

RETRAUMATIZED IN COURT

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In addition to the indignities associated with the violence itself, intimate partner violence survivors very often risk being retraumatized when trying to access the justice system. While the “me too” movement has shed light on how survivors of sexual assault and harassment often experience victim-blaming and other types of retraumatization when they try to tell their stories, few legal scholars have written about the retraumatization that occurs when survivors of intimate partner violence attempt to seek help through the courts. This retraumatization risk presents a barrier to effective justice: it has a chilling effect on the criminal prosecutions of domestic violence crimes; and it deters civil domestic relations and dependency actions, including child custody trials.

This Article details how courts are implicated in retraumatization and is the first to propose cross-cultural communication to improve the quality of justice for survivors of intimate partner violence. Adequate justice requires combatting an institutional culture that all too frequently trivializes the impacts of intimate partner violence.

While adapting the legal process to address this problem is a long-term task, the focus of this Article is to lay out more immediate strategies for advocates of survivors of intimate partner violence to improve the experience of their clients. Key to this urgent endeavor are: (1) employing “habits” of cross-cultural communication to better prepare our clients for how retraumatizing the legal system can be and (2) expanding the services provided by legal services organizations, including law school clinics, to include supportive services such as case-management and counseling.

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INTRODUCTION

Joan is petite and soft-spoken, with large brown eyes and a sweet demeanor. She met Anthony when she was about to turn 19 years old at a party she went to with some friends. He was older and charming, and he pursued her intensely. Within a year of meeting him, Joan had given birth to their son, and Anthony had

begun physically abusing her, frequently hitting, punching, and kicking Joan. Joan attempted to leave Anthony many times, but many obstacles, including fear of Anthony escalating the violence and worries about supporting herself and her children financially, held her back. When Joan left Anthony, she had three children with him, with Robert, their oldest, entering his tweens.

Joan did all the “right things” when she left her abuser, obtaining a protection order against him and seeking custody of the children in court. But despite her best efforts and a relatively good outcome given her position prior to trial, Joan’s overall experience with the court was negative. Instead of feeling heard, she felt blamed for the abuse and traumatized by the process, causing her to question her decision to go to court at all. First, she had to relive a long history of emotional and physical abuse over several days of a trial spread out over a period of many months. Second, she endured being disparaged as an alcoholic, neglectful, and promiscuous mother by Anthony’s attorney, a depiction not only with no basis in fact but rife with racial stereotypes. Third, Anthony and his friends intimidated Joan by snickering and staring her down in court. Finally, and most devastatingly, she perceived the judge’s decisions as blaming her for the abuse she had endured, largely because of a comment regarding how she must still be attracted to Anthony.

Courts are an essential component of addressing the problem of intimate partner violence (“IPV”). A survivor¹ of IPV may interact with the legal system in several ways. On the criminal side, an abuser may be charged with a number of crimes, including harassment, stalking, threatening or intimidating, assault, and attempted homicide.² On the civil side, a survivor may seek an order of protection, divorce, separation, child custody, or child support.³

And yet, survivors face specific barriers to accessing the court system. Survivors are often recovering from trauma and many have post-traumatic stress disorder (“PTSD”);⁴ must overcome the challenge of facing their abuser in court;⁵

1. The word “victim” is typically used by members of law enforcement and within the context of courtroom proceedings, but for many, “survivor” speaks to a sense of empowerment. The best practice may be to follow the lead of the person who has experienced the violence, since the journey from victim to survivor is unique to each person. Many are beginning to use the term “victim/survivor” to represent this continuum. This Article uses survivor for ease of reading as well as to err on the side of empowerment.

2. See generally *Domestic Violence/Domestic Abuse Definitions and Relationships*, NCSL (June 13, 2019), <http://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx>.

3. See generally *Navigating the Civil Legal System: Resources for Survivors of Domestic Violence, Their Advocates, and Legal Professionals*, VAWNET (Dec. 1, 2015), <https://vawnet.org/sc/navigating-civil-legal-system-resources-survivors-domestic-violence-their-advocates-and-legal>.

4. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 410 (2019).

5. Survivors “entering the court system face a challenging experience, in part, because the experience can be intimidating and difficult for any person, and in part because of the nature of intimate partner violence cases.” Carol E. Jordan, *Intimate Partner Violence*

are likely to have financial obstacles if they are separating,⁶ even temporarily, from their abusers; and are more likely to suffer from health problems.⁷ But few legal scholars have written about the retraumatization that occurs when survivors come forward and attempt to seek help through the legal system. This gap in the legal literature exists despite overwhelming scientific evidence that survivors experience retraumatization.⁸ Such retraumatization has been defined as negative treatment by third parties that the survivor experiences as additional trauma echoing the original IPV.⁹

“And then it came time for him to testify and I learned what it meant to be revictimized.”¹⁰ These are the words of Chanel Miller, once known only as Emily Doe, a rape survivor who has spoken out about the difficulties of enduring a trial where her integrity and character were questioned.¹¹ While rape and IPV are not one and the same, there are many IPV survivors who read these words with sighs of recognition.¹² It is called retraumatization because for some survivors simply

and the Justice System: An Examination of the Interface, 19 J. INTERPERSONAL VIOLENCE 1412, 1412 (2004).

6. See generally Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339 (2014); Margo Lindauer, “Please Stop Telling Her to Leave.” *Where is the Money: Reclaiming Economic Power to Address Domestic Violence*, 39 SEATTLE U. L. REV. 1263 (2016).

7. Survivors of IPV experience health problems at a higher rate than their peers who have not experienced abuse, including gynecological dysfunction, sexually transmitted diseases, chronic pain, and PTSD, with such health consequences often continuing long after the abuse has ended. THERESA DOLEZAL, DAVID MCCOLLUM & MICHAEL CALLAHAN, ACAD. ON VIOLENCE & ABUSE, HIDDEN COSTS IN HEALTH CARE: THE ECONOMIC IMPACT OF VIOLENCE AND ABUSE 9 (2009); Amy E. Bonomi et al., *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence*, 44 HEALTH SERV. RES. 1052, 1052–53 (2009); Jacquelyn C. Campbell, *Health Consequences of Intimate Partner Violence*, 359 LANCET 1331, 1331 (2002); Keith E. Davis et al., *Physical and Mental Health Effects of Being Stalked for Men and Women*, 17 VIOLENCE & VICTIMS 429, 440 (2002).

8. See *infra* Section I.A.

9. See generally Echo A. Rivera et al., *Secondary Victimization of Abused Mothers by Family Court Mediators*, 7(3) FEMINIST CRIMINOLOGY 234 (2012).

10. Katie J.M. Baker, *Here’s the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED (June 3, 2016, 4:17 PM), <https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra>.

11. Chanel Miller has since written a memoir and revealed her name. Concepción de León, *You Know Emily Doe’s Story. Now Learn Her Name.*, N.Y. TIMES (Sep. 4, 2019), <https://www.nytimes.com/2019/09/04/books/chanel-miller-brock-turner-assault-stanford.html>.

12. See David Palumbo-Liu, *Stanford Professor Calls on University to Include Chanel Miller’s Words at Site of Attack*, TEEN VOGUE (Oct. 8, 2019), <https://www.teenvogue.com/story/stanford-professor-calls-on-university-to-include-chanel-millers-words-at-site-of-attack> (“[Chanel Miller’s story] also opens a window on the systems of power that can serve to silence survivors, an experience that has resonated with the truths of countless others.”). There are also many overlaps between sexual assault and IPV, as most survivors of sexual assault knew their attacker, and most relationships that feature IPV also feature sexual assault. Lauren R. Taylor & Nicole Gaskin-Laniyan, *Sexual Assault in Abusive*

participating in the process can be as painful and damaging as the crime itself.¹³ In the context of IPV, facing one's abuser in a courtroom is not only an intimidating and difficult process, but can provide the abuser with an additional opportunity to exert power and control over the victim,¹⁴ often by coopting the features and personages of our justice system, including judges, clerks, and lawyers.¹⁵

This risk of retraumatization can have a chilling effect on the participation of survivors in court proceedings, including both criminal proceedings to prosecute IPV crimes and civil proceedings to establish and maintain orders of protection and custody and child support orders.¹⁶ In the civil context, many survivors may settle for less in mediation or settlement negotiations or opt out of participating in the legal system altogether for fear of being traumatized or dissatisfied, often because of previous experiences. In other words, retraumatization presents a serious barrier to justice, particularly given the prevalence of IPV.¹⁷ Given the broader inequalities faced by women in poverty and women of color, the chilling effect of retraumatization can have a particularly harmful effect to already disadvantaged, vulnerable, or marginalized populations.¹⁸

Our legal system has features that can make it more difficult for survivors to pursue justice. For one, while many survivors fear confronting their abusers, ours is an adversarial system that requires such confrontation.¹⁹ In fact, the most recognizable element of our adversarial system is the often intense, high-pressure process of cross-examination, and in cases where the abuser is unrepresented,

Relationships, NAT'L INST. JUST. (Feb. 1, 2007), <https://nij.ojp.gov/topics/articles/sexual-assault-abusive-relationships>; *Most Victims Know Their Attacker*, NAT'L INST. JUST. (Sept. 30, 2008), <https://nij.ojp.gov/topics/articles/most-victims-know-their-attacker>.

13. Some prefer to use the term revictimization or secondary victimization. See Rivera et al., *supra* note 9 (choosing to use the term retraumatization because it captures the experiences of a broader population of survivors and avoids the misconception that revictimization refers to a new criminal act).

14. See generally EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* (2007).

15. Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 24 (2004) (detailing how abusers often race their victims to the courthouse and make claims that mirror the victim's but for the identity of the perpetrator). Additionally, "having the justice system turn on you instead of vindicating the injustice of how you were treated, is an even more profound betrayal and harm than the original abuse." E-mail from Joan Meier, Professor of Clinical Law, George Washington Law Sch., and Legal Dir., DV LEAP, to author (July 25, 2018, 5:28 AM) (on file with author).

16. Rivera et al., *supra* note 9, at 245–46.

17. See MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJ. PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2* (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

18. See generally *20 Facts About U.S. Inequality that Everyone Should Know*, STAN. CTR. ON POVERTY & INEQ. (2011), <https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know>.

19. See generally William T. Pizzi, *The American "Adversary System"?*, 100 W. VA. L. REV. 847 (1998).

survivors must endure this questioning by their abuser.²⁰ In addition, while survivors may be seeking affirmation that they have been wronged, our legal system is premised on an objective decision-maker.²¹ In family courts, that involves a dispassionate judge.²² Furthermore, survivors of IPV find it difficult maneuvering in our highly formalistic legal system, even when its rules are relaxed to increase access to pro se litigants.²³ Most importantly, our legal responses to IPV are premised on the assumption that all survivors want to, or at least should want to, leave their abusers.²⁴ Thus, embedded in our legal system's approach to IPV is the myth of "the ideal victim" who leaves her abuser, turns to the legal system for assistance in leaving, and never returns.²⁵ Survivors who do not fit this stereotype are more likely to confront victim-blaming and other demeaning behavior by judges, clerks, lawyers, and others in the legal system that can cause retraumatization.²⁶ These features of our legal system pose such obstacles that some scholars have questioned the efficacy of the legal system for addressing the needs of survivors and suggested that survivors may choose alternative avenues for pursuing their goals.²⁷

Some aspects of the legal system may be beyond our ability to change while others, such as the adversarial nature of court proceedings, may be outside the scope of what we want to change because of their usefulness in other contexts. Still other aspects, such as judicial attitudes, are of course more malleable, and numerous scholars have written about the importance of addressing judicial attitudes in particular.²⁸ The focus of this Article, however, is not proposing legal reforms to improve the experience of survivors.²⁹ There is an ongoing debate on such

20. In criminal cases, victims often have "trouble understanding that the central focus of the case was on the defendant, not on themselves." Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 581 (2005).

21. See generally Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493 (2013).

22. "Insistence on emotionless judging—that is, on judicial dispassion—is a cultural script of unusual longevity and potency." Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 630 (2011).

23. For a wonderful discussion of how family law in particular has evolved with respect to formalism, see Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003 (2014).

24. Goodmark, *supra* note 15, at 19.

25. Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39, 45–46 (2009) (describing the stereotypical "victim" as "meek, weak, passive, and dependent").

26. Epstein & Goodman, *supra* note 4, at 15.

27. See, e.g., Goodmark, *supra* note 15, at 45–48.

28. See, e.g., PETER JAFFE, U.S. DEP'T OF JUSTICE, ENHANCING JUDICIAL SKILLS IN DOMESTIC VIOLENCE CASES: A PROCESS AND OUTCOME EVALUATION OF A NATIONAL JUDICIAL EDUCATION PROGRAM 6–9 (2010), <https://www.futureswithoutviolence.org/wp-content/uploads/ejs-report-nov-12.pdf>.

