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BARRIERS TO RELIABLE CREDIBILITY ASSESSMENTS: DOMESTIC VIOLENCE VICTIM-WITNESSES

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INTRODUCTION

Those of us who have worked with victims of domestic violence are well aware that no one profile accurately describes every victim.[1] Individuals react to the experience of being battered as similarly as

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1. Throughout this Article, I will use "victim" to refer to individuals who endure violence in their intimate relationships. During my work with this population, I have found little consensus about which term most accurately and appropriately describes their status. Primarily, it is important to note that these individuals are three-dimensional figures whose identities are not monolithically dictated by the nature of their relationships. It is for the ease of the reader that I reduce the phrases "individual who has been battered" or "individual who has survived violence by an intimate partner" to "victim."

individuals react to any experienced event, with a complete lack of uniformity.[2] Yet, despite this reality, as a society we expect our domestic violence victims to fit a preconceived notion of the typical victim. We see this to be true when we start a domestic violence clinic class by asking our students what they expect their clients to be like. This is an easy exercise to use to break the ice in class–students do not hesitate in answering. They have all preconceived their future client's problems, reactions, and expectations. They expect their clients to be sweet, kind, demure, blameless, frightened, and helpless.

These attributes are exactly those that the general public ascribes to the paradigmatic domestic violence victim. These are the preconceptions that judges and jurors bring with them into the courtroom when they assess the veracity of a victim-witness's story.[3] These are the preconceptions that damage the credibility of victim-witnesses who present on the stand in atypical and non-paradigmatic fashions.[4]

In this Article, I examine the problem of presenting these atypical victims in a successful way in civil and criminal trials. In particular, I analyze the dilemma of presenting the victim who refuses to admit (or cannot access or does not experience) fear of the batterer, and the victim who feels anger towards her assailant.[5]

There are many explanations for these victim characteristics. Psychological literature is replete with analyses of the psychological effects of battering. Commonsense tells us that anger is a predictable emotional response to violence. Victims of violent crimes have a legitimate basis for anger toward their assailants. In addition, for some, admitting fear involves a loss of power. We do not fear that which we can control. Therefore, the victim may be loath to admit,

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2. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1225 (1993).

> [A]ll women exposed to violence and abuse in their intimate relationships do not respond similarly, contradicting the mistaken assumption that there exists a singular 'battered woman profile.' Like other trauma victims, battered women differ in the type and severity of their psychological reactions to violence and abuse, as well as in their strategies for responding to violence and abuse.

Id.

3. *See, e.g.*, Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 241-48 (1992) (reviewing the misconceptions jurors carry into domestic violence juries).

4. *See id.* (exploring the problems commonly found in traditional notions of the abused and which lead to prosecutorial bias).

5. It is important to note from the outset that I am not looking at the recanting victim or the victim who returns repeatedly to the batterer. In my opinion, other able authors have already duly examined the fallibility of those witnesses.

either to herself or to the batterer, and especially in a public forum, that the assailant has succeeded in inducing fear.

A solution, of course, is to struggle to spin the victim's demeanor as consistent with the myth of the helpless battered woman. For example, many of us have worked with a resistant client to encourage her to subvert some of her anger on the stand, and present fear of the batterer instead. This tactic, however, is rarely successful and also may be to the long-term detriment of victims of domestic violence. To perpetuate the myth is to continue to deny the authentic experiences of our clients, and it is to continue to harm the credibility of victims who cannot benefit from the techniques of "demeanor repackaging."

Part I of this Article offers a vignette illustrating the scope of this problem. In Parts II and III, this Article addresses possible policy and tactical responses to this predicament. Specifically, Part II examines the state laws perpetuating this problem. State legislatures codify the victim myth by requiring that a victim prove either actual abuse or *fear* of imminent abuse. Other jurisdictions incorporate an implicit requirement that a victim testify to fearing her batterer. Court personnel make this inquiry without any statutory basis. Part II suggests that we take action to eliminate this language from state statutes, thereby permitting victims to obtain orders on the basis of a court's determination that a victim is in danger–determined by reference to facts rather than the victim's subjective interpretation of her level of risk. Part III proposes the use of expert witnesses to assist jurors and judges in understanding atypical victim behavior. Expert witness testimony would greatly assist these triers of fact in assessing witness credibility in cases where the victim presents in such a way that contradicts fact-finder expectations.

