

IMPOSSIBLE CHOICES: BALANCING SAFETY AND SECURITY IN DOMESTIC VIOLENCE REPRESENTATION

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Domestic violence victims often face the impossible choice between physical safety and financial security. State intervention can offer some protection to victims, but enlisting the criminal justice system through reporting domestic violence or restraining order violations can have drastic financial consequences. Involving the state is likely to lead to sanctions for the abuser that would ultimately deprive the victim of child support, alimony, and other financial support, which may be the totality of the victim's financial resources. To avoid this result, many victims refuse to enforce court orders intended to maximize their safety. This article examines the context in which victims must "choose" between physical safety and financial security and the lawyer's difficult position when a client prioritizes financial stability. Using a compelling case study that exemplifies this impossible choice, the article examines the role of economic dependence in victim decision-making; reasons why victims avoid protections offered by the criminal justice system; issues of capacity, competence, and the Model Rules of Professional Conduct in representing victims; the different models of client-centered lawyering and cause lawyering; the question of whether private rights become public in domestic violence cases; and recent social science work on the ability to predict future domestic violence based on current behavior. The authors view this through the lens of law school clinical programs, and the experiences of students who work on the cases and what limitations, if any, there are to representation when the client trades safety for economic stability.

INTRODUCTION

We co-taught a Domestic Violence Clinic at Yale Law School. Our clinic followed a holistic model in which the clinic students represented victims of domestic violence in a full range of legal problems,

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including family law, immigration, tort actions against abusers, mortgage foreclosure, consumer, landlord-tenant, public benefits, and tax matters. We found that many of our clients were forced to balance the issue of physical abuse with the threat of severe financial stress. In this article, we offer a case study in which our client, largely out of concern for her children's economic security, refused to enforce civil restraining and criminal protective orders to ensure that her husband would be able to work and support the family. This situation is not unique. Many of our clients were loath to enforce existing restraining orders or protective orders, fearing that enforcement would result in incarceration of the abuser, which would interrupt financial support. These pressures were particularly severe for clients with minor children.

This article focuses on the role of economic security in a domestic violence victim's decision-making, and the role of the attorney in trying to assist in and execute the domestic violence victim client's decisions. We concentrate on the economic pressures that make it difficult to leave, but recognize that financial matters represent one piece of a complicated picture. We are concerned with isolating any single factor in what is often a multi-faceted decision. As a result, we have purposely taken a wide-ranging approach in examining both the factors that lead to a decision to stay or not enforce court orders, as well as the role of the lawyer in helping to effectuate these decisions. We analyze this situation through the lens of one clinic case—offering the perspectives of the clinic students who worked on the case and discussing what limitations, if any, there are to representation in a case like this when a client trades safety for economic stability. This is a broad analysis, and we appreciate that we raise more questions than we answer, but we are looking for ways to better inform representation of clients in dangerous situations, and we have not found the answers to be easily forthcoming.

In Part I, we discuss our client Barbara's situation as a case study that provides a context in which to examine these complex issues. We provide background about Barbara's case, along with the perspectives of the two clinic students who, under our supervision, represented Barbara and identified many of the issues relevant to this article in a contemporaneous "g-chat" (instant messaging through Google) about her case. In Part II, we provide an overview of the problem presented by Barbara's situation and many other similar situations—namely what limits, if any, there might be in a lawyer's representation of a domestic violence victim when that representation may increase the victim's risk of harm or circumvent legal processes that are meant to protect the victim. We look at issues of capacity and competence and

when a lawyer can limit or withdraw from representation under the Model Rules of Professional Conduct. Part III examines how financial pressures and economic dependency cause many domestic violence victims to eschew court involvement or “opt out” of the criminal justice system. In Part IV we discuss other reasons why victims opt out of court protections—including problems with the criminal justice system, fear of retaliation, concerns about immigration consequences for the victim or the abuser, and love for and attachment to the abuser. Part V views domestic violence representation through different models of representation, namely client-centered lawyering and cause lawyering. Part VI explores whether domestic violence victims’ rights are public or private rights. Part VII examines the predictability of domestic violence under lethality and risk assessment instruments and questions whether these instruments should guide lawyers in representing victims of domestic violence.

I. THE CASE STUDY

A. *The Client: Barbara*

Each week, we went with our clinic students to a local domestic violence advocacy center located in a beautiful, old Victorian house in a nearby neighborhood in New Haven, Connecticut. We interviewed prospective clients at a dining room table under a chandelier in what had once been an upscale dining room. It was there that we met Barbara. Barbara had been married to her abuser for 19 years and had two minor children, ages 10 and 15. During the marriage, Barbara had never been away from home overnight without her husband Tom, although he had taken several trips with girlfriends. Her husband was extremely controlling. She was not permitted to work or learn a trade. He owned a business, had substantial earnings, built a house, paid all the bills, and doled out household money in modest amounts. The business was labor-intensive and was entirely dependent on his ability to bid on public contracts and perform strenuous physical labor. If he did not work, the income stream would end.

Barbara’s husband beat her frequently. On two occasions, she took pictures of her black eyes and bruises. The only time she went to a doctor, she gave a false account of the cause of her injuries. She was afraid to take any action that could lead to her husband’s arrest. Her main concerns were that she be able to pay the mortgage and household bills and continue to maintain her children’s home and lifestyle.

Two years before we met her, Barbara prepared a *pro se* divorce complaint. Connecticut has an unusual procedure, in which a complaint is served before being filed with the court. When Barbara

served her husband in their home, by handing him a copy, she was afraid of physical violence. Instead, he looked at the papers, tore them in half, told her she was not getting a divorce, and left the house. She felt trapped, but assumed that her husband was correct. She believed there was no way she could pay for an attorney and there was no way she could get the divorce on her own. It was only after she contacted a domestic violence hotline that she learned that she might be able to receive free legal services.

We represented Barbara for three years, obtaining a divorce, custody, alimony, child support, and a property settlement. During that period, the only time she was inconsolable was when her husband was arrested when a neighbor reported a domestic dispute at Barbara's home. Barbara told us that the one thing she could not allow was for her husband to go to jail. She could put up with anything so long as she could provide for her children, and the only way she could do that was for her husband to keep working. Although the court had entered restraining orders and, due to a third party complaint, a criminal protective order, Barbara refused to enforce those orders.¹

In a remarkably successful multi-day divorce trial, the court awarded Barbara over 50% of her husband's income for child support and alimony, as well as 100% of the equity in the marital home, valued at \$350,000. Connecticut is an "equitable distribution" state, and the evidence was quite compelling and was a major factor in the property distribution. As just one example, Barbara testified that one morning, on awakening after a beating the night before, she was exhilarated when she looked in the mirror, because she had only one black eye, when she expected two.

Family lawyers reading about a "remarkably successful" result in a domestic violence case will probably ask "then what happened?" Even before the end of the trial, we knew that compliance with the terms of the judgment was unlikely. At a recess during the last day of the trial, when things were not going well for the defendant, we saw him huddled with his brother, who then made a series of telephone calls. They conducted their business openly, with an occasional smirk for our benefit. It was clear that they were planning something, and equally clear that they wanted us to be worried about it. When our client got home, most of her furniture was missing. In one sense, we were relieved that the plan was limited to possessions, but we filed a motion for contempt the next morning. The problem was resolved

¹ We use the term "restraining order" to refer to civil restraining orders—sometimes referred to as orders of protection or protective orders. We use the term "protective order" to refer to orders by criminal courts—sometimes called orders of protection, protective orders, and conditions of release.

when the older son, then 17, drove to his father's house, convinced his father to help him load the furniture on a truck, and brought it home.

At trial, the judge issued a new restraining order, on her own motion, noting that this was the first time in her twelve years on the bench she had issued a restraining order without an application. An earlier restraining order had expired, and Barbara did not want a new order, having experienced panic when her husband was arrested for violating the order.

Tom continued his attempts to control Barbara. He violated the restraining order on a regular basis. He came to the house frequently. Barbara refused to take any action to enforce the order. He failed to pay alimony and child support, and we were in court on contempt motions on many occasions, always seeking compliance with the financial orders, but never raising the restraining order violations. Usually he showed up at court with a check. Once he brought forty \$100 bills. Eventually, the court scheduled monthly hearings, requiring that he keep current on payments.

At a post-judgment contempt hearing for failure to pay child support and alimony, the defendant described a conversation he had with Barbara at the marital home, noting that he had frequent conversations with her at the house. The judge was livid about his failure to comply with the restraining order, and said she should throw him in jail until he learned the meaning of a court order. The judge suggested that we might need a public defender for the unrepresented defendant, a sure sign that she was considering jail time. We expected this issue to arise, and the students were prepared. They found themselves arguing, strenuously and effectively, that the court should issue additional monetary sanctions, but not incarceration.

We had warned Barbara that the restraining order violations were likely to be disclosed. Barbara remained adamant that she wanted to enforce the financial orders, but not the restraining order. In fact, the mortgage was in arrears and without access to support and alimony payments, a mortgage foreclosure was imminent.

The judge expressed fear for Barbara's safety, a fear that we had lived with for over two years, with constant self-doubts about our failure to enforce the restraining and protective orders. We had discussed this as a class and as a litigation team. We had the benefit of consultation with a psychologist specializing in domestic violence issues, social workers who consulted with Barbara, victim advocates, and a prosecutor assigned to domestic violence prosecutions. In the end, the students and the authors agreed that the choice was the client's, not ours. When the judge raised her concerns, the students explained and advocated for the client's position. The judge looked surprised, and took a

recess. When she returned to the bench, the judge allowed the defendant to remain free and to continue working.

The defendant continued to violate the restraining and protective orders and Barbara continued in her insistence that she wanted us to enforce the financial orders but to do everything we could to keep her now ex-husband out of jail. Ultimately, he came to the house one day when Barbara's friend was visiting. When the friend told him to leave, Tom told the friend to mind his own business and pushed him, causing him to crash into a bookcase and hurt his shoulder. Someone called the police, they came, and the defendant was arrested. After a lengthy plea bargain, he pled to five violations of restraining orders and protective orders, and was sentenced to four years imprisonment.

B. The Students' Perspective: Mary and Elizabeth

When we started writing this article, we contacted Mary Adkins and Elizabeth Tulis, the Yale Law School students who represented Barbara throughout the above case study. Yale Law School permits first-year law students to enroll in a clinic, and Mary met Barbara at an outreach site a few weeks into the spring semester of her first year of law school. Elizabeth worked in the Yale clinic during the summer between her first and second years of law school and, as part of her responsibilities, represented Barbara throughout the summer. Both Mary and Elizabeth continued to represent Barbara throughout their second and third years of law school. (We appreciate the luxury of having the same students work with a client for over two years, but we do not think that changes the issues).

After an initial discussion about this article, Elizabeth offered an extraordinary g-chat that she had with Mary during the representation. The content has been edited slightly for length, but the words are entirely our students'. While this paper is about a lawyering problem, and not about clinical pedagogy, our case study did arise in the context of a domestic violence clinic, and, as the conversation shows, the students were conscious of and concerned with our client's refusal to enforce orders, and it brings to life in real time the difficult issues with which we were all struggling. The clinical setting adds a dimension to the lawyering skills involved, and we think it is helpful to consider the real-time concerns of the students:

Mary: Tom [husband] comes over a lot, according to Joe [Barbara's friend]. Joe was like "He has to go to jail to get his attention."

Elizabeth: Joe saw him come over? Was Barbara there when Tom came over?

Mary: Yes and she hid upstairs. He has a key.

Fall 2014]

Impossible Choices

207

Elizabeth: Tom came in the house? Did Barbara get the locks changed?

Mary: Yes but it doesn't matter. I don't think he has the order yet. Whether or not Barbara wants Tom to go to jail, something has to change in the way she's been dealing with this, or else Tom simply won't stop. He won't stop.

Elizabeth: I wonder if we could ask for financial sanctions. Barbara really might need to get used to the idea of him being in jail for a while. We're just no longer in a place where we can use this to get assets divided, etc.

Mary: I think [the judge] is smart and caring.

Elizabeth: But even [the judge] is going to lose patience at some point and be like, if he keeps doing these things, and she wants him to stop, he needs to face the consequences. I just feel like in this case, I am really walking a line between serving what Barbara "wants" and giving her good legal advice, honest legal advice, about what her options are and good practical advice, responsible advice, about what I think she should do, legally.

Mary: I think we've told her what she has to do legally. She's not doing it.

Elizabeth: I feel like there's a certain point in this case, though, where I can't honestly be asking for a TRO [temporary restraining order]² that she won't enforce. Or, there's not anything I can do if she won't enforce it. By not allowing us to report violations we're not serving her interests, —at least if we think that subjective assessments of interest in cases like Barbara's are not all there is. If Barbara thinks that everything would be fine if she took Tom back, that that was what she wanted, would we be serving her interest by facilitating that? Or by, say, transferring property to Tom? I don't know, I guess I've just been feeling really frustrated, to some extent with Barbara herself.

Mary: I mean I think this is the fundamental question in DV work, right?

Mary: But what she's asking from us in this particular kind of instance is not action but inaction, not pushing the violation in front of the court, which is a passive kind of facilitating I realize, but it's more palatable to me.

Elizabeth: It's making Tom think she won't enforce. It just feels very hypocritical, when our whole case was premised on "he's so abusive and he needs to be away from her."

² As we mentioned earlier, the previous temporary restraining order had expired and Barbara did not want it extended. The students reminded her frequently that we could get another restraining order, but Barbara was consistent in her objections. At the time of this conversation, however, the restraining order issued by the court at trial was in place.

Mary: I know. I asked her today if she felt scared of him and she said no, not right now. I said, well he has the key to the house, you know he's going to change his tune at any point and he could hurt you.

Elizabeth: And if at some future point, she does want to enforce, and report him, say coming to the house, he'll go to court and say "she's just mad at me for something else—I've been coming to the house all the time and she hasn't complained." [The judge] TOLD Barbara not to have contact with him at the hearing.

Mary: I'm not sure she would have told me today, except Joe was there and he said it.

Elizabeth: I just feel weird going to [the judge] and asking her to enforce child support, say, but refusing to bring up the other contempt. It suggests that Barbara, like Tom, is being selective in her respect for the orders. I know that's not exactly what it is. . .but it doesn't feel right to me, when we put on such a dramatic DV case and emphasized that this was about getting him out of her life, to tolerate him staying in it in such blatant ways. Ethically (not legally ethically, just ethically) it is getting to me.

Mary: She's legitimately scared about his incarceration. I mean, scared for legit reasons.

Elizabeth: But she's not being particularly respectful towards the legal orders.

Mary: Well, right, but they are orders that she asked for.

Elizabeth: Or to the legal framework her case assumed when we decided to present DV evidence at trial and asked [the judge] to rule on it. It would be different if we had not gotten all those financial orders etc. on the basis of the DV.

Mary: Because those aren't the priorities in her life. She's thinking about her priorities which I think are reasonable to a certain extent.

Elizabeth: But Tom's violation of the RO (restraining order) is a criminal act—maybe that's part of the reason this is bothering me. Because literally, legally, by imposing the RO, Barbara was involving the state, and making it the state's interest too.

Mary: Well she certainly picks and chooses.

Elizabeth: I guess, maybe, I've just sort of internalized the basic premise of the civil/criminal distinction, which is that once you enter the criminal law system, it's not just the interest of the victim, but of society that is at issue. Going into the system, you marshal the resources of the state to protect you, but you also cede some control of the case to the State.

Mary: I think you really hit the nail on the head when you told her that she can't have someone to keep mowing the lawn but not beating her up. Her lifestyle WILL change. I don't think she's accepted that.

