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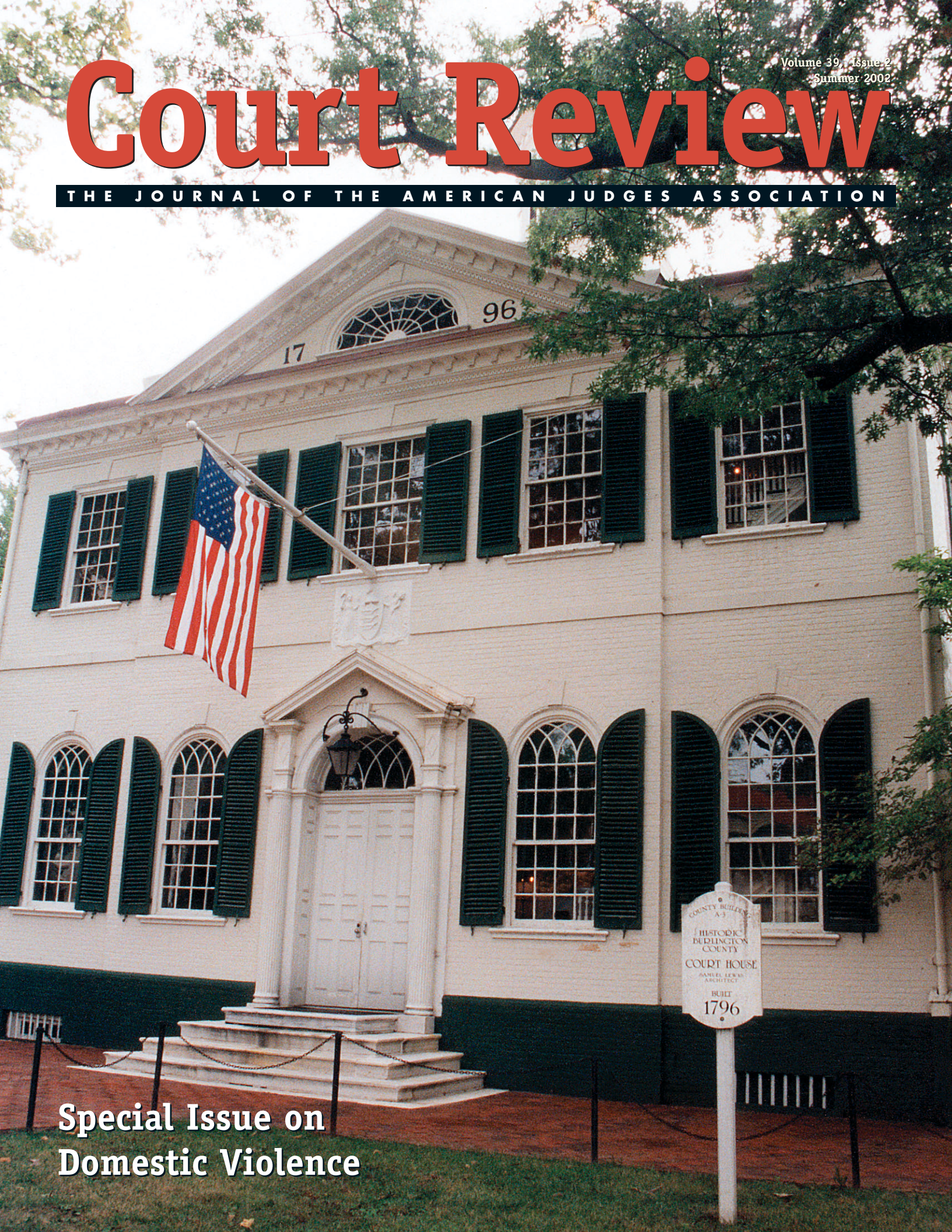
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION



Special Issue on Domestic Violence

Volume 39, Issue 2
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Court Review

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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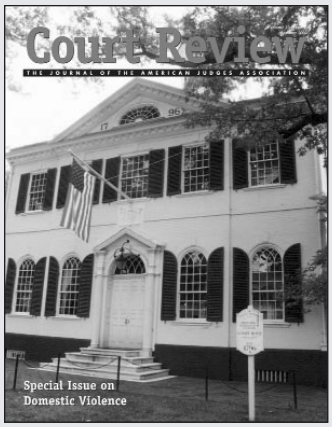
EDITOR'S NOTE

Domestic violence is a subject about which judges need good initial education and continuing refresher courses. Quite simply, there is much about it that is counterintuitive. Why *does* a woman who is physically and mentally abused day after day, week after week, *stay* with the abuser? For most of us, the answer is neither self-evident nor a part of our personal life experience. Yet there is a large—and growing—body of good research in the area.

Julie Kunce Field, a member of *Court Review*'s editorial board who specializes in the area of law and domestic violence, has recruited some leading experts to contribute to this special issue, covering issues of special interest to judges: Field provides a useful overview of the area, including strategies for identifying high-risk cases and some tips for handling those cases. Lundy Bancroft covers issues involving the parenting of men who commit domestic abuse. Lavita Nadkarni and Barbara Zeek Shaw focus on the judicial role in protecting children involved in families where abuse has occurred. Darren Mitchell and Judge Susan Carbon explain the often-confusing state and federal laws regarding possession and purchase of firearms by perpetrators of domestic violence. And Jane Aiken and Jane Murphy review evidence issues prevalent in domestic violence cases.



In addition to these articles, we have a Resource Page section focusing on domestic violence cases, including a list of past *Court Review* articles available on the web and other web-based resources.

Summer 2002? Yes, sadly it's not a misprint. This *is* the Summer 2002 issue of *Court Review*. And though it hasn't actually been all that long since you received your last issue, we have gradually fallen behind in our publication schedule.

The good news is that we are committed to getting caught back up in a measured way over the next year. You can expect to receive issues during the rest of 2003 on an accelerated schedule. I expect that you will actually receive five issues, instead of four, during 2003. We remain committed to making sure that there is useful information for judges in each issue. We appreciate your continued readership. —SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 43 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Court Review is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: cover photo, Mary Watkins. The cover photo is of the Old Courthouse in Mt. Holly, New Jersey.

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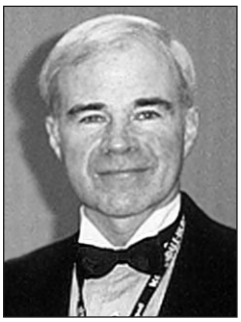
President's Column

Francis X. Halligan, Jr.

I have chosen for my initial column a topic that is of importance to all judges, regardless of jurisdiction or locality, yet is often ignored—courtroom and personal security. Given the domestic violence theme of this issue and the special security concerns involving courtrooms that conduct hearings involving domestic violence and family matters, I thought that this subject matter was most appropriate. I have been interested in courtroom security for many years, due to my law enforcement background, having served as a police officer in Washington, D.C., and in New Jersey. Given the limited space I have for this column, I can only touch briefly upon this topic. It is my hope that by revisiting this subject, each of us becomes more vigilant and sensitized to issues involving both personal and courtroom security.



From a global perspective, since the tragic events of 9-11, all of us have seen heightened security measures in effect in both our private and professional lives. In addition to courthouses, most public facilities have taken added security measures to insure the safety of the general public. Most of us, subsequent to the incidents at the World Trade Center, have spent considerably longer periods of time waiting to be screened by those in charge of airport security. The presence of additional police, National Guard, and other security forces is most evident.

While serving as an assistant county prosecutor in northern New Jersey, a tragedy occurred in a municipal court that impressed upon me the need for heightened security. We were required to attend probable cause hearings in municipal courts that involved alleged felony offenses. A disgruntled defendant, who appeared before the court and was convicted of a traffic violation, left the courtroom, only to reappear outside, undetected, with a weapon. The defendant positioned himself outside of the municipal complex, which housed the courtroom, and fired a rifle shot, mortally wounding the judge, who was conducting court. Unfortunately, this was made possible due to the manner in which the building was constructed. The courtroom was located on the second floor, with the judge's bench being positioned behind a window and visible from the street level. This occurred many years ago and, fortunately, most court facilities are now constructed in such a fashion that this type of event could not occur today.

Each of us should be aware of the safety and security features that are to be integrated into court facilities during construction and renovations. As most judges have no expertise in this area, other professionals should be consulted to provide input before any construction or renovation begins. Once the plans are drawn and construction begins, design changes are both difficult and costly. An architect should be chosen who is familiar with the special security needs of court facilities. Your local trial court administrator's office can usually provide insight and guidance regarding construction and renovation of court facilities.

Access and entrances to both the courthouse and courtrooms should be carefully guarded. Video cameras should be strategically placed in order to monitor both inside and outside of all court facilities, including parking areas. The number of entrances should be limited, given the problems presented by multiple entrances. A sign should be prominently posted, advising that all who enter the courtroom are subject to search. The mere posting of this notice may in and of itself serve as a deterrent to those having weapons. Officers should use a metal detector at each entrance and search all those entering the room. Bags, packages, knapsacks, computers, and briefcases must be closely scrutinized. A list of prohibited items that cannot be taken into the courtroom, including electronic devices, should also be prominently displayed. Those entering the courtroom should be advised to remain seated during the session, as it is then easier to monitor those individuals. Officers should be positioned between the bench and those in the room and remain present at all times, including recesses. Witness stands should be constructed so as to deny the witness direct access to the judge. There should be no public access to the judge's chambers. Once in the building, the judge should not use public corridors without being escorted by security personnel.

Each judge's bench should be lined with a protective shield and be equipped with an alarm that can alert law enforcement personnel outside of the courtroom in the event of an emergency. All security personnel should be aware of contingency plans in case of an emergency.

Judges and their staffs should have secured, well-lit parking places, close to the court complex, that are not accessible to the public. Some judges and their staffs may wish to be escorted to their cars at the conclusion of the working day, especially if secured parking is not available.

Judges should not receive mail that identifies them as a judge at their home. When contacting contractors to do work within the home or ordering "take out" foods for consumption within the house, the judicial title should be avoided. All household members should have immediate access to police telephone numbers in the event of an emergency. The taking of these simple precautions may prevent a serious incident or tragedy. Stay alert and remain vigilant!

Screening for Domestic Violence:

Meeting the Challenge of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases

Julie Kunce Field

Domestic abuse is common. It includes emotional and psychological abuse as well as physical assaults.[1] Children are harmed by it, even if they are not the direct victims of the physical violence.[2]

Because domestic abuse is so prevalent and its effects are so far-reaching, court personnel must educate themselves to understand domestic violence and determine strategies for handling cases where it is present. Even if domestic violence is present but does not seem to have a direct impact on the case at hand, one should be aware of the power and control dynamics of domestic abuse to provide effective intervention in domestic violence cases.

Screening for domestic violence is important because it can provide information that can help courts make better decisions about the cases before them. Domestic violence is a critical fact in determining the process and the outcome in a domestic relations case. Without an understanding of domestic violence in general and knowledge about whether there is domestic violence in a particular case, the decision maker could erroneously be making orders that (1) increase danger to the victim and children, including the danger of lethality,[3] and (2) reduce the resources available to the victim, thus increasing the likelihood that the violence and abuse will continue.[4] Before the court orders mediation or other alternative processes, it should look into screening for domestic violence to ensure that the process of mediation can be effective, and not coercive or revictimizing.[5]

WHAT THE FACT-FINDER NEEDS TO KNOW ABOUT DOMESTIC VIOLENCE

To make good decisions in domestic relations cases, the fact-finder must know:

A. What is domestic violence, and who are the most common victims of domestic violence?
B. What are the risks and consequences of not knowing whether there is domestic violence in a relationship?
C. Do all system players understand domestic violence?
D. What are the tools available to find out whether there is domestic violence in a relationship?
E. What can be done once the fact-finder knows that domestic violence is present in a case?

A. WHAT IS DOMESTIC VIOLENCE AND WHO ARE THE MOST COMMON VICTIMS OF DOMESTIC VIOLENCE?

Domestic violence is a pattern of assault and coercion, often including physical, sexual, and psychological attacks, as well as economic coercion, that adults and adolescents use against their intimate partners.[6] The key factor characterizing domestic abuse is one partner's need to control the other.

The most recent, reliable, and comprehensive studies of violence find that:

- Women are more likely than men to be victimized by intimate partners; women are harmed more severely in those assaults; and males who are victims of assault are generally assaulted by other males.[7]

Footnotes

1. *See* FAMILY VIOLENCE PREVENTION FUND & NATIONAL JUDICIAL INSTITUTE ON DOMESTIC VIOLENCE, ENHANCING JUDICIAL SKILLS IN DOMESTIC VIOLENCE CASES 3-12–3-15 (2001) (for more information on this program, *see* http://www.endabuse.org/programs/justice); PETER JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 4 (2002); LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 8 (2002).
2. *See* LUNDY BANCROFT AND JAY SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).
3. The most dangerous time for a victim is when she attempts to leave the relationship. *See, e.g.,* Barbara J. Hart, *The Legal Road to Freedom* (1991) available at: http://www.mincava.umn.edu/hart/legalro.htm; Martha Mahoney, *Legal Images of Battered Women: Redefining the Issues of Separation*, 90 MICH. L. REV. 1 (1991); Margo Wilson and Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 10 (1993).
4. *See* Family Violence Prevention Fund, *supra* note 1.
5. Mediation can be a dangerous setting and can lead to extreme disadvantages for less powerful women, particularly when they are victims of domestic violence. *See* Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). *See also The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 4-17 (Goelman et al., eds., 1996) [hereinafter *Lawyer's Handbook*].
6. *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE DEPT., EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999).
7. *See* P. Tjaden and N. Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, NATIONAL INSTITUTE OF JUSTICE AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION (1998) available at http://www.ojp.usdoj.gov/nij. According to National Crime Victimization Survey data from the Department of Justice, about 1 million violent crimes in 1998 (a conservative estimate) were committed against people by their current or former spouses, boyfriends, or girlfriends. These crimes were committed primarily against women. About 85% of victim-

- More than 50% of abusers will be abusive of their partners in a subsequent relationship.[8]
- Nearly 100% of children in violent homes hear or see the abuse.[9]
- False allegations of domestic violence occur infrequently, and there is in fact a significant *underreporting* of domestic violence.[10]
- Consequently, the great majority of cases where there is domestic violence will have female victims and male perpetrators.

The Family Violence Prevention Fund has identified five central characteristics of domestic violence:[11]

1. Domestic violence is learned behavior.
2. Domestic violence typically involves repetitive behavior encompassing different types of abuse.
3. The batterer—not substance abuse, the battered woman, or the relationship—causes domestic violence.
4. Danger to the battered woman and children is likely to increase at the time of separation.
5. The victim's behavior is often a way of ensuring survival.

1. Domestic violence is learned behavior.

Domestic violence perpetrators use domestic violence because it works: it serves to maintain power over the battered woman and to cause her to do what the batterer wants. Domestic violence is learned behavior that batterers perfect through observation, experience, reinforcement, culture, family, and community.[12] The batterer learns what works, and what doesn't, to cause his victim to do his will. Domestic violence perpetrators universally use the same tactics to maintain control over their victims. Those tactics are similar to the tactics used by terrorists.[13]

2. Domestic violence typically involves repetitive behavior encompassing different types of abuse.

"Battering is the pattern of intimidation, coercion, terrorism or violence, the sum of all past acts of violence and the promises of future violence that achieves enhanced power and control for the [batterer] over [the] partner."[14]

The key factor characterizing domestic abuse is one partner's need to control the other. The methods of control include using economic abuse, isolation, intimidation, emotional abuse, and sexual abuse. Children become pawns that the abuser may use to continue his control over his partner's actions.[15] Each method of control may be enforced—and reinforced—with the use or threat of physical violence.[16]

3. The batterer—not substance abuse, the battered woman, or the relationship—causes domestic violence.

Rarely do substance abuse, genetics, stress, illness, or problems in the relationship cause domestic violence, though these conditions are often used as excuses for the violence, and they may exacerbate violent behavior.[17]

Batterers who blame drugs or alcohol for their violence generally are selective in their violence, thus demonstrating that the violence is *controlled*, not *out of control*. Their violence is directed against their partner, generally when there are no other witnesses (perhaps except for the children), and not against everyone who crosses his path.[18]

Domestic violence is a problem with the batterer, and caused by the batterer. It is not a problem with the relationship or with the battered woman, but with the batterer's belief that violence against his partner is acceptable and appropriate. Accepting his excuses—that he was drunk or high, or that she somehow "made" him hit her—reinforces his violence and control and does not help to protect the battered woman and her children.

4. Danger to the battered woman and children is likely to increase at the time of separation.

Many batterers believe they have the right to make and enforce rules, and many battered women routinely evaluate the rules and decide which rules they will follow depending on a variety of factors, such as the dangers presented, the available interventions, and the likelihood of punishment of the perpetrator.[19]

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izations by intimate partners in 1998, or 876,340, were against women. Intimate partner violence made up 22% of violent crime against women between 1993 and 1998. By contrast, during this period intimate partners committed 3% of the violence against men. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, INTIMATE PARTNER VIOLENCE, MAY 2000 [hereinafter "BJS Report"].

8. *See* Daniel Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51 (Jan. 1994).
9. *See id.*
10. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, VIOLENCE AND THE FAMILY 10 (1996); Jaffe et al., *supra* note 1 at 58-59.
11. *See* Family Violence Prevention Fund, *supra* note 1.
12. *See* Bancroft and Silverman, *supra* note 2, at ch. 1. *See also*, JEFFREY EDLESON AND RICHARD TOLMAN, INTERVENTION FOR MEN WHO BATTER: AN ECOLOGICAL APPROACH 15-25 (1992).
13. *See* Julie Kunce Field, *Lessons from Ground Zero*, 7 DOM. VIOL. REPT. 17 (Dec./Jan. 2002).
14. MICHIGAN JUDICIAL INSTITUTE, DOMESTIC VIOLENCE: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS Ch. 1 (2d ed. 2001); LARRY TIFFT, BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION 19 (1993). *See also* Lavita Nadkarni and Barbara Zeek Shaw, *Making a Difference: Tools to Help Judges Support the Healing of Children*, COURT REVIEW, Summer 2002 at 24.
15. *See* Bancroft & Silverman, *supra* note 2.
16. For guidance on some of the methods of control used by abusers, the Domestic Abuse Intervention Project in Duluth, Minnesota has developed a graph to depict the dynamic and characteristics of domestic abuse: the Power and Control Wheel. The corollary is the equality wheel, which shows how power should be shared in a healthy relationship. These graphs can serve as useful guides to screening for domestic violence. *See Domestic Abuse Intervention Project*, available at http://www.duluth-model.org/daippce.htm.
17. *See National Judicial Institute*, *supra* note 1, at 7-55–7-58.
18. *See id.*
19. *See Lawyer's Handbook*, *supra* note 5, at Ch. 13. *See also* Barbara J. Hart, *Rulemaking and Enforcement, the Violent and Controlling Tactics of Men who Batter and Rule Compliance and Resistance, the Response of Battered Women,* in I AM NOT YOUR VICTIM: ANATOMY OF DOMESTIC VIOLENCE 258-263 (Sage Publications, ed. 1996).

According to Barbara Hart, the four rules invariably most important to batterers are:

1. You cannot leave this relationship unless I am through with you.
2. You may not tell anyone about my violence or coercive controls.
3. I am entitled to your obedience, service, affection, loyalty, fidelity, and undivided attention.
4. I get to decide which of the other rules are critical. [20]

Notably, leaving the home or the relationship breaks all of the universal rules of batterers. So, far from guaranteeing safety, when the battered woman attempts to leave, the violence against her and the children is likely to increase. To the batterer, leaving or attempting to leave can represent his ultimate loss of control over his victim and can lead to lethal violence.[21]

5. The victim's behavior is often a way of ensuring survival.

The conduct of domestic violence victims may sometimes seem "counterintuitive"—the victim fails to leave the situation, even though it may objectively appear to be intolerable. Her failure to leave doesn't necessarily indicate a lack of desire to do so, but rather that she is afraid, doesn't have resources, fears that he will become lethal if she leaves, or for some other reasons, leaving is not a viable option.[22]

The fact that the battered woman did not call the police or other agencies does not mean that she and the children were not assaulted and terrorized. Only about one in ten women victimized by a violent intimate sought professional medical treatment.[23] Domestic violence perpetrators can be charming.[24] Battered women may fear that the perpetrator will be believed and that they will not. Because of concern that they will not be believed when compared to the batterer and his smooth-talking version of events, or because of intimidation, embarrassment, or other reasons, many battered women do not seek help from police or other agencies. "The most common reasons given by victims for not contacting the police were that they considered the incident a private or personal matter, they feared retaliation, or they felt the police would not be able to do anything about the incident."[25]

B. WHAT ARE THE RISKS AND CONSEQUENCES OF NOT KNOWING WHETHER THERE IS DOMESTIC VIOLENCE IN A RELATIONSHIP?

The consequences of not knowing whether there is domestic violence in a relationship could be severe. There is a risk of death for battered women, the children, or the abuser.[26] Even short of death, not knowing about domestic violence in a relationship that comes before the court can lead to a lack of safety for adult and child victims, and allow children to continue to be exposed to abuse.

The court may unwittingly allow its processes to become another method for more abuse, and allow the power imbalance and manipulation to continue. Rather than the court making the rules, the abuser continues to make the rules and the court and other players become manipulated and under the batterer's control. Unfortunately, when distracted by the batterer's manipulations and his attempts to focus blame on the victim, it can be easy for the court to lose focus on safety, on the interests of the children, and on the needs of the adult victim. Ultimately, the victim might be blamed for abuse, and the consequences to children, and the abuser may not be held accountable for his conduct. Not knowing whether there is domestic violence in a relationship can ultimately limit the court's ability to provide necessary resources and autonomy for battered woman, which can mean that returning to the batterer is the only option available to her.

One way to think about this is to recognize that domestic violence relationships are necessarily different than a relationship where domestic violence is not a factor. Generally speaking, the expectations that the public and courts have of healthy, intimate relationships are that there will be equality and mutual respect between intimate partners, that conflict will be mutual, that power is relatively equal, and that both parents are concerned primarily about the well-being of the children.

Relationships in which there is domestic violence are markedly different than those expectations. In a domestic violence relationship, there is an extreme power imbalance; the abuser's concern is not for the children, but rather for himself, and maintaining control.[27] The conflict between the parties is not mutual conflict between equals, but abuse of one party by another.[28]

Relationships with domestic violence can actually appear to outsiders to be healthy relationships that meet our expectations of equality, mutual respect, and primary concern for the chil-

20. For more information about rulemaking, *see* Barbara J. Hart, *supra* note 19.
21. *See, e.g.,* Barbara J. Hart, *The Legal Road to Freedom* (1991) available at http://www.mincava.umn.edu/hart/legalro.htm; Martha Mahoney, *Legal Images of Battered Women: Redefining the Issues of Separation*, 90 MICH. L. REV. 1 (1991); Margo Wilson and Martin Daly, *supra* note 3, at 10.
22. *See* Susan McGee, *Why Some Battered Women Sometimes Stay: Information for Professionals,* available at http://www.comnet.org/dvp. *See also* Michigan Judicial Institute, *supra* note 14; Nadkarni and Shaw, *supra* note 14.
23. BJS report, *supra* note 7.
24. *See* Bancroft and Silverman, *supra* note 2, at 15-16.
25. *See* BJS report, *supra* note 7.
26. Commonly identified lethality factors include a prior history of violence, obsessive possessiveness and morbid jealousy, threats to kill, a perception by the abuser that he has been betrayed. Additional risk factors include specific threats to harm or abduct the children or an extended fantasy of murder/suicide of the family. *See* Jaffe et al., *supra* note 1, at 48 (citing Robin Hassler et al., *Lethality Assessments as Integral Parts of Providing Full Faith and Credit Guarantees,* VIOLENCE AGAINST WOMEN ONLINE RESOURCES (2001) available at http://www.vaw.umn.edu/FFC/chapter9.html).
27. *See* Bancroft and Silverman, *supra* note 2.
28. *See* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCIL. CTS. REV. 273 (July 1999).

dren. Only by understanding the various tactics and manifestations of domestic violence, and knowing what to do in a case where there is domestic violence, can courts provide necessary relief to the victims.

These expectations about relationships become what judges and other professionals expect to see of parties in court. Because we expect equal power, when there are conflicts, our belief is that the conflicts are the fault of both parties, and that the parties should have equal ability to resolve conflicts without outside intervention.[29] Given that premise, when a party appears to be unwilling or unable to resolve a conflict with their intimate partner, they may be seen as obstructionist. Safety is not a primary concern, because each party is assumed to be equally able to walk away from the conflict. The belief may be that if there was violence, it was a one-time event that will be resolved by separation. Even in cases in which the parties are in conflict or disagree about other issues, the overriding assumption is that they are each concerned with the welfare of the children above all.

Domestic violence cases present differently than judges' and other professionals' expectations of how parties in a domestic relations case should act. Because domestic violence is not conflict between equals, but rather abuse based on unequal power and control, the assumption that the parties are equally able to resolve the conflict does not apply in a case where there is domestic violence. Although the expectation is that a parent in a family law case should be cooperative with the other party in facilitating parenting arrangements, an abused party may have good reasons—primarily safety for herself and her children—for not cooperating in parenting time arrangements, even when ordered by the court.[30] The expectation is that both parents should and will put their own interests aside in favor of the welfare of the children. The abuser's interest is not in the welfare of the children, but in maintaining his power over them and his victim. Unlike the situation where there is no domestic violence, safety must be a primary concern; separation can exacerbate the danger, rather than eliminate the conflict.

The disparity between the expectations for how a family law case should be resolved and the reality of a case involving domestic violence can lead courts to make the wrong decisions about what should happen in a case.[31] For example, if there is domestic violence in a case and the court requires that a parent facilitate parenting time with the abuser, that can put the children and the abused parent in danger if the abused parent follows the court's order. If the abused parent puts safety as the primary consideration and refuses to follow the court's order to facilitate the children's relationship with the abuser, then she could be punished by the court for acting contrary to its expectation, and she could then lose her children to the abuser.[32]

In order to make the best decisions for battered women and children who are exposed to domestic violence, the court must understand domestic violence and recognize that the processing and decisions in a case involving domestic violence must necessarily be different than the processing of and decisions in a case not involving domestic violence. For example, the goals of joint decision making, getting along, compromise, meeting to work out problems, and sharing responsibility for the failure of the marriage or subsequent problems do not work in a case marked by the power and control dynamics of domestic violence.

