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## A Call for Limiting Absolute Privilege: How Victims of Domestic Violence, Suffering with Post-Traumatic Stress Disorder, Are Discriminated Against by the U.S. Judicial System

Jerrell Dayton King  
*University of Florida*, [jdkucf@gmail.com](mailto:jdkucf@gmail.com)

Donna J. King  
*University of Central Florida*, [donnaking@knights.ucf.edu](mailto:donnaking@knights.ucf.edu)

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**A CALL FOR  
LIMITING ABSOLUTE PRIVILEGE:  
  
HOW VICTIMS OF DOMESTIC VIOLENCE,  
SUFFERING WITH POST-TRAUMATIC  
STRESS DISORDER,  
ARE DISCRIMINATED AGAINST BY THE U.S.  
JUDICIAL SYSTEM**

*Jerrell Dayton King\* and Donna J. King\*\**

*“Justice may be depicted as a woman, but, according to the dominant ideology, law is male, not female.”<sup>1</sup>*

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\* University of Florida, Fredric G. Levin College of Law, J.D.; Center for Gender, Sexualities and Women's Studies Research, M.A., 2016; University of Central Florida, B.S., Summa Cum Laude, 2013. Thank you to Dr. Danaya C. Wright, University of Florida, Fredric G. Levin College of Law, for all of her support in this endeavor.

\*\*University of Central Florida, Doctoral Student, Department of Sociology; Florida A & M University College of Law, J.D., Magna Cum Laude, 2012; University of Central Florida, B.S., 1991. Thank you to Dr. Lin Huff-Corzine, UCF Department of Sociology, for her wonderful patience and support during my doctoral program.

<sup>1</sup> Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. L. & FEMINISM 333, 348 (1996); (quoting Frances Olsen, *The Sex of Law*, in THE POLITICS OF LAW 453, 454 (David Kairys ed. 1990)).

## I. INTRODUCTION

There is a place that exists – a place that is free from liability for any harmful harassment, willful and wanton untruths, as well as malicious lies and tortious acts.<sup>2</sup> This place protects, *with impunity*, offenders of domestic violence (“DV”) who choose to enter its doors to continue abusing their victims.<sup>3</sup> This place is a safe haven for continued DV because every threatening, intimidating, and demeaning publication directed toward a DV victim is absolutely privileged and perfectly legal.<sup>4</sup> This place, commonly referred to as the local courthouse, strictly obeys the common law rule of *absolute privilege*. Absolute privilege, a legal doctrine grounded in public policy which can be traced back to medieval England, allows DV abusers unfettered, *legal* access to their victims.<sup>5</sup> Absolute

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<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 586 (1997) (“[T]he privilege is absolute . . . irrespective of [the attorney’s] purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity.”).

<sup>3</sup> See RESTATEMENT (SECOND) OF TORTS § 586 (1997) (as long as the continued abuse concerns communications related to preliminary or continuing judicial proceedings); Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser’s Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153,168-69 (2012) (emphasis added).

<sup>4</sup> See RESTATEMENT (SECOND) OF TORTS § 586 (1997) (“An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.”); Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser’s Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153,168-69 (2012).

<sup>5</sup> See *Simms v. Seaman*, 69 A.3d 880, 885 (Conn. 2013)(The privilege is considered “as old as the law itself.”); RESTATEMENT (SECOND) OF TORTS § 586 (1997); Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser’s Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153,168-69 (2012) (explaining that absolute privilege allows even pro se litigants access to the courts for the purposes of harassing and threatening litigation tactics without fear of consequences) (emphasis added).

privilege's main purpose is to "secur[e for] attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."<sup>6</sup> The privilege applies "irrespective of the [attorney's] purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity[.]" making it the perfect weapon for a DV offender to deploy against his victim.<sup>7</sup>

Since the founding of the United States, women have been, and continue to be, institutionally and systematically discriminated against, particularly within American society and its judicial system.<sup>8</sup> From the common law doctrine of coverture and court sanctioned sex-discrimination, to the suffrage movement and fault-based divorce, women experience discrimination by men in a variety of ways and means.<sup>9</sup> Prior to the U.S. Civil War, women had

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<sup>6</sup> RESTATEMENT (SECOND) OF TORTS § 586 (1997).

<sup>7</sup> See RESTATEMENT (SECOND) OF TORTS § 586 (1997); *accord*, see generally *Simms v. Seaman*, 69 A.3d 880 (Conn. 2013) (explaining the history behind the privilege and the rationale for the absolute immunity afforded attorneys in relation to their representation of their clients). See *Kirschstein v. Haynes*, 788 P.2d 941, 952 (Okla. 1990) (The privilege applies as long as the defamatory matter or statements bear some relationship or relevance to the contemplated or existing judicial proceeding.). See also Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153, 168-69 (2012) (It is a well-known fact that both men and women, whether in heterosexual or homosexual relationships, experience DV as victims and offenders. While DV against men is a known issue, the credible social science statistics show that women experience DV much more often than men. This article focuses on the female DV victim but does not ignore the fact that male DV victimization exists as well).

<sup>8</sup> See, e.g., Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 148 (2003); see generally Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153 (2012).

<sup>9</sup> See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 59 (2011); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 14 (1987); Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 266 (1984); Claudia Zaher, *When a Woman's Marital Status*

little, if any, liberty to change their economic, political, and social status under the U.S. Constitution or through the American legal systems.<sup>10</sup> However, once the Fourteenth Amendment to the U.S. Constitution was ratified in 1868, women's legal opportunities were expected to improve because the Amendment includes a clause guaranteeing all persons "equal protection of the laws."<sup>11</sup> Yet, its spirit – *equality of rights for all persons* – has been systematically denied to women within the patriarchal framework of U.S. jurisprudence and social culture, its ratification did effect U.S. Supreme Court doctrine regarding its interpretation of the concept of liberty.<sup>12</sup> Nevertheless, this new concept of liberty did not immediately take effect for women, nor did it provide them the rights they believed they gained under the Fourteenth Amendment and the subsequent ratification of the Nineteenth Amendment in 1920.<sup>13</sup> Indeed, during the century following the Amendment's ratification, the common thread among the Supreme Court sex-discrimination case holdings was the justification that gender-biased state laws were necessary to protect women, rationalizing

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*Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460-61 (2002).

<sup>10</sup> See Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153, 161 & n.53 (2012) (explaining the masculine ideal of liberty and its effects on women's opportunities for liberty).

<sup>11</sup> U.S. CONST. amend. XIV, § 1; accord, see generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 958 (2002).

<sup>12</sup> See *Palko v. Connecticut*, 302 U.S. 319, 325, 327 (1937) (explaining that the Court had enlarged its judgment of the domain of liberty to include that of mind as well as of action); Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153, 161 & n.53 (2012); Wildman, *supra* note 9 (emphasis added).

<sup>13</sup> See U.S. CONST. amend. XIX; Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153, 161-62 & n.53 (2012); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1372 (2006).

that their main purpose in life was to serve their husbands and families in a private, domestic sphere.<sup>14</sup> It was not until *Reed v. Reed* that the Supreme Court utilized the Fourteenth Amendment, for the first time, to rule that a state law was violative on the basis of sex discrimination.<sup>15</sup>

The legal system's inability to recognize and redress the unique harms, including trauma, experienced by women in matters concerning DV is particularly pervasive throughout the United States.<sup>16</sup> Societal acceptance of male power and control over women exposes women to DV in alarmingly high numbers, resulting in most DV victims experiencing debilitating trauma.<sup>17</sup> Similarly to defining *domestic violence*, the field of trauma has

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<sup>14</sup> See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388, 395 (1937) (determining that women were in need of "the state's protective power" when upholding legislation that singled out women); *Muller v. Oregon*, 208 U.S. 412, 419-23 (1908) (justifying Oregon's discrimination against women, the Court explained that "The two sexes differ . . . the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence."); *Bradwell v. Illinois*, 83 U.S. 130, 140-42 (1873) (Bradley, J., concurring) (explaining that the Fourteenth Amendment did not afford protections to women for the purposes of employment of engaging in a profession, justifying his position by stating that "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.") Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1372 (2006).

<sup>15</sup> See generally *Reed v. Reed*, 404 U.S. 71 (1971) (although the Court utilized the standard of review in traditional rational basis terms, the Court determined that an Idaho state law was invalid on its face based on the concept of sex discrimination).

<sup>16</sup> See Mike Brigner, *Why Do Judges Do That?*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 13-5 (Mo Therese Hannah & Barry Goldstein eds., 2010); King, *supra* note 5 at 154.

<sup>17</sup> See, e.g., Amy Kaiser, Carol Strike, & Lorraine E. Ferris, *What the Courts Need to Know About Mental Health Diagnoses of Abused Women*, 19 MED. & L. 737, 741 (2000); Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 TENN. J. RACE GENDER & SOC. JUST. 153, 157-58 (2012). See generally EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007).

experienced its own difficulties in finding a consensus for one holistic working definition for *trauma*.<sup>18</sup> Indeed, the trauma experienced by DV victims is not monolithic in nature; it manifests itself in many forms of suffering often compared to that of kidnapped persons or prisoners of war.<sup>19</sup> The Substance Abuse and Mental Health Services Administration's ("SAMHSA") developed a concept of trauma for use by caretakers throughout the system who provide the support to those affected by trauma as well as the communities and stakeholders working to provide a framework of trauma-informed support.<sup>20</sup>

The most important avenue of protection and for assistance for DV victims is through the U.S. judicial system. However, many DV victims frequently find themselves re-victimized by their abusers through the court system as well as by the active participation of judges, lawyers, and other officers of the court.<sup>21</sup> In fact, even after an injunction for protection against DV is issued by the court to prevent the abuser from having direct physical contact with the victim, the parties to the litigation may often face each other in open court for a myriad of varying legal reasons.<sup>22</sup> In effect, because of absolute privilege and gender bias courts, the courthouse is a shelter for DV offenders who enter its doors with intentions of

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<sup>18</sup> See David Hirschel & Eve Buzawa, *Understanding the Context of Dual Arrest with Directions for Future Research*, 8 VIOLENCE AGAINST WOMEN 1449, 1456-58 (2002); Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, 7 (July 2014), <http://store.samhsa.gov/shin/content//SMA14-4884/SMA14-4884.pdf>.

<sup>19</sup> See JON G. ALLEN, *COPING WITH TRAUMA: HOPE THROUGH UNDERSTANDING* 4 (2nd ed. 2005); STARK, *supra* note 17, at 204; King *supra* note 5, at 156.

<sup>20</sup> See Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, 7 (July 2014), <http://store.samhsa.gov/shin/content//SMA14-4884/SMA14-4884.pdf>.

<sup>21</sup> See Mike Brigner, *Why Do Judges Do That?*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 13-5 (Mo Therese Hannah & Barry Goldstein eds., 2010); King, *supra* note 5, at 153-54.

<sup>22</sup> See Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1310, 1313 (1993).

re-abusing their victims.<sup>23</sup> Thus, the DV victim is prevented from holding her abuser liable for any untrue, excessive, or traumatic statements committed in relation to litigation.<sup>24</sup>

When a person is disabled and qualifies for protection under the Americans with Disabilities (“ADA”), it may require the court to make certain modifications to meet accommodations for disabled persons, including a DV victim who has been diagnosed with PTSD as the result of the abuse she has suffered.<sup>25</sup> This article asserts that the absolute privilege is one court rule that should be modified under the ADA when a DV victim is engaged in litigation with her abuser.<sup>26</sup> The ADA is a powerful federal statute that instructs states and their courts to accommodate or modify their judicial forums for the purposes of preventing ongoing discrimination against disabled persons, which includes DV victims with PTSD.<sup>27</sup> Although much has been done to hold offenders of sexual harassment accountable, today, there are negligible applicable ADA policies in the DV context and fewer scholars calling for substantive change to ADA modifications and accommodations for DV victims with PTSD.<sup>28</sup>

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<sup>23</sup> See Brigner, *supra* note 16, at 13-4 to -5.

<sup>24</sup> See Casey L. Jernigan, *The Absolute Privilege is Not a License to Defame*, 23 J. LEGAL PROF. 359, 360, 362 (1999). See also King *supra* note 5, at 169 n.106 (explaining that a DV survivor is revictimized “when her abuser places her ‘on trial’ . . . [T]he Fathers’ Rights movement actively encourages it’s [sic] members to smear the credibility of the victim both on the stand and in the community” (Janet Normalvanbreucher, *Stalking Through the Courts*, THE LIZ LIBRARY (1999), <http://www.thelizlibrary.org/site-index/site-index-frame.html#soulhttp://www.thelizlibrary.org/liz/FRtactic.html>)).

<sup>25</sup> See Keri K. Gould, *And Equal Participation for All... The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123, 125, 130, 133, 137-38 (1994).

<sup>26</sup> Gould, *supra* note 25, at 125, 130, 133, 137-38.

<sup>27</sup> Gould, *supra* note 25, at 125, 130, 133, 137-38.

<sup>28</sup> United States Department of Justice Civil Rights Division, *Information and Technical Assistance on the Americans with Disabilities Act*, (Oct. 2016), <https://www.ada.gov/>; LENORE E. A. WALKER, *ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST* 127-59 (1994) (explaining the policy changes regarding sexual harassment and the ADA as well as strengthening therapy for those sexual harassment victims suffering from PTSD).



