

# TURNING A BLIND EYE: PERJURY IN DOMESTIC VIOLENCE CASES

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## INTRODUCTION

Accurate testimony is essential to maintaining integrity and justice in the criminal system.<sup>1</sup> As the Supreme Court stated in *In re Michael*, all “perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.”<sup>2</sup> Perjurious testimony poses one of the greatest threats to the judicial system. Although perjury<sup>3</sup> charges would seem a logical and uncontroversial solution for addressing false statements, the issue becomes murky when false statements arise in domestic violence cases. Expressing frustration over domestic violence cases generally, Judge Atlas commented, “[i]t is simply unacceptable for our process to turn a blind eye to the dangers of such abuse by shrugging our shoulders and saying that nothing can be done within the framework of existing law.”<sup>4</sup>

False statements in domestic violence cases are a significant problem and considered an epidemic with an estimated 40 to 90 percent of domestic violence victims recanting.<sup>5</sup> Recanting refers to the act of trying to take back or withdraw a prior statement.<sup>6</sup> Because recanting involves an attempt to withdraw a prior statement, it almost always involves falsity in either the original or latter statement.

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1. See Joseph A. Shifer, *Perjury*, 43 AM. CRIM. L. REV. 799, 799 (2006).

2. *In re Michael*, 326 U.S. 224, 227 (1945).

3. Perjury is defined as “deliberately making false or misleading statements while under oath.” BLACK’S LAW DICTIONARY 1175 (8th ed. 2004). A person does not have to testify at trial to commit perjury. One of the more common forms of perjury in domestic violence cases occurs when victims recant prior sworn statements made to police officers or grand juries.

4. *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at \*16 (N.Y. App. Div. Apr. 7, 2003).

5. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005) (“Victims of domestic violence are more prone than other crime victims to recant or refuse to cooperate after initially providing information to the police. Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.”); see also 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) (describing non-cooperation by recantation and failure to appear as “an epidemic in domestic violence cases”); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence & Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM, 359, 367–68 (1996) (“[V]ictims of domestic violence are uncooperative in approximately eighty to ninety percent of cases.... [T]he victim will usually recant her prior statements....”). Most of the estimates regarding recanting appear anecdotal, since there is no known study measuring victim recanting. Certainly, some domestic violence victims are eager to assist in the prosecution of their batterers. There is, however, a consensus in the literature that recanting is a significant problem in domestic violence cases.

6. BLACK’S LAW DICTIONARY 1295 (8th ed. 2004).

Since many statements are sworn in domestic violence cases, victims are vulnerable to perjury charges and may have no viable defense.<sup>7</sup> Moreover, recent precedent from the Supreme Court involving the Confrontation Clause will undoubtedly increase opportunities for perjury.<sup>8</sup> For purposes of this article, purported domestic abuse victims who provide false statements can be divided into one of two categories: the person who files a false report but was never abused (false complainant), and the domestic violence victim who recants a true accusation of abuse (recanting victims). This article focuses on the recanting victim.

Initially it may seem odd to combine the subject of lying with something as serious as domestic violence cases.<sup>9</sup> As a young prosecutor, I expected to confront instances of lying, but I did not expect to hear lies coming from some of the victims.<sup>10</sup> Unfortunately, hearing contradictory and false statements from the mouths of domestic violence victims became generally widespread.<sup>11</sup> As one author explained,

Non-cooperation by recantation or failure to appear at trial is an epidemic in domestic violence cases. Persons qualified to give expert testimony at trial on domestic violence, including psychologists, counselors, police detectives,

7. Not all instances of recanting will rise to the level of perjury. Perjury only becomes an issue when the original statement or recanted statement was sworn.

8. See *infra* Part I.B.

9. "The actual behavior of many domestic violence victims, however, is quite different from the public's expectations. Specifically, victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers." Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 40 PROSECUTOR 12, 14 (Nov./Dec. 2006).

10. I had the privilege of serving as a prosecutor in Houston, Texas, and rotated through the Family Criminal Law Division which specialized in prosecuting domestic violence cases with uncooperative victims. During my tenure in the family violence unit I noticed that many of the purported victims had placed themselves in the position of lying. They decided to lie either in the beginning of the proceeding when the charges were initiated or at the end, in an attempt to get charges dropped. The questions I had to answer were whether the victim was lying, and at what point she decided to lie. For some purported victims, the lie began with the initial complaint that was concocted for revenge, anger, or to win custody disputes. For the vast majority of women, the first story was truthful because the victim was still feeling the impact of the most recent assault. It would not be until later when the victims would lie by recanting, faced with the realities of bills, children, housing, and emotional attachments to the batterer. For some, present realities are more pressing than an incident that is now in the past. See *infra* Part II.B.

11. See sources cited *supra* note 5; see generally *Young v. Smith*, 901 So. 2d 372, 373 (Fla. Dist. Ct. App. 2005) (recanting sworn allegation of being threatened with a gun and instead claiming that defendant threatened to kill himself); *State v. Clark*, 926 P.2d 194, 197-98 (Haw. 1996) (discussing victim testimony that she stabbed herself in the chest); *State v. Coppage*, 124 P.3d 511, 515 (Kan. Ct. App. 2005) (noting domestic violence victims "often recant their initial statements to police"); *State v. Stringer*, 897 P.2d 1063, 1066 (Mont. 1995) (discussing victim who provided written statement of repeated stabbing from defendant, but victim later testified that she provided a false statement and had been cut when defendant attempted to prevent her from slitting her wrists); *State v. McCaleb*, No. 2002-L-157, 2004 WL 2526406, at \*1, \*8 (Ohio Ct. App. Nov. 9, 2004) (recanting statements made to hospital staff and co-workers that boyfriend had beaten her over a period of several hours causing extensive injuries and instead claiming that two women outside of a club had assaulted her); *State v. Hancock*, No. C-030459, 2004 WL 596103, at \*1-2 (Ohio Ct. App. Mar. 26, 2004) (contradicting written statement that the defendant struck her twice and broke her tooth by testifying in court that the phone hit her in the mouth and she wasn't sure if the defendant punched her or not because it happened so fast); *State v. Derouin*, 64 P.3d 35, 37 (Wash. Ct. App. 2003) (denying that she remembered coming into contact with police or giving a signed statement that her husband threatened to kill her). In fact, the National District Attorneys Association issued a policy statement regarding proposed treatment for victims who perjure themselves. See National District Attorneys Association, *Policy Positions on Domestic Violence 13 (2004)*, available at [http://www.ndaa.org/pdf/domestic\\_violence\\_policy\\_oct\\_23\\_2004.pdf](http://www.ndaa.org/pdf/domestic_violence_policy_oct_23_2004.pdf) [hereinafter National District Attorneys Association] (on file with author). Prosecutor offices, however, are independent and under no obligation to comply with the policy position.

directors of battered women's shelters, and victim advocates, consistently testify that, in their experience, it is commonplace for domestic violence victims to recant or minimize initial reports of abuse. The head of the Family Violence Division of the Los Angeles District Attorney's Office estimates that ninety percent of domestic violence victims recant....[R]ecantation is the norm rather than the exception, in domestic violence cases.<sup>12</sup>

The predominant response to false statements in domestic violence cases is to turn a blind eye. After all, few prosecutors' offices want to face the criticism generated from prosecuting a domestic violence victim. On the other hand, turning a blind eye to crime committed by a particular classification of victims has its own negative consequences for the criminal justice system and all those involved.

There seems to be a conflict in the law about how to handle the person who decides to lie in a domestic violence case. Prosecutors receive little guidance in handling this difficult scenario;<sup>13</sup> consequently, the uncertainty of when and if a domestic violence victim should be charged leads to capricious consequences for victims who commit perjury.

The purpose of this article is to give scholars and practitioners a starting point on what to do with the perjurer in the domestic violence case.<sup>14</sup> Is a perjury prosecution the best response to false statements in domestic violence cases? Should domestic violence victims be allowed to commit perjury without consequences? This article considers these questions and proposes legislation to address the unique situation of when domestic violence victims break the law.

I address the issue in four parts. In Part I, I define the problem. Perjury harms the integrity of the criminal justice system. Perjury in domestic violence cases is a particularly difficult issue. Prosecutors are without guidance on how to respond to victims who commit perjury, leading to arbitrary decisions regarding prosecution

12. Beloof & Shapiro, *supra* note 5, at 3–4 (footnotes omitted); see also Lauren Bennett, Lisa Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761, 762–63 (1999) (discussing victim dropout); De Sanctis, *supra* note 5, at 367–68; Lininger, *supra* note 5, at 768.

13. A survey of the Lake County Indiana Prosecutor's Office led scholar Thomas Kirsch to conclude that there is no "systematic method in place for dealing with reluctant victims." 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, 403–04 (2001). My personal experience as a prosecutor leads me to reach the same conclusion.

14. Intimate partner violence affects people regardless of their sexual orientation or gender. See generally CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* (1992). For purposes of this article, however, the focus will be on female victims with male aggressors. An estimated three to four million women a year are battered by an intimate male. Matthew T. Huss et al., *Battered Women Who Kill Their Abusers: An Examination of Commonsense Notions, Cognitions and Judgments*, 21 J. INTERPERSONAL VIOLENCE 1063, 1064 (2006); cf. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239 (2005) ("thousands of women [have] been beaten to death"). As one sociologist noted, most experts would agree that the serious and physically damaging violence in intimate partner cases is "committed overwhelmingly by men." Alissa Pollitz Worden, *The Changing Boundaries of the Criminal Justice System: Redefining the Problem and the Response in Domestic Violence*, 2 CRIM. JUST. 215, 222 (2000). Research also indicates that much of the violence in adult relationships occurs "among couples who are dating, or perhaps cohabitating, but not legally married." *Id.*; see also Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 111 (2004) ("[T]he majority of violence against women takes place in the context of intimate heterosexual relationships....").

and punishment. Because of the Supreme Court's recently revised Confrontation Clause jurisprudence perjury will likely become a more pressing problem. I review the trilogy of Confrontation Clause cases to demonstrate that an increased need for victim participation in domestic violence trials may also increase opportunities for perjury. I also explore the increasingly apathetic attitudes which have become a collateral consequence of ignoring false statements.

I identify reasons domestic violence victims are different from other defendants who commit perjury in Parts II and III. In Part II, I address the issue of why domestic violence victims make false statements. Looking at the "why" behind the lie is essential to determine if domestic violence victims should be punished for committing perjury. The reasons for lying are particularly complex and involve considering a number of different issues, including psychological trauma, external pressures from the batterer, and self-motivated objectives. In Part III, I explore the historically strained relationship of domestic violence victims with the criminal justice system to assess the impact of state coercion on victim non-cooperation. The motivations underlying victim perjury and the unique role of the criminal justice system in domestic violence cases suggest that domestic violence victims are different from other defendants who commit perjury and may justify different treatment.

Part IV addresses whether victims should be accountable for perjurious statements or exculpated. I evaluate the intangible costs imposed by either ignoring or prosecuting perjury in domestic violence cases. I conclude that the system may be willing to bear the costs imposed in some situations, but not others. In those situations in which prosecution is warranted, a defense should be available. In this section I demonstrate why the current recantation defense is inadequate for domestic violence victims. I propose reformulating the defense so it will offer specific limited protection for domestic violence victims who decide to retract their false statements.

## I. THE PROBLEM OF PERJURY

"Truthful testimony is essential to the administration of justice and the functional capacity of every branch of government."<sup>15</sup> Scholars and jurists consider trials a search for the truth.<sup>16</sup> However, perjurious testimony hinders discovery of the truth. The crime of perjury is committed when a person "makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true."<sup>17</sup> Perjury is punishable in every United States jurisdiction.<sup>18</sup> It harms the

15. Jessica Fischweicher, *Perjury*, 45 AM. CRIM. L. REV. 799, 799 (2008).

16. See L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1707 (2007); John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in a Civil Proceeding Is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 773 (2006).

17. MODEL PENAL CODE § 241.1(1) (2001); see also 18 U.S.C. § 1623 (2006). The common elements for perjury are: (1) an oath; (2) intent; (3) falsity; and (4) materiality. Fischweicher, *supra* note 15, at 803.

18. Watts, *supra* note 16, at 774.

integrity of the criminal justice system and undermines both the “real and perceived legitimacy” of the legal system.<sup>19</sup>

David Weiner, former chair of the ABA Section of Litigation, described the impact of false statements in the court system. He explained, “[p]erjury strikes at the very heart of our system... When people lie in court, it undermines the whole process. The problem is so bad that it is severely evaporating confidence people have in the court system.”<sup>20</sup> The decline in confidence is not limited to the public, but impacts the bar and bench as well. Perjury is an “affront to justice.”<sup>21</sup> As one commentator noted, “[l]iars are hard to detect, run to ground, and punish. Discovery often comes by happenstance. As a consequence, perjurers do great harm, and do it more often than we are willing to admit.”<sup>22</sup>

If there are no consequences for dishonesty in the courtroom the system is tacitly sanctioning dishonesty. “The judicial branch, unlike the executive and legislative branches of government, depends almost entirely on its perceived legitimacy and moral authority to carry out its important functions.”<sup>23</sup> The courtroom should always symbolize justice, and members of the bar and bench must relentlessly pursue the truth. The sanctity of the criminal justice system requires the prosecution of perjury.

#### A. *The Problem of Perjury in Domestic Violence Cases*

If a trial is considered a “search for the truth” perjured testimony from domestic violence victims impedes access to the truth. The issue of lying in domestic violence cases is complex. On one hand, the law is well settled—lying under oath is perjury. On the other hand, domestic violence cases are complicated, and the motives for lying in these cases can be as diverse as the victims themselves. Professor Cheryl Hanna noted the problem of the double bind in domestic violence cases.<sup>24</sup> The double bind refers to the idea that “in every gender dilemma there are two solutions, each of which contains good and not so good elements.”<sup>25</sup> Prosecutors confronted with false statements in domestic violence cases are also faced with a double bind: either turn a blind eye or prosecute. Either decision results in serious consequences for both the criminal justice system and the victim.

Certainly, all domestic violence victims should not be jailed for recanting on the witness stand; rather, the presumption that perjury should be ignored based solely on one’s status as a victim needs to be challenged. In some cases, prosecuting a victim for perjury would be counterproductive and inefficient. In other cases, prosecuting a victim for perjury would be the right decision.<sup>26</sup>

19. *See id.* at 784–85.

20. Mark Curriden, *The Lies Have It*, 81 A.B.A. J. 68, 69 (May 1995).

21. Peter M. Agulnick, Comment, *In Search of Truth: A Case for Expanding Perjury’s Recantation Defense*, 100 W. VA. L. REV. 353, 354 (1997).

22. Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT’L & COMP. L. 307, 379 (1996).

23. Watts, *supra* note 16, at 784.

24. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1886 (1996).

25. *Id.*; *see also* Margaret Jane Radin, *The Pragmatist & the Feminist*, 63 S. CAL. L. REV. 1699, 1699–1704 (1990) (explaining the double bind).

26. The recantation defense is an affirmative defense to perjury; however, most domestic violence victims would be unable to avail themselves of the defense as written. I propose a reformulation of the recantation defense that would assist domestic violence victims. *See* discussion *infra* Part IV.C.

Testifying in court and telling the truth takes courage. Arguably, a victim who takes the witness stand and testifies truthfully could feel empowered because in standing up to her abuser she is transformed into a survivor. Feminist legal scholars who argue for victim autonomy frequently ignore the empowerment that is experienced by a witness who testifies truthfully and knows she has the support of the system behind her.<sup>27</sup> Whether it is intended or not, the victim who lies becomes a co-conspirator in helping the batterer avoid any consequences for his actions. Testifying should be an empowering experience, not an opportunity for dishonesty.<sup>28</sup>

The problem of perjury in domestic violence cases is not merely that some domestic violence victims are committing perjury. A related problem is that prosecutors are without guidance on how to address the problem; consequently, decisions may be arbitrary. Additionally, false testimony hinders access to the truth and ultimately justice. To illustrate the problem of perjury, as well as provide context for how most domestic violence cases are processed, I share the following hypothetical:

*Mary gets in an argument with her live-in boyfriend. He strikes her, rips the phone out of the wall to prevent her from calling for help, and flees the scene. Next door, neighbors hear the argument and contact the police.<sup>29</sup> When the police are dispatched they ask Mary what happened and have her sign a sworn statement regarding the incident.<sup>30</sup> The police officer does not have a camera to take pictures of Mary's injuries or the crime scene and decides against calling the crime scene unit. The police officer informs Mary that she can get a protective order. Mary's boyfriend, Tom, is arrested that evening. At his arraignment Mary is present to request an emergency order of protection. The judge asks Mary and Tom questions on the record before granting the protective order.<sup>31</sup> About a month later Tom has made bail and Mary no longer wants the case to continue. In fact, at every subsequent court date Mary is seen embracing Tom as if they are on their honeymoon.*

*Mary has indicated that she will not testify and that she loves her boyfriend. The prosecutor can try to proceed without the victim, but due to recent Supreme Court cases regarding the Confrontation Clause, the victim's testimony is necessary. There is no direct evidence that Tom has influenced Mary's absence from trial.<sup>32</sup>*

27. See generally Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 218 (1999) (citing Angela Corsilles, *No-Drop Polices in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 881 (1994)).

28. However, refusing to cooperate can be empowering for a domestic violence victim. See *infra* Part IV.A.2.

29. The most common way a domestic violence case would be initiated is an emergency phone call. A phone call would be made asking for help; however, most callers fail to consider any ramifications beyond receiving help in an ongoing emergency. Moreover, the caller requesting help may not be a direct recipient of the violence. The police will respond to calls from a variety of individuals including child witnesses, other family members, neighbors, or passing bystanders. See generally Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997); Kirsch, *supra* note 13, at 421.

30. An increasing number of officers are requiring the victim to sign a sworn statement at the scene for fear that she will later recant. Some police departments generate separate forms specifically for domestic violence cases. See, e.g., *Davis v. Washington*, 547 U.S. 813, 820 (2006) (noting that victim signed battery affidavit).

