Putting Forfeiture to Work

Sarah M. Buel*

Intimate partner violence ("IPV") victims are increasingly turning to the courts for help, too often with poor results. Successful witness tampering by offenders sabotages the court system by silencing victims through an array of unlawful conduct, including coercion and violence. The doctrine of forfeiture by wrongdoing should afford a viable solution, but several obstacles constrain its efficacy. Much confusion exists regarding witness tampering and forfeiture law as a result of the recent trilogy of the Crawford, Davis, and Giles Supreme Court decisions. Their cumulative effect is decreased doctrinal uniformity within a perplexing scheme that is difficult to implement. The resulting uncertainty contributes to massive ongoing underenforcement of witness tampering laws and conflicting interpretations of forfeiture doctrine. In response, this Article advances two main arguments: first, the forfeiture doctrine's application in IPV cases has been woefully inadequate; and second, a more robust notion of forfeiture is needed to clarify and empower the intent-to-silence calculus. A pernicious backlash by legal stakeholders against IPV victims further taints the process, as does the frequent and system-wide minimization of victim harm. This Article locates the courts' ambivalence in community norms that must evolve to ensure forfeiture can be the remedy its drafters intended. A more vigorous forfeiture doctrine will further the legislative intent of offender accountability coupled with victim protection and resuscitate the law's crucial signaling aspect. IPV victims'

^{*} B.A., Harvard Extension School; J.D., Harvard Law School; Clinical Professor, University of Texas School of Law; former domestic violence and juvenile prosecutor, and advocate since 1977. For comments, discussion, and advice I thank Jens Dammon, Mike Denton, Zanita Fenton, Jack Getman, Kelly Gier, Steve Goode, Eugene Hyman, Melissa Hamilton, Sherilynn Ifell, Paula Monopoli, and Jay Westbrook. I also thank faculty colloquium participants at the University of Maryland School of Law and the Arizona State University Sandra Day O'Connor School of Law; and U.T. School of Law drawing board readers for early suggestions; law students Deidre Ewing, Laura Smith, and Lisa Snead for their research assistance; and Angel Leffingwell for administrative assistance.

rights will not be internalized unless the legal paradigm on forfeiture is coherent and committed to both formal and substantive equality.

TABLE OF CONTENTS

INTRO	DUC	CTION	1297
I.	FORFEITURE AS INTENDED REMEDY		
	A.	Doctrinal Premise of Forfeiture	
	В.	Historical Conceptions of Confrontation	
	C.	Due Diligence	1319
II.			1322
	A.	The Aftermath of Crawford, Davis, and Giles	1325
		1. Endangered and Discouraged Victims	
		2. Race and Socioeconomic Status	
		3. Community Backlash Against IPV Victims	1335
		4. Misuse of Chronic Nuisance Laws	
	В.	Abusive Control	
	С.	Coercive Threats Implying Violence	1345
		1. Nonverbal Threats	1346
		2. Harming Victims' Helpers	
		3. Third Party Accomplices	
	D.	Nonviolent Coercion	
III.	Int	TENT-TO-SILENCE CALCULUS	
	A.	Murder	
	В.	Pending Legal Proceedings	1365
	C.	Present Protective Order	
	D.	Classic Abusive Relationship	
	E.	Recantation	
	F.	Mixed Purpose	
	G.	Admissibility of Nontestimonial Hearsay	
	Н.	Context	
Conc	LUSI	ION	
APPEN	NDIX	: STATE AND TERRITORY LAWS CONCERNING RETALIATION)N
		AINST OR INTIMIDATION OF WITNESSES	

INTRODUCTION

Intimate partner violence ("IPV")¹ offenders commit astonishing levels of witness tampering² with such apparent impunity as to suggest that they act with community and state approval.³ All fifty states, the District of Columbia, and the Commonwealth of Puerto Rico have codified prohibitions against witness tampering,⁴ including a broad range of defendant conduct that deters or attempts to deter a witness from taking part in legal proceedings. Because witness tampering sabotages the legal system by impeding an IPV victim's⁵ ability to access remedies needed to achieve safety, and because it enables guilty

¹ The terms "intimate partner violence" and "domestic violence" will be used interchangeably; generally, all refer to one intimate partner using a pattern of physical violence, sexual assault, threats, stalking, harassment, or emotional or financial abuse to control, coerce, or intimidate the other partner. See Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 HOFSTRA L. REV. 1191, 1204 (1993).

² See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 454(1) (2008) (discussing use of "force, violence or intimidation"); N.Y. PENAL LAW § 215.10-13 (McKinney 2008) (same); see also TEX. PENAL CODE ANN. § 36.05 (Vernon 2007) (same); State v. St. Clair, No. C3-97-1247, 1998 Minn. App. LEXIS 678, at *1-3 (Minn. Ct. App. June 16, 1998) (finding defendant guilty of first-degree witness tampering for forcefully preventing his girlfriend from going to court after he beat her because she refused his order to leave area to avoid testifying against him on prior domestic violence charge).

³ See Loretta Frederick & Kristine C. Lizdas, Battered Women's Justice Project, The Role of Restorative Justice in the Battered Women's Movement 34 (2003) (noting that criminal justice system is not overt in its condemnation of domestic violence, and is even less so when batterer engages in noncriminal but otherwise controlling or intimidating behavior); see, e.g., Evan Stark, Coercive Control: The Entrapment of Women in Personal Life 2 (2007) (describing long-term, ongoing, severe abuse that preceded Phil Traficonda's murdering his wife and judge's chastisement of wife for remaining with defendant too long); see also G. Kristian Miccio, Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability, 37 Rutgers L.J. 111, 152-53 (2005) (describing state's role in codifying permission for IPV, e.g., marital rape exemption laws).

⁴ See John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 90-92 (2004) (listing state witness tampering statutes). See Appendix for an author-created spreadsheet of every state's witness tampering, witness intimidation, and obstruction statutes as of Feb. 28, 2009.

⁵ Law's taxonomy confers recognition and mandates specific interpretation, as with my deliberate use of the terms "victim," "survivor," and "battered woman." Some have argued that the word "victim" places an abuse survivor in a subordinate position, penalized, yet again, for her partner's harm. This dispute foreshadows the importance of accurate naming without unnecessarily burdening a term with negative connotation. *Black's Law Dictionary* defines victim as "[a] person harmed by a crime, tort, or other wrong," which certainly captures a rudimentary description of a battered person. BLACK's LAW DICTIONARY 1598 (8th ed. 2004).

batterers to go free,⁶ a more robust forfeiture doctrine is necessary to fulfill its legislative intent.⁷

As early as 1666, the forfeiture concept was cited in American case law for the proposition that if a defendant caused a witness's unavailability, prior victim statements were permitted to prevent the defendant from benefitting from his own wrongdoing.⁸ Many of the reasons that animated the Founders to sanction forfeiture have only grown more numerous with recognition of IPV as a crime and the state's concomitant benefits from its prevention.

Situating IPV within the criminal realm was intended to clarify the state's responsibility for public safety — including that of victims — while bringing to the court's attention the full range of batterers' harmful and illegal conduct. Witness tampering includes an array of deleterious coercion, ranging from bribery, 9 threats, 10 and stalking, 11 to

⁶ See Andrew King-Ries, Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions, 39 Creighton L. Rev. 441, 442-43 (2006) [hereinafter King-Ries, Forfeiture] ("Through threats, intimidation, financial control, and violence, domestic violence defendants prevent victims from testifying in a significant number of domestic violence prosecutions."); Adam M. Krischer, Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases, Prosecutor, Nov./Dec. 2004, at 14, 15 ("The Quincy Probation Project, which tracked court-restrained male abusers, found that close to half of the victims reported that their abusers had threatened physical violence if they continued to cooperate with prosecution efforts."); see also Randal B. Fritzler & Leonore M.J. Simon, Creating a Domestic Violence Court: Combat in the Trenches, Ct. Rev., Spring 2000, at 28, 33 (asserting that batterers threaten retaliatory violence in almost 50% of domestic violence cases and that 30% of abusers assault their victims prior to trial for previous violent offense).

 $^{^7}$ See generally John H. Wigmore, Evidence § 1405, at 219 (Chadbourn rev. 1974) (stating that forfeiture is based on premise that "any tampering with a witness should once for all estop the tamperer from making any objection based on the results of his own chicanery").

⁸ See Reynolds v. United States, 98 U.S. 145, 158 (1878). See generally Harrison's Case, (1692) 12 How. St. Tr. 833, 851 (H.L.) (providing case in which depositions taken before coroner were admissible when trial judge ruled that defendant had attempted to bribe or "spirit away" two witnesses); Lord Morley's Case, (1666) 6 How. St. Tr. 769, 771 (H.L.) (stating that if witness had testified and was later "detained by the means or procurement of the prisoner," such evidence could be used against defendant).

⁹ See, e.g., Trujillo v. State, 953 P.2d 1182 (Wyo. 1998) (stating that batterer bribed several witnesses who watched him assault his pregnant girlfriend).

¹⁰ See, e.g., State v. Wagner, No. 05-CA-45, 2005 WL 2401900 (Ohio Ct. App. June 15, 2005) (stating that during his criminal trial for assaulting his girlfriend, batterer repeatedly threatened victim in person, over phone, and by letter, and also threatened her children and grandchildren).

¹¹ See State v. Mullen, 577 N.W.2d 505, 512 (Minn. 1998) (upholding defendant's conviction for stalking and witness tampering after he assaulted his ex-girlfriend);

assault,¹² rape,¹³ and murder.¹⁴ In response to prolific witness tampering, the doctrine of forfeiture by wrongdoing evolved as a necessary equitable remedy. The gist is that when a defendant coerces, threatens, or harms a witness with the intention of preventing her testimony against him,¹⁵ the forfeiture doctrine should permit admission of the witness's hearsay statements at trial.¹⁶ Despite

State v. Cress, 858 N.E.2d 341, 342 (Ohio 2006) (explaining that victim sought protective order after her boyfriend stalked her and tried to kidnap her children, but victim later recanted and married batterer).

- 12 Assault and battery herein refers not only to stereotypical punches, kicks, and other forms of physical abuse, but also to sexual assault frequently co-occurring in long-term, violent relationships. See Angela Browne, Violence Against Women by Male Partners: Prevalence, Outcomes, and Policy Implications, 48 AM. PSYCHOLOGIST 1077, 1078 (1993) (reporting that women battered by intimate partners also experienced high incidence of sexual assault). Most victims I worked with eventually related to me that their partner had forced them to have sex on many occasions. This is based on my experience as a victim advocate, prosecutor, and codirector of a Domestic Violence Legal Clinic, from 1977 to the present, where I handled tens of thousands of family violence cases in New Hampshire, New York, Massachusetts, Colorado, Washington, and Texas, and provided related training in every state and numerous foreign countries.
- ¹³ See Valerie G. Starratt et al., Men's Partner-Directed Insults and Sexual Coercion in Intimate Relationships, 23 J. Fam. Violence 315, 316 (2008) (citing studies reporting sexual coercion and forcible rape along a continuum of harm inflicted by men against female intimate partners); see also Shannon-Lee Meyer et al., Men's Sexual Aggression in Marriage: Couples' Reports, 4 Violence Against Women 415, 417 (1998) (finding that while all forms of abuse implicate doctrinal deficiencies, sexual violence is typically not acknowledged or taken seriously).
- ¹⁴ See, e.g., State v. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399 (Tenn. Crim. App. May 25, 2001) (describing how batterer, while incarcerated for burglary, assault, and rape of his former girlfriend, repeatedly threatened victim and relayed how he would kill her and dispose of body; and, when released from prison eight years later, murdered her); see also infra Appendix (listing several state witness tampering statutes).
- by men, I will use the feminine pronoun when referring to the victim. This in no way intends to minimize recognition of male victims, whether in heterosexual or homosexual relationships. See Callie Marie Rennison, U.S. Dep't of Justice, Crime Data Brief, Intimate Partner Violence, 1993-2001, at 1 (2003), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf [hereinafter IPV Statistics] (stating that women constitute 85% of reported intimate partner crimes). Similarly, females comprise a dramatically disproportionate number of reported sexual assaults. See also Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Victimization in the United States, 2005 Statistical Tables tbl.2 (2006), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus05.pdf.
- ¹⁶ One of the definitions of "forfeiture" found in *Black's Law Dictionary* is "the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." BLACK'S LAW DICTIONARY, *supra* note 5, at 677.

recognition of the doctrine in American jurisprudence for centuries, ¹⁷ a vast schism exists between the legislative intent of witness tampering and forfeiture laws and their implementation in the courts.

In a trilogy of recent cases, Crawford v. Washington¹⁸ and its progeny, Davis v. Washington, 19 and Giles v. California, 20 the U.S. Supreme Court has directly addressed the problem of unavailable witnesses vis-à-vis defendants' Sixth Amendment right to confront their accusers. In Crawford, Michael Crawford was convicted of assault and attempted murder based on a recorded statement his wife Sylvia made to police, which the state introduced to show that the crime was not committed in self-defense.²¹ At trial, Sylvia invoked the marital privilege and refused to testify. Michael objected that admission of Sylvia's statement, uncorroborated by her in-court testimony, violated his Sixth Amendment right to confront her.²² The trial court held that Sylvia's statement was reliable because it bore "adequate indicia of reliability."23 The Washington Supreme Court agreed, finding Sylvia's statement reliable because it was so close to Michael's own statement. Both Michael and Sylvia were unclear about the sequence of events leading to Michael's stabbing the victim, Kenneth Lee, whom Michael had accused of trying to rape his wife.²⁴ On appeal, the U.S. Supreme

¹⁷ See, e.g., Lord Morley's Case, (1666) 6 How. St. Tr. 769, 771 (H.L.) (stating that if witness "was detained by the means or procurement of the prisoner," prior statements from that witness could be read); see also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Diaz v. United States, 223 U.S. 442, 452-53 (1912); Motes v. United States, 178 U.S. 458, 472-74 (1900); Mattox v. United States, 156 U.S. 237, 242 (1895); Reynolds v. United States, 98 U.S. 145, 158-59 (1878).

¹⁸ 541 U.S. 36, 61-62 (2004) (holding that defendant's Sixth Amendment rights were violated absent opportunity to confront his wife's out-of-court testimonial statements).

¹⁹ 547 U.S. 813, 822 (2006) (finding statements to police nontestimonial when purpose is to meet an ongoing emergency, yet finding statements testimonial when emergency has abated and statements "prove past events potentially relevant to later criminal prosecution").

²⁰ 128 S. Ct. 2678, 2682 (2008) (holding that if state wants to admit murder victim's past testimonial statements, it must first prove that defendant's motive for murder was to silence victim); *see also id.* at 2695 (Breyer, J., dissenting) ("In *Crawford v. Washington*, we held that the Sixth Amendment's Confrontation Clause bars admission against a criminal defendant of an un-cross-examined 'testimonial' statement that an unavailable witness previously made out of court." (internal citations omitted)).

²¹ Crawford, 541 U.S. at 40.

²² Id.

²³ *Id.* (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

²⁴ Neither Michael nor Sylvia was sure whether Lee brandished a weapon before Michael attacked him. *Id.* at 38-39.

Court reversed, holding that the Sixth Amendment requires an opportunity for confrontation with an unavailable witness when testimonial statements are proffered, abrogating the prior rule of *Ohio v. Roberts*, in which a nontestifying witness's statement could, under some circumstances, be admitted.²⁵ Michael Crawford argued that his Sixth Amendment rights were violated because Sylvia's recorded statement to the police was testimonial, making confrontation the only acceptable standard of reliability.²⁶

The Court, however, declined to define "testimonial" statements, causing much confusion and conflicting decisions in lower courts.²⁷ As a result, the Court granted certiorari in Davis and Hammon v. Indiana, two domestic violence cases with differing interpretations of what constituted a testimonial statement. In Davis, Adrian Davis fled after attacking his girlfriend, Michelle McCottry. She promptly called 911, described the assault and, audibly upset, expressed fear that Davis would return to harm her. Police officers arrived within four minutes and documented that McCottry had recently suffered injuries on her face and arm, and was frantically trying to collect her belongings and children to flee. Davis was subsequently charged with felony violation of a protective order, but McCottry did not testify at the trial. Davis was convicted partly based on McCottry's 911 tape, which was admitted over Davis's objection that her statement violated his Sixth Amendment right to confrontation. The Washington Court of Appeals and Washington Supreme Court affirmed, finding that McCottry's naming of Davis as her batterer in the 911 tape was not testimonial.²⁸

Similarly, *Hammon*, *Davis*'s companion case, evolved from the police's response to Hershel Hammon's assault of his wife Amy. Although Amy Hammon greeted officers from her front porch and assured them that there was no problem, they asked to enter the home after observing that she was quite nervous and it was late February in Northern Indiana at 10:55 p.m. — too cold to be outside without a coat. Once inside, the police saw shattered glass on the floor and flames leaping from the broken stove. Amy then admitted that her

²⁵ 448 U.S. 56 (1980).

²⁶ Crawford, 541 U.S. at 36, 61-62.

²⁷ *Id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' ").

²⁸ Davis v. Washington, 547 U.S. 813, 813-14 (2006).

²⁹ Id. at 819.

 $^{^{30}}$ It turned out that Hershel Hammon was on probation for a prior domestic violence assault of his wife, providing the motivation to dispatch her to the front porch to get rid of the police. *Id.* at 820.

husband had smashed the heater, a phone, and at least one lamp prior to pushing her to the floor, shoving her head into the broken glass, and punching her twice in the chest.³¹ The officer testified that after Hershel Hammon repeatedly attempted to interrupt Amy's conversation with the police, Hershel "became angry when [the officer] insisted that [Hershel] stay separated from Mrs. Hammon so that [the police could] investigate what happened."32 Hershel was charged with violating his probation and assault, but Amy did not testify at his bench trial. The court found Hershel guilty of both charges after admitting the officer's account of Amy's story, thus authenticating her affidavit as a present sense impression and excited utterances.³³ The Indiana Court of Appeals and Indiana Supreme Court affirmed, concluding that Amy's statements were excited utterances and not testimonial. However, they found Amy's affidavit to be testimonial and thus ruled that it should not have been admitted, but decided it was harmless error, given the bench trial.³⁴

Davis and Hammon were consolidated (as Davis) and a unanimous U.S. Supreme Court decided that an abuse victim's 911 call did not result in testimonial statements because the questioning was related to police assistance in an ongoing emergency.³⁵ The Court distinguished Hammon from Davis by finding that a battered woman's statements to law enforcement were testimonial if given after the crisis had dissipated and if the information was being sought for use in a later criminal prosecution.³⁶ This ruling is unfortunately cabined in a faulty paradigm misinterpreting the constitutional Framers' intent to prevent trial by affidavit or ex parte examination.³⁷ Davis employed a flawed analytical framework that incorrectly applies remedies for state interference with confrontation to defendant actions that prevent a witness's testimony. It makes little sense to eliminate the injustice alleged in Crawford and Davis only to reward known criminals for

³¹ Amy Hammon also told officers that Hershel had assaulted her daughter. *Id.* at 819-21.

³² *Id.* at 819-20.

³³ *Id.* at 820-21.

³⁴ *Id.* at 821.

³⁵ *Id.* at 813-14.

³⁶ *Id.* at 829-30.

³⁷ See id. at 836-37 (analyzing dangers Framers sought to address in enacting Confrontation Clause and determining that these concerns require that statements contained in "extrajudicial statements" like affidavits be subjected to Confrontation Clause analysis). For more expansive discussion of the Davis decision and its impact on domestic violence cases, see Sarah M. Buel, Davis and Hammon: Missed Cues Result in Unrealistic Dichotomy, 85 Tex. L. Rev. 19, 20-21 (2007) [hereinafter Buel, Missed Cues].

brazen witness tampering and deny terrified victims a legal remedy. The Court also misguidedly imposed a temporal delineation that gives rise to an unrealistic dichotomy between evidence relating to ongoing emergencies and evidence of past conduct. In *Hammon*, the Supreme Court missed many conspicuous cues and ignored salient facts supporting the trial court's determination that the abuse victim's statements were not testimonial.

In 2008, the Supreme Court granted certiorari in *Giles v. California* to resolve lingering confusion regarding confrontation and offender motives. The *Giles* majority held that even if a batterer kills his victim, he can invoke his confrontation rights to keep her past statements out of the trial unless the state can prove he killed with the intent of preventing her testimony.³⁸ In early September of 2002, Brenda Avie reported to police that her boyfriend, Dwayne Giles, had punched her in the head and face, strangled her, and threatened her with a knife.³⁹ Three weeks later, Giles shot an unarmed Avie six times and then claimed that he acted in self-defense, not intending to kill her.⁴⁰

At trial, the prosecutor introduced Avie's statements to the police, which described Giles's earlier assault, in order to rebut the defendant's self-defense claim and impeach his testimony. Both the California Court of Appeal and California Supreme Court held that Giles's right to confrontation was not violated by admitting Avie's unconfronted statements at Giles's trial because *Crawford* recognized a doctrine of forfeiture by wrongdoing. The California courts concluded that Giles had lost the right to confront Avie because his intentional killing made her unavailable to testify.

After the case was appealed to the Supreme Court, Justice Scalia invoked sweeping originalist claims in his majority opinion to buttress

³⁸ Giles v. California, 128 S. Ct. 2678, 2687-88, 2693 (2008) (holding that theory of forfeiture by wrongdoing is not exception to Sixth Amendment's confrontation requirement because it was not exception established by Framers).

³⁹ *Id.* at 2681-82.

⁴⁰ *Id.* at 2681 ("One wound was consistent with Avie holding her hand up at the time she was shot, another was consistent with her having turned to her side, and a third was consistent with her having been shot while lying on the ground. Giles fled the scene after the shooting. He was apprehended by the police about two weeks later and charged with murder.").

⁴¹ Id. at 2681-82.

 $^{^{\}rm 42}$ $\it Id.$ at 2682 (noting that Avie's statements were admitted under Cal. EVID. CODE Ann. \S 1370 (West Supp. 2008), which permits out-of-court statements describing threats and physical injury when declarant is unavailable to testify at trial and prior statements are considered trustworthy).

⁴³ Id.

the Court's decision requiring lower courts to specifically address the defendant's intent in killing Avie.⁴⁴ Although Justice Scalia had acknowledged in *Davis* that domestic violence is "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial,"⁴⁵ this recognition is noticeably absent from his final formulation of a confrontation paradigm. Justice Scalia held that it was necessary to vacate the California Supreme Court's *Giles* ruling⁴⁶ because the Sixth Amendment's Framers did not recognize a forfeiture exception absent specific intent to silence.⁴⁷

The *Giles* Court acknowledged that "[t]he absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them." In a majority opinion imbued with the rhetoric of originalism, the Court required the state to prove with what purpose the offender acted, but did not clarify the evidence needed to substantiate that the offender "expressed the intent" to silence a witness. In this Article, I urge that offender conduct causing an IPV victim not to testify should result in forfeiture of the right to confront his accuser, as referenced in *Crawford*, Davis, 2 and Giles, 3 but not be given the stature intended by the Framers in those cases.

Rarely are abusers held responsible, precisely because their victims are too frightened to testify about both the initial crime and subsequent witness tampering. Based on prior harm, victims understand, all too well, the likelihood of batterers' threats being realized.⁵⁴ As a result, witness tampering persists, with victims, legal scholars and practitioners alike lamenting the paucity of options and

⁴⁴ Id. at 2683-84.

⁴⁵ Davis v. Washington, 547 U.S. 813, 832-33 (2006).

⁴⁶ The California Supreme Court held that the right to confrontation can be forfeited even if the defendant had not "specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable." People v. Giles, 55 Cal. Rptr. 3d 133, 144 (2007).

⁴⁷ See Giles, 128 S. Ct. at 2693.

⁴⁸ Id. at 2686.

⁴⁹ See *infra* Part I.B for discussion of the historical conceptions of confrontation.

⁵⁰ Giles, 128 S. Ct. at 2693.

⁵¹ Crawford v. Washington, 541 U.S. 36, 62 (2004) (affirming that rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds but does not purport to be alternative means of determining reliability).

⁵² Davis v. Washington, 547 U.S. 813, 831-33 (2006).

⁵³ Giles, 128 S. Ct. at 2678; see also id. at 2695 (Breyer, J., dissenting).

 $^{^{54}}$ See People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *31-32 (N.Y. Sup. Ct. Apr. 7, 2003) (explaining that victims accurately perceive high likelihood of batterers carrying out their threats, given past abuse following threats).

the law's sparse enforcement. The immediate result of successful witness tampering is that the victim opts not to testify against the menacing abuser. Moreover, after *Crawford*, *Davis*, and *Giles*, it is far more difficult for prosecutors to prove their cases absent the victim's in-court testimony.⁵⁵

Indeed, batterers are not only incentivized to make their victims unavailable, but are now rewarded for doing so. Although Justice Scalia recognized this state-created danger, it is puzzling that in all three decisions he appears to identify the peril, but not to offer a realistic remedy. 56 Justice Scalia's restricted standard in Giles brought renewed focus to the issue of mens rea when he said that if a defendant's prior abuse "expressed the intent" to prevent a victim's testimony, that evidence may be admissible "where such an abusive relationship culminates in murder."⁵⁷ Thus, prior to *Giles*, conceptions of witness tampering focused solely on those acts committed after the charged crime but before a court proceeding. In Giles, Justice Scalia acknowledged that the defendant's previous harm can substantially contribute to silencing a victim. However, under a more just conception of the law, the forfeiture doctrine must presume admission of all conduct indicating the offender's intent to silence the witness, including conduct in nonhomicide cases, to fulfill its normative and doctrinal purpose.⁵⁸

Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse, in Woman Battering: Policy Responses* 102 (Michael Steinman ed., 1991) (stating that "[m]any victims who become witnesses in criminal cases against their abusers are subject to threats, retaliation, and intimidation to coerce their noncooperation with prosecutors"); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence,* 8 Yale J.L. & Feminism 359, 367 (1996) (stating that victims do not cooperate with prosecution in 80% to 90% of domestic violence cases); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768-69 (2005) (citing research finding that between 80% and 90% of domestic violence victims recant or refuse to participate in prosecution, and stating that "[t]he reasons why victims refuse to cooperate with the prosecution are manifold, but chief among them is the risk of reprisals by the batterers").

⁵⁶ See David Alan Sklansky, Anti-Inquisitiorialism, 122 HARV. L. REV. 1634, 1691 (2009) (arguing that in its recent confrontation cases, Court has "almost entirely avoided" discussion of purpose of confrontation and when, specifically, it should be required).

⁵⁷ Giles, 128 S. Ct. at 2693.

⁵⁸ See Deborah Tuerkheimer, Forfeiture After Giles: The Relevance of "Domestic Violence Context," 13 Lewis & Clark L. Rev. 711, 722-26 (2009) [hereinafter Tuerkheimer, Forfeiture After Giles] (discussing "non-lethal domestic violence" and including pre- and post-incident conduct).

The practices in most courts do not reflect an awareness of domestic violence dynamics when faced with offenders who have unlawfully silenced their victims. ⁵⁹ Batterers often successfully shift the attention from themselves to the victim's conduct, mischaracterizing recantation and refusal to participate in prosecutorial proceedings as indicative of fabrication or stupidity. ⁶⁰ Victim blaming has proven an effective weapon in the offender's arsenal, allowing the batterer to skillfully reframe his violence away from the crime on which the court should be focused and, instead, onto the victim's agency interfering with orderly case handling. ⁶¹

This Article illuminates the law on witness tampering and the largely failed application of forfeiture as a remedy in intimate partner violence cases. It offers two main arguments: first, the forfeiture doctrine's application in IPV cases has been woefully inadequate; and second, there is an immediate need to clarify the "intent-to-silence" calculus. The forfeiture doctrine advances significant jurisprudential and public policy interests, in part by furthering what one court characterized as "the truth-seeking function of the adversary process, allowing factfinders access to valuable evidence no longer available through live testimony." The loss of a victim's statements as a result of witness tampering is often fatal for the case because the typical batterer has ensured that insufficient corroborative evidence exists — such as 911 calls, medical records, additional witnesses, forensic corroboration, and police or emergency personnel testimony on victim injuries — to sustain a conviction.

Despite concise remedial statutes, identification of applicable constitutional rights, impressive reforms, and common law precedent, domestic violence remains a ubiquitous problem.⁶⁵ IPV programs

⁵⁹ See Melanie Randall, Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law, 23 St. Louis U. Pub. L. Rev. 107, 108 (2004) (describing, with regard to recanting or "uncooperative victims," "fundamental discordances between the way in which domestic violence is understood and processed in criminal justice system and the way in which it is lived and negotiated in the context of assaulted women's lives").

⁶⁰ See id. at 137.

⁶¹ Id.

⁶² See Victim and Witness Protection Act of 1982, Pub. L. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C.A. § 1512 (West 2008)) ("Under current law, law enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated.").

⁶³ Commonwealth v. Edwards, 830 N.E.2d 158, 167 (Mass. 2005).

 $^{^{64}}$ See supra note 12 (discussing author's experience).

⁶⁵ According to the Department of Justice, family violence constituted 11 percent of

perpetually cope with underfunding and crippling budget cuts.⁶⁶ Survivors regularly face apathetic police responses and court decisions rife with distorted logic and blatant disregard for their safety.⁶⁷ This continuing struggle highlights the system-imposed limitations of legal rights when confronted with deeply entrenched cultural norms that absolve batterers of culpability for their crimes. The community, however, cannot internalize full support for IPV victim's rights unless the legal paradigm is coherent and committed to both formal *and* substantive equality.

Part I of this Article explicates the doctrine of forfeiture by wrongdoing, discussing the historical conceptions of confrontation, its premise, and why most current interpretations are underdeveloped. Part II unpacks the crime of witness tampering, its current paradigm, and why present interventions are problematic. In discussing the impact of the *Crawford*, *Davis*, and *Giles* decisions, the Article reveals a systemic community- and court-based backlash against IPV survivors and explains the otherwise incomprehensible practices imperiling victims. Because batterers are typically successful in employing both violent and nonviolent coercion to intimidate victims from testifying against them, the crisis is worsening.

all reported and unreported violent crimes, 10.1 percent of all aggravated assaults, and nearly a quarter of all murders between 1998 and 2002. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1, 8 (2005), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf.

66 Professor Linda J. Bilmes, former chief financial officer at the Commerce Department and professor at Harvard University's Kennedy School of Government, and Professor Joseph E. Stiglitz, former chairman of the Council of Economic Advisors, recently estimated that the Iraq war will ultimately cost the United States at least \$3 trillion. Linda J. Bilmes & Joseph E. Stiglitz, The Iraq War Will Cost Us \$3 Trillion, and Much More, WASH. POST, Mar. 9, 2008, at B1. On the other hand, President Bush's proposed 2009 budget cut \$120 million from life-saving domestic violence programs funded by the Violence Against Women Act ("VAWA"). This cut constituted one third of VAWA funding. In addition, President Bush's proposed budget eliminated the \$2 billion balance in the Victims of Crime Act ("VOCA") Fund, a non-taxpayer-funded resource that served more than three million crime victims each year, including victims of domestic violence, sexual assault, terrorism, and mass violence like that of September 11. Press Release, Nat'l Network to End Domestic Violence, President Bush Requests Funding Cuts that Endanger Domestic Violence Victims (Feb. 5, 2008), available at http://www.reuters.com/article/pressRelease/ idUS220573+05-Feb-2008+PRN20080205.

⁶⁷ See, e.g., Town of Castle Rock v. Gonzales, 545 U.S. 748, 761-62 (2005) (holding that although Colorado law specifically requires that police officer "shall use every reasonable means to enforce" protective order, this language permits officer discretion); see also Randall, supra note 59, at 107-08 (stating that legal responses to IPV victims are problematic, in part because of "distorted representations of the nature, causes, and effects of that violence").

To eliminate much of the current legal confusion, Part III argues for creating a robust forfeiture doctrine that courts can more fairly apply. To remedy batterers' toxic success with witness tampering, I propose adopting Justice Souter's position in *Giles* that evidence of a "classic abusive relationship" should meet forfeiture's requisite intent-to-silence element. In examining the present limited-versus-proposed-expansive vision of forfeiture, I offer a nuanced analysis of the intent-to-silence calculus, addressing case factors that should be deemed dispositive. These factors include witness tampering during the pendency of a legal proceeding, presence of a protective order, murder, recantation, mixed purpose, prior abuse, and the necessity of considering context. This is not a trivial proposal, but one that reflects my goal to change the prevailing rhetoric that deems a defendant's confrontation rights as absolute, even in the face of centuries-old common and statutory law recognizing the forfeiture doctrine.

This Article concludes by arguing that preserving the defendant's Sixth Amendment right to confrontation should not mean extinguishing the victim's right to be secure in her person, free from violence and tyranny. ⁶⁹ I emphatically support the right of confrontation and see a more muscular forfeiture doctrine as adding necessary nuance to the intended scope of the Sixth Amendment. In the calculus of justice for IPV survivors, the legal system must not further postpone reforms that address systemic inadequacies. The astonishingly high rates of IPV case dismissals due to offender misconduct demand a rethinking of the structural, cognitive, and psychological basis of the witness tampering-forfeiture paradigm.

I. FORFEITURE AS INTENDED REMEDY

The doctrine of forfeiture by wrongdoing predates the Constitution. Its equitable foundation lies in not permitting the accused to benefit from his misconduct and encompasses coercion that thwarts IPV victims from truthfully testifying against their perpetrators.⁷⁰ Judge

⁶⁸ Giles v. California, 128 S. Ct. 2678, 2695 (2008); see infra Part III.D.

⁶⁹ See Jane Maslow Cohen, Regimes of Private Tyranny: What Do They Mean to Morality and the Criminal Law?, 57 U. PITT. L. REV. 757, 773 (1996) (describing IPV batterers as fitting schema of tyrants who use violence and extreme control to achieve compliance).

⁷⁰ See generally Crawford v. Washington, 541 U.S. 36, 62 (2004) (stating that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"); Reynolds v. United States, 98 U.S. 145, 158-59 (1878) (finding that if witness is not present due to defendant's wrongdoing, "he cannot complain if competent evidence is admitted to supply the place of that which

Jeffrey Atlas affirmed its sound social policy basis in *People v. Santiago*, a case in which a particularly violent batterer terrorized, coerced, and controlled his girlfriend over a ten year period: "No class of cases seems more worthy of the protections afforded by the public policy which dictated this evidentiary rule [of forfeiture by wrongdoing] than matters involving domestic violence."71 Santiago demonstrates that at least some courts are acknowledging not only the prevalence of witness tampering in IPV cases, but also the apt fit of forfeiture analysis in these matters.⁷² Although higher courts reiterate that it is "well established, as a matter of [s]imple equity" and "common sense" that the right to confrontation is forfeited if the defendant has "wrongfully procured the witnesses' silence through threats, actual violence or murder,"73 lower courts face the impractical requirements of the present approach to forfeiture. These burdensome procedural demands imperil the legal framework for abuse prevention and offender accountability.

Current interpretations of the forfeiture doctrine require an often unrealistic, rare confluence of empowered, tenacious survivors and engaged state actors if victims are to access such legal remedies.⁷⁴ In an archetypal case in which I was involved as counsel, Mary S. had been brutally beaten by her ex-husband, John, throughout their marriage, including during each of her three pregnancies, and even post-divorce while a protective order was in place.⁷⁵ Soon after Mary was forced to let the protective order lapse because she could not afford to miss any

he has kept away"); *id.* (stating that "[t]he [forfeiture] rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong").

h

⁷¹ People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *51 (N.Y. Sup. Ct. Apr. 7, 2003). In this forfeiture hearing, the prosecutor sought admission of a battered woman's out-of-court and grand jury testimony alleging ten years of severe violence by her common law husband. The judge found that because the defendant's blatant witness intimidation caused her recantation, the victim's prior statements would be allowed at trial under the doctrine of forfeiture by wrongdoing. *Id.*

⁷² See State v. Wright, 701 N.W.2d 802, 814 (Minn. 2005) ("[P]erpetrators of domestic violence frequently intimidate their victims with the goal of preventing those victims from testifying against them. Thus, a forfeiture by wrongdoing analysis is particularly suitable for cases involving domestic violence.").