Furthermore, while piecemeal accommodations may be occurring, there is a gap in the scholarship linking DV and absolute privilege.<sup>29</sup>

The purpose of this article is to explore the U.S. civil court system and to expose the debilitating trauma that DV victims experience within the judicial system when having to face their abuser, particularly the trauma caused by absolute privilege, and to suggest an avenue for redress. Part II explains the gendered nature of law and the difficulties victims of DV face when entering the U.S. legal system. Part III discusses domestic violence, trauma, and PTSD, specifically focusing on issues pertaining to questioning the credibility of female witnesses. Part IV describes the difficulty victims of DV experience when leaving their abuser and provides specific details as to the trauma and injuries caused by DV, especially that of PTSD. Part V explains the DV abuser's ability to manipulate the gender-biased court system and describes how the DV victim is re-traumatized during contentious litigation with their abuser. Part VI presents the common law doctrine of absolute privilege as a weapon for furthering DV within a judicial proceeding. Part VII asserts that the ADA mandates that the U.S. judicial system has an obligation to modify its policies, specifically as to the affirmative defense of absolute privilege, to accommodate DV victims with PTSD in litigation whereby the victim's disability prevents the proper administration of justice.

## II. THE GENDERED NATURE OF LAW: THE MEN'S TRIBUNAL

*“The backlash against gender-sensitive responses to women’s victimization, offending, and imprisonment is inseparable from the broader context of contemporary resistance to and reaction against feminism and other movements for civil and human rights.”*<sup>30</sup>

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<sup>29</sup> See Gould, *supra* note 25, at 125, 130, 133, 137-38.

<sup>30</sup> Molly Dragiewicz, *Patriarchy Reasserted: Fathers’ Rights and Anti-VAWA Activism*, 3 FEMINIST CRIMINOLOGY 121, 121 (2008).

By its very construct, the law, as a discourse and a practice, is traditional and conservative, making it very ridged to new concepts, radical thinking, and change.<sup>31</sup> Through the process of legal precedent, legal language tends to rely on antiquated terminology that is grounded in masculine legal thought and processes that reflect patriarchal social norms.<sup>32</sup> Indeed, the term *man* is considered the genderless norm upon which all other forms of identity, including gender and race, must rely.<sup>33</sup> However, the notion that the law is genderless, with men representing the non-gender perspective, is not reflective of the gender-biased reality most women face on a day-to-day basis throughout the U.S. judicial system.<sup>34</sup> In the law, the use of the term *gender* is meant to signify the social and cultural construct of *women* rather than *men* for which legal jurisprudence, regarding sex or gender discrimination, identifies as feminine rather than masculine characteristics.<sup>35</sup>

Since the U.S. Constitution came into force in 1789, U.S. state and federal judiciaries have consistently protected and reinforced a male-gendered legal position.<sup>36</sup> The U.S. legal system is entrenched in male concepts and female stereotypes, causing the male experience to be viewed as the only legitimate foundational

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<sup>31</sup> See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888-90 (1989).

<sup>32</sup> Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 890 (1989); See Molly Dragiewicz, *Patriarchy Reasserted: Fathers' Rights and Anti-VAWA Activism*, 3 FEMINIST CRIMINOLOGY 121, 123 (2008).

<sup>33</sup> See Finley, *supra* note 31 at 887-88.

<sup>34</sup> See, e.g., Brigner, *supra* note 16, at 13-3 to -8; See also Erika R. Schwarz, *When "Neutral" Doesn't Really Mean "Neutral": Louisiana's Child Custody Laws—An Attempt to Erase Gender Bias in the Name of Neutrality*, 42 LOY. L. REV. 365, 365 (1997).

<sup>35</sup> See Molly Dragiewicz, *Patriarchy Reasserted: Fathers' Rights and Anti-VAWA Activism*, 3 FEMINIST CRIMINOLOGY 121, 122 (2008); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887-88, 890 (1989).

<sup>36</sup> See Erika R. Schwarz, *When "Neutral" Doesn't Really Mean "Neutral": Louisiana's Child Custody Laws—An Attempt to Erase Gender Bias in the Name of Neutrality*, 42 LOY. L. REV. 365, 372 (1997).

standard upon which legal rights and claims are based.<sup>37</sup> This gendered legal perspective creates a fertile breeding ground for male-dominated legal decisions, especially in family court where DV cases are heard.<sup>38</sup> Indeed, the voice of the female DV victim is often drowned out by the male-centric legal reasoning and legal rhetoric of judges who have the discretion to determine that DV has not occurred or is a thing of the past, even in cases with the most substantial physical evidence of abuse.<sup>39</sup>

### A. Domestic Violence Dismissiveness: A Case Study

The legal system is inherently male and overtly seeks to empower the male norm.<sup>40</sup> *The reasonable person (man) standard* utilized throughout the U.S. judicial system and within societal norms reflect the male gender standard.<sup>41</sup> Even still, women experience discrimination in more subtle ways through male-gendered power dominance that expects women to assimilate into the male norm rather than allowing them to maintain the female-gendered differential, especially through unwritten social norms

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<sup>37</sup> See *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977) (In making its decision, the court stated that “the gender-based differentiation created by [the statute] that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men – is forbidden by the Constitution, at least when supported by no more substantial justification than ‘archaic and overbroad’ generalizations, . . . or ‘old notions,’ . . . such as ‘assumptions as to dependency,’ . . . that are more consistent with ‘the role-typing society has long imposed,’ . . . than with contemporary reality.”); Erika R. Schwarz, *When “Neutral” Doesn’t Really Mean “Neutral”: Louisiana’s Child Custody Laws—An Attempt to Erase Gender Bias in the Name of Neutrality*, 42 LOY. L. REV. 365, 373 (1997).

<sup>38</sup> See, e.g., Brigner, *supra* note 16, at 13-3 to -8; Schwarz, *supra* note 36, at 372-73.

<sup>39</sup> See, e.g., Brigner, *supra* note 16, at 13-3 to -8.

<sup>40</sup> See EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 156 (2007); Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352, 355 (1988).

<sup>41</sup> See STARK, *supra* note 17; Finley *supra* note 31.

and expectations that pervade legal doctrines.<sup>42</sup> Psychologist Lenore Walker, who developed the term *battered women's syndrome* ("BWS"), explains that social battering stems from various forms of coercion implemented by the DV abuser, such as economic discrimination and social isolation.<sup>43</sup> Indeed, Walker asserts that PTSD is the most accurate diagnosis for the psychological symptoms of most abused women who seek assistance through therapy. However, for those abused women who do not meet the criteria for such a formal diagnosis, BWS is understood as another model of explanation for the clinical symptoms the DV victim suffers.<sup>44</sup> The result of such cross-diagnosis utilized within the psychological community, crossing over into the judicial system, allows for further confusion and pervasive bias against the DV victim. Indeed, having to determine whether to apply BWS or PTSD prior to a trial for the purposed of a DV case, where the judge is already indignant, does not bode well for the DV victim. Indeed, throughout the United States and its legal system, women, especially those who are victims of DV, are treated with disdain, disbelief and dismissiveness, as the case below exemplifies.<sup>45</sup>

Susan Rhoades and Reginald Garcia were married in 1978, but, following 25 years of violence and sexual assault, Susan finally summoned the courage to separate from her husband.<sup>46</sup> Her divorce proceedings were highly contested and protracted, and the trial court found that Susan's testimony was not correct, including her

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<sup>42</sup> See STARK, *supra* note 17 (explaining that men are provided the full dignity of an adult entitled to a complete set of rights whereby women must prove themselves worthy of this same treatment); Finley *supra* note 31.

<sup>43</sup> See STARK, *supra* note 17, at 120.

<sup>44</sup> See STARK, *supra* note 17, at 120; LENORE E. A. WALKER, ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST 369-70 (1994).

<sup>45</sup> See Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1309-10 (1993).

<sup>46</sup> See *Garcia v. Rhoades*, 2012 Cal. Unrep. LEXIS 8837, at \*4-7 (Cal. Ct. App. 1st Dist. Dec. 3, 2012).

allegations of DV against her husband.<sup>47</sup> Nevertheless, trial court testimony shows how Susan's experiences with DV profoundly affected her struggles in the courtroom.<sup>48</sup> Although Susan's expert testimony supported her experiences of DV, Susan's attempts to protect herself through the judicial system by her requests for protection from her estranged husband, her DV allegations were viewed as baseless.<sup>49</sup>

At trial, Susan testified to receiving threatening phone calls where she could hear a clip being inserted into a gun and the noise of a police scanner in the background.<sup>50</sup> After living in constant fear, Susan presented as very distressed, tearful, and anxious at her first counseling session which were determined to be cluster symptoms associated with Post-Traumatic Stress Disorder (PTSD), stemming from a traumatic experience in her marriage.<sup>51</sup> Still, due to Garcia's expert's testimony at trial, stating that Susan lacked the required major life-threatening traumatic experience for a PTSD diagnosis, Susan was found by the trial court to have exaggerated her experiences with Garcia.<sup>52</sup> Although the trial court record in this case contains substantial evidence of Susan's struggles with DV and its effects on her abilities to function, the court did not view the evidence as such. Rather, it found that Susan was irresponsible, prolonged the proceedings, and was the cause of the costly litigation.<sup>53</sup> Thus, the court found that Garcia committed no DV against Susan.<sup>54</sup>

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<sup>47</sup> *See Id.* at \*35.

<sup>48</sup> *See Id.* at \*23-29 (at the end of the day of expert testimony on Susan's mental health condition brought on by DV by both Susan's and Garcia's experts, the court admonished both parties that the case was taking too long, needed to be concluded, or would continue into the next calendar year).

<sup>49</sup> *See Id.* at \*43.

<sup>50</sup> *Id.* at \*21.

<sup>51</sup> *Id.* at \*23.

<sup>52</sup> *See Garcia v. Rhoades*, 2012 Cal. Unrep. LEXIS 8837, at \*37 (Cal. Ct. App. 1st Dist. Dec. 3, 2012).

<sup>53</sup> *See Id.* at \*43.

<sup>54</sup> *See Id.*

### B. Preventing Progress: *Bradwell v. Illinois*

American society considers maleness the apex or pinnacle of its gendered hierarchy due to the fact that men dominate public and private positions of power.<sup>55</sup> However, maleness is also the foundation, or the bedrock of the American legal system because its federal and state laws are based upon the male worldview.<sup>56</sup> Femaleness is ignored, devalued, and disregarded with impunity by the overall gendered structure of American society, which permits the law and government to perpetuate the United States' primary patriarchal atmosphere.<sup>57</sup> This atmosphere of women's inferiority and male superiority allows DV to perpetuate because violence against women is not stigmatized.<sup>58</sup>

Historically, men have maintained the power and ability to construct a gendered hierarchy that governs and controls societal structures, including government and the law.<sup>59</sup> This gendered power continues to support inequality, resulting in the subordination and domination of women.<sup>60</sup> It is due to these societal gender inequalities that DV abusers feel empowered to deploy their many DV tactics upon their victim.<sup>61</sup> Without society's social stigmas working against them, abusive men are more enabled to continue the cycle of abuse through ongoing power and control structures implemented within the home, structures that continue into the law and its institutions.<sup>62</sup>

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<sup>55</sup> Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 *Cornell L. Rev.* 1398, 1411-12 (1992).

<sup>56</sup> See Joan Zorza, *Batterer Manipulation and Retaliation Compounded by Denial and Complicity in the Family Courts*, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 14-11 to 14-12* (Mo Therese Hannah & Barry Goldstein eds., 2010); Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 *Wis. L. Rev.* 1345, 1348-49 (1994).

<sup>57</sup> See *Id.*

<sup>58</sup> See STARK, *supra* note 17.

<sup>59</sup> See Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 *CORNELL L. REV.* 1398, 1412 (1992).

<sup>60</sup> See *Id.*

<sup>61</sup> See STARK, *supra* note 17.

<sup>62</sup> See STARK, *supra* note 17.

The patriarchal atmosphere was classically expressed in the U.S. Supreme Court's decision in *Bradwell v. Illinois*, which illustrated its view of female autonomy.<sup>63</sup> With the majority's interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment, the Court used its male-biased interpretation to indefinitely deny women their unenumerated fundamental rights.<sup>64</sup> As long as the Court found it necessary to maintain the patriarchal society it cherished, it circumvented the intent of the Fourteenth Amendment.<sup>65</sup> In his infamous concurring opinion in *Bradwell*, Justice Bradley expressed his strongly held viewpoint regarding women and their status within society.<sup>66</sup> He stated that Mrs. Bradwell "assume[d]" incorrectly that "women as citizens" have the right "under the fourteenth amendment of the Constitution ... to engage in any and every profession, occupation, or employment in civil life."<sup>67</sup> Additionally, Justice Bradley stated that the "natural and proper timidity and delicacy" of women makes them unfit "for many of the occupations of civil life."<sup>68</sup> In his conclusion, Justice Bradley stated that it is "[t]he paramount destiny and mission of woman [] to fulfill the noble and benign offices of wife and mother."<sup>69</sup> It is this typical, Court endorsed, stereotype of women that perpetuates societal, economic, and gender inequalities.<sup>70</sup> Truly, Justice Bradley's comments, in his concurring opinion in *Bradwell*, proclaim the same anti-feminist undertones that women, especially DV victims, face today.

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<sup>63</sup> See *Bradwell v. Illinois*, 83 U.S. 130 (1873).