I. VIGNETTE EXEMPLIFYING THE PROBLEM

One particular case starkly (and tragically) illustrates this problem. I represented a woman several years ago in a Civil Protection Order ("CPO") case, who had been dating a man whom she had met in school. The relationship had eventually unraveled, leaving their interactions saturated with tension. Approximately a week after they broke up, my client went to her ex-boyfriend's apartment to retrieve her belongings. Upon her arrival, she found her ex-boyfriend in his apartment with another woman, who ultimately left when she saw my client. Once in the apartment, my client began to gather her own belongings that she had left behind there during their relationship. Soon, the two began to fight about the other woman. In the midst of

the verbal altercation, the man grabbed my client's wrist, wrapped her arm behind her back, grabbed below her elbow with the other hand, and began to twist her arm. After one rotation, my client heard her arm snap and yelled for him to stop. Instead, he twisted two more times, breaking her arm in two places. We obtained a CPO by consent for her.

The case was also prosecuted as a misdemeanor. At trial, my client took the stand and testified to the story I have just recounted. Although she did not admit she was jealous, she did admit that she was extremely angry with the defendant. It was on cross-examination, however, that the depths of her anger surfaced. She was very defensive and became irate with defense counsel's insinuations about her jealousy. Then, the defendant took the stand. On direct examination, the defendant admitted to having broken her arm. His defense relied on the fact that my client had been in a jealous rage. At the close of evidence, the judge acquitted the defendant. Why? Because the complaining witness appeared to the judge to be an angry, bitter woman who lacked credibility. Even if the defendant did break her arm, the judge reasoned, he only did so because she had been in a jealous rage.

This client defied the judge's expectations of the demure, helpless victim. Because the prosecution's case was so strong–complete with an admission--I found it hard to explain the acquittal in any way other than pointing to the judge's discomfort with the witness' demeanor, both at the scene and on the stand. His findings revealed a severe distaste for the witness' range of "aggressive" emotions.

II. LEGISLATIVE REFORM

Under the laws of all fifty states and the District of Columbia, a victim of family violence can seek a protection order from the court[6] that is intended to protect her from violence and allow her to live independently from the batterer. The forms of relief generally associated with protection orders are "stay away" and "no contact" provisions–the perpetrator must stay away from the victim's person and home and may not contact her by phone or in writing.[7]

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6. *See, e.g.*, D.C. CODE ANN. § 16-1001 (2001); GA. CODE ANN. § 19-13-4 (Harrison 2000); NEV. REV. STAT. ANN. § 33.020 (Michie 2001); OHIO REV. CODE ANN. § 3113.31 (Anderson 2001); TEX. FAM. CODE ANN. § 81.001 (Vernon 2000). *See generally* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (providing an overview of state statutes authorizing domestic violence restraining orders); *Developments in the Law–Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1505, 1515-18, 1535-43 (1993).

7. *See, e.g.*, D.C. CODE ANN. § 16-1005(c) (2001).

However, in order to obtain this relief, the victim must prove that the respondent committed or threatened to commit a violent act.[8] This proof, in many states, includes evidence that the victim fears the batterer.[9] Some state statutes explicitly require such evidence. In other states, court personnel impose an implicit requirement that victims must present proof of their subjective fear. Whether implicit or explicit, these requirements systematically disadvantage victims who cannot or will not testify to fearing their batterers.

A. Explicit Statutory Fear Requirement

In order to obtain a civil protection order when the batterer has not yet committed a violent act but threatens to do so, many states statutorily require victims to testify that the perpetrator acted in such a way that induced "fear of imminent physical harm, bodily injury or assault between family or household members."[10]

Case law reveals that in various jurisdictions, courts interpret this requirement as necessitating a showing of subjective fear on the part of the victim.[11] In Ohio, for example, the courts have held that to prevail, a petitioner must demonstrate that she is fearful of the batterer and that her fear is objectively reasonable.[12] Her own fear is the necessary predicate to the issuance of a restraining order. In

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8. *See supra* note 6 and accompanying text.

