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Janet A. Johnson

Victoria L. Lutz

Neil Websdale

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DEATH BY INTIMACY: RISK FACTORS FOR DOMESTIC VIOLENCE¹

Panelists:

Professor Janet A. Johnson

Professor Victoria L. Lutz

Professor Neil Websdale

PROFESSOR WEBSDALE:² Today I want to discuss the topic of domestic violence-related homicides from the perspective of ongoing research in Florida.³ I want to emphasize that this is ongoing research. I am an ethnographer by trade, which means you hang out and talk to people. I am not a social scientist in the sense that I am a statistician. Essentially, my take on this work, and on risk specifically, is that talking about risk is risky business.

I would like to start by introducing a study that we are doing in Florida. This is material we acquired from looking at domestic homicides that occurred in the State of Florida in 1994.⁴

1. This Panel Discussion was part of a special program presented on April 8, 1999, by Pace University School of Law with Albert Einstein College of Medicine Division of Law and Psychiatry at Pace University School of Law, entitled *Playing the Psychiatric Odds: Can We Protect the Public by Predicting Dangerousness?*

2. Neil Websdale is Associate Professor of Criminal Justice at Northern Arizona University in Flagstaff, Arizona. Dr. Websdale received his Ph.D. from the University of London. He has published works on violence against women, the state response to domestic violence cases, and the media's portrayal of intimate partner and stranger violence. He has completed three books: *RURAL WOMAN BATTERING AND THE JUSTICE SYSTEM: AN ETHNOGRAPHY* (1998), *UNDERSTANDING DOMESTIC HOMICIDE* (1999), and *MAKING TROUBLE: CULTURAL CONSTRUCTIONS OF CRIME, DEVIANCE, AND CONTROL* (1999). He is currently writing a book tentatively titled, *POLICING THE POOR*, due to be published by Northeastern University Press, Boston, MA, in 2001.

Dr. Websdale consults for the Florida Governor's Task Force on Domestic and Sexual Violence. His current work involves the setting up of Domestic Fatality Review Teams in Florida.

3. Florida Governor's Task Force Against Domestic and Sexual Violence (1997). For additional information on this research, contact Bonnie Flynn, Executive Director, Florida Governor's Task Force on Domestic and Sexual Violence, 2555 Shumard Oak Boulevard, Tallahassee, FL 32399-2100.

4. See UNIFORM CRIME REP. (1994) (visited Mar. 3, 2000) <http://www.fdle.state.fl.us/crime_statistics/index.asp>.

Our task was to examine the approximately 230 domestic homicides officially identified that year by the Florida Department of Law Enforcement [hereinafter FDLE].⁵ The FDLE received information compiled from jurisdictions and police departments, and then the Governor's office in Florida put the data together for us to study.⁶ We were examining these 230 cases with a view toward understanding their micro-dynamics with the goal of eventually intervening more effectively in domestic disturbances and preventing fatalities. That was our initial mission.

What we sought to do here was to look, from multiple perspectives, at deaths occurring in intimate circumstances. In order to do this, we had to adopt a very broad range of methods. First, it is important to note that crime statistics are notoriously suspect, and the less serious the crime, the more suspect the statistics. For this study, the FDLE began with the Florida statute, which basically states that in order to be classified as a domestic violence related homicide, the homicide must occur either between a husband and wife, co-habitees, or people who share a child in common but who do not necessarily live together.⁷ This definition is somewhat more narrow than the definition we planned to use. We wanted to take those statistics and combine them with a number of different sources of information and see what number we finally arrived at.

In order to get a more accurate view of domestic violence related homicides, we began with the FDLE list of 230. We then went to the newspaper archives. We spent several weeks reading Florida newspapers on microfiche in an attempt to determine how many domestic violence homicides the newspapers reported. We found that although there was some correspondence between the list we compiled and the official FDLE list, it was not an exact one. There were several cases the FDLE did not catch that were actually in the newspapers. Essentially, the newspapers were an additional source of information for us.

We then talked directly to law enforcement agencies. We actually went into the agencies, sat down, read the homicide log and looked at all the homicide files. Law enforcement agencies

5. See NEIL WEBSDALE, *UNDERSTANDING DOMESTIC HOMICIDE* 2 (1999).

6. See *id.* at 5. FDLE receives its information annually from reporting law enforcement agencies across the State of Florida.

7. See FLA. STAT. ANN. § 741.28 (West 1994).

code domestic violence homicides, but in 1994, they were not necessarily coding them accurately. As a result, we found a number of homicides that were simply classified incorrectly.

We also worked closely with child protection agencies. We found that many abuse and neglect deaths were not counted as domestic homicides.⁸ Often, those deaths occurred within the context of ongoing domestic violence between parents that spilled over into abusive behavior towards children.

We pursued a number of other methods to ascertain whether or not cases were domestic violence related. We called a number of people in the field, including prosecutors, judges, and defense attorneys, to discover the nature and origins of specific cases. The FDLE list itemized 230 domestic homicides. When we had finished our analysis for 1994, we discovered that there were 319 domestic homicides, roughly a third more than had been officially counted.⁹

The disparity in numbers was not just a question of misclassification. We included cases that were not even covered by statute. For example, we counted homicides between a boyfriend and girlfriend even where they did not cohabit. The disparity came not from malfeasance on the part of law enforcement agencies, but was a genuine effort on our part to extend the definition, the very meaning, of what domestic violence is. In 1995, our working total from FDLE was 195,¹⁰ and our final total was 295.¹¹

That being said, let me move into some of our general observations about domestic violence related homicides. First of all, the most important point for us in our research is that these offenses are gendered. By gendered I mean they are committed differently by men and women, and they are committed for different reasons. Men typically commit many more of these of-

8. See WEBSDALE, *supra* note 5, at 2-3.

9. See *id.*

10. See UNIFORM CRIME REPORT (1995) (visited Mar. 3, 2000) <http://www.fdle.state.fl.us/crime_statistics/index.asp>.

11. See Neil Websdale and Byron Johnson, *Domestic Violence Mortality Review: Final Report, 1995*, submitted to the Florida Governor's Task Force on Domestic and Sexual Violence. Although we report a total of 295 domestic violence related deaths in this report, we emphasize that this is still a work in progress and that number is likely to increase.

fenses. The Sex Ratio of Killing¹² [hereinafter "SROK"] basically refers to the number of women who kill intimate partners for every 100 men who kill intimate female partners. The SROK is used as an index for the gendering of this offense. For example, in 1994 we determined that 106 men killed women and twenty-six women killed men.¹³ In 1995, our working numbers are seventy-seven and twenty-five, respectively.¹⁴

Another important phenomenon that we looked at was the killing of children. The killing of children is often understood to be somewhat different from domestic violence related homicides. In fact, what we have found is that a significant number, maybe even two-thirds of the cases where children were killed, involved an adult context of ongoing domestic violence.¹⁵ In terms of identifying problematic issues and intervention, that is a very important finding that is beginning to emerge in the literature in general.

We found that biological fathers and mother's boyfriends made up the two major male blocks of perpetrators when it came to killing children.¹⁶ But biological mothers, particularly in 1994, also made up a significant block of those who killed children.¹⁷ As a general rule, from reading the files and interviewing people, when men kill children, they kill violently. When women kill children, it is typically out of neglect or a much milder, less violent form of child abuse.

AUDIENCE MEMBER: Did you include any homosexual domestic violence homicides?

PROFESSOR WEBSDALE: That is a good question. We did not leave them out at all. We looked high and low for homosexual cases. In 1994, we found four cases of men killing other men.¹⁸ We found no cases of lesbian partners killing each other.

I would like to discuss the different types of killing. I would like to distinguish between multiple domestic homicides and single domestic homicides, because they have different etio-

12. See WEBSDALE, *supra* note 5, at 8-9.

13. See *id.* at 205.

14. See Websdale, *supra* note 11. We reported that 77 men killed female intimates compared with 25 females who killed male intimates.