Elizabeth: I know. Like she says she's trying to, but I feel like she's saying that to please us.

II. THE PROBLEM: CAPACITY, COMPETENCE, AND LIMITING OR WITHDRAWING FROM REPRESENTATION

A. *The Problem*

Our case study raises several issues. What does client-centered lawyering mean in such a context? It is easy to say that we take direction from the client, but does it matter that the client is placing herself in danger of serious harm or death, not to mention using our services to facilitate an ongoing violation of court orders? The question of the limits of a lawyer's advocacy on behalf of a domestic violence victim has gone largely unexamined.

Lawyers who work with domestic violence victims regularly represent clients who continue to be subjected to physical and sexual violence. These clients might still be in a relationship with the abuser or may have intended or undesired contact with the abuser. The abuser continues to perpetrate abuse and the victim, based on the abuser's prior conduct, knows that she is likely to suffer further abuse. The lawyer often knows of the ongoing abusive conduct, although the client does not always disclose this information.³ The ongoing abuse can range greatly in its severity, from minor pushing to lethal violence. We ask if there is a point at which a lawyer should or can reconsider his or her role in representing the client, especially when the lawyer's advocacy increases the likelihood of the client's exposure to violence.

We are particularly concerned with the lawyer's limits, if any, when the client is making decisions that put her at risk of harm. For the purposes of this article, we are thinking about the lawyer's boundaries arising in two related categories: when advocacy facilitates contact with the abuser that might subject the victim to risk of further violence and when the client requests that the lawyer assist in circumventing legal processes meant to provide safety to the victim.

First, there might be a level or risk of violence to which the client is exposing herself that would cause a lawyer to reconsider representation of the client. Most domestic violence attorneys are accustomed to representing clients who experience ongoing low- or mid-level violence. A typical domestic violence caseload often also includes some ongoing high-level violence. Is there a level of risked harm at which the lawyer can question whether the client's directions accurately represent her interests? Does the lawyer pause when the abuser uses or

³ See Pauline Quirion, *Why Attorneys Should Routinely Screen Clients for Domestic Violence*, 42 BOSTON BAR J. 12, 13 (1998).

poses the risk of extreme violence or potentially lethal violence and the lawyer's services are helping to facilitate contact between the parties? Or does the lawyer continue advocacy regardless of the risk to the client? We are concerned when the client is voluntarily exposing herself to a high risk of harm, but it is not clear how we should best inform our decision about representation when the risk arises. In our case study, we knew that Barbara had ongoing contact with Tom, although Barbara was rarely forthcoming about the type and frequency of the contact. Given the history of violence in the relationship, we were constantly concerned about Barbara's safety, but we continued to proceed on Barbara's directions.

Second, the lawyer might reconsider representation when the client requests that her attorney attempt to circumvent or even obstruct legal processes that are meant to protect the client. The client might ask that the attorney conceal the abuser's conduct from the court to purposely avoid remedies meant to protect the client. She may ask that the attorney not disclose the abuser's violation of court orders. She may request that the attorney advocate against civil court protections, like issuance of a restraining order, or criminal court protections, like prosecution, that are meant to provide safety to the victim. The issue presented by our case study arises when the client asks the lawyer to advocate that the perpetrator not be prosecuted for an incident of domestic violence or violating a restraining or a protective order, even when the failure to prosecute will almost certainly allow for additional violence.

A lawyer might refuse to provide certain types of advocacy when that advocacy is likely to bring the client harm. We examine the circumstances that create sufficient concern for the attorney such that she might establish a boundary in the representation. The Model Rules of Professional Conduct require that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation, but when can a lawyer deviate from a client's direction."⁴

B. Capacity and Competence

One exception to the requirement that the lawyer abide by the client's decisions is provided under Rule 1.14 when the client has "diminished capacity."⁵ Some may question a victim's "capacity" or "competence" to make decisions involving exposure to harm. This line of questioning implicates our first inquiry above, namely whether there is a level or risk of violence to which the client is exposing her-

⁴ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008).

⁵ *Id.* at 1.14.

self that would cause a lawyer to reconsider representation of the client. There has been limited discussion of the capacity and competence of domestic violence victims to make autonomous, rational decisions and realize those decisions.⁶ Society treats a victim's decision as to whether to leave an abusive relationship as indicative of her capacity or competence.⁷ Some might perceive that a victim "choosing" to stay with an abuser or have contact with an abuser after separation indicates clouded judgment.

While "competence" and "capacity" are similar and often used interchangeably,⁸ they are distinct concepts. Competence, referring to legal competence, means a legal standard relating to a person's mental ability to understand problems and make decisions.⁹ Competency is required in order to complete a legal task.¹⁰ To be competent, an individual's capacities or functional abilities must be sufficient for the legal context in which a decision is being made.¹¹ Capacity, on the other hand, speaks to an individual's level of psychological functioning.¹² Psychological or psychiatric evaluations can determine an individual's capacity to make rational decisions, understand complex concepts, or

⁶ See Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 545 (2010); Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 609-11 (2000); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 22-29 (2009); Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 166-67 (2003); Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work This Time?* 31 PEPP. L. REV. 709, 728 (2004); Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 926 (2006).

⁷ Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 59, 78 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

⁸ The definition for capacity cross-references the definition for competence in the Black's Law Dictionary. BLACK'S LAW DICTIONARY 235 (9th ed. 2009); Connie J. A. Beck & Lynda E. Frost, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL'Y & L. 1, 4 (2006); Paul S. Appelbaum, *Assessment of Patients' Competence to Consent to Treatment*, 357 N. ENGL. J. MED. 1834 (Nov. 2007).

⁹ Beck & Frost, *supra* note 8, at 4; BLACK'S LAW DICTIONARY, *supra* note 8, at 322. We discuss competence under the Model Rules of Professional Conduct later in the article.

¹⁰ Beck & Frost, *supra* note 8, at 4; HUGH M. LEE & JO ALISON TAYLOR, ALABAMA ELDER LAW § 1:7, *Ethical Considerations—Assessing Client Competence* (Nov. 2012).

¹¹ Beck & Frost, *supra* note 8, at 4; see 62 AM. JUR. 3D *Proof of Facts* § 197 (2001) (citing McKinney's Public Health Law § 2981, subd. 1(b)); *Matter of Rose S.*, 293 A.D.2d 619, 741 N.Y.S.2d 84 (2d Dep't 2002); see also *Wheeler v. United States*, 159 U.S. 523, 524-25 (1895) (discussing competence of children).

¹² Beck & Frost, *supra* note 8, at 4; see also Erica Wood, *Addressing Capacity: What Is the Role of the Mediator?*, *MEDIATE.COM* (July 2003), <http://www.mediate.com/articles/woodE1.cfm>; THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 2 (2d ed. 2003).

understand the nature and effect of one's acts.¹³

Some have argued that domestic violence victims lack competence to make legal decisions consistent with their values and priorities if they are afraid of their abusers.¹⁴ This alleged incompetence arguably arises as duress when victim decision-making is controlled by fear of the abuser and desire to avoid retaliation.¹⁵ Because of this duress, it is argued that the victim is not able to make decisions serving her own best interests.¹⁶

The discussion of victims' ability to make decisions has focused more on capacity rather than competence. Rule 1.14¹⁷ considers the messy notion of "diminished capacity." The Comment to Rule 1.2, which requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation,"¹⁸ notes that Rule 1.14 controls "[i]n a case in which the client appears to be suffering diminished capacity. . . ." ¹⁹ Rule 1.14(a) states that capacity may be diminished "because of minority, mental impairment or for some other reason."²⁰ This definition is very broad and could arguably extend to some victims, especially given the catchall phrase "for some other reason."

In a case of diminished capacity, the lawyer may take reasonable action to protect the client. Rule 1.14(b) provides that

[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.²¹

Professor Ruth Jones asserts that some domestic violence victims should be appointed legal guardians due to capacity issues.²² For Jones, some domestic violence victims are "unable to act on their own" and "require an intervention that permits someone else to act on their behalf to protect them from their abusers until they can pro-

¹³ LEE & TAYLOR, *supra* note 10; BLACK'S LAW DICTIONARY, *supra* note 8, at 235.

¹⁴ Beck & Frost, *supra* note 8, at 28.

¹⁵ Susan S. M. Edwards, *From Victim to Defendant: The Life Sentence of British Women*, 26 CASE W. RES. J. INT'L L. 261, 284 (1994).

¹⁶ *Id.*

¹⁷ MODEL RULES OF PROF'L CONDUCT, *supra* note 4, at 1.14.

¹⁸ *Id.* at 1.2(a).

¹⁹ *Id.* at 1.2.

²⁰ *Id.* at 1.14(a).

²¹ *Id.* at 1.14(b).

²² Jones, *supra* note 6, at 609.

tect themselves.”²³ She argues that appointment of a guardian for a victim may be necessary when the abuse has deprived the victim of the ability to exercise independent judgment.²⁴ This guardianship would remain in effect until the abuser’s control of the victim is removed and a victim can make decisions for herself.²⁵ The guardian could obtain public benefits and obtain and enforce a restraining order on the victim’s behalf.²⁶ The guardian could also restrict the victim’s contact with the abuser and petition the court to remove the abuser from the shared residence or move the victim into separate housing.²⁷ The desired outcome of the “aggressive intervention” of a guardianship is for the victim to decide to end the abusive relationship.²⁸

The Court of Appeals of Minnesota addressed the capacity of a domestic violence victim in a conservatorship case, where the victim refused to seek a restraining order. In *In Re Conservatorship of Barbara J. Frarck*, a Minnesota appellate court upheld the lower court’s decision to appoint a conservator for a domestic violence victim due to incapacity.²⁹ Barbara Frarck was in an abusive relationship and suffered from borderline personality disorder.³⁰ The court wrote that “[d]espite being physically abused by [her boyfriend], Frarck remains involved in their relationship” and that the testimony “indicated that if a conservator were appointed and sought a restraining order, Frarck could be protected from his abuse.” While the court appointed a conservator based on both the domestic violence and Frarck’s mental condition, the court focused more on the domestic violence in concluding that a conservatorship was appropriate. The court stated that, “Frarck’s continued threats to move in with her boyfriend, despite his abusive treatment, indicate that she is unable to make rational decisions about her living arrangements.”³¹ The court went on to state, “Without a conservator, there is no legal mechanism to stop the abuse, given Frarck’s refusal to obtain a protective order.”³²

This focus on exiting the relationship as the test of capacity or competency³³ is highly problematic. A victim’s decision as whether to

²³ *Id.* at 628.

²⁴ *Id.*

²⁵ *Id.* at 610, 656.

²⁶ *Id.* at 642.

²⁷ *Id.* at 655.

²⁸ *Id.* at 642.

²⁹ *In re Conservatorship of Frarck*, No. C4-92-2176, 1993 WL 139537 (Minn. Ct. App. May 4, 1993); see Jones, *supra* note 6, at 641-42.

³⁰ *In re Conservatorship of Frarck*, 1993 WL 139537 at *1.

³¹ *Id.*

³² *Id.* at *2.

³³ Mahoney, *supra* note 7, at 73-81 (introducing the concept of exit as the test of the

remain with an abuser or separate cannot be the test of whether a victim is acting rationally or in her own best interests.³⁴ Victims are competent, rational decision-makers, but the nature of abusive relationships limits their choices. Their options are narrowed by a number of factors, including conditions of the relationship, economic dependence, and possible consequences for violating the confines of the relationship as established by the abuser. Absent capacity issues unrelated to domestic violence, we believe it is inappropriate to:

take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian

under Rule 1.14(b).³⁵

C. *Limiting or Terminating Representation*

We do not support seeking the appointment of a guardian, as allowed by the capacity rule, but we question whether there might be some circumstances in which it would be appropriate to set a boundary on representation. The Model Rules of Professional Conduct are not particularly helpful in determining what circumstances permit an attorney to deviate from the general rule that the attorney must take direction from the client. Under Rule 1.2(d), “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”³⁶ A lawyer cannot, for example, advise a client to disregard a ruling of the court.³⁷ Similarly, Rule 1.16 allows an attorney to seek withdrawal if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent” or if “the client has used the lawyer’s services to perpetrate a crime or fraud.”³⁸

These rules relate to our second inquiry into the problem presented by our case study, namely whether the lawyer might reconsider representation when the client requests that her attorney attempt to circumvent or even obstruct legal processes that are meant to protect the client. What does it mean that the lawyer’s services are

level of agency for domestic violence victims).

³⁴ *Id.* at 74.

³⁵ MODEL RULES OF PROF’L CONDUCT, *supra* note 4, at 1.14(b).

³⁶ *Id.* at 1.2(d).

³⁷ *In re Matter of Johnson*, 597 P.2d 740, 743 (Mont. 1979).

³⁸ MODEL RULES OF PROF’L CONDUCT, *supra* note 4, at 1.16(b)(2)-(3).

used to “perpetrate a crime or fraud?”³⁹ What is “a course of conduct involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent?”⁴⁰ Is it fraudulent to conceal the abuser’s conduct from the court to purposely avoid remedies meant to protect the client? Is the lawyer obligated to inform the court of the abuser’s violation of restraining and protective orders? In Barbara’s case, we told her that the violations would likely arise and that she would have to testify truthfully, but we did not take affirmative steps to advise the court of the violations. Had we done so, Barbara’s husband would likely have been incarcerated. Barbara would have been safer, at the expense of our ignoring our client’s directions.

For the purpose of this paper, Rule 1.16 raises a more salient question: what is “a violation of the rules of professional conduct or other law?”⁴¹ Rule 1.16, Declining or Terminating Representation, provides that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in a violation of the Rules of Professional Conduct or other law;”⁴² and “[a] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.”⁴³

Rule 1.16 also provides that a lawyer may withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”⁴⁴ For the purposes of this article, we are assuming that a lawyer who does not wish to continue to represent a client who refuses to enforce a restraining order can seek to withdraw pursuant to Rule 1.16(b)(4) of the Model Rules of Professional Conduct if the lawyer considers this decision to be “repugnant” or fundamentally disagrees with the refusal.⁴⁵ It may be that the court will not allow withdrawal. That situation is beyond the scope of this article.

One scholar has suggested that in some situations domestic violence lawyers should break client confidentiality and request outside intervention from law enforcement or others when the lawyer assesses that a victim is at risk of harm.⁴⁶ For support, she cites Model Rule of Professional Conduct 1.6(b)(1), which provides that “[a] lawyer may reveal information relating to the representation of a client to the ex-

³⁹ *Id.* at 1.16(b)(3).

⁴⁰ *Id.* at 1.16(b)(2).

⁴¹ *Id.* at 1.16(a)(1).

⁴² *Id.*

⁴³ *Id.* at 1.16(b)(1).

⁴⁴ *Id.* at 1.16(b)(4).

⁴⁵ *Id.*

⁴⁶ Harrington Conner, *supra* note 6.

tent the lawyer reasonably believes necessary. . .to prevent reasonably certain death or substantial bodily harm.”⁴⁷ We have never contemplated going this far outside of the bounds of the attorney-client relationship. For one, we do not believe that an attorney is in a position to conduct risk assessments or make such determinations based on “the facts and circumstances of the case” and the “intuition of the lawyer.”⁴⁸ That conclusion, however, says little more than reaffirming our commitment to confidentiality. It does not answer the thornier question of the lawyer’s responsibility to the client’s direction, the client’s safety, and the court.

While we are exploring whether the lawyer must follow the client’s directions when those directions place the client in physical jeopardy, in no way are we suggesting that the client’s directions are not rational. To the contrary, the problem is accentuated or created by the fact that the client’s reasons are quite rational from one perspective, i.e. economics, but from another perspective place her in great physical danger.