<sup>64</sup> See *Bradwell*, 83 U.S. at 138-39; Donna J. King, *The War on Women's Fundamental Rights: Connecting U.S. Supreme Court Originalism to Rightwing, Conservative Extremism in American Politics*, 19 *CARDOZO J. L. & GENDER* 99, 99 (2012).

<sup>65</sup> See *Bradwell*, 83 U.S. at 138-39; King, *supra* note 64, at 123-24.

<sup>66</sup> See *Bradwell*, 83 U.S. at 140-42.

<sup>67</sup> *Id.* at 140.

<sup>68</sup> *Id.* at 141.

<sup>69</sup> *Id.*

<sup>70</sup> See STARK, *supra* note 17.

### C. Equality and Feminism

The decision and sexist rhetoric within the opinion from *Bradwell v. Illinois* set an overtly damaging precedent for “legitimiz[ing] sex discriminat[ion] attitudes and behavior” for well over a century.<sup>71</sup> The holding in *Bradwell*, as well as the legal analysis employed by the Court, reinforced the concept that “gender determines one’s appropriate social role.”<sup>72</sup> By legitimizing and perpetuating sex discrimination, the Supreme Court maintained and fortified the “diminishment of women’s power in society.”<sup>73</sup> This legal behavior further fuels the oppression and subjugation of women within American society, helping to foster the nation’s ignorance of and detachment from the issues surrounding the perpetration of DV and the many harms it invokes upon its victims.<sup>74</sup> Today, these decisions continue to affect women’s ability, or lack thereof, to obtain the equal protection of the laws to which they are entitled.<sup>75</sup>

The adversarial system, from which our American judicial system is based, uses metaphors that parallel individualistic and conflict-oriented constructs that portray a system that was “created for people for whom conflict is natural or even desirable.”<sup>76</sup> Legal language, and the use of metaphors in legal language, can alienate women and hinder their participation in legal dialogue.<sup>77</sup> The framers and users of legal language, i.e. white, educated, privileged men, drafted the narrative of the law and the traditional nature of metaphors used in legal language so that the law emphasizes “masculine ‘patterns of socialization, experience, and values.’”<sup>78</sup> Feminists lament that the use of baseball metaphors, for example,

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<sup>71</sup> Wildman, *supra* note 9, at 266.

<sup>72</sup> Wildman, *supra* note 9.

<sup>73</sup> Wildman, *supra* note 9.

<sup>74</sup> See STARK, *supra* note 17.

<sup>75</sup> See, e.g., Calabresi & Rickert, *supra* note 9, at 56-57; King, *supra* note 5.

<sup>76</sup> Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225, 251 (1995).

<sup>77</sup> Adam Arms, *Metaphor, Women and Law*, 10 HASTINGS WOMEN’S L.J. 257, 273 (1999).

<sup>78</sup> Arms, *supra* note 77, at 274.



and other sporting rhetoric in legal language represent the very essence of patriarchal oppression.<sup>79</sup> At present, male and sports metaphors used in legal language “do not reflect the presence of women in litigation.”<sup>80</sup> The use of sexual metaphors in legal language to emphasize the dominance of the legal system by heterosexual male sexuality is more subtle than sports and war metaphors, but it also emphasizes that the realm of litigation is occupied predominantly by men.<sup>81</sup> Moreover, if women are unable or unwilling to assume male traits in the “specific metaphorical structuring of litigation,” women risk devaluation and a relegation to perceived non-entities in the legal realm as well as complete exclusion from legal dialog.<sup>82</sup> Still, the law is not simply a dichotomous interpretation of unambiguous words. The “nature of legal reasoning” is predominantly “male defined,” leaving it open to gender-biased interpretation, rather than objective legal reasoning.<sup>83</sup>

Some feminist legal theorists, including Angela P. Harris, suggest that the U.S. gendered hierarchical system does not afford women full economic, social, or legal status.<sup>84</sup> When explaining dominance feminism, Harris describes a gendered system that converges with the institutional structures and economic practices of American society, essentially threatening women’s individuality and vulnerabilities. Indeed, it is foremost women’s autonomy and agency that DV abusers understand they must control.<sup>85</sup> However, the theoretical model of dominance feminism does not argue for gender equality. Rather, it advocates abolishing the existing systems which are founded on the concept of woman-hating.<sup>86</sup> It is these

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<sup>79</sup> Arms, *supra* note 77, at 274.

<sup>80</sup> Thornburg, *supra* note 76, at 246.

<sup>81</sup> Arms, *supra* note 77, at 275.

<sup>82</sup> Arms, *supra* note 77, at 276.

<sup>83</sup> See Finley, *supra* note 31, at 886.

<sup>84</sup> See Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37, 51 (2009).

<sup>85</sup> See Harris, *supra* note 84, at 51-52; STARK, *supra* note 17.

<sup>86</sup> See Harris, *supra* note 84, at 51.

systems that reinforce structural misogynistic attributes within American society, making it extraordinarily difficult for the female DV victim to find a voice.<sup>87</sup> Indeed, these theorists assert that the male perspective is the dominant measurement and viewpoint, or norm, from which all other legal perspectives are developed.<sup>88</sup> Harris asserts that the misogynist norm should not be the equality standard to which women aspire. Rather women, as well as society as a whole, should seek to remove this male legal standard because it creates a barrier for all other protected groups of people.<sup>89</sup> As a result, despite the legal losses that women like Mrs. Bradwell and Susan Garcia experience, they must continue to seek equality through the legal protections provided by the Fourteenth Amendment.<sup>90</sup> Although the Supreme Court attempts to overtly deny women their enumerated and unenumerated fundamental rights, by determining through the most sexist means that the Amendment does not apply to them, it is important that the charge for full access to rights and liberties is not abandoned.<sup>91</sup>

### III. DOMESTIC VIOLENCE, TRAUMA, AND POST-TRAUMATIC STRESS DISORDER: QUESTIONING THE CREDIBILITY OF THE FEMALE WITNESS

“*[W]omen are often disbelieved because they are women.*”<sup>92</sup>

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<sup>87</sup> See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 888, 892 (1989).

<sup>88</sup> See Harris, *supra* note 84, at 51.

<sup>89</sup> See Harris, *supra* note 84, at 51.

<sup>90</sup> See King, *supra* note 64, at 125-26.

<sup>91</sup> See Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Centuries*, 6 *HUM. RTS.* 125, 126 (1977); Donna J. King, *Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 *TENN. J. RACE GENDER & SOC. JUST.* 153, 161 n.53 (2012) (discussing Justice Scalia's comments and others' viewpoints that women are not protected under the Fourteenth Amendment); King, *supra* note 64, at § IV.

<sup>92</sup> Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD*

Men's systemic discrimination against women finds no better historical example than the legal doctrine of coverture.<sup>93</sup> Upon marriage, the husband and wife were considered "one person in law."<sup>94</sup> Adopted from the common law in England, coverture considered married women *covered* under the legal protection of their husbands.<sup>95</sup> Once a woman married, coverture severely limited her rights to own and control property, including her pre-marital and post-marital property, as it immediately transferred to the sole control of her husband.<sup>96</sup> Through the simple act of marriage, a woman was legally subsumed by her husband, making her "civilly dead."<sup>97</sup> As coverture lost its foothold and women became stronger legally due to the Fourteenth and Nineteenth Amendments, divorce law evolved concurrently with the changing roles of women throughout American society.<sup>98</sup> A basic strain within family relationships, fueling to an ever climbing contemporary divorce rate, is women's determination to achieve greater autonomy and recognition as an equal partner within the marriage and family.<sup>99</sup> Indeed, divorce was an escape for those whose spouses failed to

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CUSTODY 5-9 (Mo Therese Hannah & Barry Goldstein eds., 2010) (quoting Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2205 (1993)).

<sup>93</sup> Danaya C. Wright, *Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866*, 38 U. RICH. L. REV. 903, 903 n.1 (2004) ("Coverture is a legal doctrine in which a woman's legal existence is subsumed into that of her husband upon marriage. While in a state of coverture—so long as she remains married—she is unable to own property, control her own wages, enter into contracts, make her own will, or be sued.")

<sup>94</sup> See Zaher, *supra* note 9, at 460.

<sup>95</sup> See Zaher, *supra* note 9, at 460 (emphasis added).

<sup>96</sup> See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385 (1994).

<sup>97</sup> See Zaher, *supra* note 9, at 460.

<sup>98</sup> Steven Mintz, *Children, Families and the State: American Family Law in Historical Perspective*, 69 DENV. U. L. REV. 635, 647 (1992); See U.S. CONS. T. amend. XIV; U.S. CONST. amend. XIX

<sup>99</sup> Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 657 (1984).

achieve the higher expectations of this demanding marital dynamic.<sup>100</sup>

Domestic Violence has garnered an ever increasing awareness in America in recent decades. However, the issue of DV is documented throughout history dating back to Ancient Rome.<sup>101</sup> As late as the 1870s in America, husbands and fathers exercising their property rights were legally allowed to chastise their wives and children, including the use of the rule of thumb.<sup>102</sup> Today, although the practice of physical chastisement is illegal, society has repeatedly turned a blind eye toward dealing with DV and family matters in general, resisting interference within the nuclear family unit because of our long-standing concern with maintaining domestic privacy.<sup>103</sup>

The social science term *domestic violence*, defined by Mary Ann Dutton, is:

a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is a pattern of behavior exhibited by the batterer that includes words, actions, and gestures, which, taken together, establish power and control over an intimate partner.<sup>104</sup>

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<sup>100</sup> See Friedman, *supra* note 99, at 658.

<sup>101</sup> See Ver Steegh, *supra* note 8, at 148.

<sup>102</sup> See Ver Steegh, *supra* note 8, at 148; Williams, *supra* note 96, at 386 (a husband could chastise his wife with a stick as long as it was no larger in diameter than that of his thumb).

<sup>103</sup> See Ver Steegh, *supra* note 8.

<sup>104</sup> Ver Steegh, *supra* note 8, at 151 (quoting Mary Ann Dutton, *Expert Witness Testimony* in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, ABA COMMISSION ON DOMESTIC VIOLENCE § 8-81, § 8-8 (Deborah M. Goelman et al. eds., 1996)).

Dutton's definition indicates that DV is part of a larger dynamic whereby an abuser uses violence to reinforce domination strategies over his victim.<sup>105</sup> However, definitions of DV utilized in the practice of law are different from social science definitions.<sup>106</sup> The law is primarily focused on specific, discrete incident(s) of physical abuse, rather than the broader spectrum of abusive conduct that encompasses "a cohesive pattern of coercive controls," which is understood to occur by the social science definition.<sup>107</sup> The term *domestic violence*, whether used in the broader social science or narrower legal context, is often too truncated to properly describe an individual's DV experience.<sup>108</sup> A more individual, abstract concept is needed to address the unique experiences of the DV victim due to the shortcomings of the one-size-fits-all prevailing view of DV.<sup>109</sup>

Abused women may experience a wide variety of near-term and long-term impacts from physical, sexual, and emotional DV.<sup>110</sup> Specifically, women can suffer from "clinical depression and somatic complaints, anxiety disorders, mental illness, alcohol and drug abuse, low self-esteem, and suicidal ideation."<sup>111</sup> DV manifests as the use of power and control by an abuser, who is typically male, against an intimate partner, who is typically female.<sup>112</sup> The use of power and control by an abuser can take many forms.<sup>113</sup> Physical violence is used in select circumstances and in strategic, calculated ways.<sup>114</sup> The abuser may seem irrational or

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<sup>105</sup> See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985 (1994-1995).

<sup>106</sup> See Ver Steegh, *supra* note 8, at 151.

<sup>107</sup> Linda E. Offner, *Power and Control: Dispelling the Myths Surrounding Domestic Violence*, 13 NEV. FAM. L. REP., Winter Extra 6, 6 (1998); accord Ver Steegh, *supra* note 8, at 151.

<sup>108</sup> Ver Steegh, *supra* note 8, at 152.

<sup>109</sup> See Ver Steegh, *supra* note 8, at 151.

<sup>110</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 740.

<sup>111</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 740.

<sup>112</sup> See ALLEN, *supra* note 19, at 15-16; STARK, *supra* note 17, at 281.

<sup>113</sup> See STARK, *supra* note 17, at 269-276; Stark, *supra* note 105, at 983-84.

<sup>114</sup> See Stark, *supra* note 105, at 986.

unpredictable in order to maintain a sense of insecurity and fear in his victim.<sup>115</sup> Verbal, emotional, and economic threats are other tactics employed by many DV abusers.<sup>116</sup> However, many abused women, especially those who do not experience physical violence from their abuser, may not even realize they are victims of DV.<sup>117</sup> Thus, they do not self-identify as a victim or seek outside assistance to remedy their situation.<sup>118</sup> As a result, millions of women are unwittingly subjected to ongoing DV every day, living under the torment and control of their abusers.<sup>119</sup>

On June 26, 1987, the United Nations Human Rights Office of the High Commissioner entered into force its Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>120</sup> The Convention against Torture defines *torture* as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act her or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>121</sup>

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<sup>115</sup> See STARK, *supra* note 17, at 281.

<sup>116</sup> See King, *supra* note 5, at 156.

<sup>117</sup> See, e.g., King, *supra* note 5; STARK, *supra* note 17, at 157-158.

<sup>118</sup> See King, *supra* note 5, at 154-55, 157.