Asking the parties to work out their own parenting time schedule and details would be comparable to asking a former hostage to return to his captors alone, without any weapons or back-up support, to negotiate the surrender of weapons and the release of other hostages or goods. The hostage takers have all the guns, power, and ability to control the outcome to their design. Similarly, the battered woman and her children have no relative power without legislative and court assistance to design a custody or parenting time plan that can help them stay safe. The court is in the best position to help the battered woman equalize the power between her and her batterer and to ensure that she has the resources necessary to remain free from her former partner's violence and control.

C. DO ALL SYSTEM PLAYERS UNDERSTAND DOMESTIC VIOLENCE?

Courts necessarily rely on a number of professionals to provide them with information or assistance in a given case. For example, in a domestic relations case, those professionals might include a custody evaluator, guardian ad litem, a therapist, or a mediator or facilitator, among others. In a criminal case, probation officers, pretrial services personnel, and other law enforcement personnel may provide information or do background screening for the court system. In any kind of case, the attorneys for the parties also are charged with being officers of the court and providing accurate information to the court, albeit from the perspective of an advocate for a party. The information that the court receives from those professionals may be inaccurate or incomplete if domestic violence is a factor in the case, and the professionals don't screen for, or understand, domestic violence. Bad information can lead the court to make decisions that are based on false assumptions or an incorrect understanding of the situation, and those decisions can in fact be harmful to the abused party and the children.

D. WHAT ARE THE TOOLS AVAILABLE TO FIND OUT WHETHER THERE IS DOMESTIC VIOLENCE IN A RELATIONSHIP?

Screening for domestic violence is critical to determining what are appropriate court and system responses in the case.

29. *See id.*
30. *See* Joan Zorza, *Friendly Parent Provisions in Custody Determinations*, 26 CLEARINGHOUSE REV. 8 (Dec. 1992).
31. *See* Dalton, *supra* note 28.
32. *See* Jaffe et al., *supra* note 1, at 89-90 (summarizing research that "approximately 70% of contested custody cases [in the United States] that involve a history of domestic violence result in an award of sole or joint custody to the abuser," citing Jane Aiken and Jane Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 43-62 (2000). A recent revision of Professors Aiken and Murphy's article appears in this issue of COURT REVIEW. *See* Jane H. Aiken and Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, COURT REVIEW, Summer 2002, at 12

Given the prevalence and high risk of harm in cases where domestic abuse is a factor, it is essential that court personnel screen for domestic violence in every case that involves family members or intimate partners. What follows are a number of different screening questions that can help the questioner determine whether domestic violence has occurred in a case. After determining that domestic violence has occurred in a case, the court or other relevant professional must evaluate the actions that it can take to provide safety and autonomy for the abused party and the children, based on an understanding of domestic violence and the use of power and control tactics by the abuser.

1. Screening considerations

a. Demeanor and conduct of the parties

As with any case, it is essential that the investigator develop a rapport with the parties and understand that revelations about painful issues may not occur fully or immediately. Compassion, patience, empathy, and active listening skills are critical and will be essential to obtaining necessary information in these cases. An awareness that batterers can appear charming and calm, while the victim may be fearful and agitated, can help court personnel as they assess the domestic violence in the case. Batterers are, by their nature, manipulators.[33] The cautious court investigator or judge will be able to assess the truth by listening carefully to what is said, and by looking for signs of power and control in the parties' statements or demeanor.

Also, the screener should understand the context of domestic violence: perpetrators make rules that the victim must follow,[34] while certain behavior or words of the perpetrator may be threatening or harmful to the victim even though they may seem harmless or even kind to outsiders. A key screening device therefore is to understand what the batterer's actions or words mean to the victim. By asking: "*What does that behavior mean to you?,"* the court can understand the conduct of the batterer, and use that information to interrupt the batterer's rulemaking, and therefore help keep the battered woman and her children safe.

b. Demeanor of the questioner

A review of judicial behavior in domestic violence cases in Massachusetts found that judicial demeanor was critical to the process and the outcome of these cases.[35] Helpful judicial responses include:

- Prioritizing women's safety.
- Making the court hospitable to abused women.
- Supportive judicial demeanor by listening to abused women and asking questions.
- Connecting women with resources.
- Taking the violence seriously.
- Focusing on the needs of children.
- Imposing sanctions on violent people.
- Addressing the economic aspects of battering.[36]

When screening for domestic violence, the demeanor of the questioner is critical to getting good information and creating safe and final outcomes.

The screening tools outlined below give some examples of questions that the investigator can adapt to suit her or his style and practices. Some keys to remember in gathering this information are:

- The investigator should not be judgmental when asking the screening questions.
- The questions should be phrased in the investigator's own words. If a written questionnaire is used, it should be supplemented with questions in a face-to-face interview.
- The questions should be introduced with a nonthreatening opening, such as, "Because abuse and violence are so common in intimate relationships, I ask about it routinely."
- The information related to domestic violence should be asked about in every case where intimate partners or family members are involved.
- Both parties may minimize the abuse or not identify it as "domestic violence."
- The more specific the questions, the more likely it is that the information elicited will be accurate. Asking, "Has there been domestic violence in your relationship?" will not provide accurate or enough information to determine whether domestic violence has in fact occurred, or whether precautions are necessary to protect the parties and the court personnel from harm.

2. Tools to identify domestic violence: screening questions

a. Identifying lethality risks

Lethality increases at the time of separation. There are a number of lethality assessment tools and checklists that can help a fact-finder determine whether a domestic violence perpetrator may become deadly. Although no one can predict with absolute certainty which domestic violence offenders will become lethal, some warning signs include:[37]

- Suicidal or homicidal ideation, threats, or attempts.
- Escalation (or sudden decrease) in frequency and severity of violent episodes.
- Access to weapons or threats to use weapons.
- Prior criminal behavior or injunctions.
- Depression or substance abuse.
- Obsession or preoccupation with victim.
- Stalking behaviors.
- The victim believes he will become lethal.

33. *See* Bancroft and Silverman, *supra* note 2.
34. *See* Hart, *supra* note 3.
35. *See* JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999).
36. *See id.* at 176.
37. One example of a screening tool used to identify high-risk behaviors or history that would identify someone who needs further assessment before sentencing on a domestic violence offense was developed by the Colorado State Court Administrator's Office and directed for use by the Division of Probation Services of the Colorado state courts. The Colorado Domestic Violence Screening Instrument (DVSI) asks about such things as prior court involvement on domestic violence and non-domestic violence cases, recent separations, and employment history. A copy of the DVSI is on file with the author.

b. Identifying cases with prior court involvement

One of the most apparent means of discovering information about domestic violence history in a relationship is to determine whether there has been prior court involvement by either party. Court personnel should be cautioned, however, that the lack of prior court or police involvement does not necessarily mean that there is no domestic violence between the parties or that reports of current domestic violence are not truthful.[38] Court personnel should also be aware that victims may be arrested and charged with domestic violence when they were defending themselves against the primary aggressor.[39] Therefore, any screening must be mindful of these issues and with awareness of the myths about domestic violence victims and perpetrators.

Some questions that can help determine whether there has been prior court involvement might include:

- Are there now, or have there ever been any criminal charges brought against either party? If so, in what court? What was the outcome?
- Has any other court ever issued an order involving either party? If so, what court? What did the order provide?
- Has either party ever been arrested? If so, when? Where?
- Is there a personal protection order issued involving either party? If so, what court issued it?
- Has any other court ever issued an order for custody, support, or parenting time regarding any of the parties' children?

c. Other screening tools

1. AMA screening guidelines

The American Medical Association has developed diagnostic and treatment guidelines for cases of domestic abuse.[40] Those guidelines suggest that doctors ask their patients questions included in the following list. Those questions are easily adapted to the court investigation setting:

- Are you in a relationship in which you have been physically hurt or threatened by your partner?
- Are you in a relationship in which you felt you were treated badly? In what ways?
- Has your partner ever destroyed things that you cared about?
- Has your partner ever threatened or abused your children?
- Has your partner ever forced you to have sex when you didn't want to? Does he ever force you to engage in sex that makes you feel uncomfortable?
- We all fight at home. What happens when you and your partner fight or disagree?
- Do you ever feel afraid of your partner?
- Has your partner ever prevented you from leaving the house, seeing friends, getting a job, or continuing your education?
- Does your partner use drugs/alcohol? How does he act when he is drinking or on drugs? Is he ever physically or verbally abusive?
- Do you have guns in your house? Has your partner ever threatened to use them when he was angry?

2. ABA screening suggestions

The ABA Commission on Domestic Violence has developed a lawyer's handbook, which gives practical, useful information about domestic violence for lawyers and judges.[41] Many of the ABA's proposed questions are similar to the AMA's. Some additional screening questions outlined in the ABA's publication that may be adaptable to investigations include:

- Do you ever do anything differently because of the consequences of a fight?
- Has your partner ever put his hands on you against your will, or forced you to do something you didn't want to do?
- Does your partner criticize you or your children often?
- Has your partner ever tried to keep you from getting medical help? Kept you from sleeping at night?
- Has your partner ever hurt your pets or destroyed your things? Does your partner throw or break things during arguments?
- Is it hard for you to have relationships with friends or relatives because your partner disapproves of, argues with, or criticizes them?
- Does your partner make it hard for you to keep a job or go to school?
- Does your partner withhold money from you? Do you know what your family's assets are? If you wanted to find out, or to find any important documents like birth certificates, passports, bank books, house deed, would your partner make it difficult for you to do so?

3. Other screening aids

Larry Rute, then with Kansas Legal Services, proposed the following screening questions for mediators, which could be adapted for use by other court professionals:

- Are you fearful of the other person for any reason?
- Are you afraid you will be harmed?
- Have you ever been threatened?
- Have you ever been harmed?
- Have you had to call the police for protection?
- Have you ever stayed in a shelter?
- Are you afraid to answer these questions?
- Are you afraid to be in the same room with the other party?
- How can I tell when he/she is angry?
- How can I tell if you are angry, frightened, or upset?
- Can you ask for a break if you are feeling uncomfortable? [42]

To screen for violence from a different perspective, some

38. *See, e.g.*, K. Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUSTON L. REV. 30 (1998).
39. *See* Casey G. Gwinn and Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor,* 20 W. ST. U.L. REV. 297 (Spring 1993). *See also* Arleen Erland, *Study of Women Arrested for Domestic Violence*, (unpublished paper, on file with the author).
40. *See* Kathleen Waits, *Critical Issues: Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027 (Spring 1995).
41. *See Lawyer's Handbook, supra* note 5, at 2-1–2-11.
42. *See* Presentation at a Continuing Legal Education for Kansas mediators at Washburn Law School, Topeka, Kansas, August 8, 1997.

sample questions developed by the Alternatives for Domestic Aggression program in Ann Arbor, Michigan,[43] include:

- Was there violence in your family (of origin)?
- During conflict do you often threaten someone, break things, punch walls, slam doors, ignore her, or leave?
- Do you have mood swings, where one moment you feel loving and affectionate, and the next moment angry and threatening?
- Have you ever shoved, grabbed, hit, slapped, or choked your partner, or any past partners?
- Do you find it difficult to talk to your partner about your feelings, your hopes, your fears?
- Do you tend to blame others for your behavior, especially your partner?
- Are you a very jealous person?
- Do you try to control how your partner thinks, dresses, who she sees, how she spends her time, how she spends her money?
- Do you try to discourage her from seeing her friends or family?
- Do you get angry or resentful when she is successful in a job or hobby?
- Do your conversations quickly escalate into threats of separation or divorce?
- Do you ever threaten to hurt her, yourself, or others, if she talks about leaving you?
- Do you do or say things that are designed to make her feel "crazy" or "stupid"?
- Do you blame alcohol, drugs, stress, or other life events for your behavior?
- Do you feel guilty after aggressive behavior and strive for your partner's forgiveness?
- Do you think that you could never live without her, yet other times want her out?
- Do you use sex, money, or other favors as a way to "make up" after conflict?
- Is your partner afraid of you sometimes?

E. WHAT CAN BE DONE ONCE THE FACT-FINDER KNOWS THAT DOMESTIC VIOLENCE IS A FACTOR IN A CASE?

1. Develop protocols

According to the National Council of Juvenile and Family Court Judges, communities that are concerned about domestic violence "are asked to confront a new and compelling set of facts: (1) adult domestic violence and child maltreatment often occur together and (2) new responses are required of *everyone*, if violence within families is to stop."[44]

The protocols that courts and court personnel may develop will depend upon the nature of the information sought, the circumstances of the parties, and the individual court's caseload and resources, among other factors. At minimum, courts should develop procedures that will ensure that the court environment is a safe one for disclosure and that court personnel and other system players become as educated as possible about domestic violence. Local guidelines should address such topics as training of court personnel on domestic violence; points in the proceedings when the parties will be given a specific opportunity to talk about violence in their relationship; procedures for promoting safety and confidentiality; and when and what referrals will be made.

Mediation, and other processes that are based on a presumption of equal power, should allow for a victim to opt out without negative consequence to that party.[45] If mediation is undertaken, the mediation session should be done in a way that enhances safety and allows a victim to provide information to the mediator about the violence in a confidential, safe setting.[46] The process should also allow a victim to bring a support person into the mediation session if she desires, even if the other party does not. Any agreements discussed in mediation must be subject to attorney review and court approval and should be viewed from the perspective of safety and autonomy for the abused party. The victim should not be pressured into making an agreement, and the lack of agreement through mediation should not be viewed as obstructionist if there is domestic violence.

2. Recognize what can be solved through court processes

Courts have tremendous power to stop a batterer from continuing his power and control over the victim. The most effective interventions are those that hold the safety of battered women and their children paramount and that provide for consistent, swift, and sure consequences for battering behaviors.

Courts can promote safety for battered women by issuing protection orders; contrary to popular opinion that they are "just a piece of paper," protection orders have been found to be effective, particularly when the court and law enforcement systems enforce them.[47] Courts can also promote safety by taking away the batterer's rule-making power, and making and enforcing rules against the batterer. Rules need review, enforcement, and consequences for noncompliance. In order to be effective against an abuser, a court's rules and orders need to be reviewed, enforced, and provide for clear and swift consequences for noncompliance.

Some courts use regular review hearings, in criminal cases

43. *See Alternatives to Domestic Aggression Assessment* available at http://csswashtenaw.org/ada/services/index.html.
44. National Council of Juvenile and Family Court Judges, Family Violence Dept., Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice 9 (1999).
45. *See* Jaffe et al., *supra* note 1, at 75.
46. *See id.* at 75 (Besides the power imbalance between the parties in a domestic violence case, another "reason why domestic violence cases may be exempted from mediation is that mediators may not be able to obtain accurate information if one of the parties is so afraid of the other party that she (or he) cannot speak freely to the mediator."). For a checklist of recommendations on mediation when there is domestic violence, *see* Family Violence Prevention Fund, *supra* note 1, at 4-4–4-5.
47. *See* Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence,* 288 J. Am. Med. Ass'n 589 (Aug. 7, 2002); Kit Kinports and Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes,* 2 Tex. J. of Women & L. 163 (1993).

and family law cases, to monitor the conduct of an abuser and to ensure that the abuser knows that the court is paying attention.[48]

3. Safety of the children and the battered partner should always be the primary concern

In custody and parenting time cases, child and victim safety follows when one recognizes that battering a partner is *per se* bad parenting. It is not in a child's best interest to be ordered to live with a batterer, or to visit a batterer without clear and effective safeguards for the child's safety.[49] In addition, research shows that batterers are difficult to change—many batter in subsequent relationships, so the presence of a new partner for the batterer may not be a safety valve for the children.[50] When making any order in a domestic violence case, the court should actively ask itself whether it is doing everything that it can to keep the children and the non-abusive parent safe and alive.

4. Don't hold women to impossible standards of parenting, and recognize their efforts to stay safe.

Put the blame for the battering where it belongs—on the perpetrator.[51]

5. Draft all orders with safety as the primary consideration.

"Father's rights" or "parent's rights" should always be secondary to safety.[52]

6. Recognize that keeping the mother safe can translate into keeping the children safe.

As one means of ensuring that the mother is safe, the court, as part of its decision-making process, can inquire whether a woman has a safety plan.[53] Courts should also order temporary custody or possession of the children as part of temporary restraining orders to ensure that children are safe, and make supervised parenting time (supervised by a non-related third party) the first choice until the perpetrator actually demonstrates that he is fit to have the children unsupervised.[54]

7. Orders must be clear, specific, and detailed as to the definite terms of the order, and should include built-in consequences for noncompliance.

There should be no room for ambiguity or negotiation. Orders should be vigorously enforced and perpetrators held accountable.[55]

CONCLUSION

The processing of a family law case where there is no domestic violence is necessarily different than that of a case where there is domestic violence. What would appear to be reasonable and helpful in a case without domestic violence can actually be harmful and even deadly in a case where domestic violence has occurred. Once a court or a professional identifies that domestic violence is a factor, then the court must shift its usual way of thinking about, and processing, a family law case. Without that paradigm shift, the court may be creating greater problems than it solves in the families that come before it.

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48. *See* Family Violence Prevention Fund, *supra* note 1, at 7-59 (Gondolf's findings demonstrate that court review dramatically increases compliance and lowers recidivism among batterers. The full report by Mr. Gondolf is available from the Mid-Atlantic Addiction Training Institute, phone number 724-357-4405.).
49. *See* Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe,* 35 COURT REVIEW, Fall 1998, at 23, 31.
50. *See* D. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 53 (Jan. 1994); Bancroft and Silverman, *supra* note 2.
51. *See* Susan G.S. McGee, *Why Some Battered Women Sometimes Stay*, INFORMATION FOR PROFESSIONALS, available at http://comnet.org/dvp/dvp-prof.html. *See also* G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings,* 22 HARV. WOMEN'S L.J. 89 (Spring 1999).
52. *See* National Council of Juvenile and Family Court Judges, *Final Report of the Child Custody and Visitation Focus Group*, available at http://www.vaw.umn.edu/FinalDocuments/custodyfin.htm.
53. *See id.* The court or other personnel who report to the court should not ask for specific details of the safety plan. If the details of a safety plan are revealed, the safety plan itself can be compromised and becomes less effective as a means of keeping the battered woman safe.
54. *See* Field, *supra* note 49; Nadkarni and Shaw, *supra* note 3; Jaffe, et al., *supra* note 1; Family Violence Prevention Fund, *supra* note 48.
55. *See* Field, *supra* note 49; *Lawyer's Handbook, supra* note 5, at 13-3.

Dealing with Complex Evidence of Domestic Violence:

A Primer for the Civil Bench

Jane H. Aiken and Jane C. Murphy

New laws and policies aimed at protecting victims of domestic violence have been adopted across the country throughout the last twenty years. The legal approaches taken to protect battered women and control family violence have brought about significant changes in family law.[1] New laws include statutes permitting civil protection or restraining orders,[2] and laws requiring that domestic violence be considered in custody and visitation decisions.[3] Both of these types of statutory reforms can provide protection to adult victims of domestic violence and their children. Evaluating a parent's fitness by considering past acts of violence to other family members results in decisions that are more likely to protect children than decisions that discount or disregard spousal abuse.[4] Civil protection orders can provide abused women and their children with a quick and easily accessible remedy that provides housing, financial relief, and an order of child custody.[5] While there is some controversy about the effectiveness of such orders in cases involving severe violence,[6] most advocates and scholars agree that these statutes contribute to improving the lives of women and children.[7]

The effectiveness of these new laws in reducing the incidence of domestic violence, however, has been limited for a number of reasons.[8] One of the major barriers to using these laws is the difficulty litigants often encounter when trying to prove domestic violence. First, the alleged victim is often the only witness to the abuse. For a variety of reasons, victims are reluctant to testify against their abusers and pursue civil and criminal remedies.[9] Even when they do testify, women who experience domestic violence sometimes exhibit characteristics that make them less believable. Despite changes in legal and popular conceptions of domestic violence, judges[10] and juries[11] fail to understand some of the effects of domestic violence and their impact on perceived credibility.

Experienced practitioners in the area of domestic violence

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Footnotes

1. *See generally,* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence,* 39 Wm. & Mary Law Review 1505 (1998); *Developments in the Law: Legal Responses to Domestic Violence*, 106 Harv. L.R. 1498, 1528-51 (1993). Changes in criminal laws, including creating new criminal sanctions to fit the patterns of domestic violence and encouraging the enforcement of existing criminal sanctions in domestic situations, have also developed in the last decade. *See* Bonnie J. Campbell, U.S. Department of Justice, *A Message from Violence Against Women Office Director, Bonnie J. Campbell,* 1 Violence Against Women Act News, July 1996, available at http://www.usdoj.gov/vawo/newsletter/bjc796.htm (last modified July 2, 1996).
2. All 50 states and the District of Columbia have some form of protection order statute. These statutes typically provide for eviction of the abuser from the home, temporary child custody, and a prohibition against continued abuse. Some state statutes provide for monetary relief for the duration of the order. The duration of the order varies with each state and ranges from 60 days to 3 years. *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 (1993).
3. *See* The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice,* 29 Fam. L.Q. 197 (1995).
4. *See id.*
5. *See* Klein & Orloff, *supra* note 2, at 812.
6. *See, e.g.,* Eve S. Buzawa & Carl G. Buzawa, *Introduction* in Do Arrests and Restraining Orders Work? 1-5 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996).
7. *See* Lenore E. Walker, The Battered Woman 210-12 (1979); Molly Chaudhiri & Kathleen Daly. *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, *in* Domestic Violence 227, 245-47 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy,* 4 Women & Pol., 13, 19-20 (Fall 1984) (concluding that protection orders are most effective in curtailing abuse when the level of violence is not severe); Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse,* 21 Harv. J. Legis. 61, 70 n.35 (1984). 10 *See generally* U.S. Department of Justice, Bureau of Justice Statistics, Violence Against Women: A National Crime Victimization Survey Report (1994).
8. *See generally* U.S. Department of Justice, Bureau of Justice Statistics, Violence Against Women: A National Crime Victimization Survey Report (1994).
9. Comment, *The Search for Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence,* 20 Hawaii L. Rev. 221, 252 (1998) (hereafter *The Search For Truth*) (describing the unequal power and control in abuse relationships, which leads to victims recanting their allegations, resulting in a "heightened" necessity for admitting evidence of prior abuse in domestic violence cases.); Lisa Marie DeSanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 367-368 (1996) (finding that victims of domestic violence are uncooperative in approximately 80% to 90% of criminal prosecutions).
10. James Ptacek, Battered Women in the Courtroom (1999).
11. *See e.g., Comment: Prosecuting Domestic Crimes: Effectively Using Rule 404(b) to Hold Batterers Accountable for Repeated Abuse*, 34

attempt to introduce as much evidence of the abuse as they can gather. Established principles of evidence law, however, present particular challenges in domestic violence litigation. While there is expansive literature on evidentiary challenges in criminal prosecutions for domestic violence, there is very little written about the way courts have looked at particular evidentiary issues in civil cases in which domestic violence is at issue. This article is intended to assist judges in anticipating and responding to some of the evidentiary challenges in civil cases involving domestic violence.

First, expert testimony is often necessary to dispel common myths about battered women and to educate judges and juries about the dynamics of domestic violence. Recent case law, however, has limited the admissibility of "non-scientific" expert testimony, making the court's qualification of experts more challenging. In addition, particular evidentiary issues arise when alleged victims are pursuing both criminal and civil remedies against the alleged batterer. This article explores the ways that may effect civil actions arising from the domestic violence. Finally, we discuss the difficulties in using prior bad acts evidence. Because batterers tend to engage in repeated acts of abuse, evidence of prior acts may be particularly relevant in proving the extent of harm and predicting the likelihood of future abuse. Traditional principles of evidence law, however, often prohibit the admission of other crimes, wrongs, and acts.

I. THE USE OF EXPERT OPINION ON THE EFFECTS OF BATTERING

When assessing whether domestic violence has occurred, the court often must understand a complex context and cope with inevitable misconceptions and incomprehensible contradictions regarding the alleged victim's perceptions and reactions. A battered woman's survival strategies appear maladaptive, illogical, and unstable. For example, despite brutal abuse, the woman stays in the relationship; she seems to fail to protect her child from her abuser; her resulting alcohol or drug abuse may cause her to neglect her child; she may minimize or deny the abuse; she may appear erratic and unreliable because she continually relocates to avoid the abuser.[12]

[E]xpert testimony is often necessary to dispel common myths about battered women and to educate judges and juries about the dynamics of domestic violence.

Research reveals that a battered woman remains in her abusive relationship because her abuser convinces her she cannot survive outside the relationship.[13] She may rationalize that her child's need for a father outweighs the damage of his abuse. She may realistically fear that he will kill her if she escapes, or she may simply believe she cannot afford to support herself and her child without him. Expert opinion illuminates these paradoxes for the judge or jury.[14]

Three types of expert opinions facilitate an understanding of the dynamics and perspectives underlying a domestic violence relationship: (1) the clinically based opinion, (2) the social framework opinion, and (3) a hybrid of the clinically based and social framework opinions. The clinically based expert assesses the relationship and can offer opinion evidence about the particular effects of battering on this specific relationship. Social framework experts put clinical data in perspective, usually without any clinical relationship with the parties. The social framework expert clarifies the contradictions and the misconceptions regarding domestic abuse. The hybrid expert offers a clinical opinion about the abuse and effects in this particular relationship and explains the behavior of the abused person.

Too often, courts limit expert opinion to clinically based testimony and are more skeptical of useful social framework testimony. This limitation may result from an erroneous belief that battered women's syndrome testimony remains the only admissible expert testimony in a domestic violence case.[15] Although evidence regarding battered women's syndrome can be used to establish a self-defense claim to murder or assault under some state's laws, it remains inadequate when attempting to explain fundamental contradictions within an abusive

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GONZ. L. REV. 361, 365 (1998).

