

## **Victims' Rights Compel Action to Counteract Judges' and Juries' Common Misperceptions About Domestic Violence Victims' Behaviors\*\***

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Domestic violence,<sup>1</sup> which is a pattern of controlling and abusive behavior engaged in by one intimate partner to control the other,<sup>2</sup> is a pervasive social, economic, and health problem in the United States.<sup>3</sup> Despite its prevalence, crimes of domestic violence are chronically underreported to law enforcement, and of those incidents that are reported and referred for criminal prosecution, rates of prosecution vary dramatically.<sup>4</sup> This reality is attributable, in part, to the existence of widespread misconceptions or myths about domestic violence victims, perpetrators, and the crime. Among these myths are the beliefs that victims exaggerate the problem of domestic violence; that victims instigate, provoke, deserve, or subconsciously desire the abuse; and that “true” victims immediately and permanently leave abusive partners.<sup>5</sup>

Fueled by a focus on victim behavior that appears to the inexperienced or untrained eye to be confusing and not consistent with how a victim “should” behave, these myths encourage suspicion of a victim’s account of the crime and ultimately lead to the conclusion that the victim lacks credibility.<sup>6</sup> Victim credibility is routinely weighed by all criminal justice system participants—including police, prosecution, judges, and juries—as they determine whether and how to investigate, prosecute, assess release conditions, and convict and sentence someone for a crime. Due to the reality that most domestic violence crimes often have only two witnesses<sup>7</sup>—the victim and the perpetrator—this negative impact on the credibility of the victim creates a significant barrier to accessing justice.

This *Bulletin* identifies many of the most common domestic violence myths, provides evidence to debunk these myths, and explains that victims’ rights compel the submission of explanatory information to educate judges and juries about the reasons victims engage in what otherwise might be perceived as “counterintuitive” behaviors.

\* View NCVLI's other legal publications at [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/professional\\_resources/ncvli\\_library/](https://law.lclark.edu/centers/national_crime_victim_law_institute/professional_resources/ncvli_library/)

## I. Understanding and Countering Common Myths Regarding Victims' Behaviors

The prevalence of sexual and domestic violence myths causes the public to search for reasons to doubt, rather than reasons to believe, allegations of a domestic or sexual assault. This doubt often is fueled by a focus on the victim's behavior both during and after the assault, which laypeople—who generally are inexperienced and uneducated about common victim responses to trauma—may find puzzling.<sup>7</sup> Frequently, the public's expectations of how a victim “should” behave conflicts with the way victims actually behave.<sup>8</sup>

Consistent with widely held myths about domestic violence, members of the public—including law enforcement, prosecutors, judges, and juries—typically expect victims to immediately report all of their intimate partners' abusive behaviors, maintain a consistent story regarding their abuse without recantation, leave their abusive partners shortly after being abused, and not return to or have contact with their abusive intimate partners after having left. Many domestic violence victims' behaviors are not consistent with these assumptions. “When this [perceptual conflict] occurs, the public perceives a victim's behavior as ‘counterintuitive,’ and, therefore, compelling evidence of her lack of credibility.”<sup>9</sup>

Understanding the dynamic of domestic violence (only one aspect of which is physical assault) is the first step in helping law enforcement, prosecutors, judges, and juries avoid making flawed credibility determinations based upon societal myths that incorrectly define “normal” victim behavior. As part of the dynamic of domestic violence, the perpetrator engages in consistent behavior, both subtle and straightforward, which psychologically terrorizes the victim.<sup>10</sup> The perpetrator often creates a dynamic of dependency, both practical and

psychological, that goes unseen by those outside the relationship.<sup>11</sup> Over time, this dynamic may create neural networks in the brain of the victim that broadly influence her behavior.<sup>12</sup> It is important to educate all system participants about common survivor behaviors that are likely to be perceived as “counterintuitive” because the behaviors do not conform to the public's assumptions about how domestic violence victims should behave.

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### A. *Failing to report abusive acts.*

When a victim of domestic violence turns to law enforcement, she may recount a history of abusive behavior, including specific incidents of prior abuse that led to prior injuries.<sup>13</sup> As noted above, much of this prior abusive behavior may not have been previously reported to law enforcement; yet drawing upon the myth that victims of “real” domestic violence report all abusive incidents, particularly those causing physical injury, law enforcement may immediately doubt the victim's credibility.<sup>14</sup> This myth of reporting fails to account for the fact that victims of domestic violence often do not report

their abuse for a myriad of reasons, including: (1) past negative experiences with the criminal justice system;<sup>15</sup> (2) retaliation from the abusers for past reporting or the threat of reporting;<sup>16</sup> (3) a belief that the abusive behavior is one's own fault rather than the responsibility of the perpetrator;<sup>17</sup> and (4) a belief that an assault is an anomaly.<sup>18</sup>