29. Since the 1970s, advocates' calls for reform have resulted in the passage of statutes that establish and expand civil orders of protection; consider domestic violence as a factor in custody determinations; create domestic violence crimes that are distinct from existing assault and battery statutes; and criminalize the violation of a civil order of protection. During the 1980s and 1990s advocacy efforts led to mandatory arrest laws requiring police

improvements and it is important that it continues. The focus of this Article is instead on the role of advocates in addressing the urgent need to improve the experience of survivors who choose to access the legal system.³⁰ In doing so, this Article is the first to explore what the insights of cultural competence can bring to this conversation to ensure a trauma-informed approach to lawyering.

More specifically, this Article relies on the important work done by scholars who have promoted a trauma-informed approach to legal services by

officers to make an arrest if there is probable cause to believe that a crime of domestic violence has been committed and no-drop prosecution policies that prevent prosecutors from dismissing charges at the victim's request. There is an ongoing debate as to the best steps forward with respect to further reform. Mandatory arrest statutes and no-drop prosecution policies serve as useful vignettes in understanding the contours of this debate. Proponents of mandatory arrest and no-drop prosecution policies argue that these policies empower survivors by sending a strong, expressive message that the legal system will hold abusers accountable. Opponents, on the other hand, contend that these policies disempower survivors, deprive them of agency, and fail to acknowledge that survivors are in the best position to weigh the risks they will face as a result of legal intervention. Debates regarding utilizing systems that are less adversarial, such as therapeutic justice and restorative justice models, continue, and there is some evidence that such programs can be effective in the IPV context. For a thoughtful discussion of what types of court system reforms would improve the experience of survivors, see Epstein & Goodman, *supra* note 4, at 453–59. For a particularly intriguing example of reform to IPV law and policy that falls in the category of therapeutic justice as advanced by David Wexler, see Catherine Cerulli et al., *Unlocking Family Court's Potential for Public Health Promotion*, 22 BUFF. J. GENDER L. & SOC. POL'Y 49 (2014) (reimagining and expanding the work of the family court to encompass extra-legal services including childcare and a mental health clinic, and suggesting that universities and courts partner in meaningful ways to initiate and sustain similar or parallel models of therapeutic justice to improve litigants' physical and mental health); see also Richard A. DuBose III, *Katsenelenbogen v. Katsenelenbogen: Through the Eyes of the Victim—Maryland's Civil Protection Order and the Role Of the Court*, 32 U. BALT. L. REV. 237, 242–43 (2003) (comparing the expanded definition of “abuse” and the classes of persons eligible for relief in Maryland's 1992 domestic violence statute with the previous 1980 act); Goodmark, *supra* note 15, at 31 (detailing arguments for and against mandatory arrest statutes and no-drop prosecution policies); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 211–25 (2008) (providing an overview of the development of mandatory arrest statutes, no drop prosecution policies, and restorative justice models in the context of IPV); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1194 (1995) (describing how violations of civil protection orders have evolved to involve more criminal sanctions); Michelle Aulivola, Note, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 169 (2004) (noting that within the past ten years, many states have amended their domestic violence statutes to include gender neutral pronouns and exclude phrases like “opposite sex” so that victims of same-sex domestic violence may be included under the statutes).

30. See, e.g., Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 488 (2003) (arguing that “effective advocacy” for victims “requires more than mere accompaniment in the courtroom or a conversation about how to navigate the court system”).

detailing how cross-cultural communication skills can help identify previous trauma, adjust the attorney-client relationship, and adapt litigation strategy to limit retraumatization. Building on the work of Jean Koh Peters, Sue Bryant, Antoinette Sedillo López, and others, it examines how these tools can limit the retraumatization of survivors.³¹ It argues that while culture is often thought of as encompassing race, ethnicity, social group, or national origin, cross-cultural competence is also important in navigating differences in experience. In this case, the experience differential is between those who have experienced IPV and those who have not. This Article also argues for expanding the services provided by legal services organizations, including law school clinics, to include supportive services such as social work, case-management, and counseling to support clients. Such essential services not only support clients by limiting retraumatization, but also support clients who wish to access nonlegal solutions. Finally, this Article argues that developing cross-cultural intelligence is an essential element of legal education that should play a more prominent role in legal curriculum. Expanding the teaching of these skills outside of the clinical setting will not only help survivors but will also help us build a more “just legal system.”³²

The Article proceeds as follows: Part I introduces the concept of retraumatization and how it can serve as a barrier to justice. Part I also includes a case study of retraumatization in the IPV context as well as a survey of practitioners and advocates documenting the prevalence of retraumatization amongst survivors. Part II examines how specific features and approaches of our legal system increase the risk of retraumatization. Part III summarizes the techniques developed by clinicians and others writing on cultural competence. Before concluding, Part IV explains how these tools, along with an expansion of services provided to survivors, are essential to trauma-informed lawyering.

I. RETRAUMATIZATION AS A BARRIER TO JUSTICE

A. *What is Retraumatization?*

Retraumatization, also known as secondary victimization, describes the experience of survivors who encounter “victim-blaming attitudes, behaviors, and practices” from service providers and institutions “which result in additional trauma.”³³ In other words, retraumatization refers to additional traumatization during a survivor’s interactions with professionals and processes in the justice system and other fields (medical, behavioral health, and even services designed for victims). While individuals in these fields may be doing their best to help, they can

31. See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 36 (2001); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J. L. & POL’Y 37 (2008).

32. See Bryant, *supra* note 31, at 36 (“On the macro level, a clinic may teach cross-cultural perspectives and skills to enable students to help build a more just legal system.”).

33. Rivera et al., *supra* note 9, at 237 (quoting Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors’ Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 56 (2005)).

unintentionally retraumatize survivors through negative statements, behaviors, and attitudes.³⁴

Survivors then experience these negative or unresponsive behaviors and process them as a further violation that echoes and relates to the original IPV they experienced at the hands of their abusers.³⁵ The term retraumatization is most frequently used in the context of sexual assault, but also applies to any form of IPV or crime.³⁶ It includes victim-blaming, and explicitly or implicitly accusing someone of failing to prevent what happened to them.³⁷ It also includes other negative attitudes and behaviors, such as dismissive or unresponsive actions, as well as statements that minimize what the survivor has experienced.³⁸

Existing research shows that IPV survivors who interact with the court system feel traumatized by the process and the legal system itself.³⁹ The same has been found of survivors of sexual assault,⁴⁰ a sometimes overlapping population.

34. Kayleigh Roberts, *The Psychology of Victim-Blaming*, ATLANTIC (Oct. 5, 2016), <https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/> (quoting Sherry Hamby, Professor of Psychology at the University of the South, and elaborating that therapists who work in prevention programs where women are given recommendations about how to be careful and avoid becoming the victim of a crime are engaging in victim-blaming). The phenomenon is not limited to IPV or sexual assault but rather can affect survivors of any crime.

35. Rivera et al., *supra* note 9, at 237.

36. *Id.*

37. Laura Niemi, *Victim Blaming in the Case of Sexual Assault*, in THE SAGE ENCYCLOPEDIA OF PSYCHOLOGY AND GENDER, 1756–57 (Kevin L. Nadal ed., 2017); Roberts, *supra* note 34.

38. Revictimization is also a term used for retraumatization. However, revictimization is also used to describe renewed violence by the abuser. *See, e.g.*, Graham Farrell, *Preventing Repeat Victimization*, 19 CRIME & JUST. 469 (1995). Such a concept of revictimization is not the focus of this Article.

39. Karla Fischer & Mary Rose, *When “Enough is Enough”: Battered Women’s Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 419 (1995) (finding that women “occasionally remarked that this fear of the court process can be so overwhelming as to cause a traumatic dissociative reaction”); *see also* JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM* 145–48 (1999) (reporting that many of the women in their study of those seeking protection orders found themselves feeling vulnerable to judgment and humiliation in the courtroom); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1515 (2008) (stating that women find the court process embarrassing and intimidating); Elise C. Lopez & Mary P. Koss, *VAWA After the Party: Implementing Proposed Guidelines on Campus Sexual Assault Resolution*, 18 CUNY L. REV. F. 4, 6 (2014) (“Criminal justice response to sexual assault . . . [has] been found to include policies and practices that discourage reporting, re-traumatize victims, and lead to high rates of closed cases.”).

40. In a study of rape victims, 52% appraised the contact with the legal system as harmful. Rebecca Campbell et al., *Preventing the “Second Rape”: Rape Survivors’ Experiences With Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1250 (2001). In a study of mental health professionals, 81% of the participants believed that contact with the legal system can be psychologically harmful for rape victims. Rebecca Campbell &

Violations of the interpersonal aspect of legal proceedings, such as whether one is treated with respect versus whether one is subject to victim-blaming, insensitive remarks, and statements that minimize the harm caused by the abuse, are likely to have negative effects on a survivor.⁴¹ This is true of experiences with both the criminal and the civil court system.

In the civil system, a study conducted by researchers at Michigan State University examining how abused mothers experienced the custody mediation process in a midwestern U.S. county found that 63% of women reported experiencing retraumatization, while 84% reported at least a partially negative mediation experience.⁴² This study argues that retraumatization may be one of the most important factors contributing to a negative experience with the justice system.⁴³ Women reported feeling blamed and disbelieved, and felt that the abuse in their relationships had been dismissed because it was “too complicated an issue for mediators to consider or discuss.”⁴⁴ In addition, women felt judged and blamed by the mediators, even in cases where the mediator believed that the abuse had occurred.⁴⁵ In one example, the mediator told the woman in question that it was her fault that she had been the victim of violence because she should have given into the abuser’s demands and given the abuser the phone right away.⁴⁶ In another, the mediator asked, “if he’s such a con man, what the hell did you marry him for?”⁴⁷ All told, the Michigan study found that 37% of the women in the study reported experiencing retraumatization by both the abuser and the mediator during the mediation.⁴⁸ None of this subset of women reported feeling safe, respected, free to speak, or empowered during the mediation.⁴⁹

In the United Kingdom, a study by Women’s Aid and Queen Mary University of London found that survivors were repeatedly not believed, blamed for experiencing abuse, and seen as unstable by judges, barristers, and officers of the government agency responsible for children, Cafcass.⁵⁰ The study found that for some survivors, “the court experience had retraumatized them and created extra

Sheela Raja, *Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 267 (1999).

41. Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 316 (2002) (citing Tracy Bennett Herbert & Christine Dunkel-Schetter, *Negative Social Reactions to Victims: An Overview of Responses and Their Determinants*, in LIFE CRISES AND EXPERIENCES OF LOSS IN ADULTHOOD 497–518 (Leo Montada et al. eds., 1992)).

42. Rivera et al., *supra* note 9, at 243.

43. *Id.* at 244.

44. *Id.* at 243.

45. *Id.* at 245.

46. *Id.* at 244.

47. *Id.*

48. *Id.*

49. *Id.*

50. Owen Bowcott, *Domestic Abusers Still Able to Cross Examine Victims in Court*, GUARDIAN (May 29, 2018), <https://www.theguardian.com/society/2018/may/30/domestic-abusers-still-able-to-cross-examine-victims-in-court>.

barriers in their recovery after domestic abuse.”⁵¹ One participant stated “it’s just been very overwhelming for me, so yeah, it’s been traumatic. More traumatic than it needs to be if there was more awareness of this sort of abuse.”⁵²

A different study of sexual assault victims found that victims are more likely to experience traumatizing attitudes by those around them if they present against the gendered stereotype of a hysterical crying victim.⁵³ This study found that women who adopted a numbed style of self-presentation, as compared an emotional one, experienced more retraumatizing behaviors by those around them—a phenomenon the researchers termed “demeanor bias.”⁵⁴

With respect to the criminal system, a study of crime victims in Germany found that 35% of rape victims and 23% of victims of physical assault frequently experience retraumatization in criminal proceedings.⁵⁵ This study found that criminal proceedings were likely to cause negative psychological changes among crime victims.⁵⁶ Some participants reported that the proceedings harmed them even more than the original crimes. Other studies have found that victims are likely to feel blamed by the perpetrator or the perpetrator’s attorney in criminal trials.⁵⁷

Although researchers have studied retraumatization for 30 years,⁵⁸ contextualized research on IPV survivors is particularly scant for a variety of reasons. Many survivors are reluctant to engage in studies, in part because the moment they engage with the court system is likely to be the most exigent in their attempts to seek greater security.⁵⁹ In addition, researchers may have difficulties

51. JENNY BIRCHALL & SHAZIA CHOUDHRY, WOMEN’S AID, “WHAT ABOUT MY RIGHT NOT TO BE ABUSED?” DOMESTIC ABUSE, HUMAN RIGHTS AND THE FAMILY COURTS 44 (2018).

52. *Id.* at 42.

53. Frans Willem Winkel & Leendert Koppelaar, *Rape Victims’ Style of Self-Presentation and Secondary Victimization by the Environment: An Experiment*, 6 J. INTERPERSONAL VIOLENCE 29, 35 (1991).

54. *Id.* In addition, professionals who regularly work with survivors of IPV and sexual assault report witnessing or learning of retraumatization that their clients have experienced when attempting to get help. One survey of licensed mental health professionals found that “most therapists believed that some community professionals engage in harmful behaviors that are detrimental to rape survivors’ psychological well-being.” Campbell et al., *supra* note 40, at 261.

