* Linda Neilson, *Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice*, 18 WINDSOR Y.B. ACCESS JUST. 115, 144 (2000) (reporting that a study of 1147 randomly selected court files in a Canadian jurisdiction found that "not only do abusers obtain unrestricted access to their children, they also obtain custody in a significant number of cases. . . . [j]oint, split or full custody was granted to, or obtained by abusers in 16% of the court-filed cases . . . ").

My own (and research assistant's) admittedly unscientific survey of many of the United States cases (contained in Appendix A) found that, of thirty-eight cases in which mothers alleged abuse and sought to limit fathers' access to children, *only two trial courts* agreed with the mother; the remaining thirty-six courts awarded at least joint, and often sole, custody to the father. Thirteen of these decisions were upheld on appeal; one of the two favoring the mother was reversed on appeal. *See* Dinius v. Dinius, 564 N.W.2d 300 (N.D. 1997). Most of these cases were decided in states with a presumption against custody to the batterer. That battered women are now frequently losing custody to batterers shocked even me when I first started researching the case law for this Article. However, it is also clear that, in those few cases where appeal is possible, appellate courts are more likely to recognize the validity and significance of domestic violence for child custody decisions. *See* Quirion et al., *supra* note 18, at 519-20. *See generally infra* App. A

20. *See, e.g.*, Joan Meier, *Battered Justice*, WASH. MONTHLY, May 1987, at 37-45

courts (and sometimes even the same judges) toward the same battered women and domestic violence allegations, when raised in the context of custody or visitation litigation, can be stunning.[21]

This difference suggests that, while society and the courts have acquired a superficial understanding of the reality of domestic violence, that understanding is not sufficiently deeply integrated to survive the challenge of truly painful choices regarding families. Thanks to the battered women's movement and massive legal reforms of the past three decades, courts are now more willing to recognize domestic violence in some "first order" cases, e.g., protection orders, and criminal prosecutions. But, as Martha Fineman has pointed out, "it is far easier to work out a position when the focus is on the male/female (or equivalent) dyad than when the implications of any action are for those relationships with their children."[22] Thus, when the issues become more fraught, and fathers' relationships with their children are at stake, hard won insights about domestic violence too often fall away as judges once again avoid facing the reality of women battering, and the difficult choices needed to protect women and children and hold abusers accountable.

The remainder of this Article first offers two case studies from my own practice which illustrate the resistance of family judges to battered women's claims concerning children. It then surveys changes in courts' understandings of domestic violence over the past two decades. Next, it discusses a series of analytic misconceptions that help fuel courts' resistance to battered mothers' claims in cases concerning children. While my analysis of family judges' ideology reflects some agreement with Schneider and other feminist theorists regarding the prevalence of patriarchy and sexism,[23] I focus more on

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[hereinafter Meier, *Battered Justice*]; *see also infra* Part II.A.

21. *See infra* Parts I.A and II.B.

22. *See* Martha Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 216 (2002).

23. *See* SCHNEIDER, *supra* note 1, at 149 (quoting Martha Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 274, 289-90). Schneider states that motherhood is "a colonized concept," defined in our culture almost entirely by men in a manner that perpetuates women's social subordination to men. *Id.* From this perspective, it is not surprising that adjudications of the relative rights of mothers and fathers with respect to children would bring out the most patriarchal and woman-blaming attitudes in judges and other professionals. However, it seems over-determinative to suggest that the resistance of so many judges to mothers' claims is purely the result of sexism. Even reasonable, "enlightened" and/or "feminist" judges sometimes under-value domestic violence evidence in these cases. While patriarchal values may unconsciously be influencing even these judges' and evaluators' thinking, they are unlikely to be the sole explanation. Moreover, whereas conscious or unconscious sexism is not easily amenable to solutions, identification of other explanations for judges' blindness to the validity of mothers' claims may suggest other solutions.

the apparently gender-neutral constructs which consciously drive many judges and allow them to see themselves as doing "justice" or "right" when they reject battered women's claims on behalf of children. In so doing, I seek to open a dialogue between those like myself who start with an advocate's perspective and those in evaluative roles (courts and forensic evaluators) who must start from a "neutral" perspective in these cases. Accusations of patriarchy, while unfounded, cannot bridge the gap between us and will only contribute to a hardening of positions. My hope is that a presumption of good faith—such as that which enabled the Green Book's process to bridge the conflicting professional perspectives of domestic violence advocates, child protection advocates and the courts—may facilitate at least some movement toward better understanding and protection of children by those who seek to do their best in determining outcomes in these painful cases.

Finally, also in the spirit of the Green Book, I offer a thought experiment regarding two alternative forms of "collaboration" that could counter these dynamics. The Green Book Initiative's new collaboration between courts, child protection agencies and battered women's advocates has already triggered a re-visioning of the paradigm of public child protection actions. While aspects of my proposals for the private litigation realm are radical and raise practical questions, "out of the box" thinking about collaborative responses is needed to address the parallel problems in private litigation when domestic violence and child maltreatment overlap.

## I. CASE STUDIES

### *A. Case 1*

Ms. Green[24] had two sons, approximately six and eight years old, by two different fathers. She was living with a third man, who fathered her third child in the course of the litigation. The older boy's father, Mr. Anders, was very attached to his son and had long fought, both physically and verbally, with Ms. Green over the boy. The history of domestic violence (much of it not concerning the boy) was severe, including a rape at knife-point in Ms. Green's home after the parties were separated and an attempted strangling with a clothesline. The case came to court pursuant to Ms. Green's motion for contempt for violations of her civil protection order ("CPO"), largely involving Mr. Anders' verbal threats to kill her. A companion motion to modify the

24. The parties' names have been changed.

CPO was pending in which Mr. Anders was requesting that custody be transferred to him. This case was heard by a judge within a dedicated Domestic Violence Court that considered itself fairly well-educated on domestic violence and committed to proactively addressing it. In the course of the contempt litigation, the judge admitted extensive testimony about the history of domestic violence, and indicated at various points that he believed a fair portion of it.

The litigation was protracted over a series of months due to a hotly litigated due process issue concerning the investigative practices of the defense counsel. At the end of the first stage of the contempt litigation, with the next court date pending in two months, the court turned to the question of interim custody/visitation. Requesting no visitation with the father, Ms. Green's counsel (myself) argued that after returning from visits with his father, the boy had expressed violent hostility toward women including his mother, was incorrigible and impossible to control, expressed a desire to die, and pounded and kicked walls. After a month without seeing his father, his behavior had settled down. The court responded by saying "Where do you get this from? The *mother*?" in a tone of intense disgust, making clear that visitation was going to be awarded.[25] Within minutes, the mother decided to transfer custody to the father and gave up all contact with her son for the summer. She wanted to protect her own safety; and her continued dealings with both the courts and the abuser over the boy were traumatic and intolerable to her. Ultimately, she gave up custody for the remainder of the CPO (and to the best of my knowledge, permanently).

### *B. Case 2*

This case came to court in approximately 1992, before structural reforms were instituted to improve the court's response to domestic violence, and before the judge (and most others on this bench) had significant experience or education in that topic. The history of violence in this relationship included the abuser, Mr. Benson, choking, punching and threatening to kill Ms. Turner and their baby, as well as grabbing the baby and threatening to throw her out the window. After Ms. Turner obtained a protection order removing him

25. Not atypically, this court refused to hold an evidentiary hearing on the "temporary" visitation/custody determination. Rather, it addressed this issue solely through "colloquy" with counsel. The court's hostility toward the mother's claims regarding the boy was in contrast with its objectivity and basic respect for her testimony about the history of violence. It also contrasted noticeably with the court's strong concern for the boy when the abusing father alleged that the *mother's* partner was physically abusing the boy by pulling him by the ear and spanking him.

from their shared apartment, he broke in repeatedly one night. After the police did nothing, on the fourth break-in, he stabbed Ms. Turner with scissors while the child watched from her crib. (Ms. Turner's life was saved by a friend's intervention.) Both before and after this incident, Mr. Benson made threats in person, on the telephone and in writing, such as "we're all going to die," and "I give you dead baby." After the stabbing, Ms. Turner moved to her father's home in the next state, but Mr. Benson continued to stalk and threaten her and the then four-year-old child with death. After we obtained a temporary protection order, she withdrew the CPO petition because she could not accept any award of visitation to Mr. Benson, which I had to advise her was likely, based on my experience with that court. (Mr. Benson had been home with the baby for at least the first year of her life while Ms. Turner worked).

Subsequently, Mr. Benson filed for custody or visitation. (Early on, the custody request was dropped.) After one day of testimony in which the history of abuse— including the stabbing— was aired, the court opened the next hearing by loudly lecturing both parties for "mudslinging" and for subjecting their daughter to "the police" and not resolving their dispute out of court. Subsequently, the court granted Mr. Benson temporary visitation twice a week for four hours, under supervision. During one visit the supervisor witnessed him putting his tongue in the girl's mouth. He refused to stop, stating that she's his daughter and he could do what he wanted. Ms. Turner also experienced her daughter tickling her in her crotch and attempting to tongue-kiss her, while stating that Mr. Benson did that with her. During other court-supervised visits, he had tantrums against Ms. Turner and on one occasion lay down on top of his daughter to prevent Ms. Turner from taking her home.

The trial lasted for approximately eight days, and included expert testimony validating Ms. Turner's claims and the serious danger she and her daughter faced from Mr. Benson, as well as two court-appointed evaluations, both of which entirely ignored the domestic violence history, and one of which evidenced a distinct lack of comprehension of the dynamics of domestic violence. Both court evaluators suggested that both parties must be lying since their stories were so contradictory. Eventually, after more typed threats appeared, including one sent to the judge, the judge appointed a guardian ad litem ("GAL"), ordered more psychological evaluations (including one for sexual abuse in which the evaluator relied on the father's claim that he had a normal childhood and found no support for the suspicion), and continued visits supervised by the GAL. The outside psychological evaluations once again ignored the domestic violence

and indicated a lack of comprehension of the issue. The GAL found the father-child bond to be positive (based on the child's tears when her father would leave) and the father's conduct during the visits she supervised to be appropriate. She found the mother (whose plastic demeanor, inappropriate giggling, and racing speech were indicative of post-traumatic stress disorder) to be highly non-credible. On numerous occasions, the judge stated that both parents were failing this child, threatened to put the child in foster care, and expressed his view that neither party was credible. Ultimately, after lengthy deliberation, the court ordered limited visitation conditioned on several kinds of counseling and supervision. The father never complied with these conditions, and the mother retained custody.

## II. JUDICIAL SCHIZOPHRENIA IN RESPONSES TO DOMESTIC VIOLENCE

While significant progress has been achieved in many state courts concerning basic understandings of domestic violence, including the commitment of resources, creative efforts to assist victims, and a genuine culture change, making the dismissal of such claims is no longer an acceptable norm,[26] there has been a striking insulation of custody/visitation adjudications from this new "enlightenment." Despite the widespread acceptance of the growing body of evidence that adult domestic violence is detrimental to children,[27] both courts and lawyers commonly separate the issue of domestic violence from custody/visitation, and even sometimes excuse it in a divorce context.[28] More notably, sympathy and concern to an adult battering

26. *See infra* note 35 and accompanying text.

27. "Children of battered women have been found to be at increased risk for a broad range of emotional and behavioral difficulties, including suicidal tendencies, substance abuse, depression, developmental delays, educational and attention problems, and involvement in violence." BANCROFT & SILVERMAN, *supra* note 16, at 9. Furthermore, children exposed to batterers are themselves at high risk to become direct targets of physical abuse and of sexual abuse. The danger even extends to homicide: one multiyear study found that in approximately one-fifth of domestic violence homicides and attempted homicides, a child of the battered woman is also killed in the process." *Id. See also* Green Book, *supra* note 10, at 9 (noting that 30-60% of battered mothers' children are also maltreated). Betsy McAlister Groves eloquently documents the profound impact even violence which courts might view as "minor," i.e., in which no injuries were received, can have on children. Groves, *supra* note 9, at 64-72 (describing an upper middle class family in which the father once held a knife to the mother's throat).

28. *See infra* Part I.B; Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 255-58 (1993) (explaining that "most of the studies of gender bias in the courts report that judges routinely ignore the issue or dismiss as insubstantial the impact of parental violence on children in the household"). The risks to children when in the care of a batterer, even after the adult parties are separated, are discussed *infra* Part III.D.2.

victim can be transformed into an attitude of disdain and outright hostility when the battered woman seeks to limit the abuser's access to his child.[29] This disjunction can even occur within a single case, heard by a single judge, as Case 1 above demonstrates. And, as Case I also suggests, this judicial attitude all too often inures to the profound detriment of the children involved.[30]

### *A. Changes in Courts' Understanding of Domestic Violence*

If we consider domestic violence proceedings which are *not* focused on children, e.g., protection order cases, it is fair to say that a battle has been fought and at least partially won, regarding the seriousness with which domestic violence is taken by the courts. Back in the 1980s, before domestic violence was widely recognized and understood, women were often hounded out of court and overtly disdained for claiming domestic violence, even in protection order cases. It was possible then to hear judges saying things that one would be far less likely to hear today *in such proceedings*. Thus, one Maryland woman who sought a protection order recalled the judge saying:

> I don't believe anything that you're saying. . . . The reason I don't believe it is because I don't believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe that it happened to you.[31]

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29. *See supra* Part I.A; *see also infra* Part II.B.

30. That child essentially lost his mother because the court was not willing to prioritize her safety and protection from trauma over the father's "rights" to his child. While the boy was unquestionably attached to his father, his behavior clearly indicated how destructive emotionally his father was for him. Regarding children's physical and psychological risks from batterers, see *infra* Part III.D. (discussing the future effects past domestic violence can have on a child's emotional well-being). Not only are the risks of physical and sexual abuse elevated where a father is a batterer, but the emotional manipulation and abuse that many battering fathers inflict on their children, as in Case 1, often pose an ongoing and significant threat to children's emotional well-being. *Id.*

31. *See* Czapanskiy, *supra* note 28, at 252 (citing victim's testimony contained in GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 2-3 (1989)). In one highly publicized case in the mid-1980s, the judge told one alleged abuser "[if] you want to gnaw on her and she on you, fine, but let's not do it at the taxpayers' expense;" this defendant later murdered his wife. *See* Meier, *Battered Justice*, *supra* note 20, at 38. It is not hard to find a litany of past examples of abusive judicial reactions to battered women seeking protection in the courts. *See generally* ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 15 (2000) (emphasizing that the law itself "contributes to the abuse abused women undergo" and describing various cases of domestic violence).

Similarly, in Case 2, litigated about ten years ago, after a day of testimony about the history of abuse, the judge opened the second day of proceedings by yelling at the parties (and myself) about "mudslinging." Subsequently, the judge seemed inclined to treat all of Ms. Turner's allegations of violence as fabrications.[32] Similarly, the forensic psychiatrist found Ms. Turner's "stories" of Mr. Benson's abuse "puffed up," "exaggerated" and "bizarre." In particular, he characterized her statements that the abuse had caused her to lose her job (through absenteeism and accusations Mr. Benson made to her employer) and forced her to go live in a shelter, as not making sense.[33] (He also found Mr. Benson even more unbelievable.) The social worker, although he experienced Mr. Benson's belligerence and coercion, and expressed concern (in private) about Mr. Benson's dangerousness, steadfastly insisted on presenting him as reasonable and decent in his statements to the court.[34]

We know now that the type of violence alleged in both Case 2 and the Maryland case just discussed is all too plausible, and that it plays out in many relationships. And in the past twenty years, in many jurisdictions, the litigation of domestic violence has been greatly transformed from what might fairly be called the "dark ages" to what might be called an "age of partial enlightenment," where judges more often respect women's right to seek protection and frequently credit their allegations. Many courts have instituted dedicated domestic violence dockets or courts, and in a growing number of jurisdictions it is no longer acceptable conventional practice, *at least in protection order or criminal cases,* to treat domestic violence allegations as implausible or trivial.[35] It is now at least somewhat

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32. *See supra* Part I.B. The judge may have been influenced by Ms. Turner's previous avoidance of the court proceedings, and his belief that she had lied about receiving notice. Ultimately, while the court did not in its opinion reject all of the abuse allegations, and did fashion a highly protective visitation order, even years later the judge still expressed doubt to this author as to the truth.

33. *See* Report Milton Engel, in D.R. 2029-92d 6, 13 (June 23, 1993) (on file with author). Ms. Turner lost her job because Mr. Benson's abuse caused her to arrive late and miss work repeatedly. Ms. Turner's claim that she had to go to a shelter was apparently incomprehensible to the evaluator because Ms. Turner's father supposedly had a very nice house in which she had stayed with her daughter. The fact that she was being stalked at that location apparently did not enter in to the forensic psychiatrist's assessment. *Id.*

34. *See generally* Report by Dan Feeney, in D.R. 2029-92c 3 (May 28, 1993) (on file with author) (choosing not to interview parties about abuse because they "disagree about everything"). In retrospect, it seems likely that the social worker was intimidated by Mr. Benson, who was very large and imposing, often angry and yelling, and could be quite menacing.

35. *See generally* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999).

shocking for domestic violence victims and their lawyers to be dismissed out of hand in criminal and civil cases where the violence itself is the central concern.[36]

A case in point is the District of Columbia's new Domestic Violence Court, which has been touted as a "model court" for its proactive approach and improved accessibility, efficiency and responsiveness to domestic violence claims.[37] As a litigator in the D.C. courts both before and since the Domestic Violence Court was instituted, I would agree that the new court has improved the handling of domestic violence cases in some respects,[38] and that the issue has risen to a

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36. *See* Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1291 (2000) (noting that "the legal system has made great strides in its treatment of domestic violence"). *But cf.* Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly Between "The Truly National and the Truly Local"* 42 B.C. L. REV. 1081, 1126 (2001) (noting that "increased attention to domestic violence has resulted in unfounded assumptions about progress in the courts"). The findings of James Ptacek's landmark study of two Boston courts' responses to battered women in protection order cases support the widely held view that the courts' treatment of battered women has improved. *See* JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 106 (1999). In his survey Ptacek found that "most judges presented a supportive demeanor" to the battered women that appeared before them. *Id.* at 106, 150. In fact, the study found that eight out of eighteen judges presented a "good-natured" demeanor toward the women, and *only one judge was seen as "firm (condescending/harsh)" toward the women before him.* (Two more presented a "good-natured" but "condescending" demeanor to the women; six presented a "bureaucratic" (i.e., impersonal) demeanor.) *Id.* Seven judges were seen as "firm" toward the men, six as "bureaucratic," and only three as "good-natured" toward the men. *Id.* Interviews with eight of the judges confirmed that many of these seek to make battered women welcome and comfortable in the court, and to take the violence allegations seriously. *Id.* at 116-35. These findings are quite astonishing when placed next to the recent findings of a survey by the Wellesley Centers for Women which documents repeated instances of Boston judges demeaning and insulting battered mothers before them in *custody matters*. *See* WELLESLEY CTRS. FOR WOMEN BATTERED MOTHERS' TESTIMONY PROJECT, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (2002) [hereinafter WELLESLEY BMTP REPORT], *available at* http://www.wcwonline.org/wrn/battered.html. Yet there are hints of a similar mental bifurcation between custody and "pure" domestic violence cases even among the "supportive" judges interviewed by Ptacek. *See* Ptacek, *supra* at 124 (observing that one supportive judge also expressed in his interview sympathy for batterer's visitation rights, which, according to Ptacek, "seemed to conflict with his initial remarks about the seriousness of the violence").

37. *See e.g.*, Epstein, *supra* note 38, at 5, 28, 44 (writing that "the community has already witnessed substantial differences in judicial treatment of these cases").

38. The new court may also have made it harder for victims in some respects. For instance, there is now greater involvement of the defense bar in these cases, and the court is extremely sensitive to that bar's claims that the court is biased toward females. *See* Robinson v. United States, 769 A.2d 747 (D.C. App. 2001) (rejecting an equal protection challenge to the Domestic Violence Unit). Many judges make a point of emphasizing, as one did at a bench/bar meeting, that "women are violent too." Men now account for approximately 15-20% of the filings for CPOs in this court (including cross-petitions where women have also filed); some percentage of these are granted. Telephone Interview with Paul Roddy, Chief Clerk of the Domestic Violence Unit, D.C. Superior Court (Apr. 15, 2003).

much higher level of importance and is now taken seriously more often than not. But it is these very improvements in the handling of domestic violence cases that have made the lack of such respect for battering claims in custody/visitation cases within the same court so striking.

### *B. Limits of the "New Enlightenment": Custody and Visitation Determinations*

Thus, in Case 1 above, which was litigated within the Domestic Violence Court, the judge's very demeanor switched from being objective and basically respectful regarding the domestic violence allegations (which were related to the claim of contempt of the protection order), to hostile and demeaning when the subject of child visitation was addressed (as part of the abuser's motion to modify the CPO). In response to my argument that the batterer should not receive visitation pending the next court date in two months, the judge snarlingly dismissed my description of the child's destructive behaviors because it came from "*the mother*" (who was standing right next to me).[39] The judge's hostility toward the abused mother's claim of risk to the child was in marked contrast to his receptivity to the *abuser's* claim that the mother's new boyfriend was abusing the child. In fact, the court ordered a child abuse investigation of the *mother* and her boyfriend, but not the batterer. It is important to bear in mind that this judge, although known to have quite a temper, was generally considered fairly enlightened on domestic violence. Moreover, he has since been elevated to a significant administrative position, was previously credited as one of the more effective judges in the Domestic Violence Court, and has generally expressed a fair degree of openness to the concerns of domestic violence advocates.

I have had similar, albeit less intense, experiences elsewhere in the D.C. Domestic Violence Unit with a variety of judges, typically in cases where clients sought custody or visitation as a term of a CPO. Even in the context of these cases, brought specifically to seek protection from violence, many D.C. judges, including those in the Domestic Violence Unit, consciously strive to treat custody or visitation issues independently from the abuse, and to cabin off their knowledge of the abuse from their determination of custody or visitation.[40]

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39. *See supra* Part I.A (noting the impact of this comment and the hostile dynamic of the court proceedings on the mother's decision to give up custody).

40. *See* Ptacek, *supra* note 36, at 124 (noting the judge's co-existing attitudes of firmness against domestic violence but sympathy toward visitation requests).

This sense that many family judges seem to retain a mental "bifurcation" between "custody/visitation" matters and "domestic violence" matters was crystallized during planning discussions in 2002 for the new Family Court in the District of Columbia. While the new court does not encompass the existing Domestic Violence Unit, where protection orders and criminal cases are handled, it adjudicates all other family law cases. When the question arose of how domestic violence would be handled in the new Family Court, both the judges and attorneys involved in the planning stated that this court would not be handling "domestic violence cases," as though domestic violence is not an issue in divorce and custody cases.

Courts' discounting of battered women's claims that their children are at risk from the batterer is actually extraordinarily common and of late has received increasing public attention. For instance, the Wellesley Battered Mothers' Testimony Project found, based on interviews of forty abused women and thirty-one victim advocates across Massachusetts, that these mothers were commonly treated as "hysterical and unreasonable," with "scorn, condescension and disrespect," and were prevented from being heard in court.[41] According to interviewees, fifteen of the forty had joint or sole custody awarded to their abusive ex-partner, each of whom had also abused the children. Thirty-eight said that judges, family service officers, and GALs had ignored or minimized their claims. Nine said judges and GALs failed to investigate the alleged physical and sexual abuse. And six said judges and GALs refused to even consider documented evidence of child abuse.[42]

While published opinions are harder to parse because their renditions of the evidence tend to support their legal rulings, it is apparent even here that both the majority of trial courts and some number of appellate courts are rejecting the implications of domestic violence for custody. For instance, in *In re Custody of Zia*,[43] the Massachusetts Court of Appeals upheld a trial court's finding that there was "no history or pattern of domestic violence" despite two

41. *See* Lombardi, *supra* note 19, at Part 2.

42. *See id.* (reporting the findings of the WELLESLEY BMTP REPORT); WELLESLEY BMTP REPORT, *supra* note 36, at app. A. The Battered Mothers' Testimony Project was a "multi-year, four-phase study using a variety of research approaches in which human rights fact finding was complimented by qualitative and quantitative social science research methodologies." *Id.* at 6. It has been criticized because the researchers did not interview the accused abusers. Court records and other documentation were reviewed in 25% of cases; all confirmed the women's reports. Lombardi, *supra* note 19, at Part 2 (citing an interview with Lundy Bancroft, author of the study).

43. 736 N.E.2d 449 (Mass. App. Ct. 2000).

restraining orders and multiple assault convictions against the father.[44] As justification, the court pointed to the mother's "thwarting" of the father's joint legal custody, her inadequate boundary-setting and arrest for possession of drugs.[45] In *Kent v. Green*,[46] the Alabama Court of Civil Appeals, over a troubled dissent, upheld an award of sole custody of a sixteen-month-old to the father despite the father's undisputed choking of the mother resulting in her hospitalization and his arrest. The court affirmed the trial court's determination of the "best interests of the child" based primarily on the testimony of a psychologist, who found that the father was not likely to commit violence again and was in treatment for his anger, whereas the mother was not receiving treatment for her psychological problems.[47] In *Gant v. Gant*,[48] the Missouri Court of Appeals upheld custody to the father, despite the mother's extensive testimony of a history of violence, threats of homicide and suicide, and property destruction, and the father's admission to some incidents. The appeals court noted that the lower "court may believe all, part or none of any witness's testimony."[49]

It is notable that courts' resistance to domestic violence issues has not been constrained by state statutes which were adopted to do exactly that, e.g., by adoption of presumptions against custody to batterers. Several courts have evaded the legislative intent of such statutes by holding that, even where domestic violence was *proven*, those incidents are simply not sufficient to constitute "domestic violence" as contemplated by the statute.[50] Other courts continue to

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44. *Id.* at 246.

45. *Id.* at 456 n.12.

46. 701 So. 2d 4 (Ala. Civ. App. 1996).

47. *Id.* at 5; *see also infra* Part III.E (discussing how and why mental health experts' predictions are so consistently misguided and damaging in this field); *infra* note 167.

48. 923 S.W.2d 527 (Mo. App. 1996).

49. *Id.* at 531.

50. *See, e.g.*, Couch v. Couch, 978 S.W.2d 505 (Mo. App. 1998) (upholding the trial court's finding that the father's breaking of the mother's collarbone does not constitute a "pattern of domestic violence" under the statute, and discounting child sexual abuse allegations); Simmons v. Simmons, 649 So. 2d 799, 802 (La. App. Ct. 1995) (holding that the trial court properly found no "history of perpetuating family violence" as required by statute, where it accepted "only occasional incidents of violence that may have been provoked by the wife's adultery" and rejected abuse allegations which were not corroborated by a document or the husband's admissions); *see also In re Custody of Zia*, 736 N.E.2d at 456 (explaining that past restraining orders and a pending assault charge do not constitute "a pattern or serious incident of abuse that would give rise to the rebuttable presumption"); Hamilton v. Hamilton, 886 S.W.2d 711, 715 (Mo. App. 1994) (commenting that the two admitted assaults over twenty years and wife's testimony of ongoing "verbal and abusive" behavior do not prove the "pattern of violence" required by statute); Brown

exclude evidence of domestic violence despite legislative requirements that it be considered.[51]

Still more disturbingly, courts' reactivity to mothers' domestic violence allegations in the custody/visitation context sometimes blinds judges to evidence of direct *abuse of the child* by the batterer. The failure to recognize such "co-abuse" flies in the face of the well-established correlation between adult domestic violence and child abuse by the adult batterer.[52] Both the correlation and the court's refusal to consider it was classically present in Case 2 above. We presented substantial evidence of very troubling behaviors by Mr. Benson toward the child, including his tongue-kissing the child during court-supervised visits (and angry retort when the supervisor told him to stop); the child's report that she slept in the same bed with her father during an unsupervised visit and that he told her a "secret;" and subsequent reports that he "tickles" her between her legs.[53] My client also testified to Mr. Benson's repeated threats to kill the child along with her mother (including a written threat, "I give you dead baby"), attempt to throw the child out the window, and excessive spanking of the child when the parties lived together. All of these allegations, along with the claims of spousal abuse, were virtually ignored.[54]

Again, the horror stories abound. The kinds of child abuse

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v. Brown, 867 P.2d 477, 479 (Okla. Ct. App. 1993) (holding that the mother's testimony that the father shoved her with force against a dorrway, broke car windows, and made verbal threats of violence against her does not constitute "any evidence which supports . . . claim [of] 'ongoing domestic abuse' as required by the statute"); Cox v. Cox, 613 N.W.2d 516, 521 (N.D. 2000) (noting that a conviction for simple assault which caused bruises and hitting the car instead of the complainant did not constitute an incident causing "serious bodily injury," or a "pattern," where other allegations were found not credible); Brown v. Brown, 600 N.W.2d 869, 873 (N.D. 1999) (upholding the trial court's finding that "incidents of domestic violence by both parties" neither indicated a "pattern of behavior" nor "incidents of sufficient severity to trigger the rebuttable presumption"); Dinius v. Dinius, 564 N.W.2d 300, 303 (N.D. 1997) (reversing the trial court's finding that the father's use of physical force against the daughter entitled the mother to custody because both incidents occurred seven years prior, and holding they did not involve serious bodily injury or a "pattern of domestic violence").

51. *See, e.g.*, Raney v. Wren, 722 So. 2d 54 (La. Ct. App. 1998) (upholding the trial court's exclusion of evidence of past domestic violence pre-dating a prior consent custody order, despite the lower court's finding that the mother's fear was unjustified and that it was "outraged" by her move away without notifying the father).

52. *See supra* note 27 and accompanying text.

53. *See supra* Part I.B (explaining that such evidence could be characterized as evidence of either "abuse" or of "grooming" for more full-fledged sexual abuse).

54. Allegations of child sexual abuse are especially charged and likely to be turned against the mother, regardless of whether adult domestic violence is in the mix. *See* Lombardi, *supra* note 19, at Part 3 (describing cases of alleged sexual abuse and courts' refusal to respond).

ignored, minimized, disbelieved, or allowed to happen in the cases investigated by the Wellesley Battered Mothers' Testimony Project, included the following:

> My husband took the baby and said, 'Shut this f****** kid up!' and threw him across the room. And all I could see was Nathan hitting the wall, and I grabbed him.[55]
>
> She told me that he put two fingers inside of her vagina.[56]
>
> When I first saw my son after that year with his father, he had on pants . . . that were ripped, he had eczema so bad, he had sneakers that were too small, with no laces, he was emaciated. . . . To this day, this boy is like a boy of stone.[57]

## III. WHY AND HOW COURTS RESIST DOMESTIC VIOLENCE CLAIMS IN CUSTODY CASES

It can generally be assumed that judges and forensic evaluators who react negatively to battered mothers' claims in custody/visitation contests do not (with some notable exceptions) consciously do so out of sexism. Rather, they often rely on apparently gender-neutral rationales, which undercut the likelihood that a battered mother is truly seeking to protect her children. Part A below explores one sometimes unspoken but extremely powerful "gender-neutral" norm which pervasively influences courts adjudicating custody and visitation, and militates against serious consideration of domestic violence: the emphasis on parental equality, which more specifically takes the form of a focus on fathers. It is my sense that the desire for greater parental involvement is exerting a magnetic pull in these cases which impels courts to avoid full consideration of domestic violence. Courts are assisted in this avoidance by their reliance on several rationales, or more accurately, misconceptions, which misconceive the role of domestic violence in custody litigation. These misconceptions are discussed in some detail in Parts B, C, and

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55. WELLESLEY BMTP REPORT, *supra* note 36, at 13.

56. *Id.* at 14.

57. *Id.*; *see also* Couch v. Couch, 978 S.W.2d 505 (Mo. Ct. App. 1998) (upholding the trial court's award of primary residential custody to father, despite the court's refusal to appoint a GAL or investigate child sexual abuse allegations based on the child's "strange" sexual behaviors, and the undisputed evidence that the father had broken the mother's collarbone); Dinius v. Dinius, 564 N.W.2d 300, 303 (N.D. 1997) (reversing a custody award to the mother where the trial court found that the father committed domestic violence against his daughter, and holding that hitting the daughter in her face and pulling her from a car by grabbing her arm and hair may have been permissible parental discipline). In at least one instance the court of appeals corrected the trial court's error. Russo v. Gardner, 956 P.2d 98 (Nev. 1998) (reversing the trial court's award of joint legal custody where there was evidence that the father had abused his two children).

D below. What I term the "Equality Principle" also powerfully influences forensic experts who have been major contributors to the courts' denial of the significance of domestic violence for custody/visitation adjudications.[58] Because domestic violence is unquestionably relevant to children's well-being, all of these factors work in conjunction to lead courts too often to fail to make custody awards that protect children's needs and best interests.[59]

### *A. Parental Equality at all Costs*

The commitment to parental equality in custody and visitation litigation is driven both by "process" and by "substantive" norms. As a matter of process, all courts are ethically and legally obligated to adjudicate cases from a stance of judicial neutrality, to hear evidence with an open mind, and not to bring any personal biases to the determination of the case. In custody cases, courts' "neutral" stance is linked to their unquestionable obligation to treat both parties as starting with equal rights to custody, and not to presume, for example, that children need their mothers more than their fathers.[60]

In contrast to a presumption of equal fitness, allegations of domestic violence or child abuse seem to frame the parties at the start as "innocent victim" vs. "evil perpetrator." This makes such allegations appear almost unfair, tilting the scales before a court hears and sifts all the evidence. Courts may resist such allegations because to accept them can have the effect of replacing the exercise

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58. *See infra* Part III.E.

59. *See infra* Part III.D. Another hypothesis for why courts so often marginalize domestic violence in these cases is that confronting the horrors inflicted within families is sometimes simply too painful, and is resisted by a form of psychological denial. Few who work in this field doubt that denial frequently fuels resistance to battered women's claims. *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Ann Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM U. J. GENDER SOC. POL'Y & L. 567 (2003). However, psychological denial does not fully explain the *difference* between how courts in custody litigation and courts in protection order cases respond to similar disturbing material about adult domestic violence. Part of the answer to that question is implicit in the discussion contained in Part A below. Parts B-D explore the particular rationales courts use to justify their decisions and how the custody context critically shapes those rationales. By crystallizing what it is about the child-centered context that rigidifies courts' resistance to domestic violence issues, we may be able to find other approaches to integrating domestic violence knowledge into these decisions.

60. "The two parties stand on equal footing at the outset of trial, and the court determines the best interest of the child based on the relative fitness and ability of the competing parties in all respects." Simmons v. Simmons, 649 So. 2d 799, 802 (La. App. Ct. 1995) (upholding the trial court's refusal to find that testimony about a twenty year history of violence meets the statutory standard for triggering a presumption against awarding custody to the abuser, where only one incident had documentary corroboration).

of the court's unconstrained discretion under the "best interests of the child" test, with an implicit presumption of one party's unfitness (effectively erasing judicial discretion).[61] Courts are reluctant to cede their discretion and judgment in this manner.[62]

Nonetheless, courts' reluctance to accept domestic violence evidence, or sometimes even to hear it, cannot be explained by the neutrality norm alone. After all, the same norm does not prevent courts from "finding facts" in, for example, criminal cases where the two sides have diametrically opposed stories. The reality of all judging is that, at some point, the open-minded hearing of evidence must evolve into a judicial interpretation or conclusion about the facts, i.e., who is truthful, who has done what, etc. Yet, in custody/domestic violence cases, too often the court's emphasis on parental equality persists in the face of clear evidence that one parent is violent and abusive to the other. In other words, courts treat the equality principle as not just a starting point, but as the requisite outcome, a goal that overrides contradictory information.

It seems clear, then, that the equality principle is also powerfully driven by substantive values. Such values derive most obviously from the powerful (although incomplete) gender revolution of the 1960s, which ushered in the rejection of explicitly gendered standards in family law, in particular, the tender years presumption as a means of determining the best interest of the child.[63] One thing has been clear since "women's liberation": mothers are no longer supposed to be considered the pre-eminent parent. By the late 1970s-80s, notions of gender equality were taking a more affirmative form; "joint custody"—i.e., the physical and/or legal sharing of parenting responsibilities and rights after separation—was now increasingly touted by policy analysts, courts, and embodied in affirmative

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61. I am describing only a mental analytic process, not explicit legal requirements. While many states have adopted a legal presumption against custody to a batterer, I argue that, even in states where domestic violence is only a "factor," domestic violence allegations are seen as reducing discretion and tilting the scales, something that courts resist.

62. The perennial debate over whether judicial discretion or legislative presumptions in custody cases better serve children does not change the fact that most judges likely believe that the exercise of their own discretion and judgment, after hearing the facts, is more conducive to a just outcome than would be the blunt application of a legislative presumption. *See, e.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984). The one exception to courts' dislike of presumptions may well be the presumption in favor of joint custody, which speaks to courts' strong attraction to this concept of parental equality. *See infra* notes 64-74 and accompanying text.

63. *See, e.g.*, Ex Parte Devine, 398 So. 2d 686, 695-96 (Ala. 1981) (holding that a presumption in favor of maternal custody for children of "tender years" unconstitutionally discriminates on the basis of sex).

legislation requiring a presumption in its favor.

Since that time, joint custody has been the subject of much debate. On the one hand, it has been defended as embodying an ideal vision of what children need and parents deserve, and a means of furthering gender equality and shared parental responsibility.[64] On the other hand, its imposition on unwilling parents in practice has been much criticized as profoundly unfair to primary caretakers, typically women, and often contrary to children's best interests.[65] There is also a considerable consensus about its inappropriateness in cases of "high conflict" between the separating parents.[66]

It is notable, however, that this well-documented debate and the fairly widespread nuanced recognition of the limitations of joint custody do not seem to have penetrated judicial thinking to a significant degree. On the contrary, to the vast majority of custody courts, some form of joint custody has increasingly become not just an aspiration, invitation, or even a preference, but an absolute ideal. Buttressing the notion of co-equal parenting as the highest good for children and the only fair resolution for parents has been the rapid adoption of a series of other legislative and judicial policies, including "friendly parent" preferences and "parental alienation" claims. Both of these notions reflect and further the seductive assumptions that any parent who does not support co-equal parenting (typically mothers) is by definition a deficient parent, and that any parent who advocates joint parenting (typically fathers) is inherently virtuous.[67]

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64. *See, e.g.*, ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112 (1992) (cautiously endorsing joint legal custody as a means of encouraging joint involvement); Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 483 n.37 (1999) (acknowledging her own earlier work suggesting that joint custody could further gender equality, and stating that she now supports the new American Law Institute standard of designing a custody award to reflect the prior parenting roles).

65. *See, e.g.*, Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988) (arguing that court-imposed joint custody arrangements are an abdication by judges who are afraid of making tough custody decisions, and a sacrifice of children's best interests in favor of "equitable" results for parents).

66. *See* Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739 (1983); Jaffe et al., *supra* note 9, at 15.

67. These types of policies, along with joint custody presumptions, are frequently intensively lobbied for and pushed through by groups which see themselves as advocates for "fathers' rights." In the District of Columbia, joint custody was lobbied three separate times, over a period of several years, and was finally passed over substantial opposition from the Bar and domestic violence advocates. The initiators of the bill were from a national "Children's Rights Council" which engages in legislative advocacy around the country. Leading members of the organization were identified fathers' rights advocates. *See* Margaret Martin Barry, *A Leap Backward: D.C.'s Joint Custody of Children Act*, WASH. LAW., Nov./Dec. 1996, at 41-42.

The problems with joint custody (and the related friendly parent and parental alienation concepts) in the domestic violence context, which are amply documented in the literature,[68] warrant brief recapitulation here. In essence, providing a batterer with maximum access to his children may only further his abuse by increasing his control over and harassment of the mother, and significant physical and emotional risks to both the children and the mother. "Friendly parent" provisions are implicitly "unfriendly" to battered women, who may need to avoid interaction with their abusers for their safety and mental health.[69] Similarly, application of "parental alienation syndrome" (discussed further in Section III.B.2 below) in cases with abuse allegations, seems intrinsically to deny the likelihood that some children appropriately want and need their exposure to fathers who abuse their mothers or themselves to be limited. While most statutes contain an exception to the preference for joint parenting where there is evidence of domestic violence, in practice, unfettered access to their children is increasingly being seen as a father's "right,"[70] and joint legal and physical custody is frequently imposed despite mothers' claims of domestic violence.[71] Moreover, the concept of "parental alienation" was actually invented to rebut mothers' claims of child abuse, particularly sexual abuse. Thus, despite the contrary assumptions of many courts that accept "parental alienation" claims, it is hard to avoid the conclusion that this theory is only a thinly

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68. *See generally* Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 34 (1992); Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1122-23 (1996).

69. *See* Zorza, *supra* note 68, at 1122; *see also* Ford v. Ford, 700 So. 2d 191 (Fla. Dist. Ct. App. 1997) (reversing the trial court's award of custody to a father who had admitted to abuse, because the trial court failed to address the domestic violence and, among other things, its implications for the "friendly parent" preference). *See generally* Fredrica Lehrman, *Factoring Domestic Violence into Custody Cases*, TRIAL, (Feb. 1996), at 32-39 (discussing the interaction between domestic violence allegations and friendly parent provisions).

70. Indeed, advocates have observed in judicial trainings that some judges apparently believe that they are not free to restrict fathers' access to children because such restrictions would infringe a constitutional parental right. Telephone Interview with Roberta Valente, Senior Advisor, Domestic Violence Resource Network (Dec. 18, 2002). The notion that the constitutional rights attaching to parenthood, see, e.g., Stanley v. Illinois, 405 U.S. 645, 650-52 (1972), apply in contests between two private parties appears doubtful, and would essentially mean abandoning the "best interests of the child" test. However, even if custody litigation were to be appropriately recast as concerning parents' constitutional rights, such rights would not mean that fathers are entitled to access to their children *regardless of the safety or well-being of those children or other individuals.* No constitutional right is this absolute. Of course, a complete exploration of this issue deserves its own article.

71. *See* SUPREME JUD. CT. OF MASS., GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 59 (1989) [hereinafter MASSACHUSETTS GENDER BIAS STUDY], *cited in* WELLESLEY BMTP REPORT, *supra* note 36, at 4 n.22.

veiled instrument for denying paternal abuse and furthering a bias against mothers.[72]

Each of these policies, and the trend as a whole, deserves greater reflection than is possible here. However, what is important for present purposes is the recognition of and reasons for the remarkably powerful hold of these "equal parenting" principles on the courts.[73] It appears that these principles, which seek to ensure more access by fathers to children, fall on fertile ground. In essence, they tap into a widespread, deeply felt lack of fathering throughout our culture and courts. Anyone who has litigated custody knows that it is an unspoken "given" in most custody courts that fathers' involvement with their children is both rare and very important. A concomitant assumption is the implicit sense that mothers start with an unfair advantage, presumably because they fit our intuitive image of "parent," and are *assumed* to be primary and/or "natural" parents. The combined effect of these unspoken assumptions is that custody courts, while believing they are merely furthering parental "equality," not infrequently give fathers' claims and requests greater weight than mothers'.[74]

In short, the judicial emphasis on both parental equality and father involvement in custody is powerfully driven both by process and substantive norms, which fuel resistance to considering domestic violence as determinative of custody or visitation. The next three Parts look more specifically at the ostensibly neutral rationales that allow courts to further this desire for equal parenting by marginalizing domestic violence claims in cases where custody or visitation is at issue. There are at least three "neutral" tenets that

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72. *See Family Violence in Child Custody Statutes*, *supra* note 18, at 201-02; Richard Du Cote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. PUB. INT. L.J. 106, 141 (2002); Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1373-75 (1994).

73. Parental Alienation Syndrome has been widely debunked as lacking any scientific basis, making its incredibly rapid and virtually universal adoption in the courts all the more striking. *See infra* note 105.

74. *See* WELLESLEY BMTP REPORT, *supra* note 36, at 4 (quoting MASS. GENDER BIAS STUDY, *supra* note 71, at 59, 62) ("When fathers contest custody, mothers are held to a different and higher standard than fathers."); SCHNEIDER, *supra* note 1, at 170 (stating that the mere act of seeking custody is treated as prima facie evidence of paternal— but not maternal— fitness). In the District of Columbia, there is also an intense sensitivity to the lack of African-American father figures in the poor communities of color, which strongly reinforces the reluctance to reject any father who is actively seeking, by litigating custody or visitation, a parenting role.

Ironically, this modern emphasis on fathers' roles appears to be recapitulating, in the name of modern values of equality and fairness, the old rule that gave fathers absolute "property" rights to custody of their children divorce. *See generally* Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 252 (1999).

courts invoke in responding to domestic violence allegations: first, a skepticism toward the plausibility of the allegations; second, an assumption that the truth may be unknowable, but that in any case the problem is mutual; and third, an assumption that any past domestic violence is ultimately irrelevant to the future-oriented custody decision. The mechanisms by which these beliefs operate, and the fallacies upon which they rest, are discussed below. It should be noted that, while each is described in sequence, they are not intrinsically distinct concepts, but rather ideas which overlap in many respects.

One last caveat is appropriate: with the exception of the discussion of gender bias (*infra* Part B.2), I seek to take these rationales at face value and to respond to them objectively and analytically. While elements of gender bias can be found in many of the analyses which discount domestic violence, many–if not most–judges are struggling to cope as best they can with extremely difficult, disturbing material and very painful choices. The following discussion responds objectively to these perspectives in the hope that a dispassionate discussion will facilitate greater understanding, and more protective outcomes for children and parents who have suffered abuse.

### *B. Discounting the Credibility of Domestic Violence Accusations*

The gulf between domestic violence advocates and those (predominantly judges and court-appointed forensic evaluators) who resist the characterization of fathers as batterers who are dangerous to their children, is defined in large part by advocates' willingness to believe women's claims (both about risk to themselves and to the children), and the courts' skepticism toward those same claims. These fundamentally contradictory starting perspectives are fueled by differing attitudes toward three core elements of factual assessment which shape the players' judgments in these cases: (i) the meaning of neutrality, (ii) gender bias, and (iii) demeanors of victims and perpetrators.

#### *1. The Meaning of Neutrality*

Defenders of judicial and evaluator "neutrality" often assert that news reports or surveys of only one party to a case, such as the Wellesley survey, cannot be taken at face value, and that the case decisions critiqued earlier[75] may well have been correct, because we can never know what the truth is in any given case without hearing all

75. *See supra* notes 43-51 and accompanying text.

the evidence or at least reviewing the transcripts.[76] Furthermore, they will argue that neither judges nor evaluators should approach any given case with presumptions about who is telling the truth. While facially inarguable, there are two fallacies in this form of studied neutrality. First, it denies the working assumptions, or "life experience," that inevitably color any evaluator or judge's interpretation of the evidence. For instance, those who are predisposed to believe that women often fabricate or exaggerate domestic violence allegations are likely to be harder to persuade of the truth of such allegations, than those who are predisposed to believe that men frequently beat women. Despite the tendency of psychological evaluators to invoke a purely "scientific" basis for their opinions (often by relying on psychological tests), the reality is that it is not possible for human beings to eradicate their life experience or perspective from their interpretations of facts. Second, instead of genuine neutrality, which is receptive to information, many judges and evaluators actually exhibit skepticism or disbelief toward abuse allegations, which is somewhat resistant to contrary input.[77]

Is such skepticism warranted? Both existing statistics and qualitative knowledge about domestic violence offer some objective guidance. Current understandings of domestic violence suggest something more than the mere possibility that, in any given relationship, allegations of violence may or may not be true: we know empirically that domestic violence is surprisingly widespread[78] and

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76. *See* Lombardi, *supra* note 19, at Part 2 (indicating that the Massachusetts courts are, not surprisingly, critical of the Wellesley study because it only interviewed the mothers, and conducted a corroborative document review in only 25% of the cases). My understanding of the "pro-neutrality" view has been honed in part in discussions on electronic list serves, including the "CHILD-DV" list.

77. *See* Fineman, *supra* note 22, at 218-19 (reviewing NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES (Robert J. Levy ed., 1998)) ("[T]he *Deskbook for Judges* appears to anticipate that disbelief is to be not only expected but also encouraged as the initial judicial response.").

78. The National Institutes of Justice found in 1998 that 52% of women surveyed said they were physically assaulted as a child or adult; it estimated that approximately 1.9 million women are assaulted by intimates each year in the United States. *See* PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2 (1998). (It is worth noting that, contrary to the admonitions by critics of the recent reports (Wellesley BMTP and NOW-California) which were based on women's "testimony," this highly regarded "objective," "scientific," empirical research also uses women's self-descriptions as the basis for discerning empirical fact.) Other research has demonstrated that wife-beating results in more injuries requiring medical treatment than rape, auto accidents and muggings combined. *See* Evan Stark & Anne Flitcraft, *Violence Against Intimates, in* HANDBOOK OF FAMILY VIOLENCE 298 (Vincent B. Van Haslett et al. eds., 1988). The Supreme Court has acknowledged studies on prevalence which "suggest that from one-fifth to one-third of all women will be

that it is perpetrated most often by males against females.[79] Further, we know that domestic violence is more prevalent in the relationships of parties who are divorcing, and still more common— with estimates of up to 75%— among couples in conflict over visitation or custody.[80]

Moreover, contrary to the assumptions of many evaluators and judges, as best we can determine, fabricated claims of abuse are rare. This question has been examined with respect to child sexual abuse allegations. Here, despite the persistent belief among judges and evaluators that child sexual abuse is frequently fabricated, studies have consistently shown that fabricated allegations are quite rare. For instance, a national study of 9000 contested custody and visitation cases by the Association of Family and Conciliation Courts concluded that only 2% of the total contained child sexual abuse allegations: 50% of those allegations were valid, 33% were incorrect, (i.e., less than 1% of all contested cases reviewed), and 17% were indeterminate. Only 14% were found to be intentionally false.[81] A more recent exhaustive study of child sexual abuse allegations in custody cases by *University of Michigan* professor of Social Work Kathleen Coulborn Faller found that 70% of the allegations were factually true.[82]

While there appear to be no empirical studies of fabrication of

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physically assaulted by a partner or ex-partner during their lifetime. . . ." Planned Parenthood v. Casey, 505 U.S. 833, 891-92 (1992) (quoting AMA COUNCIL ON SCIENTIFIC AFFAIRS, VIOLENCE AGAINST WOMEN 7 (1991)).

79. *See* AM. PSYCHOLOGICAL ASS'N PRESIDENTIAL TASK FORCE REPORT, VIOLENCE AND THE FAMILY 80 (1996) [hereinafter APA REPORT] ("Despite the contention by some researchers that women are as violent as men, clinical studies show that men more frequently are the abusers and that women more frequently are the victims of violence in the family."). The Report's finding is supported by numerous statistical surveys. The United States Bureau of Justice Statistics indicate that 85% of incidents of victimization by intimate partners are against women; that women are five times more likely to experience violence from an intimate than men; and that three out of four murder victims in 1998 killed by their intimate partners were women. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, INTIMATE PARTNER VIOLENCE 1-2 (Bureau of Just. Stat. Special Rep., NCJ 178247, May 2000). Surveys of United States and European police and court records consistently show that women make up 90-95% of the victims of reported domestic violence. *See* R. Emerson Dobash et al, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBLEMS 71, 71-91 (1992).

80. *See* BANCROFT & SILVERMAN, *supra* note 16, at 120.

81. *See* ASS'N OF FAM. & CONCILLATION CTS., ALLEGATIONS OF SEXUAL ABUSE IN CUSTODY AND VISITATION CASES: AN EMPIRICAL STUDY FROM 12 STATES (1988); Pamela Burke, *Fit Calif. Moms Losing Custody to Abusive Dads*, WOMEN'S ENEWS, Oct. 22, 2002, *available at* http://www.womensenews.org/article.cfm/dyn/aid/1080; *see also* Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 152-53 (1998). *See generally* Wood, *supra* note 72, at 1374 n.54 (citing additional sources discussing this question).

82. *See* Lombardi, *supra* note 19, at Part 4 (citing a study by Kathleen Coulborn Faller).

domestic violence,[83] Dr. Evan Stark, a widely published and recognized author and researcher in the field of domestic violence, has testified that there is no documented instance of a woman fabricating a history of domestic violence, and that he independently knows of none.[84] On the contrary, women tend to minimize and deny abuse while understating the amount and severity of abuse.[85] Women's reluctance to reveal that they have been abused is widely recognized.[86] This uncontroversial truth is hard to square with the belief prevalent in the legal system that women in litigation (whether as plaintiffs or defendants) frequently fabricate such claims.[87] In short, much of the skepticism toward women's claims of domestic violence and child abuse appears to be based on an inaccurate understanding of the real prevalence of domestic violence among couples engaged in contested custody litigation.

Finally, when not dismissing domestic violence claims altogether, courts and evaluators often reject such claims as exaggerated or insufficient.[88] However, in many cases, the view that abuse is merely

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83. Such studies are fundamentally indeterminate in that any researcher who seeks to measure rates of fabrication faces the same difficulty as judges and evaluators: there is no purely "objective" means of verifying such allegations. However, the reality is that most courts and evaluators do not ordinarily consider all existing evidence of abuse; hence it is quite possible that a researcher would be able to reach more satisfactory and "objective" conclusions based on a thorough factual investigation. *See* Freedman, *supra* note 60 (discussing the inadequacy of fact-finding in domestic violence cases); BANCROFT & SILVERMAN, *supra* note 16, at 120.

84. This testimony was presented in Case 2. *See supra* Part I.B. Stark now amplifies on that point to say that when one understands that domestic violence is defined by a "pattern of coercive control," instead of mere discrete incidents of violence, it becomes much harder to fabricate. E-mail from Evan Stark, Associate Professor, Department of Public Administration, Rutgers University-Newark, to Joan Meier (Dec. 27, 2002, 12:43 EST) [hereinafter Stark E-mail].

85. Report of Evan Stark, from Case 2 (June 27, 1993) (on file with author).

86. *See* Fineman, *supra* note 22, at 218 (noting that "women are reluctant to raise patterns of domestic abuse to their lawyers, let alone the judges and others who pass judgment on them in regard to custody petitions") (citing Mahoney, *supra* note 59).

87. *See* Jon R. Conte, *Has this Child Been Sexually Abused?: Dilemmas for the Mental Health Professional Who Seeks the Answer*, 19 CRIM. JUST. & BEHAV. 54, 62 (1992) (writing that "I am not aware of a single empirical study that has documented that in fact false cases of sexual abuse are more likely to arise in divorce/custody cases"). In fact, in my experience with my clients, all of whom were seeking legal protection, most were *reluctant* to fully acknowledge the domestic violence they had suffered, and many did not recognize low-level violence (e.g., hitting, shoving) as worthy of note. Moreover, contrary to the stereotype of vengeful mothers among custody courts, many of my battered clients were very reluctant to acknowledge that their batterers posed risks to their children.

88. *See, e.g.*, In re Custody of Zia, 736 N.E.2d 449 (Mass. App. Ct. 2000) (stating that two prior protection orders and pending assault charge do not indicate a "pattern or serious incident" as required by statute); Hamilton v. Hamilton, 886 S.W.2d 711 (Mo. App. 1994) (commenting that two incidents over twenty year marriage do not create statutorily required "pattern" of domestic violence); Brown v. Brown, 867 P.2d 477, 479 (Okla. Ct. App. 1993) (holding a father's shoving a mother

"minor" or "exaggerated" ignores both the better-documented phenomenon of minimization and denial, and the reality that domestic abuse spans a wide spectrum of behaviors (and that victims often reveal lesser incidents before they disclose the most traumatic ones). Not all domestic violence result in bruises or broken bones. Some forms of abuse are predominantly sexual. Yet the hallmarks of an abusive relationship, namely the power, control, domination and state of fear, even without much severe physical violence, may still be profoundly damaging.[89]

While courts are quick to discount mothers' claims of battering, they tend implicitly to over-value fathers' claims of desire for custody. It is now well-established that many batterers seek custody primarily as an extension of their power and control over and abuse of the mother.[90] The American Psychological Association found that batterers are twice as likely to contest custody as non-batterers, and are more likely to contest custody of sons.[91] In addition to seeking to impose their rigid views of gender roles on their children, many batterers see winning custody over the mother as a powerful means of vindicating their moral and functional superiority.[92] As is discussed in greater detail in Part III.B.3, victims and perpetrators' demeanors in

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roughly against a door, smashing car windows of a man he believed she was seeing, and repeated threats of violence do not constitute "ongoing domestic abuse" under statute). *See also* cases cited *supra* note 50.

89. *See* Stark, *Re-presenting Woman Battering*, *supra* note 16, at 986.

> Physical violence may not be the most significant factor about most battering relationships . . . they have been subjected to an ongoing strategy of intimidation, isolation, and control . . . the unique profile of 'the battered woman' arises as much from the deprivation of liberty implied by coercion as it does from violence induced trauma."

*Id.*

90. *Id.* at 1017 ("Every aspect of this case indicated that David's major interest in custody was to extend the control he had created through violence and withdrawal in the marriage into the post-marital period, an example of 'tangential spouse abuse.'"); *see also* APA REPORT *supra* note 79, at 40 ("When a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse."). These findings about batterers' frequent use of the court system to extend their power over their former partners are reinforced by the results of an in-depth study of divorced (but not necessarily abusive) fathers in New York State by Terry Arendell. Arendell's findings have been characterized as elucidating common attitudes of divorced fathers, including "a consistent shared masculinist discourse . . . with emphasis on the central importance of fathers' rights, the appropriateness of efforts to establish control over the former wife despite the divorce, the lack of male responsibility for post-divorce conflict, and the viability of absence as a strategy. . . ." Barabara Allen Babcock et al., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY 1284-85 (1996) (describing Terry Arendell's article *After Divorce: Investigations into Father Absence*, in 6 GENDER & SOCIETY 562, 573-75 (1992)); *see also* TERRY ARENDELL, FATHERS AND DIVORCE 13-17, 45-67 (1995).

91. *See* APA REPORT, *supra* note 79, at 40.

92. *See* BANCROFT & SILVERMAN, *supra* note 16, at 114-15.

court also powerfully influence, often inaccurately, courts' interpretations of fathers' and mothers' claims.

The net effect of the courts' unwarranted skepticism toward mothers' claims of battering and excessive deference toward accused fathers, then, is that it is highly unusual for a battered woman in private litigation to be recognized by a court to be sincerely advocating for her children's safety.[93] Rather, her very status as a litigant, a mother, and battered, seems to ensure that she will be viewed as, at best, merely self-interested, and at worst, not credible. Conversely, men's demands for access to their children are typically met with a presumption of good faith, even when those men are adjudicated batterers. Notably, this type of resistance to battered mothers' veracity in litigation over the children can co-exist with the court's basic acceptance of her claims for purposes of the non-child-centered aspects of the case.[94] In other words, the mere presence of children as a "stake" in the litigation can profoundly shift the culture of a case.

### 2. *Gender Bias*

Given what is known about domestic violence and batterers, the courts' insistence on "neutrality" or "objectivity" leads us inescapably back to the question of gender bias. And in fact, while the bulk of

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93. This has consistently been my own experience in the D.C. trial courts. From exchanges on a listserv devoted to the subject of domestic violence and children, it appears to be the experience of others around the country as well. *See* Lombardi, *supra* note 19, at Part 4; WELLESLEY BMTP REPORT, *supra* note 36. While appellate decisions around the country are mixed, even the favorable ones reflect unfavorable trial court decisions. *See infra* app. A; Ford v. Ford, 700 So. 2d 191 (Fla. Dist. Ct. App. 1997) (finding abuse of discretion where the trial court barely mentioned an "established pattern of domestic violence" and applied a "friendly parent" principle against the victim); Lewis v. Lewis, 771 So. 2d 856 (La. Ct. App. 2000) (reversing the award of joint custody to the father as primary residential parent where the lower court failed to apply a presumption against custody despite the husband's admitted past abusive conduct); Nazar v. Nazar, 505 N.W.2d 628 (Minn. Ct. App. 1993) (reversing a custody award to the father and rejecting the trial court's finding that the mother had "falsely" and "maliciously" alleged violence); Russo v. Gardner, 956 P.2d 98 (Nev. 1998) (reversing joint legal custody where the father was convicted of wife abuse and there was evidence that he abused children); Zugar v. Zugar, 563 N.W.2d 804 (N.D. 1997) (rejecting the trial court's award of joint custody on grounds that the victimized parent was "over-protective," that the violence would not occur again, and that the violence was not directed at children); Smith v. Smith, 963 P.2d 24 (Okla. Civ. App. 1998) (reversing custody award to father and holding that the wife's affidavit and witness' testimonies demonstrated clear and convincing evidence of ongoing abuse). Unfortunately, these appeals are the exception: most custody litigants cannot and do not take appeals.

94. *See* Fineman, *supra* note 22, at 217 (characterizing as "schizophrenic" legal decision makers' tendency to accept established "stories and statistics" of domestic violence, yet to "ignore the stories and lessons they teach" in more complex policy contexts such as child custody and visitation); *see also supra* Part I.A.

this Article examines the neutral rationales that fuel rejection of the implications of domestic violence in custody cases, the discussion would be incomplete without some reference to what we know about gender bias in this area.[95]

First, Case 1 provides a classic case in point: the court's snarling rejection of "the *mother's*" claims about the child's condition can hardly be understood in any other way than as an expression of hostility to "the mothers."[96] This comment is not explainable as reflecting the court's negative view of a party who the court had deemed excessively non-credible across the board, because the court had already indicated acceptance of many of her domestic violence allegations when presented in the contempt (non-custody) context.[97]

In fact, strikingly, many courts themselves (through appointed commissions) have identified dynamics of gender bias in custody and/or domestic violence adjudications. The Massachusetts Gender Bias study of 2100 disputed custody cases found that courts consistently held mothers to higher standards of proof than fathers, a finding that it stated "directly contradicts the popular misconception that if gender bias does exist in child custody cases, it is in favor of mothers."[98] Karen Czapanskiy has found that states' gender bias studies consistently indicate that the "credibility accorded women litigants is less than that accorded men litigants" in domestic violence cases.[99] For instance:

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95. There is still a fairly widely held view that family courts are biased against men. *Id.*; *see, e.g.*, David Crary, *Preventing the Rage; Court Bias Plays a Role in Violence by Divorced Dads, Contend Groups for Fathers' Rights*, GUELPH MERCURY (Canada), Nov. 26, 2002, at B7. Not only the dynamics discussed in this Article but the available empirical findings counter this view. *See* BANCROFT & SILVERMAN, *supra* note 16, at 115, 120-21 (stating that "fathers have been at a marked advantage in custody disputes"). My own experience, as well as the survey contained in Appendix A, *infra*, suggests that batterers are *more* likely than non-batterers to win custody because of the courts intense negative reactions when mothers raise the issue of domestic violence in a custody dispute.

96. It is difficult to imagine a judge derogatorily referring to allegations by "the father" in a comparable context.

97. Nonetheless, the entire litigation was also highly charged with inidicia of gender bias. In her review of gender bias studies, Karen Czapanskiy has identified a "negative synergy" in cases with female attorneys advocating for female clients alleging battering. Czapanskiy, *supra* note 28, at 258, *passim*. Case 1 was a striking example of this: I was a female attorney with a battered woman client; the male batterer was represented by a very aggressive and highly-regarded male public defender. The male judge and defense attorney exhibited a great familiarity, including frequent jovial banter, jokes and even bets about various trivia, while I frequently found it difficult to get the court's attention. The judge's raw venom toward my client on the day we sought to eliminate the abuser's visitation with the child was merely the low point of a very charged trial.

98. WELLESLEY BMTP REPORT, *supra* note 36, at 2.

99. Czapanskiy, *supra* note 28, at 253.

> These responses reveal a strong perception by both the bar and the judiciary that, at least in rape and in domestic violence cases, a female comes to court in Georgia bearing a credibility burden, a burden based on a stereotypic view of gender that does not affect males in the same way. The effect of such undue skepticism frequently places female litigants in a position where they must offer more evidence than do male litigants.[100]

Lest it be thought that this bias is limited to certain states or regions, similar observations have been made in most other states as well, e.g.:

> A New York criminal court judge told me recently that although the court personnel in her courtroom are usually quite prosecution-minded, this attitude shifts when a woman testifies in a domestic violence case. Then, court personnel's body language clearly conveys to the judge and jury an acute skepticism.[101]

In custody cases, gender bias also often appears in a more masked form.[102] For instance, the claim of "parental alienation" is being used with growing frequency against women alleging domestic violence (or child abuse). This concept was first invented by psychiatrist Richard Gardner, who himself stated that "parental alienation syndrome" ("PAS") is almost exclusively inflicted by mothers against fathers.[103] Gardner and others who have propounded the PAS in custody cases have asserted that it is grounds for denying custody to the perpetrator of such alienation.[104] Although the American Psychological Association has rejected it as a clinical phenomenon and states that there is no data to support it, use of this theory is increasingly prevalent in custody and domestic violence litigation.[105]

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100. *Id.* at 256 n.23.

101. Lynn Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53, 62 (1990), *cited in* Czapanskiy, *supra* note 28, at 253. *See also* Lombardi, *supra* note 19, Part 4 (citing results of the MASS. GENDER BIAS STUDY, the WELLESLEY BMTP REPORT, the NOW California Report and other cases).

102. *See* BANCROFT & SILVERMAN, *supra* note 16, at 122-31 (providing a fairly comprehensive list of "tactics" batterers use to discredit mothers' credibility in custody cases).

103. *See id.* at 135-36 (citing RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEXUAL ABUSE (1991)). At one point the gendered basis for the "syndrome" was made explicit. *See* David Turkat, *Divorce-Related Malicious Mother Syndrome*, 10 J. FAM. VIOLENCE 253-64 (1995).

104. *See* BANCROFT & SILVERMAN, *supra* note 16, at 135 (citing RICHARD GARDNER, SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED (1991)).

105. *See* APA REPORT, *supra* note 79, at 100 (noting that "although there are no data to support the phenomenon called 'parental alienation syndrome' terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger toward their violent father"); Lombardi, *supra* note 19, at

Whatever the merit of the concept of "parental alienation" in the abstract, as it has been both constructed and typically used in court, it is both blatantly gender biased and fundamentally misguided. The very notion that fathers are the dominant victims of "parental alienation" is ludicrous to anyone who has worked with battered women in the courts. In the vast majority of cases I have litigated, the abusive father actively sought to "alienate" the children from their mother. Yet the PAS theory was invented to be—and usually is—used only against mothers claiming abuse.[106] And, while some evaluators will argue that it can be a gender-neutral concept, it is almost unheard of for an evaluator or court to even recognize, let alone penalize, a father by limiting access to a child because of his intentionally alienating conduct.[107] In contrast, women who allege fathers are abusing children are increasingly being subjected to draconian punishments, including complete loss of contact with the

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Part 4 ("It's a non-syndrome . . . [if] you cannot confirm a syndrome by stating that it exists.") (quoting Robert Geffner, Founder, Family Violence and Sexual Assault Institute). The widespread appeal of PAS and parental alienation ("PA") claims in the courts is all the more remarkable in light of the pedigree of the theory and its inventor: Gardner himself has advocated pedophilia, and has never concealed that he invented PAS to give accused fathers a tool against child sexual abuse allegations. Ducote, *supra* note 72, at 140 n.158 (noting Gardner's claims that the United States is inappropriately punitive and moralistic towards sexual activity between parents and children) (citing RICHARD GARDNER, TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE (1992)); Kathleen Coulborn Faller, *The Parental Alienation Syndrome: What is it and What Data Support it?*, 3 CHILD MALTREATMENT 100 (1998) (describing PAS as offering "an explanation for reports of sexual abuse when parents are divorcing"). Moreover, Gardner's hypotheses for why so many women purportedly fabricate child sexual abuse allegations, such as that they are "women scorned," or enjoy imagining pedophilia, *id.* at 104, are have been aptly called "ludicrous." *See* Hanson v. Spolnik, 685 N.E.2d 71, 84 (Ind. App. 1997) (Chezem, J., concurring in part and dissenting in part) (criticizing the "women scorned" theory). Since Gardner has provided such an easy target for critics, other clinicians and researchers have begun to offer less outlandish analyses and defenses of parental alienation. However, the validity of the concept and its use in litigation cases remains highly contentious at best. *See generally* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001) (reviewing and critiquing Gardner, Johnston and other theorists).

106. *See* APA Report, *supra* note 79, at 40; BANCROFT & SILVERMAN, *supra* note 16, at 135-36 (offering a brief critique of the parental alienation theory as used against battered women). Regarding abusers' "alienation" of their children from their mother, see *infra* note 174 and accompanying text. Contrary to the beliefs of proponents of parental alienation theory, in over ten years of litigating these cases I have never experienced a client expressing comparable venom about her abuser, the children's father. Rather, more often than I have liked, clients have insisted on preserving the children's relationship through visitation.

107. In Case 2, in response to our request to protect the child from the abuser's trashing of the mother, the courts enjoined both parties from speaking about the other to the child. *See supra* Part I.B. As is discussed further below, this "joint" or "mutual" accountability does not have the effect of holding a batterer accountable; rather, it perpetuates his claim that the mother is equally or more responsible for whatever abuse is at issue. *See infra* Part III.C.

children.[108]

*3. Demeanor Differences between Perpetrators and Victims of Abuse*

Battered women, and especially battered mothers, may be disbelieved for another, and arguably more "appropriate," reason: the parties' respective demeanors. Judges (and arguably, evaluators) are in the business of assessing credibility. Unfortunately, many common assumptions about witness credibility backfire when applied to victims and perpetrators of domestic violence.

While courts often find batterers to be sympathetic and convincing in their denials, these credibility assessments are often incorrect. Many who work in batterers' counseling attest that a common characteristic of batterers is their passionate and eloquent denial of the abuse and the impact of their own conduct on others. As Bancroft and Silverman succinctly state, "it is common for our clients to be skillfully dishonest. . . ."[109] Batterers convince not only other people, but also themselves that they are "right" and their accusers are wrong and unworthy. Their denials are especially believable by courts in cases where the allegations of physical violence can be perceived as minor.

Many batterers also exhibit a smooth and charming persona in public and when it is in their interest.[110] An unusually explicit

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108. *See* Wood, *supra* note 72, at 1367 (describing a case in which a father was given sole custody and the mother was denied all contact with her young daughter after her child sexual abuse allegations were held to be unproven); Burke, *supra* note 81 (discussing a California NOW study which found in preliminary research that in thirteen counties that the parent charging child sexual abuse received supervised visitation or no contact at all in more than 50% of those cases, and the alleged perpetrators received full or partial unsupervised custody 90% of the time). A national study by sociologist Amy Neustein of over 1000 cases documented mothers being held in contempt, jailed, losing custody and having visitation restricted or cut off, as a result of pursuing allegations of child abuse against the father. *See* Amy Neustein & Ann Goetting, *Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse*, 8 J. CHILD SEXUAL ABUSE 103, 105 (1999) (critiquing scientifically discredited psychological syndromes, such as Parental Alienation Syndrome and Malicious Mother's Syndrome); Lombardi, *supra* note 19. A smaller study of 300 cases over ten years found that alleged child sexual abusers received unsupervised visitation or shared custody 70% of the time, and over 20% of cases resulted in the mother who alleged child sexual abuse losing visitation rights altogether. *See* Lombardi, *supra* note 19, at Part 4 (describing the Neustein studies). This trend is stunning, especially in comparison to the typical treatment of adjudicated child abusers or batterers, who rarely have their visitation even restricted, let alone terminated.

109. BANCROFT & SILVERMAN, *supra* note 16, at 124; (arguing that "[b]atterers rarely disclose their violence fully, even in the face of considerable evidence").

110. *See* David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23 (1989) (noting that while the woman often appears agitated and hysterical, the man often appears calm and friendly, which makes it more likely that friends neighbors, police officers, and courts will believe the woman is exaggerating);

depiction of this problem was provided by a Maryland judge who had denied a protection order to a woman who was later killed by her abuser. The judge subsequently explained that the man did not come across in court as a "sick" person who would commit the violence she had alleged; hence he had disbelieved the woman's claim of fear.

In contrast, battered women, particularly those who have made it to court, are often angry or emotional.[111] While this is a perfectly understandable reaction to domestic abuse and contests over custody,[112] these demeanors do not enhance women's credibility in the eyes of a judge or other evaluator.[113] Moreover, many battered women in court are experiencing some stage of post-traumatic-stress-disorder ("PTSD"), which may distort their affect.[114] In particular, PTSD can cause victims to over-react to ostensibly trivial issues,[115] to display a strange lack of affect when discussing the violence, or to

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BANCROFT & SILVERMAN, *supra* note 16, at 15, 122-23 (stating that "[t]he great majority of batterers project a public image that is in sharp contrast to the private reality of their behavior and attitudes"); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1878 (1996) (noting that judges and others often identify with the batterers who may appear "charming, respectful, and persuasive"); Kathleen Waits, *Battered Women and their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 54 (1998) (noting a survivor's comment, "Russ, with his charming batterer's demeanor, won every time").

111. *See* Laura Crites & Donna Coker, *What Therapists See that Judges May Miss: A Unique Guide to Custody Decisions when Spouse Abuse is Charged*, 27 JUDGES J., 9, 40-41 (1988).

112. *See* BANCROFT & SILVERMAN, *supra* note 16, at 123.

113. *See, e.g.*, Canning v. Wieckowski, No. C4-98-1638, 1999 WL 118509, at *5 (Minn. Ct. App. Mar. 9, 1999) (finding no error in the assessment of an evaluator and the trial court that the father is "willing and capable of toning down his anger and negativity toward [mother, but mother] seems preoccupied with making [respondent] out to be a villain without just cause"). It is conventional wisdom among advocates that angry victims of abuse are seen as less credible. One explanation is ignorance: some judges and evaluators expect a "victim" to act helpless or passive. When they appear angry or even strong, they contradict the stereotype. However, it seems likely that gender bias also plays a role. After all, while courts typically negatively judge a woman who is angry on the stand, they seem to have more sympathy for a father who is angry, e.g., because his wife has withheld the children from him.

114. *See* Joan Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1312 (1993) [hereinafter Meier, *Notes from the Underground*] (describing elements of PTSD and how they can affect battered women's testimony). For a brilliant and nuanced discussion of trauma and survivors of domestic abuse, see JUDITH HERMAN, TRAUMA AND RECOVERY (1992).

115. On one occasion, the client in Case 2 became extremely agitated when her batterer walked down the hallway of the courthouse after her (and myself) and waved a newspaper in her face while making an angry statement. Such behavior may well have triggered her past experience of being stabbed by him (and other assaults) and may have felt far more threatening than it appeared to the outside observer.

giggle inappropriately.[116] Thus, the forensic psychiatrist in Case 2 described my client's affect as "very strange," noted that it was "hard to tell what she feels," and described a "plastic-like wall" between them. Both he and the expert witness on battering noted her inappropriate giggling; however only the latter was able to link that behavior to her traumatization.[117] In short, all the professionals without specific domestic violence expertise who sought to evaluate the facts in Case 2 had trouble finding my client to be credible. Without the PTSD framework for understanding her demeanor, it was, at best, simply off-putting, and at worst, made her appear fake.

Thus, judges and evaluators lacking in-depth knowledge about domestic violence and PTSD may easily be misled into trusting the calm, sincere-sounding accused's veracity more than the "strange" or emotional purported victim's.[118]

### *C. Insistence on Mutual Blame or Blamelessness*

For all the reasons discussed above, courts' first line of defense against domestic violence allegations is often disbelief. However, many courts also marginalize or neutralize such allegations without overtly taking a stand against the mother, merely by hewing firmly to the "neutral" role and treating both parents "equally." Thus a common response to the difficulty in evaluating the truth in these cases is to blame both parties for the "mess," and abdicate the duty to find the facts: the judge or evaluator simply says that the contradictions of the two parties make neither one credible. Judges' resistance to finding the facts is signaled when they characterize the dispute over abuse as "mudslinging" (as in Case 2) or, more politely, a "swearing contest."[119]

Thus, in Case 2 above, the forensic psychiatrist and the social worker who did the home study stated that they could not know the truth, given the contradictions between the parties' stories.[120] The judge even more explicitly repeatedly expressed his frustration with

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116. *See* Meier, *Notes from the Underground*, *supra* note 114, at 1313 (explaining that such an affect can cause observers to see the victim as weird or fabricating).

117. Report of Evan Stark, *supra* note 85, at 20.

118. *See* Lombardi, *supra* note 19, at Part 4 (noting that often women are in a "no-win" situation and are criticized for *whatever* demeanor they exhibit) (quoting Eileen King, Director, D.C. office of Justice for Children). If they are emotional, they are treated as hysterical or vengeful. *Id.* If they are calm, they are characterized as "cold and calculated." *Id.*

119. *See* Raney v. Wren, 722 So. 2d 54, 58 (La. Ct. App. 1998); Freedman, *supra* note 60, at Part I (describing courts' avoidance of fact-finding).

120. *See* Reports of Social Worker and Forensic Psychiatrist in Case 2 (on file with author).

the contradictions between the parties, his inability to know the truth, and his distrust of both parties' testimony. He fairly quickly adopted the stance that the two parties should have no contact with each other, and that such contact was "a disaster." He willingly issued interim orders requiring both parties to refrain from derogatory comments in front of the child and requiring them to stay away from each other. He was careful to make clear that each such order was not premised upon any finding of responsibility or blame, but was essentially an acknowledgment that the parties "cannot get along." In fact, this re-frame was contradicted by the fact that most of the worst violence, including the stabbing, threats to kill, and stalking (and possibly sexual abuse of the child), had occurred after the parties had separated (against Mr. Benson's will).

Finally, both parties were berated for bringing this dispute into the courtroom, rather than working it out like "mature adults," and for subjecting their child to "the police." Both parties were also criticized for assaulting each other. (Ms. Turner had testified that she hit Mr. Benson with a vase the night he broke in and stabbed her; both parties received hospital treatment.) The judge repeatedly threatened to punish the parties by removing the child from both of them and placing her in foster care.[121]

Similarly, in a protection order case in Maryland, the judge told *both* parties "you're setting a real good example for your children. . . ." This was after the abusive father, who had already been criminally convicted of assaulting the mother, had repeatedly talked back to the prior judge, taunted the marshals by saying "you're going to have to put me in jail," and continued to threaten the mother. The judge to whom the abuser acted so contemptuously stated, "I don't want to pour kerosene on the fire that's already burning in this case. . . . [I try] . . . to de-escalate tense relationships between the parties."[122] Such statements, while presented as neutral (because merely advocating a private settlement) are actually punishing the mother by assigning her partial responsibility for the father's abusive conduct.[123]

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121. *See* Mahoney, *supra* note 60, at 46 (describing a case in which a welfare department recommended that a baby stay in a temporary placement with the father's parents, on the grounds that "the fact that their stories [were] so contradictory makes both parents seem unreliable.") (citing ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987)).

122. *See* George Lardner, *Beating the System; Battered Wives, Battered Judges—and a Tsk Tsk for the Abuser*, WASH. POST, Aug. 1, 1993, at C5.

123. Such purported "neutrality" in response to domestic violence is not neutral in effect. Rather, it furthers the power of the abuser and the negative impacts of the abuse. By allowing abuse to be perpetrated and refusing to establish a consequence

I believe this view—that domestic violence, like all other relationship issues, is a mutual problem—is, consistent with the equality principle, at the root of many courts' unsatisfactory responses to domestic violence allegations in custody cases. In particular, the belief in mutuality appears often to guide many mental health professionals involved in evaluations in such cases.[124] Because this construct is so central–and gaining a growing following, particularly among custody evaluators–I will take a moment to consider it more deeply here.

*1. A Hypothetical Debate on the Mutuality Perspective*

Let me posit the following view of a hypothetical custody evaluator: violence, like emotional abuse or any other cruel behavior, takes place within a relationship between two people. Few dynamics within relationships are solely caused by one person. Rather, the character of a relationship is typically defined by interactions and reactions between the two personalities. Moreover, the analysis advanced by analysts like Bancroft and Silverman, and many advocates, which focuses solely on *the batterer*, leaves out critical information, such as the parental capacity of the mother, and her contribution to the problems in the relationship. The "advocacy perspective," as it might be termed, seems to absolve mothers of all responsibility for problems within the relationship or even within herself. In fact, even in an abusive relationship, neither party is perfect. Although some women manage to remain excellent mothers while experiencing partner abuse, at the other extreme some women themselves are violent or abusive. Most women are probably in the middle; they are human beings and mothers with their own flaws.

As an advocate I must acknowledge that, over my years of representing battered women, I have had clients with drug addictions, with mental illness, who liked to frequently go out and "party" at night despite having young children at home, and a few who were at least emotionally and sometimes physically abusive to their children. Some court opinions describe mothers who are

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or accountability, it furthers the terrorizing and harassment, teaches children that abuse succeeds, and reinforces the batterer's insistence that the victim is equally (or more) to blame.

124. An ongoing theme in debates on the CHILD-DV listserv has been the advocates' assertion that battering is never amenable to joint responsibility and that it trumps most other deficits the mother-victim may have, countered by the mental health evaluators' assertions that to assume the woman is telling the truth, and that violence trumps all other issues, would constitute unethical bias on the part of an evaluator. A related perspective of many mental health professionals appears to be the view that relationship problems are never attributable to only one party.

sloppy, do not bathe the children regularly, and may feed the children inappropriately.[125] While most of my clinic's clients have actually been admirable mothers, one tragically killed her eighteen-month old daughter while hearing voices. It is also true that, as domestic violence advocates, we tend to say as little as possible about our clients' flaws.

However, custody evaluators and judges are obligated to look at those flaws, and to weigh them. The question for such neutral evaluators is whether to weigh the father's violence more heavily than the mother's non-violent flaws. To add to the "neutral" evaluator's position, I might note that our clients and many advocates have long argued that the violence does not capture the whole person of the abuser; indeed, the label "abuser" does not adequately convey that some violent fathers are also kind, loving, affectionate, humorous, and deeply involved with their children.[126] Our clients have loved the whole person in their partner and ask us to understand that; why should evaluators and courts not *similarly* consider the whole person, and not let a father's violence be his sole defining characteristic when assessing fitness for custody?

In response to this devil's advocacy, I want to suggest several reasons why violence is different, and cannot be treated as a "mutual" problem. First, the premise of the "mutuality" perspective *must* be that there are two equal, autonomous and more or less free individuals interacting in a relationship. For instance, equal mutual responsibility is not ordinarily considered an appropriate approach to problems in parent-child relationships, for the very reason that children are not and should not be seen as equal autonomous beings with adults.[127] However, even in adult relationships with nominally equal partners, violence acts as a "trump." The willingness to use violence puts the abused partner in fear for her life at all times, not just at the particular times when, for example, a gun or fist is being used against her. Hence, domestic violence at least impairs, if not destroys, the partner's autonomy, holds the mother and children hostage (metaphorically), and allows the father to take power over

125. *See* Gant v. Gant, 923 S.W.2d 527, 529-30 (Mo. Ct. App. 1996) (accepting these claims about the mother, and upholding primary residential custody to the father despite his admitted past violence against her).

126. *See* Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 344-45 (1995) (discussing the problem with stereotyping of battered women and abusers by advocates for battered women).

127. *But see* BANCROFT & SILVERMAN, *supra* note 16, at 136-38, (describing instances in which both Gardner and Johnston appear to treat children as partially or wholly responsible for sexual involvements with their fathers).

the other individuals in the family. It is not appropriate to hold as "mutually responsible" a person who is necessarily and appropriately in fear from her partner. None of their interactions can accurately be viewed as occurring without his thumb on the scale, even if the last act of physical violence occurred years ago.

It is the use of violence as a means of ongoing power and control, and not just (as is often mistakenly believed) out of "lack of control," that sets an "abuser" apart from a victim or partner who occasionally hits out in frustration or despair. And it is the use of violence to dominate and control another person that sets it apart from most other human flaws of the kinds illustrated above.[128]

Second, violence is traumatic, and qualitatively different in impact on both adults and children, from other flaws many mothers exhibit, even potentially including drug abuse. Recent research indicates that children who even *witness* domestic violence suffer significantly altered brain chemistry or structural development.[129] Experts in post-traumatic stress disorder have long been familiar with the traumatic nature of experiencing or being exposed to violence, particularly when one is helpless.[130] Because violence triggers our fear of death, our survival instinct, it touches our deepest vulnerability and fear. And because intimate violence is inflicted intentionally, by a human being, and one whom we are supposed to be able to trust, few other human flaws, including those many mothers may display, are so profoundly damaging, terrifying, and traumatizing.[131]

Finally, too often evaluators and courts (and sadly, attorneys as well) overlook the fact that many of mothers' "character" flaws are the *product* of the battering. For instance, drug abuse (or "self-medication" in the vernacular) is a common way of coping with abuse. Depression and other mental disorders are also recognized sequelae to domestic violence.[132] Neglect of children, failure to keep

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128. *See* Stark, *supra* note 16, at 986 (emphasizing "coercion and control" as key elements of battering). I do not include force used in self-defense within my definition of "violence."

129. *See* GROVES, *supra* note 9, at 37-38 (citing research by Bruce Perry at Baylor University).

130. *See id.* at 58-62. *See generally* HERMAN, *supra* note 115, at 33 ("Psychological trauma is an affliction of the powerless.").

131. *See generally* HERMAN, *supra* note 115, at 1-4 (describing and analogizing traumatic experiences in war and at home, and comparing some domestic abuse to the traumas endured in concentration camps).

132. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221-22 (1993); Penelope Eileen Bryant, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1231-33 (1999) (discussing the psychological impact of abuse and the system's pathologizing of victims).

the house or children clean, and other "un-motherly" behaviors may be predictable occurrence circumstances when the mother is living in constant fear of violence, and is operating to survive rather than to further a healthy day-to-day existence.[133]

Schneider and many others have painstakingly described the phenomenon of custody courts which appear to penalize a mother who is suffering from the effects of domestic violence, especially those diagnosed with "battered woman syndrome," by awarding custody to the abuser.[134] Despite the apparent injustice of punishing the victim, it seems clear that many courts and evaluators, focusing on the forward-looking "best interest of the child" analysis, deem it irrelevant *why* the mother is depressed or traumatized. Under this view, if the father is a more capable parent, the child's best interests may require him to receive custody, even if he also perpetrated the trauma or caused the mother's depression. In short, courts may feel the "best interest of the child" must be determined independent of "justice" between the parents.[135]

How the clash between "justice" principles and "best interests" principles should be resolved, in cases where they are genuinely incompatible, deserves its own article. For the purposes of this one, let me offer three reasons why, even where a mother's functioning is compromised due to abuse, a child is likely nonetheless to be better off in her custody than in the abuser's.[136] First, a child whose mother has been abused has already suffered a loss of full "mothering" by

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133. I do not even address here other oft-cited "flaws" of battered mothers which are more obviously responses to battering, such as some women's apparent "instability" or frequent relocations that are often triggered by efforts to escape abuse. This issue has been addressed repeatedly in the literature. *See, e.g.*, Mahoney, *supra* note 60, at 23; Enos, *supra* note 14, at 246 (1996).

134. *See* SCHNEIDER, *supra* note 1, at 170-71.

135. *See* Kinsella v. Kinsella, 696 A.2d 556 (N.J. 1997) (noting that the custody court does not adjudicate relative rights of parents but only the best interests of the child); Stark E-mail, *supra* note 84 (noting the difference between "justice" principles and a best interests analysis). It seems likely that this distinction is too gendered. It is much harder to imagine courts doing the same if the roles were reversed (e.g., being willing to "excuse" or cabin off a mother's behavior, where she has perpetrated a crime or significant harm against the father). It seems far more likely that a mother found to have engaged in violence against the father (or *anyone*) would lose custody, even if the father's functioning was found to be impaired by depression, trauma, and/or other symptoms of her abuse. *See, e.g.*, R.H. v. B.F., 653 N.E.2d 195 (Mass. App. Ct. 1995) (overturning the trial court's award of custody to the father based on the mother's violence, where the lower court had disregarded a psychologist's testimony that the mother's violence was defensive).

136. Of course there are always exceptions. Where a mother is herself violent to the child and is unlikely to cease upon separation from the batterer, where she is not providing a minimum of physical and psychological care for the child, or in comparable circumstances, foster care may be the least harmful resolution, until substantial supportive services can be provided and improvements are demonstrated.

virtue of the abuse. Assuming that the mother was previously the primary parent, sending the child to live with the father would result in even greater loss and separation trauma. What that child needs is to get his or her mother back, ideally while she is supported, strengthened, and healed.[137]

Second, an award of custody to an abuser is a powerful lesson to the child that violence and abuse *wins*, that power and control are their own law, and that the courts and society see (essentially) nothing wrong with what the father has done to the mother. There may be no more effective way to teach children to become abusers. This has been recognized by some of the more educated appellate courts.[138]

Finally, and perhaps most importantly, is the point that advocates have not sufficiently made until now: men who batter women usually make bad parents.[139]

Thus, while both mothers and fathers are usually imperfect as people and as parents, a history of committing violence in the family is, or should be, weighed as uniquely negative in the overall assessment. Moreover, even where a mother's functioning is compromised due to the impact of such abuse, a strong case can be made that "justice" principles are consonant with "best interest" principles because the children will *not* be better off with the batterer, even if he seems to be more "functional" in some respects.[140]

### 2. *A Brief Case Study— The Work of Janet Johnston*

The problems with the mutuality perspective are crystallized in the work of Janet Johnston and Linda Campbell. Johnston and Campbell's work, based in part on their own research, studies relationships involving ongoing custody/visitation conflicts. To describe these cases they coined the term "high-conflict divorce,"

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137. Moreover, the mother can be expected to regain her mental health, at least to some degree, if and when the abuse is terminated. *See, e.g.*, Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1057 n.93 (1991) (citing LENORE WALKER, THE BATTERED WOMAN SYNDROME 60 (1984)) (noting that battered women were eight times more likely to abuse their children when being battered themselves than when not in battering relationships).

138. *See* Custody of Vaughn, 664 N.E.2d 434, 439 (Mass. 1996) (discussing expert witness Peter Jaffe's testimony that if the son remained in the father's custody it would "reinforce the acceptability of the father's behavior to [the son] which has the potential to make [the son] a batterer himself in the future").

139. *See Infra*, Part III.D.2 (discussing bad parenting at greater length).

140. In my view this analysis is a reasonable interpretation of best interests analysis under statutes (i.e., most) requiring consideration of multiple factors, and does not depend on the legislature's adoption of a rebuttable presumption.

itself an implicitly "mutual" label for relationships the majority of which involve the man's violence.[141] Several of Johnston's case examples demonstrate how they subsume violence into a "mutual" responsibility model. For instance, in one case, "the authors acknowledge that the father's abusiveness and controlling behavior toward the daughter were unrelenting after separation despite efforts at therapeutic intervention . . . [yet they state] incongruously that Julianne's case illustrates *the impact of inter-parental conflict on the child* rather than the impact of the father's abusiveness."[142] In another, Johnston and Campbell describe a couple in which the man had pointed a gun and physically assaulted his partner twice, yet they state that the parties have "somewhat irrational images" of each other, referring to the woman's fear of the man.[143] Similarly, while citing several case examples in which the man used substantial violence, including death threats, and has continued to use "occasional violence," the authors nonetheless criticize the women for their reluctance to believe the father has changed sufficiently.[144] Bancroft and Silverman also note that Johnston and Campbell "offer various explanations for children's reluctance to visit with the non-custodial parent in 'high-conflict' cases, none of which has to do with the father's abusiveness. . . ."[145] Finally, they state that in "dozens" of case descriptions, Johnston and Campbell "fail to offer even one in which a mother acts as an appropriate protective parent after separation;" rather, mothers who seek to restrict visitation are criticized, even in the face of continuing "sporadic" violence.[146]

The premise of mutuality on which much of Johnston and Campbell's analysis is predicated, then, simply repeats the blaming of mothers for their behaviors that respond to fathers' violence. The authors' lack of respect for the real damage and danger to children from domestic violence is evident in their discussion of protection

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141. BANCROFT & SILVERMAN, *supra* note 16, at 131 (noting that a history of domestic violence existed in approximately 75% of the intractable custody conflicts Johnston and Campbell studied) (citing JANET R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1988)). The following discussion of Johnston and Campbell's work is heavily indebted to the summary and critique contained in BANCROFT & SILVERMAN, *supra* note 16, at 130-49.

142. BANCROFT & SILVERMAN, *supra* note 16, at 135 (emphasis in original) (citing JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (1997)).

143. *Id.* at 133.

144. *Id.* (citing JOHNSTON & CAMPBELL, *supra* note 141, at 217-18).

145. *Id.*

146. *Id.* at 134.

orders—which are referenced as being occasionally sought by mothers with purported "paranoid tendencies."[147]

Johnston's work has been widely disseminated, both among mental health evaluators and to judges. It has become a popular new "authority" for custody cases involving domestic violence, because, unlike most mental health professionals' discussions of custody and divorce, it acknowledges and discusses domestic violence in some detail. Unfortunately, in many respects it minimizes the significance and impact of the abuse, making the analysis both seductive and dangerous.

### *D. Treating Past Domestic Violence as Irrelevant to the Batterer's Parenting or the Children's Future Well-being*

The third and extremely common dynamic in custody litigation in which domestic violence is alleged is courts' resistance to hearing about the violence or to recognizing the relevance of those allegations to the future well-being of the children. Courts both explicitly and implicitly invoke two rationales for rejecting this link: (1) that harm to the mother is not the same as harm to the child; and (2) that the domestic violence will end when the parties are separated.

In some respects, battered women's advocates have been least effective in educating courts and society as to why a history of battering is per se powerfully negative data about a parent's fitness for custody.[148] The following discussion offers several examples of the problem and then briefly addresses the fallacies at the heart of courts' (and evaluators') tendencies to separate battering behavior from their thinking about a father's suitability for custody.

#### *1. Treating Adult Domestic Violence as Irrelevant to Children*

A core challenge in litigating Case 2 was the need to refute the apparent belief of the judge and court-appointed forensic experts that domestic violence was not central to the custody decision. Early on, after hearing extended testimony of a history of severe abuse, including a stabbing, the judge called my client's allegations "mudslinging," clearly implying that all the claims of violence were

147. *Id.* at 133.

148. This past failure is understandable. We assumed that violence, particularly within the family, would be seen as *per se* inconsistent with good parenting. As we have been stunned to experience widespread judicial resistance to this equation, we have recognized the need to more explicitly articulate how battering is indicative of bad parenting. Bancroft and Silverman, *supra* note 16, at 29-53, offer an incisive exposition of this subject. *See infra* note 169.

irrelevant to the custody determination. Much of the opposing counsel's case was based on the claim that violence toward the mother is not harm to the child. Moreover, none of the "neutral" mental health evaluators investigated or even addressed the domestic violence allegations.[149]

More recently, in Case 1, the judge's determination to give a respondent—whom even he appeared to believe had engaged in life-threatening violence against the child's mother—child visitation, indicated his unwillingness to hold a batterer accountable *as a father* for his violence against the mother. This was a man who had raped the child's mother at knife-point (while masked, after they had separated), had strangled her with a clothesline, and had threatened to kill her repeatedly. Had he been proven to have done these things to *another* individual, it is hard to imagine them being ignored in a custody decision.[150] In any event, while we had not alleged any direct child abuse by the father, the degree of aggression felt and expressed by the abuser against the child's mother should have been a cue to the judge that the child would be at least emotionally at risk.[151]

Other evidence that the child would be at least psychologically at risk was the abuser's extremely dysfunctional and unstable living situations,[152] and the fact that he had been involved in litigation over domestic violence with at least three other women in addition to my client. Thus, the child was highly likely to be exposed to continued domestic violence while in the abuser's care, even if only for visitation. Yet the court would not consider the possibility of no visitation, and was extremely hostile and disparaging toward the

149. *See infra* Part III.E (regarding evaluators' response to domestic violence allegations).

150. As I have reflected on courts' willingness to subject children to extremely violent men, to whom it is inconceivable that judges would be willing to send their *own* children, I have concluded that it must at some level reflect the oft-noted view that there is something wrong with the mother for "staying" or "putting up with" the abuse. At root, I suspect that many judges award children to dangerous fathers because they feel that the minimum of safety they would demand for their own children does not apply where the mother has already "tolerated" or "subjected" the children to the man's abuse. In other words, consistent with many of the dynamics discussed herein and identified in the child protection world, see *supra* note 14, the mother is implicitly held responsible for whatever harm her children suffer from her partner's abuse.

151. As noted above, the mother reported that every time the eight-year-old child returned from a visit with his father he was uncontrollable, aggressive and hostile to women, and sometimes declared he wanted to die. The court refused to hear or consider this information. *See supra* Part I.A.

152. While it appears that the father did love the child (in a narcissistic manner), he was not in fact capable of taking adequate care of him. During the first year of being in his father's custody, the child was left with other relatives, some of whom physically abused him.

mother and myself for suggesting it might be appropriate.

In her survey of the state Gender Bias studies, Czapanskiy has noted that attorneys as well as judges see spousal violence as a function of problems in the relationship, rather than as the perpetrator's own dysfunction. In Washington State, where family violence is a statutory ground for limiting custodial access, a number of attorneys participating in a study indicated that they would not investigate or raise allegations of family violence even where it would benefit their client's case because "'some inappropriate behavior' is pretty typical of people going through a divorce." No judge investigated the behaviors even where they were alleged, despite being statutorily required to do so.[153]

Perhaps more surprising is the prevalence of courts which acknowledge a father's perpetration of domestic violence, yet treat it as irrelevant to custody. Fully half of the Maryland judges and masters who responded to a custody hypothetical, stated that their decision would not change if they learned that the father had beaten the mother before the parties separated.[154] This attitude is commonly seen in real cases as well. For instance, a Florida court accepted a psychologist's statement that the man's "past violence was related to the deterioration of his relationship with [his wife]" and upheld "shared parental responsibility" for the man, despite a history of severe violence when she was pregnant, and threats to kill her, her father, and himself.[155] Many courts state explicitly that they see no link between domestic violence and custody: for instance, in Georgia, "[w]hile judges may restrict visitation with minor children because of alcoholism, drug use, indiscreet relationship, or other [sic] criminal behavior, they are not likely to do so because of repeated spouse battering . . . judges disregard or minimize domestic violence in custody disputes and visitation due to the gender-biased belief that these are just 'family squabbles.'"[156]

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153. *See* Czapanskiy, *supra* note 28, at 257-58.

154. *Id.* at 256.

155. Collinsworth v. O'Connell, 508 So. 2d 744 (Fla. Dist. Ct. App. 1987); *see also* Gant v. Gant, 923 S.W.2d 527, 531 (Mo. App. 1996) (noting that a custody award was not precluded by a history of violence, among other reasons because the "incidents of violence were not recent and were not directed at the children"); Hart v. Hart, 766 S.W.2d 131 (Mo. App. 1989) (upholding an award of custody to the father despite violence before birth and a later assault not directed at, and purportedly not adversely affecting, the child); McDermott v. McDermott, 946 P.2d 177 (Nev. 1997) (reversing the trial court's modification of custody in favor of the father despite his conviction for assault of the mother when she came to get child); Waits, *supra* note 110, at 55 (reporting the client's statement that "the psychologists and the judge bought the idea that Russ's abuse of me was irrelevant to child custody issues").

156. Czapanskiy, *supra* note 28, at 258 n.33.

As previously noted, even judges who are fairly proactive and firm on domestic violence generally, such as the one in Case 1, and others in D.C.'s Domestic Violence Court, cabin off that issue from their thinking about the abuser's relationship with his child. A similar bifurcation is also evident in Ptacek's research into Boston judges' attitudes toward domestic violence.[157]

In short, while judges trained in and "enlightened" about domestic violence are unlikely to voice such opinions explicitly, it appears that some are not far from the view of the Massachusetts judge who, in refusing to deny a batterer visitation, stated "[e]ven Dillinger could have made a good father . . . How about Manson?"[158] While such sarcasm may be more rare nowadays, the willingness to tolerate extreme violence by a father persists: a number of courts have awarded custody to fathers who have even killed their wives, on the ground that the violence against the children's mother was not directed toward the children and did not indicate the father would be a poor parent.[159]

### 2. *Why Past Domestic Violence is Necessarily Relevant to Future Parenting*

The fallacy in the mental separation of custody and domestic violence is at least four fold: first, as has been detailed extensively in the literature, domestic violence is quite harmful even to children who only witness it, and most children do.[160] While some might say (incorrectly) that past violence is "water under the bridge,"[161] the fact

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157. *See supra* note 36 and accompanying text (describing the Ptacek interview in which the judge was firm on domestic violence but sympathetic to the batterer regarding visitation); *see also supra* Part II.B.

158. *See* Meier, *Battered Justice*, *supra* note 20, at 40 (quoting Massachusetts Judge Tempone).

159. *See, e.g.*, In re Lutgen, 532 N.E.2d 976, 986-87 (Ill. App. Ct. 1988) (upholding an award of custody of daughters to the father who killed the mother, in a contest with the maternal aunt and uncle). In the O.J. Simpson custody battle between Simpson and the maternal grandparents, the custody court refused to hear the evidence (from the civil liability trial) that Simpson had killed the children's mother, and awarded custody to Simpson. An appellate court reversed this decision, but the case was ultimately settled, allowing Simpson to retain custody. *See* SCHNEIDER, *supra* note 1, at 163, 286 n.58. Courts have even rejected *States'* petitions to terminate parental rights of men who have killed children's mothers. *See* Painter v. Barkley, 276 S.E.2d 850 (Ga. Ct. App. 1981) (affirming the trial court's refusal to terminate parental rights of a father convicted of murdering the child's mother); Bartasavich v. Mitchell, 471 A.2d 833 (Pa. Super. Ct. 1984) (reaching the same result after the father's guilty plea to voluntary manslaughter); In re James M., 65 Cal. App. 3d 254 (Cal. Ct. App. 1976) (rejecting the State's petition to terminate the father's parental rights after he pled guilty to the mother's murder).

160. *See* BANCROFT & SILVERMAN, *supra* note 16, at 37-39; Hart, *supra* note 68, at 33-34.

161. Or that both parents are responsible: Stark E-mail, *supra* note 84. *See also supra* note 13 (describing the New York child protection agency's policy of penalizing

remains that causing harm to one's children—even only psychological harm, and even if it is unintentional—is normally considered a form of either child abuse or neglect. In fact, the reality that adult domestic violence constitutes a form abuse or neglect is reflected in the growing number of states which are criminalizing domestic violence as a form of child abuse.[162] And certainly, past abuse or neglect of children has always been seen as indisputably relevant to who should retain future custody.

Second, the notion that the domestic violence between the parents is in the past, and that the children will no longer be subjected to it,[163] ignores the realities of separation abuse and serial battering. Without rehashing the many extant discussions of the continuation of domestic violence after separation, suffice it to say that many batterers refuse to let their victims "leave" and be safe. Rather, separation from their adult victim, even after a legal divorce proceeding, often triggers greater and more serious violence against her or other members of the family.[164]

While many batterers continue to harass and abuse their adult victims after separation, many also direct their abuse to the children as the easiest way to accomplish the goal of punishing the mother. At its extreme, this need to punish the mother can lead to the batterer's decision to kill her children.[165] At its less extreme, such batterers may abuse the children physically, sexually or emotionally.[166] Contrary to

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battered mothers for "engaging in domestic violence"). Even if both are held responsible, the violent parent could and should still be deemed less fit.

162. *See supra* note 9 (citing articles discussing the merits and risks of these statutes).

163. *See infra* note 185 (quoting a psychologist who said, "she's young; she'll get over it").

164. *See* Mahoney, *supra* note 60, at 6 (coining the term "separation assault" to describe the violence inflicted on women by batterers when they learn that their victim is taking steps toward independence or separation); *see also* SCHNEIDER, *supra* note 1, at 77-78; WELLESLEY BMTP REPORT, *supra* note 36, at 17 (noting that a majority of mothers interviewed were abused or mistreated by an ex-partner after separation).

165. *See* Paul Duggan, *Parolee in Slaying of First Wife Charged in Stepdaughters' Deaths*, WASH. POST, Sept. 6, 1996, at A20 (writing that the "police said the suspect . . . killed the girls in a fit of rage over his estrangement from his current wife, the children's mother"). A high profile case in Dallas involved John Battaglia's murder of his two daughters while their mother listened on the telephone, allegedly because he was angered that she had gotten an arrest warrant against him. His second wife, a law professor, also survived two years of his abuse. Posting of Michelle Ghetti, to CHILD-DV (Nov. 18, 2002) (copy on file with author).

166. *See* BANCROFT & SILVERMAN, *supra* note 16, at 1, 71-75 (describing batterers' use of children "as weapons" after separation, including kidnapping of children); Green Book, *supra* note 10, at 9 (stating that 30-60% of batterers abuse children); Hart, *supra* note 68, at 33-34 (citations omitted). Evan Stark states that "[t]angential spouse abuse occurs when the batterer determines he can best hurt his partner by

the assumptions of many court personnel,[167] these risks *increase* after the batterer's separation from the mother, both because batterers so often use the children as a means of furthering their abuse of the mother, and because they are freer to indulge their own inappropriate needs or emotions with children when their mother is not there.

Finally, and most importantly, even those batterers who do not necessarily intend to harm the children are unlikely to be good parents, and are often quite destructive. As previously noted, many batterers seek custody, not out of a genuine desire to take care of the children, but to retaliate against or further their control of their partner.[168] The persona of many—though not all—batterers, is inconsistent with the qualities needed to make a good parent.[169] People who need to control and abuse their intimate partners are unlikely to be capable of the loving, nurturing and self-disciplined behavior that good parenting requires. By definition, a father who abuses the mother has indicated that he cannot put the children's interests first, since their mother's abuse, by undermining her well-being, inherently harmful to the children. Many batterers expect children to meet *their* needs, rather than vice versa; this can lead him to expect children to give up their other interests to spend time with him; to demand quiet to an inappropriate degree, to demand physical affection regardless of their feelings; and to become blaming, tearful, or yelling when they fail to meet his needs.[170]

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hurting her children." Stark, *Re-Presenting Woman Battering*, *supra* note 16, at 976 n.15.

167. *See, e.g.*, Kent v. Green, 701 So.2d 4, 5 (Ala. Civ. App. 1996) (commenting that the therapist and "psychological profiles" indicated that the abuser was "unlikely to be violent in the future," resulting in his receiving custody). In fact, the only factor considered to be predictive of future violence is past abuse. *See generally* BANCROFT & SILVERMAN, *supra* note 16, at 118 (noting that "[n]o psychological test exists that can determine whether an individual is a batterer or which batterers are most likely to re-offend"); *id.* at 150-177 (discussing how best to assess risk to children from future contact with batterers).

168. Batterers can and often do use contacts with their former partner through the children to continue to harass, obstruct, undermine, and generally interfere with their former partners. *See* Lehrman, *supra* note 69, at 34; Zorza, *supra* note 68, at 1124.

169. Bancroft and Silverman note that we "can expect that one or more of the following problems will be present in the parenting of the great majority of these men." *See* BANCROFT & SILVERMAN, *supra* note 16, at 29-53 (describing batterers' parenting as characterized by authoritarianism, under-involvement, neglect and irresponsibility, self-centeredness, and manipulativeness). They also caution that batterers' "parenting characteristics" are less universal than are their attitudes and behaviors toward their adult partners. *Id.* at 29. The following discussion is drawn liberally, but not solely, from their discussion.

170. This is most evident in batterers who are intolerant of babies or young children crying, see BANCROFT & SILVERMAN, *supra* note 16, at 34, which sometimes

Batterers are often patriarchal, believing in strict gender roles and subordination of females, and can be controlling or authoritarian toward children of both sexes. Batterers "tend to be rigid, authoritarian parents."[171] They tend to expect their will to be obeyed unquestioningly, or to be inflexible in their arrangements, extremely angry at any sign of non-compliance or disrespect, spank more often and be angry more often than other fathers. In short, they tend to use "power parenting."[172] They are unlikely to possess the empathy that allows parents to treat their children with respect and to validate their feelings, two qualities considered important to raising emotionally healthy, conscientious, caring children.[173]

Many, if not most, batterers both consciously and unconsciously undermine the children's mother and relationships with their mother.[174] Many tell the children that it is their mother's fault that the parents are separated, that they cannot see their father more, that they cannot have certain things, or any other source of sadness in the child's life. Many of my clients' batterers would demean the mother to the children, telling them their mother is a "whore" or "slut," and in at least one case, demanding that the children come out of their rooms to watch him beat her up as punishment for some purported wrong.

Finally, batterers are often manipulative to children as well as partners, denying their own conduct and its effects, blaming the mother, and seeking to persuade the children that they are the "nicer" or "better" parent.[175] Often batterers use the children to further their control over the mother, explicitly or implicitly enlisting

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leads to shaken baby syndrome.

171. *Id.* at 30.

172. *Id.* at 29-30. However, "[h]arsh disciplinary practices, negative or critical interactions with children, or explosive anger toward children teach them the wrong lessons." GROVES, *supra* note 9, at 132.

173. *See, e.g.*, BECKY A. BAILEY, EASY TO LOVE, DIFFICULT TO DISCIPLINE: THE 7 BASIC SKILLS FOR TURNING CONFLICT INTO COOPERATION 8, *passim* (2000) (advocating "loving guidance" which teaches respect and self-control rather than punitive discipline which teaches power and conflict); BANCROFT & SILVERMAN, *supra* note 16, at 104 (stating that traumatized children need to be with a parent who is able to "acknowledge, recognize and bear witness to the child's pain"); GROVES, *supra* note 9, at 133-34 (stating that all children need parents to model respect, tolerance and non-aggression).

174. *See* BANCROFT & SILVERMAN, *supra* note 16, at 33-34. This behavior is well-recognized to be characteristic of batterers, yet appears to have been entirely overlooked by those who subscribe to the theory of "parental alienation" as a problem paradigmatically created by mothers who falsely allege abuse.

175. *Id.* at 36 ("After separation, battered women in our cases raise concerns about manipulation of the children by the batterer with greater frequency than any other single aspect of his parenting.").

the children in his vendetta. In Case 1 above, the abuser sent his son to spy on his mother, to report to him about who she spent time with, and to make sure that he could keep tabs on her. When the boy went to live with his father, the mother could not tell him where she was going to be moving because she knew the boy would tell his father.

In short, it is simply fallacious to assume that past domestic violence is in the past, that it is not directly relevant to future custody, or that it can ever really not impact the children.

### *E. Over-Reliance on "Neutral" Experts*

Very often courts are assisted in sustaining the foregoing misconceptions by the input of so-called "neutral" professionals, typically mental health experts. These neutrals include Guardians Ad Litem ("GALs"), custody evaluators, and a host of other possible players in custody litigation.[176] The discussion below focuses on the first two roles, as the most prevalent and most likely to impact the court's decision.

Because the "best interest of the child" standard is both amorphous—a vacuum to be filled by the decision-maker's personal values—and prospective—i.e., unlike most legal causes of action it does not intrinsically require an inquiry into past events—family courts have increasingly looked to mental health professionals, or other "neutral" professionals, to assess this murky psychological concept. The reliance on neutral "experts" or even lawyers (in the case of many GALs), is understandably seductive. Courts feel they are more likely to hear a recommendation that truly reflects the children's interests from somebody whose sole obligation is to ascertain those interests and who has no other personal or professional stake in the outcome, than from anyone—even a psychological expert—hired by one of the parents. Reliance on forensic evaluations or recommendations by mediators also enables courts to manage an overwhelming caseload by reducing the time spent on fact adjudications.[177] However, this reliance is excessive by many estimations, and it is especially problematic in domestic violence cases.

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176. *See* Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 270-73 (2002).

177. *See id.* at 302-03 (positing that "practical concerns [i.e., docket control], rather than scientific or legal considerations, appear to be the primary motivating force behind the increasing delegation of judicial responsibility to mental health professions in custody proceedings").

*1. Ignorance of Domestic Violence*

First, with rare exceptions, mental health professionals tend to be uneducated about domestic violence and to underrate it in importance.[178] While certain psychologists have pioneered the development of some of the fundamental concepts in the field,[179] as a whole, the mental health professions have yet to integrate education about domestic violence into mainstream training and degree programs.[180] Thus, surprising though it may seem, the typical custody evaluator does not recognize basic domestic violence dynamics, does not ask about abuse or know how to ask questions in ways that will facilitate disclosure of pertinent information,[181] does not know the domestic violence literature, and simply does not consider domestic violence to be a major factor in custody.[182] This is especially true where the abuse is not highly visibly physical, as evidenced by broken bones and the like, but takes more subtle forms such as psychological (and physical) intimidation and abuse, power and control, and/or sexual abuse.

Indeed, most neutral evaluators appear to have a bias toward disbelieving abuse allegations (which they find easier to assume are fabricated or exaggerated by angry mothers), perhaps because they are unaware of the high rate of domestic violence among divorcing couples and especially among those litigating custody.[183] Strikingly, evaluators' ignorance of the prevalence of abuse appears to fuel a punitiveness toward mothers who allege abuse. At least one evaluator recommended that the mother lose custody merely on the ground that she alleged abuse, while he had investigated facts that might corroborate the woman's allegations.[184]

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178. *See* BANCROFT & SILVERMAN, *supra* note 16, at 119.

179. *See, e.g.*, LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION (1992).

180. *See* BANCROFT & SILVERMAN, *supra* note 16, at 119 ("Graduate training programs for psychologists 'have largely ignored abuse as a specific content area.'").

181. In one case with which I am familiar, the custody evaluator found, in his interviews of several third parties, no corroboration of the mother's claims of psychological and physical intimidation and abuse. (In part, the evaluator did not recognize that some of the information he received was, in fact, corroborative.) Yet a domestic violence expert interviewing the same individuals received more detailed and relevant information clearly corroborating the mother's claims.

182. *See* BANCROFT & SILVERMAN, *supra* note 16, at 119.

183. *See id.* at 120; *supra* note 78-87 and accompanying text. Where concern about child abuse is alleged, the likelihood of a neutral mental health professional confirming it is at its nadir. *See generally* Lombardi, *supra* note 19, at Part 4; *supra* note 108.

184. *See* BANCROFT & SILVERMAN, *supra* note 16, at 120 (describing a GAL who

Thus, even in Case 2 above, where the violence included a life-threatening stabbing documented with medical records and a police report, other written threats, and some witnessed threats, with the exception of the domestic violence expert I hired, not one of the forensic examiners (including the court-employed psychiatrist and social worker, a private psychologist chosen by the other party, and the alleged child sexual abuse expert on contract with the court), nor the GAL, paid the slightest attention to these incidents other than in some instances to suggest that the complainant was not altogether stable and not credible. In a more recent story told by Kathleen Waits about a domestic violence client in a custody battle, three separate psychologists, including the one *she hired*, dismissed the history of severe domestic violence as doubtful or irrelevant.[185]

The power of these "neutral experts" is immense. Scratch the surface of many cases where courts have discounted proven abuse, and you will often find a mental health "expert" opinion or GAL recommendation underlying the decision.[186] Moreover, where a GAL

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recommended a switch of custody to the father because the mother had fled to a battered women's shelter when (he believed, without investigation) that was unnecessary); *see also* E-mail from Sharon Farmer, Child Advocate, Arizona Protective Parents Network, to Joan Meier (Oct. 17, 2002, 11:50 EST) (writing that the custody evaluator labeled Farmer an "alienating parent" because of her repeated claims of the child's sexual abuse by her father, based on the toddler's statements and sexual acting out); Lombardi, *supra* note 19, at Part 4; WELLESLEY BMTP REPORT, *supra* note 36.

185. In that case the client reported that her psychologist said, "[s]o he's abused you. But he loves those kids." Waits, *supra* note 110, at 48-54. When reminded that the three-year-old had seen the abuse, this psychologist responded, "She's young, she'll get over it." *Id.* at 55. There have been suggestions that professionals are disinclined to recognize domestic violence among upper middle class white people. While that is often true, my experience is that professionals in custody cases are disinclined to credit or give it any weight in all races and classes. Both Case 1 and Case 2 involved African-American middle or lower-middle class families.

186. *See* WELLESLEY BMTP REPORT, *supra* note 36, at 20 (stating that more than one "state actor" ignored, minimized or refused to believe women's reports of partner or child abuse, resulting in court decisions to place children in abusers' care); *see also* R.H. v. B.F., 653 N.E.2d 195, 199 (Mass. App. Ct. 1995) (noting that the trial court followed a GAL recommendation of joint legal custody and primary residential custody to the father despite the GAL's acknowledgment of battering and a failure to "analyze . . . the family relationships in respect to the characteristics to be found in a battered family"); Kent v. Green, 701 So.2d 4, 5 (Ala. Civ. App. 1996) (noting that two psychologysts, including the father's therapist, stated that the father was "unlikely" to be violent in future and that the mother had psychological problems likely to deteriorate without treatment); Brown v. Brown, 867 P.2d 477 (Okla. Ct. App. 1993) (affirming the trial court's award of an infant to the father, despite evidence of some "violent or aggressive behavior," where the expert witness, who had performed psychological tests on both parties, recommended custody be given to the father because of the mother's "high degree of evasiveness"); Raney v. Wren, 722 So. 2d 54, 62-63 (La. Ct. App. 1998) (upholding the trial court which relied in part on a psychologist's finding that a psychological test would suggest she is "in the dumps," while rejecting the custody evaluator's recommendation of custody to the mother); In re Custody of Zia, 736 N.E.2d 449, 452 n.6 (Mass. App. Ct. 2000)

has been appointed to represent the children's best interests, his or her failure to link adult domestic violence to the welfare of the children virtually ensures that that relationship is rendered invisible.[187] Even if the mother's attorney points out the link and makes arguments about the children's best interests, such advocacy is typically discounted as merely "partisan" and largely ignored.