#### B. *Recanting of an initial report.*

After reporting an incident of domestic violence, victims may recant the initial report. Many people assume that if a victim recants an initial report it is because the reported incident did not happen or was exaggerated.<sup>19</sup> Importantly, however, victims of domestic violence generally recant for reasons unrelated to the veracity of their initial report and instead related to the impacts of the dynamic of domestic violence, including that: (1) the perpetrator artfully appeals to the victim's emotions, minimizes the abuse, complains of depression, or expresses that he misses the children;<sup>20</sup> (2) the victim has been threatened by the perpetrator or the perpetrator's family and friends;<sup>21</sup> and (3) the victim is financially dependent on the perpetrator.<sup>22</sup>

#### C. *Remaining in the relationship.*

Many survivors of domestic violence remain in a relationship with their perpetrators—conduct that runs counter to the common assumption that if a victim was truly being abused, she would immediately leave the relationship. There are a myriad of reasons that a victim may remain in a relationship with an abusive partner, including that: (1) leaving an abusive partner increases the victim's risk for serious harm;<sup>23</sup> (2) a victim may be financially dependent upon a perpetrator

such that leaving is practically impossible;<sup>24</sup> (3) a victim's religious beliefs make it difficult to conceptualize leaving the relationship;<sup>25</sup> and (4) consistent with a decision to not report abuse, a victim may feel responsible for the abuse and therefore not feel entitled to end the relationship.<sup>26</sup>

#### D. *Ongoing contact with the perpetrator.*

Even when a victim ends her intimate relationship with an abusive partner, she may have ongoing contact with the perpetrator. This dynamic runs counter to common assumptions that a "true victim" would be grateful to get away and be free from the relationship and would never look back. These assumptions contribute to the perception of some that a victim who has "voluntary" contact did not actually experience abuse or at least not severe abuse. Research suggests, however, that victims have continued contact with perpetrators after leaving a relationship for a wide variety of reasons, including: (1) facilitation of contact between shared children and the perpetrator;<sup>27</sup> (2) feeling responsible for the abuse, and therefore guilty about staying away from a perpetrator who has expressed feelings of depression

or even suicide, or professed remorse and a desire to seek counseling;<sup>28</sup> and (3) managing risk by staying aware of the perpetrator's whereabouts, or, if the perpetrator locates the victim, assessing that it is safer to be with the perpetrator rather than flee.<sup>29</sup>

#### E. *Returning to an intimate partner relationship with the perpetrator.*

Victims who initially end an intimate relationship with an abusive partner may ultimately return to that partner. Many find this behavior counterintuitive, believing that only women

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who want to be abused or women who were not actually abused return to their partners. There are, however, many reasons why victims return to or renew an intimate relationship with their abusive partners, including that: (1) the victim's financial circumstances may be precarious when separated from the perpetrator, including risking homelessness;<sup>30</sup> (2) the victim may be convinced by the perpetrator that the incident will never occur again due to the perpetrator expressing remorse or promising to seek counseling;<sup>31</sup> and (3) because being alone is overwhelming for the victim.<sup>32</sup>

Myths about domestic violence fundamentally undermine survivors' access to justice.

## II. Victims' Rights Compel the Introduction of Explanatory Information About Victim Behaviors in Justice Proceedings

Victims have a fundamental right to access justice,<sup>33</sup> which, together with their rights to fairness, dignity, and respect,<sup>34</sup> and protection,<sup>35</sup> compel offering information during the justice process to educate judges and juries about common victim behaviors that they may otherwise perceive to be “counterintuitive.”<sup>36</sup> Judges and juries need an “accurate context in which to evaluate victim behavior so that . . . [they] do not misjudge certain conduct as evidence of a victim's dishonesty and incredibility.”<sup>37</sup> If judges and juries form conclusions about victims' credibility or entitlement to other legal protections and rights based on domestic violence myths, victims are denied fair adjudication of the matter.<sup>38</sup>

Although introduction of explanatory information is critical during trial, there are a myriad of other procedural moments when introduction of explanatory information may also be necessary, including release, sentencing, and restitution hearings. With respect to release hearings, the judge may underestimate the victim's fear of

defendant—and the level of threat to the victim if defendant is released—if the judge is made aware that the victim initiated or maintained post-assault contact with the perpetrator and is not provided additional contextual information to combat the perception that this behavior is “counterintuitive.” With regard to restitution determinations, without a proper understanding of the nature and effects of domestic violence, a judge may fail to include a myriad of appropriate expenses in a victim's restitution award.<sup>39</sup>

Explanatory information may be offered by way of having the victim provide an explanation or by the use of expert evidence.<sup>40</sup> Many courts have sanctioned the use of expert testimony as a permissible way to prevent jurors from misjudging the victim based upon the jurors' misperceptions about domestic violence.<sup>41</sup>

Myths about domestic violence fundamentally undermine survivors' access to justice. Victims' rights require that victims' behaviors be understood by judges and juries, and that this understanding be based on accurate information about the nature of the crimes and their effects on victims.

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\*\* NCVLI expresses its gratitude to Christopher F. Wilson, PsyD., contributing author for this *Bulletin*. Dr. Wilson is a licensed psychologist in Portland, Oregon and the president-elect of the Oregon Psychological Association. For the last fifteen years Dr. Wilson has worked in the field of domestic violence, with both perpetrators and victims.

