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# Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years

D. Kelly Weisberg\*

## I. INTRODUCTION

Thirty years ago, law schools first began offering courses in Domestic Violence Law.<sup>1</sup> That same time period also witnessed the birth of an impressive development in the law of domestic violence—lethality assessment.<sup>2</sup> This article explores the origins of the lethality assessment movement, its expansion into the law, and its role in the courts.

When lethality assessment emerged in the mid-to-late 1980s, it took root in fertile soil. Major developments had already occurred in the field of intimate partner violence in the criminal and civil justice systems on both the state and federal level.<sup>3</sup> The criminal justice system was in the midst of a transformation in terms of law enforcement treatment of domestic violence calls; the development of policies of warrantless arrest, mandatory arrest, and no-drop prosecutions; the creation of new domestic violence-related crimes; the establishment of training programs for law enforcement and judges; and the implementation of special domestic violence

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1. Melissa L. Breger & Mary Ann Lynch, *From Kate Stoneman to Stoneman Chair, Katheryn D. Katz: Feminist Waves and the First Domestic Violence Course at a United States Law School*, 77 ALB. L. REV. 443, 444 (2013-2014) (pointing out that the first documented class in domestic violence was a two-credit seminar offered at Albany Law School by Professor Katheryn Katz in the 1986-87 academic year). Professor Nancy Lemon was also an early teacher of domestic violence law at the University of California, Berkeley School of Law. See NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW iii (2001) (discussing the creation of her course in 1988). In the first decade in which law schools offered courses on domestic violence law, the number of law schools with either courses or clinics expanded rapidly from zero in 1987 to 57 in 1997. *Id.*

2. The term is used here to signify the risk of both near-fatal and fatal intimate partner violence. Note that many domestic violence risk assessment methods exist. These vary in terms of whether they predict reassault and/or lethality. They also vary in terms of their methodology (collecting information from the victim, perpetrator and/or other sources such as criminal records) and the ultimate beneficiary of the assessment (victim services or the legal system). Jacquelyn C. Campbell, *Assessing Dangerousness in Domestic Violence Cases: History, Challenges, and Opportunities*, 4 CRIM. & PUB. POL'Y 653, 659 (2005) [hereinafter Campbell, *Assessing Dangerousness in Domestic Violence Cases*].

3. For a comprehensive survey of these developments in the criminal and civil law of intimate partner violence, see D. KELLY WEISBERG, DOMESTIC VIOLENCE LAW (2019) (treatise); D. KELLY WEISBERG, DOMESTIC VIOLENCE LAW: LEGAL AND SOCIAL REALITY (2019) (casebook).

jurisdiction and courts.<sup>4</sup>

The civil law was witnessing the proliferation of statutes authorizing orders of protection and domestic-violence related tort remedies; and the development of case law and statutory law that addressed the role of domestic violence in family law and dependency proceedings. Beginning in the 1970s, the social service system experienced the creation of hotlines and battered women shelters, and subsequently, the establishment of batterer intervention treatment programs and counseling programs nationwide.<sup>5</sup> Although the field of domestic violence law emerged following the enactment of the first civil protection order statute in 1976,<sup>6</sup> it was only after the passage of the Violence Against Women Act (VAWA)<sup>7</sup> in 1994 that law reform, legal services, and social services really escalated.

VAWA was also responsible for the creation of a whole body of *federal* law on domestic violence (i.e., the interstate crime of domestic violence, interstate stalking, and violation of protection orders); the development of the federal government's role in firearm regulation, including restrictions on those persons' subject to restraining orders; and the creation of tribal law on domestic violence. Federal firearm regulation continued when, in 1996, Congress enacted the Domestic Violence Offender Gun Ban<sup>8</sup> (known as the "Lautenberg Amendment" after its sponsor, Senator Frank Lautenberg (D-NJ)), that banned access to firearms by people convicted of misdemeanor crimes of domestic violence.

International legal developments occurred during the 1990s as well. In 1996, Congress enacted the Illegal Immigration Reform and Responsibility Act, which constituted the first regulation of the mail-order bride industry.<sup>9</sup> As part of that legislation, Congress requested the Immigration and Naturalization Service (INS) to conduct research on the connection between domestic violence, trafficking, and marriage fraud.<sup>10</sup>

However, one of the most far-reaching developments in the field of domestic violence in the past thirty years is lethality assessment.<sup>11</sup> Lethality

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4. See WEISBERG, DOMESTIC VIOLENCE LAW (treatise), *supra* note 3, at 173-86, 201-02, 205-10.

5. See generally SUSAN SCHECHTER, THE ROOTS OF THE BATTERED WOMEN'S MOVEMENT: PERSONAL AND POLITICAL (1982) (describing these developments).

6. See Susan Kelly-Dreiss, *A Retrospective: The Nation's Landmark Restraining Order Law and First State Domestic Violence Coalition*, 20 DOMESTIC VIOLENCE REP. 19 (Apr./May 2015) (pointing out that the Pennsylvania legislature enacted the Protection for Abuse (PFA) Act, in 1976, and that statute served as the model for similar laws across the country).

7. Violence Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 108, Stat. 1190 (1994).

8. Pub. L. No. 104-208; 18 U.S.C. § 922(g)(9).

9. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified in relevant part at 8 U.S.C. § 1375(c).

10. 8 U.S.C. § 1375(c)(4).

11. Scholars date the origins of risk assessment in the field of domestic violence to the mid-1980s and early 1990s. N. Zoe Hilton et al., *A Brief Actuarial Assessment for the Prediction*

assessment involves an evaluation of a victim's risk of severe reassault or homicide.<sup>12</sup> Lethality assessment is especially valuable to identify high-risk victims who are critically in need of services and also to determine the victims who are most in danger of experiencing severe recurring intimate partner violence (IPV). Today, this evaluation is widely used by legal professionals, health care providers, and social service personnel.

Lethality assessment was spurred by the growth of the field of risk assessment. Risk assessment is synonymous with the term "dangerousness assessment" and encompasses lethality assessment.<sup>13</sup> Risk assessment measures the characteristics of a person and the person's conduct to assess that person's level of dangerousness in order to effectuate better decision making about a variety of issues.<sup>14</sup> In the criminal justice system, risk assessment occurs in many stages of the criminal process from bail, no-contact orders, sentencing, to probation and parole. Risk assessment also is considered in treatment decisions to determine the type of treatment best tailored to an offender. Many different professionals (including police, prosecutors, judges, and social service providers) are called upon to make informed decisions to assess an offender's level of dangerousness. These decisions are useful for two primary purposes: accountability (to gauge the most appropriate response to the offender in terms of punishment and treatment) and protection (to safeguard the victim and the public from a recurrence of violence).

The law first relied on risk assessment in the context of mental health in the 1970s. In the first generation of research on risk assessment, studies focused on institutionalized individuals in psychiatric, forensic, and correctional settings to determine whether mental illness placed a patient or

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*of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment*, 16 PSYCHOL. ASSESSMENT (APA) 267, 267 (2004) (citing five articles dating from 1992-2001 that empirically identify "predictor items for wife assault recidivism," including: age, severity and duration of prior violence, other prior antisocial behavior, violence in the offender's family of origin, hostility, and substance abuse); Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will be Murdered by Her Partner*, 24 WIS. J.L. GENDER, & SOC'Y 277, 281 (2009) (identifying the first use of a domestic violence-related lethality risk assessment instrument in 1985).

12. Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171, 171 (2000).

13. *Id.* at 171.

14. An additional word about terminology. Risk assessment and lethality assessment are not coterminous; they do not measure the same outcome. Risk assessment measures the likelihood that abuse will recur, whereas lethality assessment measures the risk of severe reassault or the likelihood that a fatality will occur. GLEN KERCHER ET AL., ASSESSING THE RISK OF INTIMATE PARTNER VIOLENCE, CRIME VICTIMS' INSTITUTE, CRIMINAL JUSTICE CENTER, SAM HOUSTON UNIVERSITY 1, 3 (Jan. 2010), [http://dev.cjcenter.org/\\_files/cvi/CVI\\_AssessingRiskFinal\\_1-21-10.pdf](http://dev.cjcenter.org/_files/cvi/CVI_AssessingRiskFinal_1-21-10.pdf) [<https://perma.cc/ZMK6-C9MK>] (citing D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk versus Risk Factors and Instruments in Predicting Repeat Re-Assault*, 19 J. INTERPERSONAL VIOLENCE 778 (2004)).

others in imminent risk of harm.<sup>15</sup> The impact of this research reverberated in the courts. For example, courts relied heavily on clinical assessment of risk in making decisions about involuntary commitment.<sup>16</sup> Such determinations were necessitated by state statutes that often included the term “dangerousness to self or others” as the standard for involuntary hospitalization. By 1981, there was so much interest in risk assessment that psychology professor John Monahan authored a widely-cited review of the burgeoning literature.<sup>17</sup> His article concluded by noting the potential of risk assessment while, at the same time, expressing skepticism about the ability of forensic psychologists to make accurate predictions of future dangerousness.<sup>18</sup>

Despite this skepticism, the U.S. Supreme Court gave its imprimatur to risk assessment in two cases in the 1980s. In *Barefoot v. Estelle*,<sup>19</sup> the Supreme Court stated that, although expert testimony on dangerousness may not always be correct, it is admissible and the adversarial process should evaluate it.<sup>20</sup> The following year, in *Schall v. Martin*,<sup>21</sup> the Supreme Court again gave its approbation to risk assessment when it upheld the practice of preventative detention for juvenile criminal suspects, reasoning that the practice is based on a prediction that the accused poses a serious risk of future criminal conduct.<sup>22</sup>

Forensic psychologists relied on these judicial decisions to emphasize the importance of the use of predictions of dangerousness. In response, risk assessment took root in a number of other contexts including the field of domestic violence. Some commentators contended that risk assessment had particular value when applied to the domestic violence context.<sup>23</sup> As rationale, they cited: (1) the base rates for repeated physical assaults by intimate partners are relatively high which serves to reduce the rate of false predictions; (2) evaluators who make risk assessments in partner assaults often have access to the victim who is able to provide a rich source of information about the perpetrator; and (3) several risk factors exist that are

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15. MATTHEW T. HUSS, FORENSIC PSYCHOLOGY: RESEARCH, CLINICAL PRACTICE, AND APPLICATIONS 107 (2009).

16. JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 3 (2001).

17. JOHN MONAHAN, CLINICAL PREDICTION OF VIOLENT BEHAVIOR (U.S. Gov't Printing Office, DHSS Pub. No. (ADM) 81-921 (1981).

18. *Id.* at 123.

19. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

20. *Id.* at 936-38.

21. *Schall v. Martin*, 467 U.S. 263 (1984).

22. Preventative detention refers to the post-arrest, preconviction detention of alleged criminals based upon a judicial finding that the criminal is dangerous. See Donald G. Dutton & P. Randall Kropp, *A Review of Domestic Violence Risk Instruments*, 1 TRAUMA, VIOLENCE, & ABUSE 171, 171 (2000).

23. *Id.* at 172.

uniquely related to dangerousness in the domestic violence context.<sup>24</sup>

The primary purposes of risk assessment in the context of domestic violence include: (1) to enable the criminal justice system to identify which offenders deserve higher bail, specific conditions of release, various forms of supervision, and particular sanctions; (2) to formulate appropriate treatment programs for perpetrators; (3) to assist victims and service providers to develop relevant social services, including safety plans; and (4) to educate legal and social service personnel to obtain a better understanding of the dynamics of domestic violence (e.g., the seriousness of non-fatal strangulation incidents, the dangerousness of the stage of separation).<sup>25</sup>

## II. DEVELOPMENT OF RISK ASSESSMENT INSTRUMENTS

Beginning in the 1990s, scholars became interested in the development of *instruments* to measure the risk of violence. Previously, the approach to risk assessment relied on clinical judgment. Assessments were based on “human judgment, judgment that is shaped by education and professional experience.”<sup>26</sup> However, these judgments were increasingly disparaged as being subjective and difficult to replicate. In response, actuarial and structured approaches developed. In terms of mentally ill offenders, researchers diverted their efforts from improving clinicians’ judgment about dangerousness to developing evidence-based tools that would inform clinicians’ judgment.<sup>27</sup> Before that time, few tools existed to assess the risk of violence.

The growing emphasis on the development of instruments to measure risk reached the field of domestic violence. Initially, scholars highlighted risk markers or risk indicators. This effort led to the subsequent development of risk assessment instruments. Risk factors, of course, are not causal factors. That is, they do not establish causality (that an offender who manifests these risk factors will severely reassault an intimate partner or kill her). Rather, they suggest merely correlations (that an offender who commits certain acts is more likely than an offender who does not commit these acts to severely reassault an intimate partner or kill her).<sup>28</sup>

Barbara Hart was one of the first scholars to develop a list of factors

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24. Dutton & Kropp, *supra* note 22, at 172.

25. BATTERED WOMEN JUSTICE PROJECT, INTEGRATING RISK ASSESSMENT IN A COORDINATED COMMUNITY RESPONSE, <http://www.bwjp.org/our-work/topics/risk-assessment.html> [<https://perma.cc/6RLK-YUW5>].

26. HUSS, *supra* note 15, at 109.

27. MONAHAN ET AL., RETHINKING RISK ASSESSMENT, *supra* note 16, at 7.

28. Thus, the fact that an abuser chokes a victim and threatens to kill her does not mean that he will severely reassault her or kill her. However, the presence of these (and other) risk factors is suggestive that this offender is a more dangerous offender than others and is more likely than others who do not commit these acts to reassault the victim severely or to kill her. The existence of a higher number of risk factors enhances the likelihood of severe reassault or homicide.

suggesting the potential lethality of abusers based on findings derived from her legal and social advocacy work on behalf of battered women.<sup>29</sup> Hart advised law enforcement officers that they should evaluate, during every incident, the dangerousness of intimate partner offenders based on a list of factors.<sup>30</sup> According to Hart, these risk markers included: threats (and fantasies) of homicide or suicide, weapons, a feeling of ownership of the intimate partner, separation violence, depression, access to the victim and/or her family members, prior history of domestic violence, escalation of batterer risk, and hostage-taking by the offender.<sup>31</sup> Hart also added that the existence of a larger number of risk factors in a given intimate partner situation signifies an enhanced likelihood of severe violence or lethality.<sup>32</sup>

Criminologist Neil Websdale also developed risk markers that correlated with the increased risk of death. Based on his work with domestic violence fatality review committees, he identified such factors as: the abuser's prior history of IPV, a pending or separation or estrangement, the abuser's obsessive possessiveness or morbid jealousy, the abuser's threats to kill, alcohol and drug use, unemployment, and the presence of stepchildren in the household.<sup>33</sup>

Professor Jacquelyn Campbell of the Johns Hopkins School of Nursing also had a major impact on the development of domestic-violence-related risk factors and risk assessment. Campbell, who is a professor and Anna D. Wolf Chair at the Johns Hopkins School of Nursing, conducted a classic study on lethality assessment that provides the most comprehensive data to date. Her study included a sample of 220 female homicide victims as well as a control group of 343 abused women. Her multisite data collection effort involved 11 cities. The sample identified homicide victims and abuse victims from police and medical examiner records from 1994 to 2000.<sup>34</sup> The purpose

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29. BARBARA HART, PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, *ASSESSING WHETHER BATTERERS WILL KILL 1* (1990), [http://victimsofcrime.org/docs/Information%20Clearinghouse/Assessing\\_Whether\\_Batterers\\_Will\\_Kill\\_PCADV.pdf?sfvrsn=4](http://victimsofcrime.org/docs/Information%20Clearinghouse/Assessing_Whether_Batterers_Will_Kill_PCADV.pdf?sfvrsn=4) [https://perma.cc/KH6J-L5QW]; see also BARBARA HART, *BEYOND THE DUTY TO WARN: A THERAPIST'S "DUTY TO PROTECT" BATTERED WOMEN AND CHILDREN IN FEMINIST PERSPECTIVES ON WIFE ABUSE* 234 (Kersti Yllo & Michele Bogard eds., 1988).

30. HART, *ASSESSING WHETHER BATTERERS WILL KILL*, *supra* note 29, at 1.

31. *Id.* at 1-2.

32. Roehl & Guertin, *supra* note 12, at 174 (citing HART 1990).

33. NEIL WEBSDALE, *ASSESSING RISK IN DOMESTIC VIOLENCE CASES* IN *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 38, 39-40 (Nicky Ali Jackson ed. 2007); Janet Johnston et al., *Death by Intimacy: Risk Factors for Domestic Violence*, 20 PACE L. REV. 263, 267-271 (2000) (coauthor Neil Websdale discusses risk markers); NEIL WEBSDALE & BAHENY DEDOLPH, *LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS* (Feb. 2000), <https://vawnet.org/material/lethality-assessment-tools-critical-analysis> [https://perma.cc/P6P2-VBCU]; NEIL WEBSDALE, *UNDERSTANDING DOMESTIC HOMICIDE* (1999). Websdale is a Professor of Criminal Justice at Northern Arizona University and the Director and Principal Project Advisor of the National Domestic Violence Fatality Review Initiative of the U.S. Department of Justice.

34. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships:*

of the study was “to determine the risk factors that, over and above previous intimate partner violence, are associated with femicide within a sample of battered women.”<sup>35</sup>

After identifying victims and victim-perpetrator relationships from the police and medical examiner records, Campbell used those records to identify at least two individuals in each homicide case who were knowledgeable about the victim’s relationship with the perpetrator. Researchers then contacted the seemingly more knowledgeable informant and requested an interview to explore risk factors that had preceded the homicide. The findings identified certain factors associated with an increased risk of intimate partner homicide, including: gun ownership, previous threats with a weapon, the presence of the perpetrator’s stepchild in the home, estrangement, stalking, forced sex, and pregnancy abuse.<sup>36</sup>

Jacquelyn Campbell is also the creator of the widely used domestic-violence risk assessment instrument, the Danger Assessment (DA). Risk assessment instruments, like the DA, improve the determination of the likelihood of reassault beyond that evoked by risk factors.<sup>37</sup> Professor Campbell developed the DA, a questionnaire, that was one of the first tools to assist service providers to more accurately assess the risk of fatal violence by an abuser.<sup>38</sup> Campbell also developed the Lethality Assessment Program (LAP), a shorter screening protocol, which is administered by first responders when they arrive at the scene of a domestic violence incident to improve the provision of services to victims. Both of these developments are explored in more depth below.

### III. DANGER ASSESSMENT TOOL

The Danger Assessment Tool (DA) was first developed in 1985 for use by service providers in interviews with battered women.<sup>39</sup> In developing this evidence-based tool, Campbell’s objective was to encourage use of the instrument by health care personnel to assess the future risk of homicide by

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*Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/pdf/0931089.pdf> [https://perma.cc/VN J6-KUC8] [hereinafter Campbell et al., *Risk Factors for Femicide*].

35. Campbell, *Risk Factors for Femicide*, *supra* note 34, at 1091.

36. *Id.* at 1089.

37. LESLEY LAING, RISK ASSESSMENT IN DOMESTIC VIOLENCE, AUSTRALIAN DOMESTIC & FAMILY VIOLENCE CLEARINGHOUSE 1, 10 (2004), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.540.7076&rep=rep1&type=pdf> [https://perma.cc/V57B-8LSA].

38. For background on the circumstances that influenced Campbell to develop the danger assessment instrument; *see* Campbell, *Assessing Dangerousness in Domestic Violence Cases*, *supra* note 2, at 660-64.

39. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 14, 15 (Jan. 2003), <https://www.ncjrs.gov/pdffiles1/jr000250e.pdf> [https://perma.cc/JM25-XXH8] [hereinafter Campbell et al., *Assessing Risk Factors*]; Hitt & McLain, *supra* note 11, at 283.

an intimate partner and alert the woman of her risk. (The DA has since been used in many settings to screen not only for the risk of homicide but also for the likelihood of severe reassault.)<sup>40</sup> The instrument was empirically validated in 2003, and subsequently revised several times based on input from battered women, law enforcement agencies, and victim advocates.<sup>41</sup>

The DA consists of approximately 20 questions concerning the risk factors in abusive relationships. The initial DA was comprised of 15 questions that were derived from a literature review as well as from interviews with victims and advocates. In 2003, five additional items were incorporated based on evidence from a federally funded study of homicides.