31. Some judges require that the victim make her request on the record. Prosecutors familiar with issues of recantation may have the witness testify before the grand jury.

32. Under the forfeiture-by-wrongdoing doctrine if there is evidence that Mary's absence is due to Tom's wrongdoing her out-of-court statements could be admissible. See FED. R. EVID. 804(a)(5).

*Statements that the victim made to the officer may or may not be admissible. Essential elements needed to establish the case like the defendant's identity will be difficult because he was not arrested at the scene. Mary decides to testify on behalf of her boyfriend. Mary is called to the witness stand and admonished by the judge about the penalties of perjury. Mary lies on the witness stand and claims she was never assaulted. Her lie is evident based on her two prior sworn statements and the other evidence that corroborates her initial complaint.*

Whether or not Mary will be prosecuted for perjury may be impacted by the level of frustration from the prosecutor or judge. When the government's primary witness claims she is lying, the prosecutor is placed in a very difficult position.<sup>33</sup> As some prosecutors explained, "The last thing I want is to end up in an adversarial position with the victim. However... I feel the need to reinforce for the victims that they need to prosecute. One word about these cases—*frustrating*."<sup>34</sup> Prosecutors must walk a thin line between encouraging a victim to proceed truthfully and making a victim feel coerced.<sup>35</sup> Encouragement to testify truthfully may come in the form of a veiled threat or can be even more direct.<sup>36</sup> As one prosecutor explained, "I would have had

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33. Impeaching the testimony of a recanting victim can be helpful to allow the admission of expert testimony on domestic violence and why a victim may recant; however, a prosecutor may not present a witness for the primary purpose of impeachment. *See, e.g.,* John Jay Douglass, *Recantation: Problems for Prosecutors Before, During & After Trial*, 18 AM. J. CRIM. L. 187, 194 (1990–1991). Additionally, a prosecutor may neither "present a perjurious witness or false testimony...." *Id.* This presents a difficult situation for prosecutors. The Confrontation Clause generally requires a right of cross-examination for testimonial hearsay; however, it is well established that many domestic violence victims recant. *See* cases cited *supra* note 5. If a victim notifies a prosecutor that she does not plan to testify, plans to testify for the alleged batterer, or plans to claim she fabricated the allegation, is securing her testimony presenting a perjurious witness? Testimony in domestic violence cases can be unpredictable. A victim may not directly lie, but minimize the incident, claim she does not recall, or testify truthfully. Some prosecutors may prefer to see if the defense calls the victim, but it is unlikely that a batterer would be motivated to encourage a domestic violence victim to testify since it would open the door to any excited utterances. For example, if a victim testifies and denies the abuse the investigating officer may be able to testify regarding her initial complaint as impeachment. In addition, the prosecutor may need the victim to testify for other purposes. For example a specific finding of domestic violence may require proof of the nature of the relationship.

34. Jennifer L. Hartman & Joanne Belknap, *Beyond the Gatekeepers: Court Professionals' Self-Reported Attitudes about & Experiences with Misdemeanor Domestic Violence Cases*, 30 CRIM. JUST. & BEHAV. 349, 363 (2003); *see also* Wills, *supra* note 29, at 177 (noting the reluctance of prosecutors and the courts to accept the reality that "a domestic violence victim's 'refusal to press charges' is the norm in domestic violence prosecutions").

35. It is not uncommon for prosecutors and judges to remind recanting victims and individuals who file false reports about contempt proceedings, perjury, and filing a false report. As anecdotal evidence I recall a case involving a victim who had two charges of domestic violence pending against the same defendant. The photographic evidence indicated that she was brutally beaten by the defendant who also happened to be twice her age. When the victim arrived in court she was hugging the defendant as if they were on their honeymoon until the judge admonished them both. When the victim took the witness stand the judge excused the jury and told the victim about the penalties of perjury. As a prosecutor, I was pleasantly surprised that my victim who had repeatedly told me she had planned to sabotage the case told the truth. Any victim who is planning on committing perjury needs to understand the possible penalties; however, the victim probably felt intimidated by the admonishment. Some feminist legal scholars may argue that the admonishment was coercive and should not have occurred. *See, e.g.,* Linda G. Mills, *Killing Her Softly: Intimate Abuse & the Violence of State Intervention*, 113 HARV. L. REV. 550, 591 (1999) (criticizing the use of subpoenas and explaining that threats of imprisonment "mimic[] [the victim's] abusive dynamic with the batterer"). In actuality, the court treated the victim as any other witness who was about to commit perjury. To behave any differently would support the stereotype that domestic violence victims are delicate and should be handled accordingly. An important goal of domestic violence cases is ensuring that victims are treated respectfully and feel empowered. The criminal justice system, particularly prosecutors and judges, are in a unique position to impact victim empowerment.

36. Well-meaning judges and lawyers may cross the thin line into coercion and intimidation by trying to encourage or convince reluctant victims to cooperate and/or testify truthfully. When convincing includes discussing

no problem putting a victim in jail because she refused to cooperate. I have a legal obligation to the people of this state to prosecute crimes of this nature. To me these are serious offenses that affect other people in the community.”<sup>37</sup>

Similarly, in *Ohio v. McCaleb*,<sup>38</sup> the prosecutor was accused of prosecutorial misconduct when she purportedly told the victim “if [she] didn’t stick with [her] first statement that [she] would need a babysitter for [her] daughter because her dad would be in jail and her mom would be in jail.”<sup>39</sup> The purported statement in *McCaleb* was blatant, but reminding a victim about the possibility of criminal charges through a separate false report, contempt, or perjury prosecution can be intimidating as well. The idea of a perjury prosecution as a backlash for non-cooperation is not farfetched. Criminal law needs standards to guide prosecutors so decisions will not be arbitrary. Confrontation Clause jurisprudence suggests that the problem of perjury will be even more pressing in the near future.

### B. The Problem of Perjury and the Confrontation Clause

Recent Supreme Court cases regarding the Confrontation Clause will make victim participation in criminal trials more essential and may increase opportunities for victim perjury. The government has responded to uncooperative victims in domestic violence cases by proceeding without them.<sup>40</sup> Victimless or evidence-based prosecutions occur when the victim is unavailable or unwilling to testify.<sup>41</sup> Instead of relying on victim testimony the prosecution would rely on out-of-court statements to 911 operators, police officers, medical personnel, and handwritten statements.<sup>42</sup> Since recantation is prevalent in domestic violence cases, reliance on out-of-court statements under exceptions to the hearsay rule was routine and considered the “linchpin of the prosecution’s proof.”<sup>43</sup> During this period prosecutors relied heavily on *Ohio v. Roberts*, which allowed the introduction of victim statements as long as they demonstrated sufficient indicia of reliability.<sup>44</sup> For example, under the excited utterance exception to hearsay, if the victim makes statements “under the stress of excitement caused by the event or condition” it is considered reliable.<sup>45</sup> The primary inquiry for admitting the out-of-court statement

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the consequences of failing to show up to court or testify truthfully it can be viewed as coercive depending on the tone and context.

37. Kirsch, *supra* note 13, at 402.

38. No. 2002-L-157, 2004 WL 2526406 (Ohio Ct. App. Nov. 9, 2004).

39. *Id.* at \*8.

40. See Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 PROSECUTOR 18 (Jan./Feb. 2005) (describing evidence-based prosecutions).

41. *Id.* at 19.

42. See John M. Leventhal & Liberty Aldrich, *The Admission of Evidence in Domestic Violence Cases After Crawford v. Washington: A National Survey*, 11 BERKELEY J. CRIM. L. 77, 80–81 (2006). Other relevant evidence may include photographs, observation of visible injuries, observation of physical evidence such as torn clothing, broken furniture, or broken telephones. Claypoole, *supra* note 40, at 20.

43. See sources cited *supra* note 5 and accompanying text regarding the prevalence of recantations; see also Leventhal & Aldrich, *supra* note 42, at 80 (noting prosecutors’ heavy reliance on out-of-court statements in domestic violence cases).

44. 448 U.S. 56, 73–74 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

45. See FED. R. EVID. 803(2); see also Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1178–79 (2002).



was the emotional state of the victim.<sup>46</sup> Professor Myrna Raeder described the excited utterance exception as “the bread and butter of domestic violence prosecutions.”<sup>47</sup> These vital out-of-court statements are now in jeopardy because of recent Confrontation Clause jurisprudence.

Recent changes in Confrontation Clause jurisprudence have minimized the number of victim statements entered into evidence. The Sixth Amendment Confrontation Clause provides, in relevant part, “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”<sup>48</sup> A trilogy of recent Supreme Court cases has altered how domestic violence cases are now prosecuted and hinders the admissibility of testimonial out-of-court statements.

In *Crawford v. Washington*, the Supreme Court decided that testimonial hearsay violated the Confrontation Clause under the Sixth Amendment.<sup>49</sup> *Crawford* involved a defendant who stabbed a man who allegedly tried to rape his wife.<sup>50</sup> During the wife’s interrogation, she revealed that the victim had nothing in his hands, which contradicted her husband’s self-defense claim.<sup>51</sup> The wife did not testify at trial, and the lower court admitted her recorded statement after finding it was trustworthy.<sup>52</sup> The Supreme Court reversed.

Under *Crawford*, testimonial out-of-court statements are inadmissible unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness.<sup>53</sup> The Court noted that non-testimonial hearsay was exempted from the scrutiny of the Confrontation Clause.<sup>54</sup> The Court, however, left “for another day” a definition for testimonial.<sup>55</sup> Rather, it stated that the term testimonial “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>56</sup> The *Crawford* decision caused significant confusion in the area of domestic violence which had relied so heavily on hearsay in evidence-based prosecutions.<sup>57</sup>

In 2006, the Supreme Court further clarified the use of out-of-court statements in domestic violence prosecutions in *Davis v. Washington*.<sup>58</sup> There, the Court reviewed two separate domestic violence cases involving two different forms of police interrogation and out-of-court statements.<sup>59</sup> Both cases involved uncooperative domestic violence victims who did not appear at trial.<sup>60</sup>

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46. Friedman & McCormack, *supra* note 45, at 1179.

47. Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759, 788 (2007).

48. U.S. CONST. amend. VI.

49. 541 U.S. 36, 68 (2004).

50. *Id.* at 38.

51. *Id.* at 39.

52. *Id.* at 40. The lower court relied on *Ohio v. Roberts*, 448 U.S. 56 (1980), which was criticized and ultimately abrogated by *Crawford*. 541 U.S. at 65.

53. *Crawford*, 541 U.S. at 59, 68.

54. *Id.* at 68.

55. *Id.*

56. *Id.*

57. Lininger, *supra* note 5, at 772–73.

58. 547 U.S. 813 (2006). The companion case that was decided with *Davis* was *Hammon v. Indiana*.

59. *Id.* at 817.

60. *Id.* at 819–20.

In the first case, the victim contacted 911 to report a domestic disturbance.<sup>61</sup> The lower court concluded that the 911 call was not testimonial.<sup>62</sup> The Supreme Court viewed the 911 call as an interrogation.<sup>63</sup> The Court adopted a “primary purpose” test and held that statements during police interrogation “under circumstances objectively indicating that the primary purpose of the interrogation” is to gain assistance in an ongoing emergency are not testimonial.<sup>64</sup> Consequently, statements made during an ongoing emergency (like many 911 calls) would be admissible without any Confrontation Clause problems.<sup>65</sup> Statements made when there is no ongoing emergency and where “the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution” would be considered testimonial.<sup>66</sup> The Court concluded that the portion of the 911 call that elicited statements to resolve an emergency, including the identity of the assailant, was admissible.<sup>67</sup> The Court reached a different conclusion in the companion case, *Hammon v. Indiana*. There, the police were dispatched to a domestic disturbance and observed glass on the ground.<sup>68</sup> The victim confirmed that she had been assaulted and then completed and signed a “battery affidavit.”<sup>69</sup> The Court found that the statements describing past events during the police investigation qualified as testimonial because they focused on past conduct.<sup>70</sup>

The most recent case with repercussions in this area is *Giles v. California*, which focused on the rule of forfeiture by wrongdoing.<sup>71</sup> In both *Crawford* and *Davis* the Court explained that the “rule of forfeiture by wrongdoing...extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”<sup>72</sup> The defendant in *Giles* was accused of murdering his ex-girlfriend.<sup>73</sup> Giles admitted to killing his ex-girlfriend, but claimed he did so in “self-defense.”<sup>74</sup> To counter, prosecutors offered an out-of-court statement the decedent made to a police officer regarding the defendant’s domestic violence.<sup>75</sup> The victim made the statement three weeks prior to her death.<sup>76</sup> The statement was admitted under a California hearsay exception and the defendant was convicted of first degree murder.<sup>77</sup> During the defendant’s appeal, the Court decided *Crawford*. Although the lower California

61. *Id.* at 817.

62. *Id.* at 828.

63. *Id.* at 826.

64. *Id.* at 822.

65. *Id.* at 826–27.

66. *Id.* at 822.

67. *Id.* at 828–29.

68. *Id.* at 819.

69. *Id.* at 820. A battery affidavit is an alternate term for the sworn statement which many police officers gather in domestic violence cases. For additional examples where sworn statements were later contradicted by domestic violence victims, see cases cited *supra* note 11.

70. *Id.* at 829–30.

71. 128 S. Ct. 2678 (2008).

72. *Davis*, 547 U.S. at 833 (internal quotation marks and citations omitted); see also *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

73. *Giles*, 128 S. Ct. at 2681.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 2682.

courts sought to rely on the forfeiture doctrine, the Supreme Court vacated and remanded the case.<sup>78</sup>

The Court held “unconfronted” testimony would only be admitted under the forfeiture doctrine if the defendant *intended* to prevent the witness from testifying.<sup>79</sup> Consequently, although the defendant’s conduct of murdering the decedent prevented her from testifying, the case was remanded to determine if the defendant intended to prevent her from testifying.<sup>80</sup> In dicta, the Court addressed the special nature of domestic violence cases and noted that the pattern of abuse may be sufficient to establish the doctrine because “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”<sup>81</sup> It is unclear if courts will consider evidence of prior abuse sufficient, or whether there must be a showing that the abuse was intended to dissuade the victim from getting help.<sup>82</sup>

It is too soon to tell how lower courts will react to *Giles*. Following *Crawford* the confusion over testimonial hearsay caused the dismissal of many domestic violence cases involving uncooperative victims.<sup>83</sup> Statements that were once essential to prosecuting domestic violence cases are now in jeopardy unless the victims are made available at trial, or the defendant has a prior opportunity to cross-examine the victim.<sup>84</sup> However, a prior opportunity to cross-examine the victim would necessitate that the victim give another statement which may be used against her later. In domestic violence cases the earlier out-of-court statements are usually the most damning to batterers. The only clear way to guarantee the admission of hearsay statements under recognized exceptions is to produce the witness.<sup>85</sup> As it becomes more necessary for victims to appear and be cross-examined at trial, the incidents of perjury by domestic violence victims will undoubtedly increase.<sup>86</sup> The increased need for victim availability for cross-examination combined with the prevalence of recantations and non-cooperation is a perfect storm for perjured testimony.

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78. *Id.* at 2693.

79. *Id.* at 2684.

80. *Id.* at 2692.

81. *Id.* at 2693.

82. *See id.* During a typical forfeiture hearing,

[T]he prosecutor can introduce the history of abuse between the defendant and the victim; prior charges filed, even if they were later withdrawn; testimony from bond hearings; testimony from prior cases; evidence from police, a prior prosecutor, family or friends about the victim’s fear of the defendant; evidence about the victim’s fear of testifying in prior cases; and anything else that shows that the defendant did something to prevent the victim from testifying.

Jennifer Gentile Long & Viktoria Kristiansson, *Taking A Process-Oriented Approach to Domestic Violence Prosecutions*, 41 PROSECUTOR 14, 17–18 (Sept./Oct. 2007).

83. Lininger, *supra* note 5, at 772–73.

84. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

85. Prosecutors may attempt to argue that a statement is not testimonial, but it is unclear how a court will rule. *See Davis v. Washington*, 547 U.S. 813, 838 (Thomas, J., concurring in part and dissenting in part) (criticizing Court’s decisions for failing to provide clear guidance to police and prosecutors).

86. The Confrontation Clause will not be implicated if the prosecutor can show that the victim is unavailable because of the batterer. *See Davis*, 547 U.S. at 833. Forfeiture does not apply if the victim testifies, or if the prosecution is unable to establish that the victim’s absence was caused by the batterer.

*Crawford* and its progeny also invite increased pressure tactics by prosecutors and the courts when domestic violence victims recant or refuse to cooperate at trial. One unpopular tactic is use of the subpoena power and a bench warrant or body attachment to ensure the victim is made available for cross-examination at trial.<sup>87</sup> In a post-*Crawford* case, the Supreme Court of Indiana elevated the importance of the subpoena power when it stated:

We adhere to the view that a witness is not unavailable simply because the witness does not take the stand. If the attendance of the witness can be obtained through subpoena or otherwise, that person is available. Thus tools to compel attendance must be exhausted before a claim of violation of the Confrontation Clause will be entertained.<sup>88</sup>

Arguably, a bench warrant can be viewed as state-sanctioned coercion that may do violence to a victim's sense of autonomy and teach her to distrust the system.<sup>89</sup> Although these tactics have been heavily criticized as disempowering women,<sup>90</sup> empowerment does not justify affording domestic violence victims with the right to ignore subpoenas, dictate if charges are prosecuted, and lie under oath without consequences. Consequently, the pressure on victims to participate in domestic violence prosecutions will increase. Thus, prosecutors need an effective tool to minimize the consequences of the likely increase in perjury by domestic violence victims due to *Crawford*.<sup>91</sup>

### C. The Problem of Collateral Consequences from Ignoring Perjury

False statements from recanting domestic violence victims have led to a great deal of apathy within the criminal justice system.<sup>92</sup> Even the most sympathetic

87. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 66 (2007); see also Hanna, *supra* note 24, at 1865–66. Requesting a bench warrant for a witness who ignores a subpoena is not a tactic devised solely for domestic violence cases; rather, the number of uncooperative victims is greater in domestic violence cases.