⁷³ United States v. Stewart, 485 F.3d 666, 670 (2d Cir. 2007) (quoting United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001)).

 $^{^{74}}$ Witness tampering is also a serious problem in gang, organized crime, and other criminal matters, but it is beyond the scope of this Article to stray from the focus on intimate partner violence cases.

⁷⁵ Mary S. is a pseudonym for a former client of mine, with supporting documentation on file. I have assisted this survivor in obtaining three successive protective orders over the past eight years.

more work to attend yet another hearing, her ex-husband broke into her home and assaulted her as she tried to call the police. He smashed her cell phone and fled, telling her and their children that they had better not report him or he would return to "finish the job." Because Mary was terrified of increased violence, she did not call the police until John later slashed her car tires, stalked her at all hours, and screamed threats at her from the street. Although the prosecutor initially subpoenaed several neighbors and me to testify, he later said that the case would not go forward because Mary was too afraid to testify due to John's threats of retaliation if she did so. ⁷⁶

I explained forfeiture doctrine to the prosecutor, but he assured me that, after Davis, the judge would allow neither Mary's statements to the police nor any witness testimony about prior abuse to be introduced at trial.⁷⁷ Subsequently, Mary's depression worsened as her nine-year-old daughter began bedwetting and her twelve-year-old son was suspended from school for assaulting other children and his teacher. After the Attorney General's Office told John he would have to pay child support, Mary saw John throw a large rock through her living room window, after which he and his girlfriend raced off in a new truck.⁷⁸ Mary cried as she explained the history of abuse to yet another police officer, adding that the abuse would only worsen if she testified against John. As the officer prepared to leave, Mary's six yearold son asked if he could borrow the officer's gun. When the officer asked why he wanted the gun, the child replied, "I need to scare my Daddy from hurting us anymore. Nobody else will stop him, but I can." The young police officer said to me, "Ma'am, you need to fix these laws. Look what this guy is allowed to get away with as long as he keeps them scared enough!"79

⁷⁶ I was subpoenaed because I had witnessed the defendant bump her car on the highway while she had the children inside, and, on several occasions while on the phone with the client, I heard the defendant screaming at her through a closed door.

⁷⁷ See Davis v. Washington, 547 U.S. 813, 822 (2006) (delineating nontestimonial statements as those made when "the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency" and noting that statements are testimonial when "there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

⁷⁸ Adding insult to the very real injuries, John, like so many batterers, refused to pay child support yet sported a new truck and worked full time.

⁷⁹ The officer told me that this case changed how he saw domestic violence. He wrote a ten-page incident report, carefully chronicling the full history of abuse and including the impact of system inaction. I wrote a letter to his chief commending the officer's empathic response, professionalism, and willingness to do all in his power to improve the safety of Mary and her children.

Mary's case epitomizes the conundrum faced by those seeking to bring IPV cases forward and prevent ongoing abuse as relentless offenders intimidate witnesses with seeming impunity. Current interpretations of the forfeiture doctrine are unlikely to bring relief because many victims are understandably too scared to testify. In *Giles*, Justice Scalia made clear that in order to trigger a forfeiture claim, the state must prove that when the defendant committed the offense rendering the witness unavailable, the accused intended to deter the victim from testifying in a legal proceeding. Seemingly consistent with basic criminal law requirements for proof of mens rea prior to conviction, this narrow reading ignores the need for a more nuanced analysis of intent, at least in cases involving current or former intimate partners.

This Part first reviews the formal interpretation of forfeiture, and then examines historical conceptions of confrontation that arguably do not comport with those of the *Giles* majority. The final section urges that intervening professionals can — and should — dramatically improve case outcomes by performing due diligence. By relying on rigid originalist claims, the Court not only stymies progress in protecting victims, but also forgoes a chance to clarify the powerful role of courts and communities in reimagining IPV as a crime.

A. Doctrinal Premise of Forfeiture

When defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.

Justice Antonin Scalia⁸²

To determine whether forfeiture is an available remedy, most states require an evidentiary hearing, outside the presence of a jury, in which the prosecutor must prove four elements: (1) unavailability of the declarant;⁸³ (2) the defendant's intent to silence the witness with his

⁸⁰ Giles v. California, 128 S. Ct. 2678, 2693 (2008).

Mens rea, in Latin meaning "guilty mind," refers to the mental state necessary to prove intent to commit a crime. BLACK'S LAW DICTIONARY, *supra* note 5, at 1006-07 (defining mens rea as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness").

⁸² Davis, 547 U.S. at 833.

⁸³ The state must demonstrate that it made reasonable efforts to bring the witness to court. *See, e.g.,* People v. Dement, 661 P.2d 675, 681 (Colo. 1983) ("Unavailability

actions;84 (3) knowledge that the witness had sought to or had reported the crime, was to be a witness, or both; and (4) that the offender was the cause of the declarant's absence.85 In dicta, the Davis Court specified that it took no stance on the necessary standard of proof required, but instead cited federal courts' use of the preponderance of the evidence standard and noted state courts' general adherence to the same.86 Some states require a clear and convincing standard, notably Washington and New York.87

In their concurrence in Giles, Justices Souter and Ginsburg were troubled by what they called "near circularity" when the court decides both whether the accused committed the underlying crime (here, murder) and simultaneously whether he is guilty of witness tampering.88 In nearly all cases, however, separate proceedings — with different standards of proof — are held to determine if forfeiture applies, and then, whether this defendant is guilty of the underlying offense. Professor Richard Freidman pointed out that for some time it has been standard procedure for the state to argue that evidence should be admissible when it offers proof of a defendant's attempts to further the conspiracy for which he is being charged.⁸⁹ If a judge is

'in the constitutional sense' is established by the prosecution when good faith, reasonable efforts have been made to produce the witness without success."); see also Deborah Tuerkheimer, Crawford's Triangle: Domestic Violence and the Right of Confrontation, 85 N.C. L. REV. 1, 49-51 (2006) [hereinafter Tuerkheimer, Crawford's Triangle] (noting necessity of sworn testimony to find unavailability).

- 84 Of note, Hawaii does not require specific intent to silence within its now statutorily codified Rules of Evidence. See HAW. REV. STAT. § 626-1, Rule 804 (2009) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (7) Forfeiture by wrongdoing. A statement offered against a party that has procured the unavailability of the declarant as a witness[.]").
- 85 See infra Appendix (listing every state, territory and the District of Columbia's witness tampering, retaliation, bribery and forfeiture laws). But see United States v. Dhinsa, 243 F.3d 635, 656 (2d Cir. 2001) (finding that although trial courts may be required to "hold an evidentiary hearing prior to the admission of the challenged witness statements," "failure to do so may constitute harmless error" if witness tampering is established).
 - 86 Davis, 547 U.S. at 833.
- 87 See People v. Geraci, 649 N.E.2d 817, 822 (N.Y. 1995) (mandating application of clear and convincing evidence standard to prove that defendant's conduct resulted in witness's unavailability); State v. Mason, 162 P.3d 396, 404-05 (Wash. 2007) (requiring clear and convincing evidence establishing that accused's wrongdoing has caused unavailability of declarant).
- 88 Giles v. California, 128 S. Ct. 2678, 2694 (2008) ("Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying.").
- 89 Richard D. Friedman, Giles v. California: A Personal Reflection, 13 LEWIS & CLARK L. REV. 733, 736 (2009).

persuaded that the accused is guilty of witness tampering, the judge then permits the witness's statements to be heard by the jury but does not proclaim the decision to them.

Much case law supports the principle that the forfeiture-by-wrongdoing exception permits admission of missing witnesses' statements in trials for crimes against them, as well as in trials charging defendants for the underlying offenses about which they worried that murdered witnesses would testify. This concept of reflexive forfeiture should apply in murder and nonhomicide cases alike based on principles of equity. As courts have stressed for over a century:

[This] question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce 91

Although its purpose is to protect the accused in criminal cases, 92 the Sixth Amendment right to confront one's accuser is not without exception and must flex to accommodate compelling rule of law concerns. 93 A defendant's own disruptive behavior, absence from trial, misconduct, or instigation of a witness's unavailability for trial may

⁹⁰ See FED. R. EVID. 804(b)(6); United States v. Thevis, 665 F.2d 616, 627-33 (5th Cir. 1982) (permitting murder victim's previous testimony when one of three counts against defendant was for murdering that victim); see also United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005) (finding that by murdering his wife, defendant forfeited right to confrontation in trial for that murder); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999); United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997) (deciding that, although it was relevant that defendant's intent was to prevent witness's testimony, this finding was not essential); United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) (ruling that defendant who killed undercover federal agent during arrest lost his right to cross-examine that agent by murdering him); United States v. Honken, 378 F. Supp. 2d 970, 992 (N.D. Iowa 2004); cf. United States v. Lentz, 282 F. Supp. 2d 399, 426-27 (E.D. Va. 2002) (not allowing reflexive application of forfeiture although government asserted that defendant murdered victim to ensure she could not testify in divorce proceeding).

⁹¹ Diaz v. United States, 223 U.S. 442, 458 (1912).

⁹² United States v. Flores, 985 F.2d 770, 781 (5th Cir. 1993) (explaining that while "the hearsay rules operate in civil as well as criminal proceedings[,] . . . the Confrontation Clause applies only in criminal prosecutions and protects only the accused").

⁹³ See State v. Alexander, 755 A.2d 868, 874 (Conn. 2000); State v. Jarzbek, 529 A.2d 1245, 1252 (Conn. 1987); State v. Wegman, 798 A.2d 454, 462 (Conn. App. Ct. 2002), cert. denied, 806 A.2d 1058 (Conn. 2002).

constitute a waiver of this right.⁹⁴ Courts have been clear that defendants must not be allowed to benefit from their unlawful witness tampering, whether achieved by threats, chicanery, violent assaults, or murder.⁹⁵ To reward batterers for their deleterious crimes is counter to the very essence of equitable law.⁹⁶

B. Historical Conceptions of Confrontation

Increasingly, scholars are questioning both longstanding and newly created assumptions about confrontation, 97 with *Crawford*, *Davis*, and *Giles* offering surprisingly little guidance on its purpose. In *Crawford*, Justice Scalia offered that the "ultimate goal" is to admit only reliable evidence, 98 while in other cases, he emphasized the symbolic importance of "face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' "99 Contrary to Justice Scalia's originalist assertions, the Framers of the Confrontation Clause left few clues as to its mandates, with previous Justices noting that it comes to us "on faded parchment." Yet John Henry Wigmore asserted that cross-examination was the critical and necessary purpose of confrontation; the Supreme Court has since adopted this position as its own. 101

⁹⁴ See State v. Jarzbek, 529 A.2d 1245, 1252 (R.I. 1987); see also United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982).

⁹⁵ See Thevis, 665 F.2d at 630-31 (murder); United States v. Balano, 618 F.2d 624, 628-29 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980) (threats); United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976), cert. denied sub nom., Hofstad v. United States, 431 U.S. 914 (1977) (same); United States v. Mayes, 512 F.2d 637, 650-51 (6th Cir. 1975), cert. denied, 422 U.S. 1008 (1975) (chicanery).

⁹⁶ See Mastrangelo, 693 F.2d at 272-73 ("Any other result would mock the very system of justice the confrontation clause was designed to protect."); see also State v. Altrui, 448 A.2d 837, 844 (Conn. 1982) ("Though justice may be blind it is not stupid.").

⁹⁷ Sklansky, *supra* note 56, at 1638 n.22 (citing five scholarly articles critical of such assumptions about American criminal procedure); *see also* Roger C. Park, *Is Confrontation the Bottom Line*?, 19 REGENT U. L. REV. 459, 466 (2007) (noting that Court appears to be saying that "the purpose of confrontation is confrontation").

⁹⁸ Crawford v. Washington, 541 U.S. 36, 61 (2004); *see also* Giles v. California, 128 S. Ct. 2678, 2692 (deeming role of Confrontation Clause to be ensuring that only "reliable and admissible" evidence convicts defendant).

⁹⁹ Sklansky, *supra* note 56, at 1655 (citing Coy v. Iowa, 487 U.S. 1012, 1017 (1988)).

See id. at 1643 (citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988)); accord Richard
 D. Friedman, Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011, 1022 (1988); Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 RUTGERS L.J. 77, 77 (1995).

¹⁰¹ See Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986); Delaware v.

Writing for a splintered court in Giles, 102 Justice Scalia traversed the historical terrain he covered in Crawford and Davis, analyzing treatises and common law103 while locating the absence of cases on point as indicative of the Framers' assent. 104 Justice Brever, dissenting, countered by stating that "I know of no instance in which this Court has drawn a conclusion about the meaning of a common-law rule solely from the absence of cases showing the contrary — at least not where there are other plausible explanations for that absence." ¹⁰⁵ Justice Souter's concurrence, joined by Justice Ginsburg, addressed why the rhetoric of originalism did not square with today's recognition of domestic violence:

The historical record . . . simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example the forfeiture rule operating of circumstance. 106

Imposing originalist analysis on the Confrontation Clause, and thereby the forfeiture doctrine, seems further ill advised because of the nascent state of evidence law when the Sixth Amendment was drafted. 107 At the Giles oral argument, Justices Kennedy and Breyer noted that given the array of witness restrictions in place during the Founding era, the Giles case would not have been heard at that time. 108 In that era, the categories of those unable to testify included spouses,

Fensterer, 474 U.S. 15, 19-20 (1985); Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Sklansky, supra note 56, at 1644.

¹⁰² Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia's opinion, with Justices Souter and Ginsburg joining in part, thus producing five separate opinions. Giles, 128 S. Ct. at 2681.

¹⁰³ Id. at 2683-84.

¹⁰⁴ Id. at 2684-86.

¹⁰⁵ Id. at 2702.

¹⁰⁶ Id. at 2694-95.

¹⁰⁷ See Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. PA. L. REV 1171, 1208 (2002) (stating that when Confrontation Clause was adopted, evidence law as whole, and hearsay specifically, was not well developed). See generally Thomas Y. Davies, What Did the Framers Know, and When Did They Know It?: Fictional Originalism in Crawford v. Washington, 71 Brook. L. Rev. 105, 107 (2005) (arguing that claims attributed to Framers' intent are not "validly derived from history").

¹⁰⁸ Transcript of Oral Argument at 10-11, Giles, 128 S. Ct. 2678 (No. 07-6053), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-6053.pdf.

children, atheists, "interested persons" in a case, and convicted felons. ¹⁰⁹ Because domestic violence was not viewed as a crime, the archetypal Confrontation Clause case involving prior statements to police by a recanting victim was not within their realm of possibility. ¹¹⁰

Justices Souter and Ginsburg insisted that the presence of domestic violence gives rise to an inference of intent to silence. Because Justices Souter and Ginsburg were critical members of the majority, a state seeking to introduce an unavailable victim's previous statements should be able to successfully invoke their — the Souter-Ginsburg — argument. Professor Deborah Tuerkheimer convincingly argued, "At least in 'the classic abusive relationship,' the Court's rule effectively allows forfeiture to be presumed without a specific inquiry into the defendant's intent." Although Justice Scalia did not reference this Souter-Ginsburg test, he recognized that domestic violence perpetrators, through their abuse, often intend to prevent victims from accessing help and testifying in criminal cases. Taking the text of Justices Souter and Scalia together, lower courts should permit an absent victim's statements once the prosecutor has provided evidence of prior abuse or a classic abusive relationship.

Professor David Sklansky noted that although the *Giles* majority presumed that out-of-court statements are shunned because they are untrustworthy, the majority could provide no true evidence to substantiate the claim.¹¹⁴ Professors Park and Sklansky argued that this

¹⁰⁹ See Trammel v. United States, 445 U.S. 40, 43-44 (1980) (spouses); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 Mich. L. Rev. 1063, 1113 (1999) (interested persons); see also Transcript of Oral Argument, supra note 108, at 9 (convicted felons).

¹¹⁰ See Myrna Raeder, Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 71 BROOK. L. REV 311, 312 (2005) [hereinafter Raeder, Remember the Ladies and the Children Too]; see also Brief for the Domestic Violence Legal Empowerment and Appeals Project et al. as Amici Curiae Supporting Respondent at 20-23, Giles, 128 S. Ct. 2678 (No. 07-6053), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-6053_RespondentAmCu3DomViolenceLegalOrgs.pdf.

¹¹¹ Tuerkheimer, supra note 58, at 719 (footnotes omitted).

¹¹² *Giles*, 128 S. Ct. at 2693 (stating that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions").

¹¹³ See, e.g., Criminal Law and Procedure — Sixth Amendment — Witness Confrontation — Forfeiture by Wrongdoing Doctrine: Giles v. California, 122 HARV. L. REV. 336, 343 (2008) (arguing that "based on the language from both Justices Scalia and Souter, it is difficult to comprehend a situation in which a domestic violence victim's statements could not be introduced under the 'isolation' theory").

¹¹⁴ See Sklansky, supra note 56, at 1655 (citing Crawford v. Washington, 541 U.S.

stance is problematic because it has resulted in the Court's misguided and vague definition of what constitutes a "testimonial" statement. In Crawford, Justice Scalia rejected the "reliability" standard of Ohio v. Roberts, the declarant was unavailable; and (2) the statements showed "particularized guarantees of trustworthiness" or were considered a "firmly rooted" hearsay exception. The Court then struggled to find a suitable replacement with "testimonial." Scholars have taken issue with the Court's notion that the formality of the setting should be the basis for determining whether statements are testimonial as this is both counterintuitive and absent from early conceptions of forfeiture. Indeed, a more logical approach is to recognize that the more formal the setting, the less likely it is that the state can maneuver with wrongful intent and the more likely resulting statements are reliable.

Professor Richard Freidman offered that instead of applying the confrontation right presumptively to all hearsay statements, the historically supported rule should limit it to those made in expectation of future prosecution. A more coherent doctrine is one in which a domestic violence victim's statements are only deemed testimonial if made with a nefarious intent. An abuse victim who has been terrorized by her partner for a duration may understand that her outcry could become part of the state's case against her batterer, but this in no way impinges on the credibility of her rendition of events.

Regardless of whether statements are made to a police officer or doctor, the investigation should focus on verifying the veracity of those statements, not on discarding all evidence that might help get to the truth. To do so rewards the recidivist offender who has forced his victim to have prior contact with the criminal justice system, making her unwittingly familiar with the process. The judge or jury with a more accurate picture of the incident before them — in the context of the "classic abusive relationship" — can then decide how much

^{36, 61 (2004)).}

¹¹⁵ See id.

¹¹⁶ 448 U.S. 56, 66 (1980).

¹¹⁷ Crawford v. Washington, 541 U.S. 36, 36 (2004).

¹¹⁸ See, e.g., Richard D. Friedman, Giles v. California: A Personal Reflection, 13 Lewis & Clark L. Rev. 733, 736-37 (2009) (noting that Friedman also made this argument in his *Crawford* amicus brief); Sklansky, *supra* note 56, at 1639 (citing Davis v. Washington, 547 U.S. 813, 830, 830-31 n.5 (2006)); see also Park, supra note 97, at 460-61.

¹¹⁹ See Park, supra note 97, at 459-62.

¹²⁰ See Freidman, supra note 100, at 1022.

weight to accord the statements. Historical and current notions of equity require that courts concentrate on the perpetrator's unlawful actions that caused a witness's unavailability, not on whether the victim knows how the legal system works *and* whether the defendant admits intentional obstruction of justice.

Although *Giles* finally acknowledged the crucial role of domestic violence context in assessing forfeiture, it failed to resolve the conflicting textual ambiguities inherent in the insistence that cross-examination is always the best means to discern the truth. Again writing for the majority in *Crawford*, Justice Scalia emphasized that the Confrontation Clause is a substantive guarantee demanding that reliability of evidence be tested "in the crucible of cross-examination." *Crawford*'s citing to Blackstone's *Commentaries* of 1768 and a British historical analysis from 1713 is a stark reminder that domestic violence was neither recognized nor criminalized when those tomes were written. 122 Thus, reliance on their unequivocal determinations of how best to seek the truth is of little use here.

I cannot say with certainty if cross-examination is the best means to truth-finding in other types of cases, but I can attest to its ineffectiveness in domestic violence matters because of batterer coercion and the profound and adverse impact of cumulative trauma. If the primary purpose of the Confrontation Clause is truly to guarantee only that reliable evidence will be presented in court, ¹²³ forcing a terrified IPV victim to face her perpetrator is not the means to achieve that end. Many domestic violence victims are paralyzed with fear at the thought of facing their offenders, and because the courts cannot guarantee their safety, it should surprise no one that they choose the course of action least likely to incur the batterer's retribution.

Because trial court judges serve as the gatekeepers in determining what evidence is admissible, 124 they look to the Supreme Court for

¹²¹ See Crawford, 541 U.S. at 61-62.

¹²² *Id*.

¹²³ Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."); see also Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding ").

See, e.g., Coffin v. State, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994) ("The trial court is the institutional arbiter of whether hearsay is admissible under exceptions to the general rule of exclusion of such testimony.... Thus, whether

guidance on evolving jurisprudential norms. When the Court leaves gaps in definition, analysis, practical application, and explanation, the bench and bar fill them. That five Justices agreed on the relevance of the domestic violence context in determining forfeiture reflects an intuitive logic that ought to change the implementation dynamic.

C. Due Diligence

Forfeiture hearings are a burdensome process for all parties, particularly at the misdemeanor level where high case volume hinders the court's ability to schedule trials, let alone additional hearings, in a timely manner. However, because delays most often benefit defendants in criminal cases, ¹²⁵ this unwieldy process can easily be manipulated to their advantage. Because many victims cannot safely testify against their abusers, diligent prosecutors flag IPV cases to "fast-track" them, including setting an early date for the forfeiture hearing. ¹²⁶ This means that in addition to setting a hearing as quickly as possible, prosecutors oppose continuances as this only gives an offender more time to intimidate witnesses.

Absent a victim's testimony regarding her batterer's witness tampering, the prosecutor can provide the court with documentation ranging from jail phone calls, letters, ¹²⁷ and e-mail or phone messages to eyewitness accounts ¹²⁸ and medical records. ¹²⁹ For example, the Dallas Police Department and the Dallas County District Attorney's

evidence comes in under Rule 804(b)(1) is a question for the trial court to resolve, reviewable on appeal only under an abuse of discretion standard."); Montgomery v. State, $810 \, \text{S.W.2d} \, 372$, $378-79 \, \text{(Tex. Crim. App. 1990)}$ (noting that trial judge has much discretion in deciding what to allow as evidence at trial).

125 See, e.g., Paul Bergman & Sara Berman, The Tactical Advantages of Delay, in The Criminal Law Handbook 224 (11th ed. 2009) ("Prosecution witnesses may forget what they saw and heard, prosecutors lose evidence, and cases simply lose momentum. The older a case, the easier it typically is to negotiate a plea bargain favorable to the defense.").

¹²⁶ See, e.g., Dana Nelson, Travis County Assistant Dist. Att'y, Presentation to Prof. Sarah Buel's Domestic Violence and the Law Class at the University of Texas School of Law (Feb. 26, 2009) [hereinafter Nelson Domestic Violence Class Presentation].

¹²⁷ See, e.g., State v. Gauthier, 941 So. 2d 642, 645-47 (La. Ct. App. 2006) (reporting that defendant repeatedly beat and threatened victim, and that after arrest, he wrote victim several letters threatening to kill her).

¹²⁸ See United States v. Stewart, 485 F.3d 666, 669 (2007). At the defendant's trial, the court admitted evidence from a police detective and several other witnesses that the victim had told them that the man who shot him on July 29, 1999, was the defendant. *Id.*

¹²⁹ See generally Krischer, supra note 6 (offering guidance to prosecutors wanting to prove batterer culpable for victim's unavailability).

_

Office flag high-risk batterer cases to routinely listen to their taped jail phone calls. This has been a fruitful endeavor because those in detention are often determined to convince their victims not to cooperate with authorities. 131

To further aid in expediting forfeiture hearings and trials, training for medical personnel should include recording the perpetrator's identity in their records and fully describing their diagnoses (including a list of injuries and their causes, as well as a diagramed body map). Law enforcement training must also specify the importance of documenting the full history of abuse as a means of creating a paper trail and identifying other potential witnesses. All jail calls should be recorded, with high-risk cases flagged to catch those perpetrators engaging in witness tampering. Finally, victim-witness advocates should be involved in every IPV case to maintain contact with the victim, provide her with ongoing safety planning, and keep the prosecutor informed of past and ongoing abuse.

Importantly, some courts have said that the defendant's actions need not rise to the level of a crime to trigger forfeiture provisions as long as the conduct resulted in the witness being made unavailable to testify. Success in preventing a witness from testifying is also not necessarily a required element of this crime. Federal Rule of Evidence 804(b)(6) requires that the witness's unavailability was procured to trigger forfeiture, but not to secure an underlying witness tampering conviction. In *People v. Henderson*, the defendant appealed his

¹³⁰ Telephone Interview with Cindy Dyer, Director of the Family Crimes Bureau and former Assistant Dist. Att'y, Dallas Criminal Dist. Att'y's Office (June 20, 2007) [hereinafter Dyer, 2007 Interview].

¹³¹ *Id.* A similar program in the Travis County, Texas Sheriff's Department is also yielding taped threats, coercion, and witness tampering. Nelson Domestic Violence Class Presentation, *supra* note 126.

¹³² For example, since 1992 I have provided this training to Harvard Medical and Dental School faculty and all first year medical students, as well as with other medical schools, myriad hospitals, medical associations, and conferences.

¹³³ A number of prosecutor's offices use these taped jail calls to document witness tampering by incarcerated batterers. *See*, *e.g.*, Nelson Domestic Violence Class Presentation, *supra* note 126 (describing convictions she has obtained using jail phone calls to IPV victims); *see also* Dyer, 2007 Interview, *supra* note 130 (describing same).

¹³⁴ See supra note 12 (describing author's experience).

¹³⁵ See, e.g., People v. Salazar, 688 N.Y.S.2d 401, 404 (Sup. Ct. 1999) (noting that, in domestic violence relationships, "the potential for abuse and manipulation of the complainant and the Criminal Justice System itself is great as the accused may exert power and control over his or her partner" and that "[c]onduct that may not rise to criminal behavior may nonetheless be improper amounting to forfeiture of a right").

¹³⁶ See FED. R. EVID. 804(b)(6) (defining forfeiture by wrongdoing as "[a] statement

convictions for tampering with a witness, intimidating a victim or witness, and criminal solicitation, but the New York appellate court held that, regardless of whether he was successful, it was enough that he attempted to cause fear in the victim to meet the elements of these crimes. In State v. Charger, the South Dakota Supreme Court affirmed a decision holding that a defendant does not have to succeed in convincing a witness to deny information or testimony in order to be found guilty of witness tampering; the overt attempt to do so is sufficient. Similarly, in Navarro v. State, a Texas appellate court found that the crime of witness tampering occurred when a defendant agreed to provide a benefit (money) to a witness with the intent of altering his testimony.

Increasingly, courts admit expert testimony to explain victim behavior that may seem irrational to a layperson, but is, in fact, typical, necessary, and logical when framed within the context of the abusive relationship. Jurors may not understand why a victim stayed with the offender after being beaten, delayed her help-seeking actions (e.g., calling the police or a shelter), or why these attempts failed. ¹⁴⁰ An expert can either describe general characteristics of IPV victims or those specific to the instant case, including whether the survivor speaks English, suffers depression, knows of the available community resources, or lacks the job skills necessary to support her children. ¹⁴¹ An expert can make clear that given evidence of a batterer's far-

offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness"); see, e.g., State v. Charger, 611 N.W.2d. 221, 228 (S.D. 2000) (finding that it is not required that attempt to influence witness be successful).

 $^{^{137}}$ People v. Henderson, 705 N.Y.S.2d 589, 590 (N.Y. App. Div. 1999) (citing N.Y. Penal Law \$\$ 215.11, 215.15[1] (McKinney 1998)).

¹³⁸ Charger, 611 N.W.2d at 228 (noting that prosecutor has to prove only defendant's intent to persuade witness to withhold information and testimony in criminal trial).

¹³⁹ Navarro v. State, 810 S.W.2d 432, 437 (Tex. App. 1991).

¹⁴⁰ Batterers frequently convince victims not to pursue criminal charges or convince them to leave a shelter by promising to reform, only to threaten victims with great harm should they attempt to flee or testify again. The victim may not have initially gone to a shelter because she learned that they were full or did not allow male children over the age of twelve. See generally Sarah M. Buel, Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay, 28 Colo. Law. 19, 20 (1999) [hereinafter Buel, Fifty Obstacles to Leaving] (describing many reasons why victims cannot leave their abusers or take part in criminal prosecutions, including lack of money, job skills, literacy, and self-esteem, as well as batterer's threats, coercion, and manipulation of victim and children).

¹⁴¹ See generally id. (describing myriad impediments to victim's fleeing abusive relationship).

reaching power, an IPV survivor may accurately, and thus reasonably, perceive that her only option is to comply with his demands, thus explaining her absence from court.

Although it is not always feasible, use of an expert can be enormously helpful in forfeiture hearings and in trials to explain the dynamics and impact of abuse. 142 In the Santiago forfeiture hearing, a domestic violence expert elucidated why the victim repeatedly sought police help then returned to her abuser after he alternatingly professed his love and threatened to kill her if she took part in the prosecutions for his violent assaults. 143 Consistent with recommendations of legal scholars, the scope of expert testimony permitted should ensure inclusion of necessary information regarding the circumstances of IPV in the present case. 144 The court's focus can thus be enlarged from criticizing the survivor's behavior to situating it within the rubric of the batterer's patterns of domination, coercion, and abuse. At least some of the legal system's deficient handling of IPV cases derives from ignorance about the dynamics of abusive relationships, a circumstance that experts can help alleviate if given the chance.

II. PREDICATE WITNESS TAMPERING

Despite being the most common crime committed by batterers, 145 witness tampering is the least charged, prosecuted, and sentenced

¹⁴² See Krischer, supra note 6, at 16.

¹⁴³ People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *30-31 (N.Y. Sup. Ct. Apr. 7, 2003).

¹⁴⁴ See Raeder, Remember the Ladies and the Children Too, supra note 110, at 315 (suggesting expansion of expert testimony to allow background regarding domestic violence); see also Tom Lininger, Evidentiary Issues in Federal Prosecutions of Violence Against Women, 36 IND. L. REV. 687, 709 n.76 (2003) [hereinafter Lininger, Evidentiary Issues]; Myrna S. Raeder, The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence, 68 U. COLO. L. REV. 147, 152 (1997); Myrna S. Raeder, The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence, 67 U. Colo. L. Rev. 789, 790 (1996).

¹⁴⁵ See Andrew King-Ries, An Argument for Original Intent: Restoring Rule 801(D)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World, 27 PACE L. REV. 199, 217 (2007) (noting that witness intimidation is "rampant in domestic violence prosecutions"); see also Sally F. Goldfarb, Preconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?, 29 CARDOZO L. REV. 1487, 1511-12 (2008) (citing numerous studies indicating that from 35% to 63% of batterers violate protective orders). It is my experience that those who refuse to obey court orders are highly likely to commit witness tampering against their victims. But because many victims are too terrified to report protective order violations and witness tampering to authorities, closer to 75

offense. As the frequency and severity of the coercive conduct increases, the batterer gains greater control of the court-centric legal process, enabling him not only to subvert the law and avoid sanctions, but also to increase the likelihood of his recidivist harm to the victim. For victims, the consequences of perpetrator intimidation are often so dire that lingering traumatic effects interfere with almost every aspect of their lives.

Reasons that forfeiture is a starkly deficient remedy are at least elevenfold, including (1) far fewer cases being prosecuted;¹⁴⁷ (2) more victims and witnesses unable to testify in trials;¹⁴⁸ (3) a sharp increase in the number of violent offenders going free;¹⁴⁹ (4) escalated rates of domestic violence as offenders avoid sanctions;¹⁵⁰ (5) greater suffering by victims and their children as a result of unchecked recidivism;¹⁵¹ (6) increased costs for law enforcement and the courts, from arrest through case disposition, particularly with repeat batterers;¹⁵² (7) greater law

percent of batterers tamper with witnesses. See supra note 12 (describing author's experience).

- ¹⁴⁷ I believe prosecutions will be more infrequent because: (a) most prosecutors are too busy to hold forfeiture hearings for all felony cases, let alone misdemeanor cases; (b) the court administration will be burdened if judges, prosecutors, defense attorneys, court reporters, and clerks need to take part in a forfeiture hearing in every case of witness tampering; (c) the *Giles* standard further narrows the window through which prosecutors can admit relevant evidence; and (d) many prosecutors have already told me they are overwhelmed by the changing standards and complexity of learning how to conduct a forfeiture hearing on top of the original trial. *See id.* (describing author's experience).
- ¹⁴⁸ See Judicial Oversight Demonstration Initiative, Vera Inst. of Justice, Prosecuting Witness Tampering, Bail Jumping, and Battering from Behind Bars 3 (2006), available at http://www.vera.org/download?file=165/Prosecuting.pdf (describing challenges posed when batterers effectively intimidate witnesses) [hereinafter Prosecuting Witness Tampering]; see also Tom Lininger, Bearing the Cross, 74 Fordham L. Rev. 1353, 1363, 1364 n.61 (2005) [hereinafter Lininger, Bearing the Cross] (stating that, of domestic violence victims who file criminal complaints, about eighty percent eventually refuse to testify or recant their stories).
- ¹⁴⁹ See, e.g., Lininger, Bearing the Cross, supra note 148, at 1366 n.72 (reporting that 76 percent of respondents in Professor Lininger's study said they were more apt to dismiss IPV cases when victim is unwilling to testify).
- ¹⁵⁰ In my thirty-two years' experience, I have found that many offenders are acutely aware of legal system limitations and will engage in the level of abuse permitted by their community. *See supra* note 12 (describing author's experience).
- Adult and child victims suffer a range of adverse reactions to the trauma. *See* Amanda Konradi, Taking the Stand: Rape Survivors and the Prosecution of Rapists 34 (2007) (describing "trauma induced incapacitation" as result of sexual and physical assault).

¹⁴⁶ Supra note 12 (describing author's experience).

See Casey Gwinn & Gael Strack, Don't Buy the Lie that You Can't Afford It, in

enforcement frustration as their crime-scene efforts go for naught; 153 (8) decreased public confidence in the legal system's ability to protect innocent victims;¹⁵⁴ (9) an increased number of youth engaging in delinquent behavior because they grew up learning that violence is an acceptable means to achieve one's ends; 155 (10) higher costs for employers dealing with victim and offender issues relating to safety, retention, and productivity; 156 and (11) an ongoing minimization and denial of victim danger perpetuating centuries of discrimination against women (given the gendered nature of IPV crimes). 157 Such sweeping, injurious impact demands an adequate response, one that affirms a right to safety and dignity as specified in the federal crime victims' bill of rights, stating that they have "the right to be reasonably protected from the accused offender." ¹⁵⁸ The focus must remain on the dual purposes of victim safety and offender accountability, keeping in mind that but for

HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA 73, 81 (2006) (citing statistics stating that, on average, cost per domestic violence arrest is about \$3,241 and \$2,555,793 for homicide).

¹⁵³ See Prosecuting Witness Tampering, supra note 148, at 3 ("Case dismissals create frustration among prosecutors, police officers, judges, and other criminal justice practitioners who may not have specialized training in the issues of domestic violence.").

