DOMESTIC VIOLENCE REPORT™

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Brady Center Report

More Than 525 Women Shot and Killed Every Year by Intimate Partners

As the country recognizes Domestic Violence Awareness Month, and ahead of the Week of Action, a new report highlights that one in three women and one in four men have been the victim of physical violence or stalking by an intimate partner. Many of these domestic violence cases result in a shooting, with one out of every three women murdered in 2016 being killed by an intimate partner with a gun. And between 2006 and 2016, an average of more than 525 women were shot and murdered by an intimate partner. The report from the Brady Center to Prevent Gun Violence, "Beyond Bullet Wounds: Guns in the Hands of Domestic Abusers," explores these tragic statistics and the stories behind them, as well as ways to save lives moving forward.

"Countless women and men face the terrors of domestic violence in their lives, and when a gun is brought into the situation, victims who are already afraid for their lives are tormented even further. The painful truth is that the mere presence of a gun is a key factor in an abusive partner turning

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Violence Against Women Act Must Not Languish In "MeToo" Era

by Lynn Rosenthal

For the third straight October, the country has engaged in an unprecedented national conversation about violence against women. From then-candidate Donald Trump's bragging about groping women on an Access Hollywood tape, to the sexual abuse allegations against Harvey Weinstein that created the "MeToo" movement, to a Supreme Court Justice accused of sexual assault, the sheer magnitude of the sexual and domestic violence that *millions* of women experience in their lifetime has been made frighteningly clear.

As story after story is revealed, it cannot go unnoticed that the Violence Against Women Act (VAWA) has been languishing in Congress. VAWA provides critical resources for our crisis response and community prevention programs. The failure to renew it would not only be devastating financially to those who rely on its funding, but also would send the message that stopping violence against women is not a priority. Due for reauthorization every five years, VAWA was set to expire on September 30, although Congress temporarily extended VAWA through December 7 in the stopgap spending measure passed to keep the government running. This short-term extension does *not* allow for any improvements to VAWA or further its story of ongoing innovation to reduce violence against women.

The VAWA Story

In June 1990, then-Senator Joe Biden introduced the Violence Against Women Act with three goals: to make streets safer for women; to make homes safer for women; and to protect women's civil rights. In a series of Judiciary Committee hearings in the years that followed, women testified about their experiences with domestic violence and sexual assault, and experts weighed in with research and data. In two groundbreaking reports, the Committee exposed the extent of violence women were suffering at the hands of husbands, boyfriends, acquaintances, and strangers.[1]

In the 1993 Judiciary Committee report, Senator Biden wrote: "Through this process, I have become convinced that violence against women reflects as much a failure of our nation's collective moral imagination as it does the failure of our nation's laws and regulations."[2]

VAWA sought to stimulate collective efforts to engage stakeholders in this conversation and bring badly needed resources to the local, state, and

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national level to support new programming to improve victim safety and hold perpetrators accountable. Despite an extensive Congressional record on violence against women, passing VAWA was not easy. The Bush administration's Justice Department opposed the bill, as did conservative members of Congress and some members of the judiciary, including Chief Justice William Rehnquist who spoke publicly against the proposed legislation.[3]

After a lengthy debate, the bill finally passed Congress and was signed into law by President Bill Clinton on September 13, 1994. The legislation included funding to states and local communities to improve the law enforcement response to domestic and sexual violence and created new interstate crimes of violence at the federal level. VAWA modified the Federal Rules of Evidence to establish a federal rape shield provision and created a federal gun ban for those subject to a permanent injunction for protection for domestic violence.

Since its passage, VAWA has been reauthorized three times. Each time, Congress has gathered information from the experiences of victims at the local and state levels, and expanded the legislation to address the trends that have been identified in the systemic response to domestic and sexual violence. The VAWA story is one of ongoing improvement and innovation to reduce and prevent domestic and sexual violence.

Among other critical steps, in the 2000 VAWA authorization, Congress added a definition of dating violence to the law, so that survivors could receive services regardless of whether they were living with or married to their perpetrators. This change was far-reaching, as it addressed the high rates of dating violence experienced by young women, and provided model language for states to adopt in their legislation and policies. In 2005, Congress addressed the link between domestic violence and homelessness by adding protections for survivors living in public and voucher-supported housing. That same year, Congress also directed that additional funds be provided to organizations working within and led by underserved communities, particularly communities of color facing high rates of violence. While VAWA has always focused on culturally relevant services, this change meant that culturally relevant organizations themselves could receive support for their community-based work with survivors. These VAWA improvements had bipartisan support and passed without controversy.

The VAWA story took a different turn in 2011, when partisan battles delayed the legislation and put critical VAWA programs at risk. VAWA was in limbo for two years. VAWA opponents took particular aim at the legislation's longstanding protections for battered immigrant women and victims of crime. In 1994, the original VAWA legislation created the VAWA self-petition process for battered immigrants, which allowed survivors married to U.S. lawful permanent residents to separate their immigration status from their abusive partners and petition for relief on their own. In 2000, VAWA was expanded to create the U-visa program, which allowed victims of crime to come forward and report what had happened to them regardless of their immigration status.

In 2013, some members of Congress made efforts to undercut these longstanding provisions and make it more difficult for victims of domestic violence and sexual assault to seek immigration relief. House Republicans introduced a VAWA reauthorization bill that would have jeopardized confidentiality and safety for victims in the self-petition process and greatly restricted access to U-visas for victims of crime. This effort was defeated, and the final VAWA bill maintained the integrity of these critical provisions and made modest improvements. In VAWA 2013, the Senate sought to raise the mandated cap on the number of U-visas available each year, but

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Progressive Protections for DV Survivors in Louisiana

by Jeremy Woolard*

In 2014, domestic violence advocates from across Louisiana converged to pass a number of domestic violence bills that ushered in a sea change in the legislative response to domestic violence in Louisiana. In the years following the initial passage of those bills, advocates, experts, and legislators have worked to provide domestic violence survivors with a robust package of protections under Louisiana law. This article will explain the progressive protections provided to survivors in family law proceedings.

Fault Grounds for Divorce

The movement towards adoption of no-fault divorce has been an important tool for survivors of domestic violence who have been able to obtain divorces without having the burden of proving abuse.[1] In Louisiana a no-fault divorce requires a separation period of 180 or 365 days after service of the petition for divorce depending on whether the spouses have minor children of the marriage.[2] Prior to 2014, domestic abuse only shortened the required separation period to 180 days.[3] This caused domestic violence survivors to be legally tied to their abusers long after they had decided to leave. It is well established that the most dangerous time for domestic violence survivors is when they are exiting the relationship.[4] To remedy this problem, Louisiana has added domestic abuse to the fault grounds for divorce.

Louisiana law allows spouses to receive an immediate divorce when there is marital fault. Prior to 2014, the exclusive fault grounds for divorce were having lived separate and apart for 180 or 365 days, adultery, or conviction of a felony with a sentence of death or hard labor.[5] In 2014, two new fault grounds were added as Louisiana Civil Code Article 103(4) and 103(5). Louisiana Civil Code Article 103(4) adds a finding of physical or sexual abuse by the other spouse or of a child of either spouse as a fault ground. Lousiana Civil Code Article 103(5) adds protective orders issued by consent or after a contradictory hearing as a fault ground.

Louisiana Civil Code Article 103(4) states "a divorce shall be granted on the petition of a spouse upon proof that during the marriage, the other spouse physically or sexually abused the spouse seeking divorce or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of abuse." This language is a carryover from the earlier provision that allowed domestic violence victims to receive a divorce after being separated for 180 days. The language is designed to address concerns of the family law bar while also protecting as many survivors as possible.

A major concern of the family law bar was that domestic violence survivors would hold a trump card for the duration of the marriage. Additionally, under Louisiana law reconciliation extinguishes marital fault.[6] To address these concerns, the "during the marriage" language was added. This language makes it clear that abuse prior to the marriage is not marital fault. The language has been studied by the Louisiana State Law Institute (Institute).[7] The recommendation of the Institute has been to keep the language in order to ensure that the law is as clear as possible.[8] By ensuring that criminal prosecution is not needed, the provision ensures that survivors can receive an immediate divorce without having to worry about the higher burden of proof and lengthy adjudication of a criminal case. Survivors also are not required to cooperate in a criminal case against their will or when it would be unsafe for them to do so. Additionally, survivors can receive an immediate divorce on the basis of domestic abuse that happened during the marriage even if the abuse was never reported to law enforcement.