12. *See, e.g.,* Joan A. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of the Batterer,* 76 IOWA L. REV. 553 (1991); Audrey Stone & Karla Digirolama, *Battered Women's Expert Testimony, Past and Present,* 271 PLI/EST 181 (1998).
13. *See, e.g.,* Henderson v. Henderson, 800 So. 2d 595 (Ala. Civ. App. 2000) (admitting testimony of domestic violence expert who described the characteristics of domestic violence and stated victims often remain in abusive relationship or remain silent about the abuse).
14. Courts have noted the usefulness of expert opinion. For example, in *Pratt v. Wood*, 621 N.Y.S.2d 551 (App. Div. 1994), the court held that expert testimony in the field of domestic violence was generally admissible because the average person is uneducated on the psychological and behavioral characteristics typically shared by victims of abuse in a familial setting. *Id.* at 553.
15. *See, e.g.,* People v. Gomez, 85 Cal. Rptr. 2d 101 (Cal. App. 1999). In *Gomez*, the court found that the expert testimony explaining the victim's recantation had to be excluded. The court found that before such testimony could be credited, the prosecution had to prove that the victim suffered from battered women's syndrome. *But see* People v. Williams, 93 Cal. Rptr. 2d 356 (2000) ("In the context of the reason for admission of the evidence in this case, we disagree with the limitation placed on evidence pursuant to Evidence Code section 1007 in *People v. Gomez*. There is nothing in Evidence Code 1107 to suggest that the legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator. . . . Additionally we believe that the concept of having to prove that a victim of domestic abuse has previously been battered … is not appropriate in the context of this case."); *See also* People v. Morgan, 68 Cal. Rptr. 2d 772, 773-74 (1997) (holding that battered women's syndrome expert testimony is admissible to rehabilitate a recanting victim's credibility without a proffer of evidence of a preexisting

Social framework opinion evidence often assists the fact-finder in understanding the evidence or in determining a fact relevant to material issues.

relationship.[16] There is an abundance of social science literature on abuse. Courts often undervalue social-framework testimony because they view it as general information rather than specific application. While many academics have heralded the use of domestic violence expert opinion in criminal cases, few have discussed its use in the civil arena.[17]

Social framework opinion evidence often assists the fact-finder in understanding the evidence or in determining a fact relevant to material issues. Therefore, it fits the requirements of Rule 702 or its common-law equivalent.[18] A litigant may challenge this expert opinion as within the common experience of the fact-finder urging the court to disallow the expert because such information remains unnecessary or not "beyond his or her ken." [19] On the contrary, most common experience regarding abuse remains a misconception.[20] A few states directly address the need to admit expert opinion evidence to correct common misconceptions regarding abuse. For example, Ohio Rule 702 includes the language, "A witness may testify as an expert if...[t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or *dispels a misconception common among lay persons.*" (Emphasis added). [21] The Ohio legislature changed Rule 702 after the issue was raised about expert opinion regarding domestic violence.[22] Judicial discretion in admitting this evidence is substantial. A trial court's admission or denial of expert testimony faces abuse of discretion review.[23] This makes it all the more important that such rulings are well considered at the trial level.

Courts that admit this evidence face additional hurdles. For example, in domestic violence cases, "experts" often lack educational degrees. Rules regarding expert opinion specifically allow expertise based on experience. Therefore, domestic violence workers may qualify as experts to testify regarding their knowledge of abuse arising from their experience working with women in shelters or other settings.[24] Even when an expert possesses the requisite educational degree, courts may be urged to reject the opinion as insufficiently "scientific." A litigant may characterize domestic violence experts as "advocates," lacking in "scientific distance."[25] This view damages the expert's credibility, limits the effectiveness of the expert testimony, and may cause disqualification of the expert.

Recent United States Supreme Court rulings on expert opinion may have had the effect of privileging scientific inquiry.[26] This may increase the court's use of standard scientific requirements, like testability, peer review, publication, rate of error, and general acceptance.[27] These scientific requirements often inappropriately assess the worth of social science studies or the

abusive relationship between victim and defendant).

16. The battered women's syndrome has come under significant criticism in recent years. Many critics suggest that it perpetuates negative stereotypes about victims of violence and tends to pathologize their natural reactions to abuse. *See, e.g.,* DONALD DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW (1998); EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988); Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome,* 6 AM. U.J. GENDER & L. 485 (1998); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).
17. *See, e.g.,* Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering,* 19 B.C. THIRD WORLD L.J. 593 (1999) (exploring and evaluating the use of expert testimony in the prosecution of a batterer); Cynthia Lynn Barnes, *Supplement Annotation*, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior,* 57 A.L.R. 5TH 315 (1998) (collecting and analyzing criminal cases in which the courts considered whether and when expert testimony regarding domestic violence syndromes may be used to assist the jury in evaluating a victim's testimony or conduct); Audrey E. Stone, *Presenting Battered Women's Expert Testimony: Trial And Error, in* HANDLING THE DOMESTIC VIOLENCE CASE 1998, at 255 (PLI New York Practice Skills Course Handbook Series No. F0-001V, 1998) (discussing that prosecutors increasingly find it useful to use experts in domestic violence cases to explain the conduct of a victim, such as when a victim recants, changes her story, or continues to live with the perpetrator); Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effect in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75 (1996) (providing information and analysis about expert testimony in cases involving battered women); Steven I. Platt, *Women Accused of Homicide: the Use of Expert Testimony on Effect of Battering on Women—A Trial Judge's Perspective,* 25 U. BALT. L. REV. 33 (1995).
18. *See e.g.,* Pratt v. Wood, 620 N.Y.S. 2d 551 (App. Div. 1994). For a general review of the use of social framework evidence, *see* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); *and* Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011 (1990).
19. *See* Mason Ladd, *Expert Testimony*, 5 VAND. L .REV. 414 (1952).
20. *See id.*; *see also* Donald G. Dutton with Susan K. Golant, THE BATTERER, A PSYCHOLOGICAL PROFILE (1995).
21. Ohio Evid. Rule 702, BALDWIN'S OHIO REV. CODE ANN. (West 2000).
22. State v. Koss, 551 N.E.2d 970 (Ohio 1990).
23. *See* General Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997) (holding that the question of admissibility of expert testimony is reviewable under "abuse of discretion" standard).
24. *See* MARY ANN DUTTON, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS [Research Report, Washington, D.C.: U.S. Department of Justice, National Institute of Justice and U.S. Department of Health and Human Services, National Institute of Mental Health, NCJ 160972 (1996)].
25. *See, e.g.,* U.S. v. Bighead, 128 F.3d 1329, 1336 (9th Cir. 1997) (dissenting judge calls into question the objectivity of the expert because she worked for a child advocacy center).
26. *See* Kumho Tire Co. v. Carmichael 526 U.S. 137, 149 (1999) (holding that an inquiry into both relevance and reliability applies not only to "scientific" testimony but to all expert testimony).
27. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-

clinical experience of the expert.[28] In those states relying on the *Frye* standard, the court may find that such expert opinion is not "generally accepted in the scientific community."[29] Some states specifically address this problem. For example, the California evidence code specifically exempts social framework evidence from the *Frye* test when offered to educate the fact-finder about the common misconceptions regarding a victim's behavior.[30]

In a case where testimony included a tape recording of a violent incident in which the husband battered the wife with a camcorder after threatening to "smash [her] face in" in front of the children on Christmas morning, a concurring Florida appellate judge voiced his discomfort regarding the reliability and competence of a court-appointed expert in the case:

> I am bound to say, however, that I am increasingly concerned about the proliferating and extensive use of psychologists in these family law cases and the extreme reliance trial courts appear to place on their opinions. These experts conduct interviews, sometimes do tests and then are allowed to render opinions on an extraordinary range of subjects. They have been allowed to offer opinions on a why a child nestles with its parent (no, it's not necessarily love), whether someone is prone to domestic violence, who is telling the truth, and who is "in denial." Yet, no one seems to be able to muster any measure of the competence or reliability of these opinions. On the one hand, it is certainly desirable to bring before the court as much evidence as possible to assist the trial court in making the best decision concerning the raising of the children in families torn by divorce. On the other hand, the rules of evidence exist for a reason, and the issue of competency of such broad reach of expert testimony is not something that should be taken lightly—particularly in such cases where there is frequently little other objective or disinterested evidence on which the court can rely.[31]

People inexperienced with domestic violence usually wonder why a victim did not escape her abuser.

Despite some courts' reluctance, social framework testimony remains critical in domestic violence cases to explain victim behavior.[32] Experts are often the only witnesses who can educate the fact-finder regarding the unfathomable dynamics underlying domestic violence relationships, and the subtle, confusing facts of abuse.

People inexperienced with domestic violence usually wonder why a victim did not escape her abuser. This issue arises in requests for orders of protection (why now?), in custody determinations (if he is so abusive, why did you stay and expose the children to this?), in requests for rehabilitative maintenance[33] (why did you leave college while you were married and now want him to pay?), in tort actions (you consented to this treatment, so why should you be heard to complain now?), and in myriad other settings. Expert opinion explains why the victims minimize abuse and keep abuse a secret from friends, family, clergy, or physicians.

Domestic violence experts facilitate custody determinations.[34] It is often heard in the halls of family courts that some-

95 (1993).

28. *But see generally* David L. Faigman, *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence,* 67 U. COLO. L. REV. 817 (1996) (discussing a misappprehension among lawyers about both the difficulty of doing social science research and the law's proper response when social science is difficult to conduct).
29. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test still remains quite viable in many states. Essentially, for expert opinion to be admitted, it must be scientific knowledge derived through a method that is generally accepted among the relevant scientific authorities. This test places part of the decision about whether this evidence is "reliable" outside the court and within the purview of scientists.
30. California Evidence Code section 1107 provides in pertinent part:

> In a criminal action, expert testimony is admissible . . . regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence . . . .
>
> The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.

31. Keesee v. Keesee, 675 So.2d 655, 659 (Fla. Dist. Ct. App. 1996) (Griffin, J. concurring).
32. *See generally,* Myrna Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147 (1997) (proposing a reformulated model for the use of expert testimony in domestic-violence-related cases wherein prosecutors would be permitted to introduce domestic-violence social-science framework evidence that is not syndrome or profile oriented in order to level the evidentiary playing field and provide a background against which domestic violence evidence can be understood at trial).
33. *See, e.g.,* Garces v. Garces, 704 So.2d 1106, 1107 (Fla. Dist. Ct. App. 1998). In *Garces*, the wife's expert psychologist testified about the wife's psychological condition as a result of domestic abuse. The psychologist recommended that the wife consult with a psychiatrist at least once monthly and that the wife should attend individual therapy twice a week for at least a few years. The trial court included in the final judgment the following provision: "The husband shall be required to pay any presently outstanding and all reasonable future medical, psychological, psychiatric, counseling and medication expenses for care and treatment required by the wife as a result of his egregious conduct which are not covered by her medical insurance and for those items which are covered, the husband shall be responsible for any uncovered portions, including payment of any deductibles.").
34. Sometimes the judge needs no expert to see the risks posed by placing the child with a violent person. Judges generally award unsupervised visitation in these cases. *See, e.g.,* Berg v. Berg, 606 N.W.2d

As useful as experts may be, they are often costly and impractical.

one beats his wife but is a good father. Recent literature illuminates the fallacy of such a belief. Forty-five to 70% of battered women in shelters report that their batterers commit some form of child abuse.[35] Even using the more conservative figure, child abuse is 15 times more likely to occur in households in which there is domestic violence.[36] Moreover, children simply witnessing domestic violence without themselves being abused are still more likely to grow up with serious maladaptive behavior patterns. Experts facilitate custody determinations by offering insight into the current and potential effects on children in a domestic violence household.[37]

It as been estimated that approximately 70% of contested custody cases that involve a history of domestic violence result in an award of sole or joint custody to the abuser.[38] Such awards may result from the recent trend in which more and more states adopt "friendly parent" provisions as a factor in assessing which parent should receive custody of the children.[39] A mother may find herself in a "Catch-22." If she fails to report the abuse, the court labels her an ineffective or neglectful mother failing to protect her child. If she reports the abuse, the court may label her an "unfriendly parent" afflicted with parental alienation syndrome, and she may lose custody of her child. This trend necessitates a critical distinction between an "unfriendly parent" and a mother attempting to protect herself and her child from the abuser, particularly when a victim minimizes her abuse or engages in maladaptive self-help behaviors.[40] Again, in such a situation, expert opinion critically educates the fact-finder.[41]

Expert opinion may assist in sorting out particularly difficult determinations. Of course, when parties make competing claims, either or both parties may use experts, and these experts may be court appointed. For example, a Louisiana court faced a husband who physically abused his wife but not his minor child.[42] The court admitted testimony of a court-appointed psychologist. The expert testified that the father remained a stronger nurturer than the mother. The court ordered joint custody primarily because the mother prevented the father from seeing the child, and the joint custody provision of the Louisiana statute promoted a frequent and continuing relationship with both parents. In contrast, a Mississippi court faced a father asserting that his wife was unfit to care for their children.[43] The court admitted testimony of a clinical social worker. The expert testified that the mother struggled with low self-esteem, that her low coping skills indicated her husband emotionally abused her, and that her condition would not prevent her from caring for her children. The court affirmed the award of custody to the father based on the chancellor's findings that the father had cared for the children while the mother was in school, that his possession of the house provided the children stability of a home environment in familiar surrounding, and that the mother had hidden the children for 23 days.

As useful as experts may be, they are often costly and impractical. The summary nature of order of protection hearings makes calling an expert unlikely even if the party could find and afford one. If an expert is testifying in a civil action, costs can be substantially reduced through the introduction of "learned treatise" type evidence, relying on articles from reputable journals to assist in evaluating the social framework of the case.[44] This can also be offered by briefing the court and opposing party on the relevant issue, with expert writings used to educate the court about the effect of the domestic violence on the woman and her children.

895, 899 (N.D. 2000) (although the statute places a heavy burden of proof—clear and convincing evidence—upon the perpetrator of domestic violence to show unsupervised visitation will not harm the child, the statute imposes no burden on the custodial parent to prove, by expert testimony or otherwise, that unsupervised visitation with the more violent parent will in fact harm the child).

35. *The Link Between Child Abuse and Domestic Violence*, CHILD PROTECTION LEADER (American Humane Association Sept. 1994).
36. *Id.*
37. *See, e.g.,* In re Lonell J., 673 N.Y.S.2d 116 (1998) (holding expert testimony is allowed but not *required* to prove effects of domestic violence on child's emotional and mental state); In re Marriage of Brainard, 523 N.W.2d 611 (Iowa App. 1994) (admitting expert testimony to detail the tragic and long-term consequences of spousal abuse on children who witness the violence); In re Marriage of Houtchens, 760 P.2d 71 (Mont. 1988) (allowing expert in field of social work and domestic violence to testify that children are at risk living with men who batter, both because of the likelihood that the child will be battered and the likelihood that the child will rely on that person as a role model); Chafin v. Rude, 391 N.W.2d 882 (Minn. App. 1986) (allowing court's expert to testify that domestic violence jeopardized the child's emotional development).
38. AMERICAN JUDGES FOUNDATION, DOMESTIC VIOLENCE & THE COURTROOM: UNDERSTANDING THE PROBLEM, KNOWING THE VICTIM. This publication is periodically updated; the current version can be found at http://aja.ncsc.dni.us/domviol/booklet.html.
39. "Friendly parent" provisions are typically legislation that considers which parent is most likely to foster the relationship with the other parent and considers that behavior as a positive factor in determining the best interests of the child. Manuel E. Nestle, *Child Custody Determination on Termination of Marriage*, in 34 AM. JUR. PROOF OF FACTS 2d 407.
40. *See* Faries v. Faries, 607 So.2d 1204, 1208 (Miss. 1992) (clinical social worker testified (1) that victim struggled with low self-esteem, (2) that her low coping skills indicated her husband emotionally abused her, and (3) that her condition would not prevent her from caring for the children).
41. *See, e.g.,* In the Matter of J.D. v. N.D, 652 N.Y.S. 2d 468 (1996) (finding that the respondent was engaging in protective behavior in response to the petitioner's exercise of power and control over her).
42. Windham v. Windham, 616 So.2d 276, 297 (La. App. 1993).
43. Faries, 607 So.2d at 1210.
44. To qualify for the "learned treatise" exception to the hearsay rule, an expert must testify and affirm that the treatise is authoritative, or the party offering the treatise must prove its reliable authority by another expert or by judicial notice. This essentially allows the party to offer the information through an expert and minimize the costs of production of an expert or allows a party to cross-examine that expert without having to hire a battering expert. *See* Fed.

II. EVIDENTIARY IMPLICATIONS OF CONCURRENT CIVIL AND CRIMINAL PROCEEDINGS

Often, order of protection hearings occur in the shadow of a criminal prosecution for assault. This creates particular evidentiary issues that have both substantive and strategic implications. Police practices in anticipation of a criminal prosecution may be different. Police often play a more active role in gathering physical evidence, obtaining 911 tapes and medical records of treatment following the incident. Instead of merely writing a brief report of a domestic dispute, many police forces are being trained to produce police reports that record "excited utterances"[45] and other hearsay exceptions within the document.[46] Therefore, the police report can be used to conduct "victimless prosecutions" when the victim decides to withdraw the criminal complaint and does not wish to testify.[47] These more detailed investigations and reports can be quite useful as supplemental and corroborating evidence of the domestic abuse in the protection hearing and subsequent divorce or custody proceedings.

The foundation requirements for the police record are the same as those for a public record.[48] Many states allow such records to be authenticated by affidavit provided notice is given to the other party.[49] Unlike a criminal case, the record can be used against the alleged perpetrator without the police officer present and subject to cross-examination.[50] Being able to use the police report without the officer's presence and testimony may be particularly important in an order of protection hearing because the cases tend to be heard on an expedited basis, the parties are often unrepresented, and the proceedings are often summary in nature.

"Excited utterances" may be the most likely hearsay exception covering a victim or witness's statement if the report is taken at the scene . . . .

Any hearsay statements included in the report must also meet hearsay exceptions. "Excited utterances" may be the most likely hearsay exception covering a victim or witness's statement if the report is taken at the scene and only shortly after, or during, the violent incident.[51] The timing can be significant. If the police arrived within 30 minutes of the assault, then the statements are likely to qualify.[52] Longer lapses of time may make this a more difficult argument. Other hearsay exceptions that may cover victim or witness statements within the police documentation include present sense impressions (in some jurisdictions), state of mind exception (provided her state of mind is an issue in the case),[53] and statements made for medical diagnosis or treatment.[54]

The hearing on the protection order is likely to occur prior to the prosecution and becomes a source for discovery and preservation of testimony. This cuts both ways for the parties. The future prosecution may create an imbalance in the courtroom. In anticipation of the criminal prosecution, it is far

R. Evid. 803(18).

45. An excited utterance is admissible if the statement relates to a startling event and is made while under the stress of that excitement. *See* Fed. R. Evid. 803(2).
46. Many jurisdictions are using "victimless prosecution" strategies thus necessitating creative application of the hearsay exceptions. Some states are even creating evidentiary rules that reduce the reliance on victims in these prosecutions. *See* CAL. EVID. CODE § 1370 (1997). This evidentiary rule allows the admission of hearsay statements in a domestic violence case if such a statement narrates, describes, or explains the infliction or threat of physical injury and the declarant is unavailable to testify. The statement must have been made within at least five years of the infliction of injury and must be written, electronically recorded, or provided to a law enforcement official.
47. For a detailed and thoughtful discussion of "victimless prosecutions," *see* Cheryl Hanna, *No Right to Choose, Mandated Victim Participation in Domestic Violence Prosecutions,* 109 HARV. L. REV. 1849 (1996).
48. A public record generally requires either the testimony of a custodian of records, a document under seal, or, in some states, a "business record affidavit" establishing the authenticity of the document. The document must be produced by a public agency and generally includes reports setting forth the activities of the office or agency, matters observed pursuant to duty imposed by law as to which matters there is a duty to report (this likely covers the police report at the scene) or factual findings resulting from an investigation made pursuant to authority granted by law. *See* Fed. R. Evid. 803(8).
49. Missouri, like many states, allows the introduction of business records without the custodian provided the party offering the business record has an affidavit from the custodian of records swearing to the foundation and timely notice is given to the opposing party. MO. REV. STAT. § 490.692 (2001).
50. Generally, police reports cannot be used against criminal defendants in criminal actions due to their confrontation clause implications. *See, e.g.,* FLA. STAT. § 90.803(8)(2002); AR EVID. RULE 803(8)(2002); IOWA R. EVID. 5.803(8)(2002); 12 OKLA. ST. §2803 (2003); D.R.E. 803(8)(2002). Some states also limit the use of police reports in civil actions. See, e.g., WIS. STAT. § 908.03(8)(2002); MINN. EVID. RULE 803(8)(2001); N.C. GEN. STAT. §8C-1. Rule 803(2002).
51. Actual physical violence is not required to prove that the event was "startling" for purposes of establishing an excited utterance. A threat should be enough. *See* Donna Meredith Matthews, *Making the Connection: A Proposed Threat Hearsay Exception,* 27 GOLDEN GATE U. L. REV. 117, 138 (1997).
52. *See, e.g.,* Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988); State v. Woodward, 908 P.2d 231 (N.M. 1995); State v. Anderson, 723 P.2d 464 (Wash. Ct. App. 1986).
53. The state of mind exception to the hearsay rule admits any statements by a declarant that concerns that declarant's then-existing state of mind, emotional sensation, or physical condition. This includes statements of intent, plan, motive, design, mental feeling, pain or bodily health, but not statements of past condition. *See, e.g.,* Fed. R. Evid. 803(3).
54. Statements for purposes of medical diagnosis or treatment include statements describing present symptoms and past medical history as long as the statements are designed to elicit medical care. This certainly covers statements made to a treating physician that are pertinent to diagnosis or treatment. If the victim seeks care through the police officer taking the call, then her statements might qualify for an exception. However, if she merely is reporting the events and not seeking medical care then the statements

The so-called "propensity rule" prohibits the introduction of prior bad acts to prove that the defendant acted in conformity with his bad character.

more likely that the respondent has retained counsel whereas the victim may still be without representation. An alleged perpetrator can use the hearing to preview the future criminal case. The testimony of the victim often provides a source of impeachment material, particularly if she is unrepresented. This may become a time to vigorously cross-examine the victim and witnesses in the hopes of discouraging them from going forward with the prosecution.

Some criminal attorneys have sought continuances in the protection order hearings, citing their client's Fifth Amendment privilege not to be forced to testify. Although delays do not leave victims unprotected (the temporary stay away order is usually extended), the victim is denied other relief that may be necessary for her to sustain separation, such as court-ordered mortgage payments by the perpetrator, child support, and protected visitation. In some cases, the law limits the number of continuances that can be granted and courts face the task of determining whether to deny the victim her relief or perhaps violate the Fifth Amendment right of the perpetrator. Some states have attempted to remedy this problem by preventing the use of the respondent's testimony in any future proceeding and by ensuring that the finding of abuse is not treated as res judicata (for future claims in which a finding of abuse could have an impact on the determination).[55]

On the other hand, alleged victims can benefit from the protection hearing occurring before the prosecution. Future criminal defendants may also provide inculpatory testimony in this setting when testifying about the alleged abuse. The timing of the protection hearing increases the likelihood that the lawyer for the defendant in the criminal case has not done sufficient investigation of the case, has had little time to understand the story from the alleged perpetrator's perspective, and is reasonably reluctant to allow the client to discuss the issue under oath. Such testimony may be admissible in the subsequent prosecution for both its impeachment and substantive value as party admissions. A represented victim may therefore be at a decided advantage in settlement. To avoid a finding of abuse and to keep the defendant off the stand, a respondent may be willing to negotiate with his victim to create an order that may not otherwise be available after a hearing.[56] These provisions include matters such as child support, maintenance, supervised visitation, disposal of household guns, mandated drug tests as a condition of visitation, and repayment of the costs associated with the violence.

III. INTRODUCING EVIDENCE OF PATTERN OF ABUSE IN CIVIL CASES

The law of evidence in most states[57] is governed by general principles favoring admissibility as long as the evidence is relevant[58] and is not unduly prejudicial.[59] Thus, most rules of evidence have developed as exclusionary rules—that is, the evidence is presumed admissible unless some rule of evidence excludes it. Trial judges have wide discretion in balancing the probative value of evidence against its potentially prejudicial impact.

One of the long-standing categories of evidence that is generally excluded is evidence of other charged and uncharged crimes and bad acts.[60] The so-called "propensity rule"[61] prohibits the introduction of prior bad acts to prove that the defendant acted in conformity with his bad character. The theory is that a judge or jury will convict or hold the defendant liable, not on proof of the wrong charged, but because he has a propensity to commit similar crimes or bad acts.[62] Although rules against admission of this type of evidence are most often

will not qualify. *See, e.g.,* Fed. R. Evid. 803(4).

55. *See* MO. REV. STAT. §.455.060(3) (1999) (mandating that findings in an order of protection hearing are not res judicata).
56. *See* A. HARRELL, ET AL., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS (Urban Institute 1993).
57. In the majority of state courts, the "law of evidence" has been incorporated into a code of evidence. In many of these codes, the section numbers and content conform with the Federal Rules of Evidence. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE 51.2 at 4 (1994). The references in this article to Rule 404(b) evidence refer to evidence of other acts of abuse. About a dozen states have no comprehensive code of evidence but rather an amalgam of rules derived from case law, statutes, and constitutionally based rules. In these states case law has developed which defines the parameters of the exclusion of prior bad act evidence. *Id.*
58. Fed. R. Evid. 401 and 402.
59. Fed. R. Evid. 403.
60. Fed. Rule Evid. 404(b) states:

    Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

    Although the evidence is commonly referred to as "prior" crimes or bad acts, the federal rule (and most state counterparts) includes evidence of acts committed both before and after the incident at issue in the litigation.
61. EDWARD W. CLEARY ET. AL., MCCORMICK ON EVIDENCE § 185 at 637 (5th ed. 1999).
62. Other policy reasons for excluding prior bad act evidence relate primarily to criminal prosecutions for domestic violence and are generally focused on guaranteeing the presumption of innocence. For example, if evidence that a defendant committed a similar crime is admitted, a jury may require less than proof beyond a reasonable doubt because the defendant is not an "innocent" party or, in the case of prior uncharged crimes, because he needs to be

invoked by defense attorneys in criminal cases, these rules apply in both civil and criminal cases in most jurisdictions.[63]

Evidence of prior bad acts are especially relevant and probative in domestic violence cases because of the cyclical nature of domestic violence. As one commentator described it:

> Domestic violence is never a single isolated incident. Rather, domestic violence is a pattern of behavior, with each episode connected to the others. Many times, as the pattern of abuse evolves, the level of seriousness escalates. In the most unfortunate instances, the consequence of domestic violence is homicide. By allowing evidence of past specific incidents of abuse in domestic violence cases, courts could help to prevent this escalation.[64]

Prior acts of abuse are often necessary to prove to the fact-finder the nature and seriousness of the abuse involved. One act of abuse may not warrant the same remedy as when there has been a pattern of abuse between the parties. Different remedies are required when there is an isolated act of abuse that is unlikely to be repeated as compared to a serious act of abuse following a pattern of abuse. The more abuse that occurred in the past means a higher likelihood that future acts of abuse will occur and, thus, the need for greater protective measures.