¹⁵⁴ See Kelly Dedel, U.S. Dep't of Justice, Problem-Oriented Guides for Police: WITNESS INTIMIDATION 4 (2006), available at http://www.cops.usdoj.gov/files/ric/ Publications/e07063407.pdf (describing how community members as well as witnesses themselves see threats against witnesses as credible and as major deterrent to cooperating with police).

¹⁵⁵ See generally Gary Dick, Witnessing Marital Violence as Children: Men's Perceptions of Their Fathers, 32 J. Soc. SERV. RES. 1, 3 (2006) (reviewing studies that have documented that "children exposed to family violence are typically more aggressive, destructive, non-compliant, and more antisocial than children in comparative groups").

¹⁵⁶ See Darcelle D. White et al., Is Domestic Violence About to Spill into Your Client's Workplace?, 81 MICH. B.J. 28, 29 (2002) (citing that in 1990, Bureau of National Affairs reported domestic violence cost American businesses three to five billion dollars per year); Matt Wickenheiser, Domestic Abuse's Workplace Impact Revealed in Study, PORTLAND PRESS HERALD (MAINE), Feb. 18, 2004, at 6C (noting that, in study, 70 of 152 abusers surveyed were absent from work as result of domestic violence arrests, causing 15,222 hours in lost work time, and that "78 percent of offenders used workplace resources — a vehicle, telephone or cellular telephone — to express remorse or anger, check on, or pressure or threaten a victim"); see also Stephanie L. Perin, Employers May Have to Pay When Domestic Violence Goes to Work, 18 REV. LITIG. 365, 369 (1999).

¹⁵⁷ IPV STATISTICS, *supra* note 15, at 1.

¹⁵⁸ 42 U.S.C. § 10606(b)(2) (2006). Additionally, subsection (b)(1) affords "the right to be treated with fairness and with respect for the victim's dignity and privacy" also compromised by offender who intimidates that witness.

the batterer's witness tampering, the case would likely proceed to a more equitable resolution.

This Part addresses foundational witness tampering that necessitates equitable forfeiture. By first analyzing the repercussions of the *Crawford*, *Davis*, and *Giles* cases, I locate the particular harm suffered by IPV victims attempting to navigate a labyrinth of legal and social services to little avail. In then mapping the nuanced terrain of abusive control and multifaceted coercion, an informed, richer concept of typical IPV relationships is evident.

A. The Aftermath of Crawford, Davis, and Giles

With the *Crawford*, *Davis*, and *Giles* cases, the Supreme Court muddied the troubled waters of IPV prosecution, exacerbating the already prolific incidence of witness tampering. ¹⁵⁹ Because IPV victims may be unable or unwilling to testify against their perpetrators, ¹⁶⁰ the ability to convict offenders often turns on the use of hearsay exceptions, usually excited utterances. ¹⁶¹ *Crawford* held that the Sixth Amendment requires an opportunity for confrontation with an unavailable witness when testimonial statements are proffered. ¹⁶² But *Crawford* failed to provide a clear definition of "testimonial"

¹⁵⁹ See Tom Lininger, Reconceptualizing Confrontation After Davis, 85 Tex. L. Rev. 271, 279 (2006) [hereinafter Lininger, Reconceptualizing Confrontation After Davis] (reporting dramatic decrease in domestic violence prosecutions following Crawford and Davis); see also King-Ries, Forfeiture, supra note 6, at 442-43 (noting that witness intimidation is typical in domestic violence prosecutions).

¹⁶⁰ See generally Buel, Fifty Obstacles to Leaving, supra note 140.

¹⁶¹ See GWINN & STRACK, supra note 152, at 112 (explaining that evidence-based prosecutions were means to use hearsay and circumstantial evidence to prove domestic violence case even absent victim's testimony); see also Andrew King-Ries, Crawford v. Washington: The End of Victimless Prosecution?, 28 SEATTLE U. L. REV. 301, 301-02 (2005) (asserting that evidence-based prosecutions are necessary because of abuse victims' typically being unable to testify); Krischer, supra note 6, at 14 (describing application, in domestic violence cases, of evidence-based prosecution); Geettanjli Malhotra, Resolving the Ambiguity Behind the Bright-Line in Domestic Violence Prosecutions, 2006 U. ILL. L. REV. 205, 214 (discussing use of victimless prosecution). Hearsay exceptions are codified in the Federal Rules of Evidence at Rule 803(2) as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." It is similarly included in most state evidence codes or based in case law. See DAVID F. BINDER, THE HEARSAY HANDBOOK: THE HEARSAY RULE AND ITS 40 EXCEPTIONS § 9.2 (2005) (asserting that every state recognizes some form of excited utterance exception, with most following federal rule).

¹⁶² Crawford v. Washington, 541 U.S. 36, 62 (2004).

statements and to indicate the relevance of a defendant's intent in making a witness unavailable. 163

The subsequent *Davis* and *Hammon* cases determined that testimonial statements were those made to an officer post-crisis and in anticipation of future prosecution. This analytic paradigm fails to conflate the dynamics of a typical abusive relationship with legal process. As an abuse survivor seeking police assistance on several occasions, I can verify that the prospect of future prosecution was not ever a consideration. Moreover, in thirty-two years of working with thousands of abuse victims — seven years as a domestic violence prosecutor — I have not heard survivors describe violent incidents in the context of developing a subsequent criminal case but rather in that of their quest for safety. It is flawed psychology that suggests a victim would legitimately call for help, but in the middle of the crisis switch to a manipulative mode, thus tainting her statements and causing them to become testimonial. 165

Ignoring the prolific witness tampering occurring in IPV cases implies that critical contextual analysis is missing — an omission so great that it renders the *Crawford*, *Davis*, and *Giles* trilogy an unworkable albatross for truth-seeking courts. ¹⁶⁶ The devastating impact of these cases is evidenced by prosecutors across the country being forced to dismiss domestic violence cases because batterers have coerced victims not to testify at trial. ¹⁶⁷ In 2008, an assault case against Seattle City Councilmember Richard McIver was dismissed, with the court citing *Davis* as disallowing the wife's statements to police officers immediately after the incident, as well as the officer's description of her demeanor, the crime scene, and the defendant's actions. ¹⁶⁸ After McIver's wife

1.6

¹⁶³ *Id.* at 68.

¹⁶⁴ See supra notes 35-37 and accompanying text.

¹⁶⁵ This is not to say that some people might falsely allege abuse, but, rather, that it should not be assumed that this is the motivation for those seeking police assistance.

¹⁶⁶ The majority decision bespeaks a puzzling unwillingness to formulate a workable forfeiture framework in recognition of batterers' common tactics, given much empirical data documenting typical dynamics of domestic violence relationships and evidenced in *Davis*, *Hammon*, and *Giles*. *See supra* note 12 (describing author's experience); *see also infra* Part II.B-D (describing violent and nonviolent coercive tactics of batterers).

¹⁶⁷ Lininger, *Reconceptualizing Confrontation After* Davis, *supra* note 159, at 272 (citing several sources claiming that it will be more difficult to prosecute domestic violence cases after *Davis* ruling).

Natalie Singer & Jennifer Sullivan, McIver's Domestic Violence Case Dropped, SEATTLE TIMES, Jan. 16, 2008, at A1, available at http://seattletimes.nwsource.com/html/localnews/2004127722_mciver16m.html. As an aside, McIver was appointed to the Seattle City Council in 1997 to fulfill the term of John Manning, a former police

recanted her original assault allegation, McIver commented that "prosecutors had no right delving into my private life." ¹⁶⁹

Rather than relegating the stories of real victims to footnotes, I have intentionally emphasized their narratives in an effort to capture the nuances of terror, coercion, denial, control, and vengeance that typify IPV cases yet rarely find traction in the legal maneuverings of trial and case reporting. Evidentiary rules and statutory constraints often interfere with victims telling their stories in a manner that courts find acceptable. The hope is that survivor narratives can supplant negative stereotypes and inspire substantive reforms based on the reality that their stories evolve over time. The hope officers may repudiate victims versions of events, with some officers declining to arrest the batterers, even those who blatantly violate unequivocal protective orders. As a result, victims may lack official documentation of their abuse, compounding the difficulty of creating

officer who resigned after pleading guilty to domestic violence charges. Id.

 169 *Id.* McIver seems to be saying that he expected an exemption, some special dispensation from criminal laws because the person he assaulted was his wife.

¹⁷⁰ See Deborah Tuerkheimer, Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. CRIM. L. & CRIMINOLOGY 959, 983 (2004) [hereinafter Tuerkheimer, Recognizing and Remedying] ("Given that legal structures significantly distort what would otherwise be the battered woman's 'true' (i.e., extralegal) narrative, we would anticipate that the stories victims are constrained to tell in court would hardly be persuasive to juries."). See generally 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, 32-33 (2004) (describing how abuse victims' stories are minimized: "battered women are told that their fears are groundless, overblown, or concocted to deprive their abusers of their liberty or contact with their children").

¹⁷¹ See Adele M. Morrison, Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor, 39 UC DAVIS L. REV. 1061, 1106-07 (2006) (arguing for need to change how battered women's stories are heard from viewing them with contempt to naming them as heroines for all they have endured).

¹⁷² See Jane C. Murphy, Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform, 21 HOFSTRA L. REV. 1243, 1259, 1268-92 (1993) (arguing that victim narratives have proven effective in enacting legal change in realms of employment and reproductive rights and should be used to instigate reform with domestic violence issues, and noting success of changing state policy by having abuse victims relate their stories to Maryland governor and legislators).

¹⁷³ See Leslie G. Espinoza, Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender, 95 MICH. L. REV. 901, 908 (1997) (discussing survivor stories and their progression with time).

¹⁷⁴ See Goodmark, supra note 170, at 32 ("Client after client has told me how the police refused to arrest their batterers, refused to listen to their stories, and refused to honor their restraining order."); see also supra note 12 (describing author's experience).

a credible prosecution case. Official police, medical, employment, and business records take on added significance when victims are too frightened to testify or have been murdered. A paper trail provides the documentation needed to prove that the perpetrator's pattern of unlawful conduct *expresses the intent to silence* his witness. Because some batterers prevent victims from accessing help, it is particularly important to document the allegations when possible.¹⁷⁵

Because the stories of silenced IPV victims are not reflected in most reported cases, legal scholarship has largely ignored them as well. Two decades ago, Professor Mari Matsuda eloquently argued that new gendered and raced jurisprudence reflected a methodology grounded in the experiences of those previously marginalized and omitted from legal scholarship. By telling victim's stories, we create citable references and we can become agents of reform, hoping to compel courts to admit victims' prior statements when batterers make it too dangerous for us to speak for ourselves. 177

1. Endangered and Discouraged Victims

Crawford's insistence that IPV victims be present to testify gives offenders greater incentive to threaten, coerce, or kill them as a means of ensuring case dismissal. That batterers' witness tampering is such a successful enterprise poses great danger for abuse victims. The

_

¹⁷⁵ See Laura A. McCloskey et. al., Abused Women Disclose Partner Interference with Health Care: An Unrecognized Form of Battering, 22 J. GEN. INTERNAL MED. 1067, 1067 (2007) (finding that among women who had been physically battered in past year, 17% reported that their partner had interfered with their access to health care and that partner interference increased chances of women exhibiting poor health).

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-24 (1989). In calling for criminalization of some kinds of hate speech, Professor Matsuda stated: "The victims' experience reminds us that the harm of racist hate messages is a real harm, to real people. When the legal system offers no redress for that real harm, it perpetuates racism." *Id.* at 2380.

¹⁷⁷ I have previously written about my own mostly negative experiences with legal and social service systems in the course of fleeing my violent ex-husband. *See* Buel, *Fifty Obstacles to Leaving, supra* note 140, at 19; Sarah M. Buel, *A Lawyer's Understanding of Domestic Violence*, 62 TEX. B.J. 936, 939 (1999).

Lininger, Reconceptualizing Confrontation After Davis, supra note 159, at 284-85.

¹⁷⁹ *Id.*; see also Christina Hall, *Domestic Violence Case Took Tragic Turn*, TOLEDO BLADE, Sept. 3, 2006, http://toledoblade.com/apps/pbcs.dll/article?AID=/20060903/NEWS08/609030336/0/NEWS12 (describing case in which, after prosecutor dropped earlier severe assault charges because victim did not appear at trial, even though officers had heard defendant yell at victim, "I will bash your skull in!" and had observed her covered in blood and suffering from fractured facial bones, defendant murdered this victim three months later).

latest data from the U.S. Department of Justice on homicide trends suggest that while fewer men are being murdered by an intimate partner, the corresponding rate for women has held steady for at least two decades and increased in areas lacking sophisticated medical trauma centers. ¹⁸⁰ Victim safety, however, must not be measured solely in terms of homicide rates, for abusers commit a wide range of heinous though nonfatal crimes against their current or former intimate partners.

Largely absent from the world of criminal adjudication are gang members who commit IPV offenses. They are often brutal in their assaults, and are proficient at intimidating their victims and the community. In many of these cases, Baltimore Judge Videtta Brown observed that, first, IPV victims are increasingly younger; second, their batterers are frequently gang-affiliated; and, third, that established IPV resources and research have generally not contemplated such victims. Intimidation is an effective means of silencing gang partner-victims if they are under eighteen, as they are usually unsure of whom to trust and lack access to protective orders.

Although it is beyond the scope of this Article to discuss in detail the means and impact of batterers' use of children in their witness tampering schemes, at least a cursory mention is necessary to comprehend the scope of harm.¹⁸⁴ Children may be deterred from

¹⁸⁰ See James Allan Fox & Marianne W. Zawitz, U.S. Dep't of Justice, Homicide Trends in the United States 41-43, 79-80 (2007), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf (stating that homicides have decreased recently in urban areas, change that can be at least partly attributed to availability of trauma centers in urban areas); Adria Gallup-Black, Rural and Urban Trends in Family and Intimate Partner Homicide: 1980–1999, at 8 (2004), available at http://www.ncjrs.gov/pdffiles1/nij/grants/208344.pdf (citing research suggesting that inadequate medical facilities led many assaults to become homicides in rural areas).

¹⁸¹ See Videtta A. Brown, Gang Member Perpetrated Domestic Violence: A New Conversation, 7 Md. L.J. Race, Religion, Gen. & Class 395, 409 n.150 (2007) [hereinafter Brown, Gang Member Perpetrated Domestic Violence] ("A woman had the word 'snitch' burned into her face with a branding iron in apparent retaliation for helping police in a domestic violence case."); Bart Rubin, Hail, Hail, the Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute, 66 FORDHAM L. REV. 2033, 2051 (1998).

¹⁸² Brown, *Gang Member Perpetrated Domestic Violence*, supra note 181, at 412-13 (citing own experience as former prosecutor). Judge Brown is also the instructor for the Domestic Violence Law Seminar at the University of Maryland School of Law. *Id.*

¹⁸³ See id. at 412 n.161 (stating that many teens are without legal recourse in domestic violence cases "because their relationships do not fall within statutory language"). Note there is now a National Teen Dating Abuse Helpline at 1-866-331-9474 and 1-866-331-8453 TTY.

¹⁸⁴ See Raeder, Remember the Ladies and the Children Too, supra note 110, at 388

reporting IPV abuse because of the perpetrators' continuing intimidation, which offenders sometimes couch in terms of loyalty to the family. Professor Margaret Drew stated that in her twenty-four years of family law practice, the most common witness tampering she has seen is a batterer's manipulation of his children, including telling them that their mother is going to put him in jail and that they will not be able to see him unless she dismisses the charges. The children then relentlessly beg the mother to let Dad come home and not make him suffer in prison until the mother is worn down and decides she cannot testify. The typical offender may also threaten to kill the children or their mother if the case proceeds, and makes unremitting, harassing phone calls to the victim's family, friends, and coworkers, telling her he will only stop if she either returns to him or drops the charges. 188

Other times children witness terrifying violence and are forced into parental rescuer roles, often with harmful consequences. In the North Carolina case of *State v. Thomas*, a mother's ex-boyfriend kidnapped her in front of her young son and nephew, whose call to the police likely saved her life. As is typical in many of the IPV cases I have handled, the previously referenced story of Mary S. is one in which her ex-husband has engaged in ongoing manipulation, threats, and abuse of his three children (and wife) for more than a decade.

Professor Drew also reported that numerous abusers use the court system to intimidate victims by filing (1) false, retaliatory complaints with child protective services, triggering invasive investigations and records for victims, (2) unsubstantiated cross petitions for civil protective orders, (3) unfounded criminal complaints, and (4) baseless civil lawsuits to harass victims into agreeing to dismiss the criminal

_

⁽stating that some perpetrators use threats to silence child victims).

¹⁸⁵ DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, SEXUALLY ASSAULTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 2, 9 (2008), *available at* www.ncjrs.gov/pdffiles1/ojjdp/214383.pdf.

¹⁸⁶ E-mail from Margaret Drew, Professor of Law, to author (July 25, 2009) (on file with author).

¹⁸⁷ Professor Drew also said that she has seen batterers threaten the mother that he would do to the children what he had done to her if she proceeds. *Id.*

 $^{^{188}\,}$ This conduct leads those being contacted by the offender to also put pressure on the victim to "make him stop." $\emph{Id}.$

¹⁸⁹ State v. Thomas, 676 S.E.2d 56, 58 (N.C. 2009). The defendant pointed a gun at the mother, and then raped and maced her. She sustained additional severe injuries when forced to jump from the rapist's moving car as her only means of escape. *Id.* He was convicted of first degree kidnapping and first degree rape. *Id.* at 59.

¹⁹⁰ See supra notes 75-79 and accompanying text.

case. 191 Batterers may say they will kill themselves if the children report the abuse to authorities or testify in court. If victims persist in their quest for safety and justice, perpetrators seek vengeance in means as desperate as slashing victims' tires to prevent court appearances. 192

Survivors are likely to be discouraged from even reporting domestic violence offenses if they experience added obstacles once they turn to the courts for safety. Since the *Crawford-Davis-Giles* rulings, a great number of victims have revealed that their batterers actually explain to them that if they do not appear in court, the case *must* be dismissed. He have dismissed that many courts have opted for dismissal rather than navigating the confusing forfeiture process, offenders are hypermotivated to silence their victims. Thus, even when prosecutors attempt to hold batterers responsible for their crimes, witness tampering can readily sabotage prosecutors' best efforts. Most victims thus view the batterer as victor, for he has successfully manipulated the criminal justice system to ensure she cannot utilize it to achieve safety.

2. Race and Socioeconomic Status

Given that the largest national studies indicate that low-income women of color are disproportionately victimized by intimate

¹⁹¹ E-mail from Margaret Drew to author, *supra* note 186.

¹⁹² Id

¹⁹³ See Lininger, Bearing the Cross, supra note 148, at 1366 (stating that Supreme Court's expansion of confrontation doctrine results in difficulties that will deter victims from reporting abuse); Jeanine Percival, The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington, 79 S. CAL. L. REV. 213, 241 (2005) (noting adverse effect on victims because prosecutors will find it more difficult to bring cases forward); Robert Tharp, Domestic Violence Cases Face New Test: Ruling that Suspects Can Confront Accusers Scares Some Victims from Court, Dallas Morning News, July 6, 2004, at A1 (reporting that result of Crawford is to inhibit victims from turning to courts for help), as cited in Lininger, Reconceptualizing Confrontation After Davis, supra note 159.

¹⁹⁴ See supra note 12 (describing author's experience). One survivor and former client in the University of Texas Domestic Violence Clinic, N.O., stated, "I may have to just move away because he will kill me if I testify, but now the case gets dropped if I don't." Another survivor, R.T., lamented: "Last time I didn't have to testify and they still made him go to counseling and be on probation. But now he is stalking me after the last assault, telling my kids that this time, I don't need to show up because that way the case goes away."

¹⁹⁵ See, e.g., Jeannie Suk, Criminal Law Comes Home, 116 YALE L.J. 5, 47 n.196 (2006) (citing data from one New York district attorney's office).

partners, ¹⁹⁶ it is essential to fashion remedies that specifically address criminal justice system bias and structural inequalities. Absent sufficient financial resources, women of color are further constrained in their efforts to flee abuse. ¹⁹⁷ Those victims who are economically dependent on their batterers are less apt to contact the police or courts for help, ¹⁹⁸ and if they did so initially, would be more likely to later recant under duress.

For Native American IPV survivors, for example, high rates of abuse are often accompanied by risk factors of substance abuse, mental illness, isolation, and extreme poverty. If the perpetrator is Native American and has committed an offense within the federal Major Crimes Act ("MCA") in Indian Country, the local U.S. Attorney's Office has jurisdiction over the case. The General Crimes Act gives the federal courts jurisdiction if the offense is not listed in the MCA and either the victim or defendant is Indian. Tribal courts have exclusive jurisdiction when both victim and offender are Native American and can handle misdemeanor cases against Indians as well as those felonies not specified in the MCA. When tribal courts do

-

¹⁹⁶ Matthew J. Breiding et al., *Prevalence and Risk Factors of Intimate Partner Violence in Eighteen U.S. States/Territories*, 2005, 34 Am. J. Prev. Med. 112, 114 (2008) (describing by race, age, income and education prevalence rates for intimate partner violence and reporting substantially higher rates of victimization against women of color and those of lower income); *see* Susan F. Grossman & Marta Lundy, *Domestic Violence Across Race and Ethnicity, Implications for Social Work Practice and Policy*, 13 VIOLENCE AGAINST WOMEN 1029, 1031 (2007) (same); *see also* Raul Caetano et al., *Intimate Partner Violence, Acculturation, and Alcohol Consumption Among Hispanic Couples in the United States*, 15 J. INTERPERSONAL VIOLENCE 30, 31 (2000) (reporting that when socioeconomic status ("SES"), husband's occupation, and employment status are considered, some research suggests that racial disparities in IPV rates disappear).

¹⁹⁷ Grossman & Lundy, *supra* note 196, at 1032 (discussing significant impact of poverty on battered women of color and citing empirical studies).

¹⁹⁸ See Ruth E. Fleury, Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System, 8 VIOLENCE AGAINST WOMEN 181, 200 (2002).

¹⁹⁹ Nicole P. Yuan et al., *Risk Factors for Physical Assault and Rape Among Six Native American Tribes*, 21 J. Interpersonal Violence 1566, 1568-69 (2006). Furthermore, a history of child maltreatment (physical, sexual, and psychological) increased the risk of adult perpetration and victimization. *Id.* at 1582.

²⁰⁰ See 18 U.S.C. § 1153 (2000) (granting jurisdiction over "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of sixteen years, arson, burglary, robbery, and a felony under section 661 of this title [embezzlement and theft]").

²⁰¹ See id. § 1152.

²⁰² Id.

retain control of criminal cases, the Indian Civil Rights Act ("ICRA") limits the maximum sentence to one year in prison and up to a \$5,000 fine. 203 Since tribes have no criminal jurisdiction over non-Indian perpetrators (even if they live on the reservation), distant federal prosecutors must be convinced to take the cases of Native American IPV victims. 204 This confusing labyrinth of federal and local tribal laws is exacerbated by a dearth of corrections infrastructure that results in few tribes taking felony cases. 205 Not only must tribal governments amend their codes to better address IPV within their borders, but the U.S. government should also insist that its agents prosecute IPV crimes when requested to do so by Native American victims. 206 If many federal prosecutors decline to take IPV cases with eager Indian victims, it can be assumed they are even less apt to apply witness tampering and forfeiture laws on behalf of those too terrified to come forward.

Compounding racial, ethnic, and socioeconomic factors, IPV victims of color often face cultural bans against seeking help with larger criminal justice entities, especially beyond the familial milieu.²⁰⁷ For example, undocumented immigrant victims fear deportation and even those here legally may have no knowledge of their rights or resources, further isolating them from possible legal remedies such as protective orders and prosecution of their abusers.²⁰⁸ Numerous IPV survivors of

²⁰³ 25 U.S.C. § 1302(7) (2000).

²⁰⁴ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that tribes do not have jurisdiction over non-Indians accused of criminal misdemeanor offenses).

²⁰⁵ Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina, 38 Fed. B. News & J. 70, 75 n.20 (1991); see James W. Zion, <i>Navajo Therapeutic Jurisprudence,* 18 Touro L. Rev. 563, 584 (2002) (noting that Navajo Nation has "shortage of jails").

²⁰⁶ See Kathryn A. Ritcheske, Liability of Non-Indian Batterers in Indian Country: A Jurisdictional Analysis, 14 Tex. J. Women & L. 201, 221 (2005). Note that the Navajo and Hopi codes include exemplary civil provisions regarding intimate partner violence, and the Oglala and White Mountain Apache have excellent criminal and civil provisos in their codes. *Id.* at 227.

²⁰⁷ See generally Denise Hien & Lesia Ruglass, Interpersonal Partner Violence and Women in the United States: An Overview of Prevalence Rates, Psychiatric Correlates and Consequences and Barriers to Help Seeking, 32 INT'L J.L. & PSYCHIATRY 48 (2009) (describing socio-cultural factors facing IPV survivors of color and citing empirical literature).

²⁰⁸ See Anita Raj & Jay Silverman, Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence, 8 VIOLENCE AGAINST WOMEN 367, 375 (2002); see also Shamita Das Dasgupta & Sujata Warrier, In the Footsteps of "Arundhati": Asian Indian Women's Experience of Domestic Violence in

color face the challenge of competing loyalties rooted in race and gender, with ethnic identity prevailing because socialized oppression leaves no other choice.²⁰⁹ Prior negative experiences with domestic violence shelters, police, and courts make it more difficult for them to trust the largely white criminal justice system.²¹⁰ Since African-American and Hispanic men are disproportionately imprisoned,²¹¹ victims of color also cite not wanting to feel responsible for incarcerating another man from their community and seeking to keep their family together.²¹²

The narrative on witness tampering and forfeiture would be deficient if it minimized the role that race and class play in the paradigm of proffered remedies. Indeed, the irrefutable evidence of the criminal justice system's disparate treatment of victims and offenders of color raises serious questions about the sincerity of proposed reforms that fail to address such concerns. A more vigorous forfeiture doctrine can improve victim safety and offender accountability while decreasing the understandable trepidation prevalent among those who are low-income, of color, or both.

the United States, 2 VIOLENCE AGAINST WOMEN 238, 252-53 (1996) (describing cultural challenges for South Asian battered women, including not wanting to bring shame to family by publicly revealing abuse); Jaeyop Kim et al., The Incidence and Impact of Family Violence on Mental Health Among South Korean Women: Results of a National Survey, 24 J. FAM. VIOLENCE 193, 193 (2009) (reporting high rates of IPV against South Korean women, resulting depression, and cultural implications for coping strategies).

²⁰⁹ See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1257 (1991) (describing the pull of gender and race, and explaining why race often wins for battered women of color).

²¹⁰ See Denise A. Donnelly et al., White Privilege, Color Blindness, and Services to Battered Women, 11 VIOLENCE AGAINST WOMEN 6, 12 (2005) (describing, with cited empirical studies, racial dynamics within violent relationships and broader social service and legal community).

²¹¹ See Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, Prisoners in 2005, at 8 (2006), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/p05.pdf (stating that rate of Hispanic incarceration for men ages 25 to 54 was 4.3% from 1990 to 2005, more than double that of whites); see also Paige M. Harrison et al., U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2006, at 9 (2007), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf (reporting that one in nine black males (11.7%) between ages of 25 and 29 is presently in jail or prison).

²¹² See Zanita E. Fenton, Silence Compounded — The Conjunction of Race and Gender Violence, 11 Am. U. J. Gender Soc. Poly & L. 271, 282 (2003) (stating that "[m]any Black women feel pressure to stay in their relationships to keep their families together, and present a unified front").

3. Community Backlash Against IPV Victims

Too often, police and court responses to witness tampering are permeated with excuses, denial, and overt backlash against IPV victims.²¹³ For at least the past two decades, a widespread, mediahyped backlash has unfurled against female victims.²¹⁴ The sources of this vitriol sometimes label themselves feminists who contest "victim feminism" and argue that abuse victims must instead embrace "power feminism."²¹⁵ This position assumes a notion of volition, that IPV survivors can simply choose to be empowered agents and their victimization will cease. The truth is that victimized survivors cannot stop the abuse. Only the community, when possessing collective will, has the power to make it worth the perpetrators' while to stop.

Some have voiced backlash against those seeking recognition for men as IPV victims, arguing for gender-neutral definitions and law enforcement.²¹⁶ Absolute conceptualization is not necessary, for neither gender's IPV victimization is diminished by recognition of the other. Across the country, IPV victim advocates also report increasing backlash against victims by those in the legal system. Repeatedly over the past few years, police officers, judges, prosecutors, and law professors have expressed some version of "The pendulum has swung too far in favor of victims." That any person holds this view is troublesome. But it is unethical, and perhaps unlawful, when those whose job it is to enforce laws use this view as an excuse to justify conduct that further endangers IPV victims. The backlash must be named and its resulting harm publicized, identifying those engaging in

²¹³ There are, however, some notable exceptions. I will frequently cite the prototypical case *People v. Santiago*, No. 2725-02, 2003 N.Y. Misc. LEXIS 829 (N.Y. Sup. Ct. Apr. 7, 2003), which epitomizes the promise of forfeiture when properly interpreted and implemented.

²¹⁴ See Elizabeth M. Schneider, Feminism and the False Dichotomy of Victimization and Agency, 38 N.Y.L. Sch. L. Rev. 387, 393 (1993) (stating that "[n]ot surprisingly, we are now seeing a backlash against women as victims").

²¹⁵ See Katie Roiphe, The Morning After: Sex, Fear, and Feminism on Campus 51-112, 138-60 (1993); Naomi Wolf, Fire with Fire: The New Female Power and How It Will Change the 21st Century 135-42, 191-97 (1993) (attacking efforts to improve interventions for IPV and sexual harassment victims).

²¹⁶ Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. FOR SOC. JUST. 481, 491 (2007) (pointing out that "feminists have long recognized male victimization . . . [that] has not prevented them from engaging in an analysis of power relations between men and women that highlight issues of inequality, victimblaming, or the extent of female victimization, nor should it").

²¹⁷ Supra note 12 (describing author's experience).

unethical behavior and ending complicity under the guise of equal treatment of all parties.

Public backlash occurs because some feel entitled to blame victims rather than employ the means to stop offenders or hold them accountable. During the sentencing of Phil Traficonda for the murder of his wife Terry, a Connecticut judge criticized the wife for "staying with the brute so long" in spite of testimony regarding the severe and debilitating nature of the abuse. ²¹⁸ One cannot underestimate the significance of misogynist judicial discourse during the seemingly prosaic business of sentencing. When the defendant, all court personnel, and members of the public in attendance hear such blatant victim blaming, cultural norms accepting of IPV are reinforced.

As another example of this phenomenon, South Carolina State Representative John Graham Altman stated in a television interview that victims who return to their abusers are "not very smart." He was responding to complaints that the House had tabled legislation codifying a second domestic violence offense as a felony while passing a bill making cockfighting a felony. Altman said: "The woman [who is abused] ought to not be around the man. I do not understand why women continue to go back around men who abuse them. And I've asked women that and they all tell me the same answer, 'John Graham, you don't understand.' And I say you're right, I don't understand." House Minority Leader Harry Ott condemned Altman's statements: "We believe it is outrageous that a member of the Judiciary Committee would want to blame a woman who is battered."

Victim censure extends from politicians to the Supreme Court. Justice Scalia authored *Town of Castle Rock v. Gonzales*²²² in 2005, sandwiched between *Crawford* (2004) and *Davis* (2006). *Castle Rock* evidenced stark backlash against abuse victims couched in Orwellian doublespeak. Jessica Gonzales, the plaintiff, did exactly what her local court advised her to do: when her estranged husband kidnapped their three daughters — in violation of a protective order — she called the Castle Rock, Colorado, police. Over eight hours, Gonzales called six

²¹⁸ STARK, *supra* note 3, at 2 (describing long-term, ongoing, brutal abuse that preceded Phil Traficonda's murder of his wife, describing judge's statements, and reporting that Traficonda received sentence of life in prison).

 $^{^{219}}$ John Frank, Remarks Put Altman in the Eye of a Storm, Post & Courier (Charleston, S.C.), Apr. 21, 2005, at 1A.

²²⁰ Id.

 $^{^{221}}$ $\it Id.$ (reporting that by 9 a.m. Wednesday, interview was talk of Statehouse as House's Republican leadership scrambled to control damage and set record straight).

²²² 545 U.S. 748, 750 (2005).

times, including numerous calls after she had spoken with her husband and established that he had the children with him. ²²³ Repeatedly, she pleaded with the police to enforce her protective order and rescue her daughters, reminding them of the father's history of extreme violence and mental instability. Each time, the police told her to call back later. The father finally appeared at the police station at 3:20 a.m., where he was shot and killed after opening fire on officers. The bullet-ridden bodies of the three girls, ages 7, 9, and 10, were found in his pickup truck. ²²⁴

Although the Colorado mandatory arrest law at issue in *Castle Rock* specifically required that a police officer "shall use every reasonable means to enforce" a protective order, the Court decided that this language permitted officer discretion.²²⁵ In an eloquent dissent, Justice Stevens (joined by Justice Ginsburg) voiced the absurdity of this interpretation. Justice Stevens clarified that "the crucial point is that, under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do nothing.*"²²⁶

The Court's *Castle Rock* decision also gives abuse victims a contradictory message; they are chastised for not seeking help when threatened, yet the legal system appears reluctant to enforce clear statutes enacted specifically to address this deficient response. Each of Jessica Gonzales's interactions with the legal system — from the judge who granted her violent, mentally ill husband unsupervised visitation with the young daughters, to the police officers who chose inaction — manifested backlash against an IPV victim. That state law explicitly dictated what these individuals' courses of action should have been appears to have no bearing in assessing responsibility for the girls' murders. Instead, the system impugns battered women's being in relationships with persons who turn violent, as though, ex ante, they knew the offender's propensities. Backlash thus has a powerful role in hindering implementation of an effective forfeiture paradigm.

²²³ Id. at 753-54.

²²⁴ Id. at 754.

²²⁵ *Id.* at 760 ("We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*.").

²²⁶ *Id.* at 784-85 (Stevens, J., dissenting). Justice Stevens further clarified: "The innovation of the domestic violence statutes was to make police enforcement, not 'more mandatory,' but simply *mandatory*. If, as the Court says, the existence of a protected 'entitlement' turns on whether 'government officials may grant or deny it in their discretion,' the new mandatory statutes undeniably create an entitlement to police enforcement of restraining orders." *Id.* at 784.

4. Misuse of Chronic Nuisance Laws

In addition to problematic court rulings, recently enacted chronic nuisance laws — meant to penalize repeat callers for police assistance — have further victimized some IPV survivors. ²²⁷ Although initially designed to hold landlords and tenants responsible for drug distribution on their premises, ²²⁸ the newer statutes include crimes of violence. ²²⁹ The statutes protect businesses and victims from stranger violence, but there is no such provision for those victimized by an intimate partner. ²³⁰ For example, the chronic nuisance law of Coaldale, Pennsylvania, enacted in 2006, targets domestic violence victims who request help but do not subsequently agree to take part in the offender's prosecution. ²³¹

Writing in support of Coaldale's chronic nuisance law, one reporter stated:

It's always disheartening for police officers to get calls that a boyfriend is beating up a girlfriend, and then the girlfriend drops the charges within a few days. It's more frustrating when the offenders repeat the process over and over. . . . In addition, it's a big waste of taxpayers' dollars when police have to respond to nuisance calls and then to court without the benefit of cooperation from those who complained in the first place.²³²

Evidencing ignorance of domestic violence dynamics, the reporter found police officers' frustration compelling while being oblivious to that of abuse victims. His article was entitled *Police Calls: Responsibility Will Be Required in Coaldale.*²³³ Rather than focusing their efforts on holding recidivist perpetrators responsible for *their*

²²⁷ See Cari Fais, Note, Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence, 108 COLUM. L. REV. 1181, 1182 (2008) (noting that "[c]ity councils across the country are passing chronic nuisance laws" that "authorize the city to fine or otherwise sanction owners of properties that require what the city considers to be excessive police service").