<sup>119</sup> See King, *supra* note 5, at 154-55, 157.

<sup>120</sup> See generally Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984), <http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf> [hereinafter Convention against Torture].

<sup>121</sup> Convention against Torture, *supra* note 273, at art. I, ¶ 1 (Dec. 10, 1984), <http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>.

Indeed, this comprehensive definition, ascribed to the United Nations, encompasses the forms of torture tolerated by the U.S. judicial system as discussed in this article. DV, whether implemented through physical violence or through non-physical forms of abuse, is a form of torture that continues against its victim, is ongoing, and extends over a period of time.<sup>122</sup> The torture experienced by DV victims, especially through the US judicial system, the trauma these victims manifest, and the symptomology they evidence helps to explain the correlation between gender bias in the U.S. judicial system and DV.<sup>123</sup> The prevalence of PTSD among DV victims, who must interact within the U.S. judicial system, is alarming, especially considering the ones who are not properly diagnosed, treated, or accommodated.<sup>124</sup>

With torture, comes trauma. Trauma is the reaction by a person to an event or series of events that are shocking to the person and are emotionally and psychologically injurious.<sup>125</sup> When one experiences a horrible event, they experience trauma.<sup>126</sup> Trauma is “a violently produced wound [that has] an emotional shock with a lasting effect.”<sup>127</sup> Exposure to a traumatic event, such as violence and abuse, alters the way a DV victim views herself, her friends and family, and her environment.<sup>128</sup> DV victims who experience trauma may develop hyper-vigilance in reaction to perceptions of their vulnerability or lack of safety. Victims may experience a sense that the violence and abuse from their partner will reoccur or intensify.

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<sup>122</sup> See King, *supra* note 5, at 157-58.

<sup>123</sup> See King, *supra* note 5, at 153-54.

<sup>124</sup> See Meier, *supra* note 22, at 1312-14.

<sup>125</sup> See JON G. ALLEN, *COPING WITH TRAUMA: HOPE THROUGH UNDERSTANDING* 5-16 (2nd ed. 2005).

<sup>126</sup> Anne E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL’Y & L. 567, 605 (2003).

<sup>127</sup> See ALLEN, *supra* note 19.

<sup>128</sup> See Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1218 (1993).

Often, batterers employ a steady barrage of psychological abuse between episodes of violence, including; “coercion and threats; intimidation; emotional abuse; isolation; minimization, denial, and blaming; use of the children to control the victim; use of ‘male privilege;’ and economic/resource abuse[; and stalking] may incorporate several of these categories of psychological abuse.”<sup>129</sup>

SAMHSA’s concept of trauma is explained as “[i]ndividual trauma result[ing] from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.”<sup>130</sup> This concept of trauma is instructive for a court of law in regards to DV victims who have to face their abusers in open court.<sup>131</sup> In many cases, the trauma experienced by DV victims harms them both physically and mentally, even when no physical abuse has occurred or is evident.<sup>132</sup> Nevertheless, most DV definitions focus on physical abuse as the standard bearer for the court to be able to issue an order for protection against an abuser.<sup>133</sup> As Webster’s Dictionary suggests, such traumatizing DV often “causes psychological pain or discomfort and may be very disabling . . . includ[ing manifestations of] anxiety, compulsions, phobias, and depression” as well as psychological injuries such as Post-Traumatic Stress Disorder (PTSD).<sup>134</sup>

PTSD has been included in both the Diagnostic and Statistical Manual for Mental Disorders (“DSM”) and the International Classification of Diseases.<sup>135</sup> The DSM-IV, dated

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<sup>129</sup> *Id.* at 1206.

<sup>130</sup> See Substance Abuse and Mental Health Services Administration, SAMHSA’s Concept of Trauma and Guidance for a Trauma-Informed Approach, 7 (July 2014), <http://store.samhsa.gov/shin/content/SMA14-4884/SMA14-4884.pdf>.

<sup>131</sup> See *id.*

<sup>132</sup> See, e.g., STARK, *supra* note 17; King, *supra* note 5.

<sup>133</sup> See Ver Steegh, *supra* note 8, at 151-52.

<sup>134</sup> See WEBSTER’S NEW WORLD COLLEGE DICTIONARY 969 (edition year); accord Kaiser, Strike, & Ferris, *supra* note 17.

<sup>135</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 741.



1994, states that PTSD can occur when: “(1) the person experienced an event that involved actual or threatened death or a threat to the physical integrity of self and; (2) the person’s response involved intense fear, helplessness or horror.”<sup>136</sup> However, the DSM-5 differs significantly from the DSM-IV in its recognition and description of major symptoms and diagnostic criteria of and for PTSD.<sup>137</sup> For example, the DSM-IV states that PTSD is “a condition that may ensue when a person has been exposed to a traumatic event.”<sup>138</sup> But, the DSM-5 “is more explicit with regard to how an individual experienced ‘traumatic’ events.”<sup>139</sup> Indeed, exposure to DV is certainly a traumatic event, causing between 33% and 62% of DV victims to be diagnosed with PTSD.<sup>140</sup>

DV cannot simply be boxed into isolated, singular events of physical violence.<sup>141</sup> The trauma endured during the daily life course of an abused woman can be more damaging and difficult to recover from than the worst forms of physical violence.<sup>142</sup> It is because of this type of invisible torment that many women feel “a formal psychiatric diagnosis of PTSD validates [their] claim of

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<sup>136</sup> Kaiser, Strike, & Ferris, *supra* note 17, at 741-42; *accord Diagnostic and Statistical Manual of Mental Disorders*, DSM-IV, AMERICAN PSYCHIATRIC ASSOCIATION, <https://justines2010blog.files.wordpress.com/2011/03/dsm-iv.pdf>.

<sup>137</sup> See *Highlights of Changes from DSM-IV-TR to DSM-5*, AMERICAN PSYCHIATRIC ASSOCIATION, [https://www.psychiatry.org/File%2520Library/Psychiatrists/Practice/DSM/APA\\_DSM\\_Changes\\_from\\_DSM-IV-TR\\_to\\_DSM-5.pdf+%&cd=1&hl=en&ct=clnk&gl=us](https://www.psychiatry.org/File%2520Library/Psychiatrists/Practice/DSM/APA_DSM_Changes_from_DSM-IV-TR_to_DSM-5.pdf+%&cd=1&hl=en&ct=clnk&gl=us); see *Diagnostic and Statistical Manual of Mental Disorders*, DSM-5, AMERICAN PSYCHIATRIC ASSOCIATION, <https://psicovalero.files.wordpress.com/2014/11/dsm-v-ingles-manual-diagn3b3stico-y-estadc3adstico-de-los-trastornos-mentales.pdf>.

<sup>138</sup> Kaiser, Strike, & Ferris, *supra* note 17, at 741.

<sup>139</sup> See *Highlights of Changes from DSM-IV-TR to DSM-5*, AMERICAN PSYCHIATRIC ASSOCIATION, [https://www.psychiatry.org/File%2520Library/Psychiatrists/Practice/DSM/APA\\_DSM\\_Changes\\_from\\_DSM-IV-TR\\_to\\_DSM-5.pdf+%&cd=1&hl=en&ct=clnk&gl=us](https://www.psychiatry.org/File%2520Library/Psychiatrists/Practice/DSM/APA_DSM_Changes_from_DSM-IV-TR_to_DSM-5.pdf+%&cd=1&hl=en&ct=clnk&gl=us).

<sup>140</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 742.

<sup>141</sup> See Dutton, *supra* note 128, at 1208.

<sup>142</sup> See, e.g., *Id.*

exposure to severe trauma.”<sup>143</sup> The continuous levels of stress and fear, as well as feelings of disempowerment and lack of control evoked by their abuser, is comparable to the torture experienced by prisoners of war.<sup>144</sup> The trauma from DV experienced by victims, which can ultimately lead to PTSD, is part of a much “larger pattern of dominance and control,” beyond merely the physical aggression.<sup>145</sup>

A DV victim with PTSD “may experience delusions or hallucinations, high levels of distractibility, decreased personal hygiene, social isolation or withdrawal, strange behavior, confusion, anxiety, poor insight and judgement, and impaired interpersonal relations.”<sup>146</sup> Due to her PTSD injury, she may have challenges with “maintaining stamina, managing time pressure, focusing on multiple tasks, or responding to negative comments.”<sup>147</sup> Additionally, a DV victim with PTSD may be receiving treatment for her condition with psychotropic medications, which are intended to provide beneficial changes to her cognitive function. These medications, however, can have some negative side effects.<sup>148</sup> These side effects can include: “acute dystonia (severe involuntary spasms of the upper body, tongue, throat, or eyes), akathisia (motor restlessness and inability to sit still) . . . and tardive dyskinesia (a generally irreversible neurological disorder characterized by involuntary uncontrollable muscular movements often in the facial area).”<sup>149</sup> A DV victim with PTSD who displays these negative effects from her medication can affect the perceptions formed by a judge or jury related to her competence or even sanity.<sup>150</sup> Litigants with psychiatric disabilities, like PTSD, “are significantly less likely than their counterparts with non-psychiatric disabilities to

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<sup>143</sup> Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 999 (1995).

<sup>144</sup> See King, *supra* note 5, at 156.

<sup>145</sup> Meier, *supra* note 22, at 1317.

<sup>146</sup> Gould, *supra* note 25, at 147-48.

<sup>147</sup> Gould, *supra* note 25, at 147-48.

<sup>148</sup> Gould, *supra* note 25, at 147-48.

<sup>149</sup> Gould, *supra* note 25, at 148.

<sup>150</sup> Gould, *supra* note 25, at 148.

receive a beneficial outcome.”<sup>151</sup> People with PTSD were “significantly less likely than people with other disabilities to feel that they had a chance to tell their stories, that they were treated with dignity, or that decisionmakers were fair.”<sup>152</sup>

Women, who may be trapped in a “cycle of violence,” can develop PTSD from emotional, sexual, and/or physical abuse.<sup>153</sup> Studies show that a diagnosis of PTSD for an abused woman suggests that the disorder is the “causative effect of the abuse.”<sup>154</sup> Although PTSD was initially used to explain the impact on war veterans who were exposed to traumatic events in combat, symptoms associated with PTSD in veterans have also been found to be common among women who are victims of DV.<sup>155</sup> Women who are victims of DV may experience a “state of siege,” whereby the abuser continues to batter the victim with psychological abuse during times of non-physical violence episodes, while the victim lives with the varying levels of psychological abuse not knowing when the next incident of physical violence will occur.<sup>156</sup> They may experience a sense of low self-esteem and even blame themselves for the violence and abuse as a result of trauma. DV victims may find trusting others difficult or impossible due to the traumatic experience of verbal and physical violence.<sup>157</sup> Victims of DV who experience trauma may also struggle with reoccurring central nervous system issues whose symptoms include headaches, back pain, fainting, or seizures.<sup>158</sup> DV victims may also show symptoms, signs, and disorders associated with chronic fear and stress like gastrointestinal disorders, appetite loss, viral infections, and cardiac

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<sup>151</sup> See Jeffrey Swanson, et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 117 (2006-2007).

<sup>152</sup> *Id.* at 119.

<sup>153</sup> Ver Steegh, *supra* note 8, at 153.

<sup>154</sup> Kaiser, Strike, & Ferris, *supra* note 17, at 741.

<sup>155</sup> See Meier, *supra* note 22, at 1312.

<sup>156</sup> Dutton, *supra* note 128, at 1208.

<sup>157</sup> See *Id.* at 1218-19.

<sup>158</sup> See Jacquelyn Campbell et al., *Intimate Partner Violence and Physical Health Consequences*, 162 ARCH INTERN MED. 1157, 1158 (2002).

issues including hypertension and chest pain.<sup>159</sup> Finally, it is important to remember that not all victims of DV or trauma cross the threshold for a PTSD diagnosis. However, the absence of a PTSD diagnosis should never be considered as evidence that DV is not present in an intimate relationship.<sup>160</sup>

#### IV. CHALLENGES TO LEAVING THE ABUSER: PATRIARCHAL BARRIERS

The barriers to resources that assist DV victims in leaving their abuser can be social, psychological, and legal.<sup>161</sup> Although difficult, DV victims may sometimes be able to escape their abusers through, among other options, assistance from mental health counselors, victim advocates, religious leaders, and interventions from family and friends.<sup>162</sup> Support systems are a crucial element to a DV victim's successful separation from DV abusers.<sup>163</sup> DV abusers often target a victim's core support factors, such as "food, money, friendships, personal appearance, relationships with children, [and] extended family."<sup>164</sup> Without core support, DV victims become dependent on the abuser for basic needs. DV abusers also benefit from structural inequalities within our society. Inadequate or incompetent social sources of assistance help to strengthen the DV abuser's control over his victim. When police fail to arrest the abuser, when medical physicians fail to inquire about abuse, and when child protective services remove the child from the mother instead of providing assistance with helping the mother keep her and the child safe, the failure to intervene by sources of public assistance help strengthen the DV abuser's power and control over his victim.<sup>165</sup>

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<sup>159</sup> *See Id.*

<sup>160</sup> *See* Kaiser, Strike, & Ferris, *supra* note 17, at 742.

<sup>161</sup> *See* Meier, *supra* note 22, at 1318.

<sup>162</sup> *See* Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567, 574, 577, 615, 622 (2003).