*2. Bias Against Terminating Relationships*

The second problem with reliance on neutrals in custody cases is the nature of such experts' so-called "neutrality." The "equality principle" discussed above in connection with judges is actively at work here too. Mental health professionals, and, it appears, most GALs, seem to equate neutrality and objectivity with preserving an equal role for both parents, which takes the form of a widespread professional bias for joint custody and shared parenting.[188] This preference derives not only from the view that joint custody is in the best interests of children, but also from these professionals' *process* norms. The principles underlying most mental health professionals' work, that relationships are a two-way street, and that problems in families are the shared responsibility of the family, militate against the severing of relationships, while reinforcing an emphasis on developing more constructive post-divorce interactions between the former married partners.[189] For most mental health professionals,

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(upholding the trial court's award of sole legal and physical custody to the father on the grounds that the mother had "consistently denied the father participation in fundamental decisions" and where the GAL recommended joint legal and physical custody); Canning v. Wieckowski, No. C4-98-1638, 1999 WL 118509, at *15 (Minn. Ct. App. Mar. 9, 1999) (upholding the trial court's award of physical custody to the father despite the child's preference for the mother based in part on the recommendation of the psychologist who performed psychological tests, observed both parties with the child, and suggested that the mother's claims of abuse were "trumped up"); Owan v. Owan, 541 N.W.2d 719 (N.D. 1996) (reversing the trial court's award of custody to the father, in part because of improper reliance on the father's social worker witness as an "expert" on his violent conduct).

187. While GALs are harder to categorize (they tend to be either mental health professionals or lawyers), they also are typically minimally educated about domestic violence, and have generally been not only unhelpful but detrimental in these cases. This was true in Case 2. *See R.H.*, 653 N.E. 2d at 199; E-mail from Linda Carnahan, to Joan Meier (Apr. 24, 2003, 13:44 EST) (on file with author) (detailing another horror story involving both a GAL and mental health evaluators). *See generally*, Du Cote, *supra* note 72, at 106; Patricia Wen, *Report Assails Family Courts*, BOSTON GLOBE, Nov. 26, 2002, at B2 (noting that "GALs have been accused of lining up along ideological lines that predispose them to believing— or not believing— allegations of abuse").

188. *See* Bowermaster, *supra* note 176, at 290.

189. I am grateful to Janet Bowermaster for crystallizing this point. *Id.* at 290-91. This understanding of mental health perspectives on divorce is also informed by Martha Fineman. *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 747 (1988)

except those with expertise in abuse, there is a deep resistance to cutting off contact between the parents, let alone reducing contact between a parent and child. Ironically, and sometimes tragically, the communication and process values that mental health professionals privatize are anathema to many battered women, for whom such communication and "process" represents an opportunity for continued harassment and/or trauma.[190] Moreover, the power of the "equality" or shared parenting norm is such that even some GALs with domestic violence experience and alleged expertise, subtly or not so subtly discount mothers' claims of abuse and recommend joint custody.[191]

Furthermore, as in the work of Johnston discussed above, the mental health emphasis on shared responsibility for relationship problems, and the perception of abuse as no one person's fault, almost inevitably translates into judgment and blame of mothers who resist contact with the abuser for themselves or their children. Bancroft and Silverman note that in their experience with custody litigation, allegations of domestic violence or of incest perpetration tend to require a high measure of supporting evidence, whereas allegations that a mother is attempting to alienate the children from their father (e.g., by making "false" accusations of abuse) are sometimes accepted with little or no factual basis.[192]

Indeed, it is becoming almost normal to see a claim of "alienation" wherever abuse is alleged in a custody case.[193] Given the prevalence

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(noting that the influence of mental health experts on divorce has been to encourage the process to be viewed less as one of termination of the relationship than of re-structuring the family to develop new, post-divorce relationships). While Fineman focuses particularly on the social work profession, these biases are implicit in other mental health professions as well.

190. In one case with which I am familiar, the custody evaluator, while discounting the mother's claims of sexual abuse, physical intimidation and psychological abuse, insisted that more direct communication between the parents must be required, against her will, and despite her fear of her ex-husband, "for the sake of the children."

191. In one case in Washington, D.C., the GAL, who had previously litigated domestic violence cases on behalf of victim, and was seen by the courts as having domestic violence expertise, recommended joint custody despite the clear allegations of abuse. Even if the mother had been lying about the abuse, it is difficult to imagine how joint custody could work under such conditions.

192. *See* BANCROFT & SILVERMAN, *supra* note 16, at 121.

193. Sadly, the alienation claim also has the effect of silencing children's voices. In cases with which I have been associated, when the children voiced a preference *not* to see their father, or otherwise indicated troubling behaviors by the father, the courts and forensic professionals presumed they were "programmed" by their alienating mother. The inevitable corollary is that *more* rather than less contact is ordered, so as to reduce the mother's alleged ability to alienate the children from their father. It is almost unheard of for a court or forensic expert to conclude that the children were appropriately alienated from their father because of *his* abusive

of this unscientific theory, its almost sole use *against mothers* (despite the widespread reality of abusers intentionally alienating children from their mother), and the frequent rejection of mothers' claims of abuse, it seems obvious that "parental alienation" is the abuser's most potent weapon. Its remarkable success in the courts is evidence not only of gender bias, but of the power of false "neutrality" and "parental equality."

*3. Over-Reliance on "Scientific" Tests*

The third problem with reliance on forensic experts in these cases is the inappropriate weight they often give to so-called objective, scientific, or clinical testing, such as the Minnesota Multiphasic Personality Inventory ("MMPI"), the "MMPI-2," the Thematic Apperception Test ("TAT") and others.[194] As in Case 2, and several other cases with which I have been involved, these tests are regularly administered and reported by custody evaluators as though they provide relevant information about the parents' parenting capacity.[195] Unfortunately, like other aspects of forensic evaluations that fail to properly assess domestic violence, they are, at best, of minimal use, and at worst, extremely damaging in these cases, because they tend to pathologize victims and normalize the personality traits of perpetrators.

First, even outside the world of domestic violence, there is significant doubt about the validity of the use of these tests— most of which were invented for *clinical* use— for forensic purposes. For instance, the MMPI was invented as a "gross screening device for severe psychiatric disorders . . . to identify significant psychopathology, not the small differences in relatively mild pathologies more often found in parties to a custody dispute."[196]

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conduct. Even if it were true that many women lie about abuse and wrongfully seek to alienate their children from their fathers (which, as previously stated is the opposite of common experience) surely *sometimes* it would be true that an abusive father's children would appropriately seek to reduce their contact. Yet, I have seen virtually no published decisions to this effect. *But see* Ford v. Ford, 700 So. 2d 191, 195-97 (Fla. Dist. Ct. App. 1997) (reversing the trial court's opinion and admonishing the lower court for failure to take into its consideration that the mother may not have behaved as a "friendly parent" due to the father's abusive behavior).

194. *See generally* Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 142-47, 149-50 (2002).

195. *See* cases cited *supra* note 186.

196. *See* Bowermaster, *supra* note 176, at 297 (quoting David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 BEHAV. SCI. & L. 197, 207 (1989)).

Use of such a test "without scientific validation for use in child custody contexts"[197] would appear to render the results non-scientifically valid; yet, this type of test is commonly relied on in custody evaluations as providing "objective," "scientific" data which can inform the court about the parties' relative fitness for custody. While other tests were invented specifically for use in custody evaluations, these have also been criticized "for their lack of demonstrated reliability and validity, the unrealistic or untested assumptions they contain, and problems with the sample populations through which they were developed."[198]

The traditional psychological tests are even more problematic where domestic violence is concerned. Studies conducted to assess how these tests work in cases involving a history of domestic violence have consistently found, for example, that battering men "often look unexceptional on psychological tests such as the MMPI."[199] Studies of the MMPI and the Milton Clinical Multiaxial Inventory ("MCMI") as applied to batterers have found that there were "few scale elevations indicating pathology."[200] Conversely,

> [t]he MMPI-2, for example, includes many questions that, if answered accurately by a battered woman, will contribute to elevated scale scores, such as whether she believes that someone is following her, whether she has trouble sleeping at night, whether she worries frequently, or whether she believes another individual is responsible for most of her troubles.[201]

Indeed,

> [i]n an earlier study of the MMPI, battered women tended to have quite elevated scores for anger, alienation, and confusion, somewhat elevated scores for paranoia and fearfulness, and low scores for intactness and ego strength . . .[202]

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197. *Id.*

198. *See id.* at 298. Bowermaster concludes that "[w]ithout . . . validation, even these newly developed measures cannot be used with confidence." *Id.* Bowermaster offers a number of additional critiques of mental health forensic experts' practices in custody evaluations, including that there is a lack of empirical research to support many of the value judgments evaluators make about desirable parental characteristics; that the psychological tests are both over-used and mis-used; that mental health professionals are not skilled at "making clinical judgments for normal [as opposed to pathological] populations;" and that their judgments are often "in fact inaccurate." *See id.* at 296-30; *see also* BANCROFT & SILVERMAN, *supra* note 16, at 118 (standardized psychological tests that purport to measure parenting capacity "are poor predictors of parenting capacity and are commonly given inappropriate weight by custody evaluators").

199. *See* BANCROFT & SILVERMAN, *supra* note 16, at 296-30.

200. *See* Stark, *Re-presenting Woman Battering*, *supra* note 16, at 1018 n.196.

201. *See* BANCROFT & SILVERMAN, *supra* note 16, at 118.

202. *Id.*

Psychological testers are apt to believe their tests tell them something. When that "something" is "normal," it is difficult, if not impossible, to convince the evaluator— and thereby the court— that this "normal" father is in fact violent and dangerous. Conversely, when the tests indicate "elevated scales" for the mother, i.e., indications of "personality disorders" or pathology, evaluators will naturally conclude that the mother is "sick" or less psychologically healthy than the father. The net effect is that existing psychological tests tend to pathologize battered women, certify the batterer as "normal," and deflect attention altogether from domestic violence. Yet once such data are provided to a court, often without sufficient caveats, it is seen as "objective" and "scientific" and given inappropriate probative weight.

Unfortunately, most courts are not aware of the limitations and inadequacies of the psychological "experts" and tests on which they rely. Moreover, for the reasons already discussed, courts tend to rely quite heavily on these apparently "objective" recommendations. Sadly, the result often is that children's best interests in custody cases concerning domestic violence are neither accurately assessed nor protected in the outcome.

One remedy for these widespread failures of forensic assessment for which there is a growing demand is the appointment of domestic violence experts to assess for domestic violence in these cases.[203] However, while inclusion of some domestic violence experts might improve on the track record of other mental health professionals, caution is called for: increasingly, some forensic professionals, such as Johnston, are developing enough knowledge of domestic violence to qualify as "experts," but still appear to retain the biases toward mutuality, shared responsibility, and shared parenting, which ensure that they perpetuate many of the current problems. In short, until the system can transform its mistaken preference for parental "equality" in these cases into a fuller, more complex, and more honest understanding of the role of battering and the needs of children, the underlying source of the problem will remain.

### *F. Where From Here?*

The problems detailed above do not lend themselves to simple, clean solutions. Indeed, if we do nothing else, this Article urges us to take a step back from our positions as "advocates" or "neutrals," and try to consider what is valid, and even admirable, in the "other"

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203. Stark E-mail, *supra* note 84; BANCROFT & SILVERMAN, *supra* note 16; WELLESLEY BMTP REPORT, *supra* note 36, at 73.

perspective. For, as I have noted earlier, while not true of all, many of those who do destructive things in these cases are good and well-meaning people who do not intend to be gender biased, and who want to help children. To some degree, any meaningful improvement in the practice in these cases will rest on the opening of minds and the deepening of peoples' understandings, something for which I have no magic prescription.[204]

However, this Article was inspired in part by the Green Book process currently taking place at both a national and local level among child protection, domestic violence and judicial personnel. Given the obvious overlap in the nature of the issues and problems confronted in the child protection arena and the private custody litigation discussed here, what might we take from that process (not least, its optimism and energy)?

While the Green Book Initiative is certainly confronting numerous challenges, and success is far from assured, it is inspiring for one reason. This initiative, in less than five years, has broken open a frozen area of legal practice which advocates had long despaired of improving, i.e., the mother-blaming culture and bureaucracy of child protection agencies. The Green Book Initiative's intentional, concerted and careful process of collaboration has begun to shake up old ways of looking at these families and has opened dialogue and even spawned new practices to a degree that would have been difficult to imagine fifteen years ago.[205] And while gender bias is not directly addressed in the Green Book, it is necessarily a sub-text to much of the collaborative dialogue that takes place between domestic violence advocates, courts and child welfare representatives.

Because the Green Book Initiative has in fact generated remarkable momentum and some excitement about the potential for deep change, a consideration of its implications for the parallel custody context seems worthwhile. The following section, therefore,

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204. *But see* Freedman, *supra* note 60 (arguing that application of "compassionate witnessing" by all involved parties is critically needed and may be the only avenue to the profound types of social and legal change called for in this area).

205. In the early 1990s, I was involved in some discussions about bringing domestic violence advocacy to child protection agencies. National domestic violence advocates were intensely opposed to this effort based on previous negative experiences they had had which convinced them that these agencies would only use any domestic violence education they received to further blame and punish mothers. To some extent, the *Nicholson* case, and that agency's policy of removing children because their victimized mothers were "engaging in domestic violence," proved them correct. However, at the same time the *Nicholson* decision ultimately represents a groundbreaking victory for domestic violence advocates. The court's strongly favorable opinion was informed in part by the Green Book. *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 200 *et seq.* (2002).

draws on that precedent to offer some imaginative thinking, akin to a "thought experiment," about how a collaborative response to the problems in the private litigation arena could make a difference.

## IV. THINKING OUT OF THE BOX ABOUT COLLABORATIVE RESPONSES TO PROTECT CHILDREN IN PRIVATE DOMESTIC VIOLENCE/CUSTODY LITIGATION

"Enlightened collaboration" in the child protection setting has begun to address the traditionally mother-blaming attitudes of child protection agencies (and courts), and to develop a model of a respectful collaborative process in which both state actors and private advocates seek to ally with adult victims of battering in order to best protect both the mother and the children. In this context it has been recognized that it is critical to enhance child protection workers' understanding of battering and sympathy for adult victims, as well as domestic violence advocates' knowledge of the child welfare system's goals and process, and all parties' commitment to helping battered mothers protect their children. A collaborative approach seems inevitable and necessary.

In private custody litigation, as in the child protection arena, battered mothers' claims of battering have been discounted or used against them, and the tendency has been to blame the mother, while excusing the father, for whatever harms the children have suffered. The next two Parts envision alternative forms of collaboration which could help negate the courts and psycho-social professionals' tendency to discount mothers' claims, and enhance their responsiveness to the risks to children from their mothers' batterers. I call this a "thought experiment" because I am well aware that the practical realities of child protection practice may mean that it would not work, at least not until child protection agencies are far more transformed than is likely to happen soon. However, the experiment seems worth considering, if only to better crystallize the problem we face in domestic violence/custody litigation; and to imagine how we might structure the process if the promise of the Green Book Initiative is even partly fulfilled.

From that stance, I would argue that, if, as the Green Book Initiative suggests, the State were serious about improving the protection of children in families with domestic violence, it would take a more aggressive stance to restrict the rights of fathers whose abuse of the mother and/or the children makes them unsafe (physically or psychologically) for the children. There are two means by which it could do this: (1) by intervening in private litigation

where child welfare is at stake; and (2) by initiating termination of parental rights in cases (public *or* private) where a batterer has demonstrated an inability or unwillingness to eliminate the threat he poses to the family.

### *A. Public/Private Partnerships*

Many judges' and mental health professionals' resistance to taking seriously a battered mother's claims of risk to children is driven, at least in part, by the fact that she is a litigant with a presumed self-interested bias against the opposing party, which casts doubt on all of her claims about the children's welfare. In this context, the fact that she may have been battered can be—and often is—seen as only compounding her reasons to seek to hurt the father, and thereby may only fuel the system's skepticism that she is actually advocating for the children's best interests. Moreover, because the court is hearing only from two warring parents, because there is already strong sympathy for fathers who seek involvement with their children, and for all the reasons discussed earlier, courts become deaf to mothers' claims that they are advocating for the best interests of their children. What if, however, the very agency whose mission is to protect children, were to join the litigation on behalf of the children, and to support the mother's claim that the batterer poses a risk to the children?

In the world I am envisioning, in which child protection agencies have been through the Green Book process, have learned to be battered mothers' allies in order to protect children, and have established a collaborative, respectful relationship with domestic violence advocates, it would be a natural extension of their protective role to intervene in private litigation where the same kinds of child welfare issues are present. In this vision, such intervention should occur only when invited, i.e., when the court or the parent alleging abuse requests their assistance.

The presence of the State as a party (or amicus curiae) intervening on behalf of the children, and supporting the mother's claims, would force courts to take the mother's allegations about the children's safety seriously, and would make it much harder to discount the credibility (and relevance) of her allegations of domestic violence. This is a potentially powerful antidote to the deep-seated tendency toward mother-blaming that resides in custody courts. The presumptive neutrality of a state agency whose mission is to protect children would give automatic credibility to the claim that a batterer's history of violence against the mother, and threat to the children, should be given significant weight in determining child dispositions.

At the same time, the collaboration of the child protection system with a battered mother should facilitate making services available to both the mother and children, which may be critical to achieving safety as a practical matter "on the ground." Such services might include assistance with re-location and finding new housing, with welfare, employment and education, safety planning and methods, and of course, counseling to recover from trauma and to strengthen them in the challenges ahead. Many of these services would come from domestic violence organizations, but some, e.g., employment, housing, etc., might also be part of the agencies' existing spectrum of services for their traditional abuse and neglect caseload.

I envision this "proposal" as both an imaginative idea for those of us who are frustrated with the courts' responses in these cases, and as a challenge to the State. On the one hand, it would of course only be beneficial to mothers and children if the agency were able to join the litigation in a supportive role that does, in fact, understand the domestic violence issues, the risks to children, and seeks to strengthen the mother's protective role. Many will say that day will never come—yet the Green Book invites us to imagine it. At the same time, the proposal challenges the State to make good its commitment to child protection. There has been significant attention given to the Green Book process by states and federal authorities. As an advocate for battered women and their children I want to challenge these entities to recognize that the same issues, and sometimes the same children, are at stake in private cases. If the state is serious about developing an enlightened, supportive response to battered mothers where children are at risk, child protection (or other involved) agencies should be available to speak for the children in such cases.

The notion of collaboration between child protection agencies and battered mothers, while hard to imagine, is not new.[206] In *Nicholson*,

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206. Child protection agencies' unwillingness to assist mothers seeking to protect their children from batterers has been a source of great frustration to mothers and advocates. Discussants on the "CHILD-DV" list serve have repeatedly raised this issue. For instance one former child protection worker and domestic violence specialist within a child protection agency wrote,

> [a]s a former CPS worker and DV specialist in a CPS agency, CPS does have the resources, ability and responsibility to keep not only children, but mothers—families, safe). CPS has enormous power, it's how CPS uses its power, and how they leverage their resources and the paradigm from which they practice that determines and guides safety. Rather than relying solely on shelters and police to secure safety, consider partnering with them.

Posting of Lien Bragg, to CHILD-DV@mail.abanet.org (Jan 2, 2003) (copy on file with author). Too often the State's response in these cases has been to dismiss the allegations as mere litigation tactics. As discussed *supra* Part III.B, however, the fact that abuse is raised in the litigation context is not alone an adequate basis for

for example, plaintiffs' lawyers critiqued New York's child protection agency's failure to assist some mothers in obtaining arrest of the batterer. Even though the batterer had hit the child, and the agency had opened a case against the *mother*, they refused to advocate with the police for the batterer's arrest, preferring to remove four teenagers from the house and put them in temporary foster care, which caused obvious trauma and disruption to their well-being.[207] In instances such as this, a simple phone call to the police might save the child protection agency from opening a new case and adding to their own caseload.

The idea of state child protection agency and private collaboration also appears to have been touched on during the Green Book process. One recommendation in the Green Book is that child protection workers should monitor perpetrators' compliance with service plans and protection orders, and should testify in court about their protection order violations. While the Green Book does not specify in which courts it envisions those orders being heard,[208] most protection order cases are privately litigated.

Imagined benefits aside, this discussion is not complete without at least briefly acknowledging the obstacles to such a collaboration. First and foremost is the inarguable reality that child protection agencies are notoriously under-funded, overwhelmed, bureaucratically dysfunctional, and, despite the small dent made by the Green Book Initiative, fairly universally conditioned to see mothers as the problem. Thus, I cannot say enough that this thought experiment proposal is predicated on the assumption that we are working with a well-educated, enlightened, moderately functional and sympathetic agency.[209]

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dismissing most mothers' abuse allegations.

207. Posting of Jill Zuccardy, attorney for plaintiffs, to CHILD-DV@mail.abanet.org (Jan. 2, 2003) (copy on file with author).(stating "[w]e were actually happy when the police called in to CPS on the assault on the child. But when ACS showed up, they refused to call the police to advocate for his arrest! Instead, they removed the 4 teenagers. . . . It took me over a week to get the police to arrest him, and ACS wouldn't even weigh in on it"). As this instance indicates, while many discussions of battering focus on women's ambivalence and failure to take action, in reality many battered women repeatedly seek protection and assistance, from police and other agencies, without success. The intervention of a state agency on their behalf with, e.g., the police, would almost certainly get more results. *Id.*

208. *See* Green Book, *supra* note 10, at 65.

209. People involved in the Green Book Initiative have observed clear improvement in some CPS agencies' response to these cases in the few years of the Project. There is some cautious optimism that these improvements can be expected to continue. Telephone Interview with Jerry Silverman, Senior Policy Analyst, U.S. Department of Health & Human Services (Jan. 23, 2003). However, even if the agency were "enlightened" on domestic violence, there remain well-documented

Secondly, even assuming what I am denominating an "enlightened" agency, i.e., one sympathetic to the problem of battering and capable of responding appropriately, the most obvious downside to such collaboration would be the private litigant's loss of control of the case. As a matter of structure and mission, once a state agency joins the litigation, it will inevitably pursue its own agenda. Even an "enlightened" agency may disagree with the mother about some things, e.g., exactly how much visitation the father should have and under what conditions, and it may also wish to raise some concerns about her parenting as well. Would these risks outweigh the potential benefits of a supportive stance regarding the risks to the children from the batterer? This cannot be answered as a general policy matter; it would have to be weighed in each case by the litigant (and hopefully her counsel), based on their assessment of the particular agency in their jurisdiction and the particular issues in their case.

Third, substantial practical and philosophical problems attach to the question of how a child protection agency would intervene: for instance, how it would determine when and whether it should intervene in such cases; how it would structure such an intervention, e.g., whether it would need to open a formal case file, how much investigation would be required to support such intervention in the case, etc. Of course, the answers to each of these questions would affect whether such an intervention proved beneficial to the children and mothers or not.

Finally,[210] from the State's standpoint the proposal is likely to be a non-starter if it means an increased caseload for these already absurdly over-burdened agencies. While this issue is undeniably fundamental, we need not assume it is prohibitive. There is a real possibility that fruitful collaboration with private litigants, which was effective in increasing the protection of children, would actually decrease the agency's caseload, by making its interventions more effective.[211] Helpful interventions in private cases could reduce the

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and pervasive concerns about racial and class bias that historically has shaped child protection practice. Freedman, *supra* note 60, at 598 n.95.

210. I do not purport to raise all the problems with this proposal, but only several of the most obvious and fundamental ones for purposes of the "thought experiment."

211. Posting of Patricia Weel, to CHILD-DV@mail.abanet.org (Jan. 7, 2003) (copy on file with author) (stating "the typical CPS formulas for addressing DV, have the mother get a protection order, have mother leave her abuser, get shelter, etc. do not necessarily offer safety for either the mother or the children"). Another list member, from the Non-Violence Alliance/Domestic Violence Intervention Training Institute has stated:

number of child abuse and neglect cases in the current caseload, including cases opened (i) when children wrongfully placed in batterers' care are abused, (ii) against mothers who have been unable to protect their children, or (iii) against mothers who have become abusive due to their own victimization and inability to obtain sufficient support and protection for themselves and their children.[212]

### *B. Terminating Parental Rights*

Unfortunately, even where judges and child protection systems do the right things to protect children and their mothers, some of those families will remain at risk. Our focus on the failures of the legal and social service system should not blind us to the painful fact that many batterers, even after appropriate legal interventions, such as court-mandated counseling or even incarceration, do not change enough to make their original victims safe.[213] And since even those batterers who are incarcerated will ordinarily be incapacitated for no more than a few years, their ability to continue abusing their original victims remains a threat to many families. The women most likely to achieve long-term safety are those whose batterers were merely "opportunistic," or who shift their focus to other women. But for the significant proportion of women whose batterers remain "invested" in them or their children, the potential for future abuse—and the

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> It's my estimation that we have no idea how successful we can be in intervening successfully with batterers to protect children and remove the burden of blame and responsibility for his behavior from the shoulders of adult victims of domestic violence . . . [in one case] the shift in focus of the case worker from the victim to the perpetrator seemed to improve outcomes . . . the worker decided to petition the juvenile court to have the batterer mandated to inpatient substance abuse treatment. Once the batterer was out of the home, the mother became much more forthcoming about the extent of the violence and began to participate in a local battered women's support group.

Posting of David Mandel, to CHILD-DV@mail.abanet.org (Jan. 8, 2003) (on file with author).

212. More than one study has found that "once the women leave the battering relationship, the number of women who continue to engage in aggression toward their children drops." George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, *in* CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES 289, 325-30 (George W. Holden et al. eds., 1998) (cited in CLARE DALTON & ELIZABETH SCHNEIDER, BATTEED WOMEN AND THE LAW 272 (2001).

213. *See* Joan Zorza, *New Research: Broward County Experiment Shows No Benefit from Batterer Intervention Programs*, DOM. VIOLENCE REP., Dec./Jan. 2003, at 23, 25 (arguing that "[i]f the best research keeps finding that these programs do not reduce man's violence, it may be time to rethink what accountability we need to demand from men who abuse their intimate partners"). In contrast to counseling, anecdotal evidence (i.e., the experience of myself and many colleagues) suggests that the factor most reliably associated with safety for a given victim is the batterer's moving on to a new victim.

fear triggered by the possibility thereof— may remain for the long term.[214]

While in the majority of cases this painful reality may be unavoidable, there are a small percentage of cases in which I would like to see a second thought experiment considered. In those cases, it is not enough to do what is typically done, i.e., impose temporary restraints or sanctions in one case and then move on to the next. So long as children (and mothers) remain at grave risk even after "successful" interventions, i.e., those in which available civil and criminal restraints have been imposed, the State has an obligation to take whatever steps are lawful and possible to minimize those risks.

In the most egregious cases, the mother and the State should serviously consider terminating parental rights. As with the first proposal, this proposal envisions such an intervention to be appropriate only if it is chosen by the mother and the children after well-counseled, careful consideration of the potential risks and benefits. Because, as is discussed below, the risks of taking this action may be as great as or greater than the risks of not doing so, mothers considering pursuing it should receive sophisticated risk assessment and safety planning before deciding whether it is their best option.[215]

The critical question of course is, in which cases should such an extreme measure be taken? I do not intend to fully answer that question here, other than to say it should be considered in those cases where most objective people would agree that the mother or children continue to be at extremely serious risk of severe harm or death as long as the abuser's access to the children continues. The purpose of this proposal is not to define this category of cases, but merely to put on the table for further conversation this under-utilized tool in the effort to reduce violence against women and children.[216]

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214. In one case handled by students in my clinic, the client successfully obtained a protection order, and repeatedly sought to have it enforced when the batterer violated it, with only limited success. Several years later, although she has no ongoing contact with her child's father, she is still experiencing some harassment from the abuser in connection with their child.

215. It could be argued that using termination of parental rights in this way is asking the civil law to do the work of the criminal law. That is, if someone is that dangerous, they "should" presumably be behind bars. In fact, there are all kinds of reasons, some valid and some not, why such men are only rarely incarcerated for any length of time. In any case, what seems certain is that we can expect this to be the reality for the foreseeable future. And while the criminal law remedy may be preferable as more directly responsive to the "crime," rectifying the civil law status of parental relationships, based on a parent's unacceptable risk to the children, is also appropriate.

216. I am not to first to suggest this. *See* Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 768 (1996); Lillian Wan, *Parents Killing Parents: Creating a*

It may be asked what difference termination of parental rights will make, especially with respect to extremely dangerous batterers who are not deterred by criminal sanctions. The answer is that, while it will not help in all cases, there is reason to believe that termination of parental rights ("TPR") will, in some instances, slow or end a batterer's harassment and abuse of his victim and their children. This conclusion flows from an in-depth understanding of the psychological motivations of batterers. Because battering is at core typically about the batterers view of his "rights," his moral superiority, and his need to prove his children's mother "wrong," [217] in certain cases, the TPR action would powerfully challenge such a batterer's view of his prerogatives and his right to possess and control his children. Insofar as much male abuse is fueled by a sense of entitlement and "property" rights over children and mothers,[218] TPR actions–which send a clear message that batterers have lost their "rights" to their children–might actually impact many abusers more powerfully than the more common civil or criminal justice restraining orders or criminal adjudications. TPR actions would also mean that those abusers who, for whatever reasons, have not been adequately restrained or reformed by civil or criminal justice interventions, would no longer be legitimized in their claims of access to the children, and would no longer be empowered by the State's endorsement (in the form of legal recognition of his parental rights) of that access. At the least, TPR would eliminate the State and legal system's inclination to award these batterers access to their children.

This proposal is less radical than the first one (intervention in private litigation), in that it does not require the State to create a completely new kind of legal action. However, it remains well beyond current practice, both because current TPR statutes do not extend this far,[219] and because it invites state agencies to intervene in cases

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*Presumption of Unfitness*, 63 ALB. L. REV. 333 (1999).

217. *See* Karla Fisher et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2126, 2130-31 (1993) (describing an abusive relationship as "the ruler and the ruled" in which "batterers . . . consistently blam[e] women for everything that goes awry in their lives," and say things like "'I'm gonna teach you a lesson; raise you right'").

218. *See* Goodmark, *supra* note 74, at 252-53.

219. A cursory review of termination of parental rights statutes and the relevant legal literature indicates that this proposal is in fact "out of the box." As recently as 1998, no state termination statute provided that domestic violence against a parent constitutes per se parental unfitness. Leslie Johnson, *Caught in the Crossfire*, 22 L. & PSYCHOL. REV. 271, 281 (1998). More amazingly, only three states provided for termination based upon murder of one parent by the other. Haddix, *supra* note 219, at 768. However, some courts have terminated parental rights for the murder of the other parent. *See, e.g.*, Brown v. Dep't of Human Resources, 276 S.E.2d 155 (Ga. App. Ct. 1981); In re Abdullah, 423 N.E.2d 915 (Ill. 1981); In re Adoption of A.P.,

which have not previously come into the child protection system.[220] This type of "family protection" is, however, a logical extension of the Green Book's admonitions, which include, most importantly, the recommendation to keep children with their non-offending parent, and to assist battered mothers in minimizing the risks from the batterers.[221] Indeed, the Green Book acknowledges that TPR may be appropriate in some instances.[222]

There are of course also serious concerns attached to this proposal— perhaps even more serious than those identified for the first. Most obviously is the question of whether a TPR action would backfire and put women and children at greater risk, by provoking the abuser to kill them. Since some men do this when "only" deprived of custody,[223] or merely after being taken to court by their victims, we can assume that more may do so after their parental rights are terminated. My response is that, while this risk is serious and disturbing, it cannot dictate legal policy, any more than the risk that losing custody will trigger homicide should dictate custody awards, or the risk that prosecuting gang members will trigger homicides of "snitches" should preclude such prosecutions.

The second powerful concern associated with this proposal is the possibility of its backfiring in a different manner: i.e., when state agencies start to terminate the parental rights of women who have fought back or used self-defense against abusers (and presumably still been convicted of homicide). Such TPRs may have already occurred.[224] But again, I would point to my original predicate for both thought experiments: neither could be seriously considered unless the child protection agency with which we were working was genuinely enlightened about domestic violence, high-functioning and trustworthy. With this predicate, it seems plausible that the risks of the "wrong" parents having their rights terminated would be less than the risks we currently face when we allow extremely violent, possessive and vindictive men continued rights to their children.

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982 P.2d 985 (Kan. Ct. App. 1999). More surprisingly, however, some courts have also refused to do so, despite petitions by the state child protection agency. *See* cases cited *supra* note 159.

220. The same questions raised for Proposal 1 about how cases would be selected and investigations performed would apply equally here.

221. *See* Green Book, *supra* note 10, at 19, 64, 66.

222. *Id.* at 23.

223. *See* Crary, *supra* note 95 (describing several instances of men who killed themselves and/or their children after losing in court).

224. Terminations of mothers' parental rights has already been disturbingly common for the lesser wrong of alleged "failure to protect" children from the batterer. *See generally* Enos, *supra* note 14.

## CONCLUSION

These suggestions for potential State intervention in private litigation seek to imagine a way to counter the entrenched attitudes of courts that prevent them from taking seriously battered mothers' claims, and that lead them repeatedly and disturbingly to place children (and women) at unnecessary risk. Although it is unlikely that such proposals will be accepted easily, or that they are without risk to those I seek to help, they, like the Green Book Initiative, represent a sincere attempt to think "out of the box." While cognizant of some of the obvious potential pitfalls in these proposals, I take seriously the premise of the Green Book: that people of good will, both in state agencies and private advocacy roles, can work together to better protect children (and battered mothers), by increasing understanding of and empathy for adult victims of battering. If, as the Green Book does, we genuinely seek to reform and improve the State's response to child maltreatment in the context of domestic violence, we should at least consider bringing the power of the State affirmatively to bear in support of mothers who seek to protect their children in other legal fora. In other words, if it is protection of children that the State and we are seeking, the State and we must recognize and address the multiple fora in which that safety (or lack thereof) may be determined.

## APPENDIX A[225]

## APPELLATE COURTS UPHOLDING TRIAL COURT AWARDS OF CUSTODY TO FATHERS DESPITE MOTHERS' DOMESTIC VIOLENCE CLAIMS[226]

| Cases | Reasons |
|---|---|
| **Supreme Court of Alabama:** Ex Parte Fann, 810 So. 2d 631 (Ala. 2001) (sole custody to father). | ➢ Insufficient evidence of abuse<br>➢ Evidence that they frequently abused alcohol |
| **Court of Civil Appeals of Alabama:** Kent v. Green, 701 So. 2d 4 (Ala. Civ. App. 1996) (sole custody to the father, subject to the mother's visitation). | ➢ The father began counseling (after choking his wife resulting in her hospitalization and his arrest).<br>➢ The psychologist testified that the father's violence was unlikely to recur.<br>➢ Mother refused counseling, and therapist testified that without treatment, problems would deteriorate. |
| **Court of Appeals of Florida, 1st District:** Ward v. Ward, 742 So. 2d 250 (Fl. Cir. Ct. 1996) (primary residential custody). | ➢ Mother was in a lesbian relationship; child exhibited inappropriate sexual statements and behavior believed to be a result of inappropriate exposure to sexual conduct.<br>➢ Although the father was convicted of murdering his first wife, he claimed it was the result of "stupidity, jealousy, and anger." The father was in a new marriage and had no new criminal offenses since his release from prison. |

225. The following chart contains a sample, but not a comprehensive overview, of United States cases concerning domestic violence and custody.

226. The one exception is Dinius v. Dinius (N.D.), in which the appellate court *reversed* an award of custody to the *mother*.

| | |
|---|---|
| **Court of Appeal of Louisiana, 1st Circuit:** Raney v. Wren, 722 So. 2d 54 (La. Ct. App. 1998) (joint custody). | ➢ Modification of custody— trial court excluded evidence of history of family violence because it occurred prior to the stipulated custody consent decree.<br>➢ The resulting record did not support the allegation of violence.<br>➢ The court found the mother's allegations "suspect." |
| **Court of Appeals of Louisiana, 2d Circuit:** Simmons v. Simmons, 649 So. 2d 799 (La. Ct. App. 1995) (father designated primary domiciliary parent). | ➢ One instance of violence, admitted by the father but claimed provoked by the mother's adulterous affair, did not rise to the level of a "history of perpetrating family violence" as required by statute to trigger rebuttable presumption. |
| **Appeals Court of Massachusetts:** In re Custody of Zia, 736 N.E.2d 449 (Mass. App. Ct. 2000) (sole legal and physical custody). | ➢ The father's past conduct and criminal history gave the court "pause" but the court did not find, and the mother did not argue, that the father's conduct constituted a "pattern" or "serious incident of abuse" as required by statute.<br>➢ The mother was living in public housing, and had been arrested for possession of drugs.<br>➢ The father encouraged physical and mental stimulation of the child.<br>➢ The mother failed to set adequate boundaries.<br>➢ The father participated in therapy for controlling his anger. |
| **Court of Appeals of Minnesota:** Canning v. Wieckowski, No. C4-98-1638, 1999 WL 118509 (Minn. Ct. App. Mar. 9, 1999) (physical custody to father). | ➢ A finding of domestic abuse was not made.<br>➢ The father was willing and capable of "toning down his anger and negativity toward [the mother, whereas the mother] seem[ed] preoccupied with |

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| | making respondent out to be a villain."<br>➢ The father was comfortable with his son and capable of strengthening the bond with more contact. |
| **Court of Appeals of Missouri, Western District:**<br>Hamilton v. Hamilton, 886 S.W.2d 711 (Mo. App. 1994) (physical custody to father every weekend). | ➢ Court did not believe that two incidents of violence, "occurring years apart during a 20-year marriage . . . constituted a 'pattern of domestic violence.'"<br>➢ "Husband was learning to exercise more self control." |
| Gant v. Gant, 923 S.W.2d 527 (Mo. Ct. App. 1996) (joint legal custody with the father as primary residential custodian). | ➢ Violence was not directed at the children.<br>➢ The husband was a good homemaker and better aware of the daily needs of children.<br>➢ The wife was lacking in child care skills— did not always bathe them, brush their teeth, or feed them appropriate foods. |
| Couch v. Couch, 978 S.W.2d 505 (Mo. Ct. App. 1998) (physical custody to the father). | ➢ Violence was not directed towards children.<br>➢ The child's relationship with paternal grandmother who was the primary caretaker weighed in favor of granting custody to the father. |
| **Supreme Court of North Dakota:**<br>Cox v. Cox, 613 N.W.2d 516 (N.D. 2000) (custody to the father). | ➢ Most of the mother's allegations of domestic violence were not credible, and those that were (including hitting and grabbing that left marks and bruises) did not qualify as domestic violence. |
| Dinius v. Dinius, 564 N.W.2d 300 (N.D. 1997) (father awarded custody) (*appellate court reversed trial court's award of custody to mother*). | ➢ Two instances of physical force toward the child not considered domestic violence; instances were far apart in time, and could have been considered reasonable force to discipline child. |

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| Brown v. Brown, 600 N.W.2d 869 (N.D. 1999) (custody to the father). | ➢ Both parties had committed violence against one another; none of the incidents were severe enough to trigger the presumption. |
| **Court of Appeals of Oklahoma:**<br>Brown v. Brown, 867 P.2d 477 (Okla. Ct. App. 1993) (custody of father). | ➢ Violent/aggressive behavior did not amount to "ongoing domestic violence."<br>➢ Evidence that the mother had propositioned at least two men (other than her husband) during the marriage. |

APPELLATE COURTS REVERSING TRIAL COURTS' CUSTODY AWARDS TO FATHERS[227]

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| **Alabama Civil Appeals Court** | Jackson v. Jackson, 709 So. 2d 46 (Ala. Civ. App. 1997). |
| **Connecticut Supreme Court** | Knock v. Knock, 621 A.2d 267 (Conn. 1993) (*upholding award of custody to mother*). |
| **Florida District Court of Appeals** | Ford v. Ford, 700 So. 2d 191 (Fla. Dist. Ct. App. 1997). |
| **Louisiana Court of Appeals** | Lewis v. Lewis, 771 So. 2d 856 (La. Ct. App. 2000).<br>Hicks v. Hicks, 733 So. 2d 1261 (La. Ct. App. 1999).<br>Michelli v. Michelli, 655 So. 2d 1342 (La. Ct. App. 1995). |
| **Massachusetts Supreme Judicial Court** | In re Vaughn, 664 N.E.2d 434 (Mass. 1996). |
| **Minnesota Court of Appeals** | Nazar v. Nazar, 505 N.W.2d 628 (Minn. Ct. App. 1993). |
| **Supreme Court of Nevada** | Hayes v. Gallacher, 972 P.2d 1138 (Nev. 1999).<br>Russo v. Gardner, 956 P.2d 98 (New. 1998).<br>Lesley v. Lesley, 941 P.2d 451 (Nev. 1997).<br>McDermott v. McDermott, 946 P.2d 177 (Nev. 1997). |
| **New York Appellate Division** | Pratt v. Wood, 210 A.D.2d 741 (N.Y. App. Div. 1994). |
| **Supreme Court of North Dakota** | Kasprowicz v. Kasprowicz, 575 N.W.2d 921 (N.D. 1998).<br>Zuger v. Zuger, 563 N.W.2d 804 (N.D. 1997).<br>Anderson v. Hensrud, 548 N.W.2d 410 (N.D. 1996).<br>Engh v. Jensen, 547 N.W.2d 922 |

227. The one exception is Knock v. Knock (Conn.), in which the appellate court *upheld* an award of custody to the mother.

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| | (N.D. 1996).<br>Kraft v. Kraft, 554 N.W.2d 657 (N.D. 1996).<br>Owan v. Owan, 541 N.W.2d 719 (N.D. 1996).<br>Bruner v. Bruner, 534 N.W.2d 825 (N.D. 1995).<br>Heck v. Reed, 529 N.W.2d 155 (N.D. 1995).<br>Helbing v. Helbing, 532 N.W.2d 650 (N.D. 1995).<br>Krank v. Krank, 529 N.W.2d 844 (N.D. 1995). |
| **Oklahoma Court of Appeals** | Smith v. Smith, 963 P.2d 24 (Okla. Civ. App. 1998). |

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# DOMESTIC PROTECTION ORDERS AND THE PREDICTION OF SUBSEQUENT CRIMINALITY AND VIOLENCE TOWARD PROTECTEES

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*A random, comparative, archival study of select variables across a six-year period of time—three years prior to, and three years after, the issuance of a protective (restraining) order against 200 persons—was conducted. Logistic regression analyses were used to test hypotheses that certain variables would predict arrest for criminal and violently criminal acts toward the protectees. The most important finding was that most subjects were not arrested for a subsequent criminal or violent act toward protectees. Nonmutual service of a protection order, however, increased the risk of victim-related criminal arrests over no service and mutual service across all three racial groups, but was statistically significant only for Hispanics (p = .01). Nonmutual service also increased the risk of a victim-related violent criminal arrest over no service or mutual service, but race was not a significant predictor. We were able to correctly classify arrest or nonarrest with an 83.5% overall accuracy rate. Protection orders appear to be related to, and may deter criminal and violently criminal offenses toward protectees.*

The fundamental purpose of a civil protection (restraining) order is not to punish past conduct, but to prevent future harm. Although legal opinion concerning protection orders is readily available (Schollenberg & Gibbons, 1992), there is less empirical evidence concerning their effectiveness in reducing violence since their proliferation twenty years ago as a response to domestic abuse (Klein, 1995).

In a thorough review of the research, the authors found 11 studies published in the past 15 years that attempted to measure the effectiveness of protection orders, usually in domestic-violence cases. These studies were usually nonrandom samples of convenience in which victims of abuse were either interviewed or surveyed, and asked a series of questions concerning their perceptions of the protection order and its usefulness in preventing future harm through restraint of the defendant. In six studies (Chaudhuri & Daly, 1990; Committee on Criminal Courts, 1993; Finn & Colson, 1990; Grau, Fagan, & Wexler, 1984; Horton, Simonidis, & Simonidis, 1987; Kaci, 1994) the protection orders were judged to be effective; in one study (Berk, Berk, Loseke, & Rauma, 1983) the protection orders were judged to have no deterrent effect, and in four studies Fiedler, Briar, & Pierce, 1984; Harrell, Smith, & Newmark, 1993; Kaci, 1992; Sherman & Berk, 1984) the protection orders were perceived to have mixed results. Most researchers agreed that

This study could not have been completed without the cooperation and help of many individuals. The authors would like to thank Felix Aguirre, Ajay Kwatra, Diane Devlin, Mark Ginella, Kathleen Brown, Dawna Komorosky, Jim Pippin, Harry Boffman, Roger Stafford, Larry Messersmith, Fran Smith, Ken Fabricatore, William Mudd, William Howatt, Jr., and Ruby Neagles.

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the severity of violence of the defendant and the laxity of enforcement of the protection order were likely to reduce its effectiveness as a deterrent.

This study moved beyond the extant research in two ways. First, it included a large, random sample of individuals against whom protection orders had been issued and/or served over a lengthy period of time (three years), and was not limited to battered women. Second, more sophisticated research methodology and statistics were utilized, namely logistic regression analyses, to see which variables, if any, predict the violation of a protection order. Safety of the protectee is most jeopardized when the defendant engages in criminal or violently criminal behavior; therefore, we focused on subsequent victim-related arrests as our measure of protection-order violations.

## Legal Understanding

Protection or restraining orders authorize courts to enjoin, or prohibit, parties from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, harassing, or disturbing the peace of another party or parties, their family, and/or household members. Courts can enjoin knowing and willful conduct that seriously alarms, annoys, or harasses without legitimate purpose when it causes substantial emotional distress. Courts use protection or restraining orders to direct parties to do such things as stay 100 yards away from the protected person's place of residence or work or place of worship, or to not contact in person or by telephone the protected person except to arrange visitation with minor children or for the return of personal property.

Such orders are issued when, to the satisfaction of the court, based on evidence contained in declarations or affidavits, there is reasonable proof of the fact of the occurrence of an offending incident or a course of conduct, and that harm would result if the same or similar conduct is repeated or allowed to continue. One of the intended results of such orders, at a minimum, is the protection of one party from the violent conduct of the opposing party (Chaudhuri & Daly, 1990; Finn & Colson, 1990).

## Methods

### *Research Design*

The research design was a random, comparative, archival study of select variables across a six-year period of time—three years prior to, and three years after, the issuance of a protection order against 200 persons (defendants). The hypotheses of the study were (1) Certain variables will predict violation of a protection order, and (2) Certain variables will predict a violent violation of a protection order.

### *Subject Selection*

The San Diego County Marshal's office generated a list of 503 names of individuals who were defendants in domestic or civil protection-order cases from June 18, 1990 through August 20, 1990. Eight cases from the pool of 503 were eliminated in which the protection order lasted less than three years, leaving a subject pool of 495 cases.

Two hundred subjects were then randomly selected from the pool of 495 defendants using a random number table. One hundred and one names were selected from the subjects where protection orders were issued and served on the same date ($N$ = 274), and 99 names were selected from the subjects where protection orders were issued but served on a later date, or never served ($N$ = 221). These 200 subjects comprised the study sample and consisted of 144 males (72%) and 56 females (28%). One hundred fourteen were Caucasian (57%), 45 were black (22.5%), 35 were Hispanic (17.5%), and 6 were other/unknown (3%). Average age of the subjects was 38 ($SD$ = 9.8), with an age range of 15–70 years. Mental health contact was also determined for each subject. This was done by searching the San Diego County Mental Health Services records to determine if a subject had ever had at least one contact with a public mental health provider. Twenty-two subjects (11%) had at least one contact, 178 (89%) did not. Socioeconomic status (SES) was not an available demographic variable due to the unreliable or absent nature of the data.

### *Independent Variables*

The independent variables consisted of the demographic information noted above and the following variables: (1) whether the protection order was mutual (issued at the same time to both parties); (2) the order type (domestic or civil; the former requires that the parties lived as cohabitants for a period of time prior to the issuance of the order); (3) the criminal arrest records of the defendant three years prior to issuance of the order. Criminal record was determined by searching

the San Diego County database for criminal arrests, the California Information Index (CII) records, the California Law Enforcement Telecommunications System (CLETS) records, and the National Crime Information Center (NCIC) records; (4) Violence or nonviolence of the prior criminal record. This latter variable was determined by listing all the crimes for all the subjects and submitting them to an expert panel of three judges and two forensic psychologists to determine whether they were violent or nonviolent. A criminal arrest was determined to be violent or nonviolent by a majority decision of the panel, rendered independently by each expert. Examples of violent crime included kidnapping, carrying a loaded firearm in public, and battery against a police officer. Examples of nonviolent crime included forgery, petty theft, and possession of a controlled substance; and (5) Whether the criminal arrest involved drugs/alcohol. This was determined by the nature of the offense charged.

*Dependent Variables*

Dependent variables consisted of: (1) All criminal arrests of the subjects during the three years following the issuance of the protection order. Determination of criminal arrests followed the same procedure noted above; (2) Whether or not the crime was related to the protection order and the victim was the protection order plaintiff, or petitioner; (3) Whether or not the criminal arrest was violent, determined by the same procedure noted above; and (4) Whether or not the criminal arrest involved drugs/alcohol, determined by the nature of the offense charged. (If there was more than one criminal arrest per subject, the arrests were collapsed to create a dichotomous variable, arrest or no arrest.)

*Statistical Measures Utilized*

In addition to the descriptive results of the study, we used logistic regression analyses to determine the best model for predicting violent or nonviolent, victim-related arrest following issuance of a protection order. We entered the independent variables noted above in a forward, stepwise procedure, and looked for both main effects and the interaction effects of protection order issuance with other independent variables. Goodness of fit was assessed by likelihood ratio chi-square ($\chi^2$) values. Significance for variable entry was set at $p = .05$. A logistic regression is a statistical procedure that allows us to assess the individual effects, if any, of the independent variables on the probability that a person will be subsequently arrested for violent or nonviolent crimes, and/or will violate the restraining order issued against him or her.

## Results

*Subject Demographics*

To determine the representativeness of the study sample, general demographic data were collected on the population of individuals in San Diego County, and compared to the subject pool demographics. The source of the San Diego County data was the U.S. Census, and represented the population as of April 1, 1990. The sample is clearly overrepresented by men (72%).

The sample is also overrepresented with respect to blacks, and underrepresented with respect to Caucasian and those classified as "other." San Diego County census data indicated that as of April 1, 1990, the median age of individuals in the county of San Diego was 30.9 years. The median age within the sample was 36, indicating that the sample was older than the population at large.

*Protection Order (PO) Data*

Two types of POs were issued: mutual and nonmutual. Mutual POs ($N = 71$, 36%) were issued to both parties, while nonmutual POs ($N = 129$, 64%) were issued only to the offending party. Not all POs issued were then served. Some POs were immediately served ($N = 101$, 51%), some were served at a later date ($N = 59$, 29%), and some were never served at all ($N = 40$, 20%). POs that are issued mutually are more likely to be served immediately than are POs that are issued nonmutually ($\chi^2 = 14.2$, $p = .0002$).

Seventy-eight percent ($N = 156$) of the protection orders were domestic and 22% were civil ($N = 44$). A domestic protection order requires that the parties were cohabitants for an unspecified length of time at some time prior to the issuance of the order. Cohabitation does not imply an intimate relationship, and could include a family member or nonrelative. Domestic protection orders are usually issued by California courts when there is evidence of prior physical abuse of the protectee.

*Arrest Data*

Arrest records prior to issuance of the POs and postissuance of the POs were inspected. In addi-

tion, arrests that were considered violent were also inspected pre- and postissuance of the POs. The frequency of individuals arrested pre- and postissuance ($N$ = 86 vs. 84) was virtually the same. The differences in proportions of nonviolent and violent arrests from pre- to post–PO issuance approached significance ($\chi^2$ = 3.80, $p$ = .07).

Of the 84 postissuance-arrested subjects, 36 committed victim-related crimes. The timing of postissuance arrests was of interest to the researchers. In other words, how soon after the issuance of the PO did the arrest occur? Figure 1 shows the time intervals in which the victim-related arrests occurred.

As can be seen in Figure 1, 12 (33%) of the 36 subjects were arrested in the first 60 days. Twenty-one (58%) were arrested in the first six months.

*Hypothesis One*

The first research hypothesis looked for variables that would predict the occurrence of a victim-related arrest. That is, could we predict if an individual would be arrested for a victim-related offense after the issuance of a PO?

In order to address this research question, a logistic regression approach was used. The dependent variable was presence or absence of a victim-related arrest after issuance of the PO. Independent variables included race, gender, prior history of drug or alcohol arrests, prior history of any arrests, and prior mental health history. A PO variable was constructed such that there were three levels. Level 1 indicated that a PO was issued but never served. Level 2 indicated that a nonmutual PO was served to the defendant only. Level 3 indicated that a mutual PO was served to both the defendant and the victim. Specific hypotheses included that service of the PO would alter the probability of postissue, victim-related arrests. Furthermore, it was hypothesized that demographic variables, including mental health contact, would moderate this effect.

The goodness of fit for the best fit model was $\chi^2$ (191, $N$ = 200) = 188.84, $p$ = .53. The best fit model included the interaction effect of race and PO service, and the interaction effect of mental health history and PO service. Table 1 presents the significant parameters from the analysis.

The first column in Table 1 lists the predictor interaction. The second column is the logistic regression coefficient for that predictor interaction. The third and fourth columns show the standard error and significance of the coefficient, respectively. The column labeled Exp(B) gives the factor by which the odds change for the occurrence of a victim-related arrest, given the presence of the interaction. For example, when a nonmutual PO is served to a Hispanic restrainee, the odds of a victim-related arrest increase by a factor of 8.37 (over the odds of a victim-related arrest occurring with no service of a PO with the average probability of arrest across all demographic variables).

*Classification Results Using the Logistic Regression Equation*

To further assess the goodness of fit for the logistic regression equation, a classification analysis was carried out. There was an observed 18% base rate of postissuance, victim-related arrests.

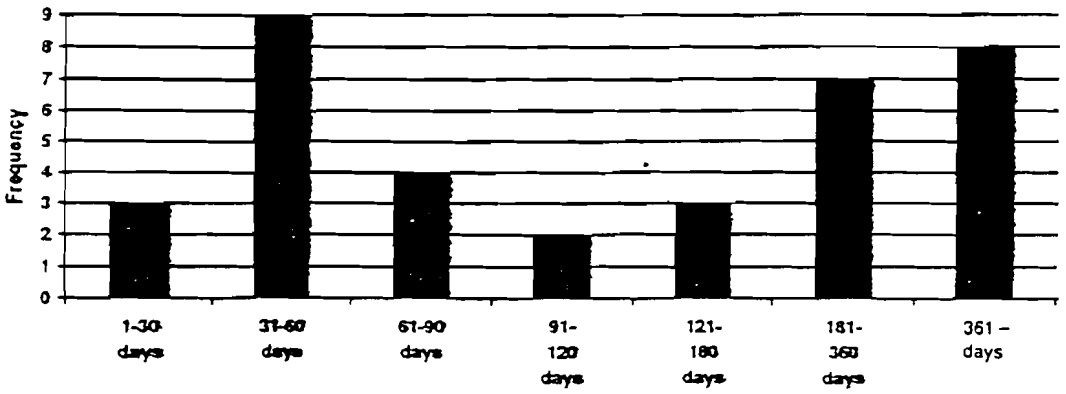


Figure 1. Number of Days Following Issuance of PO That Victim-Related Arrest Occurs ($n$ = 36)

TABLE 1. Logistic Regression Model for the Likelihood of Being Arrested for Victim-Related Offenses Following Issuance of a Protection Order

| Predictor | Coefficient | SE | Significance | Exp(B) |
|---|---|---|---|---|
| Mental Health Contact X Service | | | .03 | |
| Mental Health Contact X Mutual Issuance/Service | 3.82 | 1.80 | .03 | 45.86 |
| Mental Health Contact X Nonmutual Issuance/Service | 7.03 | 2.73 | .01 | 1126.39 |
| Race X Service | | | .002 | |
| Caucasian X Nonmutual Issuance/Service | .54 | .76 | .48 | 1.71 |
| Caucasian X Mutual Issuance/Service | −.56 | .89 | .53 | .57 |
| Hispanic X Nonmutual Issuance/Service | 2.12 | .99 | .03 | 8.37 |
| Hispanic X Mutual Issuance/Service | −2.50 | 1.92 | .19 | .08 |
| Black X Nonmutual Issuance/Service | .92 | 1.15 | .42 | 2.52 |
| Black X Mutual Issuance/Service | −.82 | 1.55 | .60 | .44 |
| Constant | −2.05 | .28 | .0001 | |

By just predicting that no postissuance arrests would occur, one would be accurate 82% of the time. By using the logistic regression equation derived above for predictive purposes, however, overall predictive accuracy increased only 1.5% (from 82% to 83.5%). Accuracy in predicting subsequent arrests, however, increased from 0% (using the base rate of 82% no arrests; by choosing no arrests, predicted arrests are 0% of the time) to 36.1%. At the expense of making Type I errors (predicting an arrest that does not occur), Type II errors have been decreased (predicting that no arrest will occur when it does in fact occur). As the authors believe that Type II errors (false negatives) are more serious in this situation, the improvement is substantial.

*Univariate Inspection of Interaction Effects*

To further illustrate the effects of the interactions of mental health contact, type of PO service, and race, on subsequent victim-related arrests, univariate chi-square analyses were carried out for each mental health contact status, race and PO type. Tables 2 through 6 present the results of these analyses.

*Hypothesis Two*

The second research hypothesis looked for variables that would predict a *violent*, victim-related arrest following issuance of a protection order. We addressed this research question by using another logistic regression. The dependent variable was presence or absence of a violent, victim-related arrest after issuance of the PO. As in hypothesis one, independent variables included race, gender, prior history of drug or alcohol arrests, prior history of any arrests, and prior mental health contact. The same three-level PO variable was used that reflected both service and mutuality of the PO. Specific hypotheses predicted that service of the PO would alter the probability of postissue, violent, victim-related arrests. Furthermore, it was hypothesized that demographic variables, including mental health contact, would moderate this effect.

The goodness of fit for the best fit model was $\chi^2$ (194, $N$ = 200) = 223.5, $p$ = .07; the best fit model included the interaction effect of mental health contact and PO service, the main effect of prior history of drug or alcohol arrests, and the

TABLE 2. Frequency of Arrests by PO Service for Those with No Mental Health Contact ($N$ = 178)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 56 (73) | 21 (27) |
| Mutual Issue/Service $N$(%) | 58 (94) | 4 (6) |
| No Service $N$(%) | 35 (90) | 4 (10) |

$\chi^2$ (2, $N$ = 178) = 12.25, $p$ = .002.

TABLE 3. Frequency of Arrests by PO Service for Those with Mental Health Contact ($N$ = 22)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 13 (72) | 5 (28) |
| Mutual Issue/Service $N$(%) | 1 (33) | 2 (67) |
| No Service $N$(%) | 1 (100) | 0 (0) |

$\chi^2$ (2, $N$ = 22) = 2.28, $p$ = n.s.

TABLE 4. Frequency of Arrests by PO Service for Blacks ($N$ = 45)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 17 (77) | 5 (23) |
| Mutual Issue/Service $N$(%) | 16 (94) | 1 (6) |
| No Service $N$(%) | 6 (100) | 0 (0) |

$\chi^2$ (2, $N$ = 45) = 3.42, $p$ = n.s.

main effect of PO service. Table 7 presents the significant parameters from the analysis. As can be seen in Table 7, a prior history of drug or alcohol offenses increased the odds of a postissuance, violent, victim-related offense by a factor of 2.96. Furthermore, a nonmutual PO service increases these odds by a factor of 2.19, while service of a mutual PO decreases the odds by 80%. Unlike the model from hypothesis one, race was not a significant predictor of violent, victim-related arrests, either as a main effect or in interaction with other variables.

### *Classification Results Using the Logistic Regression Equation*

To further assess the goodness of fit for the logistic regression equation, a classification analysis was carried out. There was an observed 14% base rate of postissuance, violent, victim-related arrests. By just predicting that no postissuance, violent arrests would occur, one would be accurate 86% of the time. By using the logistic regression equation derived above for predictive purposes, however, overall predictive accuracy increased only 0.5% (from 86% to 86.5%). Accuracy in predicting subsequent violent arrests increased from 0% (we are using the base rate of 86% no arrests; by choosing no arrests, we predict arrests 0% of the time) to 7.1%. We do not get the same level of predictive accuracy as was found in the derivation of the logistic regression model in hypothesis one. These classification results, as well as the goodness of fit $\chi^2$ indicate that this logistic regression model did not fit the data as well as the previous model. This is most likely due to the relatively fewer subjects in each examined cell.

### *Univariate Inspection of Effects*

To further illustrate the significant effects of predictors on subsequent violent, victim-related arrests, univariate chi-square analyses were carried out for mental health contact status, drug and alcohol arrest history and PO service. Tables 8 through 11 present the results of these analyses.

Table 12 presents factual summaries for six different arrests for victim-related offenses where sufficient data existed to tell what happened.

## Discussion

The overrepresentation of males in this study when compared to the population demographics from which our random sample was drawn is not surprising. Males are more aggressive than females, and have higher base rates for both criminality and violence (Wilson & Herrnstein, 1985). In this study men were more likely to violate a restraining order than women ($p$ = .04), and the likelihood increased with the number of prior arrests ($p$ = .004). The overrepresentation of blacks in our study is also predicted given their significantly higher criminal and violent criminal arrest patterns (Federal Bureau of Investigation, 1995). We will not speculate on the reasons for this stable phenomenon in the United States, but do note that we did not control for socioeconomic status, which in recent studies has accounted for any racial differences between groups when violence is studied (Klassen & O'Connor, 1994).

An intriguing corollary with the older mean age of our sample (38 years) is the finding that

TABLE 5. Frequency of Arrests by PO Service for Caucasians ($N$ = 114)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 39 (80) | 10 (20) |
| Mutual Issue/Service $N$(%) | 38 (88) | 5 (12) |
| No Service $N$(%) | 19 (86) | 3 (14) |

$\chi^2$ (2, $N$ = 114) = 1.42, $p$ = n.s.

TABLE 6: Frequency of Arrests by PO Service for Hispanics ($N$ = 35)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 9 (45) | 11 (55) |
| Mutual Issue/Service $N$(%) | 5 (100) | 0 (0) |
| No Service $N$(%) | 9 (90) | 1 (10) |

$\chi^2$ (2, $N$ = 35) = 9.04, $p$ = .01.

TABLE 7. Logistic Regression Model for the Likelihood of Being Arrested for a Violent, Victim-Related Offense Following Issuance of a Protection Order

| Predictor | Coefficient | SE | Significance | Exp(B) |
|---|---|---|---|---|
| Mental Health Contact X Service | | | .01 | |
| Mental Health Contact X Mutual Issuance/Service | 4.88 | 2.06 | .01 | 132.3 |
| Mental Health Contact X Nonmutual Issuance/Service | 9.65 | 3.28 | .003 | 15549 |
| Prior History of Drug or Alcohol Arrests | 1.08 | .48 | .02 | 2.96 |
| RO Service | | | .04 | |
| Nonmutual Issuance/Service | .78 | .61 | .20 | 2.19 |
| Mutual Issuance/Service | −1.67 | 1.14 | .15 | .19 |
| Constant | −3.05 | .48 | .0001 | |

the mean age for obsessional followers (those who "stalk") in a recent review of the research was 35–40 years (Meloy, 1996), significantly older than a random sample of offenders with mental disorders (Meloy & Gothard, 1995), and most offenders in general (Federal Bureau of Investigation, 1995). Although our study did not focus on stalking per se, the latter criminal behavior is a pattern of unwanted pursuit that often necessitates a protection order. It is likely that an unknown proportion of our sample did "stalk" their victims (one subject was twice arrested for the crime of stalking), and we note this age convergence between independent studies focusing on different aspects of adult relationship problems that may come to the attention of the civil or criminal court system. Any "stalking" behavior within our study, moreover, would have been unlikely to be criminally charged, since the crime of stalking in California had only become law six months *after* our sample was selected (January 1, 1991). Subjects in our sample who "stalked" would also likely represent only the proportion of obsessional followers who were prior sexual intimates of the victims (Meloy, 1996).

The mutual vs. nonmutual service indicates that judges decide in each case whether one or both parties will be restrained in their behavior. Mutual issuance is usually determined by negotiation of both parties or counterclaimed by the defendant and then ordered by the court. In the latter situation, there must be reasonable proof of the occurrence of an offending incident or a course of conduct by each party, and that harm would result if each party repeats or is allowed to continue the conduct (Topliffe, 1992). In this study, 36% of the subjects were issued mutual restraining orders ($N$ = 71). We also note that issuance did not always lead to service, even over the course of three years. Twenty percent of the subjects were never served, and immediate service was less likely ($p$ = .0002) if the order was nonmutual.

The relatively stable general arrest patterns of the subjects are well known to criminologists. Absent a major change in the individual or his or her environment, criminality and violent criminality are usually stable, multidetermined behaviors that are unlikely to be affected by a relatively benign, one-event factor such as the issuance and service of a restraining order.

Forty-three percent of all postissuance arrests were victim related ($N$ = 36) and the majority (58%) occurred within the first six months that

TABLE 8. Frequency of Violent Arrests by PO Service for Those with No Mental Health Contact ($N$ = 178)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 60 (78) | 17 (22) |
| Mutual Issue/Service $N$(%) | 61 (98) | 1 (1.6) |
| No Service $N$(%) | 35 (90) | 4 (10) |

$\chi^2$ (2, $N$ = 178) = 13.48, $p$ = .001.

TABLE 9. Frequency of Violent Arrests by PO Service for Those with Mental Health Contact ($N$ = 22)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 13 (72) | 5 (28) |
| Mutual Issue/Service $N$(%) | 1 (33) | 2 (67) |
| No Service $N$(%) | 1 (100) | 0 (0) |

$\chi^2$ (2, $N$ = 22) = 2.28, $p$ = n.s.

the restraining order was in effect (see Figure 1). These findings underscore the continued target selection of the protection order victim almost half the time for those who will reoffend, and also the decreasing risk over time of a victim-related reoffense (violent or nonviolent), particularly after the first 60 days. These findings are convergent with both attachment theory, assuming that the subject was in a prior relationship with the victim, and also the decreased risk of violence over time, particularly homicide, following separation from a spouse, once the initial high-risk period immediately following estrangement has been traversed (Wilson & Daly, 1993). We point out that the risk of a victim-related arrest was three times higher in the second month following the restraining order issuance than the first month, a curious finding that needs replication since our actual numbers of arrest are small.

Our first research question was to determine what variables that we studied, if any, could predict a victim-related arrest following issuance and service of a protection order. We found that the most significant predictor was an interaction effect between race and type of service ($p = .002$). Mental health contact and type of service also significantly predicted a victim-related arrest, but not as strongly ($p = .03$). Since only 11% ($N = 22$) of our sample had a public mental health contact, further research needs to be done before drawing any useful conclusions from this latter interaction effect.

Our predictive equation for criminality toward protectees only increased overall predictive accuracy by 1.5% over the base rate for no arrests (82%). This was disappointing, but not if the Type II error rate is scrutinized. Here we were able to reduce our false negatives to 6.1%; in other words, our predictive equation allowed us to cut the risk of predicting that someone would not commit a victim-related crime, when in fact they would. Our false positive rate, however, was 63.9%.

TABLE 10. Frequency of Violent Arrests by PO ($N = 200$)

| PO Type | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| Nonmutual Issue/Service $N$(%) | 74 (78) | 21 (22) |
| Mutual Issue/Service $N$(%) | 62 (95) | 3 (5) |
| No Service $N$(%) | 36 (90) | 4 (10) |

$\chi^2$ (2, $N = 200$) = 10.45, $p = .005$.

The most surprising findings of this study are elaborated on in Tables 4–6. For every race (Black, Caucasian, and Hispanic), issuance and service of a *nonmutual* protection order increased the probability of a victim-related arrest when compared to mutual service or no service at all. This finding was particularly apparent among Hispanics where nonmutual service led to a 55% victim-related arrest rate over three years, and mutual service completely eliminated a subsequent victim-related arrest. This finding was significant ($p = .01$) for Hispanics, but it should be noted that trends were in the same direction for Caucasians and Blacks. The victim-related rearrest rate for Hispanics when there was no service was 10%.

When the interaction effect of no mental health contact and type of service is compared (Table 2), the same result is apparent. Mutual service reduces the frequency of arrests to 6%, and nonmutual service increases the frequency of arrests to 27%, a significant finding ($p = .002$). For those with a mental health contact, this pattern does not apply (Table 3); but we advise against interpretation of this finding due to our small mental health sample ($N = 22$) and no significance.

Our second research hypothesis narrowed the focus to variables that would predict a *violent*, victim-related offense subsequent to the issuance of a protection order. Although the goodness of fit for this logistic regression model was very low ($p = .07$), the strongest predictor of violent, victim-related arrest was the interaction of public mental health contact and, once again, type of service. In fact, six of the 22 subjects with a mental health contact had a violent, victim-related arrest after issuance; there were only seven total arrested subjects in this group. From another perspective, six out of the 28 violent, victim-related, arrested subjects in the entire sample were persons

TABLE 11. Frequency of Violent Arrests by History of Prior Drug or Alcohol Arrest ($N = 200$)

| History Drug/Alcohol | No Postissue Arrest | Postissue Arrest |
|---|---|---|
| No Prior History of Drug or Alcohol Arrest $N$(%) | 138 (90) | 15 (10) |
| Prior History of Drug or Alcohol Arrest $N$(%) | 34 (72) | 13 (28) |

$\chi^2$ (1, $N = 200$) = 8.09, $p = .004$.

with a mental health contact (21%), an overrepresentation of subjects with a mental health contact (11%) in the entire sample.

This finding of a relationship between mental health contact and violent arrest is consistent with a growing body of research that substantiates that a psychiatric diagnosis, particularly an active psychosis, makes a small, but significant contribution to violence-risk prediction (Monahan, 1992). More important, however, were the main effects of prior drug and alcohol arrests and nonmutual service (Tables 10 & 11), which both increased the risks of a violent, victim-related offense by more than a factor of two. In other words, a nonmutual protection order more than doubled the risk of a violent arrest when compared to no service, while mutual service decreased the risk of a violent arrest by half when compared to no service (Table 10; note in the logistic regression analysis, Table 7, there was an 80% reduction when other variables were controlled). A prior history of drug or alcohol arrest increased the risk of a violent, victim-related arrest to 28% (Table 11).

Most notably, race was not a significant predictor variable when we focused on violent, victim-related arrests. This was an expectable finding and consistent with other research that has found that race does not contribute to violence-risk equations when other variables, such as socioeconomic status, are carefully controlled (Monahan & Steadman, 1994), something we could not do. Predictive accuracy of our logistic regression model for violent, victim-related arrests showed virtually no improvement over a simple prediction tied to the three-year base rate: no victim-related, violent arrests would occur 86% of the time subsequent to the issuance of a protection order.

We think we have discovered, rather serendipitously, an important factor that heretofore has remained hidden in the controversy over the effectiveness of protection orders: whether service is mutual or nonmutual. It may be that those professionals in both the mental health and criminal justice systems that have witnessed the failures of protection orders have been staring at the impact of nonmutual service. Those that are satisfied with the usefulness of protection orders, and continue to advocate for them in their respective settings, have unwittingly been privy to the effectiveness of mutual service. Why would this judicial decision have such an impact on empirical outcome, as we have demonstrated? Data are explained with theory, and we offer three different perspectives.

TABLE 12. Protection Order Violations—Factual Summaries of Six Cases

Case 1

On Friday at 0805, male subject came onto male victim's premises and was using a metal club to break personal property on the balcony of the residence, and used a crowbar to cut off electrical connections to the premises. On contact he threatened, "to kill everyone."

Case 2

On Monday at 1600, female victim returns home to find her exhusband has broken into the house. An argument ensues and he throws a plastic bottle at her, striking her head.

Case 3

On Friday at 1915, exhusband goes to the residence of the female victim, engages her when she answers the door, and tries to deliver some papers to her and to visit his children. The victim is visibly shaken by his appearance.

Case 4

On Saturday at 1630, son comes within 100 yards of parents' residence, confronts them, threatens to kill mother and stepfather, and burn down the house. He later starts a grass fire in the backyard. Subject was angry because parents reported his prior vandalism to police, resulting in his incarceration.

Case 5

On Tuesday at 1155, former girlfriend comes to former boyfriend's residence, bangs on his door for two hours, shouting angry obscenities at him.

Case 6

On Monday at 0730, boyfriend blocks victim from exiting her residence by stopping his car in front of her car and pointing a rifle at her in a menacing manner. He bumps into her car with his car, but she is able to drive away.

*A Behavioral Perspective*

When viewed from the perspective of respondent conditioning, the nonmutual service of a protection order functions as both an aversive stimulus, and a stimulus event that removes a positive stimulus, the victim, from the respondent. Behavioral psychology predicts that the combination of these two stimulus events will increase the aggression of the respondent. In our study, such nonmutual service substantially and significantly increased the risk of both violent and nonviolent, victim-related arrests subsequent to service.

Mutual service, however, is less of an aversive stimulus because it is mediated by cognitions, or thoughts, concerning fairness of treatment, and what we refer to as equity of consequences. The removal of a positive stimulus (the victim), however, still occurs. The combination of these two behavioral stimulus events, however, would predict less aggression toward the victim, which is what we found both in violent and nonviolent criminality (Hutchinson, Pierce, Emley, Proni, & Sauer, 1977). Mutual service appears to suppress reoffense below the base rate for no service.

From an operant perspective, mutual service is also likely to reduce intermittent positive reinforcement of the subject by the victim (e.g., her decision to meet with him or have brief contact with him while the protection order is in effect). This may be rationalized in a variety of ways that bespeak the intensity of her attachment to him, perhaps more so because he is physically abusive, what Dutton (1995) labeled "traumatic bonding." One woman said, "I'll just have coffee with him to see how he's doing . . . he's probably so lonely." This behavior by the victim will increase the likelihood of a subsequent protection order violation by the subject.

*A Psychoanalytic Perspective*

Nonmutual service is likely to be experienced as both shameful and humiliating by the defendant. These emotions, characterized as a public exposure of one's "badness" to others (Wurmser, 1995), are often defended against with rage, an emotion that is much more tolerable, particularly for males. This emotion may then fuel an aggressive pursuit of the victim to devalue her as an object. Such pursuit may have many motives, such as possessiveness, jealousy, or retaliation, or may conceal more subtle feelings, such as envy, wherein the impulse is to render her worthless so that there is nothing of value to have or possess (Klein, 1975).

Pathologically narcissistic individuals are particularly vulnerable to feelings of shame, and such individuals are also more likely to view others, especially sexual intimates, as objects to be controlled and used, rather than human beings deserving of empathic regard for their own rights and feelings. Narcissistic traits are prevalent in both criminals generally (Meloy, 1988), and obsessional followers (Meloy, 1989, 1992, 1996) and spousal batterers (Dutton, 1995) in particular.

Mutual service may also gratify certain angry or retaliatory impulses, and may serve fantasies of retribution or talionic revenge (an eye for an eye). The primitive wish to hurt in kind those who have hurt oneself may be satisfied through the third-party actions of the court that therefore reduce aggressive impulses toward the victim. The court may also function in a parental transference role, and in a Solomonic fashion be perceived as fair and wise by the subject, who may have had less than adequate parenting, and continues to carry early childhood griefs and angers concerning disappointments with father and mother. Among spousal batterers, mutual service also allows for the continued rationalizing of the violence and blaming of the victim (Topliffe, 1992), both which may contain or reduce aggression.

*A Social Perspective*

Different racial, ethnic, and cultural groups hold different attitudes toward relationships, what anthropologists call "sexual pair bonding," and the role of the man and woman in such relationships. These attitudes may condone complete domination of the woman and the use of physical force, if necessary, to control her. Such attitudes may lead to the direct behavioral expression of less obvious, but more pathogenic beliefs that conceive of the woman as chattel, and may arise from a dominant patriarchal society (Walker, 1989).

Empirical findings across racial groups may reflect such attitudes. For example, the *machismo* of the Hispanic male may make the issuance and nonmutual service of a protection order intolerable to him, resulting in his predictable violation, particularly if he is young and has a history of prior arrests. Attitudinal differences toward rela-

tionships, and certain social prohibitions, among Caucasians and blacks may be such that a nonmutual protection order is likely to have a less aggravating effect on the subject, resulting in a lower risk of violation. There also may be socioeconomic differences in our study that would dilute this differential effect across races, but there was insufficient data to test this hypothesis, which will need to await further research.

*Limitations of This Study*

This study was not an experimental design, and was based on archival data. Therefore, the authors may not be aware of confounding variables that could more parsimoniously explain our findings. For instance, maybe there is a true difference between people who are served mutual protection orders and those who are served nonmutual protection orders that better explains our findings, and the type of service is a corollary, rather than a cause of the restrainee's behavior. Those who are served mutual restraining orders may be, in fact, less prone to violate them, and less likely to transgress in the future. Judges may also recognize important differences among cases, and issue mutual or nonmutual restraining orders based on a private logic unknown to us. We also did not have a control group of subjects where a protection order was warranted but never issued. This would have allowed us to measure whether the court decision to issue a protection order, by itself, could have a suppression effect when compared to no issuance. Also, we did not control for differential enforcement (arrest) of mutual vs. nonmutual ordered defendants.

Our sample size was also relatively small, and a subsequent validation study would benefit by using a larger sample size from multiple geographical areas. This would increase the likelihood of more offenses and more mental health contacts, from which further conclusions could be drawn. We also recognize that arrest records usually underestimate actual criminal behavior. The best data gathering of offensive behaviors in future studies would be a combination of arrest records, self-reports, and collateral reports. The generalizability of our study (external validity) should also be viewed with caution, and our findings should only be applied to other groups whose demographics are similar to the population from which we drew our random sample.

The best single case predictor of one's reaction to a future protection order is likely to be his or her past reaction to a protection order. In the absence of such history, however, our results should furnish useful information for officers of the court and mental health professionals in recommending and making such important clinical and legal decisions.

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# TELLING REFUGEE STORIES: TRAUMA, CREDIBILITY, AND THE ADVERSARIAL ADJUDICATION OF CLAIMS FOR ASYLUM

**Stephen Paskey***

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"If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law."[1] *Judith Herman*

## PRELUDE

The scene is a small, plain courtroom: the carpeting deep blue, the walls a light grey. It could be anywhere in the United States. A woman sits in the witness chair, looking straight ahead. She came to this country from somewhere else, and she is seeking political asylum.

To her right, an immigration judge in a black robe sits at a raised wooden bench. A large government seal dominates the wall behind her. There are tables for the lawyers, with a podium between them, and several rows of empty benches behind a wooden railing. An interpreter sits in a chair, a notepad in his lap.

The U.S. Government's lawyer stands at the podium, asking questions in a clipped monotone. The judge listens intently and stares at the applicant as if she knows where things are going.

"Remember that you are under oath. Is it your testimony

1. JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 72 (1992).

that police arrested you during a political demonstration in the capital?

"Yes," the applicant replies through the interpreter.

"And you were held in jail for approximately three weeks?"

"Yes," again.

And while you were held in jail, you were raped twice by guards?"

A brief pause. "Yes."

"Is there anyone in the United States who can confirm what happened to you?"

"No."

"Do you have any papers to prove you were arrested?"

"Of course not. Why would the police give me papers? They do as they please."

"Ma'am, I am asking 'yes' or 'no' questions. Please just answer 'yes' or 'no.' Do you understand?"

"I understand." A pause. "No, I do not have any papers."

"In May of last year did you sign a declaration that explains why you are applying for asylum?"

"Yes."

"Did your lawyer read that declaration to you, through an interpreter, before you signed it?"

"Yes."

"And you swore to tell the truth?"

"Yes."

"In your declaration, did you say you were held in jail for only one week?"

"I . . . I'm not . . ."

"Please answer 'yes' or 'no.' Would you like me to read your declaration to you?"

"Yes. That is what I said. One week."

"And in your declaration, you did not say anything about being raped?"

"I did not."

"Can you explain why your testimony today is different from your declaration?"

The woman looks abruptly at her lawyer, who remains expressionless. She turns back to the judge and shakes her head.

"How can I explain?," she asks. "I am telling the truth."

Twenty minutes later, the woman and her lawyer leave

the courtroom. The judge has denied her claim for asylum after finding she is not credible. An appeals court will later uphold the judge's ruling, and the woman will be deported.

## INTRODUCTION

This story is a fiction,[2] but it reflects the reality often faced by survivors of psychological trauma when they seek political asylum in U.S. immigration courts.[3] By design, the courts are adversarial. And by its nature, that adjudication system is biased against the stories told by trauma survivors.

Claims for asylum are a striking example of storytelling in the context of law. The applicant must prove either past persecution or a "well-founded fear" of future persecution.[4] To meet that burden, the applicant must testify about her[5] life before she arrived in the United States. In most cases, there is only one witness—the applicant—and no direct evidence to corroborate or contradict her story. Thus, whether asylum is granted depends largely on the applicant's ability to tell a "good" story; one an immigration judge deems to be "credible" and that fits within the statutory definition of a "refugee."

In most cases, the judge has at least two versions of the story: the applicant's oral testimony, and a written declaration prepared by either a lawyer or community group.[6]

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2. Though this story is a fiction, it draws on the author's experiences. Between 1995 and 1998, the author worked as a Dept. of Justice trial attorney with the former Immigration and Naturalization Service, and represented the U.S. government in more than 600 asylum cases.

3. *See e.g.*, Zeru v. Gonzales, 503 F.3d 59 (1st Cir. 2007). In *Zeru*, an asylum applicant stated on different occasions that she had been raped either once, twice, or three times. Despite expert testimony proving that the applicant was suffering from post-traumatic stress disorder (PTSD), the First Circuit upheld an immigration judge's conclusion that she was not credible. *Id.* at 69–70.

4. *See* 8 U.S.C. § 1158(b)(1)(A) (stating that a "refugee" is eligible for asylum); 8 U.S.C. § 1158(b)(1)(B)(i) (stating that an applicant has the burden of proof); 8 U.S.C. § 1101 (a)(42) (defining "refugee").

5. Many applicants, of course, are men. In the absence of an accepted gender neutral pronoun or a graceful way of avoiding gendered pronouns in every sentence, I've chosen to use "she" and "her" to refer to asylum applicants throughout this article.

6. *See* Stacy Caplow, *Putting the "I" in Wr*t*ng: Drafting An A/Effective Personal Statement To Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INSTITUTE 249, 255–56 (2008) (discussing the role of a declaration in claims for asylum).

The only other evidence typically consists of written background reports on "country conditions" prepared by the U.S. State Department and human rights groups.[7] In most cases, then, the only direct evidence regarding the applicant's life experience is the applicant's story itself, told in a foreign courtroom and filtered through lawyers, lay representatives, or interpreters.

Against this backdrop, the judge will consider the applicant's declaration and testimony, and will assess the demeanor, candor, and responsiveness of the applicant, the "inherent plausibility" of the story, and whether the applicant's statements are both internally consistent and consistent with other evidence.[8] If the judge concludes the applicant is not credible, asylum will almost certainly be denied.

But psychological trauma is common among refugees,[9] and the stories told by trauma survivors defy our expectations for a "credible" story. Trauma narratives tend to be fragmented and disjointed, both logically and chronologically.[10] They may be lacking in detail, and the story will typically change over time, even with regard to critical details, as the survivor begins to heal.[11] None of these things are a reliable measure of whether a survivor is truthful, and yet they are the very things an immigration

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7. In determining whether an asylum applicant is credible, an immigration judge may consider whether the applicant's statements are consistent with "reports of the Department of State on country conditions." 8 U.S.C. § 1158(b)(1)(B)(iii). Similarly, applicants often submit reports from groups like Human Rights Watch or Amnesty International. *See* U.S. Citizenship and Immigration Services, *Asylum Division Training Programs*, *Burden of Proof, Standards of Proof, and Evidence* 17–18, available http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs (last visited July 2, 2015) (hereinafter "Asylum Officer Training").

8. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (setting standards for determining the credibility of asylum applicants).

9. Research on PTSD among refugees has found widely varying rates, with the prevalence of trauma ranging from 4% to 86% depending on sample size, country of origin, and other factors. Hollifield, M., Warner, T.D., Lian, N., Krakow, B., Jenkins, J.H., Kesler, J., Stevenson, J., & Westermeyer, J., *Measuring trauma and health status in refugees: A critical review*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 611–621 (2002). *See also*, Elisa E. Bolton, *PTSD in Refugees*, available at http://www.ptsd.va.gov/professional/trauma/other/ptsd-refugees.asp (last visited Feb. 6, 2016).

10. HERMAN, *supra* note 1, at 175–79.

11. HERMAN, *supra* note 1, at 180.

judge will typically point to as evidence that an asylum seeker is not credible.[12] Indeed, inconsistencies within and among various versions of an applicant's story are by far the most common factor cited by immigration judges when they make a negative credibility finding in an asylum case.[13]

In this country, core traits of the adjudication system compound the problem. In contrast to procedures used by some governments,[14] the United States subjects most asylum seekers to adversarial cross-examination by a government lawyer.[15] It does so in the apparent belief that cross-examination is an "engine" for "the discovery of truth."[16] But when the applicant is a trauma survivor and the only evidence is the applicant's story, aggressive cross-examination is more likely to obscure the truth than reveal it —especially when an applicant is not represented.

The process also assumes that a judge with no training in the effects of trauma can reliably assess the credibility of a survivor. Indeed, as disputes over expert testimony on rape trauma syndrome demonstrate, our legal system assumes judges and juries can reliably assess the credibility of any and all witnesses without the benefit of training or expert guidance.[17] However, when the witness is a trauma survivor, that assumption is not true.

Moreover, by requiring an applicant to tell her story

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12. Because immigration judges are administrative law judges, their factual findings are subject to the substantial evidence standard, and a reviewing court must uphold the judge's determination if it is supported by reasonable, substantial, and probative evidence in the record. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Thus, judges routinely identify for the record the reasons why they concluded an applicant is not credible. For a detailed analysis of the review standard and suggested alternatives, *see* Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581 (November 2013).

13. *See infra*, text accompanying notes 85 to 99, discussing the results from a study of 369 decisions in the Federal Courts of Appeal.

14. For a comparative analysis of the asylum adjudication systems in Australia, Canada, the United Kingdom, and the United States, *see generally* Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253 (2000).

15. Executive Office for Immigration Review, *Immigration Court Practice Manual* 83, available at http://www.justice.gov/eoir/office-chief-immigration-judge-0 (last visited June 10, 2013) (hereafter "EOIR Practice Manual").

16. 5 JOHN H. WIGMORE, EVIDENCE 29 (3d ed. 1940).

17. *See generally* Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991 (2007).

repeatedly over a lengthy period and "freezing" an early version in writing, the adjudication process increases the likelihood that a survivor will present inconsistent versions of her story.[18] The role of lawyers and community groups introduces still further challenges. If the applicant is a survivor, inconsistencies between an applicant's declaration and oral testimony are likely to say as much about the work habits and writing style of the person who drafted the declaration as they do about the applicant's credibility.

This Article examines these issues from the perspective of scholarship on psychological trauma. Part II summarizes the standard for asylum and the process by which asylum claims are adjudicated in the United States. It concludes with the results of original research on 369 asylum decisions issued by federal appeals courts in 2010. A systematic review of the cases demonstrates that when immigration judges conclude an applicant is not credible, they *overwhelmingly* rely on inconsistencies within or among the various versions of the applicant's story, and especially inconsistencies between the testimony and declaration.

Part III introduces a useful concept from structuralist narrative theory: the distinction between *story* and *discourse*, between the content of a story (characters and events) and the way the story is told. That distinction is critical to an understanding of the differences between multiple versions of a single story (the testimony and declaration, for instance), as well as the effects of trauma on storytelling. The most critical point is this: judges and lawyers typically assume that trauma impacts only the way an applicant tells her story—the *discourse*—but not the *content* of the story itself. Empirical research has proven that assumption to be wrong.[19]

The Article then turns directly to the challenges faced by survivors who seek asylum. After explaining the symptoms of trauma, Part IV examines the effects of trauma on a survivor's ability to tell her story and the role of storytelling in the recovery process. Part V re-examines the asylum

18. In a study of refugees who suffered from PTSD, for instance, British researchers found that the rate of discrepancies increased substantially when they told their stories twice with a delay of six to seven months. Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 TORTURE 81 (2006).

19. *See infra*, text discussing notes 159 to 167.

adjudication system. It begins by reconsidering the process by which immigration judges evaluate credibility, then explores the ways a lawyer's handling of a case can impact an immigration judge's credibility findings.

The final section, Part VI, surveys proposals for reform, then recommends that the U.S. Government eliminate adversarial hearings for asylum seekers. In addition, both judges and lawyers should be trained to understand the symptoms and effects of trauma, and especially the impact of trauma on a survivor's ability to tell her story.

But in some respects the scope of this Article is limited: there are other cultural, psychological, and practical issues that may affect a survivor's testimony, ranging from feelings of shame or a fear of authority figures to the challenges of accurate interpretation.[20] Though the Article does not consider these issues, they further support the Article's central claim—that an adversarial hearing is a deeply and inherently flawed way to assess the credibility of asylum applicants who have experienced traumatic events.

## I. THE ADJUDICATION OF CREDIBILITY IN U.S. CLAIMS FOR ASYLUM

In the words of a former immigration judge, the system by which the United States adjudicates claims for asylum is a "byzantine," "crazy-quilt method" for deciding cases on which an applicant's life may depend.[21] This section will walk readers through that method and then present the results of original empirical research on the reasons why immigration judges find applicants not to be credible.

### *A. The Asylum Adjudication Process*

Asylum is potentially available to any foreign national

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20. For instance, trauma survivors often feel shame, guilt, or self-loathing about their experiences, and survivor's ability to discuss her experiences in the presence of lawyers and judges may be diminished by cultural factors, gender roles, a fear of authority figures, or the social repercussions of talking about a rape with strangers. Herman, *supra* note 1, at 94; *See* David Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE 79, 80, 82 (2007). Moreover, because the goal of torturers is often to make their victims talk, a torture survivor may associate talking in a legal setting "with the experience of forced talking under torture." *Id.* at 80.

21. Bruce J. Einhorn, *The Gift of Understanding*, 3 ALB. GOV'T L. REV. 149, 152, 156 (2010).

who is physically present in the United States.[22] It is also available to any foreign national who seeks admission at a port of entry if the government determines, after an interview, that the person has a "credible fear" of persecution.[23] The ultimate goal of the adjudication process is to determine whether the applicant is a "refugee." The applicant has the burden of proof[24] and must demonstrate she is unwilling or unable to return to her country of nationality or citizenship[25] because of past persecution or a "well-founded fear" of future persecution.[26] The term "persecution" is construed narrowly to include only serious (and usually physical) harm.[27]

The applicant must also prove she has been (or may be) targeted for persecution "on account of" race, religion, nationality, political opinion, or "membership in a particular

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22. 8 U.S.C. § 1158(a)(1). Refugee status may also be granted to certain persons who are outside the United States. *See* 8 U.S.C. § 1157.

23. 8 U.S.C. § 1225(b)(1)(B)(ii).

24. 8 U.S.C. § 1158(b)(1)(B).

25. 8 U.S.C. § 1101(a)(42) (defining "refugee"). But if the applicant is stateless (i.e., the applicant "has no nationality"), the assessment will focus instead on the country of the applicant's "last habitual residence." *Id.*

26. 8 U.S.C. § 1101(a)(42). To establish a "well-founded fear" of persecution, an applicant must demonstrate that her fear is both subjectively genuine and objectively reasonable. *See e.g.*, Ahmed v. Keisler, 504 F.3d 1183, 1191–92 (9th Cir. 2007).

27. *See, e.g.*, Abdel-Masieh v. INS, 73 F.3d 579, 584 (5th Cir. 1996) (two arrests with beatings and interrogation that the applicant did not characterize as "severe" or "excessive" did not establish past persecution); Thomas v. Ashcroft, 359 F.3d 1169, 1179 (9th Cir. 2004) (holding that escalating intimidation and a serious threat of physical violence established persecution); Salazar-Paucar v. INS, 281 F.3d 1069, 1075 (9th Cir. 2002) (holding death threats along with beatings of family members and murders of political allies constitute persecution). The term persecution does not include lesser forms of discrimination. *E.g.*, Fatin v. INS, 12 F.3d 1233, 1243 (3d Cir. 1993) (treatment of feminists in Iran was not so harsh as to amount to "persecution"). Nor does it include purely economic harms unless they threatened a person's life or freedom. *See, e.g.*, Li v. Attorney Gen. of U.S., 400 F.3d 157, 168 (3d Cir. 2005) (holding that the deliberate imposition of severe economic disadvantage which threatens a petitioner's life or freedom may constitute persecution). In one case, the Ninth Circuit held that a Seventh Day Adventist minister had not suffered past persecution by being forced to serve as a porter for the Burmese military. Khup v. Ashcroft, 376 F.3d 898, 903 (9th Cir. 2004). However, because a fellow minister had been tortured and killed, the Court concluded that the applicant had a well-founded fear of persecution. *Id.* For a broader discussion of asylum's persecution requirement, see Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109 (2007).

social group."[28] A generalized fear of civil strife will not suffice,[29] nor will a threat motivated by personal animosity.[30] The standard is forward-looking: while past persecution creates a presumption that an applicant has a well-founded fear of future persecution, the Government can rebut that presumption by showing that circumstances have changed, or that internal relocation is both possible and reasonable.[31] But in extreme cases, past persecution alone may be sufficient if the applicant demonstrates "compelling reasons" why he or she is unwilling to return to the country "arising out of the severity of the past persecution."[32]

Certain classes of applicants are barred as a matter of law. Some are excluded because the applicant was firmly resettled in another country[33] or could safely relocate to another part of her own country.[34] Still others are excluded for "bad" behavior, ranging from assistance in the persecution of others[35] to terrorism-related activity[36] to a conviction for certain crimes.[37] But even if an applicant clears these hurdles, an immigration judge still has discretion to deny her application on other, unspecified grounds.[38]

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28. 8 U.S.C. § 1101(a)(42). Several circuits have formally adopted the doctrine of "mixed motives," which recognizes that an applicant may be eligible for asylum if her alleged persecutors have multiple motives as long as at least one of the motives is among those specified in the statute. *E.g.*, Mohideen v. Gonzales, 416 F.3d 567, 570 (7th Cir. 2005).

29. *E.g.*, Rasiah v. Holder, 589 F.3d 1, 5 (1st Cir. 2009) ("simply because civil strife causes substantial hardships for an ethnic minority, that does not automatically entitle all members of that minority to asylum").

30. *E.g.*, Zayas-Marini v. I.N.S., 785 F.2d 801, 806 (9th Cir. 1986) (holding that death threats grounded only in "personal animosity" were not grounds for asylum).

31. 8 C.F.R. 206.16(b)(1)(i).

32. 8 C.F.R. § 1208.13(b)(1)(iii)(A).

33. 8 U.S.C. § 1158(b)(2)(A)(vi); 8 CFR § 208.15 (defining "firm resettlement").

34. 8 U.S.C. § 1158(a)(2)(A).

35. 8 U.S.C. §§ 1101(a)(42) & 1158(b)(2)(A)(i).

36. 8 U.S.C. § 1158(b)(2)(A)(v).

37. 8 U.S.C. § 1158(b)(2)(A)(iii) (conviction for serious non-political crime); 8 U.S.C. § 1158(b)(2)(B)(i) (conviction for aggravated felony).

38. *See* 8 U.S.C. § 1158(b)(1)(A) (providing that the Attorney General "may" grant asylum to an eligible refugee); 8 C.F.R. § 1208.14 (stating that an immigration judge "may grant or deny asylum in the exercise of discretion"). While immigration judges can and sometimes do deny asylum to otherwise eligible applicants on purely discretionary grounds, such denials are rare and are generally based on egregious conduct by the applicant. *See, e.g.*, Aioub v. Mukasey, 540 F.3d 609, 612 (7th Cir. 2008) (asylum denied because of

To meet her burden, an applicant must tell a story about her life. The context for this legal storytelling is unusual. The principle of res judicata is founded on the premise that a litigant is entitled to a single adjudication of any claim.[39] But for asylum cases, there are two distinct systems of adjudication, run by separate agencies. Some applicants receive a non-adversarial interview; some an adversarial hearing. Many claims are adjudicated twice,[40] and asylum can be granted after either adjudication. There is no "law of the case" doctrine, and the second adjudication (if there is one) is entirely de novo.[41]

The adjudication process begins with a government form[42] on which the applicant provides biographic information and summarizes the facts underlying her claim. Many applicants also submit a declaration presenting the facts in greater detail than the form allows. The declaration is typically drafted by a lawyer if the applicant has one, or by a community group if she does not.[43]

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applicant's fraudulent marriage); Kouljinski v. Keisler, 505 F.3d 534, 543 (6th Cir. 2007) (asylum denied because of applicant's three drunk-driving convictions).

39. *See, e.g.*, Mahmood v. Research in Mot. Ltd., 905 F. Supp. 2d 498, 502 (S.D.N.Y. 2012) *aff'd*, 515 Fed. Appx. 891 (Fed. Cir. 2013).

40. The exact percentage is impossible to determine: two separate federal agencies are involved, and there are no statistics that track individual cases through the complete system. That said, the number is probably more than 20 percent. In fiscal year 2014, for instance, asylum offices referred roughly 50% of all cases to an immigration court, and 44% of the cases adjudicated by immigration judges that year had previously been adjudicated by an asylum officer.Those percentages were calculated from data separately maintained by the Asylum Office, see infra note 64, and the Executive Office for Immigration Review, see infra note 71..

41. If an alien in removal proceedings expresses fear of persecution and files an application for asylum, the immigration judge must conduct a hearing and consider the application unless the alien previously filed an application that was referred to (and considered by) another immigration judge. *See* 8 C.F.R. § 1240.11(c).

42. *See* 8 CFR § 208.3. Department of Homeland Security, *I-589, Application for Asylum and for Withholding of Removal*, available at http://www.uscis.gov/sites/default/files/files/form/i-589.pdf (last visited September 26, 2014).

43. Asylum applicants in removal proceedings are entitled to assistance by counsel of their choice at no expense to the government. 8 U.S.C. § 1229a(b)(4)(A). Some scholars have argued that the Government should provide free representation to indigent applicants. *See, e.g.*, Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295, 384 (2007) (hereinafter

Once this paperwork is ready, the process diverges. If the government has initiated a removal case against the applicant—or if the applicant seeks asylum after a credible fear interview—the claim is *defensive* and will be adjudicated by an immigration judge during an adversarial hearing.[44] Other claims are *affirmative*, and the applicant will receive a non-adversarial interview with an asylum officer.[45] But asylum officers grant just 47% of the claims they adjudicate.[46] A larger number of applicants —50% of the total—are placed in removal proceedings, where they receive a second, adversarial adjudication. Because the adversarial hearings are the same for all applicants, this discussion will begin with an asylum interview and follow an affirmative claim through the process.

Asylum officers are employees of U.S. Citizenship and Immigration Services (USCIS), an agency in the Department of Homeland Security (DHS).[47] Most officers are not lawyers, but all receive extensive training.[48] Asylum interviews are conducted under oath but are not recorded or transcribed. The officer's handwritten notes are the only record of the applicant's statements, and the applicant has no opportunity to review the notes or challenge their accuracy.[49] If an

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"Refugee Roulette").

44. *See* 8 CFR 208.2(a) (delineating the respective jurisdictions of immigration judges and asylum officers). See also EOIR Practice Manual at 38 (discussing the procedural differences between affirmative and defensive claims).

45. *See* 8 CFR 208.2 (outlining the respective jurisdictions of the asylum offices and immigration courts).

46. For an explanation of the data and sources on which that figure is based, *see infra*, text accompanying notes 64 to 67 and source cited therein.

47. U.S. Citizenship and Immigration Services, *Refugee, Asylum, and International Operations*, available at http://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate (last visited June 12, 2015). Prior to the creation of the Department of Homeland Security in 2003, most immigration functions were performed by employees of the Justice Department. *See generally* U.S. Citizenship and Immigration Services, *Our History*, available at http://www.uscis.gov/about-us/our-history (last visited June 12, 2015).

48. The training includes a 5–1/2 week course required of all USCIS immigration officers, and a five-week Asylum Officer Basic Training Course. Supervisory asylum officers receive an additional two weeks of training. U.S. Citizenship and Immigration Services, *Asylum Division and Training Programs*, available at http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs (last visited June 12, 2015).

49. The procedures for asylum interviews state that the record shall consist

applicant needs an interpreter she must provide one, and many use a family member or friend.[50]

By design, the interviews are non-adversarial.[51] Training materials explain that the officer is a "neutral decision-maker" rather than an "advocate," and that a non-adversarial interview allows an applicant to present her claim in "as unrestricted a manner as possible, within the inherent constraints of an interview before a government official."[52] Officers are instructed to treat applicants with respect, to be "nonjudgmental and non-moralistic," and to "create an atmosphere in which the applicant can freely express his or her claim."[53]

The applicant may bring a lawyer or another representative to the interview,[54] but the government is not represented.[55] The representative's role is limited: he or she may ask questions about points the officer did not cover, and may also comment on the evidence and make a closing statement.[56] The documentary evidence typically consists of background material on the applicant's country of nationality or citizenship, including reports from human rights organizations and the Department of State.[57] These

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of the application, other documents submitted by the applicant, comments from the Department of State, and "other information specific to the applicant's case." 8 C.F.R. 208.9(f). The applicant's statements are not ordinarily recorded: instead, the training for asylum officers includes a module on taking clear and comprehensive handwritten notes. *See generally* Asylum Officer Training, *supra* note 7, Interviewing Part 2: Notetaking.

50. The training for asylum officers notes that there are few limits on who may serve as an interpreter, and readily acknowledges the "inherent" challenges of working with an interpreter. Asylum Officer Training, *supra* note 7, Interviewing Part 6: Working with an Interpreter at 7–8, 12–15.

51. 8 CFR § 208.9(b).

52. Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 6.

53. Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 7–8.

54. In lieu of an attorney, an applicant may be represented during the interview by a person accredited by the Board of Immigration Appeals, by a law student or law graduate not yet admitted to the bar, or by a "reputable person" who meets certain criteria. *See* 8 CFR 292.1.

55. Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 6.

56. 8 CFR § 208.9(d). *See also* Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 23 (discussing the role of a representative).

57. 8 CFR § 208.12 (permitting an asylum officer to consider information

materials are aimed at showing whether a particular *category or class* of persons has been persecuted in the country in question on the basis of a protected trait.[58] In addition, applicants are required to corroborate their claim if they reasonably can: most cannot.[59]

Two weeks after the interview, the applicant will return to receive the officer's written decision in person.[60] If the applicant is not in this country legally, the officer will either grant asylum or "refer" the applicant to immigration court—a circumspect way of saying the officer will initiate a removal case.[61] But if the applicant has a valid legal status, the officer will either grant or deny asylum.[62] In either situation, there is no appeal: an applicant's only remedy from an adverse decision is to renew her claim before an immigration judge if the Government attempts to deport her.[63]

In 2014, asylum officers granted 47% of the 27,006 claims they adjudicated, while 50% of were referred to immigration courts and 3% were denied.[64] Among cases that were

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provided by the State Department, by certain other U.S. government offices, or by "other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions").

58. The documentary evidence may also address secondary issues, such as the possibility of internal relocation. For instance, although Somalia has been plagued by clan-based civil strife since the collapse of the Siad Barre regime in 1991, the U.S. Department of State has long maintained that most Somalis can safely relocate to a part of the country controlled by their particular clan.

59. *See* 8 CFR § 208.9(e) (requiring the asylum officer to consider evidence submitted by an applicant in addition to the application itself).

60. *See* 8 CFR §§ 208.9 & 19 (requiring an asylum officer to communicate his or her decision to the applicant in person and in writing); U.S. Citizenship & Immigration Services, *Asylum Division, Asylum Procedures Manual*, § II.K.2. (November 2013), available at http://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf (last visited July 2, 2015) (hereinafter "Asylum Procedures").

61. *See* 8 CFR § 208.14(c) (denial, referral, or dismissal of claims by an asylum officer).

62. 8 CFR § 208.14(c)(2).

63. The Board of Immigration Appeals has authority to review asylum decisions by an immigration judge, but not the decisions of an asylum officer. *See* 8 CFR § 1003.1(b) (delineating the Board's appellate jurisdiction). Federal courts likewise do not have jurisdiction, primarily because the officer's decision is not a final agency adjudication. *See, e.g.*, Barahona-Gomez v. Reno, 236 F.3d 1115, 1120 (9th Cir. 2001).

64. The asylum office statistics for 2014 are compiled from four separate quarterly summaries on the U.S.C.I.S. web site. All were last accessed on February 4, 2016. *See* Asylum Office Workload January 2014, available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Pre

"completed" but not "adjudicated,"[65] 4,706 were also referred to immigration courts, while 2,073 were closed.[66] Thus, 54% of all asylum cases completed by asylum officers in 2014 were referred to an immigration court, where the applicant was entitled to de novo consideration of her claim.[67]

Immigration court hearings are conducted by the Executive Office for Immigration Review (EOIR), an agency in the Department of Justice (DOJ).[68] The presiding "judge" is a DOJ lawyer, appointed by the Attorney General to serve as an administrative judge.[69] In sharp contrast to an asylum interview, the hearings are adversarial and relatively formal. The court provides a professional interpreter and creates a formal record, which includes an audio recording of the hearing.[70] In fiscal year 2014, 55% of respondents were represented,[71] and the government is almost always

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vious%20Engagements/AffirmativeAsylum_JanuaryFebruaryMarch2014.pdf (first quarter); Asylum Office Workload April 2014 https://www.uscis.gov/sites/default/files/USCIS/Outreach/Affirmative_Asylum_-_April_May_June_2014.pdf (second quarter); Asylum Office Workload July 2014 https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Affirmative_Asylum_July_August_September_2014.pdf (third quarter); Asylum Office Workload October 2014 https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf (fourth quarter). Hereinafter, these four documents are collectively referenced as "2014 Asylum Office Workload."

65. U.S.C.I.S. regards a case as being "completed" but not "adjudicated" if the case is referred to an immigration court without an interview; dismissed for failure to provide fingerprints; or closed because the applicant failed to appear for an interview. *See* 2014 Asylum Office Workload, *supra* note 64.

66. *See* 2014 Asylum Office Workload, *supra* note 64. Most of these cases were closed because the applicant failed to appear for an interview.

67. The percentage was compiled from data in the 2014 Asylum Office Workload, *supra* note 64.

68. For an outline of the procedures, *see generally* 8 CFR § 1240. For more detail on any aspect of the procedure, *see* the EOIR Practice Manual, which has a detailed index.

69. 8 CFR § 1001.1 (l) (defining "immigration judge" as "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review").

70. *See* 8 CFR § 1240.9 (requiring a verbatim recording of the proceeding, including any testimony); EOIR Practice Manual, *supra* note 15, at 12 (requiring that judges make a digital audio recording of hearings); § 1008.28 (barring the use of any recording equipment in immigration court other than the equipment used by the judge to create the official record). If either party appeals, the audio recording of the hearing will be transcribed. *See* 8 CFR § 1003.5(a) (discussing transcription of the proceedings on appeal to the BIA).

71. Respondents in removal proceeding have a statutory right to counsel of their choice at no expense to the Government. 8 U.S.C. § 1229a(b)(4)(A). *See*

represented.[72]

During removal proceedings, an immigration judge must first determine whether the respondent is subject to removal.[73] If she is, she is entitled to apply for relief, which may include benefits other than asylum.[74] Respondents who previously filed an affirmative asylum application are entitled to a de novo hearing on their claim. In addition, immigration judges hear defensive claims for asylum—claims first filed after a removal case began. In fiscal year 2014, 44% of the 17,997 asylum claims adjudicated by immigration judges were affirmative, and 56% were defensive.[75] Most (but not all) of the affirmative claims were adjudicated twice.[76]

In most cases, the judge will issue a brief oral decision at the end of the hearing.[77] Both the applicant and the government have the right to appeal an adverse decision to the Board of Immigration Appeals (BIA), an administrative appellate body in DOJ.[78] Finally, the applicant—but not the

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*also* EOIR Practice Manual 19–25 (discussing the right to representation and the role of counsel). In fiscal year 2014, the immigration courts completed 167,774 cases: of that number, 55% of the respondents were represented. Executive Office for Immigration Review, *FY 2014 Statistics Yearbook A2, K4 (F2)* (March 2015), available at http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf) (last visited July 2, 2015) (hereinafter "EOIR 2014 Yearbook").

72. *See* 8 CFR § 1240.2 (delineating the authority and duties of Government counsel in a removal proceeding). The regulations continue to refer to "service counsel"—i.e., the counsel of the Immigration and Naturalization Service (INS)—even though the INS no longer exists. Since 2003, Government counsel in removal cases have been employed by Immigration and Customs Enforcement (ICE), a component of DHS.

73. *See, e.g.*, RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 14.21 (2015 ed).

74. The INA gives immigration judges broad authority to consider applications for relief from removal. *See* 8 U.S.C. § 1229a(c)(4). The judge's authority to grant various forms of relief are specified in other provisions of the INA or by regulation. *See, e.g.*, 8 U.S.C. § 1229b (cancellation of removal); 8 C.F.R. § 245 (adjustment of status); 8 C.F.R. § 208.16 (withholding of removal and protection under the Convention Against Torture).

75. In 2014, immigration judges granted or denied 17,997 claims, of which 7,955 were affirmative and 10,042 were defensive. Judges granted 75% of the affirmative claims, but only 28% of the defensive claims. *See* EOIR 2014 Yearbook, *supra* note 71, at K3.

76. In FY 2014, 21.6% of the claims referred to immigration courts by asylum offices had not been adjudicated. *See* 2014 Asylum Office Workload, *supra* note 64.

77. *See* 8 CFR §§ 1240.12 & 13 (permitting immigration judges to issue an oral decision). In rare cases, judges will issue a written decision.

78. Under EOIR regulations, any adverse decision by an immigration

government[79]—has the right to appeal an adverse BIA ruling to the federal Courts of Appeal.

During an asylum hearing, the applicant's testimony is the core of her case. The applicant will be examined by her lawyer, or by the judge if she is unrepresented. She will then be cross-examined by the government lawyer, and sometimes the judge as well.[80] The evidentiary rules are more lenient and more flexible than in other courts—for instance, hearsay is usually admissible.[81]

Beyond the testimony, the record will routinely include: the written application, the applicant's declaration, and background materials on the applicant's country of nationality or citizenship.[82] In some cases, the record will also include an asylum officer's handwritten notes, or evidence of other prior statements by the applicant. If the applicant received a credible fear interview, documents from that interview will be part of the record.

Much less commonly, applicants present documents or testimony to corroborate their claim. When available, such materials typically consist of medical evidence, foreign government documents, the applicant's passport, or the testimony of family members. Some applicants support their claim with expert testimony, typically on medical issues, psychological issues, or political and conditions in the applicant's home country.

In the great majority of cases, however, there is no direct evidence to either corroborate or contradict the applicant's version of events. This is not surprising: the events took place in another country; the Government lacks the resources

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judge, other than an in absentia order of removal, may be appealed to the BIA. 8 CFR § 1240.15.

79. Because the BIA's decision is an agency adjudication, government lawyers are bound to accept it. *See* 8 U.S.C. § 1240(a)(1) (final orders of removal are subject to judicial review under 28 U.S.C. § 158, which provides for review of federal agency decisions).

80. *See* 8 CFR § 1003.10(b) (authorizing immigration judges to "interrogate, examine, and cross-examine" witnesses).

81. *See, e.g.*, Ogbolumani v. Napolitano, 557 F.3d 729, 734 (7th Cir. 2009) ("in removal proceedings, hearsay is admissible so long as it's probative and its use is not fundamentally unfair").

82. *See, e.g.*, 8 CFR § 1208.11 (authorizing an immigration judge to consider information from the State Department, including both background information on country conditions and information specific to the applicant); 8 C.F.R. § 1240.10 (permitting both sides to submit documentary evidence).

to investigate; and if the applicant is indeed a refugee, she fled her homeland in fear for her safety. But an applicant's inability to corroborate her testimony is not fatal to her claim. Her testimony alone may be sufficient to meet her burden of proof if "it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account" of the essential facts.[83]

Given this limited evidence, the applicant's credibility is the linchpin of the judge's analysis—asylum is all but certain to be denied to an applicant who is deemed not credible.[84] With that in mind, this Article now turns to the grounds on which judges typically rely when they make an adverse credibility finding.

### *B. The Reasons Why Applicants Are Found Not Credible*

For asylum applications filed on or after May 11, 2005, credibility determinations are governed by statutory provisions enacted as part of the REAL ID Act.[85] The statute makes clear that judges must consider "the totality of circumstances, and all relevant factors."[86] Relevant factors include: the demeanor, candor, and responsiveness of the applicant; the inherent plausibility of the applicant's account; consistency between the applicant's written and oral statements; the internal consistency of each statement; and the consistency of the applicant's statements with other evidence.[87] The statute expressly provides that judges may consider any "inconsistency, inaccuracy, or falsehood" without regard to whether the discrepancy "goes to the heart of the applicant's claim or any other relevant factor."[88]

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83. *See, e.g.*, Biriiac v. Holder, 399 Fed. Appx 27, 35 (6th Cir. 2010) (citing Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987)).

84. Conversely, the fact that an applicant is credible is not enough. For instance, a judge may conclude that she is telling the truth, but the harm she fears does not rise to the level of "persecution."

85. *See* 8 U.S.C. § 1158(b)(1)(B)(iii). The same statute applies to credibility determinations by an asylum officer. To a large degree the REAL ID Act simply codified factors immigration judges had long considered on a case-by-case basis.

86. *Id.*

87. *Id.*

88. 8 U.S.C. § 1158(b)(1)(B)(iii). Prior to the REAL ID Act, some circuits held that an adverse credibility finding could not be supported by "minor inconsistencies that do not go to the heart of an applicant's claim." Kaur v. Gonzales, 418 F.3d 1061, 1064 (9th Cir. 2005); *accord* Gao v. Ashcroft, 299 F.3d 266, 299 (2002).

The REAL ID Act also codified a formal corroboration requirement, one that some courts had previously rejected. Under that standard, "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[89]

Which of these factors do immigration judges rely on most frequently when they find an applicant is not credible? Because immigration hearings are administrative, it is possible to provide a detailed, nuanced answer to that question.

As noted earlier, immigration judges are employed by DOJ. On appeal to the BIA (also a component of DOJ), their credibility findings can be reversed only if the BIA determines the findings were "clearly erroneous."[90] In a federal court of appeals, the administrative conclusion that an applicant is not credible is subject to the substantial evidence standard.[91] Thus, even before the REAL ID Act was enacted, federal courts required an immigration judge to explicitly state the factors supporting a negative credibility finding.[92] In the words of the Ninth Circuit, an immigration judge must "provide specific and cogent reasons" for such findings,[93] and that rule makes it possible to analyze the factors judges consider.

In 2010, the Courts of Appeals decided over 400 cases[94]

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89. 8 U.S.C. § 1158(b)(1)(B)(ii).

90. 8 C.F.R. §1003.1(d)(3)(i).

91. *See, e.g.*, Xiao Ji Chen v. U.S. Dept. of Justice, 471 F.3d 315, 334 n. 13 (2d Cir. 2006) (noting that the Second Circuit uses the substantial evidence standard, but suggesting that the standard of review in immigration cases may be even more deferential).

92. *See, e.g.*, Gui v. I.N.S., 280 F.3d 1217, 1225 (9th Cir. 2002) (an immigration judge "must have a legitimate articulable basis to question the petitioner's credibility"); Secaida-Rosales v. I.N.S., 331 F.3d 297, 307 (2d Cir. 2003) ("Adverse credibility determinations based on speculation or conjecture, rather than on evidence in the record, are reversible."); Ahmad v. I.N.S., 163 F.3d 457, 461 (7th Cir. 1999) ("Credibility determinations are accorded substantial deference, but they must be supported by specific, cogent reasons.")

93. Shrestha v. Holder, 590 F.3d 1034, 1044 (9th Cir. 2010) (quoting *Gui*, 280 F.3d at 1225).

94. It should be noted that a significant percentage of asylum applicants do not have a lawyer during their immigration court hearing, and that many unrepresented applicants do not appeal an adverse decision to federal courts. *See* Refugee Roulette, *supra* note 43 at 325. Nonetheless, there is no obvious

(both published and unpublished) in which they reviewed an immigration judge's conclusion that an asylum applicant was not credible. Of those, 369 clearly state the reasons for the judge's negative credibility finding. Under a research project funded by the Baldy Center for Law and Social Policy, each of those decisions was reviewed, and the reasons judges gave for their negative credibility findings were tabulated. The data are fully summarized in the Appendix, which includes eight separate tables.

As detailed in Table 2, the factors relied on by judges were divided into three distinct groups. The first set of factors consisted of *internal inconsistencies* in the applicant's story, including inconsistent testimony during the hearing; inconsistencies between the applicant's testimony and declaration, and inconsistencies between the testimony and other prior statements. The second set involved aspects of the way the story was told, including the applicant's demeanor and other concerns, such as whether the applicant's story was deemed to be "vague" or "implausible." The final set of factors includes anything *external* to the applicant's story, including inconsistencies between the story and other evidence as well as an applicant's failure to corroborate her claim.

In 76% of cases, judges cited some combination of two to four of these factors in support of their adverse credibility findings. Only sixty-four decisions (17%) cited a single factor, most commonly inconsistencies between the applicant's testimony and either the written declaration or evidence external to the applicant's story. (See Table 8.)

Five key points emerge from this research. First, an applicant who is found to be not credible will almost certainly lose her case on appeal. In a remarkable 96% of the cases, an appeals court affirmed the immigration judge's negative credibility finding and the decision denying asylum.[95] Twelve

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reason to believe inconsistencies within and among the applicant's statements would play a lesser role in such cases. Indeed, in one respect an unrepresented asylum seeker may have an advantage: if there is no written declaration, a judge cannot find that the applicant's testimony and declaration are inconsistent.