15. See WEBSDALE, *supra* note 5, at 179-86.

16. See *id.* at 167-70.

17. See *id.* at 169.

18. See *id.* at 30, 120.

gies and different risk factors. The first type of case I want to distinguish is what we call multiple domestic killings. This includes situations that I call familicides, where the father kills his female partner, the children, and then typically kills himself.¹⁹ The other category of multiple domestic homicide is the homicide/suicide case where the male typically kills his female partner and then kills himself.²⁰

Taking multiple domestic homicide cases as a whole, they constitute roughly one-third of all the domestic violence related deaths in the State of Florida.²¹ This is a very important category of offense. I want to distinguish multiple homicides from single homicides. Let us look for a moment at the background history and the characteristics of these cases as they develop. The idea is to look at the antecedents to the killing. What happened? Not with a view to establishing risk and prediction, because I do not believe that you can predict lethal outcomes. The whole language of prediction to me is problematic.

Focusing first on multiple domestic homicides in which the perpetrators were male, we found common themes. We went through these cases; we looked to the homicide file; we interviewed people and we compiled information. In forty-seven cases of multiple killings in which the male was the perpetrator, there were 104 victims.²² The first and foremost characteristic of these cases was a history of domestic violence. In all but one of these cases, there was classic woman battering.²³ In the one case in which battering did not occur, the children killed their parents.²⁴

In seventy-two percent of the cases that we could identify, there was an escalating history of domestic violence accompanied by a number of important forms of victimization.²⁵ A characteristic of these relationships was that there was increasing entrapment of women, to the point where some women felt unable to call law enforcement, to resort to the courts or to other

19. See *id.* at 18, 28-29.

20. See WEBSDALE, *supra* note 5, at 16-18, 28-62.

21. See *id.* at 29, 65.

22. See *id.* at 28-29. Out of 53 multiple killings, 47 were committed by males, 6 by females. Out of 117 victims, 104 were killed by men, 13 by women.

23. See *id.* at 33.

24. See *id.* at 33-34, 60-61.

25. See WEBSDALE *supra* note 5, at 33-39.

sources of assistance such as shelters. In a number of cases, prior to the killing, usually within a month or so of the killing, there was a twist in the victimization pattern, for example, marital rape.²⁶ Many of these cases may have been preceded by unusual marital rapes which just did not make it into the data. This is one of the reasons that I am suspicious of prediction work. With domestic violence, it is very difficult to know what is going on in the relationship. So this data is our best window into these relationships. It is significant because it is the same window that judges and law enforcement have, and that all players in the field of domestic violence have when they are dealing with these relationships. The mere fact that it is not in the data is not to say that it is unimportant. But nevertheless, it is what we have to work with.

So, a history of domestic violence is the most important factor. The second most important factor is an attempt by one party to separate from the other party.²⁷ In seventy percent of the cases, we see an attempt to separate occurring between the parties.²⁸ The female typically attempts to leave the male in order to estrange herself from him. An attempt to separate could include a divorce or some pending court action.

Another important common theme is obsessive/possessiveness. Now, this is a difficult one. I am not a psychiatrist, nor am I a lawyer, so I hesitate to use this because I always get in trouble with it, but I am going to use it anyway. Obsessive/possessiveness is identified in the files with considerable frequency.²⁹ Now, what does that mean? Let us imagine that we are in a relationship with an intimate partner, and we come home, and we find that partner engaged in some kind of intimate activity with someone else. What is our response to that? "I'm liberated. You're not my possession." Is that what we say? Or do we say what I often hear from audiences: "I'm not too happy with that, or I don't know how I feel about this, or I'm not comfortable with this." Perhaps an average possessive reaction would be to feel uncomfortable, but remember, we are not talk-

26. *See id.* at 51.

27. JACQUELYN C. CAMPBELL, *ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS* (1995).

28. *See WEBSDALE, supra* note 5, at 33, 52-55.

29. *See id.* at 33, 40-43.

ing about your average form of possessive behavior. With these offenders, obsessive/possessiveness is often accompanied by some kind of medically treated depression; a sleep disturbance, pacing the floor, some kind of visceral reaction or stalking behavior. There are a plethora of associative behaviors that go with obsessiveness that an average person would typically not engage in.

Another common theme is police contact. In at least one-third of multiple killing cases, the police have been to the residence before³⁰ and prior police contact is a significant component. There is a difference between these cases and the single killings.

Another problem with the police contact is, of course, how the police log the call. I had one case where I was talking to a victim who was tried for second degree murder.³¹ She killed her husband after he came at her with a lighter in one hand and a can of lighter fluid in the other. He was basically squirting the lighter fluid on her and was about to set her on fire when she killed him. She went to trial on second degree murder. When we reviewed the files there were no police visits to the residence logged as domestic violence complaints. However, when we went back to the police department and took a closer look, we found 15 prior visits all logged in terms of his or her drunkenness, or some other kind of offense. At first glance, you might think that there is no history of domestic violence. But upon closer inspection, when you asked people who knew them, neighbors or the victim herself, you will find a long history of domestic violence. So, again, prior police contact is a warning. If it is not in the files it does not necessarily mean that we should rule it out completely. After further investigation, we determined that in approximately thirty-two percent of multiple domestic homicides committed by males the police had been summoned to the house regarding domestic violence prior to the killing.³² There could well have been a lot more.

30. *See id.* at 33, 49-51.

31. *See id.* at 148-55. The case of Alison Murray (pseudonym), must remain anonymous to protect her and key informants.

32. *See id.* at 33.

Another frequent indicator that we found was "threats to kill".³³ Frequently, when we talked to a neighbor, we were told that the perpetrators had repeatedly threatened to kill the victim. When asked if they reported it, we were told "no, I didn't think it was important." I am sure that in most of these cases, there are threats to kill and these communicated threats are important signifiers of potential problems in a relationship.

Alcohol and drug use are also often associated with domestic violence.³⁴ They too often go together with regular domestic violence. In situations involving multiple homicides, we did not find it was a major factor. However, some of the cases were preceded by heavy drug and alcohol use.³⁵

Likewise, restraining orders are associated with domestic violence homicides. In twenty-three percent of domestic violence homicides there are protection orders or restraining orders in force.³⁶ Prior criminal histories were also common among perpetrators.³⁷ In all but six of the fifty-three multiple killings, the perpetrators were men. In about one-fifth of the cases the men had prior criminal histories.³⁸ When you put this together, you get a cluster of what you might want to call red flags or antecedents that we can look at a little more closely with other cases.

Now, I would like to contrast multiple killings with single killings in the domestic violence context. Single killings are cases where women were killed in single episodes by men. The classic pattern in eighty-six percent of the cases was escalating domestic violence.³⁹ This is slightly higher than in the multiple killing situations.⁴⁰

33. See WEBSDALE, *supra* note 5, at 33, 48-49.

34. See *id.* at 23 (discussing the relationship between alcohol, drug use, domestic violence and domestic homicide); See also Carolyn R. Block, *Intimate Partner Homicide in Chicago over 29 Years*, 41 CRIME AND DELINQUENCY 496, 508-10 (October 1995).

35. See WEBSDALE, *supra* note 5, at 33, 55-56.

36. See *id.* at 33, 51-55

37. See *id.* at 32-33.

38. See *id.*

39. See *id.* at 81-84.

40. See WEBSDALE, *supra* note 5, at 33. Compare with the 72.3% shown in Table 2.5.

Divorce, estrangement, and separation were present in about sixty percent of the cases.⁴¹ We could identify obsessive/possessiveness in about fifty percent.⁴² Police contact was present in about half of these cases, although there is probably more contact in reality.⁴³ My impression is that there is a big difference between these cases and multiple homicides.