Courts of limited jurisdiction that hear some domestic violence cases—protection orders and crimes classified as minor—may not strictly apply the rules of evidence. The traditional hesitancy to admit prior bad act evidence, therefore, may not apply. In other cases, where one or both of the litigants are pro se, objections to this type of evidence will probably not be made. In many cases, however, where the rules of evidence are observed and parties are represented, the court is likely to encounter evidentiary challenges to prior abuse evidence. A litigant may rely upon a variety of theories when arguing for admission of pattern of abuse evidence in protection order or other civil proceedings where domestic violence is at issue. First, in some circumstances, the general prohibition on admitting prior bad acts evidence does not apply. This argument would be particularly persuasive when the statute relied upon instructs the court, either directly or indirectly, to consider a history or pattern of abuse. Many protection order statutes, for example, include a directive to the petitioner to include the incidents of past abuse in the petition or may direct the court to consider a history of domestic violence before granting particular relief in the order.[65]

Prior acts of abuse are often necessary to prove to the fact-finder the nature and seriousness of the abuse involved.

In *Coburn v. Coburn,*[66] the Court of Appeals of Maryland affirmed a trial court's admission of prior evidence of abuse in a protection order proceeding. The court noted that the language in Maryland's protection order statute included both a directive to the petitioner to include prior acts of abuse and required consideration of the history of abuse before granting certain kinds of relief under the statute. After analyzing the protection order statute's references to past abuse, the court concluded that the statutory references demonstrated the relevance of past abuse evidence in deciding whether and what kind of protection order should issue.[67] The court went on to state:

> The policy consideration underlying the general prohibition against admission of evidence of prior crimes or bad acts is that such evidence tends to prejudice the defendant because the trier of fact will improperly use the evidence to determine the ultimate issue of guilt. This rationale does not apply in a civil protective order hearing where the ultimate issue is what, if any, remedy is necessary to protect the petitioner based on the likelihood of future abuse. Evidence of past abusive acts is admissible to show that abuse is likely to recur and to help the court determine what remedies will adequately prevent future abuse. Hence, Md. Rule 5-404(b) is inapplicable and evidence of prior incidents of abuse is admissible.[68]

punished for the prior act.

63. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition,* 51 OHIO ST. L.J. 574, 576 (1990).
64. *The Search for Truth*, *supra* note 9, at 240, *citing* Anne L. Ganley, *Understanding Domestic Violence* in IMPROVING THE HEALTH CARE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE: A RESOURCE MANUAL FOR HEALTH CARE PROVIDERS 18 (1995). *See also*, Letendre, *Beating Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973 (2000).
65. *See,* e.g., MD. FAM. LAW ART. § 4-504 (b)(ii)(1) (requiring inclusion of prior abuse in petitions for protection); MINN. STAT. ANN. § 634 R.634.20 (WEST 1996); ARIZ. R.S. § 13-3602 (West 2000) ("The court shall issue an order of protection . . . if the court determines that there is reasonable cause to believe . . . the defendant has committed an act of domestic violence within the past year. . . ."); CAL. FAM. § 6300 ("an order may be issued to restrain any person for the purpose of preventing a recurrence of domestic violence. . . if an affidavit shows. . . reasonable proof of a past act or acts of abuse.").
66. 674 A.2d 951 (Md. App. 1996).
67. *Id.* at 258-259. The District of Columbia Court of Appeals has also approved the admission of evidence of prior abuse in protection order cases noting that "a [batterer's] past conduct is . . . perhaps the most important [evidence] of his probable future conduct. . . . This is especially true in the context of a marital or similar relationship." *Cruz-Foster v. Foster,* 597 A.2d 927, 930 (D.C. App. 1991) (citation omitted).
68. 674 A.2d at 260. The *Coburn* court also offered a related justification for admitting prior abuse evidence in noting that the character of the accused as an abuser is at issue in protection order proceedings. *Id.* at 260-61. Even where the statute doesn't direct the court to consider history of abuse, it can be argued character is directly at issue in custody and visitation cases where fitness of

Most custody and visitation statutes direct the court to consider the parties' history of abuse.

Other courts have also relied on either the implicit[69] or explicit[70] language of the protection order statute to find that the court should admit and consider evidence of past abuse when issuing a protection order.

At least one appellate court has found evidence of prior abuse relevant to assess the reasonableness of a woman's "fear of imminent bodily harm" under a state's protection order statute. In holding that a woman's fear from her husband's act must be evaluated in the context of prior abuse in the relationship, the court held:

> A person who has been subjected to [abuse] may well be sensitive to nonverbal signals or code words that have proved threatening in the past to that victim but which to someone else, not having that experience would not perceive to be threatening.[71]

In child custody and visitation cases, evidence of domestic violence is often a critical part of the best interests assessment. Most custody and visitation statutes direct the court to consider the parties' history of abuse.[72] Most states require consideration of domestic violence as a factor in the best interest analysis.[73] Almost every state requires courts to consider the presence of abuse when making such determinations.[74] The effect of this evidence varies among the states. [75] Some states prohibit the award of custody to a parent who has been found to have committed domestic violence in the past.[76] Others have created a rebuttable presumption against awarding custody or visitation to the abusive parent.[77] Courts vary in the amount of evidence of abuse that they deem necessary to trigger a finding that a parent has engaged in domestic violence.[78] Some states require a conviction for a serious domestic violence-related crime. [79] Other states look for a pattern of violence. Idaho requires a "habitual perpetrator,"[80] Louisiana, Missouri, and Oklahoma require that the abuse be ongoing or part of a pattern of conduct.[81] In most states, a mere preponderance of evidence will suffice to prove domestic violence for purpose of affecting the custodial decision. Oklahoma, however, requires that such evidence be "clear and convincing."[82] In all of these situations, the legislature in the state has created a "statutory exception" to the Rule 404(b) counterpart, thus making prior bad acts evidence admissible.

Dealing with objections to this kind of evidence when there is arguably no statutory exception is more difficult. Evidence of prior domestic violence may be admissible under well-recognized exceptions to Rule 404(b). Most rules prohibiting admission of prior bad acts to prove character or propensity permit the admission of such evidence when it is relevant to a non-character issue such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of a mistake, or accident.[83] Case law on these exceptions in the domestic violence area has focused primarily on criminal prosecutions. In *Clark v. United States*,[84] for example, the District of Columbia Court of Appeals reviewed a case in which a man who had killed his paramour claimed that he had done so by accident. The court held that "an attempt to restrict the violence [between the parties] to the events of the fatal evening would unreasonably cramp the inquiry, to the detriment of the search for truth." The court recognized in this and other cases that the likelihood of mistake or accident diminishes when the defendant has engaged in a pattern of abuse against the victim.

Probably the most widely publicized litigation involving an effort to introduce evidence of past abuse to show motive is the O.J. Simpson prosecution.[85] In that case, the prosecution was successful in admitting some of the evidence (which included

one or both parents is a primary consideration.

69. Boniek v. Dunick, 443 N.W. 2d 196, 198 (Minn. 1989) (finding that text under the Domestic Abuse Act, "past abusive behavior," although not dispositive, is a factor in determining cause for protection").
70. Strollo v. Strollo, 828 P.2d 532 (Utah 1992) (reversing a trial court decision denying a protection order and finding that the language of the protection order statute required the court to consider past abuse).
71. Katsenelenbogen v. Katsenelenbogen, 775 A.2d 1249 (Md. 2001).
72. *See* Family Violence Project, *supra* note 1.
73. *Id.*
74. *Id.* at 204.
75. *Id.*
76. *See, e.g.,* ARIZ. REV. STAT § 25-403 (2001); COLO REV. STAT. ANN. § 14-10-124 (West 1997); 750 ILL. COMP. STAT. 5/602 (West 2000); N.H. REV. STAT. ANN. § 458:17(2000); R.I. GEN. LAWS § 15-5-16 (2000); WYO. STAT. ANN. § 20-2-201 (2000).
77. *See, e.g.,* FLA. STAT. § 61.13 (2)(b)(2) (2000); IDAHO CODE SEC. 32-717 (2000); LA. REV. STAT. ANN. § 9:364(A) (West 1997); MINN. STAT. ANN. § 518.17 subd. 2(d) West 2000); N.D. CENT. CODE § 14-05-22.3 (2000); OKLA STAT. TIT. 10 § 21.1(d) (West 2000).
78. *See e.g.*, David M. Gersten, *Criminal Practice; Evidentiary Trends In Domestic Violence Cases*, 72 FLA. BAR J. 65, 67 (1998) (discussing language of Louisiana, Missouri, Oklahoma, Delaware, and Florida custody statutes, which direct the court to consider past abuse). In some cases, however, the victim's ability to introduce evidence of past abuse is limited to certain types of evidence such as felony convictions. *Id.*
79. *See* Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. B.J. 65 (Aug. 1998). For example, Florida requires a conviction for a third-degree felony or higher to establish a rebuttable presumption that will preclude joint custody. *See* FLA. STAT. § 61.13(2)(b)(2)(2000).
80. IDAHO CODE § 32-717(1997).
81. *See, e.g.,* Simmons v. Simmons, 649 So. 2d 799 (La. Ct. App. 1995); Hamilton v. Hamilton, 886 S.W. 2d 711 (Mo. Ct. App. 1994); Brown v. Brown, 867 P.2d 477 (Okla. 1993).
82. OKLA. STA. TIT. 43, § 112.2 (2001 Supp.).
83. *See, e.g.*, Fed. R. Evid. 404(b), *supra* note 15.
84. 593 A.2d 186 (D.C. App. 1999). *See also* State v. Featherman, 651 P.2d 868 (Ariz. 1982) (acknowledging the significance of understanding the pattern of abuse in the relationship of the defendant and victim to prove both motive and intent); People v. Thompson, 314 N.W.2d 606 (Mich. App. 1981) (evidence of prior bad acts, such as threats to kill the victim, admissible to establish motive for assault with intent to do great bodily harm).

testimony, photographs, "911" tape-recorded phone call by victim) of physical beatings and threats by the defendant going back several years from the date of the murder.[86] The evidence was admitted "to provide the jury with an appreciation of the 'nature and quality' of the relationship between Mr. Simpson and Ms. Brown, and to aid in establishing motive, intent, plan, and identity of the killer."[87]

In the protection order context, evidence of prior abuse may be relevant to prove the batterer's intent, motive, or absence of mistake. For example, intent is an element of assault, battery, and false imprisonment, all of which are included within the definition of abuse in most protection order statutes.[88]

Evidence of prior abuse has also been admitted to prove identity in criminal prosecutions. In a leading California case, *People v. Zack,*[89] the defendant was charged with murdering his girlfriend by beating her to death. The California Court of Appeals affirmed the trial court's decision to admit evidence of prior abuse against the victim to prove identity when the defendant contended he was out of town the night of the murder.

Evidence of prior bad acts may also be admissible to negate anticipated defenses. Again, this theory is not well developed in the civil context, but there is ample precedent on the criminal side for allowing prosecutors to admit evidence of a defendant's prior crimes in their case in chief to counter anticipated defenses.[90] An increasingly common defense in protection order and custody cases in which allegations of abuse are made is that the victim has a motive to fabricate the allegations to gain an advantage in a divorce or custody case.[91] If the batterer claims that the victim fabricated some or all of the allegations, the lawyer can argue that evidence of prior abuse should be admitted to rebut this defense claim.

In the protection order context, evidence of prior abuse may be relevant to prove the batterer's intent, motive, or absence of mistake.

Finally, at least one state, California, has adopted a rule of evidence that provides specifically for the admissibility of prior bad act evidence to prove propensity in domestic violence cases under certain circumstances.[92] California's new rule is based upon the recently enacted Federal Rules of Evidence 413 and 414, which permit, under certain circumstances, the admission of uncharged acts in sexual assault and child molestation cases to show propensity and disposition.[93] These "groundbreaking" rules were enacted because of congressional "outrage that the Federal Rules of Evidence were being used to keep the jurors from finding out about the extremely probative evidence of uncharged rapes unless the attacks were extremely similar in the facts."[94] While California's rule only applies to criminal prosecutions for domestic violence, practitioners may use it to argue for similar treatment in civil cases in their jurisdictions. The new California rule may also reflect a trend in which legislators and judges recognize the distinctive nature of domestic violence cases and the need to modify evidentiary rules to address these cases.[95]

85. No. BA 0 9 7211 (Cal. App. Dep't., Super. Ct., Oct. 3, 1995).
86. David Gargolick, *Prosecutors Win Key Simpson Fight: Judge Allows Most Material About Domestic Violence*, N.Y. TIMES, Jan. 19, 1995, at B8.
87. Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73, 74 (1995). Of course, in this case such evidence did not lead to conviction, but in many cases it would.
88. Klein & Orloff, *supra* note 2, at 848-876.
89. 229 Cal. Rptr. 317, 310 (Cal. Ct. App. 1986). The decision was a departure from prior precedent, which permitted evidence of prior crimes to prove a defendant's identity only where the characteristics of the prior bad acts were similar enough to the charged crime to raise an inference that the crime was committed by the same person. *Id.*
90. *See* e.g., People v. Santarelli, 401 N.E. 2d 199 (N.Y. 1980) (evidence of prior bad acts may be admitted in anticipation of disproving defendant's anticipated defense that he was legally insane at the time of the crime); Solomon v. State, 646 A.2d 1064, 1082-83 (Md. App. 1994) (evidence of prior crimes may be admitted to counter anticipated defense).
91. Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 366 (1997), *citing* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1085 (1991); *see* also Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 191 (1995).
92. CAL. EVID. CODE § 1109 (2002) provides:
    (a) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.
    (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.
    (c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.
    (d) As used in this section, "domestic violence" has the meaning set forth in Section 13700 of the Penal Code. . . .
    (e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.
93. For opposing views on Fed. R. Evid. 413-414, *compare Bridging the Gap*, *supra* note 9, *with* James L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689 (1997).
94. *Bridging the Gap*, *supra* note 9, at 381.
95. Proposals to follow California's lead and adopt rules admitting prior abuse evidence in domestic violence cases are being developed in other states as well. *See e.g.*, *The Search for Truth*, *supra* note 9 (describing a proposal for an evidentiary rule for Hawaii that would broadly admit prior abuse evidence in domestic violence cases).

CONCLUSION

As states pass more laws enhancing the remedies available to victims of domestic violence and recognizing its devastating effects on children, the historical informality of these proceedings is likely to fade and be replaced by greater adherence to traditional rules of evidence. We have identified three types of evidence that pose the greatest challenges for courts. This article outlines the kinds of considerations courts might use (1) to admit expert opinion to enhance the understanding of the effects of battering; (2) to benefit from the evidence generated due to a concurrent criminal actions while blunting efforts of alleged perpetrators to manipulate that system; and (3) to cope with the difficult admissibility problems posed by the batterers' prior acts of abuse. Understanding the dynamics of abuse and its evidentiary consequences can help a court get a more accurate picture of the abusive context and will go a long way in protecting victims of domestic violence and their children.

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Making a Difference:
Tools to Help Judges Support the Healing of Children Exposed to Domestic Violence

Lavita Nadkarni and Barbara Zeek Shaw

Domestic violence has emerged from the privacy of one's own home, where only the victims were aware of the abuse, to more public domains, where one can witness the impact of such abuse on society through our court system. Judges, in both the civil and criminal arenas, exercise considerable power in instituting a wide range of possible dispositions in cases involving domestic violence. The Family Violence Prevention Fund's National Judicial Education Advisory Committee concluded that judges made the most significant decisions affecting the lives of victims, abusers, and their children.[1] Judges can also play a significant role in shaping society's response to the issue of domestic violence.

DOMESTIC VIOLENCE PLACES CHILDREN AT RISK

Our children's futures are heavily impacted by domestic violence. One study reported that 43% of female victims of domestic violence live in households with children under the age of 12.[2] Other recent studies have estimated that between 3.3 million and 10 million children witness domestic violence each year. In addition, in a study of homicides related to domestic violence in Massachusetts between 1991-1995, researchers found that in more than one in eight domestic violence homicides, the abuser killed one or more children.[3]

Domestic violence, by definition, is damaging to the children who live with it. Yet, in the courtroom, one hears parents and professionals alike minimize its impact, saying that "the children didn't know it was going on," "they were never in the room," or "he may be a bad husband, but he loves his kids." The court stands able to correct these misperceptions.

As noted above, the impact of domestic violence on the children of the victims is far reaching and can affect many domains of their individual functioning: behavioral, psychological, cognitive, developmental, educational, and social. While it is beyond the scope of this article to illustrate the multitude of ways that domestic violence impacts children, several authors offer a review of this literature.[4] Research over the last decade has shown that children in families where domestic violence is present show trauma-related symptoms similar to symptoms of children who have been the direct victims of physical and emotional abuse at home.[5] In addition to the direct impact domestic violence has on the child, it also inflicts damage by disrupting the victim parent's relationship to the child.[6]

UNCOVERING THE EXTENT OF DOMESTIC VIOLENCE

The National Council of Juvenile and Family Court Judges defines domestic violence as a "pattern of assaultive and coercive behaviors often including physical, sexual, and psychological attacks, as well as economic coercion, used by one intimate partner against another."[7] Fortunately, judges in civil court proceedings can take into account *all* forms of coercion possibly present in a particular case, not only those defined as criminal behavior. The primary goal of these behaviors is to maintain the abuser's sense of control over his family, and specifically the spouse/partner.

Given the increase in domestic violence matters reaching judicial attention, it is critical that judges fully understand how their decisions can play a significant role in preventing domestic violence injuries and deaths.

EVALUATION OF DOMESTIC VIOLENCE

In each family law case coming before the court with allegations of domestic violence, the court needs to make a determination of how to proceed in the investigation and evaluation of this issue.

Given the data showing widespread domestic violence,[8] the court may wish to operate on the assumption that, when an allegation of domestic violence has been made, it is likely that such is present. After investigation, the court should be able to articulate why the allegations have or have not been sustained. If domestic violence exists, the court should deal with that, both in the court order and in the enforcement and monitoring of that order. It is sometimes argued that domestic violence is not a sci-

Footnotes

1. FAMILY VIOLENCE PREVENTION FUND, PROGRAMS ENHANCING JUSTICE: PROGRAM OVERVIEW, available at http://endabuse.org/programs/justice (last visited Feb. 7, 2003).
2. *See* Callie Marie Rennison & Sarah Welchans, *Intimate Partner Violence,* BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (2000).
3. *See* LINDA LANGORD ET AL., HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995 (1999).
4. *See* GEORGE W. HOLDEN, ET AL., CHILDREN EXPOSED TO MARTIAL VIOLENCE: THEORY, RESEARCH & APPLIED ISSUES (1998). *See also* LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).
5. Mary Kenning et al., *Research on the Effects of Witnessing Parental Battering: Clinical and Legal Policy Implications,* in WOMEN BATTERING: POLICY RESPONSES at 137-161 (Michael Steinman, ed., 1991).
6. *See* Jessica P. Greenwald O'Brien & Lavita I. Nadkarni, *Domestic Violence Under the Microscope: Implications for Custody and Visitation,* FAMILY ADVOCATE, 23(1), 34-39 (1999).
7. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999).
8. *See* Callie Marie Rennison, *Intimate Partner Violence and Age of Victim, 1993-1999*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (October 2001). *See also* THE COMMONWEALTH FUND, HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: SURVEY OF WOMEN'S HEALTH (1998).

ence, and therefore holds no "givens" that can be relied upon in assessing its existence or absence in any particular case. Actually, a large numbers of studies document a number of typical perpetrator and victim behaviors, as well as the negative impact of domestic violence on children. These studies and expert information, along with information that the parties and third parties may possess, can be used to assess the probable existence of domestic violence in an individual case.

Courts can take advantage of tools already developed by programs and individuals across the country that work in the field of domestic violence intervention to more fully understand the dynamics of the relationship before them. Resources are available to help in identifying domestic violence, assessing the lethality of the perpetrator, helping the victim or survivor craft a workable safety plan, and measuring the impact of domestic violence on children.[9]

The success of an inquiry into a potential domestic violence case first depends upon the amount and quality of information one is able to acquire to evaluate. Based on our clinical experience, a more complete picture of the domestic violence is obtained by doing a domestic violence inventory, a lethality assessment, and reviewing collateral information.

1. Domestic violence inventory

A domestic violence inventory can summarize:

(a) The length of relationship and timeline of violence.
(b) The types and extent of power and control used over time: physical, sexual, psychological/emotional, or financial.[10]
(c) The first, last, and worst abusive incident.

There are several reasons why a comprehensive detailing of this information is valuable. First, it gives the court an understanding of this family's experience over time. Second, there will be clues in the information gathered as to the ongoing dangerousness of the violent parent and whether the abusive behavior is escalating. Third, the nature and extent of the abuse experienced by the battered woman before the court may greatly impact her ability to tell the story of her abuse in a coherent and credible way, make decisions easily and with confidence, and "cooperate" with the court.

2. Lethality assessment

There are several reasons why the lethality assessment[11] should be completed by a knowledgeable domestic violence professional in the community. These domestic violence professionals have accumulated their expertise by seeking out workshops and training programs that focus on the unique nature of this societal problem. By specializing in this field, they know how to interview the parties to get the maximum information in the least intrusive way, and are better able to assess and understand the meaning of the information they have gathered. They are less likely to be fooled by a manipulative and socially adept batterer, and more likely to be sensitive to some of the indicators of potential lethality. They also are aware that stalking behavior is a risk factor for increased danger to the battered woman and her children—and that it can show itself in many subtle forms (such as leaving flowers or notes) that may be misread by the untrained as "love," concern for his children's well-being, sadness about the divorce, etc., rather than the ongoing threat that it is. Last, these professionals also are aware of another misunderstood behavior—the threat of suicide by the abuser—that may also indicate homicidal intent.

It is not unusual that the divorce process . . . is the first time the victim/ survivor feels safe enough to talk about the abuse.

3. Collateral information

Domestic violence can, and often does, exist with no other adult witnesses or independent corroboration. It is not unusual that the divorce process, which often offers supportive community resources to the battered woman, is the first time the victim/survivor feels safe enough to talk about the abuse. The fact that she was never able to call the police or report the violence to a doctor or other professional may be an indicator of the extent of control the batterer exercised over her. It also may speak to the level of his dangerousness.

By the time some cases involving allegations of domestic violence come before the court, the battered woman may have received help from a number of professional support systems (such as an attorney, a counselor for herself, another for her children, a safe shelter for temporary housing) even though she may never have called any of these people while the batterer still had access to her. To the court, these already involved professionals may be seen as too immersed in the case to be objective. In actuality, these people may offer helpful insights into the case, especially if their information is assessed in conjunction with other information, and by someone with domestic violence intervention expertise.

MAKING SENSE OF THE INFORMATION

Each of us who assesses a case involving domestic violence is impacted by the content of the information gathered, the demeanor of the parties, our own education and life experience, and the attitude toward the case shown by other professionals involved. It is crucial to examine each of those influences to ensure the parties and ourselves that we are approaching our decision making in a competent and objective manner.

9. *See* MICHAEL LINDSEY ET AL., CHANGE IS THE THIRD PATH: A WORKBOOK FOR ENDING ABUSIVE AND VIOLENT BEHAVIOR (1996).
10. In determining the types of coercion used in the relationship, it can be helpful to refer to the "Power and Control Wheel," a tool developed by the Domestic Abuse Intervention Project in Duluth, Minnesota, which is used by professionals throughout the country to assess the coercive behaviors used by batterers to maintain control of their partners. Any investigator can begin to explore the possibility of domestic violence by asking questions based upon the various categories contained in this wheel. *See Domestic Abuse Intervention Project* available at http://www.duluth-model.org/daipmain.htm. *See also* Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions that Can Help Keep Children and Victims Safe,* COURT REVIEW, Fall 1998, at 23.
11. *See* BARBARA J. HART, ASSESSING WHETHER BATTERERS WILL KILL *(1990)* available at http://www.mincava.umn.edu/Hart/lethali.htm.

We, as a society, have never been able to provide a battered woman with safety, so she chooses the only realistic alternative: survival.

When evaluating information received as part of a domestic violence assessment, ask yourself:

(a) Does the story emerging add up to a coherent whole?
(b) Does it make sense in the context of domestic violence?
(c) Is there any other way to corroborate parts of that whole?
(d) What has been the opinion of other professionals involved?
(e) If a panel of domestic violence experts looked at it, what might their opinion be?
(f) Are there parts of the information that need clarification, or domestic violence interpretation?
(g) What does not make sense?
(h) Whose opinion do you value in helping make sense of the whole?

It is essential that these cases not be handled in isolation. Their complexity requires the expertise of many disciplines in order for the court to understand the dynamics well enough to craft an order that is truly helpful to the family involved.

Safety vs. survival: A battered woman's choice

If you have a woman in your courtroom who is a survivor of abuse by her husband or partner, her presentation needs to be understood in the context in which it is occurring. Judith Lewis Herman, in her book *Trauma and Recovery*, likens the process that is imposed on battered women to that which prisoners of war experience.[12] In fact, batterers use the same coercive techniques that Amnesty International recognizes as tools employed by war captors to keep their victims' compliant and under their control: isolation, monopolization of perception, induced debility, threats, occasional indulgences, demonstrating "omnipotence," degradation, and enforcing trivial demands.[13]

A battered woman does not leave an abusive relationship for the same reasons we all stay in situations longer than we want: lack of perceived, acceptable alternatives; financial security; promises made; love or caring about others; commitment; expectations of others and self; and fear of failure. In addition, the victim may remain in an abusive relationship because of fear of losing her children or escalating violence. The documented fact that a battered woman is at most risk for homicide when or after she leaves the abusive relationship provides greater understanding that her focus is survival rather than safety.[14] We, as a society, have never been able to provide a battered woman with safety, so she chooses the only realistic alternative: survival. This focus on survival may require some choices or behavior on her part that seem counter-intuitive to those of us on the outside. She may never call the police, or she might attack the police when they respond to a 911 call. She might insist the next day that the prosecutor "drop the charges" against her batterer, or refuse to testify against him or tell little of the truth on the stand. She may go back to him in order to survive. It is important to understand this use of counterintuitive behavior patterns by the victim. For the victim, she is most concerned about and focused on what the abuser will next do to "punish" her for the actions taken and not on whether she is acting in a consistent manner.

