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Context Is Everything:

Victims Who Stand Accused

Teresa M. Garvey

Thanks to significant reforms over the past few decades, the American justice system today recognizes that intimate-partner violence is not a private wrong, but an evil that society as a whole condemns. Courts routinely issue protective orders to enhance victim safety and punish convicted batterers¹ with sentences commensurate with the seriousness of the harm they inflict. However, the dynamics of abuse and the pernicious effects of ongoing violence are not always recognized or taken into proper account when a victim of battering stands accused of some sort of wrongdoing, whether in criminal court or in the course of family-court proceedings.

Victims of battering are often fearful of finding themselves in court in any capacity because they have been subjected repeatedly to threats about how the batterer will “destroy” them in court. They have become convinced, based on what the batterer has told them (and perhaps based on prior negative experiences with the justice system), that no one will believe them. Victims have seen firsthand how the batterer has been able to manipulate others (police, marriage counselors or therapists, family, neighbors, clergy, and the courts) into believing the victim is to blame for whatever problems the couple or their children are experiencing.² Batterers are often skilled at presenting a calm, reasonable demeanor to responding officers, judges, or other court personnel, while victims may present as emotional or inarticulate as a result of the trauma they have experienced.³

Judges presiding over criminal or civil actions in which victims of battering stand accused of wrongdoing—as parties or as witnesses—are charged with the responsibility of making factual findings, requiring them to assess the credibility of witnesses and competing claims. They are called upon to control the litigants, to determine the admissibility of evidence, and to fashion a just result. To do justice in these cases, judges must possess a firm grasp of the dynamics of intimate-partner violence—the tactics employed by batterers in their pursuit of power and control over victims and the effects these tactics have on victims and

their children. Where victims are proven guilty of violating the law for reasons attributable to the effects of battering, courts should consider those reasons in imposing penalties that hold victims *appropriately* accountable. Most important, courts must not allow batterers to exploit the legal system as a weapon to harass, intimidate, and harm their victims.

This article will discuss some of the common scenarios judges may encounter in which victims of abuse are accused of wrongdoing in criminal court (whether the nominal defendant or not) or in family-court proceedings and will suggest actions that judges can take to ensure the justice process is not co-opted by the abuser. Arriving at a just result in these situations demands consideration of the context giving rise to the victim’s act or to the allegation of unlawful conduct. As a preliminary matter, issues of credibility—applicable in any court setting where the batterer and victim may both be called upon to testify as witnesses—must be considered.

CREDIBILITY OF VICTIMS AND CHILDREN

Intimate-partner violence is traumatic to victims⁴ and to their children.⁵ Children may be witnesses to frightening violence against a parent or may be physically injured themselves as a result of intentional violence directed against them⁶ or as a result of intervening to protect a parent being assaulted. In addition, victims and their children are frequently subjected to intimidation and manipulation before, during, and after the acts of violence.⁷ Trauma may adversely affect the ability of these witnesses to recall and relate details of what occurred, while intimidation and manipulation often cause victims to remain with or return to the abuser, to recant or to minimize the abuse, to refuse to testify, or even to testify on behalf of the abuser. For factfinders to accurately assess credibility, they must consider the possibility that the actions of the parties and their demeanor in court may be the product of a history of violence (and accompanying trauma), intimidation, or manipulation.

Footnotes

1. The terms “battering” and “abuse” will be used interchangeably to describe “an ongoing patterned use of intimidation, coercion, and violence as well as other tactics of control to establish and maintain a relationship of dominance over an intimate partner.” ELLEN PENCE & SHAMITA DASGUPTA, PRAXIS INTERNATIONAL, INC., RE-EXAMINING “BATTERING”: ARE ALL ACTS OF VIOLENCE AGAINST INTIMATE PARTNERS THE SAME? 5 (2006), available at http://www.ncdsv.org/images/Praxis_ReexaminingBattering_June2006.pdf. It is to be distinguished from acts of violence against a partner in a different context, with a different motivation.
2. LUNDY BANCROFT, JAY SILVERMAN & DANIEL RITCHIE, THE BATTERER AS PARENT 17-18 (2012).
3. Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers’ Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1066-67, 1076-

77 (2011).

4. CAROLE WARSHAW, CRIS SULLIVAN & ECHO RIVERA, NATIONAL CENTER ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, A SYSTEMATIC REVIEW OF TRAUMA-FOCUSED INTERVENTIONS FOR DOMESTIC VIOLENCE SURVIVORS (2013), available at http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH_EBP_LitReview2013.pdf.
5. *Children and Domestic Violence*, THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/content/children-and-domestic-violence>.
6. Intimate-partner violence strongly correlates with child abuse, with batterers physically abusing the children at a rate conservatively estimated at 40%. Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578, 596 (1998).
7. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 93-98.