III. THE ROLE OF FINANCIAL FACTORS AND ECONOMIC DEPENDENCY

In our case study, financial factors played a predominant role in Barbara’s decision not to report restraining or protective order violations. This is not unusual. Financial reasons often play a primary role in a victim’s decision about whether to separate from an abuser or seek assistance from the civil or criminal justice systems. When a victim is not financially independent, separation or pursuit of criminal remedies can be almost impossible. Economic dependency is commonly cited as the primary reason victims do not separate from abusers.⁴⁹ Victims can be thrown into poverty when they leave an abusive relationship.⁵⁰

Domestic violence victims are already financial disempowered simply because they are women. Women experience discriminatory disadvantage in the paid labor force.⁵¹ Gender discrimination in employment, including hiring, status, and compensation,⁵² and lack of ac-

⁴⁷ *Id.* at 900-11 (citing MODEL RULES OF PROF’L CONDUCT, *supra* note 4, at 1.6(b)(1)).

⁴⁸ Harrington Conner, *supra* note 6, at 937.

⁴⁹ NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN 166 (1998).

⁵⁰ *Id.* at 261.

⁵¹ “In 2010, women who worked full time in wage and salary jobs had median usual weekly earnings of \$669. This represented 81 percent of men’s median weekly earnings (\$824).” U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN’S EARNINGS AS A PERCENT OF MEN’S IN 2010 (Jan. 10, 2012), http://www.bls.gov/opub/ted/2012/ted_20120110.htm.

⁵² *Id.*

cess to credit economically disadvantages women.⁵³ In the home, patriarchy supports men in urging women to opt out of the paid labor market or devote a greater amount of time to unpaid domestic labor. Regardless of whether it is a choice or due to pressure from a male partner, women assume financial losses by taking significantly more time out of the paid labor market to raise children and by performing more unpaid domestic chores like cooking, cleaning, and shopping.⁵⁴ While men could compensate women for their domestic labor, or women could seek compensation from partners for this labor under theories of implied contract⁵⁵ or *quantum meruit*,⁵⁶ this domestic labor remains almost wholly uncompensated.⁵⁷

Economic abuse is present in most domestic violence relationships, which further compounds gender-related financial disadvantages. Male authority normalizes men's abuse of female intimate partners and its economic consequences.⁵⁸ Domestic violence rela-

⁵³ Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1548 (1983).

⁵⁴ ANGELA HATTERY, INTIMATE PARTNER VIOLENCE 58, 75 (2009).

⁵⁵ An implied-in-fact contract is "an agreement . . . founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & O. R. Co. v. United States*, 261 U.S. 592, 597 (1923).

⁵⁶ In Latin, *quantum meruit* means "what one has earned." When used in contract law, it definition loosely translates to "reasonable value of services."

⁵⁷ Olsen, *supra* note 53, at 1539 (citing SILVIA FEDERICI, WAGES AGAINST HOUSEWORK (1974)).

⁵⁸ The cultural norm of men hitting their intimate partners reflects a history of women as property and society's perception of men's superiority over women, which helps to establish a man's superiority in individual relationships. Historically, men have been given the right to use force against intimate partners, especially in marriage. Until the early 19th century, spousal abuse was largely condoned. A husband "had the right to whip his wife, provided, he used a switch no larger than his thumb." *State v. Oliver*, 70 N.C. 60, 60 (1874). Retreat from state-sanctioned spousal abuse was slow; see *Bradley v. State*, 1 Miss. 156, 156 (1824) (holding that "the husband should still be permitted to exercise the right of moderate chastisement, in cases of great emergency, and to use salutary restraints in every case of misbehaviour [sic], without subjecting himself to vexatious prosecutions, resulting in the discredit and shame of all parties concerned."); *id.* at 61-62 ("If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive"). The Alabama Supreme Court finally declared spousal abuse to be contrary to law in 1871: "the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face, or kick her about the floor, or to inflict upon her like indignities is not now acknowledged by our law." *Fulgham v. State*, 46 Ala. 143, 146-47 (1871). Yet reprieve for spousal abuse is not just an historical aberration; the common law doctrine of marital rape exemption (where a husband cannot legally rape his wife due to explicit exemptions for marital relationships in the rape statute) is still present in state laws across the country. While categorical rape exemptions are no longer present, Jill Elaine Hasday notes that, even today, the marital rape can result in lighter sentences, additional procedural hurdles for even bringing the case, or sometimes only apply to a narrower range of crimes. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV.

tionships tend to follow traditional gender roles, with the abuser being particularly attached to his male privilege.⁵⁹ An abuser is likely to insist that his female partner carry most of the responsibility for “womanly tasks” like housekeeping and childcare. He sees himself as the breadwinner, with breadwinning being central to his sense of masculinity.⁶⁰ When a victim seeks to challenge these gender roles, the abuser uses controlling or violent behavior to protect his financial dominance, reinforce his male privilege, or further the power imbalance in the relationship. Abusers commonly prohibit their partners from pursuing an education or employment and usually control the financial resources of the relationship.⁶¹ These behaviors are integral to economic abuse that is frequently present in domestic violence relationships⁶² and restrict a victim’s ability to leave.

Leaving an abusive relationship is extremely difficult, especially when a victim has dependent children, few or no job skills, and little or no employment experience.⁶³ Class can play a complex role in a victim’s decision about her financial ability to separate from an abuser. Some victims will accept the most basic of shelter and subsistence. Others seek a home in a good neighborhood, high quality education for their children, nice cars, vacations, and other comfortable amenities.⁶⁴ Regardless, separation is likely to force a victim into a lower quality of life. The victim may have to move to a less desirable neighborhood, leave a job, or give up her childcare.⁶⁵ She may lose

1373, 1376, 1482-86 (2000).

⁵⁹ See, e.g., David Lisak et al., *Factors in the Cycle of Violence: Gender Rigidity and Emotional Constriction*, 9 J. TRAUMATIC STRESS 721 (1996); M. Christina Santana et al., *Masculine Gender Roles Associated with Increased Sexual Risk and Intimate Partner Violence Perpetration Among Young Adult Men*, 83 J. URB. HEALTH 575 (2006).

⁶⁰ Ross Macmillan & Rosemary Gartner, *When She Brings Home the Bacon: Labor-Force Participation and the Risk of Spousal Violence Against Women*, 61 J. MARRIAGE & FAM. 947, 948 (1999).

⁶¹ Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CAL. L. REV. 1, 1-47 (2012). It is important to note that some abusers lack financial resources. He may be unemployed or underemployed, lack education or job skills, or be a low-income wage earner. If he is attached to rigid gender roles, he can be particularly frustrated about failing to provide for his family. The abuser’s frustration, insecurity, or sense of failure related to his employment status and financial stability can fuel or provide an excuse for violence. If he is feeling a lack of control in his financial situation, he may turn to exercising more control in his intimate relationship through violence. Suzanne Prescott & Carolyn Letko, *Battered Women: a Social Psychological Perspective*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 72, 74, 89 (Maria Roy ed., 1977).

⁶² See generally Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, 83 N.Y. ST. B.A. J. 40, 40-41 (2011).

⁶³ Prescott & Letko, *supra* note 61, at 84.

⁶⁴ JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES 34-35 (1998).

⁶⁵ *Id.* at 35.

her ability to buy necessities for herself or her children and may be disconnected from her support network.⁶⁶ Due to the effects of economic deprivation, she may risk losing custody of her children through child protective services.

State intervention can cause additional hardship. An abuser can lose his job or the prospect of employment due to arrest, prosecution, or incarceration. Lost employment means that the victim can no longer receive financial support from the abuser through child support, alimony, or other financial contributions. The victim's economic dependence on the abuser often makes her reluctant to prosecute any criminal charges.⁶⁷ Victims deliberate whether "they can afford to prioritize prosecution over other more immediate concerns such as food, employment, and childcare."⁶⁸ In one survey of prosecutors, defense attorneys, judges, and victim advocates, the "overwhelming reason" given for victims' reluctance to participate in the criminal system was the financial resources of the victim and her financial dependence on the abuser.⁶⁹ One prosecutor estimated that victims give a financial reason for wanting to drop the charges in ninety-nine percent of the cases; another prosecutor estimated that victims cite financial reasons for requesting that the charges be dropped in fifty percent of cases.⁷⁰

Within the litany of reasons why domestic violence victims would avoid criminal justice interventions, financial dependence on the abuser remains the primary reason that victims opt out.⁷¹ Research reveals the significant financial impact incarceration has on families, regardless of the reason for the incarceration. As early as 1928, families of incarcerated individuals were found to have suffered financially

⁶⁶ *Id.*

⁶⁷ Robert C. Davis et al., Research Notes, *Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee*, 22 JUST. SYS. J. 61, 62 (2001) (internal citation omitted); Kimberley D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1281-82 (2010). Some scholars argue that domestic violence victim recantation in criminal cases is a product of mandatory prosecution policies. When prosecutors work in a hard no-drop jurisdiction, "the battered woman's preference is irrelevant, except to the extent that she helps, or does not help, win the prosecutor's case. In these situations, prosecutions are pursued against the batterer by forcing the woman to testify, sometimes leading to recantation, blurring, or rearrangement of the facts by the victim." Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 186 (1997).

⁶⁸ Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 823 (2001).

⁶⁹ Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 387, 392 (2001).

⁷⁰ *Id.* at 392.

⁷¹ *Infra* Part III.

“to the point of scarcely being able to ‘eke out an existence.’”⁷² Today, any parent’s incarceration creates significant economic deprivation to families.⁷³ This deprivation is largely due to the loss of income that the incarcerated parent may have provided to the family but also includes lost “informal contributions” like child care, social support, and the purchase of toys and diapers.⁷⁴

Incarceration can compromise the well-being of family members and require family members to make sacrifices. Custodial parents may have less time or money to invest in their children.⁷⁵ They may be required to take on additional employment which results in increased child care costs. Older children may be required to leave school and enter the job market to supplement household income.⁷⁶ In addition, the loss of a parent and the financial difficulties that result from incarceration can cause children to suffer from a range of emotional, psychological, and behavioral problems.⁷⁷

State intervention can create a quagmire that pits a victim’s interests in financial security against her interests in safety. Thus many victims are put in the position of “choosing” between financial support from the abuser and state intervention. We do not suggest that a victim is truly “choosing” between economic security and physical safety. The choices available to domestic violence victims are limited and complicated by coercion, the threat of harm, and imperfect options, and we use the notion of “choice” guardedly. Our case study offers an opportunity to examine the “choice” of financial security over self-protection when reporting domestic violence incidents and violations of restraining and protective orders would negatively impact a victim’s financial security. Further inquiry into criminal justice policies regarding domestic violence reveals why a victim might “choose” financial security over personal safety.

⁷² Donald P. Schneller, *Prisoners’ Families: A Study of Some Social and Psychological Effects of Incarceration on the Families of Negro Prisoners*, 12 *CRIMINOLOGY* 402, 403 (1975).

⁷³ Kathleen J. Ferraro & John M. Johnson, *Problems of Prisoners’ Families: The Hidden Costs of Imprisonment*, 4 *J. FAM. ISSUES* 575, 588 (1983); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 *CRIME & JUST.* 121, 124 (1999); Joseph Murray, *The Effects of Imprisonment on Families and Children of Prisoners*, in *THE EFFECTS OF IMPRISONMENT*, 442, 442-44 (Alison Liebling & Shadd Maruna eds., 2013); Schneller, *supra* note 72, at 410; Creasie Finney Hairston, *Prisoners and Families: Parenting Issues During Incarceration* 1, 4 (2001) (working papers prepared for the “From Prison to Home” Conference Jan. 30-31, 2002).

⁷⁴ Hagan & Dinovitzer, *supra* note 73, at 124, 139.

⁷⁵ *Id.* at 124-25.

⁷⁶ *Id.*

⁷⁷ *Id.* at 122, 138.

IV. OTHER REASONS WHY DOMESTIC VIOLENCE VICTIMS OPT OUT OF COURT PROTECTIONS

A. *The Criminal Justice System and Mandatory Policies*

Victims may be reluctant to enlist the assistance of the police or the criminal justice system because that system and its consequences are largely out of their control. Reporting an incident of domestic violence or violation of a restraining or protective order operationalizes the criminal justice system. All fifty states treat a violation of a civil restraining order as a criminal matter.⁷⁸ In our case study, Barbara asked us to advocate to stop to criminal proceedings. In one instance, she asked us to intervene with the prosecutor to not pursue charges against Tom. In another, she begged us to persuade the family court judge to not act on Tom's violation of the restraining order. Throughout the relationship, Barbara claimed that her domestic violence injuries resulted from all manners of clumsiness so as to avoid the possibility of prosecution. Barbara's situation is hardly unusual. Mandatory arrest and prosecution, warrantless arrest, and other problems with the criminal justice system lead many victims to try to "opt out" of criminal remedies.

Mandatory arrest and mandatory prosecution policies drive state intervention in domestic violence situations in many jurisdictions.⁷⁹ Mandatory arrest policies require law enforcement to make an arrest when there is probable cause to believe that domestic violence has occurred, regardless of the victim's preferences.⁸⁰ Mandatory prosecution policies require the prosecutor to pursue charges against the abuser if there is evidence of a crime of domestic violence regardless of the victim's desire to pursue prosecution.⁸¹ Even in jurisdictions without mandatory intervention policies, the state's interests and con-

⁷⁸ Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM & MARY L. REV. 1843, 1860 (2002); see also David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1194 (1995). Individuals who violate civil restraining orders can also be penalized through civil or criminal contempt proceedings. *Id.* at 1194-95.

⁷⁹ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1670 (2004).

⁸⁰ Coker, *supra* note 68, at 802, 806 n.5.

⁸¹ Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1862-63 (1996); Coker, *supra* note 68, at 802, 806 n.5; Mills, *supra* note 67, at 185. Mandatory prosecution policies, sometimes called "no-drop policies," are often characterized as "hard" or "soft" no drop policies. Hanna, *supra*, at 1863; Mills, *supra* note 67, at 185-86. Under hard policies, given sufficient evidence the prosecutor proceeds regardless of the victim's preferences, perhaps even compelling the victim to participate in the prosecution. *Id.* Under soft policies, a prosecutor may decide to forego prosecution in certain circumstances, and victims are not forced to participate in the prosecution. *Id.*

cerns supplant those of the victim.

These policies can play a substantial role in a victim's decision about whether to involve police or the criminal court. In a mandatory arrest or prosecution jurisdiction, if a victim reports a domestic violence incident or a restraining or protective order violation, the state moves toward arrest and prosecution, even if arrest or prosecution are not favored by the victim or in the victim's best interests. Even in jurisdictions that do not follow mandatory arrest or prosecution policies, reporting an incident of domestic violence or violation of a restraining or protective order often will initiate state involvement.

Policy arguments over whether mandatory policies are the right approach to domestic violence are heated. Proponents of mandatory policies argue that mandatory policies are necessary because they require otherwise reluctant prosecutors to follow through with prosecution;⁸² ensure uniform treatment of domestic violence crimes even when the victim does not cooperate or want the criminal case to proceed;⁸³ remove the burden of choosing whether to prosecute from the victim;⁸⁴ and reduce racial discrimination in the criminal justice system by seeking to ensure that all perpetrators, regardless of race, are treated similarly.⁸⁵

Opponents of mandatory intervention believe that these policies do not serve the larger goal of ending domestic violence, deny the needs of individual victims, and even replace the control of the abuser with the control of the state.⁸⁶ Opponents are concerned that these universally applied strategies do not account for the reasons women stay in abusive relationships;⁸⁷ ignore superseding financial, cultural, or emotional issues;⁸⁸ force a decision on victims without taking into account their individual needs;⁸⁹ and disempower victims and strip them of their autonomy.⁹⁰

Warrantless arrest in domestic violence cases also creates situations in which cases may be pursued against victim wishes. Prior to

⁸² Hanna, *supra* note 81, at 1860.