Externalizing blame: The batterer's belief system

If you have an accused batterer in your courtroom, it may help to be familiar with the some of the characteristics common to most men who batter. According to Michael Lindsey, founder of AMEND in Denver, Colorado (Abusive Men Exploring New Directions), a batterer believes the following in relationship to his violence:

- I didn't do anything wrong.
- If I did, I won't get caught.
- If I do get caught, I can talk my way out of it.
- If I can't talk my way out of it, the consequences will be light.[15]

Batterers begin the story where it suits them, tell just enough of the truth to be believable, and can often lie more convincingly than their victim tells the truth.[16] Batterers externalize blame for most negatives in their lives, accuse their victims of "provoking" the violence, and justify their behavior as their right to be in charge of the family.[17] Many batterers convince their victims that no one, including the court, will ever believe them if they disclose the abuse.

ASSESSING PARENTING RESPONSIBILITY AND PARENTAL ACCESS

In parenting responsibility and parental access determinations involving domestic violence, domestic violence considerations must be on center stage. If the court fails to appropriately take domestic violence into account when making parenting responsibility or parental access determinations, victim parents may continue to remain in violent homes for fear of losing contact with their children.

Legal presumptions: Best interests of the child

Within the last decade, courts have begun to consider the presence of domestic violence as a factor in parenting responsibility or parental access determinations. According to the National Council of Family and Juvenile Court Judges, 44 states and the District of Columbia have statutes that contain express provisions that permit the courts to consider domestic violence in some way in making custody decisions.[18] There are three types of state statutes, either (1) requiring the court to consider domestic

12. JUDITH HERMAN, TRAUMA & RECOVERY (1997).
13. DIANA E.H. RUSSELL, RAPE IN MARRIAGE (1982).
14. *See* NEIL WEBSDALE, UNDERSTANDING DOMESTIC VIOLENCE (1999). *See also* AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, VIOLENCE AND THE FAMILY (1996).
15. *See* Lindsey, et al., *supra* note 9.
16. *See* Bancroft & Silverman, *supra* note 4.
17. *See* DONALD DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL & CRIMINAL JUSTICE PERSPECTIVES (1995).
18. *See* National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Courts and Legal Practices,* 29 FAM. L.Q. 197, 225-227 (1995).

violence as a factor bearing on joint custody decisions; (2) requiring the court to justify the awarding of any form of custody to an abusive parent, presuming that domestic violence is not in the "best interests of the child"; or (3) requiring the court to refrain from awarding joint custody where there has been demonstrated abuse. [19]

Legal presumptions: "Friendly parent" provision

States have traditionally favored ongoing contact between a parent and a child, and have tended to favor joint custody determinations. In domestic violence cases, such a determination, absent careful consideration of the domestic violence, poses grave emotional and physical safety risks for the children. In addition, courts will often favor the parent who is more willing to cooperate and share parenting time (*i.e.,* "friendly parent" provision). The issue of safety becomes one that is crucial for the courts to understand as the victim parent may wish to conceal her place of residence or place of employment. The victim parent may seek a restraining order or deny the abusive parent visitation out of a sense of fear for her or her children's lives. Clare Dalton observes that a victim parent's appropriate concern about the abusive parent's fitness to parent will more negatively affect her chance to gain parental responsibility than his.[20] Concomitantly, the abuser parent's willingness to share parental responsibility will positively affect his chances, even though his ongoing access to the victim parent allows him to continue to manipulate and intimidate her.

Evaluative issues

In parenting responsibility or parental access determinations, the courts appear to be attempting to balance the competing rights and needs of the parents with the rights and needs of the children. This is a delicate balance when domestic violence is present.

Lundy Bancroft and Jay Silverman argue that the parental responsibility or parental access evaluation needs to be conducted by an evaluator familiar with the dynamics of domestic violence and of the parenting behaviors of abusers.[21] If that is not done, then the courts may be basing their judicial decisions on information garnered by someone who has not fully understood the dynamics of domestic violence or the impact it has on the children.

A thorough assessment should include: individual interviews with both parents; interviews with the children; an interactional session (if possible and safe) between the children and each parent; and collateral information (including, depending on the case, medical records, school records, police and criminal records, interviews with relatives and friends, interviews with domestic violence shelter workers/advocates, mental health counselors in the community and/or school, and other professionals involved with the family).

The assessment and any subsequent orders must address:

(1) Safety.
(2) Parental capacity.
(3) Access, including supervised and unsupervised parental access.
(4) Specific provisions and consequences for violations of the order.

Safety should be a priority even when the issue of safety is inconsistent with the presumption that a child should have access to both parents.

1. Safety

A thorough assessment of safety and security issues is important in any matter involving domestic violence brought before the court. Safety should be a priority even when the issue of safety is inconsistent with the presumption that a child should have access to both parents.[22] Sadly, it is reality that the most dangerous time for any abused woman is when she is attempting to leave or has left the relationship.[23] During this period, the abusive parent can no longer deny the status of the relationship and must acknowledge his loss of control over his intimate partner.

It is an erroneous assumption held by many in the legal and psychological fields that emotional or physical violence ends with the dissolution of the relationship. Controlling and manipulative behaviors, present during the relationship, often continue and get played out in court during parenting responsibility or parental access determinations. Parental access often offers the abusive parent additional opportunities to escalate the violence, engage the legal system in his manipulation, and continue to disparage the victim parent.

2. Parental capacity

When considering the parental capacity of the abuser parent, the children's emotional and physical safety is the guiding factor. To ensure the children's safety,

(a) The abuser parent must have the ability to understand the effect domestic violence has had on the children and assume responsibility for his actions.
(b) An assessment of the abuser parent's coping responses is deemed critical. Specifically, one would want to assess the level of depression, helplessness, impulse control, and frustration tolerance.
(c) Other environmental and societal risk factors include the abuser parent's employment status, substance and alcohol abuse, and history of domestic violence in his family of origin.[24]
(d) Finally, one might want to assess the abuser parent's motivation for seeking parenting responsibility or access. Concern

19. *See* Leslie D. Johnson, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence,* 22 LAW & PSYCH. REV. 271-286 (1998).
20. *See* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and their Children in the Family Court System,* FAMILY & CONCILIATION CTS. REV., 37(3), 273-296 (1999).
21. *See* Bancroft & Silverman, *supra* note 4.
22. *See* Dalton, *supra* note 20.
23. *See* Websdale, *supra* note 14; s*ee also* American Psychological Association Presidential Task Force on Violence and the Family, *supra* note 14.
24. *See* Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence,* in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH & APPLIED ISSUES 371-408 (George W. Holden et al., eds. 1998).

[D]omestic violence has traumatic effects on the victim's emotional and physical functioning and disrupts the victim parent's relationship with the child, as it tends to undermine the victim parent's authority.

should be heightened if there is a sense that the abuser parent wishes to continue to impose control on the victim parent/family through the court system; suggests by his words or actions a desire for parental access as a way of hurting and retaliating against the victim parent; wishes to prove that he is the better parent emotionally; or desires to lessen or avoid child support payments.

As noted earlier in this article, domestic violence has traumatic effects on the victim's emotional and physical functioning and disrupts the victim parent's relationship with the child, as it tends to undermine the victim parent's authority. One effect of such violence is that it can seriously compromise the victim parent's capacity to effectively manage her children's behavior. An evaluation of the victim parent's coping responses and ability to manage stress, anger, and conflict is important in assessing her ability to provide her children with a sense of safety and security. It is crucial that the court regard not only the victim parent's current coping skills, which may be strained due to the pervasive violation to her self-esteem, but also her past ability to cope with situations.

To ensure the children's emotional safety, the victim parent must be able to separate the child's views (of the domestic violence) and needs from her own and be responsive to her child's needs. It seems difficult for courts to assess the victim parent's ability to protect her children because of the traditional lack of understanding of why a battered woman would stay in an abusive relationship, and the misreading of her efforts to protect her children by limiting their contact with the abuser parent when these efforts impact what the courts see as the abuser's parental rights. Therefore, it is important for the courts to evaluate the victim parent's decisions in the larger context of domestic violence. While the court is unable to see into the future, often a victim's coping abilities and functioning will soon recover once she feels safe and removed from the abusive relationship, including the abuser's use of the court system.

3. Access

In making a determination of access time, there are some guidelines that have been proposed depending on age of the child.[25] The issue for the courts when domestic violence is present becomes how much contact should the abusive parent have with the child and what form should that contact take. Should the contact be supervised, who should supervise the contact, and who decides when the abusive parent's behavior is appropriate? Prior to the court making a determination on parental access, a thorough assessment, with focus on lethality issues, should be conducted. These might include addressing factors such as the presence of weapons, fantasies of or threats of suicide or homicide, stalking behaviors (*e.g.*, surveillance, monitoring of telephone calls or the victim parent/children's whereabouts, and prior police involvement). Were these conditions to exist, the court should determine that the risk is too great to guarantee the emotional and physical safety of a child even in a supervised setting and suspend access.

Supervised visitation between an abusive parent and his children has been highly recommended when domestic violence has occurred,[26] and should be the norm until the abuser has completed a specialized batterer treatment program.[27] Family members are an extremely poor choice for acting as the supervisor for the contact between an abusive parent and his child as they may not believe the victim, may be intimidated by the abuser, and lack the necessary domestic violence training.

Unsupervised access can expose the child to further acts of violence, inconsistent or irresponsible parenting, continued undermining of the victim parent's authority, and ongoing manipulation. As a result, the child may feel unsafe during these unsupervised contacts with the abusive parent. According to Bancroft and Silverman, supervised access does not guarantee a child's emotional safety unless the supervision is vigilant and conducted by a professional familiar with the dynamics of domestic violence.[28]

Typically, when the courts order that supervised contact should take place between an abusive parent and his child, such is set for a defined period of weeks or months, rather than based on the abuser's behavior and the child's behavior. While it is important to consider the child's behavior toward the abusive parent within the context of a supervised setting, it is equally important to make note of the child's behavior during the transfers to the contact, the hours immediately after the contact, and even the following day. As mentioned above, the progression from supervised to unsupervised visitation should not take place until the abusive parent has successfully completed a recognized batterer treatment program.[29]

When considering the movement from supervised to unsupervised visitation, determinations should include finding that there has not been:

(a) Direct abuse or irresponsible behavior toward children within the supervised context.
(b) Direct or indirect physical and/or psychological cruelty toward the partner.
(c) Expressed or subtle expression of willingness to hurt the children as an extension of hurting the victim parent.
(d) Substance abuse.
(e) Refusal to accept the end of the relationship.
(f) Sexual assaults toward the victim or boundary violations toward the children.

25. *See* MITCHELL A. BARIS & CARLA B. GARRITY, CHILDREN OF DIVORCE: A DEVELOPMENTAL APPROACH TO RESIDENCE & VISITATION (1998).
26. *See* Jaffe & Geffner, *supra* note 24.
27. *See* American Psychological Association Presidential Task Force on Violence and the Family, *supra* note 14.
28. *See* Bancroft & Silverman, *supra* note 4.
29. *See* Field, *supra* note 10.

(g) Threats to abduct or injure the children.
(h) Refusal to accept responsibility for past abusiveness.

Ongoing monitoring of the child's emotional well-being should dictate whether changes need to be made to the unsupervised conditions, such that supervised parenting time may need to be reinstated more than once over the lifetime of the case

CRAFTING AN ORDER

Before issuing an order, the court should have as thorough an understanding as is possible about the domestic violence specifics in a case, so that the order can, as clearly as possible, address the issues of containment of the violent parent and safety for the rest of the family.

An order is only as effective as it is specific and enforceable, particularly so in domestic violence cases, where abusers will try to exploit any inconsistency or vagueness to their own benefit, often creating ongoing chaos for their ex-spouse or partner, their children, and the court.

Recommendations for specificity in the order

First and foremost, an order should take into account the safety needs of the victim parent and the children. When supervised access is a condition, the order must be specific, including:
(a) The services to be provided.
(b) Duration and frequency of contact.
(c) Who may have contact with the children.
(d) Who will pay for services.
(e) Type and frequency of reporting back to the court about the progress of visitation.
(f) Whether a protection order is in effect, and what the parameters of the order are in regard to the visits.

When unsupervised access is granted, the order should include sufficient information for the transfers, if considered safe, such as:
(a) Specific dates.
(b) Specific times.
(c) Specific location or a neutral drop off or third party.
(d) Building in consequences for noncompliance (*e.g.*, for continued late return of the child).

In addition, regardless of the length of the unsupervised contact, it is recommended that the order include:
(a) Prohibitions from speaking poorly about the victim parent in the children's presence.
(b) Unrestricted telephone contact between the child and the victim parent.
(c) Appropriate structure for safety, meals, and bedtimes.[30]

For both unsupervised and supervised conditions, restrictions on alcohol and or drugs are important for the emotional safety of the child. These restrictions should apply not only for the contact period itself, but also for 12 to 24 hours before contact with the child.

Finally, long-term intervention programs, such as those offering appropriate domestic violence counseling, encompassing anger management, skills building, and accountability, are seen as necessary agents of change when parenting responsibility and access determinations are being made. In addition, where appropriate, substance, alcohol abuse, and mental health counseling is recommended.

Judicial demeanor can be as important to the process as is the fashioning of the remedy in each individual case.

Recommendations for ongoing monitoring

A batterer will take any opportunity to misinterpret or push the limits of the order, continue to harass his ex-partner(s), and create chaos for all involved. An abuser needs to be given swift and sure consequences every time he is in violation of the order. It should not be solely the responsibility of the survivor to try to hold him accountable. Her focus should be to build a new, stable life for her children, one in which they can all heal from the effects of the violence. If the court builds into the order a mechanism for review at a specified time, and a parenting coordinator who is responsible for helping to problem-solve between times, the burden is then placed on the batterer to change his behavior. Again, it is helpful to have assistance from the community. The court may want to consider:
(a) Using a cross-disciplinary approach (involving professionals from law, social work, psychology, and domestic violence).
(b) Assigning someone to provide a case management function.
(c) Building in periodic court reviews to assess progress or lack thereof.
(d) Ensuring immediate consequences for noncompliance, taking into account recommendations for those consequences from the cross-disciplinary team, particularly from the batterer treatment program professionals.

THE POWER OF JUDICIAL DEMEANOR IN THE COURTROOM

Judicial demeanor can be as important to the process as is the fashioning of the remedy in each individual case. So believes a judge in a Massachusetts courtroom,[31] and we agree. The bearing of a judge during court proceedings can have a profound effect upon the power balance in the relationship of the parties. It can help or hinder the process of equalizing that power, which, solely in the hands of the batterer, has facilitated the domestic violence itself. A judge's confrontation and control of the batterer and support of the nonviolent parent helps to set the tone of the post-separation or post-divorce process, and can facilitate the beginning of the recovery of the children.

A 1999 study conducted by James Ptacek in three court systems in Massachusetts measured the impact of judicial demeanor on battered women seeking orders of protection. Judicial demeanor was defined as "the emotional presentation of authority in the courtroom, the quality to the courtroom atmosphere

30. *See id.*

31. *See* JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE (1999).

that a judge produces with his/her emotional expressiveness or inexpressiveness."[32] Following from a study by Maureen Mileski, who described four types of judicial interactions with people appearing in their courts (good-natured, bureaucratic, firm or formal, and harsh), Ptacek added a fifth for his study, condescending or patronizing authority.

Battered women, in rating the impact of judicial demeanor on their experiences, believed the "good-natured" judges were the only ones who responded appropriately to their desire for affirmation of their experiences, their need for safety, and their appeal for justice. Good-natured judicial demeanor was defined by the researchers as "courteous, welcoming, supportive," where judges used their authority to make the women feel welcome, to express concern for their suffering, and to mobilize resources on their behalf. Surprisingly, battered women felt as unsupported by judges who were attempting to be "neutral" (bureaucratic, passive, or detached) as they did by judges who behaved in condescending and harsh manners toward them, believing all were unconcerned about their fears and, ultimately, their lives.

Judicial demeanor also has an impact on abusers. A judge's response to inappropriate behavior on the part of the batterer tells him whether he will be able to continue his manipulation of the people in his environment, or that he will be held accountable. Treatment providers affirm the importance of swift and sure consequences for men who batter as an essential part of their rehabilitation process.

CONCLUSION

Courts are asked to make decisions that profoundly affect the safety and security of our nation's families. While previously domestic violence was seen as a private matter, it has entered the purview of our court system and is prevalent in contested divorce and parenting responsibility matters. As such, it is crucial that the legal system, as well as the mental health system, have sufficient awareness of the dynamics of domestic violence within a particular family and the impact that such has on the victim, abuser, and most importantly, the children. Domestic violence has a profound and damaging effect on children. This negative impact can be somewhat mediated by outside influences, such as the response of law enforcement officers and the courts in their handling of these situations. The societal impact on the child can be substantial. If a child or family is discouraged from separating from their abuser or a child is not believed or ignored after disclosing the domestic violence, feelings of shame, humiliation, and helplessness can grow.

Effective assessment of and intervention with domestic violence families is crucial for the safety and security of our nation's children. The court can either assist or hinder the children's and family's recovery process. A judge's demeanor in the courtroom and the orders set forth can lay the foundation for the family's healing. To assist the court in crafting the most suitable orders for a particular family, especially where domestic violence is involved, a thorough evaluation of the abuser, his battering pattern, and the impact that such behavior has on the family is needed. It is crucial to be able to assess the abuser's behavior in the context of a power-and-control dynamic and to be able to understand the often counterintuitive behavior of the victim. After carefully and systematically exploring and documenting the domestic violence, the court can begin to craft an order where safety and security concerns are the primary focus. For the court order to be effective, it must be specific, detailed, and enforceable.

Judith Herman observed that the psychic trauma produced by violence may take a lifetime to heal, and that "the response of the community has a powerful influence on the ultimate resolution of the trauma."[33] The court may be one of the more powerful, and immediate, voices of that community.

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32. *Id.* at 111.
33. Herman, *supra* note 12, at 70.

Firearms and Domestic Violence:

A Primer for Judges

Darren Mitchell and Susan B. Carbon

Firearms and domestic violence are a deadly combination. As the examples on the following page show,[1] abusers who gain access to firearms pose a lethal threat both to those they have abused and to the wider community. Even where laws exist to disarm abusers and prevent them from purchasing new firearms, absent effective implementation of the laws—by judges, as well as by others in the civil and criminal justice system—survivors of domestic violence and the broader community continue to remain at risk of death or serious injury.

RESEARCH FINDINGS

The statistics regarding domestic violence in this country are startling. The United States Department of Justice and others have estimated that each year at least one million violent crimes are committed against persons by their current or former spouses or dating partners.[2] People of all ages and all gender, ethnic, cultural, and demographic backgrounds are abused, but statistically the largest number are young women between the ages of 16 and 24.[3] Overall, the vast majority of victims of intimate partner violence are women.[4]

Studies and experience show that the time of leaving a relationship can be the most dangerous for a survivor, a phenomenon that is often referred to as "separation violence." The act of separating—whether through divorce, by physical or legal separation, or by ending a dating relationship—often triggers an escalation of the violence.[5] In fact, prior abuse and separation, or announced plans to separate, appear to be the biggest risk factors indicating that the abuser will seriously injure or kill the survivor.[6]

Judges need to understand this phenomenon because many survivors, in the course of separating from their abusers, seek recourse through the legal system; they may seek a protection order or call law enforcement personnel to initiate a criminal prosecution. Because these acts of separation are intended to wrest control away from the abuser, they typically will be perceived as a significant threat, and the abuser will react by taking steps to re-exert control over the survivor. The abuser—even if there has been limited documented evidence of abuse in the relationship—may take extreme measures to reestablish control. In some instances, the abuser will choose homicide as the ultimate exercise of power over the victim.

If the abuser has access to a firearm, it is far more likely that homicide will indeed be the result. Research shows that family and intimate partner assaults involving firearms are 12 times more likely to result in death than those that do not involve firearms.[7] Approximately two-thirds of the intimate partner homicides in this country are committed using guns.[8]

In cases in which the abuser's use of a firearm does not result in death, the survivor instead may suffer a brutal, life-altering injury. A recent study of survivors of severe battering described such cases, including one in which the abuser "essentially shot off [the survivor's] leg—what was left of it had to be amputated—as she pleaded for her life." [9]

Abusers who kill their intimate partners also may injure or kill third parties. One study found that in 38 percent of homicides involving intimate partners the perpetrator kills more than one person; other victims include children, intervenors, and bystanders.[10]

JUDICIAL RESPONSE

Each year, judges across the country issue many thousands of civil protection orders. These orders, entered after the court has found evidence of abuse, are designed to protect the survivor from further acts of abuse, including assaults, threats, harassment, and destruction of property. As described more fully below, judges in most states are authorized to include in

Footnotes

1. Information from National Instant Criminal Background Check Program, Federal Bureau of Investigation.
2. *See* CALLIE M. REUNISON AND SARAH WELCHANS, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (May 2000), at 1; PATRICIA TJADEN AND NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION, EXTENT, NATURE & CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (July 2000), at 10 [hereinafter *NIJ-CDC Report*].
3. *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, *1993-1999* (Oct. 2001), at 3. Data show, however, that women between the ages of 35 and 49 are the most vulnerable to homicide by their intimate partner. *See id.*
4. *See NIJ-CDC Report*, *supra* note 2, at 1.
5. In a study of domestic homicides in Florida, 65% of intimate homicide victims had physically separated from the perpetrator prior to their death. *See* Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project Report, at 44, table 7 (1997) [hereinafter *Florida Mortality Review Report*].
6. *See* Kathryn Ann Farr, *Battered Women Who Were "Being Killed and Survived It": Straight Talk from Survivors*, 17 VIOLENCE & VICTIMS 267, 268 (2002) (citing additional studies) [hereinafter *Being Killed*].
7. *See* L.E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AMER. MED. ASS'N. 3043 (1992); Johns Hopkins University, Center for Gun Policy and Research, *Factsheet: Firearm Injury and Death in the United States* (revised April 2002), available at http://www.jhsph.edu/bin/i/g/US_factsheet.pdf.
8. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.*; "Intimate Homicide" (visited August 29, 2002), available at http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm.
9. *See* Farr, *Being Killed*, *supra* note 6, at 277.
10. *Florida Mortality Review Report*, *supra* note 5, at 51, table 28.

THE RISKS ARE REAL

July 2001: A man attempting to purchase a gun fills out the required federal form so that the Federal Bureau of Investigation can complete a criminal background check. During the check, the FBI determines that the purchaser is subject to a protection order that may prohibit him from purchasing the gun under federal law. The records do not indicate, however, whether the required relationship between the purchaser and the protected person exists. Despite contacting the court that issued the protection order, the clerk of court's office, the sheriff's office, and the police department in the issuing jurisdiction, the FBI cannot obtain the necessary information within the requisite three-business-day period and the gun shop is able to sell the gun to the purchaser. One hour later, the purchaser uses the gun to murder the person who obtained the protection order, his former live-in girlfriend. The FBI learns too late that the transaction was illegal under federal law.

December 2001: On Christmas Day, a man murders his wife and 13-year-old daughter with a firearm. He was able to purchase the gun without a criminal background check because he possessed a concealed weapon permit that had been issued several years earlier by a state court. A few months before the murders, the very court that granted the permit had issued a protection order against the murderer and had arraigned him on domestic battery charges. The protection order disqualified the murderer from purchasing or possessing a firearm, but the court never revoked the concealed weapon permit and the protection order had not been entered into any registry. The murdered wife and daughter were the protected parties on the protection order.

January 2002: A man shoots and kills a law school dean and injures others. The killer had been arrested on charges of domestic battery in August 2001 and had been released without bail conditions restricting firearm possession. The gun used in the murder was found with the gun store tags intact.

their protection orders provisions that deny a respondent access to firearms. Additionally, some state laws authorize removal of firearms in misdemeanor cases of domestic violence, including at the time of bail, arraignment, or conviction.

Over the past decade, judges have received unprecedented training about domestic violence. Often missing from the curriculum, however, has been the issue of firearms, and how the surrender, return, or denial of firearms is related to domestic violence civil and criminal cases. The issue may be ignored because judges in jurisdictions without state law on the issue believe that it is federal law, and they needn't worry about that, or because judges have philosophical differences of opinion about the propriety or efficacy of state and federal laws on the subject. Whatever the reason, judges will be unable to fulfill their judicial responsibilities if they do not educate themselves about the various restrictions that Congress and state legislatures have enacted to limit certain defendants' access to firearms in order to promote public safety and prevent death and severe injuries in domestic abuse cases.

The specific requirements regarding removal of firearms under state and federal law will be discussed in detail below. In some cases, removal is discretionary; in others, it is mandatory. It is crucial for judges to understand the circumstances under which state and federal laws provide that firearms *must* be removed. However, judges should also be sensitive to the rationale behind provisions for discretionary removal and ensure that, at the very least, they conduct an appropriate colloquy from the bench in the event firearms are *not* removed. Given the safety issues discussed above, survivors and the public at large may be at considerable risk if abusers retain access to firearms, even under circumstances where removal is discretionary. Consequently, the decision to allow an abuser to retain firearms should be made only after careful consideration of all the facts and circumstances of the particular case.

This article is intended to provide judges with an overview of the state and federal laws that address domestic violence and firearms. Because knowledge of the governing laws alone is insufficient to enable judges to take meaningful steps to safeguard survivors and the community, we also provide several examples of good judicial practices that can facilitate effective implementation and enforcement of the laws. We hope that judges around the country, irrespective of the unique features of their jurisdictions' laws, can integrate these prudent practices into their daily work.

THE APPLICABLE LAWS

Laws at both the state and federal levels prohibit abusers and stalkers from possessing firearms and ammunition. Many states have enacted laws that specifically authorize judges to prohibit firearm possession or to order seizure of illegally possessed firearms under certain circumstances, such as where an abuser used or threatened to use a firearm during an incident of abuse or where the abuser is subject to an active protection order. At the federal level, recently enacted provisions of the Gun Control Act, 18 U.S.C. § 921 et seq., prohibit firearm possession by abusers who are subject to an order of protection satisfying certain requirements or who have been convicted of a qualifying misdemeanor crime of domestic violence. These state and federal laws reflect a growing understanding and consensus among the voting public and their elected representatives that abusers present a heightened threat to survivors when they have access to a firearm.

In this section, we present an overview of the firearm prohibitions enforceable by judges under state law, followed by a discussion of the federal firearm laws relating to domestic violence. Then, before turning to an examination of the recommended judicial practices regarding firearm laws and domestic violence, we explore the sometimes confusing relationship between the state and federal firearm laws, as well as the roles and responsibilities of state court judges regarding their enforcement.