95. Of the 369 cases examined, 354 were affirmed. *See* Table 1, *infra*. In the remaining 15 cases, the appeals court vacated the administration decision and remanded the case for further proceedings. In at least one case, the court explicitly concluded that the applicant was credible, and directed the BIA to

of the fifteen remands were in the Ninth Circuit, where 86% of cases were affirmed. The Eleventh Circuit remanded two cases; the Second Circuit remanded one. In every other circuit, all cases were affirmed.

Second, immigration judges overwhelmingly expect that credible applicants will tell a consistent story. Internal inconsistencies within and among an applicant's written and oral statements are by far the dominant factor in negative credibility findings. Judges relied on some combination of these inconsistencies in 86% of the cases—roughly seven cases out of every eight.[96]

Third, the applicant's ability to testify consistently with her declaration is critical. In 56% of cases, the immigration judge's negative credibility finding relied on inconsistencies between the applicant's oral testimony and her written declaration. In 47% of cases, judges relied on inconsistencies within the applicant's testimony itself. Inconsistencies between the testimony and other prior statements were cited in 28% of cases.[97] In this last group of cases, the evidence of a prior inconsistent statement often was limited to an asylum officer's notes. In other cases, the prior statement was created as part of a credible fear interview.

Fourth, judges also give significant weight to the way an applicant's story is told. Judges cited the applicant's demeanor in 18% of all cases. In 23% of all cases, judges also relied on other traits of the applicant's testimony.[98] Judges who did so frequently described the applicant's testimony as "implausible," "vague," "lacking in detail," "unresponsive," or "evasive." Less frequently, judges described an applicant's testimony as "confusing," "hesitant," "disjointed," "incoherent," or "unreliable."[99]

Finally, the presence or absence of other evidence was important, but much less so than inconsistencies in the applicant's story. Inconsistencies between the applicant's testimony and other evidence were cited in 46% of cases, but

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reconsider its decision in light of that finding. Singh v. Holder, 406 Fed. Appx. 166, 171 (9th Cir. 2010).

96. *See* Tables 2 and 3, *infra*.

97. *See* Table 3, *infra*.

98. *See* Table 7, *infra*.

99. Unpublished research notes by Brendan McCullen (undated) (on file with the author).

in 70% of those cases the judge also relied on inconsistencies in the applicant's oral or written statements. Similarly, judges cited the absence of corroborating evidence in 43% of cases, but in 85% of those cases they also relied on inconsistencies in the applicant's statements. In only 13% of cases did a judge conclude that an applicant who told her story consistently was not credible, most often because the testimony was inconsistent with other evidence.

The data are subject to certain limitations. Many asylum cases are not appealed to the BIA, and only a fraction of those cases are further appealed to the circuit courts. Moreover, the federal court decisions are weighted in favor of applicants with a lawyer: those who are not represented are less likely to appeal an adverse decision.

Nonetheless, the decisions in these cases reflect a cultural norm: in the United States (and elsewhere), it is widely assumed that consistent statements are central to credibility, and that a person whose story changes over time is not truthful. But as discussed in detail below, when the person is a trauma survivor, that assumption is not true.

## II. THE STRUCTURE OF STORIES: NARRATIVE, STORY, AND DISCOURSE

Before considering the research on trauma and the effects of trauma on the stories told by survivors, it would be useful to step back and consider several questions: What do we mean by "story"? Why must an asylum applicant tell one? And what is the relationship between the "credibility" of a storyteller and the way the story is told? The answers to those questions are useful to an understanding of the challenges faced by survivors who seek asylum, the criteria by which we judge their credibility, and the ways in which a declaration drafted by a lawyer will differ from an applicant's testimony.

In a typical legal trial, the parties tell competing stories and present other evidence, and a trier of fact must determine whether one story or the other is true, or whether the truth lies between the two. But when there is only one story and no other evidence of the applicant's experience—as there is with most claims for asylum—the applicant's credibility becomes a proxy for the truth, even though a story that does not conform to our norms for a credible story may, in fact, be true. To help

explain precisely why that can happen, this Article will explore the ways narrative theorists think about the structure of stories, especially the distinction between *story* and *discourse*—in lay terms, between the content of a story and the form in which it is told.

At first blush, the idea of a "story" may seem obvious. A story is simply the "telling" of something that happened, an account of one or more events for which there is some sort of change or transformation—a "before" and an "after."[100] If the story includes more than one event, the events will be related both logically and chronologically. The events are caused or experienced by characters, and there are places in which the events take place. But literary theorists have long recognized that even a simple story can be deceptively complex. In the 19th century, one scholar counted more than one thousand versions of the "Cinderella story."[101] What makes each of these versions the "same" story, and how do we account for the differences?

In the language of structuralist narrative theory, each distinct telling of a story is a separate *narrative text* (or narrative)[102] and each narrative can be divided into two parts: *story* and *discourse*.[103] The demarcation between story and discourse has been characterized as a distinction between "content" and "expression,"[104] or between "plot" and "presentation."[105]

At the level of story, a narrative text contains elements known as *events* and *existents*.[106] The latter term includes,

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100. Some narrative theorists argue that a single event does not suffice to make a story. *See* H. PORTER ABBOTT, THE CAMBRIDGE INTRODUCTION TO NARRATIVE 15–16 (2d ed. 2008) (discussing definitions of "story").

101. *Id.* at 21.

102. In this context, the word "text" is used broadly and may refer to stories that are told through a medium other than oral or written language. A story told, for instance, through dance, mime, or a silent film would also be considered a narrative "text," so long as it has "narrativity," the qualities that distinguish a narrative from other forms of expression. *See generally*, Abbott, supra note 92, at 1–12 (discussing the universality of narrative).

103. *See, e.g.*, ABBOTT, *supra* note 100, at 16–20; SEYMOUR CHATWIN, STORY AND DISCOURSE: NARRATIVE STRUCTURE IN FICTION AND FILM 19-21 (1978).

104. CHATWIN, *supra* note 103, at 19.

105. JONATHAN CULLER, LITERARY THEORY: A VERY SHORT INTRODUCTION 81 (1997). Culler's use of the word "plot" in this sense is potentially problematic: the same term is used in other (and sometimes conflicting) ways by other theorists.

106. CHATWIN, *supra* note 103, at 19, 34.

among other things, the characters who cause or experience events, the places where events happen, and various things that are present.[107] Hamlet's murder of his uncle Claudius is an event: the two men, the poisoned sword, and the court at Elsinore are existents. The category of events is further divided into *actions* and *happenings*—events caused by a character and those that are not.[108] The rebuilding of a home destroyed by Hurricane Katrina is an action, the storm itself a happening.

The term *discourse*, by contrast, refers to the way a story is communicated to an audience. It consists not only of the medium in which the story is told (as a written text, a video, or a live performance), but also a myriad of traits concerning the style and manner of expression. Among them: the perspective from which the story is told, the choice to include or omit various events and characters, the order and pacing of events, and the level of detail in which events and characters are described. If a narrative includes flashbacks, those shifts in time are part of the discourse: events need not be presented in the order in which they happened.

The distinction between narrative, story, and discourse is essential to convey a basic truth about storytelling: a single story can be told multiple ways from different perspectives in different media and for different purposes to different audiences. Kirosawa's landmark film *Rashomon* is a striking example. The story's events center on the rape of a woman and the killing of her samurai husband after the couple encounter a bandit. During the film, the wife, the bandit, and the dead samurai's spirit each tell the story in different ways, and each claims to be the killer. A woodcutter who witnessed the events gives a fourth account, inconsistent with the others.[109]

But even when a story is told without contradiction from one perspective, the discourse may vary sharply. The events underlying L. Frank Baum's *The Wizard of Oz* have been told

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107. CHATWIN, *supra* note 103, at 19, 44–45.

108. CHATWIN, *supra* note 103, at 19.

109. *See, e.g.*, Wikipedia, *Rashomon*, available at https://en.wikipedia.org/wiki/Rashomon (summarizing the film's plot) (last visited June 15, 2015); Roger Ebert, *Rashomon*, available at http://www.rogerebert.com/reviews/great-movie-rashomon-1950 (reviewing the film and discussing its cultural impact) (last visted June 15, 2015).

as a novel, a film, and two Broadway musicals, *Wiz* and *Wicked*.[110] Each version is a separate narrative, in which the story is told through a different discourse. As the Cinderella example demonstrates, the potential variations in discourse are all but limitless.

Discussions of narrative theory most often focus on fictional narratives, but the distinction between narrative text, story, and discourse applies equally to nonfiction narratives. For nonfiction, however, there is an additional trait. As Doritt Cohn explains, a work of fiction is a non-referential (or self-referential) narrative: the text itself creates the world to which it refers by referring to it, and that world has no existence outside the text.[111] A work of nonfiction, on the other hand, is a referential narrative, one that makes reference to, and is bounded by, a world that exists beyond and independently from the text.[112] In Cohn's model, this world beyond the text is the *reference*.

Cohn recognized that fictional works need not be entirely self-referential. They may (and often do) refer to actual places, events, or characters.[113] But while fiction can refer to the world outside the text, it does not do so exclusively, and references to that world are not bound to accuracy. As a result, a work of nonfiction is subject to judgments about "truth" or "falsity," but a work of fiction is not, and some narratives occupy a murky middle ground, part fiction and part fact.[114]

But whether a narrative is "true" cannot be determined simply by examining the discourse. As H. Porter Abbott has suggested, fiction can readily imitate fact and there is no *textual* property that can identify a narrative as a work of fiction.[115] Instead, a narrative's truth can be assessed only by

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110. Wikipedia, *Adaptations of The Wizard of Oz*, available at https://en.wikipedia.org/wiki/Adaptations_of_The_Wizard_of_Oz (last visted June 15, 2015).

111. *See* DORITT COHN, THE DISTINCTION OF FICTION 12–14 (1989).

112. *Id.* at 14–15.

113. *Id.* at 15. For instance, Elliot Roosevelt, the son of Franklin D. and Eleanor Roosevelt, wrote a series of novels casting his famous mother as a crime-solving detective, with titles like *Murder in the Lincoln Bedroom.* Elliot Roosevelt, ELLIOT ROOSEVELT'S MURDER IN THE LINCOLN BEDROOM: AN ELEANOR ROOSEVELT MYSTERY (2000).

114. COHN, *supra* note 111 , at 15.

115. *See* ABBOTT, *supra* note 100, at 149. For an excellent discussion of the

evaluating statements in the narrative against other evidence. Complete and perfect accuracy is not possible.[116]

The application of these distinctions to claims for asylum is straightforward and useful. An applicant's written declaration is one narrative, while her testimony is another. They each intend to tell the same story, but the discourse is different, and any discrepancy between the two raises critical questions. How and why are they different? Are the differences a matter of *story* or *discourse*? To what degree has the applicant's story been shaped by a lawyer's involvement, or by the applicant's physical and mental state each time the story was told? And ultimately, there is this: to what degree—if any—do the differences tell us anything about the "truth" of the story or the credibility of the storyteller?

Whether the applicant's story is true depends on the relationship between the narrative and the reference—between the events of the story and events in the world. But without other evidence, how can an immigration judge verify the elements of the story, or determine whether the applicant has accurately represented what happened?

The answer, of course, is that the judge can never know what truly happened. Because the judge has no firsthand knowledge of the reference and no other evidence of the reference, the judge's conclusions about the "truth" of the story must rely on the story itself and how that story is told to determine whether the judge believes the applicant is credible. In short, the applicant's credibility becomes a surrogate for the story's truth.

For asylum seekers, their lawyers, and others who assist them, the challenges presented by this situation are inescapable. In the context of legal practice, storytelling is not optional, nor is it merely a rhetorical tactic or persuasive technique; it is, quite literally, required by the nature of legal rules.[117] Both lawyers and the public think of law in terms of

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issues relating to narrative and truth, *see id.* at 145–58.

116. As Abbott notes, historians and biographers must deal with an incomplete record, and what audiences expect from a nonfiction narrative is not so much the complete and literal truth as a good faith attempt to accurately represent the way things are (or were). *See* ABBOTT, supra note 100, at 146.

117. *See generally* Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories & Legal Rules*, 11 LEGAL COMM. & RHETORIC: JAWLD 51 (2014).

rules and logic, but all governing legal rules—the rules by which a decision maker can confer a benefit or impose a penalty—have the structure of a stock story, a story in which the elements (characters, events, and consequences) have been stripped to a bare minimum and stated in general terms. The "rags to riches" stories penned by Horatio Alger are classic examples. Though the characters and events change, in each of Alger's stories a poor young boy achieves success through hard work and good character.

In the same way, the legal standard for asylum is also a stock story, a set of logically-related elements with characters, events, and a change of circumstances. To meet her burden of proof, the applicant must prove, among other things, that she left her country of nationality, and that she is unwilling or unable to return because of past persecution or a "well-founded fear" of future persecution. She cannot do so except by telling a story, in which she and those who would persecute her are the central characters.

But what happens to storytelling when the storyteller has experienced or witnessed a traumatic event? This Article now turns to that question.

## III. THE IMPACT OF TRAUMA ON STORYTELLING

As some theorists have recognized, storytelling is a rhetorical act: stories are told to a particular audience for a particular purpose.[118] But immigration courts are not intended to be a therapeutic environment, and the goals of the adjudication process differ from those of therapy.

As Schulamit Almog explains, the "poetics" of legal stories are different from those of trauma literature: "Law demands orderly, 'closed' stories, and has a valid reason for this demand." Legal stories are normative, and the narrative in judgments "does not interpret reality or contemplate reality; rather, it *declares* that a particular occurrence is reality."[119] But the "literature" of trauma is "indifferent" to

118. *See, e.g.*, James Phelan & Peter J. Rabinowitz, *Narrative as Rhetoric*, in David Herman et al., NARRATIVE THEORY: CORE CONCEPTS & CRITICAL DEBATES 3, 5 (2012). Under their definition, "[n]arrative is somebody telling somebody else, on some occasion, and for some purposes, that something happened to someone or something."

119. Shulamit Almog, *Healing Stories in Law and Literature*, TRAUMA AND MEMORY: READING, HEALING AND MAKING LAW 289, 298 (Austin Sarat, Nadav

the needs of law: outside the courtroom, trauma narratives are "created first and foremost to serve its narrators, the trauma survivors."[120] This inherent tension between the needs of the law and the psychological needs of survivors lies at the very heart of the challenges faced by trauma survivors who seek asylum. And if the system by which their stories are evaluated does not reliably account for this tension, the results can be tragic.

Most immigration judges understand that an applicant who suffers from psychological trauma may have difficulty "telling" her story. They know it is hard for people to talk about traumatic events, and that doing so may trigger painful memories or feelings. But the impact of trauma on storytelling is deeper and far more complex. It will certainly impact a survivor's demeanor and memory, but it may also introduce a large degree of uncertainly, even with regard to the central details of the survivor's story. And when the survivor's story is the only evidence of what happened—as it is in most claims for asylum—the legal consequences can be severe. To understand how and why our system of asylum adjudication necessarily fails survivors, it is critical to explore the effects of trauma on storytelling in depth.

### *A. The Nature and Symptoms of Trauma*

The word "trauma," in a psychological sense, is usually associated with Post-Traumatic Stress Disorder (PTSD), but the meaning is broader.[121] The word originally was used in medicine to denote "a sudden physical blow or injury."[122] Much later, it was borrowed by psychiatry[123] "to designate a blow to the self (and to the tissues of the mind), a shock that creates a psychological split or rupture, an emotional injury. . ."[124] Psychological trauma begins with an

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Davidovich & Michal Alberstein eds., 2008).

120. *Id.*

121. As Herman explains, "[t]here is a spectrum of traumatic disorders, ranging from the effects of a single overwhelming event to the more complicated effects of prolonged and repeated abuse." HERMAN, *supra* note 1, at 3.

122. Almog, *supra* note 119, at 298.

123. Serious research on trauma originated in the late 19th century with the study of a "disorder" among women then known as "hysteria." For a detailed discussion of the history, *see* Herman, supra, note 1 at 10–32.

124. SHOSHANA FELMAN, THE JURIDICAL UNCONSCIOUS 171 (Cambridge, MA: Harvard University Press 2012).

"extraordinary" event, one that "overwhelm[s] the ordinary human adaptations to life."[125] Such events typically involve threats of death or serious bodily harm, or a "personal encounter with violence and death," including the death of others.[126] The common denominator is a feeling of "intense fear, helplessness, loss of control, and threat of annihilation."[127] As Judith Herman explains, the salient characteristic of the traumatic event is its power to inspire "helplessness and terror."[128]

While much of the study of trauma has centered on war veterans and survivors of child abuse or sexual abuse,[129] the symptoms of trauma are also widespread among "forcibly displaced persons"—a group that includes refugees.[130] Research has shown that refugees are ten times more likely to suffer from PTSD than the general population in the countries where they've resettled.[131] Before they were displaced, refugees often experienced prolonged detention, severe violence, torture, or the death of family, friends, or associates. After displacement, they may experience additional risk factors for trauma, including arduous migration, the shock of resettlement in an unfamiliar culture, and stresses related to employment, finances, and their uncertain immigration status.[132]

The general symptoms of trauma fall into three broad

125. HERMAN, *supra* note 1, at 33.

126. HERMAN, *supra* note 1, at 33.

127. HERMAN, *supra* note 1, at 33 (citing N.C. Andreasen, *Posttraumatic Stress Disorder*, *in* Comprehensive Textbook of Psychiatry 918-24 (H.I. Kaplan and B.J. Sadock, eds., 4th ed. 1985).

128. HERMAN, *supra* note 1, at 33.

129. *See* HERMAN, supra note 1, at 20-32 (discussing the history of research on psychological trauma among war veterans and domestic abuse survivors); 96-114 (discussing research on child sexual abuse).

130. *See, e.g.*, Farah Husain, et al., *Prevalence of War-Related Mental Health Conditions and Association With Displacement Status in Postwar Jaffna District, Sri Lanka*, 306 J. AM. MED. ASS'N 522 (2011) (finding high rates of PTSD and other mental health conditions among persons displaced by war in Sri Lanka); Andrés J. Pumariega, Eugenio Rothe, and JoAnne B. Pumariega, *Mental Health of Immigrants and Refugees*, 41 COMMUNITY MENTAL HEALTH J. 581, 588 (2005) (concluding that refugees are at high risk for depression, anxiety, and PTSD).

131. Fazel M, et al., *Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review*, 365 LANCET 1309 (2005).

132. *See* Crumlish and O'Rourke, *A Systematic Review of Treatments for Post-Traumatic Stress Disorder among Refugees and Asylum-Seekers*, 198 J OF NERVOUS AND MENTAL DISEASE 237 (2010).

categories. The first is hyperarousal: the nervous system "seems to go onto permanent alert, as if the danger might return at any moment."[133] As a result, many survivors sleep poorly, startle easily, and "react irritably to small provocations."[134] The second category of symptoms, intrusion, is perhaps the best known to laypersons. Survivors often "relive" traumatic events as though they were happening in the present. The experience of traumatic events "becomes encoded in an abnormal form of memory, which breaks spontaneously into consciousness, both as flashbacks during waking states and traumatic nightmares during sleep."[135] The experience of intrusion goes beyond simply remembering what happened: it "carries with it the emotional intensity of the original event," and survivors go to great lengths to avoid it.[136]

The third class of symptoms is known as constriction or numbing. Robert J. Lifton found "psychic numbing" to be almost universal in survivors of war and called it a "paralysis of the mind."[137] In contrast to intrusion, survivors are aware of the present, but their perceptions and responses are altered, and their present experience may lose the qualities of ordinary reality, as if events are happening to someone else.[138] In Herman's words, "[t]hese perceptual changes combine with a feeling of indifference, emotional detachment, and profound passivity . . ."[139]

Survivors often oscillate between intrusion and numbing, between reliving events and experiencing nothing.[140] Herman calls this "the dialectic of trauma," a complicated rhythm in which a survivor "finds herself caught between the extremes of amnesia or reliving the trauma, between floods of intense, overwhelming feeling and arid states of no feeling at all, between irritable, impulsive action and complete inhibition of action."[141] Beyond these cardinal symptoms, traumatic

133. HERMAN, *supra* note 1, at 35.
134. HERMAN, *supra* note 1, at 35.
135. HERMAN, *supra* note 1, at 37.
136. HERMAN, *supra* note 1, at 42.
137. Robert Jay Lifton, *Beyond Psychic Numbing: A Call to Awareness*, 52 AM J. OF ORTHOPSYCHIATRY 619 (October 1982).
138. HERMAN, supra note 1, at 43.
139. HERMAN, supra note 1, at 43.
140. HERMAN, supra note 1, at 43.
141. HERMAN, *supra* note 1, at 47.

events often have a deeper, existential impact: they can undermine a survivor's belief systems, "violate the victim's faith in a natural or divine order," and "shatter the construction of the self that is formed and sustained in relation to others."[142]

### *B. The Impact of Trauma on a Survivor's Story*

Stories are central to the way human beings construct a sense of self, and the experience of trauma has a profound impact on a survivor's ability to tell her story. Our ability to describe the past relies on memory, but the memories left by traumatic events are different from those of day-to-day living. In contrast to ordinary memories, traumatic memories are not encoded "in a verbal, linear narrative that is assimilated into an ongoing life story."[143] Instead, they leave an "indelible image,"[144] whereby events are "encoded in the form of vivid sensations and images."[145] In other words, a survivor's memory is "imprinted" with the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person's ordinary memories a sense of logical and chronological coherence.

Because stories are key to the construction of self, they also play a critical role in the process of healing. Herman divides recovery into three distinct stages, each with a different task: the establishment of safety; remembrance and mourning; and reconnection with ordinary life.[146] In Herman's second stage, the survivor learns to tell her story completely, repeatedly, and in detail.[147] A survivor suffering from the symptoms of trauma may begin by telling a story that is "repetitious, stereotyped, and emotionless."[148] If a survivor can tell her story at all (some cannot), the character of traumatic memory often results in a narrative that is

142. HERMAN, *supra* note 1, at 51.
143. HERMAN, *supra* note 1, at 37.
144. HERMAN, *supra* note 1, at 38 (citing ROBERT J. LIFTON, THE CONCEPT OF THE SURVIVOR, IN SURVIVORS, VICTIMS, AND PERPETRATORS: ESSAYS ON THE NAZI HOLOCAUST 113 (Joel E. Dimsdale ed. 1980)).
145. HERMAN, *supra* note 1, at 38.
146. HERMAN, *supra* note 1, at 155.
147. HERMAN, *supra* note 1, at 175.
148. HERMAN, *supra* note 1, at 175.

incomplete, incoherent, fragmented, and chronologically fractured.[149]

Even laypersons understand that a trauma survivor may have difficulty *telling* her story. Note the use of language here: the manner in which a story is told is the *discourse* and not the *story* itself. Whether a person was raped once or three times is *story*: each rape is a separate event. Whether the description of the events is vague, repetitious, or emotionless is *discourse*. But the symptoms of trauma do not affect only the discourse: they also affect the underlying story, the events and characters that form the content of a narrative. We assume the details of a "true" story will not change over time, but Herman emphasizes that this assumption does not hold for the stories told by survivors:

> [B]oth patient and therapist must develop tolerance for some degree of uncertainty, even regarding the basic facts of the story. In the course of recovery, the story may change, even as missing pieces are recovered. . . . Thus, both patient and therapist must accept the fact that they do not have a complete knowledge, and must learn to live with ambiguity while exploring at a tolerable pace.[150]

The pace of this work is often slow, and the process of constructing a full and detailed account is challenging. The survivor may become agitated or withdrawn; she may find it increasingly difficult to use words; she may suffer intrusive flashbacks; and to avoid the difficulties (and the pain) "[s]he may insist that the therapist validate a partial and incomplete version of events without further exploration."[151] And because the "truth" can be difficult to face, survivors "often vacillate in reconstructing their stories," and they may be "ambivalen[t] about truth-telling."[152]

The impact of trauma on memory and storytelling has been explored extensively in certain groups of trauma survivors. For instance, the narratives told by Holocaust survivors are often described as "fractured," "fragmented," "disrupted," or "interrupted."[153] In some instances, the

149. *See, e.g.*, HERMAN, *supra* note 1, at 177; Almog, supra note 119, at 426.
150. HERMAN, *supra* note 1, at 179-80.
151. HERMAN, *supra* note 1, at 180–81.
152. HERMAN, *supra* note 1, at 181.
153. *See, e.g.*, Shulamit Almog, *Healing Stories in Law and Literature*, in TRAUMA AND MEMORY: READING, HEALING, AND MAKING LAW 289, 293 (Austin

memories are simply too painful to recall, even after decades have passed.[154] Among women who have been sexually abused, there is a tendency to revise the story over time, a phenomenon Kim Lane Scheppele calls "shifting stories."[155] As Schepple explains, "abused women frequently repress what happened; they cannot speak; they hesitate, waver and procrastinate; they hope the abuse will go away; [and] they cover up for their abusers . . ."[156] These actions "produce delayed or altered stories, which are then disbelieved for the very reason that they have been revised."[157]

The critical point—that the stories of trauma survivors change over time, even with regard to central details—has been proven by empirical research. In a 2006 article, British researchers Jane Herlihy and Stuart Turner describe a careful study in which thirty-nine refugees from Kosovo and Bosnia were interviewed on two occasions about two events in their past, one traumatic and one non-traumatic.[158] At the outset, the refugees were assessed for PTSD, and all exhibited symptoms of trauma in varying degrees.[159] All participants had been granted refugee status in the United Kingdom, and they had given accounts of the traumatic events in the course of obtaining that status.[160]

The time between the two interviews ranged from three to thirty-two weeks.[161] During the interviews, each refugee was asked an identical set of questions, and was also asked to rate particular details as being either "central" or "peripheral" to their experience. Differences between the interviews were noted, and researchers then calculated "discrepancy rates" for each refugee, with four separate

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Sarat, et al., eds., 2007). For a book length discussion of oral testimonies by Holocaust survivors, *see generally* Lawrence Langer, HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY (1993).

154. See HERMAN, supra note 1, at 86-95 (discussing the effects of prolonged captivity).

155. Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 141 (1992).

156. Scheppele, *supra* note 155 at 126-27.

157. *Id.* at 127.

158. Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 TORTURE 81 (2006).

159. *Id*. at 87-88.

160. *Id.*

161. *Id*.

calculations depending on whether the discrepancies involved the traumatic or non-traumatic event, and whether the details in question were central or peripheral.[162]

The results of the research are striking. Though the discrepancy rate was higher for peripheral details, the rate for central details was far higher than a layperson might expect: for traumatic events, there were discrepancies in roughly 30% of the central details.[163] Though the authors give little information on the precise nature of the discrepancies, the descriptions they do provide suggest the discrepancies they found were precisely the sort of things an immigration judge might deem significant. For instance, during his first interview one participant said he was "slapped around" by military police. During the second, he said he was "badly beaten."[164]

The length of time between interviews was also an important factor: for refugees with high levels of PTSD, the overall discrepancy rate *doubled* when there was a long delay between interviews.[165] As the authors emphasize, if discrepancies are used as a factor in credibility determinations, then asylum seekers who suffer from PTSD at the time of their final interview or hearing "are systematically more likely to be rejected the longer their application takes."[166] In light of those findings, Herlihy & Turner reach an unequivocal conclusion: "the assumption that discrepancies necessarily indicate a fabricated story is incorrect."[167]

### *C. The Testimony Method of Trauma Therapy*

Despite the challenges survivors face, the act of telling the story can be critical to a survivor's recovery, so much so that a form of therapy has developed around the process. In the 1980s, Chilean psychologists who worked with torture survivors created the "testimony method," also known as

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162. *Id.*

163. *Id.* at 88. Because the data are presented as a graph rather than a table, a more precise figure is not available.

164. Herlihy & Turner, *supra* note 158 at 89.

165. *Id.*

166. Herlihy & Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 TORTURE at 90

167. *Id.* at 89.

testimonial therapy.[168] Subsequent research has used the method with Holocaust survivors,[169] recent refugees in the United States[170] and the Netherlands,[171] and torture survivors in India.[172]

Testimonial therapy is not a single procedure, but a practice used "in many variations and settings."[173] Nonetheless, some features are common. The method's "central project" is to create a written account of the patient's experience. In most studies, the therapy took place during six to twelve weekly or bi-weekly sessions.[174] Therapy sessions are recorded and transcribed, and the resulting document is revised until the patient's fragmented recollections have been assembled into a complete whole.[175] In many studies, the process ended with a "delivery ritual," in which the final written version of the story was signed by the patient and copies were given to family members or human rights groups.[176]

A pilot study among Bosnian refugees in the United States illustrates the process. In that study, the treatment involved six sessions of ninety minutes each.[177] For each

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168. *See, e.g.*, HERMAN, *supra* note 1, at 182; A. Cienfuegos & C Monelli, *The Testimony of Political Repression as a Therapeutic Instrument*, 53 AM. J. OF ORTHOPSYCHIATRY 43 (1983).

169. Raul D. Strous, et al., *Video Testimony of Long-term Hospitalized Psychiatrically Ill Holocaust Survivors*, 162 AM. J. OF PSYCH. 2287 (Dec. 2005).

170. Stevan M. Weine, et al., *Testimonial Therapy in Bosnian Refugees: A Pilot Study*, 155 AM. J. PSYCHIATRY 1720 (1998).

171. Janie A. Van Dijk, et al., *Testimony Therapy: Treatment Method for Traumatized Victims of Organized Violence*, 57 AM. J. PSYCHOTHERAPY 361 (2003).

172. Inger Agger, et al., *Testimonial Therapy: A Pilot Project to Improve Psychological Well-Being Among Survivors of Torture in India*, 19 TORTURE 204 (2009).

173. *Id.* at 210.

174. *See, e.g.*, Weine, et al., *supra* note 170, at 1721 (six sessions of 90 minutes each); Van Dijk, et al., *supra* note 171, at 363 (12 sessions); Agger, et al., *supra* note 172, at 211 (4 sessions of 90–120 minutes each). One study used only one or two sessions of 60 minutes each, but the authors of that study found no significant difference between the study participants and a control group. Victor Igreja, et al., *Testimony Method to Ameliorate Post-Traumatic Stress Symptoms: Community-based Intervention with Mozambican Civil War Survivors*, 184 THE BRITISH J. OF PSYCHIATRY 251, 252-54 (2004).

175. HERMAN, *supra* note 1, at 182.

176. *See, e.g.*, Weine, et al., *supra* note 170, at 1722; Van Dijk, et al., *supra* note 171, at 362.

177. Weine, et al., *supra* note 170, at 1721.

survivor, testimony was not limited to traumatic events—rather, there was a "constant emphasis upon 1) the [refugee's] life history, 2) the social context of life, and 3) the sense of self in history and history in one's life."[178] Once this "initial frame" was set, the interviewer asked "succinct, open-ended, and clarifying questions" about the patient's experience, and provided "support and structure" to help the survivor give an full account of the events.[179] At the end of the therapy, a written account was read to the survivor, who corrected mistakes or added details. Two copies of the final version were signed, with one going to the survivor and the second to an oral history archive.[180]

In virtually all reported studies, authors found a significant improvement in the psychological wellbeing of participants.[181] When the study of Bosnian refugees began, for instance, all participants had been formally diagnosed with PTSD.[182] A six-month follow-up found that 47% of the participants no longer suffered from PTSD, while the frequency and severity of symptoms in other participants substantially decreased.[183] In explaining similar findings, the authors of another study emphasized that "a main characteristic of trauma is the inability to talk about the traumatic experiences without being flooded by them."[184] By giving survivors gradual and supportive exposure to painful memories, they theorized, testimonial therapy decreases the main symptoms—"avoidance and re-experiencing"—and helps survivors discuss and re-evaluate their experiences.[185]

## IV. THE ASYLUM ADJUDICATION PROCESS, REVISITED

Trauma survivors often appear in legal proceedings, most frequently in cases involving rape, sexual abuse, or domestic

178. Weine, et al., *supra* note 170, at 1722.
179. Weine, et al., *supra* note 170, at 1722.
180. Weine, et al., *supra* note 170, at 1722.
181. *See, e.g.*, Weine, et al., *supra* note 170, at 1722–23 (reporting a substantial decrease in the rates of PTSD and the frequency and severity of symptoms with no negative effects); Van Dijk, et al., *supra* note 171, at 367 ; Agger, et al., *supra* note 172, at 204 (after therapy, all participants demonstrated "significant improvement" on a well-being index).
182. Weine, et al., *supra* note 170, at 1721.
183. Weine, et al., *supra* note 170, at 1722.
184. Van Dijk, et al., *supra* note 171, at 368.
185. Van Dijk, et al., *supra* note 171, at 368.

violence.[186] And yet, in important ways, trauma is uniquely situated in claims for asylum. It is uniquely situated in part because an applicant must prove that the persecution she suffered was sufficiently severe to constitute persecution, and the trauma itself is evidence of that fact. It is also different because the opposing party (the Government) rarely has evidence of its own. It is not a matter of "he said / she said," but simply one of "he or she said." And it is different because the balance of interests is weighed so overwhelmingly to one side. For instance, in a criminal case involving rape or sexual abuse, a court must balance the possible harm to the alleged victim with the harm of a wrongful conviction. But in an asylum case, the Government truly has little at stake: the consequences of erroneously *granting* asylum are de minimus.

What this means, quite simply, is that survivors who seek asylum must confront challenges for which there is no direct precedent in the U.S. legal system. With a focused understanding of both narrative theory and research on trauma narratives, this Article now turns to those challenges.

### *A. The Challenges Faced By Survivors Who Seek Asylum*

Consider again the hypothetical case with which this Article began. The applicant has testified that she was arrested, imprisoned, and raped. If her testimony is true, the odds are extremely high that she suffers from psychological trauma: rape, like torture or prolonged detention, is the sort of event that typically results in trauma. But the applicant has no evidence to corroborate her testimony, and thus her claim for asylum will turn almost entirely on whether the judge believes she is credible.

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186. A detailed discussion of legal and judicial responses to trauma in domestic violence cases is beyond the scope of this article. For a general overview of the challenges presented by domestic violence cases and responses to those challenges, *see, e.g.*, Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 Ky. L.J. 483, 542 (2013); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2002) ; Lisa A. Goodman & Deborah Epstein, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE (2008). On the specific issue of addressing the effects of trauma, Carolyn Copps Hartley has proposed various reforms grounded in principles of therapeutic jurisprudence. Carolyn Copps Hartley, *A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials*, 9 VIOLENCE AGAINST WOMEN 410 (2003).

If she filed an affirmative application and has a lawyer, she will tell her story orally no fewer than five times over a period spanning more than one year.[187] At a minimum, the applicant will tell her story when she first meets with her lawyer, during her asylum interview and the immigration court hearing, and while she and her lawyer prepare for both the interview hearing. In addition, very early in the process, the applicant will sign a written version of her story drafted by the lawyer.

In the end, a judge will consider at least two versions of her story: the first version, as retold in writing by a lawyer, and the last version, as told orally by the applicant herself. In the process of making a credibility finding, the judge will assess whether the two versions are internally consistent and consistent with each other, and whether the applicant's story is detailed, plausible, and coherent. A negative credibility finding will be fatal to the applicant's claim, and the deck will be stacked against her in three distinct ways.

First, *nearly all* of the criteria used to assess credibility are unreliable when applied to the stories told by trauma survivors. As dictated by Congress, an immigration judge's credibility assessment will be based on the applicant's demeanor, candor, and responsiveness, as well as on the inherent plausibility of her story, the consistency between her written and oral statements, the internal consistency of each statement, and the consistency of her statements with other evidence.[188] Many of these factors are a matter of discourse rather than story, and if the applicant is a trauma survivor, only the final factor—the consistency of her statements with other evidence—has any real bearing on the truth of her claim.

As emphasized earlier, adverse credibility findings are frequently based on inconsistencies in the applicant's story, and yet such inconsistencies are routine—and should be

187. In fiscal year 2014, the immigration courts received 225,896 new cases and completed 184,322 cases. EOIR 2014 Yearbook, *supra* note 71, at B1-B2. At the end of that year, the immigration courts had a backlog of 418,861 pending cases. *Id.* at W1. As those figures make clear, many cases are not completed in a year's time; some will take many years. *See, e.g.*, *Zeru*, 503 F.3d at 64 (asylum claim denied seven years after immigration court proceedings began, and over four years after testimony was first taken).

188. 8 U.S.C. §§ 1158(b)(1)(B)(iii).

expected—when trauma survivors tell their story. Moreover, factors such as demeanor, vagueness, responsiveness, and even "plausibility" are not reliable measures of truthfulness when applied to trauma survivors. In *Sanga v. Gonzales*, for instance, an asylum applicant testified that government soldiers came to his family's home, shot his father, and raped his sister while he hid in the bathroom with his mother. In the course of finding that he was not credible, the judge opined that it was not a "logical human response" for the applicant to remain hiding in the bathroom for an hour after the shooting had stopped.[189] In fact, given the traumatic quality of the events described by the applicant, it was quite plausible for him to remain hiding for an hour or even longer.

Second, the deck is stacked against survivors because key traits of the adjudication process greatly increase the chances a survivor will tell inconsistent versions of her story. An early version will be frozen in writing, while the final version (her testimony) will be told in a starkly intimidating setting, where the applicant will be subjected to adversarial (and often aggressive) cross-examination. For survivors, simply telling the story is emotionally challenging. The experience of testifying in court can provoke intrusive symptoms, and a survivor's first concern (if only subconsciously) will be to "manage" her testimony in a way that minimizes trauma symptoms, even if the result is inconsistent with earlier statements.[190] And because government lawyers rarely have evidence of their own, their primary strategy will be to challenge the applicant's credibility and highlight discrepancies— or even induce them.

In this context, the distinction between story and discourse again becomes useful. Most factors used to assess credibility, including demeanor and things like "vague" or "evasive" answers, relate to the *discourse* of the applicant's narrative. They are deemed relevant to credibility, but they have no real bearing on whether the story is *true*—on whether it accurately conveys what happened. But

189. Sanga v. Gonzalez, 121 Fed. App'x 841, 843 (10th Cir. 2005).

190. *See* HERMAN, *supra* note 1, at 180 ("In order to resolve her own doubts or conflicting feelings, the patent may sometimes try to reach premature closure on the facts of the story"); Almog, *supra* note 119, at 298–301 (discussing the tension between the demands made on narrative in the context of therapy and of law).

inconsistencies regarding the number of times an applicant was raped or the details of other central events are aspects of *story* rather than discourse. There is a widespread belief that symptoms of trauma effect discourse but not story; that they have an impact on how a story is told, but not on details of the story itself. But empirical research has proven that premise to be false: when a witness is a trauma survivor, inconsistencies in the witness's story cannot be taken as evidence that the witness is not credible.

And yet, in the context of asylum adjudication, immigration judges continue to rely on lay assumptions rather than proven empirical knowledge when they make credibility findings. The First Circuit's decision in *Zeru v. Gonzales*[191] provides a striking example of both judicial *chutzpah* with regard to expert evidence on trauma and the egregious delays sometimes produced by the U.S. government's byzantine system for adjudicating asylum claims.

Zeru filed an affirmative application for asylum in 1995; after an interview, an asylum officer initiated removal proceedings, and she renewed her application in immigration court. An immigration judge heard testimony on five occasions between January 1999 and March 2002.[192] Her case was then transferred to a new judge, who held an additional full day of hearings before denying her application in December 2003.[193] In 2006, the Board of Immigration Appeals rejected Zeru's direct appeal and a subsequent motion to reopen.[194] And in 2007—*twelve years* after her application was first filed—the First Circuit affirmed the second judge's conclusion that Zeru was not credible, as well as the decisions to deny both her asylum claim and her motion to reopen.[195]

Zeru testified she had been arrested and raped by Eritrean officials, and the judge's negative credibility finding was based largely on Zeru's inconsistent statements regarding the number of times she was raped. During 1998 interviews with Dr. Melissa Wattenburg, a clinical

191. Zeru v. Gonzales, 503 F.3d 59 (1st Cir. 2007) .
192. *Id.* at 63.
193. *Id.* at 64–65.
194. *Id.* at 67–68.
195. *See id.* at 69–72.

psychologist who specialized in PTSD, Zeru said she was raped three times. An assessment by Dr. Wattenberg concluded that Zeru "meets criterion for current moderate PTSD, and moderate depression."[196] During direct examination at the 2003 hearing, however, Zeru testified that she was raped only once, at the start of her imprisonment. On cross-examination, she testified that she had also been raped a second time, just before her release.[197] Her statements were also inconsistent in other respects. For instance, in 1999, she testified that Eritrean security officers interrogated her for ten hours, and the encounter "terrified" her. In 2003, she "described the episode as a four-hour interrogation, and stated that she did not take the officers' warnings seriously."[198]

During the immigration court hearing and her direct appeal to the BIA, Zeru presented evidence that she suffered from PTSD, but her attorney did not assert the discrepancies in her story were caused by trauma.[199] Her motion to reopen, however, was filed by a different lawyer and was replete with evidence to support that conclusion. In support of her motion, Zeru submitted evidence that her PTSD had worsened in advance of her impending deportation, including a letter from a psychiatrist who treated her after she was admitted to a hospital for "depression and suicidal thoughts."[200] Three additional letters accompanied the motion. In one, a psychiatrist explained that Zeru had flashbacks to her rapes and imprisonments, and used dissociation and denial to avoid re-experiencing trauma. In a second, a psychologist who met

196. *Id.* at 64.

197. *Zeru*, 503 F.3d at 64.

198. *Id.* at 70. Zeru also gave inconsistent testimony on several points that were irrelevant to her asylum claim, including the place where she first met a witness, the number of grades she completed in school, and the length of time she had owned a business in Eritrea. *See id.* At the time of the hearing, some federal circuits would have barred the judge from considering such matters as part of a credibility finding. *See, e.g.*, Kaur v. Gonzales, 418 F.3d 1061, 1064 (9th Cir. 2005) ("It is well settled in our circuit that minor inconsistencies that do not go to the heart of an applicant's claim for asylum cannot support an adverse credibility determination."). Following enactment of the REAL ID Act, however, a judge is authorized to consider any inconsistency, no matter how remote it may be to an applicant's claim. [FN, SUGGEST: *See* 8 U.S.C. § 1158(b)(l)(B)(iii) (2012).]

199. *See Zeru*, 503 F.3d at 73–74.

200. *Id.* at 67.

with Zeru in 2006 wrote that she was "too tearful and distressed" to discuss the details of her rapes.[201] A third letter, written by a forensic psychologist, provided an extensive literature review regarding the symptoms of trauma.[202] Despite that evidence, the BIA denied Zeru's motion.

The immigration judge's negative credibility finding made it clear that the judge relied on ill-informed lay assumptions regarding the symptoms of trauma. Without supporting evidence, the judge opined that "it would not be unusual for a victim of trauma to confuse dates or sequences of events, but it would be very unusual . . . to simply forget that an event occurred."[203] The word "forget" is deeply problematic here, and a reasonable judge familiar with the research on trauma would not make such a claim. There are other reasons why a rape survivor might give differing accounts of the number of times she was raped, ranging from her psychological state at the time of her statements to a perceived need to "embellish" the severity of the trauma she suffered for certain audiences—as if being raped once isn't enough. Given that Zeru undisputedly suffered from trauma, the fact that she gave inconsistent statements concerning the number times she was raped cannot be taken as evidence that she was not raped at all.

Nonetheless, the First Circuit affirmed both the negative credibility finding and the judge's decision to deny asylum. In doing so, the court emphasized that an immigration judge's credibility findings "demand deference"[204] and should not be reversed unless "any reasonable adjudicator" would be *compelled* to disagree.[205] Because the immigration judge did not ignore Dr. Wattenberg's conclusion that Zeru was suffering from PTSD, the First Circuit held the judge did not err.[206] The court also affirmed the BIA's decision to deny Zeru's motion to reopen, largely on the grounds that Zeru

201. *Id.* at 68.
202. *Id.* at 67–68.
203. *Id.* at 65.
204. *Id.* at 69–70.
205. *See Zeru*, 503 F.3d. at 71 (quoting 8 U.S.C. § 1252(b)(4)(B) (2012)).
206. *See id.* at 71. It should be noted that the court first held that Zeru had waived these issues by failing to raise them on direct appeal to the BIA. The court then addressed them anyway, and concluded that it would have affirmed the negative credibility findings even if Zeru had raised the issue below. *See id.*

failed to prove ineffective assistance of counsel or offer material evidence that was previously unavailable.[207]

The First Circuit's decision reflects a common belief that expert evidence related to credibility is both irrelevant and prejudicial. Both state and federal courts have held that a party may not use expert testimony to argue that inconsistent statements resulted from symptoms of PTSD. For instance, in *Westcott v. Crinklaw*, a civil rights case, the Eight Circuit held that " '[a]n expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.' "[208] The court reached that conclusion even though the expert did not directly testify that the witness's inconsistent statements were, in fact, caused by PTSD. Rather, the expert simply testified that the witness was suffering from PTSD, and that PTSD "*may* cause a person to make inaccurate, unreliable and incomplete statements."[209] In other words, the appeals court wrongly assumed that an untrained layperson is capable of accurately assessing the credibility of a witness under any and all circumstances, even when the witness is suffering from PTSD.

### *B. The Impact of a Written Declaration*

The discrepancies in *Zeru* were limited to the applicant's oral statements. But in asylum cases, the routine practice of filing a declaration drafted by a lawyer or community group adds a further layer of complexity. If the person who drafts the declaration is not well-informed about the effects of trauma and the most effective practices for working with survivors, that person may unwittingly increase the likelihood that the applicant is deemed not credible.

To understand how a lawyer or community representative may make matters worse, it is useful to compare the procedures for testimonial therapy with the way most lawyers typically work with their clients. In both situations, the applicant will be asked to tell her story, and a

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207. *See id.* at 71–72.

208. Westcott v. Crinklaw, 68 F.3d 1073, 1076 (8th Cir. 1995) (quoting United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981), *cert. denied*, 454 U.S. 829 (1981)).

209. *Id*. at 1075 (emphasis added).

version of her story will be reduced to writing. The differences, however, are stark.

During testimonial therapy, the therapist will typically meet with a client six to twelve times, for as much as ninety minutes at a time, over a period of many weeks.[210] During those sessions, the therapist will begin with a detailed account of the client's life before the trauma, thereby putting the traumatic events in a larger context, and integrating those events into the applicant's full life story. While discussing the traumatic events, the therapist will carefully probe for additional details, while being sensitive to the client's emotional state. If necessary, the therapist will back away from difficult moments, then probe for details again when the client is better able to provide them.

All of this requires a level of attention, care, and training that immigration lawyers can rarely bring to their meetings with clients. Private lawyers must bill for time spent with a client, and even lawyers who work for non-profit agencies have limited time for client interviews. Very few lawyers will be willing or able to spend sufficient time interviewing a client who has experienced trauma.

Moreover, many lawyers may feel uncomfortable with the emotions that can surface while interviewing a trauma survivor, and thus they may back away from—and never fully probe—the most traumatic aspects of a client's story. As a result, the written declaration may be based on an incomplete version of the story, one that omits critical events or other important details. As Herman notes, during therapy a survivor "may insist that the therapist validate a partial and incomplete version of events without further exploration . . . ."[211] The same thing may happen during meetings with a lawyer—indeed, it seems more likely to happen. If it does, the odds that an applicant's testimony will differ from her declaration are high. In the British study of refugees who suffered from PTSD, when refugees were asked to describe a traumatic event twice, the discrepancy rate for even central details was roughly 30%, and it increased as

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210. *See, e.g.*, Weine, et al., *supra* note 170, at 1721 (six sessions of ninety minutes each); Van Dijk et al., *supra* note 171, at 363 (twelve sessions); Agger, et al., *supra* note 172, at 211 (four sessions of 90–120 minutes each).

211. HERMAN, *supra* note 1, at 180.

more time passed between the first and second interview.[212]

The drafting of the declaration itself introduces further complications. When a survivor talks about the trauma she experienced, her statements are likely to be both logically and chronologically fragmented as well as incomplete. The applicant's lawyer or representative will then try to fashion those statements into a coherent and chronological account of the events. The danger in doing so is that the story as told by the lawyer may differ in important ways from the applicant's testimony at trial, and a judge may believe those differences to be evidence of untruthfulness. Once again, narrative theory is a useful tool for understanding the nature of the challenge.

When an applicant testifies at a hearing, both the *story* and the *discourse* are the work of the applicant. A lawyer can shape the testimony through her questions, but in the end the applicant will not only supply the characters and events, but will also determine how the story is told. The process of drafting a written declaration is quite different: while the applicant still supplies the story, *the discourse is almost entirely the work of the person who drafts the declaration*. That person, and not the applicant, will decided how much detail to include, whether certain things should be omitted entirely, what words should be used, and in what order the events will be presented.

Both before and during trial, a trauma survivor may have difficulty telling a coherent, well-ordered, chronological story. Instead, her testimony may be fragmented, disjointed, and out of sequence, and she may omit important details in an effort to manage the symptoms of trauma and avoid intrusive flashbacks. And yet when drafting the declaration, a competent, well-meaning lawyer or representative may reshape an applicant's story with the aim of telling the story in a way that conforms to a judge's expectations. In doing so, the drafter may literally create a declaration that goes *beyond* an applicant's ability to testify, and thereby increase the chances that an immigration judge will find an applicant's testimony to be inconsistent with her declaration.

The challenges faced by the applicant are further

212. *See* Herlihy & Turner, *supra* note 158, at 88–89. Because the data are presented as a graph rather than a table, a more precise figure is not available.

compounded by the context in which the hearing takes place. The immigration courts face an enormous, multi-year backlog, and the typical judge completes 144 asylum claims each year in the course of completing nearly 1,000 removal cases—an average of roughly nineteen or twenty completed cases a week.[213] Professor Stacy Caplow has succinctly explained the practical consequences of this caseload:

> Most [judges] are intelligent, patient, and respectful under quite stressful conditions. They listen to people tell tales of difficult lives, sacrifices, fears, and hopes, hour after hour, day after day. This repetition and volume has an inevitable, inuring effect on their attitudes. While they must be objective, they also are listening carefully for inconsistencies, mistakes, or inaccuracies, in other words, a reason to deny relief.[214]

Caplow also notes that judges "sometimes even seem to be trying to trap or trip up the applicant, or they may be aggressive in their questioning and probing."[215] The truth of that point is even greater for government lawyers, whose cross-examination of asylum applicants is often aggressive and ultimately intended to "trip up" the applicant by highlighting—or even inducing—inconsistencies in the applicant's story.[216]

The combative, free-swinging style of many government lawyers was evident in a research study in which trained observers watched and reported on immigration court hearings.[217] Though some government lawyers conducted cross-examination in a way that was "professional, respectful,

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213. The average number of cases per judge is not published and must be calculated from other data. On June 15, 2015, the website of the Executive Office for Immigration Review listed 253 immigration judges nationwide. *See EOIR Immigration Court listing*, DEP'T. OF JUSTICE (Feb. 2016), http://www.justice.gov/eoir/eoir-immigration-court-listing (last visited June 15, 2015). Collectively, those judges completed 248,078 cases in fiscal year 2014, of which 36,614 were asylum cases. EOIR 2014 Yearbook, *supra* note 71, at A2, K4. Thus, the average immigration judge completed 981 cases during that year, of which 144 were asylum cases. It should be noted that not every completed asylum case requires a full hearing: some 7,306 asylum claims were "withdrawn" or "abandoned." *See id.* at K4.

214. Caplow, *supra* note 6, at 263.

215. Caplow, *supra* note 6, at 263.

216. *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 493 (1992/93).

217. *See id. at* 433.

and efficient," others engaged in lengthy, aggressive cross-examinations that often focused more on the respondent's character than the merits of the case. Observers noted that the manner of these attorneys was often "hostile, sarcastic, or disbelieving."[218] At times, government lawyers attempted to block applicants from explaining their answers, and their tactics seemed to have no purpose other than portraying the applicant as "evasive."[219]

In the face of such tactics, it is hardly surprising that a trauma survivor might give testimony inconsistent with the story she told many months earlier in the relative safety of meetings with a lawyer or representative. As the research on asylum cases demonstrates, the most common form of inconsistency—one relied on by judges in 57% of cases—is an inconsistency between the applicant's testimony and the written declaration. Thus, the process by which a declaration is drafted is critical, and this Article now turns to that topic, with a detailed account from one asylum clinic as an exemplary example of how that work might be done most effectively.

### *C. The Challenges of Drafting An Effective Declaration*

An asylum declaration is simply a detailed account of the applicant's story, a written statement of the facts underlying her claim. There are books and articles advising what a lawyer *should* do when drafting one, almost all of which focus on the end product; on the final document itself and not the often "messy" process by which a declaration is drafted.[220] But Professor Stacy Caplow, director of the asylum clinic at Brooklyn Law School, has written a superb account of the process her students follow.[221] The work of those students is exemplary, and a review of Caplow's account underscores the ways in which a lawyer can unwittingly impede (or even torpedo) a trauma survivor's chances for success, by "overwriting" the declaration, failing to probe for difficult details, or failing to spend sufficient time with an applicant to

218. *Id*. at 493.
219. *Id.* at 493.
220. *See, e.g.*, REGINA GERMAN, AILA'S ASYLUM PRIMER 353 (Am. Immigration Lawyer's Assoc. 4th ed. 2005); ROBERT JOBE, ET AL., WINNING ASYLUM CASES §§ 13–19 (Immigrant Legal Resource Center 2004).
221. *See* Caplow, *supra* note 6.

fully develop the applicant's story.

For Caplow and her students, the declaration is the "central evidence" in the case, and the factfinder's "first exposure to the heart of the claim."[222] The declaration "previews the facts, establishes the case theory, introduces the client, and sets the stage" for the hearing.[223] The ultimate goal, as Caplow describes it, is to "translate facts" into a "riveting narrative"—"a story that compels the desired result."[224] Students are taught to strive for a "comprehensive, creative, and painstakingly detailed document that delicately balances case theory and the client's voice but also tells a story of courage, suffering, loss, sacrifice, and exile."[225] And in doing so, they seek to "empower" the applicant to testify "confidently and believably" during a later interview or hearing.[226]

The underlying facts—the characters and events that form the story—must be elicited from the client, and Caplow describes the process of doing so as "messy, arduous, and lengthy."[227] Students conduct multiple interviews over a period of weeks or months, in which they typically follow a "rough chronology" of the client's life, from background information through the central facts underlying the claim and the client's ultimate flight from her country of nationality to the United States.[228] Students ask open-ended questions, and many clients first tell their story in a "burst of information" in which they "gallop through years of troubles."[229] In doing so, clients tend to "omit details, go off on tangents, and drift between time frames."[230] In Caplow's words, the "process usually resembles a looping conversation," a process of moving forward then circling back to verify, elaborate, and explain.[231] The process requires persistence, and a willingness to push the client. As one client told Caplow's students: "You are asking me about things I

222. Caplow, *supra* note 6, at 249.
223. Caplow, *supra* note 6, at 249.
224. Caplow, *supra* note 6, at 252, 258.
225. Caplow, *supra* note 6, at 256–57.
226. Caplow, *supra* note 6, at 257.
227. Caplow, *supra* note 6, at 257.
228. Caplow, *supra* note 6, at 272.
229. Caplow, *supra* note 6, at 266.
230. Caplow, *supra* note 6, at 266.
231. Caplow, *supra* note 6, at 272–73.

have been trying to forget."[232]

For Caplow's students, the work is ultimately a process of "trust-building between lawyer and client that slowly yields more nuanced and specific information." And—just as critically—it is a process of "case-building during which the client's memory, confidence, and eloquence improve and grow so that by the time the hearing occurs, he or she truly understands" what must be articulated and explained.[233] It is also a "cycle of rehearsals," in which the applicant "is transformed into a more comfortable storyteller before an audience other than sympathetic law students."[234]

This Article quotes Caplow at length for two distinct reasons. First, the exemplary process she describes is one that rarely happens outside the setting of a law school asylum clinic. Lawyers in private practice must charge for their time, and even lawyers who work for a non-profit agency are constrained by budgets and caseloads. As a result, outside the context of an asylum clinic, few if any immigration lawyers are able to give an asylum applicant the time and attention the applicant would receive from Caplow's students. The same is undoubtedly true for the community groups that assist unrepresented applicants. And yet, if the client is a trauma survivor, a lawyer or representative who does anything less than Caplow's students is unlikely to elicit the full details of the survivor's story, and thus the applicant is more likely to face a negative credibility finding and the denial of asylum.

Beyond that truth, the work of Caplow's students is remarkable because *it very closely resembles the process of testimonial therapy*. The similarities are striking: among other things, students meet with their client multiple times over a period of weeks or months; they work to build trust; and they put the core of the applicant's claim into the broader context of the client's life.[235] They also probe for details and fill in gaps until they obtain a complete account of the client's story. And the end "product" of that process—just as in testimonial therapy—is a thorough written account of the

232. Caplow, *supra* note 6, at 266.
233. Caplow, *supra* note 6, at 265.
234. Caplow, *supra* note 6, at 265.
235. *See supra*, text accompanying notes 161 to 178 for a detailed discussion of testimonial therapy.

client's story, one signed by the client and shared with others.

Caplow's students are not therapists, but it is not an exaggeration to suggest that their work with a client may be no less therapeutic than the work performed by a trained counselor during testimonial therapy. This observation is consistent with the experience of mental health professionals who work with torture survivors. In an article on the therapeutic effects of evaluating asylum seekers, two such professionals emphasize that "the process of organizing the torture story into a coherent narrative" has specific therapeutic benefits that will help a survivor gain asylum.[236] In their words, "[t]he [evaluation] process can empower the survivor to testify in court and to cope with the anxiety and stress of the asylum process."[237] And because all of this happens *before* the client's story is committed to writing and filed with the asylum office or the court, the chances that the client's testimony will be inconsistent with the declaration are greatly reduced.

But the process of eliciting facts from an applicant is simply the background for drafting an affidavit: in the language of narrative theory, the process is focused on the *story*. The drafter must then craft the *discourse*, must still shape the raw material of the story into a narrative text. And it is here, too, that Caplow's clinical students excel in ways that may not be common among practicing immigration lawyers.

At various points, Caplow describes the ideal declaration as one that is "consistent," "detailed," plausible," and "coherent"[238]—precisely the same adjectives immigration judges often use when they speak of the testimony needed to establish an applicant's claim without the benefit of corroborating evidence.[239] Caplow's students are encouraged "to give texture and vitality to their client's voice," but they are also cautioned about the dangers of going too far. Many

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236. Gangsei & Deutsch, *supra* note 20, at 83–84.

237. Gangsei & Deutsch, *supra* note 20, at 84.

238. *See* Caplow, *supra* note 6, at 252 ("The facts need to be detailed, plausible, and consistent . . . ."), 265 (an attorney should prepare a "coherent and moving client narrative").

239. In reviewing the decisions of immigration judges, the Board of Immigration Appeals has long used these words. *See, e.g.*, In re S–M–J–, 21 I&N Dec. 722, 724 (BIA 1997); Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987).

applicants tell their stories in language that is "colorless and repetitious," and it can be tempting for a lawyer to "embellish and overstate facts"—for instance, by substituting "torture" when the client said "hurt."[240] Students are taught that "[a]uthenticity is critical," and that "[l]anguage, phrasing, and imagery unsuitable to the education, articulation and imagination of the client might have a devastating impact" on the client's credibility by creating the impression that the declaration was "the product of lawyer manipulation."[241] And while Caplow's students are taught to draft a detailed declaration,[242] they are also cautioned about the potential dangers of too much detail. As Caplow notes, "[t]here is a concern that the [declaration] not be so detailed as to risk possible inconsistencies when the affiant relates the facts under the pressure of oral testimony."[243]

Obviously, an immigration judge must still point to specific inconsistencies between an applicant's testimony and declaration to support a negative credibility finding. Nonetheless, a lawyer who is less cautious than Caplow's students and not attuned to the challenges faced by trauma survivors can easily draft a declaration that is too detailed, and too much in the voice of a lawyer—so much so that the declaration goes beyond the client's ability to testify. And as Caplow recognizes, a lawyer who does so may create the impression that the testimony and declaration are inconsistent, and thereby increase the likelihood that a judge will find the applicant not credible.

## V. STRATEGIES FOR REFORM

In recent decades, federal courts, legal scholars, and immigration advocates have harshly criticized the asylum adjudication process and the immigration court system more broadly. The Seventh Circuit has been a particularly harsh critic. In *Niam v. Ashcroft*, for instance, one panel declared "the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board [of

240. Caplow, *supra* note 6, at 283.
241. Caplow, *supra* note 6, at 283–84.
242. *See* Caplow, *supra* note 6, at 280–81.
243. Caplow, *supra* note 6, at 257 n.32.

Immigration Appeals] in this as in other cases."[244] This chorus of criticism has been accompanied by numerous proposals for reform. Some are far-reaching while others are modest; but with one notable exception, none would effectively address the challenges faced by trauma survivors who seek asylum.

### *A. The Scope of Reform Proposals*

The most comprehensive proposal follows from an exhaustive study of asylum cases published in 2007 under the title *Refugee Roulette*. In that study, the authors found widespread and troubling inconsistencies in the percentage of applications granted or denied by individual immigration judges, even when judges heard cases in the same city with applicants from the same countries.[245] For instance, two immigration judges in Miami granted asylum to 5% and 6% of applicants from Colombia, while two different judges in Miami granted asylum in 77% and 88% of such cases.[246] The study also found widespread inconsistencies among decisions by individual asylum officers, and in the results of appeals to both the BIA and the federal circuit courts.[247]

Eight years have passed since *Refugee Roulette* was published, but recent immigration court statistics suggest widespread problems persist. In fiscal year 2014, immigration court judges granted 49% of the 17,997 asylum claims that received a full adjudication.[248] However, the grant rate varied sharply depending on a claim's procedural posture: judges granted 75% of affirmative claims, compared to just 28% of defensive claims.[249] In other words, claims *previously* adjudicated (but not granted) by an asylum officer were nearly *three times* more likely to be granted by an immigration judge than claims first filed with the

244. Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2003).

245. *See generally* Refugee Roulette, supra note 43.

246. Refugee Roulette, *supra* note 43, at 338. The mean grant rate for Colombian cases among Miami's 22 judges was 30%. *See id.* Notably, each judge in Miami heard at least 162 Columbian cases during the period under study (most heard more than 300), and cases were assigned to judges randomly. *See id.*

247. *See* Refugee Roulette, *supra* note 43, at 372-74.

248. EOIR 2014 Yearbook, *supra* note 71, at K2.

249. EOIR 2014 Yearbook, *supra* note 71, at K3.

immigration court.[250]

The disparities between courts in different cities were equally stark. In El Paso, Texas, judges adjudicated 120 claims and granted none. In Atlanta, judges granted two claims out of 137. Grant rates were also low in Cleveland (18%); Detroit (14%); Las Vegas (7%); and New Orleans (16%).[251] At the opposite end of the spectrum, judges in New York City granted 84% of the claims they adjudicated.[252] The grant rate was also higher than average in Arlington, Virginia (71%); Honolulu (74%); Philadelphia (59%); and San Francisco (59%).[253]

The source for these figures—EOIR's Statistical Yearbook—does not break down the grant rates by the applicant's country of origin within each court. Thus, direct comparisons to the discrepancies found by the authors of *Refugee Roulette* are not possible without more data. Nonetheless, the EOIR data compel the conclusion that troubling disparities remain.

Despite these disparities, the authors of *Refugee Roulette* do not question the wisdom of adjudicating asylum cases in an adversarial hearing, nor do they recommend streamlining the existing two-track system of asylum interviews and

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250. EOIR 2014 Yearbook, *supra* note 71, at K3. This gap has grown wider in recent years: between fiscal years 2010 and 2014, the grant rate for affirmative claims climbed steadily from 61% to 75%, while the grant rate for defensive claims declined from 34% to 28%. *See id.* But the disparity between affirmative and defensive claims is more stark than these numbers suggest: in 2014, asylum officers granted 47% of the affirmative claims they adjudicated, while referring roughly 50% to the immigration courts. *See supra*, note 63. Because cases referred by the asylum office in one year may not be completed by an immigration court until the following year (or several years later), and some affirmative claims received by the immigration courts are not adjudicated, it is not possible to calculate a precise overall grant rate for affirmative claims. Nonetheless, for affirmative claims that are fully adjudicated, the grant number is certainly more than 80% and probably near 90%.

251. EOIR 2014 Yearbook, *supra* note 71, at K2. Grant rates were also low at various immigration detention centers, *see id.*, but because the demographics of persons held in those centers differ from the demographics of other courts, they are not included here. In particular, many cases adjudicated at detention centers involve persons who are barred from asylum because they have been convicted of any aggravated felony.

252. EOIR 2014 Yearbook, *supra* note 71, at K2. The disparity between New York City and the rest of the nation is striking. Judges there adjudicated 5,750 claims, which amounts to 32% of all claims adjudicated nationwide. And yet those judges granted 55% of all claims granted nationwide. *See id.*

253. EOIR 2014 Yearbook, *supra* note 71, at K2.

immigration court hearings. Instead, the *Refugee Roulette* authors recommend comprehensive and hugely expensive reforms to the immigration court system, including a substantial increase in the resources available to immigration courts (more judges and clerks, better interpretation) as well as court-appointed and publicly-funded lawyers for indigent applicants.[254] They also recommend that immigration courts should "be insulated from politics" by making them independent from the Department of Justice,[255] that hiring standards for judges should be "more rigorous,"[256] and that asylum officers and judges should receive better training.[257]

With the exception of improved training, none of these changes would directly impact the concerns detailed in this Article. That aside, the recommendations of these scholars are impractical: given the federal government's finances and the position of many conservative lawmakers on immigration reform, their plea for a huge increase in resources is politically unviable, both now and in the foreseeable future.

Other scholars, most notably Professor Stephen Legomsky, have called for a broad restructuring of the process by which immigration cases are adjudicated.[258] Professor Legomsky's plan would attempt to insulate the immigration courts from political and budgetary pressures by converting immigration judges to administrative law judges housed in an independent executive branch tribunal, and would also establish an Article III immigration appellate court.[259] On the other hand, both the National Association of Immigration Judges and the ABA propose to convert the immigration court system into an Article I court.[260] Meanwhile, Bruce Einhorn, a former immigration judge, has called for the creation of a new "U.S. Asylum Court" whose

254. Refugee Roulette, *supra* note 43, at 383–84.
255. Refugee Roulette, *supra* note 43, at 387.
256. Refugee Roulette, *supra* note 43, at 380.
257. Refugee Roulette, *supra* note 43, at 381.
258. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010).
259. *Id.* at 1686.
260. *See* Executive Office for Immigration Review: Oversight Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary, 111th Cong. 9-10 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges); ABA Comm'n On Immigr., Reforming The Immigration System § 6–35 (2010).

judges would consider only claims for asylum.[261]

Still other critics have proposed modest reforms aimed directly at credibility. For instance, Professor Ilene Durst recommends that applicants should be given "the benefit of the doubt," and that courts should adopt a "presumption of credibility" that could be rebutted only by "clear and convincing evidence of material misrepresentations or other material distortions."[262] Professor Michael Kagan rejects that approach and proposes instead that courts should adopt a standard used by the UNHCR, one that relies on whether a claim is "coherent and plausible," does not contradict "generally known facts," and is "on balance, capable of being believed."[263] Under that standard, an applicant would ultimately be found credible if there is any "reasonable basis" for believing the applicant's claim.[264]

But none of these proposals gets to the heart of the problem presented here: a decision-maker cannot assume an applicant suffering from trauma will tell their story consistently, even with regard to critical details, and especially not when subjected to adversarial cross-examination.[265] Remarkably, virtually all commentators

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261. Einhorn, *supra* note 21, at 161.

262. Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 127–28, 131 (2000). Durst fails to explain precisely what she means by "material misrepresentations or other material distortions," or how a court would decide whether that standard has been met. A student note likewise recommends a presumption of credibility, but only for women who claim to have been raped or sexually assaulted. Katherine E. Melloy, Note, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 673 (2007).

263. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEORGETOWN IMM. L. J. 367, 381–82 (2003).

264. *Id.* at 403. Arguably, this "reasonable basis" approach is simply a presumption of credibility cloaked in a different name.

265. One student note does recommend replacing the existing system with various procedures borrowed from alternative dispute resolution, including early neutral evaluation before a non-adversarial hearing as well as mandatory mediation in any case appealed to the federal courts. Daniel Forman, Note, *Improving Asylum Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process*, 16 CARDOZO J. INT'L & COMP. L. 207, 232–39 (2008). However, the proposed process would include multiple interviews with the applicant, and the final decision-maker would have access to a written record of the applicant's prior statements to help assess the applicant's credibility. *Id.* at 235–36.

seem to accept that an adversarial hearing is a fair, accurate, and efficient way to adjudicate asylum claims—even though some countries (Australia and Canada, for instance) use a process that is at least partially non-adversarial,[266] and the U.N. High Commissioner for Refugees officially takes no position on which approach is preferable.[267]

One scholar—Professor Won Kidane—has argued directly and in detail that the United States should adopt a non-adversarial adjudication system for *all* immigration cases, including asylum claims.[268] In doing so, he divides the advantages of a non-adversarial system into four categories.

First, Professor Kidane emphasizes that the current system is enormously wasteful. For each full-time immigration judge, there are *four* full-time lawyers who represent the Government in cases heard by that judge, including appeals.[269] Professor Kidane surmises that these lawyers add little to the accuracy of adjudications, at least in asylum cases. In most such cases, the role of government lawyers is limited to the adversarial cross-examination of the applicant and delivery of a short closing statement.[270]

Second, Professor Kidane emphasizes that the *accuracy* of immigration decision-making would be improved if money now spent on Government lawyers were spent instead on adding more judges. Beyond the obvious fact that judges would have more time to consider each case, Professor Kidane emphasizes that judges would be free to make decisions without the burden of Government lawyers who, in his words,

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266. The procedures followed in other countries are too complex to merit discussion here, but Prof. Peter Billings has analyzed the systems of four common law countries in detail, and he ultimately concludes that the goals of asylum adjudication would best be served by "a broadly inquisitorial [i.e., non-adversarial] approach" at the trial level. Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253, 273–80, 296-97 (2000).

267. *See* United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ¶ 189 et seq. (reissued Dec. 2011), available at http://www.unhcr.org/3d58e13b4.html (last visited Feb. 5, 2016) (hereinafter "U.N. Refugee Handbook").

268. Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647 (2012).

269. *Id.* at 709 (citing Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1701 (2010).

270. *See* Anker, *supra* note 216, at 489–95.

do little more than "spray pepper" in the eyes of the judges.[271]

Professor Kidane's third point centers on fairness. Citing *Refugee Roulette* and other sources, he contends that the "overwhelming majority" of respondents in removal proceedings are unrepresented.[272] In fact, EOIR statistics show that the percentage of unrepresented respondents has fallen over the past four years, from 60% in 2010 to 45% in 2014.[273] Nonetheless, Professor Kidane's point is important: an adversarial hearing is "fair" only when both sides have a comparable arsenal of legal "weapons." But in immigration court, the table is tilted very heavily in the Government's favor. The problem is compounded by the awkward position of immigration judges, who frequently cross-examine witnesses themselves.[274] Thus, an unrepresented applicant may feel he or she is confronted by two government lawyers.[275] Professor Kidane's final point in favor of a non-adversarial model is simply that a fair, efficient, and less expensive system would be more acceptable politically.[276]

Professor Kidane's points apply with great force to the adjudication of asylum claims filed by trauma survivors. For the reasons discussed earlier, a system that relies on the adversarial cross-examination of trauma survivors is destined to be both grossly inaccurate and fundamentally unfair. As a study conducted by Deborah Anker emphasized, the cross-examination of asylum applicants by Government lawyers tends to focus on credibility and character rather than substance. Observers noted that the manner of trial attorneys was often "hostile, sarcastic, and disbelieving," and

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271. Kidane, *supra* note 268, at 710–11. After working for three years as an INS trial attorney, I can attest to the fact that Prof. Kidane has accurately described the way many of my former colleagues approached their work.

272. Kidane, *supra* note 268, at 714–15.

273. EOIR 2014 Yearbook, *supra* note 71, at F1.

274. Kidane, *supra* note 268, at 714–15 (citing Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 489–90 (1992)). After observing nearly 200 deportation cases, Prof. Anker concluded that judges often did not appear to be neutral. In her words: "Instead of an independent adjudicator and an opposing counsel, the perception arose in many cases that applicants faced two, instead of one, opposing counsels." Anker at 489.

275. Kidane, *supra* note 268, at 714–15.

276. Kidane, *supra* note 268, at 716. The truth of that claim, of course, assumes the political beliefs of most citizens and politicians are rational.

they concluded that the often-extensive cross-examination added very little to the effective resolution of a case.[277] In such circumstances, it is not an exaggeration to say that government trial lawyers rarely do more than "throw pepper" in the judge's eyes. Paying them to do so at taxpayer expense is inordinately wasteful and inefficient. Still, it is difficult to imagine Congressional support for an entirely non-adversarial immigration system, especially when, as in recent years, the Government's focus has been on the deportation of non-citizens who have a criminal conviction, however minor.[278]

### *B. The Non-Adversarial Adjudication of Claims for Asylum*

If the United States is genuinely committed to the fair, accurate, and efficient adjudication of claims for asylum, the existing adversarial system should be abandoned. And in the absence of a fully inquisitorial immigration court, the only way to accomplish that result would be to remove the adjudication of asylum claims *entirely* from the existing immigration court system.

Thus, the existing two-tiered system of informal interviews with asylum officers and adversarial hearings in immigration court should be replaced with a single adjudication, one that is relatively formal, non-adversarial, and separate from the immigration courts. In contrast to immigration court hearings, the hearing officer should conduct the questioning instead of a government lawyer. In the great majority of cases, the government should not (and need not) be represented, and prior versions of the applicant's story should not be considered. Exceptions to these last two points could be made in compelling circumstances: for instance, if there are serious reasons to believe the applicant assisted in the persecution of others or was involved in terrorism or other serious criminal activity. Within this framework, further details should be left to discussions

277. Anker, *supra* note 216, at 49–95.

278. *See, e.g.*, Julia Preston, *Report Finds Deportations Focus on Criminal Records*, THE NEW YORK TIMES (April 29, 2014), available at http://www.nytimes.com/2014/04/30/us/report-finds-deportations-focus-on-criminal-records.html (last visited Feb. 5, 2016).

between government officials, immigration advocates, and experts on psychological trauma.

There are two ways by which a non-adversarial system could be implemented. The easier approach would be to expand the existing network of asylum offices, and to adjudicate all claims for asylum there. For applicants who file an asylum claim after a removal case has begun, removal proceedings could be continued pending a separate assessment of their eligibility for asylum,[279] and the removal case could then be terminated if asylum is granted. Certain changes to the asylum offices would be needed. Officers and staff should be added, professional interpreters should be hired, and a formal record (including a transcript) should be created. But all of these changes could almost certainly be made through executive action, without the involvement of Congress.

The potential downside of that approach, as Professor Legomsky suggests, is that any adjudication conducted within existing federal agencies may be subject to both budgetary and political pressures.[280] The alternative, then, would be to create an entirely new administrative tribunal, one independent from both the Justice Department and the Department of Homeland Security. In that scenario, the existing asylum offices would be eliminated, and personnel could be shifted to the new tribunal. In contrast to the first approach, however, an independent tribunal could be created only through an act of Congress.

Any move to a purely non-adversarial system for adjudicating asylum claims need not be prohibitively expensive. The workload of the immigration courts would be diminished by more than half,[281] and new positions could be

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279. An immigration judge has discretion to postpone removal proceedings for good cause on the motion of either party. 8 C.F.R. § 1240.6.

280. Prof. Legomsky makes the same point at length when he argues for a new immigration tribunal outside the Department of Justice. *See* Legomsky, *supra* note 258, at 1665–1671.

281. The remaining system would still decide, among other things, whether aliens are subject to removal from the United States, and whether they are eligible for other forms of relief from removal such as adjustment of status, cancellation of removal, or the relief provided under INA section 212(c) to certain immigrants convicted of a crime. *See* 8 U.S.C. § 1229b (authorizing the cancellation of removal for certain permanent residents); 8 U.S.C. § 1182(g) & (h) (authorizing the discretionary waiver of certain grounds of inadmissibility

filled by drawing qualified personnel from the ranks of immigration judges and the corps of lawyers who now represent the government in immigration court. And if the Board of Immigration Appeals were eliminated—as Professor Legomsky recommends—personnel could also be drawn from the ranks of government lawyers who now work for the BIA.

In either scenario, the end result would be an adjudication system that is more efficient, better staffed, more consistent with U.N. recommendations and the refugee adjudication practices in other countries, and more responsive to both the spirit of refugee law and the challenges faced by trauma survivors who seek asylum.

### *C. Other Trauma-Related Reforms*

Implementing the proposed reforms will require time, money, and substantial political will. In the long run, it may never happen. In the short run, important changes could easily be made to the existing adjudication process. Most notably, key participants in process should be thoroughly trained in the nature and symptoms of trauma, and the effects of trauma on the ways in which survivors tell their stories. In addition, the claims of trauma survivors could be adjudicated more fairly if small changes were made to immigration statutes.

On most fronts, existing training is inadequate or nonexistent. For instance, the section of EOIR's Immigration Judge Benchbook dealing with "mental health issues" includes an extensive discussion of issues relating to competence, but no discussion at all on the effects of trauma.[282] The section of the Benchbook dealing with evidence and testimony is likewise silent on the challenges faced by trauma survivors.[283] The guidance and training given to Government lawyers is not available online, but

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for specified persons); 8 CFR § 1245.2(a)(1)(i) (granting immigration judges exclusive jurisdiction over applications for adjustment of status filed by persons in removal proceedings).

282. EOIR, *Immigration Judge Benchbook, Mental Health Issues*, available at http://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues (last visted June 15, 2015).

283. EOIR, *Immigration Judge Benchbook, Evidence*, available at http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Evidence_Guide.pdf (last visited June 15, 2015).

given their behavior and practices, there is every reason to think that they are not trained well—if at all—in the symptoms of trauma and the challenges faced by trauma survivors.

Unfortunately, the same shortcomings are typically true for materials aimed at lawyers who represent asylum seekers. For instance, a book-length "Asylum Primer" published by the American Immigration Lawyers Association includes a detailed appendix with advice on preparing and presenting a claim. That appendix says virtually nothing about trauma, beyond noting that "[i]ndividuals who have experienced or witnessed traumatic events may have difficulty remembering."[284]

A manual on "Winning Asylum Cases" published by the Immigrant Legal Resource Center is more helpful but still falls short of giving a full account of the challenges presented by trauma survivors who seek asylum. After noting that PTSD is "perhaps the most common mental condition suffered by victims of torture,"[285] the manual explains that trauma survivors may block out all or part of a traumatic event, and may display "inappropriate behavior" during a hearing, such as a "tendency to relate horrifying events in a flat, emotionless voice."[286] These concerns, the manual cautions, may affect an attorney's ability to prepare, the applicant's ability to recall events, and "the judge's likelihood of reaching a favorable decision.[287]

The manual goes on to recommend that attorneys who represent asylum applicants should meet with their client at least twice before a hearing,[288] and should consider obtaining an assessment and testimony from a mental health expert if the client exhibits symptoms of trauma.[289] The manual's treatment of the subject is accurate as far as it goes, but it falls far short of giving practicing lawyers a full understanding of the effects of trauma, the challenges faced

284. REGINA GERMAIN, AILA'S ASYLUM PRIMER 353 (Am. Immigration Lawyer's Assoc. 4th ed. 2005).

285. ROBERT JOBE, et al., WINNING ASYLUM CASES §§ 13–20 (Immigrant Legal Resource Center 2004).

286. *Id.* at §§ 13–21.

287. *Id.* at §§13–21.

288. *Id.* at §§ 13–23.

289. *Id.* at §§ 13–21.

by survivors who seek asylum, the impact of the attorney's work on a survivor's ability to tell her story, and the ways an attorney might inadvertently introduce discrepancies into the record of proceedings. And this manual, of course, is simply a manual, one that most immigration lawyers undoubtedly have not read. Any person licensed to practice law may represent an asylum seeker; there is no mandatory training for those who wish to do so.

Unfortunately, manuals for lawyers who work with trauma survivors in other situations are often of no greater help. For instance, the National Center on Domestic Violence, Trauma and Mental Health has created a detailed, sixty-seven page handbook for attorneys who represent domestic violence survivors.[290] The advice in that handbook is thorough and sound, but it devotes only six pages to the process of interviewing the survivor and preparing her for court, and it does not discuss in detail the impact of trauma on a survivor's ability to tell a consistent, "credible" story.[291]

Perhaps most remarkable, even the UNHCR's "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" is silent on the issue. There are sections dealing with "mentally disturbed persons" and unaccompanied minors, [292] but there is no discussion of psychological trauma or post-traumatic distress disorder.

The Asylum Division of USCIS is the lone exception to this pervasive lack of training on the ways that may trauma effect a litigant's testimony. As part of their five-week "basic training," asylum officers complete a unit on "interviewing survivors." The twenty-page lesson plan for this unit is thorough and detailed.[293] Among other things,[294] it covers the nature of torture and other types of trauma; the physical and

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290. Mary Malefyt Seighman, et al., *Representing Domestic Violence Survivors Who Are Experiencing Trauma And Other Mental Health Challenges* (December 2011), available at http://csaj.org/document-library/mental_health.pdf (last visited July 15, 2015) (hereinafter "Representing Survivors").

291. *Id.* at 5–8, 41–44. Other topics discussed in the handbook include client counseling (8 pages); discovery and evidence (10 pages); custody and mental health evaluations (10 pages); and working with expert witnesses (6 pages).

292. U.N. Refugee Handbook, supra note 267, ¶¶ 206–219.

293. USCIS, *Refugee, Asylum, and International Operations, Asylum Officer Basic Training Course, Interviewing Part 5: Interviewing Survivors* (hereinafter "AO Training: Interviewing Survivors").

294. *See id.* at 4 (table of contents).

psychological effects of trauma; the process of recovery; the ways in which trauma can "inhibit applicants from fully expressing an asylum claim";[295] and suggested techniques for interviewing survivors. The lesson plan emphasizes that an interview may trigger intrusive flashbacks or other symptoms of PTSD, and that survivors may avoid discussing certain events, have difficulty remembering events, be confused about details, lose composure, avoid eye contact, be unresponsive, or have difficulty following questions or answering coherently.[296] The training urges officers to "treat the applicant with humanity," and provides suggestions on ways to "be thorough but sensitive" and "help the person feel safe and in control."[297]

All of this is commendable, but the training falls short on one critical point: it fails to emphasize that discrepancies in an applicant's story may be evidence of psychological trauma rather than untruthfulness. The training simply stresses instead that a survivor may respond in different ways "when confronted with discrepancies in his or her story."[298] A separate lesson on "decision writing" emphasizes that officers must make an assessment of the applicant's credibility, and in doing so must note any *material* "discrepancies, inconsistencies, or lack of details in the applicant's claim."[299] But that lesson does not advise officers on the conclusions they can properly draw from inconsistencies. Unless they are introduced as evidence in a removal case, the decisions of asylum officers are not public. Thus, it is impossible to assess how well officers apply the advice they are given, and the extent to which their negative credibility findings may be based on inconsistencies in an applicant's story.[300]

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295. *Id.* at 6.
296. *Id.* at 16–19.
297. *Id.* at 19–22.
298. *Id.* at 22.
299. AO Training: Decision Writing Part I at 10.
300. An article by mental health professionals who work with torture survivors provides an antidote that may be typical. During an asylum interview, a Guatamalan applicant testified that she had been raped. Because she did not mention the rape in her declaration, the asylum officer referred her case to an immigration court. During the immigration court hearing, however, she presented expert testimony concerning the symptoms of PTSD, and an immigration judge granted her application. *See* Gangshei & Deutsch, *supra* note 20, at 82.

The need for improved training of immigration judges, attorneys, and asylum officers is clear and compelling. In conjunction with that training, Congress should also revise the standards for credibility assessment to make it clear that immigration judges *must* consider the consequences of psychological trauma and the possibility that any perceived problems with the applicant's testimony are the result of trauma rather than untruthfulness. But even if the law is not changed, judges can and should consider those issues: as now framed, the statute permits judges to consider "all relevant factors," and the possible effects of trauma are indisputably relevant.

In addition to better training, the adjudication of claims involving survivors would benefit from modest amendments to asylum-related statutes. Under existing law, an asylum application must be filed within one year after an applicant's arrival in the United States unless the applicant demonstrates either "changed circumstances" that materially affect the applicant's eligibility or "extraordinary circumstances" related to the delay in filing.[301] In addition, the standards for credibility make no reference to the effects of trauma on an applicant's ability to present her case.[302] The statute should be amended to expressly recognize that psychological trauma is an "extraordinary circumstance," and should further direct that possible effects of trauma must be taken into account when an applicant's credibility is considered.

Finally, just as the Government now funds and maintains a Forensic Document Laboratory to review questioned documents in immigration cases,[303] Congress should consider providing psychological evaluations for indigent asylum seekers who exhibit symptoms of trauma. Doing so would benefit not only the asylum seekers themselves, but also the accuracy and integrity of the adjudication process.[304]

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301. 8 U.S.C. § 1158(a)(2)(B), (D).

302. 8 U.S.C. § 1158(b)(1)(B)(iii).

303. *See* Department of Homeland Security, *Forensic Document Lab (ICE)*, available at http://www.dhs.gov/external/forensic-document-lab-ice (last visited July 15, 2015).

304. For a detailed discussion of the benefits of psychological evaluation in this context, *see generally* Gangshei & Deutsch, *supra* note 20.

### *D. Potential Objections and Other Comments*

The most vocal objections to any changes, of course, will come from those who are deeply—and rightly—concerned about fraudulent claims for asylum. Accurate statistics on fraud would be impossible to compile, but anecdotal evidence suggests the problem is serious. Over the past several decades, there have been repeated instances in which immigration officials have broken up criminal schemes to perpetuate asylum fraud, some of them involving immigration lawyers.[305]

Nonetheless, the possibility of fraud should not deter the proposed changes. The existing system's primary check on fraud consists of adversarial cross-examination, but without evidence to contradict an applicant's testimony, that strategy is inaccurate and ineffective. By substantially reducing the waste in the current system, resources and personnel could be devoted to the factual investigation of key facts in many cases.

An example from my own experience illustrates the possibilities. An asylum applicant from the Ivory Coast testified she was a founding member of an opposition political party and helped organize the party's first public demonstration, during which police killed six party members. The applicant was adamant that this demonstration took place in the city of Abidjan. In fact, reports from the media and human rights groups proved the demonstration took place in a different city more than 200 miles away—a city the applicant had never visited. Given their current workload, government lawyers rarely have time to search for this sort of evidence, but a streamlined process would allow for a more thorough investigation of the facts underlying many cases, and any evidence found could be provided to an asylum officer without a formal appearance by government counsel.

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305. *See, e.g.*, *Maryland lawyer convicted in asylum scheme*, AP Alert – DC Daybook (Feb. 12, 2009); *Five guilty in immigration asylum scam*, UPI Newstrack (June 29, 2009); *Lawyer charged in smuggling case: U.S. plans to review status of thousands of Chinese immigrants*, Dallas Morning News 6A (Sept. 21, 2000). For a detailed account of the challenges faced by immigrants caught up in these schemes, *see* Frances Robles, *Tamils' Smuggling Journey to U.S. Leads to Longer Ordeal: 3 Years of Detention*, available at http://www.nytimes.com/2014/02/03/us/tamils-smuggling-journey-to-us-leads-to-longer-ordeal-3-years-of-detention.html?_r=0 (last visited Feb. 5, 2016).

There is a second and more compelling reason why concerns about fraud should not deter the shift to a non-adversarial system of adjudication. If a legitimate refugee is denied asylum, the stakes are enormous: the applicant's safety and life may literally be in danger. On the other hand, the stakes are minimal in most cases involving fraud: the government—and society at large—would lose little if asylum is incorrectly granted to someone who is not a refugee. In cases where the stakes are higher—for instance, if there is reason to think an applicant has been involved in terrorism, the persecution of others, or serious criminal activity—the procedures could easily allow for government lawyers to participate in hearings, present evidence, and cross-examine the applicant.

## CONCLUSION

The shortcomings of our current asylum procedures have been decades in the making. In the Refugee Act of 1980, Congress enacted sweeping changes to U.S. refugee laws. As Sen. Edward Kennedy (the lead sponsor) explained, the changes were intended to "reform the discriminatory and outdated refugee provisions" then in place, and to "insure greater equity in our treatment of refugees."[306] But at that time, the dynamics of psychological trauma were not yet well understood, and the procedures envisioned by the Refugee Act's sponsors did not account for the needs of trauma survivors. Later amendments to the law—most notably the statutory provisions related to credibility and corroboration—have made matters worse, not better.

Beneath the laws themselves are deep misunderstandings about the character of "true" stories, the truthfulness of storytellers, and the supposed power of cross-examination to distinguish between truth and falsehood. For trauma survivors, the system remains both discriminatory and outdated, and the Refugee Act's full promise cannot be met without further reform.

Some might suggest that it would be enough to provide better training for everyone involved in the process, and that further changes are unnecessary. To do so would be an

306. 125 Cong. Rec. S2630 (daily ed. March 13, 1979) (statement of Edward Kennedy).

improvement over the current state of affairs, but it would leave the United States with an expensive, unwieldy system that remains ill-equipped to assess the credibility of the asylum applicants who are most vulnerable and most in need of the safety that asylum offers.

Adversarial systems of adjudication are grounded in the premise that the "truth" benefits from a contest of wills in which competing sides present evidence and "test" the evidence offered by the other side. But when the witness is a trauma survivor, adversarial cross-examination is not an "engine of truth," but rather a cudgel by which both the witness and the truth are likely to be beaten and broken.

Isak Dinesen once suggested that "[a]ll sorrows can be borne if you put them into a story or tell a story about them."[307] But for trauma survivors, simply telling the story is not enough: others must believe the story to be true. This Article is intended to point the way forward, from the broken procedures that now exist toward a more humane system for adjudicating asylum claims.

307. Those words were attributed to Dineson by Hannah Arendt, but Arendt provided no source. *See* Lynn R. Wilkinson, *Hannah Arendt on Isak Dinesen: Between Storytelling and Theory*, 56 COMPARATIVE LITERATURE 77, 77 (Winter 2004).

## APPENDIX

TABLE 1

*Federal Appellate Decisions that Review a Negative Credibility Finding in an Asylum Case: 2010*

For this study, researchers examined 369 decisions* issued by the Circuit Courts of Appeals in 2010. Each of these cases reviewed an immigration judge's negative credibility finding in an asylum case. Table 1 breaks down those cases by circuit, and includes both the raw number of cases remanded in each circuit and the percentage of cases affirmed. Of the 369 cases, 15 were remanded, and the remaining 354 cases were affirmed.

| ***Circuit*** | ***Number of Cases*** | ***Cases Remanded*** | ***Percentage Affirmed*** |
|---|---|---|---|
| First Circuit | 4 | 0 | 100.0% |
| Second Circuit | 130 | 1 | 99.2% |
| Third Circuit | 55 | 0 | 100.0% |
| Forth Circuit | 2 | 0 | 100.0% |
| Fifth Circuit | 14 | 0 | 100.0% |
| Sixth Circuit | 24 | 0 | 100.0% |
| Seventh Circuit | 6 | 0 | 100.0% |
| Eighth Circuit | 7 | 0 | 100.0% |
| Ninth Circuit | 84 | 12 | 85.7% |
| Tenth Circuit | 3 | 0 | 100.0% |
| Eleventh Circuit | 40 | 2 | 95.0% |
| **Total** | **369** | **15** | **95.9%** |

* An additional 44 cases were reviewed but were not included because the decision does not clearly identify grounds for the negative credibility finding. Also, cases involving a single appellate decision for two or more family members with related claims were treated as a single case.

TABLE 2

*Factors Identified By Immigration Judges As Support for a Negative Credibility Finding*

In most cases, judges listed two to four factors in support of the negative credibility finding. For the 369 cases reviewed, Table 2 lists the number of decisions that mention each of various factors. The first category listed includes inconsistencies in the applicant's testimony at the asylum hearing, as well as inconsistencies between the testimony and the applicant's prior statements. This category is broken down further in Table 3.

| | |
|---|---|
| Applicant's story was inconsistent | 318 (86.2%) |
| Other aspects of testimony (vague, implausible, etc.) | 84 (22.8%) |
| Applicant's demeanor | 65 (17.6%) |
| Applicant's story was inconsistent with other evidence | 171 (46.3%) |
| Applicant failed to corroborate story | 158 (42.8%) |
| All other factors | 36 (9.8%) |

TABLE 3

*Breakdown of Decisions That Relied on Inconsistencies in the Applicant's Story*

As noted above, 318 of the 369 cases (86.2%) relied on one or more inconsistencies in the applicant's story as grounds for a negative credibility finding. Table 3 breaks that group down further into combinations of three distinct types of inconsistency.

The testimony was:

| | ***Number*** | ***Percentage of All Cases*** |
|---|---|---|
| (A)Internally inconsistent | 172 | 46.6% |
| (B) Inconsistent with the declaration | 210 | 56.9% |
| (C) Inconsistent with other prior statements | 104 | 28.2% |

| | |
|---|---|
| (A) only | 67 |
| (B) only | 81 |
| (C) only | 26 |
| (A) + (B) | 77 |
| (A) + (C) | 15 |
| (B) + (C) | 39 |
| (A) + (B) + (C) | 24 |

TABLE 4

*Breakdown of Cases that Relied on Inconsistencies between the Testimony and Other Prior Statements as Grounds for a Negative Credibility Finding*

In 104 cases (28.2% of the total) the immigration judge relied on inconsistencies between an applicant's testimony and the applicant's prior statements other than a written declaration. Table 4 breaks this down to separate out the cases in which the judge relied on a record of the applicant's statements during an asylum interview.

| | |
|---|---|
| Total cases | 104 |
| Testimony inconsistent with asylum interview only | 39 |
| Testimony inconsistent with other prior statements | 51 |
| Testimony inconsistent with both asylum interview and other statements | 14 |

TABLE 5

*Breakdown of Factors Considered in Cases for Which the Applicant's Story Was Not Inconsistent*

In 51 cases (13.3% of the total), the immigration judge did not mention inconsistencies in the applicant's story, but nonetheless found the applicant not credible for other reasons. Table 5 identifies the factors the immigration judge relied on in these cases.

| | ***Number*** |
|---|---|
| (A) Story was inconsistent with other evidence | 44 |
| (B) Applicant failed to corrorborate testimony | 21 |
| (C) All other factors, including demeanor | 13 |

| | |
|---|---|
| (A) only | 22 |
| (B) only | 4 |
| (C) only | 1 |
| (A) + (B) | 7 |
| (A) + (C) | 5 |
| (B) + (C) | 2 |
| (A) + (B) + (C) | 10 |

TABLE 6

*Cases that Combine External Factors with Inconsistencies in the Applicant's Story*

As noted above, in most cases immigration judges relied on two to four factors to support a negative credibility finding. Table 6 lists five factors that do not involve inconsistencies in the applicant's story. For each of those factors, the table demonstrates that judges rarely relied on such factors alone. Instead, these factors were usually combined with an inconsistency in the applicant's story.

| | | |
|---|---|---|
| (A) Applicant's story inconsistent with other evidence | 171 | |
| Applicant's story was also internally inconsistent | 120 | 70.2% |
| (B) Applicant failed to corroborate story | 158 | |
| Applicant's story was also internally inconsistent | 135 | 85.4% |
| (C) Demeanor | 65 | |
| Applicant's story was also internally inconsistent | 57 | 87.7% |
| (D) Other aspects of testimony (vague, implausible, etc.) | 84 | |
| Applicant's story was also internally inconsistent | 73 | 86.9% |
| (E) Other grounds for negative credibility finding | 36 | |
| Applicant's story was also internally inconsistent | 34 | 94.1% |

TABLE 7

*Factors Considered in Conjunction with Inconsistencies Between the Applicant's Testimony and the Written Declaration*

As noted above, in 210 cases (56.9% of the total) an immigration judge relied on inconsistencies between the applicant's testimony and a written declaration prepared by the applicant's lawyer. In most of those cases, the judge also relied on other factors. Table 7 identifies the number of times each of these other factors was relied on.

| | |
|---|---|
| Inconsistency between testimony and declaration only | 21 |
| Testimony itself was also inconsistent | 90 |
| Testimony was inconsistent with other prior statements | 63 |
| Applicant's demeanor | 31 |
| Also other aspects of testimony (vague, implausible, etc.) | 51 |
| Testimony was inconsistent with other evidence | 79 |
| Applicant failed to corroborate testimony | 81 |
| Also other factors | 23 |

TABLE 8

*The Number of Factors Cited In Each Decision*

| ***Factors*** | ***Cases*** |
|---|---|
| 1 | 64 |
| 2 | 95 |
| 3 | 122 |
| 4 | 62 |
| 5 | 17 |
| 6 | 7 |
| 7 | 1 |
| 8 | 1 |

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# Domestic Violence and the Female Victim: The Real Reason Women Stay!

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**Abstract**

The criminalization of domestic violence refers to efforts to address domestic violence through the passage and enforcement of criminal and civil laws. This article reviews the social science, legal, and criminal justice literature regarding interventions used to stop domestic violence. Theoretical foundations, effectiveness of police interventions, and the use of protective orders are addressed. Further explored are prosecution and victim advocacy, court responses, batterers' intervention as a condition of probation, and coordinated community responses to domestic violence. Implications are given for social work practice, along with basic information for assisting clients who are victims of violence in their own homes.

## Introduction

Violence implies destruction, anger, and pain; while family suggests the qualities of caring, love, and joy. Domestic violence occurs at all familial levels—between couples, in parent-child relationships, sibling relationships, and oftentimes, dating relationships. Domestic violence is deeply rooted in the lives of many American families (English, Marshall & Stewart, 2003). Yet, closely interwoven are the words “family” and “violence”, even now.

Many female victims of domestic violence become victims of their own psychological realities (Hurley, Sullivan & McCarthy, 2007). Financial viability can be limiting for many female victims along with other barriers they face when attempting to flee safely from violent situations (Murray, 2008). While there are various types of domestic violence situations, here the focus has to do with violence directed toward females and the psychological impact many female victims experience throughout the court proceedings**.**

Theories abound regarding the negative social and economic consequences of domestic violence (Lehrner, & Allen, 2008; Bouffard; Wright; Muftić & Bouffard, 2008; Murrell, Christoff & Henning, 2007). Many of these theories are well grounded and built over time. They offer much, but unfortunately far exceed the scope of this paper. However to move out of the problem and into the solution, empowerment theory must be mentioned (Itzhaky, & Porat, 2005). This theory asserts that victimization is not something that happens to an individual because of personal characteristics, family of origin, or other outside distinctions. Rather, family violence can happen to anyone who has the misfortune of becoming involved with someone who seeks to maintain power and control over intimate partners or family members.

One of the most fundamental functions of any civilized society is the protection of its citizens from criminal victimization. During the past 20 years, there has been an explosion of knowledge about domestic violence, its prevalence, and its linkage with other social problems. Although a number of criminal and civil justice tools exist to stop abuse and hold batterers accountable for their behavior, no one tool has proven effective across all situations (Sartin, Hansen & Huss, 2006). Social workers need an understanding of both the tools that work best in specific situations, and the potentially dangerous consequences resulting from the use of these tools (Danis, 2003).

For years, the standard practices in most police departments was to treat domestic violence cases as “family affairs” (Stalans & Finn, 2006); and as such, do not become involved. Much of the resistance of law enforcement officials tied to the notion that privacy of homes is sacrosanct, particularly in homes socialized where men are dominant and women submissive. In this framework, the view of domestic violence may be as a struggle between men and women over limited resources and/or incompatible goals, housed within a society that teaches and sanctions the use of force by men against women. The feminist approach to domestic violence “holds that almost all male-on-female abuse is based on the patriarchal values of our society,” and that “these values are sanctioned by a culture in which male domination of women is both covertly and overtly reinforced” (Lawson, 2000, p. 20). Violence in domestic abuse is nothing more than a tool oftentimes used by men to control women. Many men in our society still support the notion that it is okay to use physical violence toward a woman if her behavior or freedom threaten his power or standing in the family hierarchy (Sartin et al., 2006). While studies suggest a recent shift toward egalitarianism between the sexes, many men continue to hold onto traditional attitudes. Such attitudes have ruled this country for decades, especially in the areas of family roles and decision-making (Taubman, 1986).

**The Problem**

During the past 20 years, the social science and criminal justice fields developed interventions designed to deter abuse and rehabilitate abusers so they will not abuse again. Central to these interventions has been the increasing role of the criminal justice system to enforce laws that regard the use of violence against one's intimate partner as a criminal act. Thus, domestic violence has moved from being viewed as only a social problem to also being viewed as a criminal justice mandate (Fleury-Steiner, Bybee, Sullivan, Belknap & Melton, 2006). The criminalization of domestic violence refers to efforts to address the issue of domestic violence through the passage and enforcement of criminal and civil laws (Buchbinder & Eisikovits, 2004).

Domestic and intimate partner violence occurs in epidemic proportions, affecting an estimated 6.2 million American women each year, causing injury that is more serious to women than car accidents, muggings, and rapes combined (Department of Justice (DOJ), 2008). It is estimated that at least 4 million women experience a serious assault by an intimate male partner during an average 12-month period. In fact, nearly 95 percent of domestic violence victims are women (DOJ, 2008). In consideration of these startling statistics, some of the most obvious questions flummox many in our legal system. Questions like: Why do women minimize their injuries? Why do they refuse to participate in the prosecution of their assailants? Why do they post bail for their abusers getting them out of jail? Why do they stay with or return to the men who abused them? To some, these questions appear to be simple questions with simple answers; however, stop if you will, for one minute, and seriously consider what female victims experience when they prosecute violent male partners.

Many of the initial aspects of victim reporting include situational, relational, and systems-level factors that influence battered women's use of either the police, prosecutorial, or court systems. It is interesting to note that Fleury et al. (2006) has examined how these factors each influence women's intentions to reuse these systems in the event of future violence. Fleury et al. (2006) reported employed women were more likely to want further involvement with these systems; felt supported by their communities; received information about services from the police; found case outcomes consistent with their desires; and, felt the criminal legal system treated them well. Victims were less inclined to intend to use the system in the future if they were legally or financially tied to their perpetrators; they had been assaulted again before the court case was closed; court proceedings had been cancelled at least once; or, they had been pressured rather than supported by the criminal legal system (Fleury et al., 2006).

If you were to visit any urban courthouse and sit in any courtroom on any given day, you would witness attorneys and public defenders celebrating dismissals when female victims fail to appear at a second court appearance. Police officers and prosecutors become frustrated and angered by a female victim who wishes to drop charges (Sandusky, 2001). Judges see hundreds of domestic violence cases a year. While it is the duty of the judge to be objective, judges are disgruntled when the victim fails to appear resulting in dismissal. It is easy to see how a judge might ponder their responsibility to keep the community safe versus victims' rights when victims fail to appear only to return later on a new charge with more severe signs of abuse. Other court workers feel that victims not following through waste their time and energy. All of these issues within the justice system hinder the speediness of the court process for cases of domestic violence making it difficult for victims who want the help of the court system to put an end to their abuse. Sadly, stakeholders within the legal system, prosecutors, police, judges, and social workers alike, oftentimes assert that the victim is to blame when a male assailant goes free.

Women with a history of domestic violence and multiple encounters with the legal system often feel police officers are unsympathetic or lack empathy (Stalans & Finn, 2006). They believe this is especially true if the woman is one who has failed to follow through with prosecution previously. Female domestic violence victims perceive that the police do not view domestic violence as they would other crimes, with a perpetrator and a victim. Notwithstanding these suppositions, professionals in the legal system know that battered women do have an interest in participating in the legal process, and obtaining a satisfying outcome. Abused female victims want to be free from harm from their intimate male abusers, as is evidenced by the number of cases appearing on court dockets each year. In Ohio alone, the Office of the Attorney General (OAG) (2007) reported that 73 percent of family violence victims are female. Additionally, females were 84 percent of spousal abuse victims and 86 percent of the abuse victims in non-spousal, but committed relationships (OAG, 2008). Furthermore, nationally there were 20,608 domestic violence cases filed in 2007, and 135,645 people received domestic violence services (DOJ, 2008). The cost of intimate violence exceeds $5.8 billion each year, $4.1 billion of which is for direct medical and mental health services (DOJ, 2008).

Many in the legal system fail to acknowledge the barriers that ultimately destroy women's will to follow through with prosecution (Murray, 2008). Unequivocally, the most significant factor that allows the violence perpetuated upon female victims to continue is that society still supports patriarchy, and the indoctrinated belief that men have the right to inflict abuse (i.e., physical, mental, financial, and sexual) on their female partners. Thus, directly linked to domestic

violence is sex role attitudes, along with power and control. Over the years, women have endured the intended and consequential impacts of this patriarchal system of authority, unfortunately remaining, in abusive relationships.

**Direct Impact**

There are a plethora of short and long-term costs that many female victims must consider when choosing whether to leave a violent relationship. For example, many women remain in abusive relationships to avoid retaliation toward them or their children (Murray, 2008). Studies show that the highest risk for serious injury or death from violence in intimate relationships is the point of separation, or at the time when the decision to separate is made (English et al., 2003). As many as 50 percent of all female victims of violent crimes report being fearful that male abusers will seek some form of reprisal if victims participate in prosecution. Revictimization of battered women occurred at 32 percent within 6 months after the assault gave rise to criminal justice intervention (DOJ, 2007). In many abusive situations, female victims attempt to mitigate the situation by talking it out with the male abuser, fighting back, or by trying to solve the problem by meeting their male partner's demands. When the abuse continues, many women become passive, or withdraw emotionally in order to reduce immediate danger. In the end, many choose to live in a life fielded with abuse, or commit suicide or homicide (Murray, 2008).

Unlike many victims of assault by strangers, but like other victims known to a defendant, victims of domestic violence may be reluctant witnesses (Felder & Blair, 1996). There are two primary reasons for their reluctance to serve as witnesses. Primarily, many women who sincerely attempt to prosecute find significant resistance to the charging of the abuser. National data reveals law enforcement classifies most domestic assaults as a misdemeanor notwithstanding evidence that the criminal conduct involved is more serious than many of the rapes, robberies, and aggravated assaults suffered by others (DOJ, 2008). Serious assaults, like domestic violence, are often charged as misdemeanors and abusers released on probation. Many victims of domestic violence conclude it is better to dismiss charges than be subsequently exposed to the abuser after the hearing is over. These victims learn early that a protective order does not guarantee their safety; rather, such an order is only a tool that holds the batterer accountable if or when he violates the order. Second, female victims often remain in violent relationships realizing that participation in prosecution is by no means a guarantee of their safety, nor will it change the behavior of the batterer (Murray, 2008).

Victims are acutely aware that the legal system will not protect them after the proceedings end. For the most part, in criminal proceedings, a temporary restraining order lasts only as long as the court proceedings. With little or no follow-up intervention by the court once the case ends, many female victims are harassed and pursued by their abusers again. A phone call by the male abuser indicating he is free and "nothing can happen to him" is petrifying to a female victim who comes to understand the legal system can only protect her for a minimal amount of time (Murray, 2008). Many female victims are more concerned with preventing future attempts on their life rather than vindicating the state's interest in penalizing the male abuser for breaking the law. Thus, female victim's interest in protecting herself at all costs runs contrary to the criminal justice system's interest of winning criminal convictions.

Another factor that prevents female victims from proceeding with prosecution is the female victim's financial reliance on the perpetrator's resources. Research reveals that it is typically not the paramount reason they terminate prosecution (Ford & Burke, 1987); although, the common belief is that battered women withdraw cooperation because of decisions to reconcile with the perpetrator. The victim's challenge is finding financial resources to survive day to day, and it is easier for some victims to value staying in an abusive setting versus sleeping on the streets. For many women, prosecuting the breadwinner may wreak economic ruin on the family. In the end, many female victims must consider the over-bearing expenses they must encounter when the perpetrator is no longer living in the home, or incarcerated for the offense. Thus, to the female victim it makes more sense to terminate prosecution and keep a roof over her head for the sake of herself and her children.

Finally, many times female victims encounter difficulties from their employers for taking so much time off work (Tebo, 2005). While some employers find it necessary to support female victims with respect to medical appointments, many employers are not accommodating and considerate to the needs of female victims when cases are strung out and continued at the whim of defense attorneys and prosecutors. Female victims oftentimes weigh moving forward with prosecution versus losing their job. Few stakeholders in legal system ever consider whether the female victim will still have a job after the proceedings end.

**Strategies to Facilitate Victim Participation**

As established earlier in this paper, one of the most fundamental functions of any civilized society is the protection of its citizens from criminal victimization. In the United States, the primary responsibility for protecting innocent people from those who would harm them rests with the criminal justice system. The effectiveness of this system relates

directly to the appropriate balancing of rights, roles, and responsibilities of the various participants within the system (Danis, 2006). A variety of strength and support for victims of domestic violence has expanded in the past two decades as community advocates have pushed police, prosecutors, hospitals, and social services agencies to respond to domestic violence. Additionally, many new policies and procedures for victim services and delivery have developed within governmental and quasi-governmental environments. Yet, maintaining a voice outside these systems is central to advocacy and affecting real and continued change. Advocacy requires that the needs of battered women, individually and as a class, come first. This purpose can conflict with the interest of the criminal justice system with its focus on arrest prosecution and sentencing (Sandusky, 2001).

For the most part, many of the women pose questions around how legally to get out of a violent situation without being physically hurt and financially strapped. Post-separation violence is an issue for a significant group of domestic violence survivors, and their children, leaving abusive relationships (Humphreys, 2003). Humphreys (2003) found 76 percent of the 161 separated women in the study initially suffered further abuse and harassment from their former partners post-separation. Much of the violence ceased after the first 6-12 months, often due to the woman moving. However, more than one-third (36 percent) of the women suffered continued post-separation violence. This article explored women's experiences of legal routes to protection and the effectiveness of the law in tackling the issue of post-separation violence. For many of the women in this study violence escalated over time. These women and their children were seriously at risk of harm. Poor law enforcement, the ineffectiveness of civil protection orders and inadequate prosecution and sanctions left these women (and their children) vulnerable to further assaults and harassment. In a follow-up study, Humphreys (2006) further found that child contact was a point of vulnerability for on-going post-separation violence and abuse.

Safety planning is critical, as social workers and legal professionals face the truth about judicial limitations and communicate those limits to clients. Clients must also be cautioned and clearly understand that a protective order does not guarantee safety. It is only a mechanism that holds the batterer accountable if he violates a protective order. In addition, caution must be given that participation in prosecution is no guarantee of victim’s safety, or that prosecution will bring about behavioral changes in the batterer (Danis, 2003). Many women still fear for their lives after they have attempted to prosecute or leave their violent partners. Therefore the question becomes, can the legal system assist women in feeling safe once they have completed the process of prosecuting the perpetrator. The following are offered as solutions for many in the criminal justice arena to consider.

First, the legal system must become more sensitive to the female victim’s reluctance of pursuing prosecution, especially if it invites more trouble down the road from her abusive male partner. Police officers, prosecutors, public defenders, judges, and probation officers should all consider relevant safety requirements for the female victim that will aid her in coming forward to prosecute, as female victims are at risk of violence before, during, and after prosecution of the perpetrator. Safety requirements for the victim are just as important as privileged communication between the attorney and his client. Safety requirements from all court personnel implies each and every party involved in court proceedings take measures to address all potential incidents of threats that may come to the female victim if she pursues prosecution. Policies that promote arrest, increase convictions, stricter sanctions, and protect the female victim from further contact with the assailant are effective only when they are uniformly and consistently applied by all stakeholders who have contact with the victim in the legal system, which also includes forensic nursing and medical personnel.

Second, heavy burdens should be placed on the police officers; to not only assist in the temporary protection order stage, but also, in obtaining information on availability of domestic violence and temporary shelters in the area, including phone numbers. Concomitantly, the police officer should also be responsible for follow-up calls after the case is disposed of in court. Furthermore, police officers need to be aware of abusers placed on probation for domestic violence, so that they will be better able to interact with the probation department, and assist the victim if the abuser violates the court order to stay away. These needs could be met if police departments established domestic violence units, similar to child abuse units currently within many departments. Such a unit could help in the facilitation process of those women who want to prosecute their perpetrators.

Third and finally, financial assistance or other forms of social service should be available when necessary for victims who successfully follow through with prosecution. Temporary shelters should be set up to not only shelter victims of domestic violence for short-term periods, but also assist them in transitioning from a two parent home to a one parent home when appropriate. Isomorphically speaking, much as care and attending to the needs of abused children, female victims of abuse should be provided ample resources to help them adjust and move on with their lives. Unfortunately, according to Gondolf and Fisher (1988), our institutions insufficiently respond to the battered woman. Since many agencies suffer from insufficient resources, options, or authority to make a difference, many are reluctant to take decisive actions. Thus, the coordination of resources and services to provide comprehensive resources for

battered women are necessary. Essentially, a female victim's contact with the court or another helping source should trigger and bring forth responses of the entire helping system (Gondolf &Fisher, 1988).

**Conclusion**

The authors have provided a glimpse of real life challenges for many women in violent relationships. Many victims' stories touch social workers and others, both professionally and personally. Professionals are encouraged to stand firm in the convention that to curtail violent acts against women, more needs to be done in the criminal justice system. Further, increased advocacy on behalf of victims, gives a continuing loud voice to this social ill and injustice. Regardless of victim status, domestic violence affects the lives of many women across the U.S. and remains one of the most prevalent issues of social injustice in our society today. The interest of our justice system must seriously consider the plight of the female victims, and how to protect them better from the hands of the male abuser. Whereas members of the legal profession cannot eliminate all domestic violence, with all of the court officers working together in harmony it could certainly put a major dent in the problem. Advocates can continue to affect positive change from outside the system as well. Remain cognizant of the fact that "victories" for defense attorneys and prosecutors in the courtroom must not come at the expense of placing female victims back in danger. Rather, the ultimate safety of the female victim should challenge us all to do not only what justice demands, but also provide ample support and a voice for female victims on the streets and inside the home. Continue to search and advocate for twenty-first century solutions to these Neanderthal-like problems.

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

| | |
|---|---|
| THE PEOPLE OF THE STATE OF NEW YORK,<br><br>- against -<br><br>MONICA SZLEKOVICS,<br><br>Defendant. | Indictment No.<br>96-0915<br><br>Criminal Term: Part<br>Hon.<br><br>**AFFIDAVIT OF CHITRA RAGHAVAN IN SUPPORT OF CPL § 440.10 MOTION** |

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

Chitra Raghavan, being duly sworn, deposes and says:

**Professional Background**

1. I am a licensed clinical psychologist with more than 13 years of experience in the field of clinical psychology.

2. I am a full Professor of Psychology, Acting Director of the Forensic Mental Health Counseling Program, and Coordinator of Victimology Studies in Forensic Psychology at John Jay College of Criminal Justice.

3. I obtained my doctorate in Clinical and Community Psychology at the University of Illinois at Urbana-Champaign and furthered my post-doctorate training at Yale University.

4. I routinely conduct psychological evaluations and provide expert witness testimony in criminal cases about domestic violence, human trafficking, and the outcomes of chronic violence, including Complex Posttraumatic Stress Disorder and

Trauma Bonding. I have been hired as an expert by various District Attorney's Offices in New York City.

5. I conduct trainings on domestic violence and trauma for law enforcement officers and legal and mental health personnel in New York State, and I have taught classes, both locally and internationally, on trauma and victimization.

6. I conduct research on all forms of interpersonal exploitation, including domestic violence, sexual assault, and linked traumatic consequences, including memory and post-traumatic stress disorder, or PTSD. I teach specialized classes in this area at John Jay College and have developed several trauma-focused programs, which I currently direct.

7. My testimony during a Frye hearing resulted in *case law on trauma bonding* in New York State: https://law.justia.com/cases/new-york/other-courts/2018/2018-ny-slip-op-28161.htm.

8. I have made over 150 conference presentations and have published over forty articles in various publications, including *Violence Against Women*, *American Journal of Community Psychology*, *Journal of Traumatic Stress*, and *Journal of Interpersonal Violence*. I have also edited two books:

(i) Raghavan, C. & Levine, J. (eds.). (2012). *Self-Determination and Women's Rights in the Muslim World*. HBI Series on Gender, Culture, Religion, and Law. Boston: Brandeis University Press.

(ii) Raghavan, C. & Cohen, S.J. (eds). (2013). *Domestic Violence: Methodologies in Dialogue*. Northeastern Series on Gender, Crime, and Law, Northeastern University Press.

**Assignment**

9. At the request of Monica Szlekovics's counsel at Davis Polk & Wardwell LLP, I conducted a psychological evaluation of Ms. Szlekovics on April 18, 2018 and August 22, 2018. The evaluations focused on the following referral questions and topics:

(i) Ms. Szlekovics's childhood experiences, including the ways in which they may have made her vulnerable to exploitation later in life;

(ii) the abuse that Ms. Szlekovics suffered at the hands of her estranged husband, Angel Mateo, prior to the criminal episode and the mental-health consequences of the abuse;

(iii) whether Mr. Mateo's abuse and its consequences help explain Ms. Szlekovics's involvement in the incidents comprising the criminal episodes that led to Ms. Szlekovics's convictions and sentencing.

10. This declaration is based on the results of a psychological evaluation comprising a clinical interview and standardized testing, which lasted a total of ten hours and were conducted on two separate occasions. I also reviewed various documents, including forensic reports submitted in 1997 for the original trial and reference letters in support of Ms. Szlekovics's clemency application.