Threats to kill were more significant in single domestic homicides. In nearly half of the cases, there were threats to kill.⁴⁴ Prior criminal history was another significant difference. When men kill women, forty-three percent of them have prior criminal histories of violence other than domestic violence.⁴⁵ A number of them have domestic violence histories as well.⁴⁶ This was borne out by research in other jurisdictions in Florida. So, again, there is a significant difference between single domestic homicides and multiple homicides, *i.e.*, homicides/suicides and familicides. The people who commit multiple homicides seem to be more secretive about it and less exposed to the system; perhaps more likely to suffer from some kind of diagnosable depression. The people who commit single domestic homicides exhibit more violent criminal behavior in other contexts. Alcohol and drug consumption is higher in the single homicides.⁴⁷ The percentage of restraining orders is approximately the same with single and multiple homicides.⁴⁸

There are several differences between multiple and single killings of women. Let me draw on some of the differences inherent in single domestic homicides. It seems that there are a cluster of characteristics that could signify a problem. If an offender has been through the court system, has restraining orders or protection orders taken out against him, has a history of criminal violence, an alcohol or drug related problem, in combination with the first three things discussed (the divorce/separation, the obsessive/possessiveness and escalating domestic

41. *See id.* at 81, 96-97.

42. *See id.* at 81, 84-89

43. *See id.* at 81, 93-96

44. *See id.* at 81, 89-93.

45. *See WEBSDALE, supra* note 5, at 81, 109-13.

46. *See id.* at 109. Documents reveal that 27 out of the 29 male perpetrators with criminal histories battered their partners at some point prior to killing them.

47. *See id.* at 81, 101-05.

48. *See id.* at 81, 97-99.

violence) this offender seems to be particularly dangerous. This is just a subjective reading of the files. It seems to me that men who have gone through the criminal justice system and are undeterred by that system pose a particularly acute problem.

Now I want to address the difference between women who kill men in intimate situations and men who kill women, because I think this research area is greatly misunderstood. There are stereotypes that need to be confronted. In the research that we did in Florida, and indeed in other research, there is little evidence that women who kill men engage in a history of battering of men.⁴⁹ You do not see women who kill men engaged in the same kind of continuing abuse as their counterparts, where the male is increasingly entrapped to the point where he feels unsafe. It is not the type of abuse that continues over a long period of time. That is one key gender dynamic we want to point out.

We did find, in our Florida research, evidence of female perpetrators offensively assaulting men in only five of the twenty-four cases where women killed men.⁵⁰ In other words, these five cases were independent assaults by the female where the male had not in some way precipitated the attack by assaulting her first. In other words, it was not self-defense.

There were four cases where the male and the female both seemed to be using offensive violence during the relationship.⁵¹ There was only one case where we could document that the female was the only one using offensive violence.⁵² There, however, she used it sporadically, occasionally, and not with the same power/control dynamic that seemed to be evident in cases where men killed women.

When females killed they were not in the process of separating. Only sixteen percent were in the process of leaving the relationship.⁵³ This seems to indicate that when women kill, they appear to be entrapped to a point where they cannot do anything else.

49. *See id.* at 122, 124-33.

50. *See* WEBSDALE, *supra* note 5, at 122.

51. *See id.*

52. *See id.*

53. *See id.*

Female perpetrators displayed jealousy. When we looked at jealousy and the obsessive/possessiveness on the part of women, it was not accompanied by stalking; it was not accompanied by the kinds of behaviors that men engaged in. In fact, it was a different kind of envy. It was managed in different ways and had different meanings for the parties. We had one case where the female partner discovered the guy she was living with was having an affair. She actually called the woman and had the woman over for coffee and they talked it through. However, the resolution in that case was very different from the cases where men jealously compete with other men for the affection of women.

AUDIENCE MEMBER: Did she kill him later?

PROFESSOR WEBSDALE: Yes, she killed him later. She's doing eight years for it.⁵⁴ Prior police contact was present in only eight percent of the cases in which the female kills.⁵⁵ In other words, again, she is isolated; she is trapped. This seems to be her only resort.

In about a third of the cases, the female perpetrator had a prior criminal history, things like shoplifting, doing favors for him or bringing money in, as well as some minor drug offenses.⁵⁶ Drug offenses are commonly connected with women who are battered, if she is going to commit offenses at all, they tend to be attempts to medicate the pain of victimization. In approximately a third of the cases with female perpetrators, there was heavy alcohol or drug consumption prior to the killing.⁵⁷ In only two out of the twenty-four cases, the female perpetrator had a restraining order out against the victim.⁵⁸ Again she was trapped and isolated, not resorting to the courts. In one case we found a child custody dispute, although I suspect there were more.⁵⁹

These numbers are very different from the numbers involving male perpetrators. I think these numbers raise important questions about the defense of women who end up killing men

54. See *id.* at 155-57.

55. See WEBSDALE, *supra* note 5, at 122.

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.* at 122, 142-46.

in situations where the women were being battered. I believe it is a great injustice that these women end up serving long prison sentences, or any time at all, for committing these offenses.

Just by point of contrast, male victims often precipitate their own killings through their actions against women. These numbers are put forth to open the debate. You can see that in those cases where women killed men, the men had a propensity towards violence. The men had been violent in twenty of twenty-four cases.⁶⁰ So women were, in fact, typically acting in self-defense. In sixteen of the cases, the male was the only one to resort to violence. You can run down the list and see that some of those numbers are higher and some are not. However, twenty percent of the males had a prior criminal history and fifty percent had alcohol and drug problems. Attention needs to be paid to the difference between men and women with regard to violence.

I also want to say a brief word about policy. One thing we have done in Florida is to develop a system of reviewing domestic fatalities on a local basis. We have set up four teams to bring multiple players to the table and ask questions that do not blame, shame, or speak to liability. Although it is difficult to ask questions in a way that is not insulated by a confidentiality statute, this is an attempt to understand and make sense of these homicides and determine how we could have prevented them.⁶¹

It is my understanding that New York State has not moved in the direction of using fatality review teams.

AUDIENCE MEMBER: They had one for one year.

PROFESSOR WEBSDALE: Yes, as I understand it they had one but they moved away from formally setting up the teams. The idea in Florida was to set up these teams to identify ways in which the system breaks down so that these atrocities can be prevented.

AUDIENCE MEMBER: Do you have any data relative to ethnicity?

60. See WEBSDALE, *supra* note 5, at 123.

61. See generally Neil Websdale et al., *Domestic Violence Fatality Reviews: From A Culture Of Blame To A Culture Of Safety* 50 JUV. AND FAM. CT. J. 61, 61-74 (Spring 1999).

PROFESSOR WEBSDALE: Yes, I do. If you take, as we do in our research, Caucasians as a baseline, the domestic homicide rate amongst Latinos in Florida is two and a half times that of Caucasians.⁶² The rate amongst African Americans is six times the rate amongst Caucasians.⁶³ However, I want to caution that there is research published in both the American Journal of Public Health⁶⁴ and the Journal of the American Medical Association⁶⁵ showing that when you control for socioeconomic status, the effect of race disappears completely. I believe that research was done in New Orleans and in Atlanta. So we interpret ethnicity very cautiously.

The other thing I would say on ethnicity is that African American women are much more likely to kill their male partners than are Caucasian or Latino women. Some scholars have implied that the reason for this is that the African American community is matriarchal.⁶⁶ These women network, become empowered and then they kill. However, our interpretation is that the African American women in our sample were entrapped, isolated, and left with little option but to kill.

AUDIENCE MEMBER: Can you tell us where this data might be available in black and white that we could look at?

PROFESSOR WEBSDALE: The book that I am publishing on this topic is going to be published by Northeastern University Press in June of this year. It is called, "Understanding Domestic Homicide."⁶⁷

AUDIENCE MEMBER: Did you find that the factors you used also correlated to domestic violence that resulted in non-homicidal incidents?

PROFESSOR WEBSDALE: There were many domestic violence cases, and very few domestic homicides. So let us say for argument's sake there are a million domestic assaults a year. There are probably between 1,000 to 1,500 domestic homicides

62. See WEBSDALE, *supra* note 5, at 216.

63. See *id.*

64. See generally Brandon S. Centerwall, *Race, Socioeconomic Status and Domestic Homicide in Atlanta, 1971-72*, 74 AM. J. OF PUB. HEALTH 813, 813-15 (1984).

65. See Brandon S. Centerwall, *Race, Socioeconomic Status, and Domestic Homicide*, 273 J. AM. MED. ASS'N. 1755, 1755-58 (June 14, 1995).