State Laws

Over the past several years, state legislatures throughout the country have enacted laws that restrict domestic violence perpetrators' access to firearms and ammunition. Not surprisingly, the states have taken a wide variety of approaches to the issue, some imposing mandatory prohibitions on certain

In many states, a firearm prohibition is a mandatory condition imposed on all defendants charged with a domestic violence crime.

offenders and others leaving the power to disarm offenders largely to the court's discretion. This section provides a brief overview of the types of firearm prohibitions that have been enacted by the states, including both those enforceable by civil-court judges and those enforceable by judges who hear criminal matters.

Civil System

In at least nine states, entry of a civil domestic violence protection order meeting certain criteria subjects the respondent to a *mandatory* prohibition on the possession of firearms.[11] For instance, Florida law prohibits possession of a firearm or ammunition by a person subject to a valid final protection order that enjoins that person from committing acts of domestic violence,[12] while New Hampshire law requires relinquishment of firearms and ammunition by a respondent if the court finds that the respondent represents a credible threat to the safety of the survivor.[13] In states that have a mandatory prohibition, judges do not have any discretion over whether the prohibition applies; in some instances, however, a specific finding may be required to trigger the prohibition under state law.

A more common approach is to give judges issuing civil protection orders the discretion to include a provision prohibiting firearm possession within the order.[14] In a few states, such provisions may be included in both temporary, ex parte protection orders and in final orders entered after the respondent has had an opportunity to be heard. Some states also authorize judges to include a prohibition against purchasing or otherwise acquiring a firearm for the duration of a protection order.[15]

Some states, recognizing that an abuser who possesses a license or permit to carry firearms may be able to circumvent a state or federal law firearm prohibition by evading a background check, authorize judges to order the respondent to surrender the permit or license for the duration of a protection order.[16] For instance, under New York law the court is required to suspend any existing license possessed by the respondent and to order the respondent ineligible for such a license upon issuance of a protection order if the court finds that the conduct that led to issuance of the order involved the infliction of serious physical injury, the use or threatened use of a deadly weapon or dangerous instrument, or behavior constituting a violent felony.[17]

Some of the firearm prohibitions described above are subject to exceptions intended to allow law enforcement officers to possess firearms despite being subject to an order that would otherwise disqualify a respondent from possession. For instance, the mandatory firearm prohibition imposed by Wisconsin law against a person subject to a domestic violence restraining order does not apply to peace officers if they are required to possess a firearm while on or off duty.[18] As discussed more fully below, one of the federal statutes that prohibits firearm possession is also subject to an exception for law enforcement officers and military personnel.

Criminal System

Judges hearing criminal matters in many states also have legal authority to deny domestic violence perpetrators access to firearms. Depending on the state, the prohibition may be imposed as a bail or other condition of release, or it may be included as a probation condition. In some states, a firearm prohibition is a mandatory condition imposed on all defendants charged with a domestic violence crime.[19] In other states, a firearm prohibition is highly favored and must be imposed absent a special finding by the judge.[20] In still other states, a prohibition is required only if the judge makes certain findings regarding the likelihood that the defendant will use a firearm in further acts of violence.[21]

Upon conviction of a domestic violence crime, defendants in many states become subject to a firearm prohibition, although in some cases a firearm must have been used in the offense.[22] In most cases, the prohibition is mandatory, but at least one state (Minnesota) makes the prohibition discre-

11. *See* CAL. FAM. CODE § 6389(a) (2002); DEL. CODE ANN. TIT. 11, § 1448(a) (2002); FLA. STAT. CH. 790.233 (2002); HAW. REV. STAT. § 134-7(2002); MD. CODE ANN., ART. 27, § 445(d)(2)(v) (2002); N.H. REV. STAT. § 173-B:5 (2002); VA. CODE ANN. § 18.2-308.1:4(A) (2002); W. VA. CODE § 61-7-7 (2002); WIS. STAT. § 813.12 (2002).
12. *See* FLA. STAT. CH. 790.233 (2002).
13. *See* N.H. REV. STAT. § 173-B:5 (2002).
14. *See* ALASKA STAT. § 18.66.100 (2002); ARIZ. REV. STAT. ANN. § 13-3602 (2002); 725 ILL. COMP. STAT. 5/112A-14(b)(14.5) (2002); IND. CODE ANN. § 34-26-5-9(c)(4) (2002); MD. FAM. LAW CODE ANN. § 4-506(d)(12) (2002); MICH. STAT. ANN. § 600.2950(1)(e) (2002); MONT. CODE ANN. § 40-15-201 (2002); N.J. REV. STAT. §§ 2C:25-28, 2C:25-29(16) (2002); OR. REV. STAT. § 30.866 (2002); 18 PA. CONS. STAT. ANN. § 6105(c)(6) (2002); TEX. FAM. CODE § 85.022(e) (2002); UTAH CODE ANN. § 30-6-4.2 (2002); W. VA. CODE § 48-27-403 (2002).
15. In states that do not explicitly authorize firearm removal as part of a protection order, judges may be able to use the "catch-all" relief provision available in many protection order codes to order that the respondent not possess firearms for the duration of the order.
16. *See* MASS. GEN. LAWS ANN. CH. 209A, § 3C (2002); N.Y. FAM. CT. ACT § 842-a(1)-(2) (2002); 23 PA. CONS. STAT. § 6108(A)(7) (2002); TEX. GOV'T CODE ANN. § 411.187 (2002).
17. *See* N.Y. FAM. CT. ACT § 842-a(1)-(2) (2002).
18. *See* WIS. STAT. § 813.12(2002); *see also* TEX. FAM. CODE § 85.022 (2002).
19. *See* COLO. REV. STAT. ANN. § 18-1.3-204 (2002); FLA. STAT. CH. 790.065(c)(1) (2002); HAW. REV. STAT. § 806-11 (2002).
20. *See* CAL. PENAL. CODE § 646.93(c)(3) (2002); 725 ILL. COMP. STAT. 5/110-10 (5) (2002).
21. *See* N.Y. CRIM. PROC. LAW § 530.14(1)(b) (2002); N.D. CENT. CODE § 14-07.1-13 (2002).
22. *See, e.g.*, DEL CODE. ANN. TIT. 11 § 1448(a) (2002); FLA. STAT. CH. 790.065 (2002); MD. CODE ANN. ART. 27, § 445 (2002); MONT. CODE ANN. § 45-5-206(7) (2002); TEX. P. CODE § 46.04(2)(b) (2002); W. VA. CODE § 61-7-7 (2002).

tionary and requires that the court make written findings to support an order not to possess firearms.[23]

Federal Laws

Congress has also recognized the importance of restricting domestic violence abusers' access to firearms. In 1994, along with the passage of the original Violence Against Women Act (VAWA),[24] Congress enacted the first federal legislation to address this issue directly. The new law, which amended the Gun Control Act of 1968 and is codified at 18 U.S.C. section 922(g)(8), makes it a federal crime for a person who is subject to a qualifying protection order to possess a firearm or ammunition, or to ship or receive a firearm or ammunition in interstate or foreign commerce. To qualify under section 922(g)(8), a protection order must:

(1) have been issued after a hearing of which the respondent received actual notice, and at which the respondent had an opportunity to participate;
(2) restrain the respondent from harassing, stalking, or threatening an intimate partner of the respondent or child of such intimate partner or the respondent, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(3) either include a finding that the respondent represents a credible threat to the physical safety of such intimate partner or child *or* by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.[25]

The federal law defines the term "intimate partner" for purposes of section 922(g)(8) as a spouse or former spouse of the respondent, a person who is a parent of the child of the respondent, or a person who cohabits or has cohabited with the respondent.[26]

Provided that these requirements have been satisfied, mere possession of a firearm or ammunition will subject a defendant to prosecution under section 922(g)(8). The order itself need not prohibit possession of firearms, and the respondent need not have violated the order itself in any way. The federal law does, however, require that the possession be "knowing" to support a prosecution.[27] Section 922(g)(8) applies only for the duration of the qualifying protection order.

In addition to section 922(g)(8), the 1994 amendments to the Gun Control Act included 18 U.S.C. section 922(d)(8), which makes it a federal crime to sell or transfer a firearm or ammunition to a person knowing or having reasonable cause to believe that the person is subject to a qualifying protection order. The same requirements discussed above in reference to section 922(g)(8) apply to protection orders under section 922(d)(8).[28] The intent behind section 922(d)(8) takes on special significance for state court judges when respondents petition a court for the return of guns that have been seized pursuant to state or federal law. If the court knows or has reasonable cause to believe that the respondent is subject to an active protection order that satisfies section 922(d)(8) (as where a criminal court is petitioned for return of weapons but is aware of a qualifying protection order issued by a sister civil court), it should not return the firearms. As described more fully below, good judicial practice would be to search, prior to returning any firearms, all available records to determine whether a person is subject to a firearms disqualification under state or federal law.

The "Lautenberg Amendment" . . . added persons who have been convicted of certain misdemeanor crimes of domestic violence to the list of those barred by the federal law from purchasing or possessing firearms . . . .

A limited exception to sections 922(g)(8) and 922(d)(8) exists for law enforcement officers, armed forces personnel, and other local, state, and federal employees who are required to use weapons as part of their official duties. Under 18 U.S.C. section 925(a)(1), sometimes referred to as the "official-use exemption," the prohibitions in sections 922(g)(8) and 922(d)(8) do not apply to firearms that are received or possessed by such individuals for use in performing official duties on behalf of a federal, state, or local agency. Personal weapons, however, are not covered by the exemption.[29]

In 1996, Congress enacted the second important amendment to the Gun Control Act related to domestic violence. Known as the "Lautenberg Amendment," the new law added persons who have been convicted of certain misdemeanor crimes of domestic violence to the list of those barred by the federal law from purchasing or possessing firearms and ammunition. The prohibition, found at 18 U.S.C. section 922(g)(9), has been particularly controversial because it applies to misdemeanors and does not include an official-use exemption for law enforcement and military personnel.

23. *See* MINN. STAT. § 609.2242(3)(c) (2002).
24. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.).
25. *See* 18 U.S.C. § 922(g)(8)(A)-(C) (2002).
26. *See* 18 U. S.C. § 921(a)(32) (2002).
27. *See* 18 U.S.C. § 924(a)(2) (penalty imposed for "knowingly" violating section 922(g)(8)).
28. *See* 18 U.S.C. § 922(d)(8)(A)-(B).
29. *See* Letter from Stephen R. Rubenstein, Associate Chief Counsel, Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, to Charles Higgenbotham, International Association of Chiefs of Police (Feb. 12, 2001) (on file with authors); *see also* National Instant Criminal Background Check Program, Federal Bureau of Investigation, *Frequently Asked Questions Regarding Federal Firearms Prohibitions Resulting from Protection Orders, 18 U.S.C. 922(g)(8), and Misdemeanor Crimes of Domestic Violence, 18 U.S.C. 922(g)(9),* Presentation to the National Council of Juvenile and Family Court Judges, at 5 (July 16, 2002) [hereinafter *NICS Frequently Asked Questions*].

The federal firearms statutes related to domestic violence have withstood an onslaught of legal challenges in virtually every federal circuit.

Despite several court challenges, section 922(g)(9) has withstood judicial scrutiny and remains good law.

Which misdemeanor crimes qualify under section 922(g)(9)? The definition of a misdemeanor crime of domestic violence requires that the offense be a misdemeanor under federal or state law and have, as an element, the use or attempted use of physical force or the threatened use of a deadly weapon.[30] In addition, a misdemeanor conviction qualifies only if one of the enumerated relationships exists between the perpetrator and the victim of the crime. Specifically, the perpetrator must be a current or former spouse, parent, or guardian of the victim; a person who shares a child in common with the victim; a person who is cohabiting or has cohabited with the victim as a spouse, parent, or guardian; or a person similarly situated to a spouse, parent, or guardian of the victim.[31]

The federal law also imposes two due-process-related requirements, namely that the perpetrator must have been represented by counsel (or have knowingly and intelligently waived that right) and that if the perpetrator was entitled to a jury trial, either the case was tried by a jury or the perpetrator knowingly and intelligently waived that right.[32]

It is important to note that only a "conviction" triggers the section 922(g)(9) prohibition. The variety of state court practices employed to streamline the criminal judicial process can make it difficult to discern whether an adjudication is indeed a "conviction" as required by the federal law. The problem often arises where some form of delayed adjudication is available to state courts, as where an "adjournment in contemplation of dismissal" may be entered.[33] By regulation, the question of whether a qualifying "conviction" exists is made by reference to the governing *state* law: if the form of adjudication is considered a conviction under state law, it will qualify as a "conviction" and support prosecution under section 922(g)(9).[34] In many, if not most, circumstances, a delayed adjudication will not be considered a conviction under state law, so to the extent judges accept such pleas they should keep in mind that one of the collateral consequences is that the federal firearm prohibition may not apply against the perpetrator.

Although section 922(g)(9) imposes a lifetime ban on firearm possession following a qualifying misdemeanor conviction, the statute does provide that firearm possession rights may be restored under limited circumstances. Specifically, the conviction must be "expunged or set aside" or it must be "an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such offense)."[35]

Federal courts have consistently held that section 922(g)(9) applies to misdemeanor convictions that occurred prior to the 1996 enactment of the Lautenberg Amendment. The courts have rejected challenges based upon the Ex Post Facto clause of the U.S. Constitution, ruling that so long as the illegal act of firearm possession occurs after the enactment date, the law does not retrospectively punish acts that were legal prior to the enactment date.[36]

Unlike section 922(g)(8), section 922(g)(9) is not subject to the "official-use exemption" for law enforcement and military personnel.[37] Consequently, a law enforcement officer or member of the military who has been convicted of a qualifying misdemeanor crime of domestic violence is subject to a lifetime ban on firearm possession, including possession of official-duty weapons. Thus, departments may need to terminate or reassign officers who become subject to the ban.[38]

As part of the Lautenberg Amendment, Congress also enacted 18 U.S.C. section 922(d)(9), which prohibits the sale or transfer of a firearm or ammunition to a person if the transferor knows or has reasonable cause to believe that the person has been convicted of a misdemeanor crime of domestic violence.[39] The definition of misdemeanor crime of domestic violence is the same as that which applies to section 922(g)(9).[40]

Challenges to the Federal Firearm Laws

The federal firearm statutes related to domestic violence have withstood an onslaught of legal challenges in virtually every federal circuit. Defendants have sought to overturn their convictions using a plethora of legal theories, including several constitutional challenges. To date, the federal courts have rejected every such challenge, and the statutes remain on solid legal ground.

Defendants have repeatedly invoked the notice and due process requirements of the Fifth and Fourteenth Amendments

30. *See* 18 U.S.C. § 921(33)(A) (2002).
31. *See id.* That is not to say that the criminal offense must be named "domestic assault" or "spousal abuse," or even that it have as an element the requisite relationship between the perpetrator and the victim; rather, to qualify under the federal law one of the enumerated relationships must have existed in fact. *See, e.g.*, United States v. Meade, 175 F. 3d 215, 218-221 (1st Cir. 1999).
32. *See* 18 U.S.C. § 921(33)(B)(i) (2002).
33. *See* N.Y. FAM. CT. ACT § 315.3(2002).
34. *See* 27 C.F.R. § 178.11.
35. 18 U.S.C. § 921(33)(B)(ii). In addition, if the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, then the restriction against firearms possession continues. *See id.*
36. *See, e.g.*, United Sates v. Mitchell, 209 F. 3d 319, 322-23 (4th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000).
37. *See* 18 U.S.C. § 925(a)(1) (specifically excluding sections 922(g)(9) and 922(d)(9)).
38. *See* John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, "Open Letter to All State and Local Law Enforcement Officials" (visited August 20, 2002), available at http://www.atf.treas.gov/firearms/domestic/opltrleo.htm.
39. Therefore, a court should not authorize the return of a firearm to a person that the court knows or has reasonable cause to believe has been convicted of a qualifying misdemeanor crime of domestic violence.
40. *See* 18 U.S.C. § 921(33).

to attack the constitutionality of both 18 U.S.C. sections 922(g)(8) and (g)(9). Without exception, the federal courts have ruled that even if a defendant was unaware of the existence of the federal law, the "ignorance of the law is no excuse" doctrine governs.[41] Thus, while it may be good judicial practice to advise defendants of these laws, such notice is not a requirement.

Defendants have also contended that the statutes are beyond Congress's power under the Commerce Clause, a challenge that the courts have rejected because both sections 922(g)(8) and 922(g)(9) include a "jurisdictional element," namely, the requirement that the firearm or ammunition must have been "shipped or transported in interstate or foreign commerce."[42] Likewise, Tenth Amendment challenges have failed because the federal courts have ruled that the statutes are federal criminal statutes that are to be implemented by federal authorities, not state authorities, and so they neither "commandeer" state governments into serving federal purposes nor implicate the states' rights to regulate domestic relations.[43]

The Second Amendment provided the basis for the most highly publicized challenge to the federal firearm statutes since their enactment. In 1998, Dr. Timothy Joe Emerson was indicted in a Texas federal district court for possession of firearms in violation of 18 U.S.C. section 922(g)(8).[44] Dr. Emerson had purchased a firearm while he was subject to a protection order issued by a Texas state court that prohibited him from harming or threatening to harm his wife or the couple's four-year-old daughter. Dr. Emerson, who was arrested after he allegedly brandished the firearm in front of his wife and daughter, moved to dismiss the indictment, asserting among other things that section 922(g)(8) violates the Second Amendment. The district court granted the motion to dismiss, finding that the Second Amendment recognizes an individual right to own and possess firearms and concluding that section 922(g)(8) was unconstitutional because it criminalizes protected conduct based upon a state civil court order with no particularized findings.[45]

The district court decision set the stage for the government's appeal to the U.S. Court of Appeals for the Fifth Circuit. In a lengthy decision, two of the three judges on the panel that heard the appeal agreed with the district court that the Second Amendment confers on individuals the right to bear arms.[46] In so doing, the majority departed from the conclusion reached by every other federal appellate court to decide the question.[47] The *Emerson* majority did, however, uphold the constitutionality of section 922(g)(8) as applied to Emerson, finding that the law is a sufficiently "limited, narrowly tailored specific exception or restriction" to the Second Amendment right.[48] Emerson subsequently appealed the decision to the U.S. Supreme Court, which denied certiorari on June 10, 2002.[49]

In practice, the system is imperfect, and a disconcertingly large number of abusers have been able to obtain a firearm . . . .

The National Instant Criminal Background Check System (NICS)

In 1993, Congress enacted a new law intended to prevent prohibited persons from purchasing firearms from dealers. That law, the Brady Handgun Violence Prevention Act (Brady Act),[50] requires all federally licensed gun dealers to obtain a criminal background check of all purchasers before completing a sale. In most cases, the required background check is to be made using the National Instant Criminal Background Check System, or "NICS," which comprises several computer databases managed by the Federal Bureau of Investigation.[51] Among other things, the FBI search includes an examination of the federal database that contains information about state-court-issued protection orders (the National Crime Information Center Protection Order File) and state criminal history records. During the course of the background check, the FBI conducts a search to determine whether the sale of the firearm would violate any applicable state or federal laws.[52] By statute, the FBI search is limited to three business days; if no state or federal prohibitions are uncovered within that period, the sale is allowed to proceed by default.[53]

In theory, the NICS background check should prevent an abuser who is prohibited from possessing a firearm under state or federal law from buying one from a licensed gun dealer. In practice, the system is imperfect, and a disconcertingly large number of abusers have been able to obtain a firearm in violation of federal law because the FBI could not complete its investigation within three business days.[54] There are, however,

41. *See, e.g.*, United States v. Kafka, 222 F. 3d 1129, 1130-31 (9th Cir. 2000) (and cases cited therein); Mitchell, *supra* note 36, at 323-24 (and cases cited therein).
42. *See, e.g.*, United States v. Napier, 233 F. 3d 394, 399-402 (6th Cir. 2000) (and cases cited therein).
43. *See, e.g.*, United States v. Jones, 231 F. 3d 508, 515 (9th Cir. 2000); United States v. Wilson, 159 F. 3d 280, 287-88 (7th Cir. 1998).
44. *See* United States v. Emerson, 270 F. 3d 203, 211-12 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (June 10, 2002).
45. *See* United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999).
46. *See* Emerson, *supra* note 44, at 218-260.
47. *See, e.g.*, Napier, *supra* note 42, at 402-04 (and cases cited therein).
48. Emerson, *supra* note 44, at 260-64.
49. Emerson v. United States, 122 S. Ct. 2362 (2002).
50. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).
51. *See* 28 C.F.R. pt. 25. FBI personnel do not perform all NICS background checks. In some states, a state or local law enforcement agency has been designated a "point of contact" (POC) and is responsible for conducting the check. *See* 28 C.F.R. §§ 25.2, 25.6(d).
52. *See* 28 C.F.R. § 25.6.
53. *See* 18 U.S.C. § 922(t)(1)(B)(ii).
54. *See* U.S. General Accounting Office, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System (GAO-02-653)*, at 17-23 (July 2002) [hereinafter *GAO Report*].

Confusion also arises over a state court judge's role in the *enforcement* of the 18 U.S.C. section 922(g)(8) prohibition . . . .

some practical steps that judges can and should take to improve the speed and accuracy of the FBI investigation. Doing so would significantly increase the likelihood that their protection orders and judgments of conviction will be enforced and that community and survivor safety will be enhanced. These steps are discussed in detail below.

State Judges' Role with Respect to Federal Firearm Laws

What is the relationship between the federal and state firearm laws, and to what extent do state court judges play a role in the enforcement of the federal laws? Those questions are the source of considerable confusion among members of the bench and bar throughout the country.

Perhaps the most common misunderstanding about the relationship between the federal and state firearm prohibitions arises when the two sets of laws address similar situations but differ significantly in their approach. For instance, we have seen that under the federal Gun Control Act (18 U.S.C. § 922(g)(8)), a person subject to a domestic violence protection order meeting specific statutory criteria is not permitted to possess a firearm while the order is in effect. By contrast, many states impose such a ban only if the issuing court exercises its discretion to prohibit firearm possession as part of the order's terms and conditions. In such a state, the question arises whether a respondent legally can possess a firearm when the order does not include a state-law firearm prohibition yet otherwise satisfies the federal Gun Control Act requirements. In more formal legal terms, some judges wonder whether the federal law, under the Supremacy Clause of the U.S. Constitution, preempts or supercedes the state law.

In fact, this is neither a situation that triggers the Supremacy Clause nor one that enables the state court judge to abrogate the federal firearm laws. Rather, both sets of laws remain in full force and both apply to this situation. The respondent would not be subject to a state-law firearm prohibition, because the judge opted not to invoke her authority to prohibit gun possession, but the respondent nonetheless would be subject to federal prosecution under the federal gun law, because the federal prohibition is independent of state law. This analysis holds true for all of the federal firearm statutes discussed above.[55]

Confusion also arises over a state court judge's role in the *enforcement* of the 18 U.S.C. section 922(g)(8) prohibition when it is a state court order of protection that triggers the federal law. Especially in states where the protection order form provides a space for the issuing judge to indicate whether the federal prohibitions apply, some judges misunderstand their role. For instance, some judges are under the misimpression that they can "over-ride" the operation of 18 U.S.C. section 922(g)(8) simply by not checking the appropriate space on a protection order form, or by including language in the order to the effect that the federal law does not apply against the respondent.

In fact, section 922(g)(8) does not rely upon state law definitions or standards to determine whether a person is prohibited from possessing a firearm. Rather, the question of whether a protection order issued by a state court triggers the section 922(g)(8) prohibition is determined solely by reference to the specific requirements of the *federal* statute. In practice, this means that the particular findings and terms of the order must be assessed against the federal requirements enumerated in section 922(g)(8), and inquiry must be made into whether the federal notice and hearing requirements were satisfied.

Thus, an otherwise qualifying protection order will still trigger the federal prohibition even if the issuing judge rules that the respondent is entitled to possess a firearm under state law, or if the judge fails to note on the order that the federal prohibition would apply (for example, by failing to mark a box on the form that indicates application of the federal prohibition). Simply put, state court judges do not determine the applicability of the federal law.[56]

All of this is not to say, however, that the actions of state court judges do not profoundly affect the operation of the federal law. In fact, the nature of the conduct proscribed by the order or of the findings of fact included therein determines whether the federal law applies. For instance, by ensuring that their orders hew to the specific requirements of section 922(g)(8) (that is, that they contain the requisite findings or prohibitory language or both), judges can facilitate subsequent enforcement of the federal firearm laws. In addition, judges can promote the deterrent effect of the federal law by providing the respondent with both written and oral notice that they will be in violation of section 922(g)(8) if they possess or purchase a firearm while the protection order is in effect. By indicating on the order the relationship between the parties as well as the order's compliance with the due process requirements of section 922(g)(8), judges can also make it clear that a protection order triggers the federal prohibition. Other practical steps that state court judges can take to facilitate enforcement of section 922(g)(8) and the other federal laws are described in further detail below.

Full Faith and Credit and Firearm Prohibitions in Protection Orders

The Violence Against Women Act of 1994 included provisions requiring the interjurisdictional enforcement of protection orders. Codified at 18 U.S.C. sections 2265 and 2266, these "full faith and credit" provisions of VAWA require states and Indian tribes to enforce protection orders issued in other jurisdictions as if they had been issued by the enforcing state or

55. *See NICS Frequently Asked Questions*, *supra* note 29, at 1-2.

56. In fact, when FBI personnel conduct the NICS background check on a potential firearm purchaser and find that a protection order has been issued against the purchaser, they are required to perform an independent analysis to determine whether the order triggers 18 U.S.C. § 922(g)(8) and do not rely upon state authorities' determinations. Personal communication with Fanny L. Haslebacher, Senior Attorney, National Instant Criminal Background Check Program, Federal Bureau of Investigation.

tribe, provided certain jurisdictional and due process requirements are met.[57] That mandate applies to firearm restrictions in protection orders and requires that such restrictions be enforced even if the enforcing jurisdiction does not authorize judges to include a firearm prohibition in a protection order.

Judges must be aware that violation of a firearm prohibition in an out-of-jurisdiction protection order can be the basis of a prosecution in the enforcing jurisdiction, using whatever enforcement mechanism is applied to violations of orders issued within that jurisdiction. Even if the protected party would not have been eligible for the order in the enforcing jurisdiction, and even if the duration of the order exceeds the maximum duration allowed for orders issued in the enforcing jurisdiction, VAWA mandates enforcement of the foreign order, including any firearm provisions.[58]

EFFECTIVE JUDICIAL PRACTICE

Having a clear understanding of the law is essential to good judicial practice. It is also helpful to look at some specific examples that judges confront in courtrooms on a regular basis. The following are judicial practices that can help safeguard the community. By taking some simple steps in the courtroom and by encouraging clerks of court and other court personnel to ensure that relevant information is gathered and conveyed to the appropriate agencies, judges can do much to facilitate the effective operation of the state and federal laws described above. While we recognize that state law and procedures vary from jurisdiction to jurisdiction, the following should be of general applicability, regardless of a jurisdiction's idiosyncrasies.