9. In other states the requirement may be implied rather than statutorily mandated. *See, e.g.*, D.C. CODE ANN. § 16-1004(d) (2001) (requiring a petitioner to prove that her safety or welfare is immediately endangered by the respondent in order to receive a CPO). While the statute does not literally require the judge to find that the petitioner fears the respondent, the court system interprets the statute as if it did require such a finding. *See id.*

10. CONN. GEN. STAT. § 46b-38a(1) (1995 & Supp. 2002); *see also* OHIO REV. CODE § 3113.31(A)(1)(b) (Anderson 2000 & Supp. 2001) (defining domestic violence as including an act "placing another person by the threat of force in fear of imminent bodily harm"); MINN. STAT. § 518B.01(2)(a)(2), (4)(b), (7)(a) (West 2002) (indicating that a petitioner must allege the existence of physical harm or the fear of imminent physical harm, supported by an affidavit made under oath, to obtain an ex parte order); N.D. CENT. CODE §§ 14-07.1-01(2), 14-07.1-02(4) (1997 & Supp. 2001) (stating that "[u]pon a showing of actual or imminent domestic violence," which includes fear of physical harm, "the court may enter a protection order after due notice and full hearing").

11. *See, e.g.*, Gaab v. Ochsner, 636 N.W.2d 669, 672 (N.D. 2001) (noting that petitioner's protection order was properly extended because she was able to demonstrate fear of physical harm).

12. *See* Rush v. Rush, No. 74832, 1999 Ohio App. LEXIS 5450, at *16 (8th Dist. Nov. 18, 1999) (noting that although the petitioner testified that she was "scared," she "provided no facts to show that her fear was objectively reasonable"); Reynolds v. White No. 74506, 1999 Ohio App. LEXIS 4454, at *16 (8th Dist. Sept. 23, 1999) (holding that placing a minor daughter in "reasonable fear of imminent serious physical harm" constitutes independent grounds for upholding a domestic violence civil protection order).

Parrish v. Parrish,[13] the Ohio Court of Appeals affirmed the dismissal of a protection order petition, stating that evidence of a simple pattern of abuse did not support the petitioner's belief that respondent would cause her physical harm.[14] The petitioner had appealed the dismissal on the basis that the court required a subjective rather than an objective showing of fear.[15] On appeal, the court skirted the issue and failed to directly characterize the proof of fear as a subjective or objective standard; instead, the court affirmed the dismissal on the basis that the petitioner did not present credible evidence of her own fear.[16]

B. Implicit Fear Requirement

In other jurisdictions, although protection order statutes do not explicitly require a showing of fear on the part of the petitioner, court personnel will often read this requirement into the law. The District of Columbia provides a useful illustration. In D.C., the standard for issuing a temporary protection order is whether the petitioner's safety or welfare is immediately endangered.[17] To issue a year-long order, the court must find that the respondent committed or threatened to commit an act punishable as a criminal offense.[18] Yet, despite this statutory language, the personnel in the D.C. Domestic Violence Unit Clerk's Office inquire if petitioners fear their batterers in order to determine if the petitioner is eligible to appear before the judge to obtain a temporary protection order.[19] Ultimately, once the petitioners get into the courtroom, the judges themselves make the same inquiry of petitioners who appear before

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13. 767 N.E.2d 1182 (Ohio Ct. App. 2000).

14. *See id.* at 1187 ("The evidence presented by the appellant consisted of events mostly remote in time to the petition for domestic violence and did not support any finding that the appellee threatened appellant or her children.").

15. *See id.* at 1185.

16. *See id.* at 1187 (remarking that while appellee's history of violence may have been relevant in a child custody hearing, it did not support appellant's domestic violence complaint).

17. *See* D.C. CODE ANN. § 16-1004(d) (2001) (indicating that the Family Division may issue an ex parte protection order of a maximum fourteen day duration if "the Division finds that the safety or welfare of a family member is immediately endangered").

18. *See id.* § 16-1001(5) (2001) (defining an "intrafamily offense" as "an act punishable as a criminal act committed by an offender upon a "relative or a person with whom the offender maintains a romantic relationship").

19. This observation is based on five years of practice in the District of Columbia Domestic Violence Unit, and extensive exposure to the Domestic Violence Unit Clerk's Office.

them for emergency orders.[20] In fact, several advocates have reported that judges even pose this question in default hearings for full year civil protection orders, where the statute unambiguously requires the judge simply to determine whether or not a criminal offense occurred.[21] When a petitioner denies fearing the assailant, the judge denies her petition.