**Traumatic Bonding and Its Impact on Ms. Szlekovics**

11. It is my professional opinion that, to a reasonable degree of psychological certainty, Ms. Szlekovics's actions between October 10, 1996, and November 6, 1996—the time period during which she committed acts that ultimately led to her convictions—were neither willful nor consensual. Rather, they were driven by a traumatized state,

which was provoked and maintained by Mr. Mateo to ensure total obedience and compliance.

12. Based on my evaluation of Ms. Szlekovics, it is my opinion to a reasonable degree of psychological certainty that, in 1996, she suffered from complex post-traumatic stress disorder, and also met criteria for Complex-PTSD after having endured years of violent and sadistic abuse and coercive control inflicted by Mr. Mateo. Complex-PTSD is an aggravated form of PTSD, which results from prolonged or repetitive traumatic events and from which escape is difficult or impossible. Ms. Szlekovics's violent and unsafe childhood likely contributed to and/or exacerbated her Complex-PTSD symptoms. As Mr. Mateo's abuse of Ms. Szlekovics worsened over time, Ms. Szlekovics further developed traumatic bonds with Mr. Mateo, as described below.

13. The specific pattern of abuse that Mr. Mateo inflicted is important in understanding Ms. Szlekovics's traumatic symptoms.

14. First, from my evaluation of Ms. Szlekovics, it appears that Mr. Mateo kept Ms. Szlekovics in a constant state of fear by using extreme violence. For instance, Ms. Szlekovics informed me that Mr. Mateo routinely threatened her with a loaded gun and beat her so badly that she required medical attention (although she almost never sought it).

15. Second, from my evaluation of Ms. Szlekovics, it appears that, in addition to physical violence, Mr. Mateo was intimately aware of many of Ms. Szlekovics's vulnerabilities, and he psychologically abused her and manipulated and exploited her drug use, financial struggles, chaotic childhood, and desperate attempts to not end up a

caretaker to her mentally ill mother. By repeatedly demeaning Ms. Szlekovics (he called her names and referred to her as stupid and unlovable) and questioning her competence (among other things, he told her that she was good for nothing and a drug whore), Mr. Mateo crushed her already fragile self-esteem, eroded her autonomy and initiative, and created an artificial dependence on the relationship.

16. Third, my evaluation of Ms. Szlekovics leads me to understand that, when she was most desperate or considered leaving Mr. Mateo, he offered her affection—and, later, heroin. Ms. Szlekovics informed me that, after a beating, Mr. Mateo would often blame his violence on Ms. Szlekovics's drug use and then use sex to comfort her. This strategic deployment of comfort convinced Ms. Szlekovics that Mr. Mateo loved her and made her believe that, if she could figure out how to please him, he would cease the abuse. Over time, Ms. Szlekovics became more self-hating, more adoring of Mr. Mateo, more compliant with his wishes, and less resistant to his abuse.

17. It is my professional opinion with a reasonable degree of psychological certainty that this pattern of abuse destroyed Ms. Szlekovics's sense of self and her connection to reality. Mr. Mateo instilled terror, helplessness, and a belief that he had the power to both rescue Ms. Szlekovics and destroy her. At the same time, because of the unbearable and escalating abuse, Ms. Szlekovics experienced repeated transient dissociative states, which further damaged her sense of reality. She had numerous episodes in which her thoughts, feelings, and actions became disconnected from reality, including experiencing her own selfhood and the world around her as unreal and having difficulty distinguishing between reality and fantasy. Short periods of dissociative relief soon gave way to lengthy days during which Ms. Szlekovics described herself as

"wandering through an alternate reality" but knowing vaguely that "inside her head" and "outside her head" were two different worlds. This "doublethink" allowed Ms. Szlekovics to exist in a fantasy world in which Mr. Mateo loved and protected her—a fantasy that allowed her to survive a viciously violent relationship from which there appeared to be no escape.

18. Thus, it is my professional opinion with a reasonable degree of psychological certainty that the abuse (and dissociation) experienced by Ms. Szlekovics created a psychological state of dependency—referred to as Stockholm syndrome, trauma bonding, or paradoxical attachment.

19. While trauma bonding is rare in the general population, it has been well documented in religious cults, prisoners of war, severe domestic violence relationships, and situations involving labor and sexual servitude (such as prostitution). Ms. Szlekovics's traumatic symptoms included both an intense fear of Mr. Mateo and a cult-like obedience to him, believing him to be her savior and expressing gratitude for his violence and ill treatment of her and seeing that treatment as evidence of his unconditional love and her unworthiness.

20. Ms. Szlekovics's actions in October and November 1996 are comprehensible when viewed through a trauma lens.

21. Consistent with a diagnosis of Complex-PTSD and specifically viewed through a dissociative episode, and with full understanding of traumatic bonding, Ms. Szlekovics did not know who she was, where she was, or what was going on around her during the time period of the criminal episodes. Her seemingly passive and compliant behaviors are consistent not only with the inert, detached, and disconnected presentation

of a victim in a severe dissociative state, but also with someone who was "robotized" and had given up on life.

22. Ms. Szlekovics's lack of autonomy and apparent resignation are also consistent with captive trauma and the most severe phase of a trauma-bonded relationship. After years of abuse, Ms. Szlekovics had such a restricted range of autonomy that she was unable to act for herself, let alone on behalf of others besides Mr. Mateo.

23. Based on my evaluation of Ms. Szlekovics, it appears that, during the period that she was being held by Mr. Mateo, in October and November 1996, Ms. Szlekovics had lost the will to live and, with it, what little engagement she had with the world.

24. Ms. Szlekovics has also informed me that, during the relevant time period, she was physically restrained in Mr. Mateo's house and drugged by him, effectively nullifying her ability to act independently or escape.

25. Based on my evaluation of Ms. Szlekovics, it appears that the chronic domestic abuse inflicted on Ms. Szlekovics, compounded by a deeply traumatic childhood, led to her development of Complex-PTSD by the time of the criminal episode. Her mental state at that time was marked by severe and frequent episodes of disconnection and detachment of thoughts, feelings, and self-awareness from reality. Based on my evaluation of Ms. Szlekovics and documentary evidence from around the time of the crimes and the trial, it appears that she would "black out" or "zone out" and feel herself slowly detaching from or not noticing her surroundings and losing her awareness of herself. As Mr. Mateo's abuse of Ms. Szlekovics escalated, her symptoms

and despair increased. Her beliefs that she had no future, her inability to plan, and her seeming lack of initiative are commonly seen in victims of protracted interpersonal trauma. Rather than reflecting passivity, her paralysis is properly viewed within a trauma framework as the product of a breakdown in motivational systems that are linked to emotional systems. In other words, chronic trauma damages one's ability to regulate feeling, and when a victim loses all hope, there can be no initiative. Mr. Mateo fully exploited the breakdown in Ms. Szlekovics's motivational systems to keep her addicted and dependent on him.

26. Ms. Szlekovics became trapped in a vicious cycle of drugs and dissociation, both of which protected her temporarily from reliving her chronic complex-PTSD symptoms and the existential emptiness she felt when she was not high. However, because of early trauma and chronic adult dissociation, Ms. Szlekovics felt constantly numb and empty. Dissociation separates the mind and body and eventually leads to emotional dysregulation marked by emptiness and feeling depersonalized and distant from the world around oneself, even when not actively dissociating. Ms. Szlekovics's constant use of dissociation as a child facilitated her ability to remain with an abuser by worsening her emotional regulation capabilities. Often, Ms. Szlekovics's intense fear of Mr. Mateo, coupled with numbness, drove her back to use drugs, perpetuating the trauma cycle.

27. As a result, it is my professional opinion with a reasonable degree of psychological certainty that Ms. Szlekovics's symptoms are best explained by Complex-PTSD and trauma bonding. The criteria endorsed are a history of totalitarian control for a period of several years, alterations in affect regulation, alterations in consciousness,

alterations in self-perception, alteration in perception of Mr. Mateo, alterations in relationships with others, and alterations in systems of meaning.

**State of Knowledge about Traumatic Bonding at the Time of Ms. Szlekovics's Convictions**

28. It is also my professional opinion that, in 1996 and 1997, the state of psychological science, particularly as it pertained to domestic violence, Complex-PTSD, memory, and trauma bonding, was undeveloped. At that time, the forensic examiners who investigated Monica's conduct would not have had easy access to the rich sources of research and data that are now available and that permit a more nuanced examination of the circumstances of Ms. Szlekovics's crimes. Further, at that time, few forensic examiners specialized in trauma and domestic violence as the field of forensic psychology had not yet begun to consider the impact of victimization, and indeed, even today, traditional forensic examiners are usually not trained to understand trauma or victimization.

29. The concept of trauma bonding was first introduced in the psychological literature in an article by Donald G. Dutton and S.L. Painter titled *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, which was published in 1981. The article is attached as Exhibit A to this declaration. However, the concept remained within the field of clinical psychology and known primarily to trauma experts following the initial publication of this article. The topic was studied by a small group of specialized psychologists, led by Dutton and Painter, but did not gain significant traction in forensic psychological literature for several decades.

30. In 1993, Dutton and Painter published a follow-up articled titled *Emotional Attachments in Abuse Relationships: A Test of Traumatic Bonding Theory*. The article is attached as Exhibit B to this declaration. The theory of traumatic bonding had not undergone significant developments, modifications, or expansions since the publication of Dutton and Painter's initial article in 1981. The same phenomenon came to pass with respect to their 1993 article. While a groundbreaking article within domestic violence and other trauma-relevant fields, it was not widely noticed outside of highly specialized circles and did not generate significant citations or follow-on research for several years within forensic circles.

31. In the past decade, psychologists' understanding of trauma bonding has grown significantly and continues to grow. In 2011, Abby Stein published an article titled *Engendered Self-States: Dissociated Affect, Social Discourse, and the Forfeiture of Agency in Battered Women*, which explored the psychological development of victim self-states and contributed to academic understanding of trauma bonding. I co-authored articles from 2015 and 2017—*Trauma-Coerced Bonding and Victims of Sex Trafficking: Where Do We Go from Here?* and *"No Voice or Vote": Trauma-Coerced Attachment in Victims of Sex Trafficking*—have further advanced knowledge of traumatic bonding.

32. Collectively, these academic advances over the past decade have converted the theory of traumatic bonding—little known and even less understood at the time of Ms. Szlekovics's trial—into a broadly accepted theory that helps explain patterns of behavior in intimate partner violence relationships. Importantly, these theories and supporting data are entering the forensic world.

33. It is thus my professional opinion that, when Ms. Szlekovics was tried in 1997, forensic and generally trained psychologists—let alone lawyers and other non-specialists outside the field—had minimal understanding of traumatic bonding and its permutations or implications. Today, psychologists' understanding of the phenomenon has increased dramatically and is continuing to advance rapidly in light of ongoing research and analysis.

Chitra Raghavan

Sworn to before me this
14th day of February, 2020.

Edgar Bernard Halford
Notary Public

EDGAR BERNARD HALFORD
Notary Public, State of New York
No. 01HA6361259
Qualified in New York County
Commission Expires July 3, 2021

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# *Trauma-coerced* Bonding and Victims of Sex Trafficking: Where do we go from here?

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***ABSTRACT:*** *Although well documented across multiple abusive contexts, trauma bonding (here referred to as trauma-coerced bonding or trauma-coerced attachment) has yet to be systematically studied within the context of sex trafficking. The theory surrounding trauma-coerced bonding posits that victims of abuse can form powerful emotional attachments to their abusers, as a result of a complex interaction of abusive control dynamics, exploitation of power imbalances, and intermittent positive and negative behavior. The attachment is marked by a shift in internal reality, whereby the victim begins to lose her sense of self, adopts the worldview of the abuser, and takes responsibility for the abuse. We argue that first, trauma bonding be reconceptualized as trauma-coerced attachment to adequately reflect the abusive dynamics at play. Second, we highlight that relationships of sex-trafficking victims often involve complex dichotomies (e.g., romantic and coerced with enforcers and competitive and violent with peers) and warrant individual consideration. Finally, we suggest that the unique role of sex within this victim population be explored using an integrated mind-body approach. Effective victim outreach begins with a comprehensive and integrative understanding of victims' personal experiences, as well as their physical and psychological responses to abusive environments. Directions for future research are offered.*

**Key words:** *Victimization, sex trafficking, prostitution, trauma, abuse, control, coercion*

Victims of abuse are vulnerable to a wide range of physical, sexual, and emotional consequences that can affect a multitude of domains including, somatic, cognitive, affective, behavioral, and relational functioning (Herman, 1992a; Matthews, 2015). The trauma literature offers explanations for these consequences and has broadened our understanding of victim psychology. However, despite abusive relationships being of particular interest to scholars, there is still much to learn about the complex dynamics and consequences—especially when those consequences involve victim pathology and emotional or internal responses to their continually abusive environments. One particular area of the trauma literature—trauma bonding (henceforth to be referred to as *trauma-coerced attachment* or *trauma-coerced bonds*)—remains underdeveloped. The goal of this work is to offer an explanation of *trauma-coerced attachment* and provide the theoretical underpinnings for furthering our understanding of this traumatic outcome within sex-trafficking contexts. Specific suggestions concerning systematic study (e.g., adopting a coercion framework) and relevant areas of inquiry (e.g., hybrid relationships and the role of sex) are provided.

*Trauma-coerced attachment* is hypothesized to be a dynamic, cyclical state in which victims form a powerful emotional attachment to their abusive partners (Dutton & Painter, 1981; Dutton & Painter, 1993; Herman, 1992a; Romero, 1985). What has been suggested of the pathways to these bonds includes a complex interaction of: (i) abusive control dynamics, (ii) the exploitation of power imbalances within the relationship, and (iii) intermittency in the doling of punishment and reward. While there are extensive data supporting this form of traumatic outcome (De Fabrique et al., 2007; Dutton & Painter, 1981; Dutton & Painter, 1993; Goddard & Stanley, 1994; Romero, 1985), systematic empirical data for how these bonds are formed, maintained, and subsequently sundered is lacking.

Despite this, the literature does offer a rich body of observational and clinical data drawn from case studies as varied as prisoners of war (Romero, 1985), hostages (De Fabrique, Van Hasselt, Vecchi, & Romano, 2007), child abuse victims (Goddard & Stanley, 1994), and intimate partners (Dutton & Painter, 1981; Dutton & Painter, 1993; Romero, 1985). These data, which are drawn from many different countries across the western world and include both men and women, support these contentions where victims who are subjected to these unpredictable, tense, and abusive tactics experience a host of characterological and affective consequences (Cantor & Price, 2007). These observed changes, for victims who form *trauma-coerced bonds*, are marked by a shift in their internal reality and change in cognition because the abuser's persistent and invasive tactics have successfully deteriorated the victim's sense of self (Dutton & Painter, 1981; Dutton & Painter, 1993; Herman, 1992a; Herman, 1992b; Romero, 1985).

Herman (1992a) describes this deterioration of the self, "All the structures of the self—the image of the body, the internalized images of others, and the values and ideals that lend a sense of coherence and purpose—are invaded and systematically broken down" (p. 385). The victim surrenders her will completely to her abuser. Herman (1992a) offers a useful analogy in the statements of women who have experienced one isolated traumatic event (e.g., "I am not my self anymore"), as compared to those who are exposed to chronic abuse and repeated traumatic experiences (e.g., "I do not have a self"). As a consequence of this cognitive shift and lost sense of self and meaning, the victim is forced to adopt a new worldview entirely dependent on the abuser's perspective. She subsequently begins to take blame and responsibility for the abuse; she idealizes her abuser and strives to please him (Dutton & Painter, 1981; Dutton & Painter, 1993; Herman, 1992a; Mills, 1985).

While the construct of *trauma-coerced* bonding has been explored across different abusive relationships, one important abusive context—sex trafficking[1]—have been less well documented

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[1]As defined by The Trafficking Victim Protections Act, sex trafficking of persons is "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, in which the commercial sex

in research. In part, this neglect is due to the relative recency of research in sex-trafficking contexts. Sex trafficking has been recognized as a significant domestic and international social problem only in the last ten years or so. This neglect could also be due, in part, to the complexity of the phenomenon and the confusing presentation of its outcomes. That is, *trauma-coerced bonds* are marked by abuse, control, and dependency, but also by love, admiration, and gratefulness. As a consequence, these outcomes of *trauma-coerced attachment* have been misconceptualized as masochistic tendencies in the victim (Freud, 1924; Stein, 2011). Finally, the lack of a coherent theoretical framework has also discouraged researchers because *trauma-coerced* bonding may be misviewed as the latest flavor of the day due to the current domestic and international relevance of sex trafficking, rather than as a legitimate and concerning response to repeated traumatic experiences.

Trafficked victims exhibit many familiar consequences of chronic victimization. Media and clinical reports note that sex-trafficking victims often bear the legal consequences for their abusers. For example, victims often refuse to testify in court against their abusers even if it means the victims themselves will face charges. Many of these women even testify in defense of their traffickers despite evidence of long histories of abuse and exploitation. For example, a recently publicized case involved the victims testifying in court to being well taken care of and treated affectionately by their enforcer, despite wiretap evidence with threats of "beatings" if adequate money was not made (Crimesider Staff, 2013). Victims' refusal to testify is viewed negatively as being complicit in their own abuse or guilty of trafficking themselves. Indeed, several cases have been reported where prosecutors have charge trafficked women with being traffickers themselves because of their roles vis a vis the trafficker (NBC, 2015).

To further the understanding of *trauma-coerced bonds* in sex trafficked women, we make a number of crucial suggestions. First, we suggest that *trauma-coerced* bonding should be redefined from its base—presenting a grounded theory that reflects the nature of a coerced attachment, rather than suggests a masochistic victim. Thus, we propose reframing the traumatic nature of the abuse as arising from chronic coercive control, a concept that recently garnered much interest in the intimate partner violence literature but has not been extended to trafficking. Second, we propose that the relationships of sex-trafficked victims and their abusers warrant individual attention within the inquiry of *trauma-coerced* bonding due to: the hybrid nature (e.g., romantic and intimate, yet coerced-working relationship) and the complexity of their roles with other victims (e.g., abusive and competitive, yet isolated from social support together).

Third, we introduce the unique role of sex within this victim population and suggest that its use both within the relationship and outside of it warrants specific exploration. We conclude with suggested future directions for researchers to begin the systematic and empirical study of this traumatic outcome.

## RECONCEPTUALIZING FRAMEWORKS OF TRAUMA BONDING AS *Trauma-coerced attachment*

The first theoretical step researchers should consider is to reframe *trauma-coerced attachment* as a traumatic response to a terrifying chronic stressor rather than as a dysfunctional attachment that reflects masochism, weakness, or social vulnerability in the victim. Such a framework is not new and undergirds the conceptualization of complex PTSD (Herman, 1992b). However, the nature of a prolonged terrifying interpersonal trauma has not been well specified in trafficked contexts. Accordingly, we suggest that using the concept of coercive control—drawn from the intimate partner violence literature—may be helpful in defining the prolonged traumatic experiences that trafficked women often have.

Coercive controlling behaviors have been well documented in intimate partner relationships (Stark, 2007). In using coercion, the abuser attempts to entrap the victim by systematically stripping her of her decision-making ability, forcing her to believe in his omnipotence, and isolating her from any validation of the abuse (Johnson, 1995; Johnson, 2006; Stark, 2007). The relationship between a sex-trafficking victim and her abuser mirrors the power imbalances and abusive control dynamics within an intimate partnership (Herman, 1992a). This may be particularly true when the trafficker is also romantically involved with the victim, a point we take up below.

Common tactics used within coercive control are: microregulation, surveillance, threats, intimidation, humiliation, and isolation. These tactics are applied continuously and often permeate multiple domains of the victim's life, which can include but are not limited to: finances, children, dress, employment, family, and friends (Dutton & Goodman, 2005; Johnson, 1995; Lehmann, Simmons, & Pillai, 2010). Although this control framework is informed by the intimate partner violence literature, the potential dual or hybrid role of the relationships in the sex-trafficking context (both lover and trafficker, developed below) offer new avenues of control dynamics to consider (e.g., the increased legitimacy of the financial aspect or the use of other sex-trafficked women to humiliate and create competition).

The coercive control framework can also help shed light on the confusion concerning the apparent absence of physical violence in many trafficked relationships suggesting that the relationship between the trafficker and the victim may not be so bad after all. However, successful coercive control creates an environment of fear, dread, and obedience even in the absence of physical violence (Beck & Raghavan, 2010; Dutton & Goodman, 2005; Romero, 1985; Stark, 2007). The invisibility of the power imbalance may, in part, be responsible for the flummoxed reaction law enforcement and the public have when confronting sex-trafficked victims. If there is no physical abuse, or if it is infrequent, then why is commercial sex coerced? Addressing the invisibility issue, researchers who study coercion have long argued that abuse is not a simple addition of the frequency and severity of physical abuse and that such a concrete framework has failed to capture the true power imbalances in an abusive relationship (Raghavan, Swan, Snow, & Mazure, 2005; Stark, 2006; Stark, 2007). Rather, it is that traumatic entrapment is created by a complex interaction of exploited power imbalances, physical and sexual abuse, humiliation, dehumanization, as well as vague and unpredictable threats, which are clearly specified within coercive controlling behaviors.

Similar to any prolonged interpersonal trauma, including torture and abduction, the traumatic outcomes of coercive control include symptoms that resemble classic post-traumatic stress disorder such as intrusive memories of abuse, hyperarousal, and flashbacks (Zoellner et al., 2013). In addition, the prolonged coercion also results in a set of symptoms that distort the victim's view of herself and her relationship to the abuser (Dutton & Painter, 1993; Herman, 1992a; Herman, 1992b). It is this self-relational component which is key to understanding *trauma-coerced attachment*. Over time, these coercive tactics create an environment of psychological captivity for the victim marked by powerlessness and uncertainty, but also love and idolization (Cantor & Price, 2007; Herman, 1992a; Herman, 1992b).

Viewing these contradictory feelings as a predictable traumatic response, Cantor and Price (2007) propose that these positive feelings the victim experiences are a direct result of: "(i) perceived threat to one's physical or psychological survival at the hands of an abuser(s); (ii) perceived small kindnesses from the abuser to the victim; (iii)

act is induced by force, fraud, or coercion. Or in which the person induced to perform such act has not attained 18 years of age."

isolation from perspectives other than those of the abuser; and (iv) the inescapability of the situation" and are used as a coping and defense mechanism to trauma (p. 379). To this end, at the risk of adding more terminology to a confusing field, we have adopted the term *trauma-coerced attachment* and/or *trauma-coerced bonds* rather than trauma bonding. The latter suggests that the woman is in some way responsible for her bond to the abuser, whereas the former helps to adequately portray the attachment as a product of the abuser's deliberate tactics.

In sum, we suggest that *trauma-coerced a have been less well documented ttachment* is a traumatic disorder which results from chronic interpersonal trauma. The interpersonal trauma is most efficiently captured by the concept of coercive control, which has been well studied in intimate partner violence contexts. By reframing it thus and extending it to sex-trafficking contexts, this traumatic outcome and its presentation in and consequences for victims lends itself to systematic and comprehensive empirical study.

## COMPLEX RELATIONSHIPS IN SEX-TRAFFICKING CONTEXTS—THE ROLE OF TRAFFICKERS AND OTHER WOMEN

Sex-trafficking victims often are romantically involved with their traffickers and in some cases, have children with them. At the same time, they engage in commercial sex with numerous partners in the context of coercion and a seriously impaired degree of agency (Giobbe, 1993; Matthews, 2015; Monto, 2004). As a consequence, in addition to experiencing the abusive tactics present in intimate relationships (e.g., threats, intimidation, isolation, etc.), they are also subject to additional tactics such as, pressure to pay off large debts, threats concerning citizenship status, and terrorization about exposing their work to family and friends (Matthews, 2015).

This hybrid relationship leads to a particular complication, which involves the distinct difference between the way the victim views her abuser (i.e., a lover) and the way the criminal justice system sees him (i.e., a criminal). From the perspective of the victim, her abuser is a romantic companion—one to whom she is emotionally loyal and in some cases, one with whom she has children. In certain relationships, the romantic component is coercively introduced to facilitate control. This hybrid relationship is not always apparent because the massive power imbalance that undergirds it is carefully concealed by the abuser (Herman, 1992b). The obstacles the victim faces are then compounded with not only those she faces as a coerced sex worker, but also those she faces as an intimate partner in an abusive relationship (e.g., legal ties, fear of loneliness, economic dependence, loyalty, and social support; Anderson & Saunders, 2003; Iverson et al., 2013; Raghavan et al., 2005). When examining the relationship of trafficked women to their trafficker, clinicians and researchers should strive to define the relationship first and foremost from the victim's point of view, rather than a legal one. Such a viewpoint will provide better insight to her behaviors and coerced bonds.

A second area of relationships, which is crucial to consider are those of the trafficked women to other women who work beside her (if her working context involves multiple women). These peer relationships mirror those of trafficker to victim and are marked by competition, abuse, and exploitation, on the one hand, but also often constitute the only social support group women have. The competition may take form of newer younger women and new favorites threaten to the victim's position and whom the trafficker may actively offer as threatening. The older favorite may be asked to take an active role in "breaking" in the new woman, disciplining her, and humiliating her when she brings in less money or does not meet the expected earnings. This can lead to personal criminal charges reflecting violence and abuse (JohnTV, 2014). The result of this tangled net of power imbalance—powerful trafficker and fluctuating power among trafficked victims—has not been seriously considered within the trauma framework.

How might these more vertical power relationships compound the trafficked victim's psychological entrapment and *trauma-coerced* bond to the trafficker? First, the presence of an unreliable yet desperately needed social group undermines further the possibility of stable human attachment. Thus, the traumatic-coerced attachment may grow more powerfully because all other relationships are marked by mistrust and betrayal. Two, when asked to exploit, abuse, and punish other women, trafficked victims are being asked to violate their own moral stance to an extreme (Herman, 1992a). This betrayal of values is considered key to *trauma-coerced bonds*. That is, these victims are not only experiencing personal abuse, but also inflicting abuse in the sacrifice of others. This creates a complete violation of moral standards marked by a final surrender of will, autonomy, and the self—it often leads to shame, self-hatred, and ultimately, identification with the abuser as a means of coping and protection from their 'wrong doing' (Herman, 1992a; Cantor & Price, 2007).

The phenomenon of *trauma-coerced attachment* needs to be explored and understood specifically within this context of complex hierarchical and vertical relationships, rather than a single dominant relationship. The hybrid relationships (i.e., both that of a coerced and exploited working relationship and an intimate partnership) and complex peer dynamics (i.e., only form of social support, yet marked by competition and abuse) create convoluted interpersonal interactions and have negative consequences of the victim's selfhood and eventual *trauma-coerced* bond. Again, adopting the coercive control framework to understand these hybrid relationships within the sex-trafficking context can provide a means of systematic and deliberate empirical study.

### Role of Sex

A third area of inquiry is sex. Ironically, the psychological role of having sex with paying clients has been neglected in the study of trafficking other than determining what is considered coerced and if there is violence involved. However, the role of sex in commercial sex is much more complex. First, those entering commercial sex often have extensive histories of sexual abuse and trauma (Matthews, 2015; Monto, 2004). They frequently enter into their coerced working and intimate relationships with a poor knowledge of healthy sexuality (Matthews, 2015). Often they begin commercial sex from places of desperation (e.g., economic desolation or immigration status) or fear and coercion (e.g., threatened violence from a partner or pimp). The subsequent level of "consent" these women exert over their sexual agency is seriously impaired—at best, and completely coerced—at worst (Matthews, 2015; Monto, 2004).

Women with sexual abuse histories can and do use sex to feel powerful (Marcus et al., 2014). The very fact that men are willing to pay for their bodies creates a momentary empowerment. However, such empowerment can result in dangerous overreliance on the body and obscuring the original need to compulsively fend off feelings of shame and degradation. Thus, at the first level, "consent" to have sex may not actually reflect the qualitative experience of the actual sex act. Under such conditions (conscious willingness but unconscious dread or fear or use of sex to repel powerlessness) and the repeated and consistent violation of personal bodily autonomy, regardless of "voluntary consent" can lead to a host of negative outcomes. These include the routine use of dissociation to tolerate sex with paying clients, drugs to induce the dissociation or to reintegrate the mind and body, and a cycle of shame and self-hatred punctuated by empowerment (Herman, 1992a). All of these outcomes likely enforce, maintain, and or strengthen *trauma-coerced bonds*, or contribute to such distress that the bonds cannot be severed. As such, the role of sex—separate from a moral stance associated with selling sex—should be explored in more depth.

In furthering understanding trauma-enforced attachment, researchers should return to understanding that the study of sex in trafficking contexts has been done with an implicit mind-body divide. Did she say yes? In that case, the body cannot be hurt. Was she hit or raped? No? In that case, the mind was not injured. These are false dichotomies. This Cartesian rupture between mind and body hinders our understanding of the human experience, particularly within the complex context of sex trafficking. We recommend that instead of these concrete benchmarks that obscure the interconnection between body experience and emotional functioning, researchers should begin with the assumption that the body is not separate from the mind. The concept of embodiment has gained popularity as a key paradigm within interdisciplinary research in psychology, psychiatry, and neuroscience (Fuchs & Schlimme, 2009). Within the embodiment paradigm, origins of cognitive and emotive processes are understood as embedded within an individual's sensory-motor experience (Corazon, 2011; Fuchs & Schlimme, 2009; Johnson, 2008). The flow of human experience and emotion is rooted in the body's engagement with, and experience of, the people, places, and activities of everyday life—the human experience cannot be separated from how the body feels in its environment (Fuchs & Schlimme, 2009).

Further, the body is evolutionarily designed to be an instrument of mutual reciprocated communication and desire, to provide intimacy whether briefly in passionate temporary encounters, or more continuously as is the case of more committed relationships. If we agree with this evolutionary premise, how do we as living organisms tolerate repeated, regular, unreciprocated, imbalanced sexual contact divorced from the experience of people, place, and activity? Would such an imbalance create traumatic outcomes related to violation of autonomy? How are these outcomes mitigated by consent or non consent? Are some women able to protect themselves from dissociation because they do not feel violated? Are these women in the majority or minority? How is consent mitigated by histories of abuse and the resulting power imbalance?

Asking these questions while embracing an embodiment paradigm will allow for deeper exploration of the victims' subjective experience in addition to the relationships with their environment. Through such an exploration, we may discover that victims of sex trafficking experience what Fuchs & Schlimme (2009) term "disturbances of embodiment" that affect sense of self, body image, and body awareness after prolonged abuse. To attempt to live with the abuse, victims of sex trafficking may disintegrate mind and body, thus experiencing "disembodiment," or detachment from self and body. Because the lived body unites the mind and brain (Fuchs & Schlimme, 2009), this can have negative effects on cognition, emotion, and social interaction, which may shed light on the formation and consequences of *trauma-coerced* bonding.

Exploring each of these questions will aid us in understanding not only a more diverse range of traumatic outcomes, but how these traumatic disorders can affect those involved in the sex-trafficking context specifically. Thus, the complex, yet crucial role of sex both out of and within the relationship warrants further inquiry. As researchers begin to examine trauma-induced attachment within the sex-trafficking context, the role of sex should be explored systematically as well.

### Non-Binary Victimhood

In the past, 'victimhood' has wrongfully been conceptualized through a binary identification—true victim versus not a victim at all. Because many victims of sex trafficking are vulnerable and coerced but not immediately physically abused, they are defined as "voluntary" or "consenting," and thus subject to criminal charges and deportation, among other consequences (Matthews, 2015). However, the reality for victims of sex trafficking is much more complex. They are subject to extensive physical and emotional abuse and a host of sexual, physical, and emotional issues. In turn, many of them utilize unhealthy coping mechanisms (e.g. drug use) to offset these negative experiences (Zimmerman et al., 2006). They also face a host of traumatic outcomes, including: dissociation, somatization, changes in affect and identity, and emotional dysregulation (Herman, 1992a; Herman, 1992b; Matthews, 2015).

Accordingly, the conceptualization of "victimhood" should involve more complex considerations than a binary identification system can offer. Further, understanding victim status as affected by not only physical abuse or "captivity," but also by exploited power imbalances can enrich researchers' and clinicians' understanding of victim experiences. By repeated exploitation of her subordinate position (in concert with his other abusive behaviors), the abuser makes himself the most powerful person in her life—both physically and emotionally. Over time, her psychology reflects this power differential leaving her uncertain, lost, fearful, and entrapped (Herman, 1992a).

## FUTURE DIRECTIONS

In conclusion, we suggest reframing the conceptualization of trauma bonding to one that reflects a *trauma-coerced attachment* or bond. Adopting the framework of coercive control can be helpful in fostering our understanding of the pathways to the complex outcome of these traumatic experiences and lends its inquiry to systematic study. We also proposed that the hybrid and complex relationships of victims of sex trafficking warrant individual attention due to the additional burdens they place on these victims. Finally, we suggested that the role of sex within relationships and the working context be examined using an embodied united mind-body framework, rather than a Cartesian split as is currently favored.

Researchers and clinicians are beginning to make strides toward this dynamic understanding of traumatic outcomes. The DSM-5 has expanded its PTSD diagnosis (Friedman, 2015; Zoellner et al., 2013) and is beginning to recognize the importance of broken and abusive relationships as a function of trauma. Specifically, symptomology of self-blame, pervasive negative mood, and shame are offered in the new PTSD criteria and a rich range of traumatic outcomes (e.g., attachment, love, idolization) is central to complex PTSD, and will be listed in the ICD-11 (Friedman, 2015). However, clinical considerations of traumatic experiences still fail to specify the full range of traumatic outcomes (e.g., attachment, love, idolization). In order to fully understand the range of possible outcomes to chronic and repeated abuse or trauma, the current gaps in the literature need systematic and empirical exploration.

Systematic inquiry into *trauma-coerced attachment* is not an easy undertaking, despite the prevalence of domestic and international victims. Many of the outcomes for victims are abstract and difficult to conceptualize and measure (e.g., cognitive shift and diminished sense of self). Further, this population is difficult to access when they are currently in the lifestyle and are usually interviewed several years after exiting. Empirical inquiry post-relationship may yield to missing pieces of information or details about traumatic experiences and outcomes. Therefore, researchers must explore these outcomes and develop systematic and cohesive forms of measurement in order to offer a comprehensive understanding of their role within trauma-induced attachment and their presentation in victims who experience them.

Future directions for research in this area should aim to reintroduce and clarify the concept of *trauma-coerced attachment* within the trauma literature. Further aims should include comparing the presentation of these attachments in victims of sex trafficking to other forms of victimization (e.g., intimate partners, childhood sexual abuse, etc.) in order to more clearly grasp what commonalities these

relationships share and also how they differ. More specifically, little is known about the process of forming the attachment or bond—is the process rigid or does it fluctuate? Further, why do some women bond and others do not? What level of awareness do the victims have over their cognitive shift? How does the dual role of intimate partners and coerced working relationships and the nature of sex work, which involves the body, affect the presentation of the *trauma-coerced attachment* and the experiences had by the sex-trafficking victim? Lastly, prevention and intervention strategies should be explored so that researchers, clinicians, and the criminal justice system are better equipped to successfully meet the needs of these victims.

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# Looking Beyond Domestic Violence: Policing Coercive Control

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*The current policy, legal, and criminal justice response to partner abuse is based on a "violent incident model" that equates abuse with discrete assaults and gauges severity by the degree of injury inflicted or threatened. Although application of this model by police has reduced serious and fatal partner violence, it has not significantly improved the long-term prospects of battered women. This article argues that the limited effectiveness of the criminal justice response stems less from failures in policing than from a large gap that separates the violent incident model guiding the current response from the pattern of coercive control that drives most victims to seek police or other outside assistance. This article identifies the flawed assumptions that underlie the violent incident model, shows why application of this model by law enforcement has failed abused women, describes the pattern of coercive control research shows to be typical of abusive relationships, and outlines how adapting the coercive control model would improve the police response.*

*KEYWORDS Coercive control, violence model, battered women, entrapment, micromanagement*

## INTRODUCTION

Since shortly after the first battered women's shelters opened in the United States in the 1970s, the movement to stem partner abuse has relied heavily on a criminal justice approach. Early feminists saw male violence as one among other important means used to secure male domination and perpetuate sexual inequalities in society as a whole. By the early 1980s, however, "ending violence" had become a primary goal of the advocacy movement, and attention had shifted from economic and political sources of inequality, such as discrimination in employment and wages, to policing individual

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acts of power and control. The new victim–offender economy highlighted physical injuries and other concrete harms and demanded protection and punishment, goals that quickly moved the courts and criminal justice system to the center of the societal response to partner abuse. Based on an analogy between partner abuse and assaults by strangers, the advocacy movement demanded that law enforcement provide battered women with the "equal protection" they were guaranteed by the 14th Amendment to the U.S. Constitution. This approach was enormously successful in winning policy reforms: By the late 1990s, federal and state law defined violence by partners as a criminal offense; provided for emergency as well as longer-term Protection from Abuse Orders (PFAs) that restricted a respondent's access to victims and their children as well as to firearms; and funded a range of programs to provide shelter, legal assistance, and other supports for victims and counseling for offenders through Batterer Intervention programs (BIPs). Following federal guidance, states also made arrest mandatory or the preferred response to domestic violence offenses, including violations of Protection Orders and protected police from liability if they followed this policy. The Violence Against Women Act (VAWA) and other federal and state funding streams have consistently joined grants for shelters to money to enhance the response by police and the courts, including the creation of specialized responses by police, prosecutors, and the courts (Buzawa, Buzawa, & Stark, 2012).

At the root of these reforms is a model that equates partner abuse with discrete assaults or threats, what I call the "violent incident model." Domestic violence laws target discrete assaults/threats and carry the implication, only occasionally spelled out in criminal statutes or service protocols, that the severity of abuse can be gauged by applying a calculus of physical harms to these incidents. Research shows that the level of harm they observe is among the most important factors that determine how police respond to domestic violence (Buzawa, Buzawa, & Stark, 2012). The same focus on violent incidents frames the response of other services: Community-based programs like shelters prioritize "safety" for victims and "accountability" for perpetrators; BIPs seek to "end the violence"; public education campaigns highlight dramatic injuries or fatalities; and child welfare agencies emphasize how children are harmed by "exposure to violence." PFAs are predicated on the belief that victims and offenders have sufficient time "between" violent incidents (called "time to violence" in the treatment literature) to exercise their decisional autonomy to "leave" or stop the abuse. Assessment instruments designed to predict "dangerousness" consider few abusive tactics other than physical and sexual violence (Stark, 2012).

The adaptation of the violent incident model is a significant improvement over the past, when few instances of domestic violence led to any intervention, let alone an arrest. Arrests of abusers have skyrocketed, and, in many jurisdictions, the proportion of domestic violence complaints that result in arrest is similar to the proportion of arrests in other crimes. There is also

evidence that more aggressive policing has contributed to a dramatic drop in serious and fatal injury in partner abuse cases, a major accomplishment.

Despite the contribution of policing to reductions in the severest forms of partner violence, arrest and court protections appear to have had relatively little impact on the long-run prospects of victims. As we shall see, this is because the hallmarks of violence in abuse cases are its frequency and duration, not its severity. Thus, when the response is gauged to severe violent acts, most abuse goes either unrecognized or unpunished. Moreover, in a majority of these cases, tactics other than violence are the most salient and consequential. Indeed, focusing on the most serious violent acts may have contributed to a sharp rise in reported rates of low-level physical abuse, so that overall levels of partner violence are about the same today as they were in the early 1970s (Stark, 2007, 2012). Because calling police, seeking shelter, and getting a PFA afford women an alternative to responding violently to abuse of themselves or their children, many fewer abuse victims kill abusive men than was the case 40 years ago. By contrast, the number of female victims killed by abusers has dropped much more slowly, in part because the safety net designed to protect women from violence has failed to effectively deny abusers access to their partners.

In this article, I argue that the limited effectiveness of the criminal justice response stems less from failures in policing than from the fact that current laws, training, and procedures are based on a violent incident model of abuse that bears little resemblance to the forms of oppression that drive most abused women to require outside assistance. Domestic violence laws target discrete threats and assaults. However, most abused women have being subjected to a pattern of sexual mastery that includes tactics to isolate, degrade, exploit, and control them as well as to frighten them or hurt them physically. This pattern has been variously termed "psychological or emotional abuse," "patriarchal or intimate terrorism" (Johnson, 2008; Tolman, 1992) and "coercive control" (Stark, 2007), the term I prefer. This gap between what the law defines as the crime of domestic violence and the actual tactics abusers use to subjugate their partners severely limits the efficacy of even the most dedicated and well-trained police.

Some of the tactics used in coercive control are criminal offenses, such as stalking, while others are crimes only if committed against strangers, such as economic exploitation or sexual coercion. But most of the tactics abusers use in coercive control have no legal standing, are rarely identified with abuse, and are almost never targeted by police or the courts. These tactics include forms of constraint and the monitoring and/or regulation of commonplace activities of daily living, particularly those associated with women's default roles as mothers, homemakers, and sexual partners, and run the gamut from their access to money, food, and transport to how they dress, clean, cook, or perform sexually. In addition to limiting the effectiveness of police intervention, adapting the violent incident model of

abuse masks its true scope as well as its most devastating consequences. No amount of reforms in how police administer the violent incident model can fully correct for the failure of laws to criminalize the coercive and controlling dimensions of abuse. Nevertheless, as we await changes in law and policy to incorporate coercive control, the police response can be greatly improved simply by learning to recognize coercive control and adapt their decision making accordingly.

The article is divided into three parts. Part I identifies the shortcomings of the violence model as a framework for the police response to partner abuse. I contrast its emphasis on discrete assaults with evidence showing that frequent, low-level violence is the hallmark of abuse and that its cumulative effects are the proper basis for assessment, not the effects of particular incidents. The analogy of partner to stranger assault misses the historical nature of partner abuse, the fact that it is typically ongoing rather than comprised of discrete incidents, fragments and trivializes the oppression involved, and supports perceptions and expectations of victims that often exacerbate their predicament. The violence model also ignores the multiple nonviolent tactics typical of most cases and that are as often the predicate to violence as its sequelae.

Part II outlines the alternative model of coercive control, documents the relative prevalence of its various components, and shows their significance. There is no validated measure of coercive control. However, compelling evidence shows that the presence of control tactics predicts a range of harms, including sexual, physical, and fatal violence, far better than prior assault (Beck & Raghavan, 2010; Glass, Manganello, & Cambell, 2004). The level of control an offender is exercising is a far better way to ration scarce police resources than the level of violence.

Part III addresses the implications for improved policing of adapting the coercive control model. Offenders use coercive control to establish a pattern of nonreciprocal authority (domination) by replacing a partner's capacity for independent and self-interested decision making with nonvoluntary dependence (subordination). To this extent, coercive control has more in common with capture crimes such as kidnapping or hostage taking than with conventional assaults. As with capture crimes as well, the "wrong" of coercive control involves depriving partners of their liberty, dignity, and equality, as well as violating their physical integrity. Because it insults fundamental liberties, coercive control constitutes what the former prosecutor Michele Dempsey (2009) calls "domestic violence in the strong sense." These insults also set the aim of criminal justice intervention, to restore the victim's basic freedoms, including her capacity for decision making wherever and however it has been quashed. As with other cases involving subjugated adults, the police response involves a complex mix of authoritative decision making (to arrest, aggressively pursue violations of Protection Orders, etc.) and respect for the dignity and rationality of the victim's decision making.

This article emphasizes the "technology" of coercive control and its major experiential consequence, a hostage-like condition of *entrapment* that often includes many of the same physical and psychological consequences suffered by victims of other types of assault. What distinguishes coercive control from simple domestic violence and most stranger assaults is that the victim's vulnerability to future harm is a function of her objective or structural subordination rather than of the level of physical violence. The nature of policing necessitates focusing on what perpetrators do *to* their partners. But the larger significance of coercive control derives from what abusers prevent women from doing for themselves. David Adams (1988), a founder of an early BIP, defined abuse as including any act "that causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to be afraid . . . regardless of whether assault is involved" (p. 191). Just as the rationale for policing violence comes from the need for persons to transact their purposes in the world without fear for their safety, the rationale for policing coercive control comes from the foundation of rights and freedoms without which persons cannot enjoy the "fruits of liberty" guaranteed by the U.S. Constitution.

Until recently, coercive control was invisible in plain sight. In part, this is because many of the control tactics target activities already identified as women's default responsibilities (such as housework or cooking) or involve areas still viewed as male prerogatives, such as control over money or how women perform sexually. Taken separately, many of these behaviors seem to reflect individual biases, such as the belief that a woman should not work or that she should exchange sex for access to her own credit card. Other behaviors may seem idiosyncratic, such as a demand that a wife clean "till you can see the lines" or that the temperature of the bath water be exactly so many degrees. The full scope of coercive control as a form of abuse only becomes apparent when these behaviors are interwoven into a pattern over time and when obeying an abuser's demands is largely based on fear of what will happen to her if she disobeys, the "or else" proviso. Since violence may not be present or remain below police radar in these relationships, it is not always easy to distinguish coercive control from voluntary compliance with traditional gender roles.

## PART I. THE LIMITS OF THE VIOLENT INCIDENT MODEL OF ABUSE

Most people still imagine that the broken bones, black eyes, and bruises that mark the abused women shown on television or on posters during "Domestic Violence Week" are typical of abusive relationships. Nothing could be further from the truth.

## The Violence Model

The violence model defines abuse as "an act carried out with the intention or perceived intention of causing physical pain or injury to another person" (Gelles, 1997, p. 14). Drawn from criminal justice and the analogy to stranger assault, this definition targets discrete violent acts whose seriousness is measured by the degree of harm inflicted or intended. Perpetrators who continue their assaults are referred to as "recidivists," another criminal just concept. The implication is that, like someone who commits many burglaries, a subgroup of abusers "repeat" their offense, often multiple times. Arrest policies, Protection Orders, BIPs, and other interventions are predicated on the belief that there is sufficient time "between" assaultive episodes for victims and perpetrators to contemplate their options and make self-interested decisions to end their abuse or exit the abusive relationship, what is termed "time to violence" in the treatment literature.

The first problem with this model is the well-documented fact that partner assaults are almost never isolated incidents. Indeed, almost half of the abuse reported in population samples involve "serial abuse," where violence occurs at least once a week (Klaus & Rand, 1984), while over a third of the victims interviewed at police calls report being assaulted on a daily basis (Brookoff, O'Brien, Cook, Thompson, & Williams, 1997). Since the average abusive relationship lasts between 5.5 and 7.3 years (Campbell, Rose, Kub, & Ned, 1998; Stark & Flitcraft, 1996), a high proportion of abused women have been assaulted dozens and even hundreds of times by the same offender before they encounter police. For these women, abuse is "ongoing," not merely "repeated," and so has more in common with course of conduct crimes such as harassment or with chronic diseases such as HIV-AIDS than the sort of acute, time-limited assaults that involve strangers and that are anticipated by our current laws and court interventions.

A second problem with the violence model is the weight it assigns to injury. In the early 1980s, Dr. Anne Flitcraft and I conducted The Yale Trauma Studies, research that established that domestic violence was the leading cause of injury for which women sought medical attention (Stark & Flitcraft, 1996). In fact, however, even in the Emergency Department or among women who call police, between 95% and 99% of domestic violence involves noninjurious assaults, pushes, shoves, grabs, punches, kicks, and the like (Stark, 2007; Stark & Flitcraft, 1996).

The importance of "minor" acts of violence only becomes clear when we set them in their historical context as part of a pattern of physical intimidation that has a cumulative effect on a particular victim that can be devastating. But when they are approached with a model that considers each assault separately, the pattern of routine, low-level assault is replaced by a view of minor assault or a series of trivial assaults, none of which appears to merit serious intervention. If we live in a state like Massachusetts where

arrest is used mainly for victims who have suffered "serious" physical harm, then no intervention will occur in the vast majority of incidents, although a high proportion of those arrested will spend time in jail. By contrast, in Connecticut, New Jersey, and other states where even minor domestic assaults prompt an arrest, only a tiny proportion of arrests, somewhere between l% and 5%, will be followed by conviction and/or jail time. In neither circumstance will multiple offenses prompt a more serious response than a single incident.[1]

The consequences of the current approach were illustrated by a study in Northumbria in the United Kingdom. Researchers followed 692 offenders arrested (Hester, 2006; Hester & Westmarland, 2006). Most calls for help resulted in arrest (91%). But because the focus was the incident only and most incidents were noninjurious, arrests were primarily for breach of the peace, and perpetrators were charged and convicted in only 120 (5%) of 2,402 incidents of domestic violence reported, an attrition rate from report to conviction of 95%. Interviews confirmed that offenders recognized their assaults would not be taken seriously. Abuse was typically chronic in Northumbria, as it is in the United States. Half of the offenders were rearrested for domestic abuse crimes within the 3-year study period, and many were arrested multiple times. Because each incident was treated independently, however, the most common penalty for convicted men was a fine, and there was no correlation between the likelihood that a perpetrator would be arrested and either the number of his domestic violence offenses or even whether he was judged "high risk." Indeed, since assessment of risk was also incident specific, the same offender who was judged "high risk" one week (because the target assault was deemed serious) was labeled "low risk" the next.

Because abuse is typically ongoing, victims seek help repeatedly. As their entrapment builds, so does their risk and so also their level of fear. Given the assumption that victims and offenders exercise decisional autonomy "between" episodes, however, police and other service providers tend to apply negative stereotypes to these persistent help seekers, seeing them as "repeaters" rather than realizing that their desperation reflects the fact that their abuse is ongoing and that arrest has done little to interrupt it. Some police officers attribute the woman's apparent inability to "leave" to a deficit in her character and consider her expressions of fear exaggerated, fabricated, or as the byproduct of mental illness, particularly in contrast to the relatively minor nature of the incident to which they are responding. More sympathetic officers view the fact that abuse continues as "tragic" but somehow inevitable, given the characters involved. In this respect, the police response is no different than the response victims meet in family court, child welfare, or the health system. Over time, as a victim's entrapment becomes more comprehensive, the police response tends to get more perfunctory, a process termed "normalization." Institutions collude (rather than collaborate)

in a negative image of victimized women that pervades all of their encounters with the helping system.

*Note:* The transformation of a devastating crime into a second-class misdemeanor for which only a tiny proportion of offenders go to jail is the byproduct of the way law and policy define partner abuse, not of any malfeasance on the part of police or the courts. Conversely, this problem cannot be fixed by strengthened training and commitment to enforce current laws.

The third problem with the violent incident model is that between 60% and 80% of the victims who seek outside assistance are experiencing multiple tactics to frighten, isolate, degrade, and subordinate them, as well assaults and threats (Stark, 2007). These tactics run the gamut from sexual exploitation, material deprivation, and imprisonment, to the imposition of rules for how victims carry out their daily affairs. These tactics are almost never included in domestic violence assessments or charges. To the contrary, the victim's subordination is often misinterpreted as a byproduct of the same "dependent personality" that kept her from leaving.

## PART II. AN ALTERNATIVE MODEL: COERCIVE CONTROL

The coercive control model was developed to encompass the ongoing and multifaceted nature of the abuse experienced by the 60% to 80% of victimized women whose partners extend their oppression beyond physical and psychological abuse. The essence of coercive control is that its primarily male offenders exploit persistent sexual inequalities in the economy and in how roles and responsibilities are designated in the home and community to establish a formal regime of domination/subordination behind which they can protect and extend their privileged access to money, sex, leisure time, domestic service, and other benefits. To this extent, abusers resemble the worst class of predators. Women often abuse men physically and can also "dominate" men, using many of the same tactics men use in coercive control. When women deploy coercive control in heterosexual relationships, or men or women use it in same sex relationships, it is rooted in forms of privilege other than sex-based inequality (since men cannot be unequal to women at the same time women are unequal to men), including social class, income, age, race, or homophobia. Since each of these characteristics may converge with systemic inequalities, they can reinforce an abuser's power in much the same way as sex-based privilege. However, since the vast majority of intimate relationships involve racially homogeneous, same-cohort heterosexual partnerships, sexual inequality is the primary context for coercive control and the source of the vast majority of cases police will encounter.

## The Technology of Coercive Control

Coercive control has identifiable temporal and spatial dimensions, recognizable dynamics, and predictable consequences. For the purposes of assessment, I subdivide the tactics deployed into those used to hurt and intimidate victims (coercion) and those designed to isolate and regulate them (control). Perpetrators adapt these tactics through trial and error based on their relative benefits and costs and the perceived vulnerabilities of their partner. Hostage taking, kidnapping, and other capture crimes share many of the same tactics. What distinguishes coercive control from these other crimes is the unique access intimacy affords a perpetrator to personal information about a partner (which kidnappers, terrorists, etc., rarely possess); the normative support for "control" associated with the male role; its substantive focus on micromanaging how women perform gender roles they inherit by default, simply because they are women; and a host of situational factors such as whether the money on which an abuser depends will be jeopardized if his wife misses work or appears at her job with an injury.

### Coercion

Coercion entails the use of force or threats to compel or dispel a particular response. In addition to causing immediate pain, injury, fear, or death, coercion can have long-term physical, behavioral, or psychological consequences.

*Violence.* Partner assaults frequently involve extreme violence. In a British survey of 500 women who sought help from Refuge UK (referred to as the "Refuge UK sample"), 70% had been choked or strangled at least once, 60% had been beaten in their sleep, 24% had been cut or stabbed at least once, almost 60% had been forced to have sex against their will, 26.5% had been "beaten unconscious," and 10% had been "tied up." As a result of these assaults, 38% of the women reported suffering "permanent damage" (Rees, Agnew-Davies, & Barkham, 2006). Like physical assault, repeated sexual assaults are a common and underappreciated facet of coercive control, with fully 27% of the Refuge UK sample reported they were forced to engage in sex "often" or "all the time," and 24% reported being forced to engage in anal sex at least once.[2]

Even so, the vast majority of assaults used in coercive control are distinguished by their frequency and duration, not by their severity. Johnson (2008) reported that men using coercive control assaulted women 6 times more often on average than men who used physical violence alone. In the Refuge UK sample, the women reported that "often" or "all the time," their partners "shook" or "roughly handled" them (58%); pushed or shoved them (65.5%); slapped or smacked them or twisted their arm (55.2%); or kicked, bit, or punched them (46.6%; Rees et al., 2006). To many of these men,

assault was a routine, like using the toilet, and not the byproduct of overt anger or a "conflict." Similarly, while rape is common enough in abusive relationships, "coerced sex" is far more common, though it rarely is picked up in charging abusers.

*Intimidation.* Intimidation is used to keep abuse secret and to instill fear, dependence, compliance, loyalty, and shame. Offenders induce these effects in three ways primarily—through threats, surveillance, and degradation. Intimidation succeeds because of what a victim has experienced in the past or believes her partner will or may do if she disobeys, the "or else" proviso. If intimidation sufficiently undermines a partner's will to resist, violence may not be deemed necessary. In a Finish population survey, a subgroup of older victims who had not been physically assaulted for 10 years or more reported significantly higher levels of fear than younger women who were experiencing ongoing assault (Piispa, 2002).

In the Refuge UK sample, 79.5% of the women reported that their partner threatened to kill them at least once, and 43.8% did so "often" or "all the time." In addition, 60% of the men threatened to have the children taken away, 36% threatened to hurt the children, 32% threatened to have the victim committed to a mental institution, 63% threatened their friends or family, and 82% threatened to destroy things they cared about (Rees et al., 2006). Few threats are reported. The destruction of property is another common tactic. A client in my forensic practice reported: "Once, when he was angry about my buying a dress, he just turned and put his fist through the car windshield. All I could think was 'I'm glad that isn't me.'"

Intimidation extends to subtle warnings whose meaning eludes outsiders, such as a raised eyebrow or a clenched fist or which may even seem loving, such as a promise to help a wife comply with a dietary regime recommended by a physician. The boyfriend of one of my clients would come onto the field and offer her a sweatshirt. Only she understood she would have to cover up her arms that night after he beat her.

Another class of threats creates the "battered mother's dilemma," where a victim is made to choose between her own safety and the safety of a child. My forensic work included several women who were killed after returning to the house to protect their children. Many of the same tactics used to extract information or compliance from hostages are deployed in coercive control, including withholding or rationing food, money, clothes, medicine, or other things. Thirty-eight percent of the men in the Refuge UK sample stopped their partner from getting medicine or treatment they needed, and 29% of the men in a U.S. study did so (Rees et al., 2006; Tolman, 1989, 1992). Passive-aggressive threats such as emotional withdrawal, disappearing without notice, or the "silent treatment" can be equally devastating. In the Refuge UK sample, more than half of the men threatened to hurt or kill themselves if the woman left, and 35% used the same threat to get her to obey (Rees et al., 2006).

Another class of threats, illustrated by the meticulously organized cabinets in the American film *Sleeping with the Enemy* (1991), involves anonymous acts whose authorship is never in doubt. Men in my practice have left anonymous threats on answering machines, invented false personae to send them threatening texts or e-mails, removed pieces of clothing or other memorabilia from the house, cut telephone wires, stolen their partner's money or their mail, or removed vital parts from their cars. Abusers also exploit secret fears to which they alone are privy or play "gaslight" games, named after the 1944 film *Gaslight* in which Charles Boyer created various visual and auditory illusions to convince his wife she was insane. In the Refuge UK sample, 75% of the women reported that their partners had tried to make them feel crazy "often" or "all the time" (Rees et al., 2006). Perpetrators will also threaten their partners by telling transparent or outrageous lies or saying or doing things in a public setting that insult or embarrass them. Their intent is to remind victims that confrontation is dangerous. The more transparent the offense, the more humiliating is compliance.

*Stalking* is the most prevalent form of surveillance used in coercive control and is distinguished by its duration—lasting 2.2 years on average, twice the typical length of stalking by strangers—its link to physical violence, and its combination with complementary forms of intimidation and control. Of the 4.8 million women in a U.S. study who reported being stalked by present or former partners, 81% were physically assaulted, 31% were sexually assaulted, 61% received unsolicited phone calls, 45% were also threatened verbally or in writing, and roughly 30% had their property vandalized or received unwanted letters or other items (Tjaden & Thoennes, 2000). Designed to convey the abuser's omnipotence and omnipresence, stalking falls on a continuum with a range of surveillance tactics that include timing partners' activities (calls, toileting, shopping trips, etc.); monitoring their communications; searching drawers, handbags, wallets, or bank records; cyberstalking with cameras or global positioning devices; or having partners followed. Eighty-five percent of the women in the U.S. study by Tolman (1989) and over 90% of the Refuge UK sample (Rees et al., 2006) reported that their abusive partner monitored their time. Surveillance tactics allow abusers to "cross social space," making physical separation ineffective.

Degradation establishes an abuser's moral superiority by denying self-respect to their partners, a violation of what Cornell (1995) calls "the degradation prohibition." Virtually all of the women in the Refuge UK sample reported that their partners called them names (96%), swore at them (94%), brought up things from their past to hurt them (95%), "said something to spite me" (97%), and "ordered me around" (93%). In more than 70% of these cases, this happened "often" or "all the time" (Rees et al., 2006). The insults used in coercive control target areas of gender identity from which the woman draws esteem, such as cooking. Insults are devastating because the woman cannot respond without putting herself at risk.

Common *shaming tactics* involve using a tattoo, burns, or bites to "mark" ownership; forcing a partner to submit to sexual inspections or participate in sexual acts she finds offensive; or demanding she engage in other rituals around personal hygiene, toileting, eating, or sleeping she finds degrading. My clients have been denied toilet paper or the right to cut their hair (in one case, for 2 years), made to sleep standing up, or to steal money from their boss or their children. Other abusers force partners to obey rules that would be used to discipline a child, such as staying at the table until they've eaten all their food.

## Control

Perpetrators use control tactics to compel obedience indirectly by depriving victims of vital resources and support systems, exploiting them, dictating preferred choices, and micromanaging their behavior by establishing "rules" for everyday living. These rules remain in play even when the perpetrator is absent physically, such as when a partner is shopping, at work, or with her friends or family. Because of their portability, control tactics make victims feel their abuse is all encompassing and their partner is omnipresent.

*Isolation.* Controllers isolate their partners to prevent disclosure, instill dependence, express exclusive possession, monopolize their skills and resources, and keep them from getting help or support. In a study of women in a shelter, 36% had not had a single supportive or recreational experience during the previous month (Forte, Franks, Forte, & Rigsby, 1996). By inserting themselves between victims and the world outside, controllers become their primary source of information, interpretation, and validation. Eighty-one percent of the Refuge UK sample reported they had been kept from leaving the house, with almost half (47%) reporting this happened "often" or "all the time" (Rees et al., 2006).

To isolate a partner from her support system, abusers have assaulted and threatened family members, friends, and coworkers; forbidden calls or visits; forced victims to chose between "them" and "me"; called them repeatedly at work or showed up unexpectedly; denied partners funds to travel for visits; or forced them to steal from friends, family, or employers; showed up drunk or otherwise embarrassed their partner at family gatherings. Over 60% of the women in the UK Refuge sample said their partners threatened their family or friends, and 60% of the women in the U.S. sample and 48% in the Refuge UK sample reported that partners kept them from seeing their families (Rees et al., 2006; Tolman, 1989). Immigrant or fundamentalist women are particularly vulnerable to isolation because traditional cultures are typically patrifocal, reject divorce or separation, assign custody in a marital dispute to the father, discourage women's working, and ostracize women who reject their obligations as wives.

Isolation tactics also include denying women access to phones or cars—as in more than half of abusive relationships in the United States and UK Refuge samples. Among teens, a common isolating tactic is to sabotage birth control and use unwanted pregnancies to force a girlfriend to drop out of school.

Isolation tactics are often designed to keep women from working or to isolate them at work, significantly impacting their employability as well as their performance or chances for promotion. More than a third of women in the U.S. study by Tolman (1989) and Refuge UK sample (Rees et al., 2006) were prohibited from working, and over half were required to "stay home with the kids." To keep women from going to work, men in my practice have blocked in their partner's cars, taken their keys or items of clothing, demanded sex just as they were going to work, blackened their eyes, forced them to call in sick, and suddenly found they could not babysit or transport a child to day care.

*Deprivation, exploitation, and regulation.* Control tactics also foster dependence by depriving partners of the resources needed for autonomous decision making and independent living, exploiting their resources and capacities for personal gain and gratification, and regulating their behavior to conform with gender stereotypes.

The "materiality of abuse" is rooted in a partner's control over basic necessities such as money, food, housing and transportation, sex, sleep, toileting, and access to health care. Seventy-nine percent of the Refuge UK sample (Rees et al., 2006) and 58% of Tolman's (1989) U.S. sample were denied access to money or had it taken from them through threats, violence, or theft. Conversely, 54% of the men charged with assaulting their partners acknowledged they had taken their partner's money (Buzawa & Hotaling, 2003). Financial exploitation extends from denying victims credit cards or money for necessities to forcing them to account for all expenses, no matter how trivial.

Complementing material controls is the microregulation of women's behavior in everyday life. While micromanagement often extends to the most trivial activities (such as what shows women may watch), its main targets are women's default responsibilities for housework, child care, and providing sexual pleasure. Abusive men regulate how women emote, dress, wear their hair, clean, cook, and discipline their children. In a widely publicized U.S. case, Travis Frey forced his wife to sign a "Contract of Wifely Expectations" that exchanged "good behavior days" (GBDs) for his wife's compliance with his sexual demands. Rules given to women in my practice have extended to how the carpet was to be vacuumed ("till you can see the lines") and the height of the bedspread off the floor to the heat of the water in the bath drawn each night for a husband. There is an inverse relationship between the pettiness of the rules women are forced to obey and the same associated

with compliance. The fact that the only purpose of the rules is to exact obedience is illustrated by continual revisions and replacements. As Mrsevic and Hughes (1997) put it, "[a]s men's control over women increases, the infractions against men's wishes get smaller, until women feel as if they are being beaten for 'nothing'" (p. 123).

### Coercive Control, Injury, and Fatality

Coercive control is the most devastating form of abuse as well as the most common. A large, well-designed, multicity study showed that, in addition to a recent separation and the presence of a weapon (or access to a weapon in the case of offenders who are the respondents of Protection Orders), the level of control in an abusive relationship increased the risk of a fatality by a factor of 9. (Glass et al., 2004). Neither the frequency nor the severity of violence was predictive of fatality. Control is also predictive of the less dramatic but far more prevalent forms of coercion in abusive relationships. In a study of over 2000 individuals referred to mediation in Arizona during divorce, the presence of coercive control was more than 4 times more likely than the presence of violence to explain the postseparation escalation of violence (81% vs. 20%), threats to kill (80% vs. 17%), and forced sex (76% vs. 24%) (Beck & Raghaven, 2010). Why does control predict subsequent violence but not the reverse? The answer has to do with the fact that women's vulnerability to violence, including lethal violence, is typically a byproduct of an *already established* pattern of domination that has disabled her capacity to mobilize personal, material, and social resources to resist or escape.

## PART III. IMPLICATIONS FOR CHANGING INTERVENTION

Police intervention in domestic violence incidents since the implementation of mandatory arrest policies in the 1980s has undoubtedly prevented tens of thousands of injuries and several thousand deaths. Perhaps even more importantly, the criminalization of partner abuse has challenged the normative approval of violence against women, helping to make the absence of violence in relationships a litmus test for their integrity. These are significant achievements, particularly given the pervasive role of violence in male socialization and identity and the continued legitimacy the state derives from appealing to this socialization process. In equating abuse with discrete assaults and targeting those most likely to cause injury, policing was following the broad consensus among researchers, policy makers, and service professionals, as well, of course, as the statutes to which police are held accountable.

It is increasingly clear, however, that even the most rigorous enforcement of current domestic violence law is largely ineffective against coercive control, the most prevalent and devastating form of partner abuse. Violence is typically a major component of coercive control, and severe physical and sexual violence are commonplace. But the characteristic pattern of violence in coercive control involves frequent, even routine, low-level assaults that either fall below the radar of police screens or else result in little or no sanctions. Meanwhile, the forms of intimidation, isolation, degradation, and control that comprise the infrastructure of coercive control remain largely invisible to law and criminal justice. Despite our best efforts, a major crime against the women and children in our midst as well as a major obstacle to the development of our race has been turned into a second-class misdemeanor for which almost no one is held accountable. The failure of domestic violence policing to improve the long-term prospects of battered women is a direct byproduct of the gap that separates the realities of coercive control from the crime targeted by law enforcement.

Reframing domestic violence as coercive control changes everything about how law enforcement responds to partner abuse, from the underlying principles guiding police and legal intervention, including arrest, to how suspects are questioned, evidence is gathered, resources are rationed, to how Protect Orders are crafted and enforced.

To start, policing in coercive control is guided by the same "antisubordination" principle as the basis of policing other capture crimes, that no one has a right to subjugate or entrap an independent adult, not merely the prohibition against violence. The antisubordination principle is complemented by the principle used to police "hate" crimes or other acts used to subjugate or dominate members of a class who are already vulnerable by virtue of their social standing. Police authority is an equalizer in these cases, much as it is when used to counter the illegitimate power of any kind, a tool of justice, not only of law enforcement. The reasoning is that persons should be treated as ends in themselves whose individual sovereignty deserves our fullest protection. Of course, applying this reasoning to personal life is not as straightforward as it is when strangers are involved.

Another major change follows when police shift their understanding of partner abuse from a discrete assault to a course of malevolent conduct that unfolds over time. The same incident has completely different significance for the type and level of interdiction required, depending on whether we are confronting a simple assault or part of a long-standing pattern of hostage-like entrapment. In the same way that an ER physician presented with a complaint of chest pain would rule out a heart attack before investigating how often the patient has eaten at McDonald's, officers with a model of coercive control in their toolbox proceed from the assumption that they are confronting coercive control until proved otherwise. Arriving at the scene,

an officer may learn that the husband has only pushed or slapped his wife or threatened her with a raised fist. Depending on the jurisdiction, police may be compelled to arrest even if the assault is an isolated incident, though the likelihood of the offender being sanctioned are extremely low. By setting these acts in their historical context, however, police can determine whether the raised fist is part of a long-standing pattern of subjugation in which the mere suggestion of violence is sufficient to bring a wife to her knees. In this instance, there may be an inverse relationship between the level of violence deployed and the level of hostage-like dominance present.

Putting the abusive incident in its historical context also changes how police respond to victims. An analogy to this change comes from the AIDS epidemic. When AIDs first appeared, doctors were puzzled by why a population of relatively young gay adults or IV drug users presented with a series of opportunistic infections. Until clinicians appreciated that a patient's susceptibility to these infections was a function of an underlying disease process and shifted to antiviral intervention, they were treated symptomatically and soon died. Similarly, a doctor who views each complaint of chest pain as separate may become frustrated by multiple visits with identical complaints, as many police, physicians, mental health practitioners, judges, and advocates are when abused women return repeatedly for help or "remain" in abusive relationships. But when physicians recognize that the particular complaint is a symptom of heart disease, a chronic problem, they become proactive, view repeated use of their services as appropriate and even desirable, and take steps to ensure long-term risk reduction.

The same shift from an incident-specific reaction to a proactive response would be expected once police and the courts redefined partner abuse as a course of ongoing conduct, applied sanctions appropriate to and designed to curtail the course of conduct, and approached each subsequent call or appearance as evidence that risk had escalated and stepped-up sanctions were required. Instead of stigmatizing "repeaters," police would anticipate, even encourage repeat visits and interpret expressions of fear or "staying" as indicative of the severity of the entrapment involved, even when there is little or no violence. Innovative programs in New York City and Turkey involve officers paying visits to families where they have encountered domestic violence in the past, symbolizing their continued concern for family safety as well as acknowledging the ongoing nature of coercive control. Similarly, the coercive control model allows courts to reframe issuance of Protection Orders as part of a victim's long-term strategy for restoring their capacity to resist and escape abuse rather than as a one-time antidote. Judges, like police, reframe repeat requests for protection as signaling they have done something right in the past (which is why victims return) and now must expand the scope of prohibited behaviors to encompass controlling acts and assist women in accessing the resources needed for independent, self-interested decision making.

It is already standard practice for police at the scene of a domestic violence incident to interview each party separately, as well as witnesses, where available. The detective work required to uncover coercive control is far more sophisticated, however, than the investigation required even to identify a "primary aggressor." The multiple tactics deployed in coercive control imply that the scope of questioning and investigation must be broadened to encompass routine, but minor violence; subtle forms of intimidation and forms of surveillance or monitoring that "cross social space" by extending abuse to the workplace or school, for instance; a range of sexually coercive acts; patterns of isolation; and the explicit and implicit "rules" that govern everything from a woman's access to money and other material necessities to how she sleeps, dresses, or talks on the phone. The "enhanced" questioning and investigation required to identify the elements of coercive control push the boundaries of privacy, requiring strong disclaimers as well as protections of civil liberties and can rarely be collected at one interview or in a home where the abuser is present or nearby.

None of this expanded effort can be justified, given the current legal status of domestic violence, particularly in states where it is treated primarily as a low-level misdemeanor. While history taking should be a routine part of any domestic violence investigation, it is unlikely to become standard procedure until coercive control attains the status of a new "course of conduct" crime with sanctions appropriate to the rights and liberties that are jeopardized. With a new Class A felony in hand, the resources can be made available to determine if a victim with little or no physical signs of abuse is a virtual hostage in her home who requires the same level of aggressive interdiction evoked by a suspected kidnapping. A number of countries have taken steps in this direction, either by adding "coercive control" explicitly to their government's definition of abuse (England, e.g.) or identifying a "pattern" of abuse (Spain) or elements of coercive control such as "economic violence," isolation, or psychological abuse to their criminal statutes (Scotland, Turkey, etc.).

Adapting a coercive control model also shifts how we respond when women assault or kill their abusers, even when they are not under a direct attack. Set against the abuser's attempts to quash a woman's freedom, dignity, and autonomy, her retaliatory violence can be reframed as a liberatory response to progressive entrapment similar to the response we would expect from a man who had been subjected to a similar regime of coercion and control. Indeed, given the fact that the harm inflicted on women by coercive control is hard to appreciate unless we grant them full status as persons, it is often helpful if police ask, How would we expect a man to react if someone took his money, forced him to undergo sexual inspection, and repeatedly insulted his dignity by ordering him about like a child?

As I write, the current iteration of the Violence Against Women Act is stalled in Congress, reflecting a backlash against domestic violence law

enforcement. It may be a decade or more before the legal framework that guides domestic violence policing in the United States is broadened to encompass the elements of coercive control. In the interim, it is imperative that we introduce professional education about coercive control into the curriculum for new recruits as well as established officers. Even if we cannot yet charge offenders with a single crime that encompasses the scope of their oppression, police can charge offenders with many of the tactics used in coercive control, including forced sex, witness intimidation, harassment, terroristic threats, and binding or other forms of imprisonment. There is nothing radical about holding abusers accountable for these crimes since they are routinely treated as crimes when committed against strangers or in public settings, including the workplace. Even if the evidence to support such charges may be difficult to garner, given the relative dearth of resources committed to policing domestic violence, the presentation of complaints enumerating these offenses will help educate other law enforcement and legal actors as well as the public at large.

## NOTES

1. In my home state of Connecticut, well over 95% of domestic violence cases are nolled or dismissed. At best, the offending men are referred for counseling. In the neighboring state of Massachusetts, where the law requires a much higher level of violence, only a small proportion of incidents prompt arrest, though the proportions punished is much higher.

2. As part of the Yale Trauma Studies, Dr. Anne Flitcraft and I reviewed the medical records of all rape victims who had used the hospital in the previous year. We found that over a third of the rapes were committed by partners or former partners, and if the rape victim was over 30, the proportion jumped to more than half (Stark & Flitcraft, 1996).

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**John G. Taylor, MA**
The Reality Corner

DOMESTIC VIOLENCE

# Behind the Veil: Inside the Mind of Men Who Abuse

## Domestic violence and unmasking the terror of Dr. Jekyll and Mr. Hyde.

Posted Feb 05, 2013



Domestic violence is the leading cause of injury to women, sending more than 1 million every year to doctor's offices or emergency rooms. This violence isn't occurring from the hands of a stranger but from the hands of the man who said *I love you*. Let's take a look inside the minds of men who abuse.

I want to share the knowledge and experiences that I've had facilitating groups and counseling more than 1,000 men who have abused their intimate partners. There are too many women and men dying, people being injured, far too many children growing up in violent homes to later become victims or abusers themselves.

**What Is Domestic Violence?**

Domestic violence happens when a partner physically, verbally, emotionally, and sexually abuses their intimate partner by exerting power and control over them. Domestic violence occurs in all cultures, races, religions, classes, as well as same-sex relationships. We find that domestic violence is perpetrated by men and women, 95 percent of reported domestic violence cases are men abusing women and 5 percent of reported domestic violence cases are women abusing men.

**National Stats**

1. Every 12 seconds a woman is abused by her intimate partner in the U.S.
2. 37 percent of pregnant women are battered during pregnancy, including blows to the abdomen
3. There are more animal shelters than there are shelters for victims of domestic violence in the U.S.

These numbers are staggering and they are growing. However, this is only what is reported, imagine how many more women are being abused but never report the incident.

**The Cycle of Violence**

Phase 1: Tension building; usually there is tension building within the batterer and there is usually an argument

Phase 2: Explosion; where the assault happens

Phase 3: Honeymoon; the abuser apologizes for his behavior buying the victim gifts or flowers

The cycle of violence will not end until one partner leaves or seeks treatment.

There are five types of abuse and they usually start with the less noticeable first and become more obvious as the abusive relationship continues.

**The Five Types of Abuse**

3. Technological; GPS tracking, Facebook sabotaging

4. Sexual; forcing sex while partner is asleep or basing sex on the Bible

5. Physical; physical harm such as punching, choking, even murder



Would you know an abuser by looking at him? What makes them tick? What are the signs of a batterer? You can't tell if a person is an abuser by looking at them. Yet there are some tell-tale signs and behaviors. Here are a few:

**Profile of an Abuser**

1. Jealousy; questioning partner constantly about whereabouts, jealous of the time she spends away from him
2. Controlling behavior; the victim cannot get a job, leave the house, or bathe without permission
3. Isolation; makes partner move away from family and friends so that she depends on him solely for support
4. Forces sex against partner's will
5. Holds very rigid gender roles; partner's job is to cater to the abuser

Men who abuse are clever, smart, and extremely charming. Most of these men have a personality that draws people in, he is adept at charming, deceiving and manipulating. When a victim reports an assault, she is not easily believed. People normally say: "Not him, he is so nice." "You are so lucky."

He gets people outside of the home to buy into his deceit, and the victim has little to no support. Most batterers are seen as Jekyll and Hyde because of the stark contrast in their public and private selves. When we look into the mind and behaviors of batterers, the DSM cites these criteria:

**Diagnosis of Abusers**

1. Antisocial Personality Disorder; deceitfulness, repeatedly lying, use of aliases or conning others for personal profit or pleasure
2. Borderline Personality Disorder; a pattern of unstable and intense interpersonal relationships by alternating between extreme idealizations and devaluation
3. Narcissistic Personality Disorder; a grandiose sense of self-importance

When we look at the profile and characteristics of batterers or abusers we can clearly see how the diagnosis will be found in this population.

**Treatment for this population**

Group therapy is important because it allows the batterer to be confronted by his peers on his behavior. I've facilitated groups with 16 men, which can become confrontational. But it's important for the men to be held accountable for their behavior by other men and group facilitators. Group therapy focuses on respect, effective

Individual therapy is a good form of treatment because it gives the batterer more time to express himself without the interruption of others, but even in this therapy, the batterer has to be strongly confronted and held accountable for his behavior. Sometimes the batterer will want to bring his partner to the sessions. I strongly advise against this until both parties have had individual sessions.

Batterers can stop their behavior. I have seen many men change, I remind myself that people aren't their behavior, it's just what is manifested on the surface and we must get beneath that and deal with the root cause. We can't afford to have women and children living in fear. Let's shout it from the highest heights: "There is No Excuse for Domestic Violence."

- **Victims of Domestic Violence call National DV Hotline: 1-800-799- (SAFE) 7233.**



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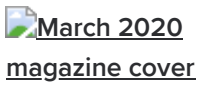
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US

# CRIMINALIZING "PRIVATE" TORTURE

TANIA TETLOW*

ABSTRACT

*This Article proposes a state crime against torture by private actors as a far better way to capture the harm of serious domestic violence. Current criminal law misses the cumulative terror of domestic violence by fracturing it into individualized, misdemeanor batteries. Instead, a torture statute would punish a pattern crime—the batterer's use of repeated violence and threats for the purpose of controlling his victim. And, for the first time, a torture statute would ban nonviolent techniques committed with the intent to cause severe pain and suffering, including psychological torture, sexual degradation, and sleep deprivation.*

*Because serious domestic violence routinely involves the use of torture techniques, other scholars have proposed stretching the state action requirement of international law against torture to apply it to domestic violence. This Article proposes a simpler solution, urging states to pass statutes banning torture by private actors. Indeed, California and Michigan have already done so, seemingly without controversy and without any real scholarly comment. Both states have used their general torture statutes to prosecute serious domestic violence. This proposal would better tailor a torture statute to*

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*domestic violence and includes ways to motivate the state to prosecute torture more often.*

*Prosecuting domestic violence under a general torture statute would have both direct and indirect impacts. In addition to providing a solution to the existing inadequacy of criminal law, it would also have great rhetorical power. Describing domestic violence as torture focuses the criminal justice system and the public on the defendant's clear premeditation and culpability. We see batterers as merely angry, whereas we acknowledge torturers as cruel. Although we see domestic violence victims as weak and masochistic, we do not blame torture victims for their fate. Describing domestic violence as torture helps to explain both the purpose of abuse and its full pattern.*

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## INTRODUCTION

International law defines torture as acts committed by, or with the complicity of, state actors,[1] but the technique of torture is far more ubiquitous. Our streets are dotted with torture chambers—houses in which perpetrators use violence, threats, and psychological tricks to break the spirit of their victims.[2] Because those victims are usually wives and children, however, the problem fails to capture much attention.[3] Not only is this torture "private" because it is committed by nonstate actors, but it is doubly private because it occurs inside the home.[4]

Others have argued for the application of international and federal torture laws to domestic violence by stretching the state action requirement to include the state's complicity in permitting domestic violence.[5] I propose a simpler solution. States should specifically criminalize "private" torture—the use of torture techniques by nonstate actors. A prohibition on torture should not prove particularly controversial, and to make it even less so, it should apply broadly to any use of torture, not just to family violence. A torture law would equally capture the terror of a drug kingpin exacting information, a kidnapper with a basement of horrors, and a domestic violence batterer. Indeed, two states, California and Michigan, have already banned torture generally and have used their torture statutes to prosecute domestic violence.[6]

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1. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

2. *See infra* Part I.

3. *See* Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 798 (2001) (suggesting that the concept of violence was socially constructed and traditionally focused on stranger violence); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2206-07 (1996) (describing the law's permission to physically chastise a wife and children, a right that remains as to children, and the ways that the law continues to devalue domestic violence).

4. *See* Siegel, *supra* note 3, at 2153.

5. *See, e.g.*, Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 299 (1994).

6. CAL. PENAL CODE § 206 (West 2016); MICH. COMP. LAWS § 750.85 (2016). California's torture statute passed by referendum in 1990, as part of a series of tough on crime measures collectively designated Proposition 115 Criminal Law-Iniative Constitutional Amendment and

Once given the statutory tool, prosecutors should routinely prosecute serious domestic violence as torture. Doing so would solve several existing problems. Current domestic violence statutes fail to capture its cumulative horror, instead fracturing the patterns of domestic violence into constituent, *de minimis* parts.[7] Taken individually, many torture techniques remain perfectly legal, and most other techniques are classified as mere misdemeanors such as discrete assaults and batteries.[8] We need a law that accomplishes for domestic violence what stalking statutes did to criminalize that pattern crime. Before then, a terrifying pattern of intimidation constituted, at best, a few disjointed misdemeanor charges such as trespassing, while most of the defendant's behavior remained perfectly legal.[9]

A torture statute would, for the first time, encompass the full scope of domestic violence.[10] It would connect the dots between sporadic acts of violence and make the perpetrator's purpose of controlling his victim relevant. Instead of a fractured series of misdemeanor battery charges, a torture charge would demonstrate the terrifying whole. The law would ban other torture techniques such as sleep deprivation, sexual degradation, and psychological torture when part of a pattern of violence. It would punish domestic violence as a felony even when the perpetrator's primary intent is to cause physical pain rather than to leave "serious bodily injury."[11]

Further, identifying and punishing domestic violence as "torture" would help the criminal justice system and the public understand its full scope and horror.[12] Indeed, in many ways, these cultural

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Statute, Proposition 115, 1990 Cal. Legis. Serv. Prop. 115 (West). For discussion of cases applying these statutes to domestic violence, see *infra* notes 254-55 and accompanying text.

7. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 972-73 (2004).

8. *See generally* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46-53 (1992).

9. *See infra* Part II.

10. *See infra* Part III.A.

11. *See infra* note 86 and accompanying text.

12. Deborah Tuerkheimer has proposed a broad domestic violence "battering statute" that would capture the pattern and purpose of domestic violence. *See* Tuerkheimer, *supra* note 7, at 1019-20; *see also* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 595-602 (2007) (building on Tuerkheimer's arguments to propose a similar statute). I argue, however, that the term "torture" conveys something more useful.

signals constitute the most important aspects of our very flawed criminal justice system.[13] A felony crime of torture might help the public to stop blaming victims for domestic violence and stop imagining the victims as weak and pathetic or masochistic and fickle because the public recognizes that techniques of torture can control the mind and warp the will of even the most stoic soldiers.

Although the public often confuses domestic violence with the cumulation of random temper tantrums by a spouse with a nasty disposition, it tends to understand that torture has a purpose: to control or to punish.[14] Defining domestic violence as torture would help the public understand that batterers do not merely inflict temporary physical pain, but cause permanent psychological damage as well. Popular culture gives us insight into the deviousness of psychological torture and helps us understand why torturers alternate between inspiring despair and granting hope. All of this would go a long way to explaining some of the counterintuitive aspects of domestic violence and to curing our fixation on the victim's culpability rather than the perpetrator's cruelty.

This Article proposes a general torture statute that would apply to the use of torture techniques by private actors for a variety of actions, from domestic violence, to child abuse, to preying upon strangers. Part I describes the evidence that domestic violence abusers frequently make use of torture techniques. Part II argues that current law utterly fails to acknowledge the pattern and scope of domestic violence. Part III argues that a torture statute would capture the ongoing and varied nature of domestic violence, and would, for the first time, criminalize the full variety of torture techniques. A torture statute would also explain the real nature of domestic violence to prosecutors, judges, juries, and the public. Part IV then crafts statutory language that works to include the broad scope of torturous conduct without watering down its impact. Convincing legislators to pass a torture statute of general application should prove entirely uncontroversial. Persuading prosecutors to charge the crime of felony torture in domestic violence cases would prove transformative.

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13. *See infra* Part III.B.
14. *See infra* Part III.B.

## I. DOMESTIC VIOLENCE CONSTITUTES TORTURE

When batterers use violence and psychological torment in order to control their victims, they engage in torture.[15] Although torturers within the home may make use of fewer physical chains than our paradigmatic examples, they utilize every other tool of the trade. Almost every torture technique catalogued in human rights scholarship matches the strange and sadistic ways that batterers routinely exercise power: from the creative and sporadic use of violence, to sensory deprivation, to attacks on the personality of the victim.[16] Simply put, the most effective methods of breaking down and controlling another human being have not altered much in human history.[17]

The reader may object that such depressing torture chambers cannot be common. In some ways, that empirical question does not matter to my proposal for a torture statute. Regardless, making this

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15. *See, e.g.*, Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757, 763 (1996) (framing the battering relationship as an ongoing "regime of private tyranny"); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204-10 (1993) (discussing broader social science definitions of the nature, pattern, and severity of violence and abuse); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 537-38 (1992) (characterizing what she calls "broader description[s]" of battering in an attempt to capture interrelated aspects of coercion, power, and control not limited to physical abuse); Shannon Selden, *The Practice of Domestic Violence*, 12 UCLA WOMEN'S L.J. 1, 18 (2001) (conceptualizing domestic abuse as torture and noting that "intimate violence involves separate attacks of physical injury, strung together by patterns of domination, coercion, and control.... [T]he violence that occurs may be merely one tool of domination among many.").

16. One scholar attempted to catalogue those techniques looking at torture cases from around the world. He listed isolation, psychological debilitation (including sleep deprivation), sensory assault (shouting or loud noise), induced desperation (random punishment or reward, implanting guilt, abandonment, or learned helplessness), threats to self or others, sexual humiliation, feral treatment (forced nakedness, denial of personal hygiene), desecration (forcing victim to violate religious practices), and finally pharmacological manipulation (forced use of drugs). *See* Almerindo E. Ojeda, *What Is Psychological Torture?*, *in* THE TRAUMA OF PYCHOLOGICAL TORTURE 1, 2-3 (Almerindo E. Ojeda ed., 2008).

17. *Cf.* Shazia Qureshi, *Reconceptualising Domestic Violence as 'Domestic Torture*,' 20 J. POL. STUD. 35, 39 (2013) ("Curiously, batterers do not receive any formal training for torture, yet the methods of abuse not only coincide with those of the other batterers' but also bear resemblance with torture inflicted by state officials.").

charge available to prosecutors in any case involving the horrors described in detail below would matter enormously.

Torture is, in fact, entirely ubiquitous. First, domestic violence itself is absurdly common. The Centers for Disease Control estimates that one out of four American women will be severely beaten by a partner in her lifetime.[18] The World Health Organization puts the worldwide average at one in three.[19] Even if a fraction of those cases involve what this Article attempts to proscribe as torture, it would represent an extraordinary number of cases. Indeed, the empirical evidence on domestic violence, discussed in detail below, shows that it typically involves (1) a pattern of violence, rather than random individualized acts; (2) done for the purpose of control; and (3) accompanied with the use of other techniques that we associate with torture.[20] Social scientist Evan Stark estimates that 60 percent of domestic violence involves "domestic terrorism."[21]

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18. Matthew J. Breiding et al., Ctrs. for Disease Control, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011*, CDC SURVEILLANCE SUMMARIES, Sept. 5, 2014, www.cdc.gov/mmwr/pdf/ss/ss6308.pdf [https://perma.cc/8M3H-PEEF] ("The lifetime prevalence of physical violence by an intimate partner was an estimated 31.5% among women and in the 12 months before taking the survey, an estimated 4.0% of women experienced some form of physical violence by an intimate partner. An estimated 22.3% of women experienced at least one act of severe physical violence by an intimate partner during their lifetimes. With respect to individual severe physical violence behaviors, being slammed against something was experienced by an estimated 15.4% of women, and being hit with a fist or something hard was experienced by 13.2% of women. In the 12 months before taking the survey, an estimated 2.3% of women experienced at least one form of severe physical violence by an intimate partner."). *See also* John Wihbey, *Domestic Violence and Abusive Relationships: Research Review*, JOURNALIST'S RESOURCE, http://www.journalistsresource.org/studies/society/gender-society/domestic-violence-abusive-relationships-research-review#sthash.1zNq.dpuf [https://perma.cc/JL4S-RQC9].

19. *See* K.M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 SCI. 1527, 1527 (2013) (finding in their peer-reviewed metastudy that "in 2010, 30.0% [95% confidence interval (CI) 27.8 to 32.2%] of women aged 15 and over have experienced, during their lifetime, physical and/or sexual intimate partner violence" (alteration in original)).

20. Michael Johnson, for example, has attempted to categorize domestic violence into four types: mutual violent control, situational couple violence (signaled only by an event), violent resistance (a partner acting only to resist ongoing abuse), and the category that my torture statute would focus on, "intimate terrorism." *See* Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003, 1006 (2006).

21. *See* Peter Cohn, *Evan Stark, Rutgers*, VIMEO (Apr. 2, 2010), https://vimeo.com/11114721 [https://perma.cc/CZ4L-8AKH]; *The Academics: Causes and Prevention of Domestic*

My own work with domestic violence victims, as a prosecutor and a lawyer representing survivors in family law, has provided me with plenty of anecdotal evidence to equate much domestic violence with torture. Over the past fifteen years, victims have described to me eerily similar accounts of creative cruelty. I include some of these insights below.

First, in the most obvious analogy to torture, domestic violence abusers use violence in forms both mundane and creative, and they use violence over time.[22] Slaps and shoves escalate to beatings and strangulation.[23] Batterers focus on vulnerable parts of the body, like breasts and genitals.[24] They also sometimes evade detection by hitting places that do not reveal bruises so easily. They use their fists, but also burn with cigarettes and cut with knives.[25]

In torture, actual violence constitutes a means for control rather than an end in and of itself.[26] As such, threats punctuated with sporadic violence prove far more effective than constant violence.[27] The torturer gives the victim the illusion of some control over pain by being compliant.[28] Consistent and regular violence would not serve the same purpose of forcing the victim to be hyper-vigilant and terrified of what might come next. That is the somewhat

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*Violence—Evan Stark*, POWER AND CONTROL: DOMESTIC VIOLENCE IN AMERICA, http://www.powerandcontrolfilm.com/the-topics/academics/evan-stark [https://perma.cc/KJ7U-LMKB].

22. Evan Stark, *The Dangers of Dangerousness Assessment*, 6 FAM. & INTIMATE PARTNER VIOLENCE Q. 13, 18-19 (2013) (arguing that, as the system pays more attention to the most egregious forms of physical domestic violence, batterers focus more on "coercive control," the use of psychological torture, and constant low-level violence as a means of enforcing the deprivation of liberty).

23. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996) (noting that "domestic violence usually escalates in frequency and severity").

24. *See* Copelon, *supra* note 5, at 312 ("Some women are threatened with mutilation of their breasts or genitals and suffer permanent disfigurement.").

25. *Id.* at 311.

26. *See* Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT'L REV. RED CROSS 591, 614-15 (2007).

27. *See* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2128-29 (1993) ("[V]iolence does not need to be a constant presence for the victims to feel threatened that it could erupt at any point, nor does the explosion always have to be physical. Violence need only symbolize the threat of future abuse in order to keep the victim in fear and control her behavior.... In fact, physical abuse may only be utilized by abusers who are too unsophisticated to be able to control their victims with verbal or sexual violence." (footnotes omitted)).

28. *See* Reyes, *supra* note 26, at 614.

counterintuitive pattern that we see in domestic violence. Usually batterers do not use a torrent of uncontrolled violence, but rather violence that is purposeful and sporadic.[29] Indeed, the seriousness of violence does not necessarily predict whether the batterer will ultimately murder his victim; his level of control over her does.[30]

Violence may not even constitute the most useful tool of torture. The threat of violence, whether explicit or implicit, may do as much work as its actual infliction.[31] To give an idea of how creative and commonplace these threats are, consider that a majority of the victims I have interviewed reported one or more of the following threats: (1) the explicit threat to kill the victim and bury her body at a specified location where it would never be recovered; (2) the implicit threat of the batterer cleaning his gun in front of the victim when making a point; and (3) the nonverbal threat of veering the car as if to crash it, or grabbing the wheel of the car while the victim is driving.

More effectively still, batterers threaten to kill those whom the victim cares about, from family members to the family dog.[32] Threats to pets are so common that several states have incorporated such threats into their protective order law.[33] Abusers will eagerly show news clippings to their victims after some other batterer

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29. *See* Fischer et al., *supra* note 27, at 2128.

30. *See* Stark, *supra* note 22, at 18-20.

31. *See* Fischer et al., *supra* note 27, at 2132 ("[F]ear may also be triggered by any verbal or nonverbal symbol associated with the onset of an abusive incident. In some cases, threats of harm ... may be as effective in controlling her behavior as physical violence itself." (footnote omitted)).

32. *See* Frank R. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 SOC'Y & ANIMALS 205, 208 (1997) (noting that in a survey of women entering a domestic violence center in Utah, 71 percent of those who reported that they currently or recently owned pets indicated that their batterer had threatened, harmed, or killed their pet); Vivek Upadhya, Comment, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L.J. 1163, 1171-74 (2014); Stacy Teicher Khadaroo, *Texas Family Killed: In Domestic Violence Cases, More Focus on Red Flags*, CHRISTIAN SCI. MONITOR (July 11, 2014), http://www.csmonitor.com/USA/Justice/2014/0711/Texas-family-killed-In-domestic-violence-cases-more-focus-on-red-flags-video [https://perma.cc/77FU-Y9SB] (suggesting that "[t]he killing of family members of domestic violence victims is on the rise across the country").

33. *See* Joshua L. Friedman & Gary C. Norman, *Protecting the Family Pet: The New Face of Maryland Domestic Violence Protective Orders*, 40 U. BALT. L.F. 81, 93-94, 94 n.99 (2009) (noting that including animals in protective orders began with Maine in 2006 and had expanded to fourteen states by 2009).

actually engages in a killing spree of his victim's parents, siblings, coworkers, or friends.[34]

Most effectively of all, batterers routinely threaten to harm or kill their own children.[35] Studies show an overwhelming overlap between domestic violence and child abuse.[36] Victims who disobey thus risk not only their own lives and safety, but also those of their children. In the ultimate exercise of power, some batterers in fact murder their own children.[37]

Even leaving the batterer may not protect the victim's children. Batterers routinely threaten to gain custody of the children as punishment, so escaping from the torture chamber requires leaving hostages behind.[38] These are not idle threats. Batterers are far more

34. *Cf.* Copelon, *supra* note 5, at 313 (describing the psychological effect of threats to kill the victim's family). For an example of a news clipping, see Khadaroo, *supra* note 32.

35. *See* Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 363 (1995) ("[M]any batterers threaten to kill their partners, their children, or their partner's children if their partners leave the relationship. Some batterers have carried out such threats.").

36. *Id.* at 357 ("When spouse abuse was severe, one study found 77 percent of the children in those homes had also been abused."); *id.* at 369 ("Estimates are that between 3.3 million and 10 million children annually observe domestic violence within their homes. An estimated 87 percent of children in homes with domestic violence witness that abuse." (footnote omitted)).

37. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 752-54 (2005) (describing how plaintiff's ex-husband took their three daughters, aged ten, nine, and seven, in violation of a protective order and then murdered them all). In the last year, there have been several occasions in which a father with a history of domestic violence murdered his child or children. *See* Ashley Harding, *No Bond for Father Charged in Son's Death*, NEWS4JAX (Nov. 13, 2015, 3:15 PM), http://www.news4jax.com/news/local/no-bond-for-father-charged-in-sons-death [https://perma.cc/4G3A-SRAP]; Jessica Kartalija, *Police: Father Admits to Killing 2-Year-Old Daughter, Mother*, CBS BALT. (Feb. 3, 2016, 5:26 PM), http://baltimore.cbslocal.com/2016/02/03/woman-slain-with-2-year-old-daughter-was-2nd-grade-teacher/ [https://perma.cc/5QER-AQHF]; Jason Pohl & Jacy Marmaduke, *Colo. Girl's Killing Shocks 'Peaceful' Neighborhood*, COLORADOAN (Mar. 31, 2016, 7:09 AM), http://www.coloradoan.com/story/news/2016/03/30/girls-killing-shocks-peaceful-colorado-neighbhood/82428366/ [https://perma.cc/YN43-249C].

38. *See* OLA BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN 301 (2d ed. 2005) ("Many IPV [Intimate Partner Violence] perpetrators threaten their victims with death or inform the victims that they will take the children, hurt the children, or both."); *see also* Lundy Bancroft, Understanding the Batterer in Custody and Visitation Disputes (1998) (self-published article), http://lundybancroft.com/articles/understanding-the-batterer-in-custody-and-visitation-disputes/ [https://perma.cc/2TEL-WQKG] ("A batterer also tends to involve his children in the abuse of the mother.... He may threaten to take the children away from her, legally or illegally.").

likely than nonviolent fathers to seek, and to succeed at winning, custody of their children.[39]

Batterers also make use of more subtle torture techniques that are ordinarily considered innocuous under current criminal law.[40] When the CIA did experiments in the 1950s to decipher the torture techniques used to make its most stalwart soldiers crack, it found that mental torture and sensory deprivation worked surprisingly well.[41] Batterers also, for example, frequently make use of sleep deprivation as an effective way to incapacitate their victims.[42] Exhaustion makes every life activity, from working to parenting, difficult and seriously impairs the victim's ability to plot escape.[43]

My own clients described batterers who woke them up routinely and did so in jarring or terrifying ways. Sometimes their abusers turned on all the lights or blared music. Worse yet, one woke up his

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39. *Cf.* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 678, 707-08 (2003) (describing the significant barriers for domestic violence victims attempting to protect their children from abusers, from the application of "friendly parent" provisions to an overreliance on custody evaluators unqualified to determine the factual issue of the reality of abuse); Bancroft, *supra* note 38 ("A batterer who does file for custody will frequently win, as he has numerous advantages over his partner in custody litigation," including his ability to afford better representation, to better pass psychological testing, and to manipulate custody evaluators and the children.).

40. Some batterers use "hybrid techniques"—methods that do not leave any physical marks on the body but still cause severe physical or psychological pain. *See* Copelon, *supra* note 5, at 313 ("Such hybrid techniques include forcing prisoners to assume positions such as wall-standing for prolonged periods, thereby causing agonizing pain without directly administering it.... Sensory deprivation techniques, which create anxiety and disorientation, include exposure to continuous, loud noises, hooding, alternating darkness with blinding light, sleep deprivation, starvation and dehydration.").

41. *See* David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 833 (2012) ("[S]eemingly minor manipulations of a prisoner's environment—disruptions of space and time by capriciously varied schedules and environment, isolation, sensory and sleep deprivation, irregular sleep, and extremes of hot and cold—could cause major degradations of the victim's personality.").

42. *See id.* at 831; *see also* James P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595, 601 (2010) (explaining that sleep deprivation can reduce a victim's tolerance to pain).

43. Sleep deprivation causes as much impairment to activities like driving as being drunk does. *See* A.M. Williamson & Anne-Marie Feyer, *Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication*, 57 OCCUPATIONAL & ENVTL. MED. 649, 653 (2000) (reporting the results of a study that concluded that "commonly experienced levels of sleep deprivation depressed performance to a level equivalent to that produced by alcohol intoxication of at least a BAC [Blood Alcohol Concentration] of 0.05%").

wife by spraying her with mace, and another by raping her. All of this made sleep permanently difficult, even after escaping the relationship.

Like any good torturer, batterers particularly focus on sexual violence as the most effective way to break a victim's spirit.[44] They routinely rape their victims, a practice only recently made illegal within marriage.[45] Just as effectively, and without breaking current criminal law, batterers use sexual humiliation—from conducting sexual "inspections" designed to sniff out alleged adultery, to coercing the victim into degrading sexual practices.[46] The use of shame serves multiple purposes: it creates searing psychological scars and it further isolates the victim from help as she correctly guesses at the world's reaction.[47]

Batterers also use variations on the psychological torture techniques that the CIA has determined to be effective, including mind games and "crazy-making" behavior.[48] They tell the victim

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44. *See* Fischer et al., *supra* note 27, at 2123; Reyes, *supra* note 26, at 605-06; ("Researchers who have investigated the phenomenon find that rates of battered women who have been sexually assaulted consistently fall in the thirty-three percent to sixty percent range. Sexual abuse frequently involves acts that could also be classified as physical assaults, blurring the line between physical and sexual abuse, such as the insertion of objects into the woman's vagina, forced anal or oral sex, bondage, forced sex with others, and sex with animals." (footnotes omitted)). This translates to an extraordinary 15.8 percent of all U.S. women experiencing forms of sexual violence by an intimate partner in their lifetimes. *See* Breiding et al., *supra* note 18, at 9.

45. *See* Breiding et al., *supra* note 18, at 6 (describing the prevalence of intimate partner rape); *see also* Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1830 n.92, 1833 (2011) (noting that marital rape was banned in all fifty states by 1993, but exceptions remain to certain types of marital rape in criminal law). In many states, marital rape is excluded from tort law by the interspousal tort immunity doctrine. *See* Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L.J. 305, 333 (2003).

46. *See* Copelon, *supra* note 5, at 311, 313.

47. *See* Copelon, *supra* note 5, at 315.

48. One example of this is "gas lighting." The term "gas lighting" is based upon the play, *Gas Light*, that was made into films in 1940 and 1944, in which a husband attempts to drive his wife insane by manipulating her environment in small ways and claiming she imagined it. *See* Judith L. Alpert et al., *Comment on Ornstein, Ceci, and Loftus (1998): Adult Recollections of Childhood Abuse*, 4 PSYCHOL. PUB. POL'Y & L. 1052, 1063 (1998).

that she imagined the abuse or that she is merely overly sensitive.[49] They hide objects and tell her that she lost them.[50]

Another technique that batterers utilize is to intersperse violence and threats with kindness and false hope.[51] They begin, as described above, by working hard to establish an emotional connection before striking.[52] Some become masterful at alternating cruelty with effective appeals to victims' generosity, forgiveness, and guilt.[53] Lenore Walker, a distinguished researcher in the field of battered woman syndrome,[54] famously described a "cycle of violence" including a tension-building phase, violence, and then a honeymoon period in which the batterer pleas for forgiveness and acts with kindness.[55]

Batterers use stalking and surveillance to monitor their victims and to instill a sense of the batterers' own omnipotence.[56] They follow and monitor, demanding constant contact from the victim to avoid punishment.[57] They check their victims' cell phones and hack into their e-mail.[58] Technology has made this terrifyingly easy, allowing a batterer to establish his victim's whereabouts with a mere computer search for her smart phone location.[59] This stalking

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49. *See* NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 129-32 (1998).

50. *See id.* at 131; EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 254-55 (2006).

51. *See* LUNDY BANCROFT, WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 65-66 (2002).

52. *See id.* at 65-67.

53. *See id.*

54. *See* David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 622 & n.10 (1986).

55. *See* LENORE E. WALKER, THE BATTERED WOMAN 55 (1979). Some authors have criticized Walker for being overly simplistic and have argued that many abusive relationships do not fit the paradigm so neatly. *See, e.g.*, Faigman, *supra* note 54, at 636-42. In my experience, victims are rarely fooled by batterers' ploys (though they may defend the abuser to the world out of embarrassment at having chosen him). But victims frequently feel responsible for caring for abusers, who often have truly heart-wrenching tales of growing up in abusive households and struggling with the difficulties of the world.

56. *See* Justine A. Dunlap, *Intimate Terrorism and Technology: There's an App for That*, 7 U. MASS. L. REV. 10, 23 (2012).

57. *See id.* at 18-19.

58. *See id.* at 18, 22.

59. *See id.* at 23 (noting that technologies such as global positioning systems (GPS), spyware, and social media make it "easier, scarier, and deadlier" for a batterer to "undermin[e] the will ... and ... ability of the victim to resist"). Indeed, a National Public Radio

technology also allows the abuser to appear "omnipresent and omniscient to the victim," thus extending his control past even the expansive reaches of his monitoring.[60]

Batterers create rules and micro-regulations of daily life, from what the victim may wear to who she can talk to.[61] Using this technique the perpetrator creates a world in which the victim is constantly monitored and criticized; every move is measured against an unpredictable, ever-changing and unknowable "rule-book."[62] The victim's attempt to survive leads to constant anxiety and vigilance to avoid displeasing the torturer.[63] The experience of walking on eggshells becomes so excruciating that some victims actually provoke an attack to get it over with.[64]

Most commonly of all, batterers use constant verbal cruelty to degrade their victims.[65] We minimize this under the category of "emotional abuse," but it creates some of the most lasting wounds inflicted under a regime of torture.[66] They use relentless criticism

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survey found that 54 percent of domestic violence shelters ask survivors to disable GPS on their devices, and even more startling, 85 percent of shelters are working directly with victims whose abusers have tracked them via GPS. Aarti Shahani, *Smartphones Are Used to Stalk, Control Domestic Abuse Victims*, NPR (Sept. 15, 2014, 4:22 PM), http://www.npr.org/sections/15/346149979/smartphones-are-used-to-stalk-control-domesticabuse-victims [https://perma.cc/XJ2R-VMZC].

60. Dunlap, *supra* note 56, at 23.

61. *See* STARK, *supra* note 50, at 32, 203.

62. DOMESTIC VIOLENCE VICTORIA, SPECIALIST FAMILY VIOLENCE SERVICES: THE HEART OF AN EFFECTIVE SYSTEM 9-10 (2015) (citing STARK, *supra* note 50).

63. *See* Dutton, *supra* note 15, at 1221.

64. *See* Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, *in* HUMAN RIGHTS OF WOMEN 116, 124 (Rebecca J. Cook ed., 1994) ("For some women, the psychological terror is the worst part. Indeed, it can be so great that women will precipitate battering as opposed to enduring the fear."). This use of violence by the victim tends to gut her credibility in the criminal justice system. *See* Faigman, *supra* note 54, at 621-22.

65. *See* DAWN BRADLEY BERRY, THE DOMESTIC VIOLENCE SOURCEBOOK 2-4 (1998) ("'[D]omestic violence' is generally understood to include ... [e]motional abuse [including, but not limited to,] [c]onsistently doing or saying things to shame, insult, ridicule, embarrass, demean, belittle, or mentally hurt another person.... It also involves withholding money, affection, or attention; [and] forbidding someone to ... see friends or family.").

66. *See* Nora Sveaass, *Destroying Minds: Psychological Pain and the Crime of Torture*, 11 N.Y.C. L. REV. 303, 314 (2008); Tuerkheimer, *supra* note 7, at 968 ("Victims of domestic violence often identify nonphysical abuse as a critical component of the battering dynamic. Indeed, 'some battered women have described psychological degradation and humiliation as the most painful abuse they have experienced.'" (quoting Fischer et al., *supra* note 27, at 2123)).

and belittlement and they degrade and humiliate their victim.[67] Further, batterers have an advantage over those who torture strangers because the batterers have the opportunity to persuade their victim to entrust them with their secrets and emotional weak points.[68]

The only major distinction between domestic violence and the catalogue of torture techniques used elsewhere is that we normally associate torture with kidnapping or confinement of the victim. Batterers sometimes imprison their victims,[69] but more often they isolate them in less obvious ways. They almost always wait to begin abuse until they have their victims legally and emotionally entangled with them, often hitting for the first time on the wedding night or when the victim is pregnant.[70] Batterers use threats to prevent escape: threats of violence to the victim and her loved ones, threats to fight for custody of the victim's children, threats to impoverish the victim and her children, and threats to falsely accuse the victim of crimes.[71] Batterers isolate victims by punishing them for contact with their friends and family.[72] The resulting isolation may not

67. *See* Sveaass, *supra* note 66, at 316 ("Psychological torture is deliberate and targeted attacks on the mind and dignity of the person—through humiliation, through degrading mocking, through forcing people into shameful actions and positions and impossible choices.").

68. *See* Selden, *supra* note 15, at 13-14 ("Like the torturer to the prisoner, a man in an intimate relationship has continuous access to the woman he beats. They are, or began as, lovers, spouses, partners. The word 'intimate' describes a proximity between individuals that is not identified in other relationships.").

69. *See, e.g.*, United States v. Dowd, 417 F.3d 1080, 1083 (9th Cir. 2005) (affirming the conviction of a defendant for federal domestic violence based on his beating, kidnapping, and taking of the victim across state lines).

70. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 42 (1987) ("Typically—in 72 percent to 77 percent of the cases—violence occurs only after a couple has become seriously involved, is engaged, or is living together; rather than in the early, more casual stages of dating.").

71. *See* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19-26 (1999) (listing the above reasons and many more). If a victim seeks help from the criminal justice system, at best, it will respond with a misdemeanor prosecution of the perpetrator with no offer of protection for her. *See* Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59, 68 (2001) (reporting the results of a six-month longitudinal study that found that among sixty-five abused women applying and qualifying for a protection order, only half initially received the order).

72. *See* Buel, *supra* note 71, at 22.

match that of solitary confinement, but it still takes an enormous psychological toll.[73]

*State v. Norman* is a case that demonstrates most of these torture techniques.[74] J.T. Norman regularly beat Judy, his wife of twenty-five years, using a fist or any object at hand, burned her with cigarettes, and smashed glass against her face.[75] He knocked her down the stairs while she was pregnant, which resulted in the death of their child.[76] He sexually humiliated her and forced her to work as a prostitute.[77] He used psychological torture, calling her "bitch," "whore," and "dog," and making her sleep on the floor and eat dog food.[78] He threatened to kill her in very specific ways if she attempted to leave or to call for help.[79] At trial an expert testified that the abuse resembled the treatment that the Nazis gave to prisoners-of-war (POW) or the brainwashing techniques used during the Korean War.[80]

As I discuss next, a court would have deemed little of this evidence of torture relevant in a prosecution of J.T. Norman for individual discrete acts of domestic violence. Indeed, the State did not prosecute Norman at all.[81] Almost the only legal arena in which domestic violence victims have the opportunity to describe the full horror of their abuse is in their own trials for killing their batterers

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73. *See* JOHN T. CACIOPPO & WILLIAM PATRICK, LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTION 99-108 (2008) (describing five ways that loneliness negatively impacts human health); *see also* Rona M. Fields, *The Neurobiological Consequences of Psychological Torture*, *in* THE TRAUMA OF PSYCHOLOGICAL TORTURE, *supra* note 16, at 139, 139 (arguing that feelings of fear and powerlessness can have medical consequences); Stuart Grassian, *Neuropsychiatric Effects of Solitary Confinement*, *in* THE TRAUMA OF PSYCHOLOGICAL TORTURE, *supra* note 16, at 113, 121-24 (discussing the psychological effects of solitary confinement through the story of Jose Padilla); Atul Gawande, *Hellhole*, NEW YORKER (Mar. 30, 2009), http://www.newyorker.com/magazine/2009/03/30/hellhole [https://perma.cc/Z9QY-QFY4] (discussing long-term solitary confinement).

74. 366 S.E.2d 586 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989).

75. *Id.* at 587.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Norman*, 378 S.E.2d 8, 17-18 (N.C. 1989) (Martin, J., dissenting).

81. *Id.* at 17.

when they present their self-defense arguments.[82] In this case, as in many, Judy Norman's horror stories failed to earn her acquittal.[83]

## II. WHAT A TORTURE CRIME ACCOMPLISHES FOR DOMESTIC VIOLENCE

Against this backdrop, it becomes easier to understand the utter failure of criminal law to grapple with domestic violence. Current law criminalizes batterers' violence and explicit threats of violence but almost no other form of torture.[84] Part of this stems from the fact that U.S. criminal law does not prioritize most violence as much as it does narcotics or property crime.[85] Violence constitutes a mere misdemeanor unless it involves "serious bodily injury" or weapons;[86] even cigarette burns to genitals might not rise to a felony.[87] But criminal law also fails to adequately address domestic violence in

82. *See* Burke, *supra* note 12, at 580-81; Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326 (1992).

83. After an escalating day of violence, Judy Norman killed her husband while he slept. *Norman*, 378 S.E.2d at 13. The trial court determined that these circumstances did not meet the legal definition of "imminent danger" necessary for perfect self-defense. *Id.* As a result, the jury was not instructed on the law related to self-defense, and the case resulted in a voluntary manslaughter conviction. *Id.* at 9. The state appellate court ordered a new trial, holding that the existence of battered spouse syndrome, in certain circumstances, "does not preclude the defense of perfect self-defense" for the "unlawful killing of a passive victim." *Norman*, 366 S.E.2d at 592. However, the State Supreme Court reversed and upheld the initial conviction. *Norman*, 378 S.E.2d at 14-16. For arguments about why self-defense law fails to understand the kind of imminent danger faced by domestic violence victims, see generally ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000), and Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003).

84. *See* Tuerkheimer, *supra* note 7, at 971-72.

85. *See generally* Eve Buzawa et al., *Responding to Crimes of Violence Against Women: Gender Difference Versus Organizational Imperatives*, 41 CRIME & DELINQ. 443, 443, 445 (1995); Jane W. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIMINOLOGY 56, 57-58 (1984); Margaret E. Martin, *Mandatory Arrest for Domestic Violence: The Courts' Response*, 19 CRIM. JUST. REV. 212, 212-13 (1994).

86. Tracy A. Bateman, Annotation, *Sufficiency of Bodily Injury to Support Charge of Aggravated Assault*, 5 A.L.R.5th 243 (1992).

87. *See, e.g.*, Souder v. Commonwealth, 719 S.W.2d 730, 732 (Ky. 1986) (cigarette burns to the mouth, standing alone, were not serious enough to constitute "serious physical injury" for first-degree assault), *overruled on other grounds by* B.B. v. Commonwealth, 226 S.W.3d 47 (Ky. 2007). *But cf.* United States v. Peneaux, 432 F.3d 882, 890-91 (8th Cir. 2005) (upholding a felony assault conviction for inflicting serious bodily injury on a child by extinguishing a lit cigarette on her body).

more particular ways. Criminal law does not recognize domestic violence as a pattern crime and instead treats it as individual, isolated incidents.[88] Because of these inadequacies, the law fails to explain the nature of domestic violence to the public, instead dividing it into a thousand minimal, constituent parts.[89]

### *A. Criminal Law Does Not Capture the Scope and Harm of Domestic Violence*

Domestic violence violates an array of statutes, from battery, to trespass, to attempted murder.[90] In the 1980s, states created specific domestic violence statutes to make clear that no informal exception for violence against an intimate partner existed.[91] States did so, however, by merely relabeling misdemeanor battery between intimates as the crime of "domestic violence."[92] They did not alter the fundamental nature of the charges already available, which were designed for far more singular acts of violence inflicted on strangers or acquaintances.[93] As Alifair Burke points out, domestic violence reformers have focused more on procedural attempts to improve the criminal justice system than on examining the limitations of statutory law.[94]

Most criminal law statutes remain "transaction-bound," focused on a single and discrete action.[95] These statutes generally function well to capture the harm of stranger violence. The harm of a bar

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88. *See* Tuerkheimer, *supra* note 7, at 960-61.

89. *See id.*

90. *See* Dutton, *supra* note 15, at 1204.

91. These statutes did accomplish a few things: At a practical level, they helped to capture the quantity of domestic violence by labeling it explicitly. *See* Zorza, *supra* note 8, at 62. They helped law enforcement direct special services to victims. *See id.* at 56. States also allowed warrantless arrests in domestic violence cases (despite some general prohibitions on such arrests in other misdemeanor cases) and many states passed "mandatory arrest" statutes. *See id.* at 61-65. Domestic violence statutes also sometimes raised penalties for repeat offenses. *See* Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J.L. REFORM 645, 657, 664 (2014).

92. *See* Zorza, *supra* note 8, at 62-63.

93. Tuerkheimer, *supra* note 7, at 960, 971-74 (arguing that current domestic violence laws are "[p]remised on a transactional model of crime that isolates and decontextualizes violence").

94. Burke, *supra* note 12, at 565-66.

95. *See* Tuerkheimer, *supra* note 7, at 972.

fight, for example, is usually contained by a single act of battery. But the law falls short when applied to years of abuse ranging from shoves to strangulation.[96] At best, a prosecutor can choose fragmented pieces of the whole by asking the victim to remember a few particular batteries. Thus, a batterer's reign of terror constitutes nothing more than the sum of any of its parts that can be singled out and shown in isolation.[97]

Transaction-bound offenses are not, in fact, a requirement of criminal law. Conspiracy statutes have long allowed the description of patterns of crimes; racketeering laws do so even more expansively.[98] Both conspiracy and racketeering would prove quite valuable to allow a prosecutor to fully describe the pattern of harm in domestic violence cases, except that each statute requires more than one perpetrator.[99] Batterers usually act alone, conspiring with no one.