The DA's weighted scoring system enables identification of various danger levels (variable, increased, severe, and extreme). The tool assists the victim in recalling the severity of violence over the past year with the help of a 12-month calendar. The use of a calendar serves to increase recall, raise the consciousness of the victim, and reduce the victim's denial and minimization of the abuse. Risk factors on the DA that are most highly correlated with the risk of near-fatal assault or homicide include:

- gun ownership;
- threats to kill or threats with a weapon;
- recent separation;
- controlling behaviors;
- having a child that is not the abuser's child;
- forced sex; and
- nonfatal strangulation.<sup>42</sup>

The victim's danger is categorized according to various levels, ranging from lowest to highest (Variable Danger, Elevated Danger, High Danger, and Highest Danger). Interviewers inform victims at the Variable Danger level of the risk they face. However, interviewers caution victims that risk can change quickly and urge victims to watch for additional warning signs. Victims at the Elevated Danger category or above are advised to seek safety assistance from social services support groups, law enforcement, and the judiciary. Victims at either the High or Highest level of danger merit even greater attention from criminal justice professionals.

The DA is one of few evidence-based measures of lethality and the only

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40. Jacquelyn C. Campbell, *Assessing Dangerousness in Domestic Violence Cases*, *supra* note 2, at 654.

41. Hitt & McLain, *supra* note 11, at 283.

42. Jill Messing & Jacquelyn Campbell, *The Use of Lethality Assessment in Domestic Violence Cases*, 21 DOMESTIC VIOLENCE REP. 69 (June/July 2016); JILL MESSING ET AL., POLICE DEPARTMENTS' USE OF THE LETHALITY ASSESSMENT PROGRAM: A QUASI-EXPERIMENTAL EVALUATION 20-21 (Mar. 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247456.pdf> [<https://perma.cc/S4J9-2S3P>] [hereinafter MESSING ET AL. POLICE DEPARTMENT'S USE].

risk assessment that gathers data solely from victims.<sup>43</sup> It has been the subject of over 30 peer reviews.<sup>44</sup> It has also been the subject of several validation studies.<sup>45</sup> Numerous studies have found that the DA is a good predictor of reassault in the short term.<sup>46</sup> When it was compared to two other common risk assessment instruments, the DA was the best predictor of repeat reassault.<sup>47</sup> The DA is currently regarded as a “best practice” by criminal justice, health providers, and social service workers.<sup>48</sup>

Today, lethality assessment (often including some version of the Danger Assessment tool) has uses in both the civil and criminal law of domestic violence. It is employed widely by such first responders as police, ambulance attendants, and paramedics.<sup>49</sup> It is also used by social workers, domestic violence shelter volunteers, and other victim counselors.<sup>50</sup> It has a role in the criminal justice system in setting bail and charging decisions in domestic violence cases.<sup>51</sup> It is utilized as a component to the administration of a GPS monitoring program for batterers who present a high risk to their victims.<sup>52</sup> It is also used in a variety of civil proceedings, including protection order proceedings, child welfare hearings, and custody decision making.<sup>53</sup> Finally,

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43. The DA has been empirically-validated by Dr. Campbell in 11 federally funded research grants addressing the subject of risk assessment. Campbell et al., *Risk Factors for Femicide*, *supra* note 34, at 1092-93. The Danger Assessment is available at [www.dangerassessment.org](http://www.dangerassessment.org) [<https://perma.cc/LVV5-X547>]. It has also been independently validated (as the text below explains). On the use of DV-risk assessment by social workers, see Jill Theresa Messing & Jonel Thaller, *Intimate Partner Violence Risk Assessment: A Primer for Social Workers*, 45 BRIT. J. SOC. WORK 1804 (2015), <https://doi.org/10.1093/bjsw/bcu012> [<https://perma.cc/7BKM-2VTF>].

44. Hitt & McLain, *supra* note 11, at 308.

45. D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault*, 19 J. INTERPERSONAL VIOLENCE 778 (2004).

46. Heckert & Gondolf, *supra* note 45, at 787-88.

47. *Id.* at 794.

48. Hitt & McLain, *supra* note 11, at 283-91 (discussing judicial and extrajudicial uses of DA); Julie Saffren, *Using Judicial Knowledge of Lethality Factors in Civil Domestic Violence Matters*, 21 DOMESTIC VIOLENCE REP. 73, 73 (June/July 2016) (explaining the status of lethality assessment as a “best practice” by a “wide variety of professionals who deal with victims of abuse, including DV advocates, law enforcement, and health-care professionals”).

49. Hitt & McLain, *supra* note 11, at 282.

50. *Id.*

51. See, e.g., ARIZ. REV. STAT. ANN. §13-3967(b)(5). See also Arizona PBS, *Domestic Violence Lethality Assessment*, AZPBS (Oct. 20, 2015), <https://azpbs.org/horizon/2015/10/domestic-violence-lethality-assessment/> [<https://perma.cc/9PGD-9E43>].

52. Shelley M. Santry, *Can You Find Me Now? Amanda's Bill: A Case Study in the Use of GPS in Tracking Pretrial Domestic Violence Offenders*, 29 QUINNIPIAC L. REV. 1101, 1117 (2011).

53. KERCHER ET AL., *supra* note 14, at 3 (identifying its use in protection order proceedings).

For a case referring to a lethality assessment in a parenting plan determination, see *In re Marriage of Ashagari & Kassahun*, No. 71295-1-I 2015 WL 1307124 at \*3 (Wash. Ct. App.

it plays a role in batterers' intervention treatment programs, expert witness work, and asylum cases.<sup>54</sup>

The spread of lethality assessment received a huge boost with the reauthorization of the Violence Against Women Act of 2013 (VAWA 2013).<sup>55</sup> The original Violence Against Women Act of 1994<sup>56</sup> provided funding by way of grants to law enforcement, prosecutors, judges, and social service providers, among others. VAWA 2013 encouraged all VAWA-funded programs to undertake training for their personnel in evidence-based lethality indicators and homicide prevention.<sup>57</sup> Previously, such training was not explicitly listed in the purposes for VAWA-funded grants to law enforcement (Services, Training, Officers, Prosecutors (or STOP) grants).<sup>58</sup> However, VAWA 2013, although it did not *require* lethality training as a prerequisite for the receipt of funding did *encourage* grantees to conduct such training.

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2015). *See also* William G. Austin, *Partner Violence and Risk Assessment in Child Custody Evaluations*, 39 FAM. CT. REV. 483 (2005); *Bench Guide for Recognizing Dangerousness in Domestic Violence Cases*, 21 DOMESTIC VIOLENCE REP. 69, 82 (June/July 2016) (bench guide for judicial officers at all stages of judicial proceedings involving allegations of domestic violence and orders of protection in civil and criminal domestic violence cases).

54. Jacquelyn C. Campbell, *Safety Planning Based on Lethality Assessment for Partners of Batterers in Intervention Programs*, 5 J. AGGRESSION, MALTREATMENT & TRAUMA 129 (2001), DOI: 10.1300/J146v05n02\_08 [<https://perma.cc/8LEE-RDQH>] (study of use of lethality assessment in batterers' intervention program); Laurie Cook-Heffron, *Assessing Lethality to Support Asylum Claims Based on Intimate Partner Violence*, 21 DOMESTIC VIOLENCE REP. 89, 91 (Aug./Sept. 2016) (explaining lethality assessment in context of asylum claims); Alyce LaViolette, *Assessing Risk with Perpetrators*, 21 DOMESTIC VIOLENCE REP. 89, 94 (Aug./Sept. 2016) (use of lethality assessment in batterers' intervention program); Nancy K.D. Lemon, *Using the Danger Assessment as a Domestic Violence Expert Witness*, 21 DOMESTIC VIOLENCE REP. 69, 87 (June/July 2016) (use of danger assessment in expert witness work); *D.O.H. v. T.L.H.*, 799 So.2d 714 (La. Ct. App. 2001) (recounting occurrence of a lethality assessment in a batterers' intervention program).

55. Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified as amended in scattered sections of 42, 25, 22, and 18 U.S.C.).

56. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 108 Stat. 1190 (1994).

57. *See* NAT'L TASKFORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, SUMMARY OF CHANGES FROM VAWA REAUTHORIZATION 2013, [https://isc.idaho.gov/dv\\_courts/conferences/2014/NTF%20High-Level%20Summary\\_05.14.pdf](https://isc.idaho.gov/dv_courts/conferences/2014/NTF%20High-Level%20Summary_05.14.pdf) [<https://perma.cc/c29WS-ZY3H>] (describing changes in VAWA 2013, referring to 42 U.S.C. § 3796gg).

58. When VAWA was originally enacted in 1994, the law mandated that at least 25 percent of STOP grants had to be distributed to law enforcement, another 25 percent to prosecution, and another 25 percent to victim services (allowing considerable discretion for how the remaining 25 percent could be spent). The legislation permitted grants to be used for police training; establishment and expansion of specialized units on domestic violence; and the development and implementation of policies, protocols, and procedures.

#### IV. VICTIM'S LACK OF AWARENESS OF LETHALITY

The DA's role in the identification of danger to alert victims of the seriousness of their situation is essential, in part, because victims' perceptions of their risk are highly inaccurate.<sup>59</sup> Use of risk assessment helps alert the victim to both the likelihood and severity of re-abuse. A victim's calculus of risk generally depends on three factors: her level of resources, her experience in the system, and her capacity to appraise the risk of future violence.<sup>60</sup> However, fewer than half of the women who are eventually killed by their partners accurately perceive their risk of death.<sup>61</sup>

A multistate study of batterers' intervention programs revealed that women who were uncertain about their risk of reabuse or who felt "somewhat" safe were more likely to be reassaulted repeatedly than those women who felt that they were in greatest danger. This apparent contradiction stems from the fact that victims who feel in the greatest danger took effective countermeasures. In contrast, victims who are uncertain about the likelihood of revictimization tend to err by giving the benefit of the doubt to abusers.<sup>62</sup>

Various reasons exist why victims' perceptions of risk are so unreliable. Some victims are unable to accurately perceive their risk because they experience the victimization as a normal part of intimate partner relationships. Victims' perceptions also may be marred by their preoccupation with other problems of their abuser, such as the perpetrator's drug and alcohol use, financial problems, or infidelity issues. This preoccupation with partners' problems leads victims to feel as if they are helping their partners change, and diverts their attention from feeling

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59. Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 669 (2009); Jacquelyn C. Campbell, *Helping Women Understand Their Risk in Situations of Intimate Partner Violence*, 19 J. INTERPERSONAL VIOLENCE 1464, 1464 (2004) (pointing out that only half of 456 women who were killed or almost killed by a husband, boyfriend, or ex-husband or ex-boyfriend accurately perceived their risk of homicide). Note, however, that victims' perception of the *risk of reassault* are considerably more accurate than their perceptions of the potential for homicide. Campbell, *Assessing Dangerousness in Domestic Violence Cases*, *supra* note 2, at 665 (citing references).