²²⁸ *Id.* at 1185-86 (citing relevant local and federal laws).

²²⁹ *Id.* at 1188 (specifying that "[i]n many jurisdictions, these 'chronic nuisance offenses' include battery, assault, stalking, sexual assault, and discharge of a firearm").

 $^{^{230}}$ Id. at 1187 (finding that vast majority do not have codified exception for intimate partner victims).

²³¹ *Id.* at 1192 (stating that "[o]f all the ordinances examined in this Note, the Coaldale law seems to be the one most explicitly aimed at victims of domestic violence" and "deemed necessary because of a large number of calls that result in the caller dropping or refusing to press charges").

²³² Id.

²³³ Id.

unlawful conduct, local Coaldale officials and reporters instead expressed disgust with victims, whom they characterized as squandering law enforcement resources by repeatedly calling for help.²³⁴ Reminiscent of attitudes encountered decades ago,²³⁵ the City Solicitor and Council Police Committee Chair openly affirmed their goal of targeting IPV victims who do not assist prosecutors with these cases.²³⁶

Penalizing victims for repeat police calls ignores the role of witness tampering in domestic violence cases. Survivors opting not to take part in criminal prosecutions are usually doing what they believe is necessary to keep their children and themselves alive.²³⁷ If the goal is reduction in police calls, the Coaldale community would do well to implement a coordinated community response that wraps victims in the services needed to be safe.²³⁸ The chronic nuisance laws vary as to whether they trigger an automatic fine or arrest, but all specify that the victim incurs civil liability for failing to stop the offender's problematic behavior.²³⁹ Yet it is common knowledge among IPV experts that the victim cannot stop the abuse; only the community's holding the offender accountable for his crimes accomplishes that end.²⁴⁰ Given the proliferation of chronic nuisance laws adversely impacting abuse survivors,²⁴¹ a batterer can now threaten not only his own violent

²³⁴ *Id.* ("Richard Marek, chairman of the Borough Council's Police Committee, described how 'police officers can invest a lot of time into calls, mostly domestic situations, and the complainant often refuses to press charges or testify in court, thus wasting a police officer's time.' ").

²³⁵ Supra note 12 (describing author's experience). I recall hearing similar comments from law enforcement and community members when convening domestic violence trainings in the late 1970s in Massachusetts, New Hampshire, and New York.

²³⁶ Fais, *supra* note 227, at 1192 (noting that their support of chronic nuisance law was aimed at "victims of domestic violence who refuse to 'follow through' with the prosecution of their partner").

²³⁷ Supra note 12 (describing author's experience).

²³⁸ See generally GWINN & STRACK, supra note 152, at 149-68 (describing myriad means that Family Justice Centers increase safety by providing "wraparound" services to abuse victims and their children).

²³⁹ Fais, *supra* note 227, at 1188-89 (reviewing scope of chronic nuisance laws).

²⁴⁰ See David Adams, Treatment Programs for Batterers, 5 CLINIC & FAM. PRAC. 159, 164 (2003). See generally DAVID ADAMS, WHY DO THEY KILL?: MEN WHO MURDER THEIR INTIMATE PARTNERS (2007) (reporting findings that almost all batterers who kill or attempt to kill intimate partners denigrated and blamed victims, while citing obsessive jealousy and fury at their wanting to end relationship).

²⁴¹ See Fais, supra note 227, at 1188-89. The article cites a number of jurisdictions recently passing such laws, including Beaverton, Or.; Cincinnati, Ohio; Coaldale, Pa.; East Rochester, N.Y.; Milwaukee, Wis.; Phillipsburg, N.J.; Pittsburgh, Pa.; Wilkes-Barre, Pa.; and York, Pa. *Id.* at 1182 n.4.

retaliation for her seeking help, but can count on the state to punish the victim as well. In the process, the identity of wrongdoer becomes transposed, further alienating the true victim from the legal system and quite effectively sabotaging abuse prevention laws and rational public policy.

B. Abusive Control

Domestic violence is characterized by intentional harms perpetrated against an intimate partner as a planned pattern of coercive control.²⁴² By ascribing negative connotations of abandonment, shame, jealousy, and rejection to their victim's conduct, offenders justify inflicting abuse. 243 It is not surprising, then, that batterers feel outraged when their crimes are reported to authorities, for then their victims are challenging their absolute power. Rarely does an IPV perpetrator take responsibility for his abuse; instead, he blames the victim for betraying him by being disobedient, assertive, or behaving in any manner that most would consider ordinary.²⁴⁴ To avoid accountability within the legal system and to regain control of his partner, the batterer typically begins his campaign of witness tampering. 245 If this IPV offender is not in custody and his nonviolent, coercive tactics have failed to deter the victim from proceeding with legal action, then he may resort to physical attacks.²⁴⁶ Experts theorize that as the perpetrator senses he is losing control of his victim, he may escalate the violence, and even murder her. 247 Professor Tuerkheimer explained, "The batterer's desire

 $^{^{242}}$ See Lundy Bancroft, Why Does He Do That?: Inside the Minds of Angry and Controlling Men 113 (2002) (explaining that batterer's violent behavior is most often deliberate).

²⁴³ See Daniela M. Costa & Julia C. Babcock, Articulated Thoughts of Intimate Partner Abusive Men During Anger Arousal: Correlates with Personality Disorder Features, 23 J. FAM. VIOLENCE 395, 396 (2008) (citing several studies). IPV offenders also report experiencing "more general irrational beliefs and cognitive distortions than nonviolent groups when angered" and some batterers' cognitive distortions reflect jealousy and fears of abandonment, while others indicate verbal abuse, controlling behavior, anger, and rigid gender roles. *Id.*

²⁴⁴ See David Adams, Identifying the Assaultive Husband in Court: You Be the Judge, 33 BOSTON B.J. 23, 24 (1989) [hereinafter Adams, Identifying the Assaultive Husband in Court] (explaining that, too often, focus centers on victim's behavior, which "is a disservice to the abuser because it reinforces his denial of responsibility").

²⁴⁵ See James Ptacek, Battered Women in the Courtroom: The Power of Judicial Responses 79 (1999) (describing strategies used by batterers, including "retaliation or coercion against women's pursuit of court or police remedies").

²⁴⁶ Id.

²⁴⁷ See T.K. Logan et al., Factors Associated with Separation and Ongoing Violence Among Women with Civil Protective Orders, 23 J. FAM. VIOLENCE 377, 383 (2008)

to dominate his victim functions as the animating force behind his abusive behaviors." ²⁴⁸

The cumulative harm of this multifaceted abuse can result in the victim exhibiting low self-esteem, guilt, shame, anger, sadness, unrealistic hope, denial, self-blame, and, especially, fear. These conflicting and evolving emotions may make it difficult for survivors to disclose the scope of abuse to counsel, let alone to a courtroom full of strangers. Doctrinal obstacles often obstruct the court's ability to comprehend the scope of sexual, psychological, physical, and economic abuse often co-occurring in IPV relationships.

(citing numerous studies to support statement that "leaving a violent partner may increase the risk of more severe or even lethal violence"); Aysan Sev'er, Recent or Imminent Separation and Intimate Violence Against Women: A Conceptual Overview and Some Canadian Examples, 30 VIOLENCE AGAINST WOMEN 566 (1997) (same).

²⁴⁸ Tuerkheimer, Recognizing and Remedying, supra note 170, at 965.

²⁴⁹ See Mindy B. Mechanic et al., Mental Health Consequences of Intimate Partner Abuse, A Multidimensional Assessment of Four Different Forms of Abuse, 14 VIOLENCE AGAINST WOMEN 634, 634 (2008) (reporting that victims of stalking, physical violence, sexual coercion, and psychological abuse indicated higher levels of post-traumatic stress disorder ("PTSD") with each added type of victimization); see also Sarah M. Buel, Fifty Obstacles to Leaving, supra note 140, at 20 (describing myriad victim responses). See generally Judith Herman, Trauma and Recovery 162 (1992) (describing Dr. Judith Herman's groundbreaking, long-term study of tortured prisoners of war and IPV survivors and finding that these victims could not begin healing until they felt physically safe).

²⁵⁰ See generally Sarah M. Buel, Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders, 83 OR. L. REV. 945 (2004) [hereinafter Buel, Access to Meaningful Remedy] (describing at least three doctrinal obstacles thwarting use of tort law as remedy for abuse victims: courts' reluctance to interfere in marriages; assumption that existing laws adequately regulate divorce; and primacy of statutes of limitation); supra Part II.A.3.

²⁵¹ See Valerie G. Starratt et al., Men's Partner-Directed Insults and Sexual Coercion in Intimate Relationships, 23 J. Fam. Violence 315, 315 (2008) (citing studies reporting sexual coercion and forcible rape along continuum of harm inflicted by men against female intimate partners). See generally Shannon-Lee Meyer et al., Men's Sexual Aggression in Marriage, 4 Violence Against Women 415 (1998) (finding that, while all forms of abuse implicate doctrinal deficiencies, sexual violence is typically not acknowledged or taken seriously).

²⁵² See Mechanic et al., supra note 249, at 635-36 (citing studies finding that psychological abuse greatly contributes to PTSD, even in absence of physical abuse, but especially in addition to other forms of IPV); see also Patricia Evans, The Verbally Abusive Relationship 42-50 (1992) (discussing adverse consequences of verbal abuse, yet not being codified as criminal offense).

²⁵³ See notes 1, 9-14 and accompanying text. See generally Victoria M. Follette et al., Cumulative Trauma: The Impact of Child Sexual Abuse, Adult Sexual Assault, and Spouse Abuse, 9 J. Traumatic Stress 25 (1996) (stating that data indicates high coincidence of various forms of abuse); Heidi S. Resnick et al., Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of

1342

During both civil and criminal proceedings, batterers often tenaciously persist with their abuse in whatever mode the police and courts permit.²⁵⁴ Offenders typically employ a range of witness tampering tactics that include nonviolent inducements such as promises, gifts, and bribery,²⁵⁵ as well as intimidation by threats of or actual physical harm.²⁵⁶ The notion of attaching criminal liability for retaliatory violence evolved because of the legal system's apathetic response to batterers' inexorable witness tampering against adult and child victims, including noncompliance with protective orders.²⁵⁷ Criminal law, however, does not address the continued diminution of a victim's dignity and autonomy resulting from the batterer's relentless exploitation.

By the time of trial, the victim may still be traumatized from the relationship abuse and may still be intimidated because she knows all too well that the batterer is capable of carrying out his threats.²⁵⁸ It is

Women, 61 J. CONSULTING & CLINICAL PSYCHOL. 984 (1993) (reporting same).

²⁵⁴ This Article will focus on witness tampering in cases involving criminal matters and protective orders. It is beyond the scope of this Article to address the full range of witness tampering that occurs in civil cases, though there, too, it is pervasive and adverse to the interests of justice. *See, e.g.*, People v. Salvato, 285 Cal. Rptr. 837, 839 (Ct. App. 1991) (reporting that batterer coerced victim into giving up her rights to marital property and threatened her when she hired attorney to get them back).

²⁵⁵ In one of my cases, the IPV victim had indicated that she wanted to testify against her perpetrator as his violence was escalating. However, just before we were to impanel the jury, the victim told me that she could not testify against him because he was now sitting in the courtroom prominently displaying a large diamond ring in a velvet jewelry box. She explained that they had lived together for several years and she had wanted to get married for some time, but he had repeatedly said he could not commit to her. She told me, "By showing me that ring, he's saying he is ready to get married and I have to honor that." I was one year out of law school and did not know that this behavior constituted classic witness tampering. Although the judge, defense attorney, and other more experienced prosecutors also saw the defendant holding the ring at shoulder level, nobody identified his conduct as inappropriate or unlawful. Instead, literally everyone commented on how stupid and gullible the victim was to give him another chance.

²⁵⁶ See, e.g., Tex. Penal Code Ann. § 36.06 (Vernon 2007) (defining offense as person intentionally harming or threatening to harm another by unlawful act, in order to intimidate potential witness or retaliate against witness).

²⁵⁷ See, e.g., Sarah M. Buel, Domestic Violence and the Law: An Impassioned Exploration for Family Peace, 33 Fam. L.Q. 719, 730, 742-43 (1999) (chronicling author's early belief that civil protections would be sufficient, but gradually concluding that some batterers were too dangerous to let slide with only civil sanctions). See generally Mary McKernan Kay, The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations, 73 CHILD WELFARE 29 (1994) (noting batterer's retaliatory harm to children in course of visitation).

²⁵⁸ See generally HERMAN, supra note 249 (explaining long-term impact of all forms of abuse, whether it is terror inflicted in prisoner of war or domestic violence context).

thus logical that she refuses to place her children and herself in greater danger by testifying or otherwise appearing to be cooperative with authorities. Under current law, the batterer may go free since most judges will not admit the victim's prior testimonial statements if she refuses to testify.²⁵⁹ This routine injustice essentially permits the batterer to control the courts, and reinforces the victim's experience that little will be done to protect her.

Paradoxically, leaving the abuser does not bring the victim safety because batterers frequently increase the severity of abuse during that time, including committing crimes against the victim's children, family, pets, and property. Although some victims remain with the batterers in the immediate aftermath of abuse, most flee at least temporarily, thus greatly increasing the likelihood of more dangerous forms of witness tampering later. One study found that seventy-three percent of battered women requesting emergency medical care were injured by a violent partner after leaving him. Separation abuse is thus typically part of a batterer's campaign to make accessing legal assistance too risky for the victim.

When perpetrators are not deterred by termination of the relationship or the presence of a protective order, survivors feel frustrated, vulnerable, and unsure how to achieve safety.²⁶³ Yet most well-intentioned professionals, friends, and family are puzzled when

²⁵⁹ See People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *2-5 (N.Y. Sup. Ct. Apr. 7, 2003) (explaining that in forfeiture hearing, when defendant is accused of causing victim's unavailability, court must hear full range of abusive conduct to determine — including that which occurred before present case — in order to accurately determine causation).

²⁶⁰ See Logan et al., supra note 247, at 377-78 (citing numerous studies); see also Ruth E. Fleury et al., When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners, 6 VIOLENCE AGAINST WOMEN 1363, 1371 (2000) (reporting that more than one third of women who participated in their longitudinal study were assaulted by male ex-partner during two-year time period); infra Part III.

²⁶¹ See, e.g., Kathryn Ann Farr, Battered Women Who Were "Being Killed and Survived It": Straight Talk from Survivors, 17 VIOLENCE & VICTIMS 267, 277 (2002); Darren Mitchell & Susan B. Carbon, Firearms and Domestic Violence: A Primer for Judges, CT. Rev., Summer 2002, at 32, 33 (discussing batterers use of weapons against abuse victims attempting to flee); Maria Kelly, Note, Domestic Violence and Guns: Seizing Weapons Before the Court Has Made a Finding of Abuse, 23 Vt. L. Rev. 349, 353 (1908)

²⁶² Kelly, *supra* note 261, at 353.

²⁶³ See id. at 353; see also Logan et al., supra note 247, at 378 (citing numerous studies on frequency with which protective orders are violated and fears and difficulties imposed on abuse victims).

victims will not or cannot leave the batterer.²⁶⁴ Given that leaving the abuser often does not achieve safety, it is remarkable that little effort is made to warn victims of this likely impending danger.²⁶⁵

Most jurisdictions recognize that offenders do not need to inflict physical harm to coerce their victims not to call for help, obtain protective orders, or testify against them. Thus, in some state statutory schemes, witness *tampering* refers to unlawful, coercive offenses that do not involve violence, ²⁶⁶ while witness *intimidation*, ²⁶⁷ retaliation, or obstruction refers to the threat or use of physical harm to influence witnesses. ²⁶⁸ Other states take a more expansive approach, codifying all violent and nonviolent witness intimidation in one statute, including threatening, attempting, or causing emotional, economic, and physical injury, as well as property damage to mislead, intimidate, or harass a witness. ²⁶⁹

²⁶⁴ See Kelly, supra note 261, at 356 (noting that people are mystified by abuse victims who stay). The vast majority of the many thousands of victims with whom I have worked over the past 31 years were repeatedly told to "just leave" the batterer. See supra note 12 (describing author's experience).

²⁶⁵ Kelly, *supra* note 261, at 355-56 (detailing danger to abuse victims who flee); *see also* Rennison, *supra* note 15, at 1 (finding that separated females are victimized more often than married, divorced, widowed, or never-married women); *see also* Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37, 53 (2004) (describing separation abuse as exposing "women to increased violence when they try to leave"); Tuerkheimer, *Recognizing and Remedying*, *supra* note 170, at 1005 n.229 (discussing separation assault).

²⁶⁶ See, e.g., CONN. GEN. STAT. § 53a-151 (2008) (classifying tampering with witness as Class C felony by providing that "(a) [a] person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding"); see also Tex. Penal Code Ann. § 36.05 (Vernon 2007).

²⁶⁷ See, e.g., CONN. GEN. STAT. § 53a-151a (defining intimidation of witness as attempting or threatening to use violence "to (1) influence, delay or prevent the testimony of the witness . . . or (2) induce the witness to testify falsely, withhold testimony, elude legal process summoning the witness to testify or absent himself or herself from the official proceeding").

 $^{^{268}}$ See, e.g., Tex. Penal Code Ann. § 36.06 (Vernon 2007) (defining offense as person intentionally harming or threatening to harm another by unlawful act, in order to intimidate potential witness or retaliate against witness).

²⁶⁹ See, e.g., Mass. Gen. Laws ch. 268, § 13B (2008). Intimidation of witnesses, jurors, and persons furnishing information in connection with criminal proceedings includes "(1) (a) threatening, attempting, or causing physical, emotional, or economic injury or property damage to; (b) conveys a gift, offer or promise of anything of value to; or (c) misleads, intimidates or harasses another person who is: (i) a witness or potential witness at any stage of a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type . . . or (v) a person who is or was attending

In 1997, under the rubric of hearsay exceptions, the doctrine of forfeiture by wrongdoing was codified within the Federal Rules of Evidence.²⁷⁰ Its drafters wanted to clarify conflicting interpretations of forfeiture while also signaling strong abhorrence for conduct intended to sabotage the legal system's enforcement efforts.²⁷¹ Their goal was to address both the seemingly innocuous and more obvious forms of coercion. The spectrum of batterer misconduct is thus narrowly tailored to achieve the desired result of victim compliance.

C. Coercive Threats Implying Violence

IPV perpetrators employ an array of oppressive schemes to silence witnesses, sometimes ably conveying their threats without directly contacting the victims. Batterers who use violence to deter witnesses from testifying against them are guilty of witness intimidation, and often make good on prior threats to the victim.²⁷² In the Texas capital murder case of *Hartfield v. State*,²⁷³ prosecutors presented evidence that the defendant had been previously acquitted of sexually assaulting his wife, and that during that trial, he had publicly threatened to kill her when he was released from jail. His wife obtained a protective order, but her husband strangled her and then burned her home, for which a court later found him guilty.²⁷⁴ The legal system's denial of the existence of IPV danger is evident in this 2000 case where the

or had made known his intention to attend a grand jury proceeding, trial or other criminal proceeding of any type with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type " *Id.*

²⁷⁰ See FED. R. EVID. 804(b)(6) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.").

²⁷¹ See Jay M. Zitter, Annotation, Construction and Application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., Hearsay Exception Based on Unavailable Witness' Wrongfully Procured Absence, 193 A.L.R. FED. 703 (2004) ("Rule 804(b)(6) of the Federal Rules of Evidence (Fed. R. Evid. 804(b)(6), 28 U.S.C.A.) is an attempt to respond to the problem of witness intimidation whereby the criminal defendant, his associates, or friends through one means or another, often a simple telephone call, procures the unavailability of the witness at trial and thereby benefits from the wrongdoing by depriving the trier of fact of relevant testimony of a potential witness. Even more seriously, the defendant may have the witness assaulted, kidnapped, or even killed so as to silence him or her.").

 $^{^{272}}$ See supra note 2 (statutory definitions of witness tampering); in fra note 283 & Appendix (same).

²⁷³ 28 S.W.3d 69 (Tex. App. 2000).

²⁷⁴ *Id.* at 71.

defendant Hartsfield made his death threat in open court yet was charged with neither witness intimidation nor retaliation. In another case, Michael Goodsell threatened to burn down his girlfriend's house if she did not request that the court dismiss her protective order but in the next breath apologized for his violent assaults and promised not to harm her again.²⁷⁵ The girlfriend reported that within hours of that conversation, Goodsell called again to say that "he could kill [her] if he had to lose [her]."

It is quite typical for batterers to engage in this seemingly incongruous pattern of threats, pleas, and promises, and they are often able to convince confused victims that such conduct represents the depth of their love and devotion. For example, as a means of coercing compliance, abusers may also drive dangerously with the victim in the car, usually at high speeds, while simultaneously assaulting the victim physically and verbally. Batterer conduct can be akin to a venomous spider spinning an intricately perilous web over time; although not initially appearing dangerous, ensnared victims soon learn the consequences of attempting escape. Perpetrators' coercive schemes are not limited to physical abuse; they often utilize other abusive tactics such as nonverbal threats; harming those assisting victims; and enlisting third-party accomplices to achieve their abusive dominance over victims.

Nonverbal Threats

Incessant violence is sufficient but not necessary to ensure near total control, for astute batterers use tone of voice, a look, and other more subtle forms of threatening communication to ensure victim compliance.²⁷⁹ Though most people can understand the threat implicit

²⁷⁵ People v. Goodsell, No. 235634, 2003 WL 1558219, at *1 (Mich. Ct. App. Mar. 25, 2003) (stating that victim's protective order affidavit alleged that Goodsell had choked, slapped, and spit on her).

²⁷⁶ Id.

²⁷⁷ See id. (reporting that the victim interpreted her batterer's abuse, which he blamed on jealousy, as indicative of his "protecting his interest" in her); see also People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *3, *8 (N.Y. Sup. Ct. Apr. 7, 2003).

²⁷⁸ Goodsell, 2003 WL 1558219, at *1 (describing victim's testimony that while defendant was driving at very high speed, he ridiculed her body, called her abusive names, and threatened that she would go home "in a body bag"); see also supra note 12 (describing author's experience). Scores of victims have reported to me that their assailants drove at high rates of speed while battering them, inciting great fear.

²⁷⁹ Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2128-29 (1993) (explaining that abuse need not

in the simple presence of a previously harmful actor in the organized crime context, they have not been sufficiently educated to similarly analogize a batterer's impact on his victim. In *The Godfather Part II*, Mafioso Michael Corleone brought a long-lost brother from rural Italy to a New York hearing in which another brother was about to testify about the family's organized crime activities. Words were unnecessary to assure that no testimony was forthcoming, for the Corleone brothers knew from past experience that Michael would not hesitate to use violence to ensure that they did not cooperate with authorities. Similarly, IPV victims have learned that a batterer's frown, raised eyebrows, or seemingly innocuous comment may signal impending harm.

In some cases, the frequency and type of violence are so severe that even if the batterer is unable to directly contact the victim post arrest, she is terrorized enough so that cooperation with authorities seems implausible to her. Implicit in a case of extreme abuse is the batterer's message that he is capable of inflicting torture, what the Geneva Convention prohibits as "outrages upon personal dignity, in particular, humiliating and degrading treatment." Professor Leslie Espinoza Garvey described a case of this ilk handled in her legal aid clinic:

[T]he client brought to the student attorney a ten-page history of her relationship with her husband and the specifics of his reign of terror. He was a martial arts expert and would use disabling martial arts techniques to force her to perform degrading sexual acts. These would leave no physical bruises, and he assured her that no one would ever believe her story that he forced her to do anything.²⁸³

A defendant may resort to nonviolent means of coercion that are nonetheless quite effective, particularly if he is incarcerated. For

be constant or physically violent in order for victims to suffer fear of imminent harm on ongoing basis).

²⁸⁰ The Godfather Part II (Paramount Pictures 1974).

²⁸¹ Id.

²⁸² Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(c), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The main source of international humanitarian law is the four Geneva Conventions of 1949, ratified by the United States in 1955. In particular, the Geneva Convention provides that women shall be protected from rape and any form of indecent assault. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁸³ Leslie Espinoza Garvey, The Race Card: Dealing with Domestic Violence in the Courts, 11 Am. U. J. GENDER SOC. POL'Y & L. 287, 294 (2003).

example, Jeffrey Stillman assaulted his live-in girlfriend and was charged with attempted murder, assault, rape, and kidnapping.²⁸⁴ The emergency room physician who saw the victim on the night of the attack testified: "[She] was clearly beaten about the face; her face was swollen; it was black and blue . . . [and] she had scratches and abrasions here and there; she had a cut on her hand. She seemed quite upset."285 Another physician examined the victim the following day and diagnosed "facial bruising, ecchymosis, and trauma to the eye; perforated right ear drum," as well as a right shoulder strain and symptoms from post-traumatic strangulation.²⁸⁶ The victim testified that she passed out repeatedly from the beatings, including after being strangled by the defendant.²⁸⁷ From jail, Stillman sent several letters directing the victim to change her testimony: "Say you were drunk when they questioned you [and] the officers got you all confused Call my attorney [and] tell him you were drunk/confused when you gave statements [and] now you remember that I didn't hit you, rape you, or kidnap you Please think about a way to get me out You'll be glad you did!" and "I really wish you'd reconsider fixing the story."288 The jury found Stillman guilty of the felonious assault, rape, kidnapping, tampering with evidence, intimidation of a witness, and the domestic violence, but not guilty of attempted murder. ²⁸⁹

2. Harming Victims' Helpers

Some batterers also retaliate against those they perceive as helping the victim in any capacity. A few prototypical case narratives may be helpful here. In the first, Vaughn Jones engaged in a terrorizing campaign of retaliation against those close to his ex-girlfriend because the San Francisco police arrested him for assaulting her.²⁹⁰ Strong

²⁸⁴ Stillman v. Moore, No. 2:05-CV-1119, 2006 WL 2787112, at *2 (S.D. Ohio Sept. 6, 2006). The jury found Stillman guilty of felonious assault, rape, kidnapping, tampering with evidence, intimidation of a witness, and the domestic violence offense, and not guilty of attempted murder. The judge ordered that the eight years on the felonious assault and the four years on the tampering be served consecutively for a total of twelve years. *Id.*

²⁸⁵ Id

 $^{^{286}}$ Id. (reflecting testimony of Dr. David Watson, who added that victim's injuries were causing her "substantial suffering").

²⁸⁷ *Id.* at *3.

²⁸⁸ *Id.* Additional letters from the defendant urged the victim to allege that someone else had attacked her at a local restaurant, among other stories. *Id.*

²⁸⁹ *Id.* at *1

²⁹⁰ Jaxon Van Derbeken, Man Charged in Series of Arson Attacks on Homes of Ex's Friends, S.F. Chron., Mar. 6, 2008, at B3.

evidence indicated that Jones committed sixteen arson-type felonies on the homes of his ex-girlfriend's friends and relatives, and that he sent a threatening letter to the ex's ten-year-old daughter. Jones had previously said that he would "get" her and her friends if she reported the abuse and sought help from the Daly City police. Jones was subsequently convicted of domestic violence crimes and served time in the San Mateo County Jail. Upon his release, Jones distributed flyers in the neighborhoods of four friends and relatives of his ex-girlfriend, stating that child pornographers and drug dealers lived in these four person's homes. Cars and homes at those four addresses were then firebombed or otherwise subjected to arson-type crimes.

To cite another example, George Hudspeth repeatedly beat his wife Mary before she finally called the police.²⁹⁴ A neighbor who lived across the street attempted to help Mary. Hudspeth subsequently said to his wife, "When I get out, you have had it! I will take care of you and that damn bitch across the street when I get out of jail! [F]or calling the law you will pay!"²⁹⁵ Convicted for retaliation, Hudspeth appealed on the basis that his threats did not specify he would commit violence against the victim. The appellate court affirmed the conviction, finding it was reasonable for the jury to conclude that Hudspeth's statements relayed intent to harm the victim by means of an unlawful act, defined as "anything reasonably regarded as loss, disadvantage or injury."²⁹⁶ No action, however, was taken for Hudspeth's threat of retaliation against the helpful neighbor.²⁹⁷

Although batterers can often safely assume that witnesses will neither intervene nor later testify in IPV cases, those bystanders willing to intercede can protect the victim even when she is unable to do so. For example, in front of eyewitnesses, Thomas Glenn held his pregnant girlfriend, Coleen Brown, against the wall and beat her.²⁹⁸ Brown screamed, "Stop it, you're hurting me!" and several bystanders

²⁹¹ *Id.* (describing damage estimated at over \$100,000).

²⁹² Id.

²⁹³ With several of these residences, Jones committed multiple arson crimes, sometimes using firebombs and later pouring gasoline through the mail slots and setting the homes on fire. Jones now faces additional charges of receiving stolen property and grand theft as \$40,000 worth of jewelry, coins, and paintings from his employer were found in his apartment. *Id.*

²⁹⁴ Hudspeth v. State, 31 S.W.3d 409, 411 (Tex. App. 2000).

²⁹⁵ Id

 $^{^{296}\,}$ Id. (noting that Tex. Penal Code Ann. \S 36.06(a) (Vernon 2003) requires only threat to "harm another by an unlawful act").

²⁹⁷ See id. (making no mention of any sanctions for threats against neighbor).

²⁹⁸ Glenn v. State, 61 P.3d 389, 391 (Wyo. 2003).

intervened to prevent the assault from escalating. Glenn left, but returned a short time later and stabbed Derek Stone, one of those who had facilitated Brown's escape.²⁹⁹ A few days later, Glenn again assaulted Brown, and the responding officer noted that she had a bloody nose, scrapes, and bruises. That day, and at trial, Brown would only say that she had fallen while running and was unsure how she got the injuries.³⁰⁰ Glenn was ultimately convicted, however, because several of the witnesses testified at trial that he had not only contacted them prior to the court date, but had done so in a threatening manner.³⁰¹

Some perpetrators also target counsel for victims intending to deprive them of access to legal remedies. Attorney Julie Porzio was handling Donna Bochicchio's divorce from Michael Bochicchio, an abusive retired state trooper, with whom Donna had two children. 302 As Porzio and Donna pulled into the Middletown, Connecticut, court parking lot for a hearing, Bochicchio murdered his estranged wife and severely injured Porzio. 303 In another case, when attorney and clinical law professor Jeana Lungwitz was nine months pregnant, she received a letter from the jailed husband of a battered client saying he planned to kill Lungwitz upon his release.³⁰⁴ Several family law and Legal Aid lawyers said they asked for officer accompaniment after perpetrators made menacing gestures, threatened them, and followed them from courtrooms.³⁰⁵ Several prosecutors who routinely handle domestic violence cases describe incidents in which batterers attempted or threatened to harm them.³⁰⁶ These threatened lawyers expressed shock, humility, fear, and renewed compassion for their abused clients after being subjected to the perpetrators' control tactics. One attorney — whose office was trashed by a wealthy, violent defendant in a divorce case — said she will think twice before knowingly

²⁹⁹ Id.

³⁰⁰ Id.

³⁰¹ *Id*.

³⁰² 20/20: Divorce Case Takes a Shocking Turn (ABC television broadcast Aug. 30, 2007).

 $^{^{303}}$ Michael shot Julie at close range in shoulder, chest, and arm, shattering her wrist — requiring ten surgeries. *Id.*

³⁰⁴ Telephone Interview with Professor Jeana Lungwitz, Director of the Univ. of Tex. Domestic Violence Clinic (Dec. 29, 2009).

 $^{^{305}}$ Telephone Interviews with five attorneys who asked to remain anonymous (Mar. 23, 2009, May 15, 2009 & Aug. 10, 2009).

 $^{^{306}}$ Telephone Interviews with four prosecutors who asked to remain anonymous (May 15, 2009, June 11, 2009 & Oct. 2, 2009) (describing a total of nine instances in which defendants in pending criminal cases threatened them with violence if trials went forward).

representing another battered wife.³⁰⁷ Advocates in two large American cities said they felt forced to ask abused residents to leave their shelters after their partners threatened and attempted to harm staff.³⁰⁸ Most of these lawyers explained their desire for anonymity based on fear of batterer reprisal and embarrassment, notably, the same sentiments voiced by IPV victims.

It is thus consistent with their intent to control that defendants intimidate and assault third parties who are trying to protect adult and child victims, 309 as well as those whom they believe to be potential witnesses. 310 Not only do intimate partners need protection, but, so too, all witnesses targeted by batterers should be included under the ambit of forfeiture's shield. Once the court hears the scope of witness tampering, it can more accurately decide if the perpetrator's actions express the intent to silence witnesses.

3. Third Party Accomplices

Batterers also enmesh third parties in their witness tampering schemes.³¹¹ Some accomplices willingly collude with the batterer while others do so only under duress or significant coercion. In a recent domestic violence witness intimidation case involving high-level officials over time, New York Governor David Paterson and several of

 $^{^{\}rm 307}$ Interview with a thirty-year veteran divorce lawyer who asked to remain anonymous (Nov. 18, 2007).

 $^{^{308}}$ Telephone Interview with advocate who asked to remain anonymous (Mar. 15, 2008) (describing being run off road by a defendant); Telephone Interview with advocate who asked to remain anonymous (June 26, 2007) (stating that batterer repeatedly followed and threatened to kill her as long as his wife was in shelter).

³⁰⁹ See, e.g., Davis v. State, 890 S.W.2d 489, 491 (Tex. App. 1994) (ruling that jury could find that defendant committed offense of retaliation, where defendant threatened social worker after social worker expressed desire to terminate defendant's parental rights).

³¹⁰ See, e.g., Williams v. State, Nos. 2-02-262-CR, 2-02-263-CR, 2-02-264-CR, 2004 Tex. App. LEXIS 2049 (Tex. App. Mar. 4, 2004) (upholding batterer's retaliation conviction for assaulting postal worker, his girlfriend, and several neighbors, and then telling several witnesses they had "better not say nothing").

³¹¹ See Prosecuting Witness Tampering, supra note 148, at 3 (describing experience of victim whose abuser was in jail awaiting trial but had his friends follow her and appear at her home and workplace); see also People v. Scialabba, 55 P.3d 207, 210 (Colo. App. 2002) (describing how batterer asked his mother to tell victim not to show up); State v. Mayeaux, 570 So. 2d 185, 188 (La. Ct. App. 1990) (describing how perpetrator arranged attack on ex-girlfriend from prison using friend who threw chemicals onto victim's face, blinding her and causing severe burns on her face); State v. Farnsworth, No. 21165-7-III, 2003 WL 21652734, at *1 (Wash. Ct. App. July 15, 2003) (convicting defendant of witness tampering after he sent letters to his exgirlfriend instructing her how to destroy evidence through third party).

his top aides were accused of pressuring an IPV victim to drop her requests for protection orders.³¹² David Johnson, a top advisor to Governor Paterson, was alleged to have severely beaten his live-in girlfriend, Sherr-una Booker, on October 31, 2009.313 Staff said the Governor directed his press secretary, Marissa Shorenstein, to persuade the victim to characterize the incident as nonviolent.³¹⁴ The same sources told the New York Times that another state employee, Deneane Brown, was directed to contact Booker and "[t]ell her the governor wants her to make this go away."315 Brown also arranged a phone call between the Governor and Booker the day before Booker was to appear in court for a permanent protection order against David Johnson. The case was dismissed when Booker did not appear, although she had twice before obtained temporary protective orders,³¹⁷ and at the first hearing, the judge had noted bruising on her arms. 318 Booker subsequently asserted that the state police (who lacked legal authority in the case) had bullied her to refrain from seeking the protective order against Johnson.³¹⁹ Although state police superintendent Harry Corbitt resigned in the wake of his admissions that state troopers did contact Booker, he depicted their intent as only to explain her "options." Whatever the alleged motivations for Governor Paterson and his staff's repeated contact with Booker,

³¹² Danny Hakim & William K. Rashbaum, *Paterson Is Said to Have Ordered Calls in Abuse Case*, N.Y. Times, Mar. 2, 2010, at A1, *available at* http://www.nytimes.com/2010/03/02/nyregion/02paterson.html; David Kocieniewski & Danny Hakim, *Investigators Are Told of Paterson Bid to Quiet Accuser*, N.Y. Times, Mar. 3, 2010, at A1, *available at* http://www.nytimes.com/2010/03/03/nyregion/03paterson.html.