EFFECTS OF TRAUMA

Neuroscientists have been studying the effects of trauma on the brain, including the ways in which memories are recorded and accessed. While understanding of these processes is far from complete, studies suggest that during a traumatic event, details essential for survival are stored and later accessed far more readily than such descriptive details as the exact sequence of events or the actual words that may have been uttered.⁸ Without a rudimentary understanding of this phenomenon, a factfinder may conclude that the witness has had a “convenient lapse of memory” about crucial details of the event. A related possibility is that a witness, pressured into believing he or she *ought* to be able to recall certain details, will confabulate—filling in details with what seems to have been likely, rather than relating events as they were experienced and recorded in the brain.⁹ As a result, the traumatized witness’s statements to police may be inconsistent with later statements or with courtroom testimony, and accounts of events may be disorganized due to the difficulty of retrieving details and the fact that additional memories may emerge over time.¹⁰ When victims or witnesses are describing an event that was traumatic for them, inconsistencies may be a product of trauma rather than an attempt to deceive.¹¹ The witness may be quite literally providing the most accurate information possible.

EFFECTS OF BATTERING

Even where the effect of trauma on memory is not a significant factor, victim behavior in response to ongoing violence may be difficult for factfinders to understand without a grasp of the dynamics of abuse and its effects. In the absence of explanation, factfinders may question the victim’s credibility for such actions as remaining with or returning to the batterer, failing to report the abuse to the police, requesting to “drop” criminal charges or protective orders, failing to appear in court, minimizing or recanting on the stand, or testifying on behalf of the batterer.¹²

Courts around the country are increasingly willing to permit expert testimony to explain the dynamics of battering and its effects so the victim’s credibility can be evaluated in proper context.¹³ Most often, this expert is not a licensed professional who has conducted a psychological examination of the victim; in fact, expert witnesses called to explain victim behavior are most often “blind” to the specific details concerning the parties, the incident at issue, or the history of the relationship.

They may be advocates or other professionals, with or without academic credentials, who have extensive training and/or experience working with victims of domestic violence.¹⁴ The purpose of this type of expert testimony is not to provide a “diagnosis” or opinion whether someone has been a victim of abuse, nor to provide an improper opinion as to the veracity of a report of abuse, but rather to enlighten factfinders about the ways in which victims may be affected by the constant pressures of coercive control on the part of the batterer. These control tactics may include isolating the victim from sources of support like friends and family, depriving the victim of economic independence, threatening the victim with dire consequences if the abuse is disclosed to anyone, or threatening to take the children. In addition, victims are often affected by a sense of shame and self-blame, which may cause them to try to hide the abuse at all costs or to assume responsibility for it.

Because each victim is unique as an individual and faces unique challenges in terms of the type and magnitude of the abuse and the resources available to cope with or to escape the abuse, it is impossible to identify a single set of responses or

When victims or witnesses are describing an event that was traumatic for them, inconsistencies may be a product of trauma rather than an attempt to deceive.

8. See, e.g., James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME, Dec. 9, 2014, available at <http://time.com/3625414/rape-trauma-brain-memory/>; Rebecca Campbell, Transcript “The Neurobiology of Sexual Assault,” NATIONAL INSTITUTE OF JUSTICE (Dec. 3, 2012), available at <http://www.nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>; Bessel van der Kolk, James Hopper & Janet Osterman, *Exploring the Nature of Traumatic Memory: Combining Clinical Knowledge with Laboratory Methods*, 4 J. AGGRESSION, MALTREATMENT & TRAUMA 9 (2001).

9. Van der Kolk, Hopper & Osterman, *supra* note 8, at 28-29.

10. Campbell, *supra* note 8.

11. *Id.*

12. JENNIFER LONG, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS 8 (2007), available at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

13. See, e.g., *People v. Brown*, 94 P.3d 574, 583 (Cal. 2004); *State v. Borelli*, 629 A.2d 1105, 1115-16 (Conn. 1993); *Earl v. United States*, 932 A.2d 1122, 1128 (D.C. 2007); *State v. Clark*, 926 P.2d 194, 203 (Haw. 1996); *State v. Newell*, 710 N.W.2d 6, 28-29 (Iowa 2006); *People v. Christel*, 537 N.W.2d 194, 205 (Mich. 1995)

(finding expert testimony admissible provided proper foundation laid; harmless error to admit in this case); *State v. Grecinger*, 569 N.W.2d 189, 197 (Minn. 1997); *State v. Bonamarte*, 213 P.3d 457, 461 (Mont. 2009); *State v. Searles*, 680 A.2d 612, 615 (N.H. 1996); *State v. Townsend*, 897 A.2d 316, 332 (N.J. 2006); *State v. Haines*, 860 N.E.2d 91, 97-98 (Ohio 2006); *State v. Weaver*, 648 N.W.2d 355, 365 (S.D. 2002); *State v. Laprade*, 958 A.2d 1179, 1188 (Vt. 2008); *State v. Ciskie*, 751 P.2d 1165, 1171-74 (Wash. 1988); *Dean v. State*, 194 P.3d 299, 311 (Wyo. 2008).