88. *Fowler v. State*, 829 N.E.2d 459, 465 (Ind. 2005).

89. Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U.J. GENDER SOC. POL'Y & L. 465, 469 (2003).

90. See, e.g., Mills, *supra* note 35, at 589–90.

91. There are also negative consequences imposed on the system when false reports of abuse are made. As one scholar noted, “[t]o be arrested and jailed, however briefly, is as punishing an encounter with criminal justice as any citizen could expect to experience. Most of the costs are obvious—inconvenience, loss of freedom, bail, lost wages, embarrassment, stigmatization and even loss of employment.” David A. Ford, Nat’l Inst. Just. Final Grant Report, *The Indianapolis Domestic Violence Prosecution Experiment 4* (1993) (copy on file with author). When an allegation of domestic violence is made, the accused is arrested, frequently forced to leave his home because of a protective order, and labeled a batterer. In addition to enjoining the accused from committing further abuse or contact, a protective order may include “eviction from a victim’s residence, child custody and support and in some jurisdictions, monetary relief.” Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 12 (2007). An accusation of spousal abuse can also have an adverse impact on custody and divorce disputes. Although many domestic violence cases are based on true allegations, individuals who file false reports frequently go unpunished and subject the accused to unwarranted prosecution. In my opinion, the incidents of false reporting are not as widespread as most defense attorneys would have the public believe; however, people who file false reports should be punished, similar to any other crime. Based on my experience, the political pressure surrounding domestic violence cases is a factor in some prosecutors’ reluctance to prosecute false report cases in family violence situations.

92. The perception in the criminal justice system is that recanting is a serious problem. That perception can

advocates become weary when receiving the predictable phone call requesting that charges against a batterer be dropped.<sup>93</sup>

Distrust towards domestic violence victims contributes to apathy and negative stereotypes regarding all domestic violence victims. The perception of battered women being uncooperative is problematic because some battered women are eager to prosecute and the perception can negatively impact how cases are handled.<sup>94</sup> Some studies suggest between fifty and eighty percent of battered women will drop charges if given the opportunity.<sup>95</sup>

A study funded by the National Institute of Justice examined the attitudes of court professionals in misdemeanor domestic violence cases.<sup>96</sup> The study found that 31.8 percent believe domestic violence victims actually *undermine* the prosecutor's case, and 56.2 percent believe the victims will only testify if they are subpoenaed.<sup>97</sup> The results of the study were alarming in that they suggest that members of the criminal justice system are more likely to be apathetic when a case is not considered sufficiently serious.<sup>98</sup>

In recent years, there have been cases suggesting that judges are also expressing their contempt towards recanting victims in domestic violence cases. For example, in some courts judges may arrange their trial dockets in a way that gives low priority to domestic violence cases.<sup>99</sup> The creation of specialized domestic violence courts should minimize some of these problems, but they are not present in every state.<sup>100</sup> The negative feelings court professionals harbor are reflected in the derogatory language they use,<sup>101</sup> and the manner in which they treat domestic

have an unfortunate ripple effect on charging decisions, trial dates, and sentencing. See Hartman & Belknap, *supra* note 34, at 351. One survey involving prosecutor offices reported a belief that over 55 percent of battered women are uncooperative. See Mills, *supra* note 35; see also Wills, *supra* note 29, at 177; Bennett et al., *supra* note 12, at 761. Domestic violence cases are difficult and in spite of all the rhetoric, all of the monies spent, and educational programs, it is a battle that we are still losing.

93. Randall, *supra* note 14, at 137 (noting that the decision to refuse to participate "causes considerable frustration, confusion and resentment on the part of key players in the legal system").

94. Hartman & Belknap, *supra* note 34, at 351.

95. Ford, *Prosecution Experiment*, *supra* note 91, at 15, 20.

96. See Hartman & Belknap, *supra* note 34, at 349, 354. The court professionals who were the focus of the study included judges, prosecutors, and public defenders. See *id.*

97. *Id.* at 361.

98. The criminal justice system has been severely criticized for treating most domestic violence cases as misdemeanors regardless of the seriousness of the offense. This is significant because most domestic violence cases do not happen in a vacuum of a single incident. Most domestic violence relationships are characterized by ongoing traumatic and abusive conduct. See Deborah Tuekheimer, *Criminal Law: Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962-63 (2004) (describing domestic violence as an ongoing pattern defined by both physical and non-physical power).

99. See Hartman & Belknap, *supra* note 34, at 351.

100. Specialized domestic violence courts consist of specially trained judges, prosecutors, and victims' advocates. See Amanda Dekki, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT. 549, 562-63 (2004).

101. Derogatory terms referring to domestic violence cases have included the "weekend divorce." See Hartman & Belknap, *supra* note 34, at 363-64. One public defender in the survey commented that the weekend divorce allowed women to "have a weekend off without the husband around. By Monday, they want their case dismissed." *Id.* at 364. Another term for domestic violence cases I heard as a prosecutor was "slap a bitch case." These types of derogatory terms suggest that resentful sentiments towards these cases are growing. These types of negative stereotypes can also filter down to other law enforcement officials, like the police.

violence cases. One judge in the study expressed his opinion on responding to victim recantation:

If the victim does not show up and/or recants, that compromises the state's ability to prosecute. It is almost better for the victim to not show up than for her to recant her earlier testimony and/or actions. Although recantation may be a sign that the violence is very serious/significant...if the victim recants in court, she can then be held criminally liable for making a false filing. Typically, if I find a false statement was made, I will hold her to time served that he did on false charges—for example, if he did 2 days, so will she.<sup>102</sup>

Perjury also places judges in a difficult position when they are aware of a victim's untruthfulness. Some judges who believe a victim is getting ready to commit perjury will warn the witness about the penalties of perjury.<sup>103</sup> Depending on the tone of the admonishment, a victim could feel intimidated.

To illustrate, consider *Ohio v. Hancock*.<sup>104</sup> In *Hancock* the accused batterer appealed his conviction and in one of his assignments of error claimed that the trial court threatened the victim with a perjury prosecution and intimidated her to modify her testimony.<sup>105</sup> Although the court reversed the trial court on other grounds, the appellate court noted that the lower court "was obviously frustrated by [the victim's] apparent recantation."<sup>106</sup> In admonishing the victim, the trial court asked:

THE COURT: You willing to go to prison for—

[WITNESS]: No, I am not.

THE COURT: —for five years for perjury?

[WITNESS]: No.

THE COURT: Is that what—so what is the story going to be then? What is it?

[WITNESS]: That we were arguing.

THE COURT: Well, you were arguing—you said initially after it happened that he actually hit you twice. Now you're telling us that it is an accident. So, either he goes or you go, what is it going to be. You got kids?<sup>107</sup>

Appointing independent counsel to inform a victim of her legal rights and possible consequences is a better procedure for judges to follow. Consider the dialogue that took place in the presence of the jury in another Ohio trial court in a domestic violence case where the victim recanted:<sup>108</sup>

THE COURT: 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?

102. *Id.* at 363.

103. Curriden, *supra* note 20, at 72 ("Judges are seekers of truth and justice, not just referees...judges should make comments. They should tell witnesses when they are being less than truthful...[W]e need judges to speak out and say when it is obvious someone is not telling the truth. It is not always as obvious to the jurors.") (quoting ALI Director, Geoffrey C. Hazard).

104. *State v. Hancock*, No. C-030459, 2004 WL 596103 (Ohio Ct. App. Mar. 26, 2004).

105. *Id.* at \*5.

106. *Id.*

107. *Id.* at \*2.

108. *State v. Spraggins*, No. 82170, 2003 WL 22971050, at \*2 (Ohio Ct. App. Dec. 18, 2003).

THE WITNESS: I was upset.

THE COURT: Answer the question. We are here—

THE WITNESS: I lied about some [of] these things.<sup>109</sup>

The demeaning exchange from the court was not considered plain error since the victim had already admitted in the jury's presence that she lied to the police and in her sworn statement.<sup>110</sup> The frustration and negative comments are a byproduct of the frustration towards widespread victim recanting.

The ultimate result is the trivialization of a serious situation that could become lethal. False statements by domestic violence victims can no longer remain ignored. Whether or not domestic violence victims should be exculpated should be decided legislatively, rather than exclusively by frustrated players in the criminal justice system. It is essential for those involved in domestic violence cases to understand the underlying motivations for false statements to determine if an excuse is warranted.

## II. THE UNDERLYING MOTIVATIONS FOR FALSE STATEMENTS

Just as crime victims can be from any race, religion, family background, or social status so can a domestic violence victim.<sup>111</sup> Many domestic violence victims do not fit the stereotypical image of the battered woman.<sup>112</sup> Stereotypical victims have been described as "weak, dependent, passive, fearful, white and [heterosexual] women who need the court's assistance because they are not able to take positive action to stop the violence against them."<sup>113</sup> A victim may not be uneducated, or poor, or a shrinking violet. She may be educated, wealthy, and manipulative. She may have psychological issues because of the abuse, or she may be involved in a mutually

109. *Id.*

110. *Id.*

111. Domestic violence may have a different impact upon poor women, women of color, immigrant women, or other women who face different life situations and have limited resources. Interestingly, at least one study of a major city concluded that batterers who were prosecuted "tend to be disproportionately non-white with less education and higher unemployment rates." Ford, *Prosecution Experiment*, *supra* note 91, at 4.

112. What does a typical battered woman look like? The danger in answering this question is found in the correctional facilities of women who did not fulfill the stereotype and struck back at their batterers. The victim who is not a pristine shrinking violet is frequently treated as a counterfeit victim. As professor Aya Gruber noted, "society embraces the image and rhetoric of the absolutely innocent victim and absolutely guilty defendant." Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 663 (2003). The stereotype for victims generally is a person who is "helpless, decimated, pathetic, weak." *Id.* (citation omitted). Similarly, the common stereotype of the battered woman is an individual who is helpless and frail. Individuals who have a hard time understanding why a victim would remain in an abusive relationship feel comfort in placing victims into categories. The battered woman who has any undesirable traits that conflict with the stereotype is viewed as illegitimate. Undesirable traits include a history of alcohol or drug use, promiscuity or prostitution, aggressive behavior, economic independence, or self-defense training. See Mary Ann Dutton & Lisa A. Goodman, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215, 223 (1994) (considering the various myths and stereotypes by jurors in cases involving battered women); see also Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 302 (1995) ("While battered women in general must overcome myths involving psychological disabilities and images of victimization, African American women must overcome stereotypes which are far more onerous.").

113. Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 91 (2008).

abusive relationship.<sup>114</sup> Not all domestic violence victims recant, and victims do not necessarily react to violence and trauma in the same way.<sup>115</sup> The realities involved with complex human relationships make domestic violence cases complicated. Additionally, the motivation for lying—similar to victims—is diverse. What motivates some domestic violence victims to lie and deny their abuse? It depends on whether the lie is a false report or a lie recanting a true allegation of abuse.

The “why” behind the lie of a false complainant making a false report can be similar to the motivation of those who lie in other cases (for example, revenge, custody disputes), and does not require further exploration.<sup>116</sup> The reasons why a domestic violence victim would recant a true allegation of abuse are more complicated. A conscious decision to lie under oath may be understandable when a victim is confronted by psychological issues, coercion from batterers, financial concerns, concern for children, and other issues.<sup>117</sup> The question is whether the unique challenges facing domestic violence victims justify exculpation. Consider the case of Joann Gilliam and Calvin Woodard.<sup>118</sup>

Joann Gilliam is a victim of domestic violence. She is also a convicted perjurer. In a tape-recorded statement, Gilliam was heard trying to convince a friend to lie to support her story. The following statement would haunt Gilliam and cause her to spend thirty months in a federal prison for perjury and obstruction of justice: “I don’t know if you gonna agree to it or not, but I need you to tell a big lie.”<sup>119</sup> In many ways Gilliam’s story of abuse is typical. She met Calvin Woodard in a nightclub and dated him.<sup>120</sup> Gilliam told the *Washington Post* that shortly after they started dating, Woodard showed signs of jealousy, including following her around, checking her caller ID, and looking “in her closets and underwear drawer for signs of unfaithfulness.”<sup>121</sup> According to Gilliam, Woodard had threatened her life, ruined a computer, and kicked out the window of her car.<sup>122</sup> Gilliam responded to Woodard’s behavior by attempting to end the relationship.

Unfortunately, ending a relationship with a batterer can frequently result in increased violence, a condition some refer to as “separation assault.”<sup>123</sup> Gilliam claimed that Woodard fired shots out of the car window and pistol-whipped her

114. See Moore, *Battered Woman*, *supra* note 112, at 302.

115. See Jana L. Jasinski, *Trauma & Violence Research: Taking Stock in the 21st Century*, 20 J. INTERPERSONAL VIOLENCE 412, 412 (2005) (“[V]iolence and trauma are experienced in different ways by different individuals....”); see also Dutton & Goodman, *supra* note 112, at 224 (“[N]ot all battered women respond to violence in the same manner.”).

116. The theories advocated for filing a false report by defense attorneys range from custody disputes to revenge over infidelity. See Raeder, *supra* note 47, at 784.

117. See discussion *infra* note 132 and accompanying text.

118. Maureen O’Hagan, *In Baltimore, a Victim Becomes a Criminal; Woman Covered Up Domestic Violence Abuse*, WASH. POST, Mar. 30, 2001, at A01.

119. Gail Gibson, *Advocates Decry Prosecution of Domestic Violence Victim: Woman is Sentenced for Lying in Federal Case Against Boyfriend*, BALT. SUN, Apr. 2, 2001, at 1B.

120. See generally O’Hagan, *supra* note 118, at A01.

121. *Id.*

122. *Id.*

123. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991) (discussing separation assault); Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women From Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451, 472 (2003) (same). The majority of domestic violence homicides occur when a victim decides to leave. Lininger, *supra* note 5, at 769.



with the gun after she tried to end the relationship.<sup>124</sup> Gilliam called 911 and Woodard was arrested. Like many domestic violence victims, Gilliam refused to cooperate with the local prosecutors, who consequently decided not to pursue local charges.<sup>125</sup> The federal government pursued federal gun charges against Woodard based on the incident and subpoenaed Gilliam to testify as a witness before the grand jury.<sup>126</sup> Gilliam did not show up to testify and a bench warrant was issued for her arrest.<sup>127</sup> When Gilliam finally testified, she denied even seeing Woodard with a weapon and claimed that she found the gun in the gutter and had a friend who could verify her story.<sup>128</sup> When Gilliam contacted her friend for help, the government was recording the conversation.<sup>129</sup> Later, the front page of the *Washington Post* headlines read: "In Baltimore, a Victim Becomes a Criminal."<sup>130</sup>

The Gilliam case involved the difficult issue of how the law should respond when breached by a victim. It is unclear why Gilliam went to such extremes to both lie and protect her batterer. As one prosecutor explained:

Although with my training and experience, I can imagine why a victim would be reluctant to testify against her abuser, I can never be totally sure of the underlying reasons: Is the victim declining to cooperate to ensure her own safety? Is it due to continuing feelings of love and loyalty? Is it to maintain financial security? Is she being pressured or threatened by her abuser or family members? Could the reason be something less noble?<sup>131</sup>

The most common motivations for false statements will be explored to determine whether they should serve as an excuse for perjury. Reasons for recanting will be discussed in three categories: (1) psychological trauma, (2) self-motivated objectives, and (3) external pressure or coercion.<sup>132</sup> Although the reasons are

124. O'Hagan, *supra* note 118.

125. See Stephen M. Schenning, U.S. Attorney for the District of Maryland, Editorial, *Contempt for Justice*, WASH. POST, Apr. 7, 2001, at A17.

126. Gibson, *supra* note 119.

127. See *id.*

128. *Id.*

129. *Id.*

130. O'Hagan, *supra* note 118. The conflict between domestic violence advocates and the criminal justice system was clear based on the headlines. In response to O'Hagan's *Washington Post* article the U.S. Attorney for the District of Maryland during the time of Gilliam's case, Stephen Schenning, wrote an editorial. He disputed the claims that Gilliam was only reacting out of fear.

Rather than some overwhelming fear on the part of an abused woman, what underlies this whole episode is contempt and disrespect for our criminal justice system. Had Gilliam been passively uncooperative, it is unlikely that she would have been prosecuted. But she evinced a determination to provide Woodard with a false defense by lying to the grand jury and suborning perjury. I reject the notion that holding her accountable for this conduct constitutes victimizing the victim.

Schenning, *supra* note 125.

131. Claypoole, *supra* note 40, at 34.

132. The reasons for victim recanting are numerous; consequently, this list is not meant to be exhaustive. See generally Kirsch, *supra* note 13, at 392-98 (discussing reasons identified by prosecutors for non-cooperation of domestic violence victims); Randall, *supra* note 14, at 137 (identifying "a belief that the criminal justice system will not meet their needs, fear of retaliation from the abuser, a commitment to reconciliation with the abuser, and a desire to protect him from sanctions" as reasons for non-cooperation). Interestingly, the reasons identified with recanting are similar to the reasons some abuse victims remain with their abusers. See Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (Oct. 1999); see also Miccio, *supra* note 14, at 307 (listing fear of reprisal, fear of losing custody, economic concerns, emotional ties, and lack of support

discussed separately, it is likely that a victim's choice to recant may be impacted by multiple reasons.

### A. *The Battered Woman & Psychological Trauma*

The most popular explanation for recanting is the belief that *there must be something wrong with her*. The *something's wrong with her* explanation is one that most juries and participants in the criminal justice system are eager to accept; after all, what other excuse could explain a victim risking lying under oath in an effort to stop the prosecution of her abuser?<sup>133</sup> Society tends to blame the victim for having emotional problems in an attempt to offer a rational explanation for behavior that appears irrational. Violence traumatizes most victims of crime and impacts them physically, emotionally, and psychologically;<sup>134</sup> however, it would be dangerous to assume that all domestic violence victims who recant suffer from some form of emotional defect.