⁸³ *Id.*

⁸⁴ *Id.* at 1852, 1865.

⁸⁵ Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV 550, 564 (1999).

⁸⁶ See Goodmark, *supra* note 6; Jessica Dayton, *The Silencing of a Women's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281 (2003); Mills, *supra* note 67.

⁸⁷ Mills, *supra* note 67, at 187-88.

⁸⁸ *Id.* at 185.

⁸⁹ *Id.*

⁹⁰ *Id.* Opponents believe that the state's indifference to the victims themselves is "harmful, even violent." *Id.* at 187-88.

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the domestic violence movement's legal reform efforts,⁹¹ the typical police response to domestic violence was to tell the husband or boyfriend to "take a walk around the block."⁹² Police often did not have the legal authority to make an arrest at the scene of a domestic violence crime.⁹³ That era has ended. Now all fifty states allow an officer to make a warrantless arrest when the officer has probable cause to believe that an abuser has committed a misdemeanor or violated a restraining order.⁹⁴ This means that the criminal justice system can be operationalized even if a domestic violence victim does not report an incident or call the police. A neighbor's phone call could be enough to initiate arrest or prosecution.

Involving the criminal system can have other negative consequences for victims, including sanctions when a victim has contact with an abuser who is subject to a restraining order. Victims have been held criminally liable for aiding and abetting an abuser in violating a restraining order when the victim has had contact with the abuser.⁹⁵ Victims have also been held in contempt for having contact with an abuser when a restraining order is in effect. One Kentucky judge held two different victims in contempt for having contact with an abuser who was subject to a restraining order.⁹⁶ The judge fined one victim \$100 and the other \$200 as a penalty for contempt.⁹⁷ Other

⁹¹ Mandatory intervention policies are the product of years of criminal justice reform fueled by the domestic violence movement and feminists, with the perceived interests of domestic violence victims driving the reform efforts. This reform has taken place only since the late 1960s, when the battered women's movement began launching concerted efforts.

The battered women's movement was an outsider movement, a grassroots movement that developed from the civil rights and feminist movements of the 1960s. Many feminists saw battering as the product of patriarchy, as male control over women. . . . The movement developed shelters, safe houses, and alternative institutions. Groups rejected governmental funding for battered women's services and programs. Despite ambivalence about the government's role in protecting battered women, 'engaging with the state' emerged as a principal strategy of the battered women's movement in the early 1980s and developed over the next two decades.

Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 500-01 (2003).

⁹² Hanna, *supra* note 81, at 1858.

⁹³ *Id.* at 1859.

⁹⁴ *Id.*

⁹⁵ See, e.g., *Henley v. Iowa Dist. Court for Emmet Cnty.*, 533 N.W.2d 199 (Iowa 1995). *But cf.* *N. Olmsted v. Bullington*, 744 N.E.2d 1225 (Ohio Ct. App. 2000); *State v. Lucas*, 100 Ohio St. 3d 1, 795 N.E.2d 642 (Ohio 2003); see generally Marya Kathryn Lucas, *An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders*, 5 GEO. J. GENDER & L. 763, 774-78 (2004).

⁹⁶ Francis X. Clines, *Judge's Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, <http://www.nytimes.com/2002/01/08/us/judge-s-domestic-violence-ruling-creates-an-outcry-in-kentucky.html>.

⁹⁷ *Id.*

judges in Kentucky have incarcerated women because they contacted their husbands while a restraining order was in effect.⁹⁸

Victims may be compelled to participate in criminal proceedings against their will by subpoena, threatened incarceration, or other means.⁹⁹ For example, in *State v. Finney*,¹⁰⁰ the prosecutor subpoenaed the victim—who had been raped by her husband—and then threatened her with arrest if she failed to testify. During her compelled testimony, the victim indicated that she had been harassed and intimidated by the prosecutor. She stated that she did not want to testify but that she was afraid not to and believed the prosecutor would ensure she was arrested immediately after leaving the courtroom for her failure to testify.¹⁰¹ In *Tejeda v. State*,¹⁰² the trial court judge ordered the victim to remain in the courtroom in case the court needed her and stated, “If you leave, you’ll be in contempt of Court and I’ll have you put in jail.”¹⁰³ The court also threatened that the court and the police would not assist her in the future as a result of her reluctance to testify.¹⁰⁴

Victims may experience penalties or harassment from the criminal system for “recanting” or committing perjury.¹⁰⁵ In *State v. Spragins*, the victim requested that charges be dismissed and asserted that her earlier statement about a domestic violence incident was false.¹⁰⁶ The victim was subpoenaed to testify, and during cross-examination of the victim, the trial court stated in the presence of the jury, “So let me see if I’ve got this all straight. We’re here trying this case because you are a liar. Is that correct? Do you want to answer the question yes or no? We are here going through this, trying this case because you are a liar, is that correct?”¹⁰⁷ In *State v. Hancock*, the wife recanted at trial despite prior written and videotaped statements to the contrary.¹⁰⁸ The trial court threatened to send her to prison for five years for perjury and went on to say, “So, either he goes or you go, what is it going to be. You got kids? . . . What is it going to be? Who is going to jail,

⁹⁸ Stephanie Simon, *Judges Push for Abused to Follow the Law*, L.A. TIMES, Jan. 22, 2002, <http://articles.latimes.com/2002/jan/22/news/mn-24141>.

⁹⁹ See Kirsch, *supra* note 69, at 402-06.

¹⁰⁰ 591 S.E.2d 863 (N.C. 2004).

¹⁰¹ *Id.* at 865.

¹⁰² 905 S.W.2d 313 (Tex. Ct. App. 1995).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ For a discussion of the reasons victims recant, see Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 163-75 (2009). Professor Rutledge advocates that some victims should be prosecuted for perjury. *Id.* at 182-94.

¹⁰⁶ No. 82170, 2003 WL 22971050, at *1 (Ohio Ct. App., Dec. 18, 2003).

¹⁰⁷ *Id.* at *2.

¹⁰⁸ No. C-030459, 2004 WL 596103, at *1 (Ohio Ct. App., March 26, 2004).

you or him?”¹⁰⁹

It is no wonder that victims try to opt out of the protections provided by the criminal justice system. “Attrition dismissal rates” in domestic violence cases are extremely high.¹¹⁰ A series of studies have shown that victims fail to participate in criminal cases arising from domestic violence in about 60% to 80% of cases.¹¹¹ Such attrition may occur as a result of a victim dropping charges or recanting.¹¹² Other modes of noncooperation include failure to cooperate with the police, sign the complaint, meet with the prosecutor, and appear at court hearings.¹¹³ One study found that judges, lawyers, and other court personnel perceive that 56% of domestic violence victims will only testify if subpoenaed,¹¹⁴ that 31% of victims change their minds about the abuser’s guilt, and 31% undermine the prosecution’s case.¹¹⁵ Experts on domestic violence—including psychologists, counselors, law enforcement officers, shelter employees, and victim advocates—regularly testify that it is common for domestic violence victims to recant.¹¹⁶

Many victims eschew criminal system involvement by trying to avoid intervention at all. A staggering amount of domestic violence goes unreported. One study indicated that 55% of intimate violence is never reported to the police.¹¹⁷ Another study found that less than 10% of seriously injured victims report abuse to the police and even fewer report if they are endangered by but escape serious injury.¹¹⁸ In yet another study, about 47% of victims tried to opt out of the crimi-

¹⁰⁹ *Id.* at *2.

¹¹⁰ EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 87 (1996) (internal citations omitted). *But see* KARIN V. RHODES ET AL., VICTIM PARTICIPATION IN INTIMATE PARTNER VIOLENCE PROSECUTION: IMPLICATIONS FOR SAFETY, U.S. DEPARTMENT OF JUSTICE, 11 (2011) (finding that victims have a strong preference for mandatory prosecution with or without the victim’s participation).

¹¹¹ BUZAWA & BUZAWA, *supra* note 110, at 87.

¹¹² *Id.*

¹¹³ Maureen McLeod, Research Note, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 CRIMINOLOGY 395, 400 (1983).

¹¹⁴ Jennifer L. Hartman & Joanne Belknap, *Beyond the Gatekeepers: Court Professionals’ Self-Reported Attitudes About and Experiences with Misdemeanor Domestic Violence Cases*, 30 CRIM. JUSTICE & BEHAV. 349, 361 (2003).

¹¹⁵ *Id.*

¹¹⁶ Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims’ Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002); *see* Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 78-83, 87-91 (1998); Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 1.4 THE VOICE 2-3 (2006).

¹¹⁷ McLeod, *supra* note 113, at 400 (citing U.S. Department of Justice, *Intimate Victims: A Study of Violence Among Friends and Relatives* (1980)).

¹¹⁸ *Id.* (citing LENORE WALKER, BATTERED WOMEN (1979)).

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nal system before the case was even brought to the attention of the prosecutor's office.¹¹⁹ Victims are instead turning to the family law system where they are requesting civil restraining orders in droves.¹²⁰ Violation of this civil remedy often results in criminal prosecution, a consequence that may be unintended and unknown by many victims.

The high rates of victim nonparticipation in the criminal justice system are unsettling and indicate the problematic nature of the system for domestic violence victims. The victim may not want to involve the criminal justice system because the system does not meet her needs.¹²¹ If the system successfully addressed domestic violence, victim engagement would be more prevalent.¹²² The criminal justice system has emerged as the primary domestic violence intervention strategy,¹²³ but it is failing victims.

Victims may avoid the criminal justice system because of how they are treated by judges, lawyers, and other court personnel. Victims who do not cooperate or do not separate from the abuser are viewed by some judges and lawyers as "pathetic, stupid, or even deserving of the abuse."¹²⁴ Those who do cooperate are seen by these same actors as "vindictive, crazy, or falsely charging domestic violence to meet their own selfish needs."¹²⁵

Other factors may deter involvement. Victims who may otherwise seek intervention might not bother contacting law enforcement because of low arrest rates for domestic violence incidents.¹²⁶ Victims may not participate because they may not perceive the conduct as criminal or abusive or believe that it is a personal matter.¹²⁷ They may not understand how the system works or may have logistical bar-

¹¹⁹ McLeod, *supra* note 113, at 405.

¹²⁰ JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 24 (1996) (describing civil restraining orders as "the primary source of legal sanction and protection for battered women"); Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L. J. 361, 376 (2002) (describing civil restraining orders as the "most attractive" remedy for domestic violence victims).

¹²¹ Law enforcement does not always enforce protection orders. In 1984, Tracey Thurman was awarded \$2.9 million after suing the Torrington, Connecticut Police Department and twenty-four city police officers on the grounds that the city's policy and practice of nonintervention and nonarrest [sic] in domestic violence cases was unconstitutional on Fourteenth Amendment Equal Protection grounds. *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1524 (D. Conn. 1984).

¹²² Bailey, *supra* note 67, at 1281-82.

¹²³ Deborah Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 402 (2007).

¹²⁴ Hartman & Belknap, *supra* note 114, at 363.

¹²⁵ *Id.*

¹²⁶ BUZAWA & BUZAWA, *supra* note 110, at 51, 53.

¹²⁷ *Id.* at 45.

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riers such as not having transportation, time, money, or childcare.¹²⁸ They may fear that the abuser will retaliate by reporting the victim to child protective services and alleging abuse, neglect, or substance abuse.¹²⁹ Post-traumatic stress disorder created by the abuse may make it difficult or impossible to cooperate.¹³⁰

Race, culture, and sexual orientation may also play a role in a victim's decision as to whether to enlist the criminal justice system.¹³¹ Victims may choose not to call the police due to racism in law enforcement or because of a community ethic against state intervention.¹³² Women of color are less likely to have contact with a prosecutor, want to press charges, or want prosecution than white women.¹³³ (Barbara and Tom are both white). Gay, lesbian, and transgender victims may avoid the criminal system because of prior negative experiences with law enforcement or the courts or due to fear of reprisals from the system.¹³⁴

While we are focusing on economic issues and problems arising from criminal justice system intervention, we do not want to ignore other factors—including fear of retaliation, risks due to immigrant status, and love for or attachment to the abuser—that may feature prominently in a victim's decision about whether to enforce a restraining or protective order or report an act of domestic violence. At the risk of raising new questions that we do not attempt to answer, we briefly address issues related to separation assault, immigration and immigrant status, and the role of love or attachment, all of which must be considered to grasp the complexity of the issues facing a domestic violence victim.

B. Retaliation

An abused woman may decide not to involve the criminal justice system because of the abuser's threat of violence or the victim's fear of retaliation.¹³⁵ When a victim separates or decides to separate from

¹²⁸ RHODES ET AL., *supra* note 110, at 48.

¹²⁹ BUZAWA & BUZAWA, *supra* note 110, at 45.

¹³⁰ *Id.*

¹³¹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

¹³² *Id.*

¹³³ RHODES ET AL., *supra* note 110, at 7-8.

¹³⁴ See DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE (1991); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).

¹³⁵ Kirsch, *supra* note 69, at 393-96; see Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, 250 NAT'L INST. OF JUST. J. 20, 24 (2003) (finding an increase of femicide of married white and unmarried black women and an increase in victimization of unmar-

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her abuser, the risk of violence escalates, especially if the couple was cohabitating.¹³⁶ This “separation assault” is “the particular assault on a woman’s body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation.”¹³⁷ Domestic violence is most likely to become lethal when a victim separates from her abuser.¹³⁸ In 56% of intimate partner femicide (or the murder of women) cases, the abuser and victim were living apart on the day of the murder.¹³⁹ Separation was the “immediate precipitating factor” in 45% of intimate partner femicides.¹⁴⁰ Victims will often postpone leaving the abuser fearing separation assault¹⁴¹ and will only choose to separate or pursue criminal justice protections if it seems possible or safe to do so.¹⁴² Additionally, the victim may be terrified that the abuser will harm her, family members, or loved ones if she pursues criminal remedies.¹⁴³

C. Immigration and Immigrant Status

Noncitizen women are even less likely than citizens to involve the criminal justice system because of cultural beliefs, language limitations, or other barriers.¹⁴⁴ Immigrant women tend to feel more pressure to live up to cultural ideals and fear that separation is disloyal to

ried white women when a prosecutor pursued protective order violations). *But cf.* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003) (finding that domestic violence arrests decrease the risk for femicide).

¹³⁶ Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 20 (1991); Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 FLA. B.J. 24 (1994) (quoting Mahoney, *supra* at 94); Campbell et al., *supra* note 135, at 1092.

¹³⁷ Mahoney, *supra* note 7, at 6.

¹³⁸ *Id.* at 79.

¹³⁹ George W. Bernard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 (1982). In fact, a victim’s chances of being killed by her intimate partner increases by a factor of four when the worst incident of abuse in the relationship was triggered by a prior attempt by the victim to leave the relationship. The odds of being murdered increase by a factor of five when the worst incident was triggered by an attempt to leave the abuser for another partner or by the abuser’s jealousy. Campbell et al., *supra* note 135, at 1092.

¹⁴⁰ Carolyn Rebecca Block, *Risk Factors for Death or Life-Threatening Injury for Abused Women in Chicago*, U.S. Department of Justice, National Institute of Justice, II-4-6, NCJ 199732 (2004).

¹⁴¹ *Id.* at 65-93.

¹⁴² Mahoney, *supra* note 7, at 73-74.