14. See, e.g., *Gipson v. State*, 772 S.E.2d 402, 410 (Ga. App. 2015) (shelter director qualified as expert based on bachelor’s degree, 13 years of experience as advocate, and specialized ongoing training); *State v. Newell*, 710 N.W.2d 6, 28 (Iowa 2006) (police lieutenant qualified as expert based on extensive experience and training in domestic violence); *Salinas v. State*, 426 S.W.3d 318, 323 (Tex. App. 2014), *rev’d on other grounds* by 464 S.W.3d 363 (Tex. Crim. App. 2015) (social worker qualified as expert based on training and experience). Pursuant to Fed. R. Evid. 702, an expert may be qualified by virtue of “knowledge, skill, experience, training, or education.” See also LONG, *supra* note 12, at 34-35.

[A]rresting a victim of intimate-partner violence can have serious consequences for victim safety.

behaviors that will exist in every case. Expert testimony, however, provides the factfinder with explanations of some of the possible reasons that may have compelled a victim of abuse to stay with or return to the abuser, to recant, to minimize the severity of an incident, or to testify on behalf

of the abuser, thereby allowing the factfinder to more accurately judge the victim's credibility.

BATTERER CREDIBILITY

In contrast to victims, whose testimony may be angry, emotional, or disorganized, batterers are often highly skilled at presenting a calm and reasonable demeanor when it matters most.¹⁵ Family and friends who have not witnessed acts of abuse may describe the batterer as an admirable person. Some police officers may uncritically accept batterer claims that the victim is “crazy,” based solely upon the emotional state of the parties at the time of the police response. Courts must recognize that when judging the relative credibility of partners in abusive relationships, many of the external cues normally relied on to assess credibility may be turned on their heads. The calm and reasonable-appearing party, eloquently describing the tragedy of separation from the children, may not be telling the truth; the emotional party with a bulging folder of notes, desperate to be believed, may be the one worthy of belief.¹⁶ It is critical for judges to look beyond surface demeanor in judging credibility and to consider whether they may be observing the effects or tactics of battering.

CRIMINAL PROCEEDINGS

Failure to Appear

When a victim fails to appear in court pursuant to a properly served subpoena, the court may be called upon to consider whether to issue a bench warrant or a material-witness warrant to compel appearance at trial. Although a subpoena is a valid court order to appear, arresting a victim of intimate-partner

violence can have serious consequences for victim safety.¹⁷ Most victims who fail to appear for trial are not simply “uncooperative”—rather, they are acting in accordance with their sense of what is the safest course of action (which often is to avoid testifying against their abuser) or in response to intimidation or manipulation on the part of the defendant. Arrest amounts to re-victimization by the criminal-justice system, effectively punishing the victim for the intended outcome of the batterer's campaign of intimidation and manipulation. The message sent to both the victim and the batterer is that calling the police is a risky proposition for the victim. A victim humiliated by an arrest or confinement may think twice about reaching out for help from the criminal-justice system in the future.

In the extraordinary case of a defendant so highly dangerous that prosecution is imperative, where there is no alternative to move forward without the victim's testimony, the court can craft its order in a way that minimizes negative consequences to the victim. For example, unless officer safety or departmental policy requires otherwise, the court can direct that no physical force or restraints be used. The court could also direct that an advocate accompany the officer serving the warrant to provide reassurance and assistance with safety planning, that the warrant be executed only while the court is in session and prepared to take the victim's testimony, and that the victim have an opportunity to make any necessary arrangements for childcare. Such considerations communicate the justice system's concern about the victim's ongoing safety.

Evidence-based prosecution¹⁸ makes it possible for most criminal cases to move forward without victim testimony, just as in homicide prosecutions. Before granting a defense motion to dismiss a case because of the victim's failure to appear, it is important to consider whether sufficient evidence exists to survive a motion to dismiss at the conclusion of the State's case. The court should give serious consideration to motions seeking to admit the victim's out-of-court statements under the doctrine of forfeiture by wrongdoing when there is evidence that the defendant's own acts of intimidation and manipulation are responsible for the victim's absence at trial.¹⁹ By admitting the victim's hearsay statements when the requirements of the rule are satisfied, the court can protect the integrity of the jus-

15. Przekop, *supra* note 3, at 1066.

16. *Id.* at 1066-67, 1081-82.