Ignoring the psychological impact of violence for fear of stereotyping women is equally dangerous.<sup>135</sup> It is important to strike a balance between acknowledging the psychological impact from violence without stereotyping domestic violence victims as emotionally defective. Interpersonal violence is a traumatizing experience.<sup>136</sup> Psychological trauma from domestic violence can range anywhere from low self-esteem or denial to Post Traumatic Stress Disorder.<sup>137</sup> Most legal scholarship on domestic violence and trauma has focused on the controversial Battered Woman's Syndrome.

The Battered Woman's Syndrome was pioneered by feminist psychologist Dr. Lenore Walker to describe the psychological impact of abuse and the pattern of violence.<sup>138</sup> She explained that "[t]he use of trauma theory together with the psychological understanding of feminist psychology, oppression, powerlessness, and intermittent reinforcement theories such as learned helplessness, all help us to understand the psychological impact of physical, sexual, and serious psychological abuse on the battered woman."<sup>139</sup> For decades, the term "Battered Woman's

as reasons women stay). The criminal justice system imposes some degree of pressure on victims as well; however, whether the pressure leads victims to make false statements is unclear. See discussion *infra* Part III.

133. Expert witnesses have testified in countless domestic violence cases to explain the psychological issues behind a victim recanting, failing to appear, or not cooperating. See generally Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 68–69 (1998); see, e.g., *State v. Clark*, 926 P.2d 194 (Haw. 1996).

134. See generally Dean G. Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims*, 32 J.L. MED. & ETHICS 73, 74–75 (2004).

135. See, e.g., Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 327 (2004).

136. See generally Kilpatrick, *supra* note 134, at 74–75.

137. Some victims are in denial regarding the level of danger they are in and their ability to stop the abuse. See Buel, *supra* note 132, at 20. Further, victims with low self-esteem are particularly vulnerable to abuse believing they do not deserve better. See *id.* at 23; Kirsch, *supra* note 13, at 396.

138. Jennifer Gentile Long & Dawn Doran Wilsey, *Understanding Battered Woman Syndrome and its Application to the Duress Defense*, 40 PROSECUTOR 36, 36 (Mar./Apr. 2006).

139. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 321, 326–27 (1992) (footnotes omitted).

Syndrome” has been used by both lay persons and experts in courtrooms to explain victim behavior in domestic violence.<sup>140</sup>

According to Walker’s theory, domestic violence victims remain in abusive relationships because of learned helplessness<sup>141</sup> and the cycle of violence. Learned helplessness refers to the victim’s belief that attempt to escape is futile.<sup>142</sup> Walker also believes domestic violence relationships are cyclical.<sup>143</sup> The cycle of violence occurs in three stages: (1) tension building, (2) aggression, and (3) contrition.<sup>144</sup> Some scholars argue that it is during the contrition stage, also known as the “honeymoon” period, when victims decide to recant. As one scholar noted:

If a report is made, by the time that police report is filed with the district attorney’s office, and the victim’s cooperation becomes necessary, the victim is usually moving into phase three, the honeymoon. The honeymoon phase is the time when the batterer seeks forgiveness. He may be apologetic, promise to refrain from using violence in the future, and promise to seek therapy. He may shower her with gifts, love letters, romantic gestures and affection....[A]fter the onset of the honeymoon, many victims actively work against the prosecution by cooperating with the defense attorney, hiring a defense attorney, or posting bail for the batterer’s release.<sup>145</sup>

Some battered women do not fit neatly into the cycle of violence, and there are other theories that try to explain the “dynamics of domestic violence.”<sup>146</sup> The Battered Woman’s Syndrome has been heavily criticized in legal and psychological communities as well.<sup>147</sup> Professor Shelby Moore explained, “[a]lthough battered woman syndrome testimony is intended to show the reasonableness of a battered woman’s actions, the outcome usually reinforces an image of women as weak, crazy, powerless ‘victims’ in need of protection.”<sup>148</sup>

Although all psychologists and legal experts do not agree on the validity of the controversial Battered Woman’s Syndrome, the impact of trauma from interpersonal

140. Bess Rothenberg, “*We Don’t Have Time For Social Change*”: *Cultural Compromise & the Battered Woman Syndrome*, 17 GENDER & SOC’Y, 771, 777 (2003).

141. Dr. Walker’s theory is that external factors internalized by battered women lead to psychological issues beyond their control. The theory was widely accepted as the first theory to psychologically address the issue of why battered women stay. Dr. Walker “argued that women remained in abusive relationships in part because they found themselves unable to sever ties to their partners in part because they had developed psychological problems that rendered them passive victims.” See *id.* The term “learned helplessness” originated from a 1968 experiment involving shocks given to four caged dogs. Long & Wilsey, *supra* note 138, at 36. The repeated exposure to the uncontrolled shock “rendered them helpless to try to escape.” *Id.* Similarly, the random and uncontrollable nature of domestic violence leads to a belief that the victim cannot escape her abuser. *Id.* at 37; see also Randall, *supra* note 14, at 120–21.

142. Long & Wilsey, *supra* note 138.

143. *Id.* at 36.

144. The tension-building phase may include verbal arguments and limited physical abuse. The aggression stage includes physical abuse. In the contrition stage there is an absence of violence that may or may not be combined with remorse or apologies. As the cycle continues the violence “escalate[s] both in frequency and severity.” *Id.* (citation and internal quotation marks omitted).

145. De Sanctis, *supra* note 5, at 369–70; see also Kirsch, *supra* note 13, at 396–97.

146. See Long & Wilsey, *supra* note 138.

147. See Miccio, *supra* note 14, at 303–05; see also Randall, *supra* note 14, at 119–22.

148. Moore, *Battered Woman*, *supra* note 112, at 301; see also Randall, *supra* note 14, at 123 (criticizing the syndrome for depicting women as “incapable of autonomy or rationality in their actions”).

violence is undeniable.<sup>149</sup> The most common psychological response to trauma is for victims to experience Post Traumatic Stress Disorder (PTSD).<sup>150</sup>

PTSD is recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).<sup>151</sup> PTSD was originally used to diagnose individuals who were exposed to trauma from natural disasters and war.<sup>152</sup> The diagnosis evolved to describe the impact of interpersonal violence, including sexual assaults and domestic violence.<sup>153</sup> Recanting happens frequently in adult rape and child sexual abuse cases,<sup>154</sup> which are also associated with PTSD. PTSD is a

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149. See Epstein et al., *supra* note 89, at 474 (noting study finding that 80 percent of victims suffered from clinical depression).

150. In fact, Battered Woman's Syndrome is considered a sub-category of PTSD. See Walker, *supra* note 139, at 327. The application of PTSD to battered women has been criticized as well since PTSD generally involves a "single traumatic event" instead of chronic battering. Dutton & Goodman, *supra* note 112, at 221.

151. According to the DSM-IV, an "essential feature of Post Traumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed., text edition 41, 2000) [hereinafter DSM-IV]. PTSD can be triggered by a variety of traumatic events from natural disasters and automobile accidents to victimization. See *id.* PTSD can be especially severe when the stressor is a human being. *Id.* at 464. Individuals who are traumatized by an event try to avoid the stimuli associated with the event. Unfortunately for the domestic violence victim, it may be impossible to avoid the stimuli with whom she is living or sharing a child. Possible symptoms seen in domestic violence victims diagnosed with PTSD are shared with victims who experience childhood sexual or physical abuse. These commonly seen symptoms include "impaired affect modulation; self-destructive and impulsive behavior; disassociative symptoms; somatic complaints; feelings of ineffectiveness, shame, despair or hopelessness; feeling permanently damaged; a loss of previously sustained beliefs; hostility; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual's previous personality characteristics." *Id.* at 465. Diagnosing an individual with PTSD was originally based on examining the effect and the re-experiencing of a traumatic event. Unlike most sexual assault victims the traumatic event for the domestic violence victim is recurring. A domestic violence victim does not have to experience continual violence to be traumatized. Intermittent traumatic experiences from an intimate relationship can be devastating as well. See Debra Vandervoort & Ami Rokach, *Posttraumatic Relationship Syndrome: The Conscious Processing of the World of Trauma*, 31 SOC. BEHAV. & PERSONALITY, 675, 679-80 (2003).

152. Dutton & Goodman, *supra* note 112, at 215.

153. Susan H. Berg, *The PTSD Diagnosis: Is It Good for Women?*, 17 AFFILIA 55, 62 (2002). PTSD has also been criticized as an inappropriate diagnosis for battered women because it usually encompasses "a single traumatic event" as opposed to ongoing battery. Dutton & Goodman, *supra* note 112, at 220-21.

154. See Margaret Rieser, *Recantation in Child Sexual Abuse Cases*, 70 CHILD WELFARE 611, 611 (1991). Recanting is a recognized problem in both child sexual abuse and adult sexual abuse cases. Recanting in adult sexual abuse cases is increased based on the victim's acquaintance with the offender. See Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 870-71 (2002). Some of the reasons identified for recantations in child sexual abuse cases include familial pressure, a sense of self-blame, a sense of powerlessness, and the child's relationship to the offender. See Rieser, *supra*, at 612-14. Some of the same reasons children are likely to recant are present in domestic violence cases as well. Domestic violence victims can experience pressure from other relatives or children who may blame the victim/parent for sending their father to jail. See *infra* Part II.B.1. A child who is sexually abused may feel he or she has no power to change the circumstances. Similarly, a domestic violence victim may feel powerlessness because so much is not in his or her control. Although recantations are frequent in adult sexual abuse cases, child sexual abuse cases provide a better comparison because most adult sexual assault victims experience one traumatic event and have little to no further contact with the abuser. In contrast a domestic violence or child sexual abuse victim is more likely to have ongoing contact which can have a significant impact with the victim wanting to follow through with a prosecution. This is not to suggest that domestic violence victims are like children. It is important to note the significant similarities both groups have in their relationship to the criminal justice system and their reaction to ongoing trauma. See Susan Perlis Marx, *Victim Recantation in Child Sexual Abuse Cases: The Prosecutor's Role in Prevention*, 75 CHILD WELFARE 219 (1996).

prevalent diagnosis for victims of violent crimes.<sup>155</sup> Although we cannot assume that all victims of domestic violence experience PTSD, one study suggests that an estimated 63 percent demonstrate PTSD symptoms.<sup>156</sup> The identification of PTSD symptoms in battered women has been criticized by feminist scholars who claim that PTSD diagnosis “diminishes the specific role of male violence against women.”<sup>157</sup> Although all crime victims do not experience PTSD, many will experience some form of emotional trauma.<sup>158</sup> There have been no studies linking recanting with PTSD; however, the high incidence of recanting in crime victims who have a higher chance for demonstrating PTSD suggests a correlation.

It is important that social scientists conduct additional studies to explore the correlation between recanting and PTSD. If recanting that rises to the level of perjury is a direct byproduct of PTSD it should be excused by the criminal justice system. One of the diagnostic criteria for PTSD is “persistent avoidance of stimuli associated with the trauma.”<sup>159</sup> Avoidance can include inability to recall the event in some victims who are mentally blocking the event.<sup>160</sup> Avoidance and minimization could explain why victims of interpersonal violence are reluctant to participate and decide to recant.

While psychological trauma and Battered Woman’s Syndrome may account for some victims who commit perjury, it is not the only motivation for false statements. Certainly psychological trauma and Battered Woman’s Syndrome would serve as a reasonable excuse for committing perjury. If, however, the reason for recanting does not stem from psychological issues, whether domestic violence victims who commit perjury should be excused becomes more complicated.

Some domestic violence victims who recant purposefully decide to perjure themselves to meet their own objectives. For these victims, the decision to recant is based not on psychology, but is a conscious choice based on their individual situation and their judgment regarding their ability to “handle” the batterer. Past experience and statistics indicate that many women either underestimate their abusers or overestimate their abilities to “handle” things on their own.<sup>161</sup>

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155. Ulrich Orth, Leo Montada & Andreas Maercker, *Feelings of Revenge, Retaliation Motive and Posttraumatic Stress Reactions in Crime Victims*, 21 J. INTERPERSONAL VIOLENCE 229, 229 (2006); see also Sascha Griffing et al., *Exposure to Interpersonal Violence as a Predictor of PTSD Symptomatology in Domestic Violence Survivors*, 21 J. INTERPERSONAL VIOLENCE 936 (2006).

156. Stephanie J. Woods, *Intimate Partner Violence & Post Traumatic Stress Disorder Symptoms in Women*, 20 J. INTERPERSONAL VIOLENCE 394, 395 (2005); see also Griffing et. al, *supra* note 155, at 938 (noting that estimates of PTSD among battered women vary from 31 to 84 percent.)

157. Berg, *supra* note 153, at 62. PTSD, similar to Battered Woman’s Syndrome, has been criticized for reinforcing stereotypes of domestic violence victims as scared, meek, and dependent. See Goodmark, *When is a Battered Woman*, *supra* note 113, at 82–83.

158. A recent study concluded that female victims of interpersonal violence are at risk for “a range of long-term mental health concerns, irrespective of whether or not they stay or leave the abusive relationship or their degree of injury.” Caron Zlotnick, Dawn M. Johnson & Robert Kohn, *Intimate Partner Violence and Long-Term Psychosocial Functions in a National Sample of American Women*, 21 J. INTERPERSONAL VIOLENCE 262, 271 (2006).

159. DSM-IV, *supra* note 151, at 463.

160. *Id.* at 464.

161. See Wills, *supra* note 29, at 179, 180–81 (“Victims who shield their batterers from criminal sanctions naïvely accept responsibility to stop the batterer on their own, primarily by verbal persuasion. This approach is risky because the victim may be less objective in recognizing the lethal potential of everyday batterers.... When the 911 call is made to law enforcement, the criminal justice system is triggered. When the report of violence is made,

### B. *The Survivor and Self-Motivated Objectives*

Psychiatrist Edward Gondolf countered Dr. Walker's learned-helplessness theory with the survivor theory. Dr. Walker's learned-helplessness theory argues that women remain in abusive relationships because escape would be futile.<sup>162</sup> On the other hand, Dr. Gondolf concluded that "women respond to abuse with helpseeking [sic] efforts that are largely unmet. What the women most need are the resources and social support that would enable them to become more independent and leave the batterer."<sup>163</sup> The survivor "actively takes measures to protect herself and her children from within the relationship."<sup>164</sup> Under Dr. Gondolf's theory, the survivor may decide her chances of survival are greater if she remains in the relationship.<sup>165</sup> The survivor theory has been criticized as well for creating stereotypes that fail victims who are unable to fulfill either the survivor or battered woman theory.<sup>166</sup> One sociologist opines:

[V]ictims seldom withdraw from prosecution because of second thoughts about their romantic relationships; instead, they engage the legal system for practical reasons—protection from violence, attempts to get help for abusive partners, attempts to enforce collection of child support, or the need to recover property—and tend to withdraw from prosecution after those objectives are achieved.<sup>167</sup>

If the above statement is correct, domestic violence victims are not dependent on the criminal system to rescue them, but are using it as a tool to survive and control the batterer for their own objectives.<sup>168</sup> Some victims may assume that threatening to prosecute will give them leverage to get the batterer to stop, go to counseling, or grant a divorce.<sup>169</sup> Once it appears the tool is working, these victims seek to drop the charges.<sup>170</sup> Some victims are motivated by a desire to protect the relationship,<sup>171</sup> are fearful regarding immigration status,<sup>172</sup> or may be concerned with cultural loyalties.<sup>173</sup> A victim may also be involved in substance abuse or criminal activity,

that moment signifies that the victim is without the power to get the batterer to stop the violence.".)

162. See *supra* notes 141–44 and accompanying text.

163. EDWARD W. GONDOLF WITH ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11 (1988).

164. Goodmark, *When is a Battered Woman*, *supra* note 113, at 85.

165. *Id.*

166. *Id.*

167. Worden, *supra* note 14, at 238 (citation omitted).

168. *Id.*; see also David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC'Y REV. 313 (1991) (arguing that the threat of prosecution is a more powerful power resource than prosecution itself).

169. Cf. Worden, *supra* note 14.

170. *Id.*

171. As Professor Goodmark noted, "[h]aving your husband or boyfriend arrested or jailed may be an unappealing prospect if your goal is to minimize violence from within the relationship." Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 21 (2004); see also Epstein et al., *supra* note 89, at 479.

172. Immigrant victims face additional barriers including "lack of knowledge and misinformation about the legal system; fear of police and the judicial system; fear of deportation; fear that their abuser will be deported; and language, cultural, religious, and economic barriers." See Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27, 37–39 (2002) (discussing the particular issues confronting immigrant domestic violence victims and analyzing the Violence Against Women Act's remedies).

173. Another common reason for recanting stems from cultural pressure and immigration status. Buel, *supra*

or be on community supervision, which may cause her to hesitate before joining forces with the court system. The most-often-cited, self-motivated objectives for domestic violence victims are concern for children and finances.<sup>174</sup>

### 1. Protecting their Children

The existence of children in an abusive relationship further complicates matters. Children may pressure or blame the victim for the father's absence from the home,<sup>175</sup> while some victims may believe that it is important to keep the family intact.<sup>176</sup> Losing custody is also a significant fear for domestic violence victims.<sup>177</sup> Unfortunately, this is a legitimate concern since accusations of battering do not guarantee the termination of visitation or parental rights.<sup>178</sup> In fact, some courts may disregard evidence of battering as irrelevant to behavior that impacts the child.<sup>179</sup> Professor Sharlene Graham Lassiter explained some of the problems with the family court system. She wrote:

I had physical possession of the children and was awarded temporary sole custody. My husband was granted visitation. However, he never returned the children following any visitation.