In the 1990s, states outlawed stalking, thereby acknowledging a pattern crime committed by an individual perpetrator.[100] Before the passage of stalking statutes, prosecutors would have to pursue a terrifying pattern of following, monitoring, and implied threats with individual *de minimis* charges like trespassing.[101] Stalking

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96. *See* Burke, *supra* note 12, at 555; Tuerkheimer, *supra* note 7, at 960-61; *see also* Buel, *supra* note 83, at 233 (explaining that courts address only individual incidents of violence, rather than the pattern of abuse); Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 264 (1994) ("Because the criminal codes generally already provide remedies against typical forms of domestic abuse such as battery, property destruction and criminal threat, most states do not designate domestic violence as a separate crime."); G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of* Deshaney, 29 COLUM. HUM. RTS. L. REV. 641, 672 n.147 (1998) ("Because most jurisdictions do not classify domestic violence as a separate crime, intimate violence is subsumed in general crime classifications, e.g., murders, rapes, larceny.").

97. *See* Tuerkheimer, *supra* note 7, at 973.

98. *See, e.g.*, 18 U.S.C. § 371 (2012) (conspiracy); *id.* §§ 1961-1962 (racketeering).

99. *See id.* § 371 (requiring "two or more persons"); *id.* §§ 1961-1962 (requiring an "enterprise").

100. *See generally* U.S. DEP'T OF JUSTICE, NCJ 186157, REPORT TO CONGRESS ON STALKING AND DOMESTIC VIOLENCE, at v-vii (2001), https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf [https://perma.cc/R8YY-SN6F].

101. *See* Burke, *supra* note 12, at 589 (stating that before stalking laws, individual incidents "seem[ed] innocuous ... even flattering"); Tuerkheimer, *supra* note 7, at 1004-05.

captures the full array of harm done by a single individual over time.[102]

Domestic violence, however, remains mired in the world of fragmentation.[103] Not only do the available charges fail to present a full picture of the pattern and scope of violence, the rules of evidence often forbid painting such a picture at trial. A prosecutor conducting a trial of a single individualized act of violence often will be prohibited from bringing in evidence of all the other crimes committed by the batterer against his victim.[104] Under Federal Rule of Evidence 404(b), the law frowns on bringing in "prior bad acts" to prove current wrongdoing as "propensity" evidence.[105] Courts do not allow prosecutors to prove, for example, that a defendant committed the charged bank robbery merely because he has robbed ten other banks.[106]

Pursuant to Rule 404(b), the prosecutor must go to the trouble of giving notice and then defending against a motion to exclude evidence of prior bad acts in order to use such evidence to show the defendant's motive and intent.[107] Even when prosecutors succeed with these efforts, the focus of the trial must remain on the single incident charged.[108] All other context becomes a legal distraction.

Professor Tuerkheimer points out that the isolation of single incidents also undermines the credibility of the victim's testimony—frequently the only evidence in domestic violence cases.[109] The judge or jury faced with the story of a single moment of violence in isolation will never understand the totality of the reign of terror.[110]

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102. *See* Tuerkheimer, *supra* note 7, at 1004-05.

103. Stalking statutes are generally inapplicable to domestic violence cases, because a prosecutor cannot bring stalking charges until after the victim has left the perpetrator. *See id.* at 1005-06. The concept of "unconsented contact" becomes far too blurry while the victim and perpetrator still live together. *See id.* at 1010-11 (noting that the "law disregards the continuing course of conduct ... before the relationship is deemed to have 'ended'").

104. *See id.* at 985.

105. *See* FED. R. EVID. 404(b); Tuerkheimer, *supra* note 7, at 989-90.

106. *See, e.g.*, United States v. Phillips, 599 F.2d 134, 136-37 (6th Cir. 1979) (reversing a bank robbery conviction because the trial court erroneously allowed admission of evidence of prior bank robberies).

107. FED. R. EVID. 404(b)(2). Upon request by the defendant, the prosecutor must give notice before trial of her intent to use evidence of prior bad acts. *Id.*

108. *See* Tuerkheimer, *supra* note 7, at 994.

109. *Id.* at 981-84.

110. *Id.* at 983-88.

They will never understand how the victim found herself in the situation, much less how she became trapped there.[111] Further, because existing law ignores the purposes of domestic violence altogether, these stilted trials omit much of the evidence of the defendant's motive that would help to explain the crime.[112]

An industrious prosecutor might attempt to capture all of the abuse by charging multiple counts of domestic violence—bringing a single indictment listing twenty different crimes. The power of our transactional notion of criminal law is such, however, that a judge might sever those charges into different trials.[113] The law requires the evidence of each charge to stand alone and gives the court discretion to avoid the potential of prejudice from overlapping evidence.[114]

More to the point, police or prosecutors will rarely know about the full scope of abuse precisely because the law requires them to focus on an individual incident. A busy police officer responding to a domestic violence call has no incentive to inquire about the broader pattern of domestic violence,[115] nor does the busy prosecutor triaging the case as part of the always-enormous docket of domestic violence cases.[116] Most police and prosecutors will ask only about the incident charged and may even become impatient with a victim who veers off into a jumble of descriptions about the past.[117]

Even when charges are brought, criminal law seriously underestimates the harm caused by a batterer's cumulative reign of terror. The law charges the vast majority of domestic violence as mere misdemeanors, punishable at best by a few months' incarceration, but rarely giving any.[118] Almost uniquely in the criminal justice

111. *Id.* at 986.
112. *Id.* at 986-87.
113. *Id.* at 973 n.71
114. *See* FED. R. CRIM. P. 14.
115. *See* Burke, *supra* note 12, at 577; Tuerkheimer, *supra* note 7, at 976.
116. *See* Tuerkheimer, *supra* note 7, at 977-79.
117. *See id.*
118. *See* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 34 (2004) ("Battered women ... frequently find their abusers punished by nothing more than probation."); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508 (1998) (discussing her frustration as a former domestic violence prosecutor "with the unwillingness of judges to sentence domestic violence offenders to incarceration"). In recognition of this issue, the federal law banning felons from

system, we "punish" domestic violence with treatment in lieu of jail time.[119] Regardless of whether this treatment works (and the evidence suggests it proves effective for only a small fraction of batterers), there is no reason that it should entirely supplant punishment and deterrence.[120]

The failure of the law to capture the full pattern or seriousness of domestic violence also results in a warped consideration of danger during bail determinations. The judge deciding bail will know nothing about the defendant's threats to kill the victim if she reports him, his years of escalating abuse, or his use of rape and humiliation.[121] Instead the judge will see only a single petty offense and will likely grant the defendant's bail. Despite the extraordinary level of witness tampering and threats endemic to domestic violence cases, the judge will not have access to the larger pattern necessary to determine danger.[122] Bail also depends heavily on the seriousness of the charges brought, and most domestic violence will constitute no more than a misdemeanor.[123]

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possession of firearms dips down to include domestic violence misdemeanors as well. *See* 18 U.S.C. § 922(g)(9) (2012).

119. *See* Hanna, *supra* note 118, at 1522 ("When prosecutors decide to go forward, the final disposition is often a period of probation, either pre- or post-conviction, contingent upon completion of a batterer treatment program.").

120. *See* Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 644-46 (2004) (surveying research on batterer intervention programs).

121. *See* Tuerkheimer, *supra* note 7, at 976-77.

122. *See* Giles v. California, 554 U.S. 353, 405-06 (2008) (Breyer, J., dissenting). Justice Breyer noted that domestic violence cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." *Id.* at 406 (quoting Davis v. Washington, 547 U.S. 813, 832-33 (2006)). Regardless of the batterer's purpose, the use of "threats, further violence, and ultimately murder can stop victims from testifying." *Id.* at 405. Justice Breyer then criticized the majority's ruling that the forfeiture rule required a showing of the batterer's purpose in preventing the victim's testimony as "grant[ing] the defendant not fair treatment, but a windfall." *Id.* at 406.

123. *See, e.g.*, CAL. CONST. art. 1, § 28(f)(3) ("In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, *the seriousness of the offense charged*, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case." (emphasis added)); *see also* Goodmark, *supra* note 118, at 35 (noting that domestic violence cases are "usually charged and tried as misdemeanors"). Indeed, a survey conducted across multiple prosecutors' offices in California, Oregon, and Washington found that 82 percent of domestic violence cases were charged as misdemeanors. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747 app. at 822 (2005); *see also* EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 132 (3d ed. 2003) ("[E]ven if accompanied by a night in jail, the minimal costs of arrest alone may sometimes actually

A victim who has the courage to report her torturer thus faces his almost immediate release.[124] If the assistant district attorney meets with her at all, it will be for the few precious minutes available for a misdemeanor charge, with a prosecutor who will ask questions only about the specific incident that led the victim to call for help.[125] In return for all of that risk, the victim knows that—at best—her abuser will face a mere misdemeanor conviction and a class on how to not beat women any more.[126] Even if convicted, and that is a big "if," the torturer will return home enraged and seeking revenge.[127]

The criminal justice system does not respond to the inability of victims to testify by expanding sentences for domestic violence to keep them safer when they do come forward.[128] Instead, prosecutors focus on forcing reluctant victims to testify, sometimes by jailing them for contempt.[129] This creates a situation in which victims calling the police face a terrible choice between protecting themselves and risking jail for doing so.[130]

The decision to punish most domestic violence only as misdemeanors also undermines the attention paid to the national epidemic of domestic violence. Police and prosecutors give misdemeanor domestic violence less attention and fewer resources, often shuttling the cases through special misdemeanor courts.[131] Nor

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serve as a reinforcement of the crime's benefits. In jurisdictions without a comprehensive strategy for domestic violence intervention, offenders will rapidly learn that there are no further sanctions imposed beyond the arrest itself.").

124. *See supra* note 118-19 and accompanying text.

125. *See* Tuerkheimer, *supra* note 7, at 977-87.

126. *See supra* notes 118-19 and accompanying text.

127. *See* Hanna, *supra* note 118, at 1555.

128. *See id.*

129. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1851 (1996). Prosecutors act with the best intentions to remove the power of witness tampering from defendants by forcing the case forward regardless. *See id.* at 1852. The problem is that a conviction that results in little chance of punishment seems hardly worth putting the victim in that kind of danger.

130. *See id.*

131. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280-82 (2011) (explaining that most criminal cases are misdemeanors, which receive far fewer resources from both prosecutors and public defenders). Conversely, some jurisdictions have created special domestic violence courts, though these matter much more if they receive more resources than other cases, not fewer. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 21-22 (2009); Rekha Mirchandani, *What's So Special About Specialized Courts? The State and Social Change in Salt Lake City's*

does domestic violence count in the policy tradeoffs made by mayors and police chiefs.[132] One political fact that does not receive scholarly attention is that the FBI does not count misdemeanor violence—including the vast majority of domestic violence—in its statistics on violent crime.[133] So, cities concerned about the public rise and fall of their violent crime rates need not concern themselves with domestic violence until some of those cases result in murder and register in the annual homicide rate. Community pressure pushes all the actors within the criminal justice system to focus on felony arrests, prosecutions, and convictions, thus excluding domestic violence (and for that matter, most violent crime).[134]

The line between misdemeanor and felony violence makes sense in the context of stranger and acquaintance violence, but not in the context of domestic violence.[135] The defendant charged in the bar fight must face felony counts if he caused "serious bodily injury" or if he used a weapon.[136] Both factors represent increased dangerousness and harm. Yet, as described above, batterers focus more on control through pain than injury in and of itself.[137] Although the definitions of "serious bodily injury" in state law sometimes include a notion of serious pain, the pragmatic focus usually remains on lasting physical injury.[138] Batterers also use violence in a way that

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*Domestic Violence Court*, 39 LAW & SOC'Y REV. 379, 379-80 (2005); John R. Emshwiller & Gary Fields, *Justice Is Swift as Petty Crimes Clog Courts*, WALL ST. J. (Nov. 30, 2014), http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782 [https://perma.cc/TXE4-YKHC]. Misdemeanor courts in a few states, including New York, even make use of nonlawyer judges. *See* William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1, A18.

132. *See* Buzawa et al., *supra* note 85, at 459-60.

133. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2013 at 1 (2014), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain_final [https://perma.cc/CHG9-3SHU] ("[V]iolent crime is composed of four offenses: murder and nonnegligent manslaughter, rape, robbery, and aggravated assault.").

134. *See generally* Ellis, *supra* note 85, at 60-61 (discussing how the public interest affects prosecutorial charging decisions).

135. *See* Johnson v. United States, 559 U.S. 133, 150 (2010) (Alito, J., dissenting) ("Since that time, however, the term 'felony' has come to mean any offense punishable by a lengthy term of imprisonment (commonly more than one year); the term 'misdemeanor' has been reserved for minor offenses." (internal citations omitted)).

136. *See* MODEL PENAL CODE § 211.1(2)(a) (AM. LAW INST., Proposed Official Draft 1980).

137. *See supra* Part I.

138. *See* Burke, *supra* note 12, at 583 (discussing how batterers frequently stop short of committing felony violence because they focus more on control than on causing serious injury).

maximizes psychological torment and the deprivation of liberty more than visible injuries.[139]

### *B. Most Torture Techniques Remain Legal*

I would add to the analysis of Professors Burke and Tuerkheimer the fact that many of the torture techniques described in Part I remain entirely legal under current criminal law.[140] For example, sleep deprivation violates no law, even when done for the purpose of causing extreme pain or anguish.[141] Torturers can make use of sexual humiliation legally, so long as they do not commit an unconsented touching of the victim's genitals.[142] Torturers can coerce victims into degrading sexual acts while still meeting the legal definition of consent under rape law.[143]

States even vary in how thoroughly they cover threats of violence. The law often punishes only explicit threats, not the kind of implied threats batterers frequently employ.[144] Nor does every state outlaw

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139. *See id.* at 569-70. Some of batterers' favorite techniques remain in the misdemeanor category, particularly strangulation (though many states have specifically decided to make it a felony). As of September 2014, seven states have a strangulation-specific felony statute. *See* NAT'L DIST. ATTORNEYS ASS'N, CRIMINAL STRANGULATION/IMPEDING BREATHING 4 (2014), http://www.ndaajustice.org/pdf/strangulation_statutory_compilation_11_7_2014.pdf [https://perma.cc/XDH8-G9SW].

140. Both of them note that "emotional abuse" falls outside of the scope of the law. *See* Burke, *supra* note 12, at 596 ("[E]motional abuse ... is not itself criminal."); Tuerkheimer, *supra* note 7, at 1030 (discussing the "[l]aw's failure to redress the ... non-physical manifestations of the abuser's effort to dominate his victim").

141. The Department of Justice maintains that sleep deprivation of up to 180 hours does not even violate the federal torture statute, though that statute is overly narrow and the DOJ interpretation arguably wrong. *See* Luban & Shue, *supra* note 41, at 831-32; Mark Mazetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES (Apr. 16, 2009), http://www.nytimes.com/2009/04/17/us/politics/17detain.html?hp [https://perma.cc/2ZXC-JLAX].

142. Rape law, at best sexual battery, remains focused on physical contact, such as "touch[ing] an intimate part of another person while that person is unlawfully restrained." CAL. PENAL CODE § 243.4 (West 2016).

143. Coercive sex remains lawful in most states, and even the few states that have outlawed coercion have done so indirectly, by providing that it serves to negate consent. *See* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 124 (1998). For example, Florida's sexual battery statute provides that "'[c]onsent' ... does not include coerced submission." FLA. STAT. § 794.011 (2016).

144. Most assault statutes require a threat to accompany an "immediate intention coupled with a present ability to commit a battery." 6 AM. JUR. 2D *Assault and Battery* § 1 (2008). Courts also frequently require more explicit threats before issuing civil protection orders, such

threats against others, such as threatening to kill the victim's loved ones.[145] And some states still struggle with conditional threats, such as "I will kill you if you leave me." Courts have dismissed conditional threats, for example, because they violated an imminence requirement,[146] though perhaps they would be covered under extortion statutes.[147]

Let me give an example of how poorly criminal law functions against domestic violence, making use of a rarely examined type of evidence in legal scholarship, the trial transcript of an acquittal.[148] On March 28, 2010, seventy-eight-year-old Alfred Andrews rolled into a New Orleans criminal court in a wheelchair, seeming weak

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as threats that present an immediate danger or even threats to kill. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 860-61 (1993).

145. *See* Klein & Orloff, *supra* note 144, at 860.

146. *See, e.g.*, People v. Wilson, 112 Cal. Rptr. 3d 542, 555 (Ct. App. 2010) (holding that conditional threats must convey "a gravity of purpose and imminent prospect of execution"); City of Cincinnati v. Baarlaer, 685 N.E.2d 836, 840-41 (Ohio Ct. App. 1996) (requiring the victim to be placed in imminent harm before a conditional threat constitutes domestic violence). *But see, e.g.*, People v. Melhado, 70 Cal. Rptr. 2d 878, 883-84 (Ct. App. 1998) (focusing on the use of the word "so" in the statutory language requiring a terroristic threat be "so unconditional" and finding that conditional threats may suffice, so long as the context conveys a "degree of seriousness and imminence" to the victim of the "*future prospect* of the threat being carried out"); State v. Thompson, 580 S.E.2d 9, 14 (N.C. Ct. App. 2003) (finding that conditional threats are unlawful if they make a reasonable person, and the victim in fact, believe that the threat is likely to be carried out). The Supreme Court itself has noted that the conditional nature of a statement diminishes its status as a true threat worthy of exception to free speech protections. *See* Watts v. United States, 394 U.S. 705, 708 (1969). *Watts*, however, involved political speech and the conditional nature of the threat helped determine its hyperbolic nature. *See id.* During its last term, the Supreme Court declined an opportunity to measure the limits of threat law against the First Amendment in a domestic violence case. *See* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015). The Court did hold, however, that the federal interstate threat statute does require a showing of intent that the defendant "transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.*

147. *See, e.g.*, FLA. STAT. § 836.05 (2016).

148. Legal research focuses instead on conviction appeals, thus missing real, qualitative analysis of trials, but also missing all criminal acquittals—the cases in which equal protection violations are often most apparent. *See generally* Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75 (2009) (discussing the danger of juries engaging in discriminatory acquittals in domestic violence cases). Scholars generally do not examine trial transcripts in acquittals for the understandable reason that they are not created unless someone pays to order them. The trial transcript discussed in this section was sent to me by local journalists seeking comment and was ultimately posted online. *See* Transcript of Testimony, State v. Andrews, No. 490-177 (La. Crim. Dist. Ct. Dec. 21, 2009), http://www.media.nola.com/crime_impact/other/andrews.transcript.pdf [https://perma.cc/2YUF-EQT5].

and frail, and complaining about diabetes.[149] Andrews faced trial for a misdemeanor charge of domestic violence battery.[150] His thirty-one-year-old wife, Jennifer Muse, testified that, on the night in question, Andrews shoved her, causing her to fall and hit a pile of books and cut her face.[151] Andrews testified in turn that his wife started the fight and he had simply defended himself.[152]

The entire incident seemed petty, and the Commissioner hearing the case found him not guilty.[153] She acknowledged the ways that Andrews mistreated his wife but then characterized it as provocation: "Ms. Muse was probably right for not wanting to be awakened, she was weary and tired, but that's a part of the consequence, she married someone fifty years, forty years ... her senior. And, so that's one of the consequences."[154] The Commissioner assumed an equal power balance between the two and given the narrow scope of the trial, heard no obvious evidence to the contrary.

Two days after his acquittal, Alfred Andrews shot and killed his wife, her sister, and her mother before turning the gun on himself.[155] A neighbor interviewed on the local news described watching Muse's mother die on the porch.[156] She bled to death as the SWAT team determined whether Andrews was still a threat.[157]

The trial transcript is remarkable for what it does not cover. It necessarily focuses on a single, seemingly minimal incident of violence, with no reference to a history of abuse. Yet some facts, chillingly relevant in hindsight, did sneak in through the testimony of Muse. She described being woken regularly by Andrews in the middle of the night even though he knew she had to leave for work

149. *See* Ramon Antonio Vargas, *Treme Triple-Murder Suspect's Poor Health a Factor in Domestic Abuse Acquittal*, TIMES-PICAYUNE (Mar. 31, 2010, 7:50 AM) http://www.nola.com/crime/index.ssf/2010/03/treme_triple-murder_suspects_p.html [https://perma.cc/L5Q2-LSXE].

150. *See* Transcript of Testimony, *supra* note 148, at 2.

151. *Id.* at 4, 10.

152. *Id.* at 20-21.

153. *See id.* at 31.

154. *See id.*

155. *See* Vargas, *supra* note 149. Andrews was listed in critical condition and died in jail a year later before facing trial for the triple murder. *See* John Simerman, *New Domestic Violence Initiative Follows Deadly Breakdowns in New Orleans*, NEW ORLEANS ADVOC. (Oct. 25, 2014, 8:29 PM), http://www.theadvocate.com/sports/10622687-32/new-domestic-violence-initiative-follows [https://perma.cc/MLA6-Y6WC].

156. *See* Vargas, *supra* note 149.

157. *See id.*

at four o'clock in the morning.[158] Andrews testified that he wanted to finish an argument with his wife, but that she left the room.[159] He said, "I object to that," and kept her from leaving.[160] She then took a stool to try to break the window and escape.[161]

Worst of all, no one did the math on their ages. Muse described a relationship that spanned fifteen years, meaning that it began in statutory rape when Muse was sixteen and Andrews sixty-three.[162] According to later news reports, Andrews impregnated Muse while he was dating and living with her mother and sister.[163] For more than a decade, he lived with all three women, sleeping with at least two of them, before killing them all.[164] There are many facts we will never know about this case because existing law deemed them irrelevant, but it seems likely, based on the clues at trial and on his ultimate killing spree, that Alfred Andrews ran a torture chamber of his own. The structure of criminal law guaranteed that no one bothered to find out.

## III. A TORTURE STATUTE WOULD SOLVE MANY OF THESE LEGAL PROBLEMS

Professors Burke and Tuerkheimer would solve the current gaping holes in criminal law by broadening domestic violence statutes. Their proposals would punish patterns of violence and recognize

158. *See* Transcript of Testimony, *supra* note 148, at 4, 9.

159. *See id.* at 20.

160. *See id.*

161. *See id.*

162. *See id.* at 10 (relative ages of the parties); LA. STAT. ANN. § 14:80 (2016) (felony carnal knowledge).

163. *See* Vargas, *supra* note 149. Other reports described an aggravated rape charge filed (and later withdrawn) against Andrews in 1996, charging him with raping a different girl from age eleven to sixteen while he was dating her mother. *See Man Who Killed 3 After Domestic Violence Acquittal Labeled 'Career Criminal,'* WWLTV.COM. (April 2, 2010), https://perma.cc/UGZ8-47M6.

164. *See* Vargas, *supra* note 149.

coercive control.[165] I would focus instead on creating a torture statute that is not specific to domestic violence for three reasons.

First, a ban on private torture should easily pass legislatures without inspiring any organized opposition because no one publicly supports torture by private actors.[166] A torture statute closes gaps in existing law in a variety of contexts of acknowledged horror. It may not occur to legislators that the paradigmatic torturer in fact lives down the street, attacking only the members of his household. Instead, legislators can safely focus on drug kingpins, kidnappers,

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165. Professor Tuerkheimer proposes the following statute:

> A person is guilty of battering when:
> He or she intentionally engages in a course of conduct directed at a family or household member; and
> He or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member; and
> At least two acts comprising the course of conduct constitute a crime in this jurisdiction.

Tuerkheimer, *supra* note 7, at 1019-20. Professor Burke proposes the following: "A person commits the crime of Coercive Domestic Violence if the person attempts to gain power or control over an intimate partner through a pattern of domestic violence." Burke, *supra* note 12, at 601. Burke defines a "pattern of domestic violence" as "two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner." *Id.* at 602 (footnote omitted).

166. The public increasingly does, however, tolerate torture by government actors seeking out terrorists. *See* AMNESTY INT'L, STOP TORTURE GLOBAL SURVEY: ATTITUDES TO TORTURE 5 (2014), https://www.amnestyusa.org/pdfs/GlobalSurveyAttitudesToTorture2014.pdf [https://perma.cc/L7SJ-74UT] (finding that 45 percent of Americans agree that torture is sometimes "necessary and acceptable to gain information that may protect the public"); *About Half See CIA Interrogation Methods as Justified*, PEW RESEARCH CENTER (Dec. 15, 2014), http://www.people-press.org/2014/12/15/about-half-see-cia-interrogation-methods-as-justified [https://perma.cc/534B-358G] (finding that 51 percent of people believe the CIA methods detailed in the Senate Intelligence Committee report were justified). Analysts blame this major shift in opinion over time both on changing attitudes after 9/11, but mostly on positive cultural depictions of torture, from the television show *24* to the movie about killing Osama bin Laden, *Zero Dark Thirty*. *See* Sam Kamin, *How the War on Terror May Affect Domestic Interrogations: The* 24 *Effect*, 10 CHAP. L. REV. 693, 703-08 (2007) (detailing cultural depictions of torture, such as its effectiveness in obtaining truthful confessions, and expressing concern that these depictions will desensitize the public and ultimately the courts); John Blosser, *TV Show* 24 *May Have Normalized Torture for Americans*, NEWSMAX (Dec. 10, 2014), http://www.newsmax.com/US/normalized-torture-Jack-Bauer-24/2014/12/10/id/612274/ [https://perma.cc/36M6-8KDJ]; Eric Deggans, *Even If Torture Doesn't Work in the Real World, TV Has Us Convinced It Does*, NPR (Dec. 12, 2014), http://www.npr.org/2014/12/12/370264893/even-if-torture-doesnt-work-in-the-real-world-tv-has-us-convinced [https://perma.cc/LT9L-Q8JY]. Despite the sad fact that Americans are becoming more inured to the horrors of torture when they deem it justified, the analogy remains a powerful tool.

or serial killers in training. This proposal does not require persuading legislators to give special status to domestic violence victims.

Indeed, in Michigan and California, the states that have already passed general torture statutes, prosecutors have used their statutes to capture other egregious harms, such as home invasions and beatings of elderly victims,[167] as well as cruel and sadistic rapes of strangers.[168] Notably, prosecutors have also used torture statutes to capture the full pattern and horror of child abuse, another enormous benefit of torture statutes that I do not address here.[169] Finally, prosecutors have also gone after gang members and drug dealers who cruelly torture less sympathetic victims.[170]

Second, a torture statute can go farther than a "coercive domestic violence" statute to cover conduct beyond battery and threats. While both Professors Burke and Tuerkheimer acknowledge that violence

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167. *See, e.g.*, People v. Riley, Nos. 295838, 298164, 2011 WL 4501765, at *1 (Mich. Ct. App. Sept. 29, 2011) (per curiam) (affirming defendant's torture conviction for breaking into an elderly man's home, punching him in the face so hard his dentures came out, leaving a shoe print on his face, tying him up, and beating him at length until he repeatedly lost consciousness); People v. Lachniet, No. 297836, 2011 WL 2859818, at *1 (Mich. Ct. App. July 19, 2011) (per curiam) (affirming defendant's torture conviction for breaking into an elderly woman's home, punching her repeatedly in the face until she lost consciousness, and tying her up with cords).

168. *See, e.g.*, People v. Massie, 48 Cal. Rptr. 3d 304, 308-09 (Ct. App. 2006) (upholding defendant's torture conviction after he raped a stranger in her home, reacted with rage when she told him that Jesus loved him, used various methods to inflict pain, and acted over a long period of time, taking breaks in between); People v. Pre, 11 Cal. Rptr. 3d 739, 740-42 (Ct. App. 2004) (holding that the torture conviction was supported by evidence that defendant selected a woman unknown to him, forcibly entered into her apartment, attacked her viciously when she resisted, twice choked her into unconsciousness, and then intentionally inflicted great bodily injury and cruel and extreme pain by biting her while she was helpless and for no other apparent purpose than revenge or sadistic pleasure).

169. *See, e.g.*, People v. Lujan, 150 Cal. Rptr. 3d 727, 729-30 (Ct. App. 2012) (affirming defendant's conviction for torturing his children and murdering one of them after he beat them repeatedly, fed them Tabasco sauce, and bit and shook them until one child died); People v. Hill, No. 317294, 2014 WL 6602570, at *1 (Mich. Ct. App. Nov. 20, 2014) (per curiam) (affirming defendant's conviction for murder, torture, and child abuse after beating a two-year-old to death for toilet training issues), *appeal denied*, 864 N.W.2d. 566 (Mich. 2015).

170. *See, e.g.*, People v. Jung, 84 Cal. Rptr. 2d 5, 6-7 (Ct. App. 1999) (finding sufficient evidence to support a torture conviction when defendant intended to cause cruel or extreme pain and suffering to a rival gang member during beating episode lasting several hours, even though victim suffered no broken bones or damage to vital organs; defendant and accomplices burned naked victim with cigarettes, hit, bit, and jumped on him, tattooed him repeatedly, poured rubbing alcohol over his fresh wounds, and applied Ben-Gay ointment to his penis, circumstances suggesting intent to cause severe pain and suffering).

represents the tip of a much bigger iceberg of abuse, they understandably do not attempt to stretch their proposed broader domestic violence statutes to explicitly cover conduct not already criminalized.[171] Torture statutes, including those already in place and described in Part IV, could capture far more misconduct without generating as much controversy.

Finally, the torture analogy accomplishes something profound to help the criminal justice system and the public understand the true nature of domestic violence.[172] When we conceive of torture, we understand things that elude us as to domestic violence. We do not blame the victim or assume she is weak. We comprehend that violence is but one tool of many, and that the torturer's ultimate goal is power.

### *A. Using a Torture Statute to Capture the Full Horror of Domestic Violence*

I grapple with the specifics of a torture statute and the many problems of line drawing in Part IV, but first let me describe my general goals. A crime of torture would capture all of a batterer's physical violence and threats, tethering together discrete incidents into a full picture of the pattern of terrifying abuse. It would allow a prosecutor to describe a list of activities spanning a period of time, with specific examples, and without separating each individual act into a *de minimis* separate count. The statute would also allow for admission of the full evidence of abuse without resort to narrow Federal Rule of Evidence 404(b) exceptions.

Unlike most violent crime charges, torture would constitute a felony with sentences commensurate with the defendant's infliction of horror. Courts would no longer equate an egregious, repeated pattern of violence completed for the purpose of controlling another human being with a mere bar fight. The focus would shift to the defendant's intent to inflict severe pain and psychological scars, rather than whether the defendant caused actual physical injury.

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171. Burke, *supra* note 12, at 601-05; Tuerkheimer, *supra* note 7, at 1020 (proposed statute focuses on a "course of conduct" consisting of existing criminal violations).

172. *See infra* Part III.B.

The statute would force the justice system to look at the full span of evidence necessary to punish the defendant's wrongdoing and to better protect victims from murder. A charge of torture could reach back farther than the statute of limitations to cover the sum total of abuse, as conspiracy law currently allows.[173] It would allow appropriate charges against a batterer who engaged in torture spanning decades.

A torture statute would encourage police and prosecutors to seek the victim's full testimony about abuse, because, for the first time, the full story would prove legally relevant. By listing the less obvious torture techniques, the statute would map out the right questions to ask victims to understand the totality of abuse. As a result, law enforcement would delve into the complexity necessary to explain the motives of both defendant and victim, and to make those motives comprehensible at trial.

A torture statute also would encourage everyone in the criminal justice system to better assess the risk that domestic violence will result in murder. Almost uniquely among murder victims, domestic violence victims often approach the criminal justice system for help multiple times before ending up dead.[174] A system that focuses only on the latest discrete battery will miss the signals of impending homicide, which are measured more by the batterer's degree of control over his victim than by his previous violence against her.[175] A torture statute would encourage police, prosecutors, and even the judge setting bail, to ask the right questions for a "lethality assessment."[176]

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173. *See, e.g.*, Smith v. United States, 133 S. Ct. 714, 717 (2013) (statute of limitations only begins to run at the end of a conspiracy, or when a particular defendant withdraws from the conspiracy).

174. *See* Jaime Adame, *Are Domestic Violence Homicides Preventable?*, CRIME REP. (Feb. 24, 2014), http://www.thecrimereport.org/news/inside-criminal-justice/2014-02-are-domestic-violence-homicides-preventable [https://perma.cc/V76E-RQB8].

175. Stark, *supra* note 22, at 20.

176. Jacquelyn Campbell worked backwards from thousands of domestic violence homicides to identify the biggest correlative factors. Her "Danger Assessment" uses a scoring system to prioritize the riskiest behaviors:

> 1. Has the physical violence increased in frequency during the past year?
> 2. Has the physical violence increased in severity during the past year and/or has a weapon or threat with a weapon been used?
> 3. Does he ever try to choke you?
> 4. Is there a gun in the house?

A torture charge could include the techniques not currently banned by the law, including psychological torture, sexual humiliation, and sleep deprivation. Rather than isolate a single, often minor, incident in a way that makes the victim's behavior seem entirely counterintuitive, a torture trial would explain all of the ways the batterer trapped her. The judge or jury would finally hear the details of a victim stuck, because she was sleep-deprived, isolated from family and friends, and threatened with violence against her children.

A prosecutor would have far more discretion to use an expert in a torture trial in order to explain the nature and harm of the abuse. At present, courts allow use of such experts primarily to explain a victim who has recanted her testimony or failed to appear.[177] Courts are leery, however, of admitting expert testimony in a domestic violence trial in which the victim actually testifies and cooperates.[178] After all, there is no need to explain the concept of an act of battery to a jury, and such evidence risks being offered merely to bolster the

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5. Has he ever forced you into sex when you did not wish to have sex?
6. Does he use drugs? (By drugs, I mean "uppers" or amphetamines, speed, angel dust, cocaine, crack, street drugs, heroin, or mixtures.)
7. Does he threaten to kill you and/or do you believe he is capable of killing you?
8. Is he drunk every day or almost every day? (in terms of quantity of alcohol)
9. Does he control most or all of your daily activities? (For instance, does he tell you whom you can be friends with, how much money you can take with you shopping, or when you can take the car?) (If he tries but you do not let him, check here ____)
10. Have you ever been beaten by him while you were pregnant? (If never pregnant by him, check here ____)
11. Is he violently and constantly jealous of you? (For instance, does he say, "If I can't have you, no one can.")
12. Have you ever threatened or tried to commit suicide?
13. Has he ever threatened or tried to commit suicide?
14. Is he violent toward your children?
15. Is he violent outside the home?

Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS 96, 105 (Jacquelyn C. Campbell ed., 1995).

177. *See, e.g.*, Arcoren v. United States, 929 F.2d 1235, 1239-41 (8th Cir. 1991) (affirming district court's admission of expert testimony on battered women's syndrome designed to explain victim's recanted testimony).

178. *See, e.g.*, People v. Christel, 537 N.W.2d 194, 201-05 (Mich. 1995) (finding the admission of expert testimony on battered women's syndrome to be error, albeit harmless, when victim did not recant or fail to appear).

victim's credibility.[179] In a torture trial, however, the prosecutor could legitimately use an expert to explain the harm that torture techniques create.[180] As I explain in the next section, the victim's physical and mental pain and suffering will be an element of the offense.[181]

A torture statute would make a long pattern of misdemeanor conduct finally add up to a serious felony. Torture would capture the full harm that batterer behavior causes to the victim and the community. And, a torture charge would create far more bargaining power for a prosecutor to exact a plea.[182]

Imagine if in the trial of Alfred Andrews the prosecutor could have brought a charge of torture that covered years of whatever violence Andrews had committed against his wife, her mother, and her sister.[183] First, the police officer responding to the incident would have been more likely to ask questions about past history and current danger. The officer might have discovered more evidence to predict the fact that the innocuous looking old man would soon commit a triple homicide. The prosecutor, in turn, might have spent the time necessary to determine whether she could bring a felony count by asking even more questions about the history of the relationship, the use of other torture techniques, and the degree of the defendant's control over his victim.

A felony charge of torture against Andrews would then have been acknowledged by the entire criminal justice system as worthy of resources. At the bond hearing, a felony charge would make clear

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179. *See id.*; *see also* State v. Borelli, 629 A.2d 1105, 1115 n.15 (Conn. 1993) ("Expert testimony on the subject of battered woman's syndrome is not relevant unless there is some evidentiary foundation that a party or witness to the case is a battered woman, and that party or witness has behaved in such a manner that the jury would be aided by expert testimony providing an explanation for the behavior.").

180. *See, e.g.*, People v. Studier, No. 317351, 2015 WL 447408, at *5 (Mich. Ct. App. Feb. 3, 2015) (per curiam) (affirming admission of expert testimony in a torture case explaining a domestic violence victim's sense of danger that prevented her from fleeing, though also finding the expert's testimony that domestic violence victims rarely fabricate allegations as harmless error given overwhelming physical evidence), *rev'd in part*, *denied in part on other grounds*, 871 N.W.2d 524 (2015).

181. *See infra* Part IV.B.

182. *See, e.g.*, People v. Morgan, No. 315467, 2014 WL 2881073, at *1 (Mich. Ct. App. June 24, 2014) (per curiam) (affirming sentence of defendant who agreed to plead to assault with intent to do great bodily harm for dismissal of the torture charge).

183. *See supra* Part II.B.

the seriousness of the offense. A torture charge would help demonstrate the defendant's motive of controlling and owning his wife and her family; it would have covered his psychological torture and sleep deprivation along with the physical violence.[184] As such, it would have provided more clues about the risk of witness tampering and intimidation to the judge considering bail. In a jurisdiction with resources for witness safety, the prosecutor might have encouraged and provided help for the victim to hide.

A torture trial against Andrews would have presented the full picture of the defendant's actions based on evidence now deemed relevant and admissible. That evidence would have provided the jury with a better understanding of the victim's situation and thus her credibility. It probably would have described a lifetime of control over Muse, her mother, and her sister, enforced through some combination of violence, threats, sleep deprivation, and years of sexual abuse. Compare that possibility to the scant evidence actually presented to the court of a single pathetic shove.[185]

Because of this broader context, Andrews' trial under a torture statute might have resulted in his conviction, instead of the acquittal that emboldened him to take revenge against the wife who dared testify against him.[186] More to the point, a torture statute would have offered more than the possibility of a mere misdemeanor conviction and a resulting slap on the wrist. A felony conviction of torture, making clear the sum total of what Andrews did to his family for years, might have resulted in actual jail time. Further, it might have kept Jennifer Muse, her mother, and her sister alive.

### *B. Changing the Cultural Perception of Domestic Violence*

Those who have debated for years about how best to describe "domestic" or "intimate partner" "violence" or "abuse," understand

184. At the least, the prosecutor would have known to ask about all of these facts. *See* Tuerkheimer, *supra* note 7, at 977.

185. *See supra* notes 149-54, 158-62 and accompanying text.

186. Although conviction rates in domestic violence trials are not well documented, some empirical evidence suggests that few offenders are convicted under the current system. *See* Hanna, *supra* note 118, at 1517-19; Virginia E. Hench, *When Less Is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. HAW. L. REV. 37, 40-41 (1997).

that labels matter.[187] In years of training police, prosecutors, lawyers, judges, and the public, I find that describing domestic violence as torture, an argument that several domestic violence scholars have made, works better than any other to help explain the dynamics of abuse.[188] For the reasons detailed in this section, the torture analogy cuts through many of our cultural misunderstandings and our diminishment of domestic violence. It puts the focus back on the perpetrator instead of the victim. It reminds us that violence is but one tool of many and that the worst scars are psychological.

Current cultural attitudes acknowledge domestic violence as a clear wrong but also subject it to disdain and contempt.[189] The public

187. *See, e.g.*, Dutton, *supra* note 15, at 1196 (urging expert testimony on "battered women's experiences" rather than "battered woman syndrome" in order to better explain the diverse reactions victims have to trauma); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 69 (1991) (arguing for the use of the term "separation assault" to better explain the difficulty of leaving and answer the age-old question of why victims stay); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985-86 (1995) (arguing for the use of the term "coercive control" to better express the nature of abuse).

188. *See supra* note 15.

189. I teach a class on domestic violence and the law and assign students to research cultural attitudes toward domestic violence so that they will understand what they are up against in courtrooms clearly influenced by those attitudes. Students have come to class with examples ranging from country music to rap. *See, e.g.*, Toby Keith, *A Little Too Late*, YOUTUBE (June 16, 2009), https://www.youtube.com/watch?v=nOd2NuHgwew [https://perma.cc/76T4-GZVY] (making light of a man purportedly laying bricks to entomb a terrified woman tied to a chair); Eminem, *Kim*, YOUTUBE (Oct. 14, 2011), https://www.youtube.com/watch?v=z_6lgDFX6y0 [https://perma.cc/T67Z-JKR4] (rapping about his fantasy of killing his real life ex-wife complete with mimicking her screams). Eminem also has a duo with famous domestic violence victim Rihanna that features him singing about love driving him to violence and her singing the chorus "Just going to stand there and watch me burn / But, that's alright because I like the way it hurts / Just gonna stand there and hear me cry / But that's alright because I love the way you lie." *See* Eminem ft. Rihanna, *Love the Way You Lie*, YOUTUBE (Aug. 15, 2010), https://www.youtube.com/watch?v=uelHwf8o7_U [https://perma.cc/7UF9-Q3WH]. Family Guy does its usual excellent job of mocking and revealing attitudes towards the subject. *See* Nando Di Fino, *Funny or Die? Family Guy's Domestic Abuse Episode Raises Questions of Taste and Appropriateness*, MEDIAITE (Nov. 1, 2011), http://www.mediaite.com/tv/funny-or-die-family-guys-domestic-abuse-plot-line-raises-questions-of-taste-and-appropriateness/ [https://perma.cc/4BDF-L63A]. Some of the most disturbing images are those aimed at children and teenagers. For example, in Disney's *Beauty and the Beast*, Belle is terrified by a physically menacing and utterly cruel Beast before she proudly sings of having transformed him. *See* Rachelle Schmidt, *Local Panel Examines Domestic Violence in Popular Culture*, PORTLAND ST. VANGUARD (Oct. 22, 2013), http://psuvanguard.com/local-panel-examines-domestic-violence-in-popular-culture/ [https://perma.cc/5CQC-KG68]. The *Twilight* movies

exaggerates the expansion of rights for women and thus believes that women stay in abusive relationships only by choice, not necessity.[190] To those who imagine that calling 9-1-1 will result in instant safety, domestic violence victims who stay seem masochistic or insane.[191] The public entirely overestimates the ability of victims to escape threats of murder, economic ruin, public shaming, and lost custody of children.[192] In contrast, Americans do not ask themselves why abused Pakistani women "stay" because they understand that these women have nowhere to turn.[193]

The concept of torture focuses on the culpability of the defendant and distracts us from our absurd cultural fixation on blaming victims of domestic violence.[194] Almost uniquely among crimes, we blame women for the domestic violence (and rape) committed against them.[195] We stereotype them as provocative and deserving of violence or as masochistic and thus enjoying and choosing it; we require that victims seem appropriately meek and pathetic and punish them if they seem too strong.[196] These hurdles, above all else, make the prosecution of domestic violence exceedingly difficult.[197]

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mirror this message, romanticizing stalking, obsessive jealousy, and ultimately sexual violence on the couple's honeymoon night for which the heroine immediately forgives her new husband. *See* Wind Goodfriend, *Relationship Violence in* Twilight, PSYCHOL. TODAY (Nov. 9, 2011), https://www.psychologytoday.com/blog/psychologist-the-movies/201111/relationship-violence-in-twilight [https://perma.cc/7NMH-THSJ].

190. *See* Buel, *supra* note 83, at 297.

191. *See id.*

192. *See id.*

193. *See* Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1189 (2012) (noting that Americans blame domestic violence in immigrant communities and third world countries on the perpetrators' "culture," while simultaneously ignoring the role of American culture on America's shameful rates of domestic violence murders).

194. Similarly, this is part of the efforts of Professors Burke and Tuerkheimer in their proposals for a broader domestic violence statute. *See* Burke, *supra* note 12, at 582; Tuerkheimer, *supra* note 7, at 986-87.

195. *See* Burke, *supra* note 12, at 580.

196. *See* Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 615-16 (1999) ("Jurors may expect victims and batterers to fit certain stereotypes and may have certain expectations regarding a battered woman's behavior in a battering situation.... Expert testimony identifying the dynamics of domestic violence and the patterns of behavior in battering relationships is relevant ... [and] particularly important for evaluating [the victim's] credibility.").

197. *See* Hanna, *supra* note 118, at 1508.

Our cultural paradigm of *torture*, however, does not blame or even focus on the victim. Our images of torture involve strong victims such as soldiers or terrorist suspects. Few would blame John McCain for crumbling under torture in a Vietnamese POW camp and denouncing his nation.[198] We understand that the techniques of torture work on anyone, regardless of their physical and psychological strength. Few of us harbor any illusion that we could sustain our dignity under torture for very long.

Describing domestic violence as premeditated torture also corrects the cultural excuses we make for batterers. We stereotype them as flailing victims of their own hapless tempers, frustrated rather than cruel, emotional rather than cold-blooded.[199] We believe that batterers merely lash out at the closest victim out of pent-up emotion and therefore see domestic violence as more of a social problem than a violent crime.[200] Almost uniquely in the criminal justice system, we "punish" it with mere treatment.[201]

Torture, in contrast, invokes clear criminal culpability. Whether a torturer seeks information, compliance, or punishment, torture constitutes cruelly and chillingly premeditated behavior.[202]

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198. *See* Adam Chandler, *This Is How a Prisoner of War Feels About Torture*, ATLANTIC (Dec. 9, 2014), http://www.theatlantic.com/politics/archive/2014/12/John-Mccain-Speech-Senate-Republican-CIA-Torture-Report/383589/ [https://perma.cc/F45H-UPPV] (describing McCain's opposition to the use of torture and his description on the Senate floor of his five-and-a-half-year ordeal).

199. The television show *Family Guy*, for example, was criticized for a harsh depiction of domestic violence in which the characters made fun of the victim, saying things like "she's gotten a lot better" as a result of the abuse she has endured, and "let's hope she's good at talking because we know she doesn't listen so good." *Family Guy: Screams of Silence: The Story of Brenda Q* (Fox television broadcast Oct. 30, 2011); *see* Whitney Jefferson, *Family Guy Hits Horrible New Low with Domestic Abuse Episode*, JEZEBEL (Oct. 31, 2011), http://jezebel.com/5854810/family-guy-hits-horrible-new-lows-with-domestic-abuse-episode [https://perma.cc/5SGX-XQ6A]. Another episode of *Family Guy* portrays a character hearing graphic domestic abuse from a neighboring apartment, including the abuser saying "You think I want to hurt you?" and "You make me hurt you!" while the woman cries, and responding by saying "I'm sure there's two sides to this." *Family Guy: Love, Blactually* (Fox television broadcast Sept. 28, 2008).

200. *See* DAVID ADAMS, WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS 23-24 (2007) (describing myths about men who batter).

201. *See* Goodmark, *supra* note 120, at 643-44.

202. *See* Reyes, *supra* note 26, at 591; *see also* Copelon, *supra* note 5, at 327 ("'Battering, whether or not it is premeditated, is purposeful behavior' and 'should be seen as an attempt to bring about a desired state of affairs.' Battered women report that men often plan their attack ... [and often have] excellent impulse control in other contexts." (footnotes omitted)

Batterers use torture because it gives them power.[203] They do not torture accidentally or because they are frustrated at work; they do so because it gives them control over another human being.[204] Understanding that basic fact would fundamentally change how we perceive and punish the crime.

The public also understands torture to be serious—a violation of fundamental human rights. Even in a culture steeped in violence as entertainment, torture garners attention.[205] Popular culture is awash with descriptions of torture in fiction and in news reports, portraying both the experiences of our own soldiers in POW camps during every war, and, sadly, our own government's use of torture.[206]

Domestic violence, meanwhile, remains a petty crime in the popular imagination—a bleak and inevitable social problem that makes

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(first quoting SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 17 (1982); then quoting R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 24 (1979)).

203. *See* Cohen, *supra* note 15, at 768 (framing the battering relationship as an ongoing regime of private tyranny); Fischer et al., *supra* note 27, at 2126, (describing the context of rulemaking and dominance); Mahoney, *supra* note 187, at 34 ("Feminist activists writing about heterosexual battering have ... defined power and control, rather than incidents of violence, as the heart of the question."); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1317 (1993) (observing "a growing emphasis in the literature and community on understanding battering not as violence, per se, but rather, as a larger pattern of dominance and control"); Joan Erskine, Note, *If It Quacks like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 BROOK. L. REV. 1207, 1216 (1999) (asserting that need for control motivates domestic violence).

204. Batterers come in different forms, some more closely resembling the stereotypes. For example, Donald Dutton characterizes the different types of batterers as family only batterers (who can be quite charming and functional in daily life and terrorists at home), sociopaths (who act in entirely cold-blooded cruelty for sport), and borderline batterers (who struggle with substance abuse and with their tempers and who act in escalating desperation). DONALD DUTTON WITH SUSAN K. GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE 23, 26, 29 (1995). This last category involves the kind of dysfunction we project onto the group as a whole.

205. Sadly, this is perhaps why we have so many cultural representations of torture—the need to ratchet up depictions of violence to impress viewers increasingly inured to them. *See* John Hayes, *Films and TV Up the Ante on Graphic Torture Scenes*, PITTSBURGH POST-GAZETTE (Jan. 19, 2007), http://www.post-gazette.com/ae/movies/2007/01/19/Films-and-TV-up-the-ante-on-graphic-torture-scenes/stories/200701190242 [https://perma.cc/NM27-9G3B]; Maura Moynihan, *Torture Chic: Why Is the Media Glorifying Inhumane, Sadistic Behavior?*, ALTERNET (Feb. 2, 2009), http://www.alternet.org/story/124739/torture_chic%3A_why_is_the_media_glorifying_inhumane,_sadistic_behavior [https://perma.cc/8527-PGWS].

206. *See* Hayes, *supra* note 205; Moynihan, *supra* note 205.

national news only when committed against or by celebrities.[207] Understanding domestic violence as torture would clarify that it constitutes more than the sum total of hits and shoves. As Evan Stark argues, the core injury of domestic violence is the deprivation of liberty.[208] Domestic violence "seeks to take away the victim's liberty or freedom, to strip away their sense of self. It is not just women's bodily integrity which is violated but also their human rights."[209] A felony crime of torture, by its very name, signals a premeditated, cruel, and heinous crime.

The torture description also provides an entirely comprehensive summary of the methods of domestic violence. As described in Part I, batterers use the full array of torture techniques, from sporadic violence designed to control, to the creative use of threats against the victim and everyone she cares about, sleep deprivation and psychological torment.[210] In the context of domestic violence, these patterns seem counterintuitive and *de minimis*—a batterer who merely wakes up his wife, who insults her, who hits her only occasionally and without great force, and who spews seemingly empty

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207. Compare the coverage of Ray Rice or Chris Brown with the countless murders that make only local news under headlines like, "Volatile Relationship Goes Bad." *Compare* Ken Belson & Steve Eder, *In Ray Rice Case, N.F.L. Chose Not to Ask Many Questions*, N.Y. TIMES (Jan. 8, 2015), http://www.nytimes.com/2015/01/09/sports/mueller-report-nfl-did-not-see-ray-rice-video-before-it-suspended-him.html [https://perma.cc/3ZGA-F534], *and Times Topic: Chris Brown*, N.Y. TIMES, http://www.nytimes.com/topic/person/chris-brown [https://perma.cc/6DSJ-BHX8] (long list of articles about Chris Brown and domestic violence in New York Times), *with* Jennifer Portman, *Mysterious Death Reveals Volatile Relationship*, TALLAHASSEE DEMOCRAT (Mar. 1, 2015), http://www.news4jax.com/news/local/mysterious-death-reveals-volatile-relationship [https://perma.cc/9DXV-8R2B]. Even celebrity headlines can be co-opted by other subjects. Tapes released by Mel Gibson's former girlfriend captured him essentially admitting to hitting his own baby while attempting to punch the child's mother and threatening to bury the mother under the rosebushes, but what made headlines about the tapes was his use of racist language. *See, e.g.*, Jewel Samad, *Controversial Character: Mel Gibson*, L.A. TIMES, http://www.latimes.com/entertainment/gossip/la-et-controversy-mel-gibson-l598k8nc-photo.html [https://perma.cc/V6JG-25F9].

208. Stark, *supra* note 22, at 4. Those who work with survivors frequently use the "power and control" wheel developed in Duluth, Minnesota, as a way to discuss this aspect of domestic violence. *Power and Control Wheel*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf [https://perma.cc/ZEK6-6VSK]. It describes the ubiquitous forms of control, none of which actually involve violence. *Id.*

209. *What is Coercive Control?*, CEDAR NETWORK, http://www.cedarnetwork.org.uk/about/supporting-recovery/what-is-domestic-abuse/what-is-coercive-control/ [https://perma.cc/QP7S-NFCG] (citing Evan Stark).

210. *See supra* Part I.

threats. In self-defense cases—the cases in which the victims are allowed to describe their entire experiences—we see how short current law falls when applied within the context of our paradigm of domestic violence.[211]

In the context of torture, however, the public imagination understands that the infliction of violence is merely one of many effective techniques to break the spirit.[212] Sporadic violence, while giving the victim some illusion of control, works better than constant violence.[213] Threatening the victim, or better yet, threatening his loved ones, can work even better than the reality of violence.[214] Sleep deprivation, or other physical efforts to unnerve and confuse the victim, work as well as the infliction of pain.[215]

The concept of torture also helps to explain the brutality of sexual violence and humiliation. While the law does criminalize rape within marriage, actors within the criminal justice system fail to understand that the harm of rape is not made easier by previously consensual sex, but instead is magnified by being attacked by someone the victim loved and trusted.[216] Our culture tends to equate rape with theft of sex, rather than violence and degradation.[217] If rape is merely theft, then marital rape does not involve more than

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211. *See* Jody Armour, *Just Deserts: Narrative, Perspective, Choice, and Blame*, 57 U. PITT. L. REV. 525, 527-28 (1996); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1247-48 (2001).

212. Unfortunately much of the public education on this subject has involved techniques used by the U.S. government against prisoners at Guantanamo and Abu Ghraib. *See* Luban & Shue, *supra* note 41, at 835.

213. *See, e.g.*, ZERO DARK THIRTY (Sony Pictures 2012) (depicting CIA agents utilizing the phrase "when you lie to me, I hurt you" to portray to the detainee that the level of torture he endured was within his control—he would then either be rewarded for his cooperation or punished for his insubordination).

214. *See, e.g.*, *Homeland: Blind Spot* (Showtime television broadcast Oct. 30, 2011) (depicting the CIA questioning terrorist operative and threatening the safety of the man's family to persuade him to cooperate); *24: Day 2, 7:00 p.m.-8:00 p.m.* (Fox television broadcast Feb. 11, 2003) (depicting agents threatening to kill a terrorist's wife and two children, and ultimately even staging a mock execution of one child, in order to coerce the suspect to cooperate).

215. *See* ZERO DARK THIRTY, *supra* note 213.

216. *See* Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1453 (2014) (citing NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18 (2011) (noting that one in five women in the U.S. will be raped in her lifetime, and of those, half are raped by an intimate partner).

217. *See id.* at 1456, 1456 n.10.

the overruling of a frigid wife too tired to satisfy her husband.[218] Indeed, until quite recently, the law gave husbands that prerogative.[219]

We understand, however, that sexual degradation constitutes a powerful tool of torture, perhaps the most powerful. At the U.S. detainment center in Abu Ghraib, the media reported that never-released pictures showed soldiers raping male and female prisoners, sometimes with objects.[220] Reports also indicated that children were raped in front of their parents.[221] Photographs actually released showed acts of sexual humiliation against prisoners including photographs of prisoners who were forced to create a naked human pyramid or wear women's underwear.[222] In the context of that searing national embarrassment, the public came to understand rape and sexual humiliation as forms of torture that cause lasting psychological wounds.

That brings us to another insight of the torture analogy—that psychological wounds matter just as much, or more, than physical injury. In the context of domestic violence, the public thinks little

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218. *See, e.g.*, *Rescue Me: Satisfaction* (Fox Network television broadcast, July 18, 2006) (portraying a marital rape as harmless); *see also* Scott Collins, *Dennis Leary Doesn't Care if You're Angry*, L.A. TIMES (June 12, 2007), http://www.articles.latimes.com/2007/jun/12/entertainment/et-channel12 [https://perma.cc/8Y7T-W3NR] (describing the outrage caused by the *Rescue Me* marital rape scene).

219. *See* Klarfeld, *supra* note 45, at 1819.

220. *See* Duncan Gardham & Paul Cruickshank, *Abu Ghraib Abuse Photos 'Show Rape,'* TELEGRAPH (London) (May 27, 2009), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html [https://perma.cc/SQH7-ZJQ2]; Luke Harding, *Focus Shifts to Jail Abuse of Women*, GUARDIAN (London) (May 11, 2004), http://www.theguardian.com/world/2004/may/12/iraq.usa [https://perma.cc/L4WM-KEX2]; Daniel Tencer, *Journalist: Women Raped at Abu Ghraib Were Later 'Honor Killed,'* RAW STORY (Sept. 11, 2010), http://www.rawstory.com/2010/09/women-abu-ghraib-honor-killed/ [https://perma.cc/5LJ5-2JG5].

221. *See* Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST (May 21, 2004), http://www.washingtonpost.com/wp-dyn/articles/A43783-2004May20.html [https://perma.cc/TZ2U-UX9S]; Geraldine Sealey, *Hersh: Children Sodomized at Abu Ghraib, On Tape*, SALON (July 15, 2004), http://www.salon.com/2004/07/15/hersh_7/ [https://perma.cc/XTP2-532J].

222. *See* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib [https://perma.cc/WLV4-HLNG]; Bill Redeker, *Former Iraqi Prisoners Recount Abuse*, ABC NEWS (May 3, 2004), http://www.abcnews.go.com/WNT/story?id=131663 [https://perma.cc/84XQ-47E5]. To view some of the released photos, see *Abu Ghraib Abuse Photos*, ANTIWAR.COM (Feb. 17, 2006), http://www.antiwar.com/news/?articleid=8560 [https://perma.cc/KF6N-5J2J].

of the concept of "emotional abuse"; it equates "emotional abuse" with being called fat too many times, which results in mere low self-esteem.[223] We dismiss the premeditated cruelty of a batterer as the careless insults of a thoughtless spouse. And, we fail to acknowledge the profound harm of sleep deprivation in domestic violence cases at all.

Our culture better understands the concept of psychological torture. Soldiers at Abu Ghraib and Guantanamo Bay used psychological torture techniques, because these techniques proved effective to break prisoners and skirted the edges of legality.[224] Both in our fictionalized versions of torture and our reporting on the real thing, we acknowledge the damage done. The experience forever robs the victim of sleep, implanting permanent nightmares and creating psychological wounds that distort the personality and ruin lives.[225] Because our paradigmatic torture victim is male, not female, we spare him the minimization of his psychological harm.[226]

Finally, our cultural references to torture occasionally even help to explain some of the most counterintuitive aspects of psychological warfare. Torturers intersperse cruelty with kindness.[227] They find

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223. For example, take note of how the characters in *Family Guy* treat the daughter, Meg Griffin: her emotional and sometimes physical abuse is made out to be a joke and is not portrayed as harmful. *See Meg Griffin*, WIKIA, http://www.familyguy.wikia.com/wiki/Meg_Griffin [https://perma.cc/7TF7-4LZ6] (describing all the instances of abuse Meg has suffered throughout the episodes and how she feels about herself, particularly about her weight).

224. *See* Luban & Shue, *supra* note 41, at 833-34; Paul Sperry, *U.S. Losing 'Hearts, Minds,' Despite Sensitivity Training*, WORLDNETDAILY (Apr. 2, 2004), http://www.wnd.com/2004/04/24006/ [https://perma.cc/M6SA-UUPE] (describing other tactics that were used, including "pride-and-ego down" techniques, which attack the prisoners' sense of self-worth to make them more willing to cooperate).

225. Perhaps the best recent example of this in fictional portrayal is the show *Homeland*, which portrays the return of an American soldier, whom terrorists captured and held for years. *See Homeland: Pilot* (Fox 21 Television Studios television broadcast Oct. 2, 2011). The show depicts Sergeant Brody's inability to sleep, difficulty being intimate with his wife and close to his children, moments of reliving his trauma, flashes of anger, and inappropriate behavior. *See Homeland: Grace* (Fox 21 Television Studios television broadcast Oct. 9, 2011).

226. *See* George Simon, *Minimization: Trivializing Behavior as a Manipulation Tactic*, COUNSELLING RESOURCE (Feb. 23, 2009), http://www.counsellingresource.com/features/2009/02/23/minimization-manipulation-tactic/ [https://perma.cc/43D5-J448] (discussing process by which men attempt to convince women that the wrongful things they do are not really harmful, making women feel as though they have overreacted).

227. *See, e.g.*, ZERO DARK THIRTY, *supra* note 213 (rewarding detainee for his cooperation by speaking to him softly and politely, providing him water, or allowing him to go outside to eat a full meal and have a cigarette).

ways to persuade the victim to bond with them. For example, the tortured POW in the television series *Homeland* described with great shame the reasons he became loyal, and even "loved," his terrorist persecutor.[228] After years of isolation and physical and psychological torture, his captor then offered him kindness and connection.[229] This insight becomes crucial to understanding domestic violence and the counterintuitive aspects of remaining emotional attachment.

The biggest disconnect in the analogy between torture and domestic violence is the absence of captivity in most domestic violence. Even so, the public has a slightly better understanding of the ways that a torture victim can feel trapped even when the door remains open. We understand that a torturer can exercise total control over a victim without constant vigilance.[230] Effective torture inspires a terror so total, a sense of utter omnipotence, that victims do not believe they have an avenue of escape.[231]

If the criminal justice system actually prosecuted domestic violence crimes as torture, it would send powerful signals both within the system and beyond it. A torture crime would help police, prosecutors, and judges understand the seemingly counterintuitive dynamics of the problem. It would also help translate the issue for those who serve on juries deciding the fate of both defendants and victims.

Most of all, prosecuting domestic violence as torture would help the public as a whole to better understand domestic violence. The

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228. *Homeland: The Weekend* (Fox 21 Television Studios television broadcast Nov. 13, 2011).

229. *Id.* ("He offered me comfort. And I took it ... I was broken, living in the dark for years, and a man walked in and he was kind to me. And I loved him."). For a critique of the glorification of torture in *Homeland* see, for example, Alyssa Rosenberg, *The Critique of Torture that Mass Culture Can't Make*, WASH. POST (Dec. 10, 2014), https://www.washingtonpost.com/news/act-four/wp/2014/12/10/the-critique-of-torture-that-mass-culture-cant-make/ [https://perma.cc/45BE-ZN5T].

230. *See, e.g.*, *Game of Thrones: The Gift* (HBO television broadcast May 24, 2015) (showing that a torture victim was given an avenue of escape by helping another victim, the wife of the torturer, but chose to turn her in to his torturer instead).

231. *See, e.g.*, Daniel Schwartz, *Profiling Abductors: Q&A with Brad Garrett*, CBC NEWS (June 23, 2011), http://www.cbc.ca/news/canada/profiling-abductors-q-a-with-brad-garrett-1.999522 [https://perma.cc/2AMV-J7RT] (describing why kidnap victims sometimes fail to escape when given the chance and using the example of Jaycee Dugard, who was kidnapped as a child and held hostage in the kidnapper's back yard for eighteen years).

countries around the world with the lowest rates of intimate partner violence are those with cultures that thoroughly condemn it and shame the perpetrator instead of the victim.[232] The legal system can accomplish little compared to the enormous power of culture, particularly to root out deeply seeded violence in the home.[233] But the legal system can act as an important cultural signal of what we prioritize and what we condemn.

The criminal justice system's signaling role is perhaps its most important. Consider how the anti-drunk driving movement succeeded at fundamentally shifting cultural opinion not only with public service announcements, but also with tough laws that signaled an end to the tolerance of the behavior.[234] The mere presence of the penalties sent an important signal of deterrence and of the shamefulness of the conduct.[235] Thus, it would matter enormously to the public understanding of domestic violence if the criminal justice system declared it to be torture.

## IV. DRAFTING A TORTURE STATUTE

We may know torture when we see it, but it remains hard to define. A torture statute must be broad and general enough to capture the cruel creativity of torturers and the full range of their techniques. Yet, as occurred with the criminalization of stalking, a torture statute may be prone to charges of vagueness as it attempts to criminalize true terrorism while excluding innocuous conduct.[236]

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232. *Cf.* WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: SUMMARY REPORT OF INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN'S RESPONSES 5 (2005) (connecting rates of domestic violence around the world to cultural attitudes towards domestic violence).

233. *See id.* at 22.

234. *See* James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, PAC. INST. RES. & EVALUATION 195, 195 (2006), http://www.documents.jdsupra.com/2a7743e0-ea80-41d8-9739-efb8cf57928b.pdf [https://perma.cc/S2YX-GVG9] (describing the successful grassroots efforts of Mothers Against Drunk Driving, which have helped reduce alcohol-related traffic deaths from an estimated 30,000 in 1980 to 16,694 in 2004).

235. *See id.* at 203.

236. *See* Jennifer L. Bradfield, Note, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L.J. 229, 233 (1998) (critiquing the effectiveness of the anti-stalking laws); Laurie Salame, Note, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67, 68-69 (1993) (discussing the development of anti-stalking legislation and constitutional issues

Members of our own government famously quibbled about the actions necessary to constitute torture, arguing, for example, that waterboarding did not count.[237] Torturers everywhere have taken advantage of any existing loopholes, prioritizing pain over injury and psychological scars over physical ones.[238] A torture statute cannot allow torture techniques to evade existing rules, nor can it apply too broadly and risk losing its rhetorical power.

The drafting of a torture statute also requires deciding how broadly the law can capture abuse without weakening the impact that the word "torture" should bring to domestic violence. It requires deciding whether the definition of torture should include specific examples of techniques. Must torture constitute a pattern of behavior, or can it be based on a single act? Should psychological torture suffice, or should violence be a necessary component? To grapple with these questions, we first will compare the statute I propose with international law, federal law, and the laws of two states that have experimented with private torture statutes.

### *A. Existing Torture Law*

International law, federal law, and the state statutes in California and Michigan make different attempts to define the conduct necessary to rise to the level of torture.

The Convention Against Torture creates the broadest application, limited only by the requirement that torture be done for a broad set of purposes by a state actor.[239] International law does not require

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it potentially raises).

237. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), http://www.nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf [https://perma.cc/8L77-TQMM].

238. *See id.*

239. The Convention Against Torture (CAT) includes:

> *[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes* as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed ... or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

CAT, *supra* note 1, art. 1 (emphasis added). CAT contains a broad definition of torture, which I make use of, but also requires a purpose, an element that I reject for the reasons discussed

physical violence, much less physical injury; nor does it require that the victim be in the custody or control of the perpetrator.[240] Once stripped of the state action requirement, as I propose, this statutory language would include all of the torturous conduct previously described.[241] Although CAT captures a torturer who uses every technique, even in the absence of violence, its purpose requirement, discussed in more detail below, does not particularly fit domestic violence.

At the other extreme, California requires the actual infliction of "great bodily injury," though it also states that it does not require proof of pain.[242] This requirement restricts the application of the torture statute to cases involving felony levels of injury and, thus, would accomplish far less than this Article attempts. Like international law, California requires a purpose for torture but includes a broader list: "revenge, extortion, persuasion, or for any sadistic purpose."[243] Arguably, a batterer would meet the purpose requirement if his torture counted as "persuasion."[244]

Occupying the middle ground, U.S. federal law, which Michigan essentially copied, punishes violence that causes severe physical suffering, without requiring the "great bodily injury" of California law.[245] This would cover a pattern of domestic violence not resulting

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below. By its nature, CAT also applies only to state action. *See id.* (applying only when pain or suffering is inflicted by or with the involvement of a public official).

240. *See id.*

241. *See supra* Part I.

242. California requires serious physical violence:

> Every person who, with the *intent to cause cruel or extreme pain and suffering for the purpose of* revenge, extortion, persuasion, or for any sadistic purpose, *inflicts great bodily injury* as defined in Section 12022.7 upon the person of another, is guilty of torture.
>
> The crime of torture does not require any proof that the victim suffered pain.

CAL. PENAL CODE § 206 (West 2016). (emphasis added). California returns to the "purpose" requirement contained in international law. California defines "great bodily injury" as "a significant or substantial physical injury," in its sentence enhancements. *See* PENAL § 12022.7(f).

243. PENAL § 206.

244. *See* PENAL § 206

245. *Compare* 18 U.S.C. § 2340 (2012), *and* MICH. COMP. LAWS § 750.85 (2016), *with* PENAL § 206. The federal law also outlaws torture by state actors, defined as: "an act committed by a person acting under the color of law *specifically intended to inflict severe physical or mental pain or suffering* (other than pain or suffering incidental to lawful sanctions) upon another person within his *custody or physical control*." 18 U.S.C. § 2340 (emphasis added). The federal statute mirrors international law in defining the requisite intent to torture broadly. *See* CAT,

in serious injury, ranging from slaps to punches. Like federal law, Michigan law does not actually require physical violence.[246] Both laws punish the intentional infliction of "severe mental pain or suffering."[247] The disjunctive "pain *or* suffering" serves the purpose of avoiding any argument over the difference between the two.[248] Sleep deprivation, for example, can cause incredible suffering but not necessarily pain.[249] Although both statutes would cover the torture techniques beyond physical violence described in Part I, each then creates serious limits in their definition sections.[250]

In the context of domestic violence, these statutes would punish only a narrow category of torture techniques beyond violence. They would ban only specific threats of imminent death or other serious violence against the victim or another and would seem to not cover implied or more vague threats. It leaves nebulous the legality of sleep deprivation, famously approved by the Department of Justice for regular use in Guantanamo.[251] These laws also do not forbid other methods of psychological torture, from denigration to mind games and sexual humiliation.

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*supra* note 1, art 1. But it adds a requirement, one I also reject in my proposal, requiring physical control over the victim. *See* 18 U.S.C. § 2340. The statute goes on to limit the possible definition of "severe mental pain or suffering," by creating a very limited demonstrative list of its causes. *See id.*

246. The Michigan statute defines torture this way:

> A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.

MICH. COMP. LAWS § 750.85(1).

247. *Id.*

248. *See* Luban and Shue, *supra* note 41, at 828.

249. *See id.* ("[O]f course forms of physical suffering exist that aren't pain: freezing cold, unbearable heat, itching, nausea, paralysis, aching all over, inability to breathe—all are suffering; none are pain.").

250. In both statutes, "mental pain or suffering" must be caused by a restrictive list of activities: (1) the intentional infliction of either "severe physical pain or suffering" (in federal law) or more narrowly "great bodily injury" (in Michigan law); (2) the use or threatened use of mind-altering drugs (not particularly relevant to domestic violence); (3) the threat "of imminent death" or other violence (in federal law, the threat of "severe physical pain or suffering," and in Michigan law, the threat of "great bodily injury"), thus excluding less explicit threats; or (4) the threat that another person will be subjected to each of the categories above. *See* 18 U.S.C. § 2340(2); MICH. COMP. LAWS § 750.85(2)(d).

251. *See* Memorandum from Jay S. Bybee, *supra* note 237, at 13, 28-29.

The Michigan statute's requirement that the victim be within the perpetrator's "custody or physical control" is also limiting for domestic violence purposes.[252] Batterers sometimes kidnap and lock up their victims, but, generally, they use far more indirect methods of isolation and control.[253] A torture statute aimed at domestic violence could not include a kidnapping requirement.

All of these statutes fail to fully protect victims of domestic violence. Both California[254] and Michigan[255] have used their torture

252. MICH. COMP. LAWS § 750.85. There are domestic violence cases that include such overt kidnapping, but those cases are more rare. *See, e.g.*, People v. Studier, No. 317351, 2015 WL 447408, at *1, *7 (Mich. Ct. App. Feb. 3, 2015) (per curiam) (ruling that defendant met the "custody and control" provision of the statute because he kicked in the victim's door and assaulted her all night, and rejecting the defendant's arguments that the victim could have left before or after the attack), *rev'd in part*, *denied in part on other grounds*, 871 N.W.2d 524 (Mich. 2015).

253. *See supra* Part I.

254. *See, e.g.*, People v. Alvarez, No. F066511, 2014 WL 5409070, at *1-2 (Cal. Ct. App. Oct. 24, 2014) (affirming defendant's conviction of torture for beating his girlfriend repeatedly with his hands, feet, a shoe rack, and aluminum bat); People v. McCoy, 156 Cal. Rptr. 3d 382, 386, 388 (Ct. App. 2013) (affirming defendant's conviction of torture for folding his girlfriend's legs backwards over her head, breaking her back and leaving her a quadriplegic, shoving batteries in her rectum, and smearing feces on her face); People v. Hamlin, 89 Cal. Rptr. 3d 402, 411-13 (Ct. App. 2009) (affirming defendant's conviction of torturing his wife and sentence of life in prison for a long history of physical abuse, including strangulation, threats with guns and a sword, hitting her with a taser, hitting her injured wrist with a metal pipe, and threatening to kill her unless she falsely confessed to molesting their children); People v. Burton, 49 Cal. Rptr. 3d 334, 336-37 (Ct. App. 2006) (affirming defendant's conviction of torture of the mother of his children for permanently disfiguring her face with four deep cuts in the presence of their young sons); People v. Baker, 120 Cal. Rptr. 2d 313, 315-16 (Ct. App. 2002) (affirming defendant's torture conviction for pouring gasoline over his wife and setting her on fire); People v. Hale, 88 Cal. Rptr. 2d 904, 908-09 (Ct. App. 1999) (affirming defendant's torture conviction when he entered the victim's bedroom at night, while the victim slept beside her three-year-old daughter, and struck victim twice in the face with a ball peen hammer, cracking a number of her teeth, splitting her lip, and cutting her under the eye, and then stayed and hid in the room to observe victim's pain and terror); People v. Healy, 18 Cal. Rptr. 2d 274, 277 (Ct. App. 1993) (affirming defendant's torture conviction when he told the victim she never had any real hardship in her life and that "he needed to create some hardship" to get her to listen to him and proceeded to beat the victim unprovoked, warning the victim not to make any noise during beatings for fear a neighbor would call police).

255. *See, e.g.*, *Studier*, 2015 WL 447408, at *1 (affirming defendant's torture conviction based on an attack against his estranged wife, whom he had abused for years, in which he kicked open her door and assaulted her until dawn, striking her in the face, kicking her in the groin, choking her, threatening her with a steak knife, calling her a whore, and blaming her for the attack); People v. Hinton, No. 308019, 2013 WL 514870, at *1 (Mich. Ct. App. Feb. 12, 2013) (per curiam) (affirming defendant's torture conviction when he committed sexual assault against his victim, peed in her mouth, made her put a beer bottle in her vagina, whipped her with a cord while naked, tied her to the bed, and gagged her while he left the house);

statutes frequently in domestic violence cases, but, given the strict requirements of their laws, those prosecutions have focused on cases involving extreme and sometimes lurid facts. As a result, a new statute that will apply more broadly must be created.

### *B. Proposed Torture Statute*

My draft of a torture statute includes some easy choices, like omitting a state action requirement and a "custody or control" requirement. Other choices remain much closer, like the decision to include at least one act of violence while criminalizing a much broader spectrum of torture techniques. To resolve the deficiencies of existing statutes, this Article proposes the following statute:

> Any person who knowingly inflicts severe physical or mental pain or suffering upon another, through a pattern of torture techniques including at least one crime of violence, is guilty of torture. Torture techniques include, but are not limited to: physical violence, threats of violence to the victim or to the victims' family members or loved ones, sleep deprivation, sexual violence or humiliation, or psychological torture.

"Crime of violence" should be defined to include simple battery, so that the torture statute will capture a broad range of domestic violence. It should also include kidnapping, because psychological abuse alone should rise to the level of torture when conducted upon a kidnapping victim. "Psychological torture" should be defined, with reference to the tort of intentional infliction of emotional distress,[256]

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People v. Hoover, No. 308115, 2013 WL 45647, at *1, *4-5 (Mich. Ct. App. Jan. 3, 2013) (per curiam) (affirming defendant's torture conviction after he broke into his ex-girlfriend's home, grabbed her and forcibly exposed her breast to his friends, choked her, and threatened to kill her and slash her car tires; and holding that the evidence presented was sufficient to show "severe mental pain or suffering" by the victim, even in the absence of great bodily injury); People v. Schaw, 791 N.W.2d 743, 744 (Mich. Ct. App. 2010) (per curiam) (affirming defendant's torture conviction after he choked, restrained, threatened to kill, attempted to drug, and held a knife to the neck of his ex-wife); People v. Green, No. 279519, 2009 WL 349749, at *1 (Mich. Ct. App. Feb. 12, 2009) (per curiam) (affirming defendant's torture conviction when he struck the victim with his fist multiple times in the face and the vagina, forced an ammunition clip down the victim's throat and into her anus, and heated knife blades and held them against the victim's thigh).

256. *See* RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965). As background on

as "the use of extreme and outrageous conduct to intentionally cause severe emotional distress." Finally "pattern" should be defined as two or more torture techniques, or one technique that results in serious bodily injury.

The statute (1) removes a state action requirement in order to apply to private torture; (2) includes a requirement of at least some physical violence, threat of violence, or kidnapping to avoid controversy and the dilution of the concept of felony torture; (3) provides that once that threshold requirement is met, the full range of torture techniques are illegal and clearly relevant at trial; (4) adds a pattern requirement made necessary by broad line drawing; (5) removes the "custody and control" requirement as too narrow in the context of domestic violence; and (6) removes a purpose requirement as both redundant given the conduct involved and difficult to prove in the abstract. The choices involved in each of these elements are explained below.

*1. Removing the State Action Requirement*

First and foremost, a private torture statute must drop any state action requirement. The common definition of "torture" refers to the technique rather than to its use by state actors.[257] Michigan and California, as previously discussed, have already passed private torture statutes of general application seemingly without controversy.[258] Numerous states use torture as an aggravating factor in murder cases.[259] Several other states also use torture in their child

definitions of psychological torture, see Reyes, *supra* note 26, at 594-95.

257. *See, e.g.*, *Torture*, Merriam-Webster, http://www.merriam-webster.com/ dictionary/torture [https://perma.cc/2HYB-XGMQ] ("[T]he act of causing severe physical pain as a form of punishment or as a way to force someone to do or say something; something that causes mental or physical suffering: a very painful or unpleasant experience."); *Torture*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/torture [https://perma.cc/X2U9-V3JJ] ("The action or practice of inflicting severe pain on someone as a punishment or to force them to do or say something, or for the pleasure of the person inflicting the pain.").

258. *See* CAL. PENAL CODE § 206 (West 2016); MICH. COMP. LAWS § 750.85 (2016).

259. *See, e.g.*, ALASKA STAT. § 12.55.125(a)(3) (2016); ARK. CODE ANN. § 5-4-604(8) (2015); *see also* Christopher G. Browne, Note, *Tortured Prosecuting: Closing the Gap in Virginia's Criminal Code by Adding a Torture Statute*, 56 WM. & MARY L. REV. 269, 274-75 (2014) (discussing the inclusion of torture as an aggravating factor for murder and capital punishment).

abuse statutes.[260] And, several states have "sexual torture" statutes that cover crimes like rape with objects.[261]

Outlawing torture committed by private actors does nothing to weaken the special condemnation of state-sponsored torture. Torture committed by state actors is particularly terrible and worthy of special attention, but all torture is abhorrent and worthy of criminalization. Nor does the focus of international and federal law on state-sponsored torture make that focus mandatory. As a practical matter, neither body of law could have general jurisdiction over private torture.[262]

Focusing the public on the abhorrence of torture in general might actually help remind the public that the state is not justified in making use of torture. To an extraordinary degree after the September 11 attacks, the American public's resistance to the state's use of torture to capture terrorists eroded in the face of government arguments about its necessity to remain safe in a dangerous world.[263] Popular culture, from the television show *24* to the film *Zero Dark Thirty*, reifies this effect through dramatized stories justifying torture by government officials.[264] When the public feels vulnerable enough to rationalize torture, it also becomes tempted to minimize the harm of torture.

In contrast, torture committed by private actors presents no such cognitive dissonance. It epitomizes acknowledged evil and,

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260. *See, e.g.*, CONN. GEN. STAT. § 53-20 (2015); *see also* Browne, *supra* note 259, at 275 (discussing the inclusion of torture as an aggravating factor for child abuse).

261. *See, e.g.*, ALA. CODE § 13A-6-65.1 (2016) (banning "sexual torture" in order to include rape with an inanimate object).

262. International law focuses on state action. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW II INTRO. NOTE (AM. LAW INST. 1987). Federal law requires a constitutional basis to regulate private violence, either through the Commerce Clause or to enforce the Fourteenth Amendment, neither of which would seem to apply here. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (striking down portion of the Violence Against Women Act that created a private right of action against gender-based violence, because it exceeded Congress's power). Regardless, the focus of international and federal law on state action has nothing to do with the question of whether states *should* regulate nonstate action.

263. Recent polling shows that the American public has become increasingly inured to the horrors of torture when done by the state to root out terrorism. *See supra* note 166.

264. *See, e.g.*, M. Angela Buenaventura, *Torture in the Living Room*, 6 SEATTLE J. SOC. JUST. 103, 116-25 (2007) (discussing the impact of the television show *24* on the public's perception of torture); Jane Mayer, *Zero Conscience in* Zero Dark Thirty, NEW YORKER (Dec. 14, 2012), http://www.newyorker.com/news/news-desk/zero-conscience-in-zero-dark-thirty [https://perma.cc/2KZ7-HUG5].

thus, reminds the public of torture's cumulative harm. The public can more clearly measure, for example, the degradation of psychological abuse and the impact of sleep deprivation in the context of a kidnapper than it can when justifying police interrogation techniques.[265] The public is unlikely to rationalize the horrors of waterboarding conducted by criminals, though it proves surprisingly willing to do so when it seems necessary to locate terrorists.[266]

*2. Defining Torture*

The proposed statute would borrow language from the statutes described above to define torture as the intentional infliction of "severe physical or mental pain or suffering."[267] As with stalking laws, the requirement of injury to the victim is both subjective—the victim must actually be so injured—and objective—a reasonable person would be so injured. The injury must rise to the level of "severe" to qualify as torture. And, as explained immediately below, it must involve a pattern including at least one act of violence.

This proposed statutory language would capture and criminalize the full array of torture techniques. A nonexclusive list of these techniques helps to clarify the types of nonviolent behavior the statute means to address. I would include both the obvious—violence and threats of violence—and the less obvious techniques with particular resonance in domestic violence cases—sleep deprivation, sexual humiliation, and psychological torture. While even nonexhaustive lists risk being treated as exhaustive, this list is necessary to suggest to courts the types of techniques batterers and other torturers use. In theory, the statute should still remain open to punishing more creative methods of abuse.

*a. Requiring at Least One Act of Violence*

Labeling domestic violence as torture will have less impact if we water down the definition of torture. Thus, the proposed statute

265. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 229-30, 240 (1941) (deeming answers given during a police interrogation voluntary, despite the testimony of use of sleep deprivation and physical contact).

266. *See supra* note 166 and accompanying text.

267. *See, e.g.*, 18 U.S.C. § 2340(1) (2012).

creates a threshold requirement of a "crime of violence" before turning to the punishment of other torture techniques. Accordingly, psychological abuse standing alone, no matter how painful, would not meet the definition of torture.

The threshold requirement of violence is not overly high. The definition would include simple battery and misdemeanor domestic violence, a broader standard than the California torture statute's requirement of "great bodily injury."[268] At the same time, however, the statute as a whole would clearly avoid inflating every petty shove into torture. Standing alone, a shove would not rise to the level of torture, unless other behavior causing the victim "severe physical or mental pain or suffering" accompanied it.

I singled out kidnapping, which is usually considered a crime of violence anyway,[269] in my threshold requirement in order to capture the kind of torture that occurs in nondomestic violence cases. Sexually humiliating, degrading, and using mind games against someone you have tied up in your basement meets the public paradigm of torture without watering down its impact.

The threshold act of violence requirement purposefully excludes the abuser who causes severe mental pain and suffering through verbal cruelty, sleep deprivation, sexual humiliation, and emotional degradation but never actually uses violence. This was not an easy decision. There exist torture chambers operated through purely psychological means, some of them quite dangerous.[270] By its nature, torture focuses on mental and emotional scars and permanent changes to the personality.[271] As some scholars of torture point out, the line between physical and mental injury is inherently blurred given the physiological reactions of the brain and body to trauma.[272]

Should we punish cruelty as torture? We have a growing trend of punishing nonviolent behavior, because it causes serious emotional

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268. CAL. PENAL CODE § 206 (West 2016).

269. *See, e.g.*, 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence" as any felony containing the use or threatened use of force against another). The commentary for the United States Sentencing Commission Guidelines makes clear that this definition includes kidnapping. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015).

270. Luban & Shue, *supra* note 41, at 824.

271. *See supra* Part I.

272. Luban & Shue, *supra* note 41, at 830 ("[M]ental pain and suffering can cause physical effects and, vice versa, that physical pain and suffering can cause mental effects—including mental pain and suffering.").

suffering. Stalking statutes punish patterns of behavior that collectively amount to implied threats.[273] In the last few years, every state has enacted an antibullying statute.[274] These statutes punish a course of conduct designed to psychologically abuse another.[275] Antibullying statutes range from prohibitions on "creat[ing] a hostile environment [and] ... disrupt[ing] the education process,"[276] to the causing of "psychological distress" through, among other things, "teasing" or "social exclusion."[277] The statutes focus on the mental pain bullying causes, whether that mental pain is caused by physical violence, threats, or by purely psychological techniques.[278] Forty-four states also prohibit hazing, using similar definitions of patterns of sometimes purely psychological techniques against consenting victims.[279]

Broadening torture to include cruelty in the absence of violence would resemble the criminalization of the tort of intentional infliction of emotional distress (IIED).[280] IIED allows civil damages for "outrageous" behavior resulting in "extreme emotional distress."[281]

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273. *See* Ashley N.B. Beagle, Comment, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 476 (2011).

274. *See* Deborah Temkin, *All 50 States Now Have a Bullying Law. Now What?*, HUFFINGTON POST (Apr. 27, 2015, 12:19 PM, updated June 27, 2015), http://www.huffingtonpost.com/deborah-temkin/all-50-states-now-have-a_b_7153114.html [https://perma.cc/M9CG-C8WG].

275. Massachusetts, for example, defines "bullying" as follows:

> [T]he repeated use by one or more students ... of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.... [B]ullying shall include cyber-bullying.

MASS. GEN. LAWS ch. 71, § 370 (2016).

276. CONN. GEN. STAT. § 10-222d (2016).

277. FLA. STAT. § 1006.147(3)(a)(1)-(2) (2016).

278. *See* Claire Wright, *Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 554 (2013).

279. *See id.* at 555. For a current list of antihazing statutes by state, see *States with Anti-Hazing Laws*, STOP HAZING, http://www.stophazing.org/states-with-anti-hazing-laws/ [https://perma.cc/FG7F-ZLTX].

280. *See, e.g.*, N.M. STAT. ANN. § 13-1628 (West 2016).

281. *See* Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 188 (1995) ("The success of suits for intentional infliction of emotional distress

In the context of marriage in particular, courts struggle, but have managed, to find lines between mere meanness and "outrageous" cruelty.[282]

I reject this path for several reasons. First, most potentially lethal cases do, in fact, involve violence.[283] Second, I cannot imagine that prosecutors would charge even terrible cruelty as torture, unless it involved at least some violence. Indeed, as I address below, it will require serious effort to persuade prosecutors to make use of the statute even in the most paradigmatic cases. Accordingly, there would be little benefit to including a very broad definition, and it might come at quite a cost. This Article attempts to create a felony torture statute deemed serious, a law that will bring the most horrendous of facts to light for the first time. Diluting the statute would make it both more controversial to legislators and less influential with the public.

*b. Adding a Pattern Requirement*

As another method to narrow the scope of the statute to a recognizable definition of torture, I also would require a minimum pattern of conduct. A pattern requirement helps to distinguish between true torture and more isolated and less horrific conduct. It helps to prove both the intentionality and the impact of the defendant's behavior.[284] For this reason, stalking, hazing, and bullying statutes almost always make use of a pattern requirement in order to limit their scope.[285]

I include a pattern requirement even though none of the existing general torture statutes discussed do so. A pattern requirement provides a limiting factor that better captures the repetitive nature

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generally turns on the plaintiff's ability to demonstrate that the defendant's conduct was 'outrageous.'").

282. *See id.* at 188-89; *see, e.g.*, *id.*; Hakkila v. Hakkila, 818 P.2d 1320, 1330-31 (N.M. Ct. App. 1991) (holding that a husband's insults to his wife over the course of their marriage were insufficiently outrageous to establish liability for intentional infliction of emotional distress).

283. *See* Campbell, *supra* note 176, at 97; Jaquelyn C. Campbell et al., *Risk Assessment for Intimate Partner Violence*, *in* CLINICAL ASSESSMENT OF DANGEROUSNESS 136, 137 (Georges-Franck Pinard & Linda Pagani eds., 2000).

284. *See* Wright, *supra* note 278, at 518.

285. *See id.* For an analysis of each state's stalking laws, see *Criminal Stalking Laws*, STALKING RESOURCE CTR. (July 20, 2015), https://victimsofcrime.org/our-programs/ stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state [https://perma.cc/ R3N2-9JZG].

of domestic violence.[286] It replaces some of the other limiting factors in those statutes that I have rejected, from "great bodily injury"[287] to "custody or physical control" over the victim.[288]

A pattern requirement directs prosecutors to examine and prove a history of abuse, rather than focus on the culminating act, as the Michigan and California torture prosecutions have tended to do.[289] When prosecutors present evidence of a pattern, moreover, they should have little difficulty proving the defendant's intent, as discussed below.[290]

In my proposal, this pattern requirement would be met with two or more "torture techniques." The proposal also leaves the door open for a single egregious act resulting in "serious bodily harm" to cover an extreme case: a defendant who sets his victim on fire, and nothing else, would still be guilty of torture.[291]

### *3. Torture Should Require Specific Intent but Without a Further Purpose Requirement*

The crux of each of the existing torture statutes discussed herein rests on the defendant's specific intent to inflict "severe,"[292] or "cruel or extreme,"[293] "physical or mental pain or suffering."[294] The

286. For similar reasons, several child abuse torture statutes also include a pattern requirement. *See, e.g.*, IOWA CODE § 726.6A (2016); State v. Crawford, 406 S.E.2d 579, 581 (N.C. 1991).

287. CAL. PENAL CODE § 206 (West 2016).

288. 18 U.S.C. § 2340 (2012).

289. *See supra* notes 254 and 255.

290. *See* People v. Hamlin, 89 Cal. Rptr. 3d 402, 455 (Ct. App. 2009) (affirming defendant's torture conviction based on a pattern of violence as itself proof of specific intent). The defendant in that case also argued to no avail that the California torture statute precluded a pattern of conduct adding up to torture, because the statute did not require a course of conduct. *Id.*

291. *See, e.g.*, People v. Baker 120 Cal. Rptr. 2d 313, 319 (Ct. App. 2002) (affirming defendant's torture conviction after he poured gasoline over his wife and set her on fire).

292. CAT, *supra* note 1, art. 1; 18 U.S.C. § 2340.

293. MICH. COMP. LAWS § 750.85(1) (2016); CAL. PENAL CODE § 206 (West 2016).

294. The federal torture statute requires "specific intent" in its statutory language. 18 U.S.C. § 2340. Michigan courts have interpreted its torture statute to require specific intent. *See* People v. Galvan, Nos. 299814, 299822, 2013 WL 5338520, at *8 (Mich. Ct. App. Sept. 24, 2013) (per curiam) ("[D]efendant was charged with torture and first-degree child abuse. These were specific intent crimes."). California courts have similarly interpreted their own statutes. *See* People v. Pearson, 266 P.3d 966, 980 (Cal. 2012) ("[T]his mental state element describes a specific intent rather than general criminal intent.").

defendant must act with the *purpose* of causing the victim to suffer, not with mere knowledge that pain will result.[295]

The proposed statute would incorporate this specific intent requirement to avoid watering down the definition of torture. First, a specific intent requirement distinguishes between a true torturer and a dentist or surgeon. Surgeons act with the knowledge that they cause pain but (hopefully) without the purpose of causing pain.[296] Second, the intent requirement helps to distinguish between true torture and ordinary violence by requiring that the infliction of pain constitute more than an afterthought. A torturer commits violence not just out of rage, but because he intends to make the victim suffer.[297] Along with the other proposed limiting factors, the specific intent requirement helps to identify the requisite cruelty.

How would a prosecutor prove specific intent? Courts in California and Michigan have upheld torture convictions when evidence of the defendant's callous disregard for suffering demonstrated specific intent.[298] Prosecutors met this standard by providing evidence of, for example, repeated beatings,[299] or the severity of the victim's wounds.[300]

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295. *See generally* MODEL PENAL CODE § 2.02 (AM. LAW INST., Proposed Official Draft 1962); Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 801 n.40 (2012) ("The Code 'establishes four levels of culpable criminal intent ranging, in order, from the most culpable to the least culpable level; purposeful, knowing, reckless, and negligent.'" (quoting FRANK AUGUST SCHUBERT, CRIMINAL LAW: THE BASICS 157 (2d ed. 2010))).

296. Luban & Shue, *supra* note 41, at 849. The author of the infamous "torture memo" argued that the specific intent of the federal torture statute required that a torturer act with the "precise objective" of causing pain, rather than the use of pain in order to extract information. Memorandum from Jay S. Bybee, *supra* note 237, at 3. It is hard to imagine a state court adopting such strained reasoning when applied to private torture.

297. *See, e.g.*, 18 U.S.C. § 2340 (defining torture as an act "specifically intended to inflict severe physical or mental pain or suffering"); CAL. PENAL CODE § 206 (West 2016) (defining a torturer as one who "inten[ds] to cause cruel or extreme pain and suffering").

298. *See supra* Part III.

299. *See, e.g.*, People v. Assad, 116 Cal. Rptr. 3d 699, 706 (Ct. App. 2010) (holding that the state met its burden of proving defendant acted with the intent to inflict cruel pain when he repeatedly struck his son in regions of his body in which he had already suffered injuries); People v. Misa, 44 Cal. Rptr. 3d 805, 809 (Ct. App. 2006) (upholding finding of specific intent based on evidence that the defendant struck his victim in the head repeatedly over a significant period of time and displayed callous indifference to the victim's obvious need for medical attention).

300. *See* People v. Burton, 49 Cal. Rptr. 3d 334, 337 (Ct. App. 2006) (ruling that "a jury may consider the severity of the wounds in determining whether the defendant intended to torture," and rejecting defendant's argument that he did not act with "intent to cause cruel

The violence committed by batterers involves an abundance of evidence that the batterer intended to cause his victim to suffer. As described in Part I, domestic violence involves a pattern of repeated activity, clearly demonstrating intent and premeditation.[301] Batterers also use a variety of different techniques designed to find new and creative ways to cause physical and mental pain.[302] They do not just demonstrate the callous disregard for their victims' pain; they work hard to cause suffering in creative and terrible ways.[303]

Although I would require specific intent to inflict "severe physical or mental pain or suffering," I would not go farther and require a specified purpose or motive.[304] The specific intent to cause pain should suffice to distinguish torture from more mundane violence. Indeed, neither the federal torture statute, nor the Michigan statute, requires a particular purpose.[305] And despite the purpose requirement in international law, legal scholars have rarely focused on that element, arguing instead that the government should not engage in torture regardless of its purpose.[306]

Omitting a purpose requirement may seem counterintuitive—a lost opportunity to focus on the batterer's motive. I argued above that one of the important insights that the torture label brings to an understanding of domestic violence is the notion of a purpose beyond the loss of temper.[307] Batterers act to control another human being, to exert power.[308] For that reason, Professor Tuerkheimer

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or extreme pain and suffering" when he permanently disfigured the face of his ex-girlfriend by cutting her deeply four times in the face in the presence of their children).

301. *See supra* Part I.

302. *See supra* Part I.

303. *See supra* Part I.

304. In contrast, international law lists the following requisite purposes, nonexclusively: "obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." CAT, *supra* note 1, art 1. California requires a purpose of "revenge, extortion, persuasion, or for any sadistic purpose." CAL. PENAL CODE § 206 (West 2016). Note that California courts have interpreted "sadistic purpose" as any defendant who derives pleasure from causing pain. People v. Pre, 11 Cal. Rptr. 3d 739, 743 (Ct. App. 2004).

305. *See* 18 U.S.C. § 2340 (2012); MICH. COMP. LAWS § 750.85 (2016).

306. *See* Copelon, *supra* note 5, at 329, 329 n.136; Rebecca B. Schechter, Note, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1257 (2003).

307. *See supra* Part III.B.

308. *See supra* Part I.

would craft a broader domestic violence statute defining it as violence done for the purpose of control.[309] The list of purposes contained in the California statute—"revenge, extortion, persuasion, or for any sadistic purpose"[310]—would still work well in covering domestic violence, perhaps with the addition of the word "control."

Yet a torture statute should provide the insight of purpose without actually requiring a prosecutor to prove purpose. Demonstrating that the level of cruelty over time involved in domestic violence is torture will necessarily show the judge or jury that the defendant did not act out of whim or frustration.[311] By its very nature, torture implies premeditation and purpose. Requiring proof of purpose to control, moreover, seems both pointless and arduous, akin to suddenly requiring prosecutors to prove motive in every case. The law generally does not require this kind of proof of motive.[312] A prosecutor can prove intentional murder, for example, without ever understanding why the defendant chose to kill his victim.[313] Yet evidence of motive remains generally admissible, as it would in a torture prosecution.[314] Courts recognize that motive evidence helps the jury understand and believe the other evidence of the defendant's guilt.[315]

A purpose requirement would add little and might even come at significant cost. A prosecutor might prove a pattern of domestic violence sufficient to show that the defendant acted intentionally (rather than merely negligently) and that the defendant's actions

309. Tuerkheimer, *supra* note 7, at 1019-20.

310. CAL. PENAL CODE § 206 (West 2016). The concept of "sadism" as a purpose would capture much, but not all, of domestic violence. About 40 percent of men in Professor Dutton's treatment groups meet the diagnostic criteria for antisocial behavior. *See* DUTTON WITH GOLANT, *supra* note 204, at 26. These men seem to take pleasure in violence and in their utter lack of empathy find violence soothing. *Id.* Yet even these batterers are motivated by getting their way. *Id.* at 28-29.

311. *See* Tuerkheimer, *supra* note 7, at 977; *supra* Part I.

312. *See* Burke, *supra* note 12, at 592 ("[H]ardly any rule of penal law is more definitely settled than that motive is irrelevant." (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 153 (1947))); Tuerkheimer, *supra* note 7, at 984-85. There are exceptions to this general rule for crimes that revolve around motive, like hate crimes. *See* Wisconsin v. Mitchell, 508 U.S. 476, 477-78 (1993) (holding that states could lawfully enhance punishment for conduct based on disfavored motives); Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 389 n.2 (2002).

313. *See* Burke, *supra* note 12, at 594; Tuerkheimer, *supra* note 7, at 984-85.

314. Tuerkheimer, *supra* note 7, at 984-85.

315. *Id.*

thus demonstrate his intent to cause "severe physical or mental pain or suffering." Yet that prosecutor might seriously struggle to further prove that the defendant intended to control the victim. Ideally, every case would involve an exhibit of the batterer's written "rules" for the victim. In many cases, however, the batterer's purpose will remain more subtle and implied, and thus very difficult to prove.

Under the proposed statute, the prosecutor must prove the defendant's specific intent to cause pain or suffering, without having to prove a further motive to control the victim through that suffering. The torture description, in and of itself, helps to clarify that violence has a purpose without having to actually prove that purpose in each case. And as with any motive, evidence of a controlling purpose should remain admissible.[316]

### *C. Making Sure the Torture Statute Does Not Sit on a Shelf*

Finally, crafting a statute and getting it passed by state legislatures would constitute only the beginning of the effort to properly redefine domestic violence as torture. The bigger step is to find persuasive ways to encourage police and prosecutors to make use of a new torture statute.[317] This will not be an easy task, but I will now suggest some very pragmatic methods to try.

As described above, prosecutors in California and Michigan have used their torture statutes in domestic violence cases.[318] But given the size of those states, and the relatively few appeals of torture convictions, it seems unlikely that prosecutors make use of the torture statutes as often as they could. The cases clearly focus on the most egregious levels of violence, perhaps because those torture statutes are drawn too narrowly, as I argue above.[319] Michigan's requirement that the defendant have "custody or control" over the victim and California's requirement of "great bodily injury" would make the statutes inapplicable to most domestic violence cases.[320]

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316. Wright, *supra* note 278, at 561.

317. *See generally* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011).

318. See *supra* notes 254-55 for descriptions of some of those cases.

319. *See supra* Part IV.A.

320. *See supra* Part IV.A.

My hope is that a statute designed for the purpose of capturing domestic violence would broaden its application. Even with this new statute in place, there would remain a real risk that this felony torture statute would remain unused, or used only in nondomestic violence cases. Prosecutorial discretion can become a black hole that swallows statutory law.[321]

The scale of the pragmatic problems involved in using a new statute can be illustrated by statistics I have access to in my home city. With a population of only about 390,000,[322] New Orleans had 7390 9-1-1 calls complaining of domestic violence in the first *six months* of 2015.[323] Those calls resulted in 1690 arrests or warrants: a charge rate of approximately 23 percent.[324] The police booked 204 of those cases as felonies: 12 percent of all charged cases.[325] After screening, the district attorney added another 56 cases,[326] bringing the felony rate up to 15 percent.

The District Attorney's Office assigns five prosecutors to their misdemeanor domestic violence cases and chooses to prosecute these cases in a Municipal Court.[327] Each assistant district attorney therefore has a docket of approximately 60 cases a month, or about 3 new cases per work day. Of the 1430 misdemeanor cases charged in six months, prosecutors brought only 8 to trial, resulting in 7 acquittals and 1 guilty verdict.[328] Another 522 pleaded guilty, often to lesser offenses, like trespassing or disturbing the peace.[329] Presumably, the rest were dismissed. Meanwhile, the domestic-violence-related murders continue to pile up.[330]

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321. *See* Fairfax, *supra* note 317, at 1261.

322. *Quick Facts: New Orleans City, Louisiana*, U.S. CENSUS BUREAU, www.census.gov/quickfacts/table/PST045215/2255000 [https://perma.cc/L5S2-6BPF].

323. NEW ORLEANS HEALTH DEPT., BLUEPRINT FOR SAFETY DOMESTIC VIOLENCE DATA TRACKING (July 2015) [hereinafter NOLA BLUEPRINT 2015] (on file with the *William & Mary Law Review*). This information was provided pursuant to a federally funded "Blueprint" project in New Orleans, Louisiana, by the Police Department and District Attorney's Office. The author serves on a taskforce for that project and has the statistics in a report on file.

324. *See id.*

325. *See id.*

326. *Id.*

327. *See* Alex Woodward, *Domestic Violence: The DA's Side*, GAMBIT WKLY. (Dec. 9, 2013), http://www.bestofneworleans.com/gambit/domestic-violence-the-das-side/Content?oid=2285348 [https://perma.cc/4DQA-WUZT].

328. NOLA BLUEPRINT 2015, *supra* note 323.

329. *Id.*

330. In 2015, nine women and children were reportedly killed by abusers in New Orleans,

In general, district attorney's offices fear domestic violence prosecutions, because they lower conviction rates.[331] At the moment, prosecutors succeed at tucking these cases away in their statistics as mere misdemeanors, generally deemed unimportant by FBI statistics and the press.[332] Indeed, in 2011, the city of Topeka,

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a city of fewer than 400,000 people. *See, e.g.*, Jonathan Bullington, *In Algiers Shooting, Years of Abuse End in Daughter's Heroic Act*, TIMES-PICAYUNE (Feb. 4, 2015), http://www.nola.com/crime/index.ssf/2015/02/in_algiers_pattern_of_abuse_en.html [https://perma.cc/YC8D-Q7Z4] (reporting on Lindsey Crain, 28, who was killed by her stepfather with a shotgun as she protected her mother from him); Jonathan Bullington, *McDonald's Stabbing Victim IDed by Orleans Coroner*, TIMES-PICAYUNE (Mar. 23, 2015), http://www.nola.com/crime/index.ssf/2015/03/woman_fatally_stabbed_at_elysi.html [https://perma.cc/NR79-QGS3] (reporting on Julia Anderson, 23, who was stabbed in the neck by her boyfriend in a parking lot); Andy Cunningham, *Family of Murdered Mom, Daughter Speak Out After Accused Killer's Arrest*, WDSU NEWS (Mar. 6, 2015), http://www.wdsu.com/news/local-news/neworleans/family-of-murdered-mom-daughter-speak-out-after-accused-killers-arrest/31658712 [https://perma.cc/E7RD-UWC3] (reporting on Walesha Williams, 25, her daughter, Paris Williams, 8, and a friend, who were all shot and killed by the mother's ex-boyfriend); Ken Daley, *Here's How a Broken Ankle Became a Homicide*, TIMES-PICAYUNE (Mar. 27, 2015), http://www.nola.com/crime/index.ssf/2015/03/heres_how_a_broken_ankle_became_a_homicide.html [https://perma.cc/R47Y-35GA] (reporting on Teita Vaughn, 33, who died from a pulmonary embolism, after her boyfriend attempted to throw her out of a window, and then broke her ankle by repeatedly smashing it with an object until it cracked); Ken Daley, *Slain Tulane Law Student Sara LaMont 'Always Was the Brightest Star,'* TIMES-PICAYUNE (Apr. 16, 2015), http://www.nola.com/crime/index.ssf/2015/04/slain_tulane_law_student_alway.html [https://perma.cc/987H-GSMU] (reporting on Sara LaMont, who was third in her class at Tulane Law School and killed in an apparent murder-suicide by her boyfriend, also a Tulane Law School student); Heather Nolan, *Couple's Death Investigated as Murder-Suicide: NOPD*, TIMES-PICAYUNE (June 30, 2015), http://www.nola.com/crime/index.ssf/2015/06/couples_death_investigated_as.html [https://perma.cc/N2PQ-9QAZ] (reporting on Margaret Ambrose, 72, killed by her husband in an apparent murder-suicide); Heather Nolan, *Victim's Boyfriend Is Suspect in Metropolitan Street Shooting: NOPD*, TIMES-PICAYUNE (June 4, 2015), http://www.nola.com/crime/index.ssf/2015/06/metropolitan_street_shooting.html [https://perma.cc/KR37-TG7H] (reporting on Melissa Hunter, 23, who was shot multiple times by her boyfriend); Carlie Kollath Wells, *Algiers Woman Killed in Stabbing Identified by Coroner*, TIMES-PICAYUNE (Apr. 20, 2015), http://www.nola.com/crime/index.ssf/2015/04/algiers_woman_stabbed_name.html [https://perma.cc/E8FK-SDNF] (reporting on Esperanza Rojas, 25, who was stabbed multiple times). *See also* Matt Sledge & John Simerman, *Arrested NOPD Officer Wardell Johnson Has History of Downplaying Domestic Violence Incidents*, NEW ORLEANS ADVOCATE (July 8, 2015, 9:03 AM), http://theadvocate.com/news/neworleans/neworleansnews/12847224-123/arrested-nopd-officer-wardell-johnson [https://perma.cc/PD7Z-JULE].

331. *See* Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 43-44 (2007).

332. Naomi Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, 161, 162-63 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) ("For battered women and their advocates, prosecutors' offices have often been a major impediment to improving the overall response of the criminal justice system. Indeed, some prosecutors admit that they simply do not take

Kansas, threatened to repeal its municipal domestic violence statute in order to save money by not prosecuting the cases at all.[333]

Treating domestic violence as torture would ratchet up the pressure to take these cases seriously as felonies.[334] This only works, however, if the police charge those cases as felonies in the first place. Prosecutors are not measured by how many misdemeanor arrests they fail to bump up to felonies; they are measured by how many felony arrests they decline.[335] Then, and only then, do the cases become politically and statistically relevant in our current regime.

Another probable hurdle is getting police to do full investigations that could potentially lead to convictions under a torture statute. Police are unlikely to do the kind of work required to identify patterns of torture on the scene of a domestic violence arrest. First, police avoid making difficult subjective statutory calls when they can charge simpler lesser offenses.[336] More importantly, the political pressure to reduce crime rates has famously resulted in fewer charging decisions.[337] In an environment in which attempted murder routinely becomes aggravated battery by shooting, felony torture will probably result in an arrest for simple domestic violence, instantly "reducing" that jurisdiction's violent crime rate.

Ideally, the dedicated prosecutor—armed with excellent training, infinite investigative resources, and the time to triage each case—would make these charging decisions. This, of course, rarely oc-

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domestic violence as seriously as other crimes." (footnote omitted)); *see also* Hanna, *supra* note 118, at 1860-61 ("Prosecutors may also resist pursuing cases because they believe that battering is a minor, private crime.").

333. *See* A.G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES (Oct. 11, 2011), http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalize-domestic-violence.html [https://perma.cc/AD3B-VYRU].

334. *See, e.g.*, Hanna, *supra* note 118, at 1521 ("Of those cases that are prosecuted, many are charged or pled down to misdemeanors despite facts that suggest the conduct constituted a felony.").

335. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1715 (2010) (explaining that little evidence exists of declination rates for felonies, and even less for misdemeanors).

336. For more on how police officers respond to domestic violence calls and arrests, see BUZAWA & BUZAWA, *supra* note 123, at 152-53.

337. *See, e.g.*, William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES (Feb. 6, 2010), http://www.nytimes.com/2010/02/07/nyregion/07crime.html [https://perma.cc/2AT4-7FQU] (reporting that precinct commanders and administrators manipulated Compstat data to favorably impact crime rate statistics for their precinct).

curs.[338] Yet, there are still two ways to encourage felony torture prosecutions: first, by making torture easier and more obvious to identify in police investigations, and second, by applying political pressure to incentivize using the torture statute.

In order for this to work, police reports would need to include questions about each of the torture techniques listed in the statute. Some jurisdictions have already done this, in part by adding a lethality assessment to police reports, to facilitate prosecutors' bond consideration and triage.[339] In other jurisdictions, police ask victims more general questions about their attackers' history of violence such as the following: "(1) How recent was the last violence?; (2) Is the violence increasing in frequency?; (3) What types of violence and threats are you experiencing?; and (4) Do you think [the offender] will seriously injure or kill you or your children?"[340]

To capture the possibility of torture charges, a police report would need to *require* officers to ask questions like these:

> (1) How long has the offender abused you?
> (2) How often does he hit you?
> (3) What kinds of violence does he use against you? (Include a checklist of types, including strangulation.)
> (4) Does he hurt your children?
> (5) Does he threaten you? What does he say?
> (6) Does he threaten to hurt anyone else, including your children?
> (7) Does he have a weapon?
> (8) Does he point a weapon at you or intimidate you with it?

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338. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262-63 (2011).

339. *See* JILL THERESA MESSING ET AL., POLICE DEPARTMENTS' USE OF THE LETHALITY ASSESSMENT PROGRAM: A QUASI-EXPERIMENTAL EVALUATION, at i (2014), https://www.ncjrs.gov/pdffiles1/nij/grants/247456.pdf [https://perma.cc/3BEK-3RUX].

340. *See* CITY OF NEW ORLEANS, THE NEW ORLEANS BLUEPRINT FOR SAFETY 15 (Oct. 21, 2014), http://www.nola.gov/health-department/domestic-violence-prevention/domestic-violence-documents/blueprint-for-safety-opening-pages-and-chapter-one/ [https://perma.cc/P4CM-J7SE] (alteration in original); *see also* SECOND JUDICIAL DIST. VIOLENCE COORDINATION COUNCIL, GUIDELINES AND PROCEDURES FOR DOMESTIC ABUSE-RELATED CRIMINAL CASES 56 (4th ed. Jan. 1, 2013), http://www.mncourts.gov/mncourtsgov/ media/second_district/documents/Criminal_Court/Guidelines_DA_Related_Cases_Crim.pdf [https://perma.cc/E4A3-QVC2] (St. Paul, Minnesota); CITY OF DULUTH, THE DULUTH BLUEPRINT FOR SAFETY 39 (Jan. 29, 2015), http://www.theduluthmodel.org/cms/files/4-Duluth-law-enforcement-chapter-3.pdf [https://perma.cc/N2R9-65M3] (Duluth, Minnesota).

> (9) Does he force you to perform sex acts that you do not want to do?
> (10) Does he call you names? What names?
> (11) Does he purposefully keep you from sleeping?
> (12) Does he control you?
> (13) Does he check your phone or your email, or demand to know your whereabouts?
> (14) Do you believe that he will kill you or your children?[341]

Police policy would need to insist on officers asking these questions as part of every domestic violence call, and, of course, to allow officers to spend more time responding to such calls. On a pragmatic note, officers often fill in these reports using drop-down menus, which can require particular questions to be answered.

Police reports listing each of the graphic and gripping details relevant to a torture charge would make it easier for a prosecutor to screen the case and to understand that a torture statute *could* apply. Without those facts, we would be relying too heavily on prosecutors' time and willingness to interview victims themselves in order to determine the context of cases. Moreover, these prosecutor interviews often come too late, after the batterer has had time to intimidate and coerce his victim to be uncooperative with the system.

Just as importantly, such reports would amp up the political pressure to prosecute felony torture. This would not happen in a direct way; the news would not report on the number of cases that could have been charged as felonies but were not. Instead, prosecutors will know that they face a ticking time bomb of cases in which any facts relevant to the risk of homicide are clearly laid out but ignored. Once a felony torture statute exists and a police report documents a torture chamber in graphic detail, the district attorney's office will suddenly become far more culpable for failing to protect the victim.

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341. I include this last question because it has proved to be a fairly accurate predictor of the chances of homicide. *See* Judith A. Wolfer, *Top 10 Myths About Domestic Violence*, 42 MD. B. J. 38, 40 (2009) ("The second highest predictor of whether a woman will be killed by an intimate partner is his threat to kill her." (citing Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089-97 (2003))).

## CONCLUSION

"The limits of my language mean the limits of my world."[342] In many ways, we have failed both culturally and in our criminal justice system to understand the full horror of domestic violence because we simply lack the proper language to describe it. Identifying domestic violence as torture gives us a name for the scope of the terror batterers inflict. It reveals domestic violence as a pattern of accumulated cruelty, with searing psychological scars often worse than the physical pain. It redirects our focus away from blaming victims and instead focuses on the cold calculation of the batterer.

Prosecuting domestic violence as torture would save lives. Batterers would face serious felony charges for years of terrorizing a victim, rather than disjointed misdemeanor offenses. Judges could correctly calculate the danger of witness tampering and homicide during bond consideration. For the first time, police, prosecutors, judges, and juries could hear the full story of a pattern of torture rather than a single, isolated incident. The system would gain a better understanding of the motives of both abusers and their terrified victims.

342. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 74 (C.K. Ogden trans., Kegan Paul, Trench, Trubner & Co., LTD. 1922) (1921).

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# Coercive control: To criminalize or not to criminalize?

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**Abstract**
Criminalizing coercive or controlling behaviour in an intimate relationship, as has been done in England and Wales and is proposed in Scotland, has the advantage of offering an offence structure to match the operation and wrong of intimate partner violence. This article raises the question as to whether other jurisdictions should follow suit. It argues that the successful implementation of such an offence may require a complexity of analysis that the criminal justice system is not currently equipped to provide and will require significant reforms in practice and thinking. If it is not successful such an offence could conceivably operate to minimize the criminal justice response to intimate partner violence and be used to charge primary victims.

**Keywords**
Coercive control, crime, intimate partner violence

## Introduction

In 2015 England and Wales took the bold move of enacting an offence that criminalizes controlling or coercive behaviour within an intimate relationship.[1] In 2017 Scotland proposed a specific offence of domestic abuse, intended to capture the patterns of harm that constitute intimate partner violence (IPV), including behaviours that fall within existing interpersonal violence offences and those that do not.[2]

This is not the first time that attempts have been made to address *patterns of harm*, as opposed to one-off events, in the legal response to IPV (Douglas, 2015). Civil protection orders, for example, were developed for this purpose and were also designed to cover abusive behaviours that are not limited to physical violence. The criminal law has also

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been moving towards criminalizing 'courses of conduct' that encompass a broader range of behaviours than physical violence. For example, the UK[3] and all Australian jurisdictions have offences of stalking,[4] New Zealand has the offence of criminal harassment,[5] while Tasmania introduced the summary offences of emotional and economic abuse in 2004[6] (Douglas, 2015: 456–457). The English and Welsh and the Scottish reforms are a step further in this direction and raise the question as to whether other countries should follow suit.[7] In New Zealand the decision has been made not to (Office of the Minister of Justice NZ, 2016: [26]–[29]) and this article attempts to engage with this broader question, rather than the specifics of any particular reforms or reform proposals.

The potential benefits of criminalizing coercive control have been canvassed elsewhere (Tuerkheimer, 2004) and are summarized next. Essentially such a reform offers an offence structure designed to match the operation and wrong of intimate partner violence.

In this article I sound a note of caution. The criminal justice system was not designed to address IPV and the problems that it presents in this context are deeper and more extensive than simply the fragmentation of long-standing patterns of harm into individual transactions. In the third section of this article I suggest that prosecuting coercive control successfully will necessitate a greater reliance on victim testimony and may require a breadth of evidence and complexity of factual analysis that the criminal justice system is not currently well equipped to provide. Such an offence may therefore be unlikely to deliver in practice on the many benefits that it theoretically promises. In the fourth section I raise the possibility of a worse scenario – that enacting such an offence could operate to further minimize the justice response to IPV, invalidate the experiences of primary victims and form the basis of charges against them. I have based the analysis in this article on the most common manifestation of IPV – in which the predominant aggressor is male and the primary victim is female (FVDRC, 2017).