66. See Milton Rosenbaum, *The Role of Depression in Couples Involved in Murder-Suicide and Homicide*, 147 AM. J. OF PSYCHIATRY 1036, 1038 (1990).

67. See WEBSDALE, *supra* note 5.

a year and 2,000 to 3,000 when you include children.⁶⁸ This is a very small number. When asked about the predictive power of this data my response is to look at these themes and whether you are dealing with an offender or a victim, and combine these facts with your professional intuition, and your gut sense of what is going on. If you combine your intuition and the common themes, it gives you the tools to work with. However, this is one of the reasons I have a problem with predictions. Although there are many similarities, it is a question of degree and extreme, level of entrapment, kind of abuse, kind of sexual abuse, and level of planning with regard to obsessive/possessiveness.

AUDIENCE MEMBER: Those factors seem to be a common theme running throughout all the domestic violence cases that I am studying which are not of a homicidal nature. Those factors keep coming up again and again.

PROFESSOR WEBSDALE: They absolutely do. However, when you put these factors together with the flagrant disregard of restraining orders, a prior criminal history, alcohol/drug abuse, and other factors, such as obsessive/possessiveness, and stalking, we should be cautioned that closer attention may be warranted. Yes, I agree with you that there are many similarities. It is a question of feel and degree.

AUDIENCE MEMBER: The evolutionary psychology crowd roots about statistics on homicides by non-biological fathers. Statistics show that the odds of a child being killed by a non-biological father are 60 or 100 times greater than being killed by the biological father. Yet your data showed them to be approximately equivalent in Florida. What is the reason for this difference?

PROFESSOR WEBSDALE: To make this assessment, you need to consider the fact that far fewer kids in Florida are living in homes where there are step-parents versus natural fathers. To make sense of our numbers, you have to play with that information a little bit more and I suspect you will arrive at the differences you mention. My next project will look more closely at that type of variable. It seemed important to us to state that biological parents were also committing these offenses. In addi-

68. See *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, (visited Mar. 3, 2000) <<http://www.ojp.usdoj.gov/bjs/abstract/vi.txt>>.

tion, although there were a number of women killing children people have not wanted to look at that for a number of political reasons.

PROFESSOR LUTZ*: The Pace Women's Justice Center** is writing a domestic violence bench manual with the New York State Office of Court Administration and the Westchester County Department of Probation.⁶⁹ In this part of the symposium, we will discuss risk assessment as a component of drafting orders of protection. We hope to receive input and advice from the audience to assist us in refining the manual.

I would like to begin with a Will Rogers story.⁷⁰ In the early years of the Second World War, Will was talking at a country meeting and doing what he did best—witty, political commentary. Apparently, at that time, German U-boats were wreaking havoc with American ships in the Atlantic; radar had not been invented, and the Germans had U-boats long before we had that same capacity. When asked what he would do about the U-boats, Will stood there and thought about it while he spun his lasso. His reply was that we should heat the Atlantic Ocean to the boiling point so that the U-boats would rise to the surface and then our gunners could pick them off as easy as shooting ducks in a barrel. When asked how he would heat up the Atlantic Ocean, he said: "Why, I'm an idea man, and I leave that to the technicians."

* Victoria L. Lutz is the Executive Director of the Pace University Women's Justice Center (WJC). She has created and conducted customized domestic violence training programs for prosecutors, civil and criminal defense attorneys, judges, law enforcement officers, shelter workers, advocates and other members of the community-response network since 1994. Training programs are designed to enable attorneys to provide better legal representation to battered women in civil and criminal proceedings and to empower other groups to better assist battered women.

Professor Lutz and Professor Johnson gratefully acknowledge the substantial contributions made by Carrie Bernier and Kate Cerrone in developing the material and ideas reflected in their dialogue.

** The Pace Women's Justice Center is the oldest university-based domestic violence center dedicated to training attorneys how better to represent battered women. In addition to its original function, the WJC serves as a resource on gender violence and provides direct client representation.

69. To be published in Spring 2000.

70. *Larry King Live: How to Talk to Anyone* (Random House Audio Publishing, Inc. 1994).

Today, we have been hearing about many new ideas concerning risk assessment, but I am here now as a technician. I want to talk with you about how understanding and using risk factors can help fight the war against domestic violence. I could not agree more completely with what Neil has said, that lethal risk is something that no one can predict in a particular case. We can no more definitively predict death or serious physical injury using risk assessment tools than Will Rogers could have figured out an absolutely foolproof way to rid the Atlantic of German U-boats. Yet, we finally did find a method of providing a greater degree of safety for the sailors on our ships. Radar was adapted as a risk assessment tool, if you will, to help cure the U-boat problem. Similarly, while there is no easy way to end domestic violence, understanding the uses and limitations of risk factors is a step in the right direction.

For judges, lawyers, advocates, police, and other professionals who work with victims of domestic violence, risk assessment is an art, not a science. Risk assessment research simply provides more information to the court in its exercise of discretion. It is not a litmus test. However, the concern has been raised that if courts have such information, judges might use it as a litmus test to produce undesirable consequences for the petitioner who is at risk but who cannot articulate this information.⁷¹ Is that petitioner going to walk out of court without an order of protection? I have asked this question of many people, including domestic violence advocates, lawyers and judges, and I think Neil actually had the best answer. He said that judges, like everyone else, already routinely engage in risk assessment. We engage in risk assessment when we cross the street! Actually, judges are paid to do risk assessment as part of the art of exercising judicial discretion.

Analysis of risk assessment information should be part of any decision relative to a battered woman's safety, e.g., (1) whether to grant an order of protection, (2) what conditions to

71. Barbara J. Hart, Esq., Legal Director, Battered Women's Justice Project, Harrisburg, PA, expressed the following opinion when asked if she thought judges should engage in risk assessment analysis when they considered orders of protection, "I do believe that judges should assess dangerousness and then craft remedies to avert/reduce the danger." Email from Barbara J. Hart, Esq. to Victoria L. Lutz, March 22, 1999.

include in the order, and (3) the duration of the order.⁷² Courts should not be reluctant to grant or frame temporary orders of protection incorporating new risk assessment data. Whether consciously recognized or not, risk assessment permeates our legal system. Examples abound of risk assessment analogous to the intuitive process used by courts and attorneys addressing orders of protection. Judges regularly grant *ex parte* orders based on similar combinations of factual data and sociological insights.⁷³ Examples include arrest warrant applications, search warrant applications, wire taps,⁷⁴ or the removal of a child under Article 10 of the Family Court Act.⁷⁵

Should there be a concern that these risk criteria are not based on complete, solid, consistent data? The answer is no. While risk assessment in domestic violence cases may be new, decisions are made routinely by courts using this type of risk

72. See, e.g., N.Y. FAM. CT. ACT ART. 8 (McKinney 2000); see also "Judicial Checklist," prepared by the Judicial Subcommittee of the ABA, which features the following :

**LETHALITY ASSESSMENT-attempt to
Identify when a perpetrator is most
dangerous by examining perpetrator's
beliefs, patterns of violence, and control.**

Red Flags to Judges

- *suicidal and/or homicidal ideation, threats or attempts
- *escalation in frequency & severity of violent episodes
- *weapons owned by perpetrator, threats to use weapons, or recent purchases of weapons
- *prior criminal behavior or injunctions
- *mental health issues, including:
psychiatric history, medication needs, acute depression
- *substance abuse
- *preoccupied or "obsessed" with victim
- *stalking
- *saying "If I can't have her, nobody can"

**CAVEAT: In all likelihood, violence will escalate in
frequency and severity when victim attempts to end
relationship.**

The same risk assessment analysis is critical whether domestic violence is being addressed in a criminal proceeding, a tort action, a matrimonial proceeding, or elsewhere. This lecture analyzes risk assessment in a family court context.

73. See G. Marlow & A. Gilber, *Ex parte Orders of Protection in Cases of Domestic Violence*, 20 FAM. L. REV. 1:3 (NYS Bar Assoc. Mar. 1989), reprinted in *Assessing Violence: Risks and Remedies* (Judicial Seminar Materials) (NYS Unified Court System, Spring 1999) (hereinafter *Judicial Seminar Materials*).