I complained to the court via contempt motions, but to no avail. At Christmas time, my husband did not pick up my son from the daycare for his Christmas Eve

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note 132, at 20. Professor Renée Römkens explained that “[v]ictims’ anticipation of racism in the criminal justice system and feelings of loyalty toward their community might make women of color even more reluctant to call the police.” Renée Römkens, *Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence*, 12 VIOLENCE AGAINST WOMEN, 160, 165 (Feb. 2006). Cultural pressure in domestic violence cases has been documented by African American, Latina, Asian American, and Native American victims. Minority victims can be particularly sensitive to accusations of racial disloyalty. See Goodmark, *When is a Battered Woman*, *supra* note 113, at 96–99 (discussing reasons why African American women in particular may remain silent about domestic violence). One African American domestic violence survivor summarized some of the concerns of some minority victims: “Call the police? Never! I just never could really trust that they would help me and not just use my 911 call as one more excuse to beat up a Black man.” *Id.* at 99 (quoting BETH E. RITCHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 95 (1996)) (ellipses omitted). General distrust for the criminal justice system may cause victims who are undocumented or of color to not cooperate with law enforcement officers and prosecutors. Cf. Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 819–20 (2000). But see Hanna, *supra* note 24, at 1881–82 (“[I]n our efforts to be racially, culturally, and economically sensitive, we cannot allow violence to go unchecked under the rationale that state intervention is always racist, ethnocentric, or classist.”).

174. But see Jennifer Langhinrichsen-Rohling, *Top 10 Greatest “Hits”: Important Findings and Future Directions for Intimate Partner Violence Research*, 20 J. INTERPERSONAL VIOLENCE 108, 114 (2005) (“[O]ne of the main reasons that physically victimized married women give for staying is love—rather than fear or obstacles for leaving such as money or children.”) (citation omitted).

175. See Buel, *supra* note 132, at 20.

176. *Id.*

177. *Id.*; see also Long & Kristiansson, *supra* note 82, at 15.

178. See generally SHARLENE GRAHAM LASSITER, *I HAVE A TESTIMONY* (2003). Professor Graham Lassiter explains some of the difficulties involved with a spouse who is savvy about the legal system. Professor Lassiter was sued by her ex-husband. *Id.* at 95; see also Lassiter v. Lassiter, 456 F. Supp. 2d 876 (E.D. Ky. 2006) *aff’d*, 280 F. App’x 503 (6th Cir. 2008). Professor Lassiter’s inspirational story illustrates the challenge of custody issues, the failings of the court system, and the role of faith.

179. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1083–84 (1991). But see Goodmark, *Law is the Answer*, *supra* note 171, at 13 (noting that forty-seven states have developed “legislation requiring domestic violence be considered in custody determinations”).

visitation. He also did not return my daughter to spend Christmas with me. Instead, he left the state.... The court did nothing...."<sup>180</sup>

Some scholars argue that batterers with children use "the legal system as a new forum for their abuse."<sup>181</sup> Issues related to children are further complicated if the victim is an immigrant. One scholar noted that "most immigrant women would rather stay in an abusive relationship than return to their country of origin because life in the United States means opportunity for their children."<sup>182</sup>

For some victims, the children are all they have because some batterers are successful at isolating their victims. Consequently, many victims have limited options regarding employment, transportation, and outside relationships.<sup>183</sup> Protecting the children is also a significant motivation if the batterer has threatened to harm the children. Protecting children can also involve protecting them from hardships including losing medical care, housing, and financial security. Children can be a strong motivation for a woman's choice not to cooperate and even commit perjury. As one victim stated, "I will lie to keep him out of jail if that's what it takes to keep my kids safe."<sup>184</sup> For many victims, one aspect of protecting children includes financial stability.

## 2. Protecting Their Finances

The decision to recant can also be an economic decision.<sup>185</sup> Financial stress tends to be underestimated by the criminal justice system. Unlike other crime victims, domestic violence victims may risk loss of housing, employment, and financial support.<sup>186</sup> There is a 50 percent chance that a domestic violence victim will drop below the poverty line if she leaves her abuser.<sup>187</sup> Domestic violence is also the leading cause of homelessness for women.<sup>188</sup> Limited financial resources and financial dependence is a frequent reason given by domestic violence victims for failing to cooperate.<sup>189</sup>

Financial pressure is further intensified when children are involved.<sup>190</sup> As scholar and domestic violence survivor Sarah Buel recounted from her personal journal:

All the private attorneys wanted at least \$10,000 for a retainer since he threatened to contest custody.... So, now I'm a single Mom, without child support and trying to go to night school to keep my job. But with minimum

180. LASSITER, *supra* note 178, at 73.

181. Goodmark, *Law is the Answer*, *supra* note 171, at 7.

182. Shapiro, *supra* note 172, at 38–39.

183. See Epstein et al., *supra* note 89, at 476–78, 478 ("[P]erpetrators refuse to assist with childcare or to provide access to transportation, intentionally interfering with the victim's ability to maintain employment or interpersonal relationships.").

184. *Id.* at 480 (internal quotation marks omitted).

185. See, e.g., De Sanctis, *supra* note 5, at 368.

186. Long & Kristiansson, *supra* note 82, at 15.

187. De Sanctis, *supra* note 5, at 368 (citation omitted); see also Patricia Cole & Sara M. Buel, *Safety and Financial Security for Battered Women: Necessary Steps for Transitioning From Welfare to Work*, 7 GEO. J. ON POVERTY L. & POL'Y 307 (2000) (discussing family violence and its impact on a victim's financial situation).

188. Belooof & Shapiro, *supra* note 5, at 4.

189. Kirsch, *supra* note 13, at 392.

190. See Epstein et al., *supra* note 89, at 477–78.



wage, I can't seem to pay both day care and the rent, so sometimes I think about going back, just to make sure my son has enough to eat. It hurts more to watch him eat macaroni with ketchup for the third night, than it ever did to get beaten.<sup>191</sup>

In addition to financial despair some batterers use financial coercion to control victims. Batterers threaten to reduce economic support in an estimated 42 percent of domestic violence cases.<sup>192</sup> Batterers may also harass individuals who assist the victim like employers, neighbors, friends, landlords, and child-care workers to cut off means of assistance.<sup>193</sup> While some victim's rights groups have emergency funds available and shelters, most emergency funds are unable to assist with mortgage payments, healthcare for sick children, or car notes.<sup>194</sup> Shelters are frequently overcrowded and family members may be unsupportive.<sup>195</sup> Moreover, some victims are ignorant regarding the services available. Lack of transportation to social services and medical expenses can add further financial stress to victims.<sup>196</sup> Thus, survival and self-motivation—including providing for themselves and their children—are two other potential reasons why domestic violence victims perjure themselves.

### C. External Pressures and Coercion

Another reason offered for recantation is external pressure and coercion. External pressure to recant may come from well-meaning family members and clergy who either do not believe the victim or believe in preserving the relationship at all costs.<sup>197</sup>

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191. Buel, *supra* note 132, at 19.

192. Lininger, *supra* note 5, at 769–70 (citation omitted).

193. See De Sanctis, *supra* note 5, at 369 (identifying economic harm batterers may cause including destroying property); see also LASSITER, *supra* note 178, at 70 (“Every friend who offered her services as a baby sitter for my children or who accompanied me to deliver the children received a nasty, threatening letter from my husband on an almost weekly basis.”).

194. Although crime victim compensation funds exist in all fifty states, less than half will assist with relocation expenses, and even fewer will help with rent or housing costs. National Association of Crime Victim Compensation Boards, Crime Victim Compensation Quarterly 1 (2008), available at [http://www.nacvcb.org/NACVCCrimeVictimQuarterlyIssue1\\_2008.pdf](http://www.nacvcb.org/NACVCCrimeVictimQuarterlyIssue1_2008.pdf). Most crime victim compensation funds are limited to medical and dental care, mental health counseling, funeral and burial costs, and lost wages for victims. See, e.g., 42 U.S.C. § 10602(b)(1) (2006).

195. Victims who suffer from unrelated mental illness, substance abuse, or have children can have particular difficulty obtaining shelter assistance. Buel, *supra* note 132, at 22, 24 (noting that shelter space is limited for victims with children or employed victims). Shelters may also be ill-equipped to address victims with diverse cultural, religious, or dietary needs. See Stacey A. Guthartz, *Domestic Violence and the Jewish Community*, 11 MICH. J. GENDER & L. 27, 45–46 (2004). Dr. Gondolf's survivor theory suggests the inability of resources to assist the victim further traps her in the abusive relationship. Gondolf, *supra* note 163, at 22–23.

196. Cf. Buel, *supra* note 132, at 24, 26; Epstein et al., *supra* note 89, at 481–82.

197. See Buel, *supra* note 132, at 20, 22.

The most common and effective external pressure is from batterers.<sup>198</sup> Victims may be fearful “for their own safety or the safety of friends, family or pets.”<sup>199</sup> The position of the batterer can cause additional pressure, particularly if he is powerful or well known.<sup>200</sup> For example, if the batterer is a member of law enforcement the victim may be skeptical that truthful testimony will positively change her situation.<sup>201</sup>

Domestic violence victims have legitimate reasons to take threats from batterers seriously. The assumption that a victim is safer by leaving an abusive relationship is not always true because of separation assault.<sup>202</sup> A battered woman’s chance of being murdered increases substantially when she tries to leave.<sup>203</sup> Unfortunately, the criminal justice system cannot guarantee victim or witness safety.<sup>204</sup> One of the reasons domestic violence cases are difficult is that batterers have an intimate knowledge of their victims, including social security numbers, financial resources, and the location of family members and friends.

Although protective orders are now routine, they do not always mark the end of batterer coercion. Protective orders are viewed by some batterers and some members of law enforcement as just another piece of paper.<sup>205</sup> Protective orders are not accompanied by twenty-four hour security details, panic buttons, or defensive weapons. Members of law enforcement may make assurances of safety, but there are no guarantees.<sup>206</sup> According to one study, 30 percent of victims are re-assaulted during the prosecution process.<sup>207</sup> Moreover, if batterers cannot wield physical strength they will wield financial strength instead by having utility or other services

198. Batterer coercion is a significant concern for prosecuting domestic violence cases. In fact, no-drop prosecution policies emerged partly in an effort to address the issue of batterer coercion. Now, the actual policies have been criticized as coercive by feminist scholars. No-drop policies “were intended to relieve some of the pressure felt by the victim by putting the onus of prosecution on the state.” Barbara Flemming, *Equal Protection for Victims of Domestic Violence*, 18 J. INTERPERSONAL VIOLENCE 685, 688 (2003). Consequently, a domestic violence case would not be dismissed solely because the victim requested it or recanted her allegations. For a discussion of no-drop policies, see *id.*; see also Wills, *supra* note 29. Although aggressive prosecution strategies were once lauded by feminists, they have now been attacked for placing undue pressure on victims.

199. Long, *supra* note 9, at 14 (citations and footnote omitted).

200. Buel, *supra* note 132, at 19.

201. Victims may have similar reactions when the batterer is famous. In a letter admitted into evidence in the O.J. Simpson murder trial Nicole Simpson wrote:

I called the cops to save my life whether you believe it or not. But I didn't pursue anything after that—I didn't prosecute, I didn't call the press & I didn't make a big charade out of it. I waited for it to die down and asked for it to.

CourtTV.com, Letter from Nicole Brown Simpson, [http://www.courtvtv.com/casefiles/simpson/new\\_docs/nicoleletter.html](http://www.courtvtv.com/casefiles/simpson/new_docs/nicoleletter.html) (last visited May 31, 2008).

202. See Römken, *supra* note 173, at 160 (describing the separation period as “the most dangerous time for women”); see also *supra* note 123 and accompanying text (discussing separation assault).

203. Buel, *supra* note 132, at 19.

204. See Mathias H. Heck, Jr., *Message from the President: Witness Intimidation*, 41 PROSECUTOR 5, 5 (May/June 2007) (explaining the large incidence of witness intimidation and that “[t]here is no guarantee that these witnesses will or can be fully protected and guarded at all times”); see also Randall, *supra* note 14, at 149 (noting that cooperating with the system does not guarantee an end to violence).

205. See Römken, *supra* note 173, at 161. Victims may also question the effectiveness of protective orders; however, some scholars argue that civil protection orders have demonstrated effectiveness. See Goodmark, *Law is the Answer*, *supra* note 171, at 11. *But see* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).

206. See generally Flemming, *supra* note 197 (discussing ensuring victim safety through prosecution).

207. Epstein et al., *supra* note 89, at 476 (noting that some batterers have kidnapped, murdered, or killed victims to prevent them from testifying in court).

cut off while they are in jail.<sup>208</sup> Professor and former prosecutor Donna Wills summarized the extent of batterer manipulation:

They call from jail threatening retaliation. They cajole their victims with promises of reform. They remind her that they may lose their jobs, and hence, the family income. They send love letters, pledging future bliss and happiness. They have their family members turn off the victim's electricity and threaten to kick the victim and her children out into the street. They pay for the victim to leave town so that she will not be subpoenaed. They use community property to pay for an expensive lawyer to try and convince the jury that the whole thing was the victim's fault and that she attacked him. They prey on the victim's personal weaknesses, especially drug and alcohol abuse, physical and mental disabilities, and her love for their children. They negotiate financial and property incentives that cause acute memories of terror and pain to fade dramatically.<sup>209</sup>

The ability of batterers to continue reaching their victims only increases safety fears. Domestic violence victims face exceptional challenges which distinguish them from other crime victims and other perjury defendants. Unlike others, domestic violence victims are confronted with issues of psychological trauma, custody issues, financial pressures, and batterer coercion. The underlying motivations for false statements are not the only unique factor of domestic violence cases. Domestic violence cases are also distinctive in how they are viewed in the criminal justice system.

### III. THE PECULIAR AND STRAINED RELATIONSHIP BETWEEN DOMESTIC VIOLENCE VICTIMS AND THE CRIMINAL JUSTICE SYSTEM

Domestic violence cases are unique. They represent one of the few instances in the criminal justice system where the victim may be at odds with the police and the prosecutor. It is important to understand the peculiar relationship between domestic violence victims and the criminal justice system because the system has been criticized for coercing victims which suggests that the system bears some responsibility in the problem of victim perjury.

The hypothetical discussed earlier involved a victim's decision to lie and unwanted state intervention.<sup>210</sup> Increased state intervention and mandatory policies in domestic violence cases have been both praised and criticized.<sup>211</sup> The most prevailing criticisms are that mandatory policies do not necessarily end violence or

208. See Anique Drouin, Comment, *Who Turned Out the Lights?: How Maryland Laws Fail to Protect Victims of Domestic Violence from Third-Party Abuse*, 36 U. BALT. L. REV. 105, 122–25 (2006) (“A legal advocate at the House of Ruth Maryland Domestic Violence Legal Clinic estimated that at least one victim per week calls and reports that her utilities have been disconnected by her abuser. More often than not, the victim cannot afford the expense of past-due payments or the reconnection fee and will have to borrow money from a relative or apply for emergency aid at the Department for Social Services.”); Wills, *supra* note 29, at 179–80.

209. Wills, *supra* note 29, at 179–80.

210. See *supra* Section I.A.

211. See Miccio, *supra* note 14, at 294–96 (“[F]aith in the deterrent effect of mandatory criminal intervention is misplaced.”); see also Aya Gruber, *Feminist War on Crime*, 92 IOWA L. REV. 741, 757–61 (2007); Keith Guzik, *The Agencies of Abuse: Intimate Abusers' Experience of Presumptive Arrest and Prosecution*, 42 LAW & SOC'Y REV. 111, 112 (2008).

ensure victim safety, and are paternalistic.<sup>212</sup> In spite of the criticism there is a general consensus that the response by police officers and prosecutors has improved.<sup>213</sup> Nevertheless, state intervention has been blamed for adding an additional element of coercion on women's lives, which may have the unintended consequence of encouraging perjury.<sup>214</sup> This section is not meant to serve as a critique or defense regarding the efficacy of mandatory policies. Rather, it is a brief summary to provide context and understanding of why domestic violence cases are so unique.

### A. *Focus of the Criminal Justice System*

Some advocates argue that the criminal justice system should focus on supporting individual victims; consequently, numerous creative reforms have been proposed for addressing domestic violence cases.<sup>215</sup> In reality, the criminal justice system protects the broader society.<sup>216</sup> The system "is primarily designed to focus on perpetrators while secondarily supporting victims..."<sup>217</sup> The prosecuting party in a criminal case is the government, not the victim. As another scholar noted, since crimes are considered offenses against the state, "the potential impact of the prosecution on the victim is not considered particularly relevant."<sup>218</sup>

In the typical adversarial process a party represented by counsel may dictate how a case is handled. Some advocates push for victims to have more control over the process and the decision of whether a case should proceed.<sup>219</sup> But a victim's "interests and concerns are but one set of factors among many that prosecutors must consider in making decisions about how to prosecute a case."<sup>220</sup> Consequently, victims generally do not possess the power to dictate what happens to a case. The government has a responsibility to "seek punishment of batterers, irrespective of whether the victims are willing to cooperate in prosecuting their assailants."<sup>221</sup> Allowing domestic violence victims the authority to decide is akin to asking the criminal justice system to return to its former policies of treating these cases as private family matters.<sup>222</sup>

212. See, e.g., Gruber, *Feminist War*, *supra* note 210, at 757–61. Some scholars also contend that mandatory policies have not eradicated discretion and can result in a disproportionate number of arrests in communities of color. *Id.* at 758.

213. See DAVIS, *supra* note 87, at 64; Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 17 (1999); see also Epstein et al., *supra* note 89, at 471 ("[A]ggressive prosecution, flawed as it is, remains the best and most practical option for many women.").

214. See *infra* Part III.C.

215. See, e.g., Carolyn Copps Hartley, *A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials*, 9 *VIOLENCE AGAINST WOMEN* 410 (2003).

216. Trying to alter the way the criminal justice system relates to domestic violence cases is difficult because the criminal justice system must address crimes other than domestic violence. In fact, the criminal justice system alone has proven inadequate in stopping violence against women.