C. Systematic Barriers Erected by Fear Requirements

These explicit and implicit requirements of a subjective fear of harm systematically disadvantage petitioners who will not express, cannot access, or do not experience fear. These litigants may well be entitled to the court's protection because they have been the target of a threat or an assault. Ironically, if these same victims were to testify as complaining witnesses in criminal prosecutions for a threat, their testimony may well allow the government to prevail in a conviction. Many states' criminal threat statutes solely require a showing that a reasonable person would experience fear in reaction to the defendant's words.[22] This objective fear requirement does not discriminate against the victim who herself has a high threshold for fear or will not testify in the presence of the assailant that she experienced fear.[23]

In order to permit the range of deserving petitioners to obtain the protection that they need from the court, these subjective fear requirements must be eliminated from protection order statutes and from the judicial lexicon. In order to eradicate these requirements, we as advocates will need to pressure our legislatures. We will need to encourage our legislatures to substitute the word "believe" for "fear" as the standard for the issuance of civil protection orders based on threatened harm. Many victims who will not testify to fear, but who are in danger, may be capable of stating the objective reality that they *believe* themselves to be in imminent danger. In the alternative, or

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20. Five years of practice in the District of Columbia Domestic Violence Unit has provided me with extensive opportunity to observe the judges' approach to granting temporary protection orders.

21. *See* D.C. CODE ANN. § 16-1001(5) (2001).

22. *See, e.g.*, United States v. Baish, 460 A.2d 38, 42 (D.C. 1983) (holding that to prove a criminal threat, the government must show that the defendant's words "were of such a nature as to convey fear of serious bodily harm or injury to the *ordinary* hearer") (emphasis added).

23. *See id.*; *see also* Postell v. United States, 282 A.2d 551, 553 (D.C. 1971) (noting that an objective standard does not require the court to inquire "whether or to what degree the threat engenders fear or intimidation in the intended victim"); State v. Lizotte, 256 A.2d 439, 442 (Me. 1969) ("Some men [and women] are braver than others and less intimidated.").

even more effectively, we could encourage purging the subjective inquiry all together. Legislatures can, as they have in many jurisdictions, simply leave it to the judge to determine if the petitioner is in danger of imminent bodily harm or if she has been the victim of a criminal act.[24]

Eradicating the implicit subjective fear requirement will call for judicial education and advocacy with court administrators. We all know the importance of judicial education in the area of domestic violence. Many judges preside over domestic violence cases without any understanding of the dynamics of domestic violence and therefore lack the tools with which to effectively assess the credibility of victims. This effort will require us to encourage judges to defer to the legislature's standard for the issuance of an order. It will require us to explain why the judge's shorthand inquiry into the petitioner's subjective fear may result in erroneous denials.

At the administrative level, we will need to review all the pre-printed court forms to purge them of this "fear" language. For example, the Minnesota pre-printed petition requires the petitioner to swear that she fears immediate and present danger or further acts of domestic violence.[25] Until these forms have been modified to read that the petitioner believes such a result, or that such a result has been threatened, we will force certain victims either to lie or to be erroneously denied protection. We will also need to approach court clerks, who act as gatekeepers to the judges, to verify that, as occurs in D.C., for example, they are not systematically interpreting the law themselves to require fear and refusing to let victims who cannot state subjective fear proceed in their cases.[26]

Although it may seem picayune to focus on one word–fear–that may or may not be literally interpreted by the courts,[27] it is a word that is extremely loaded for victims of domestic violence. While many victims willingly testify that they are extremely scared of their assailants, others will find that requirement insurmountable. They

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24. *See, e.g.*, D.C. CODE ANN. §§16-1004(d), 16-1005(c) (2001) (allowing the judge to issue an ex parte temporary protection order).

25. *See* Petitioner's Affidavit and Petition for Harassment Restraining Order Form (Minn. Dec. 8, 1998), *available at* http://www2.mnbar.org/xpforms/charaf2.pdf.

26. I rely on five years of personal observation during my practice in the District of Columbia Domestic Violence Unit to support this assertion.

27. Fear has multiple connotations, which make interpreting the word open to contradictory results. One could define fear as "agitated foreboding often of some real or specific peril," while another could use fear to mean "calm recognition or consideration of whatever may injure or damage." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 831 (Philip Babcock Gove ed., 1981).

may find that testifying to fearing the individual who has intentionally sought to terrorize them feels like defeat. These victims must not be forced to swallow their pride in order to obtain court protection. Others who cannot access their fear, but are in grave danger nonetheless, should not be disadvantaged by the semantics of a seemingly arbitrary court requirement.