55. Orth, *supra* note 41, at 321.

56. *Id.*

57. *Id.* at 316 (quoting Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOL. 1332, 1343 (2000)); Roger K. Pitman et. al., *Legal Issues in Posttraumatic Stress Disorder*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 388 (Bessel A. van der Kolk et al. eds., 1996).

58. One of the earliest studies on retraumatization is Winkel & Koppelaar, *supra* note 53.

59. See MARY ANN DUTTON ET AL., U.S. DEP’T OF JUSTICE, RECRUITMENT AND RETENTION IN INTIMATE PARTNER VIOLENCE RESEARCH 9 (2003), <https://www.ncjrs.gov/pdffiles1/nij/201943.pdf> (citing a study detailing numerous problems in recruiting and retaining participants for studies of IPV, including participants’ concerns about

accessing survivors, a vulnerable population often marginalized on several levels.⁶⁰ Furthermore, it is difficult to design an experimental research study that features a control group to analyze aspects of retraumatization in the courtroom context due in part to ethical considerations.⁶¹ These limitations aside, there is a need for greater research on this topic to expand our understanding of how and when retraumatization occurs.

B. IPV Legal and Social Service Provider Survey

1. Context

This Author surveyed lawyers, advocates, law clinic staff, and lay advocates who work with survivors because each of these populations has significant contact with survivors and courts. Lawyers and law clinic staff represent and provide advice to survivors in obtaining orders of protection and advancing their legal interests in custody, landlord-tenant, immigration, and other legal matters. Lay advocates provide information to, and assist, survivors regarding these legal goals as well nonlegal services such as housing and therapeutic counseling. The current model for representing survivors as a legal or nonlegal advocate is client-centered, meaning that advocates maximize their client's autonomy by providing them with information about their rights and options, and by respecting the client's decisions regarding the same.⁶² Moreover, those who provide client-centered services to survivors are well-placed to provide insights into what they've observed about the experiences of those survivors.

2. Survey Design

The survey was distributed online among legal and nonlegal advocates of survivors and collected information from 53 respondents.⁶³ It consists of ten questions to balance incentivizing participation and gathering information.

confidentiality; class differences between researchers and participants; lack of phones for follow-up contact; hesitancy by participants in providing feedback to researchers; participants' skepticism about the research process sometimes related to prior research abuses; no direct benefit for participation; participants' perception of research as intrusive; participants' lack of time and resources required to participate; concern that involvement in the research process would create excessive worry for themselves; and agencies' overwhelming service demands and high employee turnover).

60. See *id.* at 7–8 (mentioning gender differences and racial differences between researchers and participants).

61. See, e.g., Jill T. Messing et al., *Research Designs in the Real World: Testing the Effectiveness of an IPV Intervention*, 275 NAT'L INST. OF JUST. J. 49, 50 (2015) ("Because the women in our study faced a high risk for homicide due to the fact that they were victims of high-risk IPV cases, we did not feel that we could meet our ethical obligations as researchers or professionals by using a randomized control trial.").

62. Monroe H. Freedman, *Client-Centered Lawyering—What it Isn't*, 40 HOFSTRA L. REV. 349, 353 (2011).

63. See *infra* Appendix. The survey was distributed to listservs frequented by legal and nonlegal advocates of survivors, including the National Network to End Domestic Violence's listserv, a law clinic listserv of law clinic staff, and the Arizona Coalition to End Sexual Assault and Domestic Violence's listserv. The survey is anonymous and limits respondents to one submission each.

The first six questions are designed to gather contextual information about the quality and quantity of respondents' interactions with survivors, including whether respondents are lawyers or nonlawyers, how many years they have served survivors, and what percentage of their client population consists of survivors. The contextual survey questions are also designed to gather information about the types of cases respondents work on; for example, order of protection versus custody, as well as where they practice geographically and the gender breakdown of their clients.

The final four questions are substantive and are designed to gather information about how many of the respondent's clients have experienced some type of retraumatization when accessing the legal system. These questions are designed to capture different types of retraumatization, including that which occurs as a result of court procedures as well as that which occurs as the result of the verbal or nonverbal behavior of the abuser, the abuser's associates, or court personnel. Respondents were given examples of retraumatizing behaviors—including those that are intentional, such as threatening behavior, and those that could be unintentional, including victim-blaming, insensitive remarks or behavior, and minimizing remarks or behavior. The survey questions were also designed to determine how many of the respondent's clients have expressed regret as a result of choosing to access the legal system due to the retraumatization they faced when doing so.

3. Results

Not surprisingly, perhaps, 81% of respondents indicated that many, most, or all of their clients identified the actions of the abuser or the abuser's associates as a source of retraumatization.⁶⁴ Well over half of the respondents—60%—indicated that many, most, or all of their clients experienced retraumatization as a result of the behavior, statements, or actions of court personnel. In perhaps the most startling finding, 83% of respondents indicated that many, most, or all of their clients reported retraumatization due to court procedures and outcomes—a *greater* percentage than reported retraumatization by their abusers while in court.

64. For the purposes of data analysis, the categories "many," "most," and "all" were combined to capture larger-end numbers.

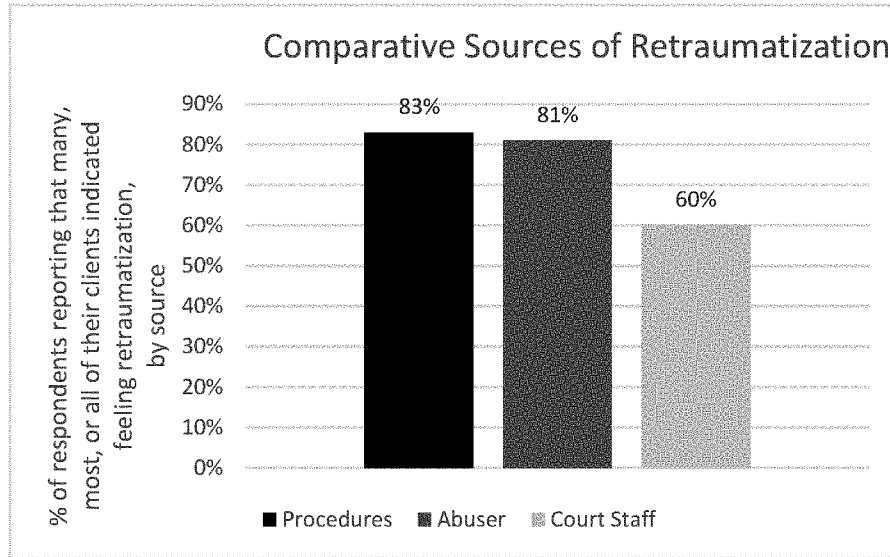


Figure 1: Comparative Sources of Retraumatization

Further worth highlighting is that when asked about expressions of regret or distress as a result of going to court, only 1 of the 53 providers reported never hearing of regret from a client. The other 52 indicated they had heard expressions of regret or distress from some ($n = 19$), many ($n = 21$), most ($n = 9$), or all ($n = 3$) of their clients, as evidenced by statements about not feeling heard, not feeling respected, or feeling that going to court was not worth their time.

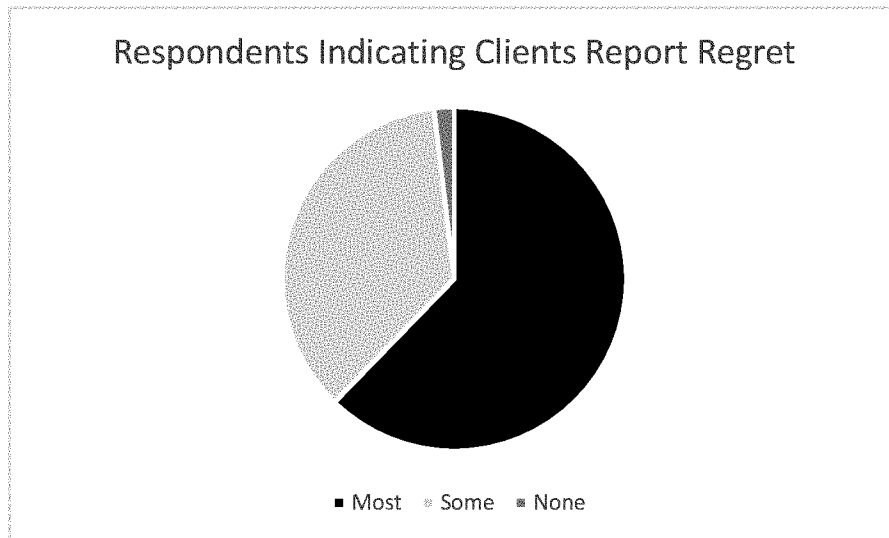


Figure 2: Respondents Indicating Clients Report Regret

4. Population and External Validity

The majority of respondents primarily serve survivors, with 63% of respondents stating that between 75% to 100% of their clients are survivors. Half of the respondents were nonlawyer advocates, while the other half were evenly split between attorneys at nonprofit organizations and clinics at law schools. Respondents spanned 18 states, reflecting both political and geographic diversity. Respondents also reflected a diversity of experience levels, with years of practice ranging from 0 to 3 years to 20 plus years, and about half of all respondents in the field for 10 or more years.

While neither the survey design nor the number of respondents produces generalizable findings, the data are nevertheless important because they provide a sense of how those with expertise in IPV perceive the experiences of the survivors with whom they have worked. Of course, there are other limitations including, among others, that professionals may be more likely to report these kinds of problems due to confirmation bias.

The survey results confirm that survivors regularly experience retraumatization when seeking help through the legal system.⁶⁵ As one attorney and

65. Social scientists have studied what leads people to engage in behaviors that are likely to retraumatize, in particular victim-blaming (perhaps the most representative form of retraumatization), and found that an individual's experiences, background, and culture can make them more or less likely to engage in retraumatizing behaviors. Several factors influence the likelihood of this happening. One factor is the degree to which a person subscribes to what has been termed the "just world hypothesis." The more a person subscribes to the concept that the world is just and fair and that people deserve both the good and bad things that happen to them, the more likely they are to engage in retraumatizing behaviors. In other words, "people blame victims so that they can continue to feel safe themselves." Roberts, *supra* note 34 (quoting Barbara Gilin, Professor of Social Work, at Widener University); see also Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030 (1978). A second factor that researchers have identified is whether an individual endorses binding values or a focus on the group rather than the individual. Roberts, *supra* note 34. One study of 994 participants found that those who endorse binding values, or values associated with prohibiting behavior that destabilizes groups and relationships, such as purity, are more likely to express stigmatizing attitudes about victims in the context of both sexual and nonsexual crimes. Laura Niemi & Liane Young, *When and Why We See Victims as Responsible: The Impact of Ideology on Attitudes Toward Victims*, 42 PERSONALITY & SOC. PSYCHOL. BULL. 1227 (2016). The researchers measured moral values associated with unconditionally prohibiting harm ("individualizing values") versus moral values associated with prohibiting behavior that destabilizes groups and relationships ("binding values": loyalty, obedience to authority, and purity). Increased endorsement of binding values predicted increased ratings of victims as contaminated, increased blame and responsibility attributed to victims, increased perceptions of victims' (versus perpetrators') behaviors as contributing to the outcome, and decreased focus on perpetrators. *Id.* at 1228–30. A third factor is that people often have greater difficulty understanding a story that departs from a continuous, linear narrative, while narratives of survivors tend to be more "impressionistic than linear" and may appear "somewhat illogical" or even "emotionally off-kilter" due to the trauma they have

law professor expressed: “how courts are so destructive to survivors is a well-kept secret, but it is beginning to get out.”⁶⁶

C. *Retraumatization’s Chilling Effect*

The risk of retraumatization presents a serious barrier to justice, as it negatively influences survivors’ choices in several ways. First, many may opt out of seeking help from the legal system entirely.⁶⁷ One qualitative study of sexual assault survivors found that survivors chose not to continue disclosing their assault after experiencing negative reactions from formal and informal support providers.⁶⁸ Second, some may settle for less than they would like in settlement negotiations or mediation.⁶⁹ The result is a chilling effect on the participation of survivors in both criminal and civil court proceedings. Moreover, the chilling effect of a negative experience for one survivor can infect an entire community, resulting in distrust and reluctance to access the courts on the part of a large number of survivors.⁷⁰

experienced. Epstein & Goodman, *supra* note 4 (providing an in-depth exploration of why court officials are likely to discredit survivors). Victim-blaming or retraumatizing attitudes are not static and can be changed. Researchers have found that manipulating the sentence structure of hypothetical vignettes about sexual assault victims changed the degree to which readers attributed responsibility for the crime to the victim. When the perpetrator was the subject of the sentence, participants were less likely to blame the victim for the violence. Roberts, *supra* note 34 (discussing a separate study by Laura Niemi & Liane Young). Because of this study, other researchers believe that even a sympathetic narrative that focuses on the victim’s experience might increase the likelihood of victim-blaming. *See* Niemi, *supra* note 37, at 1756–57 (noting a separate study of Niemi and Young quoted in Atlantic article). For lawyers striving to help their clients present their narrative in court, this presents obvious challenges about how to avoid triggering unsympathetic attitudes on the part of decision-makers.