217. Römken, *supra* note 173, at 162.

218. Epstein et al., *supra* note 89, at 467.

219. DAVIS, *supra* note 87, at 70.

220. *Id.*

221. Lininger, *supra* note 5, at 783.

222. Domestic violence victims may pursue claims against their abusers in tort, but seldom do so. See generally DOMESTIC VIOLENCE LAW 232 (Nancy K.D. Lemon ed., West Group 2001). Elevating family privacy

Although victims' wishes should be considered, they cannot be decisive because if the criminal justice system is triggered there is "public interest in preventing further violent victimization that might transcend the individual victim's wishes."<sup>223</sup> As prosecutor Barbara Flemming noted, "[a] criminal prosecution is the mechanism by which the state imposes punishment for criminal behavior, which may involve taking away an individual's liberty. Such a weighty responsibility must lie in the hands of an objective party."<sup>224</sup> Historically, domestic violence cases were treated as a private matter in the criminal justice system.<sup>225</sup> Domestic violence can no longer be viewed as a private matter, but one that negatively affects the entire community and is a threat to public safety.<sup>226</sup> Although the government's response to domestic violence has been less than perfect, there have been significant improvements.

### B. Police Officers and Mandatory Arrests

The most common first responders in domestic violence cases are police officers. Police officers have received significant criticism over the years for their handling of domestic violence cases. Before 1980, the police were heavily criticized for their response to family violence cases which frequently failed to lead to an arrest of the accused batterer.<sup>227</sup> Members of the police had the unfettered discretion to determine whether or not a crime was committed in family violence cases. By 1980, forty-seven "states had passed domestic violence legislation covering a range of reforms, including warrantless arrest for misdemeanor assault."<sup>228</sup> Further, many

in these cases would necessarily lead to decreasing criminalization. See Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, 11 CRIME & JUST. 19, 20 (1989). The prosecuting party in a criminal case is the government, not the victim. Crime victims are never parties in a criminal case, they are witnesses. There are no criminal cases where victims have carte blanche authority to determine if a case should be prosecuted. See DAVIS, *supra* note 87, at 14; Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 17–18 (1999). Subpoenas are routinely issued for both friendly and unfriendly witnesses in a case and a person ignoring a subpoena risks being held in contempt of court. Exercising the subpoena power should continue to apply to all witnesses. Holding domestic violence victims to different standards without sufficient cause would only lead to increased apathy and frustration from the criminal justice system. See *supra* Part I.C. Further, treating domestic violence victims as untouchable would be counterproductive. Two of the greatest achievements of the battered woman's movement were getting domestic violence cases taken seriously and holding individuals accountable regardless of their familial relationship.

223. Römken, *supra* note 173, at 178.

224. Flemming, *supra* note 197, at 686.

225. See generally Miccio, *supra* note 14.

226. See generally Wills, *supra* note 29.

227. It was typical for police to remain uninvolved in family disputes and ignore obvious evidence of crime. Some police agencies would purposely delay their response time. See Deborah Epstein, *Redefining The State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 133 (1999). One 1990 study revealed that police in D.C. were arresting accused batterers in only 5 percent of cases, and they refused to arrest in 85 percent of cases when the victim had visible serious injuries. *Id.*

228. Worden, *supra* note 14, at 228. Police, as a matter of custom, rarely arrested individuals accused of domestic violence, but would take the accused for a walk around the block. See, e.g., Goodmark, *Law is the Answer*, *supra* note 171, at 14. The no-arrest custom was well known. In 1967, the training manual for the International Association of Chiefs of Police directed that "in dealing with family disputes, the power of arrest should be exercised as a last resort." Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 10 (1992). The Domestic Violence Task Force and the enactment of the Violence Against Women Act made significant strides towards criminalizing domestic violence. See 18 U.S.C. §§ 2261–2266 (2006).

police departments have instituted mandatory arrest policies in response to lawsuits and criticism.<sup>229</sup>

Under mandatory arrest policies the police are required to initiate an arrest based on probable cause.<sup>230</sup> A victim's allegation of abuse can satisfy probable cause regardless of the presence of corroborating evidence.<sup>231</sup> The mandatory arrest<sup>232</sup> policy makes it easier for individuals to make false allegations of abuse and can be manipulated by batterers. For example, the batterer may call 911 to make a false allegation in an effort to preempt the victim.<sup>233</sup> In fact, mandatory arrest policies have been criticized because in some incidents they have resulted in a dual arrest, with the alleged victim being arrested as well.<sup>234</sup> Mandatory arrests allow police officers to make arrest decisions with or without victim cooperation.

Because recanting has become so prevalent, more law enforcement agencies are taking aggressive steps to capture the victim's original statement for fear she will back out later. For example, frustrated police officers are insisting on sworn statements from victims before they will arrest.<sup>235</sup> An unintended consequence of taking initial sworn statements is that they can be used later as evidence of perjury. Consequently, tension between members of law enforcement and victims begins

229. See generally Sherman, *supra* note 227, at 23 (identifying multi-million dollar verdict against Connecticut police department as influencing policy).

230. See Goodmark, *Law is the Answer*, *supra* note 171, at 15.

231. Misdemeanor assault cases do not always require physical evidence. For example, a person can be charged with a misdemeanor assault in the state of Texas for causing bodily injury, which is defined as pain. See TEX. PENAL CODE ANN. §§ 1.07(8), 22.01 (Vernon 2007). Visible injuries like bruising may not accompany pain. Moreover, bruising may not be visible immediately after the incident or in darker-complexioned women.

232. Mandatory arrest policies have also been heavily criticized for resulting in the arrest of both the victim and the batterer. One researcher concluded that in the state of Connecticut one in three domestic violence arrests involved a dual arrest. See Worden, *supra* note 14, at 236. Some cunning batterers are starting to file cross-complaints, and in some cases mutual combat may have occurred. As anecdotal evidence, one case I prosecuted involved the batterer calling 911 and accusing his girlfriend as a preemptive action. To address this issue some police agencies are enacting primary aggressor policies. In California, the primary, "dominant aggressor" is defined as "the person determined to be the most significant, rather than the first, aggressor." CAL. PENAL CODE § 13701(b) (West 2008). Factors the police should consider include "the history of domestic violence between the people involved, the threats and fear level of each person, and whether either person acted in self-defense." Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 159 n.327 (2003).

233. See Shapiro, *supra* note 172, at 34–35 (describing examples of victims arrested due to false allegations by their batterers).

234. In some cases the police have noted instances of mutual combat and have arrested the female victim who may have fought back to protect herself from the male aggressor. The number of women being arrested in intimate partner assault has increased. The percentage of cases in California increased from 6 percent to 17 percent from 1988 to 1998. Kris Henning, Angela R. Jones & Robert Holdford, "I didn't do it, but if I did I had a good reason": *Minimization, Denial, and Attributions of Blame Among Male and Female Domestic Violence Offenders*, 20 J. FAM. VIOLENCE 131, 131 (2005). Although some departments have implemented primary aggressor policies, dual arrests are still a problem. See Römkens, *supra* note 173, at 165. When domestic violence victims are arrested alongside the batterer it may trigger negative consequences with child protective services and immigration. See Shapiro, *supra* note 172, at 28.

235. See *Davis v. Washington*, 547 U.S. 813, 820 (2006) (noting that police officer had victim complete and sign a "battery affidavit"); see also *State v. Thach*, 106 P.3d 782, 787, 791 (Wash. Ct. App. 2005) (finding officer's testimony of policy to take written statements in domestic violence cases because victims frequently change their minds was harmless error). Most of these sworn statements will probably be found inadmissible, but may still be gathered for impeachment purposes. See *Davis*, 547 U.S. 813 (2006); see also discussion *supra* Part I.B. Some prosecutor's offices take a similar aggressive approach by taking domestic violence victims before the grand jury to "nail down" their testimony in the event the victim decides to recant.

early.<sup>236</sup> Some victims want the abuse to stop, but do not want their abuser arrested, so they may begin recanting at the scene.

Domestic violence cases may engender a visceral response from police officers in contrast to other types of violent crimes. Officers may become weary of responding to the same address, particularly if they have a negative court experience. Of course recanting is not the sole cause of law enforcement apathy towards domestic violence cases. Some police officers may feel an animus towards domestic violence cases, especially if they have not received significant domestic violence training. Many officers view domestic violence cases as particularly dangerous to their personal safety.<sup>237</sup> Other officers still view domestic violence as a private matter.<sup>238</sup> Mandatory arrest policies coupled with the attitudes of police officers can have a dramatic impact on domestic violence victims.

### C. Prosecutors and No-Drop Prosecutions

The relationship between prosecutors and domestic violence victims can be more strained than the relationship with police officers. In many cases, police officers may be seen as “saving the day” if there is an ongoing emergency. For the uncooperative victim, a prosecutor is rarely seen as a hero and may be viewed as the enemy. Prosecutors have faced continual and diverse criticism regarding the handling of domestic violence cases.<sup>239</sup>

Like police officers, prosecutors have also undergone tremendous change in response to domestic violence cases over the years. In the 1980s, prosecutors were heavily criticized because of policies to drop charges at the victim’s request.<sup>240</sup> Aggressive lobbying and political pressure as well as recanting victims helped create the no-drop prosecution policies of today.<sup>241</sup>

Under no-drop policies a domestic violence case may be prosecuted with or without a victim’s consent or cooperation.<sup>242</sup> Since it is common for a domestic violence victim to recant and claim that she manufactured the initial complaint,

236. Some scholars state that immigrant victims are more affected by “negative police attitudes and, therefore, are more likely to be arrested when they react violently in a domestic dispute.” Shapiro, *supra* note 172, at 37.

237. Cf. Federal Bureau of Investigation & U.S. Department of Justice Report, *Law Enforcement Officers Killed & Assaulted*, tbl. 19, available at [http://www.fbi.gov/ucr/killed/2007/data/table\\_19.html](http://www.fbi.gov/ucr/killed/2007/data/table_19.html) (2007) (over 9 percent of police officers killed in the line of duty nationally were killed while responding to domestic disturbances); Debra J. Saunders, Editorial, *Battered, But Still Responsible*, S.F. CHRON., Apr. 5, 2001, at A25 (“[Twenty-two] percent of police officers killed in the line of duty were responding to domestic violence calls.”).

238. Arguably, one of the most shocking examples of police apathy occurred in Castle Rock, Colorado, where Ms. Gonzales begged police to enforce a protective order. The police refused. Ms. Gonzales’s children were found dead several hours later in front of the police department’s front door. Perhaps apathy towards these cases influenced the Supreme Court’s decision that enforcement of protective orders was not mandatory. See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (finding no protected property right in enforcement of protective order).

239. See, e.g., Mills, *supra* note 35, at 589–90.

240. Epstein, *Redefining the State’s Response*, *supra* note 227, at 32–33.

241. Interestingly, some of the same groups that once lobbied for more aggressive prosecution have criticized the no-drop policies as disempowering and overly paternalistic. See Miccio, *supra* note 14, at 265–66.

242. See generally Goodmark, *Law is the Answer*, *supra* note 171, at 16–17 (discussing the distinction between soft and hard no-drop policies); see also Miccio, *supra* note 14, at 266 (same); Mordini, *supra* note 135, at 318 (same).

most prosecutors will not take a recantation at face value.<sup>243</sup> Some feminist scholars criticize no-drop policies, claiming they are paternalistic and that victims should decide for themselves if charges are pursued so they will feel empowered.<sup>244</sup> Those scholars would argue that if the victim has used the system to meet her objectives, the purpose of the criminal justice system has been satisfied, and the prosecution should halt.<sup>245</sup> Scholars further claim that recanting is just a response to aggressive prosecution and victims feeling disempowered.<sup>246</sup> As one author explained:

All too often, the effect of mandatory prosecution is to align the battered woman with her batterer, to protect him, and to further entrench her in the abusive relationship. A woman placed on the witness stand against her will is often willing to perjure herself rather than testify against her partner. In some jurisdictions, this choice will result in the victim being prosecuted for making a decision that she felt was in her best interest.<sup>247</sup>

Domestic violence charges no longer disappear just because the victim decides she does not want to proceed with prosecution. Consequently, a victim may try to force a prosecutor to stop a prosecution by lying and denying the abuse.<sup>248</sup> Due to the adoption of no-drop prosecution policies, the prosecution will probably continue; however, the future of no-drop policies is unknown because of the Supreme Court's recent Confrontation Clause cases.

The principal actor in a prosecution, including a domestic violence prosecution, is not the victim—it is the prosecutor. Prosecutorial autonomy can create immediate

243. See sources cited *supra* note 5; see also Wills, *supra* note 29, at 177.

244. Scholars who criticize no-drop policies identify victims served with subpoenas, forced to testify against their batterer, and threatened with contempt charges for failing to appear as problems with the policies. See generally Ford, *Prosecution as a Victim*, *supra* note 168, at 313; Miccio, *supra* note 14; Mordini, *supra* note 135. Professor Linda Mills described the state's subpoena power for recanting witnesses as degrading, humiliating, and dangerous. Mills, *supra* note 35, at 589–90.

245. Prominent sociologist David Ford argues that protecting battered women should include “empowering the woman to take whatever steps she deems appropriate, beyond court sanctions, to arrange for her own security.” A battered woman should be able to “use the threat of prosecution to bargain for arrangements satisfactory to her wishes.” Ford, *Prosecution Experiment*, *supra* note 91, at 11, 16–17. This position ignores the role of prosecutorial discretion. Prosecutor discretion to determine whether or not to prosecute applies to all criminal cases, not just domestic violence. See Dubber, *supra* note 221, at 17–18; Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 377 (2000) (discussing prosecutorial discretion). As professor Angela J. Davis explained, a “prosecutor does not have a client. Instead, she represents the state, which consists of everyone who lives in the jurisdiction she serves, including the defendant. For that reason, her role is complicated and involves the balancing of conflicting goals.” DAVIS, *supra* note 87, at 61.

246. This argument ignores the empowerment many victims feel when they confront their victims in court, knowing that the law and society are behind them. As Donna Wills noted in her article, “Supporters of ‘no drop’ domestic violence policies realize that empowering victims by giving them the discretion to prosecute, or even to threaten to prosecute, in actuality only empowers batterers to further manipulate and endanger their victims’ lives, the children’s lives, and the safety and well-being of the entire community.” Wills, *supra* note 29, at 180.

247. Mordini, *supra* note 135, at 320 (internal quotation marks omitted).

248. A prosecutor who took a recantation at face value would be jeopardizing the safety of the victim. It is generally accepted that the fight against domestic violence necessitates that some batterers be prosecuted. The Indianapolis Domestic Violence study, however, found a correlation between allowing a victim to drop charges and a reduction in continued violence. Ford, *Prosecution Experiment*, *supra* note 91, at 67. The author of the study did concede that “victim complainants who are permitted to drop charges are best off when they continue to pursue the process.... Bargaining with and then dropping charges appears to be an unwise strategy for security protection.” *Id.* at 72–73.



tension with some victims. The tension between domestic violence victims and prosecutors is further exacerbated by their conflicting expectations.

Conflicts frequently arise between prosecutors and victims in domestic violence cases because of the variance in goals. The domestic violence victim may expect more control in the case since the case is based on conduct that impacts her directly.<sup>249</sup> The prosecutor may expect to prosecute the case like any other assault case. But domestic violence cases are not like any other case. The National District Attorneys Association listed the following policy comment regarding the conflicting goals with victims:

Because of their relationship to the offender and the associated fears and concerns, victims believe that they know the best methods for ensuring their safety along with the safety of their family. These methods may include attempts at dropping charges of abuse, recantation of testimony during trial, or advising the police and prosecutor that they falsified the incident.

... It is imperative that when such conflicts arise that prosecutors be acutely aware of, sensitive to, and respectful of the victim's feelings regarding the case. That is not to say, however, that prosecutors should not vigorously prosecute such cases in order to hold abusers accountable and to protect the victim and the community from further violence.<sup>250</sup>

From the prosecutor's perspective, justice in domestic violence cases encompasses victim safety, public safety, and punishment, usually achieved through a conviction.<sup>251</sup> A domestic violence victim may be less interested in justice and more interested in survival.<sup>252</sup> Often, a primary goal for the domestic violence victim "is simply to stop the violence."<sup>253</sup> The prosecutor's view of safety—getting the victim away from her abuser—does not always mesh with the victim's view of safety. As one scholar explained, "victims often leave the system when they have finished using it to their advantage, whether or not that means following through with criminal prosecution."<sup>254</sup> Victims may view continued prosecutorial involvement that is intended to help them as coercive. As one author noted:

[A victim] may live in constant fear of violence or under constant threats and pressure to recant her story. In addition to her husband's constant intimidation, she may also be threatened by the prosecutor or by the judge. Each person in

249. See generally Hartley, *supra* note 214, at 413 (discussing the difficulty rape survivors have "with the realization that it was not their trial, that the law afforded more protection to the abuser's rights than theirs, and that they had little control over what happened during the trial").

250. National District Attorneys Association, *supra* note 11, at 7.

251. See generally Long & Kristiansson, *supra* note 82 (describing justice as encompassing more than convictions and encouraging prosecutors to litigate without alienating the victim, assess lethality, and balance victim safety with batterer accountability).

252. One of the reasons domestic violence victims frequently clash with the criminal justice system is that they hold different goals. "Victims seldom seek public confrontation or punishment for their abusive partners." Worden, *supra* note 14, at 238. It is not uncommon for domestic violence victims to be concerned with issues of children, safety, finances, immigration, and other practical survival issues. See *supra* Part II.B. Although both victims and the system have a concern for safety, the means of achieving that goal differ. See Randall, *supra* note 14, at 108 (arguing that victims who refuse to cooperate may be making a reasonable and rational choice based on their circumstances).