III. EXPERT TESTIMONY

A. Role for Expert Witnesses in Domestic Violence Trials

Another way that advocates might help non-paradigm victim-witnesses overcome the damage wrought to their credibility by their atypical demeanor is to educate the triers of fact.[28] The dynamics of domestic violence are woefully misunderstood by the public at large.[29] Domestic violence is a private crime that most often takes place beyond the view of any witnesses. Because it induces shame, victims are often reluctant to discuss their experiences with acquaintances. Public education has taken place primarily through popular media portrayals of victims of domestic violence such as Tina Turner in *What's Love Got to Do with It,*[30] or the protagonist in *Sleeping with the Enemy.*[31] Each of these victims jibes neatly with the myth of the domestic violence victim and reinforces that stereotype. She is scared, helpless, meek, and blameless.[32]

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28. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 35, 35-49 (1999) (asserting that judicial education helps combat judicial notions about domestic violence understood by a lifetime exposure to myths on the topic and help restore judicial neutrality).

29. According to a poll conducted by Lifetime TV in 2002, the general public holds many misconceptions about domestic violence. For example, studies have shown that one in seven women have been victims of domestic violence. However, according to the poll, 43% of Americans underestimate this number, believing it is closer to one in ten or one in fifteen. In addition, while social science has identified myriad theories to explain the existence of battering, 50% of women and 41% of men identify low self esteem on the part of women as the "leading and proximate cause" for battering. *See* Lifetimetv.com, *Lifetime Poll Shows Americans Highly Concerned About Violence Against Women* (last visited Oct. 25, 2002), *available at* http://www.lifetimetv.com/community/olc/violence/poll_results.html. *See also* Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 150 (1997) [hereinafter Raeder, *The Better Way*] (discussing the general lack of understanding in the general public about the dynamics of battering).

30. WHAT'S LOVE GOT TO DO WITH IT (Touchstone Pictures 1993) (adapted from TINA TURNER & KURT LODER, I TINA (Morrow 1986)).

31. SLEEPING WITH THE ENEMY (Twentieth Century Fox 1991).

32. *See* Bowman, *supra* note 3, at 243 (claiming that the myths about domestic violence portrayed by popular media are often damaging to the prosecution's case).

Jurors and judges enter the courtroom with these preconceptions and cannot be expected to resist relying on them as they assess the credibility of a domestic violence victim-witness. Why would they be deterred from using the tools that they have? The anatomy of our jury selection system assures that a large portion of the jury pool does not bring to court any nuanced understanding of the dynamics of domestic violence.[33] Juror strikes for cause and peremptory challenges permit defense attorneys to seek to ensure that any prospective members of the jury who reveal personal experience with domestic violence or insight into the issue will not serve on the jury.

The ignorance of jurors and judges on this topic creates serious risks of imperfect justice for domestic violence victims who do not present on the stand in concordance with widely held expectations of the typical victim of domestic violence.[34] When fact-finders encounter what they perceive to be atypical victim-witness testimony, they may interpret it as lacking credibility simply because the victim's demeanor contradicts their expectations.[35] Andrew Taslitz studied jurors to determine those elements that most inform their judgment. He concluded, predictably, that "jurors use their past experiences or cultural assumptions much the way a judge uses precedent to interpret an event."[36] For the majority of jurors, the myth of the domestic violence victim will represent the sum total of their past experiences and cultural assumptions about the appropriate demeanor for a victim of intimate abuse.[37]

Attempting to redefine the image of the battered woman in popular culture and to educate the public at large is a project of massive scope and perhaps better suited to non-lawyers. However, education of *particular* members of the public--jurors and judges--is

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33. *See* Oregon v. Middleton, 657 P.2d 1215, 1220-21 (Or. 1983). In an analogous area of the law (sexual assault), one case is illustrative of this systemic reality. Of eighteen prospective jurors, fifteen said that they did not know anyone who had experienced abuse, while two explained that they had heard some stories of sexual abuse. The final juror was excused when she said that her past experience with the issue had rendered her impartial. *See id.* (involving a sexual assault case illustrative of this systemic reality).

34. *See* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 664-65 (1998) (noting that social attitudes influence the decision to report, investigate, prosecute, and believe rape).

35. *See id.* at 670 (citing reasons for excluding character evidence and noting that such reasons include the potential for such evidence to divert a jury's attention from the facts of the case and the risk that a jury might overvalue the relevance of such evidence).