66. E-mail from Joan Meier, *supra* note 15.

67. Epstein & Goodman, *supra* note 4, at 452 (quoting FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL & GENDER BIAS IN THE JUSTICE SYSTEM 405 (2003) (“The tendency to doubt the testimony of domestic violence victims and to ‘blame’ them for their predicament not only hampers the court’s ability to provide victims with the protection they deserve, it also has a chilling effect on the victim’s willingness to seek relief.”)).

68. Courtney E. Ahrens, *Silent and Silenced: The Disclosure and Non-Disclosure of Sexual Assault* 26–27 (Dec. 19, 2001) (unpublished Ph.D. thesis, University of Illinois) (on file with University of Illinois at Chicago).

69. “Related to this is the fact that the batterer may use children and custody issues to force women to drop their financial claims, and domestic violence can cause victims to settle prematurely and not necessarily in their best interests.” Susan L. Pollet, *Mediating Domestic Violence: A Potentially Dangerous Tool*, 77 N.Y. ST. B.J. 42, 42–43 (2005) (citing Domestic Violence Screening Training Curriculum, “Policy of New York State’s Unified Court System, Office of ADR Programs,” *CDRC Program Manual*, Guideline II, Ch. 4, Pt. 4.030).

70. Epstein & Goodman, *supra* note 4, at 453 (describing how this “ripple effect” discourages “the broader community of women from seeking the help they need”).

In the civil context, many survivors settle for less in mediation or settlement negotiations⁷¹ or opt-out of participating in the legal system altogether for fear of being traumatized or dissatisfied, often because of previous experiences.⁷² Most of the mediation study participants in the Michigan study indicated that they would avoid going back to family court, and some indicated that they would not even tell anyone else about the abuse because of the mediator's reactions.⁷³ One mother, for example, wanted to request a safer custody arrangement but did not object to the order because she was too worried the mediator would give the father full custody if she did.⁷⁴

In the criminal context, courts that have incorporated impartial and independent victim advocates who provide confidential and informed support for survivors have noticed an increase in victims appearing in court.⁷⁵ However, courts still report that many survivors do not appear for criminal hearings or refuse to cooperate with prosecutors.⁷⁶ While some survivors may choose not to participate in proceedings because they deem it safer not to confront their abuser⁷⁷ (or because of another rational reason),⁷⁸ reducing the likelihood of retraumatization would at least decrease deterrents for those survivors who fear retraumatization. Often a survivor's failure to appear results in prosecutors offering a plea agreement they would not have otherwise offered or dismissing the case altogether.⁷⁹ In addition,

71. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1601–02 (1991); Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 469 (2011).

72. Sarah M. Buel, *Fifty Obstacles to Leaving*, a.k.a., *Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19, 24 (1999); Rivera et al., *supra* note 9, at 244; *see also* E-mail from Wendy Million, Tucson City Court Judge, to author (Dec. 28, 2018, 8:35 AM) (on file with author).

73. Rivera et al., *supra* note 9, at 245.

74. *Id.*

75. E-mail from Wendy Million, Tucson City Court Judge, to author (Dec. 17, 2018, 11:52 AM) (on file with author). For a thorough discussion of the benefits of involving victims' advocates in criminal cases see Anna F. Conrad, *The Use of Victim Advocates and Expert Witnesses in Battered Women Cases*, 30 COLO. LAW. 43, 43 (2001).

76. Kohn, *supra* note 29, at 203; *see also* E-mail from Wendy Million, *supra* note 72.

77. Buel, *supra* note 72, at 19 (“It is estimated that a battered woman is 75 percent more likely to be murdered when she tries to flee or has fled, than when she stays.”).

78. NAT'L DIST. ATT'YS ASS'N, DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 7 (2017), <https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf>.

79. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 384, 388–89 (2001) (Author's interviews of current and former prosecutors, defense attorneys, judges and victim-witness advocates in Lake County, Indiana, found that almost all interviewees agreed that most cases did not end in conviction, but rather the defendant was given a conditional discharge or prosecution was deferred and ultimately resulted in dismissal, in large part due to the reticence of survivors to participate in criminal proceedings); *see also* Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L.

survivors who have been through the criminal system once as victims may be less likely to want to participate again.⁸⁰ The German study discussed above found that victims of crimes reported that their trust in the legal system and faith in a just world were negatively affected by their experience in criminal court.⁸¹

D. A Case Study of Retraumatization

In our Domestic Violence Law Clinic at the University of Arizona James E. Rogers College of Law, we have represented many Jane Does who feel revictimized by their experience of pursuing their legal claims in court. The story of one client stands out. For the purposes of this paper, names and details have been changed.

Joan is a petite and soft-spoken Native American woman with large brown eyes and a sweet demeanor. She was about to turn 19 years old when she met Anthony at a party she went to with some friends. He was a few years older than her and worked as a club promoter. She had little experience dating and found him charismatic and exciting. He pursued her intensely and the two were soon inseparable. Within six months Joan was pregnant.

Anthony presented some early warning signs, including possessiveness, mood swings, and isolating Joan from her friends and family. Within a year of meeting him, and at just 19 years old, Joan had given birth to their son Robert, and the abuse had turned physical. Anthony had begun to frequently hit, shove, and kick Joan.

When Robert turned two, Joan mustered the courage to leave Anthony. She moved out and enrolled in college at the University of Arizona. But Anthony pursued her relentlessly, often in frightening ways. One night he appeared seemingly out of nowhere as she returned from a night out with her friends, waving a gun at her and yelling about seeing her talking to a man that night. He was arrested and imprisoned for threatening and attempting to assault her, and was eventually let out on probation with completion of an IPV class as a condition of his release.

Anthony continued to pursue Joan intensely, arguing that prison and the class had changed him. Five years after breaking up with Anthony, when Robert was about seven, Joan relented. Soon afterwards she discovered she was pregnant. She gave birth to Sara when she was 26 and soon became pregnant again. Jordan was born when she was 27. Joan decided to stay home to take care of the children while Anthony worked. Anthony left most of the child care to Joan and often slept much of the day so he could spend his nights working. Despite Anthony's promises of a better relationship, nothing changed. Anthony continued to threaten, hit, and push Joan. On one occasion, he kicked her ankle so hard he caused a fracture, putting her in a boot for six weeks.

REV. 853, 857 (1994) ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court. In these situations, prosecutors dispose of approximately fifty to eighty percent of cases by dropping the charges.").

80. Buel, *supra* note 72, at 24.

81. Orth, *supra* note 41, at 321.

At 30 years old, with three children aged 11, 4, and 2, and after a cumulative 6 years with Anthony, Joan told Anthony she had had enough of his abuse and asked him to move out. He agreed to leave, but only after punching two holes in her bedroom door. Joan got a protection order against Anthony, and Anthony moved in with his mother, Sally, down the street from the home he once shared with Joan. Joan got a job so she could support herself and her kids.

In Arizona, protection orders do not address custody or child support. Thus, while the protection order indicated that Joan and Anthony were to communicate about their children through Sally, it was silent as to the timing or other details of custody exchanges. Anthony insisted, however, that only his mother should watch the children while Joan was at work. Joan feared conflict with Anthony would result in violence and harm to the children, so she tried to avoid conflict by acquiescing to his demands. Anthony repeatedly threatened that he would take the children away if she did not agree to his terms.

For a year and a half after she left Anthony, Joan worked five days a week, eight hours a day, while Sally watched the kids during these times. Sometimes Joan worked double shifts, staying at work past the children's bedtimes, and on those nights the children would stay at Sally's house. During this period, Anthony used the children to try to control Joan. Whenever he suspected that Joan was out with friends or another man, he refused to return the children. Anthony kept a diary of the custody exchanges, but in it he twisted the truth to make it seem like Joan did not want to spend time with her own children. He would omit his own efforts to interfere with Joan's parenting time with her children and write that he had not heard from Joan when Joan was actively trying to coordinate a time with Sally to pick up the children when Sally was home so that she would not have to encounter Anthony alone.

When Joan started a serious relationship with a coworker, her oldest son Robert started refusing to spend time with Joan and told her he only wanted to live with his father. Robert would frequently parrot Anthony's accusations against her, stating that if she really loved him, she would never have left his father. This was particularly heartbreaking for Joan, as it seemed that Anthony had succeeded in poisoning her son against her.

Joan tried negotiating a different schedule through Sally, where she had the children on her days off, from Friday afternoon to Monday afternoon, hoping that this would limit Anthony's opportunity to interfere with her parenting time. But Anthony continued to withhold the children when he was upset. He would also request time with the children during weekends and then refuse to reciprocate when Joan wanted to spend time with the children during the week.

Disheartened and desperate, Joan filed for custody of her three children 2 years after breaking up with Anthony for good, and about 13 years after first meeting him. She requested sole legal decision-making and for the children to live with her the majority of the time, spending every other weekend with Anthony. Anthony responded by denying Joan's allegations of IPV, stating that it was "never physical" and claiming that Joan had abandoned her children.

The trial spanned several days spread over a 75-day period due to the court's crowded calendar. The trial was so difficult for Joan that she frequently questioned her decision to file for custody. She endured cross-examination by Anthony's attorney, who tried to paint her as a drunken "party mom" who abused and neglected her children and only cared about collecting child support from Anthony. The attorney used Anthony's journal to support Anthony's version of events. The lawyer also questioned her repeatedly about a decision she regretted deeply—sleeping with Anthony about six months after breaking up with him the final time. Anthony stared menacingly at Joan the entire time each of them was on the stand to provide their testimony and respond to cross-examination. He also brought an entourage of friends to court, and as Joan and her witnesses detailed the times Anthony had threatened and assaulted Joan, he and his witnesses laughed and snickered.

Anthony requested that the court interview Robert as to his preferences on parenting time and legal decision-making. In Arizona, such interviews can be conducted by Conciliation Court staff who issue a report to the judge. In this case, the Conciliation Court staff informed Robert that both his father and his mother would see a report of his comments. The resulting interview report noted that Robert stated he wanted to have nothing to do with his mother. Joan believed that Robert would have felt more free to express an interest in seeing her if his father would not have had access to the Conciliation Court staff's report.

The court found that Anthony had committed domestic violence, triggering the legal presumption established by Arizona statutes that granting legal decision-making or parenting time to Anthony was not in the children's best interests. The court found that Anthony had overcome that presumption with respect to Robert, but that he had not done so with respect to the younger children. Thus, Anthony was awarded sole legal decision-making for Robert, and Joan was awarded sole legal decision-making for Sara and Jordan. The court also decided that Joan and Anthony would have equal parenting time with the younger children, with Sara and Jordan alternating weeks between their parents' homes. Though it held that Robert would continue to live with Anthony and would not be required to spend time with Joan, the court ordered reconciliation therapy between Joan and Robert. In addition, the court ordered that all communication regarding the children would take place through Sally. Joan was also ordered to pay child support to Anthony, as she made a decent salary, while his work was mostly under the table, and neither Joan nor Anthony were able to provide documents verifying his true income, leaving the court no choice but to impute the minimum wage.

In addition to custody determinations, Joan had requested a renewal of her protection order. The judge denied the extension in court, and in doing so, stated that while there was a history of IPV, the two parties were "clearly still attracted to each other." This was certainly the lowest point for Joan, who cried silently in her seat while the judge made this statement. Later, Joan told me that she felt the judge did not care about her case and considered it a "waste of time." She did not believe that the judge took the abuse seriously or cared to hear about how it had affected her or her children. Throughout the trial, the judge never made any sort of statement condemning Anthony's behavior. While the court's final written decision did find

that Anthony had committed domestic violence in the past, this decision was delivered by email and mail after the trial had ended.

Given the status quo when Joan and Anthony went to court, the outcome of the case was not altogether surprising. We had prepared Joan for the likelihood that the court would grant Anthony significant parenting time and thus child support, as Arizona statutes state that parenting plans should maximize each parent's respective parenting time.⁸² On the one hand, Joan's situation after trial was better than it was at the time of filing, as now she had a court order that she could show to the police if Anthony attempted to interfere with her parenting time with her younger children. With respect to Robert, at least a mechanism was put in place to facilitate her attempts to reestablish and repair her relationship with her oldest son.

On the other hand, from Joan's perspective, Anthony was rewarded for his abuse with equal parenting time of the younger children, legal decision-making for Robert, and child support, while she was not awarded any parenting time with Robert. Most problematically, Joan felt revictimized by the process of going to court. Not only did she have to recount and reexperience a long history of emotional and physical abuse over several days, but the trial from start to finish spanned a period of several months. In addition, Anthony, his counsel, and his family members disparaged Joan as an alcoholic, neglectful, and promiscuous mother—a depiction that not only had no basis in fact but was rife with racial stereotypes. On top of that, Anthony menacingly stared her down in court while his friends snickered at her from the audience. Finally, and most devastatingly, she perceived the judge's decisions as blaming her for the abuse she had endured, largely because of the judge's comment regarding how she must still be attracted to Anthony.