74. *Id.* at 5.

75. See N.Y. FAM. CT. ACT, art. 10, pt. 2 (McKinney 1996).

assessment data, for example, determining the best interests of children in custody litigation;⁷⁶ considering bail applications;⁷⁷ or deciding whether to remove a juvenile offender to family court⁷⁸ or dismiss an indictment in the interest of justice.⁷⁹ Judges can be more comfortable in using risk assessment information in domestic violence cases when this information is viewed in the context of how courts use risk evaluation in analogous legal settings.

One area in which risk assessment provides valuable insight is in understanding what may contribute to the presence of domestic violence in some cases. "Family offenses"⁸⁰ in New

76. Factors used when determining custody include domestic violence, NEW YORK DOMESTIC RELATIONS LAW §240 (McKinney 1996); NY FAM. CT. ACT §§ 447, 467, 549, 651, 652 (McKinney 1996); and

1. original placement of the child;
2. length of the placement;
3. child's desires;
4. relative fitness of parents;
5. quality of the home environment;
6. parental guidance given the child;
7. parent's financial status;
8. parent's ability to provide for the child's emotional and intellectual development; and
9. presence of siblings.

See *Williams v. Williams*, 188 A.D.2d 906 (N.Y. App. Div. 1992); *Klat v. Klat*, 176 A.D. 922 (N.Y. App. Div. 1991); *Robert T.F. v. Rosemary F.*, 148 A.D.2d 449 (N.Y. App. Div. 1989); *Sullivan v. Sullivan*, 190 A.D.2d 852 (N.Y. Sup. Ct. 1993), *appeal denied* 81 N.Y.2d 706 (1993).

77. N.Y. CRIM. PROC. LAW §510.30 (2)(a)(i-viii) (McKinney 1982).

78. N.Y. CRIM. PROC. LAW § 210.43 (2)(a-i) For example, in deciding this removal question, "the court shall examine individually and collectively, . . . the impact . . . on the safety and welfare of the community." (f) (McKinney 1979).

79. N.Y. CRIM. PROC. LAW § 210.40 (1) (a-j) ("h" uses the same language as §210.44 (2)(f), quoted in the preceding footnote).

80. N.Y. FAM. CT. ACT, art. 8, § 812(1) (McKinney 2000). The term "family offense" found in New York Criminal Procedural Law § 530.11 grants concurrent jurisdiction to the N.Y. family court and criminal court over designated offenses committed between spouses, former spouses, a parent and child, or members of the same family or household (i.e., related by blood or marriage, legally married or formerly married, or persons with a child in common). The "family offenses" in New York are: N.Y.P.L. § 240.20 (disorderly conduct); N.Y.P.L. §§ 240.25, 240.26 (first and second-degree harassment); N.Y.P.L. §§ 240.30 (1,2,4) (second-degree aggravated harassment); §§ 120.14, 15 (second- and third-degree menacing); N.Y.P.L. §§ 120.20, 25 (first- and second-degree reckless endangerment); N.Y.P.L. §§ 120.00, 05 (second- and third-degree assault) (and attempts are same where possible) N.Y.P.L. § 530.11 (McKinney 1999); N.Y. PENAL LAW §§ 120.45, 50, 55, 60 (stalking in the first through fourth degree).

York State require proof of certain statutory elements. In order to establish these elements, risk assessment can provide crucial information.⁸¹ In New York, these elements include proof of "course of conduct,"⁸² "reasonable fear,"⁸³ and "intent to harass, alarm and annoy," just to name a few.⁸⁴

Once the court gets over the hurdle of whether to issue the order of protection, the question becomes, what kind of order? Getting a vacate order⁸⁵ may be more difficult in some courts than in others. For example, in order to get a vacate order in a situation where a woman fears for her life because of a suicidal batterer, the woman may need to explain what his threat to commit suicide means to her and how she interprets this threat. A spouse's suicide threat causes fear in the woman because she recognizes that when someone is willing "to take himself down, he may not hesitate to take a few people down with him. After all, he is not going to have to pay for it."⁸⁶ Although certain caveats must be understood and weighed when using risk assessment research data, *the most important thing to remember is that we must look at domestic violence through the eyes of the woman seeking the order.* "[The domestic violence victim] is an expert concerning her husband's behavior patterns, although she may attribute too much power to him."⁸⁷ Careful risk assessment will help the court issue the most appropriate and protective order.

There are actually two overlapping fields of expertise in risk assessment: lethality and reoffending assessment. There

81. See, e.g., *Rogers v. Rogers*, 161 A.D.2d 766, 566 N.Y.S.2d 114 (1990). Risk assessment to develop a "course of conduct" is also relevant to whether a court orders a three year, rather than a one year order of protection, and to whether the family court issues a warrant for a respondent's appearance.

82. N.Y. FAM. CT. ACT, art. 8; see, e.g., N.Y. PENAL LAW §§ 120.14, 240.25, 240.26 (McKinney 2000); *People v. Murray*, 635 N.Y.S.2d 928 (N.Y. Crim. Ct. 1995).

83. *Id.* § 240.26.

84. N.Y. PENAL LAW § 240.26 (McKinney 2000).

85. N.Y. FAM. CT. ACT, § 842 (a); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1999). A "vacate order" is a colloquial term for an order of the court requiring that the respondent or defendant be required to remove him or herself from the home.

86. Digirolamo, Karla, Executive Director of Unity House, 3215 6th Avenue Troy, NY, 12180.

87. The Honorable Marjory D. Fields, *Practical Ideas for Trial Judges in Domestic Violence Cases*, THE JUDGES' JOURNAL, Summer, 1996, at 33, reprinted in Judicial Seminar Materials, *supra* note 73.

has been less research in the reoffending risk assessment area, which is an area that we are not highlighting here today.⁸⁸ Interestingly, however, when I collected research instruments for obtaining data on high risk assessment, dangerousness and lethality from around the country, the information was very similar.⁸⁹ The overhead that I am showing you now is simply a

88. Andy Klein, 3 NAT'L BULLETIN ON DOMESTIC VIOLENCE PREVENTION 7 (July 1997) ("If the abuser has a substantial prior record, if he is a substance abuser . . . , and /or if he is below 40, we know he is more likely to [abuse] again than the average abuser who, himself, is more likely than not to do it again! . . . Remember, however, predicting re-abuse is not the same as predicting lethality[.]" (p.3)

89. See, e.g., Travis A. Fritsch, M.S., Lethality Assessment and Death Review Panels in National College of District Attorneys Domestic Violence Training Binder, 11c, p.15 (1999) [hereinafter Fritsch criteria]:

Assessing Lethality

The following factors to consider in determining serious injury or lethality potential can be helpful in many cases, but are not guaranteed predictors of future violence. The absence of these factors is also no guarantee of safety.

- Threats of homicide or suicide, or suicide attempts
- History of domestic violence and violent criminal conduct
- Stalking
- Depression or other mental illness
- Obsessive attachment to victim
- Separation of parties
- Drug or alcohol involvement
- Possession or access to weapons
- Abuse of pets
- Destruction of victim's property
- Access to victim and victim's family and other supporters.

High Risk & Lethality Factors

Any domestic violence case has the potential for serious physical injury or death.