<sup>163</sup> *See Id.*

<sup>164</sup> *See* Meier, *supra* note 22, at 1319.

<sup>165</sup> *See Id.*

### A. The DV Victim: Barriers in the Court System

DV victims and their abusers often end up tangled in the civil (and criminal) legal system(s).<sup>166</sup> Legal matters involving DV victims seeking relief – including injunctions, petitions for orders for protection, and divorce – can accelerate violence during and following court actions.<sup>167</sup> But even as DV victims look to legal institutions for help, they often find themselves mired in a system that reinforces the power imbalance they faced throughout their abusive intimate partner relationship.<sup>168</sup> DV abusers often use the judicial process to continue to abuse their victims.<sup>169</sup> DV abusers can employ a variety of successful maneuvers in court in which the abuser

project[s] a non-abusive image, using new partners as character references, using the [DV victim’s] anger or mistrust to discredit her, making false or exaggerated defensive accusations against the [DV victim], presenting themselves as the parties who are willing to communicate, . . . “it is common for [abusers] to be skillfully dishonest.”<sup>170</sup>

Even if a civil judge admits that DV occurred, many times they will focus on a specific incident of physical violence, trivialize the severity of the abuse and, often, ignore the emotional and economic effects placed upon the DV victim which can be more profound, severe, and extensive than the DV itself.<sup>171</sup> Adding to the pressure DV victims face in court, those who are in divorce proceedings are “routinely denied protection [from domestic violence] on the

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<sup>166</sup> See Ver Steegh, *supra* note 8, at 159, 181.

<sup>167</sup> See Freedman, *supra* note 126, at 575.

<sup>168</sup> See Ver Steegh, *supra* note 8, at 161-63.

<sup>169</sup> See Ver Steegh, *supra* note 8, at 161-63.

<sup>170</sup> See Freedman, *supra* note 126, at 581.

<sup>171</sup> See Meier, *supra* note 22, at 1318.

suspicion that their requests for protection are manipulative tactics.”<sup>172</sup>

The impact on women who endure DV should be of significance to a court of law.<sup>173</sup> PTSD, BWS, and other psychological disorders have been used effectively to legitimize the impact of abuse on women, but, they are also used to undermine the DV victim’s credibility in court, especially when there is no confirmed diagnosis.<sup>174</sup> Women, who suffer from PTSD, can have symptoms from their disorder that negatively impact them in litigation situations.<sup>175</sup> PTSD can have a subtle presentation in victims, which may lead to a lack of consistent rulings from courts.<sup>176</sup> PTSD often causes victims to react with “hyperarousal,” in which they feel irritable and on guard; “intrusion,” in which they re-experience painful memories; and “constriction,” in which they feel a diminished ability to experience emotion or whereby they experience a feeling of detachment from a given situation.<sup>177</sup> Thus, having to testify in court in judicial proceedings related to their abuser exacerbates these symptoms, causing the DV victim to re-experience the trauma that caused the PTSD or causing the DV victim to completely dissociate during a hearing or trial to protect herself from the reoccurrence of the trauma that triggers the PTSD.<sup>178</sup>

### B. The DV Victim: PTSD as a Stigma

The DV victim’s potential reactions in litigation settings as discussed above may cause a court to question “the woman’s demeanor and interaction with people and events, and thereby affect her credibility.”<sup>179</sup> Manifestations of PTSD may appear as

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<sup>172</sup> Freedman, *supra* note 126, at 584.

<sup>173</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 740.

<sup>174</sup> See Dragiewicz, *supra* note 92, at 5-8 to -9; Kaiser, Strike, & Ferris, *supra* note 17, at 741.

<sup>175</sup> See Dragiewicz, *supra* note 92, at 5-8 to -9.

<sup>176</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 743.

<sup>177</sup> Meier, *supra* note 22.

<sup>178</sup> See Meier, *supra* note 22, at 1328-29.

<sup>179</sup> *Id.* at 1313.

“dissociation” in which a DV victim dissociates herself from her body in order to protect herself from the onslaught of triggering events that cause the original trauma that caused the PTSD to emerge. When dissociation occurs, the DV victim becomes numb and may appear “plastic” or “fake” when describing her abuse, exhibiting a preoccupied demeanor that a judge or jury would not expect.<sup>180</sup> She may experience “hyperarousal” and become extremely excited in reaction to a minor event like an insult or a look from her abuser in court.<sup>181</sup> The presence of DV can profoundly alter how a DV victim fares in court.<sup>182</sup> When these diagnoses are utilized properly in an effort to explain the victim’s seemingly irrational behavior, whether in or out of court, a woman, who would otherwise seem non-credible, instead, has an advocate who is able to advance her DV experience and injuries.<sup>183</sup> But, when they are not utilized appropriately or DV victims do not have adequate legal counsel, the result can be dramatically unfair.<sup>184</sup>

DV abusers can wreak psychological and legal havoc during and following divorce proceedings.<sup>185</sup> Abusers can use the judicial process as a way to continue the verbal and economic abuse of their victims to maintain their power and control over her.<sup>186</sup> Judges in family court matters typically must attempt to sift through the facts presented through a distorted lens of contentious and, often, very complex adversarial litigation.<sup>187</sup> Some of these adversarial cases involve intense conflicts regarding the custody of the children

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 738; Lois Schwaeber, *Recognizing Domestic Violence: How to Know It When You See It and How to Provide Appropriate Representation*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 2-22 to 2-25 (Mo Therese Hannah & Barry Goldstein eds., 2010).

<sup>183</sup> See Kaiser, Strike, & Ferris, *supra* note 17, at 741 (PTSD is a brain injury, rather than a mental illness).

<sup>184</sup> See Schwaeber, *supra* note 182.

<sup>185</sup> See Freedman, *supra* note 126, at 575.

<sup>186</sup> See Freedman, *supra* note 126, at 575.

<sup>187</sup> See Freedman, *supra* note 126, at 582.

where it is necessary for the court to determine the best interests of the child in a family where DV is present.<sup>188</sup> In custody matters, victims who suffer from PTSD will most likely have their psychological injuries from DV used against them by lawyers, expert witnesses, and judges because of the legal system's myopic bias against women's autonomy and reliability.<sup>189</sup>

Courts have used symptomology stemming from PTSD as a catalyst to find that a mother is unfit as a parent, subsequently awarding custody to the abuser.<sup>190</sup> Although relatively rare, some courts have awarded custody to "fathers who killed the childrens' [sic] mother, on the ground that the violence against the childrens' [sic] mother was not directed toward the children and did not indicate the father would be a poor parent."<sup>191</sup> As repugnant to legal fairness as this extreme example may seem, it is an indication of the dismissive attitude courts often reveal toward DV victims and the actions of their abusers.<sup>192</sup> It is very common for courts to hold the abuse of the children by the abuser against the protective parent where neglect or abuse are at issue, especially in cases where the protective parent is a victim of abuse by the abuser as well.<sup>193</sup> It is widely recognized that children are harmed by witnessing the abuse of a parent by the other parent.<sup>194</sup> However, evidence of the children witnessing the abuse will often be held against the mother for exposing the children to the violence, including possible criminal sanctions and even termination of parental rights.<sup>195</sup>

Even more so than women generally, DV victims enter the adversarial court system at a clear disadvantage.<sup>196</sup> The foundation

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<sup>188</sup> See Ver Steegh, *supra* note 8, at 161.

<sup>189</sup> See Meier, *supra* note 22, at 1306.

<sup>190</sup> See *Id.*

<sup>191</sup> See Meier, *supra* note 22, at 1308.

<sup>192</sup> See Karen Anderson, *Courageous Kids: Abused Children Sharing Their Experiences*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 9-20 to 9-21 (Mo Therese Hannah & Barry Goldstein eds., 2010) (discussing the role of judges as the secondary abuser).

<sup>193</sup> See Meier, *supra* note 22, at 1309.

<sup>194</sup> See Dragiewicz, *supra* note 92, at 5-10 to -11.

<sup>195</sup> See Dragiewicz, *supra* note 92, at 5-10 to -11.

<sup>196</sup> See Ver Steegh, *supra* note 8, at 161-62.



of fairness that makes up the American adversarial court system is primarily based upon a concept that the parties will enter the court with professional representation (attorneys) and that the finder of fact (the judge) will determine the truth through a process whereby relevant information will be brought forth through the attorneys' best efforts to bring forward their clients' best positions, therefore leading ultimately to a just and fair decision from the court.<sup>197</sup> However, in order to realize this ideal, the American adversarial court system presumes that the parties to the litigation will have an equal balance of economic resources and access to competent legal representation.<sup>198</sup> This balance is rarely, if ever, achieved, especially in cases involving DV in which the abusers will often "use the court system as a forum to harass and intimidate the abuse survivor by engaging in traumatic and expensive ongoing litigation."<sup>199</sup> Without an economic equal balance, the adversarial model is ill-equipped to compensate for any imbalance of power or resources.<sup>200</sup>

Family courts encourage negotiation and will order mediation in an effort to lead to private settlements. It is, however, dangerous for DV victims to mediate with their abusers.<sup>201</sup> Avoiding public judicial proceedings to adjudicate issues between intimate partners is a high priority for practical and ideological rationales; yet, courts do not understand the inequity of power between a DV victim and her abuser.<sup>202</sup> This powerful anti-litigation bias is motivated from historical ideals about family autonomy and privacy, and places the DV victim in a vulnerable position and at a disadvantage, where she will be unable to negotiate

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<sup>197</sup> *See Id.* at 161.

<sup>198</sup> *See Id.*

<sup>199</sup> *Id.* at 161-62.

<sup>200</sup> *See Id.* at 161.

<sup>201</sup> *See* Joan Zorza, *Child Custody Practices of the Family Courts in Cases Involving Domestic Violence*, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY* 1-15 to 1-19 (Mo Therese Hannah & Barry Goldstein eds., 2010).

<sup>202</sup> *See* Freedman, *supra* note 126, at 594; Zorza, *supra* note 201.

for her and her children's best interests.<sup>203</sup> Litigants, who reject the anti-litigation bias and choose to litigate, risk being labeled as foolhardy, unreasonable, or mentally unstable.<sup>204</sup> The litigants who receive such labels may be determined as such through the lens of gender bias as well as anti-litigation bias when, in fact, the litigant is clearly asserting her legal right to fight for her liberty, children's safety, and property.<sup>205</sup>

### **C. PTSD and DV: A Barrier to Leaving the DV Abuser**

There are many reasons a DV victim might decide to leave her abuser, but there are also many reasons she may be forced to stay, especially when a diagnosis of PTSD for the DV victim is involved.<sup>206</sup> The adversarial litigation model lacks a capacity to properly recognize the emotional and psychological issues between the DV victim and her abuser, placing too much emphasis on the role of the civil court judge who is typically inadequately trained in these areas.<sup>207</sup> Under the adversarial model, litigants and their attorneys prepare for an impending trial even though a majority of dissolution matters are settled.<sup>208</sup> Trial preparation places the parties at odds with each other and places them into a win-lose mentality, creating differences that are accentuated and common interests, which are minimized.<sup>209</sup> Attorneys are primarily pressed into roles as advocates rather than problem solvers.<sup>210</sup> Consequently, the marital dissolution process becomes unnecessarily hostile and

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<sup>203</sup> See Freedman, *supra* note 126, at 594-95; Zorza, *supra* note 201.

<sup>204</sup> Freedman, *supra* note 126, at 596.

<sup>205</sup> See Freedman, *supra* note 126, at 596.

<sup>206</sup> See Thomas E. Hornsby, *Do judges Adequately Address the Causes and Impact of Violence in Children's Lives in Deciding Contested Child Custody Cases?*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 7-8 (Mo Therese Hannah & Barry Goldstein eds., 2010) (explaining that judges treatment of victims, coupled with their fragile conditions due to their exposure to abuse, is often the reason why women choose to stay in DV relationships).

<sup>207</sup> See Ver Steegh, *supra* note 8, at 162.

<sup>208</sup> See *Id.*

<sup>209</sup> See Schwaeber, *supra* note 182, at 2-22 to -25.

<sup>210</sup> See Schwaeber, *supra* note 182, at 2-22 to -25.

confrontational.<sup>211</sup> All these drawbacks to the adversarial model in family law matters involving DV have “the potential to exacerbate [an] already dangerous conflict.”<sup>212</sup>

DV victims have other hurdles to jump over within a court process. Even if adequate representation is secured, DV victims must provide assistance with evidence.<sup>213</sup> They must also balance pressures to face “humiliating events that they previously tried to keep private.”<sup>214</sup> The court setting can be a contentious arena for DV victims who suffer from PTSD. In many circumstances, victims will be subjected to intimidating cross-examination and may also experience hostile reactions from judges in the course of hearings.<sup>215</sup> Even if judges acknowledge that DV has taken place, all too often they devalue the significance of the violence and ignore the controlling behavior of the abuser when deciding disputes and crafting orders.<sup>216</sup> Also, they often erroneously assume that, because the parties are in court, the victim has completely escaped the abuse.<sup>217</sup>

DV victims who are suffering from PTSD, find it especially challenging to conduct legal actions because, as a result of their condition, they “may have difficulty standing up for themselves.”<sup>218</sup> Indeed, it is crucial that a DV survivor with PTSD finds an affordable attorney who screens for and understands DV.<sup>219</sup> Studies show that most litigants are typically “unrepresented because they cannot afford to hire an attorney.”<sup>220</sup> Indeed, women, including

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<sup>211</sup> See Schwaeber, *supra* note 182, at 2-22 to -25.