In sum, despite the relatively good outcome given her position prior to the trial, Joan's overall experience with the court was negative. She felt both blamed and disbelieved, and questioned the wisdom of going to court. She experienced retraumatization by the abuser, his counsel, and, perhaps even worse, the judge.

II. SPECIFIC FEATURES OF THE LEGAL SYSTEM THAT IMPACT RETRAUMATIZATION

As is clear from both the survey data and the experiences of women like Joan, key elements of our legal system contribute to the revictimization of survivors. Indeed, in the words of Judith Herman, “if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.”⁸³ This Part examines these features and their impact on survivors in further detail. This Part also divides these features into two categories: passive and active. Passive features are inherent to our legal system. They would require a significant paradigm shift to change and may not even be elements we want to change, given their usefulness in other contexts. Active features are more feasible to change, through either legislative reform or judicial and perhaps public education.

82. ARIZ. REV. STAT. ANN. § 25-403.02 (2015).

83. Herman, *supra* note 20, at 574.

A. *Passive Features*

1. *Adversarial*

First, the adversarial nature of our legal system can make seeking legal redress through the court system particularly traumatizing for survivors,⁸⁴ even if they have the right support and are in a survivor-friendly courtroom.⁸⁵ While survivors fear direct confrontation with their abusers, the adversarial system requires survivors to endure both face-to-face confrontations and to relive acts of victimization in specific detail.⁸⁶ Testifying, confronting one's abuser, and the presence of spectators—known and unknown—adds significantly to the psychological stress survivors feel during legal proceedings.⁸⁷ This is particularly challenging for survivors with PTSD or those who have repressed traumatic events as a coping mechanism.⁸⁸

Moreover, survivors must endure questioning by their abuser or the abuser's attorney that is designed to undermine the survivor's credibility.⁸⁹ This is particularly hard on survivors when the abuser is unrepresented and can directly cross-examine the survivor.⁹⁰ Almost a quarter of survivors (24%) surveyed by Women's Aid and Queen Mary University of London said they had been cross-examined by their abusive ex-partner.⁹¹ Sympathetic judges may require the abuser to pose the questions to the judge, who will then repeat them to the survivor, so that

84. Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOL. 1332, 1335 (2000); Orth, *supra* note 41 (quoting Amanda Konradi, "I Don't Have to be Afraid of You": Rape Survivors' Emotion Management in Court, 22(1) SYMBOLIC INTERACT. 45–77 (1999)).

85. Alesha Durfee, "Usually it's Something in the Writing": Reconsidering the Narrative Requirement for Protection Order Petitions, 5 U. MIAMI RACE & SOC. JUST. L. REV. 469, 482 (2015) ("However, the adversarial nature of the legal system, in combination with complex and confusing bureaucratic procedures and untrained court staff, may make the PO process an incredibly traumatizing experience—even with the 'right' support and in the 'right' environment.").

86. Herman, *supra* note 20, at 574 (describing how while survivors often fear direct confrontation with their perpetrators, courts require face-to-face confrontation).

87. Orth, *supra* note 41 (citing Konradi, *supra* note 84, at 51–55; Koss, *supra* note 84, at 1332–43).

88. Durfee, *supra* note 85, at 482.

89. Herman, *supra* note 20, at 574.

90. For this reason, The Office of Civil Rights, which has issued guidelines for Title IX investigations of campus sexual assault, "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment." Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to colleague 12 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. *But see* Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017, 11:08 AM), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/> ("The era of 'rule by letter' is over.").

91. Bowcott, *supra* note 50.

the survivor is not directly questioned by the abuser.⁹² But other judges may want to conform more closely to the accused's right to confront witnesses.⁹³

Even in victim-friendly courtrooms, the risk of traumatization is high, as abusers are typically well-versed in verbal abuse and how to use emotional content to intimidate and humiliate their survivors.⁹⁴ Put simply, abusers are better-positioned to use the intimate and personal information gained from the intimate partner relationship as a sword.⁹⁵ This was evident in Joan's case, as Anthony's attorney used the times that Joan reconciled with Anthony against her to argue that, despite her own testimony and other evidence to the contrary (police reports, an order of protection, witnesses to Anthony's assaults and threats), she was not truly afraid of Anthony. In this way, survivors' intimate partner relationships with abusers put them at a particularly high risk of retraumatization relative to other crime victims or civil suit participants.⁹⁶

92. This has been a common practice of some judges in the District of Columbia Superior Court. Email from Tianna Gibbs, Assistant Professor of Law, Univ. D.C. David A. Clarke Sch. of Law, to author (Nov. 22, 2018, 4:19 PM) (on file with author). In the United Kingdom, there has been discussion of passing legislation to disallow abusers from cross-examining survivors altogether. Bowcott, *supra* note 50.

93. The right to confront one's accusers in the civil context is the subject of some debate. Some cases state that the right to confront witnesses does not apply in civil cases. *See In re Estate of Clinger*, 872 N.W.2d 37, 54 (Neb. 2015) (“[T]he Sixth Amendment right to confront witnesses and its Nebraska equivalent do not apply.”). Other cases, however, hold that the right does apply in civil cases, specifically cases concerning family law. *See In re DeLeon J.*, 963 A.2d 53, 58 (Conn. 2009) (holding that a party in a civil case regarding guardianship of a minor child must have “an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”) (internal quotation marks omitted) (quoting *Giaimo v. New Haven*, 778 A.2d 33, 54 (Conn. 2001)); *see also* Nick Klenow, *Due Process: Protecting the Confrontation Right in Civil Cases* (May 19, 2015) (unpublished student Note), <http://www-personal.umich.edu/~rdfrdman/Civil.Confrontation.Hornbook.pdf>.

94. Epstein & Goodman, *supra* note 4, at 450 (“The more powerful the perpetrator, the greater is his prerogative to name and deny reality, and the more completely his arguments prevail.”).

95. Bowcott, *supra* note 50 (In the words of one survivor: “He was following his own agenda and asking me about previous boyfriends and my sex life – things that were completely irrelevant to what we were discussing.”).

96. The emotionally intrusive nature of such trials in part explains why many survivors are reluctant to discuss abuse in the courtroom. Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protections for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837, 843 (2005); PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 7 (2000), <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (“Most victims of intimate partner violence do not consider the justice system an appropriate vehicle for resolving conflicts with intimates.”). Another reason survivors do not disclose abuse is the social stigma against women who make such claims. *See* Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 243 (2011) (“Domestic violence is viewed as a ‘hidden

While judges are accustomed to the adversarial nature of our system, for survivors it is a particularly traumatic and foreign experience. Unfortunately, abusers all too often take advantage of this reality to advance their own interests in the courtroom.⁹⁷

2. *Impartial*

Second, the conventional view of our legal system is that it features impartial judges. While scholars have exposed the fallacy of this perception, the ideal of the dispassionate judge persists.⁹⁸ Even judges who seek to harness their emotions toward justice often do so while keeping a poker face to avoid the impression of being biased.⁹⁹

Survivors can be thrown by the strict impartiality that many judges strive to embody. Some survivors who access the legal system do so expecting justice in the form of validation.¹⁰⁰ Many are seeking vindication in the form of someone in a position of authority admonishing the abuser.¹⁰¹ When met with a judge who is focused on following proper procedures and ensuring that both sides are given equal time, some survivors could reasonably interpret such behavior not as impartiality but as irrationality. Thus, the ideal of an impartial judge is another reason survivors and judges approach the courtroom with different expectations.

Some scholars have argued for a more openly emotional and compassionate approach to judging in the IPV context. Professor Ann Freedman,

problem,’ and its victims are often ‘invisible’ to society because they choose not to disclose their situations for such reasons as fear, shame, and the social stigma attached to abuse.”); Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mother’s Testimony Project, Women’s Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 744 n.186 (2005) (“[W]omen are actually reluctant to disclose abuse to legal system professionals, particularly in custody cases, because of fear of both the abuser and the system’s perception of women who make such claims.”) (citing Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L. Q. 211, 222–23 (2002)).

97. Goodmark, *supra* note 15 (describing how as abusers become more “savvy” about the legal system, “the race to the courthouse” becomes more common); *id.* at 33 (“[W]hat many women find is that the legal system itself becomes the batterer’s forum for terrorizing his victim, and judges and others often give him the tools to perpetuate the abuse.”).

98. See MODEL CODE OF JUDICIAL CONDUCT CANON 2 (AM. BAR ASS’N 2011) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”); see also Catherine Gage O’Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4, 11 (2001) (expounding on debates regarding empathy’s role in the judicial process). See generally Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 631 (2011).

99. STINA BERGMAN BLIX & ASA WETTERGREN, PROFESSIONAL EMOTIONS IN COURT: A SOCIOLOGICAL PERSPECTIVE 166 (2018) (“Stone face is the primary judge mask communicating impartial listening. . .”).

100. Epstein & Goodman, *supra* note 4, at 447–48 (“But she is also hoping for validation of the harm she has endured—in other words, to have her experience credited.”); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 178 (2012).

101. Epstein & Goodman, *supra* note 4, at 447–48.

for example, has expanded on “the value of compassionate witnessing in their work with victims of violence, including domestic violence” on the part of judges as well as other law enforcement professionals.¹⁰² In doing so, she cites a study by James Ptacek, finding that some judges working in specialized domestic violence courts used what he characterized as a “good-natured” demeanor to make survivors “feel welcome in court, to express concern for their suffering, and to mobilize resources on their behalf.”¹⁰³ Ptacek contrasts this demeanor with alternative demeanors, including bureaucratic, distant, firm, condescending, and harsh.¹⁰⁴

In Joan’s experience, while the judge’s written findings did state that Anthony had committed domestic violence, the judge never used court time to state this finding to Anthony or Joan, let alone to tell Anthony that what he had done was wrong. In the view of many survivors and their advocates, cases where one person has used threats or physical violence to gain power and control over another are the perfect examples of where righteous anger is appropriate on the part of judges. But with the current ideal of judicial impartiality, such expectations are not commonly met.

3. Formal

Third, our legal system is formalistic. While its complex sets of rules and procedures are designed to ensure consistency and procedural justice, they are also difficult to navigate.¹⁰⁵ These rules and procedures include specific forms or petitions for initiating a case;¹⁰⁶ procedures for conducting a court hearing, such as

102. 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, 630 (2003).

103. *Id.* (citing JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 99, 106 (1999)).

104. PTACEK, *supra* note 103, at 145–48.

105. For this reason, scholars have advocated for a less formal system for survivors. See Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 128–29 (Heather Strang & John Braithwaite eds., 2002) (outlining the tensions between restorative justice and the public sphere that feminists seek out for domestic violence); Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL’Y & L. 921, 934 (2003) (discussing how existing, less formal models of dispute resolution may offer alternate approaches or elements of an approach to address domestic violence).

106. See, e.g., ARIZ. REV. STAT. ANN. § 13-3602(A) (2013) (stating that to obtain an order of protection, a person “may file a verified petition, as in civil actions, with a magistrate, justice of the peace or superior court judge for an order of protection for the purpose of restraining a person from committing an act included in domestic violence.”); see also Arizona Form to Petition for a Protection Order, <https://www.sc.pima.gov/Portals/0/Library/Family/Petition%20for%20Protection%20Order.pdf>.

which party presents their case first;¹⁰⁷ and specific rules for presenting relevant evidence, including oral testimony.¹⁰⁸

Survivors, the great majority of whom access the court system without the aid of an attorney,¹⁰⁹ often find these rules and procedures unnecessarily confusing and complex.¹¹⁰ Indeed, survivors who have the benefit of representation “are significantly more likely to be awarded civil protection orders than those who are unrepresented, and their orders contain more effective and complete relief.”¹¹¹ Those survivors who are unrepresented may depend on court staff who are not trained in the dynamics of IPV and may discount the credibility of survivors, to traumatizing effect.¹¹² Thus, accessing court personnel for assistance exposes survivors to further risk of encountering negative attitudes such as victim-blaming.

107. See ARIZ. R. PROTECTIVE ORDER P., [https://govt.westlaw.com/azrules/Browse/Home/Arizona/ArizonaCourtRules/ArizonaStatutesCourtRules?guid=NB4DEDE0E0679D11DCA204A4EECBB71484&transitionType=CategoryPageItem&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/azrules/Browse/Home/Arizona/ArizonaCourtRules/ArizonaStatutesCourtRules?guid=NB4DEDE0E0679D11DCA204A4EECBB71484&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1) (last visited Jan. 4, 2020).

108. See ARIZ. R. PROTECTIVE ORDER P. R. 36.

109. Durfee, *supra* note 85, at 471 (“[A]ccess to legal representation for civil cases is not guaranteed (though the defendant may have legal representation in a concurrent criminal case), the cost of a family court lawyer is prohibitive, and civil legal assistance programs are severely underfunded and cannot represent all victims seeking orders.”); Epstein & Goodman, *supra* note 4, at 404 (quoting Amy Barasch, *Justice for Victims of Domestic Violence: One Thing They Really Need is Lawyers*, SLATE (Feb. 19, 2015, 9:30 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/domestic_violence_protection_victims_need_civil_courts_and_lawyers.html (at least 80% of women are unrepresented in civil protection order cases)); see also LEGAL SERVS. CORP., THE JUSTICE GAP 6 (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (“Eighty-six percent of the civil legal problems faced by low-income Americans in a given year receive inadequate or no legal help,” including domestic violence cases); Melissa Jeltsen, *Why So Many Domestic Violence Survivors Don’t Get Help—Even When They Ask for It*, HUFFINGTON POST (June 10, 2015, 11:49 AM), https://www.huffingtonpost.com/2015/06/10/domestic-violence-help_n_7537554.html (“Only 11 percent of programs across the country reported being able to offer legal representation.”).