60. BARBARA J. HART & ANDREW R. KLEIN, PRACTICAL IMPLICATIONS OF CURRENT INTIMATE PARTNER VIOLENCE RESEARCH FOR VICTIM ADVOCATES AND SERVICE PROVIDERS 81 (Dec. 2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244348.pdf> [<https://perma.cc/5KDZ-2GL2>].

61. Campbell, *Assessing Dangerousness in Domestic Violence Cases*, *supra* note 2, at 656 (pointing out that slightly more women were able to perceive the risk of near-lethal violence than those who could accurately perceive their risk of death, i.e., 54 percent compared to 45 percent); Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument*, *supra* note 59, at 669; Campbell, *Helping Women Understand*, *supra* note 59, at 1464.

62. HART & KLEIN, *supra* note 60, at 81 (describing study).

frightened.<sup>63</sup> Other explanations for victims' inaccurate perceptions stem from the theory that denial and minimization serve as adaptive coping mechanisms that allow victims to continue to invest in the relationship while reducing the distressing symptoms of trauma. Alternatively, denial/minimization serves as a survival strategy in the face of knowledge that leaving is likely to lead to an escalation of the violence and perhaps trigger lethal violence.<sup>64</sup>

## V. INNOVATIVE PRACTICES FOR FIRST RESPONDERS

A significant outcome of the lethality assessment movement is the improved collaboration that developed between law enforcement personnel, domestic violence programs, health care providers, and allied professionals. For example, lethality assessment is increasingly used in hospital emergency rooms to connect victims with social services, including safety planning.<sup>65</sup> However, proliferation of lethality assessment among law enforcement agencies nationwide is nothing short of astonishing. In an ever-expanding number of jurisdictions, law enforcement officers are encouraged, and, sometimes required, to conduct lethality assessments at the scene of domestic violence incidents.<sup>66</sup> In some states, the practice of conducting lethality assessments is standard operating procedure: state domestic violence protocol manuals advise all law enforcement officers to routinely perform this task.<sup>67</sup>

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63. Christina Nicolaidis et al., *Could We Have Known? A Qualitative Analysis of Data from Women Who Survived an Attempted Homicide by an Intimate Partner*, 18 J. GEN. INTERNAL MED. 788, 792-93 (2003).

64. JANICE ROEHL ET AL., INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY, FINAL REPORT 1, 20 (May 2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf> [<https://perma.cc/S53D-XZB8>].

65. Ralph J. Riviello, *How to Recognize and Act on Risk Factors for Domestic Violence Homicide*, ACEP NOW NEWS, (May 9, 2014), <https://www.acepnow.com/article/recognize-act-risk-factors-domestic-violence-homicide/> [<https://perma.cc/3FER-325C>] (urging emergency room physicians to screen all patients who may be at risk for IVP and, if the screen is positive, urging these physicians to screen patients for risk factors for lethality, i.e., strangulation, access to/use of firearms, and drug/alcohol abuse); Carolyn Snider et al., *Intimate Partner Violence: Development of a Brief Risk Assessment for the Emergency Department*, 16 ACAD. EMERG. MED. 1208 (2009), [https://www.dangerassessment.org/uploads/Snider%20et%20al\\_%20Brief%20IPV%20Risk%20Assessment\\_SAEM\\_AEM\\_blned%20doc.pdf](https://www.dangerassessment.org/uploads/Snider%20et%20al_%20Brief%20IPV%20Risk%20Assessment_SAEM_AEM_blned%20doc.pdf) [<https://perma.cc/XR8G-686W>] (explaining how use of a screening instrument can provide better care to patients by aiding clinicians to differentiate among patients who need comprehensive safety interventions).

66. See, e.g., CAL. PENAL CODE § 13519(c)(6) (requiring training for law enforcement officers in the "procedures and techniques for assessing lethality or signs of lethal violence in domestic violence situations"); *Sigalavillavicencio v. State*, 2019 Tex. App. LEXIS 470 1, 13 (Tex. App. 2019); *State v. Woolverton*, 371 P.3d 941, 945 (Kan. Ct. App. (2016) (both cases illustrating the routine nature of screening by law enforcement officers using lethality assessments).

67. Jaime Balson, *Using Danger Assessment in the Prosecution of Domestic Violence Cases*, 21 DOMESTIC VIOLENCE REP. 75, 75 (June/July 2016) (identifying Maricopa County, Arizona, domestic violence protocol manual used by many county departments that states

Lethality assessment programs in law enforcement have spread to police departments in 32 states.<sup>68</sup> Some states report participation in lethality assessment programs by *all* state and municipal police departments.<sup>69</sup>

Many police departments conduct lethality assessment by administering a special screening tool at the scene of domestic violence incidents. The Lethality Assessment Program (LAP), a shortened version of the DA tool, was created by the Maryland Network Against Domestic Violence (MNADV) in 2005 with the help of Jacquelyn Campbell.<sup>70</sup> The objective was to assist first responders to improve the provision of services to victims. The LAP is a “multi-pronged intervention that consists of a standardized, evidence-based lethality assessment instrument and accompanying referral protocol that helps first responders make a differentiated response that is tailored to the unique circumstances of High-Danger victims.”<sup>71</sup> The 11-item screening instrument was developed in response to the critical need for a tool that could be used more efficiently and effectively by police in the midst of an emergency call for service when law enforcement must fulfill the dual functions of caring for the injured and conducting an investigation.

The LAP sets in motion a collaborative effort between law enforcement first responders and service providers to provide both risk assessment and advocacy services to those victims who are deemed at highest risk of being killed by their intimate partners.<sup>72</sup> The goals are: (1) to increase the use of safety planning among victims, and (2) to decrease the frequency and severity of repeat LAP.<sup>73</sup>

The LAP has two components. The first component involves an 11-question risk assessment instrument called the Lethality Screen.<sup>74</sup> The second component, a Protocol Referral, involves connecting the victim with services.<sup>75</sup> Both events occur at the scene of a domestic violence incident after an emergency call for services by the victim or a third party.

The responding officer puts the LAP into effect by administering a

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“police departments should develop and use domestic violence risk assessments to gain greater insight into the nature, frequency, and severity of violence in the relationship”).

68. UPDATE FROM PITTSBURGH: CITY MANDATES POLICE LETHALITY ASSESSMENTS, 20 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION 25 (Feb. 2014).

69. CONNECTICUT COALITION AGAINST DOMESTIC VIOLENCE, CONNECTICUT’S LETHALITY ASSESSMENT PROGRAM: 2017 REPORT 2 (Nov. 2017), [http://www.ctcadv.org/files/2515/1084/1466/2017LAP\\_report\\_11.17.pdf](http://www.ctcadv.org/files/2515/1084/1466/2017LAP_report_11.17.pdf) [<https://perma.cc/UM4Y-XHPJ>].

70. *Id.* at 1.

71. Maryland Network Against Domestic Violence, Lethality Assessment Program, How LAP Works, <https://lethalityassessmentprogram.org/about-lap/how-lap-works/> [<https://perma.cc/2PZC-P62S>] [hereinafter cited as MNADV website]. The LAP has been recognized by the U.S. Department of Justice as one of two models of evidence-based intimate partner homicide prevention.

72. *See generally* CONNECTICUT COALITION AGAINST DOMESTIC VIOLENCE, *supra* note 69.

73. *Id.* at 3.

74. *Id.*

75. *Id.*

Lethality Screen, a screening interview with the victim, after the scene is secure and the investigation of the incident is completed. Officers determine whether it is appropriate to use the Lethality Screen based on whether the victim and perpetrator have a past or current intimate relationship and whether there is a “manifestation of danger.”<sup>76</sup> A “manifestation of danger” consists of evidence of at least one of the following criteria: (1) the officer believes that an assault or other violent act has occurred whether or not there was probable cause for arrest, (2) the officer is concerned for the safety of the victim once the officer leaves the scene, (3) the officer is responding to a domestic violence call from a victim or at a location where domestic violence had occurred in the past, or (4) the officer has a “gut feeling” that the victim is in danger.<sup>77</sup> The process takes approximately five minutes during which the officer asks the victim eleven questions that are adapted from Campbell’s Danger Assessment instrument.<sup>78</sup>

The second component of the LAP begins at the conclusion of the eleven-item Lethality Screening. Depending on the findings of the screening, the responding officer utilizes a referral and service protocol to alert victims of the severity of their risk from their intimate partner and asks the victim if she/he is willing to consult by telephone with a domestic violence advocate.<sup>79</sup>

For victims who screen as “high danger” (meaning, at increased risk of homicide), the police officer conveys to the victim the seriousness of the danger that she is facing and explains that some victims with her score have been killed by their intimate partners.<sup>80</sup> The officer then tells the victim that the officer would like to call the local 24-hour domestic violence hotline at the collaborating advocacy organization on the victim’s behalf in order to obtain some information to help the victim.<sup>81</sup>

The officer asks the victim whether the victim would consider speaking with the hotline worker.<sup>82</sup> The officer then makes the call to the hotline (regardless of whether the victim chooses to speak to the hotline worker or not), and the officer provides information to the hotline worker. The officer’s call gives the victim an opportunity to reconsider speaking to the hotline worker if she has declined.<sup>83</sup> While the officer is conferring with the hotline by phone, the officer again consults with the victim to see if she/he consents to talking to the hotline. If the victim still declines, the officer abandons the

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76. MESSING ET AL., POLICE DEPARTMENTS’ USE, *supra* note 42, at 24.

77. *Id.*

78. CONNECTICUT COALITION AGAINST DOMESTIC VIOLENCE, *supra* note 69, at 3.

79. Maryland Network Against Domestic Violence (MNADV), Lethality Assessment Program – Maryland Model (LAP) 1, 10 (describing protocol for law enforcement), [https://mnadv.org/\\_mnadvWeb/wp-content/uploads/2013/12/LAP-Protocol.pdf](https://mnadv.org/_mnadvWeb/wp-content/uploads/2013/12/LAP-Protocol.pdf) [<https://perma.cc/UU2B-6P2L>].