 $^{^{313}}$ Hakim & Rashbaum, *supra* note 312, at A1. Booker told police that Johnson strangled her, threw her into a mirrored dresser, and stopped her from calling the police. *Id*.

³¹⁴ *Id*.

 $^{^{315}}$ Kocieniewski & Hakim, *supra* note 312, at A1. The source stated that Brown had repeatedly contacted Booker by text messages and phone prior to the court dates for a protection order. *Id.*

³¹⁶ *Id.* The Governor claims that Booker called him, but whoever initiated the call is irrelevant if she only did so at the request of Brown. *Id.*

³¹⁷ Id

 $^{^{318}}$ Editorial, *Gov. Paterson's Oath*, N.Y. TIMES, Mar. 3, 2010, at A10, available at http://www.nytimes.com/2010/03/03/opinion/03wed1.html. Ironically, the editorial notes that Paterson has said repeatedly that "women are often intimidated in domestic violence cases." *Id.*

³¹⁹ Jacob Gershman, *Aide's Case Hurts New York Governor*, WALL St. J., Feb. 26, 2010, at A2. New York Attorney General Andrew Cuomo's office is investigating this claim. *Id.*

³²⁰ Kocieniewski & Hakim, supra note 315, at A1.

sufficient evidence from their own admissions existed to indicate that unlawful witness tampering occurred.

The next case also exemplifies an employer directing staff to lie for his benefit. In *State v. Geukgeuzian*,³²¹ the victim of witness intimidation, Jason Lyons, was the defendant's subordinate employee. Lyons, who testified at trial that he had not heard his violent boss make repeated threats to harm his wife.³²² Lyons later acknowledged that his supervisor had intimidated him into denying the damaging evidence, in part by typing up a statement for him to sign and submit to the court.³²³

Similarly, one month before murdering his girlfriend Mayra Deloa, Paul Milne told his cousin that if Deloa decided to leave him, he would stab her to death.³²⁴ As promised, when Deloa tried to end the relationship, Milne stabbed her nineteen times and then pleaded temporary insanity.³²⁵ From jail, the defendant wrote to his mother, asking her to speak to a cousin, Wyatt Figueroa, about what the defendant wanted Figueroa to say in court.³²⁶ Milne advised his mother that it was "not tampering if she did not threaten [Figueroa]."³²⁷ Although the jury ultimately did not believe his insanity claim, Milne was successful in getting Figueroa to testify exactly as he dictated.³²⁸

Batterers may also enlist third parties, often family, friends, or new partners, to engage in witness intimidation. Justice Scalia affirmed in *Giles* that a defendant could lose his confrontation rights if he causes a witness's unavailability through the use of an intermediary.³²⁹ *State v*.

³²¹ 54 P.3d 640 (Utah Ct. App. 2002).

³²² See id. at 642.

³²³ *Id.* The defendant asked that Lyon write a statement that he had not witnessed defendant threaten his ex-wife. The defendant later requested that Lyon sign a statement that defendant had drafted and testified at trial that he had signed both statements "because he felt intimidated by Defendant, and because Defendant was his supervisor and could punish him at work." *Id.*

³²⁴ Milne v. State, No. 05-05-01691-CR, 2007 Tex. App. LEXIS 1246, at *10-11 (Tex. App. Feb. 20, 2007). The defendant showed his cousin the knife he bought to use in the killing and told his cousin that he had studied the best location to stab his girlfriend to facilitate the fastest bleeding. Milne also told his cousin that he planned to wrap his girlfriend in a tarp, along with his bloodied clothing, and set it on fire to destroy the evidence. The defendant bought a gas can and tarp. *Id.* at *11.

³²⁵ *Id.* at *3.

³²⁶ *Id.* at *10-11.

³²⁷ *Id.* at *11-12. In another letter, Milne told his mother: "Talk to Wyatt. Help him understand what he could do to me to destroy everything." *Id.*

³²⁸ See id. at *12.

³²⁹ Giles v. California, 128 S. Ct. 2678, 2683 (2008) ("Similarly, while the term

*Ulery*³³⁰ provides an example of a batterer enlisting his new companion to kill an ex-girlfriend who planned to testify about his abuse. Michael Ulery assaulted his girlfriend, Victorina Allie, who filed charges against him and fled.³³¹ In an effort to avoid standing trial for the assault, Ulery convinced his new girlfriend, Christina Ann Mannering, to kill Allie. After she forced her way into Allie's home, Mannering botched the attack, injured Allie and herself, and then left the knife at the crime scene. 332 After the police apprehended her, Mannering agreed to help them obtain Ulery's confession on tape regarding his role in both the previous assault on Allie and masterminding the attempted murder.³³³ In the resulting case, Allie's tenacity and courage in testifying at trial ended in a jury's convicting Ulery of attempted first-degree murder while armed with a deadly weapon and first-degree burglary while armed with a deadly weapon.³³⁴ Interestingly, the jury found Ulery guilty of witness tampering but not guilty of the more serious charge of witness intimidation.³³⁵ Yet for the initial assault, although Ulery admitted that his intent was to dissuade Allie from testifying against him, 336 he was

'means' could sweep in all cases in which a defendant caused a witness to fail to appear, it can also connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent.").

³³⁰ No. 25887-1-II, 2003 WL 164997 (Wash. Ct. App. Jan. 24, 2003).

³³¹ *Id.* at *1.

³³² Mannering appealed her own conviction for attempted murder, alleging duress and stating that Ulery had battered her throughout their two-month relationship and threatened to kill her if she did not murder Allie. State v. Mannering, 48 P.3d 367, 368 (Wash. Ct. App. 2002). The court ruled that duress cannot be claimed as a defense to attempted murder. Id. at 370-71.

³³³ Ulery, 2003 WL 164997, at *1.

³³⁴ Id. The court sentenced him to 285 months, including 48 months for the two 24-month deadly weapon enhancements. *Id.* at *7.

³³⁵ Id. at *7. See supra notes 2, 283, and infra Appendix for the distinctions between witness tampering (generally encompassing threats, bribes, and nonviolent coercion) and witness intimidation (generally involving violence or threats of violence).

³³⁶ In a later tape recorded statement to police, Ulery said: "And I asked Brenda to talk to Vicki or her brother, or her ex-husband, to talk to Vicki, if she would, you know, consider backing out this case that's going on because it was causing me a lot of problems and it was hurting, you know . . . I just told her . . . she just needs to back off there or f**king s**t's gonna, you know, happen, you know, I was just tired of her f**king doing this stuff. I don't know why she's doing this s**t. I know she's getting on with her life, I know she's with somebody else. Why can't she just leave my life alone. That's pretty much what I said." Ulery, 2003 WL 164997, at *3.

found not guilty of both the underlying assault and intimidating a witness.³³⁷

It is difficult to identify the reasons for such divergent dispositions involving the same victim and offender, but a few differences are notable. In Ulery's assault case, only Allie and Ulery were involved, perhaps causing the court to deem the assault a private matter. On the other hand, in Ulery's attempted murder case, Mannering, who had already been convicted for her role in the plot and was serving her sentence, corroborated Allie's testimony. 338 The appellate court noted that Ulery had also attempted to enlist one of Allie's neighbors to dissuade Allie from proceeding with the case. 339 What is evident from these cases is that some judges and jurors are still reluctant to believe an abuse victim's testimony, in part because they do not want to recognize such atrocities can actually occur within intimate relationships.³⁴⁰ Others wish victims would keep such distasteful matters private and not involve the state in their troublesome personal affairs.341 The predication of a just legal system juxtaposed with evolving social norms regarding violent intimate relationships complicates reform efforts.

The *Ulery* case exemplifies at least one other reason why victims and prosecutors are frustrated with the present system: the high incidence of acquittals when the victim testifies truthfully that severe abuse did actually occur and yet, regardless of her stance, she is viewed with disdain.³⁴² If the victim appears angry about the grievous harm inflicted by the batterer, she is characterized as motivated only by revenge. If she minimizes the violence, stays in the relationship, or both, she is portrayed as stupid, or the jury is unpersuaded that the violence actually occurred (particularly when she stays), or believes that previous stories of abuse were exaggerated. Because almost any

³³⁷ *Id.* at *1 n.3.

³³⁸ *Id.* at *5 n.8.

 $^{^{339}}$ *Id.* at *7 ("In his attempt to persuade Allie's across-the-street neighbor, Brenda, to convince Allie to drop the domestic violence charges against him, he threatened Allie's safety.").

³⁴⁰ See generally Buel, Access to Meaningful Remedy, supra note 250, at 964-65 (describing acculturated nonempathy for abuse victims).

³⁴¹ *Id.*; *supra* note 12 (describing author's experience).

³⁴² See 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, 204 (2008) (explaining that legal professionals may be disappointed by victims who do not conform to stereotypical notions — such as being angry on witness stand — of how traumatized person should behave); see also supra note 12 (describing author's experience).

scenario calls into question the veracity of their stories, it is no wonder that many victims listen to batterers who tell them nobody will believe their testimony.³⁴³ Aided by their witness tampering, batterers can engender a self-fulfilling prophecy that leads victims to believe perpetrators can, indeed, control the legal system. In *Ulery*, the jury was presented with uncontroverted evidence of both the assault and witness tampering of Victorina Allie — admissions by the defendant in several forms, the victim's testimony, and the responding officer's report — and, yet, they refused to find him guilty.³⁴⁴

Bystanders who fail to intervene or at least report witness tampering are also complicit with the offender. In her research on lynching, Professor Sherrilyn Ifill noted that many blacks remembered most clearly not just the inaction, but also the "participation or presence of average whites — law students, businessmen, waiters, shopkeepers, laborers, police officers"³⁴⁵ So, too, IPV victims often relate — with varying levels of anger, hopelessness, fear, sadness, and pain — that the many bystanders who witness all manners of retaliation refuse even to call 911.³⁴⁶

D. Nonviolent Coercion

Sometimes offenders resort to less overt means of victim tampering, including bribes, endearments, pleas for forgiveness, apologies, threats, and property damage.³⁴⁷ Judge Jeffrey Atlas astutely noted that

³⁴³ Adams, *Identifying the Assaultive Husband in Court, supra* note 244, at 23. In my experience, many batterers tell their victims, "Nobody will believe you!" *See supra* note 12 (describing author's experience).

³⁴⁴ A different jury found Ulery guilty of attempted first degree murder while armed with a deadly weapon, first degree burglary while armed with a deadly weapon, and witness tampering. *Ulery*, 2003 WL 164997, at *1.

 $^{^{345}}$ Sherrilyn A. Ifill, On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century, at xi (2007).

³⁴⁶ See generally Joan Tabachnick, Engaging Bystanders in Sexual Violence Prevention (Nat'l Sexual Violence Res. Ctr. 2009), available at http://www.nsvrc.org/publications/nsvrc-publications/engaging-bystanders-sexual-violence-prevention (providing overview of reasons why people do and do not intervene to protect another in danger); Laurel E. Fletcher, Facing Up to the Past: Bystanders and Transitional Justice, 20 Harv. Hum. Rts. J. 47 (2007) (discussing tragic consequences of bystander inaction in human rights context).

³⁴⁷ See, e.g., Conn. Gen. Stat. § 53a-149 (2007) (codifying bribery in witness tampering context); see also Cal. Penal Code § 138 (West 1999) (same); Tex. Penal Code Ann. § 36.05 (Vernon 2003) (same); People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *11 (N.Y. Sup. Ct. Apr. 7, 2003) (endearments, pleas for forgiveness, and apologies); Eric Dexheimer, Crime Leads Law Student Through Victim's View of the System; Struck by Boyfriend, Woman Finds that Legal Theory Is Little

although the *Santiago* defendant's endearments and pleas for forgiveness may have appeared innocuous, his "promises [were] not to be trusted... [because they] always contain[ed] the implicit threat that the complainant's unwillingness to cooperate with him [would] result in dire consequences for her." Thus, although the accused may engage in conduct that does not otherwise constitute criminal behavior, it can nonetheless be improper if it results in the complainant being dissuaded from testifying at trial.

The following are but two examples illustrating this means of witness tampering. In *State v. LaPointe*, a lawyer assaulted his girlfriend, R.N., resulting in her receiving six stitches over one eye.³⁴⁹ After leaving the hospital that night, R.N. filed a police report, but law enforcement did not issue an arrest warrant for LaPointe. The following day, LaPointe called R.N., asking if she planned to press charges, and offered her \$10,000.³⁵⁰ He also begged R.N. to forgive him and, within three weeks of the assault, they reconciled.³⁵¹ Three months later, R.N. testified before a grand jury that the defendant had recently given her a typed letter with the heading "[R.N.], these are the most important things to remember," followed by a list of sixteen issues regarding the assault that she said were mostly untrue.³⁵²

LaPointe was indicted and ultimately convicted of both assault causing bodily injury and tampering with a witness, but he appealed only the latter charge. The appellate court disagreed with the trial court's conclusion that the amount of the bribe coupled with the defendant's being a lawyer indicated "that this money was offered either to deter . . . [R.N.] from pressing charges or to influence any testimony that was to be given in the future." In reversing the witness tampering conviction, the appellate court reasoned that there was insufficient evidence to prove that LaPointe knew R.N. was a potential witness to her own assault or that he offered the \$10,000 with the intent of dissuading her from testifying against him.

Help, Austin Am. Statesman, Jan. 7, 2007, at 1 (describing batterer who smashed all windows on his ex-girlfriend's car while felony assault case was pending against him).

³⁴⁸ See Santiago, 2003 N.Y. Misc. LEXIS 829, at *52.

³⁴⁹ State v. LaPointe, 418 N.W.2d 49, 50 (Iowa 1988).

³⁵⁰ Id.

³⁵¹ Id.

³⁵² *Id*.

³⁵³ Id.

³⁵⁴ *Id.* at 51.

³⁵⁵ *Id.* at 52 (explaining that appellate court said evidence did not indicate beyond reasonable doubt that defendant had engaged in proscribed conduct).

This ruling is puzzling on many fronts. The appellate court here appeared to ignore its mandate to give deference to the trial court's decision, to the egregious nature of the victim's injuries, and to the defendant's actions precisely meeting the elements of witness tampering. One explanation is that the appellate court sought to punish the victim for reconciling with the offender.³⁵⁶ Even if the defendant's unlawful intent in offering \$10,000 to R.N. is ignored, his list of sixteen lies that she was to use as her script exhibited manifest intent to influence her testimony regarding the crime for which he was on trial. Given that the defendant was a lawyer (who was thus fully aware of the witness tampering implicit in providing the list), his offering of the money and his forcing their reconciliation to coincide with the court hearings, the appellate court's decision appears imbued with the social calculus of backlash.

Often, bribery is not treated as seriously as violent coercion, even when it fits within the parameters of prohibited criminal acts.³⁵⁷ Courts may view bribery within the intimate partner context as a form of verbal contract, sometimes within the realm of accord and satisfaction.³⁵⁸ This interpretation obscures the implicit threat, well understood by the victim, that she has little choice in the matter, for refusing the defendant's demands can result in violent retaliation.

Another case illustrating persistent, nonviolent coercion is *Commonwealth v. Henderson*, ³⁵⁹ in which a Massachusetts trial court reached the opposite conclusion on facts similar to those in *LaPointe*. Jerry Henderson struck his girlfriend in the face and was jailed, as he had another pending domestic violence case against the same victim. ³⁶⁰ While the defendant was incarcerated, the victim obtained a protective order against him, prohibiting all contact with her. ³⁶¹ In response, the defendant sent the victim between fifty and sixty letters, pleading with her to lie about the source of her injury in exchange for

³⁵⁶ In trainings and conversations, judges and prosecutors sometimes express disgust and even anger at victims who resume relationships with their perpetrators regardless of the circumstances. *See supra* note 12 (describing author's experience).

³⁵⁷ See infra Appendix (describing elements of various witness tampering statutes).

³⁵⁸ Many jurisdictions continue to permit accord and satisfaction dispositions in domestic violence cases despite the implicit witness tampering in such agreements. *See, e.g.,* Commonwealth v. Guzman, 845 N.E.2d 270 (Mass. 2006) (ruling that even if prosecutor is against this disposition, court can nonetheless permit it even in case involving domestic violence). These issues will be pursued in greater depth in a forthcoming article. Sarah M. Buel, *De Facto Witness Tampering* (in progress).

³⁵⁹ 747 N.E.2d 659 (Mass. 2001).

³⁶⁰ *Id.* at 659.

³⁶¹ *Id.* at 661.

money, assorted items, and a marriage proposal.³⁶² In my experience, Henderson's tenacious witness tampering is typical in its repetitious directives and scope:

I have a hundred and fifty dollars . . . get me out of here and they are all yours. Please do that for me. Tell them I did not hit you [in the eye], please, for me. I will give you my money. . . . I will give you anything I have. . . . I know it is a lie, but that is the only way. Baby, tell them that for me. I need you to lie for me. Please tell a lie for I can get out I know it is wrong for me to ask you to lie for me. Don't tell them that I hit you. . . . When you get on the stand, tell them you are lying, because you [were] mad at me. [My mother] is going to give you \$300. . . . The only one[s who] will know [are] you and me. ³⁶³

Although LaPointe was not as explicit in his directives to the witness as was Henderson, LaPointe was an attorney who was presumably familiar with witness tampering laws. LaPointe's actions indicated the intent to silence the witness in the least obtrusive manner possible. The doctrinal framework of witness tampering law, however, does not include rewarding slick perpetrators and nor should the law in practice. As the *Giles* Court emphasizes, since the earliest applications of witness tampering, it is the defendant's *intent to silence* that should determine culpability.

III. INTENT-TO-SILENCE CALCULUS

Given the sea changes wrought by the *Crawford*, *Davis*, and *Giles* cases, courts are scrambling to disentangle the morass of conflicting common and statutory law. The disorder is puzzling and unnecessary because the imposed regime is contrary even to originalist views. *Giles* verified that at common law the two types of unconfronted statements deemed admissible were dying declarations and those made by a witness whom the defendant had prevented from appearing.³⁶⁴ Because

³⁶² *Id.* A Massachusetts Superior Court jury convicted Henderson on four charges of willfully interfering with a witness, eight charges for violation of a protective order, and one charge of assault and battery. *Id.* at 659-60.

³⁶³ *Id.* at 661 n.4. The court noted that portions of these letters were redacted as they were "more inflammatory than probative." *Id.* at 661 n.3.

³⁶⁴ Giles v. California, 128 S. Ct. 2678, 2682-83 (2008) (stating that two types of admissible, unconfronted, testimonial statements were (1) declarations made by speaker who was "both on the brink of death and aware that he was dying," and (2) "statements of a witness who was detained or kept away by the means or procurement of the defendant").

every state has promulgated witness tampering and intimidation statutes,³⁶⁵ irrefutable legislative intent exists to justify fashioning a workable framework through which offenders can be held accountable.

In recognition of profuse witness tampering, the Federal Rules of Evidence Advisory Committee codified forfeiture in Federal Rule of Evidence 804(b)(6) as a hearsay exception.³⁶⁶ Although the rule creates a Confrontation Clause exception, its intent requirement rewards a defendant who lies about his goal in harming a witness. Similarly, insisting that the defendant must be successful in keeping the witness from testifying only places the cooperating victim in greater danger. Mandating intent and completion of unavailability is also contrary to many states' laws and unnecessarily burdens Rule 804(b)(6) with roadblocks to cessation of witness tampering.³⁶⁷

While noting the adverse societal impact of witness tampering in domestic violence cases, Judge Jeffrey Atlas asserted that it was time to move from excuses to remedial action. He posited:

Clearly, the nature of this syndrome and the cost to the families involved, the police, medical professionals, the courts and society in general cry out for a solution. It is simply unacceptable for our process to turn a blind eye to the dangers of such abuse by shrugging our shoulders and saying that nothing can be done within the framework of existing law.³⁶⁸

The inquiry into whether an offender's animus rises to a level meriting forfeiture requires evaluation of the intent-to-silence standard. Every nuance has potential significance, giving currency to the argument that case factors and context can be dispositive. By definition, in IPV cases, the victim and offender have a prior or current relationship which has given the defendant access to much personal and otherwise confidential information about the victim, and her family, employment, children, habits, home, and resources. This knowledge gives an offender the means to coerce a victim under the state's radar screen, necessitating inferences in certain circumstances if justice is to be served.

³⁶⁵ See infra Appendix.

³⁶⁶ FED. R. EVID. 804(b)(6).

 $^{^{367}}$ See infra Appendix (listing all states' statutes and noting those without such requirements).

³⁶⁸ People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *50 (N.Y. Sup. Ct. Apr. 7, 2003) (emphasis added).

Because *Giles* created a new standard requiring the state to prove a defendant's animus when he committed the crime, and the offender is not likely to admit his intent, it is necessary to provide guidance for inference standards. ³⁶⁹ An IPV offender does not need to specify intent for the victim to implicitly know why she is being targeted. In *Illinois v. Allen*, the U.S. Supreme Court asserted that specific intent is not required when the defendant engages in wrongdoing. ³⁷⁰ Citing other precedent, the Court reasoned, "We accept instead the statement of Mr. Justice Cardozo who... said: 'No doubt the privilege (of personally confronting witnesses) may be lost by consent or at times even by misconduct.' "³⁷¹

One premise of criminal law holds that if conduct is reckless enough, intent is inferred. Some courts have held that as long as a witness's unavailability is a foreseeable result of the defendant's actions, intent can be inferred or presumed.³⁷² Permitting a defendant to both cause a witness's nonappearance and preclude that witness's previous statements makes the court complicit with that offender's misconduct.³⁷³ Since *Crawford*, *Davis*, and *Giles* did not provide much guidance in determining sufficient intent, I offer some case factors as dispositive. As discussed below, such facets range from those directly involving the court and offender crimes to those specific to the victim and overall relationship context. As is true in applying a "totality of the circumstances" standard, here, too, these considerations must flex with appropriate weight given to achieve an equitable result.

A. Murder

Capturing the thrust of the argument in favor of presuming intent to silence with murder is the following statement from a case out of the Second Circuit:

³⁶⁹ *Giles*, 128 S. Ct. at 2683 ("The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying.").

³⁷⁰ Illinois v. Allen, 397 U.S. 337, 339-43 (1970).

³⁷¹ *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 106 (1934)).

³⁷² See, e.g., New Mexico v. Romero, 133 P.3d 842 (N.M. Ct. App. 2006) (finding that intent can be "inferred" if rational result of defendant's conduct is victim's unavailability for trial); see also Illinois v. Stechly, 870 N.E.2d 333, 352-53 (Ill. 2007) (noting that complete assurance that murdered witness will not be able to testify "could theoretically support presuming intent in the context of murder").

³⁷³ See Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-45 (1933) (stating that to follow defendant's request in that situation "would make this court the abetter of iniquity"); see also supra note 3 and accompanying text (describing state's complicity when failing to act).

It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. . . . We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness.³⁷⁴

Courts should presume that when a defendant commits murder, a rebuttable presumption or inference of intent to silence applies.³⁷⁵ In Giles. Justice Scalia stated that when an abusive relationship ends in murder, "the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution rendering her prior statements admissible under the forfeiture doctrine."376 The petitioner, Dwyane Giles, had argued that the forfeiture doctrine should not foreclose a murder defendant's Sixth Amendment right to confront the victim if his intent when committing the crime was not to prevent her testimony.³⁷⁷ Certainly, in murder cases, Giles's position would provide a bonus for the most dangerous batterers, resulting in additional motivation for them to kill their victims rather than risk the adverse testimony. Further, prosecutors would find it difficult to bring such cases forward, thereby undermining the court's goal of truth-seeking.

Linda Greenhouse, legal reporter for the *New York Times*, stated, "It is therefore likely that the Justices accepted the new case, *Giles v. California*, to make it clear that as long as the victim's unavailability as a witness was a foreseeable consequence of the murder, the Sixth Amendment does not require the state to prove the actual motive for the murder was to make the victim unavailable."³⁷⁸ And consistent with a foreseeability premise, a California court ruled in *People v. Thomas* that a defendant should not have to utter precise commands or threats to constitute witness tampering: "There is . . . no talismanic requirement that a defendant must say 'Don't testify' or words tantamount thereto, in order to commit the charged offenses . . . [a]s

³⁷⁴ United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001) (quoting United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 960 (1997)), *cert. denied*, 534 U.S. 897 (2001).

³⁷⁵ This presumption could certainly be overcome with evidence of self-defense, duress, or other contextual or mitigating circumstances. *See infra*.

³⁷⁶ Giles v. California, 128 S. Ct. 2678, 2693 (2008).

³⁷⁷ *Id.* at 2681.

³⁷⁸ See Linda Greenhouse, Justices to Hear Case Testing Rule on Witness, N.Y. TIMES, Jan. 12, 2008, at A12, available at http://www.nytimes.com/2008/01/12/us/12scotus.html.

long as his words or actions support the inference that he (1) sought to prevent or dissuade a potential witness from attending upon a trial or (2) attempted by threat of force to induce a person to withhold testimony"³⁷⁹ More recently, in 2007, the Indiana Court of Appeals ruled in *Boyd v. Indiana* that by murdering his wife, defendant Boyd forfeited both his right to cross-examine her at trial and to object to admission of her statements to officers regarding a previous domestic violence incident. Responsive to the state's equity argument, the court noted, "Boyd may not take advantage of Ruth's inability to testify, which was the natural consequence of his own misconduct — murdering her." These cases indicate that because it is unrealistic to expect a homicide defendant to incriminate himself by admitting that he killed the witness to prevent her testimony, elemental notions of justice demand that the victim's prior statements are admissible, as long as intent can reasonably be inferred.

Consistent with *Reynolds v. United States*, ³⁸² the 1898 case enshrining the forfeiture doctrine, federal common law has held that murdering a witness presumes the defendant intended to prevent the testimony and was successful in doing so, thereby admitting the declarant's statements. ³⁸³ More than a hundred years after *Reynolds*, in *United States v. Cherry*, the Tenth Circuit interpreted Rule 804(b)(6) to mean that because one defendant murdered a witness, that declarant-witness's statements can be used against all of the defendants. ³⁸⁴ One commentator has attempted to argue that such decisions are contrary to *Reynolds*; ³⁸⁵ however, this position ignores its plain text: "[I]f a witness is absent by [the defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution

³⁷⁹ People v. Thomas, 148 Cal. Rptr. 52, 54 (Ct. App. 1978).

³⁸⁰ Boyd v. Indiana, 866 N.E.2d 855, 858 (Ind. Ct. App. 2007) (finding that "Boyd's wrongdoing forfeited his right to confront Ruth at trial as provided by the Sixth Amendment and the Indiana Rules of Evidence").

³⁸¹ *Id.*

³⁸² 98 U.S. 145, 158 (1878).

³⁸³ See James F. Flanagan, Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing, 14 Wm. & MARY BILL RTS. J. 1193, 1211-12 (2006) [hereinafter Flanagan, Confrontation] (arguing that intent and deliberate action are prerequisite to forfeiture); see also United States v. Dhinsa, 243 F.3d 635, 653-54 (2d Cir. 2001) (finding that murdered witness's statements are admissible under FED. R. EVID. 804(b)(6)); United States v. Johnson, 219 F.3d 349, 355-56 (4th Cir. 2000).

³⁸⁴ United States v. Cherry, 217 F.3d 811, 816 (10th Cir. 2000).

³⁸⁵ Flanagan, *Confrontation*, *supra* note 383, at 1235 (stating that "[the] greatest potential for harm would be to the minor members who have no connection with the acts of others, and no way to challenge evidence that is unrelated to their activities").

does not guarantee an accused person against the legitimate consequences of his own wrongful acts." ³⁸⁶

It is a stretch to take from Reynolds a premise that confrontation can be denied only by conduct specifically intending to prevent a witness's testimony.³⁸⁷ The Reynolds Court makes no reference to the defendant's intent, seemingly disinterested in his reasons for preventing witnesses from testifying against him, only in the unjust result.³⁸⁸ Similarly, reported cases from the era in which the Sixth Amendment was drafted focus entirely on the nexus between the offender's conduct and a witness's unavailability. 389 The forfeiture doctrine means to hold defendants responsible for setting in motion actions that prevent witness testimony, regardless of whether they were initially intended to achieve that outcome.³⁹⁰ Particularly with domestic violence murders, a defendant would be hard pressed to argue that he could neither foresee that his actions would result in great harm to the victim, nor that the injury would prevent the victim's testimony. If the protective covenant of the Sixth Amendment is stretched to protect batterers who murder their partners, the motive to ensure silence appears obvious.

38

³⁸⁶ Reynolds, 98 U.S. at 158.

³⁸⁷ See, e.g., James F. Flanagan, Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness, 15 J.L. & Pol'y 863, 865 (2007) (stating that Reynolds held "that the right of confrontation can only be lost by deliberate action aimed at preventing the witness from testifying").

³⁸⁸ See Joshua Deahl, Note, Expanding Forfeiture Without Sacrificing Confrontation After Crawford, 104 MICH. L. REV. 599, 608 (2005) ("Notably, the Court never undertook any consideration of Reynolds' purpose, apparently indifferent to the motivations underlying his obstructionism.").

³⁸⁹ See generally Drayton v. Wells, 10 S.C.L. (1 Nott & McC.) 409 (S.C. Const. Ct. App. 1819) (stating, in dicta, that court is concerned with defendant's role in preventing witness from being present); Harrison's Case, (1692) 12 How. St. Tr. 833, 851 (H.L.) (focusing not on intent of accused, only that his agents had ensured witness's absence); Lord Morley's Case, (1666) 6 How. St. Tr. 769, 777 (H.L.) (trying defendant for murder, with court focusing only on prisoner being reason witness was detained); Lord Fenwick's Case, (1696) 13 How. St. Tr. 537 (H.C.) (admitting hearsay based on evidence that defendant or his lady had caused witness to leave area); R. v. Scaife, (1851) 17 Q.B. 238, 117 Eng. Rep. 1271 (failing to address specific intent entirely).

 $^{^{390}}$ See Marble v. City of Worcester, 70 Mass. (4 Gray) 395, 405 (1855) (noting "maxim that every man shall be presumed to intend the natural and probable consequences of his own acts").

B. Pending Legal Proceedings

Temporal proximity between a defendant's unlawful conduct and a legal proceeding could support a prima facie case for witness tampering. In *Giles*, Justice Scalia deemed "evidence of ongoing criminal proceedings at which the victim would have been expected to testify" as "highly relevant to this inquiry."³⁹¹ A factfinder may reasonably conclude that preventive or retaliatory animus was a factor motivating the defendant to coerce the witness in part because it can be assumed that at arraignment the offender received notice that his conduct was unlawful, that he is not to commit any crimes during the pendency of his case, and that he is not to contact the victim by any means.³⁹² Thus provided with specific information about prohibited conduct as part of being afforded due process, the offender has heightened knowledge of the legal system and can no longer claim to be victimized by the courts. It does not seem too much to ask that he refrain from committing crimes.

Forfeiture may also apply where the missing witness was to testify in another case.³⁹³ As have other courts, the Fourth Circuit has cited Federal Rule of Evidence 804(b)(6) as calling for the defendant to intend making the declarant unavailable "as a witness" without identifying a specific legal proceeding.³⁹⁴ Additionally, even if a criminal case has not yet been initiated, courts rely on the defendant's presumption that a witness will bear testimony against him in deciding whether forfeiture is appropriate.³⁹⁵ Although many of the

³⁹¹ Giles v. California, 128 S. Ct. 2678, 2693 (2008).

 $^{^{392}}$ Based on my thirty-two years' experience in the courts, I have noticed that judges routinely apprise defendants of the charged crimes, no-contact orders, and pretrial release conditions.

³⁹³ See United States v. Johnson, 495 F.3d 951, 971-72 (8th Cir. 2007) (discussing case in which defendant caused another witness to be unavailable in different matter).

³⁹⁴ State v. Gray, 405 F.3d 227, 241 (4th Cir. 2005) (citations omitted) (stating that Rule 804(b)(6) neither specifies type of proceeding nor restricts issues covered in admitted statements); *see also* United States v. Lentz, 58 F. App'x 961, 969-70 (4th Cir. 2003) (King, J., concurring in part and dissenting in part); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999); State v. Ivy, 188 S.W.3d 132, 146-47 (Tenn. 2006). *Contra* United States v. Lentz, 58 F. App'x 961, 968 (4th Cir. 2003) (Traxler, J., concurring); United States v. Lentz, 282 F. Supp. 2d 399, 426-27 (E.D. Va. 2002), *aff'd*, 58 F. App'x 961 (4th Cir. 2003), *abrogated by* United States v. Gray, 405 F.3d 227 (4th Cir. 2005).

³⁹⁵ See United States v. Stewart, 485 F.3d 666, 672 (2d Cir. 2007) (noting that "the forfeiture-by-wrongdoing principle made the testimony as to [witness] Ragga's statements admissible at [defendant] Stewart's trial on the present federal charges even though Stewart's efforts had been focused on preventing Ragga from testifying at a different trial, to wit, Stewart's state trial for assault, rather than the trial in the present

cited cases involve gangs and drug offenses, the same interpretive steps are necessary to reach an understanding of forfeiture analysis in the IPV context.

C. Present Protective Order

If an IPV victim obtains a protective order, and the respondent recidivates against her during its pendency, the court should presume the intent to silence.³⁹⁶ In order to obtain a protective order, an applicant must prove to a court that a domestic violence offense was committed against her and that it is likely to happen again.³⁹⁷ Meeting these elements helps document evidence of the "classic abusive relationship" that should give rise to an inference, Justice Souter argued in his Giles concurrence, of the perpetrator's goal of victim compliance. 398 Most victims are reluctant to seek protective orders; the majority of those who do cite serious abuse ranging from assault and threats to kill, to kidnapping and harming children.³⁹⁹ With the infliction of repeated trauma, the offender seeks to instill such fear that the victim will be unable to fathom facing him in court or taking any action that could bring further harm to herself and her children. 400

The legislative intent of protective order laws is to prevent further harm to IPV victims and create a rational mechanism for enforcement. 401 In practice, however, oversight of protective orders is

federal case (which had not yet been initiated)").

³⁹⁶ By 1989, every state had adopted civil protective order laws with the goal of preventing further harm to IPV victims. Goodmark, supra note 170, at 10.

³⁹⁷ See, e.g., TEX. FAM. CODE ANN. § 85.001(a) (Vernon 2009) (providing that at end of hearing on application for protective order, court must determine whether family violence has occurred and whether it is likely to happen again in future); see also ARIZ. R. PROTECTIVE ORDER PROC. 8(F) (stating that Order of Protection may issue if, by preponderance of evidence, court finds either that domestic violence has occurred within year (or longer if good cause) or that it is likely to occur without

³⁹⁸ Giles v. California, 128 S. Ct. 2678, 2695 (2008) (Souter, J., concurring).