The aim of this article is to point out the complexity of the issues involved when attempting to respond to the 'wicked' problem that is IPV within a complex system like the criminal justice system. A complex system is an unpredictable space in which reforms frequently have disappointing and/or unexpected outcomes (Morcol, 2012; Snowden and Boone, 2007). Reforms must also be systemic – addressing multiple layers and aspects of system functioning – and participatory (FVDRC, 2016). This is not a domain in which legislative reform alone will provide any kind of panacea.

## The Potential Benefits of an Offence of Coercive Control

Interpersonal violence offences are constructed primarily in terms of incidents. As a result the criminal justice system fragments long-standing patterns of IPV into separate offences (Bettinson and Bishop, 2015; Hanna, 2009: 1461). Each incident is taken out of the pattern in which it occurs and proven and responded to in isolation. A corollary of this point is that the criminal offences are primarily constructed in terms of the use of physical violence. This means that IPV is also stripped of much of its overall architecture – those aspects of the pattern of abuse that are psychological and financial, for example, along with the motivations of the abuser and the cumulative effect on the victim. As a consequence, the totality and meaning of the perpetrator's behaviour, the continuing risk

he poses and the weight of harm experienced by the victim are all potentially misunderstood and minimized at every stage of the criminal justice process – investigation, charging, trial and sentencing.

An offence of coercive control, on the other hand, criminalizes what many have suggested is the underlying architecture of IPV (Tuerkheimer, 2004: 959). Stark (2007: 15) theorizes that IPV should be understood as a liberty crime rather than an assault crime, commenting that it is a

> course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation) and appropriating or denying them access to the resources required for personhood and citizenship (control).

Criminalizing non-violent manipulation may be important for those victims whose partners 'rule like dictators over their lives' (Hanna, 2009: 1463) but who do not experience much, if any, physical violence (Youngs, 2014). This may assist police officers in responding to cases that are potentially lethal because of high levels of psychological control but where there is no overt physical abuse (Bettinson, 2016: 166). It also places physical violence in context and could mean that the police are supported to provide an escalated criminal intervention in respect of repetitive 'low level' physical offending (Douglas, 2015: 442).

Criminalizing coercive control has the advantage of making the broader context of the relationship evidentially relevant (Bettinson and Bishop, 2015: 191; Hanna, 2009). Because of the current focus on physical violence the 'courts hear only parts of victim's stories' (Kuennen, 2013: 2; Tuerkheimer, 2004: 979–988). It has been pointed out that when the victim's account is taken out of context in this manner it may resemble something other than the truth (Burke, 2007: 574; Tuerkheimer, 2004: 983–984; Youngs, 2014). When hearing only about an isolated incident the jury may also assume that the perpetrator was intoxicated, or that it was a minor event, or that it was an act of self-defence against an 'out of control' female partner (Burke, 2007: 574; Tuerkheimer, 2004: 985–988). Broader accounts of the perpetrator's behaviour may therefore add to the victim's credibility and provide clear evidence of the perpetrator's motives.

Tuerkheimer (2004: 1016) argues that if the victim's view of her relationship with the perpetrator is legally relevant then she is encouraged to recount the full range of her experiences – making the experience of giving testimony validating of her lived experience.

Furthermore, if the victim is encouraged to provide complete information this will assist the court to make better assessments of what is going on. The court can determine who is the primary victim in the overall relationship regardless of who used physical force on this particular occasion (Bettinson and Bishop, 2015: 191), appreciate that the physical violence may not be 'low level' given everything else that the perpetrator is doing and understand that the perpetrator's acts of violence are part of a larger pattern of harm and cannot be accidental or unpremeditated.

It is also suggested that an offence of coercive control captures the full wrong of IPV as perpetrated by the accused and the totality of the harm as experienced by the victim (Bettinson, 2016: 167; Burke, 2007: 588; Douglas, 2015: 465; Youngs, 2014). This

satisfies the principle of fair labelling and ensures that sentencing responses reflect the harm of the offending (Youngs, 2014). Accommodating a history of uncharged (and therefore unproven) behaviour by the perpetrator is difficult at sentencing if the offence was not charged as 'representative' of a broader criminality (ALRC; NSWLRC, 2010: 579, 604–607) or where evidence of uncharged prior abuse has not been admitted in trial as relevant to a fact in issue (ALRC; NSWLRC, 2010: 574). When patterns of harmful behaviour have resulted in past convictions these do not necessarily result in escalated sentences and are, in any case, unlikely to represent the full extent of offending. Furthermore, the very nature of this process relegates to the history of the offence what is actually part of a continuing wrong (Burke, 2007: 575; Tuerkheimer, 2004: 997–998).

Criminalizing coercive control is said to perform an educative function (Youngs, 2014). It may enhance community recognition of IPV, as well as assisting victims to better understand the abuse they have experienced (Douglas, 2015: 465). The UK Law Commission (2014: 126–127) has expressed the hope that fair labelling might contribute to rehabilitation of the offender. When one offence out of a pattern of harm is prosecuted the wrong message is sent; 'that he has only crossed a line into criminality and he therefore needs to step back behind it rather than desist entirely' (Gowland, 2013: 389).

## Barriers to Successful Implementation

The benefits of enacting an offence of coercive control are obviously contingent on the successful operation of such an offence and it is here that I want to sound a note of caution. The problems with the criminal justice response to IPV are larger than those presented by the fragmented offence structures for interpersonal violence. For example, there are barriers to reporting acts of IPV that already meet the criteria for the existing offences, and, when these barriers are overcome, there are frequently police and prosecution failures to enforce the existing laws and difficulties in meeting the criminal burden and standard of proof (VLRC, 2006: [4.25]). As pointed out by Hanna (2009: 1468; Home Office, 2014: 11):

> In the vast majority of cases before the courts currently, the problem is not that the defendant's conduct did not violate the law. The problem is that the criminal justice system is overwhelmed and underfunded and, depending on the jurisdiction, under enlightened about the concept that men do not have a legal prerogative to beat their intimate partners.

In England the offence of controlling or coercive behaviour has been enacted along with other measures, such as extensive specialist training of police (McMahon and McGorrery, 2016: 101). Of course, if the law is to be successfully applied, shifts will also be required in the collective response of *all* key criminal justice decision makers, including prosecution lawyers, judges, juries and corrections officers administering sentences.

But the problems presented by the decision-making processes of the criminal justice system go beyond the skill sets and understandings of decision makers. For example, the adversarial system is problematic as a mechanism to determine the truth of what took place and craft a response to IPV, even in respect of traditional violence offences. Judges tend to see themselves as reliant on what prosecution and defence lawyers bring to the

table and unwilling to 'descend into the fray'. Defence counsel view their task as getting their client off the charges. Aggressive pursuit of this agenda may involve objecting to the victim's statement of facts and recasting what took place as benign (e.g. a strangulation may be recast as putting the victim in a head lock to calm her down), advising the defendant to exercise his right to silence and put the Crown to the proof and subjecting the victim to rigorous cross-examination in order to discredit her. The prosecution, on the other hand, may plea bargain – agreeing to significant rewrites of the statement of facts and a discount of the charges in order to resolve the matter (ALRC; NSWLRC, 2010: 563).

Such problems are likely to have particular bite in respect of an offence that is inherently time consuming, complex and difficult to successfully prosecute. Here I point out that the criminalization of coercive control will add conceptual and evidentiary difficulties to criminal prosecution in the IPV context. This is because it requires a sophisticated factual analysis, an evidentiary base that may place additional reliance on victim testimony and a sensitivity to gender roles. It also presents definitional challenges and may be undercut by the unconscious, collectively held, conceptual frameworks used to make sense of facts involving intimate partner violence.

## *The need for an individualized and nuanced factual analysis*

While it is relatively easy to explain the concept of coercive control in theory, it is not possible to undertake a 'one size fits all' factual analysis because each case will involve an individualized package of behaviours developed through a process of trial and error for the particular victim by the person who knows her most intimately (Stark, 2007: 206–208). These behaviours may be subtle and readily understood only by the victim and perpetrator as, for example, when they are designed to exploit fears that are personal to the individual victim or consist of 'gestures, phrases and looks that have meaning only to those within the relationship' (Bettinson and Bishop, 2015: 194). Stark provides the example of a perpetrator who would publicly offer his partner a sweatshirt when she performed well in her sport. This apparently considerate gesture indicated to her that she had violated their agreement not to make him jealous and would later need to cover up the bruising she would receive (Stark, 2007: 229).

Appreciating the harms of coercive control requires a focus not only on what the abusive partner has done, but what the victim has been prevented from doing for herself. The impact of the perpetrator's behaviour on any victim will be cumulative over time, specific to that particular individual and may be contingent on a mix of external influences and personal vulnerabilities (Kuennen, 2013).

One can compare the analysis required here – the potential subtlety and individualized range of behaviours over an expanded period of time that must be examined, as well as the complexity of the analysis required – with what is needed to determine whether there has been the deliberate use of physical violence on any occasion.

## *Additional reliance on victim testimony*

Ritchie (2014) points out that the criminal justice system's need for victim involvement in the prosecution of criminal offending can be both undesirable and dangerous.

Successful prosecution of the existing criminal offences can be heavily reliant on the victim's testimony and yet frequently victims are in dangerous and/or compromised positions when it comes to giving that testimony, especially after the significant but standard delays in criminal proceedings. Delays, trauma and brain injury can also affect the victim's ability to accurately recall the details of their experiences (ALRC; NSWLRC, 2010: 563–564; Douglas, 2015). Furthermore, women, and particularly battered women, have 'credibility obstacles' in the criminal court (Kuennen, 2013: 25).

I have pointed out that coercive control is a (potentially subtle) web of behaviours over an extended period of time, the particular meaning of which may only be discernible to the perpetrator and victim. Prosecution in such instances will therefore depend on victims being 'able to appreciate or verbalise the impact of the harm they are experiencing, having left their "hostage-like" state' (Bettinson and Bishop, 2015: 194). In other words, successful prosecution will necessarily depend on the victim providing a detailed narrative in court. However, recovery may be required before the victim has a realistic understanding about what happened to her. This may not be possible until she is in a position of safety and has had the benefit of skilled support over an extended period of time.

Evidence of physical violence on a particular occasion, particularly when there is documented injury, may be easier to establish independently of the victim's testimony. And if it is necessary to rely on victim testimony: '[f]or many women it is much easier to describe how she suffered an injury than for her to provide a detailed narrative that, as Stark suggests, she herself may not yet understand' (Hanna, 2009: 1466). Tadros (2005: 1012) argues, to the contrary, that an offence of coercive control may overcome the problems of proof presented by the need to rely on the testimony of the victim in respect of the traditional offences in some instances. His example is: 'a victim, who seven times in the last year, has been admitted to hospital with bruising. Each time, when asked how the bruising came about, she reports that the injury was accidental.' He suggests that, while the mens rea for assault may be impossible to prove on any one occasion in this example, considered cumulatively there may be sufficient evidence to convict the accused of domestic abuse characterized by a course of conduct. This example, however, involves drawing inferences from accumulated incidents of physical violence which has caused documented physical injury, rather than the introduction of other forms of coercive and controlling behaviours.

## *The need for critical understanding of existing gender norms*

Applying the concept of coercive control requires a sensitive gender analysis – there is a need to appreciate the manner in which gender socialization and the gendered distribution of resources support patterns of power and domination in heterosexual relationships, particularly in 'the micro-dynamics of everyday living' (Stark, 2007: 30). Stark (2007: 21) comments that:

> the most common targets of control are women's default roles as mothers, home-makers and sexual partners. By routinely deploying the technology of coercive control a significant subset of men 'do' masculinity […] in that they represent both their individual manhood and the normative status of 'men'.

To someone who does not have a critical analysis the perpetrator may, however, simply look like an old-fashioned man – one who expects certain standards in his home and in relation to his children. This can be reinforced by women's traditionally devalued status. Women's roles as wives and mothers involve a measure of unpaid servitude, even in otherwise egalitarian relationships, and this can make a victim's oppression difficult to see:

> Indeed because most women already perform these activities by default, their regulation in personal life is largely invisible. As we've seen, however, the micromanagement of how women perform as women lies at the heart of coercive control and is emblematic of how coercive control violates their equal rights to autonomy, personhood, dignity and liberty. (Stark, 2007: 31)

In other words, male dominance is to some degree *naturalized* because heterosexual norms permit men a certain degree of dominance in the minutia of everyday living even in non-abusive relationships (Bettinson and Bishop, 2015: 195; Youngs, 2014). Decision makers are themselves formed within and thinking through these roles (Butler, 1993). For this reason Stark (2007: 14) describes coercive control as 'invisible in plain sight'.

## *Definitional difficulties*

Not only is a sophisticated analysis on the part of decision makers required in order to render *visible* the manner in which coercive control may exploit existing gender roles, but the concept blurs the line between criminal and non-criminal behaviour (Hanna, 2009: 1461; Kuennen, 2013). If abusive behaviour exploits existing gender norms when does 'normal' end and 'abuse' begin?

The use of physical violence by a man towards his female partner is not currently acceptable and such behaviour is therefore automatically criminalized unless it is consented to. While it is possible for a victim to consent to being physically harmed, the defence of consent can be withdrawn by the court in cases where the harm reaches a certain level.[8]

This is not so for a range of the behaviours potentially utilized as tactics of coercive control. It is not automatically unacceptable, for example, for the male partner to control a couple's finances, to hold joint property in their name, to make major life decisions on behalf of both and to dislike and want to minimize contact with their in-laws. Whether these behaviours are acceptable or not depends on whether they were agreed to and agreement can be the result of a matrix of factors (Kuennen, 2013: 14–17).

Testimony about coercive and controlling behaviours that are wider than the use of physical violence therefore opens the door to cross-examination of the victim about her willing participation in the balance of power in the relationship and about her psychological need/desire to be controlled by her partner (Hanna, 2009: 1467). As a result, any chance of a conviction will rest on the victim's ability to maintain her perspective under cross-examination. This may be difficult when victims themselves are thinking through the framework that has been imposed on them and the experience of what has been done to them (Tadros, 2005: 1007). Ironically a victim who is able to hold her ground under this kind of cross-examination may undercut her claim to have been the victim of coercive control.[9]

## The 'interpretative schema' for IPV

Quilter (2011) has presented a compelling analysis of the manner in which 'interpretative schema' in relation to sexual violence can undercut attempts to reform the legal response to sexual violence (see also Temkin, 2002). Interpretative schema are the sets of understandings that practitioners use to make sense of facts to determine the truth of what happened. How decision makers think about a social phenomenon is hugely significant in how they understand that phenomenon when it manifests in any particular instance and is frequently informed by inaccurate thinking.

This also occurs in relation to family violence. For example, relationships characterized by IPV are often understood as 'bad relationships' and relationships are understood to be based on choice and involve mutuality. The solution to a bad relationship is addressing one's own contribution to what is going wrong or leaving that relationship (Lindauer, 2012; Morgan and Coombes, 2016; Stanley et al., 2012). The assumption is that leaving the relationship is a choice based activity for the victim of IPV and is equivalent to ending the abuse. This resonates with a broader assumption – that victims can effectively address the violence that they and their children are experiencing by simply utilizing the range of tools that they are provided with; for example, contacting the police, getting a protection order and going into temporary refuge accommodation. And that it is appropriate to put the burden of addressing criminal offending on the victim, who is likely to be in a state of considerable trauma. It is therefore part of our interpretive schema for IPV to focus on what the victim has done to address that violence (Schneider, 1991: 983). Victims who do not behave in the manner that we expect are understood to be partially responsible for their situation – contributing to the abuse, choosing the abuse, not being honest about the abuse and/or not acting protectively in respect of themselves and their children.[10]

What is missing from the interpretive schema for IPV is an understanding of how the actions of the primary aggressor systematically operate to isolate, frighten and control the victim over time, closing down her options and undermining her choices. Or how responses by those charged with assisting can be ineffectual at best or, at worst, escalate the danger. Rarely articulated in the criminal justice context is the manner in which precarious life circumstances and limited resources – the result of structural inequity and historical trauma – can realistically close off options that are available to others living more privileged lives. In other words, decision makers frequently fail to understand the manner in which IPV, including but not limited to the tactics of coercive control employed in any instance, operates as a form of 'social entrapment'. Ptacek (1999: 10) describes entrapment as having three dimensions:

> (1) […] the social isolation, fear and coercion that men's violence creates in women's lives; (2) […] the indifference of powerful institutions to women's suffering; and (3) […] the ways that men's coercive control can be aggravated by the structural inequalities of gender, class, and racism.

Quilter (2011) discusses the invisible and entrenched nature of interpretative schema. At the most basic level – in the very language that we use – we mutualize IPV, conceal the perpetrator's responsibility and render the victim's resistance invisible when we use phrases such as 'violent relationships' to discuss what are in fact patterns of offending and victimization

(Coates and Wade, 2007; Wilson et al., 2015). In my own experience people who do not understand how entrapment operates – because they have not personally lived the manner in which coercive control can inhibit resistance and who have life experiences that have led them to expect personal safety at all times and for whom calling the police will always be an effective means of achieving this – can be vehement and entrenched in their judgements of victims.

An offence of coercive control *could* challenge this interpretive schema if it was used, in conjunction with an understanding of entrapment, to shift the focus onto the perpetrator's abusive behaviour. However, if victims are understood as complicit in and partially responsible for the serious repetitive *physical abuse* they endure, how much more so will this be in relation to other behaviours? This will be particularly so where a woman has worked hard to placate the perpetrator and maintain a semblance of normalcy, and when the abusive behaviours are on a continuum with 'normal' up one end. It is likely that decision makers will continue to assume that victims who remain in such relationships consent to the overall dynamic of the relationship.

## *Parallels with sexual violence*

The parallels between the issues I have traversed here in relation to the criminalization of coercive control and those which have been documented in the justice response to sexual offending are not confined to the unconscious schema used to understand the phenomenon at a factual level (which have undercut multiple attempts to improve the justice response to sexual violence via legislative reform: Quilter, 2011). For example, sexual offending throws up similar definitional issues because the line between criminal and non-criminal behaviour turns on the consent of the complainant and the reading of that consent by the defendant. Yet consent is frequently obtained under a myriad of pressures that blur the line between a submission without consent and a reluctant consent (Gavey, 2005: 136–165; Raphael, 2000: 48–49), and reduced capacities that blur the line between an uninhibited consent and a complete lack of the capacity to consent. Furthermore, numerous theorists have discussed the manner in which the inequitable power dynamics embedded within the mutually reinforcing practices of sexuality and gender mediate the negotiation of consent to heterosexual sexual connections (Gavey, 2005; MacKinnon, 1987: 5–8, 85–89). These privilege 'assertive' behaviour by men, read permission into what should be irrelevant behaviour by women and make sexual encounters easily 'narrated in ways where the absence of a woman's desire and pleasure is not only permissible, but almost unremarkable' (Gavey, 2005: 17). In other words the line between sexual offending and sex is easily (and on some accounts necessarily) blurred. Sexual offending takes place in circumstances where there are competing realities in respect of events that are likely to have been un-witnessed by all except the complainant and defendant. Successful prosecution will frequently depend on the capacity of the complainant to withstand rigorous cross-examination on the minutia of their account in respect of a traumatic encounter that may have taken place a considerable period of time ago. Certainly it is not reassuring – given the potential similarities noted here – that sexual offending is rarely reported to the police and is notoriously difficult to prosecute successfully, while the trial process is widely documented to be traumatic and gruelling for complainants (Graycar and Morgan, 2002: 354–364; MacDonald, 2005).

In fact, the offence of coercive control could be argued to add to the difficulties presented by the requirement for victim non-consent in the context of sexual violence. This is because, unlike serious sexual offending, the actus reus for coercive control cannot be set out in concrete terms (it cannot, for example, be defined in terms of particular sexual behaviours). Instead an indeterminate range of potential behaviours by the accused, possibly taking place over an extended period of time may or may not satisfy the actus reus requirements. For example, the Statutory Guidance Framework in the UK defines controlling behaviour as:

> a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. (Home Office, 2015: 3)

Coercive behaviour on the other hand is defined as 'a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim' (Home Office, 2015: 3). The Framework goes on to set out a *non-exhaustive* list of *17 types* of behaviours which, if they take place repeatedly or continuously and have a serious effect on the victim, could satisfy section 76 of the Serious Crime Act 2015 (Home Office, 2015: 4).

## Potential Risks

Here I raise the possibility that if the criminal justice system subverts the concept of coercive control or is unable to properly utilize it, the consequences of enacting such an offence may go beyond a failure to produce the hoped for benefits and include negative effects for victims. This is particularly so in a complex system where reforms must be expected to have unexpected consequences. Two of the risks involved in enacting an offence of coercive control are that it could be used to minimize the criminal justice response to IPV and that it could be used to charge primary victims.

### *Minimization*

Given the complexities involved in applying the concept of coercive control, it is possible that such an offence will be successfully charged only in those cases where the use of physical violence can be established (ALRC; NSWLRC, 2010: 586) and/or where there is independent evidence of levels of coercive control that are overt and extreme (Bindel, 2014). Experience in other contexts would seem to support this possibility. For example, Bettinson and Bishop (2015: 188) point out that judicial applications of course of conduct offending such as stalking frequently lapse back into an examination of individual incidents of assault that can be proven 'and whether or not these, in combination, amount to a course of conduct'. This is an 'incident additive approach' that places a strong continued focus on physical violence.

If this is the case there is the possibility that having an offence of coercive control would exacerbate the current tendency to minimize IPV in the criminal justice response. First, the existence of such an offence could encourage the police to wait for a pattern to

emerge in such cases, rather than responding appropriately to individual acts of abuse (Bindel, 2014). The dilemma for police is that if individual offences are prosecuted then principles of double jeopardy mean that those offences cannot be later included to support charges of coercive control (Crown Prosecution Service, 2015: 12).

Second, if police see the offence of coercive control as the appropriate response in all cases involving IPV, then they may fail to prosecute more serious offences of violence that have occurred in order to focus on establishing coercive control (Douglas, 2015). This phenomenon has been observed elsewhere. Douglas (2015: 436) points out that civil protection orders have become the focus of the police response to domestic violence, with breaches being the most common criminal offence charged even when more serious substantive offences may be applicable.

A third concern is that the offence will decriminalize certain acts of abuse in the domestic context. Kelly and Johnson (2008) have proposed that there are 'typologies' of IPV. Only one of these suggested typologies, 'coercive controlling violence', may be loosely equated with Stark's notion of coercive control. Other 'types' of violence include 'common couple violence' and 'separation engendered violence'.

Whether there are such typologies of IPV is controversial (Gulliver and Fanslow, 2015; Wangman, 2011). Nonetheless this work has the potential to undercut understandings of coercive control in some contexts. For example, during separation, particularly where control was high but there was not much physical violence in the relationship, there is an impulse to assume that one is dealing with a more 'benign' type of violence; 'separation engendered violence' (Jeffries, 2016: 14). This may undermine the successful prosecution of the offence of coercive control on certain sets of facts, and worse, the criminal prosecution of violent offences per se between intimate partners in such instances. For example, if the offence of coercive control is viewed as the appropriate charge but coercive control is not considered to be present on the facts because the violence is interpreted as being of a more 'benign' type then, as pointed out by Douglas (2015: 466) and Rathus (2013: 388–389): 'one of the effects may be to exclude some very valid experiences of domestic violence from criminalization'.

There are a number of other negative effects that could potentially flow on from enacting an offence of coercive control that is only enforceable in the most extreme cases and/or cases involving physical violence. Stark (2007: 144) refers to this phenomenon as 'normalizing lower levels of abuse': for example, the creation of an erroneous impression that few cases of IPV actually involve coercive control because we have few criminal convictions. Another is that, rather than making the criminal justice system *more* hospitable to victims while educating victims, the community and abusers about coercive control, such an offence could do the exact opposite. Those victims who do not have the patterns of harm that they have been subjected to recognized by the criminal justice system may experience the criminal justice process as extremely damaging, while it would be conversely validating for their abuser (Bindel, 2014).

## *Mutualization*

While the English offence of coercive or controlling behaviour is couched in gender-neutral terms, the Home Office (2015: 7) has issued statutory guidelines that point out that coercive control is gendered and underpinned by wider societal gender inequity.

Investigators are directed to take into account gender and 'any vulnerabilities' but avoid making assumptions based on stereotypes (2015: 24). Clearly the intention is that investigators will be sensitive to the social patterns of harm and gendered norms discussed in this article, while remaining open to the exceptional case that deviates from these. Gender-neutral provisions, however, open up other possibilities.

As noted above, Stark (2007: 14) points out that gender roles can render invisible the abusive behaviours of IPV perpetrators. The opposite is not the case. Indeed gender roles may throw women's attempts to assert independence and to equalize power dynamics in their relationships into sharp relief. Furthermore, assertive behaviour by women readily buys into stereotypes of women as demanding and aggressive.[11]

Unless decision makers have a critical understanding of the operation of gender roles (how they shape life experiences, expectations, options and behaviours) and the historical legacy of gendered oppression, there is a danger that reactions to women will be informed by such biases. A classic example can be found in the response to women who attempt to safeguard their children in the context of family separation. Numerous studies have documented the manner in which such women are vulnerable to finding themselves characterized not as 'experts' in the care of their children (based on their past caring experience) and 'protective' of their children's well-being, but as 'obstructive' of the other parent's rights and their children's best interests (Morgan and Coombes, 2016: 57; Salter, 2014; Tolmie et al., 2009: 678). Gender norms include expectations that mothers will bear a disproportionate burden of the unpaid labour of caring for children, including the mediating labour required to assist fathers to exercise their 'rights' to parent, rendering this work invisible (Lacroix, 2006). Mothers' attempts to build the contact parent's access around the child's breast-feeding schedule, for example, or to address neglectful parenting, or insist on access arrangements that reflect the child's developmental phase or to protect their child and themselves from abuse can be interpreted by fathers and family law professionals as 'controlling' and 'alienating' and responded to punitively (Bancroft et al., 2002; Jeffries, 2016: 7; Neustein and Lesher, 2005; Tolmie et al., 2010: 324–326).

It is not surprising then that there are already calls within England for repeated denial of contact by one parent, usually understood to be the mother, to be treated as coercive or controlling behaviour in relation to the other parent (Insideman, 2014; Woodall, 2016). Such measures, however, cannot currently satisfy the elements of section 76 of the Serious Crime Act 2015 once the parties have separated and are no longer living together because of the manner in which the requirement that the parties be 'personally connected' is defined in that section. This does, however, raise the concern that an offence of coercive control will be *applied to* primary victims in the criminal justice context and will thus backfire on victims in a very direct fashion.

Women self-report in population based studies that they use low and moderate levels of physical violence in intimate partnership at the same rate as men, but overwhelmingly women show up in homicide and hospital statistics as victims rather than perpetrators (Tolmie, 2015: 652). While the manner in which gender shapes the use of violence in intimate relationships is contested (Dobash and Dobash, 2004), international literature suggests that women's use of violence in intimate partnerships does not simply mirror men's but is frequently part of their ongoing victimization. In other words, women can

use force to react to, attempt to stop or escape from their male partner's violence (Miller and Meloy, 2006; Swan and Snow, 2006). Much of this, including expressions of frustration about a situation that they are powerless to change and attempts to equalize power in the relationship, is appropriately understood as 'resistance' to their experiences of abuse even when it does not satisfy the legal requirements of self-defence. On the other hand, Stark (2007: 105) says that, while women can and do use physical violence against their male partners, they 'rarely' use coercive control because of an 'asymmetry in sexual power'. Despite this, primary victims who use violent resistance are vulnerable to being understood within the criminal justice system as 'mutual aggressors'.[12]

Dual arrest policies are another example where the dynamics of IPV are 'mutualized'. Such policies can result in both parties being arrested if they have used physical force on a particular occasion, without determining who is the aggressor in the overall relationship. This approach can close down help seeking by primary victims who have used violence to resist their abuse (FVDRC, 2014: 75). It is worth noting that IPV offenders can be highly manipulative; minimizing their actions and recasting themselves as the victim of the abuse that they themselves are perpetrating.

The risk that a victim's resistance to abuse will be read as abuse is arguably greater when the criminalization of IPV is uncoupled from the need to establish physical violence. It will be particularly strong if the concept of coercive control (and the manner in which it employs traditional gender roles) is not properly understood but the concept is instead loosely equated with 'psychological abuse'. Stark (2007: 26), on the other hand, is clear that it is psychological abuse *in the context of coercive control* that is devastating 'because the woman cannot respond or walk away without putting herself at risk', not psychological abuse per se.

The danger in enacting a gender-neutral offence of coercive control which is untethered from the need to prove physical violence is that it will be applied to primary victims. This danger is exacerbated when decision makers lack a sophisticated understanding of the manner in which gender roles, expectations of male entitlement, disparate physical strength and disparate resources can create power imbalances in heterosexual relationships.

## Conclusion

It is impossible to determine in advance the benefits of any reform within a complex system and it is still too early to know how section 76 of the Serious Crime Act 2015 will be applied in practice. While acknowledging the potential benefits of criminalizing coercive control, I have sounded a note of caution in this article. Applying the concept of coercive control to particular sets of facts may require a breadth of evidence and complexity of analysis that the criminal justice system is not currently well equipped to provide. Some of the risks involved in enacting an offence of coercive control are that it could be used in a manner that minimizes IPV, invalidates the victim's experiences or, worst of all, recasts their resistance to abuse as abuse.

Even if an offence of coercive control is enacted, the traditional incident based violence offences are likely to continue to operate alongside this offence in the IPV context. This is because, for cases involving very serious levels of violence (e.g. repeated rapes

and assaults with weapons) an offence along the lines of section 76 of the Serious Crime Act 2015 would be a significant downgrade in the criminal justice response that might be expected. In other cases, the difficulties presented in prosecuting an offence of coercive control might necessitate continued reliance on crimes of assault. This may be less so under the Scottish approach, which allows the prosecution under the proposed domestic abuse offence (which also has significantly higher maximum penalties than the English offence) of behaviour that would currently satisfy one of the interpersonal violence offences.

What this means, however, is that enacting an offence of coercive control cannot be understood as the complete solution to the problem of fragmentation in the criminal justice response to IPV. It also, somewhat paradoxically, means that many of the conceptual and evidentiary challenges presented by the concept of coercive control should be addressed in respect of all IPV offending. This means that traditional interpersonal violence offending in the context of IPV must be understood in the context of the wider patterns of harm in which it occurs and evidence on such patterns should be routinely presented at trial.[13] It also means that if we are concerned about victim safety then all sentencing responses to IPV offending, including traditional offending, should take into account the perpetrator's pattern of harm. Without reform, sentences will continue to be a limited reaction to those aspects of the abuse that have been cordoned into the particular offence under consideration.

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1. Section 76 of the Serious Crime Act 2015.
2. Section 1, Domestic Abuse (Scotland) Bill.
3. Protection from Harassment Act 1997 (UK).
4. Criminal Code Act 1899 (Qld), s. 33A; Crimes 1900 (ACT), s. 35; Crimes (Domestic and Personal Violence) Act 2007 (NSW), s. 13; Criminal Code Act 1983 (NT), s. 189; Criminal Law Consolidation Act (SA), s. 19AA; Criminal Code Act 1924 (Tas), s. 192; Crimes Act 1958 (Vic), s. 21A; Criminal Code Compilation Act 1913 (WA), s. 338E.
5. Sections 3, 4 and 8 of the Harassment Act 1997 (NZ).
6. The Family Violence Act 2004 (Tas), ss. 8, 9.
7. A number of European jurisdictions have enacted a specific offence of family violence (ALRC; NSWLRC, 2010: 566).
8. In New Zealand this will occur when, for example, there was an obvious power imbalance in the relationship: *S v R* [2017] NZCA 83. In England it will occur in respect of certain categories of behaviour: *R v Brown* [1994] 1 AC 212.
9. On the other hand, it has been argued in relation to sexual violence that complainants who

can model their rape on the witness stand are more likely to be credible to juries (Larcombe, 2002).

10. A stark example of this can be seen in the sentencing remarks in *R v Paton* [2013] NZHC 21, [5].
11. For example, 'the shrew', an ill-tempered woman who is nagging and aggressive is a stock character in western folklore (Vasvári, 2002).
12. See, for example, *R v Wihongi* [2011] NZCA 592, [36].
13. See, for example, *R v R* [2015] NZCA 394.

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# Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study

**Bessel A. van der Kolk[1,2] and Rita Fisler[2]**

*Since trauma arises from an inescapable stressful event that overwhelms people's coping mechanisms, it is uncertain to what degree the results of laboratory studies of ordinary events are relevant to the understanding of traumatic memories. This paper reviews the literature on differences between recollections of stressful and of traumatic events. It then reviews the evidence implicating dissociation as the central pathogenic mechanism that gives rise to posttraumatic stress disorder (PTSD). A systematic exploratory study of 46 subjects with PTSD indicated that traumatic memories were retrieved, at least initially, in the form of dissociated mental imprints of sensory and affective elements of the traumatic experience: as visual, olfactory, affective, auditory, and kinesthetic experiences. Over time, subjects reported the gradual emergence of a personal narrative that can be properly referred to as "explicit memory." The implications of these findings for understanding the nature of traumatic memories are discussed.*

KEY WORDS: trauma; memory; dissociation; posttraumatic stress disorder.

The nature and reliability of traumatic memories have been controversial issues in psychiatry for over a century. Traumatic memories are difficult to study, since the profoundly upsetting emotional experiences that may give rise to posttraumatic stress disorder (PTSD) and other trauma related outcomes cannot be approximated in a laboratory setting. For example, even viewing a movie depicting actual executions failed to precipitate posttraumatic symptoms in normal college students (Pitman, personal communica-

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tion, 1994). If trauma is defined as the experience of an inescapable stressful event that overwhelms one's existing coping mechanisms, it is questionable whether findings of memory distortions in normal subjects exposed to videotaped stresses in the laboratory can serve as meaningful guides to understanding traumatic memories. Clearly, there is little similarity between viewing a simulated car accident on a TV screen, and being the responsible driver in a car crash in which one's own children are killed. While stress evokes homeostatic mechanisms that lead to self-conservation and resource-re-allocation (e.g., Selye, 1956), PTSD involves a unique combination of learned conditioning, problems modulating arousal, and shattered meaning propositions. Shalev (1995) has proposed that this complexity is best understood as the co-occurrence of several interlocking pathogenic processes including (a) an alteration of neurobiological processes affecting stimulus discrimination (expressed as increased arousal and decreased attention), (b) the acquisition of conditioned fear responses to trauma-related stimuli, and (c) altered cognitive schemata and social apprehension.

Without the option of inflicting actual trauma in the laboratory, there are limited options for the exploration of traumatic memories. These include collecting retrospective reports from traumatized individuals, post-hoc observations, and provoking, then studying, traumatic memories and flashbacks in people with PTSD. Surprisingly, since the early part of this century, there have been very few published studies that systematically explore the nature of traumatic memories based on detailed patient reports. Provocation studies of traumatic memories in the laboratory have examined psychophysiologic responses to visual or auditory stimuli (e.g., Pitman, Orr, Forgue, de Jong, & Claiborn, 1987; Rauch et al., 1995), and biological agents have been shown to promote access to trauma-related memories as well (Rainey et al., 1987; Southwick et al., 1993).

This paper will first review studies of people's memories of highly stressful and of traumatic experiences, focusing on the differences between recollections of these two types of events. We will then review the evidence for dissociation as the central pathogenic mechanism that gives rise to PTSD. Finally, the results of a systematic exploratory study of 46 subjects who reported on their memories of childhood or adult trauma is presented and discussed.

## Comparison of memories of Stressful Events and of Trauma

Contemporary memory research has demonstrated the complexity of memory systems, with many components and functions that operate outside of conscious awareness, and which seem to operate with a relative degree

of independence from each other. Declarative memory (also known as explicit memory) refers to conscious awareness of facts or events that have happened to the individual (Squire & Zola Morgan, 1991). This form of memory functioning is seriously affected by lesions of the frontal lobe and of the hippocampus, which also have been implicated in the neurobiology of PTSD (Bremner, Krystal, Southwick, & Charney, 1995; van der Kolk, 1994). Nondeclarative memory (implicit or procedural memory) refers to memories of skills and habits, emotional responses, reflexive actions, and classically conditioned responses. Each of these implicit memory systems is associated with particular areas in the central nervous system (Squire, 1994).

At least since 1889, when Janet first wrote about the relationship between trauma and memory, it has been widely accepted that what is now called declarative, or explicit, memory is an active and constructive process. What a person remembers depends on existing mental schemata: once an event or a particular bit of information is integrated into existing mental schemes, it is no longer available as a separate, immutable entity, but is liable to be altered by associated experiences, demand characteristics and emotional state at the time of recall (Janet, 1889; van der Kolk & van der Hart, 1991). As Schachtel (1947) defined it: "Memory as a function of the living personality can be understood as a capacity for the organization and reconstruction of past experiences and impressions in the service of present needs, fears, and interests."

However, accuracy of memory is affected by the emotional valence of an experience: studies of people's subjective reports of personally highly significant events have generally found that these memories are unusually accurate, and that they tend to remain stable over time (Bohannon, 1990; Christianson, 1992; Pillemer, 1984; Yuille & Cutshall, 1986). It appears that evolution favors the consolidation of personally relevant information. For example, Yuille and Cutshall (1989) interviewed 13 out of 22 witnesses to a murder 4–5 months after the event. All witnesses had provided information to the police within 2 days after the murder. These witnesses were found to have very accurate recall, with little apparent decline over time. The authors concluded that emotional memories of such shocking events are "detailed, accurate and persistent" (p. 181). They suggested that witnessing real "traumas" leads to "quantitatively different memories than innocuous laboratory events."

Researchers also have studied the accuracy of memories for less personal, but culturally significant events, such as the murder of President Kennedy and the space shuttle Challenger. Brown and Kulik (1977) first called memories for such events "flashbulb memories." While people report that these experiences are etched accurately in their minds, research has shown

that those memories are subject to some distortion and disintegration over time. For example, Neisser and Harsch (1992) found that people changed their recollections of the space shuttle Challenger disaster considerably after a number of years. These investigators did not measure the personal significance that their subjects attached to this event. However, clinical observations of people who suffer from PTSD suggest that there are salient differences between flashbulb memories for more distant events and the intrusive memories characteristic of PTSD. As of early 1995, we could find no scientific literature that reported changes in the intrusive recollections of traumatic events in patients suffering from PTSD.

### *The Apparent Uniqueness of Traumatic Memories*

The Diagnostic and Statistical Manual definition of PTSD (DSM IV; APA, 1994) recognizes that trauma can lead to extremes of retention and forgetting: terrifying experiences may be remembered with extreme vividness, or totally resist integration. In many instances, traumatized individuals report a combination of both. While people seem to easily assimilate familiar and expectable experiences, and while memories of ordinary events disintegrate in clarity over time, some aspects of traumatic events appear to get fixed in the mind, unaltered by the passage of time or by the intervention of subsequent experience. For example, in our studies of post traumatic nightmares, subjects claimed that they saw the same traumatic scenes over and over again, without modification, over a 15-year period (van der Kolk, Blitz, Burr, & Hartmann, 1984). For the past century, many students of trauma have noted that the imprints of traumatic experiences seem to be qualitatively different from memories of ordinary events. Starting with Janet, accounts of the memories of traumatized patients consistently mention that emotional and perceptual elements tend to be more prominent than declarative components (e.g., Grinker & Spiegel, 1945; Kardiner, 1941; Terr, 1993). Schacter (1987) has referred to the descriptions of traumatic memories by Janet as examples of implicit memory. These recurrent observations about the nature of traumatic memories have given rise to the notion that traumatic memories may be encoded differently than memories for ordinary events, perhaps via alterations in attentional focusing, perhaps because extreme emotional arousal interferes with hippocampal memory functions (Christianson, 1992; Heuer & Rausberg, 1992; Janet, 1889; LeDoux, 1993; McGaugh et al., 1993; Nilson & Archer, 1992; Pitman, Orr, & Shalev, 1993; van der Kolk, 1994).

*Amnesias and the Return of Traumatic Memories*

Trauma can affect a wide variety of memory functions. For convenience sake, we will categorize these into four different sets of functional disturbances: traumatic amnesia, global memory impairment, dissociative processes, and the sensorimotor organization of traumatic memories.

*Traumatic amnesia.* While the vivid intrusions of traumatic images and sensations are the most dramatic expressions of PTSD, the loss or absence of recollections for traumatic experiences is well documented. Amnesias for some, or all, aspects of the trauma have been noted in a wide variety of traumatized patients, starting with reports by Janet (1889). More recently, amnesia, with later return of memories for all, or parts, of the trauma, has been noted following natural disasters and accidents (Madakasira & O'Brian, 1987; van der Kolk & Kadish, 1987; Wilkinson, 1983). Sargeant and Slater (1941) observed the presence of significant amnesia in 144 out of 1,000 consecutively admitted combat soldiers to the Sutton Emergency Hospital during the second World War. Amnesias have been reported in other studies of combat soldiers as well (Archibald & Tuddenham, 1956; Grinker & Spiegel, 1945; Hendin, Haas, & Singer, 1984; Kardiner, 1941; Kubie, 1943; Myers, 1915; Sonnenberg, Blank, & Talbott, 1985; Southard, 1919; Thom & Fenton, 1920), and in victims of kidnapping, torture and concentration camp experiences (Goldfield, Mollica, Pesavento, & Faraone, 1988; Kinzie, 1993; Niederland, 1968), in victims of physical and sexual abuse (Briere & Conte, 1993; Janet, 1893; Loftus, Polensky, & Fullilove, 1994; Williams, 1994), and in people who have committed murder (Schacter, 1986). A recent general population study by Elliot (1994) reported complete or partial traumatic amnesia after virtually every form traumatic experience, with childhood sexual abuse, witnessing murder or suicide of a family member, and combat exposure yielding the highest rates. Traumatic amnesias are age and dose related: the younger the age at the time of the trauma, and the more prolonged the traumatic event, the greater the likelihood of significant amnesia (Briere & Conte, 1993; Herman & Shatzow, 1987; van der Kolk, Roth, Pelcovitz, & Mandel, 1993).

Amnesia for these traumatic events may last for hours, weeks, or years. Generally, recall is triggered by exposure to sensory or affective stimuli that match sensory or affective elements associated with the trauma. It is generally accepted that the memory system is made up of networks of related information: activation of one aspect facilitates the recall of associated memories (Collins & Loftus, 1975; Leichtman, Ceci, & Ornstein, 1992). Affect seems to be a critical cue for the retrieval of information along these associative pathways. This means that the affective valence of any particular experience plays a major role in determining what cognitive

schemes will be activated. In this regard, it is relevant that many people with trauma histories, such as rape, spouse battering and child abuse, seem to function quite well as long as feelings related to traumatic memories are not stirred up. However, under particular conditions, they may feel, or act, as if they were traumatized all over again. Fear is not the only trigger for such recall: any affect related to a particular traumatic experience may serve as a cue for the retrieval of trauma-related sensations, including longing, intimacy and sexual arousal.

*Global memory impairment.* While amnesias following adult trauma have been well-documented, the mechanisms for such memory impairment remain insufficiently understood. This issue is even more complicated when it concerns childhood trauma, since children have fewer mental capacities to construct a coherent narrative out of traumatic events. More research is needed to explore the consistent clinical observation that adults who were chronically traumatized as children suffer from generalized impairment of memories for both cultural and autobiographical events. It is likely that the combination of autobiographical memory gaps and continued reliance on dissociation makes it very hard for these patients to reconstruct a precise account of either their past or their current reality (Cole & Putnam, 1992). The combination of lack of autobiographical memory, of continued dissociation and of meaning schemas that include victimization, helplessness and betrayal, is likely to make these individuals vulnerable to suggestion and to the construction of explanations for their trauma-related affects that may bear little relationship to the actual realities of their lives.

*Trauma and dissociation.* Dissociation refers to a compartmentalization of experience: elements of the experience are not integrated into a unitary whole, but are stored in memory as isolated fragments consisting of sensory perceptions or affective states (Nemiah, 1995; van der Kolk & van der Hart, 1989, 1991). However, the word dissociation is currently used to describe four distinct, but interrelated phenomena: (1) the sensory and emotional fragmentation of experience (as measured by the Traumatic Memory Inventory—see below), (2) depersonalization and derealization at the moment of the trauma (peritraumatic dissociation, as measured by the Peritraumatic Dissociation Experiences Questionnaire (PDEQ; Marmar et al., 1994), (3) ongoing depersonalization and "spacing out" in everyday life (as measured by the Dissociative Experiences Scale—Bernstein and Putnam, 1986) and (4) containing the traumatic memories within distinct ego-states (Dissociative Disorder, as measured by the Dissociative Disorders Interview Scale—Ross et al., 1989) or the SCID-D (Steinberg, Rounsanville, & Cicchetti, 1991). The precise interrelationships among these various phenomena remain to be spelled out: not all people who have vivid sensory intrusions of traumatic events also experience depersonalization, while only

a small proportion of people who have both of these experiences will go on to chronically dissociate, or to develop a full-blown dissociative disorder.

Recent research has shown that "spacing out" at the moment of the trauma (peritraumatic dissociation) is a significant long-term predictor for the ultimate development of PTSD (Holen, 1990; Marmar et al., 1994; Spiegel, 1991). Bremner et al. (1992) found that Vietnam veterans with PTSD reported having experienced higher levels of dissociative symptoms during combat than men who did not develop PTSD. Koopman, Classen, and Spiegel (1994) found that dissociative symptoms early in the course of a natural disaster predicted PTSD symptoms 7 months later. A prospective study of 51 injured trauma survivors in Israel (Shalev, Orr, & Pitman, 1993) found that peritraumatic dissociation was the strongest predictor of PTSD at 6-month follow-up, explaining 30% of the variance in PTSD symptoms over and above the effects of gender, education, age, event severity, and the intrusion, avoidance, anxiety and depression symptoms that followed the event.

Christianson (1982) has described how, when people feel threatened, they experience a significant narrowing of consciousness, and remain focussed on the central perceptual details. As people are being traumatized, this narrowing of consciousness sometimes evolves into amnesia for parts of the event, or for the entire experience. Students of traumatized individuals have repeatedly noted that during conditions of high arousal, "explicit memory" may fail. The individual is left in a state of "speechless terror" in which he or she lacks words to describe what has happened (van der Kolk, 1987). However, while traumatized individuals may be unable to give a coherent narrative of the incident, there may be no interference with implicit memory: they may "know" the emotional valence of a stimulus and be aware of associated perceptions, without being able to articulate the reasons for feeling or behaving in a particular way.

More than 80 years ago, Janet observed: "Forgetting the event which precipitated the emotion . . . has frequently been found to accompany intense emotional experiences in the form of continuous and retrograde amnesia" (1909, p. 1607). He claimed that when people experience intense emotions, memories cannot be transformed into a neutral narrative: a person is "unable to make the recital which we call narrative memory, and yet he remains confronted by (the) difficult situation" (Janet, 1919/1925, p. 660). This results in "a phobia of memory" (p. 661) that prevents the integration ("synthesis") of traumatic events and splits off the traumatic memories from ordinary consciousness. Janet claimed that the memory traces of the trauma linger as what he called "unconscious fixed ideas" that cannot be "liquidated" as long as they have not been translated into a personal narrative. Failure to organize the memory into a narrative leads

to the intrusion of elements of the trauma into consciousness as terrifying perceptions, obsessional preoccupations and as somatic reexperiences such as anxiety reactions (Janet, 1909; van der Kolk & van der Hart, 1991).

Similar observations have been made by other clinicians treating traumatized individuals. For example, in 1945 Grinker and Spiegel noted that some combat soldiers developed excessive emotionality under stress which they thought to be responsible for the development of a permanent disorder: "Fear and anger in small doses are stimulating and alert the ego, increasing efficacy. But, when stimulated by repeated psychological trauma the intensity of the emotion heightens until a point is reached at which the ego loses its effectiveness and may become altogether crippled . . . ." (p. 82). Grinker and Spiegel described traumatic amnesias in these soldiers, accompanied by confusion, mutism and stupor. Kardiner, in describing the "Traumatic Neuroses of War" (1941) noted that when patients develop amnesia for the trauma, it tends to generalize to a large variety of symptomatic expressions: "(t)he subject acts as if the original traumatic situation were still in existence and engages in protective devices which failed on the original occasion" (p. 82). Kardiner noted that fixation occurs in dissociative fugue states: triggered by a sensory stimulus, a patient might lash out, employing language suggestive of his trying to defend himself during a military assault. He noted that many such patients, while riding a subway train that entered a tunnel, had flashbacks to being back in the trenches. Kardiner also viewed panic attacks and hysterical paralyses as the re-experiencing of fragments of the trauma. Piaget (1962) claimed that dissociation occurs when an active failure of semantic memory leads to the organization of memory on somatosensory or iconic levels. He pointed out: "It is precisely because there is no immediate accommodation that there is complete dissociation of the inner activity from the external world. As the external world is solely represented by images, it is assimilated without resistance (i.e., unattached to other memories) to the unconscious ego."

The recognition of the role of dissociation in the processing of traumatic memories was revived for contemporary psychiatry when Horowitz (1978) described an "acute catastrophic stress reaction" in civilian trauma victims, characterized by panic, cognitive disorganization, disorientation and dissociation. Such dissociative processing of traumatic experience complicates the capacity to communicate about the trauma. In some people the memories of trauma may have no verbal (explicit) component at all: the memory may be entirely organized on an implicit or perceptual level, without an accompanying narrative about what happened. Recent symptom provocation neuroimaging studies of people with PTSD support that clinical observation: during the provocation of traumatic memories there was

decreased activation of Broca's area, the part of the CNS most centrally involved in the transformation of subjective experience into speech. Simultaneously, the areas in the right hemisphere that are thought to process intense emotions and visual images had significantly increased activation (Rauch et al., 1995).

People who have learned to cope with trauma by dissociating are vulnerable to continue to do so in response to minor stresses. The continued use of dissociation as a way of coping with stress interferes with the capacity to fully attend to life's ongoing challenges. The severity of ongoing dissociative processes (often measured with the Dissociative Experiences Scale (DES; Bernstein & Putnam, 1986) has been correlated with a large variety of psychopathological conditions that are thought to be associated with histories of trauma and neglect: severity of sexual abuse in adolescents (Sanders & Giolas, 1991), somatization (Saxe et al., 1994), bulimia (Demitrack et al., 1990), self-mutilation (van der Kolk, Perry, & Herman, 1991) and borderline personality disorder (Herman, Perry, & van der Kolk, 1989). The most extreme example of this ongoing dissociation occurs in people who suffer from dissociative identity disorder (multiple personality disorder), who have the highest DES scores of all populations studied and in whom separate identities seem to contain the memories related to different traumatic incidents (Putnam, 1989).

*The sensori-motor organization of traumatic experience.* Numerous authors on trauma, for example Janet (1889; van der Kolk & van der Hart, 1991), Kardiner (1941) and Terr (1993), have observed that trauma is organized in memory on sensori-motor and affective levels. Having listened to the narratives of traumatic experiences from hundreds of traumatized children and adults over the past 20 years, we frequently have heard both adults and children describe how traumatic experiences initially are organized without semantic representations. Clinical experience and our reading of a century of observations by clinicians dealing with a variety of traumatized populations led us to postulate that "memories" of the trauma tend to, at least initially, be experienced primarily as fragments of the sensory components of the event: as visual images, olfactory, auditory, or kinesthetic sensations, or intense waves of feelings (which patients usually claim to be representations of elements of the original traumatic event). What is intriguing is that patients consistently claim that their perceptions are exact representations of sensations at the time of the trauma. For example, when Southwick and his group injected yohimbine into Vietnam veterans with PTSD, half of their subjects reported flashbacks that they claimed to be "just like it was" [in Vietnam] (Southwick et al., 1993).

*Empirical Study*

In the present study we designed a methodology for examining traumatic and nontraumatic memories in individuals with PTSD, in order to record whether, and how, memories of traumatic experiences are retrieved differently from memories of personally significant, nontraumatic events. In order to examine the retrieval of traumatic memories in a systematic way, we designed a structured interview, the Traumatic Memory Inventory (TMI), which inquires about sensory, affective and narrative ways of remembering, about triggers for unbidden recollections of traumatic memories, and about ways of mastering unwanted intrusions of traumatic memories in subjects' lives.

## Method

*Subjects*

Subjects were recruited from advertisements in local newspapers that invited people who were haunted by memories of terrible life experiences to participate in a 2-hr interview about these memories. Subjects were screened by telephone, and again in face to face interviews, for exclusion criteria of organic mental disorders, schizophrenia, bipolar illness, substance abuse and alcoholism. All subjects met DSM III-R diagnostic criteria for PTSD, as measured on the Clinician Administered PTSD Scale (CAPS). Ten of the subjects were men, 36 were women. Average age at time of the interview was 42.0 years (range 18-67). Subjects were paid $10.00 for their participation.

*Instruments*

Subjects were asked to sign an informed consent and filled out self-rated questionnaires, after which they participated in the interview. The instruments used were:

*Traumatic Antecedents Questionnaire (Self-Rating Version)* TAQ [S] is a 78-item questionnaire to identify exposure to traumatic life events (self-rated version of the TAQ, Herman, Perry, & van der Kolk, 1989, van der Kolk, Perry & Herman, 1991),

*The Dissociative Experiences Scale (DES).* DES (Bernstein & Putnam, 1986) is a 28-item questionnaire assessing the frequency of dissociative experiences in the daily lives of subjects. It is seen to measure dissociation

as a trait. The summary score is the average of the items, which range from 0 to 100% of time experiencing the symptoms.

*Inventory of Traumatic Experiences.* This inventory allowed the interviewer and subject together to systematically specify the circumstances and details of the subject's trauma(s). At the end of this process, subjects were asked to indicate which particular traumatic experience had had most effect on their lives, and to identify an intense, but nontraumatic experience, that was used as the "control" experience (e.g., wedding, graduation, birth of a child, accomplishment at work).

*The Traumatic Memory Inventory (TMI).* TMI is a 60-item structured interview that systematically collects data about the circumstances and means of memory retrieval of a target traumatic memory and a target memory of a personally highly emotionally significant, but non-traumatic, event. The TMI interview inquires about (1) nature of the trauma(s)/event(s), (2) duration, (3) whether the subject has always been aware that the trauma/event happened, and if not, when and where she/he became conscious of it, (4) circumstances under which subject first experienced intrusive memories; and circumstances under which they occur presently, (5) sensory modalities in which memories were experienced including (a) as a story (b) as an image (what did you see ?) (c) in sounds (what did you hear ?), (d) as a smell (what did you smell ?), (e) as feelings in your body (what did you feel ? where?), and (f) as emotions (what did you feel, what was it like ?). These data were collected for three time periods: initially, while subject was most bothered by the memory, and currently. The interview also asked about (6) the nature of flashbacks, (7) nature of nightmares, (8) precipitants of flashbacks and nightmares, (9) ways of mastering intrusive recollections (e.g., by eating, working, taking drugs or alcohol, cleaning, etc.), and (10) whether confirmation of the event was available through court or hospital records, direct witnesses, or other means. All information was collected first for the traumatic event, then for the nontraumatic event.

The interviews took about 2 hr and were conducted by staff of the Trauma Center. Information gathered from the TMI interview was presented to the members of the Trauma Center memory research group, who came to a consensus about the scoring of each item of the interviews. We were unable to establish a meaningful way for the raters to be blind to whether they were scoring the answers to traumatic or nontraumatic memories.

### *Data Analysis*

Data analysis was conducted by means of cross-tabulation and Kendall's tau computation for ordinal by categorical variables. Two-tailed Stu-

dent *t*-tests were used to compare ordinal data. Chi-square analyses were used to compare nominal data. Pearson correlation coefficients were calculated for bivariate relationships.

## Results

We interviewed 46 adults. Of these, 36 had experienced their most significant traumas in childhood, while 10 had their first traumatic experience after age 18. The traumas they had experienced are listed in Table 1. Several subjects had experienced more than one type of trauma. Age of onset ranged from 1 to 56, ($M$ = 12.4). Only 10 subjects had their first significant trauma after age 18 (Adult Trauma—AT). Of the 36 subjects with childhood trauma, 15 (42%) had suffered significant or total amnesia for their trauma at some time in their lives.

Of the total sample, 36 (78%) reported current nightmares. Two (20%) of the 10 AT and 15 (42%) of the 36 CT reported that their nightmares were dreams; they included illogical combinations and aspects of non-trauma-related material ($X^2$ = 11.0, $df$ = 4, $p$ = .02). Four (40%) of the AT and 11 (31%) of the CT reported having nightmares that were identical to their flashbacks: they were life-like presentations of the entire trauma, or fragments thereof, without intermixture of other perceptual elements.

### *Confirmation*

Twenty-seven of the 36 subjects with childhood trauma (75%) reported confirmation of their childhood trauma from a mother, sibling, or

**Table 1.** Type of Trauma Experienced[a]

| | Total Sample | Adult Trauma | Childhood Trauma |
|---|---|---|---|
| Sexual abuse/assault | 30 | 1 | 29 |
| Physical abuse/assault | 11 | 0 | 11 |
| Witnessing death of someone close | 5 | 4 | 1 |
| Being injured | 4 | 3 | 1 |
| Industrial or transportation accident | 2 | 1 | 1 |
| Imprisonment/torture | 1 | 1 | 0 |
| Combat related | 1 | 1 | 0 |
| Other | 1 | 0 | 1 |

[a]Several subjects had more than one type of trauma.

other source who knew about the abuse, from court or hospital records, or from confessions or convictions of the perpetrator(s). We did not ask them to produce records to prove that this confirmation actually existed.

*Nontraumatic Memory*

Subjects considered most questions related to the nontraumatic memory nonsensical: none had olfactory, visual, auditory, kinesthetic reliving experiences related to such events as high school graduations, birthdays, weddings, or births of their children. They also denied having vivid dreams or flashbacks about these events. Subjects claimed not to have had periods in their lives when they had amnesias for any of these events; none claimed to have photographic recollections of any of these events. Environmental triggers did not suddenly bring back vivid and detailed memories of these events, and none of the subjects felt a need to make special efforts to suppress memories of these events.

*Modalities of Traumatic Memory*

No subject reported having a narrative for the traumatic event as their initial mode of awareness (they claimed not having been able to tell a story about what had happened), regardless of whether they had continuous awareness of what had happened, or whether there had been a period of amnesia. Figure 1 shows that all subjects, regardless of age at which the first trauma occurred, reported that they initially "remembered" the trauma in the form of somatosensory or emotional flashback experiences. At the peak of their intrusive recollections all sensory modalities were enhanced, and a narrative memory started to emerge. Currently, most subjects continued to experience their trauma in sensorimotor modes, but 41 (89%) were able to narrate a satisfactory story about what happened to them. On the other hand, 5 subjects (11%—all CT) continued to be unable to tell a coherent narrative, with a beginning, middle and end, even though each of them reported outside confirmation of the reality of their trauma.

*Dissociation*

DES scores ranged from 1 to 99; 14 subjects scored 10 and under. The average DES score for the overall sample was 21.8. The DES score was significantly correlated with the event-related variables of duration of the trauma ($r = .52$, $p < .01$), presence of physical abuse ($r = .56$, $p <$

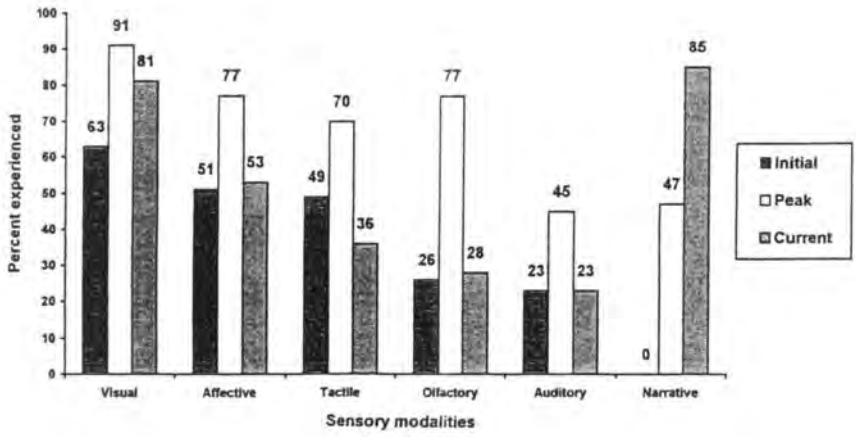


**Figure 1.** Sensory modalities reported when subjects first became aware of the trauma, when the recollections of the trauma were most intense, and currently.

.01), and presence of neglect ($r = .38$; $p < .05$). Also, level of dissociation was correlated with affective reliving ($r = .54$, $p < .01$), kinesthetic reliving ($r = .40$, $p < .05$), lack of current narrative memory ($r = .54$, $p < .01$) and with self-destructive self-soothing behaviors: bingeing and purging ($X^2 = 7.41$., $df = 1$, $p < .01$); use of alcohol and drugs ($X^2 = 2.75$, $df = 1$, $p < .10$); self-mutilation ($X^2 = 3.95$, $df = 1$, $p < .05$), and sexual activity ($X^2 = 3.0$, $df = 1$, $p < .05$). Dissociation was not correlated with the self-soothing behaviors of talking things over, working, cleaning, sleeping or turning to religion.

## Discussion

Our study suggests that there are critical differences between the ways people experience traumatic memories versus other memories of significant personal but nontraumatic events. The study supports the idea that it is in the very nature of traumatic memory to be dissociated, and to be initially stored as sensory fragments without a coherent semantic component. All of the subjects in our study claimed that they only came to develop a narrative of their trauma over time. Five of the subjects who claimed to have been abused as children were, even as adults, unable to tell a complete narrative of what had happened to them. They merely had fragmentary memories that supported other people's stories and their own intuitive feelings that they had been abused.

All these subjects, regardless of the age at which the trauma occurred, claimed that they initially "remembered" the trauma in the form of somatosensory flashback experiences. These flashbacks occurred in a variety of modalities: visual, olfactory, affective, auditory, and kinesthetic, but initially these sensory modalities did not occur together. As the trauma came into consciousness with greater intensity, more sensory modalities came into awareness. Initially, the traumatic experiences were not condensed into a narrative. It appears that as people become aware of more and more elements of the traumatic experience, they construct a narrative that "explains" what happened to them. This transcription of the intrusive sensory elements of the trauma into a personal narrative does not necessarily have a one-to-one correspondence with what actually happened. This process of weaving a narrative out of the disparate sensory elements of an experience is probably not dissimilar from how people construct a narrative under ordinary conditions. However, when people have day-to-day, nontraumatic experiences, the sensory elements of the experience are not registered separately in consciousness, but are automatically integrated into the personal narrative.

This study supports Piaget's notion that when memories cannot be integrated on a semantic/linguistic level, they tend to be organized more primitively as visual images or somatic sensations. Even after considerable periods of time, and even after acquiring a personal narrative for the traumatic experience, most subjects reported that these experiences continued to come back as sensory perceptions and as affective states. The persistence of intrusive sensations related to the trauma after the construction of a narrative contradicts the notion that learning to put the traumatic experience into words will reliably help abolish the occurrence of flashbacks.

There were some interesting trends between the adult onset trauma (AT) group and the childhood onset (CT) group. There were non-significant differences in the modalities in which the trauma was experienced, which a larger sample size might clarify further: the subjects first traumatized as children tended to first remember their abuse in the form of visual images and kinesthetic sensations. The CT group had significantly more pathological self-soothing behaviors than the adult group, including self-mutilation and bingeing. This supports the notion that childhood trauma gives rise to more pervasive biological dysregulation, and that patients with childhood trauma have greater difficulty regulating internal states than patients first traumatized as adults (van der Kolk & Fisler, 1994). Another interesting difference between the adult and the child group was that the AT group had nightmares that they reported to be exact replicas of the traumatic experience more often than did the CT group.

It was striking that some subjects, particularly those who never were able to construct a satisfactory narrative of their trauma, did not have visual flashbacks. Intuitively, it would appear to be difficult to construct a satisfactory narration that allows for the proper placement of the trauma in time and space if an individual cannot visualize what has happened. We are currently studying the mental organization of traumatic experiences in blind children and adults.

## Conclusions

When people receive ordinary, nontraumatic sensory input, they synthesize this incoming information into symbolic form, without conscious awareness of the processes that translate sensory impressions into a personal story. Our research shows that, in contrast, traumatic experiences in people with PTSD are initially imprinted as sensations or feeling states that are not immediately transcribed into personal narratives. This failure to process information on a symbolic level following trauma is at the very core of the pathology of PTSD (van der Kolk & Ducey, 1989).

Recently we collaborated in a neuroimaging symptom provocation study of some of the subjects who were part of this memory study. When these subjects experienced flashbacks in the laboratory, there was significantly increased activity in the areas in the right hemisphere that are associated with the processing of emotional experiences, as well as in the right visual association cortex. At the same time, there was significantly decreased activity in Broca's area, in the left hemisphere (Rauch et al., 1995). These findings are in line with the results of this study: that traumatic "memories" per se consist of emotional and sensory states, with little verbal representation. In other work we have hypothesized that, under conditions of extreme stress, the hippocampally based memory categorization system fails, leaving memories to be stored as affective and perceptual states (van der Kolk, 1994). This hypothesis proposes that excessive arousal at the moment of the trauma interferes with the effective memory processing of the experience. The resulting "speechess terror" leaves memory traces that may remain unmodified by the passage of time, and by further experience.

We (van der Kolk & van der Hart, 1991) have earlier written about Janet's clear distinctions between traumatic and ordinary memory. According to Janet, traumatic memory consists of images, sensations, affective and behavioral states that are invariable and do not change over time. He suggested that these memories are highly state-dependent and cannot be evoked at will. They are not condensed in order to fit social expectations.

Table 2. Traumatic and Narrative Memory Compared

| Traumatic memory | Narrative memory |
|---|---|
| Images, sensations, affective and behavioral states | Narrative: semantic and symbolic |
| Invariable—does not change over time | Social and adaptive |
| Highly state-dependent. Cannot be evoked at will. Automatically evoked in special circumstances | Evoked at will by narrator |
| No condensation in time | Can be condensed or expanded depending on social demands |

In contrast, narrative (explicit) memory is semantic and symbolic, it is social, and adapted to the needs of both the narrator and the listener and can be expanded or contracted, according to social demands (see Table 2).

The question of whether the sensory perceptions reported by our subjects are accurate representations of the sensory imprints at the time of the trauma is intriguing. The study of flashbulb memories has shown that the relationship between emotionality, vividness and confidence is very complex, and does not necessarily reflect accuracy. While it is possible that these imprints are, in fact, reflections of the sensations experienced at the moment of the trauma, an alternative explanation is that increased activity of the amygdala at the moment of recall may be responsible for the subjective assignment of accuracy and personal significance. Once these sensations are transcribed into a personal narrative, they would presumably be subject to the laws that govern explicit memory: to become a socially communicable story that is subject to condensation, embellishment and contamination. Thus, while trauma may leave indelible sensory and affective imprints, once these are incorporated into a personal narrative this semantic memory, like all explicit memory, is likely subject to varying degrees of distortion.

In this study we have merely confirmed Janet's century-old clinical observations. The time now seems ripe for more detailed investigations. These should include careful follow-up of traumatized children and adults to check for changes in memory over time, as well as the use of techniques such as brain imaging, to gain further understanding about the ways the central nervous system processes traumatic memories. There clearly is a need for further studies of dissociative processes and their relationship to the development and maintenance of PTSD. However, in the process of trying to gain a deeper understanding of traumatic memories, great caution should be exercised against making careless generalizations that infer how traumatic memories are stored and retrieved from laboratory experiments involving less stressful experiences.

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# The Body Keeps the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress

Bessel A. van der Kolk, MD



**Ever since people's responses to overwhelming experiences have been systematically explored, researchers have noted that a trauma is stored in somatic memory and expressed as changes in the biological stress response. Intense emotions at the time of the trauma initiate the long-term conditional responses to reminders of the event, which are associated both with chronic alterations in the physiological stress response and with the amnesias and hypermnesias characteristic of posttraumatic stress disorder (PTSD). Continued physiological hyperarousal and altered stress hormone secretion affect the ongoing evaluation of sensory stimuli as well. Although memory is ordinarily an active and constructive process, in PTSD failure of declarative memory may lead to organization of the trauma on a somatosensory level (as visual images or physical sensations) that is relatively impervious to change. The inability of people with PTSD to integrate traumatic experiences and their tendency, instead, to continuously relive the past are mirrored physiologically and hormonally in the misinterpretation of innocuous stimuli as potential threats. Animal research suggests that intense emotional memories are processed outside of the hippocampally mediated memory system and are difficult to extinguish. Cortical activity can inhibit the expression of these subcortically based emotional memories. The effectiveness of this inhibition depends, in part, on physiological arousal and neurohormonal activity. These formulations have implications for both the psychotherapy and the pharmacotherapy of PTSD. (HARVARD REV PSYCHIATRY 1994;1:253–65.)**

For more than a century, ever since people's responses to overwhelming experiences were first systematically explored, researchers have noted that the psychological effects of trauma are stored in somatic memory and expressed as changes in the biological stress response. In 1889 Pierre Janet[1] postulated that intense emotional reactions make events traumatic by interfering with the integration of the experience into existing memory schemes. Intense emotions, Janet thought, cause memories of particular events to be dissociated from consciousness and to be stored, instead, as visceral sensations (anxiety and panic) or visual images (nightmares and flashbacks). Janet also observed that traumatized patients seemed to react to reminders of the trauma with emergency responses that had been relevant to the original threat but had no bearing on current experience. He noted that, unable to put the trauma behind them, victims had trouble learning from experience: their energy was funneled toward keeping their emotions under control, at the expense of paying attention to current exigencies. They became fixated on the past, in some cases by being obsessed with the trauma, but more often by behaving and feeling as if they were traumatized over and over again without being able to locate the origins of these feelings.[2,3]

Freud[4] also considered the tendency to remain fixated on the trauma to be biologically based: "After severe shock . . . the dream life continually takes the patient back to the situation of his disaster from which he awakens with renewed terror. . . . The patient has undergone a physical fixation to the trauma." Pavlov's investigations[5] continued the tradition of explaining the effects of trauma as the

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result of lasting physiological alterations. He, and others using his paradigm, coined the term *defensive reaction* for a cluster of innate reflexive responses to environmental threat. Many studies have shown how the response to potent environmental stimuli (unconditional stimuli) becomes a conditioned reaction. After repeated aversive stimulation, intrinsically nonthreatening cues associated with the trauma (conditional stimuli) can elicit the defensive reaction by themselves (conditional response). A rape victim may respond to conditioned stimuli, such as the approach of an unknown man, as if she were about to be raped again—and experience panic. Pavlov also pointed out that individual differences in temperament accounted for the diversity of long-term adaptations to trauma.

Abraham Kardiner,[6] who first systematically defined posttraumatic stress for American audiences, noted that sufferers of "traumatic neuroses" develop an enduring vigilance for and sensitivity to environmental threat. He stated:

> The nucleus of the neurosis is a physioneurosis. This is present on the battlefield and during the entire process of organization; it outlives every intermediary accommodative device, and persists in the chronic forms. The traumatic syndrome is ever present and unchanged.

In *Men Under Stress,* Grinker and Spiegel[7] cataloged the physical symptoms of soldiers in acute posttraumatic states: flexor changes in posture, hyperkinesis, "violently propulsive gait," tremor at rest, masklike facies, cogwheel rigidity, gastric distress, urinary incontinence, mutism, and a violent startle reflex. They noted the similarity between many of these symptoms and those of diseases of the extrapyramidal motor system. Today we understand them to result from stimulation of biological systems, particularly of ascending amine projections. Contemporary research on the biology of posttraumatic stress disorder (PTSD), generally uninformed by this earlier research, confirms that there are persistent and profound alterations in stress hormone secretion and memory processing in subjects with PTSD.

## SYMPTOMATOLOGY

Starting with Kardiner[6] and closely followed by Lindemann,[8] a vast literature on combat trauma, crimes, rape, kidnapping, natural disasters, accidents, and imprisonment[9–12] has shown that the trauma response is bimodal: hypermnesia, hyperreactivity to stimuli, and traumatic reexperiencing coexist with psychic numbing, avoidance, amnesia, and anhedonia. These responses to extreme experiences are so consistent across the different forms of traumatic stimuli that this bimodal reaction appears to be the normative response to any overwhelming and uncontrollable experience. In many persons who have undergone severe stress, the posttraumatic response fades over time, whereas in others it persists. Much work remains to be done to spell out issues of resilience and vulnerability, but magnitude of exposure, previous trauma, and social support appear to be the three most significant predictors for development of chronic PTSD.[13,14]

In an apparent attempt to compensate for chronic hyperarousal, traumatized people seem to shut down: on a behavioral level by avoiding stimuli reminiscent of the trauma, and on a psychobiological level by emotional numbing, which extends to both trauma-related and everyday experience.[15] Thus subjects with chronic PTSD tend to suffer from a numbed responsiveness to the environment, punctuated by intermittent hyperarousal in reaction to conditional traumatic stimuli. However, as Pitman and colleagues[16,17] have pointed out, in PTSD the stimuli that precipitate emergency responses may not be conditional enough: many triggers not directly related to the traumatic experience may precipitate extreme reactions. Subjects with PTSD suffer both from generalized hyperarousal and from physiological emergency reactions to specific reminders.[9,10]

The loss of affective modulation that is so central in PTSD may help to explain the observation that traumatized persons lose the capacity to use affect states as signals.[18] In subjects with PTSD, feelings are not used as cues to attend to incoming information and arousal is likely to precipitate flight-or-fight reactions.[19] Thus they often go immediately from stimulus to response without psychologically assessing the meaning of an event. This makes them prone to freeze or, alternatively, to overreact and intimidate others in response to minor provocations.[12,20]

## PSYCHOPHYSIOLOGY

Abnormal psychophysiological responses in PTSD have been observed at two different levels: (1) in response to specific reminders of the trauma and (2) in response to intense but neutral stimuli, such as unexpected noises. The first paradigm implies heightened physiological arousal to sounds, images, and thoughts related to specific traumatic incidents. Many studies [20–25] have confirmed that traumatized individuals respond to such stimuli with significant conditioned autonomic reactions—for example, increases in heart rate, skin conductance, and blood pressure. The highly elevated physiological responses accompanying the recall of traumatic experiences that happened years, and sometimes decades, before illustrate the intensity and timelessness with which traumatic memories continue to affect current experience.[3,16] This phenomenon has been understood in the

light of Lang's work,[26] which shows that emotionally laden imagery correlates with measurable autonomic responses. Lang has proposed that emotional memories are stored as "associative networks" that are activated when a person is confronted with situations that stimulate a sufficient number of elements within such networks. One significant measure of treatment outcome that has become widely accepted in recent years is a decrease in physiological arousal in response to imagery related to the trauma.[27] However, Shalev and coworkers[28] have shown that desensitization to specific trauma-related mental images does not necessarily generalize to recollections of other traumatic events as well.

Kolb[29] was the first to propose that excessive stimulation of the central nervous system (CNS) at the time of the trauma may result in permanent neuronal changes that have a negative effect on learning, habituation, and stimulus discrimination. These neuronal changes would not depend on actual exposure to reminders of the trauma for expression. The abnormal startle response characteristic of PTSD[10] exemplifies such neuronal changes.

Although abnormal acoustic startle response (ASR) has been seen as a cardinal feature of the trauma response for more than half a century, systematic explorations of the ASR in PTSD have just begun. The ASR is a characteristic sequence of muscular and autonomic responses elicited by sudden and intense stimuli.[30,31] The neuronal pathways involved consist of only a small number of mediating synapses between the receptor and effector and a large projection to brain areas responsible for CNS activation and stimulus evaluation.[31] The ASR is mediated by excitatory amino acids such as glutamate and aspartate and is modulated by a variety of neurotransmitters and second messengers at both the spinal and the supraspinal levels.[32] Habituation to the ASR in normal human subjects occurs after three to five presentations.[30]

Several studies [33–36] have shown abnormalities in habituation to the ASR in PTSD. Shalev and coworkers[33] found a failure to habituate to both CNS- and autonomic nervous system–mediated responses to ASR in 93% of subjects in the PTSD group, compared with 22% of the control subjects. Interestingly, persons who previously met criteria for PTSD but no longer do so continue to show failure of habituation to the ASR (van der Kolk BA, et al., unpublished data, 1991–1992; Pitman RK, et al., unpublished data, 1991–1992), which raises the question of whether abnormal habituation to acoustic startle may be a marker or a vulnerability factor for development of PTSD.

The failure to habituate to acoustic startle suggests that traumatized people have difficulty evaluating sensory stimuli and mobilizing appropriate levels of physiological arousal.[30] Thus the inability of people with PTSD properly to integrate memories of the trauma and the tendency they have to get mired in a continuous reliving of the past are mirrored physiologically by the misinterpretation of innocuous stimuli, such as unexpected noises, as potential threats.

## HORMONAL STRESS RESPONSE AND PSYCHOBIOLOGY

PTSD develops after exposure to events that are intensely distressing. Extreme stress is accompanied by the release of endogenous neurohormones, such as cortisol, epinephrine and norepinephrine, vasopressin, oxytocin, and endogenous opioids. These hormones help the organism to mobilize the energy required to deal with the stress; they induce reactions ranging from increased glucose release to enhanced immune function. In a well-functioning organism, stress produces rapid and pronounced hormonal responses. However, chronic and persistent stress inhibits the effectiveness of the stress response and induces desensitization.[37]

Much still remains to be learned about the specific roles of the different neurohormones in the stress response. Norepinephrine is secreted by the locus ceruleus and distributed through much of the CNS, particularly the neocortex and the limbic system, where it plays a role in memory consolidation and helps to initiate fight-or-flight behaviors. Corticotropin is released from the anterior pituitary and activates a cascade of reactions, eventuating in release of glucocorticoids from the adrenal glands. The precise interrelation between hypothalamic-pituitary-adrenal (HPA) axis hormones and the catecholamines in the stress response is not entirely clear, but it is known that stressors that activate norepinephrine neurons also increase the concentration of corticotropin-releasing factor in the locus ceruleus,[38] and intracerebral ventricular infusion of corticotropin-releasing factor increases norepinephrine in the forebrain.[39] Glucocorticoids and catecholamines may modulate each other's effects: in acute stress, cortisol helps to regulate the release of stress hormones via a negative feedback loop to the hippocampus, hypothalamus, and pituitary,[40] and there is evidence that corticosteroids normalize catecholamine-induced arousal in limbic midbrain structures in response to stress.[41] Thus the simultaneous activation of corticosteroids and catecholamines could stimulate active coping behaviors, whereas increased arousal in the presence of low glucocorticoid levels may promote undifferentiated fight-or-flight reactions.[42]

Although acute stress mobilizes the HPA axis and increases glucocorticoid levels, organisms adapt to chronic stress by activating a negative feedback loop that results in (1) decreased resting glucocorticoid levels,[43] (2) decreased glucocorticoid secretion in response to subsequent stress,[42]

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**TABLE 1. Biological Abnormalities in PTSD**

A. Psychophysiological
   1. Extreme autonomic responses to stimuli reminiscent of the trauma
   2. Nonhabituation to startle stimuli

B. Neurotransmitter
   1. Noradrenergic
      a. Elevated urinary catecholamines
      b. Increased MHPG to yohimbine challenge
      c. Reduced platelet MAO activity
      d. Down-regulation of adrenergic receptors
   2. Serotonergic
      a. Decreased serotonin activity in traumatized animals
      b. Best pharmacological responses to serotonin uptake inhibitors
   3. Endogenous opioids: increased opioid response to stimuli reminiscent of trauma

C. HPA axis
   1. Decreased resting glucocorticoid levels
   2. Decreased glucocorticoid response to stress
   3. Down-regulation of glucocorticoid receptors
   4. Hyperresponsiveness to low-dose dexamethasone

D. Memory
   1. Amnesias and hypermnesias
   2. Traumatic memories precipitated by noradrenergic stimulation, physiological arousal
   3. Memories generally sensorimotor rather than semantic

E. Miscellaneous
   1. Traumatic nightmares often not oneiric but exact replicas of visual elements of trauma; may occur in stage II or III sleep
   2. Decreased hippocampal volume (?)
   3. Impaired psychoimmunologic functioning (?)



and (3) increased concentration of glucocorticoid receptors in the hippocampus.[44] Yehuda et al.[45] suggested that increased concentration of glucocorticoid receptors could facilitate a stronger negative glucocorticoid feedback, resulting in a more sensitive HPA axis and a faster recovery from acute stress.

Chronic exposure to stress affects both acute and chronic adaptation: it permanently alters how an organism deals with its environment on a day-to-day basis and interferes with how it copes with subsequent acute stress.[45]

## NEUROENDOCRINE ABNORMALITIES

Because there is an extensive literature on the effects of inescapable stress on the biological stress response of animal species such as monkeys and rats, much of the biological research on people with PTSD has focused on testing the applicability of those research findings to human subjects with PTSD.[46,47] Subjects with PTSD, like chronically and inescapably shocked animals, seem to have a persistent activation of the biological stress response after exposure to stimuli reminiscent of the trauma (Table 1).

### Catecholamines

Neuroendocrine studies of Vietnam veterans with PTSD have found good evidence for chronically increased sympathetic nervous system activity in PTSD. One investigation[48] discovered elevated 24-hour urinary excretion of norepinephrine and epinephrine in PTSD combat veterans compared with patients who had other psychiatric diagnoses. Although Pitman and Orr[49] did not replicate these findings in 20 veterans and 15 combat control subjects, the mean urinary excretion of norepinephrine in their combat control subjects (58.0 μg/day) was substantially higher than values previously reported in normal populations. The expected compensatory down-regulation of adrenergic receptors in response to increased levels of norepinephrine was confirmed by a study[50] that found decreased platelet $\alpha_2$-adrenergic receptors in combat veterans with PTSD compared with normal control subjects. Another study[51] also found an abnormally low $\alpha_2$-adrenergic receptor–mediated adenylate cyclase signal transduction. Recently Southwick and colleagues[52] used yohimbine injections (0.4 mg/kg), which activate noradrenergic neurons by blocking the $\alpha_2$-autoreceptor, to study noradrenergic neuronal dysregulation in Vietnam veterans with PTSD. Yohimbine precipitated panic attacks in 70% of subjects and flashbacks in 40%. Subjects responded with larger increases in plasma 3-methoxy-4-hydroxyphenylglycol (MHPG) than control subjects. Yohimbine precipitated significant increases in all PTSD symptoms.

### Corticosteroids

Two studies[42,53] have shown that veterans with PTSD have low urinary excretion of cortisol, even when they have comorbid major depressive disorder. Other research[49] failed to replicate this finding. In a series of studies, Yehuda and coworkers[42,54] found increased numbers of lymphocyte glucocorticoid receptors in Vietnam veterans with PTSD. Interestingly, the number of glucocorticoid receptors was proportional to the severity of PTSD symptoms. Yehuda and coworkers[54] also reported the findings of an unpublished study by Heidi Resnick, in which acute cortisol response to trauma was studied in blood samples from 20 rape victims in the emergency room. Three months later, trauma histories were taken and the subjects were evaluated for the presence of PTSD. Development of PTSD after the rape was significantly more likely in victims with histories of sexual abuse than in victims with no such histories. Cortisol levels

shortly after the rape were correlated with histories of previous assaults: the mean initial cortisol levels of individuals with assault histories were 15 μg/dl, compared with 30 μg/dl in the control subjects. These findings can be interpreted to mean that previous exposure to traumatic events results either in a blunted cortisol response to subsequent trauma or in a quicker return of cortisol to baseline after stress. That Yehuda and colleagues[45] also found subjects with PTSD to be hyperresponsive to low doses of dexamethasone argues for an enhanced sensitivity of the HPA feedback in traumatized patients.

### Serotonin

Although the role of serotonin in PTSD has not been systematically investigated, the facts that decreased CNS serotonin levels develop in inescapably shocked animals[55] and that serotonin reuptake blockers are effective pharmacological agents in the treatment of PTSD justify a brief consideration of the potential role of this neurotransmitter in PTSD. Decreased serotonin in humans has been correlated repeatedly with impulsivity and aggression.[56–58] The authors of these investigations tend to assume that these relationships are based on genetic traits. However, studies of impulsive, aggressive, and suicidal patients (e.g., Green,[59] van der Kolk et al.,[60] and Lewis[61]) seem to find at least as robust an association between those behaviors and histories of childhood trauma. Probably both temperament and experience affect relative serotonin levels in the CNS.[12]

Low serotonin levels in animals are also related to an inability to modulate arousal, as exemplified by an exaggerated startle response[62,63] and by increased arousal in reaction to novel stimuli, handling, or pain.[63] The behavioral effects of serotonin depletion in animals include hyperirritability, hyperexcitability, hypersensitivity, and an "exaggerated emotional arousal and/or aggressive display to relatively mild stimuli."[63] These behaviors bear a striking resemblance to the phenomenology of PTSD in humans. Furthermore, serotonin reuptake inhibitors have been found to be the most effective pharmacological treatment for obsessive thinking in subjects with obsessive-compulsive disorder[64] and for involuntary preoccupation with traumatic memories in subjects with PTSD.[65,66] Serotonin probably plays a role in the capacity to monitor the environment flexibly and to respond with behaviors that are situation-appropriate, rather than reacting to internal stimuli that are irrelevant to current demands.

### Endogenous opioids

Stress-induced analgesia has been described in experimental animals after a variety of inescapable stressors such as electric shock, fighting, starvation, and cold water swim.[67] In severely stressed animals opiate withdrawal symptoms can be produced either by termination of the stress or by naloxone injections. Motivated by the findings that fear activates the secretion of endogenous opioid peptides and that stress-induced analgesia can become conditioned to subsequent stressors and to previously neutral events associated with the noxious stimulus, we tested the hypothesis that in subjects with PTSD, reexposure to a stimulus resembling the original trauma will cause an endogenous opioid response that can be indirectly measured as naloxone-reversible analgesia.[68,69] We found that 2 decades after the original trauma, opioid-mediated analgesia developed in subjects with PTSD in response to a stimulus resembling the traumatic stressor, which we correlated with a secretion of endogenous opioids equivalent to 8 mg of morphine. Self-reports of emotional responses suggested that endogenous opioids were responsible for a relative blunting of emotional response to the traumatic stimulus.

### Endogenous opioids and stress-induced analgesia: implications for affective function

When young animals are isolated or older ones are attacked, they respond initially with aggression (hyperarousal-fight-protest) and then, if that does not produce the required results, with withdrawal (numbing-flight-despair). Fear-induced attack or protest patterns serve in the young to attract protection and in mature animals to prevent or counteract the predator's activity. During external attacks, pain inhibition is a useful defensive capacity because attention to pain would interfere with effective defense: grooming or licking wounds may attract opponents and stimulate further attack.[70] Thus defensive and pain-motivated behaviors are mutually inhibitory. Stress-induced analgesia protects organisms against feeling pain while engaged in defensive activities. As early as 1946, Beecher,[71] after observing that 75% of severely wounded soldiers on the Italian front did not request morphine, speculated that "strong emotions can block pain." Today, we can reasonably assume that this is caused by the release of endogenous opioids.[68,69]

Endogenous opioids, which inhibit pain and reduce panic, are secreted after prolonged exposure to severe stress. Siegfried and colleagues[70] have observed that memory is impaired in animals when they can no longer actively influence the outcome of a threatening situation. They showed that both the freeze response and panic interfere with effective memory processing: excessive endogenous opioids and norepinephrine both interfere with the storage of experience in explicit memory. Freeze-numbing responses may serve the function of allowing organisms to not "consciously experience" or to not remember situations of overwhelming stress (thus also preventing their learning from experience). We have proposed that the dissociative reactions of subjects in response to trauma may be analogous to this complex of

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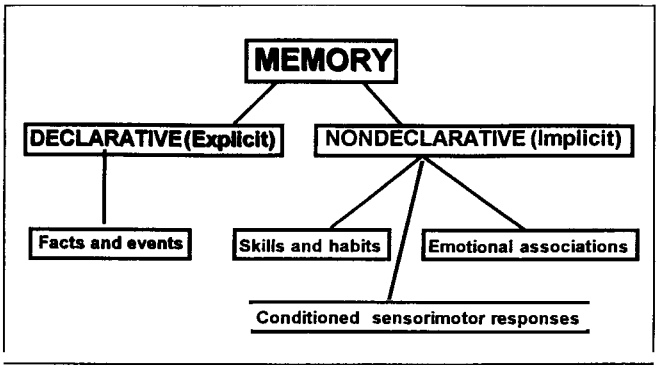


**FIGURE 1.**
Schematic representation of different forms of memory.

behaviors that occurs in animals after prolonged exposure to severe uncontrollable stress.[68]

## DEVELOPMENTAL LEVEL AND THE PSYCHOBIOLOGICAL EFFECTS OF TRAUMA

Although most studies on PTSD have been done on adults, particularly war veterans, in recent years a few prospective investigations have documented the differential effects of trauma at various age levels. Anxiety disorders, chronic hyperarousal, and behavioral disturbances have been regularly described in traumatized children (e.g., Bowlby,[72] Cicchetti,[73] and Terr[74]). In addition to the reactions to discrete, one-time, traumatic incidents documented in these studies, intrafamilial abuse is increasingly recognized to produce complex posttraumatic syndromes[75] that involve chronic affect dysregulation, destructive behavior against self and others, learning disabilities, dissociative problems, somatization, and distortions in concepts about self and others.[76,77] The Field Trials for DSM-IV showed that this conglomeration of symptoms tended to occur together and that the severity of the syndrome was proportional to the duration of the trauma and the age of the child when it began.[78]

Although current research on traumatized children is outside the scope of this review, it is important to recognize that a range of neurobiological abnormalities are beginning to be identified in this population. Frank Putnam's as-yet-unpublished prospective studies (personal communications, 1991, 1992, and 1993) are showing major neuroendocrine disturbances in sexually abused girls compared with non-abused girls. Research on the psychobiology of childhood trauma can be profitably informed by the vast literature on the psychobiological effects of trauma and deprivation in nonhuman primates.[12,79]

## TRAUMA AND MEMORY

### The flexibility of memory and the engraving of trauma

A century ago, Janet[1] suggested that the most fundamental of mental activities are the storage and categorization of incoming sensations into memory and the retrieval of those memories under appropriate circumstances. He, like contemporary memory researchers, understood that what is now called semantic, or declarative, memory is an active and constructive process and that remembering depends on existing mental schemata:[3,80] once an event or a particular bit of information is integrated into existing mental schemes, it will no longer be accessible as a separate, immutable entity but will be distorted both by previous experience and by the emotional state at the time of recall.[3] PTSD, by definition, is accompanied by memory disturbances that consist of both hypermnesias and amnesias.[9,10] Research into the nature of traumatic memories[3] indicates that trauma interferes with declarative memory (i.e., conscious recall of experience) but does not inhibit implicit, or nondeclarative, memory, the memory system that controls conditioned emotional responses, skills and habits, and sensorimotor sensations related to experience (Figure 1). There is now enough information available about the biology of memory storage and retrieval to start building coherent hypotheses regarding the underlying psychobiological processes involved in these memory disturbances.[3,16,17,25]

Early in this century Janet[81] noted that "certain happenings . . . leave indelible and distressing memories—memories to which the sufferer continually returns, and by which he is tormented by day and by night." Clinicians and researchers dealing with traumatized patients have repeatedly observed that the sensory experiences and visual images related to the trauma seem not to fade over time and appear to be less subject to distortion than ordinary experiences.[1,49,82] When people are traumatized, they are said to experience "speechless terror": the emotional impact of the event may interfere with the capacity to capture the experience in words or symbols. Piaget[83] thought that under such circumstances, failure of semantic memory leads to the organization of memory on a somatosensory or iconic level (such as somatic sensations, behavioral enactments, nightmares, and flashbacks). He pointed out:

> It is precisely because there is no immediate accommodation that there is complete dissociation of the inner activity from the external world. As the external world is solely represented by images, it is assimilated without resistance [i.e., unattached to other memories] to the unconscious ego.

### The state dependency of traumatic memories

Research has shown that under ordinary conditions many

traumatized people, including rape victims,[84] battered women,[85] and abused children,[86] have a fairly good psychosocial adjustment. However, they do not respond to stress in the way that other people do. Under pressure they may feel or act as if they were being traumatized all over again. Thus high states of arousal seem selectively to promote retrieval of traumatic memories, sensory information, or behaviors associated with previous traumatic experiences.[9,10] The tendency of traumatized organisms to revert to irrelevant emergency behaviors in response to minor stress has been well documented in animals, as well. Studies at the Wisconsin Primate Laboratory have shown that rhesus monkeys with histories of severe early maternal deprivation display marked withdrawal or aggression in response to emotional or physical stimuli (such as exposure to loud noises or the administration of amphetamines), even after a long period of good social adjustment.[87] In experiments with mice, Mitchell and coworkers[88] found that the relative degree of arousal interacts with previous exposure to high stress to determine how an animal will react to novel stimuli. In a state of low arousal, animals tend to be curious and seek novelty. During high arousal, they are frightened, avoid novelty, and perseverate in familiar behavior, regardless of the outcome. Under ordinary circumstances, an animal will choose the more pleasant of two alternatives. When hyperaroused, it will seek whatever is familiar, regardless of the intrinsic rewards. Thus animals that have been locked in a box in which they were exposed to electric shocks and then released return to those boxes when they are subsequently stressed. Mitchell and colleagues[88] concluded that this perseveration is nonassociative (i.e., uncoupled from the usual reward systems).

Analogous phenomena have been documented in humans: memories (somatic or symbolic) related to the trauma are elicited by heightened arousal.[89] Information acquired in an aroused or otherwise altered state of mind is retrieved more readily when subjects are brought back to that particular state of mind.[90,91] State-dependent memory retrieval may also be involved in dissociative phenomena in which traumatized persons may be wholly or partially amnestic for memories or behaviors enacted while in altered states of mind.[2,3,92]

Contemporary biological researchers have shown that medications that stimulate autonomic arousal may precipitate visual images and affect states associated with previous traumatic experiences in people with PTSD but not in control subjects. In patients with PTSD, the injection of drugs such as lactate[93] and yohimbine[52] tends to precipitate panic attacks, flashbacks (exact reliving experiences) of earlier trauma, or both. In our own laboratory approximately 20% of PTSD subjects responded with a flashback of a traumatic experience when they were presented with acoustic startle stimuli.

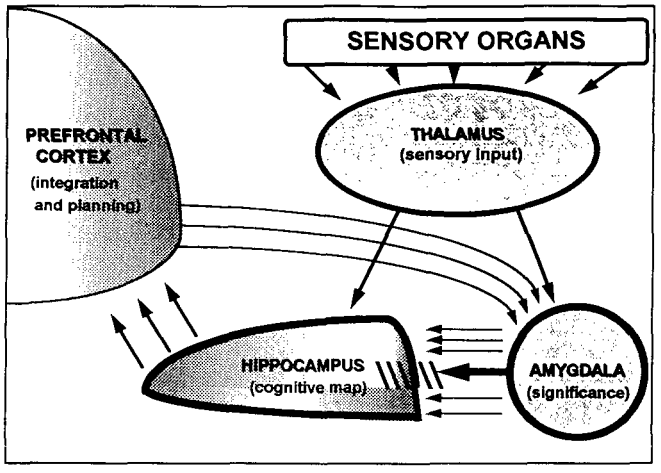


**FIGURE 2.**
Schematic representation of the effects of emotional arousal on declarative memory. The thalamus, amygdala, and hippocampus are all involved in the integration and interpretation of incoming sensory information. Moderate to high activation of the amygdala enhances the long-term potentiation of declarative memory that is mediated by the hippocampus, accounting for hypermnesias for stressful experiences. Excessive stimulation of the amygdala interferes with hippocampal functioning, inhibiting cognitive evaluation of experience and semantic representation. Memories are then stored in sensorimotor modalities: somatic sensations and visual images. These emotional memories are thought to be relatively indelible, but their expression can be modified by feedback from the prefrontal cortex.[3,16,95,98,118]

### Trauma, neurohormones, and memory consolidation

When humans are under severe stress, they secrete endogenous stress hormones that affect the strength of memory consolidation. Based on animal models, researchers have widely assumed that massive secretion of neurohormones at the time of the trauma plays a role in the long-term potentiation (and thus, the overconsolidation) of traumatic memories.[3,46,94] Mammals seem to be equipped with memory-storage mechanisms that ordinarily modulate the strength of memory consolidation according to the strength of the accompanying hormonal stimulation.[95,96] This capacity helps the organism to evaluate the importance of subsequent sensory input according to the relative strength of associated memory traces. The phenomenon appears to be largely mediated by input of norepinephrine to the amygdala[97,98] (Figure 2). In traumatized organisms the capacity to access relevant memories appears to have gone awry: they become overconditioned to access memory traces of the trauma and to "remember" the trauma whenever aroused. Although norepinephrine seems to be the principal hormone involved in producing long-term potentiation, other neurohormones secreted under particular stressful circumstances

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**TABLE 2. Functions of Limbic Structures and Effects of Lesions**

| Hippocampus | Amygdala |
|---|---|
| *Functions of limbic structures* | |
| Categorization of experience | Conditioning of fear responses |
| Creation of a spatial map | Attachment of affect to neutral stimuli |
| Storage of simple memory | Establishment of associations between sensory modalities |
| Creation of summary sketch/index | |
| *Effects of lesions* | |
| Declarative memory lost | Loss of fear responses |
| Skill-based memory spared | Meaningful social interaction lost |
| Immediate memory spared | Declarative memory intact |



(endorphins and oxytocin, for example) actually inhibit memory consolidation.[99]

The role of norepinephrine in consolidating memory has been shown to have an inverted U-shaped function:[95,96] both very low and very high levels of norepinephrine activity in the CNS interfere with memory storage. The release of excessive norepinephrine, as well as of other neurohormones such as endogenous opioids, oxytocin, and vasopressin, at the time of the trauma probably plays a role in creating the hypermnesias and amnesias that are a quintessential part of PTSD.[9,10] Interestingly, childbirth, which can be extraordinarily stressful, almost never seems to result in posttraumatic problems.[100] Oxytocin may protect against the overconsolidation of memories surrounding childbirth.

Physiological arousal in general can trigger trauma-related memories; conversely, trauma-related memories precipitate generalized physiological arousal. The frequent reliving of a traumatic event in flashbacks or nightmares probably causes a rerelease of stress hormones that further kindles the strength of the memory trace.[46] Such a positive feedback loop could cause subclinical PTSD to escalate into clinical PTSD,[16] in which the strength of the memories appears to be so deeply engraved that Pitman and Orr[17] have called it "the black hole" in the mental life of the PTSD patient: it attracts all associations to it and saps current life of its significance.

## MEMORY, TRAUMA, AND THE LIMBIC SYSTEM

The limbic system is thought to be the part of the CNS that maintains and guides the emotions and behavior necessary for self-preservation and for survival of the species[101] and is critically involved in the storage and retrieval of memory. During both waking and sleeping states, signals from the sensory organs continuously travel to the thalamus, from which they are distributed to the cortex (setting up a "stream of thought"), the basal ganglia (setting up a "stream of movement"), and the limbic system (setting up a "stream of emotions"[102] that determines the emotional significance of the sensory input). Most processing of sensory input occurs outside of conscious awareness, with only novel, significant, or threatening information being selectively passed on to the neocortex for further attention. Because subjects with PTSD appear to overinterpret sensory input as a recurrence of past trauma and because recent studies have suggested limbic-system abnormalities in brain-imaging studies of traumatized patients,[103,104] a review of the psychobiology of trauma would be incomplete without considering the role of the limbic system in PTSD (see also Teicher et al.[105]). Two particular areas of the limbic system have been implicated in the processing of emotionally charged memories: the amygdala and the hippocampus (Table 2).

### The amygdala

Of all areas in the CNS, the amygdala is most clearly implicated in the evaluation of the emotional meaning of incoming stimuli.[106] Several investigators have proposed that the amygdala assigns free-floating feelings of significance to sensory input, which the neocortex then further elaborates and imbues with personal meaning.[101,106–108] Moreover, it is thought to integrate internal representations of the external world in the form of memory images with emotional experiences associated with those memories.[80] After assigning meaning to sensory information, the amygdala guides emotional behavior by projections to the hypothalamus, hippocampus, and basal forebrain.[106,107,109]

### The septohippocampal system

The septohippocampal system, which is adjacent to the amygdala, is thought to record in memory the spatial and temporal dimensions of experience and to play an important role in the categorization and storage of incoming stimuli in memory. Proper functioning of the hippocampus is neces-

sary for explicit or declarative memory.[109] The hippocampus is believed to be involved in the evaluation of spatially and temporally unrelated events, comparing them with previously stored information and determining whether and how they are associated with each other and with reward, punishment, novelty, or nonreward.[107,110] The hippocampus also plays a role in the inhibition of exploratory behavior and in obsessional thinking. Damage to the hippocampus is associated with hyperresponsiveness to environmental stimuli.[111,112]

The slow maturation of the hippocampus, which is not fully myelinated until after the third or fourth year of life, is believed to be the cause of infantile amnesia.[113,114] In contrast, the memory system that encodes the affective quality of experience (roughly speaking, procedural, or "taxon," memory) matures earlier and is less subject to disruption by stress.[112] As the CNS matures, memory storage shifts from primarily sensorimotor (motoric action) and perceptual representations (iconic) to symbolic and linguistic organization of mental experience.[83] With maturation, there is an increasing ability to categorize experience and link it with existing mental schemes. However, even as the organism matures, this capacity, and with it the hippocampal localization system, remains vulnerable to disruption.[45,107,110,115,116] Various external and internal stimuli, including stress-induced corticosterone production,[117] decrease hippocampal activity. However, even when stress interferes with hippocampally mediated memory storage and categorization, some mental representation of the experience is probably laid down by means of a system that records affective experience but has no capacity for symbolic processing or placement in space and time (Figure 2).

Decreased hippocampal functioning causes behavioral disinhibition, possibly by causing incoming stimuli to be interpreted in the direction of "emergency" (fight-or-flight) responses. The neurotransmitter serotonin plays a crucial role in the capacity of the septohippocampal system to activate inhibitory pathways that prevent the initiation of emergency responses until it is clear that they will be of use.[110] This observation made us very interested in a possible role for serotonergic agents in the treatment of PTSD.

### "Emotional memories are forever"

In animals high-level stimulation of the amygdala interferes with hippocampal functioning.[107,109] This implies that intense affect may inhibit proper evaluation and categorization of experience. One-time intense stimulation of the amygdala in mature animals will produce lasting changes in neuronal excitability and enduring behavioral changes in the direction of either fight or flight.[118] In kindling experiments with animals, Adamec and colleagues[119] showed that, after growth in amplitude of amygdaloid and hippocampal seizure activity, permanent alterations in limbic physiology cause lasting changes in defensiveness and predatory aggression. Preexisting "personality" played a significant role in the behavioral effects of stimulation of the amygdala in cats: animals that are temperamentally insensitive to threat and prone to attack tend to become more aggressive, whereas defensive animals show increased behavioral inhibition.[119]

In a series of experiments, LeDoux and coworkers[118] used repeated electrical stimulation of the amygdala to produce conditioned fear responses. They found that cortical lesions prevent their extinction. This led them to conclude that, once formed, the subcortical traces of the conditioned fear response are indelible, and that "emotional memory may be forever." In 1987 Kolb[29] postulated that patients with PTSD suffer from impaired cortical control over the subcortical areas responsible for learning, habituation, and stimulus discrimination. The concept of indelible subcortical emotional responses, held in check to varying degrees by cortical and septohippocampal activity, has led to the speculation that delayed-onset PTSD may be the expression of subcortically mediated emotional responses that escape cortical, and possibly hippocampal, inhibitory control.[3,16,94,120,121]

Decreased inhibitory control may occur under a variety of circumstances: under the influence of drugs and alcohol, during sleep (as in nightmares), with aging, and after exposure to strong reminders of the traumatic past. Conceivably, traumatic memories then could emerge, not in the distorted fashion of ordinary recall but as affect states, somatic sensations, or visual images (for example, nightmares[81] or flashbacks[52]) that are timeless and unmodified by further experience.

## PSYCHOPHARMACOLOGICAL TREATMENT

The goal of treating PTSD is to help people live in the present, without feeling or behaving according to irrelevant demands belonging to the past. Psychologically, this means that traumatic experiences need to be located in time and place and differentiated from current reality. However, hyperarousal, intrusive reliving, numbing, and dissociation get in the way of separating current reality from past trauma. Hence, medications that affect these PTSD symptoms are often essential for patients to begin to achieve a sense of safety and perspective from which to approach their tasks.

Although numerous articles have been written about the drug treatment of PTSD, to date only 134 people with PTSD have been enrolled in published double-blind studies. Most of these have been Vietnam combat veterans. Unfortunately, until recently only medications that seem to be of limited therapeutic usefulness have been subjected to adequate scientific scrutiny. Because the only published double-blind studies of medications for treating PTSD have in-

volved tricyclic antidepressants and monoamine oxidase (MAO) inhibitors,[122–124] it is sometimes assumed that these agents are the most effective. Three double-blind trials of tricyclic antidepressants have been published;[122,124–126] two showed modest improvement in PTSD symptoms. Although positive results have been claimed for numerous other medications in case reports and open studies, at the present time there are no data about which patient and which PTSD symptom will predictably respond to any of them. Success has been claimed for just about every class of psychoactive medication, including benzodiazepines,[127] tricyclic antidepressants,[122,125,128] MAO inhibitors,[122,129] lithium carbonate,[127] β-adrenergic blockers,[130] clonidine,[130] carbamazapine,[131] and antipsychotic agents. The accumulated clinical experience seems to indicate that understanding the basic neurobiology of arousal and appraisal is the most useful guide in selecting medications for people with PTSD.[124,125] Autonomic arousal can be reduced at different levels in the CNS: through inhibiting noradrenergic activity in the locus ceruleus with clonidine and the β-adrenergic blockers,[130,132] or by increasing the inhibitory effect of the γ-aminobutyric acid (GABA)-ergic system with GABA-ergic agonists (the benzodiazepines). During the past 2 years several case reports and open clinical trials of fluoxetine have been published, followed by our double-blind study of 64 PTSD subjects treated with fluoxetine.[65] Unlike the tricyclic antidepressants, which were effective on either the intrusive (imipramine) or numbing (amitriptyline) symptoms of PTSD, fluoxetine proved to be effective for the entire spectrum of PTSD symptoms. It also acted more rapidly than the tricyclics. The fact that fluoxetine has proved to be such an effective treatment for PTSD supports a larger role for the serotonergic system in PTSD.[66] Rorschach tests administered by "blinded" scorers revealed that subjects taking fluoxetine became able to achieve distance from the emotional impact of incoming stimuli and to use cognition in harnessing emotional responses to unstructured visual stimuli (van der Kolk et al., unpublished data, 1991–1992).

Although the subjects improved clinically, their startle habituation worsened (van der Kolk et al., unpublished data, 1991–1992). The 5-$HT_{1A}$ agonist buspirone shows some promise in facilitating habituation[133] and thus may play a useful adjunctive role in the pharmacotherapy of PTSD. Even newer research has suggested abnormalities of the *N*-methyl-D-aspartate receptor and of glutamate in PTSD,[134] opening up potential new avenues for the psychopharmacological treatment of this disorder.

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# WHEN THE CONSEQUENCES ARE LIFE AND DEATH: PRETRIAL DETENTION FOR DOMESTIC VIOLENCE OFFENDERS

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ABSTRACT

*Domestic violence continues to be a critical societal issue that requires immediate attention, affecting one in three women in her lifetime. The main domestic abuse interventions in place – mandatory arrest policies, no-drop prosecution policies, and mandatory medical reporting – are salutary in their overall effects, but leave a gap in protection after the defendant is arrested and before he or she is prosecuted. During this time, the defendant may be free to pursue his or her victim. This Note proposes an underconsidered intervention: pretrial detention or denial of bail for serious domestic violence offenders. Research indicates that the risk of violence is greatest when the abused individual is attempting to leave an abusive partner, which is likely to occur during the gap left by mandatory arrest and mandatory prosecution policies. Offenders have also been shown likely to violate protective orders. Bail reform could address this lethal break in protection. Several states have policies that contemplate pretrial detention for domestic violence offenders. This Note will propose legislation that provides a model for pretrial detention statutes for domestic violence offenders nationwide. Pretrial detention hearings should also be made mandatory in domestic violence cases that meet a certain number of risk factors for severe violence.*

TABLE OF CONTENTS



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## INTRODUCTION

Jennifer Martel was twenty-seven years old, vivacious and outgoing.[1] "She didn't have a mean bone in her body," according to her uncle.[2] She was studying to become a teacher while working at a grocery store to make ends meet.[3] She shared an apartment in Waltham, Massachusetts with her boyfriend of five or six years, Jared Remy, and their four-year-old daughter.[4] On Tuesday, August 13, 2013, Jennifer and Jared got into an argument.[5] Jared slammed Jen-

1. Brian Fraga, *Jennifer Martel, a Taunton High Graduate, Allegedly Killed by Son of Red Sox Announcer Jerry Remy*, HERALD NEWS (Aug. 16, 2013), http://www.heraldnews.com/news/x273450060/Murder-victim-Jennifer-Martel-was-kind-and-outgoing-uncle-recalls?zc_p=1.

2. *Id.*

3. *Id.*

4. *Id.*

5. David Abel, Eric Moskowitz & Todd Feathers, *'He Went Back and Finished the Job': Mother of Jennifer Martel Critical of Police Decision to Free Jared Remy on Bail*, BOSTON GLOBE (Aug. 16, 2013), http://www.bostonglobe.com/metro/2013/08/16/officials-investigate-fatal-stabbing-waltham-one-person-custody/lYU4FlCQ9NWW3286u3UKoL/story.html.

nifer's head against a mirror.[6] Waltham police arrested him that night, and he was charged with assault and battery.[7] The next day, Jared was released on his personal recognizance.[8] The judge had issued Jennifer a temporary restraining order against Jared on Tuesday, but Jennifer declined to extend it on Wednesday in court.[9] Jared's mother had importuned her not to seek a permanent restraining order, saying it would ruin his life.[10] Two former girlfriends had taken out restraining orders against him in the past and he had been arrested and charged with beating a former girlfriend in 2005.[11]

The next day, Thursday, Waltham police were again called to Jennifer's apartment.[12] When they arrived, they found Jared covered in blood.[13] Jennifer's body lay lifeless on the couple's patio.[14] She had been stabbed to death.[15] Neighbors allegedly saw Jared on top of her and attempted to intervene.[16] "Neighbors tried to help, we tried to stop it. We couldn't," said a witness.[17] The muscular Jared, who had been fired from his job as a security guard at Fenway Park for steroid use, allegedly swung his knife at a neighbor trying to interfere.[18] Jared and Jennifer's four-year-old daughter was home at the time.[19] "I always used to say [Jennifer] was going to end up dead . . . He was always hitting her," said her uncle.[20] Jared would eventually plead guilty to Jennifer's murder, receiving a life sentence without the possibility of parole.[21]

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6. *Id.*

7. *Id.*

8. Brian Fraga, *Martel Slaying Highlights Frustrating Nature of Domestic Abuse Cases*, TAUNTON DAILY GAZETTE (Aug. 20, 2013), http://www.tauntongazette.com/archive/x511614979/Martel-slaying-highlights-frustrating-nature-of-domestic-abuse-cases?zc_p=0.

9. Abel et al., *supra* note 5.

10. *Id.*

11. Fraga, *supra* note 1.

12. Aditi Roy & Alexis Shaw, *Jennifer Martel's Family Speaks Out About Jared Remy: 'He Wanted Her for Himself,' Uncle Said*, GOOD MORNING AMERICA (Aug. 17, 2013, 1:27 PM), http://gma.yahoo.com/jennifer-martels-family-speaks-jared-remy-wanted-her-170105338--abc-news-topstories.html.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Fraga, *supra* note 1.

21. Eric Moskowitz, *Jared Remy Pleads Guilty Murder of Jennifer Martel*, BOSTON GLOBE (May 27, 2014), http://www.bostonglobe.com/metro/2014/05/27/jared-remy-due-woburncourtroom-today-latest-hearing-jennifer-martel-murder-case/QRd1y01jtYjZFPtZccI9VN/story.html.

A Massachusetts law would have enabled prosecutors to hold Jared without bail for up to ninety days following a dangerousness hearing if the court concluded that no conditions of release could assure Jennifer's safety.[22] However, prosecutors opted against this route, most likely due to Jennifer's reluctance to seek a restraining order: "Officials with the Middlesex prosecutor's office . . . . [s]a[id] their conversations with Martel were a prominent factor in how they pursued charges against Remy."[23]

However, in retrospect, the risk factors pointing toward a violent denouement in Jennifer's tragic case seem all too clear. Commentators observe that Jared's steroid abuse, grabbing Jennifer by the neck in the past, history of battering, and control over her social life are all signs of "increased risk" of homicidal violence.[24] These factors are all noted in the empirically-derived *Danger Assessment* created by Jacquelyn Campbell, a leader in the study of violence against women, to determine the "likelihood of lethality or near lethality occurring in a case of intimate partner violence."[25] Jennifer's family also reported that she was attempting to leave Jared in those final days.[26] Jennifer sent emails to friends and family telling them she was frightened, and on the day of her death, she changed her Facebook relationship status from "In a Relationship" to "It's Complicated."[27] Her mother stated, "I talked to her on Wednesday; she said she was

22. *See* MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06 (2014).

23. Amanda Marcotte, *Could Massachusetts Have Stopped Jared Remy from Allegedly Murdering Jennifer Martel?*, SLATE (Aug. 19, 2013), http://www.slate.com/blogs/xx_factor/2013/08/19/jared_remy_walked_out_of_court_and_murdered_jennifer_martel_could_he_have.html.

24. Yvonne Abraham, *In Remy Case, Everybody Figured Wrong*, BOSTON GLOBE (Aug. 22, 2013), http://www.bostonglobe.com/metro/2013/08/21/everybody-guessed-wrong/gTaNuQsjA6FD4TZqAorkAI/story.html.

25. Jacquelyn C. Campbell, Daniel W. Webster & Nancy Glass, *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 653 (2009). Campbell has "published more than 150 articles and 7 books on violence against women" and has "served on the congressionally appointed U.S. Department of Defense Domestic Violence Task Force." *Id.* at 673. Campbell and her colleagues determined risk factors from an eleven-city study of femicide cases (using proxy informants such as family or friends who knew details of the victim's relationship) and cases of attempted femicide (cases featuring "a nonfatal gunshot or stab wound to the head, neck, or torso, strangulation or near drowning with loss of consciousness, severe injuries inflicted that easily could have led to death, a gunshot or stab wound to other body part with evidence of unambiguous (additional to victim report) intent to kill on the part of a perpetrator who was a current or former intimate partner"). *Id.* at 659–60. The team then compared these cases to "abused controls," women who had been "physically assaulted or threatened with a weapon by a current or former intimate partner during the past 2 years." *Id.* at 661. See *infra* Appendix A for items in the Danger Assessment.

26. Fraga, *supra* note 1.

27. *Id.*

planning her escape."[28] If Jared had known Jennifer was planning to leave him, Campbell's assessment would have rated her risk as "severe."[29] The system in place, even in a jurisdiction with a law allowing a domestic violence offender to be held without bail, largely leaves to the victim the discretion to decide whether a dangerousness hearing is pursued.[30] And "victims tend to badly underestimate the risks," according to Campbell's findings.[31]

Middlesex District Attorney Marian T. Ryan has opened an internal investigation into her office's decision not to seek a dangerousness hearing for Jared.[32] Jared was no stranger to such a proceeding, having been held without bail for eighty-one days in 2005 following charges of assaulting and threatening a former girlfriend (including "threatening to kill her . . . cutting up her clothing and pictures, and punching and kicking her until she ran to a neighbor's house").[33] She survived.[34] Unfortunately, the findings of the District Attorney's Office can do nothing to reverse Jennifer's fate. The Massachusetts legislature has already sprung into action on behalf of Jennifer and future similar cases by introducing a bill on April 1, 2014 that would strengthen domestic violence laws and require judges to undergo biannual training on domestic violence issues.[35] This overhaul signals the willingness of lawmakers to take domestic violence crimes seriously and consider sweeping changes to existing policies in this area.[36]

Reforms of this nature can occur in conjunction with this Note's proposal to statutorily authorize pretrial detention of serious do-

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28. Abel et al., *supra* note 5.

29. Abraham, *supra* note 24; *see* Campbell et al., *supra* note 25, at 655; *see also infra* Appendix A.

30. *See* Abraham, *supra* note 24.

31. *Id.*

32. Todd Wallack & Sean P. Murphy, *DA Promises Wide Review of Decision to Let Remy Go: Waltham Killing Came a Day Later*, BOSTON GLOBE (Aug. 20, 2013), http://www.bostonglobe.com/metro/2013/08/19/middlesex-district-attorney-marian-ryan-orders-review-jared-remy-murder-case/eqoKGHUGqotRDDbZt3XHVL/story.html.