Question the Parties About Firearms

Judges should take every opportunity to ask about the presence of firearms when issues of domestic violence are presented. All court forms that relate to civil and criminal domestic violence cases should have questions regarding the presence and possession of firearms. In the civil arena, such forms include applications for a civil protection order, ex parte and final protection order forms, requests for extension or renewal of an order, and requests to vacate or dismiss an order. In criminal cases, they include bail or condition-of-release orders, arraignment forms, and disposition orders. The court should inquire at each stage of the civil process whether the defendant owns or has access to firearms—an inquiry that should be made at both the ex parte hearing and at the hearing on the merits (final hearing). The petitioner may not know if the respondent has firearms, or may be aware of only some of the weapons. Therefore, judges should obtain from the respondent, under oath, a list of all firearms to help ensure that all are relinquished at the final hearing.

Judges should take every opportunity to ask about the presence of firearms when issues of domestic violence are presented.

Such an inquiry is especially important at the final hearing if firearms were *not* removed at the ex parte stage, whether because state law does not permit removal at that stage, because the court did not so order, or because the defendant did not have any firearms at the time. To reassert control over the survivor or to seek revenge, a respondent subject to a protection order may attempt to acquire a firearm after being served with a protection order. If the temporary order did not include a prohibition against possession, the respondent may have legally obtained a firearm[59] and now may pose a significant threat to the survivor's safety.

Inquiry on the criminal side is equally important. At the bail hearing or arraignment, as well as upon a conviction, the court should inquire and have defendants state under oath those firearms that they own or have in their possession. This information will facilitate both the entry of a specific removal order and law enforcement's retrieval of the firearms. The court should remember that if the conviction is a qualifying misdemeanor crime of domestic violence under federal law, 18 U.S.C. section 922(g)(9) prohibits possession of firearms. If state law permits removal, the judge should order it; if not, the judge should notify defendants of the federal law and their responsibility to dispossess themselves of any firearms.

Understand the Nuances of "Possession"

As previously explained, under federal law and many state laws, an abuser may not, upon issuance of a civil protection order or conviction of a qualifying misdemeanor crime of domestic violence, "possess" firearms. Frequently abusers will report having "sold" their firearms to a friend or relative, coincidentally just at the time of the domestic violence incident. The court must determine whether this is a bona fide sale, and should request proof of the transaction. If it was a fraudulent transfer, further action may be warranted.

Another scenario is where the abuser transfers possession of firearms to friends or family members, feeling that this may help ensure retrieval at the end of the case. Such a scenario raises questions of "constructive possession."[60] If a respondent can ask for, or physically retrieve without barrier, any of the firearms transferred to a third party, such action may not constitute the requisite relinquishment. A respondent who has constructive possession of firearms has the opportunity to use them, which is an action expressly prohibited by law. A court

57. *See* 18 U.S.C. § 2265(a)-(b).
58. Specific questions regarding VAWA's full faith and credit provisions may be directed to the National Center on Full Faith and Credit at (800) 256-5883, ext. 2.
59. Recall that 18 U.S.C. § 922(g)(8) does not apply to ex parte protection orders because it requires that the order have been issued after a hearing of which the respondent received actual notice and at which the respondent had an opportunity to participate.
60. *See, e.g.*, United States v. Quilling, 261 F.3d 707, 712 (7th Cir. 2001) (defining "constructive possession" in a federal Gun Control Act case as existing when "a person . . . knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others," and affirming conviction based upon constructive, but not actual, possession).

One effective monitoring mechanism used by some courts is to require that law enforcement provide an accounting . . . of all firearms removed . . . .

should order that all such firearms be truly relinquished, for instance, to a law enforcement agency.

A related scenario is presented when a respondent, who has been removed from the joint residence with the survivor, moves into his parents' home where access to firearms is available (whether they are the respondent's own weapons that he "sold" to them or gave to them for safekeeping, or they are his parents' weapons). The court should consider ordering relinquishment of such weapons to law enforcement, especially if they are owned by the respondent.

Another possibility to consider under such circumstances is to have an arrangement with the federal authorities responsible for enforcing the federal firearm prohibitions, specifically the assistant United States Attorney assigned to domestic violence cases and agents of the Bureau of Alcohol, Tobacco and Firearms. They may send a letter to the respondent's relatives advising them of the federal laws that prohibit granting possession of firearms to those who are disqualified and warning them of the significant penalties attached to such a conviction. Of course, if the parents or others who have been asked to hold the firearms are present in the courtroom, the court may address them and so note in the record. In addition, it may be advisable to have them sign an acknowledgment of receipt of the court order, and include language to document that they were made aware of the federal prohibitions and the penalties that will attach if they allow the respondent access to the firearms.

Use All Available State and Federal Authority to Disarm Offenders

In addition to asking about the presence of firearms, judges should issue appropriate orders that will provide for the safety of the survivor. The court should utilize a risk assessment or "dangerousness" checklist of some type to determine the propriety of removing firearms if such removal is discretionary. The existence of prior protection orders, threats, firearms offenses, suicide attempts, and harm to pets are but a few of the factors that would suggest removal is appropriate, since all are indicia of potential serious violence. By the same token, in criminal cases such an assessment should be conducted at a hearing to set bail conditions, as well as at arraignment, and, if the defendant is convicted, as part of the dispositional order (whether incarceration, probation, parole, etc.).[61] The court should be careful to order relinquishment at all stages where it is mandatory under state law, including upon issuance of a protection order or upon conviction of a qualifying offense.

Build Accountability into the Process

Orders do not mean much, and judicial efforts to provide safety become moot, if an abuser is not made to follow a court order and, in the process, kills an intimate partner. In addition to issuing comprehensive orders, the court has a responsibility to ensure that orders are followed and that firearms are relinquished pursuant to whatever state process exists.

One effective monitoring mechanism used by some courts is to require that law enforcement provide an accounting to the court of all firearms removed, based upon the affidavit that the abuser signs in court. If an abuser refuses to relinquish the firearms, or if law enforcement is otherwise unable to obtain them, the court may, under appropriate circumstances, issue a search warrant for law enforcement to obtain the guns or a bench warrant for the defendant's arrest for failure to comply with the court order.

Provide Litigants with Notice of Federal Firearms Protections and Full Faith and Credit

No one wants surprises in this line of work, least of all survivors who may be unaware of the protections afforded or even abusers who may be unaware of the restrictions imposed. At all hearings that result in a state or federal firearms prohibition, the court should explain, on the record, all prohibitions that apply. Especially where only the federal prohibitions apply, providing oral and written notice is an important practice. While this may take a few extra minutes of court time, it offers the opportunity to clarify any questions the abuser may have, to create a record of "notice" to the abuser,[62] and to send a message, in the presence of the survivor, that safety is a priority set by the court and the community. Perhaps most important, the court can also use this opportunity to help the survivor to understand that law enforcement or the prosecutor should contact federal authorities if there is a violation of the federal law.

In addition, the court should advise the parties that under 18 U.S.C. section 2265, VAWA's full faith and credit provision, the firearms restrictions will be enforced not only in their own jurisdiction, but across the country in all jurisdictions. Thus, possession of or attempts to purchase firearms in another jurisdiction will be thwarted, just as they will be in the issuing jurisdiction. Both survivors and abusers may be unaware that federal law mandates nationwide enforcement of protection orders and all of the restrictions therein.

Enter Court Orders into State and Federal Registries

To maximize enforcement of protection orders, it is imperative to enter them immediately into a state protection order registry, if one exists, and the federal registry maintained by the

61. In addition, judges considering whether to enter a deferred adjudication order (e.g., an adjournment in contemplation of dismissal) should conduct a dangerousness assessment and, if appropriate and permitted by state law, impose as a condition that the defendant not possess firearms.
62. As explained above, however, notice of the federal firearm prohibitions is not necessary to support a conviction. *See supra* note 41 and accompanying text.

FBI (the National Crime Information Center (NCIC) Protection Order File). Some jurisdictions have an "automatic feed" mechanism so that a single entry will accomplish both. In some locations, court clerks enter the data directly from the court; in others, a different state agency is responsible for data entry. Whoever holds this responsibility should ensure that forms are completed appropriately so that the orders can be entered properly and accessed nationwide.

It is not uncommon for abusers to cross jurisdictional lines and violate protection orders or commit other offenses. If protection orders are not entered in registries, courts and law enforcement in the new jurisdiction may not be aware of the firearms prohibitions and may not mandate removal in appropriate circumstances (such as when a new victim seeks an order against the same individual, or the defendant attempts to purchase a weapon and the FBI or law enforcement in the new jurisdiction cannot locate the protection order in the federal registry).

To ensure that protection order information can be entered into the NCIC Protection Order File, the entering agency must have specific identifying information required by the federal database. Of particular importance is the respondent's numeric identifier, which may be, among other things, a date of birth, Social Security number, or driver's license number and expiration date. Some opportunities to capture this information arise at these points in the process: when completing a petition for a protection order, the survivor can also complete a defendant information sheet with descriptive information; upon service of a protection order, law enforcement can ask the respondent for proof of identity, including a driver's license that would indicate a date of birth, or a Social Security card, or, at a minimum, officers can simply ask the respondent to state such information; and at the final hearing, the court can ask the respondent to provide the information prior to the commencement of the hearing.

Obtaining the numeric identifier will greatly facilitate entry of appropriate orders into the state and federal registries. This will not only provide enhanced protection to victims, but can also help to prevent any inappropriate arrests or detentions when identifying information is questionable.

Support the National Instant Criminal Background Check System by Ensuring that Your Court Is Responsive to FBI Requests for Information

The National Instant Criminal Background Check System (NICS) depends on timely, accurate information to prevent unlawful firearm purchases. Because the Brady Act allows the FBI (or an FBI-designated state agency in the case of "point of contact" states) only three business days to determine whether there is any reason why an individual should not be able to purchase a firearm, the relevant information needs to be in the NICS databases or readily available from the originating court in order for the system to be effective.

In addition to ensuring that the information from their protection orders is quickly and accurately entered into the NCIC Protection Order File, judges can facilitate NICS background checks by being responsive to requests from the FBI for information concerning their orders and final disposition records. Unfortunately, this is not always the case. The General Accounting Office's recent study of the NICS system's first three years of operation, from November 1998 to October 2001, revealed that 95% of the checks were completed within the three business days allotted.[63] The other 5% is troubling, however, because it represents permitted purchases by thousands of people who were prohibited by state or federal law from buying a firearm. In fact, the GAO found that nearly 3,000 domestic abusers were able to purchase firearms simply because the FBI was unable to complete the background check within the time allotted.[64]

Clearly, the FBI's ability to perform Brady checks within the three-day period is impeded when jurisdictions do not enter their orders into the NCIC . . . .

When the FBI later discovers that a sale should not have been authorized, the agency asks agents from the Bureau of Alcohol, Tobacco and Firearms to retrieve the firearm. That procedure, sometimes called a "delayed denial" retrieval, presents enhanced risks for the law enforcement officers who must take back guns from an individual who has already "legally" acquired them.

Significantly, the GAO also found that while 14% of the almost 200,000 blocked purchases were stopped because the purchaser had been convicted of a misdemeanor domestic violence crime, that prohibition accounted for 26% of the delayed denial retrievals.[65] As the GAO noted, this difference is "disproportionately large" and the unlawful purchases present considerable risk to public safety.[66]

What exactly is causing this problem? Simply put, the FBI's lack of timely access to complete and accurate information concerning the purchaser's criminal history is to blame. Clearly, the FBI's ability to perform Brady checks within the three-day period is impeded when jurisdictions do not enter their orders into the NCIC Protection Order File, do not update criminal history information as it becomes available, or, even less excusably, refuse or delay in responding to the FBI's requests for clarifying information. Each missing piece of information means additional personnel time devoted to tracking it down from the relevant jurisdiction. Far worse, when the necessary information is not found quickly enough, a purchase may be allowed by default and, as occurred in the July 2001 case described at the beginning of this article, the abuser may use the firearm to kill the victim. Timely entry of such

63. *See GAO Report, supra* note 54. Over the approximately the same three year period (from Nov. 30, 1998 to Oct. 7, 2001), the NICS background check blocked almost 200,000 gun purchases by persons who were legally prohibited from possessing a firearm. *Id.* at 19 (chart).

64. *See id.* at 19 (chart).

65. *See id.* at 18.

66. *See id.*

A simple and effective procedure to prevent the return of firearms to disqualified individuals has been implemented in New Hampshire.

data is an important element in promoting public safety, especially for an at-risk population. Judges should take all steps necessary to ensure that all relevant information regarding their orders and criminal case dispositions is readily available to the NICS system and that their courthouses are responsive to FBI requests.

Develop a Safe Returns Process

When an abuser petitions for return of firearms because a civil protection order expires or is dismissed at the request of the petitioner, or because a qualifying misdemeanor domestic violence conviction has been expunged, the court should take all reasonable steps to ensure that it does not authorize return of the firearms to a person who may nonetheless be disqualified. A typical example is where a civil protection order expires after its one-year duration and the survivor, after being notified, decides not to apply for an extension. On the basis of these facts alone, it would appear appropriate to authorize the return. However, the same respondent may be subject to a protection order issued by another court in the same state (potentially even the same court) or in another state, protecting a *different* victim. Or the abuser may have previously been convicted of a misdemeanor crime of domestic violence (not expunged) that triggered a lifetime disqualification from possessing a firearm.

The disqualifications follow and flow with the individual abuser, not the case. Thus, it is essential that the court perform a search to determine whether there is any other pending case or cause that would impose a state or federal firearm prohibition on the abuser. It is not enough simply to examine the pending case. By so limiting its search, the court may inadvertently issue an order instructing a police department to return a gun to an individual who is legally prohibited from possessing one.

In addition, by providing notice to the survivor that the abuser has petitioned for a return of firearms, the court may be able to obtain supplementary information from the survivor that will assist in determining whether the abuser is a disqualified person. Of course, notice to survivors will also enable them to take steps, if necessary, to plan for their own and their children's safety in light of the fact that the abuser will soon regain legal access to firearms.

A simple and effective procedure to prevent the return of firearms to disqualified individuals has been implemented in New Hampshire. The state statute on protection from abuse requires the court to conduct a hearing, with notice to the victim, the defendant, and the relevant law enforcement agency, before any firearms can be returned.[67] The courts and the New Hampshire Department of Safety have developed a process in which the defendant completes a motion and affidavit for return of firearms, tracking the information from the federal form used for the Brady background check. The Department of Safety runs a records check to determine whether there is any reason the firearms should not be returned to the defendant, including the existence of a disqualifying protection order, a disqualifying misdemeanor conviction, or any other disqualifying factor (such as a drug conviction). If such a reason is found, the defendant is given the opportunity to rebut the evidence at a hearing. If no reason is found, the court issues an order authorizing the return. The victim is aware of the petition for return of firearms by virtue of having received notice.

This simple process is a good example of collaboration between agencies and branches of government to promote public safety. The New Hampshire Attorney General, the state coalition against domestic violence, and the state legislature all recognized the inherent value in such collaboration and worked together to implement it.

Facilitate the Revocation of Firearm Permits

The GAO's recent report on the NICS program identified a threat to survivor and community safety posed by state firearm-permit programs. Twenty-six states issue so-called "conceal carry" permits that exempt the permit holder from a NICS background check when he or she purchases a firearm.[68] In 16 of those states, *all* such permit holders are exempt from background checks.[69] Although states have procedures for the revocation of permits when the holder loses eligibility, for instance, if the holder is convicted of a misdemeanor crime of domestic violence or becomes subject to a protection order, there appears to be very little effort to assure that permits are in fact surrendered. In its study, the GAO visited six states that issue conceal carry permits and found that only two actively seek out permit holders to retrieve revoked permits. Only one of the states imposes a criminal penalty against those who do not surrender revoked permits.[70]

Absent active monitoring of permit holders and swift recovery of revoked permits, a person with an invalid permit may nonetheless be able to use it to evade a background check and purchase a gun. In fact, that is exactly what happened in the Christmas Day 2001 slayings described in the first section of this article.

Judges can facilitate revocation and recovery of conceal carry permits by ensuring that their orders are transmitted to the permit authority—be it a court, law enforcement, or another agency—by entering them into a statewide registry or by other means. If the court itself is the permit authority, as was the case in the Christmas Day murders, judges should

67. *See* N.H. REV. STAT. ANN § 173-B:5(X).
68. See *GAO Report, supra* note 54, at 12.
69. *See id.*
70. *See id.*

ensure that a system is put in place to actively monitor permit holders for potential disqualifying events, including convictions and the entry of protection orders against them. One possible monitoring method described in the GAO report involves electronic comparison of permit holders' names against state criminal records databases.[71] If authorized by state law, judges should issue orders requiring permit holders to surrender revoked permits and use bench warrants to authorize law enforcement to arrest those who fail to comply.

CONCLUSION

Although the phrase may sound trite, domestic violence and firearms truly can be a lethal combination, endangering adult and child survivors of abuse as well as the community at large. This is not to say that every abuser who owns or possesses firearms will use them to threaten, kill, or injure others. Indeed, most do not. However, the firearm prohibitions enacted by Congress and the states were designed to be prophylactic, to prevent harm and promote safety under circumstances in which reasonable restrictions on firearms possession are warranted.

State and federal laws concerning firearm relinquishment for an individual who is subject to a protection order or has been convicted of certain classes of misdemeanor crimes are often complex. We hope this article has helped to clarify the elements and scope of the federal laws and their relationship to the analogous state laws. We also hope judges reading this article will have learned some useful strategies that they can incorporate into their daily practice to facilitate compliance with and enforcement of their orders of protection, as well as to help ensure effective operation of the applicable state and federal firearms laws.

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71. *See id.* at 13.

The Parenting of Men Who Batter

Lundy Bancroft

It's Saturday morning in the Franklin home. Breakfast is rushed because Marty, who is 12 years old, and his sister Rhonda, 9, have early soccer games. Their mother, Donna, is scurrying around while her husband, Troy, eats and reads the morning paper. Marty grumbles to his mother, "Ma, hurry up! I told you last week, the coach picks the starting players 20 minutes before game time."*

His mother snaps back, "If you had washed your uniform last night like I asked you to, we wouldn't be in such a hurry." Rhonda pipes in, "I did mine."

Marty shoots his sister a dirty look and says, "Oh, I guess I just can't compete with goody two-shoes here. Hey, maybe my soccer suit is dirty, but at least I don't get the Bitch of the Year Award."

Donna reacts sternly, saying, "Don't talk that way to your sister, young man!" Troy now glances up from his paper, annoyed. "How the hell do you expect Marty to react? If he's not absolutely perfect, both of you are all over him."

"Never mind, Dad," Marty breaks in flippantly, "I'm used to it. If one of them isn't bitching at me, it's the other."

Donna's blood begins to boil as Troy returns to reading. "Your son just called me a bitch. You're his father—you have nothing to say about it?" Troy half rises out of his seat. "Yeah, I do have something to say. If you would conduct yourself like an adult, instead of getting all hysterical, things wouldn't get like this with the children. Don't be so damn sensitive. Marty didn't call you a bitch, he said you bitch at him, which is true. You do."

Marty laughs. Rhonda does too, then immediately feels ashamed toward her mother and turns red in the face. Their mother yells loudly at Troy, "It's not me! You're the problem here, you're just encouraging his bad attitude!"

Troy pounces out of his seat yelling back, "That's enough out of you, you goddamned bitch!" Troy then hurls his newspaper to the floor and shoves Donna hard toward the kitchen door so that she stumbles and falls. "Get the hell out of here, right now," he screams, "or you'll be sorry!" Donna bursts into tears and runs up to the bedroom. Marty and Rhonda are left trembling, although Marty forces a smile and mumbles to Rhonda, "What the hell does Mom expect?"

The published research on children's exposure to domestic violence focuses largely on two aspects of their experience: the trauma of witnessing physical assaults against their mother, and the tension produced by living with a high level of conflict between their parents.[1] As important as these factors are, they reflect only one aspect of many complex problems that typically pervade the children's daily lives. The bulk of these difficulties have their roots in the fact that the children are living with a batterer present in their home. The parenting characteristics commonly observed in batterers have implications for the children's emotional and physical well-being, their relationships with their mothers and siblings, and the development of their belief systems. All of these issues need to be examined in making determinations regarding custody and visitation in cases involving histories of domestic violence.

THE BATTERER PROFILE: IMPLICATIONS FOR CHILDREN

Batterers have been established to have a profile that distinguishes them from non-battering men. Each of these identified characteristics can have an impact on children's experience and development. Some of the critical areas that court personnel should be aware of include:

Control: Coerciveness is widely recognized as a central quality of battering men.[2] It is commonly true that one of the spheres of the battered woman's life that is subject to heavy control by the batterer is her parenting. In some cases, this control begins even before the children are born, through such behaviors as the batterer refusing to use birth control, requiring or forbidding the woman to terminate a pregnancy, or causing her pregnancy through a sexual assault.[3] Once children are born, the batterer may overrule the mother's parenting decisions, and he may enforce his will by verbally abusing the mother or physically assaulting her when he is angry about the children's behavior or when she does not cede to his parenting directives,[4] as the opening scenario illustrates. Researchers have found that battered women are far more likely than other women to feel that they must alter their parenting styles when their partners are present.[5] Thus, children are being raised in a context where their mother cannot safely use her best judge-

Footnotes

* Though fictional, this scenario incorporates family dynamics from a number of the author's cases.

1. *See, e.g.*, B.B. Robbie Rossman et al., Children and Interparental Violence: The Impact of Exposure (2000).
2. *See* Sally A. Lloyd & Beth C. Emery, The Dark Side Of Courtship: Physical and Sexual Aggression (2000)
3. Some history of intimate partner rape is present in 25% to 40% of domestic violence cases, and statistics that include other kinds of sexual assault to battered women are even higher. *See* Patricia Mahoney & Linda Williams, *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*, in Partner Violence: A Comprehensive Review of 20 Years of Research, at 113-157 (J. Jasinksi & L. Williams, eds., 1998).
4. *See* James Ptacek, *The Tactics and Strategies of Men Who Batter: Testimony from Women Seeking Restraining Orders*, in Violence Between Intimate Partners: Patterns, Causes, and Effects, at 104-123, (A. Cardarelli, ed., 1997).
5. *See* George W. Holden & Kathy L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women,* 62 Child Development 311, 311-327 (1991).

ment about how to care for them.

Entitlement: Batterers generally have much higher rates than other men of believing that they are entitled to use violence toward female partners when they deem it to be necessary,[6] and to take an overall stance in the relationship of claiming superior status and expecting catering and deference.[7] Troy exhibits his entitlement and sense of superiority by, for example, contributing nothing to the work of a very busy morning and actively encouraging his son's negative attitudes toward females.

Clinical observation indicates that the higher a batterer's level of entitlement, the more likely he is to chronically behave in selfish and self-centered ways. He may, for example, become irate or violent when he feels that his partner is paying more attention to the children than to him, which can make it difficult for the mother to properly meet the children's physical and emotional needs. Similarly, he may treat the mother like a servant in front of the children, so that they learn to disrespect her and treat her in a similar fashion. In addition, many batterers cause *role reversal* in their relationships with their children, where the children are made to feel responsible to take care of the battering parent and meet his needs. This can create a burden of parentification for the children, in addition to making them more vulnerable to sexual abuse.

Manipulation: A batterer commonly is manipulative of family members, using such tactics as dishonesty, false promises, and the sowing of divisions to increase his power and escape accountability.[8] Batterers tend, for example, to cultivate a public image of generosity and kindness. When children observe the batterer's popularity in the community, they can become more likely to blame their mother or themselves for the abuse in the home, because other people do not seem to believe that their father has a problem. Manipulation may also involve lying to the children, or drawing them in as agents of the abuse, as exhibited by Troy when he get his children to laugh at inappropriate jokes about their mother. Children who are traumatized by exposure to violent acts are at greater risk of being psychologically harmed by such manipulation than children who are less emotionally vulnerable.

A batterer commonly is manipulative of family members, using such tactics as dishonesty, false promises, and the sowing of divisions to increase his power . . . .

Possessiveness: Men who batter commonly perceive their partners as owned objects,[9] and this outlook extends to their children in many cases. Many clients of mine have, for example, defended their physical or sexual abuse of the children by insisting that it is their paternal prerogative to treat their children as they see fit. Batterers' possessiveness toward both partners and children can have important post-separation implications. For example, batterers have been found to seek custody at higher rates than non-battering fathers do,[10] and to be at their greatest risk of committing homicide of women or children during and after the break-up of a relationship.[11] Parents who perceive children as possessions have been observed to have high rates of child abuse in general,[12] and the link between such attitudes and incest perpetration is widely noted.[13]

This is a brief and partial review of the batterer profile. Each of the characteristics commonly found in batterers, including denial and minimization about their abusive and violent actions, battering in multiple relationships, and high level of resistance to change, can have an important impact on children who are exposed to them.[14]

RISK OF CHILD ABUSE

The various published studies of physical abuse of children by batterers indicate that roughly half of batterers repeatedly assault children in the home, a rate about 700% that of non-battering men.[15] An equally substantial body of research finds batterers four or more times more likely than other men to sexually abuse their children or stepchildren. Exposure to domes-

6. *See* Jay Silverman & G. Williamson, *Social Ecology and Entitlements Involved in Battering by Heterosexual College Males: Contributions of Family and Peers,* 12 VIOLENCE & VICTIMS 147, 147-164 (1997).
7. *See* D. Adams, Empathy and Entitlement: A Comparison of Battering and Nonbattering Husbands (unpublished doctoral dissertation [available from Emerge, 2380 Massachusetts Ave., Cambridge, MA, 02140]); *see also* JEFFREY EDLESON & RICHARD TOLMAN, INTERVENTION FOR MEN WHO BATTER: AN ECOLOGICAL APPROACH (1992).
8. *See* LUNDY BANCROFT & JAY SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).
9. *See* Adams, *supra* note 7.
10. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE & THE FAMILY, VIOLENCE & THE FAMILY (1996).
11. *See* L. LANGFORD, ET AL., HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995 (1999); NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE (1999).
12. *See* C. Ayoub, et al., *Alleging Psychological Impairment of the Accuser to Defend Oneself Against a Child Abuse Allegation: A Manifestation of Wife Battering and False Accusation*, in ASSESSING CHILD MALTREATMENT REPORTS: THE PROBLEM OF FALSE ALLEGATIONS, at 191-207 (M. Robin, ed., 1991).
13. *See* ERIC LEBERG, UNDERSTANDING CHILD MOLESTERS: TAKING CHARGE (1997); *see also* R.K. Hanson, et al., *The Attitudes of Incest Offenders: Sexual Entitlement and Acceptance of Sex with Children*, 21 CRIMINAL JUSTICE & BEHAVIOR 187, 187-202 (1994); ANNA SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE (1988).
14. *See* BANCROFT & SILVERMAN, *supra* note 8.
15. *See* Murray A. Straus, *Ordinary Violence, Child Abuse, and Wife-Beating: What Do They Have in Common?* in PHYSICAL VIOLENCE IN AMERICAN FAMILIES at 403-424 (Murray Straus & Richard Gelles, eds.,1990); *see also* Lee H. Bowker, et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE at 159-174 (Kersti Yllo & M. Bograd, eds., 1988); E. Suh & E.M. Abel, *The Impact of Spousal Violence on the Children of the Abused*, 4 JOURNAL OF INDEPENDENT SOCIAL WORK 27, 27-34 (1990).