Louisiana Civil Code Article 103(5) provides that a domestic violence survivor may receive an immediate divorce when "[a]fter a contradictory hearing or consent decree, a protective order or an injunction was issued during the marriage, against the other spouse to protect the spouse seeking the divorce or a child of one of the spouses from abuse." To protect the due process rights of accused abusers, the right to an immediate divorce does not arise until after the person against whom the protective order is being issued has a chance to appear in court or consent to a protective order. Recent clarifications by the Louisiana State Law Institute make it clear that the protective order can be a civil or criminal protective order.[9] In practice, it is much easier for domestic violence survivors who have received a protective order to receive an immediate divorce, as they do not have to litigate the abuse again as they may have to under Louisiana Civil Code Article 103(4). Because protective orders are self-authenticating, they can be attached with the petition for divorce, and domestic violence survivors may not have to appear in court for a divorce hearing at all.[10]

Presumption an Abused Spouse Receives Spousal Support

A big advantage of receiving a divorce under Louisiana Civil Code Article 103(4) or 103(5) is that it entitles the abused spouse to a presumption of spousal support.[11] It is well established that financial considerations are one of the most common reasons that domestic violence survivors are reluctant to leave abusive relationships.[12] When passing the domestic violence reforms in 2014, one of the main priorities of advocates was ensuring that survivors would have the means to support themselves without their abusers.

2014 Louisiana Acts, No. 316 made spousal support mandatory for those receiving a divorce under Louisiana Civil Code Article 103(4) or 103(5). The aim of the provision was to ensure that domestic violence survivors leaving abusive marriages had the financial resources to rebuild their lives. In the years after the mandatory provisions were put into place both domestic violence advocates and

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the family law bar identified issues with the language. Advocates feared that mandating spousal support in marriages where there was domestic abuse would cause judges to be more reluctant to make findings of abuse and result in an increase in denials of protective orders. The family law bar feared that mandating spousal support would lead to frivolous claims of abuse to gain an advantage in litigation. Additionally, the family law bar worried about cases where the domestic violence survivor is disproportionately wealthy compared to the abuser.

To address these concerns, the Louisiana State Law Institute proposed making the spousal support provisions a presumption instead of mandatory.[13] The proposal also widened the presumption to encompass cases in which a spouse is granted a divorce based on adultery or a felony conviction.[14] In determining whether a spouse who has received a divorce on the basis of the fault of the other party should be awarded spousal support, the court will consider the income and means of each spouse; financial obligations of each spouse; the earning capacity of each spouse; the effect of child custody on the earning capacity of each spouse; the time necessary for the spouse seeking spousal support to acquire education, training, or employment; the health and age of each spouse; the duration of the marriage; tax consequences; and the effect of any domestic abuse on each spouse.[15]

In general, spousal support may not exceed one-third of the payor-spouse's net income.[16] However when the divorce is granted on the basis of domestic abuse, the court may order an award that exceeds the one-third limit.[17] Additionally, even in cases where the divorce was not granted for reasons other than domestic abuse, a domestic violence survivor has the option of showing in the spousal support hearing that she suffered from domestic abuse at the hands of the payor during the marriage in order to receive an award that exceeds the one-third limit.[18] This allows survivors who seek divorce under the no-fault statute to have the option to ask for greater than the one-third limit. This was an important provision for advocates as it is often safer for survivors to receive a no-fault divorce. The spousal support award may be awarded as a lump sum, allowing survivors to move on without having any ongoing contact with their abusers.[19]

It should be noted that mutual fault may deprive the survivor of the ability to receive spousal support.[20] Only fault that gives rise to a cause of action for divorce will deprive a spouse of the ability to receive spousal support.[21] The spouse who seeks to defeat a claim for spousal support must affirmatively prove that the claimant spouse was at fault under the grounds for divorce in Lousiana Civil Code Article 103.[22]

Presumption Against Sole or Joint Custody for Parents Who Perpetrate Family Violence

The core protection for domestic violence survivors in child custody and visitation proceedings in Louisiana law is the Post-Separation Family Violence Relief Act (PSFVRA).[23] While Louisiana had recognized the need for specific protections for domestic violence survivors in 1979, the focus had been on the immediate physical safety of survivors.[24] The PSFVRA was enacted in 1992 to address the issue of abuse of process by domestic abusers. The legislative findings noted that after separation or divorce "violence often escalates, and child custody and visitation become the new forum for the continuation of the abuse."[25] To combat this, the PSFVRA put into place strong protections for domestic violence survivors in custody and visitation proceedings.

The PSFVRA creates a presumption that a parent who has a history of committing family violence shall not be awarded sole or joint custody of children.[26] The presumption against custody can only be overcome by a showing that the abusive parent completed a batterer intervention program, is not abusing drugs or alcohol, and that the best interest of the child requires that the parent participate in raising the child because of the other parent's absence, mental illness, substance abuse, or other circumstance negatively affecting the child.[27]

Prior to 2014, a parent had to complete a treatment program in order to overcome the presumption against sole or joint custody.[28] This requirement caused a lot of confusion in the courts as to whether this requirement was met by attendance at an anger management program.[29] As anger management programs are inappropriate for abusers, advocates pushed for the law to be clarified.[30] 2014 Louisiana Acts No. 194 §1 changed the requirement to "court-monitored domestic abuse intervention program," which is defined as:

> a program, comprised of a minimum of twenty-six in-person sessions, that follows a model designed specifically for perpetrators of domestic abuse. The offender's progress in the program shall be monitored by the court. The provider of the program shall have all of the following:
>
> (a) Experience in working directly with perpetrators and victims of domestic abuse.
>
> (b) Experience in facilitating batterer intervention groups.
>
> (c) Training in the causes and dynamics of domestic violence, characteristics of batterers, victim safety, and sensitivity to victims.

La. Rev. Stat. Ann. § 9:362(3).

An abusive parent can have only supervised visitation with children.[31] The parent may petition for unsupervised visitation only if she or he has completed a batterer intervention program since the last incident of abuse.[32] The abusive parent must show that it is in the best interest of the child for that parent to have unsupervised visitation, and the court must consider that parent's mental health condition and likelihood of committing additional acts of family violence.[33] The court can order any restrictions on visitation to protect the child, including continued supervision.[34]

If both parents are found to have a history of committing family violence, then the court must award custody to the parent who is less likely to continue committing family violence. That parent must complete a batterer intervention program. If the court finds that the child's welfare would be in danger with either parent, then the judge can award custody to a third party.[35]

If a parent sexually abused a child, that parent cannot have any contact or visitation with the child until completing a treatment program for sexual

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What Do Primary Aggressor Laws Achieve? A 10-Year National Study of Their Efficacy

by David Hirschel & Philip D. McCormack*

In the past 40 years, we have seen a massive change in the police response to incidents of intimate partner violence. Once regarded as essentially a family matter not requiring police action unless the incident was very serious, with most states enacting mandatory or pro- arrest laws, arrest is now a routine response. Consequently, arrest rates in intimate partner violence cases have increased considerably. In the l970s and l980s, they were generally in the 7% to 15% range.[1] After the passage of these laws, rates were observed to be 30% or more.[2] More recently these rates have hovered around the 50% mark.[3]

Though the adoption of arrest as the preferred response has generally been welcomed, it has not come without unintended consequences. Foremost among these has been an increase in dual arrest, the situation where both parties to an incident are arrested. The concern with this outcome is that the police, facing pressure to arrest and uncertain what has actually occurred, arrest both parties, unjustly arresting victims in the process. To address this concern, states have enacted primary aggressor laws mandating officers to determine who was the primary aggressor in the incident. This article examines the question of whether these laws have been effective in reducing the prevalence of dual arrest.

Primary Aggressor Laws

The first primary aggressor law was enacted by the Washington State. A total of 35 states now have such laws.[4] These laws vary in the discretion afforded officers. This discretion is manifested in two ways.

First, the laws state that responding officers either "shall" or "should" or "shall attempt to" determine the primary aggressor. As with the distinction between mandatory and pro-arrest laws, the terms "should or "shall attempt to" indicate a preference for arresting only the primary aggressor, while the term "shall" is more of a mandatory nature. While some 20 states[5] are very clear that they are mandating the determination of a primary aggressor, three states[6] use the word "should," and nine states[7] water down the mandate by using words such as "shall attempt" or "shall make reasonable efforts" to determine the primary aggressor. Meanwhile, Minnesota instructs law enforcement agencies to adopt policies that "discourage dual arrests,"[8] while Texas simply indicates that training "shall include instruction in preventing dual arrest whenever possible and conducting a thorough investigation to determine which person is the predominant aggressor."[9]

Second, the laws vary in the criteria to be considered and whether the listed criteria "shall" or "should" be considered. Some states, such as Florida, Rhode Island, and Texas, do not list any criteria. The criteria that are included by most of the states are all of, or a combination of, the following: comparative extent of injuries; prior domestic violence history; self-defensive actions; and likelihood of future injury. Other factors mentioned by states include "welfare of any minors present at the scene," "size and strength of each person," and "evidence from witnesses." Arizona, Connecticut, Maryland, and Minnesota specifically mention only the criterion of self-defense. All but two of the states mandate that the officers "shall" consider the listed criteria, with Michigan and New Jersey stating that the officers "should consider" the listed criteria. Three states, California, Mississippi, and Missouri, stress that that the primary aggressor is not necessarily the first aggressor.