³⁹⁹ See Adele Harrell & Barbara E. Smith, Effects of Restraining Orders on Domestic Violence Victims, in Do Arrests and Restraining Orders Work? 214, 216-17 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

⁴⁰⁰ Krischer, supra note 6, at 15 (reporting that if victims were assisting prosecution, almost half of IPV batterers threatened victim with violence and one quarter warned that their children would be kidnapped or taken away).

⁴⁰¹ See Goodmark, supra note 170, at 10; see, e.g., KAN. STAT. ANN. § 60-3101(b) (LexisNexis 2008). Kansas's Protection from Abuse Act states: "This act shall be liberally construed to promote the protection of victims of domestic violence from bodily injury or threats of bodily injury and to facilitate access to judicial protection for the victims, whether represented by counsel or proceeding pro se." Id.; see also KY.

left to an array of societal actors, such as police, judges, prosecutors, advocates, employers, family, and community members, who impose their own arbitrary biases about which victims deserve attention. An IPV perpetrator's willingness to violate a protective order signals disrespect for the court's authority as well as for the safety and privacy rights of the victim. This type of brazen disregard for the rule of law compounded by lax police enforcement caused all states to append criminal charges to violation of protective orders. Some courts and law enforcement accord a minimal level of deference to their own protective orders, thus emboldening offenders to perpetuate the "classic abusive relationship."

D. Classic Abusive Relationship

Whether a batterer murders his victim or engages in other coercive conduct, *Giles* also stated, "*Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry*, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." ⁴⁰³ Under this standard, the state must be prepared to show not only that prior abuse occurred, but also that its intent was to deter the victim from seeking assistance. Absent the victim's testimony to assert this causal connection, the prosecutor may need to offer an expert or empirical data explaining that an offender need not utter a word to discourage a victim from contacting authorities for aid. ⁴⁰⁴ However, such complicating and unnecessary impediments should be removed because the defendant's confrontation rights can be preserved without rewarding him for silencing his victim.

Notably, Justice Souter argued in his *Giles* concurrence that intent to silence should be inferred with proof of a "classic abusive relationship." The Court has signaled that evidence of prior abuse should be admissible if it deterred the witness from testifying. Many

-

REV. STAT. ANN. § 403.715 (LexisNexis 2010) (stating that purpose is to "allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible").

⁴⁰² See Town of Castle Rock v. Gonzales, 545 U.S. 748, 779-82 (2005) (Stevens, J., dissenting) (stating that state legislatures enacted mandatory arrest laws to remove officer discretion regarding arrest in response to police refusal to arrest for violation of domestic violence restraining orders).

⁴⁰³ Giles, 128 S. Ct. at 2693 (emphasis added).

⁴⁰⁴ See supra notes 147-50 and accompanying text.

⁴⁰⁵ Giles, 128 S. Ct. at 2695 (Souter, J., concurring).

facets of the *Giles* decision seemingly beckon the state to prove intent through use of substantive evidence other than a victim's direct testimony, be it circumstantial, based on acceptable hearsay, or otherwise performing the function of truth-seeking.

The *Giles* decision mistakenly implied that it is relatively easy to obtain documentation of the scope, severity, duration, and type of prior abuse to meet this standard. There are many reasons why a victim does not contact authorities to report previous harm, thereby depriving the state of a paper trail by which to document the dangerous history that the court could interpret as expressing the intent to silence. Consistent with state evidentiary rules, a prosecutor should be afforded latitude in the means by which she proves evidence of a "classic abusive relationship."

Protection should also be afforded to those victims not murdered by their partners but rendered physically or mentally incapacitated. One example should suffice to illustrate this need. After an ongoing campaign of witness intimidation, including assaults and threats, Marcus Granger so severely beat his ex-girlfriend that she sustained brain damage and, since the attempted murder, had to be in either a hospital or nursing home as she was neither able to feed nor care for herself. Witnesses described the defendant's "stomping on [the victim's] head," resulting in a cerebral concussion, brain swelling, and other injuries, from which she remained in a coma for eighteen days. The defendant threatened to take the victim's son unless she spoke with him. After the jury found him guilty of assault in the first degree, armed criminal action, victim tampering, aggravated stalking, resisting arrest, and two counts of burglary in the first degree, the

⁴⁰⁶ Id. at 2694-95.

⁴⁰⁷ See generally Buel, Fifty Obstacles to Leaving, supra note 140 (explaining why victims may not report incidents of prior abuse, including among many others, fear of retaliation, no money with which to flee, no job skills, and lack of knowledge about available resources).

⁴⁰⁸ See infra notes 474-75 and accompanying text (arguing that explicit, implicit, and circumstantial evidence should be accepted); see also supra notes 134-37 and accompanying text (describing forms of evidence, including letters, medical records, 911 tapes, jail calls, and eyewitness accounts, gathered by Dallas Police Department to substantiate forfeiture case).

⁴⁰⁹ State v. Granger, 966 S.W.2d 27, 28-29 (Mo. Ct. App. 1998) (describing that defendant had repeatedly broken into victim's home, often abusing her in front of her two young sons, and that, at time of appeal, victim was still unable to care for herself and her children).

⁴¹⁰ Id. at 28.

Missouri Court of Appeals surprisingly reversed on the convictions for victim tampering and one count of burglary in the first degree.⁴¹¹

E. Recantation

When IPV victims recant earlier allegations against their perpetrators, it is most often because they have been threatened, coerced, or otherwise unlawfully deterred from telling the truth. Duress-induced recantations proliferate, and courts, by now, should know all too well that the abuser is the most likely cause of the victim being too frightened to go forward. Whether the perpetrator threatened the victim, pleaded with her not to put him in jail, or promised improved behavior, the court must understand the dynamics when victim safety is at stake. Some judges lament the high probability of victims being forced to falsely recant their initial allegations, yet feel hamstrung by the current doctrinal framework. Although I am not suggesting that recantation should trigger some version of forfeiture per se, the law must account for this incontrovertible practice and provide a mechanism for relief.

Several courts have found that when a victim recants her earlier story of abuse, prior domestic violence between the parties is, in the words of one of these courts, "relevant to show the trier of fact the context of the relationship between the victim and the defendant, where . . . that relationship is offered as a possible explanation for the victim's recantation." By creating and exploiting victim vulnerabilities, IPV offenders make recantation as typical in this context as in gang, organized crime, and drug cases. ⁴¹⁶ It is estimated

⁴¹¹ Id. at 30.

 $^{^{412}}$ See supra notes 152-53 and accompanying text asserting that witness tampering is the most common crime committed against IPV victims, yet is the least charged, prosecuted and adjudicated offense.

 $^{^{\}rm 413}$ Melissa Hamilton, Expert Testimony on Domestic Violence: A Discourse Analysis 105 (2009) (citing numerous empirical studies documenting types and frequency of victim recantation).

⁴¹⁴ See People v. Shilitano, 112 N.E. 733, 736 (N.Y. 1916); People v. Yates, 736 N.Y.S.2d 798, 801 (App. Div. 2002) (stating that "[t]here is no form of proof so unreliable as recanting testimony"); see also People v. Napolean, No. 4751/01, 2002 N.Y. Misc. LEXIS 158, *8 (N.Y. Sup. Ct. Mar. 12, 2002) ("Partly because recantations are often induced by duress or coercion, the sincerity of a recantation is to be viewed with 'extreme suspicion.'").

⁴¹⁵ State v. Arakawa, 61 P.3d 537, 545 (Haw. Ct. App. 2002).

⁴¹⁶ Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 748 (2005) (describing many forms of abuse batterers use to leverage exploitation of their victims).

that between eighty and ninety percent of domestic violence victims decline to participate in the prosecution or recant their allegations. This astonishingly high number demands a rethinking of the structural, cognitive, and psychological basis of the witness tampering-forfeiture paradigm. The structural paradigm of the structural paradigm.

F. Mixed Purpose

In most jurisdictions, the forfeiture rule requires neither that the declarant be a witness at the time of the tampering nor that the defendant's sole intent was to silence her. The Tennessee Supreme Court, in *State v. Ivy*, admitted numerous victim statements regarding past violence because of their relevance to show the defendant's motive for the murder, as well as his intent to harm the victim over the duration of their relationship. Because the rule of forfeiture is designed to prevent precisely the outcome of rewarding offender misconduct, a batterer's claim that he lacked intentionality cannot control whether testimonial statements are admissible.

In *Gonzalez v. State*, a Texas jury convicted the defendant of capital murder and he appealed, arguing that the victim's statements to police officers were testimonial, and thus, should have been precluded from consideration at trial.⁴²¹ The Texas appellate court ruled that the victim's statements telling the officers who shot her, his physical characteristics, and his residence were admissible excited utterances because by his murder of her, the defendant forfeited any claim to confrontation rights.⁴²² The defendant countered that because there was no evidence that his intent in shooting his victim was to silence her testimony, the forfeiture doctrine should not apply. In declining to so limit the doctrine, the court cited several other states' rulings

_

⁴¹⁷ Davis v. State, 169 S.W.3d 660, 671 (Tex. Ct. App. 2005) (citing Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 Ind. L. Rev. 687, 709 n.76 (2003)). This is also consistent with my thirty-two years' experience. *See supra* note 12 (describing author's experience).

 $^{^{418}}$ Batterer coercion involves cognitive, behavioral, and emotional aspects. See Dutton & Goodman, supra note 416, at 746, 748 (describing how IPV offenders create expectancy of coercion).

⁴¹⁹ State v. Ivy, 188 S.W.3d 132, 145 (Tenn. 2006) ("[T]he rule does not require the declarant to be an actual witness and that the defendant's intent need not have been *solely* to prevent the declarant from testifying.").

⁴²⁰ Id. at 147

⁴²¹ Gonzalez v. State, 155 S.W.3d 603, 606 (Tex. Ct. App. 2004).

⁴²² *Id.* at 609 ("In this case . . . we need not resolve whether Maria's statements to the police were testimonial because Gonzalez forfeited his right of confrontation under the doctrine of forfeiture by wrongdoing.").

affirming that the defendant's sole intent in killing a victim need not be to prevent her testimony at a future trial. And yother courts have similarly reasoned that the state is only required to show that a part of the defendant's motivation for criminal conduct against the victim was to keep the witness from speaking against him.

Fixation solely on a defendant's motivations disregards forfeiture's equitable foundation. In Ivy, the Tennessee Supreme Court noted that even if a batterer did not intend to cause his victim's absence by the commission of violent crime, he should not benefit from her resulting unavailability. Similarly, in Lujan v. State, a Texas appellate court found sufficient evidence that the defendant displayed a specific intent to persuade an abuse victim not to testify against him when he delivered a letter to her that offered to pay her to "settle this case out of court." Thus, although most courts' reasoning is consistent with the remedial intent of forfeiture, others presume intent only when the defendant murders the victim.

G. Admissibility of Nontestimonial Hearsay

Davis clarified that only testimonial hearsay was implicated in the Confrontation Clause, 428 and Giles further affirmed this premise. The Giles Court specified, "Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing." 429

⁴²³ *Id.* at 611 n.6 (citing People v. Giles, 19 Cal. Rptr. 3d 843, 851 (Ct. App. 2004) (holding that if reason victim cannot testify at trial is that accused murdered her, then accused should be deemed to have forfeited confrontation right, even though act with which accused is charged is same as one by which he allegedly rendered witness unavailable)); *see also* People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004).

⁴²⁴ See United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (citing rationale that "[t]he government need not . . . show that the defendant's sole motivation was to procure the declarant's absence; but rather, it need only show that the defendant was motivated in part by a desire to silence the witness"); see also State v. Alvarez-Lopez, 98 P.3d 699, 704 (N.M. 2004) (giving same reasoning as *Dhinsa*).

⁴²⁵ See Deahl, supra note 388, at 613 (asserting that "[p]reoccupation with a defendant's motives in these cases ignores the equitable underpinnings of forfeiture, and courts frequently decide issues that are identical to the questions a jury must face").

⁴²⁶ State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006).

⁴²⁷ Lujan v. State, No. 03-02-00691-CR, 2004 WL 334516, at *5 (Tex. App. 2004).

⁴²⁸ Davis v. Washington, 547 U.S. 813, 824 (2006) (ruling that testimonial statements were obviously focus of Confrontation Clause such that it "must fairly be said to mark out not merely its 'core,' but its perimeter").

⁴²⁹ Giles v. California, 128 S. Ct. 2678, 2692-93 (2008).

Although this reference is in dicta, its inclusion indicates the Court's presumption that a victim's account of how she obtained her injuries is not testimonial, and is instead a permissible hearsay exception as long as the information gathered is relevant for medical care. In order to explain why the history of harm and identification of the offender are relevant for treatment, counsel can make oral arguments, file briefs, and use motions *in limine* in tandem with testimony of medical providers, experts, or other relevant witnesses. Medical professionals should routinely gather a complete narrative of the battered patient's abuse, as this information is critical to ethically treating IPV victims⁴³⁰ and meeting the current standard of care.⁴³¹

After *Giles*, an IPV victim's statements made to a physician as part of her medical care should presumptively be admitted.⁴³² Since the 2004

⁴³⁰ This is based on my experience and conversations I have had while conducting scores of training for medical professionals since 1985, including at many state's medical associations' conferences (including American Medical Association, American College of Obstetricians and Gynecologists, and American Nurses Association), and adjunct teaching at Harvard Medical School since 1992. I have also published several articles and medical text book chapters on the role of medical professionals in addressing domestic violence. See generally Sarah M. Buel, Obstacles and Remedies for Criminal and Civil Justice for Victims of Intimate Partner Violence and Medical and Forensic Documentation, in Intimate Partner Violence: A Health Based Perspective (Oxford University Press: Int'l Release October 2008) (with Eliza Hirst) (describing role of medical professionals in IPV interventions, including documentation of injuries, creation of safety plans, expert testimony, and appropriate referrals); Sarah M. Buel, Family Violence and the Health Care System: Recommendations for More Effective Interventions, 35 HOUSTON L. REV. 109 (1998) (explaining legal obligations of health care providers as well as steps to assist battered patients achieve safety and healing).

⁴³¹ See American Medical Association (AMA) National Advisory Council on Violence and Abuse, Policy Compendium policy H-515.965, at 17-19 (2008), available at http://www.ama-assn.org/ama1/pub/upload/mm/386/vio_policy_comp.pdf. The AMA policy states that medical "curricula should include coverage of the diagnosis, treatment, and reporting of child maltreatment, intimate partner violence, and elder abuse and provide training on interviewing techniques, risk assessment, safety planning, and procedures for linking with resources to assist victims." *Id.* The AMA supports the inclusion of questions on family violence issues on licensure and certification tests and "encourages physicians to . . . [r]outinely inquire about the family violence histories of their patients as this knowledge is essential for effective diagnosis and care." *Id.*

⁴³² It should be safe to assume that here Justice Scalia meant that the statements of all medical professionals would be admissible given the broader language of Federal Rule of Evidence 803(4) regarding hearsay exceptions. *See* FED. R. EVID. 803(4) ("Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or

Crawford decision, prosecutors have lamented that some judges have mistakenly redacted from medical records a victim's identification of the defendant as her assailant. 433 It is often relevant to the provision of care for the medical provider to know who caused an IPV victim's injuries. For instance, in order to determine an effective discharge plan, the physician must know if the patient has a safe place to live and strategies to avoid recurrent harm. By directly asking the identity of the IPV perpetrator and documenting his name in the medical record, the present doctor and all subsequent medical providers will be in a better position to assist that victim with safety planning and abuse prevention. Davis allowed that a 911 operator's questions regarding the perpetrator's identity can be "necessary to be able to resolve the present emergency" because law enforcement en route to the scene need to "know whether they would be encountering a violent felon."434 Along these same lines, physicians can assert that effective patient care necessitates their having a complete picture of a battered patient's immediate and future danger risks.

Healthcare professionals also need to know if the perpetrator came to the hospital with the victim and is in the waiting room where he can cause further harm to the victim and staff. Because IPV perpetrators generally engage in chronic and repeat abuse, it is foreseeable that victims will remain in danger. Also, medical providers may be the only persons to whom the victim discloses this information, making it particularly important that they implement effective interventions.435

In sexual assault cases, a physician needs to determine if the perpetrator is an intimate partner or stranger by whom the patient could have been infected with a sexually transmitted infection, HIV, or AIDS. Information about the "morning after pill" or other contraception may be warranted. Given the high co-occurrence of domestic violence and sexual assault within intimate relationships, all medical providers should screen for both and note the perpetrator's

treatment.").

⁴³³ See supra note 18 and accompanying text (describing the holding in Crawford v. Washington). At the National College of District Attorney's Annual Domestic Violence Conference held on October 3, 2008 in San Diego, California, five different prosecutors reported the same problem to me, but asked to remain anonymous for fear their judges would be upset at their disclosures.

⁴³⁴ Davis v. Washington, 547 U.S. 813, 827 (2006) (emphasis omitted).

⁴³⁵ Supra note 12 (describing author's experience). Many victims have told me that they first told a medical professional about the abuse and may not have disclosed it to anyone else. Id.

identity in either case. Also Law enforcement can also be instrumental in the use of medical records as corroboration to out of court statements. For example, in order to have a victim's medical record available in subsequent proceedings even if she cannot testify, law enforcement officers are increasingly obtaining the victim's written permission at the crime scene to use medical records, all as part of the incident report.

In addition to the use of medical records, friends, neighbors, coworkers, fellow parishioners, and other nongovernmental agents should be interviewed to determine if the victim told them about the abuse. These people are sometimes willing to testify about their knowledge of the abuse, but are often too frightened of the perpetrator to assist. They are understandably intimidated because they either have seen that the defendant is quite willing to carry out his threats of pre-emptive or retaliatory violence, or have already been direct targets of his witness tampering. 439

It should be noted that hearsay and testimonial evidence are not completely excluded from criminal trial proceedings. Hearsay and testimonial statements are admissible in probation revocation and restitution hearings, for example. Reliable hearsay and testimonial statements are admissible in probation revocation hearings because these proceedings not intended to be adversarial. Restitution hearings are viewed in a similar light, allowing the state to meet its burden of proof (regarding costs to the victim) through the introduction of relevant evidence, including hearsay. 441

⁴³⁶ See infra note 12 (explaining high co-occurrence of domestic violence and sexual assault).

⁴³⁷ See Incident Report Form, Travis County (Tex.) Sheriff's Dep't (on file with author), as explained in Interview with Jim Sylvester, Chief Deputy, Travis County Sheriff's Dep't (Feb. 7, 2008).

⁴³⁸ Supra note 12 (describing author's experience).

⁴³⁹ Supra note 12 (describing author's experience).

⁴⁴⁰ See, e.g., Cox v. State, 706 N.E.2d 547, 550-51 (Ind. 1999) (finding that probationers retain due process right to confront adverse witnesses, but because hearsay rules are not applicable in probation revocation hearings, relevant evidence is admissible, including "reliable hearsay"); Myers v. State, 895 N.E.2d 742, 742 (Ind. App. 2008) (stating that "probation revocation hearings are narrow inquiries with flexible procedures and are not intended to be equated with adversarial criminal proceedings"); see also Ex parte Hill, No. 1071635, 2009 WL 2840748, at *6 n.2 (Ala. Sept. 4, 2009) (noting that Alabama law provides that in probation revocation hearings, "[t]he court may receive any reliable, relevant evidence not legally privileged, including hearsay").

⁴⁴¹ See, e.g., People v. Rosado, No. 9201/99, 2008 N.Y. Misc. LEXIS 791, at *11 (N.Y. Sup. Ct. Jan. 17, 2008) (clarifying that in "restitution hearings . . . [t]he statute

H. Context

While most courts do not acknowledge the forfeiture doctrine in IPV cases, some have correctly inferred forfeiture from examining cumulative circumstances and the history of abuse in each case. 442 Giles appears to have adopted this position — that the state should not have to prove a defendant said he intended to dissuade a witness from testifying if it can be presumed from the totality of his actions. 443 Legal scholars and prosecutors agree that, most often, the abuser's ongoing coercive behavior is the direct cause of the victim not appearing for trial.444 It is thus imperative that when judges make forfeiture determinations, they hear the complete history of abuse, including that which occurred *prior* to the charge before the court. In Santiago, Judge Atlas conducted a forfeiture hearing in which he allowed the victim, her counselor, a responding New York City police officer, a prosecutor with whom the victim had spoken, and a domestic violence expert to testify about the full history of mistreatment. 445 In finding that the defendant Victor Santiago's ongoing abuse caused his girlfriend's absence, 446 Judge Atlas clarified:

I do not believe that the cases admitting prior testimony of an unavailable witness should be read to hold that prior evidence given by an unavailable witness is admissible only when the defendant's misconduct causing the unavailability occurs between the defendant's arrest and the date of trial. While that may occur in the usual case, domestic violence matters are of

permits the People to satisfy their burden through the production of relevant evidence, which, can consist of hearsay").

р

⁴⁴² See, e.g., People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *1-2 (N.Y. Sup. Ct. Apr. 7, 2003).

⁴⁴³ See Tuerkheimer, Forfeiture After Giles, supra note 58, at 711 (expressing that "[f]or the first time, the Court has identified 'the domestic violence context' as a relevant construct, thereby compelling lower courts to grapple with the particularities of violence between intimates").

⁴⁴⁴ See Tuerkheimer, Crawford's *Triangle*, supra note 83, at 49 (stating that "I have posited that in many, if not most, cases of victimless domestic violence prosecution, a batterer's conduct over time has caused the victim's unavailability"); see also Nelson Domestic Violence Class Presentation, supra note 126 (stating that most victims with whom Nelson has worked over past ten years as prosecutor refuse to testify because they have been battered for many years and are certain of perpetrator's revenge if they do so).

⁴⁴⁵ Santiago, 2003 N.Y. Misc. LEXIS 829, at *6.

 $^{^{446}}$ *Id.* at *1-2. Judge Atlas explained that Victor Santiago's "longstanding pattern of physical and emotional abuse toward Angela R. effectively forced her to become unavailable as a witness for the People at trial." *Id.*

such a different character as to justify a broader application of the rule.⁴⁴⁷

In rejecting the limited post-arrest timeframe, Judge Atlas provided the basis on which prosecutors can rest when arguing for admission of relevant history of abuse between the parties at bar. Although recognition of defendants' longstanding abusive courses of conduct is just gaining traction within criminal law, its civil corollary is the doctrine of continuing tort. If abuse occurs over a prolonged period and forms "a continuous and unbroken wrong," the doctrine permits courts to toll the statute of limitations as a means of holding batterers responsible for the full range of harm they have inflicted. Ust as continuing tort enables courts to consider the cumulative effect of batterer harm in its liability calculus, so, too, should forfeiture analysis weigh the same comprehensive scope of coercive conduct.

An IPV defendant's prior bad acts should also be subject to contextual analysis. The case of *Gardner v. State*⁴⁵¹ provides an example. Married six times, John Steven Gardner shot his second wife, Rhonda, early in her pregnancy, causing a miscarriage and permanent paraplegia.⁴⁵² Convicted of aggravated assault, he served eight years in prison, but while there, Gardner met this third wife, Margaret, and soon started threatening to kill her and her family.⁴⁵³ When Margaret fled, Gardner kidnapped her at work and was sent back to prison after leading police on a high-speed chase. Because Gardner repeatedly threatened to "hunt her down" if she ever left him, Margaret remained in fear of him.⁴⁵⁴ Gardner subsequently murdered his sixth wife, Tammy, after a terrorizing campaign of life-threatening assaults and threats against Tammy and her family — while in the presence of her young daughter.⁴⁵⁵

Gardner illustrates the reasons why a more robust forfeiture doctrine must be embraced to further the construct of IPV as criminal conduct.

⁴⁴⁷ *Id.* at *45.

⁴⁴⁸ See Buel, Access to Meaningful Remedy, supra note 250, at 1017 (explaining that many jurisdictions preclude batterers from claiming statute of limitations defense in this context)

⁴⁴⁹ See Giovine v. Giovine, 663 A.2d 109, 118 (N.J. Super. Ct. App. Div. 1995).

⁴⁵⁰ See Buel, Access to Meaningful Remedy, supra note 250, at 1017.

⁴⁵¹ No. AP-75582, 2009 WL 3365652 (Tex. Crim. App. Oct. 21, 2009).

⁴⁵² *Id.* at *1 n.1.

⁴⁵³ *Id.* (stating that Margaret testified she frequently thought about fleeing, but remained because John would kill her and her children).

⁴⁵⁴ Id.

⁴⁵⁵ *Id.* at *1.

Had Gardner been apprehended and prosecuted when intimidating Mary, perhaps Tammy would still be alive. With its intent-based doctrinal standard, the Giles majority constrained lower courts from serving their gate-keeping function. Absent specific guidance about the kind of evidence needed to find intent, lower courts are struggling to make sense of this mandate. 456 In his concurrence, Justice Souter noted that the historical precedent on which the majority relies lacks consideration of intent in the context of domestic violence because the Framers did not have the benefit of today's awareness. 457 More importantly, Justice Souter argued that there is no basis to suspect that the Framers would have disagreed with the inference that forfeiture's requisite intent could be met with evidence of a "classic abusive relationship."⁴⁵⁸ He concluded emphatically, stating, "If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger."459

Given the importance of context, a prosecutor should be permitted to use explicit, implicit, and circumstantial evidence to prove that the batterer caused a witness's unavailability. Frofessor Melissa Hamilton's empirical research documents judicial discourse that is critical of battered women who do not fight back against their abusers, do not leave violent relationships, and fail to resist reconciliation.

⁴⁵⁶ See The Supreme Court 2007 Term, Leading Cases, Sixth Amendment — Witness Confrontation — Forfeiture by Wrongdoing Doctrine, 122 HARV. L. REV. 336, 340-41 (2008) (arguing that "in failing to answer crucial questions regarding the level and type of evidence required to find intent, the Court left lower courts ill-equipped to make the careful evaluations demanded of them in the wake of Giles").

⁴⁵⁷ Giles v. California, 128 S. Ct. 2678, 2694-95 (2008) (Souter, J., concurring) ("The historical record . . . simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing").

⁴⁵⁸ *Id.* at 2695 (clarifying that Justice Souter's disagreement stems from "the absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process").

⁴⁵⁹ Id

⁴⁶⁰ Most courts have deemed the proper standard of proof in forfeiture hearings to be preponderance of the evidence. *See supra* note 86 and accompanying text.

⁴⁶¹ See, e.g., HAMILTON, supra note 413, at 129-46 (describing judicial opinions critical of victims not resisting immediate physical assault); *id.* at 147-51 (addressing victim attempts to end the relationship); *id.* at 152-58 (focusing on judges' viewing victims as unreasonable for not resisting reunion).

This important recent scholarship notes that judges continue to assume that fleeing a batterer is logical, safe, and simple, while ignoring the powerful role of intimidation. 462 In IPV cases, an expansive notion of threats must be employed to accurately take account of the deleterious intent of offender coercion.

Courts could well apply what Harvard Business School professors Nitin Nohria and Anthony Mayo call "contextual intelligence" — the use of intuitive analytic skills to understand the tactics and objectives at play in an evolving IPV relationship, and to recognize the victim's behavior as her adaptive strategies. 463 Victims must use contextual intelligence — adapting to knowledge of batterers' behavioral patterns — in attempting to survive batterers' often-changing, oppressive tactics. In Santiago, Judge Atlas modeled contextual intelligence by hearing the full extent of defendant Victor Santiago's coercion and violence against his girlfriend, and then weaving context into his richer forfeiture analysis. 464

Because some judges do not understand the power of a batterer's coercive control over time, even absent violence, they are unable to appreciate its importance when evaluating causation with an unavailable abuse victim. 465 Judge Atlas's opinion in Santiago makes clear that in order to conduct a meaningful forfeiture hearing, the court must take into account the full history of perpetrator abuse. 466 Evidencing a highly sophisticated understanding of witness tampering, Judge Atlas notes that the batterer's coercive conduct permeates every facet of the relationship, necessitating a contextual analysis of each party's actions.467

Rather than place a temporal restriction on proffered evidence, the standard from the continuing tort doctrine offers a more equitable

⁴⁶² Id. at 162.

⁴⁶³ Joseph S. Nye, Jr., Toward a Liberal Realist Foreign Policy, HARV. MAG., Mar.-Apr. 2008, at 36 (describing contextual intelligence and suggesting its application in

⁴⁶⁴ People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *49-50 (N.Y. Sup. Ct. Apr. 7, 2003) (describing how domestic violence perpetrators use strategic tactics to engender victim compliance that are not at play in witness tampering cases involving strangers).

⁴⁶⁵ See, e.g., HERMAN, supra note 450, at 168-69 (explaining batterers' use of intimidation as a nonviolent means of coercive control).

⁴⁶⁶ Santiago, 2003 N.Y. Misc. LEXIS 829, at *49-50.

⁴⁶⁷ See id. (stating that witness tampering is distinctive because it represents a "pattern of behavior [that] causes the victim of domestic abuse to succumb to the offender's importuning in ways that others might not").

alternative. 468 With continuing tort, courts admit all evidence of abuse that is part of an ongoing course of conduct. 469 An expanded forfeiture doctrine thus connotes significance not only for the harm from individual acts of abuse, but also for the cumulative physical and emotional effects of that abuse. Batterers frequently inflict many forms of trauma, each intensifying the harm of previous injuries.

Considering the batterer's full spectrum of harm underscores the criminal law premise of holding offenders responsible for all of their crimes and their deleterious consequences. In State v. Burdick, the Vermont Supreme Court reasoned that evidence of prior abuse by the same perpetrator is admissible to "provide needed context for the behavior at issue in domestic abuse cases and to portray the history surrounding abusive relationships."470 In this case, when the victim said she believed the defendant would carry out his death threat because he had previously held guns to her head, the defendant objected that her testimony referencing prior bad acts was more prejudicial than probative. 471 The Burdick court reasoned, however, that if the jury is unfamiliar with the nature of the victim and offender's relationship, "jurors may not believe the victim was actually abused, since domestic violence is learned, ... controlling behavior aimed at gaining another's compliance through multiple incidents . . . [and] we have also noted that the need to provide context in domestic abuse cases is especially relevant when the pattern of abuse involves the same victim."472

Knowledge of past abuse is vital to appreciating the contextual basis of a victim's reasonable perception that a batterer's imminent retaliation is likely. Professor Elizabeth Schneider explained that intimate partner violence is "premised on an understanding of coercive behavior and of power and control — including a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation — rather than 'number of hits.' "473 Several courts have

⁴⁶⁸ See id. at *45 ("I do not believe that the cases admitting prior testimony of an unavailable witness should be read to hold that prior evidence given by an unavailable witness is admissible only when the defendant's misconduct causing the unavailability occurs between the defendant's arrest and the date of trial.").

⁴⁶⁹ See Giovine v. Giovine, 663 A.2d 109, 118-19 (N.J. Super. Ct. App. Div. 1995) (referring to "a continuous and unbroken wrong").

⁴⁷⁰ State v. Burdick, No. 2008-158, 2009 WL 428058, at *3 (Vt. Feb. 4, 2009) (citing State v. Sanders, 168 Vt. 60, 62 (1998)).

⁴⁷¹ *Id.* at *1.

 $^{^{472}}$ Id. at *3 (internal quotation marks omitted) (citing State v. Longley, 182 Vt. 482 (2007)).

⁴⁷³ ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 65 (2000).

found that particularly when a victim recants her earlier story of abuse, prior domestic violence between the parties is "relevant to show the trier of fact the context of the relationship between the victim and the defendant, where . . . that relationship is offered as a possible explanation for the victim's recantation."⁴⁷⁴

Judge Atlas articulated a necessarily broader standard that specifically included conduct prior to the arrest for the case presently before the court. 475 Judge Atlas's position specifically included conduct prior to the arrest for the case presently before the court. Professor Myrna Raeder believes that when dealing with domestic abuse forfeiture cases, a greater evidentiary standard is warranted. 476 She proposed a wider evidentiary relevance spectrum, including information regarding prior domestic violence arrests, previous victim recantations, post-traumatic stress disorder, and history of abuse. 477 This proposal also provides the specific language and rationales to facilitate admission of relevant evidence that assist the factfinder in determining whether witness tampering occurred and forfeiture should result. 478

Often, single pieces of evidence fail to indicate abusers' intent to silence; rather, viewing the cumulative evidence in its totality forms the picture. This more nuanced analysis requires that the factfinder be fully aware of typical domestic violence dynamics in order to accurately assess the tipping point as to how much prior abuse, recantation, crime scene evidence, or other factors are enough to warrant forfeiture.

As an example, in *People v. Geraci*, the defendant was convicted of first-degree manslaughter and two counts of first-degree assault, chiefly based on the grand jury testimony of an eyewitness, Peter Terranova.⁴⁷⁹ The New York Court of Appeals held that because Terranova then abruptly moved to another state and would not affirm his earlier story, it was permissible for the prosecutor to use the prior

⁴⁷⁸ In my experience, this concept has been quite helpful in cases where battered women have killed or assaulted their abusers in self-defense. *See generally* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 262 (2003) (citing case and statutory examples permitting evidence of abuse prior to charged offense).

⁴⁷⁴ See State v. Clark, 926 P.2d 194, 207 (Haw. 1996).

⁴⁷⁵ People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *45 (N.Y. Sup. Ct. Apr. 7, 2003).

 $^{^{476}}$ See Myrna Raeder, Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?, 15 J.L. & POL'Y 759, 780-81 (2007).

⁴⁷⁷ Id. at 781.

⁴⁷⁹ People v. Geraci, 649 N.E.2d 817, 818-19 (N.Y. 1995).

Grand Jury testimony to establish that the defendant's witness tampering caused Terranova's unavailability. He Court noted that circumstantial proof should be accepted when, as is often the case, it is more accurate than direct testimony. He Because witness tampering is inherently clandestine, the proponent of hearsay testimony will often have nothing else upon which to rely other than circumstantial evidence. The *Geraci* court stressed that given the critical "policy considerations at stake, it would be unrealistic and unnecessarily rigid to adopt a formula that would make it impossible to establish the necessary foundation in so many [witness tampering] cases."

In his *Giles* dissent, Justice Breyer emphasized that permitting presumptive intent with a history of abuse does not constrain a defendant's evidentiary protections, but "simply lowers a constitutional barrier to admission of earlier testimonial statements; it does not *require* their admission." He then reminded the Court that state hearsay rules govern what evidence will be admitted. Thus, my position does not presume an IPV defendant guilty of the crimes charged, as Justice Scalia feared, but just that the victim's prior statements are admitted for consideration by the judge and jury. Without the court's ability to weigh such evidence, the defendant achieves precisely the windfall that the forfeiture doctrine was intended to prevent.

CONCLUSION

For those IPV victims who do take part in the court process, retaliation is highly likely, and yet it is rarely addressed adequately by the legal system. Batterers' overt reprisals serve to punish victims for cooperating with authorities and to warn them not to do so again. The current scheme the Supreme Court provided in the *Giles-Davis-Crawford* triad is largely unworkable, at least in part because of

⁴⁸⁰ Id. at 818, 825.

⁴⁸¹ *Id.* at 823 ("Circumstantial evidence is not a disfavored form of proof and, in fact, may be stronger than direct evidence when it depends upon 'undisputed evidentiary facts about which human observers are less likely to err . . . or to distort.'").

⁴⁸² Id.

⁴⁸³ Id.

 $^{^{484}\,}$ Giles v. California, 128 S. Ct. 2678, 2700 (2008) (Breyer, J., dissenting, joined by Stevens & Kennedy, JJ.).