17. See Erin Gaddy, *Why the Abused Should Not Become the Accused*, THE VOICE (NATIONAL DISTRICT ATTORNEYS ASSOCIATION) (2006), available at http://www.ndaa.org/pdf/the_voice_vol_1_no_8_2006.pdf. Two of the primary grant programs under the Violence Against Women Act to improve criminal-justice response to intimate-partner violence have identified forced testimony by victims of domestic violence against their abuser as an “activit[y] that compromise[s] victim safety and recovery.” See U.S. Department of Justice, Office on Violence Against Women, *OVW Fiscal Year 2016 STOP Formula Grant Solicitation* 5-6 (2016), available at <https://www.justice.gov/ovw/file/839466/download>; U.S. Department of Justice, Office on Violence Against Women, *OVW Fiscal Year 2016 Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (also known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program)* 7-8 (2016), available at [load \(disapproving “\[p\]rocedures that would penalize victims of violence for failing to testify against their abusers or impose other sanctions on victims. Instead, procedures that provide victims with the opportunity to make an informed choice about whether to testify are encouraged”\). These same considerations weigh against charging victims with perjury or false swearing as a result of recantation on the stand.](https://www.justice.gov/ovw/file/811611/down-</p></div><div data-bbox=)

18. Evidence-based prosecution involves strategies based upon the identification, preservation, and presentation of evidence other than the victim's in-court testimony, allowing a prosecution to proceed regardless of whether, or how, the victim testifies at trial.

19. *E.g.*, Fed. R. Evid. 804(b)(6). In states without a cognate provision in their rules of evidence, the doctrine is widely recognized as an exception to the rule against hearsay and the defendant's right of confrontation. See Timothy Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 532-33 (2008).

tice system by not allowing the offender to profit from wrongdoing intended to silence the victim.

Acts of Violence Against the Abuser

Victims of intimate-partner violence are sometimes charged with criminal offenses against the batterer. These may be acts committed in self-defense or unlawful conduct that nevertheless is attributable, at least to some extent, to the violence inflicted by the batterer.²⁰ In addition, some victims are falsely accused by the batterer either as another form of abuse or in an effort to impugn the victim in the context of a criminal case against the batterer. Victims often more readily enter early guilty pleas than batterers, acting out of a sense of self-blame and a desire to resolve the matter as quickly as possible.²¹

In setting bail and conditions of pretrial release where it appears that the accused may be a victim of intimate-partner violence, courts should consider any available criminal histories of both parties, as well as the history of protective orders or other family-court proceedings and details recounted in the police reports, if possible. Incarceration of victim-defendants²² whose charged offense may be attributable to the intimate-partner violence can result in loss of employment, placing victims and their children—who will likely remain in the care of the abuser—at risk of additional harm. Such victim-defendants usually do not pose a significant risk of flight or risk to the safety of the community. Counseling, drug/alcohol treatment, job training, or parenting classes, where appropriate, may be helpful conditions of pretrial release that will benefit the victim-defendant as the case moves forward.

Self-Defense

While no one should be convicted (nor, ideally, charged or even arrested) for the lawful use of force in self-defense, identifying the justifiable use of force can be complex.²³ When a victim of intimate-partner violence is charged with a crime for acting in self-defense, the arrest and subsequent proceedings may exacerbate the existing trauma.

When there is evidence to suggest that a victim of battering reasonably believed that the use of force was necessary, a self-

defense instruction may be required.²⁴ While many courts still refer to defenses that take into account a pattern of ongoing abuse as “Battered Woman Syndrome,” that term has been largely abandoned by professionals in the field in favor of more accurate descriptions, such as “effects of battering.”²⁵

Regardless of the viability of “Battered Woman Syndrome” as such, however, evidence of a history of violence against the victim-defendant remains highly relevant to that person’s use of force in self-defense. There may be subtle but recognizable precursors to a battering incident enabling the victim to reasonably anticipate such violence. These can include gestures, facial expressions (“the Look”), taking off a shirt or jewelry, or certain words or phrases (“You’re asking for it!”).²⁶ When acts of violence are routinely presaged by such signals, it is reasonable for the victim to anticipate the predictable outcome and to act accordingly. Victim-defendants in such cases may introduce expert testimony to explain their perception of the necessity of using force or to explain victim behavior that might cause jurors to doubt the veracity of a claim of history of victimization. As in the case of expert testimony offered by the State to explain victim behavior, expert testimony offered by the defense should not purport to opine whether a particular defendant was or was not a victim of battering, nor should it offer an opinion as to the truthfulness of the defendant’s testimony concerning a history of battering.²⁷ Rather, such testimony should allow the fact-finder to judge the victim’s honest belief in the necessity for use of physical force and the reasonableness of that perception.