110. Durfee, *supra* note 85, at 471 (“[V]ictims must navigate a bureaucracy that uses specialized language and specific procedures—for example, they must know the definitions of ‘petitioners,’ ‘respondents,’ and ‘service’—all at a time where they are traumatized, sleep deprived, and have more basic needs to meet such as shelter, food, clothing, and safe transportation to work, school, and/or court.”); see also Herman, *supra* note 20, at 574 (“Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control.”).

111. Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1218 (2009) (citing Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 813 (1993) (reporting findings of the National Institute of Justice Civil Protection Order study)).

112. See Epstein & Goodman, *supra* note 4, at 411–12 (explaining how courthouse clerks often discount survivors’ credibility and take on the role of credibility-assessors and system gatekeepers even though their tasks are limited to creating and maintaining case files

Survivors benefit from telling their stories in their own way because it helps them to both reestablish control over their lives and to avoid exposure to specific reminders of the traumas they have faced.¹¹³ This is particularly the case for survivors who have PTSD or have repressed traumatic events as a coping mechanism.¹¹⁴ The formalism of our legal system, on the other hand, requires survivors to fit their narratives into specific rules and procedures that survivors have no control over and which limit their ability to tell their own story as a meaningful narrative.¹¹⁵ In other words, our legal system requires survivors to go through the trauma of reliving their experience without the safeguards that mental health professionals recommend for limiting the retraumatization that can result from such retelling.¹¹⁶ In Joan's experience, she gave her testimony on one day of trial, but was then cross-examined by Anthony's attorney on another day several weeks later due to the court's busy calendar. The spacing between her testimony was difficult on Joan, who also felt surprised to find herself, on cross-examination, having to explain the reasoning behind her decisions, when in her eyes the focus should have been on Anthony's bad behavior.

While some courts deciding civil cases involving IPV have relaxed rules to allow for somewhat more informal proceedings,¹¹⁷ the resulting process still exceeds a lay person's knowledge and experience. Furthermore, the resulting process remains restrictive as to how and when survivors tell their stories.¹¹⁸ For these reasons, the formalism of the court system is yet another factor that contributes to differing expectations for judges and survivors. While judges are accustomed to formalism after years of training and may view formalism as a way of ensuring consistency, for survivors, formalism can contribute to retraumatization.

B. Active Features

1. The Separation Paradigm

Legal solutions to IPV are premised on the assumption that survivors can and should leave their abusers. From the criminal justice system that imprisons and places abusers on probation to the civil system of orders of protection and custody statutes that account for the impact of IPV, such remedies are premised on survivors

and they have no formal authority to determine whether a complaint has merit, recounting a story from Jane Stoeber regarding a clerk who tore up a survivor's petition as an example).

113. Herman, *supra* note 20, at 574 (describing how while survivors benefit from "an opportunity to tell their stories in their own way, in a setting of their choice" and "need to control or limit their exposure to specific reminders of the trauma," court procedures require them to relive their experience while responding to "yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative").

114. Durfee, *supra* note 85, at 482.

115. *See id.* (describing how when survivors are asked to recount their narrative, they "must relive acts of victimization and recall specific details about events that they have repressed simply in order to survive").

116. For further discussion of such safeguards, see Herman, *supra* note 20, at 574.

117. *See, e.g.,* ARIZ. R. PROTECTIVE ORDER P. R. 36 (relaxing evidentiary rules to allow for any admissible evidence).

118. *See* Herman, *supra* note 20, at 574.

leaving.¹¹⁹ In other words, the legal system's solutions to IPV are premised on a separation paradigm.¹²⁰ As Susan Schechter and Leigh Goodmark have written, the underlying assumption of domestic violence legal solutions currently available is that all survivors want to, or should want to, leave their abusers.¹²¹ This separation paradigm targets the short-term physical safety of the person subjected to abuse by separating her from the person who committed the abuse.¹²² The separation is accomplished through an array of legal measures, including the criminal justice system's mandatory arrest laws and no-drop prosecution policies, as well as through the remedies available in the civil system, including civil protection orders that feature stay away, no contact, and ejection from the home provisions.¹²³ Deborah Epstein and Lisa Goodman have written that judges tend to express difficulty in understanding women who stay with their abusers "in less formal contexts, such as judicial training sessions and casual conversations outside of the courtroom."¹²⁴

The assumption that all survivors should leave their abusers is so pervasive that when a survivor chooses to stay with an abuser, at best the assumption then becomes that she has not been provided with sufficient legal or other services.¹²⁵ At worst, the survivor is blamed for returning to her abuser and possibly even penalized for doing so.¹²⁶ That the legal system is the best form of assistance for leaving an abusive relationship is a reflection of the assumption that all survivors should want

119. Goodmark, *supra* note 15, at 19 (quoting Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1019 (2000)).

120. *Id.* at 19–35 (arguing that the legal tools, including civil protection orders, mandatory arrest laws, "no-drop" prosecution policies, the child protective system, and divorce and custody laws for addressing IPV are premised on faulty assumptions, most prominently the notion that all survivors should leave their abusers, but also the notions that all survivors should choose to use the legal tools available and that physical violence is the only type of violence that is important).

121. *Id.* at 19–20 (quoting SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 7 (2000)).

122. See Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 147–48 (2015); see also, Durfee, *supra* note 85, at 472 (detailing other assumptions implicit in the legal system's response to survivors, including assumptions concerning legal status, language ability, education level, attributions for abuse, beliefs about which forms of violence are the most severe, and the "appropriate" victim responses to abuse). See generally Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLINICAL L. REV. 201, 221–27 (2014).

123. Johnson, *supra* note 122, at 153.

124. Epstein & Goodman, *supra* note 4, at 414.

125. Goodmark, *supra* note 15, at 20.

126. *Id.* at 21 ("Creating a norm that assumes that women who want to keep themselves (and their children) safe will turn to the legal system has created unintended consequences for battered women.").

to leave their abusers.¹²⁷ Even the reforms that have been enacted to benefit survivors are based on this unstated and often invalid assumption about victims of domestic violence. Accordingly, research indicates that despite these “victim-friendly” procedures, the legal system continues to reproduce broader social inequalities.¹²⁸

The separation paradigm has many problematic consequences, including case outcomes.¹²⁹ Many of these are evident in Joan’s case.¹³⁰ First, despite the social science research on the obstacles survivors face in leaving an abuser, women who return to their abusers often are deemed as not credible.¹³¹ In Joan’s case, the fact that she had been intimate with her abuser after leaving him was used as evidence that she did not require an extension of her protection order. Second, women who compromise with their abusers often are not seen as meeting the legal requirements of the statutory presumptions designed to address IPV.¹³² In Joan’s case, she was able to establish that domestic violence had occurred, which triggered the presumption against granting Anthony parenting time with the children. But because she had agreed to the children spending time at Anthony’s mother’s home, where Anthony also lived, Anthony was able to rebut the presumption.

2. *The Focus on Physical Harm*

Another shortcoming of our legal system is that it has not found a way to adequately address how coercive control, including emotional and financial abuse,

127. *Id.* (“Embedded in the belief that all battered women want to or should want to leave their abusers is another assumption: that all women should turn to the legal system for assistance in leaving.”).

128. *See id.* at 23, 37–38 (explaining, for example, how mandatory arrest statutes have resulted in dual arrests and have a disproportionate impact on African American women, who may experience an increase in violence as a result of mandatory arrest policies).

129. *See* Epstein & Goodman, *supra* note 4, at 414–15 (recounting the story of one of the author’s clients, whose civil protection order was denied because the judge found it incoherent that she had gone to Red Lobster with her abuser shortly after a serious violent episode).

130. While this did not happen in Joan’s case, women who do not leave their abusers risk having their children taken away by the child protection system. *See* Goodmark, *supra* note 15, 25–27 (explaining how mothers who are victims of abuse can find themselves accused of failing to protect their children by child protection agencies).

131. Epstein & Goodman, *supra* note 4, at 414–15.

132. In Arizona, for example, one must prove that domestic violence has occurred in order to uphold an order of protection. Domestic violence is, in turn, defined by reference to various crimes, including disorderly conduct, defined, in part, as using “abusive or offensive language or gestures in a manner likely to provoke an immediate physical retaliation.” Survivors who compromise with their abusers, by, for example, continuing to exchange the children at the abuser’s home despite the abuser’s behavior that otherwise rises to the level of disorderly conduct, may be told that they do not qualify for a protective order because they continued to engage with the abuser. *See* ARIZ. REV. STAT. ANN. §§ 13-3601, 13-2904(A)(3) (2013). This has been a consistent experience of the author in representing many survivors, and watching more, not represented by counsel, tell their stories in civil protection order court.

affects survivors.¹³³ Coercive control describes an ongoing and multipronged strategy, with tactics that include manipulation, humiliation, isolation, financial abuse, and gaslighting¹³⁴ to exert power over another person.¹³⁵ Presenting evidence of coercive control may be significant in establishing a narrative of who was the primary aggressor in cases where there is also evidence of physical abuse, threats, harassment, or stalking. But on its own, such emotional and financial abuse is typically not sufficient to merit remedy by the legal system.

There is no crime or civil penalty that punishes coercive control when it takes the form of manipulation, humiliation, isolation, or financial abuse. Most protection-order statutes require the petitioner to establish that she has been the victim of assault, threats, damage to property, stalking, or harassment.¹³⁶ Custody statutes that take into account domestic violence typically define domestic violence similarly.¹³⁷ Survivors, on the other hand, often will tell you that the emotional abuse was worse than the physical abuse, and may focus more on recounting emotional

133. Goodmark, *supra* note 15, at 29–30 (“By focusing so intently on physical violence, the legal system refuses to recognize how the other types of violence experienced by battered women affect their ability to function as parents and as people.”); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1112 (2009) (describing how if “physical violence is not considered severe enough, some courts are wary to provide any remedy at all, preferring not to meddle in private relationships” and more generally advocating for protection order laws to be expanded to allow remedy for coercive, emotional, and financial control); *see also* Epstein & Goodman, *supra* note 4, at 417 (“This prioritization of physical over psychological harm is reflected in the written law: criminal law, most of tort law, and civil protection order statutes all focus heavily on physical assaults and threats of violence, rather than emotional abuse or threats of psychological harm.”).

134. Gaslighting is a form of manipulation that seeks to sow seeds of doubt in a targeted individual with the aim of making the individual question his or her own memory, perception, and sanity. The term comes from a 1944 movie by the same name, in which a husband tries to drive his wife insane by changing minor details about their house, including the brightness of the gas lights, and insisting that they have always been that way. GASLIGHT (Metro-Goldwyn-Mayer 1944).

135. Epstein & Goodman, *supra* note 4, at 417 (explaining that “in many abusive relationships victims are subjected to their partners’ coercive control through a wide variety of psychological tactics, including, for example, ‘fear and intimidation, . . . emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.”) (quoting Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 AFFILIA 244, 245 (2000)). Legal scholars as well as sociologists have cautioned, however, that conflating IPV with coercive control can also be a barrier to understanding how to address IPV. For a rich discussion of this topic, see Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 1004 (2014).

136. Johnson, *supra* note 133, at 1112 (“[T]wo-thirds of the states limit CPO remedies to those who are subjected to physical violence or other criminal acts under state law.”). For a discussion of the fixation of protection order laws on physical violence, see Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 43–44 (2008).

137. Goodmark, *supra* note 15, at 30.

abuse during testimony.¹³⁸ Accordingly, for survivors, understanding why the legal system is not interested in evidence of coercive control absent physical assault, threats, harassment, or stalking can be challenging, particularly given that coercive control can be indicative of future high-risk behavior as well as destructive parenting.¹³⁹ In Joan's case, despite significant testimony regarding how Anthony had used coercive control tactics throughout their relationship and after separation, the outcome did not reflect the impact of such abuse.

C. Conclusion

To be sure, there are elements of our legal system that do benefit survivors. This includes our system's ideals of procedural justice, consideration of all relevant evidence, and ability to appeal decisions for error.¹⁴⁰ Our system also includes a variety of remedies, including opportunities for financial compensation and rehabilitative remedies such as domestic violence classes (also sometimes called batterer intervention classes). However, these elements have their own critics.¹⁴¹ Rather than debating how the existing system could be improved, this Part's focus is on comparing the expectations of survivors with the structural and professional expectations imposed on judges.

III. CROSS-CULTURAL COMMUNICATION SKILLS TO BRIDGE THE EXPERIENTIAL GAP BETWEEN SURVIVORS AND JUDGES

Some survivors will choose not to access the justice system because of the elements mentioned above, whether based on prior bad experiences, or their perception of the system. It is our role as advocates to help survivors make an informed decision when deciding to seek court remedies. For those clients who do choose to access the justice system, how do we as advocates help them avoid retraumatization?