33. *Id.*

34. *See id.*

35. Bob Salsberg, *Bill Calls for Tougher Domestic Violence Penalties*, AP NEWS ARCHIVES (Apr. 1, 2014, 4:10 PM), http://www.apnewsarchive.com/2014/Bill_calls_for_tougher_domestic_violence_penalties/id-713e3f93847349328e354ae0c9321766. The bill additionally calls for: domestic violence suspects to be held in custody for at least six hours post-arrest to allow a safety plan to be developed for the accuser; a written assessment of any safety risks posed by the defendant's release if bail is granted; judges to have access to all prior charges and past restraining orders against the defendant when making a bail or sentencing decision; and new categories of domestic violence crimes with greater penalties (such as the crimes of strangulation and suffocation). *Id.*

36. *See id.*

mestic violence offenders with mandatory detention hearings if a certain number of risk factors are met. Part I of this Note will present data on the prevalence of domestic violence and outline the types of domestic violence interventions. It will delineate the statutory and constitutional support for denial of bail or pretrial detention. It will also explain the importance of pretrial detention in this context and summarize the status of bail statutes nationwide with regard to domestic violence offenses. Statutes nationwide are highly variable, and the great majority do not mention denial of bail or pretrial detention for domestic violence cases. Even in states that have statutory provisions to hold suspects without bail in domestic violence cases, such hearings are not mandatory and are under-utilized because victims are unwilling to work with prosecutors and police. Part II of this Note will argue that pretrial detention will likely produce benefits similar to mandatory arrest and no-drop prosecution policies in terms of reducing recidivism and will also protect victims at the most critical junction: the time of attempted separation from an abuser. Mandatory arrest and no-drop prosecution policies offer no protection during this period, the most dangerous time for a domestic violence victim. Accordingly, Part III of this Note will propose model legislation that will allow pretrial detention for serious domestic violence offenders. This model legislation is based upon existing statutory schemes. Part III will also argue that pretrial detention hearings should be mandatory in serious cases. Finally, Part III will explain safeguards for the defendant's constitutional rights which are incorporated into the model legislation, and suggest means to enact such statutes.

## I. DOMESTIC VIOLENCE PREVALENCE AND INTERVENTIONS

### *A. Domestic Violence Statistics*

Statistics on domestic violence underscore the prevalence of this societal issue and its need for legal attention. Domestic violence is the largest cause of "serious injury" to women in the United States:

> [Domestic violence] account[s] for more injurious episodes than rape, auto accidents, and mugging combined. . . . A woman is beaten every twelve seconds. Fifteen hundred women a year (approximately four per day) die at the hands of an abusive male partner. Roughly twenty-one thousand domestic crimes against women are reported every week—more than a million assaults, murders, and rapes in a year. These are the reported crimes. Police estimate that

> for each of these crimes, three more go unreported. In all, there are an estimated 1.8 to 4 million incidents of domestic violence each year.[37]

Such statistics belie common assumptions that domestic violence is "exceptional."[38] On the contrary, more than one in three women and more than one in four men have "experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime," according to the National Center for Injury Prevention and Control, a branch of the Department of Health and Human Services.[39] Approximately one in four women has experienced severe physical violence by a partner at some point in her lifetime (such as being "hit with a fist or something hard, beaten, [or] slammed against something").[40]

Intimate partner homicide has been declining for the past two decades, but it continues to be a significant concern.[41] Though there has been a decrease in marital homicide, there has been an increase in the rate of unmarried males killing their partners,[42] as in the case of Jennifer Martel. The majority of female homicide victims are killed by men with whom they have been romantically involved.[43]

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37. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1158–59 (1995). Other sources estimate that a woman is beaten every nine seconds by a domestic partner and that ten women die every day due to domestic violence. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 534 (citing *Not Just a "Family Matter": Hearings on Domestic Violence Before the Subcomm. on Criminal Justice of the H. Judiciary Comm.*, 103d Cong., 2d Sess. 9 (1994) (testimony of Vicki Coffey, Executive Director, Chicago Abused Women Coalition)).

38. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3 (1991).

39. DIV. OF VIOLENCE PROT., NAT'L CTR. FOR DISEASE PREVENTION & CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: EXECUTIVE SUMMARY 2 (2010). This statistic underscores the reality that both men and women are victims of domestic violence. However, research and scholarship tend to refer to domestic violence victims as female and perpetrators as male due to the greater likelihood that a victim of a physically severe act of domestic violence will be female. *See infra* text accompanying notes 45–46. Empirical research in particular focuses on female victims and male perpetrators, limiting efforts to draw conclusions about both sexes and necessitating the use of gendered nouns. There is also a dearth of research on interventions with same-sex couples.

40. *See* DIV. OF VIOLENCE PROT., *supra* note 39, at 2.

41. *See* SHANNON CATALANO ET AL., BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENCE 1, 4 (2009), *available at* http://www.bjs.gov/content/pub/pdf/fvv.pdf. Between 1993 and 2007, intimate partner homicides of females decreased 35%, and intimate partner homicides of males decreased 46%. *Id.*

42. *See* Laura Dugan et al., *Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women's Status, and Domestic Violence Resources*, 3 HOMICIDE STUDIES 187, 187 (1999).

43. *Compare* Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 85, 86 (Jacquelyn C. Campbell ed., 2d ed. 2007) (reporting that "greater than 90%" of female homicide victims are

The decline in overall intimate partner homicide rates has been attributed to a decline in spousal homicide and female-perpetrated homicides.[44] Domestic violence research indicates two large sex differences: in cases of women killing an intimate partner, the woman is likely to have been the victim of abuse, while this is uncommon in cases of men killing their partner.[45] Also, women are far more likely to incur serious bodily injury from intimate violence than men, though surveys indicate that women and men are equally likely to be physically aggressive toward their partners.[46] The U.S. Department of Justice's National Crime Victimization Survey found that 72% of the victims of intimate partner homicide and 85% of the victims of non-lethal intimate partner violence were women.[47] Researchers posit that declining rates of intimate partner homicide are due to: a decline in domesticity (increase in divorce rates and decrease in marriage rates) leading to decreased exposure to violence by partners; the increasing economic status of women leading to reduced financial dependence on men; and domestic violence interventions and resources.[48]

### *B. Domestic Violence Laws and Interventions*

Domestic violence has historically been treated as a private matter, not a public concern. Under early American common law, the doctrine of "chastisement" legally entitled husbands to physically punish their wives short of permanent injury.[49] This was seen as an extension of, and corollary to, the concept of coverture, whereby a woman's legal identity was subsumed by her husband's upon marriage and her husband became master over her person, labor, and property.[50] And "as master of the household, a husband could

killed by former or current intimate partners), *and* Emma Morton et al., *Partner Homicide-Suicide Involving Female Homicide Victims: A Population-Based Study in North Carolina, 1988–1992*, 13 VIOLENCE & VICTIMS 91, 91 (1998) (reporting that of all female homicide victims in four years in NC, in 86% of cases the perpetrator was a current or former partner of the victim), *with* CATALANO ET AL., *supra* note 41, at 3 (reporting that 64% of female homicide victims in 2007 were killed by a family member or intimate partner, and an additional 25% of victims were killed by others they knew).

44. *See* Dugan et al., *supra* note 42, at 190.

45. *Id.*

46. *Id.*

47. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993–2001 1 (2003), *available at* http://www.bjs.gov/content/pub/pdf/ipv01.pdf.

48. Dugan et al., *supra* note 42, at 191–95.

49. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

50. *Id.* at 2122.

command his wife's obedience" through "corporal punishment."[51] Even after the right of chastisement was rescinded, the American legal system treated domestic violence as distinct from assault in the name of "domestic harmony."[52] Authorities were loath to intervene in such cases, believing that such matters were private and not to be interfered with by the government.[53] Police officers would attempt to "mediate" between couples having an altercation and would rarely arrest abusers.[54] Prosecutors would decline to press charges since victims were generally unwilling to proceed.[55] In the 1970s, the feminist movement sought to recast these "private" concerns as an important public matter.[56] Their efforts resulted in legal reforms to protect women against domestic violence, such as statutory orders of protection, which enabled victims to access the judicial system without police involvement.[57] However, these reforms did not sufficiently address the systematic responses of police and prosecutors, leading to the development of "mandatory" interventions—mandatory arrest and no-drop prosecution policies—that would limit police and prosecutorial discretion in the matter.

### *1. Mandatory arrest*

Mandatory arrest policies require police to arrest a suspect if there is probable cause to believe the suspect committed a domestic violence offense.[58] Prior to the advent of these policies, police were reluctant to arrest for domestic violence offenses.[59] Statutes in most jurisdictions enabled police to arrest for a misdemeanor offense only if the offense had been committed in the officer's presence or if an ar-

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51. *Id.* at 2123.

52. *Id.* at 2120.

53. Zlotnick, *supra* note 37, at 1167.

54. Jo Dixon, *Mandatory Domestic Violence Arrest and Prosecution Policies: Recidivism and Social Governance*, 7 CRIMINOLOGY & PUB. POL'Y 663, 664 (2008).

55. KEITH GUZIK, ARRESTING ABUSE: MANDATORY LEGAL INTERVENTIONS, POWER, AND INTIMATE ABUSERS 7 (2009).

56. Siegel, *supra* note 49, at 2118.

57. GUZIK, *supra* note 55, at 7.

58. *See, e.g.*, COLO. REV. STAT. § 18-6-803.6(1) (2013) ("When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence . . . has been committed, the officer shall, without undue delay, arrest the person suspected of its commission . . . ."); WIS. STAT. § 968.075(2)(b)(1) (2007) ("[A] law enforcement officer shall arrest and take a person into custody if . . . [t]he officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime . . . .").

59. *See* Wanless, *supra* note 37, at 541–42 (reporting the arrest rate at 3%–10% for domestic violence offenses when mandatory arrest policies are not in place).

rest warrant was issued, which gave police "de facto legal backing to do nothing" in domestic violence cases.[60] Police also continued to favor mediation, trying to "cool down" violent offenders and leave them at the scene rather than removing them.[61] Mediation techniques treated domestic violence as a "family dispute" where both parties were at fault.[62] Furthermore, officers commonly believed that the victims likely provoked the abuse or should not be assisted if they were unwilling to seek legal recourse against the abusers.[63] As one police chief explained, "if the woman didn't do anything after she was hit, then why should we do anything[?]"[64]

Mandatory arrest policies were developed to combat these views, particularly on the heels of several highly publicized lawsuits against police for egregious cases of non-intervention.[65] These policies have been moderately successful in reducing the recidivism of domestic violence offenders. Randomized trials studying the efficacy of mandatory domestic violence interventions are scarce due to the difficulty of (and potential equal protection concerns involved with) randomly assigning defendants to different outcomes.[66] The studies that do exist are typically conducted under the aegis of the National Institute of Justice (NIJ).[67] An early study funded by the NIJ to determine the efficacy of mandatory arrest policies in reducing recidivism was promising.[68] This landmark study randomly assigned defendants in domestic violence cases in Minneapolis to mandatory arrest followed by at least one night in jail, physical separation for eight hours, or police mediation, and discovered that

60. GUZIK, *supra* note 55, at 24; *see also* Wanless, *supra* note 37, at 537 (describing the "in presence" requirement in most states which forbids police officers from making warrantless arrests for misdemeanor offenses unless the police officer witnesses the crime).

61. *See* Wanless, *supra* note 37, at 536–37.

62. *Id.* at 537.

63. GUZIK, *supra* note 55, at 24.

64. *Id.*

65. Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 218–19 (1988) (citing Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984) (awarding a domestic abuse victim $2.3 million in a suit against the City of Torrington and its police officers for negligently failing to protect the victim and violating the equal protection clause by treating victims assaulted by a perpetrator with whom they have a relationship differently than victims assaulted by a stranger); Sorichetti v. City of New York, 482 N.E.2d 70 (N.Y. 1985); Bruno v. Codd, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 407 N.Y.S.2d 165 (App. Div. 1978), *aff'd*, 393 N.E.2d 976 (N.Y. 1979); Nearing v. Weaver, 670 P.2d 137 (Or. 1983) (en banc).

66. *See, e.g.*, Dixon, *supra* note 54, at 664.

67. *See id.*

68. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 261 (1984).

mandatory arrest resulted in significantly lower recidivism rates over the following six months.[69]

Former U.S. Attorney General William French Smith cited the results of this study when he recommended that mandatory arrest be implemented as the standard response in domestic violence cases.[70] However, follow-up replication studies in six more cities funded by the NIJ had mixed results.[71] These studies uncovered a potential interaction effect at play wherein arrest led to a deterrent effect in employed or married offenders but had the opposite effect on unemployed or unmarried offenders.[72] Researchers theorized that arrest could deter offenders who were likely to be stigmatized by the arrest, but would be less likely to deter offenders who were unlikely to be stigmatized by arrest.[73] However, these studies are susceptible to the criticism that they did not successfully replicate the original study because the arrested abuser did not necessarily have to spend a night in jail.[74]

Regardless of the efficacy of mandatory arrest policies in deterring recidivism, such policies compelled police to take domestic violence seriously, and helped to shape public perception of domestic violence as a crime and not a private dispute.[75] These policies also provide ancillary benefits, such as ensuring more equitable police action across the races and socioeconomic statuses of offenders.[76] However, one drawback to mandatory arrest policies is victim arrest, wherein the victim is arrested either as a result of the same event that caused the arrest of the abuser (dual arrest), or as a result

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69. *Id*. at 267 (reporting the recidivism rate after mandatory arrest as 13% and after separation as 26%). The authors did not provide the recidivism rate after mediation.

70. Wanless, *supra* note 37, at 554.

71. *See* Joel Garner et al., *Published Findings from the Spouse Assault Replication Program: A Critical Review*, 11 J. QUANTITATIVE CRIMINOLOGY 3, 5–7 (1995); Anthony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC. REV. 691, 691–92 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 165–67 (1992).

72. Garner et al., *supra* note 71, at 7.

73. Pate & Hamilton, *supra* note 71, at 692.

74. Wanless, *supra* note 37, at 556.

75. *See id*. at 559.

76. *See* Buel, *supra* note 65, at 220–24. Mandatory arrest policies, in addition to reducing recidivism, provide the benefits of: (1) clarifying the police's role; (2) decreasing police injuries (possibly because "a batterer who understands that he will be arrested for assaulting his partner may be less likely to assault the officer whom he sees as implementing a strict legal duty"); (3) resolving the victim's dilemma of whether or not to request that the perpetrator be arrested; and (4) treating victims and offenders more equitably, particularly in terms of racial and socioeconomic factors that cause police to exercise their discretion preferentially. *Id.*

of a false or exaggerated complaint filed by the abuser (retaliatory arrest).[77] These policies have also been criticized for limiting police discretion; however, police still have discretion to determine whether probable cause exists to believe a domestic violence offense has occurred.[78]

### *2. No-drop prosecution*

No-drop prosecution policies require prosecutors to pursue domestic violence cases regardless of the victim's unwillingness to proceed.[79] Victims' desire not to press charges or testify, stemming from fear of or attachment to their abusers, had frequently hindered prosecution.[80] Prosecutors, however, can use alternative evidence such as photographs, physical evidence, medical reports, victim statements, and 911 tapes when a victim is unwilling to testify.[81] Studies of recidivism as a function of prosecution policy have found mixed results. There has only been one randomized study, funded by the NIJ, that measured the efficacy of no-drop prosecution in reducing recidivism.[82] This study found that women who had the option to drop the charges, but continued regardless, had the lowest rate of re-abuse, while women who had the option to drop the charges, and did so, had the highest rate of re-abuse (higher than women with no-drop charges).[83] However, for safety reasons, this

77. MARY HAVILAND ET AL., URBAN JUSTICE CTR., THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1995: EXAMINING THE EFFECTS OF MANDATORY ARREST IN NEW YORK CITY 5 (2001).

78. *See* Wanless, *supra* note 37, at 543–44.

79. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 856 (1994).

80. *See id.* at 857. In jurisdictions without no-drop prosecution policies, prosecutors dropped charges in domestic violence cases due to victim's request, recantation of testimony, or failure to appear in court in 50%–80% of all cases. In jurisdictions with no-drop prosecution policies, charges were dropped in only 10%–34% of cases. *Id.*

81. *See* Ruth E. Fleury, *Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System*, 8 VIOLENCE AGAINST WOMEN 181, 199 (2002).

82. *See* LAWRENCE W. SHERMAN ET AL., NAT'L INST. OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (1998), *available at* https://www.ncjrs.gov/works/ (click on "4. Family-Based Crime Prevention") (discussing the only empirical study on no-drop prosecution: DAVID A. FORD & MARY JEAN REGOLI, THE INDIANAPOLIS DOMESTIC VIOLENCE PROSECUTION EXPERIMENT (1993)). See *supra* text accompanying notes 66–67 for an explanation of the dearth of randomized studies of mandatory interventions.

83. FORD & REGOLI, *supra* note 82, at iv. This study compared three tracks in 480 men charged with misdemeanor assault of an intimate partner: pretrial diversion to counseling; prosecution to conviction with a recommended sentence of counseling; and prosecution to conviction with another sentence such as fines, probation, or jail time. Victims were either al-

study excluded many important groups of defendants: those with previous records of violence against the victim, those with criminal histories of violence, and those who posed serious threats of imminent danger.[84] Therefore, the results may not reflect the efficacy of no-drop prosecution policies with respect to all domestic violence defendants.[85] Correlational studies have been conducted on rearrest likelihood depending on various prosecutorial outcomes, such as *nolle prosequi*, dismissals, probation with treatment, and jail sentences, and have reached conflicting conclusions.[86] Notably, these studies did not compare no-drop prosecution to drop-permitted prosecution.[87]

In addition to the potential impact of no-drop prosecution policies on recidivism, other benefits of these policies include reduction of case attrition rates, facilitation of victim cooperation, and flexible prosecutorial strategies that do not necessarily depend on victim testimony.[88] Possible drawbacks include limiting prosecutorial discretion and potential retaliatory violence against victims.[89]

### *3. Mandatory medical reporting*

Some states have called for policies that would require routine screening of women for intimate partner violence during emergency

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lowed or not allowed to drop charges. The researchers "ha[d] no reservations" in advocating a drop-permitted policy. *Id.* at 73.

84. Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 CRIM. JUST. & BEHAV. 306, 312 (1998).

85. *See id.* at 313.

86. *Compare* Robert C. Davis et al., *The Deterrent Effect of Prosecuting Domestic Violence Misdemeanors*, 44 CRIME & DELINQ. 434, 441 (1998) (reporting that prosecution outcome did not affect the likelihood of recidivism), *with* Christopher M. Murphy, Peter H. Musser & Kenneth I. Maton, *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263, 273–77 (1998) (finding that the combined effects of prosecution, probation, and court-ordered counseling were associated with reductions in recidivism), *and* John Wooldredge & Amy Thistlethwaite, *Reconsidering Domestic Violence Recidivism: Conditioned Effects of Legal Controls by Individual and Aggregate Levels of Stake in Conformity*, 18 J. QUANTITATIVE CRIMINOLOGY 45 (2002) (finding that recidivism was more likely in suspects who had no formal charges filed against them and less likely in suspects undergoing counseling or serving probation and/or jail sentences).

87. *See* Davis et al., *supra* note 86; Murphy et al., *supra* note 86; Wooldredge & Thistlethwaite, *supra* note 86. These studies did not examine the difference between no-drop and drop-permitted prosecution because their correlational design did not allow random assignment to either condition, and jurisdictions only allow one policy or the other.

88. Corsilles, *supra* note 79, at 873–74.

89. *Id.* at 875–76.

room visits.[90] Health care providers may be statutorily required to report such domestic violence to the police.[91] Generally, studies show that the majority of women—in some studies, the great majority of women—support screening for domestic violence during hospital visits and mandatory reporting.[92] Women's support varies by whether they have been (or are being) abused.[93] Abused women are typically less likely to support mandatory reporting than non-abused women, with exceptions.[94]

The benefits of such policies include facilitating the prosecution of abusers and encouraging health care personnel to identify domestic violence, thereby helping to prevent serious domestic violence assaults and homicides.[95] Medical screening could also furnish victims with documentation for future court cases and potential referrals to community resources for education on prevention, safety planning, and options for leaving.[96] Drawbacks include potential retaliatory

90. Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREVENTIVE MED. 279, 279 (2000); *see also* Michael C. Wadman & Robert L. Muelleman, *Domestic Violence Homicides: ED Use Before Victimization*, 17 AM. J. EMERGENCY MED. 689, 689–90 (1999) (noting that 44% of domestic violence homicide victims over five years in Kansas City, Missouri had presented to an emergency room within two years of their deaths, suggesting that emergency room visits could be used to screen for domestic violence and prevent domestic violence homicide).

91. Gielen et al., *supra* note 90, at 279 (noting that six states in 2000 had mandated that health care personnel report domestic violence to the criminal justice system).

92. *See, e.g.*, Nancy Glass et al., *Intimate Partner Violence Screening and Intervention: Data from Eleven Pennsylvania and California Community Hospital Emergency Departments*, 27 J. EMERGENCY NURSING 141, 147 (2001) (reporting that, in a very large eleven-site study with 4,641 survey participants, 76%–90% of women supported health care providers reporting domestic violence to the police); Jean Ramsay et al., *Should Health Professionals Screen Women for Domestic Violence? Systematic Review*, 325 BRIT. MED. J. 1, 7–8 (2002) (noting that 43%–85% of women in four surveys supported medical screening, but two-thirds of physicians and nearly half of emergency room nurses did not support screening); Michael A. Rodríguez, et al., *Mandatory Reporting of Domestic Violence Injuries to the Police*, 286 JAMA 580, 581 (2001) (finding that about 70% of all women supported mandatory medical reporting); *see also* Gielen et al., *supra* note 90, at 279 (reporting that 48% of participants believed medical professionals should routinely screen all women for abuse at all visits). Gendered nouns are used consistent with the studies cited.

93. *See* Rodríguez et al., *supra* note 92, at 580.

94. *Compare* Glass et al., *supra* note 92, at 145 (90% of non-abused women supported mandatory reporting while 76%–82% of abused women supported mandatory reporting), *and* Rodríguez et al., *supra* note 92, at 580 (70.7% of non-abused women supported mandatory reporting while 55.7% of abused women supported mandatory reporting), *with* Gielen et al., *supra* note 90, at 283 (42% of non-abused women versus 54% of abused women). Notably, subjects in the Gielen study were surveyed by phone, not at emergency rooms as in the other studies.

95. *See* Rodríguez et al., *supra* note 92, at 580.

96. Gielen et al., *supra* note 90, at 279.

violence by perpetrators, reducing patients' autonomy, and compromising doctor-patient confidentiality.[97]

### *4. GPS monitoring*

Many states have statutes allowing judges to order that the defendant be monitored by a global positioning system (GPS) as a condition of bail, and a majority of states either have passed, or are considering, statutes that require pre-trial GPS monitoring in cases of domestic violence.[98] Use of a GPS device is often limited to cases in which the defendant has violated a protection order, committed a crime of domestic violence, or has been deemed "high-risk."[99] Defendants may be statutorily required to pay the cost of GPS monitoring, estimated at around ten dollars per day.[100] Also, GPS systems can be designed to only transmit information about the defendant's location when a protective order violation has taken place, thereby mitigating Fourth Amendment privacy concerns.[101] GPS monitoring is often "bilateral," monitoring both offenders and their victims in order to ensure victim safety.[102] Research shows that GPS monitor-

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97. Rodríguez et al., *supra* note 92, at 580.

98. Edna Erez et al., *Using GPS in Domestic Violence Cases: Lessons from a Study of Pretrial Programs*, 25 J. OFFENDER MONITORING 5, 5 (2013); *see, e.g.*, 725 ILL. COMP. STAT. 5/110-5(f) (2006) *amended by* 2014 Ill. Laws 98-1012 (H.B. 3744) ("[T]he court may order that the person, as a condition of bail, be placed under electronic surveillance . . . ."); IND. CODE § 35-33-8-11 (2012) ("A court may require a person who has been charged with a crime of domestic violence . . . to wear a GPS tracking device as a condition of bail."); KY. REV. STAT. ANN. § 431.517 (West Supp. 2014) ("A court ordering home incarceration as a form of pretrial release pursuant to this section may order the defendant to participate in a global positioning monitoring system program during all or part of the time of pretrial release . . . .").

99. Nicole R. Bissonnette, *Domestic Violence and Enforcement of Protection from Abuse Orders: Simple Fixes to Help Prevent Intra-Family Homicide*, 65 ME. L. REV. 285, 313 (2012).

100. *Id.* at 314 (citing the cost of monitoring); *see, e.g.*, MICH. COMP. LAWS § 765.6b (2013) ("A defendant described in this subsection shall only be released under this section if he or she agrees to pay the cost of the device and any monitoring as a condition of release or to perform community service work in lieu of paying that cost.").

101. Leah Satine, *Maximal Safety, Minimal Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy,* 43 HARV. C.R.-C.L. L. REV. 267, 268–70 (2008) (noting that one of two methodologies may be used: (1) reverse tagging, in which the abuser wears the signal receiving component of the GPS device and the monitoring device is placed with the victim; and (2) filtering, in which the monitor is programmed to accept only coordinates that correspond to the areas geographically limited by the protective order).

102. *See* Edna Erez & Peter R. Ibarra, *Making Your Home a Shelter: Electronic Monitoring and Victim Re-entry in Domestic Violence Cases*, 47 BRIT. J. CRIMINOLOGY 100, 102 (2007).

> As with a 'home detention' system, the abuser is equipped with a tamper-resistant, ankle-worn transmitter. A receiver in the abuser's residence confirms his presence during curfew hours. A receiver in the victim's home detects the presence of an abuser when he enters a radius of up to 500 feet around her residence. Radius penetration of a victim's home perimeter results in an immediate call to the police from

ing is effective at reducing offenders' likelihood of reoffending, both in the short and long term.[103] GPS monitoring has been lauded for allowing victims to re-enter society by enabling them to remain in their homes instead of relocating to shelters and to perform daily tasks without fear due to mobile monitoring.[104] Potential disadvantages reported by victims include worries of over-dependence on the monitoring, psychological debilitation when the monitors are removed, and fear caused by false alarms.[105]

### *5. Bail statutes*

Bail statutes can serve as a domestic violence intervention in two main ways: the defendant may be released on conditional bail, or the bail statute may authorize pretrial detention (denial of bail). The legal system has not widely considered denial of bail as a source of domestic violence intervention, but this approach covers a potentially lethal gap in the coverage left by other interventions. A domestic violence offender may be arrested and prosecuted, but in the meantime he or she may be set free to seek out and attack the victim; to "finish[] the job," as Jennifer Martel's mother said.[106] Conditional

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> the monitoring facility and an alert to the victim. Receivers are ordinarily monitored 24/7 by a monitoring facility via normal phone lines. In addition, the victim may be given a duress pendant and/or a cellular phone pre-programmed to notify authorities. The victim may also carry a field-monitoring device to alert her to the approach of the anklet-wearer while she is away from her home receiver.

*Id.* at 102 n.6.

103. *See* EDNA EREZ ET AL., GPS MONITORING TECHNOLOGIES AND DOMESTIC VIOLENCE: AN EVALUATION STUDY 127–38 (2012) (noting that in the short term, defendants had "practically no contact attempts" with the victim, and that in the long term, over a one-year follow up period, defendants who had previously been under GPS monitoring had a lower likelihood of rearrest for a domestic violence offense than defendants who had not been under GPS monitoring); Edna Erez, Peter R. Ibarra & Norman A. Lurie, *Electronic Monitoring of Domestic Violence Cases: A Study of Two Bilateral Programs*, 68 FED. PROBATION 15, 18 (2004); Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POL'Y 61, 61 (2006) (reporting that, in a study of 75,661 serious offenders—not solely domestic violence offenders—in Florida from 1998–2002, GPS monitoring significantly reduced offenders' likelihood of reoffending).

104. *See* Erez & Ibarra, *supra* note 102, at 100. A victim in this study stated,

> In my home I feel safe; all five of us are very fine. And we, it's almost like—whoa, he's not coming. I'm not worried. I can open my bedroom window and not worry. I like that. He broke in through that way before. He broke in the back door. He broke in through my garage . . . He broke in both my windows . . . But ever since [GPS monitoring], he's really just stayed away.

*Id.* at 109. See *supra* note 102 for a description of mobile monitoring.

105. Erez et al., *supra* note 103, at 18 (noting that false alarms could be caused by power outages or the monitoring center's mandated notification when the defendant had not arrived home by curfew).

106. Abel et al., *supra* note 5.

bail does not rectify this danger because a determined defendant will not be deterred by mere judicial stipulations that he or she should stay away from the victim.[107] Assaults and intimate partner homicides that take place while a defendant is under a protection order illustrate this grim reality.[108] Protective orders have been shown to reduce the risk of violence but do not eliminate it by any means, and can sometimes spur retaliatory violence.[109]

Bail statutes that authorize denial of bail or pretrial detention could prevent such tragedies, and such statutes carry congressional and Supreme Court approval. Denial of bail on the basis of future dangerousness was enabled in the federal system by the Bail Reform Act of 1984: "If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."[110] The statute requires a clear and convincing standard of proof to hold a defendant on the basis of future dangerousness.[111] A detention hearing must be held in a case involving certain offenses.[112] Such offenses include: crimes of violence that carry a maximum sentence of life imprisonment or death, controlled substance offenses for which the maximum term of im-

107. *See* GUZIK, *supra* note 55, at 23 (describing an incident of a husband killing his wife despite a restraining order and numerous calls made by the wife to police regarding her husband's violation of a restraining order).

108. *See* Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 LAW & SOC'Y REV. 169, 194 (2003) (reporting that prosecutorial willingness to take cases of protection order violations was associated with increased homicides of married and unmarried white females); J. Reid Meloy et al., *Domestic Protection Orders and the Prediction of Subsequent Criminality and Violence Toward Protectees*, 34 PSYCHOTHERAPY 447, 454 (1997) (noting that 27% of victims who had taken out a protection order were violently assaulted after issuance); Morton et al., *supra* note 43, at 91 (reporting that nearly half of their sample of female homicide victims had sought protection from the perpetrator prior to the homicide).

109. *See* Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 589 (2002) (noting that permanent protection orders were associated with a significant decrease in reported violence against women, but that temporary protection orders were not); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 616 (2004) (reporting that women who applied for a two-year protective order experienced lower levels of violence, but 44% of women granted a two-year protection order reported at least one violation over eighteen months); Meloy et al., *supra* note 108, at 447 (noting that mutual protection orders—issued to both parties—were related to decreased risk of rearrest due to domestic violence but that non-mutual protective orders—issued only to the offending party—*increased* the probability of rearrest due to domestic violence).

110. 18 U.S.C. § 3142(e) (2012).

111. *Id.* § 3142(b).

112. *Id.* § 3142(f).

prisonment is ten years or more, a felony if the defendant has been convicted of two or more of the preceding offenses, or any felony involving a minor victim or possession of a dangerous weapon.[113] The First, Third, and Fifth Circuits have determined that defendants may not be detained unless their charges fit one of the above four categories.[114] However, since most domestic violence cases are brought at the state, not federal, level, these policies are not dispositive. Therefore, the Bail Reform Act of 1984 serves to open the door to pretrial detention based on future dangerousness in the context of domestic violence.[115]

The Bail Reform Act of 1984 followed the Bail Reform Act of 1966, which attempted to restrict "needless[] . . . det[ention]" of defendants prior to trial.[116] The Bail Reform Act of 1966 even moved "towards eliminating 'bail' from the glossary of criminal procedure" by creating a "presumption" of non-monetary release before trial.[117] This was followed in 1969 by President Nixon's exhortation for legislation to "permit 'temporary pretrial detention' of criminal defendants whose 'pretrial release presents a clear danger to the community.'"[118]

The denial of bail potentially implicates three main constitutional issues: violation of the Eighth Amendment, violation of the presumption of innocence, and violation of due process.[119] The Eighth Amendment guarantees that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[120] The presumption of innocence has been held to follow from the Fifth, Sixth, and Fourteenth Amendments.[121] The right to due process guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[122]

The United States Supreme Court considered the constitutionality of committing defendants to pretrial detention on the basis of future dangerousness under the Bail Reform Act of 1984 in *United States v.*

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113. *Id.* § 3142(f)(1).

114. FED. JUDICIAL CTR., THE BAIL REFORM ACT OF 1984, at 12 (2d ed. 1993).

115. *See id.*

116. Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A. J. 940, 940 (1966).

117. *Id.*

118. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1223 (1969).

119. *Id.* at 1223–24.

120. U.S. CONST. amend. VIII.

121. *See In re* Winship, 397 U.S. 358, 360 (1970); Coffin v. United States, 156 U.S. 432, 454 (1895).

122. U.S. CONST. amend. V; *see* U.S. CONST. amend. XIV, § 1.

*Salerno*.[123] The Court determined that the Bail Reform Act was constitutional.[124] In an opinion written by Chief Justice Rehnquist, the Court held that the Bail Reform Act did not violate substantive or procedural due process, did not constitute "impermissible punishment before trial," and did not violate the Eighth Amendment.[125] The Act did not violate the right to due process because it had a "legitimate and compelling . . . purpose" to prevent danger and offered procedural protections.[126] Procedural protections included reserving detention for serious crimes, ensuring a prompt hearing, and limiting the length of detention.[127] The Court considered the Act stringent enough to overcome the argument that it could lead to unjust incapacitation of those "merely suspected" of committing crimes because it required not only a finding of probable cause to believe the crime had been committed by the defendant, but also a "full-blown adversary hearing" with a clear and convincing evidentiary standard before the defendant could be detained.[128]

The Court also indicated that pretrial detention did not violate the Eighth Amendment's ban on "cruel and unusual punishments" because it was not conceived by Congress as a punishment for dangerous individuals, but as a "potential solution to a pressing societal problem."[129] The Bail Reform Act's goal was therefore not punitive but regulatory, and "preventing danger to the community is a legitimate regulatory goal."[130] The Court backed this reasoning with precedents in which it had "repeatedly" held that such a regulatory interest in safety may outweigh an individual's liberty interest.[131] Therefore, the Supreme Court found pretrial detention of dangerous individuals constitutionally justified, a decision substantiated by a long line of precedents.[132]

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123. 481 U.S. 739 (1987).

124. *Id.* at 746.

125. *Id.*

126. *Id.* at 752.

127. *Id.* at 747.

128. *Id.* at 750.

129. *Id.* at 747; *see also* U.S. CONST. amend. VIII.

130. *Salerno*, 481 U.S. at 747 (citing Schall v. Martin, 467 U.S. 253, 269 (1984)).

131. *Id.* at 748–49 (citing Ludecke v. Watkins, 335 U.S. 160 (1948), in reference to detaining enemy aliens in wartime; Moyer v. Peabody, 212 U.S. 78, 84–85 (1909), in reference to detaining individuals in times of insurrection; Carlson v. Landon, 342 U.S. 524, 537–42 (1952) and Wong Wing v. United States, 163 U.S. 228 (1896), in reference to detaining dangerous aliens prior to deportation; Addington v. Texas, 441 U.S. 418 (1979), in reference to detaining dangerous mentally unstable individuals; and Jackson v. Indiana, 406 U.S. 715, 731–39 (1972) and Greenwood v. United States, 350 U.S. 366, (1956), in reference to detaining dangerous individuals who become incompetent to stand trial).

132. *Id.*

The Supreme Court of Massachusetts, one of the only states with a specific pretrial detention statute for domestic violence offenders, considered the constitutionality of this procedure in reference to domestic violence in *Mendonza v. Commonwealth* and *Commonwealth v. Callender*.[133] Mendonza, while being served by police with a protection order obtained by his wife which would require him to move out of the family home, barricaded himself in the bedroom with gasoline and threatened to burn the house down.[134] Callender was arrested for banging on the door of an apartment he was forbidden to visit, while on probation for three violations of protective orders.[135] In both cases, the Commonwealth moved for a dangerousness hearing.[136] The Supreme Court of Massachusetts determined that pretrial detention on the grounds of dangerousness for domestic violence offenses did not offend substantive due process rights or equal protection, following the precedent and reasoning of *Salerno*.[137] The court observed that "[t]he Federal statute followed extensive legislative fact-finding that tended to show that a surprising number of crimes are committed by persons awaiting trial."[138] The court further noted that the lengthy periods of time between arrest and conclusion of a trial demonstrate the need for some preliminary means for the government to "incapacitat[e] persons who pose a particular danger to the public."[139] The necessity for probable cause to believe the person had committed a serious crime and the conclusion of the trial as an "inevitable end point to the State's preventive

133. 673 N.E.2d 22 (Mass. 1996) (both cases are combined in one opinion). Due to the rarity of pretrial detention of more than a few days for domestic violence offenses, no other cases that specifically consider the constitutionality of this intervention have been found. *See also* State v. Jones, 130 So. 3d 1 (La. Ct. App. 2013) (holding that pretrial detention for domestic violence does not trigger the attachment of jeopardy, but "pretrial detention" in this case only constituted holding the defendant for six hours); State v. Malette, 509 S.E.2d 776 (N.C. 1999) (holding that North Carolina's statute on bail and pretrial release for individuals accused of domestic violence offenses was constitutional as applied to the defendant (North Carolina does not have a policy of pretrial detention as considered herein, but allows holding a defendant for up to forty-eight hours pending a bail hearing)); State v. Thompson, 508 S.E.2d 277 (N.C. 1998) (holding that North Carolina's statute allowing a domestic violence offender to be held for up to forty-eight hours did not facially violate substantive due process, procedural due process, or double jeopardy, but that the statute as applied to the defendant violated procedural due process because the magistrate scheduled the bail hearing for forty-eight hours after the defendant's commitment even though there were judges available earlier).

134. *Mendonza*, 673 N.E.2d at 26.

135. *Id.*

136. *Id.*

137. *Id.* at 29; *see supra* notes 123–32 and accompanying text.

138. *Mendonza*, 673 N.E.2d at 29; *see infra* notes 170–71 and accompanying text.

139. *Mendonza*, 673 N.E.2d at 29; *see infra* note 169 and accompanying text.

authority" provide protections for the defendant.[140] Therefore, the United States Supreme Court and the Supreme Court of Massachusetts have given their imprimatur to pretrial detention on the basis of future dangerousness and pretrial detention for domestic violence offenders on the basis of future dangerousness respectively.[141]

### a. Bail statutes for domestic violence offenses nationwide

Bail statutes vary widely across the United States. Some states have a specific provision or provisions for bail in domestic violence (or "family violence") cases, and some do not. States with a specific domestic violence provision fall into three categories. In the first and most common type, there is a presumption of conditional bail (not pretrial detention), and the defendant is required to go before a judge or magistrate.[142] Conditions of bail may include: avoiding the alleged victim's home, school, and place of employment; visitation limitations with any children; refraining from damaging specifically identified property and from assaulting the alleged victim; abstaining from consumption of alcohol; and even GPS monitoring.[143] Twenty-two states have provisions of this nature.[144] Provisions in four of these states suggest bail denial or revocation for repeat do-

140. *Mendonza*, 673 N.E.2d at 29.

141. *See* United States v. Salerno, 481 U.S. 739, 748 (1987); *Mendonza*, 673 N.E.2d at 31.

142. *See, e.g.*, ALA. CODE § 15-13-190 (2011).

143. *See, e.g.*, *id.*

144. **Alabama**, ALA. CODE § 15-13-190 (2011); **Alaska**, ALASKA STAT. § 12.30.011 (2014); ALASKA STAT. § 12.30.027 (2014); **Georgia**, GA. CODE ANN. § 17-6-1 (West 2014); 9 GA. CRIM. P. § 7:10; **Idaho**, IDAHO CODE ANN. § 19-2903 (West 2014); IDAHO MISD. CRIM. R. 13 (amended 2014); **Illinois**, 725 ILL. COMP. STAT. 5/110-5 (2014), *amended by* 2014 Ill. Laws 98-1012 (H.B. 3744); 725 ILL. COMP. STAT. 5/110-5.1 (2013); **Indiana**, IND. CODE § 35-33-8-4 (2012); IND. CODE § 35-33-8-6.5 (2012); IND. CODE ANN. § 35-33-8-11 (West 2012); **Kentucky**, KY. REV. STAT. ANN. § 67.372 (West Supp. 2014); KY. REV. STAT. ANN. § 403.750 (West Supp. 2014); KY. REV. STAT. ANN. § 431.064 (West Supp. 2014); KY. REV. STAT. ANN. § 431.517 (West Supp. 2014); **Maryland**, MD. CODE ANN., CRIM. PROC. § 5-202 (West 2011 & Supp. 2014); MD. R. CRIM. P. 4-216; **Michigan**, MICH. COMP. LAWS § 765.6b (2000); MICH. COMP. LAWS § 780.582a (2007); **Minnesota**, MINN. STAT. § 629.72 (2009); **Mississippi**, MISS. CODE. ANN. § 99-5-37 (West 2006); MISS. CODE. ANN. § 99-5-38 (West 2006); **Montana**, MONT. CODE ANN. § 46-9-302 (West 2009); **New Jersey**, N.J. STAT. ANN. § 2A:162-12 (West Supp. 2014); N.J. STAT. ANN. § 2C:25-26 (West Supp. 2014); **New York**, N.Y. CRIM. PROC. LAW § 530.12 (McKinney Supp. 2014); **North Carolina**, N.C. GEN. STAT. § 15A-534.1 (2009); **North Dakota**, N.D. CENT. CODE § 14-07.1-10 (2008); N.D. R. CRIM. P. 46; **Ohio**, OHIO REV. CODE ANN. § 2919.251 (West 2006); OHIO REV. CODE ANN. § 2937.23 (West 2006); **Oklahoma**, OKLA. STAT. tit. 22, § 1101 (2011); OKLA. STAT. tit. 22, § 1105 (2011); **Oregon**, OR. REV. STAT. § 135.245 (2003); OR. REV. STAT. § 135.247 (2013); OR. REV. STAT. § 135.250 (2003); **Tennessee**, TENN. CODE ANN. § 40-11-150 (West 2008); **Texas**, TEX. CRIM. PROC. CODE ANN. art. 17.152 (West 2014); **Virginia**, VA. CODE ANN. § 18.2-57.2 (West 2012); VA. CODE ANN. § 19.2-120 (West 2007).

mestic violence offenders or for violations of conditions of protective orders or bail.[145]

In the second type of domestic violence bail provision, however, the statute explicitly suggests pretrial detention (denial of bail) for domestic violence offenses without reference to repeat offenses.[146] Five states have provisions of this nature.[147] Some of these provisions list various serious offenses that may qualify for denial of bail and include domestic violence among the list,[148] while others, including Massachusetts and New Hampshire, have several statutes or even chapters devoted to bail for domestic violence offenses alone.[149] Part III of this Note will discuss Massachusetts's and New Hampshire's statutes as a model for a system permitting pretrial detention for domestic violence offenses.[150]

In the third type of domestic violence bail provision, the defendant need not go before a judge or can avoid it if certain conditions are met, and denial of bail is not mentioned.[151] Seven states have provisions of this nature.[152] In California, for example, the defendant need not go before a judge if the "arresting officer determines that there is not a reasonable likelihood that the offense will continue."[153] This statute directs each city and county to "develop a protocol to

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145. **Maryland**, MD. CODE. ANN., CRIM. PROC. § 5-202 (West 2011 & Supp. 2014); **New York**, N.Y. CRIM. PROC. LAW § 530.12 (McKinney Supp. 2014); **Texas**, TEX. CRIM. PROC. CODE ANN. art. 17.152 (West 2014); **Virginia**, VA. CODE ANN. § 19.2-120 (West 2007).

146. *See, e.g.*, FLA. STAT. § 907.041 (2001).

147. **Florida**, FLA. STAT. § 741.28 (2010); FLA. STAT. § 907.041 (2001); FLA. R. CRIM. P. 3.131; **Maine**, ME. REV. STAT. tit. 15, § 1023 (2003 & Supp. 2014); ME. REV. STAT. tit. 15, § 1097 (2003 & Supp. 2014); **Massachusetts**, MASS. GEN. LAWS ch. 276, § 58A (Supp. 2014); MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS §§ 8:04, 8:05, 8:06, 8:07, 8:08 (2014); **New Hampshire**, N.H. REV. STAT. ANN. § 597:2 (Supp. 2014); N.H. DOMESTIC VIOLENCE PROTOCOLS §§ 12-3, 12-4, 12-5, 12-6 (2014); **Utah**, UTAH CODE ANN. § 77-36-2.5 (West Supp. 2014).

148. **Florida**, FLA. STAT. § 907.041 (2001).

149. **Maine**, ME. REV. STAT. tit. 15, § 1023 (2003 & Supp. 2014); ME. REV. STAT. tit. 15, § 1097 (2003 & Supp. 2014); **Massachusetts**, MASS. GEN. LAWS ch. 276, § 58A (Supp. 2014); MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS §§ 8:04, 8:05, 8:06, 8:07, 8:08; **New Hampshire**, N.H. REV. STAT. ANN. § 597:2 (Supp. 2014); N.H. DOMESTIC VIOLENCE PROTOCOLS §§ 12-3, 12-4, 12-5, 12-6.

150. *See infra* Part III.

151. *See, e.g.*, CAL. PENAL CODE § 1269c (West 2012).

152. **California**, CAL. PENAL CODE § 853.6 (West 2012); CAL. PENAL CODE § 1269c (West 2012); CAL. PENAL CODE § 1270.1 (West 2012); CAL. PENAL CODE § 1275 (West 2012); **Connecticut**, CONN. GEN. STAT. § 54-53 (2009); CONN. GEN. STAT. § 54-63c (2009); **Louisiana**, LA. REV. STAT. ANN. § 46:2143 (2010); LA. CODE CRIM. PROC. ANN. art. 330.1 (2003) (allowing pretrial detention, but not specifically mentioning domestic violence offenses); LA. CODE CRIM. PROC. ANN. art. 334 (2003); **Nevada**, NEV. REV. STAT. § 178.484 (2000); **Pennsylvania**, 18 PA. CONS. STAT. § 2711 (2000); PA. R. CRIM. P. 523; **Rhode Island**, R.I. GEN. LAWS § 12-29-4 (2001); **West Virginia**, W. VA. CODE § 62-1C-1 (2002); W. VA. CODE § 62-1C-17c (2002).

153. CAL. PENAL CODE § 853.6 (West 2012).

assist officers to determine when arrest and release is appropriate."[154] In these states, the police officer may set bail and impose conditions on release.[155]

States without a specific domestic violence provision for bail follow one of two approaches. In the first, denial of bail is not mentioned and the defendant is often not required to go before a judge.[156] Bail may be assigned by a law enforcement officer or bail commissioner based upon a bail schedule stipulating monetary amounts for different offenses.[157] If the defendant must go before a judge, the judge has discretion to set conditions of the release that will ensure the defendant's appearance in court.[158] Nine states have provisions of this nature.[159]

In the second approach, statutes provide for pretrial detention or denial of bail for serious offenses, though domestic violence offenses are not mentioned specifically. Seven states have provisions of this nature.[160] In these states, denial of bail may only be available if serious aggravating factors are present.[161] In states where pretrial deten-

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154. *Id.*

155. *See, e.g.*, *id.*

156. *See, e.g.*, ARK. CODE ANN. § 16-81-109 (2013).

157. *See id.* (authorizing the arresting officer to approve bail in the manner prescribed by law where the arrest is made).

158. *See, e.g.*, NEB. REV. STAT. § 29-901.01 (2009).

159. **Arkansas**, ARK. CODE ANN. § 16-81-109 (2013); **Delaware**, DEL. CODE ANN. tit. 11, § 2104 (West 2010); **Kansas**, KAN. STAT. ANN. § 22-2802 (West 2008); **Nebraska**, NEB. REV. STAT. § 29-901 (2009); **New Mexico**, N.M. STAT. ANN. § 31-4-16 (2013); N.M. R. DIST. CT. R.C.R.P. 5-401; **South Carolina**, S.C. CODE ANN. § 17-15-10 (2014); S.C. CODE ANN. § 18-1-90 (2014); **South Dakota**, S.D. CODIFIED LAWS § 23A-43-4 (2004); **Washington**, WA. ST. SUPER. CT. CR. R. 3.2; **Wyoming**, WYO. STAT. ANN. § 5-9-132 (2007); WYO. STAT. ANN. § 7-10-101 (2007).

160. **Arizona**, ARIZ. CONST. art. II, § 22; ARIZ. REV. STAT. ANN. § 13-3961 (Supp. 2014) (West); ARIZ. REV. STAT. ANN. § 13-3967 (West 2010); **Colorado**, COLO. CONST. art. II, § 19; COLO. REV. STAT. § 16-4-101 (2006); COLO. REV. STAT. § 16-4-105 (2006); COLO. REV. STAT. § 16-1-104 (2006); **Hawaii**, HAW. REV. STAT. § 709-906 (2008); HAW. REV. STAT. § 804-3 (2008); **Iowa**, IOWA CODE § 702.11 (2003); IOWA CODE § 708.2A (2003); IOWA CODE § 811.1 (2003); IOWA CODE § 811.1A (2013); **Missouri**, MO. REV. STAT. § 544.455 (2002); MO. REV. STAT. § 544.457 (2002); **Vermont**, VT. STAT. ANN. tit. 13, § 1043 (2007) (first-degree aggravated domestic assault is considered a "violent act" for the purposes of bail); VT. STAT. ANN. tit. 13, § 7553A (2007); VT. STAT. ANN. tit. 13, § 7575 (2007); **Wisconsin**, WIS. STAT. § 968.075 (2007); WIS. STAT. § 969.035 (2007).

161. *Compare* **Arizona**, ARIZ. CONST. art. II, § 22; ARIZ. REV. STAT. ANN. § 13-3967 (Supp. 2014), *and* **Colorado**, COLO. REV. STAT. § 16-4-101 (2006) (where bail may be denied if the defendant committed the "crime of violence" while on probation or parole or on bail for a previous crime of violence charge, after previous felony convictions, et cetera), *with* **Hawaii**, HAW. REV. STAT. § 709-906 (2008); HAW. REV. STAT. § 804-3 (2008), *and* **Missouri**, MO. REV. STAT. § 544.455 (2002); MO. REV. STAT. § 544.457 (2002) (where bail may be denied if the defendant poses a danger to any person or the community), *and* **Iowa**, IOWA CODE § 702.11 (2003); IOWA CODE § 708.2A (2003); IOWA CODE § 811.1 (2003); IOWA CODE § 811.1A (2013), *and* **Wisconsin**,

tion for serious offenses is possible but its application to domestic violence offenses is not statutorily authorized, judges may be unlikely to extend the statute to domestic violence cases. However, such statutes may serve as the foundation for extension to domestic violence offenses.

In total, nine states reference denial of bail for domestic violence offenses, either initially or after repeat offenses.[162]

## II. BAIL STATUTES ARE A CRITICAL FOCAL POINT FOR DOMESTIC VIOLENCE INTERVENTIONS

An analysis of the practical utility of pretrial detention in deterring domestic violence is complicated by the fact that there is no empirical research on this topic given the rarity of pretrial detention statutes for domestic violence offenders.[163] However, the importance of this intervention can be imputed from existing research on mandatory arrest and no-drop prosecution policies and the danger of assault following victims' attempted separation from their abusers.[164]

### *A. The Effects of Mandatory Arrest Policies and No-Drop Prosecution Extended to Pretrial Detention*

As discussed in Part I, research on violence recidivism rates following use of mandatory arrest or no-drop prosecution is promising, if qualified.[165] Contrary to concerns that violence could increase following mandatory state intervention, violence tended to decrease.[166] This result may be extended to pretrial detention in that reducing the defendant's exposure to the victim reduces violence.[167]

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WIS. STAT. § 968.075 (2007); WIS. STAT. § 969.035 (2007) (where bail may be denied for certain forcible felonies and "violent crimes").

162. Florida, Massachusetts, Maine, New Hampshire, and Utah allow pretrial detention for domestic violence offenses without reference to repeat offenses. *See supra* notes 146–49 and accompanying text. Maryland, New York, Texas, and Virginia allow pretrial detention for domestic violence offenses after repeat offenses. *See supra* note 145 and accompanying text.

163. See *supra* text accompanying notes 66–67 for an explanation of the difficulty in conducting empirical research on statutory domestic violence interventions.

164. *See* FORD & REGOLI, *supra* note 82; Sherman & Berk, *supra* note 68; *see generally supra* notes 68–74, 82–87 and accompanying text and *infra* notes 172–79 and accompanying text (providing an overview of the studies determining the efficacy of both mandatory arrest policies and no-drop prosecution in reducing recidivism, as well as studies confirming increased rates of violence upon separation of women from their abusive partners).

165. *See* FORD & REGOLI, *supra* note 82; Sherman & Berk, *supra* note 68; *see supra* notes 68–74, 82–87 and accompanying text.

166. *See, e.g.*, Sherman & Berk, *supra* note 68.

167. *See* Dugan et al., *supra* note 42, at 191–95; Dugan et al., *supra* note 108, at 193–95.

However, as noted, mandatory arrest and prosecution policies may spur retaliatory effects.[168] In this regard, pretrial detention would carry the additional benefit of physically preventing a domestic violence offender from accessing his or her intended victim. Empirical research is required to determine whether pretrial detention could spur a retaliatory effect upon the defendant's release for reasons distinct from mandatory arrest or no-drop prosecution policies, but small sample sizes may impede such research.

### *B. Pivotal Juncture Covered by Bail Statutes: Recognition of the Phenomenon of Separation Assault*

Pretrial detention also covers a critical gap left by mandatory arrest and no-drop prosecution policies: the period between arrest and disposition, which is often lengthy.[169] As observed by the Court in *Salerno*, the risk of offenders committing dangerous acts post-arrest and pre-sentencing is high, as determined by congressional findings.[170] These findings indicated that anywhere from one in six to one in four defendants were rearrested during the pretrial period, a third of whom were rearrested more than once.[171]

This risk is particularly relevant to domestic violence offenses, in which research has consistently shown that the period of separation from one's abuser is the most dangerous.[172] The need for pretrial de-

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168. *See supra* text accompanying notes 72–73, 77.

169. *See* Yair Listokin, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. L. REV. 115, 121 (2007) (reporting the lag between arrest and disposition in sixteen cities at an average of 126 days).

170. United States v. Salerno, 481 U.S. 739, 750 (1987).

171. S. REP. NO. 98-225, at 6 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189 (citing LAZAR INST., PRETRIAL RELEASE: AN EVALUATION OF DEFENDANT OUTCOMES AND PROGRAM IMPACT 48 (1981) and JEFFREY A. ROTH & PAUL B. WICE, INST. FOR LAW & SOC. RESEARCH, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA 41 (1980)):

> In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample studied were rearrested during the pretrial period—one-third of these defendants were rearrested more than once, and some were rearrested as many as four times. Similar levels of pretrial criminality were reported in a study of release practices in the District of Columbia, where thirteen percent of all felony defendants released were rearrested. Among defendants released on surety bond, which under the District of Columbia code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial rearrest occurred at the alarming rate of twenty-five percent. The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial.

*Id.*

172. *See, e.g.*, George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCH. LAW 271 (1982); Walter S. DeKeseredy et al., *Separation/Divorce Sexual*

tention may commonly arise in such circumstances, when the victim is attempting to leave his or her abuser, as Jennifer Martel was—according to her family—attempting to leave Jared Remy when she was murdered.[173] Martha Mahoney famously termed this danger "separation assault": "[a]t the moment of separation or attempted separation—for many women, the first encounter with the authority of law—the *batterer's quest for control* often becomes most acutely violent and potentially lethal."[174] Mahoney and domestic violence research characterize "the batterer's quest for control of the woman . . . as the heart of the battering process."[175] Hence, when the victim begins to attempt to reassert control by leaving the abuser, she or he is at an increased risk of violence. Many studies confirm "increased rates of violence, particularly lethal violence upon perceived, attempted, or actual separation of women from their abusive partners."[176] A woman's attempt to leave the relationship is the most common precursor to intimate partner homicide.[177] The temporal element is crucial, with the danger of assault most acute immediately after separation and diminishing over time.[178] Post-separation violence is common and severe: "one in four survivors experienced at least one form of severe or potentially lethal violence more than once a month," such as being "kicked, raped, choked, stabbed, or shot."[179]

These grim findings highlight crucial areas that can be addressed by pretrial detention: protection during the period of separation from the victim's abuser and particularly protection immediately

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*Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAV. 675 (2004); Mindy B. Mechanic et al., *Intimate Partner Violence and Stalking Behavior: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women*, 15 VIOLENCE & VICTIMS 55, 56 (2000); Aysan Sev'er, *Recent or Imminent Separation and Intimate Violence Against Women: A Conceptual Overview and Some Canadian Examples*, 3 VIOLENCE AGAINST WOMEN 566 (1997); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 3 (1993).

173. Fraga, *supra* note 1.

174. Mahoney, *supra* note 38, at 5–6 (emphasis added).

175. *Id.* at 5.

176. *See, e.g.*, Mechanic et al., *supra* note 172, at 55.

177. Morton et al., *supra* note 43, at 91 (victim separation from perpetrator was the most common precursor to victim homicide (in 41% of cases), even more common than history of domestic violence (29%)).

178. *See* Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1371 (2000) (the majority of first assaults by an ex-partner took place within ten weeks of the woman's exit from the shelter where she had gone in order to separate from her partner); Meloy et al., *supra* note 108, at 453–54 (58% of post-protective-order arrests for domestic violence occurred within the first six months after issuance of the protective order).

179. Fleury et al., *supra* note 178, at 1371.

upon separation (from the time of the abuser's arrest) when it is most needed. No other intervention can provide this depth of protection at this critical time: other mandatory policies cover only arrest, charging, and prosecution. Protective orders are insufficient; research shows that almost half of abused women experienced a violation of their order of protection within six months.[180] The only other intervention that covers this critical period is GPS monitoring, which can be used in conjunction with a policy of pretrial detention for domestic violence offenses.[181] A judge may determine in less severe cases to resort to electronic monitoring and in others to order pretrial detention, or GPS monitoring may be used once the defendant is released from pretrial detention or incarceration.

Research on separation assault belies past common assumptions that victims who did not leave their abusive mates were masochists who had a "conscious or unconscious need for pain and punishment."[182] Rather, in addition to psychological and sociological factors (learned helplessness, victim blaming, institutional sexism, patriarchal norms), research shows that victims in abusive relationships have a compelling reason not to leave their abusive partners: explicit or implicit and well-founded threats of violence.[183] Bail statute reform has the potential to alter this calculus in the victim's favor by providing protection not found in other domestic violence interventions.

Furthermore, legal interventions have the power to alter sociological conceptions of a crime, as observed by Elizabeth Schneider:

> Various forms of legal process define the harm of battering differently and convey particular messages about its social impact . . . . The names that are used define the claims that are made . . . . The meaning of the name matters. Making battering a crime against the state has a broader social and more public meaning than granting an individual order of protection. Defining battering as a civil rights violation reflects a different set of social meanings than an individual ruling. Defining battering in the more general context of stalking, or as a violation of international human rights, conveys a different social message than a restraining order .

180. Mechanic et al., *supra* note 172, at 67.

181. *See supra* notes 98–105 and accompanying text.

182. Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE, & ABUSE 163, 164 (2003).

183. *See, e.g.*, *id.* at 165.

> *. . . The development of legal process can shape social consciousness by identifying and redefining harm, breaking down the public-private dichotomy, and legitimizing the seriousness of the problem*.[184]

Mandatory arrest and no-drop prosecution policies have made great strides in converting domestic violence from a private affair in which the state feared to intrude into a public matter of societal concern.[185] The further step of categorizing domestic abuse as a serious offense that may require pretrial detention will push the sociological conception of abuse still further by legitimizing its seriousness as a crime on par with those singled out for pretrial detention.

## III. PROPOSED MODEL AND SUGGESTIONS FOR EXECUTION OF DOMESTIC VIOLENCE INTERVENTION THROUGH PRETRIAL DETENTION STATUTE

### *A. Massachusetts and New Hampshire as Models*

Massachusetts's and New Hampshire's statutes together may serve as a model for statutory authorization of pretrial detention for domestic violence offenses.[186] New Hampshire clearly designates predicate domestic violence crimes that can qualify a defendant for a detention hearing.[187] Massachusetts establishes in detail the procedures for such a hearing,[188] while New Hampshire details many factors the court may and should consider in such a hearing.[189]

New Hampshire's statute broadly defines predicate domestic violence offenses that may fall under the pretrial detention provision.[190] Massachusetts's standards are more vague: the Commonwealth may seek a detention hearing for a defendant "charged with abuse."[191] A detention hearing is appropriate if prosecutors believe that the defendant's release "will endanger the safety of any other person or

184. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 46 (2000) (emphasis added).

185. *See* Siegel, *supra* note 49, at 2118.

186. *See* MASS. GEN. LAWS ch. 276, § 58A (Supp. 2014); MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS §§ 8:04, 8:05, 8:06, 8:07, 8:08 (2014); N.H. REV. STAT. ANN. § 597:2 (Supp. 2014); N.H. DOMESTIC VIOLENCE PROTOCOLS §§ 12-3, 12-4, 12-5, 12-6 (2014).

187. *See* N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-5.

188. *See* MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06.

189. *See* N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4.

190. *See id.* § 12-5.

191. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:04.

the community."[192] Once the court determines that there is probable cause to believe that the defendant committed the predicate crime, the defendant must be detained until the detention hearing.[193] The defendant has procedural rights at the hearing, including the rights to counsel, to testify, to present witnesses, to cross-examine witnesses, and to present information.[194] If "the judge finds by [a] clear and convincing [evidentiary standard] that no conditions of release will reasonably assure the safety of any other person or the community," then the defendant must be detained for up to ninety days.[195]

The matter of how to determine whether no conditions will "reasonably assure" the victim's safety is left unexplained by Massachusetts's statutes,[196] but New Hampshire attempts to fill this gap with an extensive list of factors that the court may consider.[197]

A combination of elements from both Massachusetts's and New Hampshire's statutory provisions can serve as a comprehensive scheme for pretrial detention of domestic violence offenders.[198] New Hampshire's list of offenses that can qualify as a predicate for a detention hearing is attractively broad yet specific: it encompasses a wide range of offenses, from harassment, criminal threatening, and unauthorized entry to assault and sexual assault, and it also clearly delineates qualifying offenses.[199] This broad scope would give prosecutors wide flexibility to pursue denial of bail for dangerous domestic violence offenders.[200] The specificity of the statute, in listing many offenses rather than merely stating "a defendant charged with abuse," à la Massachusetts,[201] also encourages prosecutors to consider a detention hearing when they encounter any of the domestic violence offenses enumerated.[202]

Massachusetts's detailed explication of the procedures of a detention hearing particular to domestic violence offenses would encourage streamlined implementation of such hearings.[203] Several elements of Massachusetts's approach are noteworthy, apart from the

192. *Id.* at cmt. (citing MASS. GEN. LAWS. ch. 276, § 58A (Supp. 2014)).
193. *See id.* § 8:04.
194. *See* MASS. GEN. LAWS. ch. 276, § 58A.
195. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06.
196. *Id.* § 8:04.
197. *See* N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4 (2014); *see also infra* Part III.C § 4.
198. See *infra* Part III.C for model legislation.
199. N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-5.
200. *See id.*
201. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:04.
202. *See* N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-5.
203. *See* MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06.

rarity of a comprehensive scheme for detention hearings for domestic violence offenders.[204] Massachusetts clarifies the role of the judicial actors in each stage: the Commonwealth must move for a detention hearing, and the judge must find probable cause to proceed.[205] The burden of proof is clear, as is the maximum duration of the defendant's confinement.[206] Additionally, procedural due process protections afforded to the defendant are specified.[207] Finally, New Hampshire completes the model system with a wide-ranging list of risk factors to consider when determining whether to detain the defendant without bail.[208] Combining New Hampshire's list of predicate offenses, Massachusetts's procedural rules, and New Hampshire's risk factors would yield a powerful system for detention hearings for domestic violence offenders.[209]

### *B. Further Changes to Encourage Use of Such Statutes*

Part of the widespread outrage following Jennifer Martel's case is attributable to the fact that her home state of Massachusetts has one of the most robust policies in place that might have prevented her tragic death, as indicated by media focus on Massachusetts's dangerousness hearing policy and the resultant internal investigation in the District Attorney's office.[210] This event draws into sharp relief the critical importance of prosecutorial discretion: the strongest pretrial detention statute in the nation will do nothing to protect victims if prosecutors choose not to resort to it. Therefore, a similar strategy to mandatory prosecution policies could be implemented: prosecutors should be required to request a detention hearing if a certain number of risk factors, as delineated by New Hampshire, are implicated in the case.

Furthermore, statutes may instruct judges to act notwithstanding the prosecutor's decision, as in Massachusetts's directive that "[t]he bail law should be read to require the judge to review the defendant's probation record before any . . . pretrial release decision is made . . . irrespective of the prosecution's recommendations on the

204. *See id.*
205. *Id.*
206. *See id.*
207. *See id.*
208. N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4 cmt. (2014).
209. See *infra* Part III.C for model legislation.
210. *See* Wallack & Murphy, *supra* note 32.

question of bail."[211] Similarly, the model legislation for pretrial detention of domestic violence offenders contains a provision requiring the judge setting bail to consider *sua sponte* whether enough risk factors are met to justify a detention hearing.

### *C. Proposed Model Domestic Violence Pretrial Detention Statute*

The proposed model statute is as follows:

**§ 1. In this chapter:**[212]

"Abuse" or "domestic violence" means the commission, or attempted commission, of one or more of the acts described in subparagraphs (a) through (g) by a family or household member or by a current or former sexual or intimate partner, where such conduct is determined to constitute a credible present threat to the petitioner's safety. The court may consider evidence of such acts, regardless of their proximity in time to the filing of the petition, which, in combination with recent conduct, reflects an ongoing pattern of behavior which reasonably causes or has caused the petitioner to fear for his or her safety or well-being:[213]

(a) Assault or reckless conduct;[214]

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211. MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:04 cmt.

212. Adapted from N.H. REV. STAT. ANN. § 173-B:1 (Supp. 2014).

213. *Id.* § 173-B:1.

214. *Id.* **Includes first-degree assault, second-degree assault, simple assault, and reckless conduct.**

**First-degree assault**: "I. A person is guilty of a class A felony if he: (a) Purposely causes serious bodily injury to another; or (b) Purposely or knowingly causes bodily injury to another by means of a deadly weapon . . . or (c) Purposely or knowingly causes injury to another resulting in miscarriage or stillbirth; or (d) Knowingly or recklessly causes serious bodily injury to a person under 13 years of age." *Id.* § 631:1.

**Second-degree assault**: "I. A person is guilty of a class B felony if he or she: (a) Knowingly or recklessly causes serious bodily injury to another; or (b) Recklessly causes bodily injury to another by means of a deadly weapon . . . or (c) Recklessly causes bodily injury to another under circumstances manifesting extreme indifference to the value of human life; or (d) Purposely or knowingly causes bodily injury to a child under 13 years of age; or (e) Recklessly or negligently causes injury to another resulting in miscarriage or stillbirth; or (f) Purposely or knowingly engages in the strangulation of another." *Id.* § 631:2.

**Simple assault**: "I. A person is guilty of simple assault if he: (a) Purposely or knowingly causes bodily injury or unprivileged physical contact to another; or (b) Recklessly causes bodily injury to another; or (c) Negligently causes bodily injury to another by means of a deadly weapon." *Id.* § 631:2-a.

**Reckless conduct**: "I. A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury." *Id.* § 631:3.

(b) Criminal threatening;[215]
(c) Sexual assault;[216]
(d) Interference with freedom;[217]

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215. *Id.* § 173-B:1.

**Criminal threatening**: "I. A person is guilty of criminal threatening when: (a) By physical conduct, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact; or (b) The person places any object or graffiti on the property of another with a purpose to coerce or terrorize any person; or (c) The person threatens to commit any crime against the property of another with a purpose to coerce or terrorize any person; or (d) The person threatens to commit any crime against the person of another with a purpose to terrorize any person; or (e) The person threatens to commit any crime of violence, or threatens the delivery or use of a biological or chemical substance, with a purpose to cause evacuation of a building, place of assembly, facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience; or (f) The person delivers, threatens to deliver, or causes the delivery of any substance the actor knows could be perceived as a biological or chemical substance, to another person with the purpose of causing fear or terror, or in reckless disregard of causing such fear or terror." *Id.* § 631:4.

216. *Id.* § 173-B:1. **Includes aggravated felonious sexual assault, felonious sexual assault, and sexual assault.**

**Aggravated felonious sexual assault**: "I. A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances: (a) When the actor overcomes the victim through the actual application of physical force, physical violence or superior physical strength. (b) When the victim is physically helpless to resist. (c) When the actor coerces the victim to submit by threatening to use physical violence or superior physical strength on the victim, and the victim believes that the actor has the present ability to execute these threats. (d) When the actor coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim believes that the actor has the ability to execute these threats in the future. (e) When the victim submits under circumstances involving false imprisonment, kidnapping or extortion . . . ." *Id.* § 632-A:2.

**Felonious sexual assault**: "A person is guilty of a class B felony if such person: I. Subjects a person to sexual contact and causes serious personal injury to the victim under any of the circumstances named in [the statute for aggravated felonious assault] . . . ." *Id.* § 632-A:3.

**Sexual assault**: "I. A person is guilty of a class A misdemeanor under any of the following circumstances: (a) When the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in [the statute for aggravated felonious assault] . . . ." *Id.* § 632-A:4.

217. *Id.* § 173-B:1. **Includes kidnapping, criminal restraint, false imprisonment, and stalking.**

**Kidnapping**: "I. A person is guilty of kidnapping if he knowingly confines another under his control with a purpose to: (a) Hold him for ransom or as a hostage; or (b) Avoid apprehension by a law enforcement official; or (c) Terrorize him or some other person; or (d) Commit an offense against him . . . ." *Id.* § 633:1.

**Criminal restraint**: "I. A person is guilty . . . if he knowingly confines another unlawfully in circumstances exposing him to risk of serious bodily injury. II. The meaning of 'confines another unlawfully', as used in this section and [the statute for false imprisonment], includes but is not limited to confinement accomplished by force, threat or deception or, in the case of a person who is under the age of 16 or incompetent, if it is accomplished without the consent of his parent or guardian." *Id.* § 633:2.

**False imprisonment**: "A person is guilty of a misdemeanor if he knowingly confines another unlawfully . . . so as to interfere substantially with his physical movement." *Id.* § 633:3.

(e) Destruction of property;[218]
(f) Unauthorized entry;[219]
(g) Harassment.[220]

**§ 2. Motion for detention hearing.**[221]

The [People/Commonwealth] may move, based on dangerousness, for an order of pretrial detention or release on conditions for an offense enumerated in § 1 that has as an element of the use, attempted use or threatened use of physical force against the person of another or any other offense that, by its nature, involves a substantial risk that physical force against the person of another may result.

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**Stalking**: "I. A person commits the offense of stalking if such person: (a) Purposely, knowingly, or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person's immediate family, and the person is actually placed in such fear . . . ." *Id.* § 633:3-a.

218. *Id.* § 173-B:1. **Includes arson and criminal mischief.**

**Arson**: "A person is guilty of arson if he knowingly starts a fire or causes an explosion which unlawfully damages the property of another." *Id.* § 634:1.

**Criminal mischief**: "I. A person is guilty of criminal mischief who, having no right to do so nor any reasonable basis for belief of having such a right, purposely or recklessly damages property of another." *Id.* § 634:2.

219. *Id.* § 173-B:1. **Includes burglary and criminal trespass.**

**Burglary**: "I. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied section thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned." *Id.* § 635:1.

**Criminal trespass**: "I. A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place." *Id.* § 635:2.

220. *Id.* § 173-B:1.

**Harassment:** "I. A person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person: (a) Makes a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose or without disclosing his or her identity and with a purpose to annoy, abuse, threaten, or alarm another; or (b) Makes repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another; or (c) Insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or (d) Knowingly communicates any matter of a character tending to incite murder, assault, or arson; or (e) With the purpose to annoy or alarm another, communicates any matter containing any threat to kidnap any person or to commit a violation of RSA 633:4; or a threat to the life or safety of another; or (f) With the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected." *Id.* § 644:4, *held unconstitutional by* State v. Pierce, 887 A.2d 132 (N.H. 2005) (invalidating § I(f)).

221. Adapted from MASS. GEN. LAWS ch. 276, § 58A(1) (Supp. 2014).

If three or more of the risk factors enumerated in § 4 are met, as determined by the [People/Commonwealth], the [People/Commonwealth] shall move for an order of pretrial detention or release on conditions. Regardless of the determination of the [People/Commonwealth], the judge issuing bail shall consider whether sufficient risk factors are present as to warrant a detention hearing. The court must make a determination that there is probable cause to believe that the defendant has committed a qualifying crime.

If the court finds probable cause, the defendant must be detained pending the hearing.

**§ 3. Procedure of detention hearing.**[222]

If the prosecution moves for a detention hearing pursuant to § 2, the court must hold such a hearing immediately upon the person's first appearance before the court.[223] At the hearing, the defendant has the right to counsel—and, if financially unable to retain adequate representation, to have counsel appointed—to testify, to present witnesses, to cross-examine witnesses who appear, and to present information.[224] The rules concerning admissibility of evidence in a criminal case shall not apply to the presentation and consideration of information at the hearing.

If the court determines at such a hearing that personal recognizance "will endanger the safety of any other person or the community," the court may order pretrial custody of the defendant or may

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222. Adapted from *id.* § 58A(4).

223. The following is adapted from MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06 cmt. (2014):

> Unless the court allows a continuance of no more than three business days for the [People/Commonwealth] or seven days for the defendant. A continuance of three business days may be granted to the [People/Commonwealth] only upon a showing of good cause. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. If the defendant is charged with violating a protection order issued by another jurisdiction, the [People/Commonwealth] moves for a pretrial detention hearing, and the defendant is before the court, the court should conduct the hearing as it would if the defendant were charged with violating an order issued by the [People/Commonwealth].

224. The following is adapted from MASS. GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS § 8:06 cmt. (2014):

> When the defendant seeks to call a particular witness, however, the court may request an offer of proof as to the relevance of the proposed testimony. If the testimony, even if accepted in its entirety, would be irrelevant to the issue of dangerousness, it may be possible for the court to exclude the witness's testimony or to accept a stipulation between the [People/Commonwealth] and the defendant for purposes of the detention hearing only.

order the defendant released upon conditions.[225] If, after the hearing, the judge finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, the judge must order the defendant detained for a period not exceeding ninety days.

**§ 4. Risk factors to consider in determining whether no conditions will reasonably assure the safety of any other person or the community.**[226]

The court or justice may consider, but shall not be limited to considering, any of the following conduct as evidence of posing a danger:[227]

(a) Threats of suicide;

(b) Acute depression;

(c) History of violating protective orders;

(d) Possessing or attempting to possess a deadly weapon in violation of an order;

(e) Death threats or threats of possessiveness toward another;

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225. The statute describes the conditions as follows:

> Such conditions must include the requirement that the person not commit a federal, state, or local crime during the period of release and may include other conditions that the court finds necessary to assure the defendant's appearance at trial or the safety of a particular person or of the community. In abuse cases, such conditions should always include an order to have no contact with the victim, if the victim requests such an order.

MASS. GEN. LAWS ch. 276, § 58A(2)(A)–(B).

226. Adapted from N.H. REV. STAT. ANN. § 597:2(III-a) (Supp. 2014) and N.H. DOMESTIC VIOLENCE PROTOCOLS § 12-4 cmt. (2014).

227. The statute provides the following discussion of judicial danger assessment:

> In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse, or violation of a temporary or permanent protection order, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction.

MASS. GEN. LAWS ch. 276, § 58A(5).

(f) Stalking, as defined in § 1; and
(g) Cruelty to or violence directed toward pets.

Additional risk factors that the court may consider, and that the [People/Commonwealth] should consider in determining whether to move for a detention hearing, are:

(a) Escalation of physical violence;
(b) Escalation of other forms of abuse;
(c) Sexual abuse of the victim;
(d) Recent acquisition or change in use of weapons;
(e) Suicidal ideation, threats or attempts;
(f) Homicidal ideation, threats or attempts;
(g) Change in alcohol or other drug use/abuse;
(h) Stalking or other surveillance/monitoring behavior;
(i) Centrality of the victim to the perpetrator ("he/she's all I have");
(j) Jealousy/obsessiveness about, or preoccupation with, the victim;
(k) Mental health concerns connected with violent behavior;
(l) Other criminal behavior or injunctions (e.g., resisting arrest);
(m) Increase in personal risk taking (e.g., violation of restraining orders);
(n) Interference with the victim's help-seeking attempts (e.g., pulling a phone jack out of the wall);
(o) Imprisonment of the victim in the home;
(p) Symbolic violence including destruction of the victim's property or harming pets;
(q) The victim's attempt to flee the batterer or to terminate the relationship;
(r) Batterer's access to the victim or the victim's family;
(s) Pending separation, divorce or custody proceedings; and
(t) Recent termination from employment.

**§ 5. Detention order.**[228]

In a detention order issued pursuant to the provisions of § 3 the judge shall (a) include written findings of fact and a written statement of the reasons for the detention; (b) direct that the person be committed to custody or confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and (c) direct that the person be afforded reasonable opportunity for private consulta-

228. Adapted from *id.* § 58A(4).

tion with his counsel. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the judge, at any time before trial, if the judge finds that information exists that was not known at the time of the hearing and that has a material bearing on the issue and whether there are conditions of release that will reasonably assure the safety of any other person and the community.

**§ 6. Presumption of innocence.**[229]

Nothing in this chapter shall be construed as modifying or limiting the presumption of innocence.

**§ 7. Review process.**[230]

A person aggrieved by the denial of a district court judge to admit him to bail on his personal recognizance with or without surety may petition the superior court for a review of the order of the recognizance, and the judge of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court.[231] The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court within two business days of the peti-

229. *Id.* § 58A(6).

230. Adapted from *id.* § 58A(7).

231. The petition process is described elsewhere as follows:

> When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, [either] the clerk of the district court or the detaining authority, . . . shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and of the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation.

*Id.* § 58.

tion having been filed.[232] The superior court shall, in accordance with the standards set forth herein, hear the petition for review as speedily as practicable or within five business days of the filing of the petition. The judge of the superior court hearing the review may consider the record below, which the [People/Commonwealth] and the petitioner may supplement. The judge of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, at his discretion, to reasonably assure the effective administration of justice, make any other order of bail or recognizance, or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.

### *D. Minimizing Infringement of the Defendant's Rights*

Infringements of the defendant's constitutional rights are minimized by the specific protections furnished by the model legislation. The defendant's interest in liberty and justice is substantial, protected by the Eighth Amendment's ban on cruel and unusual punishment, the presumption of innocence, and procedural and substantive due process.[233]

Before a detention hearing may take place, the court must determine that there is probable cause to believe the defendant has committed a predicate crime.[234] The predicate crime or crimes must constitute a "credible present threat" to the petitioner's safety, and must reflect an "ongoing pattern of behavior" which "reasonably causes . . . the petitioner to fear for his or her safety," and "involves a substantial risk that physical force . . . may result."[235] These limitations ensure that a detention hearing will only be sought, and granted, when the threat to the petitioner is severe and well founded. The de-

232. The statute offers further description of the petition process:

> The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process; provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court.

*Id.*

233. *See supra* Part I.B.5.

234. *See supra* Part III.C § 2.

235. *See supra* Part III.C § 1–2.

tention hearing must be held "immediately upon the person's first appearance before the court," to minimize the duration of the defendant's detention prior to an evidentiary hearing.[236]

During the detention hearing, the defendant's right to procedural due process is safeguarded by the provision of a "full-blown adversary hearing," as endorsed by the Court in *Salerno*, with counsel, testimony, witnesses, and admission of evidence.[237] The requirement that the judge find that "no conditions of release will reasonably assure" the petitioner's safety by a clear and convincing evidentiary standard further protects the defendant from improper detention.[238] Finally, the judge must provide written findings of fact and a statement of the reasons for the detention, and the defendant may promptly petition the superior court for review.[239] The statute stipulates that such procedures shall not abridge the presumption of innocence, a determination supported by the Supreme Court in *Salerno*.[240] These protections and procedures safeguard the defendant's constitutional rights throughout the process to the extent possible.

### *E. Means of Encouraging Enactment of Statutes*

Domestic violence pretrial detention statutes could be federally encouraged via the Violence Against Women Act ("VAWA").[241] VAWA, as passed in 1994 and reauthorized in 2013, comprehensively reformed legal strategies surrounding crimes of gendered violence.[242] It strengthened federal penalties for certain offenses and, through extensive grants, supported training of police officers, prosecutors, and judges to increase understanding of gendered offenses.[243] VAWA grants could be used to incentivize statutes that enable pretrial detention of domestic violence offenders and to educate legal actors as to the importance of such policies.

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236. *See supra* Part III.C § 3.

237. *See* United States v. Salerno, 481 U.S. 739, 750 (1987); *see supra* Part III.C § 3.

238. *See supra* Part III.C § 3.

239. *See supra* Part III.C §§ 5, 7.

240. *See* 481 U.S. at 746–51; *supra* Part I.B.5; *supra* Part III.C § 6.

241. *E.g.*, 42 U.S.C. § 13991 (2012).

242. *See* Leila Abolfazli, *Violence Against Women Act (VAWA)*, 7 GEO. J. GENDER & L. 863, 868–75 (2006).

243. *Id.*

## CONCLUSION

Domestic violence and intimate partner homicide continue to be serious concerns that are insufficiently addressed by current policies of mandatory arrest, no-drop prosecution, and mandatory medical reporting. Pretrial detention of domestic violence offenders could serve as a potent intervention that protects victims during the period of separation from an abusive partner when such protection is most needed. Pretrial detention on the basis of dangerousness was federally authorized by the Bail Reform Act and upheld by the Supreme Court in *United States v. Salerno*.[244] Pretrial detention in the domestic violence context could be effectuated by combining Massachusetts's and New Hampshire's already-existing models. Combined, New Hampshire's list of predicate offenses that can qualify a defendant for a dangerousness hearing, Massachusetts's detailed procedures for a hearing, and New Hampshire's list of risk factors that can be used to determine whether detention is required, can create a robust system for pretrial detention for domestic violence offenses. Such a system would minimize infringement of the defendant's constitutional rights with multiple safeguards. If pretrial detention hearings are mandatory when a certain number of risk factors are met, tragedies like Jennifer Martel's case could be prevented. The outlook for men and women like Jennifer is optimistic: legislators are taking note of the need to reform domestic violence laws, suggesting overhauls of existing systems.[245] The proposals made herein warrant consideration as legislators move forward with domestic violence law reform, as pretrial detention and mandatory detention hearings could provide protection that domestic violence victims lack under current policies.

244. 18 U.S.C. § 3142 (2012); 481 U.S. 739, 741 (1987).

245. *See supra* note 35 and accompanying text.

## APPENDIX A: DANGER ASSESSMENT[246]

The Danger Assessment has two portions. In the first, the participant is given a calendar and asked to:

> [M]ark the approximate dates during the past year when [she/he] was abused by [her/his] partner or ex partner. Write on that date how bad the incident was according to the following scale:
>
> 1. Slapping, pushing; no injuries and/or lasting pain[;]
> 2. Punching, kicking; bruises, cuts, and/or continuing pain[;]
> 3. "Beating up"; severe contusions, burns, broken bones, miscarriage[;]
> 4. Threat to use weapon; head injury, internal injury, permanent injury, miscarriage[;]
> 5. Use of weapon; wounds from weapon[.]

In the second portion, the participant marks "yes" or "no" for each of twenty items:

> 1. Has the physical violence increased in severity or frequency over the past year?
> 2. Does he own a gun?
> 3. Have you left him after living together during the past year? . . .
> 4. Is he unemployed?
> 5. Has he ever used a weapon against you or threatened you with a lethal weapon? . . .
> 6. Does he threaten to kill you?
> 7. Has he avoided being arrested for domestic violence?
> 8. Do you have a child that is not his?
> 9. Has he ever forced you to have sex when you did not wish to do so?
> 10. Does he ever try to choke you?
> 11. Does he use illegal drugs? By drugs, I mean "uppers" or amphetamines, "meth", speed, angel dust, cocaine, "crack", street drugs or mixtures.
> 12. Is he an alcoholic or problem drinker?
> 13. Does he control most or all of your daily activities? (For instance: does he tell you who you can be friends with,

246. Campbell et al., *supra* note 25, at 655.

> when you can see your family, how much money you can use, or when you can take the car? . . .
>
> 14. Is he violently and constantly jealous of you? (For instance, does he say "If I can't have you, no one can.")
>
> 15. Have you ever been beaten by him while you were pregnant? . . .
>
> 16. Has he ever threatened or tried to commit suicide?
>
> 17. Does he threaten to harm your children?
>
> 18. Do you believe he is capable of killing you?
>
> 19. Does he follow or spy on you, leave threatening notes or messages on answering machine [sic], destroy your property, or call you when you don't want him to?
>
> 20. Have you ever threatened or tried to commit suicide?

Scores are rated as follows: less than 8 answers of "yes"—*variable* danger category; 8-13 answers of "yes"—*increased* danger category; 14-17 answers of "yes"—*severe* danger category; 18+ answers of "yes"—*extreme* danger category.

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# RECIDIVISM TRENDS OF DOMESTIC VIOLENCE OFFENDERS IN WASHINGTON STATE

The 2012 Washington State Legislature passed a bill directing the Washington State Institute for Public Policy (WSIPP) to complete the following research tasks on domestic violence offenders:[1]

1) Review the research literature on treatment for domestic violence offenders and other interventions effective at reducing recidivism;

2) Survey states' laws regarding domestic violence treatment for offenders; and

3) Analyze recidivism rates of domestic violence offenders in Washington.

WSIPP published findings earlier this year on the first two tasks.[2] In this report, we complete the legislative assignment and describe the recidivism rates of domestic violence offenders in Washington.[3]

To conduct the analyses in this report, we use WSIPP's criminal history database, which was developed to conduct criminal justice research at the request of the legislature. The database is a synthesis of data from the Administrative Office of the Courts (AOC) and the Department of Corrections (DOC).[4]

This report contains three sections. In the first section, we provide context on the volume of cases filed in Washington State's criminal courts and the proportion of those cases that are domestic violence. Next, we examine re-offense behavior of domestic violence offenders after entering the criminal court system. In the final section, we examine recidivism trends of domestic violence offenders over an eight year period. A technical appendix contains a detailed description of the data and data-processing for this study.

Suggested citation: Drake, E., Harmon, L., & Miller, M. (2013). *Recidivism Trends of Domestic Violence Offenders in Washington State.* (Document No. 13-08-1201). Olympia: Washington State Institute for Public Policy.

[1] Engrossed Substitute House Bill 2363, Laws of 2012.

[2] Miller, M., Drake, E., & Nafziger, M. (2013). *What Works to Reduce Recidivism by Domestic Violence Offenders? (Document No. 13-01-1201).* Olympia: Washington State Institute for Public Policy.

[3] WSIPP was also directed to estimate of the number of domestic violence offenders sentenced to certified domestic violence perpetrator treatment in Washington State and completion rates for those entering treatment; however, those data are not available.

[4] WSIPP conducts a matching process using the court case number and the primary identification number from the data systems to link criminal history records. The criminal history database is intended for research purposes.

## I. Court Cases Filed in Washington State

In this section, we examine the prevalence of cases filed in Washington's criminal courts and the proportion of those cases that involve domestic violence.[5] In Washington State, a prosecutor files cases in criminal court.

Exhibit 1 displays the number of cases filed in court by the fiscal year (FY) the case was filed. Nearly 2.4 million cases were filed in Washington State's criminal courts between FY 2001 and 2012.

Cases are categorized as either felony or misdemeanor based on the most serious offense associated with the case.[6] As shown in Exhibit 1, 78% of cases filed in Washington's criminal courts are misdemeanor offenses.

Current Washington State law defines domestic violence broadly—acts or threats of physical harm, sexual assault, or stalking by one household or family member against another household or family member.[7]

We can identify domestic violence offenses in WSIPP's criminal history database in two ways. First, offenses are classified as domestic violence when the description from the Revised Code of Washington (RCW) indicates it as such (e.g., domestic violence violation of a no contact order).

Second, an indicator in the database, provided by the AOC, is used to identify domestic violence offenses that are not specifically domestic violence by statute. For example, rape in the first degree is not specifically a domestic violence offense, but when coupled with the AOC indicator, the offense is counted as domestic violence.

***Exhibit 1***
**Cases Filed in Washington State Criminal Courts**

| | Felony | | Misdemeanor | | Total |
|---|---|---|---|---|---|
| FY | N | % | N | % | N |
| 2001 | 39,746 | 21% | 147,476 | 79% | 187,222 |
| 2002 | 41,289 | 22% | 149,072 | 78% | 190,361 |
| 2003 | 41,912 | 21% | 157,899 | 79% | 199,811 |
| 2004 | 44,166 | 22% | 159,013 | 78% | 203,179 |
| 2005 | 45,877 | 22% | 158,185 | 78% | 204,062 |
| 2006 | 48,119 | 23% | 161,886 | 77% | 210,005 |
| 2007 | 49,748 | 24% | 161,412 | 76% | 211,160 |
| 2008 | 44,497 | 22% | 159,608 | 78% | 204,105 |
| 2009 | 41,211 | 21% | 156,935 | 79% | 198,146 |
| 2010 | 38,495 | 20% | 154,329 | 80% | 192,824 |
| 2011 | 40,147 | 21% | 150,726 | 79% | 190,873 |
| 2012 | 39,912 | 22% | 142,073 | 78% | 181,985 |
| Total | 515,119 | 22% | 1,858,614 | 78% | 2,373,733 |

Data source: WSIPP criminal history database

[5] We include cases filed in Washington's District and Superior Courts.
[6] Multiple charges or offenses can be associated with a criminal case filed in court.
[7] RCW 26.50.010

For all cases filed in Washington State's criminal courts, we examined how many cases had at least one domestic violence charge associated with the case. As shown in Exhibit 2, approximately 20% of all misdemeanor cases include a domestic violence offense and 12% of all felony cases include a domestic violence offense.

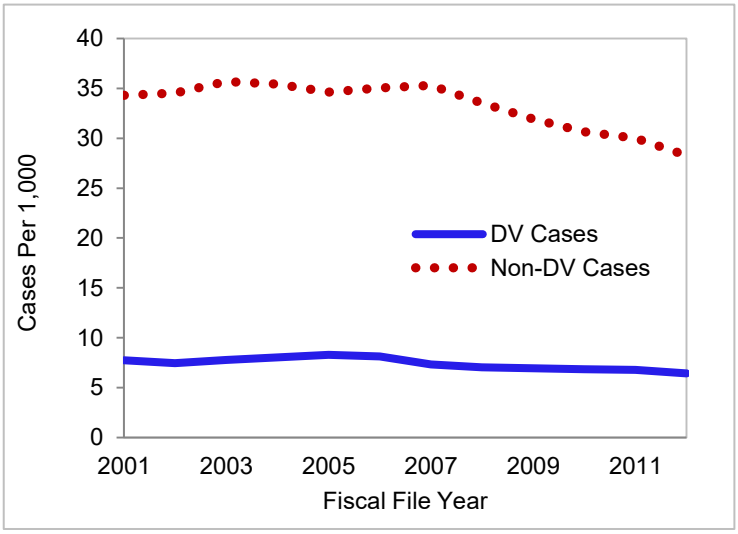
Exhibit 3 displays the rate of cases filed per capita in Washington State. Since 2007, non-domestic violence filings have declined 20% and domestic violence filings have declined 12%. In 2012, there were 33 non-domestic violence cases filed in criminal court per 1,000 people and 6 domestic violence cases per 1,000 people.

***Exhibit 2***
**Percent of Court Cases Filed in Washington State**
**By Domestic Violence (DV) or Non-Domestic Violence**

| | Felony | | | | Misdemeanor | | | |
|---|---|---|---|---|---|---|---|---|
| | DV case | | Non-DV case | | DV case | | Non-DV case | |
| FY | N | % | N | % | N | % | N | % |
| 2001 | 4,293 | 11% | 35,453 | 89% | 30,209 | 20% | 117,267 | 80% |
| 2002 | 4,592 | 11% | 36,697 | 89% | 29,228 | 20% | 119,844 | 80% |
| 2003 | 4,972 | 12% | 36,940 | 88% | 30,687 | 19% | 127,212 | 81% |
| 2004 | 5,415 | 12% | 38,751 | 88% | 32,125 | 20% | 126,888 | 80% |
| 2005 | 6,046 | 13% | 39,831 | 87% | 33,296 | 21% | 124,889 | 79% |
| 2006 | 6,235 | 13% | 41,884 | 87% | 33,278 | 21% | 128,608 | 79% |
| 2007 | 5,397 | 11% | 44,351 | 89% | 30,828 | 19% | 130,584 | 81% |
| 2008 | 5,342 | 12% | 39,155 | 88% | 30,083 | 19% | 129,525 | 81% |
| 2009 | 5,359 | 13% | 35,852 | 87% | 30,036 | 19% | 126,899 | 81% |
| 2010 | 5,453 | 14% | 33,042 | 86% | 29,712 | 19% | 124,617 | 81% |
| 2011 | 5,418 | 13% | 34,729 | 87% | 29,675 | 20% | 121,051 | 80% |
| 2012 | 5,338 | 13% | 34,574 | 87% | 28,396 | 20% | 113,677 | 80% |
| Total | 63,860 | 12% | 451,259 | 88% | 367,553 | 20% | 1,491,061 | 80% |

Data source: WSIPP criminal history database

***Exhibit 3***
**Rate of Cases Filed Per Capita in Washington State**




Data source: WSIPP criminal history database & Office of Financial Management population data.

## II. Domestic Violence Offenders Compared to Other Offenders

This section of the report examines the profile of domestic violence offenders compared with other offenders. We describe offender characteristics such as criminal history and demographics upon entry into the court system.

For simplicity, we select a single cohort of offenders—FY 2008—resulting in a total of 155,380 offenders.[8] Additionally, this is the most recent cohort available while allowing a 36-month recidivism follow-up period for offenders who are at-risk in the community. Cases are grouped into three categories:

1) Current domestic violence offender—offenders with a current domestic violence offense, but no domestic violence in their prior criminal history.
2) Current or prior domestic violence offender—offenders who had a current domestic violence charge or a domestic violence charge in their criminal history.
3) All other offenders—any remaining offenders who did not have a current or prior domestic violence offence.

### *Offender Characteristics*

Displayed in Exhibit 4 are the characteristics of the FY 2008 cohort. Domestic violence offenders have more criminal history compared with all other offenders (when measured as felonies or misdemeanors). We also find that domestic violence offenders have more violent and assault charges than non-domestic violence offenders. Domestic violence offenders are more likely to be classified as higher risk to reoffend for violent crimes.[9]

***Exhibit 4***
**Characteristics of Fiscal Year 2008 Cohort**

| | Current DV offender | Current or prior DV offender | All other offenders (non-DV) |
|---|---|---|---|
| Number | 24,698 | 52,654 | 102,726 |
| Criminal History (average) | | | |
| Total prior and current charges | 5.52 | 8.25 | 3.92 |
| Felony charges | 1.30 | 2.15 | 1.02 |
| Felony property charges | 0.49 | 0.88 | 0.47 |
| Violent felony charges | 0.54 | 0.72 | 0.21 |
| Misdemeanor charges | 4.22 | 6.09 | 2.91 |
| Misdemeanor assault charges | 2.15 | 2.51 | 0.35 |
| Misdemeanor violent charges | 2.25 | 2.68 | 0.47 |
| Offender Characteristics (average) | | | |
| Age at file date | 35.6 | 36.2 | 34.7 |
| White | 78% | 79% | 77% |
| Black | 9% | 10% | 9% |
| Native | 2% | 3% | 2% |
| Risk classification (average) | | | |
| Low | 48% | 39% | 55% |
| Moderate | 20% | 20% | 23% |
| High non-violent | 5% | 11% | 8% |
| High violent | 16% | 24% | 6% |

Data source: WSIPP criminal history database

[8] Because offenders may have more than one case in a year, the number of offenders in the FY 2008 cohort is less than the number of cases as indicated in Exhibit 1. See the technical appendix for more details.

[9] Barnoski, R. & Drake, E. (2007). *Washington's Offender Accountability Act: Department of Corrections' static risk instrument.* (Document No. 07-03-1201) Olympia: Washington State Institute for Public Policy.

### *Recidivism*

Exhibit 5 displays the results of the recidivism measures (see sidebar, "Measuring Recidivism" for a description of the measures used in this report). Section 1 of Exhibit 5 shows recidivism measures for charges. Section 2 of Exhibit 5 shows the recidivism measures for convictions.

For example, 44% of current DV offenders were charged with a felony or misdemeanor offense during the 36-month follow-up period compared with 36% of non-dv offenders.

***Exhibit 5***
**Recidivism Rates for the 2008 Cohort**

| | Current DV offender | Current or prior DV offender | Non-DV (All other) offenders |
|---|---|---|---|
| **Recidivism Measure** | | | |
| 1) Charges | | | |
| a) All offenses (DV and non DV) | | | |
| Any (felony or mis.) | 44% | 52% | 36% |
| Felony | 17% | 23% | 13% |
| Violent felony | 10% | 12% | 4% |
| Misdemeanor | 28% | 29% | 23% |
| b) DV offenses only | | | |
| Any (felony or mis.) | 25% | 24% | 6% |
| Felony | 7% | 6% | 1% |
| Violent felony | 6% | 6% | 1% |
| Misdemeanor | 19% | 18% | 5% |
| 2) Convictions | | | |
| a) All offenses (DV and non DV) | | | |
| Any (felony or mis.) | 36% | 44% | 30% |
| Felony | 12% | 17% | 9% |
| Violent felony | 7% | 7% | 3% |
| Misdemeanor | 24% | 28% | 20% |
| b) DV offenses only | | | |
| Any (felony or mis.) | 18% | 17% | 4% |
| Felony | 4% | 4% | 4% |
| Violent felony | 4% | 3% | 0.4% |
| Misdemeanor | 14% | 13% | 3% |
| Number in group | 22,288 | 45,184 | 87,624 |

Data source: WSIPP criminal history database

[#]Not all offenders were at-risk in the community long enough to calculate 36-month recidivism rates; thus, the number in group does not match the number on Exhibit 4. The numbers for the recidivism measures using charges is different from the recidivism measures using convictions due to adjudication processing time. See technical appendix for details.

**Measuring Recidivism**

Recidivism is defined as any offense committed after release to the community that results in a Washington State court legal action.[#] The follow-up period for this study is 36-months after becoming "at-risk"—the date the offender is released into the community.

We examine the following recidivism categories:

- Any recidivism (felonies or misdemeanors)
- Felonies (all felonies, including violent)
- Violent felonies (only)

For this report, we analyze both charges filed in court and charges resulting in a conviction.[##] In addition, we examine all offenses; that is, domestic violence and non-domestic violence offenses. We also examine domestic violence offenses only. In total, there are 16 different measures of recidivism.

[#] Barnoski, R. (1997). *Standards for improving research effectiveness in adult and juvenile justice*. (Document No. 97-12-1201). Olympia: Washington State Institute for Public Policy.

[##] Typically, WSIPP measures convictions for recidivism and does not examine charges. Feedback from treatment providers in the domestic violence community, however, indicates that arrests or charges may be better measures for domestic violence offenders because victims of domestic violence may be less likely to pursue charges. Thus, we chose to report charges as well as convictions for this study. Additionally, we reported domestic violence measures of recidivism as well as all offenses (including domestic violence).

Findings from our analysis of the 2008 cohort indicate that:

- ✓ **Any recidivism:** Domestic violence offenders have higher rates of recidivism than non-domestic violence offenders. For example, for offenders with a current domestic violence offense, 36% were convicted for a new felony or misdemeanor within 36-months compared to 30% of non-domestic violence offenders.
- ✓ **Domestic violence recidivism:** Domestic violence offenders have higher rates of domestic violence recidivism than non-domestic violence offenders. For example, for offenders with a current domestic violence offense, 18% were convicted for a new domestic violence felony or misdemeanor within 36-months compared to 4% of non-domestic violence offenders.

## III. Recidivism Trends

For this section of the report, we examine the longer-term recidivism trends—changes in recidivism rates over time—of domestic violence offenders.[10]

Data are presented for eight years of offenders from FY 2001 through FY 2008. Each year includes all offenders who became "at-risk" for recidivism in the community during that fiscal year.

We use the same procedures as described in the sidebar, "Measuring Recidivism." We analyzed recidivism trends for offenders who were charged with a current domestic violence offense and for offenders who did not have a current domestic violence offense.[11]

Exhibit 6 displays the results of eight different measures of recidivism. A summary of the findings include:

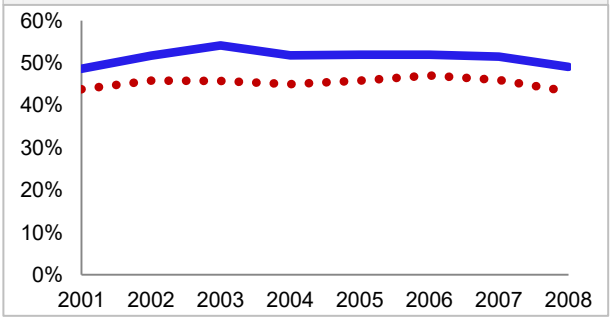
- ✓ All of the eight recidivism measures indicate that recidivism rates have been relatively stable over time with the exception of felony recidivism.
- ✓ All of the eight recidivism measures indicate that domestic violence offenders have consistently higher recidivism rates than all other offenders.

[10] The approach to the recidivism analysis in Section III is different than Section II. See technical appendix for details.
[11] We also analyzed convictions; however, the overall trend of the conviction measure was not substantively different from charges. Thus, we only display charges in Exhibit 6.

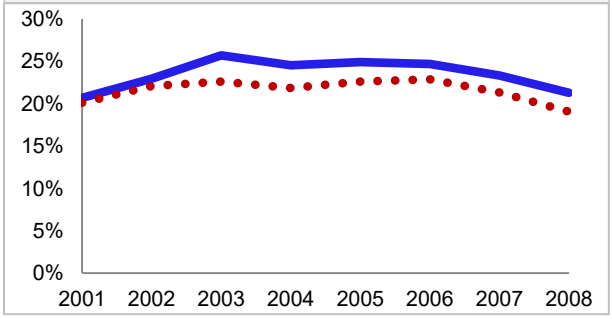
***Exhibit 6***
***Recidivism Trends***


## All offenses (DV and non-DV)

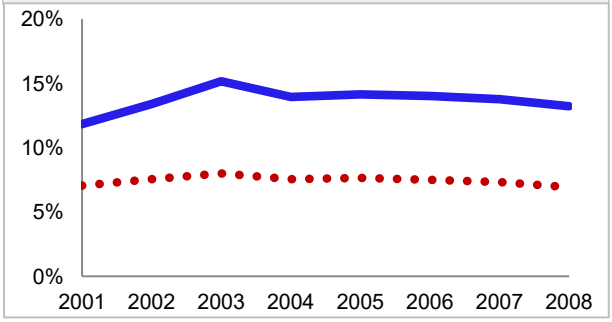
### Any recidivism charge



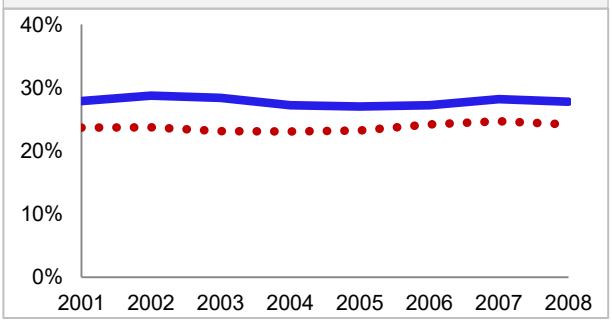

### Felony recidivism charge




### Violent felony recidivism charge

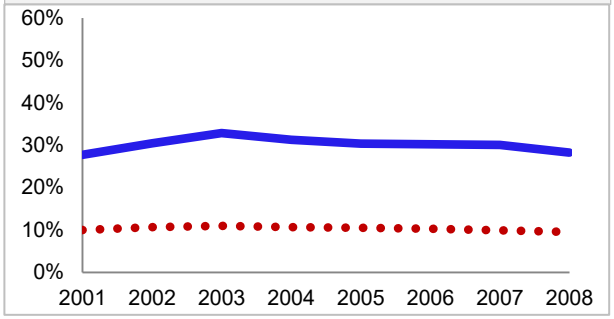



### Misdemeanor recidivism charge

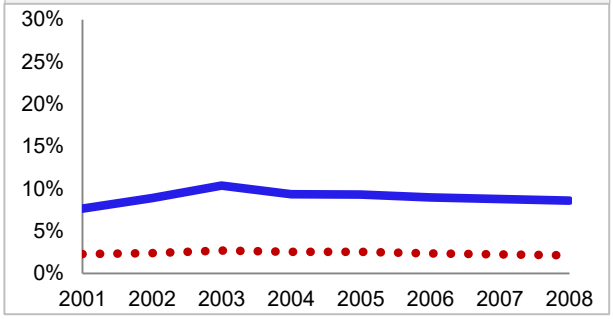



## Domestic violence offenses only

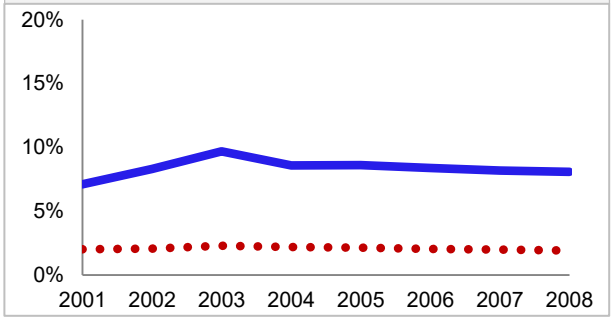
### Any recidivism charge



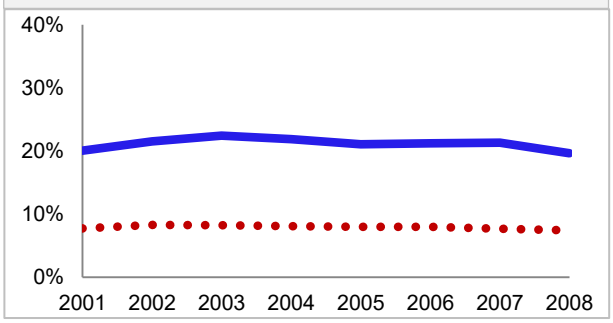

### Felony recidivism charge




### Violent felony recidivism charge




### Misdemeanor recidivism charge



# Technical Appendix:
## Study group selection, data processing, and definitions

The Washington State Institute for Public Policy (WSIPP) has a criminal history database which is a synthesis of criminal charge information for individuals. The database was developed using data from the Administrative Office of the Courts (AOC) and the Department of Corrections (DOC) with the intent to conduct legislatively mandated research in a timely fashion. This comprehensive database can be used to determine an offender's criminal history or to calculate recidivism. We used this database to select the study groups and to analyze criminal history and recidivism trends for this report.

**Case selection criteria.** We included offenders with felony or misdemeanor criminal cases filed in Washington State's superior and district courts. Offenders under the age of 18 at the time of the offense were excluded from the analysis.

**Domestic violence.** Domestic violence was determined in two ways. First, if the offense description from the Revised Code of Washington indicated that the offense was domestic violence (e.g., violation of a domestic violence protection order); the offense was classified as domestic violence. We also relied on a field in our database provided by the AOC which indicates whether or not an offense is domestic violence.

**Criminal history and static risk assessment.** Any offense charged in district or superior court prior to the offender's current case is calculated as prior criminal history. This includes adult and juvenile offenses as well as misdemeanor and felony offenses. The static risk calculations in this report are based on the assessment used by the DOC.[12] Since the static risk assessment is based on criminal history and demographics, we have the ability to estimate an offender's risk assessment at any point in time using WSIPP's criminal history database. The static risk assessment counts the total number of prior adjudications (convictions).

**Recidivism.** The legislature directed WSIPP to develop a standard protocol to define recidivism.[13] For this report, we follow those same procedures and define recidivism as any offense committed after release to the community that resulted in a Washington State court legal action. The follow-up period is 36-months from the time the offender was "at-risk" in the community—the date an offender was in the community with the potential to re-offend. In addition to this follow-up period, time is needed to allow an offense to be processed in the criminal justice system. The criminal justice process includes the time period between the date recorded for the commission of a subsequent offense and the resulting conviction of that offense. In our previous report, we found that a12-month adjudication period is adequate for adult offenders.

Typically, the at-risk date is the adjudication date. If the offender had multiple adjudication dates associated with a case, the first adjudication date was used as the at-risk date. District courts do not provide an adjudication date; thus, the disposition date was used as the at-risk date. When the adjudication and disposition dates were not available, the file date was used as the at-risk date.

When data from DOC indicated the offender was in prison, we adjusted the at-risk date to reflect the release date from prison. If the offender was sent to jail and subsequently to community supervision with DOC, the at-risk date was adjusted to account for time served in jail. It is important to note that we adjusted the at-risk date for offenders who served time in jail only for those offenders under the jurisdiction of DOC because we do not have the necessary jail data from the Jail Booking and Reporting System (JBRS) to determine time in jail for non-DOC offenders.

For this report, we analyzed both charges filed in court and charges resulting in a conviction. We analyzed any recidivism (felonies or misdemeanors), felonies only, and violent felonies only (see Exhibit A1). We examined all offenses (including domestic violence and non-domestic violence offenses) and domestic violence offenses only as defined above.

**Recidivism analyses in this report.** We examine domestic violence recidivism using two approaches. First, in Section II of this report, we provide a "cohort" analysis with the purpose of investigating what happens to domestic violence offenders once they enter into the court system by examining their re-offense behavior. For this analysis, we selected a cohort of offenders who had cases filed in Fiscal Year 2008. Offenders are only counted in the cohort once. That is, there are no duplicate persons. This is the most recent cohort available while allowing a 36-month recidivism follow-up period for offenders who are at-risk in the community. This analysis allows us to examine the criminal history of the cohort as well as how many offenders recidivate and for what kinds of offenses.

In the second recidivism approach in Section III of this report (Recidivism Trends), index cases are selected based on the at-risk-date as opposed to the file date for the cohort analysis in Section II. An offender can enter into the analysis multiple times if they have multiple criminal justice system events and multiple at-risk dates over time. The purpose of this analysis is to examine longer-term recidivism patterns for offenders who are charged with domestic violence offenses.

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[12] Barnoski, R. & Drake, E. (2007). *Washington's Offender Accountability Act: Department of Corrections' Static Risk Instrument.* (Document No. 07-03-1201). Olympia: Washington State Institute for Public Policy.

[13] Barnoski, R. (1997). *Standards for Improving Research Effectiveness in Adult and Juvenile Justice*. (Document No. 97-12-1201). Olympia: Washington State Institute for Public Policy.

## *Exhibit A1*
## Offense Descriptions for Recidivism Categories

| **Misdemeanor** | **Felony** |
|---|---|
| Assault | Animal Cruelty |
| Assault DV Related | Arson Except First Degree |
| Auto Theft/Vehicle Prowl | Auto Theft/Vehicle Prowl |
| Bail Jump | Burglary Except First Degree |
| Child sex | Deliver |
| Criminal Conduct | Destruction |
| Cruelty to Animals | Domestic violence related |
| Deliver | Escape |
| Destruction | Possession |
| Drugs | Sex Offender Fail to Register |
| DUI/DWI | Theft/Fraud/Larceny |
| DV Related | Trespass |
| Escape | |
| Fire setting | **Violent Felony** |
| Firearm | Arson First Degree |
| Harassment/DV Petition | Assault |
| Interlock Violations/Aid & Abet DWI | Assault (domestic violence related) |
| Miscellaneous Alcohol | Burglary First Degree |
| Miscellaneous Criminal | Child Sex (including Child Rape) |
| Possession | Domestic Violence (minus Assault) |
| Prostitution | Extortion |
| School | Firearm |
| Sex Offender Fail to Register | Kidnapping |
| Theft/Fraud/Larceny | Manslaughter |
| Trespass | Murder |
| Weapon | Other Sex |
| | Rape |
| | Robbery |
| | Weapon |

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# Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers

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INTIMATE PARTNER VIOLENCE RESEARCH

# Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers

**April M. Zeoli · Echo A. Rivera · Cris M. Sullivan · Sheryl Kubiak**

Published online: 21 June 2013


**Abstract** Continued abuse of themselves and their children is a concern for many mothers leaving intimate partner violence (IPV) perpetrating husbands. This research examines women's responses to abuse committed by ex-husbands with whom they had undergone custody disputes. In-depth, qualitative interviews were conducted with 19 mothers who had divorced IPV-perpetrating husbands between 1 and 3-years prior. Participants were located through publicly available family court divorce records and interviews were examined using analytic induction. Women's strategies to protect themselves and their children from abuse involved setting boundaries to govern their interactions with ex-husbands. Mothers often turned to family court for assistance in setting boundaries to keep children safe, but found that family court did not respond in ways they believed protected their children. Conversely, when women turned to the justice system for restraining orders or called the police for help against IPV, they generally found the justice system responsive.

**Keywords** Intimate partner violence · Child abuse · Child custody · Family court

Intimate partner violence (IPV) is a factor in many women's decisions to end their marriages (Kurz 1996). While it is commonly assumed that leaving an abusive partner will increase a woman's safety, this is not always the case. Previous research has established that, in many cases, IPV does not end upon separation (Fleury et al. 2000; Hardesty 2002; Hardesty and Chung 2006; Jaffe et al. 2003; Johnson et al. 2005; Kurz 1996; Slote et al. 2005). In fact, abuse often escalates post-separation (Johnson and Sacco 1995; Wilson and Daly 1993). Many victimized women report continued threats and intimidation when leaving their assailants, including threats against their children (McCloskey 2001). Moreover, estrangement has been identified as an important risk factor for intimate partner homicide, with men murdering their wives/ex-wives most commonly within a year of separation (Campbell et al. 2007).

When separating couples have minor children in common, family court decides the degree to which each parent will have physical and legal custody of, or parenting time (also termed visitation) with, the child. In most custody arrangements, IPV-victimized mothers are not allowed to completely cut ties with their assailants, the children's fathers. Survivors of IPV are often court-ordered into custody and parenting time arrangements where they must continue to see their assailants during child exchanges; they must continue to consult with their assailants in joint legal custody arrangements; and sometimes the assailants gain primary physical custody and survivors must depend on them for contact with their children. These court-mandated arrangements allow assailants to have access to survivors, and therefore provide opportunities for continued abuse (Hardesty 2002; Hardesty and Ganong 2006; Hart 1990; Shalansky et al. 1999; Varcoe and Irwin 2004).

However, mothers are not only concerned about their own safety from their estranged husbands. In 30 % to 60 % of homes with IPV, child abuse also occurs (Edleson 1999). IPV-perpetrating fathers may use opportunities presented by physical custody arrangements or parenting time to victimize children post-separation (Hardesty and Ganong 2006; Varcoe and Irwin 2004). This is cause for concern because children who have been abused suffer a range of negative health

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consequences (Wegman and Stetler 2009), including behavioral health consequences such as self-injury (Glassman et al. 2007; Goldstein et al. 2009)

There are few studies of IPV assailants' attempts to control mothers or harm children post-separation and fewer still on mothers' responses to those attempts. Assailants use a variety of tactics to control mothers post-separation, including physical violence or threats thereof (Bemiller 2008; Hardesty and Ganong 2006; Wuest et al. 2003), emotional abuse (Bemiller 2008; Hardesty et al. 2008; Wuest et al. 2003), threatening to abduct children (Harrison 2008), undermining mothers' parental authority (Bancroft and Silverman 2002; Harrison 2008), and using parenting time arrangements to track and control mothers' schedules (Aris et al. 2002; Shalansky et al. 1999; Varcoe and Irwin 2004). Women's attempts to minimize post-separation abuse include setting boundaries for interactions and maintaining physical distance (Hardesty and Ganong 2006; Varcoe and Irwin 2004). For example, women may have others conduct custody or parenting time exchanges of their children for time with fathers, thereby reducing contact with their assailants (Varcoe and Irwin 2004).

In addition to boundary-setting, women's strategies to reduce the likelihood of future harm may include, counter intuitively, cooperating with court orders even when they do not believe the orders are in their children's best interests (Harrison 2008). For example, in Harrison's (2008) research on women using supervised contact centers for visits between children and fathers, women reported that they agreed to use the centers despite concerns for their own safety and that of their children. Women feared that refusing to do so would result in the court instituting parenting time or custody arrangements that were even less safe. These fears stemmed from women's prior negative experiences with family court.

When women make allegations of IPV or express concerns that fathers will harm children, the court often views them as obstructing the court process and the father's right to have a relationship with their children (Harrison 2008; Johnston et al. 2005). There is a tendency for courts to minimize the impact of IPV on women and children and to view the perpetration of abuse toward a partner as irrelevant to parenting (Bancroft and Silverman 2002; Dalton 1999; Jaffe et al. 2003). This is demonstrated by few differences in custody granted to IPV assailants versus non-violent fathers (Kernic et al. 2005; Logan et al. 2003). Furthermore, many courts use the "friendly parent" presumption, which recommends that primary physical custody be granted to the parent most likely to encourage frequent contact of the children with the non-custodial parent (Bancroft and Silverman 2002; Jaffe and Crooks 2004). This presumption disadvantages mothers who disclose fathers' abuse because they are then perceived as unfriendly parents (Bancroft and Silverman 2002; Jaffe and Crooks 2004). Women who recognize the bind that these perceptions leave them in may avoid advocating for their and their children's safety and comply with unsafe custody and visitation arrangements (Harrison 2008). Because of this, women may regard family court as impeding their attempts to gain safety for themselves and their children (Harrison 2008).

Scant research exists on how IPV-perpetrating fathers use custody and parenting time arrangements to abuse mothers and/or children and how women respond to protect themselves and their children. The current study was conducted as a step in filling this gap. Using the research discussed above, and the qualitative data analysis technique of analytic induction, we created two preliminary assertions to be tested in the study:

| | |
|---|---|
| Assertion 1 | In those cases where the ex-husband neglects or harms the child(ren), the mother will make efforts to protect them that may not be supported by the system (e.g., if she tries to legally change the custody determination, she will be denied). |
| Assertion 2 | In those cases where the ex-husband attempts to maintain control over the mother, she will make efforts to set boundaries to limit her contact with him. |

Both assertions were later altered to better represent the shared experiences of the research participants, as will be explained.