253. Mordini, *supra* note 135, at 319 (citation and internal quotation marks omitted).

254. Bennett et al., *supra* note 12, at 763.

contact with her—her husband, the hospital, the social worker, the prosecutor, her in-laws—demands that she speak in a certain fashion and tailor her story to meet their demands. The destruction of voice, then, occurs not only at the moment when a woman is choked, beaten, or raped. It continues throughout her attempt to attain medical aid and a legal remedy.<sup>255</sup>

A professor and former public defender described her experience with prosecutor frustration and an uncooperative victim: “Most surprising was the virulent anger that she seemed to direct at the victim. The prosecutor seemed angrier with the victim than with my client. It was as if the victim was ruining *her* case and impeding *her* fight against domestic violence.”<sup>256</sup> Some scholars argue that the problem does not lie with uncooperative victims, but with the system’s failings:

There is a perception that the women who are “reluctant” or “uncooperative” victims have not fulfilled their part of the bargain; in other words, they have enlisted the assistance of the state by calling upon the police for help but have then failed to follow through with the system’s subsequent requirements. The difficulty with this view, however, is that it assumes that the “system” can, and typically does, effectively respond to the needs of assaulted women.<sup>257</sup>

The criminal justice system responds to domestic violence victims about as well as it responds to victims in other cases. Victims are necessary for testimony, but due to prosecutorial discretion the prosecutor is in charge of how and whether a case proceeds through the system. Domestic violence victims may be exposed to a greater level of state coercion than other crime victims because state actors expect victims to be non-cooperative.<sup>258</sup> The increased level of state coercion—as evidenced by the focus of the criminal justice system, the rise of mandatory arrests, and the autonomy of prosecutors—supports the contention that domestic violence victims who commit perjury are distinct from other perjury defendants; consequently, exposure to perjury prosecution should be limited.

#### IV. CONFRONTING FALSE STATEMENTS IN DOMESTIC VIOLENCE CASES

A perjury prosecution should never be based on a desire to punish an uncooperative victim for sabotaging a case; however, a domestic violence victim has no protection from a vindictive prosecution.<sup>259</sup> This is not to suggest that victim wrongdoing should be ignored. Rather, prosecution may be warranted to hold a victim accountable for breaking the law. The concept of victim wrongdoing is not new, but one resists the idea of victim wrongdoing because it does not comply with

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255. Shannon Selden, *The Practice of Domestic Violence*, 12 UCLA WOMEN’S L.J. 1, 39 (2001).

256. DAVIS, *supra* note 87, at 68.

257. Randall, *supra* note 14, at 137–38.

258. See *supra* Part II.C.

259. See Barbara J. Hart, *Battered Women and the Criminal Justice System* (1992), in Barbara J. Hart’s Collected Writings, available at <http://www.mincava.umn.edu/documents/hart/hart.html> (“Battered women should not be prosecuted for filing false police reports because they seek to terminate prosecution, except in those unusual circumstances where there is independent evidence of false swearing or perjury and the interests of justice will be served thereby.”).

most stereotypical images of the victim.<sup>260</sup> The idea of agency and victims making conscious decisions is embraced by some scholars who advocate for victim autonomy;<sup>261</sup> however, what should happen when those decisions violate the law?

Relying on sympathy and emotional responses to decide whether or not to prosecute will inevitably involve stereotypes. Victims who are not sympathetic will not be given the benefit of the doubt. Consequently, the stereotypical domestic violence victim<sup>262</sup> will never have to worry about a perjury conviction, but the unpopular victim, who may be a minority, have a criminal record or a substance abuse problem, or who fights back, may end up in court as a defendant. Ignoring victim wrongdoing actually reinforces stereotypes of domestic violence victims as weak, irrational, and untrustworthy.

If we decide as a society that turning a blind eye is the best approach to victim perjury a clear standard must exist instead of leaving it to the discretion of individual prosecutors. Clearly, one-size-fits-all approaches to domestic violence have not worked whether we are looking at supposed quick fixes or trying to understand the counterintuitive behavior of a battered woman.<sup>263</sup> Excusing perjury from a domestic violence victim who lied due to emotional trauma would be fairly uncontroversial, just as excusing perjured statements from victims who lied due to batterer coercion. Excusing perjury for victims who make a conscious choice to lie for self-motivated reasons is more difficult to justify.

#### A. *The Intangible Transaction Costs of Ignoring and Prosecuting Perjury*

Since prosecutors are autonomous, there is no clear standard for when a victim will be prosecuted.<sup>264</sup> However, ignoring perjury from domestic violence victims comes at a cost.<sup>265</sup> Perjury harms the sanctity of the criminal justice system.<sup>266</sup> The costs imposed by perjury in domestic violence cases can be greater than perjury in other criminal cases because of the large incidence of recanting.<sup>267</sup> In domestic violence cases false statements are considered predictable.<sup>268</sup> Because of the prevalence of recanting in domestic violence cases, judges and attorneys are more likely to detect a false statement in a domestic violence case than in other types of

260. See *supra* Part II. For a general discussion of victim wrongdoing, see Gruber, *Victim Wrongs*, *supra* note 112, at 651.

261. See, e.g., Mills, *supra* note 35, at 597.

262. See *supra* notes 111–113 and accompanying text.

263. For criticism of current domestic violence approaches, see Goodmark, *Law is the Answer*, *supra* note 171 and Miccio, *supra* note 14.

264. See generally Moore, *Questioning the Autonomy*, *supra* note 245, at 377 (discussing prosecutorial discretion).

265. There is a body of literature that analyzes law, economic theories, and criminal law. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law As A Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985). An analysis of law and economic theory and domestic violence cases is outside the scope of this article.

266. Curriden, *supra* note 20, at 69. According to a survey of over fifty state and federal judges, lawyers, and academics, perjury is prevalent in both civil and criminal courts. *Id.* Judge John Daffron, former chair of the National Conference of State Trial Judges, explained that “there’s a growing disrespect for the court, and...coming to court and taking the oath is not taken as seriously as it used to be.” *Id.* at 70.

267. See sources cited *supra* note 5.

268. See Long, *supra* note 9, at 12.

cases. Knowingly ignoring perjured testimony would make the attorneys and courts complicit in the wrongful act. Moreover, by remaining silent, the criminal justice system would sanction perjury.

The transaction costs involved with turning a blind eye are high. As the Supreme Court explained, “[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a ‘flagrant affront’ to the truth-seeking function of adversary proceedings.”<sup>269</sup>

The courtroom must be seen as the one place where truthful testimony must be spoken regardless of the consequences. When a victim provides false testimony in court the criminal justice system is harmed and becomes a secondary victim. Perjurious testimony should not be tolerated or ignored just because the falsity is coming from a victim or complainant. The criminal justice system “should account for the victim, not only as a wronged actor, but also as a wrongful actor where appropriate.”<sup>270</sup> False testimony without consequences also sends a message to jurors and other witnesses that truthful testimony is not required or expected. Sending a message that domestic violence victims can lie without repercussions results in hostility towards domestic violence victims and impacts how domestic violence cases are handled.<sup>271</sup> It also harms the credibility of perjury prosecutions of non-victims. A well-established maxim of the criminal justice system is that choices must have consequences. It is unacceptable to turn a blind eye to the consequences of perjury.<sup>272</sup>

Prosecuting domestic violence victims comes at a cost as well. The goal in prosecuting a domestic violence case is to hold batterers accountable for their behavior towards victims and society.<sup>273</sup> Prosecuting a domestic violence victim would only punish the victim, leaving the batterer untouched. It also diverts resources from the larger problem of battering. Some prosecutors may ignore victim perjury because few prosecutors desire the negative publicity generated from the Joann Gilliam case.<sup>274</sup> Punishing victims risks worsening the relationship between victims and state actors and may result in greater resistance to prosecution. Equitably, if the state contributed to the enormous pressure confronting victims, a perjury prosecution may seem illegitimate. Moreover, punishing victims may reinforce the belief that a domestic violence victim has no safe place to turn for help.<sup>275</sup>

### 1. Bearing the Costs When Lying Is a Byproduct of Abuse

The transaction costs imposed by victims who commit perjury and the costs involved with prosecuting those victims are high. The system should be willing to bear the costs imposed when perjury is influenced by trauma or coercion. Holding

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269. *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 323 (1994).

270. Gruber, *Victim Wrongs*, *supra* note 112, at 651 (exploring victim liability and comparative blame in criminal cases).

271. *See supra* Part I.C.

272. *See* *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at \*16 (N.Y. App. Div. Apr. 7, 2003).

273. *See, e.g.*, Hanna, *No Right to Choose*, *supra* note 24, at 1892, 1895.

274. *See supra* Part II.

275. Randall, *supra* note 14, at 140.

people accountable for their decisions is only a positive goal if people make conscious decisions. The issue of whether a domestic violence victim is making a conscious choice to lie is pivotal to accountability. One solution to protecting victims from perjury prosecution lies in the very stereotype many feminist scholars are resisting—the idea of emotional trauma or PTSD.<sup>276</sup> As discussed previously, lying can be legitimately excused if the lying is a byproduct of an emotional disturbance or defect, like PTSD.<sup>277</sup> I am not suggesting, however, that domestic violence victims are irrational, paralyzed psychologically, or incapable of functioning. In fact, emotional trauma may be only one of several reasons that lead a victim to commit perjury.<sup>278</sup>

The criminal justice system has recognized mental defect as an excuse for crimes. A victim suffering from PTSD or other psychological trauma may minimize the abuse or give contradictory statements because of the emotional trauma.<sup>279</sup> A domestic violence victim who perjures herself while suffering from the emotional effects of abuse should not be held responsible for her actions and should not be prosecuted for perjury. Victims who lie because of duress, coercion,<sup>280</sup> and fear are more complicated.<sup>281</sup>

In one sense, domestic violence victims who recant out of fear are in the same category with other frightened victims who testify in gang, mafia, and drug cases.<sup>282</sup> There is some element of state coercion for all witnesses to testify truthfully despite the dangers faced.<sup>283</sup> Moreover, courts have been reluctant to conclude that duress or coercion justifies perjury,<sup>284</sup> although duress is viewed as a valid excuse in numerous legal contexts.<sup>285</sup>

Of course, the primary difference between domestic violence victims and other frightened victims is the intimate relationship.<sup>286</sup> Domestic violence victims have

276. See *supra* Part II.A.

277. See *supra* Part II.A. Initially, encouraging domestic violence victims to argue mental defect or duress to avoid a perjury prosecution may seem offensive to some. As discussed previously, PTSD is a recognized diagnosis. Many victims of trauma (though not all) experience a form of PTSD. Those victims should be excused from perjury if it can be shown that the diagnosis impacted their behavior. Similar to the controversial battered woman's syndrome, this argument would attempt to nullify the willful element of perjury because of the victim's mental state.

278. Randall, *supra* note 14, at 109 (noting that images of victims "typically fail to apprehend the *co-existence* of women's victimization with women's agency").

279. Avoidance of stimuli and minimizing the abuse are common reactions to emotional trauma. See *supra* Part II.A.

280. Coercion usually includes the use of actual or threatened force, although the terms duress and coercion are frequently used interchangeably. See MODEL PENAL CODE § 2.09(1) (1962).

281. One scholar described victims suffering from coercion as:

Aware of the wrongfulness of the coercer's demand, the coerced actor does choose to commit the crime rather than suffer a fatal or grievous wound, but the alternatives open to h[er] were so agonizing that we accept h[er] claim that [s]he was carrying out a course of conduct that [s]he did not choose—and would not have chosen—for [her]self.

Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 15–16 (1994).

282. Flemming, *supra* note 197, at 687; see also Hanna, *supra* note 24, at 1891.

283. For example, state coercion may be in the form of the subpoena power. See notes 234 and 243.

284. See, e.g., *United States v. Nickels*, 502 F.2d 1173, 1177 (7th Cir. 1974).

285. See generally RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (discussing when duress makes a contract voidable); L.I. Reiser, Annotation, *Coercion, Compulsion or Duress as Defense to Criminal Prosecution*, 40 A.L.R. 2d 908 (1955 & 2007 Supp.)

286. Prosecutors are well aware of the unique nature of domestic violence cases. "This intimate relationship

legitimate reasons to be more fearful than most victims because batterers are likely to have greater access than other criminals to their victims. Moreover, batterers have a significant likelihood of carrying out their threats.<sup>287</sup> The Supreme Court recognized that domestic violence is a crime that is “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”<sup>288</sup>

Thus, the system may be willing to bear the costs associated with perjury from victims who are traumatized or coerced because prosecuting victims who are suffering from trauma or batterer coercion would not further the goal of truthful testimony. Moreover, individuals who are traumatized or afraid may not be deterred by the suggestion of increased prosecution and punishment. Conversely, the system may not be willing to pay the costs imposed by a self-serving victim.

## 2. Bearing the Costs When Lying Is an Assertion of Power

There are, however, domestic violence victims who make tactical decisions to serve their own interests and decide that those interests outweigh the need for truthful testimony.<sup>289</sup> An individual may survive the horrors of abuse and still exercise agency. As Professor Miccio explained, “autonomy and conceptions of will and resistance do not exist only in the absence of oppression; they are manifest in the face of oppression and terror.”<sup>290</sup>

For the victim with self-motivated objectives, the benefits associated in committing perjury outweigh her costs. The costs would represent a minimal risk of prosecution and conviction based on the predominant response to turn a blind eye.<sup>291</sup> The benefits of lying would include an assertion of autonomy, the continued relationship, or another negotiated benefit which may include an agreed divorce, custody arrangement, counseling, or a negotiated end to the abuse.<sup>292</sup> For this victim, recanting on the witness stand is an assertion of her power. She may decide to use her testimony as a power tool because lying is one of the few tools at her disposal.<sup>293</sup>

transforms the normal assault case with an adversarial victim–assailant relationship to a much more serious case that involves complex and frightening choices for the victim about issues that are often life-threatening and always life-changing.” Long & Kristiansson, *supra* note 82, at 14.

287. See *supra* note 123 and text accompanying note 202.

288. *Davis v. Washington*, 547 U.S. 813, 832–33 (2006).

289. See *supra* Part II.B.

290. Miccio, *supra* note 14, at 320.

291. The false complainant would be in a similar position since some prosecutors are reluctant to prosecute someone who once claimed to be a victim of abuse. False complainants, persons who were never actually abused but filed a false report, should always be held accountable for their actions, assuming it is clear that they are truly false complainants. Sometimes the line between a false complainant and an actual victim can be blurred, making it difficult to distinguish the two. Any legislation that provided protection from perjury charges should define the term victim narrowly to minimize false complainants from taking advantage of the defense.

292. Donna Coker, *Shifting Power for Battered Women: Laws, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1018 (2000) (“[W]omen sometimes drop protection orders or refuse to cooperate with prosecution because they were successful in using the threat of legal intervention to gain concessions from their abuser.”); see also Kuennen, *supra* note 91, at 17 (citing a study that supported victim’s use of bargaining to get batterers to “stay away, pay child support, or relinquish custody of the children”).

293. See Ford, *Prosecution as a Victim*, *supra* note 168. Although scholars have discussed using criminal prosecution as a power tool, I contend that lying is another power tool used by some victims. See *supra* Part II.B.

In the hypothetical introduced earlier, Mary attempted to abscond herself from the proceeding until a bench warrant was issued.<sup>294</sup> One of the reasons bench warrants are controversial is that they remove the victim's autonomy. Mary could not decide whether charges were filed or the prosecution was halted, but at minimum she had control over whether or not she chose to show up. Ignoring a subpoena or providing false testimony is defiant behavior. It is also an exercise of power for an individual who has limited control over her universe. The domestic violence victim who uses lying as an assertion of power should accept the consequences of her choice to commit perjury. Such a victim has every right to believe protecting herself, her children, or her finances is worth ignoring the law. She must, however, also own up to her decision.

Allowing victims to use and manipulate the system for their own ends is unacceptable. The additional transaction costs involved with ignoring perjury in these cases include exploitation of the system, increased frustration and apathy towards victims, and intentionally sabotaging criminal prosecutions of batterers. Society may be willing to bear certain costs for victims who are motivated by psychological issues or fear. Society should not bear the costs for victims who are employing a power move.

One way to encourage self-motivated victims to testify truthfully is to increase the potential costs. If prosecution for perjury becomes a real possibility for false complainants and some domestic violence victims, perjury should be deterred.<sup>295</sup>

Advocating for accountability and prosecution for some recanting domestic violence victims will likely strike a nerve. Responding to a victim who has breached the law is a complex issue.<sup>296</sup> When confronted with perjured testimony, prosecutors must carefully consider whether or not prosecuting is the best decision. In some situations prosecution is necessary and warranted while in others it may be ill advised. In reality, many overworked prosecutors may lack the time or interest to consider the underlying motivations for committing perjury. Some prosecutors would be more comfortable holding all individuals who committed perjury accountable. Aggressive prosecution is not warranted in all cases, however. Without guidance in this area, though, prosecutors may make arbitrary decisions about who to pursue for perjury.<sup>297</sup>

Perjury charges may be warranted for false complainants and victims who perjure themselves for self-serving reasons. Although domestic violence victims who are suffering from the psychological impact of battering or batterer coercion should not be prosecuted, it is likely that some will be. A defense to perjury is necessary under limited circumstances to protect these domestic violence victims from overzealous prosecution.

This is not to suggest that domestic violence victims who commit perjury should receive a windfall simply because of their status as victims. Legislation that merely

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294. See *supra* Part I.A.

295. In theory, if the potential costs for victim wrongdoing are increased to outweigh the benefits, a person who is risk-averse to punishment should be deterred from committing perjury.

296. See generally Gruber, *Victim Wrongs*, *supra* note 112.

297. See generally Moore, *Questioning the Autonomy*, *supra* note 245, at 374 (noting that a prosecutor's decision to charge is "one of the broadest discretionary powers in criminal administration").

excused domestic violence victims without more would ultimately sanction perjury without consequences in domestic violence cases. A far better approach would be to draft legislation that encourages truthful testimony and allows for a limited defense rather than relying on arbitrary decisions in individual prosecutor offices.