If any of these indicators is present, and especially if there is a cluster of indicators present, *take all reasonable precautions to protect victims & any other reasonably identified at-risk person immediately.*

- Victim's 'gut level' feelings of danger
- Threats (explicit or implicit) or fantasies of homicide or *suicide*
- Weapons (threats with, use of, access to)
- Obsessiveness about partner or family
- Separation (actual or perceived intent)
- Stalking behaviors (especially post-protective order or criminal investigation)
- Depression (acute)
- Strangulation acts
- Access to partner, *children*, or other family members
- Dangerous behavior increases in degree
- Symbolic days/events (e.g., anniversary, protective order, divorce, family member's death)

compilation of considerations drawn from Neil's research and combined with the Center's own study and empirical analysis. [What follows is the content of the overhead.] The high risk factors are as follows:

- 1. PRIOR HISTORY OF DOMESTIC VIOLENCE**
 - escalation of violence
 - past homicide attempts; choking
 - rape and sexual violence
 - violence toward pets
 - violence during pregnancy
- 2. ESCAPING VIOLENT RELATIONSHIPS**
 - marital estrangement
- 3. OBSESSIVE-POSSESSIVENESS**
 - extreme jealousy
 - stalking
 - obsessiveness about the relationship
 - suicide attempts or threats
- 4. PRIOR POLICE INVOLVEMENT**
- 5. PRIOR CRIMINAL HISTORY OF THE PERPETRATOR**
- 6. THREATS TO KILL**
- 7. ALCOHOL/DRUG PROBLEMS**
- 8. PROTECTION ORDERS**
- 9. ACUTE PERCEPTIONS OF BETRAYAL**
- 10. CHILD CUSTODY DISPUTES**
 - past attempts to kill or abduct children

-
- Perpetrator takes 'personal risks' (e.g., public exposure, job related risks)
 - Alcohol/drug abuse
 - Repeated calls to law enforcement
 - Hostage-taking
 - Prior history of criminal misconduct

See also Barbara J. Hart, *Assessing Whether Batterers Will Kill*, Pennsylvania Coalition Against Domestic Violence (Pa. Coalition Against Domestic Violence, Harrisburg, Pa. 1990) (*on file with the author*); JACQUELYN C. CAMPBELL, *ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS* (1995); and 9 NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE BULLETIN 1, at 10 (1999).

- severe abuse of children
- sexual abuse of children

**11. MENTAL ILLNESS OF PERPETRATOR
(PARANOIA, SCHIZOPHRENIA, DEPRESSION)**

- severe abuse as child

12. HOSTAGE-TAKING

13. CHILDREN ARE HERS NOT HIS

14. CHANGE IN CIRCUMSTANCES

- unemployment

15. HER FEAR!

Depending upon the facts and the victim's perceptions in the particular case, whether the research is deemed to suggest a greater degree of risk or a risk of death is far less important to the court than is the court's *per se* heightened vigilance when confronted with any number of these factors.

The question of stepchildren came up earlier in our discussion. In a recent book by Dobash and Dobash,⁹⁰ the authors found that the rate of death or serious personal injury was dramatically higher if all children in the house were stepchildren, rather than genetic children of the abuser. The authors also found that these households experienced more dissension and increased domestic violence. Because this factor is generally not intuitive for legal professionals, we had been unaware of it prior to the Dobashes' study. Fortunately, it is something that people like Neil and the Dobashes have discovered and for which they are now providing statistical support. The legal community ignores this factor to the detriment of the battered woman, particularly where this factor combines with several others that we have mentioned.

[At this point a two-minute segment of the movie "Born Yesterday"⁹¹ was shown to the audience. The segment depicts a man yelling at a woman, slapping her twice across the face, and pushing her to a table, where he forces her to sign some documents.]

90. See *RETHINKING VIOLENCE AGAINST WOMEN* 266 (R. Emerson Dobash & Russel P. Dobash eds., 1998).

91. See *BORN YESTERDAY* (Columbia Pictures 1951).

PROFESSOR LUTZ: What is going on in this video?

AUDIENCE MEMBER: You have Robert Crawford and Judy Holiday.

PROFESSOR LUTZ: Yes.

AUDIENCE MEMBER: He is involved with the mob or something. He has come from New York to Washington, and he wants her to do something that she does not want to do.

PROFESSOR LUTZ: Right. He wants her to sign some fraudulent papers, and she does not want to do it, and so he slaps her twice.

PROFESSOR LUTZ: If you were an attorney, would you be able to get a vacate order requiring him to leave their home in New York based on that evidence?

AUDIENCE MEMBER: Yes.

PROFESSOR LUTZ: Let's say they have a child in common. The child is living in Florida, and let's say it is a Family Court case, and you are in Washington, D.C. Can you get a vacate order? (You can use New York law to answer this question, just so we're all on the same page.) Now, if you remember this case—this movie, she was staying in a hotel room for which he was paying. Will the judge force him out of the hotel room?

AUDIENCE MEMBER: I do not think so.

PROFESSOR LUTZ: Probably not. The judge may try to do it for the night or for two nights, and then inform her that she may be left with paying the bill, but that could be a problem. And court-ordered restitution aside, that could present some serious short-term dilemmas for her. Let's change the scenario just slightly. Say she wants a limited order of protection.⁹² She comes in after this incident, and she asks you as the judge for a limited order of protection. She says, I want to continue to live there. I just don't want him to hurt me. I want you to give me an order of protection. What would you do as the judge?

AUDIENCE MEMBER: I'd give her the order of protection.

PROFESSOR LUTZ: Would you give her the limited order of protection?

92. A "limited order of protection" is a colloquial term for an order of protection that does not require the abuser to vacate the victim's residence. See N.Y. FAM. CT. ACT, art. 8 (McKinney 2000).

AUDIENCE MEMBER: Sure.

PROFESSOR LUTZ: Does anyone have any other suggestions?

AUDIENCE MEMBER: I would try to persuade her that she needs more than a limited protection order.

PROFESSOR LUTZ: How would you try to persuade her that she needs more than that?

AUDIENCE MEMBER: I would first ask her if she has an attorney. If she cannot afford an attorney, I would try to provide one.

PROFESSOR LUTZ: Are there any specific questions that you would like to pose to her to elicit why she might be fearful and what the basis of that fear might be? I mean, playing devil's advocate, she did get slapped twice.

AUDIENCE MEMBER: You could ask if she's been hit before. Has this happened before?

PROFESSOR LUTZ: Has it happened before.

AUDIENCE MEMBER: Is it getting worse?

PROFESSOR LUTZ: What else?

AUDIENCE MEMBER: Has he abused any animals or dogs? Where else has he been causing a problem? Are you the only one, or are there other people that he used this form of violence on? Has he hurt the children?

PROFESSOR LUTZ: Okay.

AUDIENCE MEMBER: What makes you think he won't do it again?

PROFESSOR LUTZ: What you are really doing is risk assessment, are you not? The question is, who is going to be responsible for the risk assessment? In my experience, the buck stops with the judge. However, the judge cannot do all of it, and depending upon what court you are in and which judge you have, you will get widely disparate results.

As we put together this bench manual, we talked with petition clerks, judges, and a number of other people who do assessments. Interestingly, we found there are areas of frequent inquiry and areas of less frequent inquiry. By less frequent, I mean information rarely asked for or given to the judge at the *ex parte* proceeding. The court will be unable to obtain some of this information unless the police are involved. When the wo-

man is not at the initial proceeding, the court may not be able to obtain other information useful in risk assessment. That is why risk assessment must be part of a coordinated community response to domestic violence. And that is why cross-disciplinary training is essential.

I am quickly going to review some of the areas of risk assessment that seem to be most frequently addressed in court and then turn to areas that are less frequently addressed.⁹³ The most frequent topics are:

1. What happened to bring you here today?
2. Is there any history of abuse between you? Would you describe it?
3. Give me the worst incident of abuse.
4. Give me the first incident of abuse.
5. Has the violence increased in frequency lately?
6. Has the violence increased in severity?
7. Are there weapons involved? (Involvement of weapons is almost always asked; however, access to weapons is rarely asked: are there any weapons at a friend's house, family house, in your office, that kind of a question.)
8. Does he or did he use alcohol or drugs to excess? Prescription or non-prescription?
9. Has he threatened to kill you or himself? (As Neil Websdale found, prior threats occurred in at least half of female-partner killings.) "Has he threatened to kill the children or your mother or the cops" is a less frequently asked question. In other words, how far is he going in his threats?
10. Has he had any mental problems? Has he ever been treated by health care professionals for mental illness? Has he ever taken medication or been depressed?
11. Does he control your daily activities and/or who you socialize with? (Does he control how much money you have and how money is spent? Although control over money is rarely investigated in court, every advocate I have ever talked with considers this to be a critical question.)