<sup>212</sup> See Ver Steegh, *supra* note 8, at 162-63.

<sup>213</sup> See Schwaeber, *supra* note 182, at 2-22 to -25.

<sup>214</sup> Freedman, *supra* note 126, at 598.

<sup>215</sup> Freedman, *supra* note 126, at 598.

<sup>216</sup> Freedman, *supra* note 126, at 599.

<sup>217</sup> See Thomas E. Hornsby, *Do judges Adequately Address the Causes and Impact of Violence in Children’s Lives in Deciding Contested Child Custody Cases?*, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 7-8* (Mo Therese Hannah & Barry Goldstein eds., 2010).

<sup>218</sup> Ver Steegh, *supra* note 8, at 186.

<sup>219</sup> Ver Steegh, *supra* note 8, at 165.

<sup>220</sup> See Ver Steegh, *supra* note 8, at 166.

those who are DV victims, are “less likely to be represented than men.”<sup>221</sup> DV victims are at an even more disadvantaged position if their abuser has an attorney and the victim does not.<sup>222</sup> In this scenario, the DV victim is without a spokesperson and advocate and the abuser’s attorney will most likely have “more access to financial and other case related information.”<sup>223</sup>

DV victims are particularly likely to have their claims of domestic violence minimized or dismissed outright due to a prevailing view that the DV claim is “either [a] product of an overreaction” to normal conflict within a marital dissolution, or, worse, viewed by the court “as a manipulative tactic to gain an unfair advantage.”<sup>224</sup> These barriers make the acquisition of a quality, trained attorney a crucial piece to the litigation puzzle for DV victims. Locating a quality attorney trained in domestic violence abuse and coercive control tactics is the initial hurdle, *affording* a properly qualified attorney is another matter entirely.<sup>225</sup> DV victims, who are fortunate enough to find and retain the best, most qualified attorney, still enter the legal system faced with gender-biased courts that “continue to treat claims of domestic violence with disdain, disbelief and dismissiveness.”<sup>226</sup> Adding to the hostile adversarial legal environment is the DV abuser who can harass the DV victim with false accusations, intimidating his victim into defending the falsely claimed deficiencies in trial.<sup>227</sup>

DV abusers can use the psychological stress by repeatedly using court pleadings as a tactic to wear down DV victims.<sup>228</sup> Stressors that push DV victims to prematurely settle viable cases include the discovery and exposure of humiliating events that victims attempt to keep private, intimidating and embarrassing

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<sup>221</sup> See Ver Steegh, *supra* note 8, at 166.

<sup>222</sup> See Ver Steegh, *supra* note 8, at 166-67.

<sup>223</sup> See Ver Steegh, *supra* note 8, at 167.

<sup>224</sup> Freedman, *supra* note 126, at 599.

<sup>225</sup> Ver Steegh, *supra* note 8, at 165 (emphasis added).

<sup>226</sup> Meier, *supra* note 22, at 1310.

<sup>227</sup> See Freedman, *supra* note 126, at 600.

<sup>228</sup> See King, *supra* note 5, at 168.

depositions and cross-examinations, and overtly hostile judges.<sup>229</sup> Additionally, DV victims may feel a mounting pressure to settle prematurely, or to compromise with an abuser to their detriment, all the while believing that the abuse would cease if they were to capitulate with their abuser.<sup>230</sup> If the DV victim is coerced into ending the litigation prematurely, accepts a harmful and unjust result, or withdraws her case due to re-victimization at the hands of her abuser because of absolute privilege, the civil legal system is no more than a charade and a sham, instituted to reward the abuser for the harms inflicted against his victim.<sup>231</sup>

## V. ABSOLUTE PRIVILEGE: THE COMMON LAW DOCTRINE OF CONTINUED DOMESTIC VIOLENCE

“*[C]ourts rarely find lawyers’ statements irrelevant.*”<sup>232</sup>

DV abuse does not always find its way to the courthouse steps. Of those cases that do, DV abusers are able to use the court’s judicial proceedings to continue the abuse through “intimidation, isolation, and control under the guise of litigation strategies.”<sup>233</sup> Abusers may gain access to their victims by repeatedly calling them into court, exposing them to embarrassing questions in depositions, and wearing them down with repetitive false accusations in court pleadings. Due to the common law doctrine of absolute privilege, abusers and their attorneys are immune from civil liability for making false and defamatory statements about DV victims in a judicial proceeding.<sup>234</sup> Indeed, DV abusers can use the adversarial legal system to degrade and threaten their victims without any fear of civil consequences.<sup>235</sup>

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<sup>229</sup> See Freedman, *supra* note 126, at 598.

<sup>230</sup> See Ver Steegh, *supra* note 8, at 184-85.

<sup>231</sup> See Schwaeber, *supra* note 182, at 2-22 to 2-25.

<sup>232</sup> T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 934 (2004).

<sup>233</sup> King, *supra* note 5, at 167.

<sup>234</sup> See generally Casey L. Jernigan, *The Absolute Privilege is Not a License to Defame*, 23 J. LEGAL PROF. 359 (1999).

<sup>235</sup> See King, *supra* note 5, at 169.

This article asserts that DV abusers can take advantage of the absolute privilege in litigation, use the privilege to continue their abuse of their victims within the civil legal system, and that this behavior leads to additional harm for DV victims. Indeed, for centuries, the absolute privilege has provided litigants, judges, and attorneys with absolute immunity from civil law suits for defamation, either in the form of the written or spoken word. Courts have ruled that litigants, in an effort to seek the discovery of evidence, may resort to ingenious methods to obtain the needed relevant evidence.<sup>236</sup> Examples of these ingenious methods include tactics such as publishing defamatory statements, utilizing threatening language in court documents, and intimidating the opposing party through harassing communications that include gratuitous verbal abuse or name calling.<sup>237</sup> As a result, an abuser may understand that he can legally utilize the absolute privilege as an affirmative defense to justify his offensive and abusive actions against his DV victim during the course of a dissolution of marriage or any other judicial proceeding with her.<sup>238</sup>

Absolute privilege allows a DV abuser to continue to traumatize his victim indefinitely through judicial proceedings, which could often lead to further legal and health related injuries for women who are suffering from PTSD due to DV.<sup>239</sup> The DV abuser, and his attorney, knows he has absolute privilege on his side during the course of litigation and will use it to his advantage to continue to maintain the power and control he has over his victim and to seek unjust benefits in the litigation.<sup>240</sup> The utilization of absolute privilege by a DV abuser against his victim is especially likely in states where absolute privilege has been expanded beyond its common law form. The expansion of absolute privilege essentially gives DV abusers a legal license to re-victimize the very people the court system is trying to protect. Indeed, the trauma experienced by

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<sup>236</sup> See *Kirschstein v. Haynes*, 778 P.2d. 941, 951 (Okla. 1990).

<sup>237</sup> See *Id.*; King, *supra* note 5, at 168-69.

<sup>238</sup> King, *supra* note 5, at 168-69; See *LatAm Inv., LLC v. Holland & Knight, LLP*, 88 So. 3d 240, 245 (Fla. Dist. Ct. App. 2011).

<sup>239</sup> See Allen, *supra* note 19.

<sup>240</sup> See Brigner, *supra* note 16, at 13-3 to -8; King, *supra* note 5, at 168-69.

a DV victim may often lead to injuries including PTSD, a recognized disability entitled to protection under the Americans with Disabilities Act.<sup>241</sup> Specifically, Title II of the ADA requires public entities to reasonably modify their rules, policies, practices, or services to accommodate the individual with a disability, such as PTSD, so that discrimination thereto is prevented.<sup>242</sup> Such reasonable modifications by public entities are necessary for people with disabilities to fully exercise their legal rights.<sup>243</sup>

The absolute privilege was initially used to protect accusers who alleged criminal acts from being sued for defamation, or through an action for “scandalum magnatum,” or slander,” brought by the accused.<sup>244</sup> However, the once narrow privilege articulated in an English court in 1497, later adopted in colonial American common law, has been expanded in modern jurisprudence to include any and all conduct by litigation parties and attorneys.<sup>245</sup> Indeed, the focus on defamatory words involved in litigation has broadened to include acts that, otherwise, would constitute tortious acts had they not been committed in some form or fashion in a judicial proceeding.<sup>246</sup> In fact, to utilize the affirmative defense of absolute privilege, one may simply claim that the statements or acts arose with only the barest of rational relevancy to the litigation with which the statements or acts are connected.<sup>247</sup>

Absolute privilege has been expanded to apply to any statements or conduct occurring in connection with litigation, such as preparing expert witnesses for testimony and communications thereto, communications and actions related to settlement

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<sup>241</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102, 12131-12132 (amended 2008). See also Kaiser, Strike, & Ferris, *supra* note 17, at 742.

<sup>242</sup> See 42 U.S.C. §§ 12102, 12131-32; See also Kaiser, Strike, & Ferris, *supra* note 17.

<sup>243</sup> 42 U.S.C. §§ 12102, 12131-32.

<sup>244</sup> *Simms v. Seaman*, 69 A.3d 880, 885 (Conn. 2013).

<sup>245</sup> *Simms*, 69 A.3d at 885. See generally *Levin v. United States Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994).

<sup>246</sup> See generally *Levin*, 639 So. 2d. 606 (Fla. 1994).

<sup>247</sup> See T. Leigh Aneson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 933 (2004).

agreements, as well as failure to properly maintain a client's confidential information.<sup>248</sup> The application of absolute privilege by courts is grounded in public policy and is "essential to the need for unencumbered administration of justice."<sup>249</sup> Whether absolute privilege applies in a given situation is a matter of law to be determined by the trial court.<sup>250</sup> The ability for a court to determine whether the affirmative defense of absolute privilege applies to a person, whom the privilege is meant to protect, "allows courts to dismiss cases . . . at the earliest possible stage in the litigation."<sup>251</sup>

According to the Restatement (Second) of Torts,

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.<sup>252</sup>

The courts have the responsibility to monitor the privilege by regulating the actions of litigants and attorneys under its duty to "protect the public, the [legal] profession, and the administration of justice."<sup>253</sup> However, such regulation is typically carried out through the courts' internal sanctions within the litigation or through disciplinary proceedings against an officer of the court, i.e. an attorney, rather than having another court allow a party to the litigation to file a separate legal action against the opposing party or attorneys.<sup>254</sup> One of the purposes of absolute privilege is to limit the liability and to protect attorneys for their actions during the course of representation of a party to litigation.<sup>255</sup>

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<sup>248</sup> See generally Aneson, *supra* note 248.

<sup>249</sup> Jernigan, *supra* note 24, at 360.

<sup>250</sup> Aneson, *supra* note 248, at 918.

<sup>251</sup> See Aneson, *supra* note 248, at 921.

<sup>252</sup> RESTATEMENT (SECOND) OF TORTS § 586 (1977).

<sup>253</sup> Jernigan, *supra* note 24, at 366.

<sup>254</sup> See Aneson, *supra* note 248, at 925.

<sup>255</sup> See *Id.* at 916.



The absolute privilege was initially envisioned to “protect litigants, witnesses, attorneys, and judges” from frivolous suits brought as retribution or to gain an advantage in associated litigation; but judicial discretion is the only real constraint on what may become abusive, unfair, and defamatory actions.<sup>256</sup> Use of the absolute privilege was meant to safeguard the adversarial legal system from disruptions to the litigation process.<sup>257</sup> By providing protection from liability, absolute privilege allows litigants, their attorneys, and all other participants to perform their respective judiciary functions without interference from tort claims brought by defamed parties.<sup>258</sup> Defamatory statements made by litigants or attorneys that are irrelevant to the judicial proceedings may not be protected by the absolute privilege. However, the relevancy of defamatory statements are determined by the court as a question of law.<sup>259</sup> If there are any doubts as to the relevance of an attorney’s defamatory statements, the benefit of the doubts are resolved in favor of the attorney who made the statements.<sup>260</sup> Consequently, the privilege removes the possibility of a successful claim by a defamed party against an attorney for civil liability. In practice, however, the privilege protects litigators and provides “them with a license to lie, cheat, or steal” because they know they are immune from liability for their statements and actions within the confines of a judicial proceeding.<sup>261</sup>

Historically, courts have applied a liberal construction of absolute privilege which has become so broad that it has virtually no constraint at all. Attorneys who have been found to have made “false misrepresentations, manufactur[ed] evidence, and present[ed] perjured testimony” have been ruled to be immune from lawsuits for their actions.<sup>262</sup> Attorneys are afforded absolute

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<sup>256</sup> See King, *supra* note 5, at 169.

<sup>257</sup> See Aneson, *supra* note 248, at 921.

<sup>258</sup> See Aneson, *supra* note 248, at 921.

<sup>259</sup> See Jernigan, *supra* note 24, at 361.

<sup>260</sup> See Aneson, *supra* note 248.

<sup>261</sup> Aneson, *supra* note 248, at 924.