<sup>1</sup> This *Bulletin* addresses common misperceptions held about adult domestic violence victims' behaviors and offers strategies to educate judges and juries about what is viewed as “counterintuitive” behaviors of these victims. The public (which includes judges and juries) also holds a myriad of misperceptions with respect to sexual assault victims' behaviors. Notably, there is overlap between these victim populations. For example, studies measuring the prevalence of sexual violence between intimate partners have suggested that 40 to 50 percent of battered women also experience sexual assault, and that 62 percent of adult women who reported being raped also reported that an



intimate partner had perpetrated the rape. Tara N. Richards & Lauren Restivo, *Sexual Victimization Among Intimates*, in *Sexual Victimization: Then and Now* 69, 69 (Tara N. Richards & Catherine D. Marcum, eds., Sage Publications, Inc. 2014). Although the populations and misperceptions overlap, the topic of misperceptions held about sexual assault victims' behaviors is addressed in a separate *Bulletin*. See Nat'l Crime Victim Law Inst., *Victims' Rights Compel Action to Counteract Judges' and Juries' Common Misperceptions About Sexual Assault Victims' Behaviors*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2014, available at <http://law.lclark.edu/live/files/17491-counteracting-common-misperceptions-of-sa-victims>.

For ease of reference, feminine pronouns are used in this *Bulletin* when referring to victims of domestic violence and masculine pronouns are used when referring to perpetrators of violence. This language choice is based upon studies by the U.S. Department of Justice indicating that a large majority of domestic violence victims are female, and a large majority of perpetrators are male. See Matthew R. Durose et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Family Violence Statistics Including Statistics on Strangers and Acquaintance*, at 2 (2005), available at <http://www.bjs.gov/content/pub/pdf/fvs02.pdf> (reporting that 73 percent of family violence victims were female and that females were 84 percent of spouse abuse victims). The language choice should not detract from the understanding that women perpetrate domestic violence and men are victimized by it, and that all victims deserve access to justice and to the services they need.

<sup>2</sup> See Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model 2* (1993). See also Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 *J. Marriage & Family* 283-94 (1995); Nat'l Coal. Against Domestic Violence, *Domestic Violence*, at 1 (2014), available at <http://www.ncadv.org/files/National%20DV%20Stats%20Sept%202014.pdf> (defining domestic violence as “the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by one intimate partner against another”); U.S. Dep't of Justice, Office on Violence Against Women, *Domestic Violence*, <http://www.justice.gov/ovw/domestic-violence#dv> (last visited Sept. 29, 2014) (defining domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner”).

It is important to recognize that the definition of domestic violence used in this *Bulletin* does not capture all violence that may occur between intimate partners; violence properly termed “common couples violence” or “secondary aggression” is not addressed. See Michael P. Johnson, *Gender and Types of Intimate Partner Violence: A Re-*

*sponse to an Anti-feminist Literature Review*, 16 *Aggression & Violent Behavior* 289 (2011) (discussing the debate in the literature regarding the various types of violence between intimate partners and the appropriate responses).

<sup>3</sup> See Michele C. Black et al., Nat'l Ctr. for Injury Prevention & Control of the Ctrs. for Disease Control & Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, at 2 (2011), available at [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) (reporting that more than one in three women have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime); Ctr. for Disease Control & Prevention, *Understanding Intimate Partner Violence*, at 1 (2012), available at [http://www.cdc.gov/violenceprevention/pdf/ipv\\_factsheet-a.pdf](http://www.cdc.gov/violenceprevention/pdf/ipv_factsheet-a.pdf) (reporting that “[t]he medical care, mental health services, and lost productivity (e.g., time away from work) cost of [intimate partner violence] was an estimated \$5.8 billion in 1995”); U.S. General Accounting Office, *Domestic Violence Prevalence and Implications for Employment Among Welfare Recipients*, at 8 (1998), available at <http://www.gao.gov/assets/230/226642.pdf> (reporting that 24 to 52 percent of domestic violence victims had lost their jobs because of the abuse); Sharon G. Portwood & Julia Finkel Heany, *Responding to Violence Against Women: Social Science Contributions to Legal Solutions*, 30 *Int'l J.L. & Psychiatry* 237, 237 (2007) (detailing statistics of intimate partner violence).

<sup>4</sup> Durose et al., *supra* note 1, at 2 (reporting that approximately 40 percent of family violence victimizations were not reported to police between 1998 and 2002, and that approximately 49 percent of family violence crimes recorded by police resulted in an arrest); Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, at Ch. 6-1 (2009), available at <http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/Pages/welcome.aspx> (analyzing a total of 120 studies of intimate-partner violence prosecutions between 1973 and 2006 and finding the average arrest prosecution rate was 63.8 percent drawn from a range from 4.6 percent to 94 percent).