93. Before beginning the questioning, "active listening" to a narrative of the victim's story is critical in order to gain her trust and to get an overview of her perceptions and desires. See also Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALBANY L. REV. 1027 (1995).

12. Does he stalk you? Does he follow you? Does he show up unexpectedly at places where you are? (Typical answer: "Well, he doesn't follow me, but he comes and meets me at work." Well, how often does he come? Answer: "Well, you know, he comes by everyday, you know, just because he loves me.")

Questions such as "Does he stalk you?" may produce a negative answer because they beg a negative and/or legal analysis of the other person's conduct. More direct questions that deal with facts frequently can produce a more accurate picture of the victim's situation. "How often does he call you at work?" "Three, four times a day." "Do you ever go straight from work to meet friends?" "Not really." "Why not?" "He says he doesn't get to see me enough as it is." Continuing this line of fact-based questioning should help you, and perhaps, the petitioner, get a clearer view of the "stalking," "control," and "isolation" her abuser is using to foster his agenda. These types of narrowing questions generally should precede or replace "zinger" questions, such as "Is he stalking you?"; "Is he harassing you on the phone?"; "Is he isolating you from your friends?", all of which can also push the victim into a corner, forcing her to deal with emotions and consequences with you that she is still unable to deal with, or forcing her to protect a person towards whom she may feel love or loyalty.

13. Does he have a criminal history? (That question usually addresses felonies, but what about misdemeanors?) What about violations of prior orders of protection? What about the ubiquitous adjournment in contemplation of dismissal⁹⁴ which are present all too frequently in domestic violence cases?

14. Did he ever hurt your children? Do not ask "Has he ever abused them?" or "Has he ever been physically violent with them?" Rather, has he spanked or slapped them? Disciplined them physically? Treated them in a way you don't agree with? Are you worried about them, and why?⁹⁵

94. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1999). This allows a family offense to be dismissed after a year if the defendant follows the court's directives during that time. An "ACD", adjournment in contemplation of dismissal, is neither a conviction nor a confession of guilt.

95. For an analysis of the nexus between domestic violence and shared custody, see D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1768 (Winter 1999).

15. Does he have a history of domestic violence with others? Past relationships with females can be indicative of what a batterer probably will do in the future.

16. Have there been prior orders of protection, criminal or civil court actions?

17. Are you and he still living together or are you separated? The court needs to determine the timing of any separation between the parties. The answer, "Well, I left him this morning," has different implications than "We've been living apart without any problems for three years."

Now we would like to segue into the less frequent areas of inquiry, and this is where I ask that you let us know if you see something missing. Janet is again very kindly acting as the Judy Holiday character.

PROFESSOR LUTZ: What is the size of your husband?

PROFESSOR JOHNSON:⁹⁶ He's about 5 feet, 10 inches, and weighs about 175 pounds.

PROFESSOR LUTZ: Has he ever tried to choke you?

PROFESSOR JOHNSON: Well, he has put his hands around my neck so that I can't breathe. He has put his hands around my neck and started to tighten them.⁹⁷

PROFESSOR LUTZ: How frequently does he do that or has he done that?

PROFESSOR JOHNSON: Maybe two dozen times.

PROFESSOR LUTZ: Did you ever get medical treatment as a result of these episodes?

96. Janet A. Johnson is Professor of Law at Pace University School of Law in White Plains, New York. Professor Johnson served as Dean of the school from 1983 to 1989, when she joined the faculty. Following her graduation with honors from Drake University School of Law in 1972, Professor Johnson served as staff counsel to the Iowa Crime Commission from 1972 to 1973 and joined the Drake Law faculty in the fall of 1973. She resigned as a tenured full professor in 1978 when she was appointed to serve on the Iowa Court of Appeals. She resigned from the court in March, 1983 to assume the Dean's position at Pace. Professor Johnson's areas of concentration are Family Law, Remedies, Torts, and legal issues involving women. Professor Johnson served for nine years as a member of The Lawyers Grievance Committee for the Ninth Judicial District of the State of New York; four of those years as chairperson. She has also served as a member of The Westchester County Local Conditional Release Commission since its creation in 1989. Professor Johnson obtained her B.A. from the University of Illinois at Chicago Circle in 1968 and her LL.M. from the University of Virginia in 1984.

97. See Fritsch Criteria, *supra* note 89.

PROFESSOR JOHNSON: No. He's never left any marks on my neck.

PROFESSOR LUTZ: Have you ever lost consciousness?

PROFESSOR JOHNSON: No.

PROFESSOR LUTZ: Have you ever had sex with him at a time when you didn't want to?

PROFESSOR JOHNSON: Lots of times.

PROFESSOR LUTZ: Did he ever use force? Although a court might be reluctant to pursue a specific line of questioning such as this in an *ex parte* application for a temporary order of protection, it is likely that the petitioner will not have revealed much of her past history in conversations with members of the community response network prior to the court date. The court is left with two options. One is to remain ignorant of relevant facts, thereby leaving the scales tipped in the batterer's favor, or objectively to inquire into areas known to be associated with increased risk.

PROFESSOR JOHNSON: Well, he didn't tie me down or use a weapon, no. It always comes down to the fact that he reminds me who pays the bills, and if I don't like the way he runs things, I can always find some other option.

PROFESSOR LUTZ: Did he ever hurt you while you were pregnant?

PROFESSOR JOHNSON: Do you mean physically hurt me?

PROFESSOR LUTZ: Yes.

PROFESSOR JOHNSON: Yes, in fact, that's one of the things I really remember, now that you ask me. Right before that, he had simply been angry. He has a very bad temper. But when I was pregnant, it was the first time that he ever hit me. He hit me in the stomach.

PROFESSOR LUTZ: Has he ever said to you that he was thinking of doing away with himself?

PROFESSOR JOHNSON: He's never acted really depressed, but there have been times when I thought he was going to commit suicide. He often says that he can take me out along with himself if I don't do as he tells me to.

PROFESSOR LUTZ: Would you describe him as a jealous individual?

PROFESSOR JOHNSON: Well, it's hard to say, because he tells me I'm ugly and nobody would want me, but yet he accuses me of trying to attract every man's attention. I don't know if he's jealous or not.

PROFESSOR LUTZ: Has he ever been violent to anyone outside of your home situation?

PROFESSOR JOHNSON: He's gotten into a fight several times with his buddies. Well, he calls them his buddies. The guys in the groups that he hangs around with, they're always in some kind of disagreement. I think they settle all of their arguments with fights.⁹⁸

PROFESSOR LUTZ: What about pets? Do you have a pet?

PROFESSOR JOHNSON: We do, yes.

PROFESSOR LUTZ: Has he ever threatened to harm or harmed the pet?

PROFESSOR JOHNSON: Oh, he hates cats. He has harmed the cat. We used to have a long-haired cat, and he found cat hair on his trousers one day, and he looked at me and said, well, he used a bad word, and he told me that I was stupid and I didn't clean his clothes right. And then he said, I'm going to get rid of that cat. With that he kicked the cat across the living room and broke its ribs, and we had to put it to sleep.

PROFESSOR LUTZ: [To the Audience] We had a client recently who complained that the respondent had held her arm and threatened to punch her in the face. Very low level harassment at best, in New York. We sat down with her and found out that he was bipolar; had suicide ideation; had 13 guns, although they were legal; was collecting 200 pound boxes of ammunition, although he was not a hunter; and had killed three of the family pets. Those background facts changed the situation dramatically for the court in regard to the bail that was set and the protective nature of the conditions that were drafted.

Is he employed now?

PROFESSOR JOHNSON: Yes. He works. He's self-employed. He sells junk to – he collects junk, and he sells it to other people.

98. A significant percentage of the women that we represent at the Center do not know of their partners being violent with anyone other than themselves and, sometimes, a previous female partner.

PROFESSOR LUTZ: [To the Audience] Andy Klein from Quincy, the Chief Probation Officer in Massachusetts, says that the cluster around low level re-offending is highest where you have an unemployed male who is using drugs and is younger, between, say, 18 and 25. According to Klein, this profile presents very high spiking in terms of whether or not this person is a likely re-offender.⁹⁹

Any major life changes in the near past, in the last year or so?