<sup>262</sup> Aneson, *supra* note 248, at 938.

privilege for defamatory statements that are made in the course of, or simply related to, a judicial proceeding.<sup>263</sup> Absolute privilege “applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer so long as the conduct complained of has some relation to the litigation.”<sup>264</sup> When a litigant or his attorney invokes the absolute privilege as an affirmative defense in a law suit brought against him for defamation or tortious acts, “it is irrelevant whether the defamatory material is true or false, and it is further irrelevant whether the individual making the defamatory statement knew such information was false.”<sup>265</sup> Generally, any egregious behavior by an attorney needing reprimand is handled by the court through sanctions or by the state bar association through formal disciplinary proceedings rather than by limiting the privilege.<sup>266</sup>

The expansion of the application of absolute privilege throughout the U.S. judicial system can result in significant harm to the party upon which the defamatory statements and tortious acts are directed.<sup>267</sup> Indeed, for anyone who is the victim of such, otherwise, actionable offenses, it violates the very concept of fairness and justice.<sup>268</sup> Certainly, when a judge or jury bases the outcome of a case on malicious falsehoods and witnesses or parties,

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<sup>263</sup> See Jernigan, *supra* note 24, at 371.

<sup>264</sup> Aneson, *supra* note 248, at 918.

<sup>265</sup> Jernigan, *supra* note 24, at 360.

<sup>266</sup> See Aneson, *supra* note 248, at 925. See generally Levin, et al., 639 So. 2d. 606 (explains that absolute privilege is a powerful doctrine that shields litigants and their attorneys from civil liability despite malice by the actor or tremendous harm to the victim. *Levin* expanded the absolute privilege to apply to any cause of action that includes words as well as actions inside and outside the courtroom. The Florida Supreme Court extended absolute privilege in Florida beyond its historically defined limits and set up a circumstance whereby the Florida Supreme Court implicitly condones unethical and abusive litigation conduct by attorneys and others. Indeed, the Florida courts, as well as many other states such as California, Indiana, and New Jersey recognize that absolute privilege applies to both statements and acts, a broad interpretation that was not originally contemplated by the common law doctrine. It also applies to cases arising from statutory law as well as common law, with both federal and state courts following this expansive application of the affirmative defense.)

<sup>267</sup> Keith Clausen, Case Comment, *Levin v. United States Fire Ins., Co.*, 639 So. 2d 606 (Fla. 1994), 46 FLA. L. REV. 687 (1994).

<sup>268</sup> See Clausen, *supra* note 268.

who are subjected to harassing and threatening treatment by officers of the court who act with impunity, it is difficult to imagine a situation where a fair and just legal process has occurred. However, this outrageous and abusive behavior is particularly damaging and offensive in the family law court system where the raw emotional nature of the parties runs very high, and it is especially likely to occur because of the discretion afforded family law court judges.<sup>269</sup>

DV abusers can use absolute privilege to re-victimize their victims without concern over legal repercussions.<sup>270</sup> Through the protection of absolute privilege as an affirmative defense to any lawsuit brought against him for statements and actions made against a DV victim, an attorney can defame, harass, and threaten her during the course of litigation or in connection with contemplated litigation; and he is immune from liability for the defamatory statement by using the affirmative defense of absolute privilege.<sup>271</sup> The net effect of absolute privilege is the manipulation by DV abusers of the family law court system and the denial of DV victims' equal protection of the laws.<sup>272</sup> This creates an even greater power and control imbalance between the abuser and his victim, resulting in gender inequalities within the court. Absolute privilege can exacerbate the already difficult tasks facing DV victims who cannot handle the seemingly simplest of perfunctory legal requirements with rational thought.<sup>273</sup> Simultaneously, the DV victim knows that the abuser is signaling to her that she is under his power and control, causing her to view his abusiveness as omnipresent.<sup>274</sup>

The continued reinforcement of the absolute privilege doctrine by appellate courts and the expansion of the doctrine to privilege any and all communications and actions by parties within a proceeding, or contemplated proceeding, places DV victims in a precarious position of vulnerability and places DV abusers in a

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<sup>269</sup> See Clausen, *supra* note 268; See also King, *supra* note 5.

<sup>270</sup> See King, *supra* note 5, at 169.

<sup>271</sup> See King, *supra* note 5, at 168-69.

<sup>272</sup> See King, *supra* note 5, at 168.

<sup>273</sup> See Dragiewicz, *supra* note 92, at 5-8 to -9.

<sup>274</sup> See King, *supra* note 5.

position of power.<sup>275</sup> Courts favor employing a liberal rule in finding communications or actions absolutely privileged.<sup>276</sup> Cavalierly, courts rule that because litigation is adversarial, “[f]eelings are often wounded and reputations are sometimes maligned.”<sup>277</sup> The absolute privilege doctrine expansion is generally justified by the concept that “an occasional unfair result, fraudulent communication, or perjured testimony was the price to be paid for free access to the courts without fear of harassing derivative tort actions.”<sup>278</sup> This justification fails to recognize that a DV victim, who suffers with PTSD, has her fundamental right to free access to the courts infringed upon when a blind application of absolute privilege is given to a DV abuser whose intent is to harass and intimidate his victim within the judicial system.<sup>279</sup>

If courts blindly apply a liberal interpretation of absolute privilege to all actions and communications committed by a DV abuser, a DV victim with PTSD is unable to withstand the onslaught from her abuser and is unable to realize a just result. A DV abuser can shield himself from tort actions and institute illegitimate litigation strategies for the purposes of harming his victim through abusive and harassing language deployed through court documents, as well as interrogatory and deposition questions. A DV abuser can force his victim to defend baseless accusations in pleadings, costing his victim time, money, and peace of mind; the types of resources a DV victim rarely possesses.

The alternative to allowing tort actions as remedies for litigants who are wronged within a civil litigation dispute is the court’s power to sanction a party or attorney.<sup>280</sup> Family law courts

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<sup>275</sup> See generally Clausen, *supra* note 268; See also Brigner, *supra* note 16, at 13-3 to -5, 13-12.

<sup>276</sup> See Estate of Mayer v. Lax, Inc., 998 N. E.2d 238, 247 (Ind. Ct. App. 2013).

<sup>277</sup> *Id.* (quoting Briggs v. Clinton Cty. Bank & Trust Co. of Frankfort, Ind., 452 N. E.2d 989, 998 (Ind. Ct. App. 1983)).

<sup>278</sup> Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 518 (2000).

<sup>279</sup> See *Id.*; See generally Clausen, *supra* note 268; See also Brigner, *supra* note 16, at 13-3 to -5, 13-12; Stark, *supra* note 105, at 974-75.

<sup>280</sup> See Aneson, *supra* note 248, at 13-3 to -5, 13-12.

are given wide discretion to evaluate what constitutes sanctionable conduct.<sup>281</sup> Unfortunately, conduct that typically rises to the level of outrageousness that will draw punitive sanctions from a family law court are well beyond the boundaries of tolerable conduct for a DV victim with PTSD.<sup>282</sup> Courts deciding whether to sanction litigants or attorneys for egregious conduct weigh the conduct next to a reasonable person standard, a standard based on gendered foundations and meant to cover actions experienced by individuals not diagnosed with PTSD stemming from DV.<sup>283</sup> As a result of the DV from her abuser who she now faces in court, the DV victim with PTSD has damaged tolerance levels which are far below the tolerance levels associated with a reasonable person standard.<sup>284</sup> Courts that neglect to apply a *subjective* standard of conduct, based upon what a DV victim with PTSD can tolerate, does the victim a disservice by failing to administer justice properly.<sup>285</sup>

## VI. THE AMERICANS WITH DISABILITIES ACT: A PATH TO RELIEF FOR DOMESTIC VIOLENCE VICTIMS WITH PTSD

*“Pursuing one’s rights under the ADA constitutes a protected activity.”*<sup>286</sup>

The Americans with Disabilities Act was signed into law by President George H. W. Bush on July 26, 1990.<sup>287</sup> President Bush

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<sup>281</sup> See Aneson, *supra* note 248, at 13-3 to -5, 13-12; Brigner, *supra* note 16, at 13-3 to -5, 13-12.

<sup>282</sup> See generally Stark, *supra* note 105.

<sup>283</sup> See Dragiewicz, *supra* note 92, at 5-8 to -9; See generally Stark, *supra* note 105.

<sup>284</sup> See Dragiewicz, *supra* note 92, at 5-8 to -9; See generally Stark, *supra* note 105.

<sup>285</sup> See Dragiewicz, *supra* note 92, at 5-8 to -9; See generally Stark, *supra* note 105 (emphasis added).

<sup>286</sup> Pardi v. Kaiser Permanente Hosp., 389 F.3d 840, 850 (9th Cir. 2004).

<sup>287</sup> Maryann Jones, *And Access for All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75, 77 (1998).

recognized that people with disabilities made up the largest minority group in the United States.<sup>288</sup> At the time, the ADA was considered a piece of landmark legislation because it was passed, in part, to ensure disabled persons' acceptance into places of public accommodations.<sup>289</sup>

### A. What is the ADA?

The ADA was enacted to “eliminate discrimination against individuals with disabilities” as well as to ensure the federal governments' enforcement of the law.<sup>290</sup> Specifically, Title II of the ADA ensures that individuals with disabilities are protected against discrimination, including in places of public services such as state court systems.<sup>291</sup> Title II states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>292</sup> “Title II . . . prohibits ‘public entities’ from discriminating against individuals on the basis of disability . . . As public entities, state court systems are mandated by the ADA to address the needs of people with functional limitations and provide them equal access to justice.”<sup>293</sup> Title II ensures that people with disabilities have an “active[] and meaningful[] participat[ion] in the state judicial system.”<sup>294</sup>

The justice system is an institution that provides hope to those who have found none anywhere else for injuries suffered in

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<sup>288</sup> *Id.*

<sup>289</sup> Keri K. Gould, *And Equal Participation for All... The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123, 123 (1994).

<sup>290</sup> *Id.* at 124.

<sup>291</sup> *Id.*

<sup>292</sup> 42 U.S.C. § 12132 (2008).

<sup>293</sup> Jeanne A. Dooley and Erica F. Wood, ‘Program Accessibility’: *How Courts Can Accommodate People with Disabilities*, 76 JUDICATURE 250, 250 (1993).

<sup>294</sup> Peter Blanck, Ann Wilichowski, and James Schmeling, *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825, 841 (2004).

the context of economics, politics, or social status.<sup>295</sup> Fair access to courts is considered a fundamental right in any system of government where justice remains a vital core value.<sup>296</sup> However, access to justice has been a struggle for people with disabilities, who still labor to obtain any form of meaningful participation in our legal system.<sup>297</sup> When amending the ADA in 2008, Congress acknowledged that individuals with disabilities often experience discrimination for which they have “no legal recourse to redress such discrimination.”<sup>298</sup> Still, despite the passage of the ADA, barriers to meaningful access to justice for people with disabilities still remain, resulting in some individuals with disabilities being denied relevant, substantial participation in court proceedings.<sup>299</sup>

The ADA requires that state court systems make its facilities and programs accessible to qualified individuals with disabilities.<sup>300</sup> As barriers to participation are discovered, the ADA mandates that a state court system “must reasonably modify its policies, practices or procedures to allow participation by a person with a disability.”<sup>301</sup> Historically, disabled persons have been denied active participation in the courts and equal protection of the laws.<sup>302</sup> However, under the ADA, no individual with a qualified disability shall be denied complete participation in the judicial system or be discriminated against due to the nature of their disability.<sup>303</sup>

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<sup>295</sup> Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT’L & COMP. L. 281, 285 (2011).

<sup>296</sup> Blanck, Wilichowski, and Schmeling, *supra* note 295, at 825.

<sup>297</sup> *Id.*; accord Ortoleva, *supra* note 296, at 287.

<sup>298</sup> 42 U.S.C. § 12101(a)(2), (a)(4) (2008).

<sup>299</sup> See Blanck, Wilichowski, and Schmeling, *supra* note 295, at 829-30.

<sup>300</sup> See Blanck, Wilichowski, and Schmeling, *supra* note 295, at 830-31.

<sup>301</sup> See Blanck, Wilichowski, and Schmeling, *supra* note 295, at 831.

<sup>302</sup> Gould, *supra* note 25, at 124.

<sup>303</sup> 42 U.S.C. § 12132 (2008).

### **B. Under the ADA: What is a Disabled Person and what constitutes discrimination?**

Under the ADA, to qualify as an individual with a disability, that individual must have “a physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>304</sup> The ADA Amendments Act of 2008 focuses on the disability’s impairment of an individual’s substantial limitation of one major life activity and does not require more than one activity’s substantial limitation in order to qualify as a disability under the ADA.<sup>305</sup> Historically, for psychiatric conditions, courts used diagnoses from the American Psychiatric Association’s *Diagnostic and Statistical Manual* when evaluating whether a specific condition meets the impairment criteria of the ADA.<sup>306</sup> Diagnoses that courts recognize as potentially disabling include, but are not limited to, “major psychiatric diseases such as schizophrenia, bipolar disorder, and depression, as well as most of the anxiety disorders such as panic disorder, post-traumatic stress disorder, claustrophobia, and agoraphobia.”<sup>307</sup> The legislative history of the ADA makes clear that a person is qualified for protection if one has, among others, an “emotional illness.”<sup>308</sup> Further, a litigant, who, because of “brain injuries,” cannot adequately and consistently communicate with her attorney, is “incapable of assisting in a meaningful way in the conduct of a civil case . . . [and] is therefore disabled, within the meaning of the Americans with Disabilities Act (ADA).”<sup>309</sup>

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<sup>304</sup> 42 U.S.C. § 12102(1)(A) (2008).