<sup>5</sup> For a general discussion of domestic violence myths, see Niwako Yamawaki et al., *Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser*, 27 *J. Interpersonal Violence* 3195 *passim* (2012); Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Prosecutions*, Special Topics Series, Nat'l Dist. Attorneys Ass'n, at 1 (2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).

<sup>6</sup> Long, *supra* note 5, at 1.

<sup>7</sup> Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 Tex. L. Rev. 857, 870 (2009) (noting that because there are usually only two witnesses to domestic violence it is among the hardest crimes to prosecute). See also Long, *supra* note 5, at 1. Importantly, although the data reveals that there are usually only two witnesses, particularly when assessed for purposes of prosecuting domestic violence, this data is not contrary to the fact that children are exposed to domestic violence at high rates. See Renee McDonald et al., *Estimating the Number of American Children Living in Partner-Violent Families*, 30 J. Fam. Psychol. 137, 139 (2006) (noting that approximately 15.5 million children are exposed to domestic violence every year).

<sup>8</sup> Long, *supra* note 5, at 1.

<sup>9</sup> *Id.*

<sup>10</sup> Ellen Pence & Michael Paymar, *Power and Control: Tactics of Men Who Batter: An Educational Curriculum passim* (1990); Kate Cavanagh et al., 'Remedial Work': Men's Strategic Responses to Their Violence against Intimate Female Partners, 35 *Sociology* 695 *passim* (2001). This understanding of the dynamic of domestic violence as a consistent pattern of behavior is an evolution from early articulations and understandings of the dynamic of domestic violence as a "cycle of violence." See Lenore E. Walker, *The Battered Woman passim* (1979). Also, this behavior of perpetrators is based on deeply held beliefs that controlling or abusing one's intimate partner is justifiable. See Lundy Bancroft, *Why Does He Do That: Inside the Minds of Angry and Controlling Men passim* (2002) (analyzing the various belief systems of abusive partners and noting they are all based on the core belief that controlling or abusing one's intimate partner is justifiable). See also Edward W. Gondolf, *The Future of Batterer Programs: Reassessing Evidence-Based Practice passim* (2012) (discussing perpetrator belief systems and their basis in the idea that controlling or abusing is justifiable, and promoting the idea that confronting these beliefs must be a central component of batterer intervention programs); Bernadette Dempsey & Andrew Day, *The Identification of Implicit Theories in Domestic Violence Perpetrators*, 55 *Int'l J. Offender Therapy and Comp. Criminology* 416, 417 (2011) (explaining that perpetrators appear to hold "similar sets of core beliefs about themselves, the world, and their violence" and identifying these beliefs as cognitive distortions).

<sup>11</sup> Outsiders do not see the behavior in part because the dynamic of dependency is often created by engaging in patterns of behavior intended to isolate the abused partner from friends and family, followed by verbal abuse intended

to create doubt about whether the partner is capable of surviving on her own, thereby devastating her sense of self, and ultimately influencing her belief that she is dependent on the perpetrator. Isolation may also be achieved by isolating the victim financially by preventing access to bank accounts or other financial resources and keeping the victim's name off leases, mortgages, and other bills. See Walker, *supra* note 10, at 166 (noting that both physical battering and restrictions by the batterer result in social isolation, dependency, and loss of individuality); Amy Holtzworth-Munroe & Gregory Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 *Psychol. Bull.* 476, 482 (1994) (reporting research indicating that "family only" abusers make up as much as 50 percent of abusive partners). See also Sharon Cook, *Emotionally Abusive Husbands and Boyfriends: Learn about Their Mentally Abusive Behaviors So You Don't End Up Crazy passim* (2013) (noting that the perpetrator will create a sense of doubt in the victim about a large number of issues that include one's feelings, experiences, talents, and abilities); Amy Holtzworth-Munroe & Jeffrey C. Meehan, *Typologies of Men Who Are Maritally Violent: Scientific and Clinical Implications*, 19 *J. Interpersonal Violence* 1369, 1373 (2004) (noting that the typology of Holtzworth-Munroe and Stuart appeared valid and similar to typologies suggested by other researchers).

<sup>12</sup> See Alan N. Simmons et al., *Functional Activation and Neural Networks in Women with Posttraumatic Stress Disorder Related to Intimate Partner Violence*, 64 *Biological Psychiatry* 681, 682 (2008) (citing Barbara Rothbaum & Michael Davis, *Applying Learning Principles to the Treatment of Post-Trauma Reactions*, 1008 *Annals of the New York Academy of Sciences* 112 (2003)) (describing that victims of domestic violence who experience post-traumatic stress disorder anticipate fear and discomfort that contributes substantially to their behavior); David Lisak, *The Neurobiology of Trauma*, at 3 (2002) (unpublished manuscript), <http://id3464.securedata.net/nowldef/html/njep/dvd/pdf/neurobiology.pdf> (explaining that the "characteristics of traumatic memory are not the consequence of conscious choice or resistance. Rather, they are the consequence of the radically altered neurochemical environment in which the memories were encoded.").

<sup>13</sup> Klein, *supra* note 4, at Ch. 2-2 (noting that victims typically suffer multiple assaults before contacting authorities).