Prior Research

To date, there has not been much research that has examined the impact of primary aggressor laws. The research that has been conducted provides some evidence that these laws are having their desired effect. In a process that took almost three years to successfully implement and required the support of highly regarded officers, McMahon and Pence (2003)[10] reported that in Duluth, Minnesota, the female arrest rate decreased after a primary aggressor policy was enacted, while Fraelich and Ursel (2014)[11] reported that the implementation of a primary aggressor policy resulted in a decline of the dual arrest rate in Winnipeg, Canada. Likewise, in a national study of 2003 NIBRS data, Dichter, Marcus, Morabito and Rhodes (2011)[12] found that dual arrests were slightly less likely to be made in jurisdictions with primary aggressor policies. In a study of 282 agencies in five states, Hirschel, Buzawa, Pattavina, Faggiani and Reuland (2007)[13] reported that agencies operating with primary aggressor laws and/or policies had a dual arrest rate of two percent, less than a quarter of the nine percent dual arrest rate found in jurisdictions without a primary aggressor law or policy. Finally, in an examination of 3,078 incidents of intimate partner violence reported to the police in 25 jurisdictions in four states in calendar year 2000, Hirschel and Deveau (2016)[14] found that, controlling for variables such as infliction of injury and presence of weapon, dual arrests were more than twice as likely to be made in a state without a primary arrest statute. However, they also found that police officers were one-third less likely to make any arrest in a state with a primary aggressor law, suggesting that primary aggressor laws may have a chilling effect.

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Current Study

The study reported in this article is the first multi-year national study to examine the impact of primary aggressor laws on police arrest practices. The dataset comprises 10 years of NIBRS data (2000 through 2009) of intimate partner violence cases reported to the police in 5,481 jurisdictions in 36 states and the District of Columbia. Multilevel logistic regression models were used to measure the impact of primary aggressor laws to arrest either one party or both parties involved in the incident. Nearly half (49.7%) of the incidents resulted in the arrest of one or both of the parties.[15] A total of 2.4% of the incidents resulted in the arrest of both parties for offenses committed against the other party.

With regard to arresting one of the parties, the seriousness of the offense and the existence of a mandatory arrest law were both positively associated with the likelihood of arrest. Compared to intimidation, incidents of simple assault were 4.1 times as likely, and incidents of aggravated assault 6.1 times as likely, to result in an arrest. Meanwhile, arrests were 39.7% less likely to be made in preferred arrest states, and 33.4% less likely in discretionary arrest states, than incidents occurring in a mandatory arrest state. However, incidents occurring in a state which had enacted a primary aggressor law were 24.8% less likely to result in an arrest than those occurring in a state without such a law. While incidents occurring at a residence and age of the offender were to a minor extent positively associated with the likelihood of arrest, the racial dyad of the victim and offender and the sex of the couple showed greater impact. Compared to incidents involving white intraracial dyads, those involving both a black victim and black offender were 40.6% less likely, and those involving any other victim/offender racial dyad were 15.6% less likely, to result in an arrest. Finally, female couples were 31.9% less likely, and male couples 30.7% less likely, than heterosexual couples to have the incident result in at least one arrest.

With regard to dual arrest, though incidents occurring in a state with a primary aggressor law were less likely to result in the arrest of both parties, this effect was not statistically significant. Likewise, the type of warrantless arrest law enacted in a state had no significant effect on the likelihood of dual arrest. Incidents of simple assault were 2.5 times more likely, and incidents of aggravated assault 2.1 times more likely, than incidents of intimidation to result in a dual arrest. Incidents occurring in a residence and age of offender were negatively associated with the likelihood of dual arrest. Compared to incidents involving white intraracial dyads, those involving both a black victim and black offender were 4.4% less likely, and those with any other victim/offender racial dyad 45.4% less likely, to result in dual arrest. The strongest effects were found when examining the impact of the sex of the couple. Female couples were 39.1 times more likely, and male couples 52.8 times more likely, to be dually arrested.

Discussion

The finding that states with primary aggressor laws do not significantly impact the likelihood of dual arrest is disappointing. It is important to note that when using the fixed-effects logistic model we found that incidents occurring in states that had enacted a primary aggressor law were 37.3% less likely to result in dual arrest than incidents in other states, where such a law had not been enacted, a result that is consistent with the prior studies by Dichter,[16] Fraelich and Ursel,[17] Hirschel et al.,[18] and Hirschel and Deveau.[19] The problem with using the fixed-effects logistic model is that data from one state can unduly affect the outcome. For example, when the data were examined for regional differences, an extremely high dual arrest rate (9.1 %) was observed for the Northeast. However, when the state of Connecticut was omitted from the analysis that rate dropped to 1.8%, less than the overall dual arrest rate of 2.4%.

One of the reasons for the finding of lack of statistical significance in the effect of primary aggressor laws is because there is variation among the states, with some states with primary aggressor laws having dual arrest rates that are higher than the overall average of 2.4% and some states with no primary aggressor law having dual arrest rates lower than 2.4%. A total of six of the 19 states with primary aggressor laws in effect during the 10 year study period had dual arrest rates in excess of 2.4% (Arizona, Colorado, Iowa, Missouri, Utah, and Virginia) and three of the seven states that implemented primary aggressor laws during the study period still had dual arrest rates in excess of 2.4% after the passage of those laws (Louisiana, Nebraska, and North Dakota). Interestingly, all of these states had mandatory warrantless arrest laws except for North Dakota, which had a preferred arrest law, and Nebraska, which had a discretionary warrantless arrest law. In addition, all of them except for Arizona had detailed primary aggressor laws. Conversely, four of the 10 states without primary aggressor laws had dual arrest rates lower than 2.4% (Illinois, Maine, Massachusetts, and West Virginia). Of note, two of these states had discretionary arrest laws (Illinois and West Virginia), one (Massachusetts) a preferred arrest law, and only one (Maine) a mandatory arrest law.

The interaction between the coexistence of mandatory arrest and primary aggressor laws is noticeable. The inherent conflict between these laws appears to have resulted in many officers opting to arrest both parties when there was any uncertainty about who was the primary aggressor. In Connecticut, the concern has been raised that since "statute and case law are equivocal whether self-defense is an affirmative defense against arrest, police and prosecutors *contend* that strict adherence to the mandatory aspect of the domestic violence law requires arrest when any probable cause of crime is evident."[20] This tension between primary aggressor laws and mandatory arrest laws may also partially explain the finding that an intimate partner violence incident was 24.8% less likely to result in arrest in a state with a primary aggressor law. Afraid of wrongly arresting a second party, the responding officers may opt to arrest neither party.

The variation among states with similar laws suggests that there may be implementation issues. It is naïve to assume that enactment of a law will

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Civil Legal Aid Can Buffer Against Witness Tampering Involving Children

by Amy Bonomi & David Martin*

As recognized by the U.S. Supreme Court, witness tampering is a significant problem in domestic violence cases, with abusers often pressuring their victims to recant to lessen criminal charges (**Davis v. Washington**, 547 U.S. 813 (2006)). In 2011, we published the first analysis of jail phone calls that occur between domestic abusers and their victims, outlining a five-stage model describing how abusers pressure their victims to change their stories and prepare to recant in court.[1]

Abusers typically begin the jail calls by minimizing their abuse and resisting the victim's account of what happened (stage 1), along with using sympathy appeals to position themselves as the "victim" and to manipulate the victim's emotions (stage 2). As the jail calls progress, couples reminisce about earlier happier times in their relationship, dream of a better life together (*e.g.*, getting married, having children), and position themselves against others who do not understand them and/or their relationship (*e.g.*, family, friends, the prosecutor, the domestic violence advocate) (stage 3). Then, abusers typically made a direct request for the victim to recant (stage 4), followed by the couple working together to reconstruct the abuse narrative to preserve the abuser's "innocence," blaming the state/judge/prosecutor for detaining the abuser, and giving each other specific instructions of what to say in court.

Triangulation of Children

In 2017, we published a follow-up essay to our original jail call analysis to outline a critical extension of witness tampering in domestic abuse cases: namely, how abusers manipulate their intimate partners by triangulating their children.[2] In this triangulation process,[3] the abuser might talk with the victim's children, via calls made from jail, to instruct them to say or do specific things to the victim. Or, the abuser might conjure specific images when talking directly with the victim that cause her to question her relationships with her children and with the abuser. These strategies are an additional manipulation to lessen the victim's agency, harm her self-identity and confidence (including notions she may have of being a good mother and provider for her children and family), and force her to question her ability to stand on her own (without the abuser).