¹⁴³ Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L. J. 953, 958 (1999). *But cf.* RHODES ET AL., *supra* note 110, at 10 (finding that there is not an increase in victims’ visit to the emergency department during or after prosecution).

¹⁴⁴ See Edna Erez & Carolyn Copps Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 4 W. CRIMINOLOGY REV. 155 (2003).

their culture and will lead to community stigmatization or sanctions.¹⁴⁵ A victim might not be able to speak or be literate in English, and interpretation in the woman's language may not be available through the criminal justice system.¹⁴⁶ Immigrant women also face greater financial risks in separating from an abusive partner.¹⁴⁷

Immigrant victims rarely call the police,¹⁴⁸ in part because of possible immigration consequences for their non-citizen abusers. A conviction for domestic violence or violating a restraining order is a removable offense, meaning that the abuser can be deported on that basis.¹⁴⁹ For some victims, removal of the abuser is a positive development that lowers or eliminates the risk of future violence.¹⁵⁰ Others do not want to begin a course of conduct that may result in the abuser being deported. If the abuser is the parent of the victim's children, the victim may not want to sever the parent-child relationship through the abuser's removal. The victim may be receiving financial support from the abuser through child support, alimony, or other means, and the abuser's deportation would mean almost certain cessation of that support. Finally, for emotional reasons, the victim may not want the abuser to suffer such a severe penalty as removal.¹⁵¹

A victim may choose not to report abuse fearing her own adverse immigration consequences.¹⁵² Undocumented victims assume an element of risk when interacting with law enforcement.¹⁵³ Some jurisdic-

¹⁴⁵ Yvonne Amanor-Boadu et al., *Immigrant and Nonimmigrant Women: Factors that Predict Leaving an Abusive Relationship*, 18 VIOLENCE AGAINST WOMEN 611, 613 (2012) (internal citations omitted).

¹⁴⁶ Erez & Copps Hartley, *supra* note 144, at 159-60.

¹⁴⁷ Amanor-Boadu et al., *supra* note 145, at 642.

¹⁴⁸ Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT'L J. POLICE SCIENCE & MGMT 230, 236 (2005); Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 60 (2003).

¹⁴⁹ 8 U.S.C. § 1227(a)(2)(E) (1952, as amended through 2008).

¹⁵⁰ Orloff et al., *supra* note 148, at 69-70.

¹⁵¹ *But cf.* Orloff et al., *supra* note 148, at 69-70 (finding that the immigration status of an abuser is not a factor in a victim's decision about whether to contact the police).

¹⁵² Orloff et al., *supra* note 148, at 67-68; 8 U.S.C. § 1227(a)(2)(E) (1952, as amended through 2008). When an undocumented victim reports her abuse, she may be informing the authorities that she does not have valid immigration status — and then chances removal. A victim of domestic violence might be able to seek a non-immigrant visa commonly referred to as the U Visa, under 8 U.S.C. § 1101(a)(15)(U) (1952, as amended through 2013). This status requires that the victim prove that she suffered "severe or substantial physical or mental abuse," that she "possesses information concerning criminal activity," and that she is "likely to be helpful to . . . authorities investigating or prosecuting criminal activity." *Id.* Issuance of U Visa certifications by law enforcement can vary widely from precinct to precinct. Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153, 163-64 (2010).

¹⁵³ Elizabeth M. W. Trefonas, *Access to Justice for Immigrants in Wyoming*, 34 WYO. LAW. 24, 25-27 (2011).

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tions, like Arizona, require law enforcement to verify the immigration status of any person suspected of being undocumented.¹⁵⁴ While other jurisdictions do not inquire about the immigration status of victims,¹⁵⁵ every time a victim interacts with law enforcement there is some chance that she will come to the attention of Immigration and Customs Enforcement (ICE).

D. *Love and Attachment*

Love or attachment can be controlling factors in a victim's decision whether to report an abuser's behavior or terminate the relationship.¹⁵⁶ Victims are often emotionally attached to their abusers and sometimes do not want to see them incarcerated or punished. These emotions can lead to continuing contact or a relationship with the abuser. Victims may rationalize the abusers' behavior, attributing it to substance abuse or a troubled childhood.¹⁵⁷ Reporting abusive conduct or terminating contact with the abuser may require the victim to give up a fantasy of a healthy relationship with the abuser.¹⁵⁸ The role of love in a victim's decision even can trump economic factors in a victim's decision about whether to separate or report abuse.¹⁵⁹ As one prosecutor stated, "[T]hey love the person. They're afraid that going forward will break up their relationship, and most of the time they don't want to break up."¹⁶⁰

It is from within this morass that victims ask their attorneys to advocate or not advocate on their behalf, or to pick and choose from possible remedies. When the victim is faced with so many potential negative consequences, it is no wonder that victims ask their attorneys to help them avoid state intervention even when their safety is at risk. The lawyer is left to question whether she should engage in the requested advocacy (or non-advocacy) and if it is ethically or morally responsible to do so. We turn to the issue of different lawyering mod-

¹⁵⁴ ARIZ. REV. STAT. ANN. § 13-1509 (2010). Commonly referred to as the "Support Our Law Enforcement and Safe Neighborhoods Act" or SB 1070, which refers to the bill version of the law as presented to the Arizona State Senate.

¹⁵⁵ For example, in *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995), *on reconsideration in part*, 997 F.Supp. 1244 (C.D. Cal. 1997), the court ruled that a measure requiring law enforcement agencies to verify the immigration status of every arrestee who they suspected of being in the United States unlawfully was entirely preempted by federal law, which does not require investigation into immigration status.

¹⁵⁶ Mills, *supra* note 85, at 598; RHODES ET AL., *supra* note 110, at 50.

¹⁵⁷ JACOBSON & GOTTMAN, *supra* note 49, at 166.

¹⁵⁸ *Id.*

¹⁵⁹ HATTERY, *supra* note 54, at 53, 75 ("Many affluent battered women do not leave their abusive partners for the same reasons middle-class or poor women do not: because they love their partners, and because they believe they will change.").

¹⁶⁰ Kirsch, *supra* note 69, at 397.

els for guidance about how an attorney might approach a victim-client's decision.

There are different views on how lawyers approach clients and issues. We believed, and continue to believe, in "client-centered lawyering." We might have treated this issue differently if we were "cause lawyers." It may be helpful to consider what it means to be a client-centered lawyer or a cause lawyer in the context of a domestic violence case.

V. DIFFERENT LAWYERING MODELS: CLIENT-CENTERED LAWYERING AND CAUSE LAWYERING

A. *Client-Centered Lawyering*

Starting in the late 1970s, lawyers and law school clinics started to move from a traditional lawyer-client relationship to an alternative "client-centered model,"¹⁶¹ encouraging lawyers and law students to develop meaningful relationships¹⁶² with their clients and depart from a traditionally paternalistic and adversarial approach to litigation.¹⁶³ Over time, client-centered lawyering has increasingly focused on treating the client holistically, emphasizing problem-solving, and not just the client's immediate case."¹⁶⁴

Client-centered lawyering has four primary components:

(1) it draws attention to the critical importance of non-legal aspects of a client's situation; (2) it places the lawyer's role in the representation within limitations set by a sharply circumscribed view of the lawyer's professional expertise; (3) it insists on the primacy of client decision-making; and (4) it places a high value on the lawyers' understanding their clients' perspectives, emotions and values.¹⁶⁵

Client-centered lawyering seeks to place the client in control of the

¹⁶¹ Laurie Shanks, *Whose Story is it, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 *CLINICAL L. REV.* 509 (2008); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369, 369 (2006).

¹⁶² One foundation of a meaningful lawyer-client relationship that should be taught to students is empathy for the client's dilemma. See Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 *CLINICAL L. REV.* 135 (2002).

¹⁶³ See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); see also DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

¹⁶⁴ Jason K. Cohen, *Know Your Client: Maximizing Advocacy by Incorporating Client-Centered Principles into Legal Writing Rhetoric Practice*, 1 *CHARLOTTE L. REV.* 253, 263 (2009) (citing Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not to Be a Problem-Solving Negotiator*, 14 *CLINICAL L. REV.* 253, 286 (2007)).

¹⁶⁵ Kruse, *supra* note 161, at 377.

attorney-client relationship and decision-making. Client-centered lawyering is a model that “puts the attorney in the role of an open, accepting helper and leaves both priority-setting and decision-making to the client. The lawyer helps the client determine what is best for him in light of *his own* priorities.”¹⁶⁶ In client-centered counseling, “the emphasis is on achieving the greatest client satisfaction.”¹⁶⁷

This model represents a diversion from the traditional paternalistic, attorney-knows-best role that many attorneys adopt, where the decision-making is based upon the attorney’s knowledge, priorities, and beliefs, rather than the client’s interests.¹⁶⁸ Client-centered lawyering advocates suggest that the adversarial legal system encourages attorneys to make choices on behalf of their clients that are strategically wise, while failing to recognize the client’s interest in participating in decision-making. Advocates believe the traditional approach is a product of the adversarial legal system and the approach toward lawyering that was taught in law school. In contrast, in a client-centered lawyering relationship, “[t]he client does not perceive himself as, and is not, an instrument to be manipulated by the lawyer.”¹⁶⁹ A client of a client-centered lawyer “directs his own destiny, relying on the lawyer as a helper and as a guide through the legal labyrinths.”¹⁷⁰ This model “emphasizes autonomy and individual growth” for the client.¹⁷¹

Under the client-centered model, mutual trust between the parties will empower the client to assume the dominant role of decision-maker, and the attorney can adopt a more passive role as the client’s counselor.¹⁷² The responsibility and ability to develop mutual trust between the lawyer and client rests entirely on the attorney, who is traditionally seen as being in control of the relationship. The lawyer should place himself or herself in the client’s position, attempting to understand the client’s situation and emotions.¹⁷³

A client-centered lawyer helps the client select the best course of action, rather than merely outlining the options and instructing the client to pick the path of his choice. Many scholars writing about client-centered lawyering use the term “holistic” to describe the lawyer’s

¹⁶⁶ Robert M. Bastress, *Client Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97, 98 (1985) (emphasis added).

¹⁶⁷ Cohen, *supra* note 164, at 262.

¹⁶⁸ Bastress, *supra* note 166, at 97.

¹⁶⁹ *Id.* at 100.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Much scholarship on this issue refers to the client-centered lawyering model as “client-centered counseling.” See, e.g., Cohen, *supra* note 164; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

¹⁷³ Bastress, *supra* note 166, at 101.

role within this model.¹⁷⁴ The lawyer remains neutral and serves as a resource to the client during his decision-making process.¹⁷⁵

While this model is intended to allow the client to make all decisions autonomously, involving the lawyer only when necessary, some scholars believe this cannot work in practice.¹⁷⁶ One critic argues that the differences between the client-centered and traditional models are nonexistent when applied to everyday lawyering:

The client-centered literature fails to present even a single example in which a lawyer sits down with a client and walks through alternative case theories and their implications for the case and client. In this respect, the client-centered approach differs little from the traditional approach, which relegates virtually every decision about case theory to lawyers.¹⁷⁷

Other critics argue that clients are not in the best position to make legal decisions. Instead, when a client hires you, he demonstrates “tacit willingness for you to make lawyering skills decisions free from consultation” with them.¹⁷⁸

The difficulty is in the execution. Professor Jane Stoever writes about teaching her students to be “client-centered and client-empowering advocates who provide representation that enhances both a survivors’ safety and autonomy.”¹⁷⁹ Implicit in client-centered lawyering is that the client may reach a different decision than the lawyer. Having fostered that autonomy, what do we do when autonomy and safety diverge? Professors Susan Bryant and Maria Arias also discuss empowering their clinic’s domestic violence clients as part of the clinic’s design.¹⁸⁰ Professors Bryant and Arias note that a client-centered approach “allows the students to see patterns of oppression and. . . recognize the uniqueness of each client’s situation.”¹⁸¹ They discuss a case in which the students determined that the client wanted to file court papers seeking custody and a restraining order, which the

¹⁷⁴ Kruse, *supra* note 161, at 372.

¹⁷⁵ Deborah J. Cantrell, *What’s Love Got to Do with It?: Contemporary Lessons on Lawyerly Advocacy from the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296, 304 (2010) (ensuring that the client “retains her autonomy and freedom of thought,” and “the lawyer truly remains the agent of the client/principal”).

¹⁷⁶ Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71, 76 (1996).

¹⁷⁷ Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 511-12 (1994).

¹⁷⁸ BINDER ET AL., *supra* note 163, at 270.

¹⁷⁹ Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 488 (2013).

¹⁸⁰ Susan Bryant & Maria Arias, *Case Study A Battered Women’s Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U.J. URB. & CONTEMP. L. 207 (1992).

¹⁸¹ *Id.* at 217.

students prepared, but the client missed her appointment to sign the papers. The students later learned through a social worker that the client, while afraid of her husband, was not ready to pursue a legal remedy.¹⁸² Professors Bryant and Arias note that the clinic's client empowerment "allows the client to participate in defining what a lawyer's role should be,"¹⁸³ and that in such a relationship, the lawyer's role "changes with each client because the lawyer alone does not set the professional boundaries."¹⁸⁴

Professor Michelle Jacobs endorses client-based lawyering as a good model for students, but states that a major weakness is the failure to address race, class, and (to a lesser extent) gender in the attorney/client relationship.¹⁸⁵ Professor Jacobs argues that the purpose of client-centered lawyering as a model is to "return the client to the centrality of the lawyer's work," but that clients, particularly clients of color (and women?) are still at the margins of the relationship.¹⁸⁶ She reminds us that everyone—including lawyers, law students, and law professors—have preconceived notions rooted in our cultural background.¹⁸⁷

In the domestic violence arena, our preconceived notions often center on our difficulty in accepting that a victim of domestic violence remains with her abuser. A great deal of the literature on domestic violence tries to answer the question, "Why do abused women stay?" As lawyers, we translate that question to "What can we do to help our client leave?" As Professor Jacobs points out, only when we see the client's reality can we truly work with the client in a collaborative way.¹⁸⁸

Putting aside our preconceived notions does not answer our question of limits, i.e. is there a point at which we cannot assist the client in relation to the court or her own risky behavior, but it does move us further down the road. In our case study, this was the single most important factor in acting as we did.

B. Cause Lawyering

As Austin Sarat and Stuart Scheingold have noted, "providing a single, cross culturally valid definition of the concept [of cause law-

¹⁸² *Id.* at 219-20.

¹⁸³ *Id.* at 220.

¹⁸⁴ *Id.*

¹⁸⁵ Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 346 (1997).

¹⁸⁶ *Id.* at 348.

¹⁸⁷ *Id.* at 377.

¹⁸⁸ *Id.* at 404.

ying] is impossible.”¹⁸⁹ Writing on the intersections of race, space, and poverty, John Calmore writes that “cause lawyering encompasses various law-related activities, from rights assertion to legal counseling, that relies on law-related means to achieve social justice for individuals and subordinated or disadvantaged groups.”¹⁹⁰ Stuart Scheingold¹⁹¹ describes cause lawyering as “left-activist.”¹⁹² Richard Abel writes that “the moments when law offers leverage to the relatively powerless as well as those when it is wielded, or trumped, by power” are “occasions for cause lawyering,”¹⁹³ and Thomas Hilbink, reviewing Sarat and Scheingold, comments on the definitional difficulty, noting that “belief in a cause and a desire to advance that cause are the forces that drive cause lawyering actions” for cause lawyers, but “[h]ow does one determine what fits within the rubric?”¹⁹⁴ Ann Southworth, one of the few scholars who has examined the right’s response to the historic left-leaning cause lawyering, shows that the “cause” in cause lawyering can be broad indeed, and virtually every progressive cause lawyer now has a conservative counterpart.¹⁹⁵ Today, for every cause, we can be confident that there are cause lawyers on every side of the issue.