36. *Id.* at 677 (citing Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 439 (1996)).

37. *See id.*

well-suited to lawyers and can take place in the courtroom through the introduction of expert testimony. Expert witness testimony would assist in filling in the gaps for jurors and judges who are charged with assessing the credibility of domestic violence victims, but who have little insight into the complex web of emotional baggage that victims bring with them into the courtroom.[38]

When one mentions expert testimony about domestic violence, Battered Woman Syndrome ("BWS") immediately springs to mind. Because of the work of tireless advocates, many of whom participated in the symposium at which I presented this Article, courts now widely admit testimony on BWS.[39] BWS explains the characteristics of a subset of domestic violence victims by reference to a series of behavioral traits and psychological reactions.[40] Lenore Walker, who first identified the syndrome, described it as a form of post-traumatic stress disorder characterized by hypervigilance, fear, and helplessness.[41] The syndrome explains why women stay in battering relationships by reference to "learned helplessness," which can result from acute batterings.[42] Finally, the syndrome describes the cycle of violence, including tension-building, battering, and contrition.[43] The syndrome is triggered by at least two episodes of battering.[44] By introduction of such testimony, attorneys generally seek to offer a defense for domestic violence homicide or rebut claims that the victim's failure to leave the allegedly abusive relationship suggests that the victim has fabricated her allegations.

BWS does not assist the victim-witnesses upon whom I focus, however, for three reasons. First, BWS perpetuates the stereotypes that damage the credibility of these victim-witnesses.[45] The victim who suffers from BWS is a helpless, fearful, passive woman, and not a

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38. *See id.* (noting that experts can educate judges and juries about women's experiences and can explain why women do not report a rape right away).

39. *See* Myrna S. Raeder, *Proving the Case: Battered Woman and Batterer Syndrome: The Double Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 796 (1996) (stating that all fifty states have permitted some form of BWS evidence to be presented at trial).

40. *See* LENORE E. WALKER, THE BATTERED WOMAN 96-97 (1979).

41. *See id.* at 96-97.

42. *See id.* at. 45-51 (describing "learned helplessness" as a condition characterized by passive behavior).

43. *See id.* at 55.

44. *See id.* at xv (explaining that a woman who stays in a relationship, having at least two incidents of abuse directed at her, is defined as a "battered woman").

45. *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 196-98 (1986) (chronicling the unexpected negative repercussions of BWS testimony).

multi-faceted woman who may or may not experience fear or anger.[46] Second, the symptom describes and explains the behavior of a specific, narrow set of victims. As Myrna Raeder asserts, "BWS is also not the answer for presenting a general social science background about domestic violence because it depends on a victim whose reactions to battering conform to the symptoms of the syndrome."[47] Finally, BWS testimony explains the non-paradigmatic behavior of victims *prior* to coming to court. Expert testimony focused on assisting the non-fearful or angry victim would need to address the atypical behavior that these victims present on the stand, not prior to testimony. The victims may betray anger in court or fail to testify to fearing the batterer. BWS does not address these testimonial symptoms.

But is expert testimony addressing the testimonial demeanor of victim-witnesses admissible? The legacy of BWS testimony can assist in seeking the admission of expert testimony on domestic violence victim-witness demeanor.[48] Having generally abandoned their initial hostility to BWS experts, courts now acknowledge that social science and research on the psychology of battering represents legitimate science that can assist the court in assessing domestic violence cases.[49]

While expert testimony going directly to victim-witness credibility has been used infrequently in the domestic violence context, case law reveals its use with some frequency in rape and child sexual assault prosecutions.[50] Based upon this jurisprudence, it appears that advocates might prevail under the relevant evidentiary rules in offering domestic violence victim-witness demeanor testimony through experts.

B. Federal Rule of Evidence Rule 702

Under Federal Rule of Evidence 702 and its state analogs, courts determine the admissibility of qualified expert testimony by reference to two factors. First, the expert testimony must be helpful to the trier of fact, while not invading the province of the jury.[51] Second, the

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46. *See id.* at 197 (indicating that women's self-defense work has been used to overcome sex bias and to equalize treatment of women in courts by way of explaining women's different and varying experiences).

47. *See* Raeder, *The Better Way*, *supra* note 29, at 150.

48. *See id.* at 167 (arguing that batterers' profile testimony should be admitted if the defense cross-examines witnesses in a manner calling for character evidence).