<sup>14</sup> See Long, *supra* note 5, at 1. See also Yamawaki et al., *supra* note 5 (discussing that people who endorse domestic violence myths are more likely to blame victims, not hold the perpetrator responsible, and minimize the severity of the incident).

<sup>15</sup> Klein, *supra* note 4, at Ch. 2-4.

<sup>16</sup> Lawrence A. Greenfeld et al., Bureau of Justice Statis-

tics, U.S. Dep't of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, at 19 (1998), available at <http://bjs.gov/content/pub/pdf/vi.pdf>.

<sup>17</sup> Elizabeth Shrader & Monserrat Sagot, Pan Am. Health Org., *Domestic Violence: Women's Way Out* 6 (2000), available at <http://www.paho.org/english/hdp/hdw/women-swayout.pdf>.

<sup>18</sup> For a discussion of the myriad of reasons victims do not report, see generally Tom Lininger, *Prosecuting Batters After Crawford*, 91 Va. L. Rev. 747, 769-70 (2005); Yamawaki et al., *supra* note 5; Kristine Soulé, Comment, *The Prosecution's Choice: Admitting a Non-Testifying Domestic Violence Victim's Statements Under Crawford v. Washington*, 12 Tex. Wesleyan L. Rev. 689, 697 (2006).

<sup>19</sup> Long, *supra* note 5, at 21.

<sup>20</sup> Amy Bonomi et al., "Meet me at the hill where we used to park": *Interpersonal Processes Associated with Victim Recantation*, 73 Soc. Sci. & Med. 1054, 1057 (2011).

<sup>21</sup> See Lininger, *supra* note 18, at 868-69 (noting that "one study found that batterers threaten retaliatory violence in as many as half of all cases, and 30% actually assault their victims again during the predisposition phase of prosecution").

<sup>22</sup> Financial dependence may arise because the perpetrator has prevented the victim from working, having a bank account, or has exercised such long-term and complete financial control that the victim has no independent credit history. See generally Deborah K. Anderson & Daniel G. Saunders, *Leaving An Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 Trauma, Violence, & Abuse 163, 171 (2003) (reporting that research indicates that income variables were "among the most consistently related" predictors of a woman's decision to leave or stay with an abusive partner).

<sup>23</sup> Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1092 (2003) (noting that "women who separated from their abusive partners after cohabitation experienced increased risk of femicide, particularly when the abuser was highly controlling"); Ruth E. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 Violence Against Women 1363, 1371 (2000) (reporting that "1 in 3 women (36%) were assaulted by an ex-partner at least once prior to either reuniting or the end of the study").

<sup>24</sup> See *supra* note 23. See also Suellen Murray, "Why doesn't she just leave?": *Belonging, Disruption and Domestic Violence*, 31 Women's Stud. Int'l Forum 65, 67 (2008) (noting that research indicates financial dependence on a partner is one of the reasons for maintaining a relationship).

<sup>25</sup> Anderson & Saunders, *supra* note 22, at 170 (reporting that research indicates that women with "traditional religious values/beliefs" were more likely to be more committed to their relationship, making the decision to leave more difficult).

<sup>26</sup> Shrader & Sagot, *supra* note 17, at 6.

<sup>27</sup> See Ilsa Evans, *Battle-Scars: Long Term Effects of Prior Domestic Violence* 36 (2007) (reporting that of 134 victims studied, 53 percent were required to have ongoing contact with their former abusive partner due to child visitation).

<sup>28</sup> See Walker, *supra* note 10, at 170, 238 (noting that an abusive partner may blame the victim for causing his behavior, and that she may feel humiliated and guilty); Bancroft, *supra* note 10, at 99, 214 (noting that men who take on a "victim stance" make the victim feel guilty for leaving by, among other things, portraying themselves as desperately needing the victim, making the departure seem like abandonment, and, at times, threatening suicide); Sascha Griffing et al., *Domestic Violence Survivors' Self-Identified Reasons for Returning to Abusive Relationships*, 17 J. Interpersonal Violence 306, 312 (2002) (reporting that expressions of remorse and promises to seek counseling were among the leading reasons for a victim's decision to return to an abusive partner).

<sup>29</sup> Jill Davies, *Advocacy Beyond Leaving: Helping Battered Women in Contact With Current or Former Partners*, at 4 (2009), available at [http://www.futureswithoutviolence.org/userfiles/file/Children\\_and\\_Families/Advocates%20Guide%281%29.pdf](http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Advocates%20Guide%281%29.pdf) (noting that victim contact with an abusive partner after leaving may be part of a strategy to effectively assess the perpetrator's behavior and risk, and that victims whose former-abusive partners continue to show up in the victim's life may decide that it's safer to let the contact occur).

<sup>30</sup> See *supra* note 23. See also U.S. Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities*, at 3, 91 (2013), available at <http://www.usmayors.org/pressreleases/uploads/2013/1210-report-HH.pdf> (reporting that domestic violence was a leading cause of homelessness in a number of major cities).