This Part of the paper sets out interventions that aim to decrease the likelihood of retraumatization. This Part begins by laying out and describing cross-cultural communication tools developed by legal clinicians and then illustrates how these tools are also applicable to representing survivors accessing our legal system. While we typically think of these cross-cultural communication habits as appropriate for working with clients from other countries or those who speak other languages, these tools are also appropriate for working with any clients who are

138. Durfee, *supra* note 85, at 478; Epstein & Goodman, *supra* note 4, at 418–19 (recounting how in the author's experience, survivors focus on emotional harm rather than physical violence when recounting their stories); Goodmark, *supra* note 15, at 29.

139. Danielle McLeod, *Coercive Control: Impacts on Children and Young People in the Family Environment*, RESEARCH IN PRACTICE 20, 34, <https://www.calderdale.gov.uk/v2/sites/default/files/coercive-control-impacts-on-children-lit-review.pdf> (last visited Feb. 20, 2019).

140. Orth, *supra* note 41, at 315.

141. See, e.g., Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN. ST. L. REV. 337, 341–61 (2015) (discussing how offender stereotypes have long hampered state intervention in domestic violence).

marginalized, including survivors who may be marginalized by their experience of violence and the trauma of abuse.

In addition, this Section will present strategies for better serving survivors by expanding the services provided by legal services organizations, including law school clinics, to include supportive services such as social work, case-management, and counseling.

A. What is Cross-Cultural Communication?

In her seminal piece on building cross-cultural competence in lawyers, Susan Bryant documented what she termed the “five habits,” developed over the course of a collaborative project with Jean Koh Peters, in teaching their respective law clinics.¹⁴² Bryant, Peters, and others have argued that cross-cultural communication skills are essential to lawyering because our main goal as lawyers is to represent the interests of our clients, and we cannot understand, let alone advance, those interests without sound communication.¹⁴³

Bryant terms the first habit “Degrees of Separation & Connection.”¹⁴⁴ This habit is designed to encourage contemplation of the similarities and differences between oneself and one’s client, and to consider the effect of such similarities and differences on professional distance, information gathering, assessing credibility, and other aspects of representation.¹⁴⁵ Bryant has her students prepare a Venn diagram to illustrate such similarities and differences, and then contemplate their impact as a regular part of their casework for each client.¹⁴⁶

The second habit is termed “The Three Rings,” and is designed to identify and analyze the possible effects of similarities and differences between the client, the legal system (including the decision-maker), and the legal advocate.¹⁴⁷ It is essentially a broader version of the first habit that enhances the advocate’s ability to assess the client’s legal claim, prepare a legal strategy, and prepare the client for litigation.¹⁴⁸ This includes identifying both strong and weak points in the client’s case, including perception issues that may affect how credible the client appears in court, gaps between the client’s expectations and goals, and the likely outcome given the law.¹⁴⁹

142. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 37 (2001) (“Jean and I kept questioning ourselves about two core issues: (1) what is effective cross-cultural lawyering and (2) how can we help ourselves and our students learn to be effective cross-cultural lawyers?”).

143. *Id.*; see also López, *supra* note 31, at 39, 62.

144. Bryant, *supra* note 142, at 64.

145. *Id.* at 66–67.

146. *Id.* at 65.

147. *Id.* at 68 (“In pinpointing and recording similarities and differences in the legal system-client dyad, students are asked to identify the cultural differences that may lead to different values or biases, causing legal decision-makers to negatively judge the client and the similarities that may establish connections and understanding.”).

148. *Id.*

149. *Id.* at 69.

The third habit, called “Parallel Universes,” has advocates go through the exercise of identifying multiple alternative interpretations of a client’s behavior whenever they are puzzled by a client’s decision-making.¹⁵⁰ This exercise encourages the advocate to approach the client with compassion and understanding and then explore the topic in question using active listening skills.¹⁵¹ Like The Three Rings, this habit also enhances an advocate’s information gathering, claim assessment, and legal strategy development.¹⁵²

The fourth habit involves identifying potential pitfalls, red flags, and remedies ahead of time, and is titled, appropriately, “Pitfalls, Red Flags, & Remedies.”¹⁵³ This habit involves paying attention to the process of communication itself, identifying trouble areas, and crafting solutions proactively.¹⁵⁴ For example, rather than waiting for that moment when attorney-client communication breaks down because an attorney has a “funny feeling” regarding a client, this habit involves acknowledging the feeling, inquiring into how it is affecting communication, and crafting a strategy to avoid miscommunication. In addition, habit four “encourages culturally sensitive exchanges with clients, by identifying four areas on which students should focus carefully: (1) scripts, especially those describing the legal process; (2) introductory rituals; (3) client’s understanding; and (4) culturally specific information about the client’s problem.”¹⁵⁵

The fifth habit is entitled “The Camel’s Back,” and asks advocates to be aware of their own cultural biases and stereotypes.¹⁵⁶ Solutions to such biases include creating settings where bias and stereotype are less likely to govern, including taking breaks, having food and drink, and attempting to identify what is interfering with the interaction ahead of time.¹⁵⁷ However, the habit is also more expansive, in that it encourages advocates to make a practice of reflecting on the topics of biases and stereotypes on a regular basis with the goal of being aware of one’s own preconceptions, in part by practicing mindfulness.¹⁵⁸

150. *Id.* at 70–71 (“The habit of ‘parallel universes’ thinking invites students to look for multiple interpretations, especially at times when the student is judging the client negatively.”).

151. *Id.* at 71–72.

152. *See id.* at 72.

153. *Id.*

154. *Id.* (This habit “encourages conscious attention to the process of communication—a skill and perspective that clinical teachers have used to improve interviewing skills in all attorney-client interactions.”).

155. *Id.* at 73.

156. *Id.* at 77 (explaining that while Habit Five may be the most important, because it involves “exploring oneself as a cultural being,” it can be the most difficult because “it asks the student to face the sometimes ugly side of cultural blinders-bias and stereotype” and for that reason it fits best as the last habit).

157. *Id.* at 78.

158. *Id.*

B. How Cross-Cultural Communication Skills Can Limit Victimization

The tools we have developed for cross-cultural communication can and should be applied to representing survivors to avoid retraumatization.¹⁵⁹ Cross-cultural communication skills can assist advocates in educating judges about our clients' experiences to affect not only the possibility of an optimal outcome in our clients' cases, but more importantly to improve our clients' experiences with the justice system to avoid, or at least limit, retraumatization. While Joan reported a negative experience with the justice system, our use of these tools, along with the mainstays of trauma-informed lawyering, limited her retraumatization. This Section will detail how the five habits of cross-cultural communication can help advocates understand and minimize the risks of retraumatization their clients may face and work with their clients to draft an appropriate case strategy in light of these risks.

1. Degrees of Separation & Connection

The first habit, "Degrees of Separation & Connection," asks an advocate to contemplate the similarities and differences between herself and her client. Advocates of survivors should engage in this exercise with an eye on how clients' experiences of violence and abuse may be different than the advocate's experience of violence and abuse, in addition to the other factors that make the advocate and client similar. Advocates should either include their own experience of violence and abuse as a factor in drawing a Venn diagram of similarities, or draw a separate diagram for the purpose of focusing on how the experiences of violence and abuse have affected the survivor.

Based on this contemplation, advocates may rethink their professional distance with the client as well as how they plan on approaching information gathering, assessing credibility, and other aspects of representation. For example, a client whose experience with violence and abuse is far more extensive than that of the advocate's may need additional time and rapport-building to trust the advocate. In addition, it may be necessary to gather more evidence to be prepared to document that client's experience of violence and abuse. Similarly, a client who has experienced more emotional and financial abuse may require the advocate to contemplate different types of information gathering than one who has suffered more physical abuse. Most importantly, however, this exercise encourages an advocate to consider how she may approach assessing the client's credibility given the disparity of experience with violence and abuse. In other words, those who have not experienced violence or abuse, or who have not experienced the same extent of such violence and abuse, may have a difficult time relating to someone who has. This was the case in working with Joan, where none of the attorneys had the same history of experiencing violence. Acknowledging this assisted us in gathering the necessary information to present her case.

2. Three Rings

The second habit, "The Three Rings," picks up where the first left off, and asks the advocate to add a ring to the Venn diagram to include the legal decision-

159. The following recommendations and application of cross-cultural communication skills to the context of working with survivors are based on the Author's experience teaching and supervising students in a domestic violence clinic.

maker. By considering the client's differences and similarities with the decision-maker, this exercise allows the advocate to consider how likely it is that the decision-maker will believe the client, as well as how the decision-maker is likely to relate to and treat the survivor. In the vast majority of cases, the advocate will not have any information about the decision-maker's own experience of violence and abuse. However, assuming that there is a disparity of experience in this respect will nevertheless enhance the advocate's ability to craft an appropriate litigation strategy and prepare the client for a hearing.

For example, when working with a client who has extensive experience with violence and abuse, an advocate may consider how to confront the likelihood that the decision-maker may find it hard to believe the client, or may be likely to question why the survivor did not leave the abuser earlier in the relationship. The advocate may consider a strategy of eliciting direct testimony from the client with the goal of making the client more relatable, such as questions about what kinds of activities the client engages in with her children, or where she grew up or went to school.

With respect to preparing the client for a hearing, the advocate may consider warning clients that they may face questions and statements from the decision-maker that they may find disrespectful or insensitive. In addition, when working with survivors, it is very important to identify and address any gaps between the client's expectations and goals and the likely outcome given the law. For example, a client may express a desire to have the decision-maker admonish the abuser or encourage the abuser to take steps to change. In such cases, and depending on the decision-maker, warning the client that the decision-maker will be more focused on a much narrower task (such as deciding whether or not a protection order remains in place) and may not be willing or inclined to make the types of statements desired may limit retraumatization by adjusting the client's expectations of what engagement with the justice system is likely to yield. It may be more helpful to engage the client in a broader discussion of his or her goals as well as alternatives to those goals.

In working with Joan, while we sympathized with her desire to have the children with her most of the time, we also knew that the facts of her case were unlikely to yield such a result given Arizona law on shared parenting time and our experience of the application of domestic violence presumptions in custody cases. For this reason, we had many conversations with Joan about what her goals were and what the likely outcome of going to court would be. Ultimately, she decided to go to court because the alternative meant not having a custody order she could enforce when Anthony withheld the children from her.

3. Parallel Universes

The third habit, "Parallel Universes," provides tools for when an advocate is puzzled by a client's behavior. Parallel Universes has the advocate think through as many alternative interpretations of the behavior as possible in an effort to discard one's initial unfounded assumptions. The exercise is essentially a way of reminding oneself that there are many explanations for the behavior, and we will only know the client's reasons for the decisions made if we ask. Thus, the exercise is followed

with approaching the client with compassion, asking about the decision or statement in question, and then actively listening to the client's response.

This exercise is particularly applicable to representing survivors, as those unfamiliar with the dynamics of IPV may question a survivor's decisions or even a survivor's affect. By engaging in Parallel Universes, the advocate not only identifies his or her own biases against understanding and believing the client, but also potential aspects of the client's narrative or affect that may give the decision-maker pause. As in The Three Rings exercise, identifying these potential fault lines can be critical to not only crafting a successful litigation strategy, but also to preparing the client for what she or he is likely to encounter in court. Both are critical to minimizing the risk of retraumatization.

Our use of Parallel Universes prepared us for the likelihood that the decision-maker may question why Joan chose to reconcile with Anthony in the past. We not only prepared Joan to testify about the history of her relationship with Anthony to put her decisions into context, but also prepared Joan for the likelihood that the judge, as well as Anthony's attorney, may ask her pointed and possibly disrespectful questions on this and other topics.

4. Pitfalls, Red Flags, & Remedies

The fourth habit, "Pitfalls, Red Flags, & Remedies," involves identifying trouble areas in the process of communication itself and addressing potential problems proactively. In the context of survivors, this can mean being aware of a gut reaction one is having to a client and thinking through how to address it.

In Joan's case, one of the students on the case had a bad feeling about how much time the younger children were spending in the care of Anthony's mother. We spoke about it and discussed where that feeling was coming from, and identified that we were both concerned about how it may appear that Joan had already agreed to a custody arrangement that was quite even, with the children spending half their time with Joan and half their time with Anthony's mother. We spoke to Joan about how this arrangement had come about and learned that it was not really what she wanted, but something she had agreed to in order to avoid further conflict with Anthony. In fact, she was concerned that if she did not agree, then her children would suffer because Anthony would either withhold them from her or harass her while the children were present. Explaining this to the judge became a key part of our case. Additionally, the discussions we had with Joan about why it was so important to explain how the current custody arrangement had come about helped prepare her to not only give testimony and undergo cross-examination, but also for what we knew was going to be an emotional day of testimony.