49. *See id.* at 181 (asserting that by failing to employ expert testimony, a court may be exposed to misconceptions, bias, and ill-founded beliefs).

50. *See id.* at 185 (noting that background evidence is critical in homicide cases).

51. *See* State v. Ciskie, 751 P.2d 1165, 1169 (Wash. 1988) (laying out the

expert's opinion must be based on an explanatory theory that is either generally accepted or relevant and reliable.[52]

The advocates who fought for the admission of BWS testimony may well have paved the road for the admission of testimony on victim-witness credibility under Federal Rule 702. In seeking to admit BWS expert testimony, advocates argued that evidence on the psychology of battering can be necessary background for the triers of fact. The many courts that permit expert testimony on the issue of BWS find that understanding the dynamics of a battering relationship and the reactions of a battered woman can be subjects beyond the comprehension of the average juror.[53]

Where expert testimony has been offered on the subject of witness credibility in analogous sexual assault cases, jurisdictions react with little uniformity regarding the question of whether such testimony invades the province of the jury. While some jurisdictions state a uniform ban against such testimony, and others welcome such testimony when offered,[54] the vast majority of jurisdictions fall somewhere in the middle of the spectrum, permitting experts to testify to evidence where fact-finders might gather useful information to assess credibility.[55] In *Oregon v. Petit*,[56] for instance, the Oregon appeals court permitted an expert in a sexual assault case to testify as to whether victims of sexual assault can "recall dates, can relate details, tell consistent stories and report such incidents promptly."[57]

The question of whether such social science testimony is subject to the rigors of the *Frye*[58] or *Daubert*[59] tests for admission of scientific evidence is yet to be answered. However, some courts suggest that

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admissibility requirements under Federal Rule of Evidence 702).

52. *See id.*

53. *See, e.g.*, United States v. Winters, 729 F.2d 602 (9th Cir. 1984); State v. Christel, 537 N.W.2d 194 (Mich. 1995); State v. Bednarz, 507 N.W.2d 168 (Wis. App. 1993); Hawaii v. Cababag, 850 P.2d 716 (Haw. App. 1993); New Jersey v. Frost, 577 A.2d 1282 (N.J. Super. 1990); State v. Ciskie, 751 P.2d 1165 (Wash. 1988).

54. *See, e.g.*, State v. Kim, 64 Haw. 598, 601 (1982) (permitting testimony that directly addresses the question of witness veracity).

55. *See, e.g.*, Arcoren v. United States, 929 F.2d 1235, 1239-40 (8th Cir. 1991) (proposing that expert testimony may facilitate juror understandings of behavior and the credibility of witness statements).

56. Oregon v. Pettit, 675 P.2d 183 (Or. Ct. App. 1983).

57. *Id.* at 185.

58. *See* Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923) (recognizing that courts should allow expert testimony where the scientific principle to be discussed is generally accepted in its field).

59. *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589 (1993) (requiring the judge to determine the scientific reliability of evidence through consideration of several factors, including the general acceptance of the evidence).

when parties use expert testimony to explain victim behavior, as opposed to proving that the crime has, in a legal sense, been committed, courts do not conduct a reliability inquiry.[60] Advocates using social science expert testimony in examining witness credibility will be testing the waters in this arena.

C. Ramifications of Broad use of Experts.

If experts were permitted to testify in every case, then the halls of justice would be clogged with a backlog much worse than that which they already experience.[61] Civil domestic violence cases are intended to be expedited proceedings and therefore would be particularly slowed by the use of expert witnesses. However, a minority of domestic violence cases will involve victim-witnesses with the particular demeanor issues presented here. In addition, of those civil cases, only a regrettably small number of petitioners will have the resources to utilize expert witnesses. Furthermore, the vast majority of advocates for victims of domestic violence are pro bono attorneys who cannot support the costs associated with experts, thus hampering their ability to present such witnesses.[62] Similarly, it is unlikely that there will be a significant increase in frequency of expert testimony in criminal cases either. Because the vast majority of domestic violence prosecutions are resolved before trial, the number that would proceed to trial and require the testimony of an expert on these issues is miniscule.

Turning to the issue of opening the floodgates to expert testimony on victim credibility in the court system, what must be remembered is that judges, as gatekeepers, must ultimately determine whether or not the expert testimony will assist the trier of fact.[63] In addition, judges have Federal Rule of Evidence 403 to deploy against useless or unfairly prejudicial expert testimony.[64] Under Federal Rule of

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60. *See* People v. Bledsoe, 36 Cal. 3d 236, 248 (1984) (finding the *Frye* test inapplicable and inaccurate when determining whether a rape has occurred).