<sup>31</sup> Griffing et al., *supra* note 28, at 312 (reporting that in a study of 90 women living in a residential facility for victims of domestic violence, of those who had previously



returned to their abusive partner, expressions of remorse and promises to seek counseling were among the leading reasons for the decision to return).

<sup>32</sup> See Yamawaki et al., *supra* note 5, at 3197 (recounting research indicating that fear of being alone is a reason that some individuals stay in an abusive relationship).

<sup>33</sup> Courts recognize the fundamental nature of the right of all people to access the courts. See, e.g., *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) (“Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment.”); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right). See generally Nat’l Crime Victim Law Inst., *Rape Victims’ Access to Justice: Understanding and Combatting Pervasive Rape Myths*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Apr. 2014, at 3 (internal citation omitted), available at <https://law.lclark.edu/live/files/16725-ncvlivawrape-victims-access-to> (“‘Access to justice’ is about each individual’s access to courts, as well as the availability of remedies for violations of rights. Studies have revealed that rape myths impact reporting, documenting that survivors are less likely to report a rape if it does not meet characteristics of the ‘real rape’ paradigm, such as the use of a weapon, victim injury, and lack of prior relationship. This, in part, may be due to the survivors’ views about whether what happened to them was ‘real rape’ and their fear that police will not perceive the assault as a rape. Their fear may be founded, as research reveals that police officers are generally less likely to recommend charging rapists when the factual scenario deviates from that of the ‘real rape’ paradigm. Additionally, prosecutors are less likely to prosecute when victims do not meet the standard of the ‘ideal’ victim. When survivors choose not to report and when system actors are unwilling to pursue charges because of the impact of rape myths, victims’ ability to access available legal protections is diminished.”).

<sup>34</sup> The right to fairness, dignity, and respect includes the right to have one’s rights considered within the criminal justice system. Some combination of these broad rights is found in many jurisdictions nationwide. See, e.g., 18 U.S.C. § 3771(a)(8) (stating that crime victims have the “right to be treated with fairness and with respect for the victim’s dignity and privacy”); Ariz. Const. art. 2, § 2.1(A)(1) (treated with fairness, respect, and dignity); Cal. Penal Code § 679 (treated with dignity, respect, courtesy, and sensitivity); Colo. Rev. Stat. § 24-4.1-302.5(1)(a) (treated with fairness, respect, and dignity); Conn. Const. art. 1, § 8(b)(1) (treated with fairness and respect); Haw. Rev. Stat. § 801D-1 (treated with dignity, respect, courtesy, and sensitivity); Idaho Const. art. 1, § 22(1) (treated with fairness, respect, and dignity); Ill. Const. art. 1, § 8.1(a)

(1) (treated with fairness and respect for victim’s dignity); Ind. Const. art. 1, § 13(b) (treated with fairness, dignity, and respect); Kan. Stat. Ann. § 74-7333(a)(1) (treated with courtesy, compassion, and respect for victim’s dignity); La. Const. art. I, § 25 (treated with fairness, dignity, and respect); Md. Const. Decl. of Rights art. 47(a) (treated with dignity, respect, and sensitivity); Mich. Const. art. I, § 24(1) (treated with fairness and respect for victim’s dignity); Miss. Const. art. 3, § 26A (treated with fairness, dignity, and respect); N.H. Rev. Stat. Ann. § 21-M:8-k(II) (a) (treated with fairness and respect for victim’s dignity); N.J. Const. art. I, § 22 (treated with fairness, compassion, and respect); N.M. Const. art. II, § 24(A)(1) (treated with fairness and respect for victim’s dignity); Ohio Const. art. I, § 10a (accorded fairness, dignity, and respect); Okla. Const. art. II, § 34 (treated with fairness, respect, and dignity); Or. Const. art. I, § 42(1) (accorded due dignity and respect); Pa. Const. Stat. § 11.102(1) (treated with dignity, respect, courtesy, and sensitivity); R.I. Const. art. 1, § 23 (treated with dignity, respect, and sensitivity); S.C. Const. art. I, § 24(A)(1) (treated with fairness, respect, and dignity); Tenn. Code Ann. § 40-38-102(a)(1) (treated with dignity and compassion); Utah Const. art. I, § 28(1) (a) (treated with fairness, respect, and dignity); Vt. Stat. Ann. tit. 13, § 5303(a) (treated with dignity and respect); Va. Const. art. I, § 8-A (accorded fairness, dignity, and respect); Wash. Const. art. 2, § 35 (accorded due dignity and respect); Wis. Const. art. I, § 9m (treated with fairness and dignity).

<sup>35</sup> See, e.g., 18 U.S.C. § 3771(a)(1) (providing crime victims with “[t]he right to be reasonably protected from the accused”); Alaska Const. art. 2, § 24; Conn. Const. art. 1, § 8(b)(3); Ill. Const. art. 1, § 8.1(a)(7); Mich. Const. art. I, § 24(1); Mo. Const. art. I, § 32(1)(6); N.M. Const. art. II, § 24(A)(3); Ohio Const. art. I, § 10a; S.C. Const. art. I, § 24(a)(6); Wis. Const. art. I, § 9m. Several other states provide victims with constitutional and statutory rights to be free from intimidation, harassment, or abuse. See, e.g., Ariz. Const. art. 2, § 2.1(A)(1); Okla. Const. art. II, § 34; Tenn. Const. art. I, § 35(2).