Contextual Violence

Even where the use of force is not legally justifiable, a history of abuse is still relevant to appropriate disposition. Use of force by someone who is continually subjected to violence, and

Incarceration of victim-defendants whose charged offense may be attributable to the intimate-partner violence can result in loss of employment

20. JEFFREY GREIPP, TOOLS MEISNER & DOUGLAS MILES, *AEQUITAS, INTIMATE PARTNER VIOLENCE VICTIMS CHARGED WITH CRIMES: JUSTICE AND ACCOUNTABILITY FOR VICTIMS OF BATTERING WHO USE VIOLENCE AGAINST THEIR BATTERERS* 7-14 (2010), available at http://www.aequitasresource.org/Intimate_Partner_Violence.pdf.

21. Martha McMahon & Ellen Pence, *Excerpt from: Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 *VIOLENCE AGAINST WOMEN* 1, 4 (2003), available at http://dvturningpoints.com/wp-content/uploads/downloads/2011/01/MAKING_SOCIAL_CHANGE_2003.pdf.

22. To avoid confusion, the term “victim-defendant” will be used to refer to victims of battering who are charged with criminal offenses against the batterer.

23. See GREIPP, MEISNER & MILES, *supra* note 20, at 7-14.

24. In many jurisdictions, the use of deadly force in self-defense is permitted only where the threat of harm is “imminent” and where there is no ability to retreat, which precludes the defense during quiescent periods, such as where the batterer is asleep or uncon-

scious. The imminence requirement is thoughtfully discussed in Whitley Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 *NEW CRIM. L. REV.* 342 (2007). Prosecutors and courts are bound by legislative provisions regarding self-defense; however, where the legislative scheme permits, it is important to give the instruction where the evidence arguably supports the defense.

25. For a summary of many of the criticisms of Battered Woman Syndrome as a term to describe the varied effects of battering, see generally Mary Ann Dutton, *Update of the “Battered Woman Syndrome” Critique*, *VAWNET*, August 2009, available at http://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf; see also LONG, *supra* note 12, at 44-45.

26. GREIPP, MEISNER & MILES, *supra* note 20, at 13.

27. See, e.g., New Jersey Model Criminal Jury Charge on “Battered Woman Syndrome” as a Defense, available at <https://www.judiciary.state.nj.us/criminal/charges/bws1.pdf>. The charge permits the jury to consider expert testimony as an aid to determining the honesty (and reasonableness, in the case of self-defense) of the defendant’s belief in the necessity of the otherwise criminal act.

Batterers often make false accusations against their victims, particularly as a form of harassment once the parties are separated

who acts within that context,²⁸ is qualitatively different from the use of force by someone seeking to exercise power and control over a partner or by someone who is habitually violent against others. The relevant question, “Who is doing what to whom and with what impact?” suggests that the response to reactive/resistant violence should be different from the response to bat-

tering.²⁹ There is less need to deter such victim-defendants and more need to craft a disposition that holds them appropriately accountable. Where diversionary disposition is available and appropriate, diversion enables the victim-defendant to avoid the negative collateral consequences of a criminal conviction.³⁰ Those consequences can severely compromise future safety, security, and well-being by making it more difficult to secure employment, housing, child custody, and parenting time; making it possible for the batterer to threaten or take action to revoke the victim-defendant’s probation or parole; and adversely impacting the victim-defendant’s immigration status.³¹ The court may impose diversionary conditions that promote alternatives to violence and present options that may reduce the victim-defendant’s dependence on the batterer for survival.³² Such conditions may include counseling, education, and job training to increase economic security and independence, treatment for substance abuse, and parenting classes.³³ When diversionary disposition is not an option, a probationary sentence with similar conditions may be considered, depending on the seriousness of the offense.³⁴

When the offense is so serious that incarceration is required, the context giving rise to the criminal act and the characteristics of the victim-defendant may still provide sufficient mitigation that a significant reduction in prison time is warranted.

False Accusations by the Batterer

Batterers often make false accusations against their victims, particularly as a form of harassment once the parties are separated or a protective order is in effect. Batterers may file criminal complaints for harassment, stalking, or threats; accuse the victim of child abuse or neglect; or make allegations against the victim in the course of defending the batterer’s own criminal charges. Some batterers will race to call 911 before the victim can, in an attempt to appear the true victim. Some batterers go so far as to inflict superficial injuries on themselves or create other kinds of false evidence, such as faked emails or social-media postings, in an attempt to have the victim arrested.³⁵ “Evidence” of wrongdoing on the part of a person known to be a victim of intimate-partner violence, offered by a known or accused batterer, should be viewed with a critical eye.

Other Crimes Related to Victimization

Batterers may coerce their victims into engaging in criminal activity on their behalf, forcing their victims to sell drugs; to hide drugs, weapons, or proceeds of criminal activity in their homes; to shoplift; or to claim ownership of contraband. In such cases, a defense of duress or coercion might be asserted. Expert testimony on the effects of battering may be critical to the fair consideration of the victim-defendant’s guilt.