⁴⁸⁵ *Id.* ("State hearsay rules remain in place; and those rules will determine when, whether, and how evidence of the kind at issue here will come into evidence.").

confusing mandates and contrary opinions. In his *Giles* dissent, Justice Breyer expressed "the need for a rule that can be applied without creating great practical difficulties and evidentiary anomalies." ⁴⁸⁶ By identifying the most equitable approaches specified in well-reasoned decisions, untenable results should be minimized. As officers of the court sworn to ensure that justice is served, lawyers must not lose hope that witness tampering can be eradicated by implementing reforms that serve normative criminal law goals.

The astonishingly high level of terrifying crimes committed against IPV victims demands a rethinking of the structural, cognitive, and psychological basis of the witness tampering-forfeiture paradigm. The more developed forfeiture standard herein proposed is a viable option that fairly balances the rights of the accused with those of the victim. Forfeiture has the potential to protect the integrity of fundamental values of our legal system while vindicating victims who have long been blamed for IPV cases not going forward. Forfeiture must be utilized to do the heavy lifting intended by well-informed jurists and its framers, for the law loses currency if only equitable on paper.

486 Id. at 2696.

APPENDIX: STATE AND TERRITORY LAWS CONCERNING RETALIATION
AGAINST OR INTIMIDATION OF WITNESSES⁴⁸⁷

State or Territory	Statute	Title
Alabama	ALA. CODE § 13A-10-120	Definitions

(a) The definitions in Sections 13A-10-1, 13A-10-60 and 13A-10-100 are applicable in this article unless the context otherwise requires. (b) The following definitions are also applicable in this article: (1) Juror. Any person who is a member of any jury, including a grand jury, impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term juror also includes any person who has been summoned or whose name has been drawn to attend as a prospective juror. (2) Testimony. Such term includes oral or written statements, documents or any other material that may be offered as evidence in an official proceeding.

ALA. CODE § 13A-10-121	Bribing a witness
------------------------	-------------------

(a) A person commits the crime of bribing a witness if he offers, confers or agrees to confer any thing of value upon a witness or a person he believes will be called as a witness in any official proceeding with intent to: (1) Corruptly influence the testimony of that person; (2) Induce that person to avoid legal process summoning him to testify; or (3) Induce that person to absent himself from an official proceeding to which he has been legally summoned. (b) This section does not apply to the payment of additional compensation to an expert witness over and above the amount otherwise prescribed by law to be paid a witness. (c) Bribing a witness is a Class C felony.

⁴⁸⁷ Current as of 4/14/2010. Source: LexisNexis State Codes Annotated. Statutes are in LexisNexis format for annotated state codes.

Intimidating a witness

(a) A person commits the crime of intimidating a witness if he attempts, by use of a threat directed to a witness or a person he believes will be called as a witness in any official proceedings, to: (1) Corruptly influence the testimony of that person; (2) Induce that person to avoid legal process summoning him to testify; or (3) Induce that person to absent himself from an official proceeding to which he has been legally summoned. (b) "Threat," as used in this section, means any threat proscribed by Section 13A-6-25 on criminal coercion. (c) Intimidating a witness is a Class C felony.

ALA. CODE § 13A-10-124 Tampering with a witness

(a) A person commits the crime of tampering with a witness if he attempts to induce a witness or a person he believes will be called as a witness in any official proceeding to: (1) Testify falsely or unlawfully withhold testimony; or (2) Absent himself from any official proceeding to which he has been legally summoned. (b) Tampering with a witness is a Class B misdemeanor.

Alaska ALASKA STAT. § 11.56.510 Interference with official proceedings

(a) A person commits the crime of interference with official proceedings if the person (1) uses force on anyone, damages the property of anyone, or threatens anyone with intent to (A) improperly influence a witness or otherwise influence the testimony of a witness; (B) influence a juror's vote, opinion, decision, or other action as a juror; (C) retaliate against a witness or juror because of participation by the witness or juror in an official proceeding; or (D) otherwise affect the outcome of an official proceeding; or (2) confers, offers to confer, or agrees to confer a benefit (A) upon a witness with intent to improperly influence that witness; or (B) upon a juror with intent to influence the juror's vote, opinion, decision, or other action as a juror or otherwise affect the outcome of an official proceeding. (b) Interference with official proceedings is a class B felony.

ALASKA STAT. § 11.56.540	Tampering with a witness in the first degree
--------------------------	--

(a) A person commits the crime of tampering with a witness in the first degree if the person knowingly induces or attempts to induce a witness to (1) testify falsely, offer misleading testimony, or unlawfully withhold testimony in an official proceeding; or (2) be absent from a judicial proceeding to which the witness has been summoned. (b) Tampering with a witness in the first degree is a class C felony.

Tampering with a witness in the second degree	

(a) A person commits the crime of tampering with a witness in the second degree if the person knowingly induces or attempts to induce a witness to be absent from an official proceeding, other than a judicial proceeding, to which the witness has been summoned. (b) Tampering with a witness in the second degree is a class A misdemeanor.

Arizona	ARIZ. REV. STAT. § 13-2802	Influencing a
		witness; classification

A. A person commits influencing a witness if such person threatens a witness or offers, confers or agrees to confer any benefit upon a witness in any official proceeding or a person he believes may be called as a witness with intent to: 1. Influence the testimony of that person; or 2. Induce that person to avoid legal process summoning him to testify; or 3. Induce that person to absent himself from any official proceeding to which he has been legally summoned. B. Influencing a witness is a class 5 felony.

	Tampering with a witness; classification
--	--

A. A person commits tampering with a witness if such person knowingly induces a witness in any official proceeding or a person he

believes may be called as a witness to: 1. Unlawfully withhold any testimony; or 2. Testify falsely; or 3. Absent himself from any official proceeding to which he has been legally summoned. B. Tampering with a witness is a class 6 felony.

(a) A person commits witness bribery if he or she: (1) Offers, confers, or agrees to confer any benefit upon a witness or a person he or she believes may be called as a witness with the purpose of: (A) Influencing the testimony of that person; (B) Inducing that person to avoid legal process summoning that person to testify; or (C) Inducing that person to absent himself or herself from an official proceeding to which that person has been legally summoned; or (2) Solicits, accepts, or agrees to accept any benefit and the conferring of the benefit is prohibited by this section. (b) Witness bribery is a Class C felony.

ARK. CODE ANN. § 5-53-109	Threatening,
	intimidating
	witnesses

(a) A person commits the offense of intimidating a witness if he or she threatens a witness or a person he or she believes may be called as a witness with the purpose of: (1) Influencing the testimony of that person; (2) Inducing that person to avoid legal process summoning that person to testify; or (3) Inducing that person to absent himself or herself from an official proceeding to which that person has been legally summoned. (b) Intimidating a witness is a Class C felony.

ARK. CODE ANN. § 5-53-110	Tampering, official
	investigations

(a) A person commits the offense of tampering if, believing that an official proceeding or investigation is pending or about to be instituted, he or she induces or attempts to induce another person to: (1) Testify or inform falsely; (2) Withhold any unprivileged testimony, information, document, or thing regardless of the admissibility under the rules of evidence of the testimony, document, or thing and notwithstanding the relevance or probative value of the testimony, information, document or thing to an investigation; (3)

Elude legal process summoning that person to testify or supply evidence, regardless of whether the legal process was lawfully issued; or (4) Absent himself or herself from any proceeding or investigation to which that person has been summoned. (b) Tampering is a Class A misdemeanor.

ARK. CODE ANN. § 5-53-112	witness, informant,
	or juror

(a) A person commits the offense of retaliation against a witness, informant, or juror if he or she harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of witness, informant, or juror. (b) Retaliation against a witness, informant, or juror is a Class D felony. (c) "Informant" means a person who provides information to any law enforcement agency in an effort to assist the law enforcement agency in solving a crime or apprehending a person suspected of a criminal offense.

(a) A person commits the offense of intimidating a juror, a witness, or an informant if he or she threatens a juror, a witness, or an informant with the purpose of influencing the juror's vote or decision or the witness's or informant's statement or testimony. (b) Intimidating a juror, a witness, or an informant is a Class C felony. (c) "Informant" means a person who provides information to any law enforcement agency in an effort to assist the law enforcement agency in solving crimes and apprehending persons suspected of criminal offenses.

California	_	Intimidation of witnesses and victims; Definitions
		victims; Definitions

As used in this chapter: (1) "Malice" means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice. (2) "Witness" means any natural person, (i) having knowledge of the existence or nonexistence of facts relating to any crime, or (ii) whose

declaration under oath is received or has been received as evidence for any purpose, or (iii) who has reported any crime to any peace officer, prosecutor, probation or parole officer, correctional officer or judicial officer, or (iv) who has been served with a subpoena issued under the authority of any court in the state, or of any other state or of the United States, or (v) who would be believed by any reasonable person to be an individual described in subparagraphs (i) to (iv), inclusive. (3) "Victim" means any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated.

	Preventing or dissuading witness or victim from testifying or doing other acts
--	--

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. (3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice. (b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof. (3) Arresting or causing or seeking the arrest of any person in connection with that victimization. (c) Every person doing any of the acts described in subdivision (a) or (b) knowingly

and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person. (2) Where the act is in furtherance of a conspiracy. (3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section. (4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony. (d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section. (e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial. (f) The use of force during the commission of any offense described in subdivision (c) shall be considered a circumstance in aggravation of the crime in imposing a term of imprisonment under subdivision (b) of Section 1170.

CAL. PENAL CODE § 136.2	Orders relating to harm, intimidation, or dissuasion of victim or witness; Possession of firearm by person subject to protective order; Domestic
-------------------------	---

a) Except as provided in subdivision (c), upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to,

the following: (1) Any order issued pursuant to Section 6320 of the Family Code. (2) An order that a defendant shall not violate any provision of Section 136.1. (3) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not violate any provisions of Section 136.1. (4) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose. (5) An order calling for a hearing to determine if an order as described in paragraphs (1) to (4), inclusive, should be issued. (6) An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim or a witness, or both, or for immediate family members of a victim or a witness who reside in the same household as the victim or witness or within reasonable proximity of the victim's or witness' household, as determined by the court. The order shall not be made without the consent of the law enforcement agency except for limited and specified periods of time and upon an express finding by the court of a clear and present danger of harm to the victim or witness or immediate family members of the victim or witness. For purposes of this paragraph, "immediate family members" include the spouse, children, or parents of the victim or witness. (7) (A) Any order protecting victims of violent crime from all contact by the defendant. or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant. The court or its designee shall transmit orders made under this paragraph to law enforcement personnel within one business day of the issuance, modification, extension, or termination of the order, pursuant to subdivision (a) of Section 6380 of the Family Code. It is the responsibility of the court to transmit the modification, extension, or termination orders made under this paragraph to the same agency that entered the original protective order into the Domestic Violence Restraining Order System. (B) (i) If a court does not issue an order pursuant to subparagraph (A) in a case in which the defendant is charged with a crime of domestic violence as defined in Section 13700, the court on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, that provides as follows: (I) The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect. (II) The defendant shall relinquish any firearms that he or she

owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure. (ii) Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive, a firearm while this protective order is in effect is punishable pursuant to subdivision (g) of Section 12021. (C) Any order issued, modified, extended, or terminated by a court pursuant to this paragraph shall be issued on forms adopted by the Judicial Council of California and that have been approved by the Department of Justice pursuant to subdivision (i) of Section 6380 of the Family Code. However, the fact that an order issued by a court pursuant to this section was not issued on forms adopted by the Judicial Council and approved by the Department of Justice shall not, in and of itself, make the order unenforceable. (b) Any person violating any order made pursuant to paragraphs (1) to (7), inclusive, of subdivision (a) may be punished for any substantive offense described in Section 136.1, or for a contempt of the court making the order. A finding of contempt shall not be a bar to prosecution for a violation of Section 136.1. However, any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed upon conviction of an offense described in Section 136.1. Any conviction or acquittal for any substantive offense under Section 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act. (c) (1) Notwithstanding subdivisions (a) and (e), an emergency protective order issued pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10 of the Family Code or Section 646.91 of the Penal Code shall have precedence in enforcement over any other restraining or protective order, provided the emergency protective order meets all of the following requirements: (A) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order. (B) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order specified in subparagraph (A). (C) The provisions of the emergency protective order are more restrictive in relation to the restrained person than are the provisions of the other restraining or protective order specified in subparagraph (A). (2) An emergency protective order that meets the requirements of paragraph (1) shall have precedence in enforcement over the provisions of any other restraining or protective order only with respect to those provisions of the emergency protective order that are more restrictive in relation to the restrained person. (d) (1) A person subject to a protective order issued under this section shall not own,

possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order is in effect. (2) The court shall order a person subject to a protective order issued under this section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure. (3) Every person who owns, possesses, purchases or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable pursuant to subdivision (g) of Section 12021 of the Penal Code. (e) (1) In all cases where the defendant is charged with a crime of domestic violence, as defined in Section 13700, the court shall consider issuing the above-described orders on its own motion. All interested parties shall receive a copy of those orders. In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue. (2) In those cases in which a complaint, information, or indictment charging a crime of domestic violence, as defined in Section 13700, has been issued, a restraining order or protective order against the defendant issued by the criminal court in that case has precedence in enforcement over any civil court order against the defendant, unless a court issues an emergency protective order pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10 of the Family Code or Section 646.91 of the Penal Code, in which case the emergency protective order shall have precedence in enforcement over any other restraining or protective order. provided the emergency protective order meets the following requirements: (A) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order. (B) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order specified in subparagraph (A). (C) The provisions of the emergency protective order are more restrictive in relation to the restrained person than are the provisions of the other restraining or protective order specified in subparagraph (A). (3) Custody and visitation with respect to the defendant and his or her minor children may be ordered by a family or juvenile court consistent with the protocol established pursuant to subdivision (f), but if ordered after a criminal protective order has been issued pursuant to this section, the custody and visitation order shall make reference to, and acknowledge the precedence of enforcement of, any appropriate criminal protective order. On or before July 1, 2006, the Judicial Council shall modify the criminal and civil court forms consistent with this subdivision. (f) On or before January 1, 2003,

the Judicial Council shall promulgate a protocol, for adoption by each local court in substantially similar terms, to provide for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims. The protocol shall include, but shall not be limited to, mechanisms for assuring appropriate communication and information sharing between criminal, family, and juvenile courts concerning orders and cases that involve the same parties, and shall permit a family or juvenile court order to coexist with a criminal court protective order subject to the following conditions: (1) Any order that permits contact between the restrained person and his or her children shall provide for the safe exchange of the children and shall not contain language either printed or handwritten that violates a "no contact order" issued by a criminal court. (2) Safety of all parties shall be the courts' paramount concern. The family or juvenile court shall specify the time, day, place, and manner of transfer of the child, as provided in Section 3100 of the Family Code. (g) On or before January 1, 2003, the Judicial Council shall modify the criminal and civil court protective order forms consistent with this section. . . .

CAL. PENAL CODE § 138	Taking or offering to take bribes by witness
-----------------------	--

(a) Every person who gives or offers or promises to give to any witness or person about to be called as a witness, any bribe upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding, or every person who attempts by means of any offer of a bribe to dissuade any person from attending upon any trial or other judicial proceeding, is guilty of a felony. (b) Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his or her testimony shall be influenced thereby, or that he or she will absent himself or herself from the trial or proceeding upon which his or her testimony is required, is guilty of a felony.

CAL. PENAL CODE § 139	Threats of force or violence against witness or crime victim
-----------------------	--

(a) Except as provided in Sections 71 and 136.1, any person who has been convicted of any felony offense specified in Section 12021.1 who willfully and maliciously communicates to a witness to, or a victim of, the crime for which the person was convicted, a credible threat to use force or violence upon that person or that person's immediate family, shall be punished by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison for two, three, or four years. (b) Any person who is convicted of violating subdivision (a) who subsequently is convicted of making a credible threat, as defined in subdivision (c), which constitutes a threat against the life of, or a threat to cause great bodily injury to, a person described in subdivision (a), shall be sentenced to consecutive terms of imprisonment as prescribed in Section 1170.13. (c) As used in this section, "a credible threat" is a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. (d) The present incarceration of the person making the threat shall not be a bar to prosecution under this section. (e) As used in this section, "malice," "witness," and "victim" have the meanings given in Section 136.

(a) Except as provided in Section 139, every person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or other person has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison for two, three, or

four years. (b) A person who is punished under another provision of law for an act described in subdivision (a) shall not receive an additional term of imprisonment under this section.

Colorado	Colo. Rev. Stat. 18-8-703	Bribing a witness or victim
Colorado		

(1) A person commits bribing a witness or victim if he or she offers, confers, or agrees to confer any benefit upon a witness, or a victim, or a person he or she believes is to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim with intent to: (a) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or (b) Induce the witness or victim to avoid legal process summoning him to testify; or (c) Induce the witness or victim to absent himself or herself from an official proceeding. (2) Bribing a witness or victim is a class 4 felony.

COLO. REV. STAT. 18-8-704	Intimidating a
	U
	witness or victim

(1) A person commits intimidating a witness or victim if, by use of a threat, act of harassment as defined in section 18-9-111, or act of harm or injury to any person or property directed to or committed upon a witness or a victim to any crime, a person he or she believes has been or is to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who has reported a crime or who may be called to testify as a witness to or victim of any crime, he or she intentionally attempts to or does: (a) Influence the witness or victim to testify falsely or unlawfully withhold any testimony; or (b) Induce the witness or victim to avoid legal process summoning him to testify; or (c) Induce the witness or victim to absent himself or herself from an official proceeding; or (d) Inflict such harm or injury prior to such testimony or expected testimony. (2) Intimidating a witness or victim is a class 4 felony.

C	Colo. Rev. Stat. 18-8-705	Aggravated intimidation of a witness or victim
		withess of victili

(1) A person who commits intimidating a witness or victim commits aggravated intimidation of a witness or victim if, during the act of intimidating, he: (a) Is armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being intimidated or any other person; or (b) Knowingly wounds the person being intimidated or any other person with a deadly weapon, or by the use of force, threats, or intimidation with a deadly weapon knowingly puts the person being intimidated or any other person in reasonable fear of death or bodily injury. (2) For purposes of subsection (1) of this section, possession of any article used or fashioned in a manner to lead any person reasonably to believe it to be a deadly weapon, or any verbal or other representation by the person that he is so armed, is prima facie evidence that the person is armed with a deadly weapon. (3) Aggravated intimidation of a witness or victim is a class 3 felony.

COLO. REV. STAT. 18-8-706 F	Retaliation against a witness or victim
-------------------------------	---

(1) An individual commits retaliation against a witness or victim if such person uses a threat, act of harassment as defined in section 18-9-111, or act of harm or injury upon any person or property, which action is directed to or committed upon a witness or a victim to any crime, an individual whom the person believes has been or would have been called to testify as a witness or victim, a member of the witness' family, a member of the victim's family, an individual in close relationship to the witness or victim, an individual residing in the same household with the witness or victim, as retaliation or retribution against such witness or victim. (2) Retaliation against a witness or victim is a class 3 felony.

COLO. REV. STAT. 18-8-707	Tampering with a witness or victim

(1) A person commits tampering with a witness or victim if he intentionally attempts without bribery or threats to induce a witness or victim or a person he believes is to be called to testify as a witness or victim in any official proceeding or who may be called to testify as

a witness to or victim of any crime to: (a) Testify falsely or unlawfully withhold any testimony; or (b) Absent himself from any official proceeding to which he has been legally summoned; or (c) Avoid legal process summoning him to testify. (2) Tampering with a witness or victim is a class 4 felony.

(1) The following persons are eligible for relief pursuant to this section: (a) Any person who testifies as a witness or victim in any official proceeding: (b) Any person who may be called to testify as a witness to or victim of any crime; (c) Any person who is a member of the witness' or victim's family; (d) Any person who is in a close relationship to the witness or victim; (e) Any person who is residing in the same household with the witness or victim. (2) Any person who is eligible pursuant to subsection (1) of this section who suffers any physical injury or property damage as the result of the commission of intimidating a witness or victim pursuant to section 18-8-704, aggravated intimidation of a witness or victim pursuant to section 18-8-705, or retaliation against a witness or victim pursuant to section 18-8-706 shall, in a civil proceeding to recover for such injury or property damage, be eligible for the award of treble damages and attorney fees. (3) Nothing in this section shall limit the amount of recovery which a person specified in subsection (1) of this section may receive in a civil proceeding or in any other proceeding.

		Bribery of a witness: Class C felony
--	--	---

(a) A person is guilty of bribery of a witness if he offers, confers or agrees to confer upon a witness any benefit to influence the testimony or conduct of such witness in, or in relation to, an official proceeding. (b) Bribery of a witness is a class C felony.

University	of C	alifor	nia,	Davis

[Vol. 43:1295

CONN. GEN. STAT.	Tampering with a
§ 53a-151	witness: Class C
	felony

(a) A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding. (b) Tampering with a witness is a class C felony.

	CONN. GEN. STAT. § 531-151a	Intimidating a witness: Class C felony
--	--------------------------------	--

(a) A person is guilty of intimidating a witness when, believing that an official proceeding is pending or about to be instituted, such person uses, attempts to use or threatens the use of physical force against a witness or another person with intent to (1) influence, delay or prevent the testimony of the witness in the official proceeding, or (2) induce the witness to testify falsely, withhold testimony, elude legal process summoning the witness to testify or absent himself or herself from the official proceeding. (b) Intimidating a witness is a class *C* felony.

Delaware	DEL. CODE ANN. tit. 11, § 1201	Bribery; class E felony
----------	--------------------------------	----------------------------

A person is guilty of bribery when: (1) The person offers, confers or agrees to confer a personal benefit upon a public servant upon an agreement or understanding that the public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced; or (2) The person offers, confers or agrees to confer a personal benefit upon a public servant or party officer upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office; or (3) The person offers, confers or agrees to confer a personal benefit upon a public servant for having violated a duty as a public servant. Bribery is a class E felony.

	DEL. CODE ANN. tit. 11, § 1263	Tampering with a witness; class E felony
--	-----------------------------------	--

A person is guilty of tampering with a witness when: (1) The person knowingly induces, influences or impedes any witness or victim by false statement, fraud or deceit, with intent to affect the testimony or availability of such witness; or (2) The person intentionally causes physical injury to any party or witness or intentionally damages the property of any party or witness on account of past, present or future attendance at any court proceeding or official proceeding of this State or on account of past, present, or future testimony in any action pending therein; or (3) The person knowingly intimidates a witness or victim under circumstances set forth in subchapter III of Chapter 35 of this title. Tampering with a witness is a class E felony.

DEL. CODE ANN. tit. 11,	Interfering with
§ 1263A	child witness

(a) A person commits an offense if, intending to interfere with or prevent the prosecution of any person, the person intentionally or knowingly: (1) Removes a child from the county of residence of the child knowing that the child is or is likely to become a witness in a criminal case in the county of residence; or (2) Refuses or fails to produce a child in the person's custody before a court in which there is pending a criminal case in which the child is a witness; or (3) Confers or offers or agrees to confer a benefit on another person in order to: (a). Cause a child to be removed from the county of residence of the child, knowing the child is or is likely to become a witness in a criminal case in the county of residence; or (b). Cause a person in custody of a child to refuse or fail to produce the child before a court in which there is pending a criminal case in which the child is a witness; or (4) Harms or threatens to harm another person in order to: (a). Cause a child to be removed from the county of residence, knowing the child is or is likely to become a witness in a criminal case in the county of residence; or (b). Cause a person in custody of a child to refuse to produce the child before a court in which there is pending a criminal case in which the child is a witness. (b) For purposes of this section: (1) The county of residence of a child is the county in which the child resides at the time of the commission of the offense being prosecuted in the criminal case in which the child is a witness; (2) A child is in the custody of a person

if the person is the parent or guardian of the child, is acting in loco parentis to the child or exercises control over the location or supervision of the child; and (3) A criminal case is pending in a court if an indictment, information or complaint in the case has been filed with or presented to the court. (c) "Witness" as used in this section means any natural person: (1) Having knowledge of the existence or nonexistence of facts relating to any crime; or (2) Whose declaration under oath is received, or has been received, as evidence for any purpose; or (3) Who has reported any crime to any peace officer. prosecuting agency, law-enforcement officer, probation officer, parole officer, correctional officer or judicial official; or (4) Who has been served personally or through a parent, guardian, person acting in loco parentis or other custodian, with a subpoena issued under the authority of any court of this State, or any other state or of the United States; or (5) Who would be believed by any reasonable person to be an individual described in any paragraph of this subsection. An offense under paragraph (a)(2), (a)(3)b. or (a)(4)b. of this section is a class E felony. An offense under paragraph (a)(1), (a)(3)a. or (a)(4)a. of this section is a class G felony unless the child is a complaining witness, in which event the offense is a class F felony.

D.C.	D.C. CODE ANN. § 22-713	Bribery of witness;
		penalty

(a) A person commits the offense of bribery of a witness if that person: (1) Corruptly offers, gives, or agrees to give to another person; or (2) Corruptly solicits, demands, accepts, or agrees to accept from another person; anything of value in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding before any court of the District of Columbia or any agency or department of the District of Columbia government, or that the recipient will absent himself or herself from such proceedings. (b) Nothing in subsection (a) of this section shall be construed to prohibit the payment or receipt of witness fees provided by law, or the payment by the party upon whose behalf a witness is called and receipt by a witness of a reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such proceeding, or, in case of expert witnesses, a reasonable fee for time spent in the preparation of a technical or professional opinion and appearing and testifying. (c) Any person convicted of bribery of a witness shall be fined not more than \$2,500 or imprisoned for not more than 5 years, or both.

D.C. CODE ANN. § 22-1931	Obstructing, preventing, or interfering with reports to or requests for assistance from law enforcement agencies, medical providers, or child welfare agencies

(a) It shall be unlawful for a person to knowingly disconnect, damage, disable, temporarily or permanently remove, or use physical force or intimidation to block access to any telephone, radio, computer, or other electronic communication device with a purpose to obstruct, prevent, or interfere with: (1) The report of any criminal offense to any law enforcement agency; (2) The report of any bodily injury or property damage to any law enforcement agency; (3) A request for ambulance or emergency medical assistance to any governmental agency, or any hospital, doctor, or other medical service provider; or (4) The report of any act of child abuse or neglect to a law enforcement or child welfare agency. (b) A person who violates subsection (a) of this section shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both.

Florida	FLA. STAT. ANN. § 836.10	Written threats to kill or do bodily injury; punishment
---------	--------------------------	---

If any person writes or composes and also sends or procures the sending of any letter or inscribed communication, so written or composed, whether such letter or communication be signed or anonymous, to any person, containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any member of the family of the person to whom such letter or communication is sent, the person so writing or composing and so sending or procuring the sending of such letter or communication, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

1402

Georgia	GA. CODE ANN. § 16-10-32	Attempted murder or threatening of witnesses in official proceedings
		proceedings

(a) Any person who attempts to kill another person with intent to: (1) Prevent the attendance or testimony of any person in an official proceeding; (2) Prevent the production of a record, document, or other object, in an official proceeding; or (3) Prevent the communication by any person to a law enforcement officer, prosecuting attorney, or judge of this state of information relating to the commission or possible commission of a criminal offense or a violation of conditions of probation, parole, or release pending judicial proceedings shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than ten nor more than 20 years. (b) Any person who threatens or causes physical or economic harm to another person or a member of such person's family or household, threatens to damage or damages the property of another person or a member of such person's family or household, or attempts to cause physical or economic harm to another person or a member of such person's family or household with the intent to hinder, delay, prevent, or dissuade any person from: (1) Attending or testifying in an official proceeding; (2) Reporting in good faith to a law enforcement officer, prosecuting attorney, or judge of a court of this state, or its political subdivisions or authorities, the commission or possible commission of an offense under the laws of this state or a violation of conditions of probation, parole, or release pending judicial proceedings; (3) Arresting or seeking the arrest of another person in connection with a criminal offense; or (4) Causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than ten years or by a fine of not less than \$10,000.00 nor more than \$25,000.00, or both. (c)(1) For the purposes of this Code section, the term "official proceeding" means any hearing or trial conducted by a court of this state or its political subdivisions, a grand jury, or an agency of the executive, legislative, or judicial branches of government of this state or its political subdivisions or authorities. (2) An official proceeding need not be pending or about to be instituted at the time of any offense defined in this Code section. (3) The testimony, record, document, or other object which is prevented

or impeded or attempted to be prevented or impeded in an official proceeding in violation of this Code section need not be admissible in evidence or free of a claim of privilege. (4) In a prosecution for an offense under this Code section, no state of mind need be proved with respect to the circumstance: (A) That the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of this state, a magistrate, a grand jury, or an agency of state or local government; or (B) That the judge is a judge of this state or its political subdivisions or that the law enforcement officer is an officer or employee of the State of Georgia or a political subdivision or authority of the state or a person authorized to act for or on behalf of the State of Georgia or a political subdivision or authority of the state. (5) A prosecution under this Code section may be brought in the county in which the official proceeding, whether or not pending or about to be instituted, was intended to be affected or in the county in which the conduct constituting the alleged offense occurred. (d) Any crime committed in violation of subsection (a) or (b) of this Code section shall be considered a separate offense.

GA. CODE ANN. § 16-10-93	Influencing
	witnesses

(a) A person who, with intent to deter a witness from testifying freely, fully, and truthfully to any matter pending in any court, in any administrative proceeding, or before a grand jury, communicates, directly or indirectly, to such witness any threat of injury or damage to the person, property, or employment of the witness or to the person, property, or employment of any relative or associate of the witness or who offers or delivers any benefit, reward, or consideration to such witness or to a relative or associate of the witness shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (b)(1) It shall be unlawful for any person knowingly to use intimidation, physical force, or threats; to persuade another person by means of corruption or to attempt to do so; or to engage in misleading conduct toward another person with intent to: (A) Influence, delay, or prevent the testimony of any person in an official proceeding; (B) Cause or induce any person to: (i) Withhold testimony or a record, document, or other object from an official proceeding; (ii) Alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; (iii) Evade legal process summoning that person to appear as a witness or to

produce a record, document, or other object in an official proceeding; or (iv) Be absent from an official proceeding to which such person has been summoned by legal process; or (C) Hinder, delay, or prevent the communication to a law enforcement officer, prosecuting attorney, or judge of this state of information relating to the commission or possible commission of a criminal offense or a violation of conditions of probation, parole, or release pending judicial proceedings. (2) Any person convicted of a violation of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than two nor more than ten years or by a fine of not less than \$10,000.00 nor more than \$20,000.00, or both. (3)(A) For the purposes of this Code section, the term "official proceeding" means any hearing or trial conducted by a court of this state or its political subdivisions, a grand jury, or an agency of the executive, legislative, or judicial branches of government of this state or its political subdivisions or authorities. (B) An official proceeding need not be pending or about to be instituted at the time of any offense defined in this subsection. (C) The testimony, record, document, or other object which is prevented or impeded or attempted to be prevented or impeded in an official proceeding in violation of this Code section need not be admissible in evidence or free of a claim of privilege. (D) In a prosecution for an offense under this Code section, no state of mind need be proved with respect to the circumstance: (i) That the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of this state, a magistrate, a grand jury, or an agency of state or local government; or (ii) That the judge is a judge of this state or its political subdivisions or that the law enforcement officer is an officer or employee of the State of Georgia or a political subdivision or authority of the state or a person authorized to act for or on behalf of the State of Georgia or a political subdivision or authority of the state. (E) A prosecution under this Code section may be brought in the county in which the official proceeding, whether or not pending or about to be instituted, was intended to be affected or in the county in which the conduct constituting the alleged offense occurred. (c) Any crime committed in violation of subsection (a) or (b) of this Code section shall be considered a separate offense.

Hawaii HAW. REV. STAT. ANN. Bribery of or by a witness	Hawaii	HAW. REV. STAT. ANN. § 710-1070	Bribery of or by a witness
--	--------	------------------------------------	----------------------------

(1) A person commits the offense of bribing a witness if he confers, or offers or agrees to confer, directly or indirectly, any benefit upon a witness or a person he believes is about to be called as a witness in any official proceeding with intent to: (a) Influence the testimony of that person; (b) Induce that person to avoid legal process summoning him to testify; or (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned. (2) A witness or a person believing he is about to be called as a witness in any official proceeding commits the offense of bribe receiving by a witness if he intentionally solicits, accepts, or agrees to accept, directly or indirectly, any benefit as consideration: (a) Which will influence his testimony; (b) For avoiding or attempting to avoid legal process summoning him to testify; or (c) For absenting or attempting to absent himself from an official proceeding, to which he has been legally summoned. (3) The offenses defined in this section are class C felonies.

HAW. REV. STAT. ANN.	Intimidating a
§ 710-1071	witness

(1) A person commits the offense of intimidating a witness if he uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding with intent to: (a) Influence the testimony of that person; (b) Induce that person to avoid legal process summoning him to testify; or (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned. (2) "Threat" as used in this section means any threat proscribed by section 707-764(1). (3) Intimidating a witness is a class *C* felony.

HAW. REV. STAT. ANN.	Tampering with a
§ 710-1072	witness

(1) A person commits the offense of tampering with a witness if he intentionally engages in conduct to induce a witness or a person he believes is about to be called as a witness in any official proceeding to: (a) Testify falsely or withhold any testimony which he is not privileged to withhold; or (b) Absent himself from any official proceeding to which he has been legally summoned. (2) Tampering with a witness is a misdemeanor.

HAW. REV. STAT. ANN. Retaliating against a witness

(1) A person commits the offense of retaliating against a witness if the person uses force upon or threatens a witness or another person or damages the property of a witness or another person because of the attendance of the witness, or any testimony given, or any record, document, or other object produced, by the witness in an official proceeding. (2) "Threaten" as used in this section means any threat proscribed by sections 707-764(1) and 707-764(2). (3) Retaliating against a witness is a class C felony

HAW. REV. STAT. ANN. § 626-1, Rule 804. Hearsay exceptions; declarant unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant: . . . (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (7) Forfeiture by wrongdoing. A statement offered against a party that has procured the unavailability of the declarant as a witness; . . .

Idaho	IDAHO CODE ANN. § 18-2605	Bribing a witness

Every person who gives or offers, or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any witness to give false or to withhold true testimony, is guilty of a misdemeanor.

IDAHO CODE ANN. § 18-2604	Intimidating a witness
	<u> </u>

(1) Any person who, by direct or indirect force, or by any threats to a person or property, or by any manner wilfully intimidates, influences, impedes, deters, threatens, harasses, obstructs or prevents a witness, including a child witness, or any person who may be called as a witness or any person he believes may be called as a witness in any civil proceeding from testifying freely, fully and truthfully in that civil proceeding is guilty of a misdemeanor. (2) Any person who, by direct or indirect force, or by any threats to a person or property, or by any manner wilfully intimidates, threatens or harasses any person because such person has testified or because he believes that such person has testified in any civil proceedings is guilty of a misdemeanor. (3) Any person who, by direct or indirect force, or by any threats to person or property, or by any manner wilfully intimidates, influences, impedes, deters, threatens, harasses, obstructs or prevents, a witness, including a child witness, or any person who may be called as a witness or any person he believes may be called as a witness in any criminal proceeding or juvenile evidentiary hearing from testifying freely, fully and truthfully in that criminal proceeding or juvenile evidentiary hearing is guilty of a felony. (4) Any person who, by direct or indirect force, or by any threats to a person or property, or by any manner wilfully intimidates, threatens or harasses any person because such person has testified or because he believes that such person has testified in any criminal proceeding or juvenile evidentiary hearing is guilty of a felony. (5) The fact that a person was not actually prevented from testifying shall not be a defense to a charge brought under subsection (1), (2), (3) or (4) of this section.