To illustrate how triangulation works, in a recent case prosecuted in Washington State, an abuser came home late, and he and his wife began arguing because she was taking care of their infant and suspected that he was cheating (he was). When the victim attempted to breastfeed their newborn child, the abuser beat and strangled the victim until she almost lost consciousness. The victim's teenage daughter overheard the struggle and called 911. The abuser was arrested at the scene. In numerous calls the abuser made to the victim, he demanded that the victim say whatever was needed to get him out of jail as he was their sole source of income and needed to provide for their child. The abuser admitted and apologized for past abuse, and encouraged friends and family to bring the victim money to take care of the baby but "not too much" lest she might not cooperate with his demands. During calls made from jail, the abuser repeatedly triangulated their child's needs and family future to diminish the victim's agency and discourage her participation with prosecution:

> Abuser: "You wanna sit there and think the baby is not a pawn. She's not a chess pawn. She's not a fuckin' tool. I'm not gonna be pullin' her back and forth in between us what we got goin' on. That's not right ... Me and you need to work on what we got goin' on because we're married, 'cause I got bills to pay. I gotta take care of my family. I'm not gonna sit there and watch my daughter not get what she wants or not get what we need.… We got a newborn kid and I gotta take care of my baby. These motherfuckers are gonna have to kill me 'cause they're not takin care of her. The only thing they want to do is tell you what to do with your family, but they don't want to give you any money to do it.… I love you and I'll see you (in court) tomorrow. You gotta be here with the baby."
>
> Victim: "I love you with all my heart, but I can't do this shit. I love you. I do. I love you, but you have to be a better person …"

At trial, the victim recanted and stated she did not remember what happened during the abuse event. Claiming to have lost memory is a strategy common within recanting victims and one we described in our original jail call study.

In a similar case prosecuted in Washington State, an abuser came home intoxicated and suffocated his girlfriend while she slept in bed with her infant because he suspected she (an exotic dancer) was sleeping with her customers (she was not). During multiple jail calls, when the victim suggested that the abuser's behavior toward her was problematic, especially in front of their infant ("For you to treat me the way you do in front of [the infant], that's wrong"), the abuser triangulated their infant against the victim. The abuser conjured the idea that their infant (come school age) would be ashamed of his mother's job as an exotic dancer: "For you being a stripper is just wrong. If you're dancing naked in front of his [the baby's] school teacher, do you think that's going to be cool with him? Do you

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Congress Works to Ensure Children Are Protected in Custody Disputes

On September 25, 2018, the U.S. House of Representatives passed a landmark bill to ensure that children are protected in custody disputes. The House passed a concurrent resolution (H. Con. Res. 72)[1] urging state courts to determine family violence claims and risks to children before considering other "best interest" factors. The resolution encourages states to ensure courts rely only on admissible evidence and qualified experts, and adopt qualification standards for third-party appointees. It also affirms that Congress is prepared to use its oversight authority to protect at-risk children.

DV LEAP, the Center for Judicial Excellence, and the California Protective Parents Association (CPPA)—three well-known and established non-profit organizations advocating for victims of abuse—have worked tirelessly with Pillsbury Winthrop Shaw Pittman LLP, acting as *pro bono* counsel, to ensure H. Con. Res. 72's passage. Together they assembled a coalition of more than 50 advocacy organizations that supported the initiative. The bipartisan resolution, spearheaded by Rep. Pete Sessions (R-TX) and Rep. Carolyn Maloney (D-NY), and cosponsored by more than 80 lawmakers, passed by a voice vote.

"This day has been a very long time coming," stated Founder and Legal Director of DV LEAP Joan Meier. "We and our grass-roots allies have been asking Congress to address this problem for over a decade and we are incredibly grateful to our amazing *pro bono* lawyers at Pillsbury and leading co-sponsors Maloney and Sessions for generating this outpouring of Congressional support. It is not hyperbole to state that this Resolution, by catalyzing improved state court practices, will save some children's lives and protect others from a childhood full of abuse."

"California Protective Parents Association is incredibly thankful to all who led, cosponsored and passed this important legislation to help protective parents defend their abused children," added CPPA Executive Director Catherine Campbell. "By passing this resolution, Congress has assured those kids that they will be heard and believed. They are avowing that, as a nation, we consistently put a child's right to be safe first."

The Resolution is a direct response to state family courts' difficulties hearing and evaluating claims of child abuse and domestic violence during custody litigation. According to the Leadership Council on Child Abuse and Interpersonal Violence, an estimated 58,000 U.S. children per year are court-ordered into the unsafe custody or care of abusive parents, over the objections of caring parents. Over the past decade, the Center for Judicial Excellence has documented 653 child homicides across the U.S. by a parent involved in a conflict related to divorce, separation, custody, visitation or child support.

This Resolution will save some children's lives and protect others from a childhood full of abuse.

"Many of these child homicides were preventable, if family courts had just prioritized child safety," said Kathleen Russell, the executive director of the Center for Judicial Excellence. "This resolution commemorates the lives of these innocents and helps ensure that more parents are spared the immeasurable grief of losing a child at the hands of an ex-spouse."

In just two examples of hundreds, Kyra Franchetti, age two, was murdered in 2016 by her father, who then committed suicide. Her mother's claims that Kyra's father was suicidal, abusive, and had severe anger issues were repeatedly dismissed by a judge who at the time commented, "this is not a life or death matter." And just last year, five year old Piqui was murdered by his father after a trip to Disneyland, just days after a family court denied the request of his loving mother, Ana Estevez, to supervise the father's visitation. The court minimized the father's past violence toward the child and the father's threats to kill Piqui's mother as simply "bad parenting."

"While Kyra's voice has been silenced by family violence, her story resonated loud and clear," said Jacqueline Franchetti, Kyra's mother. "I want to thank the Congressional members and staff who supported this Resolution for their kindness and compassion. While I miss Kyra every second of every day, this is an important first step to creating lasting change for so many children left vulnerable by our divorce/family court system."

Piqui's mother Ana Estevez, a child advocate who has lobbied in Washington on numerous occasions, continued: "Our children deserve to live full lives—my Piqui deserved to live more than five years—and this powerful statement by the House gives me real hope that the family court cover-ups and denials of child abuse are finally being exposed. California passed Piqui's Resolution a month ago, in honor of my son, and like this federal Resolution, it urges family courts to make child safety their number one priority."

The list of organizations that have been advocating for passage of H. Con. Res 72 includes: Advocates for Child Empowerment & Safety (ACES); California Protective Parents Association (CPPA); Center for Judicial Excellence (CJE); City of Covina; Domestic Violence Legal Empowerment and Appeals Project (DV LEAP); ACTION OHIO Coalition For Battered Women; Azusa City Council; Battered Mothers' Custody Conference; Baldwin Park City Council; California Partnership to End Domestic Violence (CPEDV); Center for Child Protection and Family Support; Child Abuse Forensic Institute (CAFI); Child Abuse Solutions, Inc.; Child Justice; Child Protection Institute (CPI) at Liberty University; Child USA; Children's Civil Rights Union (CCRU); Children's Justice Fund; Coalition Against Domestic Violence – Lynchburg VA; Courageous

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Case Summaries

Anne L. Perry

Ohio: Record Supported 30-Month Sentence for Attempted Felonious Assault

The Facts. Defendant Timothy E. Bradley was charged with felonious assault and fourth degree felony domestic violence for punching his girlfriend in the face and knocking out her tooth in the presence of their seven year old son. Bradley pled guilty to the domestic violence charge and to a reduced charge of attempted felonious assault. At sentencing, the trial court recognized the existence of allied offenses and the State elected to proceed on the assault charge. The trial court considered the record, a victim-impact statement, and the pre-sentencing report, and sentenced Bradley to 30 months in prison. The trial court also noted it had balanced the statutory seriousness and recidivism factors. The trial court recognized that Bradley, who was 33 years old, had an extensive history of juvenile adjudications, as well as multiple prior domestic violence convictions. In addition, Bradley had already attended an anger management and alcohol treatment program before committing the current offense. Bradley appealed, arguing that the trial court did not properly evaluate the seriousness and recidivism factors in sentencing, thereby violating the purposes of felony sentencing. He further argued that the trial court treated his juvenile record with more significance than his adult record.

The Appeal. The Court of Appeals of Ohio noted that under the statutory sentencing guidelines, an appellate court may modify or vacate a sentence only if it "clearly and convincingly" finds either that the record does not support the findings or the sentence is contrary to law. Here, because Bradley's sentence fell within the authorized statutory range, the only disputed issue was whether the record failed to support the 30 month sentence. The court concluded that "[i]n light of Bradley's lengthy record as a juvenile and an adult, his prior opportunity to undergo counseling, the nature of the current offense, his 'high risk' score on a risk assessment, and the recommendation of the probation officer who completed the [pre-sentencing report], we do not find that the record clearly and convincingly failed to support Bradley's 30-month prison term." Rather, the trial court "engaged in an appropriate analysis" in reaching its sentencing determination. In addition, the trial court properly found that attempted felonious assault and domestic violence were allied offenses and sentenced on the attempted felonious assault.

However, the trial court also sentenced Bradley to a concurrent term of "zero" months in prison for domestic violence. Technically, the trial court should not have imposed any sentence for the allied offense of domestic violence. To properly merge the allied offenses into a single sentence, the proper remedy was to vacate the concurrent sentence imposed for domestic violence. As so modified, the trial court's judgment was affirmed. **State v. Bradley**, 2018 WL 3814513 (Ohio Ct. App. 2018).

Editors' Note: Often the same criminal conduct results in the commission of more than one crime; for example, commission of felonious assault automatically means one has also committed assault. When multiple crimes are closely related by their facts, they are properly merged for sentencing purposes to protect against "double jeopardy." Under Ohio law, however, when the "import" of the crimes is dissimilar enough, the crimes may not be merged and separate punishments may be deemed constitutional. The "import" of a crime means its effect, either in terms of who was harmed or what types of harms were caused.