<sup>305</sup> *Id.* § 12102 (4)(A-C).

<sup>306</sup> Jeffrey Swanson, et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 121 (2006-2007).

<sup>307</sup> *Id.*

<sup>308</sup> Gould, *supra* note 25, at 130.

<sup>309</sup> David L. Abney, *Excluding the Disabled from Trial: The Impact of the Americans with Disabilities Act*, 28 AM. J. TRIAL ADVOC. 415, 415 (2005).



Judges will frequently employ sanist beliefs in decision-making.<sup>310</sup> By doing so, they incorporate sanist beliefs by using erroneous “‘common sense’, heuristic reasoning, and biased stereotyping” to rationalize their rulings.<sup>311</sup> Sanism is grounded in “myths, superstitions, and de-individualization.”<sup>312</sup> Judges who demand strict adherence to courtroom rules and procedures may employ sanist attitudes and behavior when punishing litigants who do not conform to courtroom decorum.<sup>313</sup> As discussed above, such discriminatory behavior by judges is particularly precarious for DV victims with PTSD due to the multiple negative stereotypes of gender bias and sanist beliefs against PTSD.<sup>314</sup> The U.S. Supreme Court, in *School Board of Nassau County v. Arline*, opined that the ignorant behavior and sanist attitudes can be “as handicapping as the physical limitations which flow from the impairment.”<sup>315</sup> An inflexible judge implementing insensitive and rigid courtroom procedures runs afoul of discriminatory and unjust treatment against the entire disabled community.<sup>316</sup>

### **C. Under the ADA: When federal law is superior to the absolute privilege**

The ADA, a federal civil rights law analogous to the Civil Rights Act of 1964, is superior to state laws when an actual conflict exists.<sup>317</sup> In *Pardi v. Kaiser Foundation Hospitals*, the U.S. Ninth Circuit Court of Appeals heard a discrimination dispute based upon

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<sup>310</sup> See Gould, *supra* note 25, at 138-39 (“Sanism is an irrational prejudice directed at persons with mental disabilities...”)

<sup>311</sup> Gould, *supra* note 25, at 139.

<sup>312</sup> Gould, *supra* note 25, at 139.

<sup>313</sup> See Gould, *supra* note 25, at 139.

<sup>314</sup> Gould, *supra* note 25, at 139. (“Such ‘punishment’ becomes illusionary when [ignorantly] applied to people with disabilities who may not be able to conform their behavior to rigid procedures.”)

<sup>315</sup> *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987); accord Gould, *supra* note 25, at 140.

<sup>316</sup> Gould, *supra* note 25, at 140.

<sup>317</sup> See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

a conflict with absolute privilege under state and federal law.<sup>318</sup> The Ninth Circuit in *Pardi* reaffirmed that when the purposes and objectives of a federal law are stymied by state law, the federal law must prevail.<sup>319</sup> Additionally, the *Pardi* court stated that actions taken by persons, which are wrongful under federal law, cannot be held as protected from liability by a state immunity statute.<sup>320</sup>

The plaintiff in *Pardi*, suffering from depression, a mental disorder recognized by the ADA, asserted that the ADA provided a remedy from harm caused by discriminatory conduct by the defendant.<sup>321</sup> The defendant asserted that the absolute privilege under state law provided immunity from liability.<sup>322</sup> The Ninth Circuit disagreed with the defendant and held that, because of the Supremacy Clause of the U.S. Constitution, the state absolute privilege statute did not immunize the defendant.<sup>323</sup> In fact, the *Pardi* court clearly held that the ADA's provisions ensure protection for disabled persons who experience any failure of accommodations covered under the ADA.<sup>324</sup> This ruling suggests that the state doctrine of absolute privilege would not protect those who are liable for *any* violation of the ADA during the course of litigation, especially in the case of a lack of accommodations for a DV victim with PTSD.<sup>325</sup> Thus, modifications for a DV victim, who suffers from PTSD, is a realistic solution to the problem of continuing to place DV victims in the position of being re-victimized through abusive court procedures, especially when absolute privilege provides unfettered access to the victim by the abuser. Under the ADA, a DV victim with PTSD is safeguarded from the continued abuse by a DV abuser within the forum of litigation, a state run public entity.

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<sup>318</sup> *Pardi*, 389 F.3d 840 (9th Cir. 2004).

<sup>319</sup> *See Id.* at 851.

<sup>320</sup> *See Id.*

<sup>321</sup> *See generally Id.*

<sup>322</sup> *See generally Id.*

<sup>323</sup> *See Id.* at 851.

<sup>324</sup> *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

<sup>325</sup> (emphasis added).

#### **D. Under the ADA: Court Accommodations for PTSD?**

In the twenty-five plus years since the enactment of the ADA, public accommodations for people with disabilities has seen an ever growing sensitivity to “architectural barriers faced by physically challenged persons.”<sup>326</sup> It is extremely common, for example, to find wheelchair accessible ramps to sidewalks, retail stores, and many other public areas.<sup>327</sup> It is an understandable heuristic response to look for “commonly accepted solutions” for accommodations, like ramps for wheelchair accessibility, braille placards for sight impairment, and sign language use for hearing impairment.<sup>328</sup> Judges will often think of other “commonly accepted methods of accommodation when determining individual needs within the courtroom.”<sup>329</sup> It stands to reason, then, that a litigant “who is not [overtly] physically challenged, but has a mental or emotional impairment . . . has a more difficult task when seeking accommodations.”<sup>330</sup>

The ADA requires public entities, which includes all courts, “to avoid discrimination against persons with disabilities and to make reasonable modifications in order to accommodate individuals with disabilities.”<sup>331</sup> “The ADA requires . . . reasonable accommodations and covers not only those policies and procedures that intentionally exclude those with disabilities, but also ‘facially neutral barriers’ that work to discriminate against these individuals.”<sup>332</sup> The ADA demands nothing less than the integration of courtroom procedures for people with disabilities.<sup>333</sup> The ADA’s requirement on courts to modify processes and procedures for

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<sup>326</sup> Gould, *supra* note 25, at 146.

<sup>327</sup> See Gould, *supra* note 25, at 146-47.

<sup>328</sup> Gould, *supra* note 25, at 146-47.

<sup>329</sup> Gould, *supra* note 25, at 147.

<sup>330</sup> Gould, *supra* note 25, at 147.

<sup>331</sup> Jones, *supra* note 288, at 79.

<sup>332</sup> *Id.* at 79.

<sup>333</sup> Gould, *supra* note 25, at 125.

people with disabilities is subject to the ADA's "fundamental alterations in the services provided' and 'undue burden' exception."<sup>334</sup>

If a DV victim with PTSD has problems conforming to the strict rules of the local courthouse, what kinds of accommodations would be viable?<sup>335</sup> As a start, the trial judge could allow frequent breaks, time spent with a support person like a therapist, and limitations on courtroom observers.<sup>336</sup> A DV victim with PTSD could benefit from court instructions that were broken down into smaller steps, the court could provide positive feedback to the DV victim, and the court could modify the courtroom procedures to accommodate the PTSD sufferer's limited attention span.<sup>337</sup> Additionally, the court could "arrange for morning and afternoon transcripts" for a DV victim with PTSD "who is confused by verbal instructions or who has short-term memory loss."<sup>338</sup> Accommodations for litigants, who suffer from brain injuries such as PTSD, could be implemented to allow for their "safety and comfort and be cared for properly during the proceedings."<sup>339</sup> It would be difficult to imagine that accommodations for at least medical support would fundamentally alter the nature of the court proceeding.<sup>340</sup> Moreover, the court's understanding that the DV victim with PTSD may utilize a service dog is helpful as well as the fact that *in camera* hearings may be needed when she is required to testify. Eliminating the burden from having to face her abuser, otherwise placed on the DV victim suffering from PTSD, will allow the court to see her in a less agitated state, placing all sides of the litigation on more equal footing.

Ultimately, the burden to provide reasonable accommodations in court for a DV victim with PTSD falls on the

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<sup>334</sup> Gould, *supra* note 25, at 141.

<sup>335</sup> See Gould, *supra* note 25, at 153.

<sup>336</sup> See Gould, *supra* note 25, at 153.

<sup>337</sup> See Gould, *supra* note 25, at 153.

<sup>338</sup> See Gould, *supra* note 25, at 153.

<sup>339</sup> Abney, *supra* note 310, at 421

<sup>340</sup> *Id.*

presiding judge.<sup>341</sup> It is required that the court holding the proceeding give primary consideration to the requests of the individual with the disability when determining what types of accommodations are necessary.<sup>342</sup> Most likely, an accommodation request from a DV victim with PTSD would come prior to the commencement of a courtroom proceeding through a written motion filed with the court and provided to opposing counsel.<sup>343</sup> However, the court may need to make accommodation rulings *sua sponte* in the event that the circumstances warrant such an action.<sup>344</sup> By filing a written motion requesting accommodations, it allows the court to rule using a written order to preserve the request for possible appellate rights.<sup>345</sup> An accommodations request is reviewed under a reasonableness test by the court and is subject to analysis as to whether the request would “‘fundamentally alter the nature of the activity’ or [if] the accommodation [would] place[] and [sic] undue financial or administrative burden on the [court].”<sup>346</sup> However, modifications to court procedures and reasonable accommodations do not equate to high monetary expenditures and may simply require procedural flexibility.<sup>347</sup>

If an accommodations request is denied, “the regulations state that the decision to refuse an accommodation must be made by a high-level official who has budgetary authority and responsibility for making spending decisions.”<sup>348</sup> Although courts are not required to authorize modifications to procedures or accommodations that “result in a ‘fundamental alteration of [a] program or service, or

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<sup>341</sup> Gould, *supra* note 25, at 141.

<sup>342</sup> *Id.*

<sup>343</sup> See Gould, *supra* note 25, at 138.

<sup>344</sup> Legal Information Institute, *Sua sponte*, CORNELL UNIVERSITY LAW SCHOOL (Mar. 26, 2016, 2:04 PM), [https://www.law.cornell.edu/wex/sua\\_sponte](https://www.law.cornell.edu/wex/sua_sponte). (Latin for “of one’s own accord; voluntarily.” Used to indicate that a court has taken notice of an issue on its own motion without prompting or suggestion from either party.)

<sup>345</sup> See Gould, *supra* note 25, at 138.

<sup>346</sup> Gould, *supra* note 25, at 137.

<sup>347</sup> Gould, *supra* note 25, at 138.

<sup>348</sup> Gould, *supra* note 25, at 150; *accord* 28 C.F.R. § 35.150(a)(3) (1993).

cause an ‘undue financial or administrative burden,’”<sup>349</sup> the court administration has the “burden of proof to establish financial or administrative hardship, or the demonstration that the accommodation would result in a fundamental alteration in the nature of the service, program, or activity.”<sup>350</sup> Ominously, if a court refuses to consider necessary accommodations for a DV victim with PTSD, it is likely that the functioning capabilities of the victim will be reduced.<sup>351</sup> Most likely, this inaction by the court will lead to the DV victim with PTSD experiencing an “inability to understand, follow, or actively participate in the proceedings,” requiring her to find an ADA attorney to work to enforce her legal rights under the ADA.<sup>352</sup>

## VII. CONCLUSION

Domestic violence, a part of a pattern of power and control by men, has economic, societal and legal impacts that are devastating to women.<sup>353</sup> As previously discussed, DV may often lead to PTSD in victims which can negatively affect outcomes in court for the victims.<sup>354</sup> Abusers will frequently continue to abuse their DV victims within the legal system through the perversion of absolute privilege, resulting in disastrous outcomes for the victim suffering from PTSD.<sup>355</sup> The family law courts can be an extremely hostile environment for DV victims in which the adversarial nature of litigation favors the abuser.<sup>356</sup> Gender and litigation biases permeate the family law courts and create a condition in which a DV victim with PTSD may agree to a settlement, to her detriment, to avoid the agonizing litigation process as well as gambling on a

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<sup>349</sup> Jeanne Dooley and Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 JUDICATURE 39, 40 (1993).

<sup>350</sup> Gould, *supra* note 25, at 137.

<sup>351</sup> Gould, *supra* note 25, at 142.

<sup>352</sup> Gould, *supra* note 25, at 142.

<sup>353</sup> See Ver Steegh, *supra* note 8, at 151.

<sup>354</sup> See Meier, *supra* note 22.

<sup>355</sup> See Freedman, *supra* note 126, at 575.

<sup>356</sup> See Ver Steegh, *supra* note 8, at 161-62.

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family law judge who is often overwhelmed, has immense discretion, and is suspicious of her presentation in court due to her PTSD.<sup>357</sup>

In order to cause the institution of law to become a more effective and just apparatus for women who are DV victims, more women *and* men in the legal community must choose and execute a plan that pushes back against the boundaries of the male legal view that currently dominates the law.<sup>358</sup> To compensate for the gendered nature of law and the inherently adversarial nature of the legal system, reforms to the affirmative defense of the absolute privilege provided to abusers within the family law system should be implemented to protect injured DV victims who suffer from PTSD. Absolute privilege and the abusive nature of the adversarial system should be modified in those instances involving DV victims whose traumatic experiences have severely injured them psychologically.

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<sup>357</sup> See Freedman, *supra* note 126.

<sup>358</sup> See Finley, *supra* note 31, at 386 (emphasis added).