<sup>36</sup> Importantly, submission of such information is only aligned with victims’ rights when it is supported by the victim. Submission of this explanatory information contrary to the victim’s desires runs counter to the fundamental purpose of victims’ rights (*i.e.*, victim agency). The importance of victim agency is rooted in the inherently out-of-control nature of a crime; when a person becomes a “victim,” he or she often feels robbed of control. See, e.g., Alan N. Young, *The Role of the Victim in the Criminal Process: A Literature Review—1989 to 1999*, at 11, Ottawa, Canada: Dep’t of Justice, Research and Statistics Div., available at [http://www.justice.gc.ca/eng/pi/rs/reprap/2000/rr00\\_vic20/rr00\\_vic20.pdf](http://www.justice.gc.ca/eng/pi/rs/reprap/2000/rr00_vic20/rr00_vic20.pdf). See also Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for*



*Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 17 (1987) (explaining why giving victims input into the criminal justice system proceedings and providing them with information about the justice process helps to increase victims' perceptions of control, decrease their feelings of helplessness, and reduce psychological distress). One key way in which victims may regain a sense of autonomy is through the choice of participation in the criminal justice process. See, e.g., Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traumatic Stress 159, 162-63 (2003) (discussing research that shows that victims' "overall satisfaction with the criminal justice system was directly related to their sense of inclusion and empowerment" and victims who were given a chance to participate in the criminal justice process "appeared to have better mental health outcomes"); Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 Int'l R. of Victimology 33, 36 (1994) (observing that research indicates that "[v]ictim participation in the criminal justice process reduces feelings of alienation developed when victims believe that they have neither control over, nor 'standing' in, the process"). See also Dean G. Kilpatrick et al., *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, U.S. Dep't. of Justice, Nat'l Inst. of Justice Res. in Brief (1998), available at <https://www.ncjrs.gov/pdffiles/173839.pdf> (finding that victims in states with strong victims' rights protections were more satisfied with the criminal justice system than those in states with weaker victims' rights protections).

<sup>37</sup> Long, *supra* note 5, at 9.

<sup>38</sup> A number of courts have held or recognized that a defendant's fair trial rights include the right to have the jury "fairly evaluate the evidence." *Fryer v. State*, 693 So. 2d 1046, 1048 (Fla. Dist. Ct. App. 1997). See also *United States v. Van Hise*, No. S4 12 Cr. 847(PGG), 2013 WL 6877319, at \*13 (S.D.N.Y. Dec. 31, 2013) (internal quotations and citation omitted) (holding that "[s]ubstantial prejudice may be found where evidence admissible against jointly-tried co-defendants in some way affected the jury's ability fairly and rationally to evaluate the evidence of . . . guilt"); *Lavin v. State*, 754 So. 2d 784, 786 (Fla. Dist. Ct. App. 2000) (quoting *Fryer v. State*, 693 So. 2d 1046, 1048 (Fla. Dist. Ct. App. 1997) (holding that the prosecutor's "reference to the State Attorney's Manual which instructs all prosecutors to make sure that the innocent are not charged was obviously an expression of personal belief in [defendant's] guilt that 'compromised the jury's ability to fairly evaluate the evidence and, in turn, [defendant's] right to a fair trial"). See generally *Commonwealth v. Stonehouse*, 555 A.2d 772, 783-84 (Pa. 1989) (reversing defendant's murder conviction and remanding for a new trial after finding, *inter alia*, that defendant's trial counsel was ineffective by failing to introduce expert testimony to explain the characteristics of victims of physical and

psychological abuse and observing that without such testimony to dispel common myths—including the myths that "battered women are uneducated, with few job skills, and . . . the police can protect the[m]"—the prosecutor "exploited" these myths by introducing "testimony that detailed the police training [defendant] had received, implying that her training made her incapable of being victimized by a batterer, and . . . argu[ing] to the jury that [defendant] could have been rescued, if she had wanted to be rescued, by a law enforcement system ready, willing and able to protect women who are victims of domestic violence").

<sup>39</sup> See Nat'l Crime Victim Law Inst., *Ensuring Full Restitution for Crime Victims: Polyvictims as a Case Study in Overcoming Causation Challenges*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), July 2013, at 2 (citations omitted), available at <https://law.lclark.edu/live/files/15101-ensuring-full-restitution-for-crime-victims> (describing that a number of federal statutes and "[e]very state provides for restitution to victims of crime" and that "full restitution is the appropriate outcome as it is consistent with the aims of restitution"); Nat'l Crime Victim Law Inst., *Future Expenses: A Necessary Component of Restitution*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), May 2014, at 1 (emphasis in original), available at <https://law.lclark.edu/live/files/17049-future-expenses---a-necessary-component-of> (explaining that examples of "[f]uture losses that should be factored into a restitution award include . . . losses to future income, and future medical and counseling costs" and that "[o]rdering restitution for such future expenses not only helps restore the victim but helps to ensure that defendants 'confront concretely, and take responsibility for, the entire harm resulting from their acts'").