Nevada: Prior Domestic Violence Convictions Properly Considered in Statutory Sentencing for Repeat Offenders

The Facts. The defendant and real party in interest, John T. Kephart, was first convicted of domestic violence when he pleaded no contest to "Domestic Battery – 1st Offense" in May 2010. Kephart was represented by counsel and signed a form acknowledging that the State would use this conviction to enhance the penalty for any subsequent offense.

Nevada law imposes increasingly serious penalties on repeat domestic battery offenders. This range of penalties was set out in the form signed by Kephart. A second offense, while still a misdemeanor, carries a longer mandatory minimum term of imprisonment (10 days instead of two days), a higher minimum fine ($500 instead of $200), and more hours of community service (100-200 hours instead of 48-120 hours), compared to a first offense conviction. A third domestic battery offense within seven years of the first constitutes a felony.

Kephart's second conviction came two months later, in July 2010. Citing the May 2010 conviction, he was charged with "domestic battery with one prior conviction within the last seven years." After the complaint was amended to "first" rather than "second" offense, Kephart pled guilty and was sentenced to the statutory minimums applicable to a first offense domestic battery. At this time, Kephart signed another form acknowledging the increasingly severe sentences for repeat domestic battery offenders.

Kephart's third and current conviction came in January 2017, when he was found guilty by jury of domestic battery. In charging the offense, the State relied on Kephart's May and July 2010 domestic battery convictions to enhance the offense to a felony.

Kephart objected to the State using the July 2010 conviction for a felony enhancement since the conviction resulted from plea negotiations which, he alleged, obligated the State to treat the conviction as a first offense for all purposes. The district properly deferred decision on the objection until the time of sentencing and then conducted a hearing on the issue. Kephart maintained that he believed the second conviction would be treated as a first offense if he reoffended, but also admitted that he signed and understood the acknowledgment of future sentence enhancements. The district court did not find that the State affirmatively agreed not to use the July 2010 conviction for enhancement purposes, but nonetheless ruled in Kephart's favor. The district court concluded that it would not consider Kephart's second conviction at sentencing because it would be "unfair," given the earlier plea deal, to use the second "first offense" conviction to enhance Kephart's most recent offense to a felony. The State, without jurisdiction to appeal, sought a

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this provision was dropped in the final negotiations on the bill.

In other important developments, VAWA 2013 included landmark anti-discrimination protections for LGBTQ survivors and recognized the inherent authority of tribes to prosecute non-Native men in some domestic violence cases.

Throughout is evolution, VAWA's core focus had been to help states and local communities implement best practices in survivor safety and offender accountability. VAWA requires states to certify that their policies are in keeping with best practices in survivor safety, confidentiality, and legal protections. Among other important certifications, states must indicate that sexual assault survivors are not required to take polygraph tests or pay for sexual assault kit exams; that such exams must be provided regardless of whether a report to law enforcement has been made; that mutual orders of protection and dual arrests are discouraged; and that survivor confidentiality is upheld in all circumstances. Through these certifications, VAWA works to ensure that programs are upholding the spirit of the law. After VAWA was enacted in 1994, a wave of state legislative reforms further strengthened the response to domestic violence, sexual assault and stalking.

Today, VAWA currently authorizes approximately $630 million annually for grant programs that fund states and local communities to provide a full gamut of victim services and to make systemic changes that will improve the overall response to domestic violence, dating violence, sexual assault and stalking. From mobilizing in rural communities to providing legal assistance to victims, VAWA grantees are working on the frontlines every day to reduce and prevent violence. The authorizing language for these critical grant programs now expires on December 7.

New VAWA Proposals

On July 26, 2018, Representative Sheila Jackson Lee introduced a bill to reauthorize VAWA.[4] This bill continues the forward progress of VAWA and makes modest improvements in VAWA policies and programs. The bill, introduced with no Republican co-sponsors, reauthorizes core VAWA programs and seeks to further VAWA's coordinated and multisector response to domestic violence, dating violence, sexual assault, and stalking. The proposed legislation prioritizes improving survivor safety and support while also making new investments in prevention.

It is crucial that Congress ramp up its work to pass a bill that continues VAWA's important programs and enhances the community response to domestic violence, dating violence, sexual assault, and stalking.

This bill will direct resources to reduce domestic violence homicides, improve the safety net for survivors through housing and economic security, and engage youth in working to prevent violence. New proposals will also further address the epidemic of violence against Native women and bring attention to the high rates of missing and murdered Native women. These priorities emerged from the experiences of advocates working on the ground with survivors and communities.

Reducing Homicides. On average, nearly three women a day are killed by intimate partners. In 2015, 928 women were killed by male intimate partners, and the majority were killed by firearms.[5] Federal law currently prohibits those with misdemeanor domestic violence convictions or subject to a permanent order of protection from possessing firearms. The proposed legislation closes a critical gap by including boyfriends and former boyfriends in the prohibition, regardless of whether the couple has lived together. The bill requires the National Instant Check System to notify law enforcement when a prohibited person fails a background check and makes other improvements to better implement federal gun prohibitions. Strengthening this legislation will help keep firearms out of the hands of dangerous abusers and improve safety for women and children.

Strengthening Housing. Domestic violence survivors point to lack of safe and affordable housing as a key obstacle to escaping violence and rebuilding their lives. Survivors of rape and sexual assault also struggle to find and keep safe housing in the aftermath of violence. The proposed VAWA legislation builds on current law to make housing a greater priority in our nation's response to domestic and sexual violence. The bill requires housing providers to ensure that victims retain housing assistance when families break up, and allows victims to terminate leases for safety reasons or for recent sexual assaults that occurred on the premises. The bill makes it easier for victims to transfer their housing assistance when they are moving for safety reasons. The bill creates a Director of Violence Against Women within the Department of Housing and Urban Development (HUD) to coordinate these efforts and improves data collection about the housing needs of victims. These investments in housing will provide victims with greater stability for themselves and their children.

Improving Economic Security. Violence against women is costly to individual families and to our nation as a whole. Domestic violence alone results in 4.9 billion dollars annually in medical expenses, lost productivity, and loss of earnings.[6] Domestic violence survivors may be harassed at work and face job insecurity as a result. A 2017 study of the economic burden of rape found the lifetime costs for each victim to be $122,000.[7] The proposed legislation seeks to improve economic security for survivors and to gather additional information about the costs of violence nationally. States would be prohibited from denying unemployment compensation to individuals who are separated from employment due to sexual harassment, sexual assault, domestic violence, dating violence, and stalking. The bill directs several studies that will further examine the barriers survivors face to economic security, including

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the effects of violence on completing college and handling student debt. The bill also expands VAWA's Workplace Resource Center to include a focus on sexual harassment, a timely change that will provide tools, resources and training to employers.

Preventing Violence. The proposed VAWA reauthorization bill also includes an increased focus on preventing violence before it starts and engaging more stakeholders in this important work. These proposals speak to the growing national awareness about the extent of violence against women and the issues that have emerged from survivor campaigns on social media. In recent years, college students have spoken out about their experiences with sexual violence on campus, and women from all walks of life have participated in the #MeToo movement. This critical national conversation has stretched thin the capacity of local rape crisis centers and other providers to respond to the need for training and capacity-building at the community level.

VAWA's Rape Prevention and Education Program (RPE) funds states to conduct bystander intervention and social norms change campaigns, and these programs are working. One study of high schools in Kentucky found that RPE-funded programs focused on bystander intervention decreased sexual violence perpetration and other forms of interpersonal violence.[8] The resources for these programs are insufficient today. In one national survey, nearly half of states reported that prevention programming covered only 20% of their state.[9] The proposed VAWA reauthorization would fund RPE programs at $150 million, an increase of 100 million dollars. In addition to RPE, the proposed legislation will provide VAWA funds to work directly with youth in schools and community-based programs to promote healthy relationships.

Reducing Violence Against Native Women. The proposed VAWA reauthorization also furthers efforts to combat the epidemic of violence against Native women, a population that faces the highest rates of domestic violence and sexual assault. More than half of American Indian and Alaska Native women will experience sexual assault in their lifetimes, and nearly half will experience stalking.[10] Many Native women are victimized by non-Native men. The proposed legislation builds on the tribal authority recognized by Congress in 2013 to prosecute domestic violence cases against non-Native men and expands this jurisdiction to include child violence, sexual violence, and stalking. The bill includes other important new provisions to improve the safety of Native women, and directs the Justice Department to develop new protocols to investigate cases of missing and murdered Native women.

Violence against women is costly to individual families and to our nation as a whole. Domestic violence alone results in 4.9 billion dollars annually in medical expenses, lost productivity, and loss of earnings.

Getting It Done

While our nation engages in a national conversation about violence against women, VAWA nears its new expiration date. Without authorizing language, existing VAWA grant funds will become vulnerable to cuts in the Congressional appropriations process. While VAWA's existing policy provisions—including interstate crimes of violence, LGBTQ anti-discrimination provisions and tribal authorities—remain in place with no expiration date, reauthorization remains essential to keep the nation focused on ending violence against women.