Cause lawyering in the field of domestic violence can take a variety of approaches. Karen Czapanskiy notes that “women lawyers and law professors were the first to construct the issue as a legal problem,” partly as a consequence of the identification of the battering of women as an issue affecting women’s liberation. Feminist women lawyers were instrumental in developing the theory and legal regime addressing domestic violence issues.¹⁹⁶ These efforts took a variety of forms, including criminal defense,¹⁹⁷ family law in both legal services

¹⁸⁹ Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 5 (Austin Sarat & Stuart Scheingold eds., 1998).

¹⁹⁰ John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927 (1999) (citing Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 31, 37 (1998)).

¹⁹¹ Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in *CAUSE LAWYERING*, supra note 189, at 118.

¹⁹² *Id.*

¹⁹³ Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 69 (1998).

¹⁹⁴ Thomas M. Hilbink, *You Know the Type: Categories of Cause Lawyering*, 29 *LAW & SOCIAL INQUIRY* 657, 659 (2004).

¹⁹⁵ ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008).

¹⁹⁶ Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 *FAM. L.Q.* 247, 258-59 (1993).

¹⁹⁷ See, e.g., Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconcep-*

offices¹⁹⁸ and private practice,¹⁹⁹ and state and federal legislative efforts to establish governmental intervention on behalf of domestic violence victims, a remarkably successful effort resulting in restraining order statutes and other protections in every state,²⁰⁰ as well as the passage of the Violence Against Women Act (VAWA) in 1994 and reauthorizations in 2000, 2005, and 2013.²⁰¹

Still, today's domestic violence lawyers may agree on the cause, but not necessarily the approach. Twenty years after Professor Czapanskiy emphasized their seminal role, feminist attorneys still play a major role in representing individual clients in domestic violence cases, but the advocacy community is split into those who support and those who oppose mandatory arrest.

Mandatory arrest and no-drop prosecutions have placed prosecutors in a more prominent role. As Deborah Epstein has noted, activists have focused on "transforming the responses of police, prosecutors, and the courts."²⁰² Legal reforms include warrantless arrest, mandatory arrest, no-drop prosecutions, and temporary orders with substantial implications and few procedural protections.²⁰³

Donna Wills, a veteran family violence prosecutor in Los Angeles, has written that she "firmly believe[s]" that an aggressive no-drop and no-dismissal policy "is the enlightened approach to domestic violence prosecutions."²⁰⁴ Wills approaches domestic violence through a cause lawyer's lens, stating that it is a societal problem, not just an individual or private problem, with a strong State interest in maintaining public safety. In focusing on the State interest, Wills expands the protective umbrella to include children as secondary victims.²⁰⁵ To Wills (and other supporters of mandatory arrest and no-drop policies), these policies prevent batterers from controlling the justice system through their victims.²⁰⁶ Under this approach, the domestic violence victim is best protected by having no power, with decision-making resting with the State, in the form of the police and prosecutor.

tions in *Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

¹⁹⁸ Czapanskiy, *supra* note 196, at 258-59.

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Violence Against Women Act (VAWA) of 1994 (codified in part as amended at 42 U.S.C. §§ 13925-14045 (2000, 2005, 2013)). For state resources, see generally, NATIONAL CENTER FOR STATE COURTS, www.ncsc.org/Topics/Children-Families-and-Elders/Domestic-Violence/Resource-Guide.aspx.

²⁰¹ 42 U.S.C. §§ 13925-14045.

²⁰² Epstein, *supra* note 78, at 1845.

²⁰³ *Id.* at 1847-48.

²⁰⁴ Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L. J. 173, 173 (1997).

²⁰⁵ *Id.* at 175.

²⁰⁶ *Id.* at 180.

As Wills admits, there is no evidence that mandatory arrest and no-drop policies reduce the incidence of domestic violence.²⁰⁷ Betsy Tsai, a Domestic Violence Resource Coordinator for the New York City Courts, notes that criminal justice system employees are “frustrated and embarrassed by their inability to protect victims of domestic violence,” and suggests that the court system should look toward specialized domestic violence courts.²⁰⁸ The specialized courts incorporate therapeutic jurisprudence, a multidisciplinary effort to provide comprehensive services.²⁰⁹ Therapeutic jurisprudence is a reaction to the inevitable mental health and psychological functioning of the participants in the legal system.²¹⁰ In practice, a therapeutic approach would include a supportive and informative environment to the victim, victim and witness advocates, police training, more careful monitoring of defendant compliance with court orders, and participation in intervention programs for abusers.²¹¹ This does not mean that the victim regains control of the decisions that so dramatically affect her life. In many jurisdictions employing a therapeutic jurisprudence system, the State, not the victim, controls the case.²¹²

VI. WHEN PRIVATE RIGHTS BECOME PUBLIC AND COURTS INTERVENE

In the Mary Adkins/Elizabeth Tulis g-chat, Elizabeth Tulis wrote that “once you enter the criminal law system, it’s not just the interest of the victim, but of society that is at issue. Going into the system, you marshal the resources of the state to protect you, but you also cede some control of the case to the State.” Mary and Elizabeth raise the question of whether private rights become public once a victim seeks state intervention. Does society have an independent interest in enforcing the restraining order?

Courts have allowed the public interest to transcend private choices, including forced feeding in prisons²¹³ and forced medical care to children, even in the face of religious opposition by the child’s parents.²¹⁴ The commonality in these cases is the likelihood of harm, and the public interest in preventing that harm. The question, when it

²⁰⁷ *Id.*

²⁰⁸ Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285, 1287 (2000).

²⁰⁹ *Id.* at 1294-95.

²¹⁰ *Id.*

²¹¹ *Id.* at 1298-00.

²¹² *Id.* at 1306.

²¹³ *Pennsylvania v. Kallinger*, 580 A.2d 887 (Pa. Commw. Ct. 1990).

²¹⁴ *See, e.g., Matter of McCauley*, 565 N.E.2d 411 (Mass. 1991); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (N.J. 1962).

comes to domestic violence cases, is the extent to which we are comfortable predicting future violence, and whether or not our conclusions should affect our representation of clients who are at risk. In the area of domestic violence, the rationale behind mandatory arrest policies and forced testimony combines the notions of many of the themes of this paper, including a patronizing view of protecting the victim from her inability to protect herself, a reformist attitude of treating all cases uniformly, the criminalization of domestic violence, and the transfer of decision-making to the State. Does State involvement, either through civil or criminal process, turn a private domestic violence matter into a public issue?

As we discussed earlier, several courts have sanctioned women or forced them to testify when the women refused to cooperate with the State in pursuing domestic violence remedies or testifying in criminal matters. Implicit in these decisions is a belief that the right to withdraw from civil or criminal prosecution has been supplanted by State interests. To get a sense of judicial reasoning in domestic violence cases, it helps to look at death penalty cases, where the issue of public rights trumping the private attorney-client relationship has arisen prominently.

In 1987, a Connecticut court sentenced Michael Ross to death, after he confessed to murdering eight women.²¹⁵ He fought execution for seventeen years, but ultimately withdrew all appeals and requested that the execution go forward,²¹⁶ starting a new proceeding questioning whether a defendant can rationally and competently choose to die, and whether the public has a right to contest an execution. The Chief Public Defender's office sought to intervene in Ross's case, arguing that Ross was trying to commit "judicial, state-assisted suicide," an argument based on Ross's alleged incompetence to make the decision to consent to the execution.²¹⁷ Ross's former lawyer, the Office of the Public Defender, argued that Ross's execution would make executions "more socially and politically" acceptable, an issue of great importance to the Public Defender's other clients facing execution.²¹⁸

The Public Defender's prediction was almost certainly factually

²¹⁵ *State v. Ross*, 849 A.2d 648, 665 (Conn. 2004).

²¹⁶ *Id.*

²¹⁷ Application to Justice Ginsburg to Vacate Stay of Execution of Michael Ross, *Lantz v. Ross*, 543 U.S. 1134 (2005), available at http://www.ct.gov/csao/lib/csao/app_to_vacate_stay_of_execution_04a656.pdf; Rebecca Leung, *A Decision to Die*, CBS NEWS 60 MINUTES (Jan. 26, 2005) (reporting on Charlie Rose broadcast of Jan. 26, 2005), http://www.cbsnews.com/2100-500164_162-669530.html.

²¹⁸ Lynne Tuohy, *Defenders Ordered Out of Ross Case*, COURANT (Dec. 16, 2004), http://articles.courant.com/2004-12-16/news/0412160987_1_defenders-clifford-second-penalty-hearing.

correct, but this is not how attorneys usually act. Rule 1.9(1) of the Model Rules of Professional Conduct²¹⁹ explicitly prohibited the Public Defender from representing an interest adverse to Ross, and Rule 1.9(2) explicitly prohibited using information obtained during representation against Ross's interests.²²⁰ How, then, could the Public Defender use its knowledge of Ross's mental condition as the basis for legal actions that, in the words of Ross's subsequent attorney, T.R. Paulding, "are contrary to the defendant's wishes or desires"?²²¹ The answer—and this is not much of an answer—is that some issues raise public as well as private rights.

Ross understood the incongruous nature of the proceedings, stating on his web site that "I fully support their position and efforts to bring about the abolition of capital punishment in this state. . . But, I do have a problem when they interfere with my personal decisions. . . to resolve this case in a manner that I believe will harm the least number of people. . . These are decisions that I and I alone, must make."²²² Ross objected to the actions of the Public Defender, stating "what I'm hoping is that January 26, I will be executed. I just don't understand why the public defenders can't understand that. I mean, it's so simple. And it's my damned decision."²²³

Ross's sister and father each filed separate next-friend actions, his sister arguing that Ross was not mentally competent to waive his rights, and his father arguing that his rights were being violated because he could not "volunteer" to be executed.²²⁴ The case was assigned to U.S. District Judge Robert Chatigny, who raised concerns about the competency claims.²²⁵ Paulding argued that Ross understood the appeals process, was knowledgeable about death penalty law, and was choosing to forego appeals.²²⁶ He stated that Ross "had made a logical, rational decision. He needed a voice in our court system. . . I think I'm an attorney before I'm a defense attorney. . . I think your duty, your basic duty as an attorney, is to represent your client."²²⁷

Judge Chatigny tried to persuade Paulding to pursue an appeal

²¹⁹ MODEL RULES OF PROF'L CONDUCT, *supra* note 4, at 1.9(1).

²²⁰ *Id.* at 1.9(2).

²²¹ Tuohy, *supra* note 218.

²²² Michael P. Ross, *Why I Choose Death Rather than to Fight for Life*, MONSTER? YOU DECIDE, <http://www.wild-side.com/ross.html> (last visited Feb. 16, 2014).

²²³ Leung, *supra* note 217.

²²⁴ Ross v. Rell, No. 3:05-CV-130 (PCD) (D. Conn. 2005) (Temporary restraining order), available at http://scholar.google.com/scholar_case?case=8836018988286999632&q=ross+v.+rell&hl=en&as_sdt=6,32.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Leung, *supra* note 217.

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despite Ross's expressed wishes of his client,²²⁸ telling him, "what you are doing is terribly, terribly wrong. No matter how well motivated you are, you have a client whose competence is in serious doubt and you don't know what you are talking about,"²²⁹ that failure to pursue an appeal was malpractice,²³⁰ and threatening to go after Paulding's license to practice law if future evidence showed that Ross was not competent.²³¹ Paulding got the message, and filed motions for another competency hearing in state court. The state court held that Ross was mentally competent to waive future appeals and proceed to his execution.²³² He was executed on May 13, 2005.²³³

In 1996, the New Jersey Supreme Court, considering a similar question, explicitly transformed the defendant's rights into a public question, holding that appeals of a death sentence were mandatory and could not be waived,²³⁴ stating that the public interest "transcends the preferences of individual defendants."²³⁵ Like Ross, John Martini requested that his execution proceed as scheduled and that his public defender not pursue post-conviction relief. In proceeding with a post-conviction review, the court noted that:

It is difficult to explain why a murderer who has admitted his guilt and had his conviction and sentence of death affirmed on direct appeal should not be granted his request to be executed immediately. For some, no explanation may be necessary. For others, no explanation will suffice. For those who wish to understand, we explain that under our form of government it is not the inmate on death row or the accused who determines when and whether the State shall execute a prisoner; rather, the law itself makes that determination. The public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants.²³⁶

The court recognized that its view was not universal:

We acknowledge that other jurisdictions do not recognize the standing of one such as the Public Defender to prosecute a post-convic-

²²⁸ *In re Charges of Judicial Misconduct*, 465 F.3d 532, 544 (2d Cir. 2006).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Memorandum of Decision, *State v. Michael Ross*, No. CR84-20300, 20355, 20356 (Conn. Super. Ct., Apr. 22, 2005), available at <http://www.ct.gov/csao/cwp/view.asp?A=1801&Q=292090>.

²³³ William Yardley & Stacey Stowe, *Connecticut Carries Out Its First Execution in 45 Years*, N.Y. TIMES, May 13, 2005, <http://www.nytimes.com/2005/05/13/nyregion/13cnd-death.html?pagewanted=all>.

²³⁴ *State v. Martini*, 677 A.2d 1106 (N.J. 1996), overruled by *State v. Reddish*, 859 A.2d 1173 (N.J. 2004).

²³⁵ *Id.* at 1112.

²³⁶ *Id.*

tion relief application on behalf of a death row inmate who does not seek their assistance. It is a natural reaction for some to wish to be rid of an admitted murderer who asks to be executed. The Court is nonetheless required to ensure the integrity of death sentences in New Jersey.²³⁷

Martini changed his mind, and requested that his Public Defender pursue any available remedies.²³⁸ He was subsequently convicted of three additional murders in Pennsylvania and Arizona.²³⁹ On July 26, 2006, the New Jersey Supreme Court upheld Martini's death sentence, but New Jersey had imposed a moratorium on the death penalty six months earlier.²⁴⁰ Martini died in prison in 2009.²⁴¹

Are public rights implicated in domestic violence cases? As Elizabeth Tulis noted, when a victim obtains a restraining order, not to mention a protective order, she cedes some authority to the State. Do we, as lawyers, cede a part of our relationship with our clients?

We are trained as lawyers to separate ourselves from the consequences to third parties of our representation. Criminal defense attorneys accept that they are representing the accused, not the victim, society, or the hypothetical future victim. Attorneys representing a parent in a dependency and neglect case take direction from the parent, regardless of qualms about the child's future care. In domestic violence cases, we accept that there are valid reasons why women do not leave the abuser, and that additional abuse may, and often does, occur during the representation. There is a different quality to a case in which a client is using the lawyer's legal services to avoid a court order meant to protect her. Is there a point at which this becomes a public right, enforceable by the state?

While it is rare, victims, having obtained restraining orders, have been charged with violating those orders, while some courts have struck down the charges against the victim as a violation of the Due Process Clause of the Fourteenth Amendment.²⁴² The analogy to

²³⁷ *Id.*

²³⁸ Maria Newman, *Death Row Inmate Instructs Lawyers to Fight for His Life*, N.Y. TIMES, Aug. 17, 1999, www.nytimes.com/1999/08/17/nyregion/death-row-inmate-instructs-lawyers-to-fight-for-his-life.html?ref=johnmartini.

²³⁹ Barbara Boyer, *A Defiant Murderer Dies at 79: John Martini, Condemned to Death in 1990 for Killing a Fair Lawn Man, Died in His Jail Cell. He Killed at Least Three Others*, PHILLY.COM (Sept. 11, 2009), http://articles.philly.com/2009-09-11/news/25268088_1_death-penalty-irving-flax-favor-of-capital-punishment.