### *B. Application of the Recantation Defense to Perjury in Domestic Violence Cases*

Perjurers in domestic violence cases, like any other case, have defenses available that could excuse their perjury.<sup>298</sup> The best current defense available would be the recantation defense because it encourages truthful testimony.<sup>299</sup> For reasons discussed below, however, the recantation defense is an imperfect solution for the problem of perjury in domestic violence cases. Consequently, I propose legislation amending the recantation defense.<sup>300</sup>

As stated earlier, the crime of perjury is committed when a person “makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.”<sup>301</sup> Both the Model Penal Code (MPC) and the federal perjury statute relating to sworn testimony have culpability requirements of knowingly and willfully.<sup>302</sup> As a result the crime of perjury is completed once the lie has been willfully and knowingly stated.<sup>303</sup>

One possible defense to perjury is retraction, also known as the recantation defense. Under the MPC, “no person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.”<sup>304</sup> The recantation defense has been adopted by Congress and a minority of state jurisdictions.<sup>305</sup> The purpose

298. A common defense is to claim that there was no perjury. See Fischweicher, *supra* note 15, at 817 (discussing defenses available under the federal perjury statutes).

299. See 18 U.S.C. § 1623(d) (2006). For federal perjury prosecutions the defense is only available if a defendant is charged under § 1623. Defendants may also be charged with committing perjury under § 1621. Recantation is not considered an affirmative defense under § 1621, but may be used to “disprove willfulness or intent.” Fischweicher, *supra* note 15, at 817.

300. See *infra* Part IV.C.

301. MODEL PENAL CODE § 241.1(1) (2001); see also 18 U.S.C. § 1623 (2006).

302. See, e.g., MODEL PENAL CODE § 241.1(4); see also 18 U.S.C. § 1623(d).

303. See Agulnick, *supra* note 21, at 367.

304. MODEL PENAL CODE § 241.1(4). Similarly, the federal perjury statute provides:

Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

18 U.S.C. § 1623(d). Under federal law, an individual may be charged with perjury under § 1623 or 18 U.S.C. § 1621 (2006). § 1621 does not encompass a recantation defense.

305. See ALA. CODE § 13A-10-107 (1977); ALASKA STAT. § 11.56.235 (1978); ARK. CODE ANN. § 5-53-104 (1975); COLO. REV. STAT. § 18-8-508 (1971); DEL. CODE ANN. tit. 11, § 1231 (1995); FLA. STAT. § 837.07 (1990); HAW. REV. STAT. § 710-1064 (2008); IOWA CODE § 720.2 (1976); KY. REV. STAT. ANN. § 523.090 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 451 (1999); MONT. CODE ANN. § 45-7-201 (1981); N.Y. PENAL LAW § 210.25 (McKinney 1965); N.D. CENT. CODE § 12.1-11-04 (1973); OR. REV. STAT. § 162.105 (1971); 18 PA. CONS. STAT. § 4902 (1972); TEX. PENAL CODE ANN. § 37.05 (Vernon 1993); WASH. REV. CODE ANN. § 9A.72.060 (West 1975).



behind the defense “is to encourage truth telling by barring a punishment for a witness who lied but might wish to purge his conscience by retracting the false testimony and providing the truth.”<sup>306</sup> Congress enacted the statute to “induce the witness to correct a false statement.”<sup>307</sup> As written, the recantation defense has not proved helpful for perjury defendants generally, much less domestic violence victims. A reformulated recantation defense would protect domestic violence victims who have committed perjury but retract the false statement.

The current recantation defense has four elements: (1) retract the falsification; (2) in the course of the proceeding in which it was made; (3) before it became manifest that the falsification was or would be exposed; and (4) before the falsification substantially affected the proceeding.<sup>308</sup> As discussed below, the recantation defense will probably be inapplicable in most domestic violence cases as currently written.

The current recantation defense has never been successfully asserted.<sup>309</sup> The recantation defense as written requires proof that the retraction is made in the course of the same proceeding, before the statement substantially affects the proceeding, and before it becomes “clear to the defendant that such falsity has been or will be exposed.”<sup>310</sup> The requirements of these elements have been criticized as making it impossible for defendants to successfully use the recantation defense.<sup>311</sup> Some of the elements have no relationship to the underlying purpose of the recantation statute—to promote truthful testimony.<sup>312</sup> Arguably, lies can always affect official proceedings, particularly in domestic violence cases when the purported victim takes the stand and claims she was never abused.<sup>313</sup> A domestic violence victim or any witness who is intent on lying is unlikely to retract the lie on the witness stand. Second, the recantation defense only applies if the retraction is made before it becomes manifest that the falsification is exposed.

Even if a prosecutor knows that a witness is lying, how does it become manifest that a lie will or has been exposed to the witness? Professor Linda Harrison asserts that the manifestation prong is satisfied “when the witness becomes aware of any

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306. Agulnick, *supra* note 21, at 356.

307. Linda F. Harrison, *Recantation: Illusion or Reality?*, 2006 MICH. ST. L. REV. 637, 640 (2006) (citation, internal quotation marks, and alterations omitted).

308. 18 U.S.C. § 1623(d) (2006); MODEL PENAL CODE § 241.1(4).

309. In fact, the recantation defense has been criticized as an illusory defense that is frequently asserted but never satisfied. *United States v. Awadallah*, 202 F. Supp. 2d 17, 38 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003); *see also* Harrison, *Recantation*, *supra* note 306, at 644, 660. One significant criticism of the federal recantation statute which may explain why the defense is so illusory is the construction of the language, “the declaration has not substantially affected the proceeding *or* it has not become manifest that such falsity has been or will be exposed.” *See* 18 U.S.C. § 1623(d) (emphasis added). Most federal circuits have construed the word “or” in the conjunctive based on legislative intent while the Eighth Circuit has construed it as disjunctive based on a plain meaning argument. Harrison, *Recantation*, *supra* note 307, at 650–51; *see also* Annotation, *Recantation as Bar to Perjury Prosecution Under 18 U.S.C.S. § 1623(d)*, 65 A.L.R. FED. 177 (1983).

310. Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397, 415 (2003) (citations omitted).

311. *Id.* at 415–16.

312. *See* Agulnick, *supra* note 21, at 356.

313. *See* Douglass, *supra* note 33, at 193 (describing witness recanting and telling a different story than expected as devastating).

type of evidence that reveals the falsity.”<sup>314</sup> If the element can be satisfied merely by the witness’s “awareness that [her] falsehood has been revealed,” domestic violence victims would never be able to use the defense.<sup>315</sup>

Many domestic violence victims who recant make multiple statements. The first statement may be in the form of a sworn statement to the police or the grand jury that violence has occurred. The second statement could be an affidavit or could be made on the witness stand that nothing happened. There may even be a third statement during cross-examination by the prosecution that the abuse did happen and the initial recantation was false. At what point in this confusing scenario is the domestic violence victim aware that the falsehood has been revealed? Because of the significant problem of recantations in domestic violence cases, most cases do not proceed without independent evidence such as medical records, evidence of a struggle, photos, a 911 call, or a witness. Consequently, the moment the domestic violence victim makes the contradicting statement there is already evidence of falsehood revealed to the prosecution. Moreover, prosecutors are now trained to expect conflicting statements from domestic violence victims.<sup>316</sup>

As a prosecutor, I was always surprised to see how many recanting domestic violence victims were ill-prepared to hear their own 911 calls replayed in court or to read their sworn statements to the police. When a recanting domestic violence victim decides to lie and later admit the abuse, it is usually because the falsification was exposed through impeachment evidence.

An additional obstacle is the requirement that the retraction must be made in the “course of the proceeding.” Many domestic violence cases have multiple separate proceedings. There may be a proceeding to obtain a protective order, a separate proceeding regarding a divorce or custody issues, grand jury testimony, and a criminal proceeding. All of those proceedings can involve sworn testimony and statements which may leave a recanting victim in a vulnerable position. However, if the retraction does not take place in the same proceeding, the recantation defense may not apply.<sup>317</sup>

A Florida Court of Appeals case illustrates the problem with applying the current recantation defense as written in domestic violence cases. In *Adams v. State*, a purported domestic violence victim attempted to appeal her conviction of “perjury by contradicting statement.”<sup>318</sup> Her conviction was based on a false statement she made in a domestic violence petition when she was seeking an injunction.<sup>319</sup> Adams unsuccessfully argued that her attempt to dissolve the domestic violence injunction was evidence that she had recanted the purported false statement. Adams failed to preserve the issue on appeal, but in dicta the court stated that she would have been

314. harrison, *Recantation*, *supra* note 307, at 655–56.

315. harrison, *The Law of Lying*, *supra* note 310, at 417–18.

316. See, e.g., Long, *supra* note 9, at 12. Domestic violence victims “often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers.” *Id.* at 14; see also Claypoole, *supra* note 40, at 26 (“Anticipate that the victim will sign an affidavit in the office of the defense attorney recanting her earlier statement, or sign a non-prosecution form....”).

317. See generally Agulnick, *supra* note 21, at 374–75.

318. 727 So. 2d 983 (Fla. Dist. Ct. App. 1999).

319. *Id.* at 983–84.

unable to establish the defense because she never admitted the statement was false.<sup>320</sup> She also failed to establish that the retraction was given in the same continuous proceeding since her recantation was made during the criminal prosecution, not in the proceeding when she sought an injunction.<sup>321</sup>

One of the largest problems with the recantation defense in domestic violence cases is that it fails to consider the underlying motive for lying in the first place.<sup>322</sup> Examining the “why” behind lying by domestic violence victims is important to determine who should be punished and who should be excused.<sup>323</sup> The vast majority of domestic violence victims should not face a perjury prosecution; however, there is no viable legal excuse available, making jury nullification the only option.

### C. A Proposed Domestic Violence Defense to Perjury

Since there is no set standard regarding when a victim can be prosecuted for perjury, individual prosecutor offices have discretion, which can lead to arbitrary decisions. Moreover, domestic violence victims are currently without a viable defense. A reformulation of the recantation defense could make it more widely available to domestic violence victims.

A workable recantation defense in domestic abuse cases would state:

#### *Definitions:*

*The term domestic abuse victim includes any person who is subjected to physical, sexual, or severe psychological abuse by an intimate partner. Proof of abuse by an intimate partner may be established by physical evidence, expert witness testimony, eyewitness testimony, and other corroborating evidence including medical records, prior police reports, and calls for service. Abuse may also be established by proof of a prior conviction for assault, terroristic threat, destruction of property, or stalking involving the same parties.*

*Retraction is defined as verbally withdrawing an earlier false statement or making an admission that the earlier statement was false, even if the admission is made following the presentation of impeachment evidence. The retraction must be made during the victim’s testimony and prior to deliberation by the fact-finder.*

*Course of Proceeding is defined as any part of the criminal process bearing the same cause number including sworn oral or written statements during investigations, bail hearings, no contact hearings, grand jury proceedings, court appearances, hearings and trials, and any proceeding involving a restraining or civil protection order.*

*The burden of proof for this defense shall rest with the defendant.*

#### *Domestic Abuse Recantation Defense:*

*It shall be a defense to perjury if a false statement related to an incident of domestic abuse is made by the victim of the domestic abuse, the false statement*

320. *Id.* at 984.

321. *Id.*

322. When *mens rea* is considered in the recantation defense the focus is not on the reasons for the lie, but the reasons for recanting the misstatements. Agulnick, *supra* note 21, at 369. “In particular, a court would look to see if a recanter’s motivation for correcting his lies is to avoid prosecution by authorities who are aware or will become aware of the lies.” *Id.*

323. See *supra* Part II.

*resulted from psychological trauma or coercion, and the falsification is retracted in the course of the proceeding.*

*If a person is unable to qualify for this defense, but is able to prove she or he is the victim of the domestic abuse in question, the punishment for perjury shall be restricted to community supervision and/or a maximum time of incarceration of one year.*

The proposed statute would seek to protect victims who retract true allegations under oath. False complainants would not be protected under the statute because they would not be considered domestic abuse victims under the definitional section. The proposed statute uses the broad term of domestic abuse victim. The broad term of abuse is used in recognition of the fact that the domestic abuse is not limited to physical harm. Further, using a broad term like domestic abuse victim instead of battered woman would encompass all domestic abuse victims without promoting stereotypes that all victims are frail and emotionally defective. The defense, however, will not apply to all victims. The excuse is only available if the false testimony was due to emotional trauma or coercion. As discussed earlier, coercion can take on many forms, including fear of economic or physical harm. The term "coercion" should be further defined through case law. The defense is based on the premise that women, including domestic violence victims, are capable of abiding by the law, absent extraordinary circumstances.

Status as a victim would be proven by physical evidence, expert witnesses, and other corroborating evidence.<sup>324</sup> A victim who is unable to show that the false statement resulted from psychological trauma or coercion generally will not be protected. Of course, the special issues confronted by domestic violence victims do not occur in a vacuum. A victim may experience a combination of reasons that would lead her to commit perjury. Consequently, victims who lie solely for self-motivated objectives do not fall under the defense, but a victim who is motivated by various reasons may still qualify.

Proof of psychological trauma or coercion would be established by expert testimony. Although the statute is broad enough to encompass most domestic violence victims, it is narrow enough to only provide exculpation if the false statement is retracted. It is the retraction element that will limit application and prevent the defense from becoming a windfall.

The proposed statute retains two elements from the current recantation defense: retraction and course of the proceeding.<sup>325</sup> The retention of the two elements means the legislation will not be a windfall to all domestic violence victims. The witness's retraction of the false statement is obviously central to the perjury defense. If a victim fails to retract, the defense will not be available. Congress's intent that the federal recantation defense induces witnesses to correct false testimony is recognized in the proposed statute. If there is no retraction, the witness would have failed to take any act to justify an excuse for her unlawful behavior.<sup>326</sup> The

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324. While I recognize that there is no corroborating evidence in some domestic violence cases due to the private relationship between the parties, there would normally be corroborating evidence in this instance since the recantation would presumably take place in light of a domestic violence prosecution.

325. See 18 U.S.C. § 1623(d) (2006).

326. If the defense did not require a retraction before the falsity was made known, more victims could use

retraction element also encourages the witness who has lied to tell the truth and participate in her own rescue. The second element that is retained is in the course of the same proceeding; however, this element should be broadly construed to encompass the entire criminal proceeding from arraignment to trial. Since civil protection orders and restraining orders are closely related to and sought during the pending of criminal charges, they are included as well.

The proposed perjury defense requires truthful testimony, which may be difficult for some who insist on maintaining the false statement. A perjury defendant who wants to avail herself of the defense will have to prove that she is a victim, which may conflict with the desire to minimize and deny the incident. The defense will not be available to victims who lie and fail to retract the false statement on the witness stand. A policy of prosecuting individuals for perjury unless they fall within the defense would discourage recanting under oath, which tends to sabotage domestic violence prosecutions and allows some batterers to escape conviction. The defense would also protect domestic violence victims from aggressive and overzealous prosecution tactics.

The special issues confronting domestic violence victims should also serve as mitigation for punishment. Batterer intervention programs, community supervision, and pre-trial diversion have become popular outcomes for batterers charged with misdemeanor assault.<sup>327</sup> The punishment for domestic violence victims who commit perjury should be limited as well. Perhaps access to counseling services would better benefit domestic violence victims who commit perjury as opposed to confinement.

Normally, a perjury conviction can expose a defendant to significant jail time. For example, a federal perjury conviction may result in a maximum five-year sentence.<sup>328</sup> Joann Gilliam, the domestic violence victim who was convicted of perjury discussed earlier, received thirty months in prison for perjury and obstruction of justice.<sup>329</sup> In comparison, many domestic violence cases are prosecuted as misdemeanors instead of felonies.<sup>330</sup> Consequently, a victim who commits perjury would be exposed to a punishment range that is significantly greater than her batterer. The proposed statute provides for limited jail time in the event of egregious cases or defendants with significant prior criminal histories.<sup>331</sup>

A statutory defense to perjury provides a mechanism for the system to excuse victim wrongdoing based on a set standard as opposed to arbitrary decision making. Of course, the defense will not eliminate arbitrary decisions, but it will provide needed guidance to prosecutors faced with the victim who perjures herself in the

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the defense. The obvious problem with such an argument is that it contradicts the purpose behind the recantation defense: to allow the repentant liar an opportunity to tell the truth. See generally Agulnick, *supra* note 21. A person who is confronted with impeachment evidence is not testifying truthfully out of their own volition.

327. See generally Dekki, *supra* note 100; Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998).

328. See 18 U.S.C. § 1623(a).

329. See *supra* Part II.

330. Hanna, *The Paradox of Hope*, *supra* note 327, at 1521. Misdemeanors typically have a punishment range limited to one year.

331. The minimized potential punishment reflects a balance between holding perjurers accountable while recognizing that the perjurers are still crime victims.

domestic violence case. Since prosecutor offices are autonomous and have discretion in charging decisions, legislation would be the most effective way to provide guidance. Prior to charging, prosecutors could evaluate the applicability of the defense. Criminal justice participants would no longer have to ignore unlawful behavior and ultimately sanction perjury. The defense would also serve to protect victims from overzealous prosecution.

### CONCLUSION

Perjury committed by domestic violence victims is a complex issue. Perjury is no less perjury when committed by a victim. Similarly, a victim is no less a victim when she breaks the law. The existence of false statements, particularly sworn false statements, is a significant problem in domestic violence cases. Prosecuting victims who perjure themselves is an imperfect solution. When confronted with false statements from domestic violence victims it is important that members of the criminal justice system count the costs. The costs involved with either ignoring perjury or prosecuting are substantial. In most cases, a domestic violence victim who recants a sworn statement is vulnerable to perjury charges and is currently without a viable defense. Turning a blind eye to perjury suggests that every domestic violence victim is incapable of obeying the law or facing the consequences of her decision. If domestic violence victims are treated differently, it should not be because of stereotypes and arbitrary decisions. Rather, legislation is necessary to set the proper parameters of when perjury should be excused. Providing guidance may also help prosecutors proceed with perjury and related charges when warranted. Hopefully, the proposed domestic violence defense to perjury will afford some protection to victims who retract their false statement. Instead of turning a blind eye, perjury in domestic violence cases must be dealt with head-on.