When VAWA languishes, Congress communicates to survivors and communities that ending violence against women is not a priority for the federal government. The opportunity to make critical improvements is lost and forward progress—which has always been the VAWA story—comes to a halt. In today's landscape, it is crucial that Congress ramp up its work to pass a bill that continues VAWA's important programs and enhances the community response to domestic violence, dating violence, sexual assault, and stalking—and also sends a clear message that ending violence against women is non-negotiable.

End Notes

1. *See* Majority Staff of the S. Comm. on the Judiciary, Violence Against Women: A Week in the Life of America, S. Rep. 102-118 (1992); Majority Staff of the S. Comm. on the Judiciary, 103 Congress, The Response to Rape: Detours on the Road to Equal Justice (Comm. Print 1993) [hereinafter Response to Rape].

2. Response to Rape, supra note 1, at 1.

3.William H. Rehnquist, Chief Justice of the United States, 1991 Year-End Report on the Federal Judiciary, reprinted at 138 Cong. Rec. 581, 583 (1992).

4. Violence Against Women Act Reauthorization of 2018, H.R. 6545, 115 Cong. (2017-2018).

5. Violence Policy Center (2017). When men murder women: An analysis of 2015 homicide data, at 3. Available at *http://www.vpc.org/studies/wmmw2017.pdf.*

6. McKinsey-Global Institute (2016). The power of parity: Advancing women's equality in the United States, at 39. Available at *https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Employment%20and%20Growth/The%20power%20of%20parity%20Advancing%20womens%20equality%20in%20the%20United%20States/MGI-Power-of-Parity-in-US-Full-report-April-2016.ashx.*

7. Cora Peterson, et al. (2017). Lifetime economic burden of rape among U.S. adults, *American Journal of Preventive Medicine, 52(6),* 691–701.

8. Ann. L. Coker, et al. (2017). RCT testing bystander effectiveness to reduce violence, *American Journal of Preventive Medicine, 52(5),* 566–578.

9. National Sexual Violence Resource Center Survey (2018), as cited by National Alliance to End Sexual Violence factsheet. Retrieved from *https://www.speakcdn.com/assets/2497/vawaincreaserpe_1.pdf?1526664937707.*

10. Andre B. Rosey (June 2016). Violence against American Indian and Alaska Native women and men, NIJ Journal No. 277. Available at *https://nij.gov/publications/pages/publication-detail.aspx?ncjnumber=24.*

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into a killer," stated Kris Brown, co-president of the Brady Center.

In 2018, it is projected that over 10 million people will become victims of physical abuse at the hands of an intimate partner. Already, there have been more than 485 gun-related domestic violence fatalities in 2018. The report further shows that:

- About every 16 hours, a woman is shot and killed by a former or current partner;
- 54% of mass shootings are related to domestic or family violence;
- Women who were killed by a spouse, intimate partner, or close relative were seven times more likely to have lived in homes with guns;
- One out of every 15 children in the U.S. is exposed to the effects of intimate partner violence yearly; and
- When there is a gun in a home with a history of domestic violence, there is a 500% higher chance that a woman will be murdered.

The report also notes that America's lax gun laws make the issue even more acute, with American women being 16 times more likely to be killed with a gun than in other high-income countries.

While the federal Brady background check system bars people convicted of domestic violence crimes or who are subject to restraining orders for certain types of domestic violence from purchasing guns, one in five guns today are sold without a background check, whether online, at gun shows, or in other private sales. Proposed legislation to further restrict domestic abusers from buying guns includes:

- Expanding background checks to cover all private sales, as has been done to some degree in 20 states and Washington D.C.;
- State-level laws that create a way to prosecute abusers at the local level;
- Expanding the federal definition of "domestic violence" to include dating partners who do not have a child together, otherwise known as the "boyfriend loophole;"
- Enacting laws preventing stalkers from buying and keeping guns; and
- Creating a process for states to seize guns previously owned by perpetrators of domestic violence or who have had protective orders issued against them.

**Brady Center, Press Release, October 12, 2018. Reprinted with permission. The report and other materials on how to reduce gun violence can be found at bradycampaign.org.* ■

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abusers and showing that supervised visitation is in the best interest of the child.[36]

Although the PSFVRA had been in effect since 1992, it was underutilized. The major reason for this was that if the law was not specifically invoked in the pleadings in custody cases, it was often not applied, and custody was decided instead on the basis of the best interests of the child standard. To remedy this problem, advocates sought to bring elements of the PSFVRA into all child custody cases where domestic violence was present.

2018 Louisiana Acts No. 412 § 1 made key changes to the main custody provisions of Louisiana law. Louisiana Civil Code Article 134 lists the factors to be considered in determining a child's best interests. A new best interest factor was added requiring the court to consider the potential for the child to be abused as the primary factor.[37] New language was added to the article which overrides the best interest factors in cases involving domestic violence. When a case involves a history of family violence as defined by the PSFVRA, the custody and visitation provisions of the PSFVRA must be applied in place of the best interest of the child factors.[38]

The PSFVRA also applies when the parents are seeking judicial approval of a custody arrangement they have reached between themselves. Louisiana Civil Code Article 132 previously required courts to approve an agreement for custody reached between the parties as long as it was in the best interests of the child. This provision has been modified to specify that the court must also consider whether the PSFVRA custody restrictions apply.[39]

Conclusion

Family law protections are key to ensuring that domestic violence survivors are able to effectively escape abusive relationships and ensure that survivors and their children remain safe throughout lengthy custody cases. For this reason, family law reforms continue to be a priority for advocates. Advocates will continue to work with other stakeholders to further address gaps in protections for domestic violence survivors and their children in family courts.

End Notes

1. Symposium on Divorce and Feminist Legal Theory: Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era., 82 Geo. L.J. 2525 (1994).

2. La Civ. Code Ann. art. 102 (2018).

3. La Civ. Code Ann. art. 103.1 (2010).

4. United States Department of Justice, National Crime Victim Survey (1995).

5. La Civ. Code Ann. art. 103 (2006).

6. La Civ. Code Ann. art. 104 (2018).

7. The Louisiana State Law Institute is an organization chartered by the Louisiana Legislature as the official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana.

8. Memorandum of the Marriage and Persons Committee of the Louisiana State Law Institute (Jan. 16, 2018) (on file with author).

9. La Civ. Code Ann. art. 103, Revision Comments (2018).

10. La. Code Evid. Ann. art. 902; La. Code Evid. Ann. art. 1702.

11. La Civ. Code Ann. art. 112 (C).

12. *See, e.g.,* Adrienne Adams, Measuring the Effects of Domestic Violence on Women's Financial Well-Being (2011). CFS Research Brief 2011-5.6. Available by searching *https://cfs.wisc.edu* website for *adams2011.*

13. 2018 La. Acts, No. 265.

14. *Id.*

15. La. Rev. Stat. Ann. 112(B) (2018).

16. La. Rev. Stat. Ann. 112(D) (2018).

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* **Adams v. Adams**, 389 So. 2d 381 (La. 1980).

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21. *Id.* at 383.

22. **Lagars v. Lagars**, 491 So. 2d 5, 9 (La. 1986).

23. La. Rev. Stat. Ann. § 9:361-369 (2018).

24. 1979 La. Acts, No. 746, § 1.

25. La. Rev. Stat. Ann. § 9:361 (2018).

26. La. Rev. Stat. Ann. § 9:364(A) (2018).

27. La. Rev. Stat. Ann. § 9:364(B) (2018).

28. La. Rev. Stat. Ann. § 9:364 (1995).

29. **Coleman v. Manley**, 188 So. 3d 395, 401 (La. App. 5 Cir. 2016); **Cloud v. Dean**, 184 So. 3d 235, 236 (La. App. 3 Cir. 2016); **Smith v. Smith**, 16 So. 3d 643, 650 (La. App. 2 Cir. 2009).

30. Gondolf and Russell (1986). The Case Against Anger Management for Batterers. *Response to the Victimization of Women and Children, 9(3)*, 2–5.

31. La. Rev. Stat. Ann. § 9:364(E)(2018); La. Rev. Stat. Ann § 9:341 (2018).

32. La. Rev. Stat. Ann § 9:341 (2018).

33. La. Rev. Stat. Ann. § 9:341(A) (2018).

34. *Id.*

35. La. Rev. Stat. Ann. § 9:364(D) (2018).

36. La. Rev. Stat. Ann. § 9:364(F) (2018).

37. La Civ. Code Ann. art. 134(A)(1) (2018).

38. La Civ. Code Ann. art. 134(B) (2018).

39. La Civ. Code Ann. art. 132(R) (2018). ■

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automatically ensure that it will be implemented as intended. A major concern about implementation of primary aggressor laws is that officers may not be able to distinguish between injuries inflicted by defensive as opposed to offensive actions. The need for "specialized training in making self-defense determinations at the scene" is well documented by McMahon and Pence in their analysis of the implementation of a primary aggressor policy in Duluth, Minnesota where it took three years before the intended impact of the policy was realized.[21] As the Australian Law Reform Commission noted, the issue of identifying primary aggressors "can be difficult and nuanced and better addressed through education, training, and police codes of practice," than through legislation.[22] Consequently, it is recommended that close attention be paid to the manner in which the laws have been implemented and intensive training be provided in assessing the primary aggressor.