No evidence currently exists to suggest that the risk of child abuse by a batterer declines post-separation . . . .

tic violence is one of the top risk factors for incest victimization.[16] The literature on incest perpetrators describes a profile that is compatible with battering, including a high level of control, entitlement, and manipulativeness, and a tendency to view children as owned objects.[17]

No evidence currently exists to suggest that the risk of child abuse by a batterer declines post-separation, and such risk may *increase*. Batterers tend to be enraged and retaliatory for an extended period after a relationship ends, contributing to volatility in their behavior, and they sometimes increase their targeting of the children as a way to frighten or upset the mother because the separation causes a loss of access to avenues to abuse the mother directly.[18] The risk to children may also be augmented by the fact that the battered mother is no longer able to monitor the batterer's treatment of the children during his times of contact with them. Clinicians sometimes observe that courts are reluctant to believe reports from battered women regarding mistreatment of their children during court-ordered visitation, which can sometimes leave children vulnerable to ongoing abuse by the batterer.

THE BATTERER'S PARENTING STYLE

Apart from the risk of overt child abuse, batterers often tend toward authoritarian, neglectful, and verbally abusive approaches to child-rearing.[19] The effects on the children of these parenting weaknesses may be intensified by their prior traumatic experience of witnessing violence. For example, children whose battering fathers yell or bark orders at them appear to be more shaken by these experiences than children who have not been exposed to violence, as they are aware of his capacity for physical assault whether or not he has ever assaulted them directly. My colleagues and I also often observe that a batterer's authoritarian or intimidating behaviors in the children's presence, or toward them directly, can cause traumatic memories to be reawakened in them, with resultant increase in their symptoms and interference in their social and intellectual development. Batterers have also been observed to be manipulative of children, and to exhibit neglectful parenting, including inadequate supervision of safety.[20] Additional crucial problems in the parenting of men who batter include the use of the children as weapons against the mother and the undermining of the mother's authority, which are discussed further below, with important post-separation implications.

THE BATTERER AS ROLE MODEL

Boys who are exposed to domestic violence show dramatically elevated rates of battering their own partners as adolescents or adults.[21] Research suggests that this connection is a product largely of the values and attitudes that boys learn from witnessing battering behavior.[22] Daughters of battered women show increased difficulty in escaping partner abuse in their adult relationships.[23] Both boys and girls have been observed to accept various aspects of the batterer's belief system,[24] including the view that victims of violence are to blame, that women exaggerate hysterically when they report abuse, that males are superior to females, and that the use of violence against women by men is justifiable.[25] Donna and Troy's son, Marty, exhibits, for example, his absorption of his father's negative and degrading attitudes toward females, which he acts out toward his sister, Rhonda, and toward his mother.

The destructive influence that batterers can have on children's belief systems, and therefore on their future behavior, has not received adequate attention in most professional publications, and appears to be largely overlooked in crafting custody and visitation determinations. Children who are traumatized may be particularly easy to influence because of their elevated needs for belonging, security, and self-esteem. Therefore, decisions to place children in unsupervised contact with a batterer should be made with great care.

UNDERMINING OF THE MOTHER'S AUTHORITY

Battering is inherently destructive to maternal authority. As we saw with Troy in the opening scenario, the batterer's behavior provides a model for children of contemptuous and aggressive behavior toward their mother. The predictable result, confirmed by many studies, is that children of battered women have increased rates of violence and disobedience toward their

16. *See e.g.*, Laura McCloskey, et al., *The Effect of Systemic Family Violence on Children's Mental Health*, 66 CHILD DEVELOPMENT 1239, 1239-1261 (1995); G. Paveza, *Risk Factors in Father-Daughter Child Sexual Abuse*, 3 JOURNAL OF INTERPERSONAL VIOLENCE 290, 290-306 (1988); Elizabeth A. Sirles & Pamela J. Franke, *Factors Influencing Mothers' Reactions to Intrafamily Sexual Abuse*, 13 CHILD ABUSE & NEGLECT 131, 131-139 (1989). *See also*, Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, COURT REVIEW, Spring 1998, at 12.
17. *See, e.g.*, LEBERG, *supra* note 13; ANNA SALTER, TRANSFORMING TRAUMA: A GUIDE TO UNDERSTANDING AND TREATING ADULT SURVIVORS OF CHILD SEXUAL ABUSE (1995).
18. *See* BANCROFT & SILVERMAN, *supra* note 8
19. *See* MARGOLIN ET AL., FAMILY INTERACTION PROCESS: AN ESSENTIAL TOOL FOR EXPLORING ABUSIVE RELATIONS (1996).
20. *See* BANCROFT & SILVERMAN, *supra* note 8.
21. *See* Silverman & Williamson, *supra* note 6.
22. *See* Fred Markowitz, *Attitudes and Family Violence: Linking Intergenerational and Cultural Theories,* 16 JOURNAL OF FAMILY VIOLENCE 205, 205-218 (2001). *See also,* Silverman & Williamson, *supra* note 6.
23. *See* S. Doyne, et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority,* 50 JUVENILE AND FAMILY COURT JOURNAL 1, 1-12 (1999).
24. D. J. Hurley & Peter Jaffe, *Children's Observations of Violence: II, Clinical Implications for Children's Mental Health Professionals,* 35 CANADIAN JOURNAL OF PSYCHIATRY 471, 471-476 (1990).
25. *See* BANCROFT & SILVERMAN, *supra* note 8.

mothers.[26] These inherent effects are aggravated in many cases by the batterer's deliberate weakening of the mother's ability to set limits, which may be accompanied by violence toward her regarding issues about the children.[27] We saw Troy, for example, give explicit approval to his son's disrespectful language toward Donna. Troy is able in this way to enhance his own power in the family and ensure that his wife will appear to be an ineffective or volatile parent. Troy then goes on to assault Donna to retaliate against her for her efforts to stand up for herself and for her daughter.

IMPACT ON FAMILY DYNAMICS

Many other behaviors that are commonly observed in batterers can distort family functioning. Some common examples include:

Interfering with a mother's parenting. Partners of my battering clients make frequent reports of being prevented from picking up a crying infant or from assisting a frightened or injured child, of being barred from providing other basic physical or emotional care, and even of being forbidden to take children to medical appointments. Interference of this kind can cause the children to perceive their mother as uncaring or unreliable, feelings the batterer may reinforce by verbally conditioning the children through statements such as, "Your mother doesn't love you" or "Mommy only cares about herself." The trauma caused to the mother by domestic violence can also sometimes make it more difficult to be fully present and attentive for her children,[28] which the batterer may then use to his advantage in a custody or visitation dispute.

Sowing divisions within the family. In our opening scenario, Troy uses favoritism to build a special relationship with one of his children (Marty), demonstrating a dynamic that occurs frequently in the parenting of men who batter. As other researchers have noted, the favored child is particularly likely to be a boy, and the batterer may bond with him partly through encouraging a sense of superiority to females.[29] Batterers may also sow divisions by deliberately creating or feeding familial tensions. These behaviors are a likely factor in the high rate of intersibling conflict, including violence, observed in families exposed to battering behavior.[30] Descriptions of division-sowing behaviors in incest perpetrators[31] are remarkably similar to clinical observations of these behaviors in men who batter.[32]

Use of the children as weapons. Many batterers use children as a vehicle to harm or control the mother,[33] through such tactics as destroying the children's belongings to punish the mother, requiring the children to monitor and report on their mother's activities, or threatening to kidnap or take custody of the children if the mother attempts to end the relationship. These behaviors draw the children into the abuser's behavior pattern. Post-separation, many batterers use unsupervised visitation as an opportunity to abuse the mother through the children by alienating them from the mother, encouraging them to behave in destructive or defiant ways when they return home, or returning them dirty, unfed, or sleep-deprived from visitation.[34] These important dynamics rarely appear to be taken into account in crafting custody and visitation plans.

These behaviors are a likely factor in the high rate of intersibling conflict . . . observed in families exposed to battering behavior.

Retaliation for the mother's efforts to protect the children. A mother may find that she is assaulted or intimidated if she attempts to prevent the batterer from mistreating the children, or may find that he harms the children more seriously to punish her for standing up for them, and therefore may be forced over time to stop intervening on her children's behalf.[35] In our opening scenario, Troy's assault on Donna was a direct result of her efforts to protect her daughter from psychological harm, and may have the effect of intimidating her the next time she would like to protect her children from him. This dynamic can lead children to believe that their mother doesn't care about the ways in which the batterer is hurting them, because she sometimes maintains a frightened silence in the face of his behavior. This perception in children can be exacerbated in cases where a court requires a battered woman to send her children to visitation with their father despite their objections. It therefore becomes critically important for children who have been exposed to domestic violence not to be required to see or speak with the perpetrator when they are voicing or demonstrating a preference not to do so.

POST-SEPARATION IMPLICATIONS

Custody and visitation determinations in the context of domestic violence need to be informed by an awareness of the

26. *See* Peter Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals,* in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH & APPLIED ISSUES at 371-408 (George W. Holden, et al., eds., 1998).
27. *See* Ptacek, *supra* note 4.
28. A. Levendosky & Sandra Graham-Bermann, *Trauma and Parenting: An Addition to an Ecological Model of Parenting*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE at 25-36 (Robert Geffner, et al., eds., 2000).
29. *See* Janet R. Johnston & Linda E.G. Campbell, *Parent-Child Relationships In Domestic Violence Families Disputing Custody*, 31 FAMILY & CONCILIATION COURTS REVIEW 282, 282-298 (1993). Although Johnston and Campbell make observations that are very similar to mine regarding family functioning in domestic violence cases, they reach almost opposite conclusions, greatly minimizing the risk to children from unsupervised contact with most batterers. For a detailed critique of their formulations, *see* BANCROFT & SILVERMAN, *supra* note 8.
30. *See* Hurley & Jaffe, *supra* note 24.
31. *See* LEBERG, *supra* note 13.
32. *See* BANCROFT & SILVERMAN, *supra* note 8.
33. *See* J. Erickson & A. Henderson, *Diverging Realities: Abused Women and Their Children,* in EMPOWERING SURVIVORS OF ABUSE: HEALTH CARE FOR BATTERED WOMEN AND THEIR CHILDREN at 138-155 (Jacqueline Campbell, ed., 1998).
34. *See* BANCROFT & SILVERMAN, *supra* note 8.
35. *See, e.g.,* ANN JONES, NEXT TIME SHE'LL BE DEAD (1994).

Children also need a sense of safety in order to heal well, which may not be fostered by leaving them in the unsupervised care of a man whose violent tendencies they have witnessed . . . .

destructive parenting behaviors exhibited by many batterers, and in particular the ways in which these behaviors may damage or eliminate the potential for children to heal psychologically and socially from the traumatic experiences they have endured. Exposure to a batterer's inappropriate parenting has especially important implications for children who are struggling with two sets of psychological injuries, one from previous witnessing of domestic violence and the other from their parents' divorce.[36]

In evaluating custody and visitation and crafting appropriate parenting plans, the following elements require close examination:

The children's healing needs. There is a wide consensus that children's recovery from exposure to domestic violence and from divorce depends largely on the quality of their relationship with the non-battering parent and with their siblings.[37] Therefore, visitation plans should take into account whether the batterer is likely, based on his past and current behavior, to continue (or begin) to undermine the mother's authority, interfere with mother-child relationships, or cause tension between siblings, all of which can interfere significantly with children's healing. Children also need a sense of safety in order to heal well,[38] which may not be fostered by leaving them in the unsupervised care of a man whose violent tendencies they have witnessed, even if they feel a strong bond of affection for him.[39]

The need for detailed assessment. A batterer's history of parenting behaviors must be investigated carefully, to assess the presence of any of the common problems described above, with particular attention to the risk that he may use children as a vehicle for continued abuse of the mother. Such assessment cannot be properly performed through reliance on clinical evaluation of the father, mother, or children. It must involve extensive collecting of evidence from other sources of information, such as school personnel, witnesses to important events, police and medical reports, child protective records, telephone and mail communications, and other sources. Courts must also ensure that custody evaluators have extensive training on the multiple sources of risk to children from unsupervised contact with batterers, such as the ones discussed above.[40]

Safely fostering father-child relationships. Except in cases where a batterer has been terrifyingly violent or threatening to the mother in the presence of the children, or has abused the children directly in a severe and repeated form, it is common for children to request some degree of ongoing contact with their battering fathers. In many cases, they may benefit from such contact as long as safety measures are provided, the contact is not overly extensive, and the abuser is not permitted to cause setbacks to the children's healing process.

One way to foster these goals is to increase the use of professionally supervised visitation, ideally based in a visitation center. Any future transition to unsupervised visitation should not be treated as assumed or automatic, but should instead be conditioned on the batterer completing a high-quality batterer intervention program, dealing seriously with any substance abuse issues he has, and showing other indications of being serious about changing his abusive behavior and accepting responsibility for his past actions.[41]

Where careful assessment leads to the conclusion that unsupervised visitation is physically and emotionally safe for the children, visits that are kept relatively short in duration and that do not include overnight stays can help to reduce the batterer's ability to damage children's critical healing relationship with their mother. Such restricted contact can allow the children to meet their need to have an ongoing bond with their

36. The great majority of children who live with a batterer directly see or hear one or more acts of violence. *See* J. Kolbo, et al., *Children Who Witness Domestic Violence: A Review of Empirical Literature,* 11 JOURNAL OF INTERPERSONAL VIOLENCE 281, 281-293 (1996). There have also been a substantial number who have witnessed sexual assaults against their mother: *See* Janis Wolak & David Finkelhor, *Children Exposed to Partner Violence,* in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH at 73-111 (Jana Jasinksi & Linda M. Williams, eds., 1998).
37. *See* Sheryl Heller, et al., *Research on Resilience to Child Maltreatment: Empirical Considerations,* 23 CHILD ABUSE & NEGLECT 321, 321-338 (1998); Sandra Graham-Bermann, *The Impact of Woman Abuse on Children's Social Development: Research and Theoretical Perspectives*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH & APPLIED ISSUES, at 21-54 (George Holden, et al., eds., 1998).
38. *See* Bessell A. van der Kolk & Alexander C. McFarlane, *The Black Hole of Trauma*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY & SOCIETY at 3-23 (Bessell A. van der Kolk, et al., eds., 1996).
39. Note that both children and adults can become strongly bonded in an unhealthy way to a perpetrator of abuse through a process known as *traumatic bonding*. *See* Donald Dutton, & Susan Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY: AN INTERNATIONAL JOURNAL 139, 139-155 (1983). *See also* Donald Dutton, & Susan Painter, *The Battered Woman Syndrome: Effects of Severity and Intermittency of Abuse,* 63 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 614, 614-622 (1993); BEVERLY JAMES, HANDBOOK FOR TREATMENT OF ATTACHMENT-TRAUMA PROBLEMS IN CHILDREN (1994). I have observed that evaluators who assess the strength of children's bonds with their battering fathers rarely address the role of traumatic bonding.
40. A detailed guide to performing proper custody and visitation evaluations in the context of domestic violence allegations is available. *See* BANCROFT & SILVERMAN, *supra* note 8.
41. It should be noted that batterer programs that are run on a "power-and-control" model have been found to be more effective than was previously believed, especially if any attendant drug and alcohol issues are also properly addressed. *See* EDWARD W. GONDOLF, BATTERER INTERVENTION SYSTEMS (2001).

father and to share key life events, while simultaneously limiting his influence as a destructive role model, which, as already noted here, has been shown to put them at very high risk for future involvement in domestic violence A plan of this kind also helps to ensure that children feel securely and safely attached to their primary home, and to feel that the court system is empowering their mother to protect them, elements that are indispensable to recovery of traumatized children.

CONCLUSION

Children who are exposed to domestic violence have multiple potential sources of emotional and physical injury from the batterer's behavior, well beyond the witnessing of assaults alone; their potential for recovery from past domestic violence can be compromised by ongoing unsupervised contact with their father. Additionally, children are at risk to develop destructive attitudes and values that can contribute to behavioral and developmental problems. Abused mothers face many obstacles in attempting to protect their children from a batterer, and can benefit when their protective efforts receive strong support from courts and child protective services. Family and juvenile court personnel, as well as those working in child protection agencies, can strengthen the quality of their interventions on behalf of children by deepening their understanding of the common patterns that may appear in the parenting of men who batter, including ways in which a batterer may damage mother-child and sibling relationships and make it difficult for a mother to parent her children. Courts can increase their effectiveness in domestic violence cases involving children by focusing on maternal and child safety, and by seeking ways to reduce the batterer's influence as a role model, particularly for his sons.

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Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 3,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review*'s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 715-3822. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

The Resource Page: Focus on Domestic Violence

BOOKS

PETER JAFFE, NANCY LEMON & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY. Sage Publishing, 2002 ($29.95). 194 pp.

This new book by renowned authors and researchers focuses on the complexity of the challenges facing judges, lawyers, legislators, and mental health professionals in developing safe and effective strategies for resolving custody disputes. The authors outline the essential differences between custody disputes with and without allegations and findings of domestic violence, and the different analysis and distinct interventions by judges, policymakers, and mental health professionals necessary in domestic violence cases. The volume also addresses difficult issues such as parent alienation syndrome, false allegations, and mutual abuse. The authors offer recommendations for legislative improvements, increased training for legal and mental health professionals, enhanced services and programs, and the development of new policies to deal with domestic violence in custody disputes.

JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES. Northeastern University Press, 1999 ($50 hard cover, $20 paperback). 224 pp.

Sociology professor James Ptacek studied domestic violence restraining order practices in two Massachusetts courts, and examined the role of judges and the court system (including clerks and other court officers and agents) in the process of obtaining restraining orders. Ptacek's analysis focuses on the history of the law related to domestic violence, the effect of domestic violence on women's lives, and the courtroom negotiations between women and judges in restraining order hearings. Ptacek identifies a number of judicial responses that can help assure battered women's safety.

LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS. Sage Publishing, 2002 ($32.95). 256 pp.

Lundy Bancroft and Jay Silverman rely on their extensive experience counseling men who batter to identify how abusive and controlling behaviors can affect the atmosphere in the home. Direct and indirect impacts of domestic abuse on the children in the home are discussed, and checklists of solutions for courts, evaluators, judges, criminal justice personnel and other professionals who work with domestic violence victims and perpetrators are included. Judges and other professionals dealing with domestic violence cases can develop action plans for evaluating how they respond to domestic violence custody cases based on the information in this book. (For an overview of themes explored in greater detail in this book, read Bancroft's article at page 44 of this issue.)

WEB RESOURCES

American Bar Association
Commission on Domestic Violence
http://www.abanet.org/domviol/home.html

This is the home page for the ABA Commission on Domestic Violence. The site provides information for attorneys, judges, and other professionals who work with the judicial system on issues of domestic violence. Included are several public education brochures, including *Why Abuse Victims Stay*, *Know Your Rights: Domestic Violence*, and *Domestic Violence: Safety Tips for You and Your Family*. Some of the brochures are available in both English and Spanish.

United States Justice Department
Office on Violence Against Women
http://www.ojp.usdoj.gov/vawo

This is the home page for the U.S. Justice Department's Office on Violence Against Women. The site provides links to information, including the most recent statistical information on violence against women, including domestic violence and sexual assault. The site includes a section identifying model programs for combating domestic violence, information on federal grant programs, and a 16-chapter "toolkit" to end violence against women.

Family Violence Prevention Fund
http://www.endabuse.org/programs/justice

The Family Violence Prevention Fund offers training and information for judges who work with all aspects of family violence. The website offers information about upcoming trainings, and includes resource information for judges who want to know more about judicial solutions to the problem of family violence.

Minnesota Center Against Violence and Abuse (MINCAVA)
http://www.mincava.umn.edu

MINCAVA, the Minnesota Center Against Violence and Abuse located at the University of Minnesota, offers an extensive and nationally relevant resource of information, statistical research, and articles related to violence. MINCAVA provides information about domestic violence and child abuse, along with all other types of violence in our society.

National Council of Juvenile and Family Court Judges
http://www.ncjfcj.unr.edu

The National Council of Juvenile and Family Court Judges maintains a website providing information and links to civil, family, and criminal state laws related to domestic violence for every state and the District of Columbia. The National Council of Juvenile and Family Court Judges also can provide information to judges about domestic violence issues, full faith and credit for protective orders, and firearms and domestic violence. Their resource center on domestic violence can be reached at 1-800-527-3223.

National Center for State Courts
http://www.ncsconline.org

The National Center for State Courts has a number of resources online. A recent search of its website for "domestic violence" turned up 200 entries, including a detailed Family Violence Resource Guide. Also included is the publication *Family Violence Forum,* which provides regular updates about approaches taken by various courts in combating family violence.

American Judges Association
http://aja.ncsc.dni.us/domviol/booklet.html

The American Judges Association and American Judges Foundation have published an introductory booklet for judges handling domestic violence cases. It provides a useful overview of the literature in the area and the steps judges can take in appropriately handling cases involving allegations of domestic violence.

PRIOR *COURT REVIEW* ARTICLES

Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe*, COURT REVIEW, Fall 1998, at 23 (available at http://aja.ncsc.dni.us/courtrv/cr35-3/CR35-3KunceField.pdf).

Randal B. Fritzler & Lenore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, COURT REVIEW, Spring 2000, at 28 (available at http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9FritzlerSimon.pdf).

Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, COURT REVIEW, Spring 1998, at 12 (available at http://aja.ncsc.dni.us/courtrv/cr35-1/CR35-1McDonald.pdf).

Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, COURT REVIEW, Spring 2000, at 40 (available at http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9Paradine.pdf).

Note: *Court Review* articles from 1998 to the present are available on the web at http://aja.ncsc.dni.us/courtrv/review. html).

The Resource Page

NEW REPORTS

NATIONAL CENTER FOR STATE COURTS, 2002 REPORT ON TRENDS IN THE STATE COURTS (2002). 99 pp.
http://www.ncsconline.org/D_KIS/Trends/Trends02MainPage.html

Each year, the National Center for State Courts produces a report on trends in state courts. These reports attempt to identify key areas, to report the latest developments, and to forecast potential future ones.

This year's report includes a separate, 43-page "environmental scan" produced jointly by the National Center and Futurist.com under a grant from the State Justice Institute. For anyone involved in court planning or interested in where things may go in the future, this environmental scan—along with the rest of this trends report—would be an excellent starting point.

The environmental scan attempts to identify events, trends, or other factors that will shape the future. These researchers sought to provide background that would let courts and court-related organizations evaluate their long-term programs and potential against the various conditions—internal and external—that may affect courts in the coming years. Areas in which trends are surveyed include population demographics, culture, budget, technology, and ethics, as well as several court-specific categories, such as criminal justice, civil justice, and juvenile justice.

In addition to the broad overview provided by the environmental scan, the trends report also includes short (3- to 5-page) essays describing trends in specific areas. Topics include dealing with present budget woes, handling death penalty cases, the paperless law practice, teen courts, and public access to private data found in court files.

NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES (AS OF OCTOBER 2002). 12 pp.
http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal1002Pub.pdf

The National Center for State Courts has published an annual survey of state judicial salaries for more than 20 years. While judicial compensation is always of interest, this year's edition contains some new features that make it especially noteworthy. First, in addition to the traditional rankings of judicial salaries by state, a separate comparison is provided this year for trial judge salaries taking into account a cost-of-living adjustment for each state. Second, an analysis is provided of judicial salary increases over the past 10 years as compared to the rate of inflation.

The cost-of-living-adjusted salary data will be of interest to many. For example, although superior court judges in the District of Columbia receive a salary of $150,000, it amounts to only $114,000, once adjusted. An even larger difference exists for New Jersey superior court judges, whose actual salary of $141,000 is adjusted to $98,000. By comparison, the $108,000 salary of a Missouri circuit court judge, once adjusted, amounts to $116,000. The comparison certainly suggests that the District of Columbia and New Jersey judges are not doing as well as the mere salary data might indicate.

The salary data adjusted by cost of living is only as good as the index used, however, and there may not be sufficient reliable data available. To make the cost-of-living adjustment, the National Center's staff has used the ACCRA cost-of-living index. ACCRA is a non-profit organization formerly known as the American Chamber of Commerce Researchers Association (and now found on the web at www.accra.org). It still relies for its data on local chambers of commerce or other economic development organizations that choose to participate in the program, making the data neither randomly selected nor chosen in some other scientifically prescribed manner. It now includes only cities with populations above 50,000. Three states—Maine, New Hampshire, and Rhode Island—have no participating chambers or other researchers, so that no cost-of-living data is available from ACCRA for them. Thus, while the cost-of-living-adjusted salary data is of interest, its accuracy is lessened by these underlying problems with the ACCRA data.

The comparison of salary increases over the decade from 1991 to 2001 showed that judicial salaries actually ran slightly ahead of inflation, based on increases during the last half of that period. We suspect that this small gain will be eroded by the budget problems most states have experienced during 2002 and 2003.

WEBSITES OF INTEREST

Online Course for Judges
on Handling Mass Tort Cases
http://www.ncsconline.org/D_ICM/DistLrnBlkBd.htm

The National Center for State Courts has created and posted an online educational course for judges handling mass tort cases. The online course is intended for use by state or federal judges. enrollment is easy and the course material is easily accessible. The course was created under a State Justice Institute grant in collaboration with the Conference of Chief Justices.

FOCUS ON DOMESTIC VIOLENCE

The Resource Page focuses on resources that can help judges handle cases involving domestic violence on pages 50-51.