By conducting in-depth, qualitative interviews with mothers who went through custody disputes in family court, we were able to gain a rich description of women's experiences of the complexities involved in IPV, child abuse, and court processes. Specifically, we examined the occurrence of abuse against mothers and children and mothers' perceived likelihood of future harm to themselves and their children. When mothers related events in which ex-husbands abused them or their children, or mothers perceived a likelihood of abuse to their children, we investigated their strategies for increasing their safety and that of their children, including whether mothers turned to family court for assistance in reducing risks to their children and if they found family court helpful. This research is intended to spur further investigation of mothers' and children's safety when leaving IPV-perpetrating fathers and whether mothers turn to family court to intervene to reduce the risk of future violence.

## Method

In-depth, qualitative interviews were conducted with 19 mothers who had divorced IPV-perpetrating husbands between 1 and 3 years prior. We chose this time frame so that each research participant had time with a custody determination in place on which to report, but whose divorce was recent enough that court experiences would not be difficult to recall. From July through September 2009, trained research assistants searched publicly available electronic family court

records in one Midwestern county for women with minor children who had filed for divorce between January 2006 and June 2008, and whose court records indicated that there were objections to the court's custody, parenting time or child support determination. We used the criterion of objections to identify women who were more likely to have experienced IPV (Logan et al. 2003).

When a woman's electronic family court divorce record indicated that she met our preliminary inclusion criteria, her publicly available court file was requested from the court clerk and her telephone number, if listed in the file, was logged. We then telephoned women to screen them for eligibility and, if eligible, invited them to participate in the research. A woman was eligible if she: 1) spoke English, 2) was at least 18 years old, 3) went through a divorce with at least one minor child in the study county and still lived in the general area, 4) experienced IPV, as defined as physical, emotional, and/or sexual violence by her husband during their relationship, causing her to fear for her safety, and 5) was willing to be audiotaped during the interview.

Because the women we called had not yet consented to research, and to reduce the risk of the women being overheard while speaking about IPV, we chose to screen women for IPV using two brief and general questions. We introduced the topic with the following statement:

> We'd like to talk to women about their experiences with child custody and visitation, from court processes to current experiences. We would especially like to talk to women who experienced issues in their relationship with controlling behaviors or violence. This might include physical violence, but can also include threats, emotional abuse, sexual violence, or any other behavior that caused you to fear for your safety.

After this statement, we asked the following questions: 1) Have you ever experienced any of these things within your relationship with your ex-husband?; and 2) Did you ever fear for your safety because of your ex-husband? Women who answered yes to both questions were considered positive for IPV.

We obtained the phone numbers of 174 women. Ninety-seven of those numbers were disconnected or had changed, and for an additional 19 numbers, we never reached the women. We spoke to 58 women, of which 47 were screened for inclusion and 29 were eligible for the study (61.7 % of those screened). Because not all eligible women chose to participate, we interviewed 23 women, four of whom were removed from the sample because we later determined that their cases did not meet our definition of IPV. Specifically, despite initially screening positive for IPV, during the course of the interviews, the women in these cases indicated that they were not afraid that their ex-husbands would harm them. The present analyses were conducted with the final sample of 19 women.

## Interview Protocol

We used a semi-structured protocol to guide our interviews with participants. Three main domains of prompts were used to investigate the initial assertions: 1) prompts to assess IPV before and after separation; 2) prompts to assess women's perceptions of whether family court supported their efforts to gain safety for themselves and children; and 3) prompts used to assess ex-husbands' violence against women or children and women's responses to violence after separation and divorce. Please see Appendix A for examples of prompts used under each domain. When mothers disclosed specific abusive acts by fathers against themselves or children, interviewers specifically probed for when the act(s) occurred (e.g., before or after separation); the context around the assailants' behavior; actions mothers took in response; children's responses; and whether the abuse occurred during opportunities presented by time spent with children, either through physical custody or parenting time arrangements. We also probed for whether the participant turned to the court for help in attaining safety and whether the court responded in a way she found helpful. In all cases of child maltreatment or neglect, women had alerted the appropriate officials. The research protocol was reviewed and approved (IRB# 08–912) by the Social Science/Behavioral/Education Institutional Review Board at Michigan State University.

## Analyses

Interviews were transcribed verbatim and coded for key ideas and themes. Specifically, we coded for physical and emotional abuse and stalking of mothers; physical and emotional abuse and neglect of children; and children's self-injury. Operationalizations of these concepts are as follows:

- Physical abuse: Completed or attempted forceful physical contact that causes intimidation, pain, or injury
- Emotional abuse: Acts that cause emotional pain or confusion. Acts can be verbal or nonverbal, and can include acts of omission
- Stalking: Threatening or intimidating acts, including unwanted contact, that cause the mother to fear for her safety
- Neglect of children: Failing to provide for a child's safety or health needs when one is capable of their provision
- Self-injury: Suicidal or non-suicidal physical injury committed against one's self

We also coded women's concerns for their children, including perceptions of a high likelihood of physical harm or parental kidnapping, and women's attributions of responsibility for children's self-injury. Additionally, we coded women's behaviors that were intended to minimize their ex-husbands'

opportunities to abuse them and their children. Each abusive act was time coded for when it occurred: during the relationship, post-separation, or after the divorce was finalized. We also coded specifically for whether the abuse was facilitated by access to the child through the court-ordered custody and parenting time arrangement.

Two trained graduate research assistants double-coded the first four (20 %) interviews, and compared coding for reliability. Discrepancies between codes were brought to the attention of the PI who, in discussion with the research assistants and after reading the relevant material, made a final decision. After the fourth interview, few discrepancies in coding arose and the remaining interviews were split between the two research assistants to code. Questions in coding continued to be brought to the PI. After initial coding was concluded, the PI read through each interview and confirmed codes.

The qualitative data analysis technique of analytic induction was used to analyze the interview data. Analytic induction allows researchers to approach qualitative data with preconceived hypotheses, termed assertions, about the phenomenon under study (Erickson 1986) that can be developed from existing literature and experiential knowledge (Gilgun 1995). After the preliminary assertions listed above were developed, the first interview was examined to determine the degree to which the interview data confirmed or disconfirmed the assertions. During the assertion testing process, we explicitly sought disconfirming evidence, a technique known as negative case analysis and a core component of analytic induction (Erickson 1986). When an assertion did not adequately capture a participant's experience or was disconfirmed, we undertook in-depth examinations of the contexts in which this occurred and, when appropriate, modified the assertion to accurately reflect a participant's experience. We then tested the modified assertion on all participants for final confirmation. However, we also allowed assertions to be disconfirmed without adjusting the assertion to fit the case when modification was not appropriate.

Two trained research assistants made preliminary decisions regarding assertion confirmation, disconfirmation, or modification, and discussed these decisions in a group with the PI. Modifications were made to each assertion. The PI then tested the modified assertions on the interviews again and made final decisions on assertions in consultation with the research assistant.

Both of the preliminary assertions were modified during the analytic process to accurately represent the experiences of our sample, and the final versions follow:

Assertion 1 In those cases where the ex-husband neglects or harms the child(ren) and/or there is a perceived likelihood of future neglect, physical harm, or parental kidnapping, the mother will perceive that family court does not make decisions that are in the best interests of the children. This will manifest in one of three different ways: 1) she will not go to family court for assistance; 2) she may attempt to use family court for assistance, but find that they do not support her; or 3) she may gain support from family court after extreme harm to the child occurs.

Assertion 2 In those cases where the ex-husband contacts the ex-wife, or uses times at which he has contact with her, to attempt to maintain control over her, she will make efforts to limit her contact with him.

Assertion 1 was modified to represent mothers' fears of future neglect, harm, and kidnapping, which was as much a concern for mothers as was past neglect and harm. Furthermore, as we analyzed the interviews for evidence of whether mothers' efforts to protect children were not supported by family court, the dominant theme that emerged was that women did not believe that family court made decisions in the best interests of the children. We added the ways this belief may manifest to the assertion to better characterize the experiences of our participants. Assertion 2 was modified to reflect participants' experiences of limiting contact to reduce ex-husbands' attempts to control them only when these attempts had occurred during previous contact.

For assertion 1, the threshold for *harm* was physical injury, either through physical abuse of a child or through the commission of emotional abuse that a mother believed precipitated a child's physical self-injury. Experiencing emotional abuse as a child has been positively associated with both suicidal and non-suicidal self-injury in studies of adolescents and adults (Cerutti et al. 2011; Croyle and Waltz 2007; Glassman et al. 2007; Goldstein et al. 2009; Hakansson et al. 2010; Jeon et al. 2009; Whitlock et al. 2006; Zoroglu et al. 2003). We chose to exclude emotional abuse that was directed at children who did not self-injure from this assertion because we were interested in acts that mothers believed they could bring to the court's attention. As one mother stated, regarding emotional abuse, "Who do you talk to about him hurting my daughter's feelings? What do you do, file a motion for that?"

For assertion 2, we considered post-separation abusive acts by the assailant as evidence of attempting to maintain control over his wife/ex-wife. Here, the term post-separation refers to the period of time that began at separation and includes the time during and after the divorce. Only abusive acts that required some type of contact between the parties applied to the assertion. Therefore, we considered emotional abuse, physical abuse, and stalking as evidence of attempted control; post-separation sexual abuse would have applied but was not reported by any of the women in our sample. For ease of presentation, we have assigned pseudonyms to the participants. However, to further reduce identifiability, the

pseudonyms used in this paper differ from the pseudonyms featured in other publications on this population.

## Results

Nineteen women, with a mean age of 40 years (range of 23 to 52 years), were included in this research. Seventeen of the women were White, one was Black, and one was Latina. The women had a total of 39 children whom they shared with IPV-perpetrating ex-husbands, with the children's ages ranging from 3 to 25 years; 32 of these children were under the age of 18 at the time of the interviews. At the time of the interviews, mothers had sole physical and legal custody of eight children; nine children were the subjects of joint physical and legal custody arrangements; mothers had sole physical but joint legal custody of 12 children; and fathers had sole physical but joint legal custody of three children. Fifteen mothers reported the court had mandated a parenting time plan for the non-custodial parent, of which 13 were fathers and two were mothers. The court ordered that two of the non-custodial fathers have supervised parenting time. It is important to note that custody and parenting time arrangements may change any number of times in response to petitions by parents or new circumstances. This happened for our sample of mothers multiple times.

Prior to separation, assailants used a range of abusive tactics against the mothers; notably, one participant reported that abuse began after separation. Eighteen mothers reported pre-separation emotional abuse. These acts ranged from verbal denigration of the mother; threatening the mother with the loss of her child if she leaves him; and isolating the mother from family and friends. Fifteen participants reported that assailants were physically abusive toward them, and committed such acts as holding a firearm to the mother's head; beating mothers to the point that injuries, such as broken ribs, were sustained; and throwing objects at mothers. Two mothers were sexually abused by their then-husbands. Six mothers reported that fathers used physical abuse against their children before separation, including throwing objects at them, and pushing or hitting them; five of these mothers were also physically abused. Eight mothers reported that fathers emotionally abused their children before separation. Emotional abuse took many forms, from name-calling to killing the family's puppy in front of the children.

## Post-divorce Abuse of Children

Our first assertion was: *In those cases where the ex-husband neglects or harms the child(ren) and/or there is a perceived likelihood of future neglect, physical harm, or parental kidnapping, the mother will perceive that family court does not make decisions that are in the best interests of the children. This will manifest in one of three different ways: 1) she will not go to family court for assistance; 2) she may attempt to use family court for assistance, but find that they do not support her; or 3) she may gain support from family court after extreme harm to the child occurs.* We examined only the post-divorce period for this assertion because all women received a custody and parenting time order from the court by or at the final divorce judgment. By this point, mothers had had opportunities to share their safety concerns for their children with the court, and the court had had time to take those concerns into account. Therefore, based on the degree to which women believed the court had previously taken their concerns seriously, they came to conclusions about whether or not future concerns would be taken seriously. For detailed information on whether women believed that court personnel took their safety concerns seriously, and how that affected their willingness to engage the court in the future, please see the work of Rivera et al. (2012a).

For assertion 1 to be applicable to a participant's experiences, the participant's ex-husband had to neglect or physically harm the child, the child had to have committed self-injury that the mother believed to be in response to the father's emotional abuse, or the mother had to perceive that neglect, harm or parental kidnapping were likely. For seven women, this assertion was not applicable, and for two additional women, the interviews contained insufficient information to test this assertion. The assertion was therefore tested on ten participants, eight of whom confirmed it, and two of whom disconfirmed it (see Table 1).

Mothers reported that three fathers were physically violent toward their children during the fathers' time with the child. Additionally, two mothers believed that the fathers' emotional abuse of their children led the children to engage in self-injury, namely cutting and a suicide attempt. Both mothers believed that the emotional abuse contributed to their daughters' poor mental health conditions, increasing their risk for self-injury, but more proximal emotionally abusive acts triggered the actual injury events. As one mother related:

> My youngest, she was with her father … and she got in trouble at school and he had to go and pick her up because she was gonna be suspended. And he just went ballistic. I mean, we have the assistant principal that's there, we have the school counselor, and we have two other people that are there. I was not there. The principal was telling him that he had to control his anger. But they released her to him. And he was just screaming at her and screaming at her and screaming at her. And later that night she took a knife and tried to commit suicide so she ended up being hospitalized… He just raged at her and she was just at a point where she just couldn't take it. (Jennifer)

**Table 1** Fathers' harm to children post-divorce and mothers' strategies to protect them ($n$=10)

| Fathers' harm or likely harm to children | Mothers' strategies to protect children | | | |
|---|---|---|---|---|
| | Avoid family court ($n$=2) | Family court provides no support ($n$=5) | Family court provides support after extreme harm ($n$=2) | Family court is supportive ($n$=2) |
| Physical harm ($n$=3) | | Kim, Jesy | | Vanessa |
| Emotional abuse precipitating self-injury ($n$=2) | | | Jennifer, Meaghan | |
| Neglect ($n$=3) | Kathleen | Christina | | Meredith |
| Likely future physical harm ($n$=4) | Kathleen, Carole | Carole, Karen | | Vanessa |
| Likely kidnapping ($n$=2) | Carole | Carole | | Vanessa |

Three fathers were reported to have neglected their children's safety during their parenting times. One father, for example, did not spend time with his child during his court-ordered parenting time. Instead, he left his daughter with her grandmother, who had previously physically harmed her and was specifically prohibited by the court order from watching her. The child's mother believed that her former mother-in-law was likely to harm the child again. Another father repeatedly left his small children home alone for hours at a time during his parenting time. As our participant related, "He would literally go to work in the morning and come home for five minutes to see…that they're still alive and then leave and these children were too little to take care of themselves…" (Meredith)

Four mothers believed that there was a high likelihood that their children would be physically harmed during fathers' parenting time. Karen, whose child had a mental health problem that required mental health care, feared that the father would become so frustrated with his child that he would react with physical violence, as he had in the past. Finally, because of previous threats, two women perceived a high risk that the fathers would kidnap their children if allowed to see them: "He always threatened to leave and take the kids away." (Vanessa)

As stated, eight women confirmed assertion 1. Two women avoided family court, one of whom had previously tried to increase her child's safety through family court but was unsuccessful. Additionally, six other mothers accessed family court post-divorce in attempts to safeguard their children, four of whom were not supported and two of whom were supported after the occurrence of extreme harm to the children.

Both of the women who chose to avoid family court did so because they believed that accessing the court could increase the risk to their children. One mother, Kathleen, specifically did not go to court to address her concerns for her child's safety because she feared that if she did, the court would remove the child from her custody. She believed this because before the custody order was finalized, the court mediator, who makes initial decisions on custody arrangements and recommendations to the judge, repeatedly pushed the father to ask for greater access to his child despite having been told that: 1) the father perpetrated IPV in front of his child; 2) the father's mother, with whom he left the child during his parenting time, had previously physically harmed the child; 3) the father was currently being charged with a federal crime; and 4) he did not want greater access to his child. As Kathleen stated "She just kept askin' him, 'Are you sure you want her to live with her mom? Are you sure you want her to not live with you? Are you sure that's where you really want her to live?' And [she] just kept asking him that over and over again." Kathleen believed that avoiding court was more protective of her child than accessing it because any changes the court made to the parenting time schedule may not have been in her favor: "I figured if I objected to [the current schedule], would [the mediator] have taken my daughter away from me? Put her in the home with him? Would she have made her go [more frequently]?" It is unknown whether this mother would have developed additional strategies to protect her child as, after a short period, her ex-husband was convicted of a felony crime unrelated to IPV and sentenced to prison.

The second mother, Carole, whose ex-husband had an extensive criminal background including felonies, first went to family court specifically to protect her daughter by requesting the court deny the father access to her. Carole was unsuccessful, but the court did mandate that parenting time be supervised out of recognition of the risk the father posed to his daughter. Despite the father's threat to harm their daughter during parenting time even if another adult was present, Carole strategically decided not to fight the supervised parenting time awarded to her ex-husband. Later, when a warrant was issued for her ex-husband for a crime unrelated to IPV, Carole believed it might persuade the court to deny the father's parenting time. However, the court told her that the father had the right to see the child despite having a warrant out for his arrest. Carole continued to fear for her child but believed that the court would not revoke the father's parenting time even though he had a second warrant out against him and was on the run: "Well, I want to [have his parenting time revoked] because of finding out that he's been on the run… But I've already been there, done that, and I know they're not gonna do it." Knowing that the court would not revoke parenting time, Carole tried a

different tactic: she believed that her ex-husband would lose interest in seeing the child if his threats did not appear to upset her and she appeared to support visitation. As she stated, "If you fight it, he's gonna keep pushin' it. If you go along with it, he's gonna drop it." Her strategy seemed to work as he only saw his child a handful of times before he stopped visiting.

In all, nine of the ten mothers on whom this assertion was tested accessed family court post-divorce in efforts to protect their children. These women accessed family court either by, 1) notifying court personnel of the danger and gaining information on their legal options and likelihood of a change in custody being made; and/or 2) filing a motion for a change in custody and parenting time. Eight of these women wanted to have custody and parenting time orders changed, four of whom were successful, and one woman wanted the court to make her ex-husband comply with existing court orders (she was unsuccessful).

Mothers who accessed family court but were unsupported, told the court of the fathers' physical harm or neglect of children or that they feared kidnapping or future physical harm. Jesy, who feared that her ex-husband would harm the children on occasions when he had been drinking, was able to have an order inserted into the custody decision prior to the divorce being finalized that he was not to consume alcohol during or within 24 h prior to visits with his children. Despite this order, her children often reported to her that their father drank when he had responsibility for them. Fearing for her children, she accessed the court for a remedy:

> So I go and I file to have his visitation supervised. I just want 'em supervised'cause the kids are gettin' kinda nervous. They know dad's doin' things he's not supposed to. He goes in [to the court] and lies [about using alcohol]. And lies and lies and lies. Says, 'Nope. Kids are lying.' I'm a liar. 'This isn't happening.' He didn't follow the court order [that required him to get a] drug and alcohol assessment. As far as I know he still hasn't done it 'cause I haven't received a copy. And the [court personnel] says, 'I'm sorry but we're not gonna supervise [visitations]. We're taking his word over yours.' I said, 'Okay, but I'm gonna tell you right now. If my kids come home and they tell me one more time that their dad has been drinking, I'm not sendin' 'em.' [The court personnel replied] 'Well, then you'll be held in contempt of court.' (Jesy)

In her case, the court eventually told her that she could refuse to send her children with their father if she believed they would not be safe; however, the court refused to order that parenting time be supervised.

Two women were successful in making changes to the custody and parenting time order after the occurrence of extreme harm to their teenaged children. In both of these cases, the children wanted less (or no) contact with their fathers and both had taken their own steps to limit contact. One child, who had attempted suicide, simply stopped living with her father despite being the subject of a joint physical custody arrangement. This caused the court to recognize that her custodial environment was solely with the mother and, furthermore, that removing the child from her mother's physical residence might inhibit the mother's ability to act as an advocate for the child's significant mental health care needs. The second child, who had committed non-suicidal self-injury, skipped court-ordered visits with her father. When her mother petitioned for a change in the parenting time arrangement, the daughter clearly explained to the judge why she no longer wanted contact with her father and how her previous contact had negatively impacted her.

Finally, two women disconfirmed the assertion: these women's requests to the court were taken seriously and the court acted in ways the participants believed were in the children's best interests. Significantly, both women had independent evidence of the ex-husbands' dangerous and/or illegal behaviors. The first disconfirming participant, Vanessa, had physical evidence of her ex-husband's violence, including threats to kill her. She obtained a restraining order to keep her ex-husband away from her and he was later incarcerated for violating that order. This enabled her to obtain a no-contact order against her ex-husband, which prohibited him from having any contact with their children. After leaving jail, he attempted to have his parenting time re-instated, but the court denied his request.

The case of the second disconfirming woman, Meredith, is more complex. She called the police to report that, during his custodial time with them, the father had left their small children home alone, which was specifically against the court order. After the police verified that the children were alone, the father returned home while driving under the influence of alcohol, for which he was arrested. The court granted a temporary ex-parte order for Meredith to have full physical custody of the children. However, the father fought the ruling and, within eight weeks of the event and against Meredith's views of what was best for her children, the custody arrangement was returned to joint physical custody.

Despite the court initially acting in ways these two women believed to be in their children's best interests, both women expressed the belief that the court would not continue to act in this way in the future. For Meredith, this was because the court had already acted against what she believed to be her children's best interests by restoring the joint custody arrangement. For Vanessa, it was because she disagreed with the reasoning behind the court's decision to deny her ex-husband parenting time. She believed he should be denied because she feared kidnapping and he wanted the visits to occur at a site near the state border. The court recognized the risk of kidnapping and pondered fitting the ex-husband with an electronic tether to monitor his location. However, the judge ultimately decided not to reinstate the father's

parenting time because there were firearms, which he was legally prohibited from accessing, at the proposed site. Vanessa believed that if the firearms were removed from the property, the father would be granted parenting time despite the risk of kidnapping.

### Post-separation Abuse of Mothers

All of the women in the sample experienced emotional abuse by their ex-husbands post-separation. Other tactics utilized by abusers were physical abuse ($n$=9) and stalking ($n$=5). Vanessa, whose assailant stalked and threatened to kill her, related one of many events in which her assailant showed up outside her home:

> [I called his sister] and I said, "You need to talk to him and find out what's going on." She [called him and then] called me back. She told me to get outta the house because "He's got his gun and he's gonna blow your fuckin' head off." So I called the police, made a police report, and ran next door… (Vanessa)

Assailants stalked their ex-wives post-separation by making repeated, harassing phone calls and texts, harassing them at work, or sitting in parked cars outside of their ex-wives' houses. For one woman, abuse began post-separation and three additional women reported an escalation of physical abuse post-separation. Tamara's and Mim's experiences with their ex-husbands illustrate the varied ways in which assailants would continue to attempt to control and harass their ex-wives:

> I was getting threatening text messages, threatening phone calls when he wasn't supposed to call here… He'd open the gate so my dogs got lost one day. You know, things that he knew would upset me… I had this little flower shelf that my son had painted and I had all flowers in it, I had come home and it was all trashed. They were all dumped upside down and it was dirt and all of them were ruined. You know, stupid things like that just to piss me off. He had disconnected my garage door… so it wouldn't open. Dumb stuff like that just to kinda say, I can still affect you even though I'm not there. (Tamara)

> He stole the license plate off my car. He smashed my window, or my mirrors on my car. [He] would show up to my place of employment and make nasty comments… He would back me into a corner when I was trying to get away from him. And I couldn't get away. He would grab my arm and hold onto me so I couldn't leave… [He would tell] me I'm a bad mom, [and say] 'You're ruining our kids.' (Mim)

These quotes illustrate how assailants used numerous abusive tactics to continue controlling their ex-wives. While many of these tactics are criminal, some are not, but still caused emotional distress to mothers and sent the message that their assailants could get to them at any time.

Twelve assailants used opportunities presented by parenting time schedules to attempt to control their ex-wives, mostly through emotional abuse. Emotionally abusive tactics included undermining the mother's confidence as a parent; playing "mind games;" and verbally degrading her. However, some of the emotionally abusive and controlling tactics used by perpetrators were subtler in nature and bear illustration.

One subtle tactic that fathers used was manipulating custodial or parenting time schedules to exert control over mothers' schedules ($n$=6): fathers demanded to see their children outside of scheduled times; demanded flexibility from mothers in rescheduling custodial or parenting times; failed to keep the children for the entire scheduled time, often returning them unannounced; failed to show up for scheduled visits; and refused to take the children for custodial or parenting times (even at times to which they had demanded mothers reschedule). While fathers demanded flexibility from mothers, they refused to be flexible when mothers requested changes in the schedules, even in emergency situations. As Jesy described "We were in a car accident on my way home from work one night and I called him, I said, 'Look, I've been in a car accident. I need you to go pick up the kids.' [He replied] 'No, you figure it out.'" Many fathers engaged in this tactic as a matter of course, but some used it specifically when they were angry with their ex-wives. The result was that women often had to re-arrange their schedules or avoid making firm plans because they were uncertain whether fathers would adhere to parenting time arrangements. As Emily stated, "it just, it got to the point where I never knew when he was gonna take 'em and when he wasn't." Importantly, this tactic was never used in isolation; each of the assailants who did this engaged in other types of abuse, such as stalking or physical abuse, as well.

Our second assertion, *In those cases where the ex-husband contacts the ex-wife, or uses times at which he has contact with her, to attempt to maintain control over her, she will make efforts to limit her contact with him*, deals directly with post-separation abuse (PSA) and women's strategies to minimize PSA. Sixteen of our 19 participants confirmed assertion 2. Despite all of the study participants experiencing PSA, for two women this assertion was not applicable. These women experienced mainly economic abuse and emotional abuse that took place outside of interactions with their assailants (e.g., the ex-husband repeatedly and falsely reported a mother to Child Protective Services), and therefore likely could not have been reduced by limiting contact. For an additional participant, we did not amass enough information

during the interview to examine this assertion. No participants disconfirmed this assertion.

Women used a range of strategies to limit contact with their ex-husbands with the goal of reducing PSA. Some women used formal strategies, such as accessing the civil and/or criminal justice system. Specifically, nine women accessed the court to reduce their ex-husbands' abilities to contact them. Eight of these women filed for civil restraining orders at the time of post-separation; however, only six women were awarded restraining orders. One woman who was not granted a restraining order viewed petitioning for one as a failed strategy that ultimately decreased her safety because it antagonized her ex-husband without providing a more protective police response:

> In the end I think that [petitioning for a restraining order] actually caused more problems. Because then every time [I called the police], they wouldn't make him leave. So that just led to more episodes and us calling the police more and things going on where it just escalated everything that was already going on, where we could have avoided it had they separated us. (Paige)

Conversely, women who gained restraining orders generally felt safer, or at least valued having a record of the abuse. At the time of the interview, Rebecca's restraining order had lapsed; however, she allowed her assailant to believe that the order was still in place to continue its protective effects. Another woman, whose assailant made harassing phone calls, obtained a court order specifically restricting his ability to call her. Additionally, women used the criminal justice system to limit their exposure to assailants ($n$=6). For example, one woman had her assailant jailed for violating a restraining order, and another successfully pressed charges against her assailant for misdemeanor stalking.

Women also took informal steps, such as not being present during child exchanges, to set boundaries and limit contact with their assailants. Informal steps were sometimes taken in combination with formal steps (see Table 2). One assailant, who was in prison for charges unrelated to IPV, sent letters that were manipulative in tone to his ex-wife and child and also wrote letters to a mutual friend of theirs in an attempt to gain information about his ex-wife. When he requested, through his mother, that his ex-wife allow him to call her from prison, she refused. Another way in which women set boundaries was by not allowing their assailants into their houses.

Women were also able to anticipate when their ex-husbands would harass them and used strategies to avoid it. For example, Meaghan, whose ex-husband closely monitored his child's grades in school, called her ex-husband when she knew he wouldn't answer and, in an attempt to preempt his harassing phone call, left a message explaining why the child's grades had slipped. Soma decided against obtaining professional counseling services for her child because the father did not give his permission and, because of a joint legal custody arrangement, she would have had to actually go to court to get a court order for counseling for my son.

> And the pediatrician woulda supported it. She woulda given me a letter. But [the father's] got a right to make a decision on the therapist. And I thought, 'Oh, we're gonna be at this for months and I don't want to have that much contact with you.' So I just backed off and [my son] gets social work services at school with his Special Ed. That's part of it so I just kinda let the social worker handle it. (Soma)

By dropping her request, Soma avoided having to make court appearances that would have provided her ex-husband access to her. Importantly, she was still able to provide some type of counseling for her child.

Finally, some women simply stopped interacting with their ex-husbands when they sensed that they were going to act "badly."

> I can just say, 'You know what? This is not good. I'm not having this conversation with you.' And I'll hang up the phone or…I'll leave or whatever. And I know how to cut things off when he starts to get to where I know it's gonna go badly. I pick up his signals quite quickly, you know. But it's like, 'Okay, this is not my problem anymore. This is somebody else's problem. You can talk to someone else.' (Shelby)

Mothers perceived child exchanges as times in which fathers may act badly and the risks to their safety may increase.

**Table 2** Assailants' abusive tactics post-relationship and women's strategies to limit contact with their assailants ($n$=16)

| | Women's strategies to limit contact | | | |
|---|---|---|---|---|
| Assailants' abusive tactics | Requested restraining orders/Court orders ($n$=9) | Third party/won't see at exchanges ($n$=3) | Informal ways to limit contact ($n$=8) | Called police/police report ($n$=6) |
| Emotional abuse only ($n$=5) | Rebecca, Jennifer | Meredith | Rebecca, Kathleen | Jennifer, Lisa |
| Physical abuse ($n$=9) | Shelby, Paige, Mim, Carole, Vanessa | Shelby | Shelby, Meaghan, Kim, Soma, Tawny | Paige, Mim, Carole, Vanessa |
| Stalking ($n$=5) | Tamara, Mim, Jesy, Carole, Vanessa | Jesy | Tamara | Mim, Carole, Vanessa |

Accordingly, some mothers ensured that they would not be in contact with the assailants during child exchanges by either using other people as intermediaries or by not getting out of the car during the exchange.

See Table 2 for a breakdown of assailants' abusive tactics and women's strategies to limit contact. Women often used multiple strategies over time, modifying tactics if one was unsuccessful. Requesting a restraining order was the most common strategy women used; in fact, all five women who experienced stalking petitioned for restraining orders, though only four women received them. Four of the women who called the police on their assailants had restraining orders against them. Two of the women who experienced solely emotional abuse relied only on informal ways to limit contact or avoiding seeing their assailant at child exchanges. Fear of future violence led the remaining three women to utilize the civil and criminal justice systems to help them stay safe.

## Discussion

This qualitative study examined women's responses to abuse committed by IPV-perpetrating ex-husbands with whom they had undergone custody disputes. The mothers in this research reported that IPV-perpetrating fathers made use of opportunities presented to them by child custody and parenting time arrangement to further abuse mothers and children. When fathers harmed children, or mothers believed harm was likely, women overwhelmingly turned to family court, at least at first, to help keep their children safe. However, many mothers found that family court did not act in ways that they believed protected their children. Conversely, when women turned to the justice system for restraining orders or called the police for help against IPV, they generally found the justice system responsive. When the justice system did not support women, for example by denying a restraining order petition, they found that this increased the danger they faced from their partners.

No clear patterns emerged when comparing assailants' abuse of mothers with that of children. While all women reported abuse against themselves, not all women reported that fathers abused children. Likewise, no clear patterns emerged comparing pre-separation abuse of women and children with post-separation abuse of women and post-divorce abuse of children. While the lack of patterns is likely due to the small sample size, it also illustrates a need for the court to analyze each case on its own merit.

As in other research (Harrison 2008; Kurz 1995), this sample of women provided examples of women who feared that advocating for their or their children's wellbeing in the court would backfire and increase their or their children's risk of being harmed. For one woman, a failed petition for a restraining order led to an increase in the frequency of violence her ex-husband perpetrated. Fear that advocating for their children could backfire prevented some mothers from accessing the court and possibly gaining increased safeguards for their children. The perception that the court may not help is understandable given that two of these women had been previously told that being charged with federal and felony crimes, being the subject of arrest warrants, committing IPV, and previously physically harming their children did not negate the fathers' parental rights to see the children or even warrant safeguards when the fathers saw their children. However, mothers believed that these facts indicated that spending time with those fathers was not in the children's best interests.

As has been noted by other scholars (Moloney 2008), while it is stated that the best interests of the child should guide custody and parenting time decisions, it appears to take a backseat to parental rights. Even when women had independent evidence of IPV, such as a restraining order, they were not always able to persuade the court to alter custody and parenting time arrangements in a way they believed protected their children from harm. It is possible that, as other research has suggested (Bancroft and Silverman 2002; Dalton 1999; Jaffe et al. 2003; Kernic et al. 2005; Logan et al. 2003), IPV-perpetration was not considered relevant to fathers' rights or abilities to parent their children.

Some women found it difficult to gain safety for their children as a result of court decisions. An example that bears exploring is that of Jesy, the mother who petitioned for supervised visitation so that the father would be less likely to drink or be drunk around the children, something she believed increased his risk of being violent. She believed the father to be a danger to his children because of his history of severely physically abusing her, including threatening her with a firearm and choking her in front of their children, all of which the court was aware. The court ruled against her, taking his word that he did not drink around the children, and told Jesy that she would be held in contempt of court if she denied visitation. Jesy therefore risked civil sanctions, including the possibility of jail, were she to refuse to send her children to visit their father despite the clear risks to their safety. Only after her continued arguments with the court was it written into her record that she could deny visitation in unsafe situations. Although Jesy considered this a minor win, it is actually problematic for multiple reasons.

The first reason it is problematic is because this was already the law in the Midwestern state in which the study was conducted. Thus, Jesy was initially threatened with contempt of court for acting within her legal rights. It may also be that court personnel did not believe that the father's alcohol use around the children, despite the court order against it, constituted a danger. Ultimately, it is for the court to decide what situations are unsafe, and the court already demonstrated an unwillingness to believe Jesy's report of her

ex-husband's alcohol use. Regardless, it is in the court's interest to inform parents, especially those who disclose abuse, of what they legally may and may not do in efforts to protect their children.

The second reason the court's informing the mother that she could deny visitation in unsafe situations instead of agreeing to have visitations supervised is because it increases the mother's responsibility to keep her children safe. This mother learned of her ex-husband's use of alcohol during visitation only after her children returned home to her; because child exchanges require very little if any interaction on the part of parents, she did not know beforehand. It is unclear what information the mother could use to determine whether her ex-husband had consumed alcohol prior to the visit, and certainly it is outside her ability to know whether he *would* drink during the visit. The mother stated that she would use her instincts to determine whether her children were in danger. However, we would argue that children would be safer relying on the watchful eye of a supervisor to keep them safe, rather than forcing women to predict when their children might be in danger. Furthermore, mothers' "instincts" will not likely be trusted by the court, which leaves them still at risk of contempt.

Women without independent evidence of IPV or child abuse are at a disadvantage in family court. That most women do not have independent evidence of IPV is not uncommon; a study in Australia found that most allegations of IPV in child custody proceedings are not substantiated with objective evidence (Moloney 2008). In our previous research with this sample, we found that a lack of independent evidence of IPV often lead court personnel to dismiss the allegation (Rivera et al. 2012b). Research by Kernic and colleagues (2005) found that even in custody cases in which allegations of IPV were made and independent evidence, such as police records, was available, this evidence often is not included in child custody case files. This points to a larger problem in which IPV is not adequately understood or handled in custody cases.

It is clear that while courts have processes, rules, and evidentiary procedures that must be followed, at least for many of the women in this study, these processes failed them and they, and often their children, continued to be victimized by partner-violent fathers. Family courts should undertake in-depth evaluations of procedures in place to identify, investigate, and respond to allegations of IPV and child abuse. The points in the process at which the problem of IPV could be inadequately handled are numerous, and could include, but not be limited to: 1) court personnel believing an IPV allegation to be insufficient to warrant investigation; 2) a custody evaluator or investigator being unknowledgeable of IPV; or 3) court personnel believing that IPV perpetration ends upon separation and/or is not relevant to parenting. In-depth evaluations of court procedures would determine how IPV allegations are handled in daily practice and could point to concrete ways to improve the system and its outcomes for victimized mothers.

In this research, we did not examine all abusive tactics used by assailants against mothers and children; in fact, the assertions were particularly limited in the scope of abuse considered. The iterative process of analytic induction required that our assertions develop from the data, and some types of abuse simply did not fit thematically with the assertions that were developed. For example, we had multiple cases in which fathers attempted to undermine mothers or who emotionally abused children who did not resort to self-injury. We did not include emotional abuse that did not precipitate self-injury in assertion 2 because the assertion had emerged as an examination of women's potential use of the court, and women often did not feel they could go to the court with complaints of emotional abuse alone. Because emotional abuse is implicated in serious, negative health outcomes including behavioral problems, depression, delays in growth, and problems in brain development in young children (Rees 2010), it is in the best interests of children to be protected from such abuse. Court personnel should consider emotional abuse to be a serious problem, and this message must be conveyed to parents so that they feel justified in coming forward with these complaints.

Our examination of harm to the children was also limited. Our reliance on mothers as informants limited our findings to those events of which mothers were aware. Therefore, we likely did not learn of either all the abusive acts toward children or all the children that were abused. Moreover, we do not expect that we learned, or mothers knew, of all the children who engaged in self-injury. While we relied on mothers to link the self-injury to fathers' actions, and emotional abuse has been linked to self-injury in the literature numerous times, it is critical to note that other events in these children's lives could have triggered the self-injury. Specifically, parental divorce has been linked with suicidal or self-harm behaviors (Rubenstein et al. 1998), as has living in a home with intimate partner violence (Cerutti et al. 2011; Olaya et al. 2010) and witnessing violence more generally (Wiederman et al. 1999). Furthermore, not all studies of self-harm have found a link with emotional abuse (Noll et al. 2003). Our findings in this section must be viewed not as a finding of prevalence of abuse to children or self-harm of children, but as an analysis of mother's actions and court responses upon learning of these events.

This analysis also did not investigate how state statutes were applied to the custody cases. While many of the responses from the court were likely a result of a disbelief that IPV perpetration is relevant to fathering or a disbelief of mothers' reports, as was suggested in our previous research with this sample (Rivera et al. 2012a, b), it is possible that some of the court responses that women believed put their children in danger were based largely on legal requirements. An examination of state laws as they are applied to child

custody disputes in cases involving violence must be undertaken to determine how specific laws impact safety.

Victimized women and children must be allowed opportunities to heal from the abuse they have experienced and to remain free from future abuse. Courts can prevent abuse from occurring by heeding mothers' concerns, considering prior behaviors by both parents, considering children's desires and concerns, and crafting custody and visitation agreements that maximize the children's and their mothers' safety. Such orders should be monitored periodically to assess if they are indeed working as intended. Women who experience intimate partner violence can suffer emotional, psychological, and physical health consequences (Campbell 2002; Campbell et al. 2002) as can their children from witnessing the abuse (Campbell and Lewandowski 1997; Carpenter and Stacks 2009; Holt et al. 2008; Roustit et al. 2009). When family courts decree that assailants have the right to remain in children's lives and, by extension, their mothers', opportunities to heal may not be present, and assailants can continue their abusive and controlling tactics. This research showed that many assailants did just that. However, it also showed that women act strategically to minimize violence toward themselves and their children.

## Appendix A

Prompts used to assess intimate partner violence before and after separation:

- You mentioned on the phone that your ex-husband was controlling or violent. If you don't mind, could you please describe some of his controlling or violent behaviors, or reasons why you feared for your safety?
- Did he ever use physical force against you? In other words, did he ever hit, slap, kick, punch, shove or otherwise physically hurt you?
- Were there other things that he did, actions that did not physically hurt you, that made you fear for your safety?

Prompts used to assess women's perceptions of whether family court supported their efforts to gain safety for themselves and children:

- Tell me about what happened during the court case, including your perceptions of the process.
- Were any specific safety aarrangements made for you during the court process and did these arrangements make you feel safer?
- Do you feel like the process you went through was reasonable given concerns for your safety?
- If you told any court official about abuse, what was the reaction of the court official? Were your concerns taken seriously, documented, and followed up on?
- What factors do you think *[court personnel]* took into account in making the final custody decision?
- Do you feel like you were listened to and that your safety and the safety of your child/ren were taken into account in the court process and custody decision?
- Was your or your child/ren's safety addressed during the court case?

Prompts used to assess violence and women's responses to violence after separation and divorce:

- Could you tell me how custody and visitations are going so far?
- Have you ever feared for your or your child's safety because of your ex-husband?
- Has your ex-husband threatened you or harmed you during visitation or exchanges?
  - *[If yes]* How? What have you been able to do to try to stop this from happening in the future?
- Has your ex-husband threatened or harmed your child/ren during his time with them or exchanges?
  - *[If yes]* How? What have you been able to do to try to stop this from happening in the future?
- How safe do you believe your children are during their time with their father?
- Since the relationship ended, have you had to call the police because of your ex-husband?
- In order to feel safer, some women get a restraining order. Do you currently have a restraining order?
  - *[If yes]* Have you had a restraining order in the past? Has he ever violated the order? Do you feel safer, less safe, or about the same since you took out the restraining order?
- Have your children been emotionally harmed during time spent with their father or exchanges?
  - *[If yes]* How? Have you been able to do anything to try to stop this from happening in the future?
- How concerned are you, if at all, that your ex-husband will threaten or harm your child/ren in the future? Why do you say that?
- Have you heard of or are you aware of any instances where he used drugs/alcohol in the presence of your child/ren (before, during, or after separation)?
  - *[If yes]* How? Have you been able to do anything to stop this from happening in the future?
- Do you have any ongoing fear or concerns for your own safety due to contact with your ex-husband?
- Do you have any ongoing fear or concerns for your child/ren's safety due to contact with their father?

- Have you or your children gone anywhere for help regarding the situation between you and your ex-husband (before, during, or after separation)?

– *[If yes]* Where? How helpful have these services been? What problems, if any, did you encounter?

- Do you feel like your safety concerns are being met or acknowledged by the court? Why do you say that?

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# EXHIBIT B

COUNTY COURT : DUTCHESS COUNTY

PRESENT: HON. EDWARD T. McLOUGHLIN
Dutchess County Court Judge

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

NICOLE ADDIMANDO,

Defendant.

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Post Sentencing Hearing Submission----------X
Reply in Opposition to the Defendant's
Post Sentence Hearing Submission ---------X
Defendant's Sur Reply ----------X
Trial Transcript (2,316 pages)
/accompanying exhibits ----------X
Post Trial Hearing Transcript (367 pages )
/accompanying exhibits ----------X

DECISION AND ORDER
(CPL §60.12)

Ind. No. 74/2018

Putnam County District Attorney by
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Attorneys for Plaintiff

JOHN INGRASSIA, ESQ.
BENJAMIN OSTRER, ESQ.
ELIZABETH J.M. HOOD, ESQ.
Attorneys for Defendant

The foregoing papers were considered in deciding this motion.

The defendant is awaiting sentencing following her conviction after a jury trial for Murder in the Second Degree, a Class A-I Felony (Penal Law §125.25[1]) and Criminal Possession of a Weapon in the Second Degree, a Class C Armed Violent Felony (Penal Law §265.03[1][b]).

## THE CASE

On the night of September 27, 2017, Nicole Addimando fired a semi-automatic handgun, point-blank into the left temple of Christopher Grover, causing his death. The defendant and Christopher Grover had been in a relationship since 2009, and are the parents of two young children.

Over the course of several years before the homicide, the defendant alleges numerous instances of physical and sexual violence against her by Christopher Grover, culminating in the assertion of a justification defense at trial, based on her position that she acted as a result of "Battered Women's Syndrome". The People alleged that Christopher Grover was murdered while sleeping on his couch, and that there was insufficient proof that the victim abused the defendant over the course of the previous years.

The trial was conducted in the beginning of March, 2019, with both parties presenting a vigorous exposition of the facts of the murder itself, as well as extensive background information regarding events that occurred during the relationship over several years. A jury of eight women and four men found that the People disproved, beyond a reasonable doubt, the defendant's justification defense. The jury unanimously convicted the defendant of intentional Murder and Criminal Possession of a Weapon on April 12, 2019.

## PROCEDURAL HISTORY

On June 20, 2018, the Dutchess County Grand Jury indicted Nicole Addimando in a four count indictment charging Murder in the Second Degree, Manslaughter in the First Degree, Manslaughter in the Second Degree and Criminal Possession of a Weapon in the Second Degree.

The case was presented by the Putnam County District Attorney's office by Special Prosecutor Chana G. Kraus and Larry Glasser, Putnam County Assistant District Attorneys. [1] The defendant was represented by attorneys John Ingrassia, Benjamin Ostrer and Elizabeth Hood.

The trial began on March 18, 2019. At the trial, the People called nine witnesses on its direct case and four witnesses on rebuttal. The defense presented 15 witnesses, including the defendant, who testified for approximately three full days.

On April 12, 2019, the jury of eight women and four men convicted the defendant of intentional murder. The jury unanimously rejected, beyond a reasonable doubt, the defendant's battered women's syndrome justification defense. [2]

After the trial, and before sentencing, the defense petitioned this Court to conduct a hearing pursuant to Penal Law §60.12, to allow the defendant an opportunity for sentencing pursuant to the dictates of that statute. At the hearing conducted on September 9th, 10th and 11th, the defendant, as the moving party, called four witnesses. The People presented no witnesses, but submitted one exhibit that constituted a video compilation created by Christopher Grover, during the time that the defendant was pregnant with their first child.

Both parties asked the Court to consider the full transcript of the trial, as well as all trial exhibits, in making its decision pursuant to Penal Law §60.12. Both parties submitted lengthy

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[1]The Dutchess County District Attorney's Office recused itself due to a conflict regarding an Assistant District Attorney, who was a potential witness.

[2]Among other characteristics of the twelve individuals on the jury, eight were women ranging in age from 22 to women in their 60s. The female jurors included a 22 year old recent college graduate, a divorced mother of three, a career financial advisor, an IBM and Central Hudson manager, a writer with five children and a medical professional. The male jurors included two medical professionals, a history teacher and a technology expert, ranging in age from 30s to 60s.

legal briefs in support of their position.

The Court agreed to review all of the testimony, evidence and exhibits submitted by both parties before rendering a decision and determining an appropriate and lawful sentence.

THE STATUTE
PENAL LAW §60.12

Penal Law §60.12 as amended on May 14, 2019, one month after the jury verdict in this case, states in pertinent part:

"....the Court, upon a determination following a hearing that

(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to a substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in subdivision 1 of Section 530.11 of the Criminal Procedure Law;

(b) such abuse was a significant contributing factor to the defendant's criminal behavior;

(c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00 would be unduly harsh, may instead impose a sentence in accordance with the section. A Court may determine that such abuse constitutes a significant contributing factor pursuant to paragraph (b) of this subdivision regardless of whether the defendant raised a defense pursuant to Article 35, Article

40 or Subdivision (1) of Section 125.25 of this chapter.

"At the hearing to determine whether the defendant should be sentenced pursuant to this section, the Court shall consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination. Reliable hearsay shall be admissible at such hearings."

If the Court finds in favor of the defendant's motion, §60.12 permits the court to impose a lesser sentence. In the instant case a determinate sentence of 5 to 15 years, plus post release supervision is available, if the Court grants the application. If the Court finds the defendant has not met her burden, the Penal Law allows an indeterminate sentence of 15 to life, up to 25 to life.

This is a newly amended statute which has not been interpreted by judicial decisions. In the statute, certain standards and definitions are not addressed. For example, the statute does not dictate the appropriate standard of proof that the defendant must achieve. The statute also does not define "reliable hearsay". The burden of proof and persuasion is on the moving party, the defendant.

The original section of Penal Law §60.12, signed into law in 1998, used critically different verbiage in the elements required in this section. In 1998, Penal Law §60.12 stated as follows:

"....the Court, upon a determination following a hearing that

(a) the defendant was the victim of physical, sexual or psychological abuse by the victim or intended victim of such offense,

(b) such abuse was a factor in causing the defendant to commit

such offense; and

(c) the victim or intended victim of such offense was a member of the same family or household as the defendant as such term is defined in subdivision 1 of Section 530.11 of the Criminal Procedure Law, may in lieu of imposing such determinate sentence of imprisonment, impose an indeterminate sentence of imprisonment in accordance with subdivisions 2 and 3 of this section."

Most notable about the amendment added by the legislature in 2019 is the addition of the following phrases: **"Having regard for the nature and circumstances of the crime"; "the history, character and condition of the defendant"** in section (c); and in section (b) that the abuse must constitute **"a significant contributing factor"**. The amended statute allows for a hearing with oral and written arguments, testimony, and the opportunity to present 'reliable hearsay'. The statute was also amended to require that the alleged abuse must be inflicted by a member of the same family or household.

There is a dearth of case law to assist in the interpretation and application of the statute. In People v. Sheehan, 106 AD3d 1112 (2013), the Second Department addressed the question as to whether the defendant's sentence should have been altered pursuant to Penal Law §60.12. In Sheehan, the defendant was charged with Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree - the exact two charges addressed by the jury in the instant case. In Sheehan, the defendant was acquitted of Murder based on a justification defense, but convicted on the Criminal Possession of a Weapon in the Second Degree charge. While the Sheehan Court determined that Penal Law §60.12 was applicable because the victim/defendant in

that case had been the victim of domestic violence, and that violence was a factor in the defendant's commission of Criminal Possession of a Weapon, the Appellate Court, "under the particulars circumstances of this case" decided it was not an improvident exercise of discretion for the Court to decline to sentence the defendant pursuant to Penal Law §60.12.

It is notable that although the 2009 version of the statute in Sheehan did not yet include the "nature of the case" consideration, the Appellate Division included that consideration in its decision. That same language, relied upon by the Appellate Division in Sheehan in 2013 is now included in the 2019 amendment.

The Sheehan decision affirmed the sentencing court's decision to not grant leniency pursuant to §60.12, and quoted the sentencing Judge as follows: "Society certainly must be concerned with self-help, violent behavior that is not sanctioned by law."

The Appellate Division in Sheehan determined that "since the Court viewed general deterrence as an overriding sentencing principle, we cannot say that the emphasis was erroneous or that the interest of justice calls for a reduction in the defendant's sentence." People v. Sheehan, 106 AD3d 1112, at 1113. It should be noted that the Sheehan decision was published approximately six years before the 2019 amendment of Penal Law §60.12.

THE LEGAL STANDARD

Although §60.12 of the Penal Law, either in its original 2009 version or 2019 version, does not include a standard of proof, there are other substantive sentencing sections in the Criminal Procedure Law that provide guidance.

For instance, in CPL §400.20(5), titled "Procedure for Determining Whether Defendant Should Be Sentenced as a Persistent Felony Offender", the statute provides that matters

pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct can be established by any relevant evidence not legally privileged, regardless of admissibility, and provides that the standard of proof with respect to such matters shall be a "preponderance of the evidence." Additionally, CPL §440.30 entitled "Motion to Vacate Judgment and to Set Aside Sentence; Procedure" dictates that at a hearing the defendant has the burden of proving "by a preponderance of the evidence every fact essential to support the motion".

Therefore, this Court determines the standard of proof pursuant to Penal Law §60.12 is a "preponderance of the evidence". [3] The burden of proof must be met by the defendant, as the moving party.

"RELIABLE HEARSAY"

In §60.12 of the Penal Law, subdivision 1, the Court is directed to consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination. The statute then dictates that "reliable hearsay" shall be admissible at such hearings. The statute does not define "reliable hearsay". The phrase "reliable hearsay" is also used in §440.47(2)(e) in CPL Article §440, entitled "Re-sentencing in Domestic Violence Cases".

The phrase "reliable hearsay" has been legally interpreted most often in Sex Offender Registration Act ("SORA") proceedings. For instance, Corrections Law §168-n(3) allows

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[3]It should be noted that both parties agreed to that standard at the start of the §60.12 hearing (HT page 7, line 18; HT page 9, line 6).

consideration of "reliable hearsay evidence" as long as it is relevant to the determination.[4] Corrections Law §168-n is titled "Judicial Determination", and provides direction to the Court in determining whether the offender is a sexual predator, sexually violent offender or predicate sex offender. (See also Corrections Law §168-d(3)).

In People v. Mingo, 12 NY3d 563, the Court addressed the concept of "reliable hearsay". While rejecting certain documentary evidence that was in the form of a 'synopsis' or collected data, the Court acknowledged that at a SORA hearing, "reliable hearsay can include the Board of Examiners Sex Offender Report, a Pre-Sentence Report, a case summary, Grand Jury testimony, misdemeanor and felony complaints, and trial testimony". In Mingo, the Court ordered a hearing to establish the appropriate foundation of the documents submitted for consideration. The Mingo Court stated, "Where an unsworn statement is equivocal, inconsistent with other evidence or seem dubious in light of other information on the record, a SORA Court is free to ignore it. Mingo at page 577.

Further, in §370.50 of the Criminal Procedure Law, entitled "Procedure for Determining Whether Certain Misdemeanor Crimes are Serious Offenses Under the Penal Law", subdivision 3 allows for "reliable hearsay" to the determination relevant to the statute. As long as the relevant evidence has a "indicia of reliability", such evidence does not violate the defendant's right of confrontation under the Sixth Amendment (McKinney's Article 1, Section 6: Idaho v. Wright, 497 US 805) (See also, People v. Robinson, 89 NY2d 648).

Therefore, this Court deems it appropriate to consider all trial testimony and exhibits,

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[4] It should be noted that the burden of proof in that particular statute is "clear and convincing evidence".

including video taped recordings of the defendant speaking to Officer Sisilli, Detective Honkala, and Detective Hamill. The defense has also submitted certain medical records. Although the records were not permitted at trial, (such proffered notations by a medical professional in a non-diagnostic setting were not admissible hearsay) for purposes of the §60.12 hearing, such evidence is "reliable hearsay" which the court has considered.

THE ELEMENTS OF PENAL LAW §60.12

Penal Law §60.12(1)(a) requires the Court to examine whether "**at the time of the instant offense**, the defendant was a victim of domestic violence, subjected to substantial physical, sexual or psychological abuse inflicted by a member **of the same family or household**, as such term is defined in subdivision 1 of section 530.11 of the Criminal Procedure Law." (emphasis added)

Penal Law §60.12(1)(b) requires that such abuse was **a significant contributing factor** to the defendant's criminal behavior. (emphasis added)

Penal Law §60.12(1)(c) provides that having regard for the **nature and circumstances of the crime** and **the history, character or condition of the defendant**, that a sentence of imprisonment pursuant to (the appropriate section) would be **unduly harsh,** may instead impose a sentence in accordance with this section. 60.12(1) also allows the Court to determine whether evidence of domestic violence constituted a "significant contributing" factor, even if the defense did not interpose a defense pursuant to Article 35.[5] (emphasis added)

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[5] In the instant case, the defendant served the appropriate notice and interposed a defense pursuant to Article 35, based on the claim that she acted under the influence of Battered Women's Syndrome.

## DEFENDANT'S ALLEGED HISTORY OF ABUSE

In her trial testimony, defendant related a lifelong, extensive history of abuse before and during her relationship with Christopher Grover, and by other men as well. According to the defendant, the abuse started when she was a young child and continued throughout several relationships, including abuse by individuals with whom she was not in a consensual relationship. During her trial testimony, the defendant recounted numerous abusive acts by the decedent, Christopher Grover, over the course of their relationship.

The relationship with the decedent began when both Christopher Grover and the defendant were employees at a local gymnastics business (TT page 151, line 17) [6] in 2008 (TT page 639, line 11). They moved in together in 2012 (TT page 639, line 19) and moved to a residence in Hyde Park in late 2013 (TT page 645, line 24). The Defendant testified that the sexual and physical abuse began before her first pregnancy, continued after her first child was born, continued throughout 2015, and continued during her second pregnancy (TT page 646, line 13-25).

Defendant's allegations of abuse include forced sex (TT page 648, line 7) and other violent encounters, including beatings about the face and body (TT page 650, 655, 660, 661). The defendant described the decedent burning her around her vaginal area with a heated spoon (TT page 655, line 16). The defendant's testimony regarding the abuse by the victim with a heated spoon included her testimony that the decedent held her on the floor with one hand, pulled down her underwear, heated a spoon on a stove flame with the other hand, pulled her knees apart and repeatedly burned the defendant "over and over again" (TT page 655, line 14).

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[6] TT= trial testimony; HT = hearing testimony; HV = Honkala video; SV=Sisilli video

Defendant also alleged that the victim once had bound her and left her tied up for a period of time. (TT page 687, line 25). The defendant claimed that the abuse by the victim continued into 2016 (TT page 697, line 12-21) and at one point the victim raped her vaginally with a bottle (TT page 706, line 25). At the trial, numerous pictures of injuries on the defendant were submitted for the jury's consideration (TT page 650, 660, 666), purportedly as corroboration in support of her claim of abuse.

The abuse included allegations that the victim took still photos and video of the defendant, in degrading and abusive situations, and preserved the images in his camera and on his laptop computer. The defendant also alleged that the victim uploaded these images and videos to a pornographic website called "Pornhub".

The defendant also described verbal abuse by the victim, including that he told her twice on the night of the homicide that he would kill her (TT page 740, line 9). The defendant alleged that the victim would also use instruments to gag the defendant, and would use whips to assault her (TT page 1019, line 1-5). The defendant claimed that the victim once told her that he could "kill her in her sleep" (TT page 1053, line 19). The defendant also recounted that the defendant would tell her that she "didn't learn her lesson", and was told she needed to "respect him" (TT page 663, line 17).

The defendant also testified to numerous instances of abuse by other individuals throughout her life. Defendant recounted that she was abused as a child by a neighbor known to her as "Butch" (TT page 761, line 15; TT page 810, line 21). Defendant testified that she has post traumatic stress disorder due to this abuse as a child (TT page 811, line 16). One witness recalled learning from the defendant that she had been abused by a friend's father during a sleep

over (TT page 1846, line 18), presumably referencing the above abuse.

Defendant also stated that she was abused for approximately one and half years by a maintenance worker at her apartment complex named "Caesar", (TT page 816, line 16) during the time that she alleges Christopher Grover was abusing her (TT page 812, line 22, TT page 817, line 7-10). This occurred in 2011 and 2012, (TT page 823, line 10) when she saw Caesar two to three times per week (TT page 816, line 22). Defendant alleged that during the year and a half that Caesar was sexually abusing her, at one point he used a power tool to vaginally penetrate her (TT page 824, line 24). At the time, Caesar was supervised by defendant's mother, who was the property manager of the apartment complex. (TT page 1909, 1910) During this period, defendant also told her close friends that Caesar had been abusing her (TT page 1389, line 25). Defendant told Dr. Kirschner, the People's psychiatric expert, that there had been a multitude of situations where Caesar had abused her (TT page 1909, line 17).

Additionally, a witness recounted that the defendant told her about other individuals who had abused her, including a different individual named "Chris" (TT page 1908, line 23). The defendant had also once showed a witness physical evidence of abuse that had just occurred, including displaying a ripped shirt and scratches on her cheek, at a time when Christopher Grover was away for the weekend (TT page 1839, line 20).

Further, an individual who was a police officer, "D.T." allegedly abused her. The defendant testified that she originally moved from her mother's house to D.T.'s home to "get away" from Christopher Grover and Caesar. (TT page 827, line 9) The defendant moved into D.T.'s house approximately 1 ½ years after she began her relationship with Christopher Grover (TT page 1718, line 4). According to several friends and therapists, D.T.'s relationship with the

defendant was understood to have been sexually abusive. One witness recounted that D.T., according to the defendant, had been stalking the defendant (TT page 1387, line 8; TT page 1388, line 10) by showing up at grocery stores and at other places, uninvited (TT page 1395, line 22, 24). A close confidant of the defendant understood the relationship between D.T. and the defendant as "not consensual" (TT page 1397, line 19), but not forceful (TT 1393, line 4). According to the defendant's long-time therapist and confidant, D.T. had raped the defendant (HT page 164, line 23; HT page 169, line 11). The defendant's therapist reported that D.T. had forced the defendant to perform oral sex (H.T. 167, line 16) and at the time the defendant told her this, the therapist noted a cut on the defendant's lip (HT page 167, line 23). According to the defendant's therapist, sex with D.T. was not consensual (HT page 186, line 16) and was assaultive (HT page 215, line 7). It should be noted that during the trial, when asked if D.T. ever forced himself on the defendant, the defendant told the jury "no". (TT page 829, line 5)

Defendant's therapist also referred to an account by the defendant that she was raped by a person nicknamed "Race" (HT page 240, line 18) while in her 20s, and also made reference to an abusive encounter with a person nicknamed "A-Rod" (HT page 253, line 20). At the trial, every relationship described by the defendant that occurred with a male partner or acquaintance included either physical or sexual abuse, or both.

During the trial, multiple witnesses testified to observing various wounds on numerous parts of the defendant's body over time. A friend of the defendant noticed bruises on the defendant's cheekbone in 2016 and noted that she was usually "covered up" (TT page 1247, line 24), but stated that she did not know how the wounds occurred (TT page 1250, line 14). Another witness testified that she had observed bruises and attempts to cover up bruises with makeup, on

numerous occasions (TT page 1252, line 10; TT page 1253, line 10) from 2015 to 2016. Another acquaintance testified that she noted bruises on the defendant's face and arms along with burns (TT page 1258, line 6) in 2015. The same witness noted bruises on the defendant's face (TT page 1260, line 5) and noted that she had been injured almost every time she saw her (TT page 1263, line 17). The defendant's midwife noted wounds on the defendant's private parts in 2017 (TT page 1289, line 5). In addition, a midwife noted swelling and bruising to the defendant's face (TT page 1292, line 6). The midwife documented the injuries using photos (TT page 1295, line 23). Another witness testified that she observed black eyes and bruises on the defendant on several occasions in late 2015 (TT page 1364, line 1; TT page 1365, line 23). Another domestic violence professional noted injuries to the defendant's cheek, breast, thigh and private parts in 2014 (TT page 1487, line 24 et seq). At the request of the defendant, Sergeant Ruscillo of the Hyde Park Police Department was able to view pornographic pictures of abuse uploaded to "Porn Hub". Another witness testified that the defendant would often wear scarves around her neck and face, even though the weather did not require it (TT page 1539, line 3) and also noticed a bruise on the defendant's cheek in 2016(TT page 1541, line 3).

At the Penal Law §60.12 hearing, several witnesses were presented by the defendant, including a witness that had observed red marks and bruising on the defendant (HT page 16, line 17; HT page 19, line 18). The defendant's therapist testified at the hearing that she observed red lines on the defendant's neck (HT page 60, line 8), injuries to the defendant's face (HT page 63, line 20) and was told of burns to the defendant's private parts (HT page 73, line 22). This witness also recounted over ten sessions she had with the defendant where she observed wounds on the defendant's person (HT page 60 et seq).

The defendant's original therapist testified at the §60.12 hearing that she was able to view a filmed, forced sexual intercourse video involving another individual and the defendant (HT page 279, line 23), who she now believes, approximately five years later, to be Christopher Grover.

Throughout these numerous encounters and reported observations by the other witnesses, the defendant disclosed that Christopher Grover was her abuser to only two witnesses.

Defendant claimed at trial that throughout the time period leading up to the homicide, she was under the control of Christopher Grover. For instance, the defendant was worried that the victim would find out that she was seeing doctors and thereby reveal his identity as her abuser to them (TT page 1460, line 12). Defendant also told her therapist in an email on December 9, 2016, "I don't think there was a way I would be without him, unless one of us aren't alive anymore" (HT page 206, line 12).

Defendant's psychiatric expert, Dr. Hughes, testified at length about the nature of domestic violence. She observed that abuse can be interspersed with normalcy (TT page 1596, line 4). The doctor stated that violence usually doesn't happen in public and in front of other witnesses (TT page 1737, line 17). The defendant's mid-wife testified that often, women stay with men that abuse them and thereby give them permission to continue (TT page 1358, line 12). Dr. Hughes testified that in her opinion, Christopher Grover, was still a threat and had control of the defendant, even when the defendant possessed a gun on the night of murder (TT page 1741, line 9). The defendant's psychiatric expert testified, by a reasonable degree of scientific certainty, that the defendant was acting under the influence of Battered Women's Syndrome on the night of the homicide (TT page 1648, line 4).

PEOPLE'S POSITION

In opposition to the defendant's Battered Women's Syndrome defense at trial, and the defendant's application pursuant to §60.12, the People contend that the defendant was not under the control of Christopher Grover during the time period before the homicide, is an unreliable historian regarding her history of abuse and the identity of her abuser, is inconsistent regarding the facts of the homicide, and had a host of resources available to her that would have enabled her to avoid murdering Christopher Grover.

With respect to Christopher Grover's control of the defendant, regarding her financial independence, the defendant testified that she and Christopher Grover had separate checking accounts (TT page 991, line 1). Also, the defendant had a joint account with her father, into which her father would sometimes deposit money (TT page 991, line 8). Defendant also stated that she had a small business creating and selling "booties" to earn a minor income (TT page 914, line 17).

Further, the defendant's Battered Women's Syndrome expert, Dr. Hughes, stated in her opinion that the defendant was not socially isolated (TT page 1708, line 9). Dr. Hughes stated that the victim was not a jealous person (TT page 1710, line 5) and did not stop her from seeing a therapist (TT page 1711, line 4). The doctor observed that Christopher Grover did not object to the defendant living with D.T., a police officer, and his family, during their relationship and during the time that Christopher Grover was allegedly abusing the defendant (TT page 1718, line 24; TT page 1719, line 6). Dr. Hughes observed that, according to the defendant, after Christopher Grover had been regularly abusing the defendant, the defendant moved from the home of a police officer into Christopher Grover's home (TT page 1720, line 19), where the

abuse continued.

Dr. Kirschner, the People's Battered Women's Syndrome expert, testified that it was notable that if Christopher Grover was an abuser, it was unusual for him to allow the defendant to move in with a police officer while Christopher Grover was abusing her (TT page 1916, line 7), and thereby trust her to not reveal the abuse. Dr. Kirschner stated that a common characteristic of a batterer is to not trust his victim (TT page 1916, line 13). Dr. Kirschner also noted that the defendant had, in an earlier published article, publicly rejected marriage to the victim (TT page 1926, line 2; see also TT page 874, line 7). According to Dr. Kirschner, these were all indicia that Christopher Grover was not controlling the defendant. He also noted that, according to the defendant, she had the opportunity to leave her residence at night and go for car rides (TT page 1927, line 22).

Dr. Kirschner also noted that the defendant's admission to him that she continued an affair with D.T., including in Christopher Grover's home when he was not there, is the kind of act inconsistent with a person who claims that she is afraid and under the control of her alleged batterer. In expressing doubts about the defendant, Dr. Kirschner stated that having an affair with another man in the batterer's home is inconsistent with the actions of an abused person (TT page 1921, line 17), if the abuse allegations are true.

In a revealing series of communications between the defendant and the victim, three days before the homicide, according to the People, the defendant made a series of comments and responses to Christopher Grover in a text conversation:

"Are you this stupid?" (TT page 95, line 25)

"Do you remember or is something wrong with your brain?" (TT page 96, line 21)

"I have full complex thoughts like a human being." (TT page 97, line 25)

"WTF is wrong with you?", the defendant observed that the victim "has some sort of mental disorder" (TT page 98, line 6)

"I have an asshole man child for a partner. That's my disorder." (TT page 99, line 16)

These quotes are contained in People's Exhibit 6 and 7.

Also, in defense Exhibit CCCC and Exhibit Y submitted at the trial, the defense offered the following text statements were made by the defendant to Christopher Grover, approximately three days before the homicide:

"What the fuck are you talking about?" (TT page 934, line 14)

"Are you this stupid?" (TT page 934, line 24)

"Is something wrong with your brain?" (TT page 936, line 17)

"No, I have full complex thoughts like a human being and you can't understand them." (TT page 938, line 21)

"You might have some sort of mental disorder." (TT page 939, line 14)

"I have an asshole man child for a partner." (TT page 940, line 8)

*Defendant's* expert, Dr. Hughes, stated that these statements by defendant were "emotionally degrading" to Christopher Grover three days before the homicide (TT page 731, line 21). Also, defendant's mid-wife, who had stated that the defendant was controlling of Christopher Grover (TT page 1345, line 8), believed that both the victim and the defendant were "sick and abusive" to each other (TT page 1346, line 9).

The People's expert, Dr. Kirschner, described the defendant's texts as "berating and condescending" (TT page 1941, line 1). Dr. Kirschner described the activity by the defendant as

"provocative" under the circumstances (TT page 1943, line 5). He observed that if in fact, according to the defendant, Christopher Grover found "respect" to be an important issue, normally disrespect to the abuser would be a trigger for more abuse. (TT page 1941, line 19)

Dr. Kirschner, the People's expert, conceded that often domestic violence victims do not leave an abuser's home due to concerns about children or money. However, he observed that none of those concerns existed when the defendant left police officer D.T.'s house to move in with Christopher Grover (TT page 1920, line 18), (who was allegedly already abusing her) because the defendant's children had not yet been born.

ABUSE ALLEGATIONS

The People also argue there is evidence that does not corroborate the defendant's allegations of abuse. The defendant testified that abusive sex and violence continued during her second pregnancy. (TT page 646, line 13-25). However, the defendant's mid-wife testified that she performed full exams on the defendant during the pregnancy and did not document any evidence of abuse during the pregnancy (TT page 1324, line 1).

Further, one of the People's witnesses, Marissa Hart, testified that she saw no physical injuries on the defendant in 2014 (TT page 1805, line 20), and observed that the defendant dressed the same as other moms that she encountered (TT page 1809, line 13). Ms. Hart also testified that the defendant often used fabric bands on her wrists during gymnastic training (TT page 1814, line 8). The People contend this is a possible explanation for the defendant's reported wrist-binding wounds.

The People assert, most notably, that four weeks before the night of the homicide, the defendant texted a friend stating,"It's okay. I haven't figured out a way to kill him yet without

being caught, so I'm still here." (TT page 52, line 18). The defense contends that the defendant followed up that text with a "grimacing" emoji approximately four seconds later, and that the statement was made in jest.

The People argue there are other facts which do not corroborate the defendant's position, but that actually highlight the defendant's inconsistencies. For instance, although the defendant testified that Christopher Grover destroyed a camera on the night of the homicide, which according to the defendant had pictures and video of her abuse, the camera memory was resurrected and no actual pictures of abuse were found on the camera (TT line 347, line 13-25). Similarly, although defendant testified that a laptop which she stated contained evidence of abuse had been broken in half and submerged under water in a bathtub, presumably by Christopher Grover, the resurrected computer memory revealed no images of pornographic or sexual abuse once it was examined (TT page 387, line 1).

Also, although the defendant testified that her therapist had repeatedly told her to secure the photographic evidence on the laptop and bring it with her if she left Christopher Grover, (TT page 929, line 6), the defendant chose not to do so on the night of the homicide.

ABUSER IDENTITY

The People argue that the identity of the defendant's abuser is not corroborated by any witness or pictures, but comes solely from the defendant. The defendant's expert, Dr. Hughes, acknowledged that the defendant, in recounting certain incidents, could have facts "sort of blend together" (TT page 1734, line 23), and that she may not have the precision to give details of the who, what, why, where and when (TT page 1735, line 12). Dr. Hughes also acknowledged that the defendant at one point was conflating two separate abusive situations, (TT page 1715, line 1)

perhaps because she didn't want people to know it was her partner who was the abuser. When Dr. Hughes was confronted by the People as to whether the defendant was very confused about who was doing particular acts to her, meaning Christopher Grover or Caesar, she stated that she thought the defendant was confused, and that there were elements of disassociation, avoidance, compartmentalization, and suppression (TT page 1714, line 5-11).

The defendant testified at trial that for some period of the time she was being abused by Christopher Grover, Caesar was also abusing her (TT page 804, line 4-24). The defendant testified that Caesar had abused her for approximately one and a half years (TT page 816, line 16). The defendant stated her memories are fragmented regarding the abuse that occurred at the same time by Caesar and Christopher Grover (TT page 823, line 19). During this same time, the defendant was also in a relationship with D.T., from whom she had sought protection from Caesar. However, although the defendant was willing to tell D.T. that Caesar was abusing her, the defendant did not tell D.T. that Christopher Grover was also abusing her, according to the defendant's testimony (TT page 828, line 6).

The People allege that the defendant was also inconsistent about whether the contact with D.T. was forcible, abusive rape, or consensual. The defendant testified to the jury that D.T. did not force himself on her (TT page 829, line 6). However, according to her close friend, Elizabeth Clifton, the defendant told her friend that D.T. was stalking her (TT page 1387, line 8; TT page 1388, line 10), specifically at a grocery store (TT page 1395, line 22) and he would often show up places uninvited (TT page 1395, line 24). Elizabeth Clifton also testified that she had the impression that the contact with D.T. was not consensual (TT page 1397, line 18).

The defendant also told Sarah Caprioli that she did not want to have sex with D.T., but

"she wasn't able to stop it" (HT page 164, line 23). Sarah Caprioli also relayed that the defendant had told her that D.T. had forced oral sex on her (HT line 167, line 16) and that at that time, the defendant was observed with a cut on her lip (HT page 167, line 23).

Sarah Caprioli testified that her understanding was that the sexual contact with D.T. was not consensual (HT page 186, line 15) and that the contact was assaultive (HT page 215, line 7). Ms. Caprioli recounted that the defendant told her that at one point D.T. attempted to have sex with her and she said no to him (HT page 94, line 23). However, the defendant told the trial jury that the sexual contact with D.T. was not forced on her (TT page 829, line 5).

Sarah Caprioli also confirmed that she was previously told by the defendant that she had been raped by a person named "Race" while in her 20s (HT page 240, line 18) and that Caesar was assaulting her at the same time D.T. was having sex with her non-consensually (HT page 241, line 10). Sarah Caprioli also recounted the defendant's statements regarding an abusive sexual contact with a person she described as "A-Rod" (HT page 253, line 20).

Further, the defendant told numerous people, including D.T., Elizabeth Clifton, Sarah Caprioli and others that Caesar had been abusing her, but did not tell any of those individuals that Christopher Grove was allegedly abusing her at the same time (TT page 1385, line 18). The defendant did tell Sarah Caprioli later.

At trial, Sergeant Ruscillo testified that in any abusive "Porn Hub" pictures that he viewed, there was never a person, besides the defendant, shown in the pictures (TT page 1532, line 24).

Dr. Kirschner, the People's expert, testified that at one point in her life, according to the defendant another person named "Chris" had been abusing her (TT page 1908, line 23). The

defendant also told Dr. Kirschner, as she told the jury, that D.T. never forced her or was violent with her (TT page 1913, line 4). Dr. Kirschner also questioned why the defendant never told D.T., (TT page 1913, line 22), a police officer with whom the defendant had sought and received sanctuary, that Christopher Grover was abusing her, but had told him about Caesar.

Dr. Kirschner questioned why the defendant, if the victim was beating her, would move from the sanctuary of a police officer's home, into the home of her abuser (TT page 1919, line 24; et seq TT page 1920, line 10). Dr. Kirschner described D.T. as a potential "personal body guard" for the defendant (TT page 1917, line 1) and questioned her refusal to accept help from him (TT page 1917, line 5).

During his testimony, Dr. Kirschner conceded that burns and bruises can corroborate abuse, but not necessarily the identity of the abuser (TT page 2028, line 21; TT page 2029, line 3, line 20). Dr. Kirschner noted that defendant had different accounts of who abused her at various times, even when Christopher Grover was not present (HT page 248, line 8).

Initially, the defendant reported that although she had a history of sexual abuse, there was no contemporaneous reporting of abuse by Christopher Grover after an inquiry from her midwife, Susan Ranastatd (TT page 1313, line 14), during her contact with this health professional.

At the §60.12 hearing, the defendant's therapist and confidant, Sarah Caprioli, testified that the defendant had expressed that she was upset that her mother had told Detective Hamill of the Town of Poughkeepsie Police Department that she "makes things up for attention".

In addition to the People's allegations that the defendant was inconsistent regarding the identity of who has abused her, the People allege that the defendant has been inconsistent in detailing the type of abuse that she has endured. The People posit a pattern wherein the

defendant alleges to her close friends and acquaintances that she has been abused by someone, revealing injuries and some details to them. However, according to the People, each time those friends and advisors sought to introduce the defendant to actual law enforcement professionals, such as Detective Hamill, Sergeant Ruscillo, CPS and other entities, the defendant would purposely resist a forensic gathering of physical evidence and the submission of a full detailed sworn statement (TT page 1516, line 8 et seq). For instance, Sarah Caprioli testified that it was she who told a forensic nurse what had happened to the defendant and who the defendant's abuser was (HT page 76, line 11 - line 23), not the defendant.

The defendant stated that in 2014, she had been interviewed during a forensic nurse exam (FNE) and did not report that she had been abused by weapons, hard blows, bite marks, choking or burns (TT page 902, line 22 et seq. - TT page 904). However, approximately five days later, she reported to a separate entity that she had, in fact, been burned with a spoon, had been burned and bitten, and a weapon had been used against her (TT page 904, line 15; TT page 905, line 18; TT page 906, line 6, line 16).

Also, the People argue that despite leaving Elizabeth Clifton with the impression that her contact with D.T. had not been consensual, (TT 1397, line 18) and that D.T. had stalked her, the defendant asked Elizabeth Clifton to request that D.T. visit her while she was incarcerated pending trial (TT page 1399, line 4).

Finally, the People argue there are inconsistent facts in the record that create questions regarding the abuse sustained by the defendant. For example, despite the defendant's statement that a camera had been used to take abusive pictures of her and a laptop computer contained images and information regarding her abuse, no such data was located on the camera (TT page

347, line 13-25) or the computer (TT page 387, line 1). The People ask why, if Christopher Grover was purportedly concerned that evidence of abuse by him was contained on the camera or the laptop, would he have made sure they were destroyed, if nothing had actually been recorded on the devices. The People also question why an alleged abuser would teach his victim to load and use a handgun (TT page 731, line 5; see also TT page 1022, line 4-16) and make sure she knew how to operate the gun safety (TT page 1022, line 15).

The defendant testified that she had been told repeatedly by Sarah Caprioli that she should take the lap top with her if she leaves the victim (TT page 929, line 3). However, according to the defendant at trial, she could not turn off her bathtub faucet (TT page 749, line 15), and she also chose not to take the laptop computer that she discovered under water, from the scene (TT page 1975, line 5; TT page 749, line 14).

DEFENDANT'S RESOURCES

Throughout the trial and hearing, the defendant and other witnesses referenced numerous individuals who knew or were aware, on various levels, of the abuse that she allegedly endured. Several of those witnesses testified at trial. The vast majority of these individuals offered the defendant help or services.

These individuals included her friends, including Elizabeth Clifton (TT page 800), "Nikita" (TT page 801), Lisa Whalen (TT 716), Lori Horning (HT page 40), Melanie Bailey (TT page 1262), Michelle Wolin (TT page 1243, line 25), Lisa Rosten (TT page 1251) and Noelle Todd (TT page 1535).

Also, according to the defendant, law enforcement professionals were aware and offered her help, including Officer D.T. (TT page 803); Sergeant Ruscillo of the Hyde Park Police

Department (TT page 846, 1529); Detective Chris Hamill of the Town of Poughkeepsie Police Department (TT page 837); Rochelle McDonough of the New York State Police (TT page 859; HT page 46); the Dutchess County District Attorney's Office (TT page 1532, line 7-13); Melissa Massarone, Domestic Violence Advocate for the Hyde Park Police Department (TT page 1525); and Child Protective Services (TT page 974, line 14) (on the day of the homicide).

Other domestic violence trained individuals that the defendant had access to or a close connection to among her family and acquaintances include her Aunt Cathy, who was an advocate at Grace Smith House (TT page 808; HT page 212); therapist Dusty Mason (TT page 806); therapist and confidant Sarah Caprioli (TT page 847); mid-wife Susan Rannestadt (TT page 861); mid-wife Susan Condon (TT page 863); Domestic Violence Advocate Judy Lyons (TT page 1486), Debbie Falasco (TT page 856) and Dr. Woo, M.D., (TT page 889).

According to the defendant, she received specific advice on how to safely leave Christopher Grover. Defendant testified that she was very aware of various safety plans which would help her remove herself from her abusive situation (TT page 859, line 21). This advice included suggestions from her therapist and confidant advising her to remove herself from the residence while Christopher Grover was at work (TT page 928, line 24). The defendant testified she was given several reminders that when she left her abusive home, she should remove the laptop containing evidence of the abuse (TT page 929, line 3).

At the §60.12 hearing, Sarah Caprioli confirmed that she had advised the defendant that she should leave while the victim was at work or out of the house (HT page 211, line 3). Ms. Caprioli also advised the defendant that if she could safely take the laptop that contained evidence, she should do so (HT page 211, line 18). Ms. Caprioli also testified that she discussed

places the defendant could live if she left, including with Elizabeth Clifton, at Grace Smith House, at her Aunt Cathy's, at her sister's home and at her father's home (HT page 212, line 5 et seq). Ms. Caprioli also explained to the defendant that she would help her pack her belongings and leave if she needed (HT page 213, line 12). An additional witness testified that she offered the defendant a place to live after observing signs of abuse (TT page 1262, line 8; 1273, line 3).

According to the defendant, she did not follow Ms. Caprioli's advice, nor ask for help on the night of the murder. The defendant testified that she "had nowhere else to go" (TT page 746, line 21) on the night of the homicide. The defendant also testified that she had helped her sister previously get an order of protection through Dutchess County Family Court, (TT page 807, line 25).

Ms. Caprioli also acknowledged that the victim's family had given the defendant support and help before the homicide, paying for her groceries and taking care of her children on occasion (HT page 218, line 12). However Ms. Caprioli noted that "access to services" was not the problem in the defendant's situation (HT page 219, line 25). Further, Ms. Caprioli told the defendant, when she heard that CPS would be contacting her, that "CPS is the safe way out" (HT page 259, line 17). On the day of the homicide, defendant was individually interviewed by CPS in her home, but did not disclose any facts regarding her abuse (TT page 974, line 14).

The law enforcement individuals referenced above all directly approached or were available to the defendant, and offered help at some point before the homicide. For instance, Sergeant Ruscillo of the Hyde Park Police Department waited for hours to speak to the defendant at one point in 2015 (TT page 849, line 3), in an effort to offer her help. Although his efforts were initially unsuccessful on that day, Sergeant Ruscillo ran to the defendant as she was leaving

the meeting to convince her to sign a statement that had been written by Sarah Caprioli on her behalf. This would have resulted in the arrest of Christopher Grover (TT page 1529, line 20-24; TT 1531, line 2). The defendant declined to sign the statement.

The defendant's confidant and therapist Sarah Caprioli confirmed that the defendant would not sign Sergeant Ruscillo's sworn statement which had been presented to the defendant (HT page 114, line 24). Ms. Caprioli confirmed that the defendant herself never actually told Sergeant Ruscillo about the abuse in her presence (HT page 134, line 11), but witnessed Sergeant Ruscillo tell the defendant, "You have options and don't have to live this way." (HT page 135, line 24).

Detective Hamill of the Town of Poughkeepsie Police Department also spoke to the defendant for hours in 2012, at which time the defendant declined to reveal any details of her abuse. The defendant's friend also confirmed that the defendant did not reveal her abuse to Detective Hamill in 2012 (HT page 42, line 4).

At trial, there was testimony that several medical professional and mental health experts also attempted to help the defendant. At each encounter, the defendant either refused to identify her abuser or limited the level of evidence gathering. For instance, defendant initially asked that her mid-wife not photograph her as part of the memorialization of her wounds (TT page 1295, line 2), although the mid-wife ultimately did take photos of the defendant's injuries (TT page 1295).

According to the People, a health professional had once explained to the defendant the difference between a forensic nurse exam and an evidentiary sex-assault forensic exam. The defendant was told that a forensic nurse exam was not utilized to collect evidence for criminal

prosecution (TT page 1498, line 9; TT page 1504, line 23). However, the defendant was also told that if she allowed the *evidentiary* exam, it could be used in a criminal prosecution. The defendant was also told the evidentiary exam results could be preserved, but could be withheld and not be submitted unless the defendant chose to do so later (TT page 1505, line 13-22). The defendant declined the evidentiary option and chose the non-evidentiary option.

At trial, there was testimony that during a forensic examination of the defendant on September 6, 2014, the defendant disclosed some of the details of her abuse. The defendant was interviewed on September 6, 2014 during a forensic nurse exam, and although she did disclose that she had been abused, when asked that there had been weapons used, she denied that she had endured physical blows by hand or feet, that she had sustained any bite marks, choking, or had been burned (TT page 902, line 22 et seq). The defendant also stated that there had been no threats of harm (TT page 904, line 3).

However, according to the People, five days later the defendant was re-interviewed through her therapist, Sarah Caprioli and thereafter reported that she in fact had sustained burns in the last five days (TT page 905, line 15), had sustained a bite mark in the previous five days (TT page 906, line 6), and had also now endured a burn mark in the last five days (TT page 906, line 19).

On September 12, 2017, approximately two weeks before the homicide, defendant was evaluated by Dr. Woo, at which time she did not tell the doctor about her alleged abuse, nor were there any observations by the doctor of wounds on her person (TT page 889-894).

DECEDENT ABUSER PROFILE

The People argue, with the support of the People's expert, Dr. Kirschner, that Christopher Grover did not fit the profile, nor did he appear to have the characteristics of a typical domestic violence abuser.

The defendant described Christopher Grover as a person who was more like "a big kid" (TT page 931, line 3). Early on in their relationship, the defendant testified that she expressed her concerns and hesitation, based on her previous sexual abuse history, about becoming intimate with Christopher Grover. The defendant was told by Christopher Grover that he was willing to wait for "a year" to be intimate (TT page 762, line 15). As stated above, Christopher Grover accepted that the defendant chose to move in with D.T., a police officer, and his family (TT page 853, line 11-22), during their relationship.

Several days before the homicide, the victim stated to the defendant in a text message, "Maybe you'll be happier if I go, if I make you so unhappy." (TT page 910, line 6). The defendant repeatedly testified at trial that the victim was a wonderful father and loved his children very much (TT page 1080, line 9). The defendant also stated this sentiment to her mid-wife (TT page 1353, line 24).

The defendant's confidant and friend testified that she had not observed any of Christopher Grover's texts to be threatening or controlling (TT page 1453, line 13). Sergeant Ruscillo, although being told by the defendant that the victim had photographed physical and sexual abuse and then posted them to an internet website, never actually saw Christopher Grover in any of the pictures (TT page 1532, line 24).

Also, although there were internet searches discovered on the victim's phone which

referenced "force in sexual encounters", an expert determined that there were no actual pictures of violent pornography on the victim's phone (TT page 624, line 13).

The defendant's expert, Dr. Hughes, acknowledged that she did not find any evidence that the victim was jealous (TT page 1710, line 5) and testified that the victim did not try to stop the defendant from seeing a therapist (TT page 1711, line 3).

The defendant told Dr. Kirschner that Christopher Grover started to abuse her only after she reported violent abuse by "Caesar" to Christopher Grover. (TT page 1937, line 10) Dr. Kirschner testified that it is inconsistent with a domestic violence abuser that such abuse only began after the defendant told Christopher Grover about prior abuse by another man (TT page 1937, line 5). Dr. Kirschner testified he had never heard of a situation where abuse began only after the abuser heard of abuse by a different individual (TT page 1937, line 16).

Dr. Kirschner reported that the defendant told him that the victim was great in every other way (TT page 2024, line 15). Dr. Kirschner described that the normal profile of an abuser includes tactics such as monitoring the victim's calls, following her to work, not allowing her to see her friends and otherwise ensuring control over her (TT page 1904, line 1). Dr. Kirschner testified that there is no evidence Christopher Grover did such acts. Dr. Kirschner testified that it is inconsistent with the profile of a domestic violence abuser to allow the abuser's victim to move in with a police officer during the time that the abuser is abusing his victim (TT page 1916, line 7).

There is no exhibit presented by the People or the defense, inclusive of the numerous text conversations that were submitted, where Christopher Grover can be described to be verbally abusive to the defendant. Further, there is no quotation contained in any exhibit, where the

defendant complained or made reference to any physical abuse by Christopher Grover[7] to him directly.

At trial, the defendant described the unexpected CPS investigation, involving an investigation of Christopher Grover for abuse of the defendant, as a triggering event for the acts that led to the death of Christopher Grover later that night. Regarding this "triggering event", the People argue that Christopher Grover's reaction to the CPS investigation and his actions on the night of the homicide are inconsistent with an abuser who is allegedly concerned that someone may learn about his abusive acts.

Christopher Grover told Melissa Hart after the visit by CPS, that CPS had come to see him. The witness described Christopher Grover as calm (TT page 155, line 8). The defendant also recalled Christopher Grover being calm regarding the CPS visit (TT page 948, line 19). The defendant quoted the victim with regard to the CPS visit as saying, "Don't worry, its about me" (TT page 987, line 16). The victim also stated to the defendant, regarding the CPS investigation, that "It's really going to be ok" (TT page 728, line 7). Defendant also told Officer Sisilli, at their roadside encounter, that Christopher Grover thought "CPS was a joke" (SV 53:18; Defense exhibits BB and CCCC).

Further, the People argue that the defendant told Officer Sisilli, the first person she encountered after the homicide, that "This is the least violent he's ever been tonight. That's why I asked him to let me go" (in support of their position that the alleged abuse was not occurring "at the time" of the homicide) (SV 47:05). The defendant also told Detective Honkala that their

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[7]However, the defendant was able to express criticism of Christopher Grover as a father and husband during the above-quoted text conversations.

intercourse that night was "gentle" (HV 4:12). The defendant also told Detective Honkala that the victim had said "he's sorry" after a forcible act, and observed to the detective that "he never says he's sorry". (HV 18:02). Defendant told Detective Honkola during her interview that the intimacy on the night of the homicide was "not the usual sex, he was saying sorry" (HV 24:30). Further, defendant testified that on the night of the homicide, the victim engaged in sexual intercourse that was "more gentle and not violent" (TT page 1078, line 5).

On the night of the homicide, according to the defendant, Christopher Grover showed the defendant how to load his handgun, take off the safety, and made the weapon available to her (HV 16:30).

MURDER FACTS

On September 27, 2017, shortly after shooting Christopher Grover, the defendant came in contact with Officer Sisilli of the Town of Poughkeepsie Police Department at an intersection, a short way from her home. Thereafter, in response to the defendant's statements regarding the death of Christopher Grover, Officer Murray of the Town of Poughkeepsie Police Department went to the home of the defendant and discovered the victim on his back on a couch with his legs stretched out, his hands resting on his mid-section, and his head resting on a pillow (TT page 312, line 22). Officer Murray also observed that the shower in the bathroom was running (TT page 305, line 21) and that the water in the bathtub was filling, with a laptop computer submerged under the water (TT page 317, line 12). This device was later determined to be the laptop of Christopher Grover, which had been broken in half. Additionally, a semi-automatic handgun was recovered from the scene near the victim, which was determined to contain one unexpended round in the magazine and one unexpended round in the chamber (TT page 334, line

22-25). Later, an expended round was discovered in the pillow under the head of Christopher Grover, by a forensic investigator (TT page 352, line 6).

Investigator Maria Rouche of the New York State Police Forensic Identification Unit, testified that for the weapon to fire, the trigger must be compressed for each bullet fired (TT page 433, line 19). A forensic pathologist, Dr. Kia Newman, testified that she determined that Christopher Grover was killed with a gun shot wound which entered the left side of his head (TT page 469, line 13) traveling left to right and slightly front to back and downward in its path, until it exited Christopher Grover's head (TT page 466, line 12). Dr. Newman described the wound as a hard contact wound (TT page 471, line 8) which required that the gun be pressed against the skin of the victim (TT page 473, line 15). Dr. Newman testified that the tip of the gun was pressed against the victim's head and left a "muzzle imprint" (TT page 472, line 10). Dr. Newman testified that the victim was laying in the position in which he was found, supine, when he was shot (TT page 479, line 4; TT page 479, line 23 - TT page 480, line 5). Dr. Newman testified that the top of the weapon was oriented towards the top of the victim's head (TT page 506, line 8).

The defendant testified for three days regarding her version of what occurred on the day of the homicide leading to the death of Christopher Grover.[8] The series of events that ended with the death of Christopher Grover began with contact between CPS and him regarding a report CPS had received about alleged abuse of the defendant (TT page 719, line 11). The defendant testified that she was very concerned about CPS being called in the days before the homicide,

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[8]The majority of the known facts regarding the events surrounding the death of Christopher Grover are offered by the defendant, as she is the sole surviving witness to the events.

although CPS presented an opportunity to provide her with assistance and protection (TT page 970, line 20).

On September 26, 2017, CPS came to interview the defendant and Christopher Grover separately, and did so (TT page 721, line 3). On the evening of September 26, 2017, after Christopher Grover had returned from work and the defendant had been away from her house, the defendant encountered Christopher Grover when he came home. At this time, the defendant asked the Christopher Grover how his CPS interview "went" (TT page 729, line 17).

Therein began a series of events the defendant described in her testimony, including the destruction of a camera by the victim and an encounter where the victim instructed the defendant how to load and use his handgun. Christopher Grover also instructed the defendant how to operate the weapon's safety catch (TT page 1058, line 8). The defendant testified that the victim placed four or five projectiles in the weapon. While the victim taught the defendant how to load and fire his gun (TT page 1022, line 4-16), the defendant had her phone in her hand (TT page 1044, line 3). At some point during this encounter, the defendant testified that Christopher Grover stated that he could "kill the defendant in her sleep" (TT page 1053, line 19). Christopher Grover thereafter made the weapon available to the defendant (TT page 1058, line 16).

The defendant testified that at some point before the homicide, she entered her children's room and acknowledged that while there, and in fear for her life, she did not exit the ground floor window from her children's room (TT page 1083, line 9). Defendant testified that when she returned from the children's room to the victim lying on the couch, she thought Christopher Grover was asleep (TT page 1090, line 16; TT page 1092, line 12).

At some point on this night, the defendant testified that she had encountered the victim in

the shower (TT page 732, line 18). The defendant testified Christopher Grover told her, in the shower, that he could shoot her in the shower, "but it would echo" (TT 732, line 20). Thereafter the defendant testified she joined Christopher Grover on the living room couch. While laying on top of the victim, the defendant stated that the victim produced a gun from between the cushions on the couch. At that point, while the defendant was getting up from the couch, the defendant testified that she kneed Christopher Grover in the groin (TT page 742, line 5). The defendant stated that Christopher Grover then dropped the weapon on the floor. The defendant testified she then picked up the weapon, and while a few steps away (TT page 743, line 10), pointed the gun at the victim (TT page 743, line 4), as he lay on the couch. Shortly before the shooting, defendant testified that while she and the victim were conversing, the victim was laying supine and had his eyes closed while "sighing" (TT page 1115, line 11). The defendant testified that while the victim was lying on the couch (TT page 742, line 25), the victim stated that the defendant will "give him the gun, he will kill her and then the children will have no one" (TT page 743, line 23). The defendant testified that there was an ottoman to her right (TT page 744, line 5). The defendant testified the victim did not try to get off the couch (TT page 1116, line 9). The defendant testified that Christopher Grover was a black belt in Taekwondo (TT page 1096, line 18). The defendant told Detective Honkala that while the victim was laying on the couch face up, he had spoken to her, and had "faced her", but then he "looked up for a second, then I shot him" (HV 31:58). Defendant also stated to Detective Honkala, "I think he closed his eyes for a second and was like 'you won't', then I ..." (HV 32:30).

Defendant testified that she "lunged forward and squeezed the trigger" (TT page 1116, line 14). Defendant told the jury that she caused a contact wound to the victim (TT page 1118,

line 14), and stated that after she dropped the gun (TT page 1121, line 21), she knew the victim was dead (TT page 1123, line 11).

However, Sarah Caprioli testified that the defendant told her that she did not believe the gun had touched the victim's head (HT page 263, line 2) and also told Ms. Caprioli that the victim had made some kind of move that made her think he was about to get up (HT page 263, line 11).

Defendant then testified that, after the shooting she picked up the expended cartridge (TT page 749, line 1) and went to the bathroom, but was unable to turn off the tub faucet that was pouring water on a broken laptop (TT page 749, line 6). Defendant testified that she could not turn the shower knobs off (TT page 1132, line 3), but also did not remove the laptop from the water (TT page 1133, line 6). Alternately, defendant testified that she then removed the laptop, but put it back into the running water (TT page 1136, line 7). The defendant also stated that she couldn't turn off the water that was destroying the laptop, but also could not take the laptop from the tub (TT page 1976, line 12). Dr. Kirschner testified that the defendant told him she did not take the laptop because she didn't want to "tamper with evidence", but did take the shell casing ejected from the weapon she had fired (TT page 1976, line 24). Defendant testified that she saw an empty expended shell near the couch and picked it up, but does not recall what she did with it (TT page 1150, line 2-7).

Defendant then testified that she did not call 911 (TT page 752, line 15), but rather placed her children in her vehicle, "drove around" and then went back to her home and re-entered (TT page 753, line 20). Further, shortly after the shooting, the defendant called Elizabeth Clifton twice to tell her that the victim had been shot, but did not tell her that Christopher Grover was, in

fact, deceased (TT page 1466, line 21). Defendant testified that during the encounter with the victim before the homicide, she had access to her phone and had it in her hand (TT page 1007, line 10), but testified that the victim had ordered her to shut off her phone (TT page 1009, line 24).

The People argue that the defendant was inconsistent regarding her account of how she acquired the handgun before the shooting. During her original encounter with Officer Sisilli at the roadside, the first person she spoke to after the homicide, the defendant told Officer Sisilli that she kneed Christopher Grover (while they were on the couch), the gun fell on the floor, and the defendant picked it up (SV 3:32). She also told Officer Sisilli that she knocked his arm and it fell (SV 42:02). She then told Officer Sisilli that she elbowed Christopher Grover (SV 45:57). Defendant told Detective Honkala in an interview, some hours later, that she had kneed the victim, that he flinched and "dropped it" (HV 19:45). When asked by Detective Honkala why the defendant picked up the expended bullet, but left the handgun, Defendant responded that she felt that she should not take the expended shell from the scene (HV 29:33). When asked by Detective Honkala whether the safety on the gun was on, defendant testified she was not sure, that she had just "pulled it" (HV 31:35).

There were also a number of google searches on Christopher Grover's phone on the night of the homicide, reproduced in defense Exhibit Z. The searches contained phrases such as "will they know she was asleep when shot" (TT page 106, line 20); "medulla part of scull" (TT page 111, line 5); "where do you have to get shot in the head to die instantly" (TT page 110, line 9); "part of brain to shoot in suicide" (TT page 113, line 17); and finally, "how they determine I shot person was asleep when shot" (TT page 114, line 25).

The defendant, on the night she encountered Officer Sisilli and later spoke to Detective Honkala, never told the police that Christopher Grover showed her pictures of "where to shoot someone in the head" on his phone (TT page 1964, line 8), although she testified that this did happen that night, at trial.

According to the People, among the numerous unchosen options the defendant had on the evening of the homicide, was that although repeatedly being advised to secure the laptop by Sarah Caprioli, which purportedly contained evidence of her abuse, the defendant did not do so (TT page 1975, line 18).

Defendant stated to Detective Honkala at the end of her interview on the night of the homicide, "It's obviously self defense, right?" (HV 33:54).

ANALYSIS

This Court is keenly aware of the scourge and crisis of domestic violence in our community. Unfortunately, this Court presides over numerous cases where domestic violence has occurred. Most victims don't want to report their abuse, because they don't want to anger the abuser by reporting them. Such abuse usually occurs in private. This Court is also keenly aware that an abuser can seem normal and friendly to the outside world. Further, this Court supports the important goals and legal necessity of the battered women's syndrome defense, as well as the spirit and goal of Penal Law §60.12.

However, the Court's determination, pursuant to §60.12 of the Penal Law, must be fact-based and of sufficient weight to support its decision. Our system of justice must, at its core, be proof-driven, untrammeled by laudable policy or philosophy.

Under the statute, the burden of proof is on the defendant to prove that she is factually

and legally eligible for relief. The People oppose the relief requested and ask that the Court to rule that the ordinary range of sentences for Murder and Criminal Possession of a Weapon permitted by Penal Law §70.00(2)(a) is appropriate.

The defendant presents a compelling story of abuse, with horrific allegations that include repeated, sadistic sexual violence and physical abuse, complete with pictures and eyewitnesses viewing the results of her abuse. However, the People raise critical questions about the defendant's testimony regarding her alleged abuse, the identity of her abuser and her violent acts and decisions on September 27, 2017. This factual dispute presents significant questions regarding the critical issue of the defendant's abuse.

A trial jury explicitly determined that the defendant, in murdering the victim, was not justified, beyond a reasonable doubt. The legal conclusion that can be drawn from the jury's verdict, having rejected the defendant's justification defense, was that the jury believed the murder was intentional, and not in self-defense.

The People and the defense team fully presented and argued the defendant's battered women's syndrome defense in their lengthy summations[9]. Although zealously and forcefully presented by a team of excellent defense lawyers, the jury rejected the defendant's battered women's syndrome defense. No person can fully explain the acts of the defendant on the evening of September 27, 2017, but the jury clearly weighed the defendant's non-lethal options, as against all that she had allegedly endured, and unanimously found that her decision to kill Christopher Grover was unlawful. To be clear, although the jury verdict is consistent with this Court's determination under §60.12, the verdict is not determinative.

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[9]The defense summation was 2 ½ hours, the People's summation was 3 ½ hours.

This Court makes no definitive finding as to the level of abuse the defendant endured during her life, or as to which person(s) have abused the defendant. There are significant, unresolved questions regarding the defendant's version of what occurred in her past and on the night of the homicide, as well as weighty questions regarding the nature of her relationship with Christopher Grover and the profile of Christopher Grover as an abuser, in action or by reputation.

There are four factual bases that the Court identifies in support of its decision. First, due to the inconsistent statements by the defendant regarding her life-long abuse by Christopher Grover and others, the expert testimony, and questions regarding the defendant's recollection, the Court finds that the abuse history presented by the defendant is undetermined and inconsistent regarding the extent of the abuse, as well as the identity of her abuser(s).

Second, the nature of the alleged abusive relationship between the defendant and Christopher Grover is undetermined, based on the demeanor and behavior of Christopher Grover on the day of his death, as well as during the weeks prior, as recounted by the defendant and others. This question is impacted by the notable text communications occurring three days before the homicide, between the defendant and the victim.

Third, provided throughout testimony from the defendant, it is clear that the defendant had a tremendous amount of advice, assistance, support, and opportunities to escape her alleged abusive situation, and thereby avoid the decision to take the life of Christopher Grover. By her own admission, the defendant had help and options within her family as well as in the broader health care, domestic violence, and law enforcement community. The decision not to accept the advice and help of these individuals when viewed in the context of the homicide facts, significantly weakens the defendant's position in her use of deadly force. In other words, the

defendant's resources and options must be viewed in the context of choosing to end Christopher Grover's life, with regard to the "nature and circumstances" of the crime committed.

Finally, and most importantly, the specific facts of the homicidal act, as testified by the defendant herself, reveal a situation where the victim was supine, with his eyes closed, on a couch. The defendant admitted she had a path to escape through the front door of her apartment, which was steps away, while armed with the victim's deadly weapon, which she had been shown how to operate. Instead, the defendant lunged forward and shot Christopher Grover point blank in his temple. These facts were stated under oath by the defendant. All of the above four questions and findings, in aggregate, form the factual basis for the Court's decision, but the "nature and circumstance" of the homicide facts are most weighty.

ELEMENT ANALYSIS

The above questions and findings are the factual foundation of the Court's legal decision as addressed in the three relevant Penal Law §60.12 elements. The defendant must present sufficient facts, by a preponderance of the evidence, to be entitled to enhanced leniency.

In §60.12(1)(a), the Court is required to determine whether at the time of the instant offense, the defendant was the victim of domestic violence and **subjected to substantial physical, sexual and psychological abuse inflicted by a member of the same family**.

As a preliminary matter, the Court does not adopt the People's analysis that the defendant is required to be enduring physical abuse during the crime. The legislature clearly intended that the defendant must be affected by physical, sexual or psychological abuse before the criminal event, and within a reasonable amount of time during which she would still be under the influence of such abuse. The defense is correct that there need not be actual physical abuse at the

time of the homicide to satisfy Penal Law §60.12. However, alleged events that occurred years earlier may be given more limited weight. As the defense argues, the spirit of the statute requires the Court to consider the culmination of the abuse endured by the domestic violence victim. Based on the above factual conclusions by the Court in this case however, it is not clear whether the alleged abuse was carried out by Christopher Grover in part or in whole, and to what degree.

§60.12(1)(b) requires the Court to determine that the abuse was a **significant contributing factor** to the defendant's criminal behavior.

The questions and inconsistencies that remain regarding the defendant's alleged abuse and abusers, do not amount to sufficient proof that the alleged abuse was a significant contributing factor in the defendant's act of murder. The choices the defendant made on September 27, 2017, and the choices the defendant did not make on or before September 27, 2017, combined with the undetermined abuse history and the decedents personality profile, provide insufficient evidence to sustain the defendant's burden that her act was caused by abuse that was a "significant contributing factor".

Also, if there was abuse by other individuals inflicted on the defendant, such abuse by those individuals does not constitute a significant contributing factor to the defendant's criminal behavior, in her act of taking the life of Christopher Grover in the manner in which she did. Many of the abuse allegations by others would not constitute abuse by a household or family member in any case.

The factual scenario surrounding the homicide and the events within several days therein create a question as to whether the purported abuse was a significant contributing factor. In other words, because the defendant had numerous opportunities to avoid any further abuse and was

capable of communicating "direct" sentiments to Christopher Grover, it is unknown what motive compelled the defendant.

Finally, §60.12(1)(c) requires the Court to regard the **nature and circumstances of the crime as well as the history, character and condition of the defendant**. It is critical to note that the defendant has no criminal history and has otherwise lived a law abiding life as a mother and partner. This Court also accepts that the defendant has been abused in her life by numerous individuals, as she has named several perpetrators. Further, there is nothing else about the history, character or condition of the defendant that would make her otherwise ineligible for consideration under this statute.

However, as the Court views the **nature and circumstances of the crime**, the defendant does not, by a preponderance of the evidence, sustain her burden of proof. Based upon the options and opportunities she had to avoid her decision to shoot Christopher Grover, as well as her uncontroverted ability to withdraw from her apartment while armed with a deadly weapon, the defendant does not warrant relief under this statute. The intentional murder of Christopher Grover substantially outweighs the undetermined details of the abuse and the abuser. In other words, it is presumed the defendant may have been abused in her life, but the choice she made that night, and the manner in which the murder occurred, outweighs her undetermined abusive history.

It must be noted that the above factual analysis is based almost entirely on the defendant's own version of what occurred. The People, of course, argue that the defendant simply executed Christopher Grover as he slept on his couch.

## "UNDULY HARSH"

The purpose of Penal Law §60.12 is to allow the Court to consider "enhanced leniency", which would allow this Court to consider sentences outside the normal statutory sentencing guidelines. However, based on the questions regarding the defendant's abuse history and the identity of her abuser, in addition to the violent and unjustified actions on the night of the murder, sentencing the defendant within the normal sentencing range would not be "unduly harsh".

Regarding the evening of the murder, defendant had a myriad of non-lethal options at her disposal. At the moment that she fired the gun at point-blank range into the victim's head, the victim was supine, initially had his eyes closed, and the defendant was armed with a loaded handgun which she knew how to operate. The defendant was only steps from her front door. Further, as detailed in the above opinion, the defendant had numerous individuals and entities who had offered her help, as well as advice and suggestions of how to extricate herself from her alleged abusive circumstances. The defendant's testimony regarding the details on the evening of the homicide, together with her questionable statements regarding contact with physical evidence, the alleged actions of the murder, and her inconsistent recounting of which individuals were abusing her, undermine her position that she should be considered for a sentence with "enhanced leniency".

This Court makes no definitive finding regarding the abuse of the defendant, as there is compelling evidence for both parties' propositions. This includes both the severity of the abuse and the identity of the abuser(s). However, according to the defendant's own testimony, the defendant had the opportunity to safely leave her alleged abuser before September 27th. The

defendant had the opportunity to safely leave early in the evening of September 27th before she shot Christopher Grover. The defendant had the opportunity to safely leave her home the moment before she shot Christopher Grover. She did not choose these options.

Due to the myriad of opportunities the defendant had to avoid the murder of Christopher Grover, the defendant fails, by a preponderance of the evidence, to be considered for a sentence outside of the normal range for someone convicted by a jury of her peers, of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree.

Defendant's application pursuant to Penal Law §60.12 is denied. The Court designates February 11, 2020 at 1:30 p.m. for sentencing.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
February 5, 2020

HON. EDWARD T. McLOUGHLIN
COUNTY COURT JUDGE

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# EXHIBIT C

County Court of the State of New York

County of Dutchess

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

NICOLE ADDIMANDO

Defendant-Appellant.

**Notice of Appeal**

Indictment No.: 74/2018



**PLEASE TAKE NOTICE** that Defendant Nicole Addimando hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a judgment of conviction and sentence thereon and from each and every intermediate order made therein. On April 12, 2019, Nicole Addimando was convicted following a jury trial of Murder in the Second Degree, a Class A-I Felony (Penal Law § 125.25(1)), and Criminal Possession of a Weapon in the Second Degree, a Class C Armed Violent Felony (Penal Law § 265.03(1)(b)), and was sentenced to concurrent sentences of 19 years to life in state prison for Murder in the Second Degree and 15 years in state prison with five years post-release supervision for Criminal Possession of a Weapon in the Second Degree in the County Court, Dutchess County, New York on February 11, 2020, and Nicole Addimando appeals from each and every part of the judgment of conviction and her sentences imposed and also appeals each and every intermediate order made therein, under Indictment Number 74/2018 (McLoughlin, J.).

Dated: New York, New York
February 27, 2020

Yours, etc.,

Garrard R. Beeney
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*Pro Bono Attorneys for Defendant-Appellant Nicole Addimando*

To: Bradford Kendall
County Clerk, Dutchess County
Dutchess County Office Building
22 Market Street
Poughkeepsie, New York 12601
(845) 486-2120

Hon. Robert V. Tendy
Putnam County District Attorney
Putnam County Office of the District Attorney
Special Prosecutor
40 Gleneida Avenue
Carmel, New York 10512
(845) 808-1050

CC: Benjamin Ostrer
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# Supreme Court of the State of New York
# Appellate Division : Second Judicial Department
## Informational Statement - Criminal Cases

**Instructions:** Use a separate copy of this form for each judgment, sentence or order appealed from. Multiple convictions under different accusatory instruments, even if the judgments were rendered In the same court on the same day, require the completion of separate copies of this form. Please type or print and answer all questions.

Attach a copy of the notice of appeal. If the appeal is from an order, attach a copy. If the appeal Is from a judgment or sentence, attach a copy of the commitment order or an extract of the clerk's minutes.

**Case Title:**

The People of the State of New York,

vs.

Nicole Addimando

**For Appellate Division Use Only**

**Case No:**

**File Opened:**

**Appellate Division Status:** Place a ✓ in the appropriate box to indicate the Appellate Division status of the parties.

| | | | |
|---|---|---|---|
| Plaintiff | ☐ Appellant | ☑ Respondent | |
| Defendant | ☑ Appellant | ☐ Respondent | |

**Type of Crime:** If this is an appeal from a judgment of conviction, a sentence or an order granting or denying post-conviction relief, place a ✓ mark in up to five of the following boxes to indicate the type of crime or crimes of which the defendant was convicted. If the conviction was for more than five crimes, check the five most serious charges. Check the ○ to indicate that the conviction was for the substantive crime and check the ☐ to indicate that the conviction was for an attempt to commit that crime. In the event that the precise crime of which the defendant was convicted does not appear on the following list, check the box comparable to the article of the Penal Law In which the substantive crime is set forth. If this is an appeal by the People from an Interlocutory order, check up to five boxes to Indicate the crimes of which the defendant has been charged.

○ = **Substantive Crime** ☐ = **Attempt to Commit Crime**

| | | |
|---|---|---|
| ○ ☐ 1 Arson | ○ ☐ 18 False Written Statements - Offenses Involving | ○ ☐ 35 Marital Relationship, Offenses Affecting |
| ○ ☐ 2 Assault & Related Offenses | ⊘ ☐ 19 Firearms & Dangerous Weapons, Possession | ○ ☐ 36 Motor Vehicle, Operating Under Influence |
| ○ ☐ 3 Bribery, Not Public Servant & Related Offenses | ○ ☐ 20 Firearms & Dangerous Weapons, Use | ○ ☐ 37 Motor Vehicle, Other |
| ○ ☐ 4 Bribery, Public Servants & Related Offenses | ○ ☐ 21 Firearms & Dangerous Weapons, Other | ○ ☐ 38 Obscenity & Related Offenses |
| ○ ☐ 5 Burglary & Related Offenses | ○ ☐ 22 Forgery & Related Offenses | ○ ☐ 39 Offenses Relating to Judicial & other Proceedings |
| ○ ☐ 6 Children & Incompetents, Offenses Affecting | ○ ☐ 23 Frauds on Creditors | ○ ☐ 40 Official Misconduct, Obstruction of Public Servants |
| ○ ☐ 7 Computer Offenses | ○ ☐ 24 Frauds, Other | ○ ☐ 41 Perjury & Related Offenses |
| ○ ☐ 8 Conspiracy | ○ ☐ 25 Gambling Offenses | ○ ☐ 42 Privacy, Offenses Against |
| ○ ☐ 9 Controlled Substances, Possession | ○ ☐ 26 Homicide, Abortion | ○ ☐ 43 Prostitution Offenses |
| ○ ☐ 10 Controlled Substances, Sale | ○ ☐ 27 Homicide, Criminally Negligent | ○ ☐ 44 Public Order, Offenses Against |
| ○ ☐ 11 Controlled Substances, Other | ○ ☐ 28 Homicide, Manslaughter | ○ ☐ 45 Public Sensibilities, Offenses Against |
| ○ ☐ 12 Criminal Facilitation | ⊘ ☐ 29 Homicide, Murder | ○ ☐ 46 Robbery |
| ○ ☐ 13 Criminal Mischief & Related Offenses | ○ ☐ 30 Homicide, Vehicular Manslaughter | ○ ☐ 47 Sex Offenses, Rape |
| ○ ☐ 14 Criminal Possession of Stolen Property | ○ ☐ 31 Insurance Fraud | ○ ☐ 48 Sex Offenses, Sexual Abuse |
| ○ ☐ 15 Criminal Solicitation | ○ ☐ 32 Kidnapping, Coercion & Related Offenses | ○ ☐ 49 Sex Offenses, Sodomy |
| ○ ☐ 16 Enterprise Corruption | ○ ☐ 33 Larceny | ○ ☐ 50 Theft Offenses, Other |
| ○ ☐ 17 Escape & Offenses Relating to Custody | ○ ☐ 34 Marihuana Offenses | ○ ☐ 51 Other |

**Original Court Information** (Use another Form B for additional appeals):

**Appeal From** (Check one only): ☑ Judgment ☐ Order ☐ Sentence ☐ Amended Judgment ☐ Amended Order ☐ Amended Sentence ☐ Resettled Order ☐ Decision ☐ Other (specify):

| | |
|---|---|
| **Date or Rendered:** February 11, 2020 | **Indictment or Superior Court Information No.:** 74/2018 |
| **Court:** County Court | **County:** Dutchess |
| **Stage:** ☐ Interlocutory ☑ Final ☐ Post-Final | **Judge** (name in full): Edward T. McLoughlin |
| **Conviction:** ☐ Plea of Guilty ☑ Jury Verdict ☐ Nonjury Trial ☐ Not Applicable | |
| **Codefendants:** Were there any codefendants under this accusatory instrument? ☐ Yes ☑ No<br>Names of codefendants convicted under this accusatory Instrument: | |
| **Defendant Information** (Please supply any available Information): | **NYSIIS No.:** |
| **Prisoner Identification No.:** DIN 20G0080 | **FBI No.:** |
| **Address:** | |

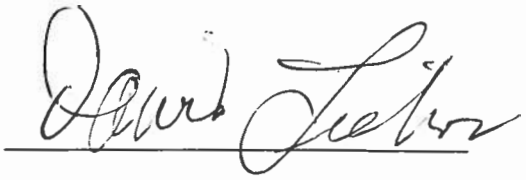
AFFIDAVIT OF SERVICE

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

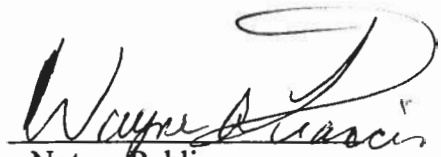
DAVID LIEBOV, being duly sworn says, that he is over 18 and not a party to this action and that on the 27th day of February, 2020, he served true copies of the attached Notice of Appeal and Informational Statement by regular mail, postage prepaid, upon the following:

Hon. Robert V. Tendy
Putnam County District Attorney
Putnam County Office of the District Attorney
40 Gleneida Avenue
Carmel, New York 10512; and

Nicole Addimando (DIN # 20G0080)
Bedford Hills Correctional Facility
247 Harris Road
Bedford Hills, NY 10507.



Sworn to before me this
27th day of February, 2020.



Notary Public

WAYNE A. FRANCIS
Notary Public, State of New York
No. 01FR6382062
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires July 24, 2021