The findings that same-sex couples are significantly less likely to have an offender arrested (31.9% less likely for female, and 30.7% less likely for male, same-sex couples) and significantly more likely to have both parties arrested (39 times more likely for female, and 53 times more likely for male, same-sex couples) are disconcerting. This strongly suggests that officers are not adequately trained to identify primary aggressor roles in same-sex relationships, and/or that a degree of prejudice still exists in responding to incidents involving these couples. Again, appropriate training could help remedy the situation. Finally, it is noteworthy that intimate partner violence cases involving black couples were 40.6% less likely to result in arrest than those involving white couples. This could be because police perceive that such violence is more normalized in the black community or, in a more positive vein, are concerned about their relationship with the black community and the high arrest rates of black offenders in general and are therefore more likely to seek alternative strategies for resolution.

Conclusion

This research constitutes the first multi-year national study to examine the impact of primary aggressor laws on arrest. Clearly, more attention needs to be paid to the manner in which these laws are implemented and intensive training provided to officers in determining the primary aggressor. In addition, the interaction between primary aggressor and mandatory arrest laws needs to be closely examined and the disparate effect they have both on white and non-white and heterosexual and same-sex couples addressed.

End Notes

1. *See, e.g.,* David H. Bayley, The Tactical Choices of Police Patrol Officers, 14 J. of Crim. Just. 329 (1986); Donald Dutton, The Criminal Justice Response to Wife Assault, 11 L. & Human Behavior 189 (1984); Robert E. Worden & Alissa A. Pollitz, Police Arrests in Domestic Disturbances: A Further Look, 18 Law & Soc. Rev. 383 (1984).

2. *See, e.g.,* Sherrie Bourg & Harley Stock, A Review of Domestic Violence Arrest Statistics in a Police Department Using a Pro-Arrest Policy: Are Pro-Arrest Policies Enough? 9 J. Fam. Viol. 177 (1994); Truc-Nhu Ho, The Influence of Suspect Gender in Domestic Violence Arrests, 27 Am. J. of Crim. Justice 183 (2003); Dana Jones & Joanne Belknap, Police Responses to Battering in a Progressive Pro-Arrest Jurisdiction, 15 Justice Q. 249 (1999); Amanda L. Robinson & Meghan S. Chandek, Philosophy into Practice? Community Policing Units and Domestic Violence Victim Participation, 23 Policing: An Internat'l J. of Police Strategies and Mgmt. 280 (2000); Sally S. Simpson, Leanna A. Bouffard, Joel Garner & Laura Hickman, The Influence of Legal Reform on the Probability of Arrest in Domestic Violence Cases, 23 Just. Q. 297 (2006).

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4. Alabama: Ala. Code § 13A-6-134. Alaska: Alaska Stat. § 18.65.530(b). Arizona: A.R.S § 13-3601-B. Arkansas: A.C.A. § 16-81-113(2). California: Cal. Penal. Code § 13701(b). Colorado: Colo. Rev. Stat. § 18-6-803.6(2). Connecticut: Conn. Gen. Stat. § 46b-386. Florida: Fla. Stat. Ch. 741.29 (4)(b). Georgia: Ga. Code Ann. § 17-4-20.1 (b). Iowa: Code: Iowa § 236.12(3). Louisiana: La. R.S. § 46.2140. Maryland: Md. Ann. Code art. 27 § 594B(d)(2). Michigan: Mich. Comp. Laws § 776.22(3)(b)(ii). Minnesota: Minn. Stat. § 629.342. Mississippi: Miss. Code Ann. § 99-3-7. Missouri: Mo. Rev. Stat. § 455.085(3). Montana: Mont. Code Ann. § 46-6-311(2)(b). Nebraska: R.R.S. Neb. § 29-439(1). Nevada: Nev. Rev. Stat. Ann.§ 171.137.2. New Hampshire: N.H. Rev. Stat. Ann. § 173-B:10(II). New Jersey: N.J. Rev Stat. § 2C:25-21 (c)(2). New York: N.Y. Crim. Proc. Law § 140.10 (4)(c). North Dakota: N.D. Cent. Code § 14-07.1-10. Ohio: Ohio Rev. Code Ann. §§ 2935.032(A)(1)(a)(ii) & 2935.03(B)(3)(d).

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Oklahoma: 22 Okl. St. § 60.16.B.2. Oregon: Or. Rev. Stat. § 133.055(2)(c). Rhode Island: R.I. Gen. Laws § 12-29-3 (C)(2). South Carolina: S.C. Code Ann. § 16-25-70 (D). South Dakota: S.D. Codified Laws § 25-10-35. Tennessee: Tenn. Code Ann. § 36-3-619 (b) & (c). Texas: Tex. Occ. Code § 1701.253. Utah: Utah Code Ann. § 77-36-2.2. Virginia: Va. Code Ann. § 19.2-81.3 (B). Washington: Wash. Rev. Code § 10.31.100(2)(c). Wisconsin: Wis. Stat. §§ 968.075(1)4c and 968.075(3)(2)(c).

5. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Iowa, Louisiana, Maryland, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Virginia, and Washington.

6. Michigan, New Hampshire, and New Jersey.

7. California, Florida, Georgia, Mississippi, Missouri, Nevada, New York, Oregon, and Tennessee.

8. Minn. Stat. § 629.342.

9. Tex. Occ. Code § 1701.253.

10. Martha McMahon & Ellen Pence, Making Social Change, 9 Violence Against Women 47 (2003).

11. Cheryl Fraehlich, & Jane Ursel, Arresting Women: Pro-arrest Policies, Debates, and Developments, 29 J. Fam. Violence 507 (2014).

12. Melissa Dichter, Steven Marcus, Melissa Morabito & Karin Rhodes, Explaining the IPV Arrest Decision: Incident, Agency, and Community Factors, 26 Criminal Just. Rev. 22 (2011).

13. Hirschel et al., *supra* note 3, Ch. 8.

14. David Hirschel & Lindsay Deveau, The Impact of Primary Aggressor Laws on Single Versus Dual Arrest in Incidents of Intimate Partner Violence, 23 Violence Against Women 1155 (2017).

15. For a more detailed description of the variables, analytic procedures, and results see David Hirschel, Philip McCormack & Eve Buzawa, A 10-Year Study of the Impact of Intimate Partner Violence Primary Aggressor Laws on Single and Dual Arrest, J. Interpersonal Violence. Available at *http://journals.sagepub.com/doi/10.1177/0886260517739290.*

16. Dichter et al., *supra* note 12.

17. Fraelich & Ursel, *supra* note 11.

18. Hirschel et al., *supra* note 3.

19. Hirschel & Deveau, *supra* note 14.

20. Connecticut Coalition Against Domestic Violence, Collective Opportunity for Change: Decades of Dual Arrest in Connecticut (2018). Available at *www.ctcadv.org/files/5615/1847/1671/DualArrestReport2.18.pdf.*

21. McMahon & Pence, *supra* note 10 at p. 64.

22. Australian Law Reform Commission. *Family Violence – A National Legal Response: Final Report*, vol. 1 at p. 409 (2010). Available at *https://www.alrc.gov.au/publications/9.%20Police%20and%20Family%20Violence/identifying-%E2%80%98primary-aggressor%E2%80%99.* ■

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think it's going to be okay with him?" Despite the victim's repeated attempts during the jail calls to make the case that she would not let their baby grow up in an abusive household, her abuser blamed her for their "household dysfunction" and ridiculed her profession as an exotic dancer.

As a result of the abuser's persistent tampering, including triangulating their child, the victim instructed the abuser to blame his abuse on being "drunk":

> Victim: "Be like, up front, be like 'I was out of control drunk, I was in a blackout. I would not have, I would've never done something like that' … you need to tell the judge that you do need [anger management] … so he [the judge] lets you the fuck out of there."

These two cases illustrate abusers' triangulation of their children to lessen the victim's agency, harm her self-identity and confidence (including notions she may have of being a good mother and provider for her children and family), and force her to question her ability to stand on her own (without the abuser).

Remedy: Civil Attorneys

To buffer against witness tampering, and the unique perils that such tampering poses when children are triangulated, promising new models point to connecting women to civil attorneys with specific training in responding to abusers' tactics. For example, in a case prosecuted in Washington State, the victim suffered years of abuse and did not report to police for fear she would lose custody of her seven children. The victim was married to her abuser for 20 years and was also the sole source of family income working at a print shop and grocery store. They had seven children ranging in age from five years up to 17 years old, who were often present for the abuse. Her abuser's power and control included a fabrication that the victim assaulted him, and he had brought charges against her for domestic violence while continuing to physically abuse her. While the case was pending, local police found the victim battered at a local courthouse[4] where she disclosed years of abuse,[5] including repeated strangulations and broken bones. Following these disclosures, the abuser was arrested and he then accused the victim of being an alcoholic with frequent falls resulting in injuries. The abuser was charged with several felonies, and charges against the victim were dismissed.