80. *Id.* at 10.

81. *Id.*

82. *Id.*

83. *Id.* at 11.

effort to put the victim in touch with advocates and merely provides some immediate safety planning tips to her.<sup>84</sup>

If the victim agrees to consult with the hotline worker, the ensuing conversation is brief (no more than 10 minutes). The hotline worker reinforces the message about the victim's risk, conducts safety planning for the victim, and encourages her to seek additional agency services.<sup>85</sup> The brevity of the consultation with the hotline worker is attributable to the fact that the officer must return to service and also that the victim may not be receptive to services at that time because she is experiencing trauma in the aftermath of the incident. Hotline workers are trained to communicate with victims in situations where time is short and where victims are wrestling with the aftermath of a violent incident and, therefore, may not yet have come to terms with the seriousness of their situation.

All victims receive valuable information from the Lethality Screen. Even those victims at low or moderate risk are aided by the screening process. The protocol conveys knowledge to them about the warning signs that could indicate that an abusive relationship is escalating in severity. "Additionally, the officer's concern for the victim, as well as the visible partnership between the officer and the advocate, both demonstrate to victims that there are people who care about their situation and are available to help when victims are able to safely seek services."<sup>86</sup>

In Maryland, where LAP originated, the screen is used by every law enforcement agency and domestic violence program in the state.<sup>87</sup> Since its launch in Maryland law enforcement agencies, the LAP has been successfully implemented in at least 350 law enforcement agencies and 48 domestic violence service providers in 14 states.<sup>88</sup> Although it was originally designed to assist law enforcement, the LAP has now spread to health care personnel (nurses, hospital personnel), social workers, case workers, and court personnel.<sup>89</sup> Some states have a statutory mandate for implementation of the LAP among law enforcement agencies.<sup>90</sup>

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84. *Id.*

85. *Id.* at 12.

86. MNADV website, *supra* note 71.

87. MESSING ET AL., POLICE DEPARTMENTS' USE, *supra* note 42, at 25. *See also* Pennsylvania Coalition Against Domestic Violence, *Assessing Lethality Risk in Domestic Violence Cases*, THE JURIST 1, 5 (Dec. 2015), available at [http://www.pcadv.org/Resources/Jurist\\_JudLethal\\_12292015.pdf](http://www.pcadv.org/Resources/Jurist_JudLethal_12292015.pdf).

88. Pennsylvania Coalition, *Assessing Lethality Risk*, *supra* note 87, at 5.

89. MNADV website, *supra* note 71.

90. OKLA. STAT. TIT. 21, § 142A-2 (2014) ("Upon the preliminary investigation of a domestic violence crime involving intimate partner violence, the first peace officer who interviews the victim of domestic abuse shall assess the potential for danger by asking a series of questions provided on a lethality assessment form." The lethality assessment form shall include, but not be limited to, the following questions [including the 11-item Lethality Screen described herein]). *See also* Laura's Law in Arkansas that requires Arkansas police officers responding to domestic violence incidents to ask victims a set of questions to evaluate their

The effectiveness of the LAP has been confirmed in a federally-funded study.<sup>91</sup> Researchers studied implementation of the program in 2008 in seven Oklahoma police departments.<sup>92</sup> They collected data for a five-year period from victims who had called police to report domestic violence.<sup>93</sup> The study compared how these women fared with how abused women fared without the program. The researchers found that the women in jurisdictions that had adopted the program reported fewer and less severe incidents of re-abuse.<sup>94</sup>

Specifically, women who received the LAP intervention used significantly more protective strategies than those in the control group—both immediately after the incident and at a follow-up time seven months later.<sup>95</sup> Victims' protective actions included: removing or hiding a partner's weapons, obtaining mace or pepper spray, establishing a safety code to alert family/friends of trouble, improving home security, applying for an order of protection, obtaining medical care from a health care practitioner, going somewhere where the partner could not find or see them, and seeking advocacy services.<sup>96</sup> Use of these protective actions contributed to the women's experiencing less severe and less frequent revictimization.<sup>97</sup>

An unanticipated finding of the evaluation research was the improvement in law enforcement investigations. By requiring officers to assess the level of risk to the victim, the screening effort spurred police to strengthen their collection of evidence.<sup>98</sup> Better forensic investigations led to improved prosecution and an enhancement in batterer accountability. Thus, although the LAP was intended to be victim focused and enhance victims' utilization of services, the program may have had an impact on the rate of domestic violence homicides. In Maryland, for example, where the LAP originated in 2005 and where all police departments utilize the LAP, domestic violence homicides have fallen by 40 percent since 2007.<sup>99</sup> This

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risk of being killed by the abuser. The assessment aims to help identify victims in severe danger needing intervention. ARK. CODE ANN. § 12-12-108(a) ("When a law enforcement agency responds to a report of domestic violence, the first law enforcement officer to interview a victim of domestic violence shall assess the potential for danger by asking a series of questions provided on a lethality assessment form...").

91. See MESSING ET AL., POLICE DEPARTMENTS' USE, *supra* note 42. See also Kelly Weisberg, *Innovative Intervention by Police Reduces IPV Victimization*, 21 DOMESTIC VIOLENCE REP. 53, 59 (Apr./May 2016) (describing the evaluation study).

92. MESSING ET AL., POLICE DEPARTMENTS' USE, *supra* note 42, at 86.

93. *Id.* at 2.

94. *Id.* (reporting that implementation of the LAP increased survivors' use of formal and informal protective strategies and decreased the frequency and/or severity of physical violence).

95. *Id.* at 51.

96. *Id.* at 86.

97. Weisberg, *Innovative Intervention*, *supra* note 91, at 59; see also MESSING ET AL., POLICE DEPARTMENT'S USE, *supra* note 42, at 4.

98. FIRST LETHALITY ASSESSMENT PROGRAM EVALUATION FINDS SOME POSITIVE RESULTS, 21 NAT'L BULL. ON DOMESTIC VIOLENCE PREVENTION 5 (Apr. 2015).

99. *The Takeaway*, Risk Assessment Model Helps Predict Domestic Violence Homicide,

contrasts with the rate of domestic violence homicides in nearly every other state where the rate of such homicides has remained virtually unchanged since the passage of the Violence Against Women Act in 1994.<sup>100</sup> The decrease in intimate partner homicides in Maryland suggests that the LAP may play a significant role in enhancing victims' safety.

## VI. ROLE OF LETHALITY ASSESSMENT IN THE COURTS

Lethality assessment has recently earned a degree of acceptance by the courts. Beginning in the late 1990s and early 2000s, criminal courts and court-connected agencies began to use lethality assessments for charging and sentencing purposes in intimate partner violence cases.<sup>101</sup> A study of legal professionals in courts and court-connected agencies in 21 states in the year 2000 found that almost all used formal risk assessment instruments for sentencing purposes.<sup>102</sup> “The most common use of assessment instruments was at sentencing, postplea or postconviction, to guide probation or incarceration decisions.”<sup>103</sup> Results from risk assessments were used to determine the levels of supervision (frequency and type of contact by probation officers, such that higher risk individuals were matched with high levels of supervision); the length of probation; and the conditions of probation (terms of criminal no-contact orders, batterers' intervention treatment, substance abuse treatment).

The study found that the second most common use of risk instruments was in charging decisions, i.e., the determination of if, and under what conditions, an offender would be released from custody (at charging, preplea or preadjudication).<sup>104</sup> Information from risk assessments guided decision making regarding (1) release of the offender from custody, (2) the decision to require bail or release the offender on his or her own recognizance; (3) the amount of bail, and (4) the terms of release (such as child visitation, access to weapons, and criminal no-contact orders).<sup>105</sup>

In some states, state law (rather than merely judicial practice) authorizes the use of information from lethality assessments in criminal proceedings, such as bail hearings.<sup>106</sup> For example, since 2006, Ohio law requires all judges to evaluate every domestic violence defendant and perform a risk

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WNYC STUDIOS <https://www.wnystudios.org/story/204147-risk-assessment-model-predicts-domestic-violence-homicide> [<https://perma.cc/L46R-S76M>].

100. *Id.*

101. Roehl & Guertin, *supra* note 12, at 171.

102. *Id.* at 176 (“we found evidence of the use of formal risk assessment instruments for sentencing purposes in eighteen states”).

103. *Id.* at 186.

104. *Id.*

105. *Id.*

106. A bail bond hearing is a court appearance during which the defendant asks the judge to release him or her from police custody pending the outcome of a criminal case.

assessment, prior to setting bail or allowing release after arrest.<sup>107</sup> Ohio judges in both felony and misdemeanor domestic violence cases are required to meet with domestic violence defendants individually for bail-setting.<sup>108</sup> The law is called “Amy’s Law,” after an Ohio woman, Amy Jones, whose violent former husband made multiple attempts on her life before he murdered her by shooting her in the head while he was free on bail.<sup>109</sup>

In 2015, the Arizona legislature followed suit when it enacted legislation that sanctions prosecutors’ use of lethality assessments at bond hearings. The law makes it mandatory for judges to consider information obtained through a lethality assessment.<sup>110</sup> As one commentator points out, information obtained from lethality assessments is especially important to prevent the release of violent domestic violence offenders into the community while criminal charges are pending.<sup>111</sup> This fact is especially true when the prosecutor cannot get in touch with a victim to warn her.<sup>112</sup> Also the use of information from lethality assessments is important in cases in which the victim wants the abuser released from custody. “In cases such as this, the prosecutor has no way of knowing whether the victim truly wants the defendant to be released or if the defendant is pressuring the victim to make statements in support of his or her release to the court.”<sup>113</sup>

Lethality assessment also plays an important role in civil protection order proceedings. The purpose of a protection order is to prevent the petitioner from suffering serious future harm by the respondent. In a protection order proceeding, the court requires proof, by a preponderance of the evidence, that certain types of abuse have occurred and are likely to recur. Protection order proceedings thereby necessitate a prediction of the risk of danger posed by the respondent to the petitioner. Risk assessments are a fundamental part of a protection order proceeding when the risk of dangerousness of the respondent is at issue and the court must evaluate the predictive quality of the defendant’s past acts as to the likelihood of future harm.