<sup>40</sup> Long, *supra* note 5, at 33 (explaining that, from a prosecutor's perspective, "[t]he decision to introduce expert testimony should be based on more than just the law of a particular jurisdiction. . . . First, prosecutors should decide whether expert testimony is the most effective method of explaining a victim's behavior in a particular case. In some cases, the victim will be able to best articulate the reasons for her behavior. One example might be a case where a victim did not flee from a sexual or physical assault out of fear. The victim's testimony itself may provide a common-sense explanation that is far more compelling than abstract expert testimony.").

<sup>41</sup> See, e.g., *People v. Brown*, 94 P.3d 574, 575 (Cal. 2004) (concluding that expert testimony concerning domestic violence victims' tendency to recant or minimize their description of the violence is admissible to assist the jury in "evaluating the credibility of the victim's trial testimony and earlier statements to the police[,] and observing that without such expert testimony, jurors may assume that

a domestic victim whose trial testimony is supportive of defendant and inconsistent with her earlier statements to the police is either an untruthful witness or someone who was not abused); *People v. Kovacich*, 133 Cal. Rptr. 3d 924, 955-56 (Cal. Ct. App. 2011) (concluding that the trial court did not abuse its discretion in admitting expert testimony in a case in which defendant, charged with murdering his wife, claimed that her conduct—*i.e.*, staying in the relationship—was inconsistent with her statements to others about fearing defendant and experiencing physical abuse by defendant, as the testimony was “necessary to disabuse jurors of commonly held misconceptions about victims of domestic violence,” including the notion that it is not difficult to leave a relationship that involves domestic violence, and helpful to explain the possible psychological reasons for the deceased victim’s behavior); *People v. Wallin*, 167 P.3d 183, 187 (Colo. Ct. App. 2007) (noting that expert’s testimony on the reasons why domestic violence victims recant is relevant to credibility); *Weiland v. State*, 732 So. 2d 1044, 1054-55 (Fla. 1999) (explaining that its holding eliminating the duty to retreat from one’s home when a defendant uses deadly force in self-defense against a co-occupant is consistent with its prior decision approving of the use of expert testimony on battered women’s syndrome as a jury instruction on a duty to retreat in such cases “may actually reinforce commonly held myths concerning domestic violence victims,” including the “myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so”); *Brown v. State*, 750 S.E.2d 453, 459 (Ga. Ct. App. 2013) (rejecting ineffective assistance of counsel claim in part because expert testimony is admissible to explain domestic violence victim’s behavior of not reporting abuse or leaving perpetrator and therefore failure to object was not ineffective); *Moorer v. State*, 659 S.E.2d 422, 424 (Ga. Ct. App. 2008) (concluding that expert testimony is admissible to explain why domestic violence victims often do not tell anyone that they are being abused or may not seek help unless they fear for their lives, after the victim testified that she has never told anyone that defendant had hit her on a prior occasion and she waited approximately 12 hours before reporting the current assault to the police, “because the reasons that a victim would not immediately leave after a violent event or report the abuse are beyond the ken of the average layperson”); *Commonwealth v. Morris*, 974 N.E.2d 1152, 1158-59 (Mass. Ct. App. 2012) (collecting citations and noting that domestic violence and the behaviors of a victim are proper subjects for an expert in order to help jurors understand counterintuitive behavior); *People v. Milczakowskyj*, 900 N.Y.S.2d 573, 574 (N.Y. App. Div. 2010) (noting that expert testimony of effects of posttraumatic stress disorder to explain behavior on part of victim that might have seemed unusual is permissible); *State v. Ciskie*, 751 P.2d 1165, 1171 (Wash. 1988) (holding that the trial court did not abuse its discretion in admitting the expert’s testimony, as it was helpful to the jury in a case in which defendant

was charged with raping his girlfriend four times over a period of approximately nine months and argued that the victim’s behaviors in never reporting the rapes immediately after they occurred, in remaining in a relationship with defendant, and in failing to complain earlier to a doctor or to the police was inconsistent with the behavior of a rape victim, finding that the expert’s testimony helped to explain why victims often stay in abusive relationships, do not immediately report the rapes, and maintain contact with the perpetrator after the assaults). *But see Commonwealth v. Balodis*, 747 A.2d 341, 345 (Pa. 2000) (excluding expert testimony on the typicality of delayed reporting because “expert testimony as to the veracity of a particular class of people, of which the victim is a member, is inadmissible”).

Because jurisdictions vary with respect to the legal tests applied in evaluating the admissibility of expert evidence in this context, it is important for practitioners to consult the particular tests employed in their jurisdictions. For more information, see Long, *supra* note 5, at 19-40.

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