More troubling are cases in which the victim of intimate-partner violence is charged with “failure to protect” the children from the batterer who shares the home or is charged with

28. A victim may, for example, instigate violence in an effort to escape or stop the battering (perhaps under circumstances or in a setting where the victim has more control of the situation) or as a form of retaliation for battering. Other victims may use violence as a result of their addiction to drugs or alcohol, which some victims turn to as a way of coping with the violence in their lives. PENCE & DASGUPTA, *supra* note 1, at 9-11, 13, 15; GREIPP, MEISNER & MILES, *supra* note 20, at 10, 14.

29. PENCE & DASGUPTA, *supra* note 1, at 15-16.

30. GREIPP, MEISNER & MILES, *supra* note 20, at 19-20.

31. See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, UNDERSTANDING AND MITIGATING THE DIRECT AND COLLATERAL CONSEQUENCES OF CRIMINAL RECORDS: SELECTED INTERNET RESOURCES FOCUSING ON WOMEN/VICTIMS OF BATTERING CHARGED WITH CRIMES (2016), available at [http://www.ncdbw.org/reentry_resources/Mitigating%20Collateral%20Consequences%20-%20NCDBW%20Reentry%20Internet%20Listing%20-%20FINAL%20\[3-8-2016\].pdf](http://www.ncdbw.org/reentry_resources/Mitigating%20Collateral%20Consequences%20-%20NCDBW%20Reentry%20Internet%20Listing%20-%20FINAL%20[3-8-2016].pdf); GREIPP, MEISNER & MILES, *supra* note 20, at 17-18. An additional potential negative consequence for victim-defendants who are convicted of a crime is the possibility that the conviction will be used for impeachment purposes in future court proceedings, thereby undermining the victim’s ability to seek safety and justice in the future. GREIPP, MEISNER & MILES, *supra* note 20, at 17-18.

32. GREIPP, MEISNER & MILES, *supra* note 20, at 11, 15-16.

33. Typical batterers’ intervention programs, geared toward correc-

tion of violence as a tool of power and control, are inappropriate for the victim-defendant because they fail to address the actual cause of the offense. GREIPP, MEISNER & MILES, *supra* note 20, at 5, 17-18. They may also exacerbate trauma by forcing a victim of abuse to interact with batterers in a group setting.

34. The National Clearinghouse for the Defense of Battered Women has collected Internet resources that may be helpful in fashioning appropriate probationary conditions. See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, WHEN VICTIMS OF BATTERING ARE ON PROBATION OR PAROLE (2015), available at [http://www.ncdbw.org/reentry_resources/Probation%20and%20Parole%20-%20NCDBW%20Internet%20Listing%20-%20FINAL%20\[8-20-15\].pdf](http://www.ncdbw.org/reentry_resources/Probation%20and%20Parole%20-%20NCDBW%20Internet%20Listing%20-%20FINAL%20[8-20-15].pdf).

35. The author prosecuted two unrelated intimate-partner stalking cases in which the stalker forged letters, emails, and social-media postings in an effort to “frame” the victim or the victim’s new partner by making it appear that the stalker was being victimized. One of these stalkers also falsely reported that the victim had threatened him with a gun (the victim had video proof of her alibi at the time of the alleged gun-pointing), and the other (a former police officer and then-current law student) reported an assault by mysterious strangers who appeared at his home and threatened to kill him if he didn’t surrender the marital home to the victim (police concluded after investigation that the superficial injuries, which were inconsistent with the reported assault, were self-inflicted).

abuse or neglect of those children. Appropriate accountability in these cases again demands consideration of context in which the acts or omissions occurred. The same factors that impede victims from protecting themselves often make it impossible for them to protect their children, while some acts of apparent abuse or neglect are intended to protect the children from even greater harm.³⁶

Jury Instructions

Although police and prosecutors have the initial responsibility to investigate and make the correct charging decisions as well as to make reasonable plea offers that take into account the victim-defendant's personal circumstances—decisions guided by principles of justice as well as the letter of the law³⁷—many of these cases ultimately rest in the hands of a jury. Correct jury instructions are crucial in every criminal case. Where the defendant is a victim of intimate-partner violence, it is especially important that juries have a fair opportunity to determine whether any of the statutorily recognized defenses may apply to justify, excuse, or mitigate the offense. Model or pattern jury instructions should be carefully reviewed and the language adjusted or supplemented where necessary to ensure that the charge explains the permissible use of expert testimony or evidence regarding the history of abuse and how the evidence may apply to the elements of the charged offense and any defenses raised.