In a protection order proceeding, the victim declares his or her allegations of current and/or previous abuse under penalty of perjury. The judge reviews the victim’s petition and documentation (i.e., affidavit). The

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107. OHIO REV. CODE ANN. § 2919.251.

108. Michael Brigner, *Amy’s Law: New Ohio Domestic Violence Bail Statute Adds Safety Precautions for Crime Victims and the Public*, 18 OHIO DOMESTIC RELATIONS J. 17 (Mar./Apr. 2006).

109. *Id.*

110. ARIZ. REV. STAT. ANN. § 13-3967(B)(5) (2018) (“In determining the method of release or amount of bail, the judicial officer, on the basis of available information shall take into account all of the following: . . . 5. The results of a risk or lethality assessment in a domestic violence charge that is presented to the court.”). *See also* Amelia Cramer et al., *How Arizona Prosecutors Implemented a Statewide Domestic Violence Risk Assessment*, 52 PROSECUTOR 21 (Oct. 2018)

111. Balson, *supra* note 67, at 76.

112. *Id.*

113. *Id.*

court must determine whether the petitioner's allegations about current or past abuse satisfy the statutory definition for domestic violence and also whether the current or previous harm is suggestive of the likelihood that the violence will recur.

Some commentators and courts have long recognized the valuable role that lethality assessment can play in protection order proceedings. As early as 1994, one Florida judge, Judge Linda Dakis, wrote an article encouraging her fellow judges in protection order proceedings to consider the use of lethality assessment. Judge Dakis commented:

A critical component of the court's intervention in domestic violence cases is an assessment for lethality. While judges can never be certain when a homicide might occur, there are certain warnings that a battered woman may be at risk for serious injury or death. Judges should focus attention on whether the perpetrator has threatened suicide, has weapons, has threatened or fantasized homicide, begun hostage-taking or extreme risk taking, is preoccupied with the partner (including stalking), has been on medication or hospitalized for mental illness, has isolated family or friends, has a strong belief or obsession about losing the partner, and abuses alcohol or drugs. These considerations apply to injunctions and any other case in which domestic violence is present.<sup>114</sup>

In 2009, the authors of a federally-funded report advised judges in protection order proceedings to conduct more comprehensive assessments of victims' risk. The report explained that petitions for restraining orders rarely fully reveal the nature of the abuse suffered by the petitioner or the risk for future abuse. To obtain necessary information from victims, the authors urged judges to question victims further about their circumstances to shed light on the existence of risk factors.<sup>115</sup> The study specifically identified the specific risk factors of post-separation abuse and stalking as evidence of high risk for lethality.

Concern about the need for risk assessments in protection order proceedings reached the national level in 2010. In that year, the National Council of Juvenile and Family Court Judges (NCJFCJ) urged the judiciary nationwide to conduct risk assessments in protection order proceedings. In proposing new guidelines for judges, the NCJFCJ recommended that the judiciary establish a process whereby judges routinely conducted risk assessment in protection order proceedings to assure that the victim's safety

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114. Judge Linda Dakis, *Injunctions for Protection*, 68 FLA. B.J. 48, 50 (Oct. 1994).

115. ANDREW R. KLEIN, DEPT. OF JUSTICE, NAT'L INSTITUTE OF JUSTICE REPORT, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 57 (June 2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf> [<https://perma.cc/74NR-DSMP>].

needs are addressed.<sup>116</sup>

Lethality assessment received the imprimatur of the legal system in protection order proceedings in 2015 in a landmark case in the Kentucky Supreme Court. In *Pettingill v. Pettingill*,<sup>117</sup> the Kentucky Supreme Court upheld a trial court decision granting a protection order that rested in large part on the judge's use of lethality factors to assess the dangerousness of an abuser.<sup>118</sup> In 2013, Sara Pettingill separated from her husband, Jeffrey, and sought a divorce.<sup>119</sup> Shortly after, Sara filed a petition for a domestic violence restraining order, alleging that Jeffrey's violent, controlling, and unstable behavior made her fear for her own safety as well as the wellbeing of their young daughter.<sup>120</sup> Her petition described numerous frightening incidents, including one event when Jeffrey became angry and abused the family pet in the presence of the daughter.<sup>121</sup> Other examples of Jeffrey's controlling behavior included: his setting up surveillance cameras inside their home, locking Sara out of bank accounts, accessing her private email and social media accounts, and breaking her cell phone.<sup>122</sup> In addition, Sara indicated that Jeffrey had become mentally unstable and boasted about keeping a firearm in their home despite the fact that, as a convicted felon, he was barred from owning a gun.<sup>123</sup> He also had threatened the life of his ex-wife, and claimed to be an ex-CIA agent.<sup>124</sup> Her petition revealed many risk factors indicating Jeffrey's dangerousness.

The Kentucky protection order statute<sup>125</sup> provided that a court may issue a civil domestic violence order (DVO) if the court finds from a preponderance of the evidence that an act or acts of domestic violence has/have occurred and may again occur.<sup>126</sup> Domestic violence is defined by statute as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple."<sup>127</sup> Jeffrey denied physically abusing Sara, and there was no proof of physical injury.<sup>128</sup> As a result, Sara needed to show at the hearing

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116. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, FAMILY VIOLENCE DEPARTMENT, CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVING PRACTICE 5 (2010), [https://www.ncjfcj.org/sites/default/files/cpo\\_guide.pdf](https://www.ncjfcj.org/sites/default/files/cpo_guide.pdf) [<https://perma.cc/DDV4-GWKM>].

117. *Pettingill v. Pettingill*, 480 S.W.3d 920 (Ky. 2015).

118. *Id.*

119. *Id.* at 921.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. KY. REV. STAT. § 403.750.

126. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky.1996).

127. KY. REV. STAT. § 403.720.

128. *Pettingill*, 480 S.W.3d at 922.

that Jeffrey's conduct inflicted *fear* of imminent physical injury, serious physical injury, sexual abuse, or assault—as well as that his conduct was *likely to recur*.

Following a hearing, the family court issued the DVO against Jeffrey.<sup>129</sup> The judge found that Sara had met her burden that acts of domestic violence or abuse had occurred and may occur again.<sup>130</sup> In documenting his order, the judge filled out a form on which he noted several findings, including 9 out of 12 lethality factors:

- 1) Jeffrey has abused the family pet;
- 2) Cyber stalking of Sara;
- 3) Threatened the life of his ex-wife in the presence of Sara;
- 4) Shown possessive, jealous behavior by monitoring Sara's cell phone;
- 5) Damaged property (Sara's cell phone) by throwing it against the wall;
- 6) Engaged in rulemaking behaviors including not allowing Sara to drive her own car;
- 7) Prior felony conviction;
- 8) Recently purchased a firearm;
- 9) Recent separation of the parties places Sara at extreme risk of physical harm.<sup>131</sup>

The Court of Appeals affirmed the issuance of the protection order.<sup>132</sup> However, the Kentucky Supreme Court granted Jeffrey's motion for discretionary review.<sup>133</sup> In the state supreme court, Jeffrey argued that the family court erred when it took judicial notice of the lethality factors and when it used the lethality factors as the standard to enter the DVO.<sup>134</sup> The Kentucky Supreme Court rejected Jeffrey's arguments and affirmed the trial judge's ruling that relied on the lethality factors.<sup>135</sup> Responding to Jeffrey's initial argument, the state supreme court conceded that the lethality factors are not the kind of "facts" (such as encyclopedias and medical treatises) that are normally taken as the subject of judicial notice.<sup>136</sup> However, the court differentiated between "judicial notice" and "judicial knowledge."<sup>137</sup> The court explained that the trial judge did not improperly take *judicial notice* of the lethality factors but rather employed appropriate and permissible *judicial*

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129. *Pettingill*, 480 S.W. 3d at 925.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 926.

136. *Id.* at 924.

137. *Pettingill*, 480 S.W. 3d at 924.

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*knowledge* after all adjudicative facts had been proven through testimony. According to the court: “The family court had permissible judicial knowledge of the lethality factors [and] employed its background knowledge of domestic violence risk factors to inform its judgment as to whether the facts of this case indicated that domestic violence may occur again.”<sup>138</sup>

The Kentucky Supreme Court also disagreed with Jeffrey’s contention that the family court erroneously relied on the lethality factors as the *standard* for issuing the DVO rather than the judge relying on the standard prescribed by state statute.<sup>139</sup> Instead, the court determined that the trial judge’s findings clearly tracked the requisite statutory language and the judge had applied the proper standard.<sup>140</sup>

Reliance on lethality indicators was especially important in *Pettingill* for two reasons. First, the statute called for a prediction that the harmful conduct was likely to recur. Lethality assessments are ideally suited for this speculative type of determination. Moreover, the actual harm that was the basis of the victim’s petition did not involve *physical* abuse (because of Jeffrey’s denial of physical abuse, and the lack of proof of physical injury). Violent past acts of abuse have long been recognized as predictive of future violence. However, pursuant to the Kentucky statute, the victim had to prove the element of “infliction of fear of imminent physical injury.”<sup>141</sup> Again, lethality assessments are well suited for that determination. “Imminent” injury implies a forward-looking determination of harm. The harm in this case consisted of a combination of threats, cyber stalking, pet abuse, and estrangement (all high lethality indicators). These acts, in combination, reached the requisite level of impending danger that evoked the victim’s fear—thereby supporting the issuance of a restraining order.

*Pettengill* is an important case establishing that courts in protection order proceedings can and should rely on lethality factors. Lethality assessments in protection order proceedings are essential to assist judges in making the critical determination of the risk that a given offender may re-offend. In light of *Pettingill*, and in light of policy recommendations over the past two decades, lethality assessments should be mandatory in protection order proceedings nationwide. Standard forms in restraining order petitions should solicit information from victims concerning the lethality indicators, especially the high lethality factors of threats to kill, nonfatal strangulation, stalking behavior, forced sex, and possession/use of firearms by the respondent. This reform would go a long way toward ensuring victims’ safety and preventing the recurrence of intimate partner violence.

In contrast to judicial approbation of lethality assessments in civil protection order cases, some criminal courts do not hold as favorable views

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138. *Id.*

139. *Id.* at 925.