5. The Camel's Back

The fifth habit, "The Camel's Back," involves practicing mindfulness so that advocates are aware of their own cultural biases and stereotypes. This is a critical endeavor for those working with any marginalized population, but particularly when working with survivors. A mindful approach entails not only being conscious that we, like everyone, have our own biases, but also approaching each step and task of the attorney-client relationship with patience, calmly acknowledging one's feelings, thoughts, and sensations. By taking it slow, and

paying attention at each step, we are more likely to take note of a client's discomfort and the importance of using particular tact in addressing a sensitive issue. This deliberate approach can limit a client's experience of retraumatization in one's office. And while challenging to achieve in the fast pace of a hearing, such mindfulness, coupled with excellent preparation, can also minimize a client's experience of retraumatization in the courtroom.

One example of mindfulness in Joan's case was preparing her for what the court process would be like, from the structure of the hearing to the positioning of all the actors in the room. We also prepared Joan for the likelihood that Anthony's attorney would ask her difficult and disrespectful questions, and that one way of coping with this process was to look at us or at the judge while answering the questions. Mindfulness helped us make objections at key points in Anthony's attorney's cross-examination of Joan so as to stop him from badgering her. These objections also had the benefit of pausing the flow of questions so that Joan could have a chance to rest and giving us a chance to make eye contact with her and remind her that she could look at us or the judge while answering his questions.

Perhaps more importantly, by striving for mindfulness in our approach to clients, advocates can be more attuned to when our own biases and prejudices may be influencing our interactions and decision-making. For example, one student noticed that she remained troubled by Joan's decision to have Anthony's mother take care of the children despite our attempts to address that issue through our litigation strategy. By noting the discomfort and discussing it with her supervisor, the student was able to anticipate moments when that discomfort might have affected her relationship with the client and the ability to advise her client and adjust accordingly.

IV. TRAUMA-INFORMED LAWYERING & EXPANDING SERVICES

A. *What is Trauma-Informed Lawyering?*

Using the five habits enhances our ability as advocates to provide trauma-informed legal services. Trauma-informed practice is "an increasingly prevalent approach in the delivery of therapeutic services, social and human services, and now legal practice."¹⁶⁰ It "incorporates assessment of trauma and trauma symptoms into all routine practice" and "ensures that clients have access to trauma-focused interventions . . . that treat the consequences of traumatic stress."¹⁶¹ Trauma-informed services are more "supportive (rather than controlling and punitive)" and "avoid retraumatizing and punishing those served."¹⁶² As Sarah Katz and Deeya

160. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 361 (2016). Trauma-informed practice builds on David Wexler's theory of therapeutic justice, which asks lawyers and judges to consider the mental and emotional consequences of the legal system on litigants and to recognize the effect of their own ethical, personal, and spiritual values on their behavior and decisions in the courtroom. David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).

161. Katz & Haldar, *supra* note 160, at 363.

162. *Id.* at 370.

Haldar have written, in the context of providing legal services, trauma-informed practice encompasses four “hallmarks”: identifying trauma, adjusting the attorney-client relationship accordingly, adapting an appropriate litigation strategy, and preventing vicarious trauma.¹⁶³

The first step to providing trauma-informed legal services is recognizing that a client has experienced trauma by either the client’s description or behavior.¹⁶⁴ From there, the attorney makes necessary adjustments to his or her relationship with the client specific to that client’s situation.¹⁶⁵ This can mean helping withdrawn or angry clients feel safe enough to share their stories, or helping emotional clients focus on particular aspects of their stories that are essential to the case, among other things. Adjustments to the attorney’s litigation strategy may also be necessary and should also be tailored to the client’s individual circumstances. One example is helping a client practice testifying to become accustomed to the difficulty of telling his or her story in court.

B. How does Cross-Cultural Communication Relate to Trauma-Informed Lawyering?

The five habits are essential in providing trauma-informed legal services. Practicing the habits is a way of ensuring that we are making adjustments to our client relationships and litigation strategy that are appropriately tailored to the specifics of our client’s situation and goals. In addition, much of retraumatization is the result of the differing expectations of decision-makers and survivors when they enter the courtroom.¹⁶⁶ The five habits are a way of bridging that gap and increasing the likelihood that the survivor feels seen and heard.

In our clinic, we teach both the five habits and trauma-informed lawyering in order to reinforce the importance of a client-centered approach to providing legal representation and counseling and to instill in our students the importance of not exposing our clients to any additional trauma. In one sense, teaching both tools is a way of achieving results through redundant communication and is indicative of the importance of client-centered lawyering.¹⁶⁷ In another sense, teaching both gives students multiple means for limiting retraumatization.

163. *Id.* at 363.

164. *Id.* at 382.

165. *Id.* at 383.

166. *See* Epstein & Goodman, *supra* note 4, at 413 (“Despite decades of activism and research, the experiences of women survivors fall into what philosopher Miranda Fricker calls a persistent ‘gap in collective interpretive resources’ that prevents the dominant culture from ‘making sense of a particular kind of social experience.’”) (citing MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 1 (2007)).

167. *See, e.g.*, Joep P. Cornelissen, *Sensemaking Under Pressure: The Influence of Professional Roles and Social Accountability on the Creation of Sense*, 23 *ORG. SCI.* 118, 123 (2012).

C. How Expanding Services Can Decrease Victimization

What we also know, however, is that our skills as lawyers are not sufficient to address our clients' needs and help them achieve their goals.¹⁶⁸ Unfortunately, Joan still felt retraumatized by her experience in court that day, despite all our efforts and our use of the five habits. Joan has an extensive support network of family and friends and was also in touch with a counselor prior to and throughout the trial. We had also referred her to local support services for survivors. Perhaps our efforts did limit Joan's retraumatization and things would have been worse without the steps we took. We will never know. However, her experience did lead our clinic to increase our internal capacity to prepare clients for the retraumatization that they may experience in court and address their nonlegal needs.

To that end, our law school has hired a Social Work Coordinator to serve all our law clinics by supervising and training social work interns to support clients.¹⁶⁹ In our clinic, this can take the form of supporting clients as they prepare for court hearings, accompanying clients to court hearings to provide additional emotional support and counseling, working with clients to develop step-by-step plans to help them meet their goals of finding employment or returning to school, and connecting clients with other community resources and services such as substance abuse counseling. In some cases, clients have chosen to take advantage of the nonlegal support that social workers can provide instead of pursuing court remedies. In this manner we are better able to provide trauma-informed services by providing our clients with truly holistic services that include nonlegal supports and approaches.

Legal and psychological counseling are a key part of a trauma-informed approach to legal representation.¹⁷⁰ Other nonlegal services, such as financial literacy training, are also integral to helping clients achieve their goals.¹⁷¹ Increasing our capacity to provide more holistic services to survivors is thus essential to limiting the retraumatization of our clients. Increasing this capacity need not mean bringing such services in-house, though we have found this model to increase our ability to ensure that these services are at least offered, if not provided. Other methods of increasing capacity include strengthening relationships with community partners who work with survivors by holding monthly meetings, serving on their boards, and engaging in community forums such as state and regional networks and coalitions aimed at addressing IPV. Most legal advocates for survivors are already taking these steps. What this Article argues is that these steps be understood as instrumental in limiting the retraumatization of our clients.

CONCLUSION

In order to limit the retraumatization of survivors, legal advocates should use cross-cultural communication skills to better prepare clients for how retraumatizing the legal system can be and should expand the services we provide

168. Goodmark, *supra* note 15, at 45.

169. See Erin Lowry, UNIV. OF ARIZ., <https://law.arizona.edu/erin-lowry> (last visited Jan. 8, 2020).

170. Katz & Haldar, *supra* note 160, at 359, 377; Orth, *supra* note 41, at 324.

171. See Goodmark, *supra* note 15, at 43.

to include social work services, case-management, and counseling. Furthermore, because cross-cultural communication skills are fundamental to improving the experience of those who access the justice system, these skills should be taught throughout the legal curriculum, not just in the clinic setting.

Trauma-informed lawyering helps us be better advocates for those survivors who choose to access the justice system. For those clients who decide against accessing the justice system, these same tools are valuable in that they can assist us in recommending solutions outside of the legal system. Limiting trauma also means expanding the services we provide to include nonlegal supportive services, whether those services are provided in-house or through referrals to community organization. Clients who decide against going to court will particularly benefit from truly holistic services that include social work, case-management, and counseling.

The broader point made by this Article is that the way individuals experience the law is as important as the substance of the law itself. Our role as lawyers is not limited to counseling our clients about the substantive law or even to seeking to reform the substantive law itself. Our role also includes ensuring that those who turn to the law find the experience worthy of the effort. Cross-cultural communication skills can enhance our ability to not only guide our clients through the justice system by equipping us to serve as translators between our clients and the courts, but also to improve the experience of all those who access the courts.

While many may perceive culture as being demarcated by race, ethnicity, social group, or national origin, the importance of cross-cultural competence extends beyond these boundaries. As lawyers and advocates, we regularly encounter cultural rifts that exist due to differences in experience. The experience of a survivor is just one type of experience that may result in a gap of understanding, expectations, and perspective between a lawyer and client, or between the judge and client. Other types of experiences can also result in an experiential divide, particularly those experiences common to marginalized communities, including those who are veterans, have grown up with alcoholic parents, or who have experienced poverty, to name just a few. The skills of cross-cultural communication are important for bridging the numerous gaps that may exist between ourselves and our clients due to experience. More importantly, these skills can be used to bridge the gap between our clients and decision-makers in court. In other words, lawyers should develop our cross-cultural communication skills so that we can understand and navigate the institutional culture of the justice system on behalf of our clients. The more we ask ourselves whether we have done our cross-cultural due diligence, the better we are as lawyers.

Developing cross-cultural competence is an essential element of legal education that should not be limited to the clinical classroom and experience. These cross-cultural skills should be taught throughout the legal curriculum and highlighted during key moments in a student's law school experience, including orientation and the first-year curriculum. When she first wrote about the five habits,

Susan Bryant argued that these skills could “help build a more just legal system.”¹⁷² As members of the legal profession, we should all care about the experience of people accessing the justice system, and for this reason we should be thinking more broadly about when we teach cross-cultural competence and how we prepare lawyers in law school.

172. Bryant, *supra* note 142, at 36.

APPENDIX

SURVEY OF LEGAL SERVICE PROVIDERS ON RETRAUMATIZATION
OF INTIMATE PARTNER VIOLENCE (IPV) SURVIVORS

1. *What is your role in serving Intimate Partner Violence (IPV) Survivors?*

Response Options:

- Non-Lawyer Advocate
- Lawyer at a Non-Profit Organization
- Lawyer at a Private Firm
- Law Clinic Director or Staff
- Law Clinic Student

2. *What County do you primarily practice in?*

Response Options: Text Box

3. *How many years have you served IPV Survivors?*

Response Options:

- 0-3 Years
- 4-10 Years
- 10-19 Years
- 20 Plus Years

4. *What percentage of your cases involve IPV Survivors?*

Response Options:

- 0-5%
- 6-25%
- 26-50%
- 51-75%
- 76-100%

5. *What percentage of your representation of IPV survivors falls into the following categories:*

Response Options:

- Custody
- Child Support
- Divorce
- Immigration
- Landlord/Tenant
- Protection Order
- Other

6. *What percentage of your clients identify as:*

Response Options:

- Male
- Female
- Non-binary

7. *How many of your IPV survivor clients would you say have experienced retraumatization through the verbal or nonverbal behavior of court personnel, including the behaviors described below. (Retraumatization describes the experience of negative or victim-blaming attitudes, behaviors, and statements when interacting with others that results in additional trauma.)*

- *Victim-blaming;*
- *Offensive remarks or behavior;*
- *Questioning client's honesty;*
- *Insensitive remarks or behavior;*
- *Dismissive remarks or behavior;*
- *Minimizing remarks or behavior;*
- *Unresponsive remarks or behavior; or*
- *Court personnel telling their own story of victimization.*

Response Options:

- None
- Some
- Many
- Most
- All

8. *How many of your IPV survivor clients would you say have experienced retraumatization through the abuser's or the abuser's associates' behavior in court, including:*

- *Threatening the client;*
- *Staring the client down;*
- *Saying something offensive or humiliating;*
- *Laughing at the client;*
- *Abuser's cross-examination of the client;*
- *Abuser's use of personal information gained through intimate relationship as a sword; or*
- *Abuser's victim-blaming.*

Response Options:

- None
- Some
- Many
- Most
- All

9. *How many of your IPV survivor clients would you say have experienced retraumatization through court procedures they found challenging, including the below.*

- *Trial/Hearings spread out over several dates;*
- *Plea bargaining and pre-trial diversion;*
- *Postponements and continuances;*
- *Testifying and/or having to re-testify;*
- *Decisions made by juries and/or the judge; or*
- *Providing a victim impact statement.*

Response Options:

- None
- Some
- Many
- Most
- All

10. *How many of your IPV survivor clients have expressed regret or distress as a result of going to court, including stating that they:*

- *Did not feel heard;*
- *Did not feel respected;*
- *Did not feel going to court was worth their time; or*
- *Did not think they would want to go to court again in the future.*

Response Options:

- None
- Some
- Many
- Most
- All