When the verdict is “guilty,” the court has final responsibility to impose a just sentence. Careful weighing of mitigating factors may permit the court to impose a sentence that holds the perpetrator *appropriately* accountable for criminal conduct. Being a victim of abuse gives no one *carte blanche* to disregard the law. Nevertheless, it is important to consider the abuse when it has directly contributed to the violation of law and to impose a sentence that addresses those factors and is commensurate with the defendant's blameworthiness.

FAMILY-COURT PROCEEDINGS

Family-court proceedings—for protective orders, divorce, child support, custody/parenting time, or any combination thereof—present a wealth of opportunities for the batterer to continue the abuse of the victim through misuse of the judicial system.³⁸ It is well known that the time of separation from the abuser is the most dangerous for victims of intimate-partner

violence. There is an increased risk of homicide, and non-lethal violence often escalates as the batterer sees the ability to control the victim slipping away.³⁹ Batterers may file cross-complaints for protective orders, seek sole custody or unsupervised parenting time with the children (often claiming that the victim has “alienated” them from the abusive parent⁴⁰), obstruct the fair division of marital property, resist paying child support or alimony, and file mountains of meritless motions for the sake of continuing to harass the victim.⁴¹

To the extent that the batterer is able to compel the victim to come back to court over and over, the justice system serves as a powerful weapon in the abuser's arsenal.

To the extent that the batterer is able to compel the victim to come back to court over and over, the justice system serves as a powerful weapon in the abuser's arsenal. For victims who have already been subjected to trauma and to the abuser's coercive control of their lives, receiving a summons to answer a complaint or being served with a motion reopens old wounds, causes distress and anxiety, and exacts monetary harm in the form of legal fees and lost time from work.⁴² The legal challenges mounted by abusers target victims' greatest vulnerabilities—their ability to properly protect, parent, and provide for their children.⁴³

Victims seek protective orders to regain a measure of peace and security in their lives. With an order in place, court proceedings may offer the only opportunity for the batterer legally to have direct contact with the victim. Victims who divorce the abuser hope that the decree will bring an end to the abusive relationship. But divorce from an abuser simply moves the arena from the victim's house to the courthouse, as the abuser files repetitive motions to amend support orders, challenge the victim's lifestyle, or seek changes in custody/parenting-time determinations.⁴⁴ Once again, the batterer is in a position of power, and the victim has been placed on the defensive.⁴⁵ The ongoing litigation also exacts a financial toll on victims.⁴⁶

Although family courts routinely grant orders of protection to victims of intimate-partner violence, the dynamics of abuse

36. Evan Stark, *A Failure to Protect: Unravelling “The Battered Mother's Dilemma,”* 27 W. ST. U. L. REV. 29, 56, 105 (2000).

37. GREIPP, MEISNER & MILES, *supra* note 20, at 16.

38. Przekop, *supra* note 3, at 1059-60.

39. Ruth Fleury et al., *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363 (2000); Przekop, *supra* note 3, at 1076.

40. “Parental alienation syndrome” posits that parents, particularly mothers, “alienate” the affections of children from the other parent in custody disputes. It has been severely criticized as an unfounded theory that overvalues the child's ongoing relationship with an abusive parent while undervaluing the child's safety, effectively punishing the non-abusive parent for acting in a supportive

fashion to protect children from the abusive parent. See BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 168-73; Joan Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 248-49 (2009); Joan Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 229-34 (2010).

41. Przekop, *supra* note 3, at 1069-72.

42. *Id.* at 1070-71.

43. *Id.*

44. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 154-68; Przekop, *supra* note 3, at 1069-72.

45. Przekop, *supra* note 3, at 1081-82.

46. *Id.* at 1082-83

While the use of third parties to transport the children . . . reduces the opportunities for abuse . . . , courts should avoid designating friends or family of the abuser

are not always sufficiently considered in parallel or subsequent proceedings.⁴⁷ Child custody and parenting time is a frequent source of ongoing litigation. Some courts view the abuse as something that affects only the victimized parent, failing to recognize the need to protect the children when the abuser continues to assert power and control over the other parent.⁴⁸ Even when children are not physically harmed, they often are used as pawns in the batterer's campaign against

the victim, and some courts are too quick to apportion blame equally between the parents, as if the victim is equally to blame for the ongoing tensions in the family.⁴⁹ When the batterer has unrestricted, unsupervised parenting time, the children may be abused themselves⁵⁰ or be used as a means of manipulating or spying on the victim.⁵¹ Such acts not only harm the children directly but undermine the victim's effectiveness as a parent.⁵² Some children—especially boys—ally with the abuser, becoming surrogate abusers in the home.⁵³

Moreover, the exchange of the children in connection with parenting time can be yet another opportunity for in-person contact with the victim, facilitating further in-person harassment.⁵⁴ While the use of third parties to transport the children or to supervise the exchange reduces the opportunities for abuse or intimidation in that setting, courts should avoid designating friends or family of the abuser to serve in that role.