61. Already civil cases feature a shocking number of expert witnesses. *See* Edward J. Imwinkelried, *A Minimalist Approach to the Presentation of Expert Testimony*, 31 STETSON L. REV. 105, 105 (2001) (summarizing that 86% of civil trials included expert witnesses, with an average of 3.3 experts per trial) (citing Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1113 (1991)).

62. *See* Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1040 (1995) (commenting on the high emotional and monetary costs associated with domestic violence suits).

63. *See Daubert*, 509 U.S. at 589 n.7 (indicating that a judge's gatekeeping responsibilities include the obligation to determine the admissibility of expert testimony during a trial).

64. *See* 28 U.S.C. § 403 (1994 & 2002 Supp.).

Evidence 403, the judge may exclude any evidence where the probative value is outweighed by the prejudicial value or where the evidence is cumulative.[65] An Oregon judge addressed this fear:

> Careful regulation by the trial court can check the 'floodgate' fear. . . . [T]the court must determine if a witness is qualified to testify to the syndrome . . . if the testimony is relevant . . . and whether the facts justify the admission of the testimony. . . . [O]f course, the party opposing the evidence can attempt to discredit the testimony.[66]

Finally, one might ask if propounding expert testimony on victim-witness demeanor opens the floodgates to testimony on alleged batterer-defendant demeanor credibility. Indeed, floodgates are likely to open, for justice dictates that if a defendant's credibility is challenged and expert testimony meets the evidentiary rules requirements, that testimony should also be admissible.[67] Perhaps such testimony would assist in our goal in delivering more perfect justice to all parties in domestic violence litigation.

CONCLUSION

What are the additional risks that we as advocates run by advocating the use of expert testimony in domestic violence cases, and are those risks worth taking?

One detrimental by-product of the use of expert witnesses is that it may reinforce stereotypes and enhance women's subordination. Replacing one set of assumptions about appropriate behavior for a woman with another set of expectations hardly improves the chances of future women being judged on the basis of their testimony alone, absent gender stereotypes. In addition, permitting an expert to pathologize a woman's behavior and interpret it for the court in a way that is "reasonable" may tend to further undermine a woman's credibility. Some argue that experts rob women of their agency.[68]

While I am concerned about reinforcing new and different gender norms by the presentation of expert testimony that would explain non-paradigmatic cases, I am not as concerned as I would be if I were

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65. *See* FED. R. EVID. 403 (2002).

66. Oregon v. Middleton, 657 P.2d 1215, 1223 n.4 (Or. 1983) (Roberts, J., concurring).

67. *See* 28 U.S.C. § 403 (outlining the basic guidelines and reasons for disallowing expert testimony).

68. *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOM. RIGHTS L. REPTR. 195, 222 (1986) (noting the complex implications of BWS on women's victimization and agency).

advocating syndrome evidence. For example, the social science framework evidence that I propose would explain why *some* women would react to violence by refusing to acknowledge fear.[69] Such evidence would force jurors to confront the stereotypes that create the expectations that render these non-paradigm victims' testimony suspect.[70] In the end, jurors and judges might leave a trial with a more nuanced and accurate understanding of the complex dynamics of violence. As Aviva Orenstein mused:

> The good news is that by talking about stereotypes and making jurors aware of inherent biases, it is possible to mitigate the harmful effect of stereotypes. This awareness, this self-consciousness, address problems of deep-rooted bias that are otherwise averse to legal solutions[71]

These risks, however, seem worth taking if we as advocates care about allowing the justice system to work fairly and effectively for all victims of domestic violence. Working legislatively to remove systemic barriers to victims' access to protection and propounding the use of experts to facilitate the truth-seeking process will improve the administration of justice for individuals seeking the court's protection from domestic violence.[72]

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69. *See supra* Part II.C (commenting on how some victims may be aware of the possibility of danger, but do not actually experience acute fear).

70. *See supra* Part III.A (discussing how expert testimony can help clear the typical misconceptions held by triers of fact with respect to domestic violence victims).

71. *See* Orenstein, *supra* note 34, at 712.

72. *See supra* Part III.A (explaining how the admission of expert witnesses in a domestic violence proceeding can assist the judge in making an accurate and informed decision).