After the victim's disclosures, she was provided with a free civil legal aid attorney through a federally-funded Victim of Crime Act civil legal aid-prosecutor partnership.[6] As with the majority of domestic violence cases,[7] the abuser attempted to tamper with the victim-witness. He arranged for a "burner" (an unaffiliated phone) to be left on the front porch of the family home giftwrapped for their young son. The abuser called their children from jail on the "burner" using the identity of a different jail inmate to prevent discovery by authorities. During these calls, the abuser used many of the strategies outlined in our original jail call study to solicit sympathy and instill fear in his children. He expressed his distress over money, missing special events (birthdays and daughter's prom), and safety (he told his children they were being watched). He communicated with the victim from jail, through their children, telling her not to cooperate in order to preserve their family.

The victim, however, stayed involved with prosecution due to the support she received from her civil legal aid attorney and her advocate, as well as the work of prosecutors and law enforcement to hold the defendant accountable. The victim outlined specific desires for civil remedies from her criminal case: namely, custody of her children and a parenting plan. In this regard, the victim's civil legal aid attorney worked with prosecution and defense lawyers to negotiate and execute a civil parenting plan as part of the criminal plea agreement. As a result, the defendant's guilty plea

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included not only a criminal sanction (prison sentence) but also a civil agreement (victim received custody of her children). The collaboration between the civil legal aid attorney, prosecutors, law enforcement and the victim resulted in the victim achieving her desired outcomes, and the prosecution was able to achieve a more just outcome than other similar cases.

Conclusions

Understanding, prioritizing, and responding to the needs of victims is the foundation of legal response to domestic violence. A 2015 Washington State Civil Legal Needs Study detailed how domestic violence victims face "the most problems of all."[8] Namely, domestic violence victims have the highest number of civil legal needs and barriers of those seen in the criminal justice system, ranging from family and parenting needs, health care, credit, housing, education and access to essential governmental benefits and services.[9] Resolution of these multiple complex needs typically requires intensive help-seeking behavior from victims to obtain civil legal aid representation. However, providing domestic violence victims in the criminal justice system early priority access to a civil legal aid attorney, as in the case described above, is a possible potent buffer to the complex interpersonal processes that keep violent relationships intact.[10]

The association of civil legal counsel and a reduction of domestic violence is seen by inference with victims of means. Domestic violence rates drop precipitously once household incomes reach $75,000 and above, suggesting victims of means have methods other than the criminal justice system to respond to domestic violence. A victim may employ her own civil counsel, who will zealously represent her interests, to resolve issues in her interpersonal relationships. Public safety actors in the criminal justice system should strongly support partnerships with civil legal aid to provide service to victims of domestic violence. Unfortunately, such prosecution-civil legal aid partnerships are too often the exception rather than the rule. The Violence Against Women Act, and its reauthorization drafts, do not support prosecution-civil legal aid partnerships (specifically barred).[11] There is no National Association of Prosecution and Legal Aid as there is a National Association of Legal Aid and Defenders. Given the risks victims face, and their significant civil legal needs, such prosecution-civil legal aid partnerships are long overdue.

End Notes

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2. Bonomi, A. & Martin, D. (2017). Jail calls: What do kids have to do with it? *Journal of Family Violence*. Available at *https://link.springer.com/article/10.1007/s10896-017-9919-2*.

3. Bowen, M. (1978). On the differentiation of self (1972) *Family therapy in clinical practice* (p. 478). Lanham, Maryland: Rowman & Littlefield Publishers, Inc.

4. The victim was waiting to quash her warrant as a defendant on the domestic violence charges her abuser had fabricated, as well as address a drunk driving charge (she had developed a substance abuse problem as a result of her abuse).

5. The victim disclosed in part because one of the police officers was someone she knew, a school resource officer from her child's school.

6. Project Safety is a federally funded collaboration between the King County Prosecuting Attorney and several civil legal aid organizations: the Eastside Legal Assistance Program (ELAP), the King County Bar Association (KCBA), the Northwest Immigrant Rights Project (NWIRP), the Northwest Justice Project (NJP), and Sexual Violence Legal Services (SVLS). The collaboration is to provide crime victims with legal assistance to resolve civil legal issues that arise as a result of victimization. Project Safety attorneys provide legal assistance to victims ranging from brief legal advice to full representation in court in the hope of helping victims stabilize their lives and prevent further victimization. The effort was awarded the Washington State Bar Association APEX award for innovation in the legal profession September of 2018. See also *http://nwlawyer.wsba.org/nwlawyer/august_2018?pg=11#pg11*.

7. Meier, J.S. (2006). Davis/Hammon, domestic violence, and the Supreme Court: The case for cautious optimism. *First Impressions, 22,* 22–27. Available at *https://repository.law.umich.edu/mlr_fi/vol105/iss1/23/*.

8. Washington State Supreme Court (2015). Civil legal needs study, p.13. Available at *http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf*.

9. In a 2016 survey of staff at the King County Prosecutor's office, only 50 cases out of 7,500 criminal domestic violence and civil protection order cases were able to access civil legal aid.

10. Attending to the needs of victims is also associated with stronger victim participation in prosecution. See DePrince, A. P., J. Belknap, et al. (2012). The impact of victim-focused outreach on criminal legal system outcomes following police-reported intimate partner abuse. *Violence Against Women, 18(8)*, 861–881.

11. National Task Force to End Sexual and Domestic Violence proposed Violence Against Women Authorization Act of 2018, Section 103. Legal Assistance for Victims. Amending 34 U.S.C. § 20121. ■

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Kids Network (CKN); Darkness to Light; Distinction in Family Courts (DFC); Families Against Court Travesties; Family Violence Appellate Project (FVAP); Futures Without Violence (FUTURES); Incest Survivors Speakers Bureau (ISSB); Joan of Arc Lawyers Foundation, Inc.; Justice for Children; Kids Are Human; Legislative Coalition to Prevent Child Abuse; Legal Momentum; Los Angeles County Sheriff's Department; Lundy Bancroft; MassKids (Massachusetts Citizens for Children); Moms Fight Back; Mothers of Lost Children; National Coalition Against Domestic Violence (NCADV); National Coalition for Family Justice (NCFJ); National Domestic Violence Hotline; National Network to End Domestic Violence (NNEDV); National Organization for Men Against Sexism (NOMAS); National Organization for Women (NOW); National Partnership to End Interpersonal Violence (NPEIV); National Task Force to End Sexual and Domestic Violence; Peace Over Violence; Piqui's Justice; Senator Ed Hernandez; SOAR for Justice; Stop Abuse Campaign; Support Network of Advocates for Protective Parents (SNAPP); Talk About Abuse to Liberate Kids (TAALK); The Hofheimer Family Law Firm; The Leadership Council on Child Abuse and Interpersonal Violence; The Nurtured Parent; US Alliance to End the Hitting of Children; and Wings for Justice. ■

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writ of *mandamus*, directing the district court to take Kephart's July 2010 conviction into account at sentencing.

The Appeal. The Supreme Court of Nevada reviewed the increasing penalties for convictions for the crime of domestic battery, specifically recognizing that offenses are a prior offense for purposes of the statute "without regard to the sequence of the offenses and convictions." The court reasoned that a "plain text reading" of the statute "undercut" the district court's decision not to count Kephart's July 2010 conviction against him. Labeling the July 2010 conviction a "first offense" still left Kephart with two prior offenses evidenced by conviction within seven years of the current offense, making his current offense a felony under the statute.

The court also considered whether a plea agreement to a first offense for a second domestic battery conviction required "first-offense treatment of the conviction for all purposes." The court held that the State may count the conviction as a second offense for future enhancement purposes where the defendant has explicitly agreed or received "appropriate clarification and warning." Here, the court concluded that "using Kephart's two prior 'first offense' convictions to enhance his third domestic battery conviction to a felony does not violate the plea bargain by which the second conviction was obtained." Kephart received the benefit of his July 2010 plea deal when he was given a lighter sentence available only to a first time offender. Before entering his plea, he signed an acknowledgement that this conviction could be used for future enhancement purposes. "Kephart has sustained three domestic battery convictions over a seven-year period for which the district court must now sentence him."

The court therefore granted the State's request for extraordinary relief and directed the district court to take both of Kephart's prior convictions into account in imposing sentences and entering the judgment of felony conviction in this case. **State v. Second Judicial District Court**, 421 P.3d 803 (Nev. 2018).

Editors' Note: Nevada imposes increasingly severe consequences on repeat DV offenders. Kephardt obtained a favorable deal for his second DV conviction, where he pled to a first offense two short months after his first DV conviction. After his third DV offense, he argued his second plea should be treated like a first offense for sentencing enhancement purposes, but the court found his multiple acknowledgements, warnings, and agreements militated against that disposition. ■

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