Many jurisdictions have recognized the ongoing danger to victims and their children by legislating a rebuttable presumption against sole or joint legal or physical custody for batterers

who have abused the other parent.⁵⁵ Where there is no such presumption by law, however, courts should weigh heavily any history of domestic violence. The focus should be on the well-being of the children rather than the “right” of an abusive parent to unrestricted parenting time. Not only are the children at risk for abuse and manipulation by an abusive parent, the children are harmed when the victimized parent is in a continual state of anxiety, stress, and fear and when that parent must continually battle for sufficient financial support to create a stable home for them.⁵⁶ Children rarely thrive in such an environment.

Another abusive tactic is to file groundless charges of parental misconduct against the victim for petty disagreements about the children's activities or supposedly harmful lifestyle choices by the custodial parent. Batterers may complain about matters such as the children's bedtimes, vacation plans, after-school activities, or eating habits. The other parent's work or school schedule, childcare arrangements, and especially dating or a new relationship are criticized as harmful to the children.⁵⁷ This is, essentially, an attempt to continue the pattern of control over the victim and the children that was exercised during the relationship and should be recognized as such.

Obviously, batterers, like anyone else, have a right of access to the courts for redress of grievances and conflict resolution. Family courts should, however, consider the motive when a litigant with a history of abuse becomes a “frequent filer.” Most jurisdictions have rules permitting sanctions against litigants who abuse the legal process by filing frivolous motions or those intended solely to harass the other party.⁵⁸ Motions can be screened for potentially meritorious claims and denied on the papers when patently frivolous. Sanctions can be imposed, with the victim reimbursed by the batterer for any financial loss occasioned by having to appear in court. Most important, courts should avoid allowing the batterer to exploit the judicial process as a weapon against the victim.⁵⁹ Assigning all cases involving the same parties to the same judge will enable that

47. Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 657, 662-63 (2003).

48. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 189-98. Two recent tragedies involving fathers with a history of domestic violence who killed or attempted to kill their children as an apparent means of harming their mothers have been reported in the news. A New Jersey man jumped with his two toddler children from a bridge after a dispute with his wife in which he threatened to harm the children. Christie Duffey, *NJ Dad Who Jumped from Overpass with 2 Sons Had History of Domestic Violence*, WPIX-TV, Oct. 25, 2016, available at <http://pix11.com/2016/10/25/nj-dad-who-jumped-from-overpass-with-2-sons-had-history-of-domestic-violence/>. A Missouri man murdered his two young children after abducting them while subject to an outstanding warrant for domestic violence. Joe Sutton & Madison Park, *Man Kills Two Sons, Himself, Police Say*, CNN, Nov. 6, 2016, available at <http://www.cnn.com/2016/11/06/us/father-kills-sons-amber-alert/>.

49. Przekop, *supra* note 3, at 1076-77; Meier, *supra* note 47, at 692-700. Poor parenting on the part of the non-abusive parent, when not attributable to the battering, can appropriately be considered without treating it as equivalent to the malign effects of battering on the welfare of the children and without blaming the victim for

the abuser's conduct. Przekop, *supra* note 3, at 1077.

50. See generally Appel & Holden, *supra* note 6.

51. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 92-96; Przekop, *supra* note 3, at 1065-66.

52. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 38-39, 72-80, 204-05.

53. *Id.* at 38-39, 91-92, 238-50.

54. Przekop, *supra* note 3, at 1071-72.

55. See, e.g., National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence § 401 (1994). Statutory rebuttable presumptions existed in 24 states as of 2013. *Rebuttable Presumption States*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2013), available at <http://www.ncjfcj.org/sites/default/files/chart-rebuttable-presumption.pdf>.

56. Przekop, *supra* note 3, at 1071.

57. *Id.* at 1068-70.

58. *Id.* at 1088-89.

59. An excellent resource for family-court judges is *A Judicial Guide to Child Safety in Custody Cases*, published by the National Council of Juvenile and Family Court Judges in 2008 and available at http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf. The Guide details the actions judges can take to protect families where domestic violence and abusive litigation are factors.

judge to become familiar with the parties and the pattern of claims, making it easier to identify meritless claims intended solely to harass the other party.

CONCLUSION

When victims of battering are accused of wrongdoing, judges must be careful to view the evidence in context, through the proper lens, and ensure that juries are educated and empowered to do the same. By factoring into their decisions the realities of abusive relationships—the dynamics of abuse, batterer tactics, and effects on victims—judges can prevent batterers from co-opting the justice system for their own ends. These efforts will bring our courts closer to the ideal of a truly fair and just forum that protects victims and their children, allows them to heal, and holds abusers accountable for their actions.



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