140. *Id.*

141. KY. REV. STAT. § 403.750 (West 2016).

of risk assessment in the context of domestic violence prosecutions.<sup>142</sup> Courts in several jurisdictions have demonstrated their reluctance to admit evidence of risk assessments in prosecutions of domestic violence offenders. Arizona and several other states, for example, preclude prosecutors from utilizing the information contained in a lethality assessment as substantive proof of guilt. In *State v. Ketchner*, Darrell Ketchner's girlfriend Jennifer, had obtained orders of protection against him after several violent encounters led to criminal charges.<sup>143</sup> However, at Jennifer's request, the court vacated each order of protection.<sup>144</sup> In one final violent attack, Ketchner shot Jennifer and stabbed one of her daughters. Jennifer survived the attack but her daughter died.<sup>145</sup>

At Ketchner's trial, the prosecution introduced expert testimony from a sociologist who specialized in domestic violence to educate the jury about patterns of domestic violence and the general characteristics exhibited by victims and abusers.<sup>146</sup> The expert testified about the lethality risk factors in abusive intimate partner relationships, including the presence of a gun in the home, threats to kill, substance use, forced sex, and strangulation.<sup>147</sup> After the defendant was convicted of first-degree felony murder, attempted first-degree murder, first-degree burglary, and three counts of aggravated assault and he was sentenced to death, the defense appealed, contending that the expert testimony should not have been admitted because it impermissibly created a "profile" of domestic abusers.<sup>148</sup>

Expert testimony that explains a batterer's behavior based on the actions of a "typical" batterer is generally excluded as inadmissible profile testimony. The admissibility of batterers' profile evidence is governed by the ban on character evidence. According to the general rule, evidence of a person's character or character trait ("character evidence") is not admissible to prove that on a particular occasion the person acted in accordance with that character or trait.<sup>149</sup> If a judge bases his/her decision on unreliable evidence, such as character evidence, the defendant's constitutional due process rights are jeopardized.

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142. See Balson, *supra* note 67, at 75 (for a discussion of judicial decisions involving lethality assessment in the domestic violence context); see also *Petriciolet v. State*, 442 S.W.3d 643 (Tex. App. 2014) (holding that testimony relating to social worker's lethality assessment of defendant was not sufficiently reliable to be admissible).

143. *State v. Ketchner*, 339 P.3d 645, 646 (Ariz. 2014).

144. *Id.* at 646-47.

145. *Id.* at 647.

146. *Id.*

147. *Id.*

148. *Id.*

149. FED. R. EVID. 404(a)(1). Most state evidence codes were influenced by the Federal Rules of Evidence. In the context of federal prosecutions, the Federal Rules of Evidence admit character evidence only for limited purposes. The limited circumstances, influenced by the Federal Rules of Evidence, encompass a noncharacter issue, such as motive, intent, mistake, identity, preparation, and a common scheme or plan. See FED. R. EVID. 404 (b); 1 McCormick on Evidence § 190 (7th ed. 2014).

The rationale favoring admission of character evidence is to convince the factfinder that the defendant acted in conformity with his character, thereby proving that he committed the crime. The rationale for precluding admission of character evidence is the concern that the factfinder will wrongly convict the offender based on the inference that his character traits and past conduct predicted the present criminal act. Holding a defendant guilty because he fits a profile violates our sense of fairness and the defendant's due process rights. According to that rationale, profile evidence should not be used as substantive proof of guilt because of the risk that a defendant will be convicted not based on his acts but rather based on similar acts that other persons are doing (i.e., that he fits a profile).

In *Ketchner*, the Arizona Supreme Court agreed with the defendant's argument, ruling that the admission of evidence regarding lethality indicators constituted inadmissible profile evidence.<sup>150</sup> The court remanded *Ketchner's* case for a new trial on the first-degree murder charge.<sup>151</sup> The *Ketchner* case, therefore, serves as a warning to prosecutors to consider the purpose for which they plan to use of the information contained in lethality assessments.<sup>152</sup>

Other courts have also wrestled with the issue of whether lethality assessments are sufficiently reliable to be admitted as substantive proof of guilt in domestic violence prosecutions.<sup>153</sup> *Ketchner* cites other decisions precluding admission of evidence of lethality factors, as inadmissible batterer profile evidence, in domestic violence prosecutions in Arkansas, Georgia, and Wyoming.<sup>154</sup> These legal decisions reveal that character evidence rules pose a serious obstacle to the admissibility of lethality assessment as substantive proof of guilt.

Admittedly, such evidence could be introduced if the prosecutor could show some exception to the character-evidence rules. Despite the general rule of exclusion, limited exceptions to the character-evidence rule exist. The majority of jurisdictions restrict the admissibility of such evidence to show

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150. *Ketchner*, 339 P.3d at 648.

151. *Id.* at 650.

152. A subsequent decision of the Arizona Supreme Court distinguished *Ketchner* and admitted profile evidence of victims (not offenders) for the purpose of explaining a *victim's* recantation of her earlier statements to the police. The court limited the admission of the profile evidence to aid jurors in evaluating a *victim's* credibility. *See State v. Haskie*, 399 P.3d 657 (Ariz. 2014).

153. The issue with which these courts are currently wrestling concerns whether lethality assessments are admissible as "novel scientific evidence" in a given jurisdiction. Courts use standard tests to determine this issue. Until 1993, the leading case on the standard for the admissibility of novel scientific evidence was *Frye v. United States*, 293 F. 2d 1013 (D.C. Cir. 1923) (holding that novel scientific evidence must have gained "general acceptance" in the relevant scientific community to be admissible). *Frye* was superseded by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) (adopting the approach of the Federal Rules of Evidence, providing that evidence may be admitted if it is helpful to the trier of fact and if the methodology is scientifically valid). *Daubert* applies in federal courts and some states. The *Frye* general acceptance standard applies in other states.

154. *Ketchner*, 339 P.3d at 648.

proof of an offender's guilt, but allow it for other limited purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence or mistake, or lack of accident.<sup>155</sup> Thus, it might be possible to introduce evidence from a lethality assessment at a criminal trial for murder to show that a defendant had a particular pattern of assaulting the victim (e.g., use of such high risk factors as choking during acts of forced sex) and that this modus operandi led to her death.

Lethality assessment testimony also has been barred in the *punishment phase* of a criminal prosecution. In *Petriciolet v. State*, the defendant was on trial for aggravated assault.<sup>156</sup> He and his girlfriend had dated on and off for a five-year period and had lived together for a portion of that time.<sup>157</sup> One night after the defendant came over to his former girlfriend's house, he began to hallucinate after the couple smoked marijuana.<sup>158</sup> He picked up his gun and, without warning, shot her in the face.<sup>159</sup>

During the punishment phase of the trial, a social worker (who was Director of Family Violence Services at the Harris County District Attorney's Office) testified regarding evidence from her administration of a domestic-violence risk assessment to the victim.<sup>160</sup> The social worker later testified regarding her analysis of the information from that interview.<sup>161</sup> That analysis revealed the presence of the following factors: the defendant's controlling nature, substance abuse, possession of a gun, and threats to harm the victim if she dated anyone else.<sup>162</sup> The social worker claimed that, based on the lethality assessment that she performed, the defendant scored "high" on the lethality assessment for the sole reason that he had used a firearm.<sup>163</sup>

The court held that the testimony relating to the social worker's lethality assessment was not sufficiently reliable to be admissible.<sup>164</sup> The court based its determination on the facts that the social worker had relied only on a single uncited journal article, did not testify regarding any specific methodology that she used to conduct the assessment, testified that she was not sure if the use of the assessment had been tested, and testified that the assessment had a "pretty high" rate of error of "about 30 to 40 percent" but without attribution to any source.<sup>165</sup>

*Petriciolet* was an unfortunate case to raise the issue of the reliability of lethality assessments. The expert testimony in that case should not have been

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155. FED. R. EVID. 404(b)(2).

156. *Petriciolet v. State*, 442 S.W.3d 643 (Tex. App. 2014).

157. *Id.* at 646.

158. *Id.*

159. *Id.*

160. *Id.* at 646-47.

161. *Id.* at 648.

162. *Id.* at 650.

163. *Id.* at 648-50.

164. *Id.* at 653.

165. *Petriciolet v. State*, 442 S.W.3d 643 (Tex. App. 2014), at 649.

admitted for the simple reason that it was not relevant. It was unnecessary to assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>166</sup> Absent from the risk assessment was the presence of high risk factors, other than the use of a weapon, that would have indicated future dangerousness. Evidence revealing the offender's controlling nature, his substance abuse, slapping the victim twice, and threats to beat her up if she dated anyone else did not constitute an indication of *high* lethality. Other than the high risk factor of the presence of a weapon, there were no other high risk factors (such as forced sex, nonfatal strangulation, stalking behavior, or threats to kill). The expert's testimony about the gravity of the use of a gun added nothing to the facts because the defendant's use of gun was obvious. Even the expert, herself, conceded that her testimony was not necessary.<sup>167</sup> As she explained: "The number one thing is the fact that he's used a weapon in the past and he's actually shot her and I think like the average man on the street, I don't even know if we need research to tell us that. . . . I should hope that . . . most of us would have enough common sense to realize that."<sup>168</sup>

In addition, the case reveals some ineptitude on the part of both the prosecutor and expert. The prosecutor did not clearly present the purpose of the expert testimony—was it to show the degree of risk of future dangerousness posed by the defendant that correlated to the particular risk factors in the case? If so, the purpose was unclear, as illustrated by the following garbled, illogical exchange between the prosecutor and expert witness:

[State]: And do you have an opinion in this case?

[Varela]: An opinion of what?

[State]: The use of the [lethality] assessment on [appellant] based on your interview of [the complainant]?

[Varela]: Are you asking me, do I have an opinion about his further risk—or her further risk?

[State]: Is that something that you used in this case?

[Varela]: Yes.<sup>169</sup>

Also, the social worker's knowledge and expertise were questionable based on several aspects of her testimony. As the court noted, she based the reliability of her lethality assessment on a single uncited journal article; she did not testify regarding any specific methodology used to conduct the assessment; she testified that she was "not sure" if the use of the assessment

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166. FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.")

167. *Petriciolet*, 442 S.W.3d at 649.