²⁴⁰ The Associated Press, *Newark: Court Upholds Death Sentence*, N.Y. TIMES, July 26, 2006, <http://www.nytimes.com/2006/07/26/nyregion/26mbrfs-008.html?ref=johnmartini>; Boyer, *supra* note 239.

²⁴¹ Katherine Santiago, *Death of Killer John Martini Brings Victim's Widow Small Comfort*, The Star-Ledger (Sept. 10, 2009), http://www.nj.com/news/index.ssf/2009/09/death_of_nj_convicted_murderer.html

²⁴² N. Olmsted v. Bullington, 744 N.E.2d 1225, 1228 (Ohio Ct. App. 2000); *see also* Bays

death cases may be useful on a lethality scale, but falters when considering the competing interests of the victim. When law enforcement intervenes and penalizes the victim for violating a restraining order against her abuser, the focus of the legal system shifts from the abuser to the victim and “the abuser is not held fully accountable.”²⁴³ The victim is prosecuted for inviting her abuser back into her life—often for a legitimate purpose, such as to discuss childcare or request financial assistance.²⁴⁴

When a civil restraining order can be enforced against either party, the purposes of the restraining order system are undermined. Victims will be less likely to report abuse for fear any action on theirs will be used against them; abusers could use the restraining orders as continued ploys against their battered victims; and the blame for the abuse shifts from the batterer to the battered.

In the abstract, the public enforcement of restraining orders, like mandatory arrest policies, has advantages. However, in the context of domestic violence, the public’s interest in the victim’s well-being is not so black and white. The enforcement of the restraining order may serve the public good of protecting the victim, but if the means necessary for that enforcement further victimizes the battered woman and provides a disincentive for victims to report abuse at all, then we need to question whether the benefit of enhanced enforcement outweighs the inherent value of client-based decision-making.

We are concerned about our clients’ safety and we try to advise them as best we can, but we are not in the business of predicting future harm. Others, however, are. Predicting behavior and lethality assessments are increasingly a part of law enforcement and safety planning, and it is useful to take a look at this field.

VII. RISK AND LETHALITY ASSESSMENT AND THE PREDICTABILITY OF VIOLENCE (AND DOES IT MATTER?)

Legal scholars have devoted a good deal of effort to the question of character evidence and how it can help predict behavior. Much of the discussion starts with G.W. Allport, a psychologist, a founder of “trait theory.” Allport believed that traits were the most fundamental building blocks of personality.²⁴⁵ Trait theorists believed that traits were stable and enduring, and produced generally consistent behavior

v. Bays, 779 So.2d 754, 758 (La. 2001).

²⁴³ CAROLYN HAM, INJUSTICE DEFINED: WHY BATTERED WOMEN CANNOT AND SHOULD NOT BE CHARGED WITH VIOLATING CIVIL PROTECTION ORDERS THAT WERE ISSUED AT THEIR REQUEST, BATTERED WOMEN’S PROJECT 6 (2003).

²⁴⁴ *Id.* at 5.

²⁴⁵ G.W. ALLPORT, PERSONALITY – A PSYCHOLOGICAL INTERPRETATION 286 (1937).

over a variety of situations.²⁴⁶ In the realm of trait theory, a person who lies in one situation will lie in other situations; a person who is violent in one circumstance will likely be violent in other circumstances.²⁴⁷ Trait theory would allow us to predict behavior, including criminal behavior.

Empirical research did not support the trait theorists.²⁴⁸ Walter Mischel found that “behavior depends on stimulus situations and is specific to the situation: response patterns even in highly similar situations often fail to be strongly related.”²⁴⁹ However, between 1968 and 1995, Mischel, along with his colleague, Yuichi Shoda, modified his views on character traits and predictability. Mischel and Shoda assert that we can develop a fuller personality profile that includes a variety of psychological ingredients, one that could successfully predict particularized behavior.²⁵⁰

More recently, Professor Edward Imwinkelried asserted that most recent studies agree that predicting behavior based on interactions between character traits and situations is more accurate than predictions based on either traits or situations.²⁵¹ Since legal scholarship on predictability revolves around the admissibility in court of character evidence, a theory “more accurate” is different from “more likely than not,” and is not going to result in reconsidering long-standing rules of evidence. The question here, however, is whether predictability should inform our representation of vulnerable clients.

Domestic violence is a subset within the broader category of violent crime. Many people, including members of Congress, believe that crimes of sexual violence and child molestation deserve special treatment. To the chagrin of many judges, lawyers, and scholars, Congress amended the Federal Rules of Evidence to allow the admission of past similar acts in criminal cases in which the defendant is accused of sexual assault²⁵² or child molestation,²⁵³ and to allow the admission of past similar actions for civil actions involving sexual assault or child

²⁴⁶ WALTER MISCHEL, *PERSONALITY AND ASSESSMENT* 6 (1968); Miguel A. Mendez, *Character Evidence Reconsidered: ‘People Do Not Seem to be Predictable Characters,’* 49 *HASTINGS L.J.* 871 (1998).

²⁴⁷ Mendez, *supra* note 246.

²⁴⁸ *Id.*; MISCHEL, *supra* note 246.

²⁴⁹ MISCHEL, *supra* note 246.

²⁵⁰ Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 *PSYCHOL. REV.* 246 (1995).

²⁵¹ Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 *SW. U. L. REV.* 741, 754-55, 768 (2008).

²⁵² *Fed. R. Evid.* 413.

²⁵³ *Id.* at 414.

molestation.²⁵⁴ In a Report submitted to Congress in 1995, the Judicial Conference requested that Congress reconsider Rules 413, 414, and 415, reporting overwhelming opposition. Two years later, Katharine Baker wrote that “Advocates of Rule 413. . . unabashedly and without proof suggest that rapists are more likely than other criminals to repeat their acts. The evidence that we have is to the contrary.”²⁵⁵ According to studies by the Bureau of Justice Statistics, recidivism for drug offenses, larceny/theft, burglary, and robbery are all much higher than rape, sexual assault, and child molestation. In fact, only homicide is lower.²⁵⁶

That did not deter Congress or the State legislatures of California and Illinois, both of which amended their rules of evidence to allow prior acts of domestic violence in cases in which the victim was murdered.²⁵⁷ California acted in response to the O.J. Simpson acquittal and Illinois just prior to the Scott Peterson trial, which culminated in a conviction.

The history of predicting criminal behavior is, at best, a cautionary tale. The ancient Greeks, including Aristotle, believed in physiognomy, the ability to predict human character by physical appearance. In the 19th Century, phrenologists believed they could predict future criminal behavior by certain bumps on an individual’s head. Phrenology was considered by many intellectuals to be a real science. Bram Stoker in *Dracula* and Arthur Conan Doyle in *The Adventures of Sherlock Holmes* both refer to phrenology with approval. No less than Holmes himself, the epitome of rational thought, authoritatively states that a new acquaintance is intelligent, based on the size of his skull.

Recent popular culture has focused more on the supernatural. In 1956, Philip K. Dick published *The Minority Report*, a short story in which psychics who are able to see the future help the police to prevent murders before they occur.²⁵⁸ The “Precrime” unit arrests future perpetrators, who are punished for the crimes they would have committed. Dick placed his story 100 years in the future. The story was made into a 2002 movie, with Tom Cruise playing Dick’s fifty year old,

²⁵⁴ *Id.* at 415.

²⁵⁵ Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997).

²⁵⁶ PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2003), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

²⁵⁷ CAL. EVID. CODE § 1109 (West 2006); 725 ILL. COMP. STAT. ANN. 5 /115-10.2a (West 2013).

²⁵⁸ PHILIP K. DICK, *THE MINORITY REPORT* (1956) (first published in *FANTASTIC UNIVERSE* and has been republished since in several anthologies of Philip Dick’s work).

balding, out-of-shape director of “Precrime,” the organization charged with arresting criminals before they commit their crime.²⁵⁹ In the television show *The Profiler*, the protagonist, who works for the FBI as a forensic analyst, is particularly effective because of her ability to see through the eyes of others. The more recent television trend, however, is toward a real-world ability to predict crime, through computer-assisted analysis, as in *Person of Interest*, or mathematics, as in *Numbers*.

The real world has caught up, and predicting future crimes has entered the mainstream. The Santa Cruz, California police department is using “predictive” software, using an algorithm similar to the program used to predict earthquake aftershocks.²⁶⁰ Based on the findings of Santa Clara Assistant Professor George Mohler that offenders tend to return to the scene of past successes, the software predicts the location where another crime is likely to occur.²⁶¹ On April 12, 2012, CBS News reported that Los Angeles joined the “predictive policing” movement, with officers patrolling computer-generated hot spots to prevent crimes before they occurred.²⁶² These and similar efforts are mundane when compared to the Department of Homeland Security’s (DHS) Future Attribute Screening Technology (FAST) program.

FAST’s goal, as stated in a December 2011 DHS privacy impact assessment, is to “determine whether technology can enable the identification and interpretation of a screened subject’s physiological and behavioral cues or signatures without the need for operator-induced stimuli which, in turn, will allow for security personnel to remotely (and therefore, more safely) identify cues diagnostic of malintent (defined as the intent to cause harm).”²⁶³ In other words, FAST has been created to identify criminals before they commit crimes, and it is no surprise that DHS identifies FAST as a “pre-crime” system,” or that many commentators have compared it to *Minority Report* and *Person*

²⁵⁹ Directed by Steven Spielberg as a joint venture between DreamWorks, Amblin Entertainment, and 20th Century Fox (2002).

²⁶⁰ Heather Kelly, *Police Embracing Tech that Predicts Crimes*, CNN TECH, (4:59pm EDT, July 9, 2012), <http://www.cnn.com/2012/07/09/tech/innovation/police-tech/>.

²⁶¹ Greg Risling, *Sci-fi Policing: Predicting Crime Before it Occurs*, YAHOO! NEWS, (12:14pm, July 1, 2012), <http://news.yahoo.com/sci-fi-policing-predicting-crime-occurs-150157831.html>.

²⁶² Bob Orr, *LAPD Computer Program Prevents Crime by Predicting It*, CBS EVENING NEWS, (8:40pm, Apr. 11, 2012), <http://www.cbsnews.com/news/lapd-computer-program-prevents-crime-by-predicting-it/>.

²⁶³ U.S. DEPARTMENT OF HOMELAND SECURITY, FUTURE ATTRIBUTE SCREENING TECHNOLOGY (FAST)/PASSIVE METHODS FOR PRECISION BEHAVIORAL SCREENING 2, available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_st_fast-a.pdf.

of Interest.²⁶⁴

Causation and prediction hold a great deal of interest in the domestic violence field. Domestic violence counselors are well-acquainted with the *Power and Control Wheel*, developed in 1984 by the Domestic Abuse Intervention Project in Duluth, Minnesota.²⁶⁵ The Wheel is a diagnostic tool to help characterize and explain abusive relationships, including domestic violence, and its use has become part of the culture of identifying abusive relationship and counseling victims.²⁶⁶

As described by its founders, the Wheel is used in a variety of settings, including assisting battered women to see how their abusers' tactics are used against them and better understand the batterers' control, to counsel men to identify their own behavior, and to train law enforcement on the nature of the abusive relationships and to better understand why women may not want to leave the relationship.²⁶⁷ The Power and Control Wheel is probably the most commonly used interpretive tool in the field of intimate violence, but it rarely, if ever, is used to predict violence.

One of the earliest and best-known tools for predicting lethality is Jacquelyn Campbell's Danger Assessment (DA), first developed in 1985, and revised several times since.²⁶⁸ It consists of a two-step assessment to determine a woman's lethality risk. First, the woman is presented with a calendar on which she documents all incidents of abuse during the previous twelve months. This allows the victim to see a graphical depiction of her abuse including patterns of abuse. Second, the woman answers a series of twenty yes-or-no questions. While the questions are weighted, in general the greater the number of "yes" responses, the greater the woman's risk of being killed by her battering intimate partner. The Danger Assessment is easily accessed, and women or those assisting them can complete it online.²⁶⁹ A shorter, eleven-question Danger Assessment test is also available for law enforcement use when responding to domestic dis-

²⁶⁴ Declan McCullagh, *Homeland Security Moves Forward with "Pre-Crime" Detection*, CNET (4:00am PDT, Oct. 7, 2011), www.news.cnet.com/8301-31921_3-20117058-281/homeland-security.

²⁶⁵ HOME OF THE DULUTH MODEL, <http://www.theduluthmodel.org/training/wheels.html>.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Jacquelyn Campbell et al., *The Danger Assessment: Validation of Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERS. VIOLENCE 653, 657, 661-62 (2009); Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERS. VIOLENCE 63, 65 (2000).

²⁶⁹ DANGER ASSESSMENT, www.dangerassessment.com (last visited Mar. 2, 2014).

putes or battering incidents.²⁷⁰

In the 1980's, Gavin de Becker developed the MOSAIC Threat Assessment System, which, in its current computer-assisted form, is used by law enforcement agencies, including the Supreme Court Police and U.S. Capitol Police, to assess threats to public figures and others.²⁷¹ De Becker developed different MOSAIC systems for a variety of situations, including domestic violence. De Becker argues that “[s]pousal homicide is the single most predictable serious crime in America. . . . [T]here is an urgent need to help police, prosecutors, and victims systematically evaluate cases to identify those with the ingredients of true danger.”²⁷² De Becker's domestic violence tool is MOSAIC-20, a computer program that evaluates cases to identify those in which the danger of homicide is highest.

In 1997, de Becker published *The Gift of Fear and Other Survival Signs that Protect Us from Violence*.²⁷³ *The Gift of Fear* was lauded by commentators from Oprah Winfrey to Marcia Clark to many domestic violence victims who felt that the book spoke to their experiences.²⁷⁴ Even those reviewers who did not like the writing or felt that De Becker was a pompous self-promoter praised the book's message.²⁷⁵ *The Gift of Fear* spent four months on the New York Times best-seller list and was the number one non-fiction seller of 1997.²⁷⁶ It was followed by other successful De Becker books on fear and security.²⁷⁷ Oprah now offers De Becker's MOSAIC-20 free of charge on her website, touting it as “the tool that could save your life.”²⁷⁸

²⁷⁰ See, e.g., MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE, LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, available at http://www.bwjp.org/files/bwjp/files/MD_LAP_Packetwebsite.pdf. For an in-depth exploration of when the Danger Assessment may be admissible in court or useful to attorneys, see Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will Be Murdered By Her Partner*, 24 WIS. J. L. GENDER, & SOC'Y 277 (2009).

²⁷¹ De Becker's web site included endorsements from several public officials, including Dennis Chapas. Tracy Johnson, *Software Assesses Likelihood of Crime*, L.A. TIMES, Oct. 21, 1996 (quoting Dennis Chapas, a former Supreme Court security official), http://articles.latimes.com/1996-10-21/local/me-56247_1_domestic-violence.

²⁷² GAVIN DE BECKER, *THE GIFT OF FEAR* 201 (1997).

²⁷³ *Id.*

²⁷⁴ *Id.*; see also, e.g., OPRAH, <http://www.oprah.com/relationships/Trusting-Your-Intuition-Could-Save-Your-Life> (last visited Feb. 27, 2014) (episode aired Jan. 29, 2008); GAVIN DE BECKER & ASSOCIATES, http://gavindebecker.com/who_we_are/what_others_say (last visited Feb. 27, 2014).

²⁷⁵ DE BECKER, *supra* note 272.

²⁷⁶ GAVIN DE BECKER & ASSOCIATES, <http://gavindebecker.com/>.