PROFESSOR JOHNSON: Do you mean, like, really big, bad things?

PROFESSOR LUTZ: Yes, like someone dying.

PROFESSOR JOHNSON: His mother died about six months ago. It was hard to tell, because he had a real mean, love/hate relationship with his mother, but I think that was a big deal.¹⁰⁰

PROFESSOR LUTZ: Do you know if he was abused as a child?

PROFESSOR JOHNSON: I think he was spanked a lot. Is that what you mean?

PROFESSOR LUTZ: Anything else?

PROFESSOR JOHNSON: Not that I can think of now.

PROFESSOR LUTZ: Could you describe how you feel about him today? Are you scared?

PROFESSOR JOHNSON: I love him, but I'm scared of him because he – he's bigger than I am, and I don't feel I can do anything.

PROFESSOR LUTZ: You know that this court can issue an order that would make him leave your home. You have requested a limited order of protection that allows you to live together and says he can't hurt, harass, or annoy you. Is that what you would like? I will tell you that I can ask for either type of order. I can help in terms of providing an advocate to

99. Andrew Klein, Ph.D., Chief Probation Officer of the Quincy District Court of Massachusetts. (The Quincy District Court was selected as a model demonstration site for domestic response training by the Justice Department's Violence Against Women Office) (from speech given to NYS Department of Probation, March 12, 1995, Saratoga, NY).

100. Advocates warn that increased vigilance is warranted when there is a major change in the batterer's existence (e.g., loss of job, family member, etc.).

work on safety planning with you. Many of the things that you have said to me today indicate a history of violent behavior at home.

PROFESSOR JOHNSON: I would just like him to be gone for a couple of weeks, I think, until he cools off. Whatever is going on now, it might get better.

PROFESSOR LUTZ: Audience, freeze frame. What we are basically trying to do is to pull together areas of inquiry that are not routinely asked by the courts and are not always on petition forms. Our purpose is to add these factors to what the courts should know.

What other information would you seek?

AUDIENCE MEMBER: Isolation of dwelling. Is it a home that is someplace in the woods away from other homes, or is it in a socially isolated place where the victim does not have contact with supportive others? Does she have viable means of transportation? Has her car ever been vandalized? Have the tires ever been slashed, the windshield broken, *et cetera*.

AUDIENCE MEMBER: I would ask about her ability to work, not just are you working, but have you had to quit a job? Has he ever called your job, caused trouble on your job, or told you that your place is at home?

AUDIENCE MEMBER: What about the circumstances of the violence. Sometimes it may be provoked behavior by the other spouse. Sometimes violence may be related to certain forms of complications; they can be sexual, financial, or others. I do not think the questions outlined whether there was any provocation or any trigger factors for the violence.

PROFESSOR LUTZ: We would suggest that there is no legal provocation that would suffice to result in her being battered; therefore, initiating such a question, particularly in the context of risk assessment, might develop a misleading line of inquiry.

AUDIENCE MEMBER: Further inquiry should include: Has he ever restricted your use of the phone or isolated you from friends and family?

AUDIENCE MEMBER: Don't forget such things as over-reaction to little things, you know, an inch difference in how far the shades are pulled, because that is "obviously" a signal to your abuser. This is real life. You know, that movie, "Sleeping

with the Enemy” is not just Hollywood. Which way the pans are hung, the way the towels are on the rack – these are all “triggers”: “If you would only hang those towels the right way, then he would not have whacked you.” But we all know, if it weren’t the towels, it could have been something else.

PROFESSOR JOHNSON: Bear in mind, what we are talking about in all of these issues is the fact that judges have no absolute guidelines set down by any statute. They have no appellate court decision that lays out the factors that must be considered. There is broad discretion and judges exercise that discretion cautiously in these kinds of cases, particularly because they usually have only one side of the story. She is asking for an order, but he is not there. Many times, she is asking for him to be removed from the home, at least for the near future. Judges respond in a cautious way, especially in light of due process considerations, because he has not had an opportunity to be heard, and he is going to be ousted from his home. Counsel should be prepared to remind the court that its power is, of necessity, broad and that judicial discretion is abused only when it is arbitrary or unreasonable.¹⁰¹

We are trying to develop a full range of factors to be considered in the preparation of the petition and/or to be used by the judges in terms of questions that will be asked. The goal is to have somewhat standardized questions, thereby reducing the disparity in or paucity of information currently available to the court. The availability of this information should make judges more comfortable in making a decision requiring him to vacate. The bottom line is that when he is not ordered to leave, which happens in many of these cases, as a practical necessity, she is going to be the one who has to leave during this period of time.

PROFESSOR LUTZ: The next overhead is a nutshell view of how judges can synthesize this information in their analysis of domestic violence issues:

DOMESTIC VIOLENCE & RISK

The Given: Domestic Violence is a process, not an incident.
Judges consider risk to determine:

- 1) elements of the offense, e.g.,

101. See *People ex rel. Totalis v. Craver*, 20 N.Y.S.2d 533 (Sup. Ct. 1940).

- course of conduct
- reasonable fear
- intent to harass, annoy or alarm
- 2) provisions in the order of protection, e.g.,
 - limited, stay away, vacate
 - specificity (guns, children, no contact)
 - duration of order

Risk consideration bases include:

- 1) judicial discretion
- 2) legal guidelines
- 3) risk indicators

AUDIENCE MEMBER: I have two questions or comments I would like people to discuss. One question would be what economic or financial resources are available to him? Can I gauge his reaction about having to leave the house by whether he is financially capable of leaving, how difficult it is or isn't, his legal response, *et cetera*.? The second is a quick and dirty understanding of what his mental capacity is. Did he finish high school or not? Is there any kind of limiting function in his thinking? This could indicate how he will handle this order. There could be an escalation of violence if he cannot handle the order or if he doesn't feel like he knows how to respond to it. So I think the risk assessment must also address what his response will be and how that will be brought across. Those are the two areas I think might make a difference in protecting her.

POFESSOR LUTZ: Well, just to hit your last point first, from my experience, batterers are no more consistent in their age, background, or their educational level than robbers or murderers or anybody else. So it is very difficult to assess risk based on educational background.

His financial status in terms of the house or where he's living – I'm not quite sure how that plays into whether the judge should issue the order.

AUDIENCE MEMBER: I am not saying the judge should, but isn't there going to be some determination of how to prevent the risk and support the woman in making this work so she does not have to leave? Would understanding some of the financial resources of the man make a difference?

PROFESSOR LUTZ: Well, the judge can order immediate support, at least child support.

PROFESSOR JOHNSON: As I understand your question, you're saying that his limited circumstances and what he feels his options are may well lead to a reaction that makes him more dangerous.

AUDIENCE MEMBER: Exactly, like beating her up again.

PROFESSOR JOHNSON: That is another factor to be considered.

PROFESSOR LUTZ: Unfortunately, there is no greater ability, I think, to predict whether or not the order of protection will trigger a violent response than to predict whether folding the napkins on the table incorrectly will trouble him.

PROFESSOR JOHNSON: We are not advocating a checklist, but rather we are advocating that judges explore risk assessment factors about which they should routinely gather information.

PROFESSOR WEBSDALE: I think we are in a situation where we have a system where people have varied access to the dynamics, the microdynamics of domestic violence and domestic homicide. My feeling is that these checklists are better than nothing.

Again, I go back to this issue of prediction and variables which are like science. I personally think that if we believe that science is predictive for social life, then we end up with this kind of confluence of science and law which supposedly respects individual rights. I think we can develop tunnel vision and move away from common sense and intuition and you end up in absurd situations. We talked in an earlier part of this program this morning about a potentially pedophilic man being a child psychiatrist. I mean, it strikes me as ludicrous. We move in these circles, and I think we just need to go back to common sense, intuition, feeling and discretion, which the court uses in the system anyway. I see it as an attempt at education. I know that is not a popular opinion.