168. *Id.*

169. *Petriciolet*, 442 S.W.3d at 648-49.

had been tested; and she testified, without attribution, that the assessment had a “pretty high” rate of error.<sup>170</sup>

In *Petriciolet*, there was no need for a predictive determination. As the judge emphasized, this was not a “future-dangerousness” case, i.e., a death-penalty, capital-murder case, in which the State had the burden to prove the defendant a ‘continuing threat to society.’”<sup>171</sup> Moreover, both the prosecutor and court minimized the importance of the testimony. The prosecutor did not refer to the social worker’s testimony in his or her summation before the jury. Similarly, the judge recognized that the evidence was unnecessary by holding that the admission of the evidence was harmless error because, as the court explained, the same facts were admitted elsewhere (that defendant was dangerous because he had used a gun).

*Petriciolet*, therefore, should be regarded as having little precedential value on the issue of the reliability of lethality assessments. Today, more and more courts recognize that risk assessments do play an important role in sentencing batterers. As mentioned above, court personnel in at least 18 states have used risk assessments in presentence investigations to develop appropriate sentences and probation conditions for intimate partner offenders.<sup>172</sup> However, *Petriciolet*, together with *Ketchner*, serve as a cautionary note that lethality assessments have not yet achieved widespread acceptance among criminal courts.<sup>173</sup> For that reason, prosecutors should carefully consider the ways in which they plan to use the information contained in lethality assessments.

## VII. CONCLUSION

Lethality assessment serves many purposes in the law’s response to domestic violence. It is relevant in decision making in many types of legal proceedings and used by a wide range of professionals, including law enforcement, prosecutors, probation officers, judges, psychologists, and victim service providers, among others. An increasing number of states are implementing lethality assessments in the handling of domestic violence cases.

In the civil law area, evidence from lethality assessments is relevant to the issuance of protection orders (especially in terms of the conditions of stay-away orders and firearm restrictions), dissolution, child custody (especially regarding the rebuttable presumption against custody for abusers), visitation (especially the need for supervised visitation), and dependency cases. In the criminal law area, lethality assessment is relevant to shed light on future risk of dangerousness in terms of charging decisions; the conditions of an offender’s release from custody; sentencing; probation;

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170. *Petriciolet*, 422 S. W. 3d at 653.

171. *Id.* at 652.

172. Roehl & Guertin, *supra* note 12, at 176-77.

173. *See* Balson, *supra* note 67 (making this same point).

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parole; and treatment decisions. Caution, however, is in order in terms of the introduction of lethality assessment evidence in criminal trials in terms of providing substantive proof of a defendant's guilt because character evidence rules may preclude the admissibility of such evidence.

Lethality assessment has both strengths and limitations. Lethality assessment serves as a gauge of the seriousness of an offender's conduct. The presence of certain high risk factors, in isolation or combination (such as threats to kill, the ownership or use of a weapon, nonfatal strangulation, forced sex, recent estrangement, and stalking) provide a red flag to warn of an offender's dangerousness. This evidence is especially useful to inform decision makers about the best methods of ensuring victims' safety as well as processing offenders in the justice system. The existence of high-risk lethality factors indicates that law enforcement and social service personnel should take these cases very seriously.

Lethality assessment can also educate legal personnel about the risk of dangerousness in situations where they might underestimate or ignore the risk. For example, an offender's threats to commit suicide are an often-misunderstood risk factor. Judges might miss the significance in terms of the risk that this factor poses. Case law illustrates the tragic consequences of situations in which law enforcement and judges failed to gauge the dangerousness of an abuser who had threatened to commit suicide and who had issued threats to harm his children. In several cases, the abuser later killed the children and then attempted (or succeeded) to kill himself.<sup>174</sup> If legal professionals had had the requisite training, they might have been able to spot the danger and issued or enforced a restraining order at the victim's request.

Lethality assessment yields other benefits. As we have seen, implementation of lethality assessment programs has resulted in improved collaboration between law enforcement personnel, domestic violence programs, health care providers, and allied professionals. In some jurisdictions, it has led to improvements in law enforcement investigations. Requiring officers routinely to assess the victims' level of risk has spurred police to strengthen their collection of evidence. Better forensic investigations lead to more successful prosecutions and enhanced batterer accountability. Evidence suggests that the implementation of lethality assessment programs in law enforcement may decrease the rate of domestic violence homicides.

Another strength of lethality assessment is that it serves as a good

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174. See Hitt & McLain, *supra* note 11, at 287 (citing a Maryland case in which the judge had denied the mother's request for a protection order); see also Testimony of Jessica Lenahan (Gonzales), Inter-American Commission on Human Rights Oct. 22, 2008, <https://www.law.columbia.edu/sites/default/files/microsites/human-rightsinstitute/files/Gonzalesdocs/jess%20statement%20merits%20hearing.pdf> [<https://perma.cc/4HCC-482U>] (revealing that law enforcement failed to enforce a violation of mother's restraining order, based on ex-husband's conduct that included suicidal behavior and threats to kidnap the children; the father subsequently murdered the children before he committed "suicide by cop"); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

predictor of the risk of *recurring assault*. In fact, evidence suggests that lethality assessment is a better predictor of reassault than of lethal violence.<sup>175</sup> An evaluation of several different domestic-violence risk assessment instruments concluded that “they correctly classified most of the women that were indeed reassaulted as being at somewhat elevated risk.”<sup>176</sup> This is an important finding because reassaults are so common in intimate partner violence.<sup>177</sup>

However, it is also important to understand the limitations of lethality assessment. It is not an exact science—that is, it is not a highly accurate predictor of homicide. The ability of lethality assessment to predict intimate partner homicide is marred by the existence of many false positives and false negatives.<sup>178</sup> It is impossible to know, with any certainty, which victims of abuse, or how many victims of abuse, who score at highest risk will ultimately be killed. In fact, many victims who score at highest risk will *not* become victims of intimate partner homicides. Conversely, some victims of intimate partner violence who score at lowest risk may nonetheless become future homicide victims. Finally, the absence of lethality indicators is not evidence of the absence of risk of lethality. That is, some abuse victims will become intimate partner fatalities even though none of the lethality indicators are present.

Several reasons explain why lethality assessment is not a highly accurate predictor of homicide. First, only a small percentage of violent intimate relationships culminate in homicide.<sup>179</sup> Causality is difficult to prove, in part, because of this low homicide rate. As Jacquelyn Campbell concedes, “Prediction of homicide rather than reassault is especially difficult because homicide is rarer than other forms of violence.”<sup>180</sup> In her large multisite study, she explains that, whereas 83% of women who were killed had scores of 4 or higher (signifying that they were at higher-than-average risk of being killed by their partners), so did almost 40% of the

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175. Jacquelyn C. Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 *TRAUMA, VIOLENCE, & ABUSE* 246, 262 (July 2007).

176. ROEHL ET AL., *supra* note 64, at 81.

177. Roehl & Guertin, *supra* note 12, at 172 (pointing out that evidence suggests that as many as half of intimate partner victims are likely to be reassaulted within a short period time after the assault that brought them to the attention of service providers).

178. Sara Thornton, *Police Attempts to Predict Domestic Murder and Serious Assaults: Is Early Warning Possible Yet?*, 1 *CAMB. J. EVID. BASED POLICE* 64, 65 (2017), <https://link.springer.com/content/pdf/10.1007%2Fs41887-017-0011-1.pdf> [<https://perma.cc/YZ4J-SYFB>] False negatives mean that a person is predicted to be less dangerous than he or she actually is. False positives mean that a person is predicted to be more dangerous than he or she actually is. See also D. Alex Heckert & Edward W. Gondolf, *Do Multiple Outcomes and Conditional Factors Improve Prediction of Batterer Reassault?*, 20 *VIOLENCE & VICTIMS* 3, 4 (2005).

179. Jacquelyn C. Campbell, *Assessing Dangerousness in Domestic Violence Cases*, *supra* note 2, at 655.

180. JACQUELYN C. CAMPBELL, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS* 85, 90 (Jacquelyn C. Campbell ed., 2d. 2007).

women who were not killed.<sup>181</sup>

Second, lethality assessment is unable to predict homicides accurately because the risk of death from an intimate partner assault is dependent on many factors. Improvements in police training have lowered the number of fatalities. Better emergency medical services (at the scene, upon transport, or at the hospital) avert the risk of death.<sup>182</sup> And, victims, themselves, may have an impact if they take advice from a screening interview sufficiently seriously that they take protective actions (in the form of safety planning) that decrease their chance of death.<sup>183</sup>

Lethality assessments are increasingly becoming an important component of a comprehensive response to domestic violence. These risk assessments are effective procedures for helping legal professionals identify those batterers who pose a high risk to their intimate partners and to society. Yet, stakeholders must recognize that lethality assessment is a “guide in the process rather than a precise actuarial tool.”<sup>184</sup>

Despite its limitations, lethality assessment has achieved considerable success in improving the provision of services to victims of intimate partner violence by legal, medical, and social service personnel. Lethality assessment is used in an increasing number of jurisdictions in law enforcement, protection order proceedings, criminal prosecutions, child welfare hearings, custody decision-making, batterers' intervention treatment programs, expert witness work, and asylum cases, among others.

The past few decades have witnessed a dramatic transformation in the response to intimate partner violence in both the civil and criminal justice systems. An impressive development is the increasing use of lethality assessments to screen for severe recurring and lethal intimate partner violence. Determining the seriousness of particular offenders is necessary to gauge the systems' response to the level of danger and to tailor that response to victims' need and batterers' culpability. At the same time, we cannot forget the limitation on admissibility of lethality assessments when necessary to respect the offenders' constitutional rights.

For thirty years, experts in the field of intimate partner violence have been advocating for greater use of lethality assessments in the various stages of the legal process. It is time to heed that clarion call for reform before our failure to do so sounds the death knell for more victims.

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181. Campbell et al., *Assessing Risk Factors*, *supra* note 39, at 16.

182. NEIL WEBSDALE & BAHNEY DEDOLPH, *LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS* *supra* note 33.

183. See MESSING ET AL., *POLICE DEPARTMENTS' USE*, *supra* note 42, at 19 (“protective actions often occur upon recognition that violence is escalating, and concerns for safety may motivate victims of IPV to leave their abuser”). *But cf.* Campbell, *Assessing Dangerousness in Domestic Violence Cases*, *supra* note 2, at 656 (noting that sometimes victims' protective actions may increase their chance of revictimization).

184. Campbell et al., *Assessing Risk Factors*, *supra* note 39, at 16.