²⁷⁷ See, e.g., GAVIN DE BECKER ET AL., *JUST 2 SECONDS* (2008); GAVIN DE BECKER, *FEAR LESS: REAL TRUTH ABOUT RISK, SAFETY, AND SECURITY IN A TIME OF TERRORISM* (2002); *PROTECTING THE GIFT: KEEPING CHILDREN AND TEENAGERS SAFE (AND PARENTS SANE)* (2002); DE BECKER, *supra* note 272.

²⁷⁸ Oprah, *MOSAIC: The Tool that Could Save Your Life*, <http://www.oprah.com/>

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The Danger Assessment and MOSAIC-20 are designed to predict lethal violence or “extreme dangerousness.”²⁷⁹ There are other assessment instruments, such as the Kingston Screening Instrument for Domestic Violence (K-SID) and the Domestic Violence Screening Instrument (DVSI), which were designed to diagnose the risk of repeat assault at any level.²⁸⁰ Other instruments that assess risk of reassault include the Spousal Assault Risk Assessment (SARA)²⁸¹ and the Ontario Domestic Violence Risk Assessment (ODARA).²⁸²

The Kingston Screening Instrument for Domestic Violence (K-SID) was developed in 1998 by Richard Gelles. The K-SID method is a ten-question survey that is provided to both the victim and abuser and is comprised of three parts: (1) a poverty chart; (2) a severity and injury index; and (3) ten risk markers: poverty, age, drugs/alcohol, domestic violence in family of origin, witness to domestic violence as a child, marital status, child abuse by defendant, education, employment, previous domestic violence arrests, and violations of protective orders. The test scores the batterer as being at a low, moderate, high, or very high “risk of reoffending.” If a batterer has a previous domestic violence arrest or has violated a protective order, he is automatically classified as being at a “very high” risk of reoffense.²⁸³

The Domestic Violence Screening Instrument (DVSI) includes twelve questions that are intended to indicate the batterer’s level of dangerousness. Like the K-SID, this method is not widely available for public use.²⁸⁴ The DVSI is based upon information received from the abuser, rather than the victim, which differentiates it from the Danger Assessment or MOSAIC-20 methods.²⁸⁵ The DVSI is administered by criminal justice professionals to classify the offender at a

oprahshow/MOSAIC-Gavin-de-Beckers-Online-Threat-Assessment-Tool (last visited Feb. 27, 2014).

²⁷⁹ JANICE E. ROEHL ET AL., INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY, Final Report (Mar. 28, 2005) (unpublished research report), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf>.

²⁸⁰ *Id.*

²⁸¹ SPOUSAL ASSAULT RISK ASSESSMENT (SARA), http://www.biscmi.org/documents/Spousal_Assault_Risk_Assessment.pdf (last visited Mar. 2, 2014); P. Randall Kropp & Stephen D. Hart, *The Spousal Risk Assessment (SARA) Guide: Reliability and Validity in Adult Male Offenders*, in RISK REDUCTION: INTERVENTIONS FOR SPECIAL NEEDS OFFENDERS (Harry E. Allen, ed. 2002).

²⁸² See N. Zoe Hilton et al., *A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment*, 16 PSYCHOLOGICAL ASSESSMENT 267 (2004).

²⁸³ Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171, 179, 181 (2000); see also Harrington Conner, *supra* note 6, at 920.

²⁸⁴ Harrington Conner, *supra* note 6, at 920.

²⁸⁵ *Id.*

particular risk level. Where the DVSI is used, it can serve as a tool during the supervision of the offender or the provision of specific services to the offender and victim.²⁸⁶

The National Institute of Justice surveyed the predictive value of the four primary risk and lethality assessment methods: MOSAIC-20, the DA, the K-SID and the DVSI. The National Institute of Justice report indicates that, overall, “all four of the risk assessment tools were significantly related to subsequent severity of abuse, but not very highly related.”²⁸⁷ A study of DVSI usage between 2003 and 2007 found that the predictive value of the DVSI across all risk groups was not statistically significant.²⁸⁸

The very existence of lethality and risk assessment tools reveals distrust in domestic violence victims’ ability to understand their situations or predict their risk of being reassaulted or murdered. These instruments arise from the belief that “most people do a poor job of evaluating their own risk for negative outcomes.”²⁸⁹ Some researchers believe that domestic violence victims are deficient in recognizing danger in domestic violence relationships.²⁹⁰ Others believe that victims cannot predict future violence even with the aid of risk assessment instruments because “there is no real way to predict unpredictable behavior.”²⁹¹

Contrary to the inherent claims of the various risk assessment tools, victims are generally the best predictors of their own risk of being seriously injured.²⁹² Victims have a unique ability to predict the violence and anticipate the degree of violence.²⁹³ Studies show that domestic violence victims’ ratings of their risk of future violence com-

²⁸⁶ See Kirk R. Williams & Stephen R. Grant, *Empirically Examining the Risk of Intimate Partner Violence: The Revised Domestic Violence Screening Instrument (DVSI-R)*, 121 PUB. HEALTH REP. 400 (2006).

²⁸⁷ NATIONAL INSTITUTE OF JUSTICE, CRIME, VIOLENCE & VICTIMIZATION RESEARCH DIVISION’S COMPENDIUM OF RESEARCH ON VIOLENCE AGAINST WOMEN 1993-2011, at 2B (2012); Jill Theresa Messing et al., *Collaborating With Police Departments: Recruitment in the Oklahoma Lethality Assessment (Ok-LA) Study*, 17 VIOLENCE AGAINST WOMEN 163 (2011).

²⁸⁸ NATIONAL INSTITUTE OF JUSTICE, *supra* note 288; Messing et al., *supra* note 288.

²⁸⁹ Jennifer K. Connor-Smith et al., *Risk Assessments by Female Victims of Intimate Partner Violence: Predictors of Risk Perceptions and Comparison to an Actuarial Measure*, 26 J. INTERPERS. VIOLENCE 2517, 2519 (2011).

²⁹⁰ Tricia H. Witte & Rachel Kendra, *Risk Recognition and Intimate Partner Violence*, 25 J. INTERPERS. VIOLENCE 2199, 2212 (2010).

²⁹¹ *Id.* (emphasis in original).

²⁹² Arlene N. Weisz et al., *Assessing the Risk of Severe Domestic Violence: The Importance of Survivors’ Predictions*, 15 J. INTERPERS. VIOLENCE 75, 81 (2000); DAVIES ET AL. *supra* note 64 at 2.

²⁹³ Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN’S RTS. L. REP. 213, 240 (1992); Jones, *supra* note 6, at 627.

mitted by an intimate partner are fairly accurate.²⁹⁴ Almost sixty-five% of domestic violence victims accurately predict their risk of reassault.²⁹⁵ Victims may not accurately predict lethal violence, however. In one study, only about half of victims of intimate partner homicide or attempted homicide recognized that their abusers were capable of killing them.²⁹⁶

In judging risk, victims use different factors than those utilized by risk assessment tools, including interpretations of the abuser's moods, facial expressions, speech patterns, and verbal threats.²⁹⁷ They also rely on abuser personality traits and dynamic factors like the abuser's ability to find the victim and his desire for revenge.²⁹⁸ These factors are difficult for risk assessment tools to capture. Victims also rely on some of the same factors used by assessment tools to predict violence, including the status of the relationship, the history of violence in the relationship, and substance use.²⁹⁹ Some of the instruments' primary indicators—like the abuser's criminal history or the abuser being in a stepparent role—play almost no role in victim prediction.³⁰⁰

In fact, lethality assessments generally incorporate the victim's own assessment of risk, bolstering the effectiveness of the instrument. For example, the first risk factor listed by De Becker, who developed MOSAIC 20, is "*The woman has intuitive feelings that she is at risk.*"³⁰¹ This factor is the only one to appear in italics, adding emphasis to its importance to the assessment. The last factor is "His wife/partner fears he will injure or kill her. She has discussed this with others or has made plans to be carried out in the event of her death."³⁰² Both factors support the importance of victim prediction in risk assessment and incorporates victim prediction into the instrument. Campbell's Danger Assessment also incorporates victim risk assessment into its instrument. The eighteenth factor in the Danger Assessment is "Do you believe he is capable of killing you?"³⁰³ Research shows that incorporating the victim's assessment of danger improves instrument prediction.³⁰⁴

²⁹⁴ Witte & Kendra, *supra* note 290, at 2200.

²⁹⁵ *Id.* at 2201.

²⁹⁶ Jacqueline Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L INST. JUST. J. 14 (2003).

²⁹⁷ Witte & Kendra, *supra* note 290, at 2200 (internal citations omitted).

²⁹⁸ Connor-Smith et al., *supra* note 289, at 2531.

²⁹⁹ Witte & Kendra, *supra* note 290, at 2200 (internal citations omitted).

³⁰⁰ Connor-Smith et al., *supra* note 289, at 2543, 2531.

³⁰¹ DE BECKER, *supra* note 273, at 183.

³⁰² *Id.* at 185.

³⁰³ DANGER ASSESSMENT, <http://www.dangerassessment.org> (last visited Mar. 2, 2014).

³⁰⁴ Witte & Kendra, *supra* note 290, at 2200; Weisz et al., *supra* note 292, at 86; D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors*

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One study revealed that victims' perceptions of risk were better at predicting reassault than the K-SID but that the Danger Assessment was more accurate at predicting lethal violence than the victims themselves.³⁰⁵ The research concluded that women's perceptions of risk are a "reasonably accurate predictor of reassault."³⁰⁶ Interestingly the study found that a victim's risk was to some extent determined by the victim's perception of the risk. Victims who were at greatest risk of future harm were those who felt somewhat safe and therefore did not take proactive action to seek safety, such as separating from the abuser or safety planning.³⁰⁷ Victims who felt safe, victims who felt like they were in danger, and victims who did not know whether they were at risk were less likely to be reassaulted because there was less risk or because precautions were taken.³⁰⁸

It is not our purpose to opine on whether MOSAIC-20, the DVSI, or any other instrument should be used to predict serious or lethal intimate partner violence (nor do we have the capacity to do so), but it is fair to assume that these efforts will become increasingly sophisticated, and the implications are dramatic. The notion of law enforcement profiling as a preventative tool is well established, and there is a great deal of literature on the value, or lack thereof, of profiling. Our question is different. Even assuming that the perfect profiling tool exists, does it affect the attorney-client relationship? Put another way, when we talk about the attorney-client relationship, particularly in the context of client-centered lawyering, we take for granted that the lawyer takes direction from the competent client. Can we maintain that presumption if we believe MOSAIC-20 is an accurate assessor and MOSAIC-20 tells us that an abuser is about to commit one of "America's most predictable murders."³⁰⁹

Murder can be the ultimate form of control. Through the threat of murder, the abuser leverages everything the victim has—her access to work, her children, and the world. Prior domestic violence is the single greatest predictor of femicide by an intimate partner. In one study, 70% of female murder victims had been physically abused by the same intimate partner who killed them.³¹⁰ Thirty-nine percent of

and Instruments in Predicting Repeat Reassault, 19 J. INTERPERS. VIOLENCE 778, 797 (2004).

³⁰⁵ Heckert & Gondolf, *supra* note 305, at 796-97.

³⁰⁶ *Id.* at 796.

³⁰⁷ *Id.* at 797.

³⁰⁸ *Id.*

³⁰⁹ DE BECKER, *supra* note 272, at 185.

³¹⁰ Campbell et al., *supra* note 135, at 1091. Of female homicide victims ages 18 to 50, 79% were murdered by an intimate partner who committed prior domestic violence against them. *Id.*

all femicides, and probably even more, are committed by an intimate partner.³¹¹ In another study, domestic violence homicide victims had experienced violence within thirty days of the homicide, some within a day or two before the homicide.³¹² Without using risk or lethality assessment tools, domestic violence attorneys know that prior domestic violence predicts homicidal possibilities.

Most domestic violence attorneys fear that the next news item about domestic violence homicide will feature one of their clients. While attorneys should be concerned about the potential for lethal violence against their clients, this fear must be subsumed by the responsibilities we carry in our professional capacity. Ultimately the lawyer's own worries about her role or responsibility in the client's safety must give way to the client's interests.

CONCLUSION

We approached this article as practicing lawyers and clinical teachers, looking at a problem that domestic violence victims and their lawyers face every day. Given the many vagaries of the rules of professional responsibility and the basic agency role of the lawyer, it is not surprising that our own discipline offered little help. Does anything else matter? We think that is a fair question.

In writing this article, we have come full circle. The project started with a post hoc reflection of our actions in Barbara's case. As is evident from the paper, each question led to new questions, some of which were unexpected. All domestic violence practitioners are conscious of the nightmare scenario inherent in their cases, and we are no different. We are aware that Barbara's case could have turned out differently. That is a sobering thought, and, in the clinical context, we asked ourselves whether students should be put into the position of being in the front lines of a case that has the potential to be so devastating.

In the end, we came back to where we started. While we do not discount the effect of a positive result for the client on our views, we believe strongly that our commitment to our client included the trust in her ability and judgment to make the decision to argue that her husband should not be incarcerated, and that our commitment to our students included sharing the full responsibilities of our representation. In making the latter conclusion, we are informed—and im-

³¹¹ SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE: ATTRIBUTES OF VICTIMIZATION, 1993-2001, Special Report, 3 (Nov. 2013). Twenty-four percent of femicides are committed by an unknown perpetrator. *Id.* Almost certainly some of these "unknown" assailants include domestic violence perpetrators.

³¹² Block, *supra* note 140, at II-4-5.

pressed—by our students’ views. We discussed these issues with them, and as is evident from their g-chat, they discussed the issues with each other. That said, we have three caveats.

First, we and our students benefitted from a multi-disciplinary approach, which included classes by a psychologist and social workers on the nature of domestic violence, along with the opportunity to consult with the same professionals on cases. We encouraged students to use these opportunities to talk about their own concerns, and provided the opportunity to do so in confidential settings. This is not a luxury; we think it is a critical part of clinical work in domestic violence.

Second, we cannot underestimate the benefit to both clients and students of having students working on the same case for at least two semesters, with the opportunity to continue longer, especially for the purpose of continuing with an existing client. During our representation of Barbara, our students prepared, filed, mediated, and litigated motions and the trial; defended an appeal; prepared and filed a successful petition for Innocent Spouse tax relief; negotiated forbearance on a mortgage foreclosure; negotiated forbearance and obtained a court-ordered title transfer on an automobile; talked with accountants, bankers, psychiatrists, social workers, victim advocates, court mediators, and lawyers; and generally lived with the case throughout law school. They appeared in court numerous times, before four judges, and, by the time she graduated, were greeted warmly in the courthouse by state marshals, family relations advisors, and court clerks. As Barbara mentioned several times, the relationship she built with Mary and Elizabeth provided relief at times of stress. It would have been difficult to change students every semester.

Third, as Professor Carey has written elsewhere,³¹³ we continue to believe in the need to provide holistic services, with a full range of legal services. We believe our obligation to our client is to use our skills to try to solve her problems, and our obligation to our students is to teach the skills necessary to make that effort. There are cases that conclude with the granting of a restraining order, but many cases involve other family issues as well as collateral legal issues arising from the breakup of the relationship. If we are truly committed to teaching best practices, we need to be willing to provide the highest quality services. In the case of domestic violence, obtaining a restraining order without resolving child custody, support, and other critical family issues will inevitably leave many clients at a loss. When we limit our representation, we start from the proposition that we are

³¹³ Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyering and Law School Clinics*, 21 COLUM. J. GENDER & L. 220 (2011).

not intending to resolve the client's problems. The message to students is that skills are enough. We should be striving for higher standards.