Illinois	720 ILL. COMP. STAT. ANN. 5/32-4a	Harassment of representatives for the child, jurors, witnesses, and others
----------	-----------------------------------	--

Harassment of representatives for the child, jurors, witnesses and others. (a) A person who, with intent to harass or annoy one who has served or is serving or who is a family member of a person who has served or is serving (1) as a juror because of the verdict returned by the jury in a pending legal proceeding or the participation of the juror in the verdict or (2) as a witness, or who may be expected to serve as a witness in a pending legal proceeding, or who was expected to serve as a witness but who did not serve as a witness because the charges against the defendant were dismissed or because the defendant pleaded guilty to the charges against him or her, because of the testimony or potential testimony of the witness or person who may be expected or may have been expected to serve as a witness, communicates directly or indirectly with the juror, witness or person who may be expected or may have been expected to serve as a witness, or family member of a juror or witness or person who may be expected or may have been expected to serve as a witness in such manner as to produce mental anguish or emotional distress or who conveys a threat of injury or damage to the property or person of any juror, witness or person who may be expected or may have been expected to serve as a witness, or family member of the juror or witness or person who may be expected or may have been expected to serve as a witness commits a Class 2 felony. (b) A person who, with intent to harass or annoy one who has served or is serving or who is a family member of a person who has served or is serving as a representative for the child, appointed under Section 506 of the Illinois Marriage and Dissolution of Marriage Act [750 ILL. COMP. STAT. ANN. 5/506] or Section 2-502 of the Code of Civil Procedure [735 ILL. COMP. STAT. ANN. 5/2-502], because of the representative service of that capacity, communicates directly or indirectly with the representative or a family member of the representative in such manner as to produce mental anguish or emotional distress or who conveys a threat of injury or damage to the property or person of any representative or a family member of the representative commits a Class A misdemeanor. (c) For purposes of this Section, "family member" means a spouse, parent, child, stepchild or other person related by blood or by present marriage, a person who has, or

allegedly has a child in common, and a person who shares or allegedly shares a blood relationship through a child.

720 ILL. COMP. STAT. ANN. 5/12-6.3	Interfering with the reporting of domestic violence
	domestic violence

Interfering with the reporting of domestic violence. (a) A person commits the offense of interfering with the reporting of domestic violence when, after having committed an act of domestic violence, he or she prevents or attempts to prevent the victim of or a witness to the act of domestic violence from calling a 9-1-1 emergency telephone system, obtaining medical assistance, or making a report to any law enforcement official. (b) For the purposes of this Section, the following terms shall have the indicated meanings: (1) "Domestic violence" shall have the meaning ascribed to it in Section 112A-3 of the Code of Criminal Procedure of 1963 [725 ILL. COMP. STAT. ANN. 5/112A-3]. (2) "Family or household members" shall have the meaning ascribed to it in Section 112A-3 of the Code of Criminal Procedure of 1963 [725 ILL. COMP. STAT. ANN. 5/112A-3]. (c) Sentence. Interfering with the reporting of domestic violence is a Class A misdemeanor.

Indiana	IND. CODE ANN. § 35-44-3-4	Tampering — obstruction of justice — special privileges

(a) A person who: (1) knowingly or intentionally induces, by threat, coercion, or false statement, a witness or informant in an official proceeding or investigation to: (A) withhold or unreasonably delay in producing any testimony, information, document, or thing; (B) avoid legal process summoning him to testify or supply evidence; or (C) absent himself from a proceeding or investigation to which he has been legally summoned; (2) knowingly or intentionally in an official criminal proceeding or investigation: (A) withholds or unreasonably delays in producing any testimony, information, document, or thing after a court orders him to produce the testimony, information, document, or thing; (B) avoids legal process summoning him to testify or supply evidence; or (C) absents himself from a proceeding or investigation to which he has been legally summoned; (3) alters, damages, or removes any record, document, or thing, with intent to

prevent it from being produced or used as evidence in any official proceeding or investigation; (4) makes, presents, or uses a false record, document, or thing with intent that the record, document, or thing, material to the point in question, appear in evidence in an official proceeding or investigation to mislead a public servant; or (5) communicates, directly or indirectly, with a juror otherwise than as authorized by law, with intent to influence the juror regarding any matter that is or may be brought before the juror; commits obstruction of justice, a Class D felony. (b) Subdivision (a)(2)(A) does not apply to: (1) a person who qualifies for a special privilege under IC 34-46-4 with respect to the testimony, information, document, or thing; or (2) a person who, as an: (A) attorney; (B) physician; (C) member of the clergy; or (D) husband or wife; is not required to testify under IC 34-46-3-1.

Iowa	IOWA CODE § 720.4	Tampering with
		witnesses or jurors

A person who offers any bribe to any person who the offeror believes has been or may be summoned as a witness or juror in any judicial or arbitration proceeding, or any legislative hearing, or who makes any threats toward such person or who forcibly or fraudulently detains or restrains such person, with the intent to improperly influence such witness or juror with respect to the witness' or juror's testimony or decision in such case, or to prevent such person from testifying or serving in such case, or who, in retaliation for anything lawfully done by any witness or juror in any case, harasses such witness or juror, commits an aggravated misdemeanor.

IOWA CODE § 722.1	Bribery
-------------------	---------

A person who offers, promises, or gives anything of value or any benefit to a person who is serving or has been elected, selected, appointed, employed, or otherwise engaged to serve in a public capacity, including a public officer or employee, a referee, juror, or jury panel member, or a witness in a judicial or arbitration hearing or any official inquiry, or a member of a board of arbitration, pursuant to an agreement or arrangement or with the understanding that the promise or thing of value or benefit will influence the act, vote, opinion, judgment, decision, or exercise of discretion of the person with respect to the person's services in that capacity commits a class "D" felony. In addition, a person convicted under this section is disqualified from holding public office under the laws of this state.

L

As used in K.S.A. 21-3831 through 21-3836, and amendments thereto: (a) "Civil injury or loss" means any injury or loss for which a civil remedy is provided under the laws of this state, any other state or the United States. (b) "Malice" means an intent to vex, annoy, harm or injure in any way another person or an intent to thwart or interfere in any manner with the orderly administration of justice. (c) "Victim" means any individual: (1) Against whom any crime under the laws of this state, any other state or the United States is being, has been or is attempted to be committed; or (2) who suffers a civil injury or loss. (d) "Witness" means any individual: (1) Who has knowledge of the existence or nonexistence of facts relating to any civil or criminal trial, proceeding or inquiry authorized by law; (2) whose declaration under oath is received or has been received as evidence for any purpose; (3) who has reported any crime or any civil injury or loss to any law enforcement officer, prosecutor, probation officer, parole officer, correctional officer, community correctional services officer or judicial officer; (4) who has been served with a subpoena issued under the authority of a municipal court or any court or agency of this state, any other state or the United States; or (5) who would be believed by any reasonable person to be an individual described in paragraph (1), (2), (3) or (4).

KAN. STAT. ANN. § 21-3832	
	witness or victim

(a) Intimidation of a witness or victim is knowingly and maliciously preventing or dissuading, or attempting to prevent or dissuade: (1) Any witness or victim from attending or giving testimony at any civil or criminal trial, proceeding or inquiry authorized by law; or (2) any witness, victim or person acting on behalf of a victim from: (A) Making any report of the victimization of a victim to any law enforcement officer, prosecutor, probation officer, parole officer, correctional officer, community correctional services officer or judicial officer; (B) causing a complaint, indictment or information to be sought and prosecuted, or causing a violation of probation, parole or assignment to a community correctional services program to be reported and prosecuted, and assisting in its prosecution; (C) causing a civil action to be filed and prosecuted and assisting in its prosecution; or (D) arresting or causing or seeking the arrest of any person in connection with the victimization of a victim. (b) Intimidation of a witness or victim is a class B person misdemeanor.

KAN. STAT. ANN. § 21-3833	Aggravated intimidation of a
	witness or victim

(a) Aggravated intimidation of a witness or victim is intimidation of a witness or victim, as defined by K.S.A. 21-3832 and amendments thereto, when: (1) The act is accompanied by an expressed or implied threat of force or violence against a witness, victim or other person or the property of any witness, victim or other person; (2) the act is in furtherance of a conspiracy; (3) the act is committed by a person who has been previously convicted of corruptly influencing a witness or has been convicted of a violation of this act or any federal or other state's statute which, if the act prosecuted was committed in this state, would be a violation of this act; (4) the witness or victim is under 18 years of age; or (5) the act is committed for pecuniary gain or for any other consideration by a person acting upon the request of another person. (b) Aggravated intimidation of a witness or victim is a severity level 6, person felony.

Kentucky Ky. Rev. Stat. Ann. § 519.020	Obstructing gov't operations
--	------------------------------

(1) A person is guilty of obstructing governmental operations when he intentionally obstructs, impairs or hinders the performance of a governmental function by using or threatening to use violence, force or physical interference. (2) This section shall not apply to: (a) Any means of avoiding compliance with the law without affirmative interference with governmental functions; or (b) The obstruction, impairment or hindrance of unlawful action by a public servant; or (c) The obstruction, impairment or hindrance of an arrest. (3) Obstructing governmental operations is a Class A misdemeanor.

KY. REV. STAT. ANN.	Compounding a
§ 519.030	crime

(1) A person is guilty of compounding a crime when: (a) He solicits, accepts or agrees to accept any benefit upon an agreement or understanding that he will refrain from initiating a prosecution for a crime; or (b) He confers, offers, or agrees to confer any benefit upon another person upon agreement or understanding that such other person will refrain from initiating a prosecution for a crime. (2) In any prosecution under this section, it is a defense that the benefit did not exceed an amount which the defendant reasonably believed to be due as restitution or indemnification for harm caused by the offense. (3) Compounding a crime is a Class A misdemeanor.

§ 524.040	Intimidating a participant in the legal process
	8. I

(1) A person is guilty of intimidating a participant in the legal process when, by use of physical force or a threat directed to a person he believes to be a participant in the legal process, he or she: (a) Influences, or attempts to influence, the testimony, vote, decision, or opinion of that person;(b) Induces, or attempts to induce, that person to avoid legal process summoning him or her to testify;(c) Induces, or attempts to induce, that person to absent himself or herself from an official proceeding to which he has been legally summoned; (d) Induces, or attempts to induce, that person to withhold a record, document, or other object from an official proceeding; (e) Induces, or attempts to induce, that person to alter,

destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; or (f) Hinders, delays, or prevents the communication to a law enforcement officer or judge of information relating to the possible commission of an offense or a violation of conditions of probation, parole or release pending judicial proceedings. (2) For purposes of this section: (a) An official proceeding need not be pending or about to be instituted at the time of the offense; and (b) The testimony, record, document, or other object need not be admissible in evidence or free of a claim of privilege. (3) Intimidating a participant in the legal process is a Class D felony. (4) In order for a person to be convicted of a violation of this section, the act against a participant in the legal process or the immediate family of a participant in the legal process shall be related to the performance of a duty or role played by the participant in the legal process.

Louisiana LA. REV. STAT. ANN. 14:92.3	Retaliation by a minor against a parent, legal custodian, witness, or complainant
---------------------------------------	---

A. Retaliation by a minor against a parent, legal custodian, witness, or complainant is the willful, malicious, and repeated threats of force against or harassment of a person or his property by a minor under the age of seventeen accompanied by an overt act on the part of the minor or by the apparent capability of the minor to carry out the threat or harassment, against a parent, legal custodian, person who filed a complaint against the minor, or a witness in a criminal case in which the minor is the defendant or charged with a delinquency and the minor intends to place that person in a reasonable fear of death, serious bodily injury, or damage to property. B. The provisions of Subsection A do not apply if the conduct of the parent, legal custodian, person who filed a complaint against the minor, or a witness in a criminal case in which the minor is the defendant or charged with a delinquency is acting in violation of any criminal law. C. A minor who violates the provisions of this Section shall be placed in the custody of the Department of Public Safety and Corrections for a period not to exceed six months. A minimum condition of probation shall be that the offender participate in forty hours of court-approved community service activities or a combination of forty hours of court-approved community service and attendance at a court-approved family counseling program by both a parent or legal custodian and the minor.

La. Rev. Stat. Ann.	Public bribery
14:118	

A. (1) Public bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty: (a) Public officer, public employee, or person in a position of public authority. (b) Election official at any general, primary, or special election. (c) Grand or petit juror. (d) Witness, or person about to be called as a witness, upon a trial or other proceeding before any court, board, or officer authorized to hear evidence or to take testimony. (e) Any person who has been elected or appointed to public office, whether or not said person has assumed the title or duties of such office. (2) The acceptance of, or the offer to accept, directly or indirectly, anything of apparent present or prospective value, under such circumstances, by any of the above named persons, shall also constitute public bribery. B. For purposes of this Section, "public officer", "public employee", or "person in a position of public authority", includes those enumerated in R.S. 14:2(9), and also means any public official, public employee, or person in a position of public authority, in other states, the federal government, any foreign sovereign, or any subdivision, entity, or agency thereof. C. Whoever commits the crime of public bribery shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

LA. REV. STAT. ANN. 14:129.1	Intimidating, impeding or injuring witnesses; injuring officers; penalties
	officers; penalties

A. No person shall intentionally: (1) Intimidate or impede, by threat of force or force, or attempt to intimidate or impede, by threat of force or force, a witness with intent to influence his testimony, his reporting of criminal conduct or his appearance at a judicial proceeding; (2) Injure or attempt to injure a witness in his person or property with intent to influence his testimony, his reporting of criminal conduct or his appearance at a judicial proceeding; or (3)

Injure or attempt to injure an officer of a court of this state in his person or property because of the performance of his duties as an officer of a court of this state or with intent to influence the performance of his duties as an officer of a court of this state. B. For purposes of this Section the following words shall have the following meanings: (1) "A member of his immediate family" means a spouse, parent, sibling, and child, whether related by blood or adoption. (2) "Witness" means any of the following: (a) A person who is a victim of conduct defined as a crime under the laws of this state, another state, or the United States. (b) A person whose declaration under oath has been received in evidence in any court of this state, another state, or the United States. (c) A person who has reported a crime to a peace officer, prosecutor, probation or parole officer, correctional officer or judicial officer of this state, another state, or the United States. (d) A person who has been served with a subpoena issued under authority of any court of this state, another state, or the United States, or (e) A person who reasonably would be believed by an offender to be a witness as previously defined in this Section. C.(1) Whoever violates the provisions of this Section in a civil proceeding shall be fined not more than five thousand dollars, imprisoned, with or without hard labor, for not more than five years, or both. (3) Whoever violates the provisions of this Section in a criminal proceeding in which a sentence of imprisonment necessarily served at hard labor for any period less than a life sentence may be imposed. the offender shall be fined not more than fifty thousand dollars, or imprisoned for not more than twenty years at hard labor, or both. (4) Whoever violates the provisions of this Section in a criminal proceeding in which any other sentence may be imposed, the offender shall be fined not more than ten thousand dollars, imprisoned for not more than five years, with or without hard labor, or both.

Maine	, , , , , , , , , , , , , , , , , , ,	Tampering with a witness, informant, juror or victim
-------	---------------------------------------	--

1. A person is guilty of tampering with a witness or informant if, believing that an official proceeding, as defined in section 451, subsection 5, paragraph A, or an official criminal investigation is pending or will be instituted, the actor: A. Induces or otherwise causes, or attempts to induce or cause, a witness or informant: (1) To testify or inform in a manner the actor knows to be false; or (2) To

withhold testimony, information or evidence. Violation of this paragraph is a Class C crime; B. Uses force, violence or intimidation, or promises, offers or gives pecuniary benefit with the intent to induce a witness or informant: (1) To withhold testimony, information or evidence; (2) To refrain from attending a criminal proceeding or criminal investigation; or (3) To refrain from attending any other proceeding or investigation to which the witness or informant has been summoned by legal process. Violation of this paragraph is a Class C crime; or C. Solicits, accepts or agrees to accept pecuniary benefit for committing an act specified in paragraph A, subparagraph (1), or in paragraph B, subparagraph (1), (2) or (3). Violation of this paragraph is a Class C crime. 1-A. A person is guilty of tampering with a juror if the actor: A. Contacts by any means a person who is a juror or any other person that the actor believes is in a position to influence a juror and the actor does so with the intention of influencing the juror in the performance of the juror's duty. Violation of this paragraph is a Class C crime; or B. Violates paragraph A and the proceeding the juror is involved in is a criminal proceeding for murder or a Class A crime. Violation of this paragraph is a Class B crime. 1-B. A person is guilty of tampering with a victim if, believing that an official proceeding, as defined in section 451, subsection 5, paragraph A, or an official criminal investigation is pending or will be instituted, the actor: A. Induces or otherwise causes, or attempts to induce or cause, a victim: (1) To testify or inform falsely; or (2) To withhold testimony, information or evidence. Violation of this paragraph is a Class B crime; B. Uses force, violence or intimidation, or promises, offers or gives pecuniary benefit with the intent to induce a victim: (1) To withhold testimony, information or evidence; (2) To refrain from attending a criminal proceeding or criminal investigation; or (3) To refrain from attending any other proceeding or investigation to which the victim has been summoned by legal process. Violation of this paragraph is a Class B crime; or C. Solicits, accepts or agrees to accept pecuniary benefit for committing an act specified in paragraph A, subparagraph (1), or in paragraph B, subparagraph (1), (2) or (3). Violation of this paragraph is a Class B crime.

Maryland	MD. CODE ANN., CRIM. LAW § 9-302	Inducing false testimony or avoidance of subpoena
----------	-------------------------------------	--

(a) Prohibited. — A person may not harm another, threaten to harm another, or damage or destroy property with the intent to: (1) influence a victim or witness to testify falsely or withhold testimony; or (2) induce a victim or witness: (i) to avoid the service of a subpoena or summons to testify; (ii) to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned; or (iii) not to report the existence of facts relating to a crime or delinquent act. (b) Solicitation prohibited. — A person may not solicit another person to harm another, threaten to harm another, or damage or destroy property with the intent to: (1) influence a victim or witness to testify falsely or withhold testimony; or (2) induce a victim or witness: (i) to avoid the service of a subpoena or summons to testify; (ii) to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned; or (iii) not to report the existence of facts relating to a crime or delinquent act. (c) Penalty. — (1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$5,000 or both. (2) If the testimony, subpoena, official proceeding, or report involving the victim or witness relates to a felonious violation of Title 5 of this article or the commission of a crime of violence as defined in § 14-101 of this article, or a conspiracy or solicitation to commit such a crime, a person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years. (d) Sentence. — A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section.

> MD. CODE ANN., CRIM. Retaliation for Law § 9-303 testimony

(a) Prohibited. — A person may not intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against a victim or witness for: (1) giving testimony in an official proceeding; or (2) reporting a crime or delinquent act. (b) Solicitation prohibited. — A person may not

solicit another person to intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against a victim or witness for: (1) giving testimony in an official proceeding; or (2) reporting a crime or delinquent act. (c) Penalty. — (1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$ 5,000 or both. (2) If the official proceeding or report described in subsection (a) of this section relates to a felonious violation of Title 5 of this article or the commission of a crime of violence as defined in § 14-101 of this article, or a conspiracy or solicitation to commit such a crime, a person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years. (d) Sentence. — A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section.

	Court to prevent
LAW § 9-304	intimidation of
	victim or witness

(a) In general. — A finding of good cause under this section may be based on any relevant evidence including credible hearsay. (b) Good cause. — (1) For good cause shown, a court with jurisdiction over a criminal matter or juvenile delinquency case may pass an order that is reasonably necessary to stop or prevent: (i) the intimidation of a victim or witness; or (ii) a violation of this subtitle. (2) The order may: (i) prohibit a person from violating this subtitle; (ii) require an individual to maintain a certain physical distance from another person specified by the court; (iii) prohibit a person from communicating with another individual specified by the court, except through an attorney or other individual specified by the court; and (iv) impose other reasonable conditions to ensure the safety of a victim or witness. (3) The court may hold a hearing to determine if an order should be issued under this subsection. (c) Enforcement. — (1) The court may use its contempt power to enforce an order issued under this section. (2) The court may revoke the pretrial release of a defendant or child respondent to ensure the safety of a victim or witness or the integrity of the judicial process if the defendant or child respondent violates an order passed under this section. (d) Conditions of pretrial release. — A District Court commissioner or

an intake officer, as defined in §3-8A-01 of the Courts Article, may impose for good cause shown a condition described in subsection (b)(2) of this section as a condition of the pretrial release of a defendant or child respondent.

Massachusetts	MASS. ANN. LAWS ch. 268 § 13B	Intimidation of Witnesses or Jurors; Penalties; "Criminal Investigator" Defined
---------------	----------------------------------	---

(1) Whoever, directly or indirectly, willfully (a) threatens, or attempts or causes physical injury, emotional injury, economic injury or property damage to; (b) conveys a gift, offer or promise of anything of value to; or (c) misleads, intimidates or harasses another person who is: (i) a witness or potential witness at any stage of a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type; (ii) a person who is or was aware of information, records, documents or objects that relate to a violation of a criminal statute, or a violation of conditions of probation, parole or bail; (iii) a judge, juror, grand juror, prosecutor, police officer, federal agent, investigator, defense attorney, clerk, court officer, probation officer or parole officer; (iv) a person who is or was furthering a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type; or (v) a person who is or was attending or had made known his intention to attend a grand jury proceeding, trial or other criminal proceeding of any type with the intent to impede, obstruct, delay, harm, punish or otherwise interfere thereby with a criminal investigation, grand jury proceeding, trial or other criminal proceeding of any type shall be punished by imprisonment for not more than 21/2 years in a jail or house of correction or not more than 10 years in a state prison, or by a fine of not less than \$1,000 nor more than \$5,000. (2) As used in this section, "investigator" shall mean an individual or group of individuals lawfully authorized by a department or agency of the federal government, or any political subdivision thereof, or a department or agency of the commonwealth, or any political subdivision thereof, to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of his official duties. (3) As used in this section, "harass" shall mean to engage in any act directed at a specific person or persons, which act seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress. Such act shall include, but not be limited to, an act conducted by mail, electronic mail, internet communications, facsimile communications, or other telephonic or telecommunications device. (4) A prosecution under this section may be brought in the county in which the criminal investigation, grand jury proceeding, trial or other criminal proceeding is being conducted or took place, or in the county in which the alleged conduct constituting an offense occurred.

Michigan	MICH. COMP. LAWS SERV. § 750.122	Prohibited acts; witnesses; threat or intimidation; affirmative defense; violation as felony; penalties; applicability of section; definitions
----------	----------------------------------	---

(1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes: (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding. (b) To influence any individual's testimony at a present or future official proceeding. (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding. (2) Subsection (1) does not apply to the reimbursement or payment of reasonable costs for any witness to provide a statement to testify truthfully or provide truthful information in an official proceeding as provided for under section 16 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.66, or section 2164 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2164, or court rule. (3) A person shall not do any of the following by threat or intimidation: (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding. (b) Influence or attempt to influence testimony at a present or future official proceeding. (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official

proceeding. (4) It is an affirmative defense under subsections (1) and (3), for which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully. (5) Subsections (1) and (3) do not apply to any of the following: (a) The lawful conduct of an attorney in the performance of his or her duties, such as advising a client. (b) The lawful conduct or communications of a person as permitted by statute or other lawful privilege. (6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding. (7) A person who violates this section is guilty of a crime as follows: (a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, or both. (b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$20,000.00, or both. (c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$25,000.00, or both. (8) A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$20,000.00, or both. As used in this subsection, "retaliate" means to do any of the following: (a) Commit or attempt to commit a crime against any person. (b) Threaten to kill or injure any person or threaten to cause property damage. (9) This section applies regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding. (10) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same transaction as the violation of this section. (11) The court may order a term of imprisonment

imposed for violating this section to be served consecutively to a term of imprisonment imposed for the commission of any other crime including any other violation of law arising out of the same transaction as the violation of this section. (12) As used in this section: (a) "Official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding. (b) "Threaten or intimidate" does not mean a communication regarding the otherwise lawful access to courts or other branches of government, such as the otherwise lawful filing of any civil action or police report of which the purpose is not to harass the other person in violation of section 2907 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2907.

	MICH. COMP. LAWS SERV. § 750.483a	Prohibited acts; penalties; "retaliate," "official proceeding," and "threaten or intimidate" defined
--	--------------------------------------	---

(1) A person shall not do any of the following: (a) Withhold or refuse to produce any testimony, information, document, or thing after the court has ordered it to be produced following a hearing. (b) Prevent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person. (c) Retaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person. As used in this subsection, "retaliate" means to do any of the following: (i) Commit or attempt to commit a crime against any person. (ii) Threaten to kill or injure any person or threaten to cause property damage. (2) A person who violates subsection (1) is guilty of a crime as follows: (a) Except as provided in subdivision (b), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both. (b) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$20,000.00, or both. (3) A person shall not do

any of the following: (a) Give, offer to give, or promise anything of value to any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime. (b) Threaten or intimidate any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime. (4) A person who violates subsection (3) is guilty of a crime as follows: (a) Except as provided in subdivision (b), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both. (b) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$20,000.00, or both. (5) A person shall not do any of the following: (a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding. (b) Offer evidence at an official proceeding that he or she recklessly disregards as false. (6) A person who violates subsection (5) is guilty of a crime as follows: (a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, or both. (b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$20,000.00, or both. (7) It is an affirmative defense under subsection (3), for which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to provide a statement or evidence truthfully. (8) Subsections (1)(a), (3)(b), and (5)(b) do not apply to any of the following: (a) The lawful conduct of an attorney in the performance of his or her duties, such as advising a client. (b) The lawful conduct or communications of a person as permitted by statute or other lawful privilege. (9) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same transaction as the violation of this section. (10) The court may order a term of imprisonment imposed for a violation of this

section to be served consecutively to a term of imprisonment imposed for any other crime including any other violation of law arising out of the same transaction as the violation of this section. (11) As used in this section: (a) "Official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding. (b) "Threaten or intimidate" does not mean a communication regarding the otherwise lawful access to courts or other branches of government, such as the lawful filing of any civil action or police report of which the purpose is not to harass the other person in violation of section 2907 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2907.

Minnesota MINN. STAT. § 609.498 Tampering we witness	with a
--	--------

Subdivision 1. Tampering with a witness in the first degree. Whoever does any of the following is guilty of tampering with a witness in the first degree and may be sentenced as provided in subdivision 1a: (a) intentionally prevents or dissuades or intentionally attempts to prevent or dissuade by means of force or threats of injury to any person or property, a person who is or may become a witness from attending or testifying at any trial, proceeding, or inquiry authorized by law; (b) by means of force or threats of injury to any person or property, intentionally coerces or attempts to coerce a person who is or may become a witness to testify falsely at any trial, proceeding, or inquiry authorized by law; (c) intentionally causes injury or threatens to cause injury to any person or property in retaliation against a person who was summoned as a witness at any trial, proceeding, or inquiry authorized by law, within a year following that trial, proceeding, or inquiry or within a year following the actor's release from incarceration, whichever is later; (d) intentionally prevents or dissuades or attempts to prevent or dissuade, by means of force or threats of injury to any person or property, a person from providing information to law enforcement authorities concerning a crime; (e) by means of force or threats of injury to any person or property, intentionally coerces or attempts to coerce a person to provide false information concerning a crime to law enforcement authorities; or (f) intentionally causes injury or threatens to cause injury to any person or property in retaliation against a person who

has provided information to law enforcement authorities concerning a crime within a year of that person providing the information or within a year of the actor's release from incarceration, whichever is later. Subd. 1a. Penalty. Whoever violates subdivision 1 may be sentenced to imprisonment for not more than five years or to payment of a fine not to exceed \$10,000. Subd. 1b. Aggravated firstdegree witness tampering. (a) A person is guilty of aggravated firstdegree witness tampering if the person causes or, by means of an implicit or explicit credible threat, threatens to cause great bodily harm or death to another in the course of committing any of the following acts intentionally: (1) preventing or dissuading or attempting to prevent or dissuade a person who is or may become a witness from attending or testifying at any criminal trial or proceeding; (2) coercing or attempting to coerce a person who is or may become a witness to testify falsely at any criminal trial or proceeding; (3) retaliating against a person who was summoned as a witness at any criminal trial or proceeding within a year following that trial or proceeding or within a year following the actor's release from incarceration, whichever is later; (4) preventing or dissuading or attempting to prevent or dissuade a person from providing information to law enforcement authorities concerning a crime; (5) coercing or attempting to coerce a person to provide false information concerning a crime to law enforcement authorities; or (6) retaliating against any person who has provided information to law enforcement authorities concerning a crime within a year of that person providing the information or within a year of the actor's release from incarceration, whichever is later. (b) A person convicted of committing any act prohibited by paragraph (a) may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than \$30,000, or both. Subd. 2. Tampering with a witness in the second degree. Whoever does any of the following is guilty of tampering with a witness in the second degree and may be sentenced as provided in subdivision 3: (a) intentionally prevents or dissuades or intentionally attempts to prevent or dissuade by means of any act described in section 609.27, subdivision 1, clause (3), (4), or (5), a person who is or may become a witness from attending or testifying at any trial, proceeding, or inquiry authorized by law; (b) by means of any act described in section 609.27, subdivision 1, clause (3), (4), or (5), intentionally coerces or attempts to coerce a person who is or may become a witness to testify falsely at any trial, proceeding, or inquiry authorized by law; (c) intentionally prevents or dissuades or attempts to prevent or dissuade by means of any act

described in section 609.27, subdivision 1, clause (3), (4), or (5), a person from providing information to law enforcement authorities concerning a crime; or (d) by means of any act described in section 609.27, subdivision 1, clause (3), (4), or (5), intentionally coerces or attempts to coerce a person to provide false information concerning a crime to law enforcement authorities. Subd. 3. Sentence. Whoever violates subdivision 2 may be sentenced to imprisonment for not more than one year or to payment of a fine not to exceed \$3,000. Subd. 4. No bar to conviction. Notwithstanding section 609.035 or 609.04, a prosecution for or conviction of the crime of aggravated first-degree witness tampering is not a bar to conviction of or punishment for any other crime.

Mississippi	MISS. CODE. ANN. § 97-9-55	Intimidating judge, juror, witness, attorney, etc., or otherwise obstructing justice
-------------	-------------------------------	--

If any person or persons by threats, force or abuse, attempt to intimidate or otherwise influence a judge, justice of the peace, juror, or one whose name has been drawn for jury service, witness, prosecuting or defense attorney or any other officer in the discharge of his duties, or by such force, abuse or reprisals or threats thereof after the performance of such duties, or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment not less than one (1) month in the county jail nor more than two (2) years in the state penitentiary or by a fine not exceeding five hundred dollars (\$500.00), or both such fine and imprisonment.

MISS. CODE. ANN.	Perjury; bribery to
§ 97-9-65	procure

Every person who shall, by the offer of any valuable consideration, attempt, unlawfully and corruptly, to procure any other person to commit wilful and corrupt perjury as a witness in any cause, matter, or proceeding in or concerning which such other person might by law be examined as a witness, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years.

a Class 2 felony.

	MISS. CODE ANN. § 97-9-113	Intimidating a witness
(1) A person commits the crime of intimidating a witness if he intentionally or knowingly attempts, by use of a threat directed to a witness or a person he believes will be called as a witness in any official proceedings, to: (a) Influence the testimony of that person; (b) Induce that person to avoid legal process summoning him to testify; or (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned. (2) Intimidating a witness is a Class 1 felony.		
	MISS. CODE ANN. § 97-9-115	Tampering with a witness
(1) A person commits the crime of tampering with a witness if he intentionally or knowingly attempts to induce a witness or a person he believes will be called as a witness in any official proceeding to: (a) Testify falsely or unlawfully withhold testimony; or (b) Absent himself from any official proceeding to which he has been legally summoned. (2) Tampering with a witness is a Class 2 felony.		
	MISS. CODE ANN. 897-9-127	Retaliation against a public servant or witness
(1) A person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of public		

Missouri	Mo. Rev. Stat. § 575.270	Tampering with a witness — tampering with a victim

servant, witness, prospective witness or informant. (2) Retaliation is

1. A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness to disobey a subpoena or other legal process, or to absent himself or avoid subpoena or other legal process, or to withhold evidence, information or documents, or to testify falsely, he: (1) Threatens or

causes harm to any person or property; or (2) Uses force, threats or deception; or (3) Offers, confers or agrees to confer any benefit, direct or indirect, upon such witness; or (4) Conveys any of the foregoing to another in furtherance of a conspiracy. 2. A person commits the crime of "victim tampering" if, with purpose to do so, he prevents or dissuades or attempts to prevent or dissuade any person who has been a victim of any crime or a person who is acting on behalf of any such victim from: (1) Making any report of such victimization to any peace officer, or state, local or federal law enforcement officer or prosecuting agency or to any judge; (2) Causing a complaint, indictment or information to be sought and prosecuted or assisting in the prosecution thereof; (3) Arresting or causing or seeking the arrest of any person in connection with such victimization. 3. Tampering with a witness in a prosecution, tampering with a witness with purpose to induce the witness to testify falsely, or victim tampering is a class C felony if the original charge is a felony. Otherwise, tampering with a witness or victim tampering is a class A misdemeanor. Persons convicted under this section shall not be eligible for parole.

Montana	Tampering with a witness and informants

(1) A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, the person purposely or knowingly attempts to induce or otherwise cause a witness or informant to: (a) testify or inform falsely; (b) withhold any testimony, information, document, or thing; (c) elude legal process summoning the witness or informant to testify or supply evidence; or (d) not appear at any proceeding or investigation to which the witness or informant has been summoned. (2) A person convicted of tampering with witnesses or informants shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed \$50,000, or both.

Nebraska	NEB. REV. STAT. § 28-918	Bribery of a witness; penalty; witness receiving a bribe; penalty
		penaity

(1) A person commits bribery of a witness if he offers, confers, or agrees to confer any benefit upon a witness or a person he believes is about to be called as a witness in any official proceeding with intent to: (a) Influence him to testify falsely or unlawfully withhold any testimony; or (b) Induce him to avoid legal process summoning him to testify; or (c) Induce him to absent himself from an official proceeding to which he has been legally summoned. (2) Bribery of a witness is a Class IV felony. (3) A person who is a witness or has been called as a witness in any official proceeding commits a Class IV felony if he accepts or agrees to accept any benefit from any other person for the purposes set forth in subsection (1) of this section.

NEB. REV. STAT. § 28-919	Tampering with witness or informant; jury tampering; penalty

(1) A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to: (a) Testify or inform falsely; (b) Withhold any testimony, information, document, or thing; (c) Elude legal process summoning him or her to testify or supply evidence; or (d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned. (2) A person commits the offense of jury tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he or she attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case. (3) Tampering with witnesses or informants is a Class IV felony. Jury tampering is a Class IV felony.

Nevada	NEV. REV. STAT. ANN. § 199.240	Bribing or intimidating witness to influence testimony
		-

A person who: 1. Gives, offers or promises directly or indirectly any compensation, gratuity or reward to any witness or person who may be called as a witness in an official proceeding, upon an agreement or understanding that his testimony will be thereby influenced; or 2. Uses any force, threat, intimidation or deception with the intent to: (a) Influence the testimony of any witness or person who may be called as a witness in an official proceeding; (b) Cause or induce him to give false testimony or to withhold true testimony; or (c) Cause or induce him to withhold a record, document or other object from the proceeding, is guilty of a category C felony and shall be punished as provided in NRS 193.130, and may be further punished by a fine of not more than \$50,000.

NEV. REV. STAT. ANN. § 199.305	Preventing or dissuading victim, person acting on behalf of victim, or witness from reporting crime, commencing prosecution or causing arrest

1. A person who, by intimidating or threatening another person, prevents or dissuades a victim of a crime, a person acting on his behalf or a witness from: (a) Reporting a crime or possible crime to a: (1) Judge; (2) Peace officer; (3) Parole or probation officer; (4) Prosecuting attorney; (5) Warden or other employee at an institution of the department of corrections; or (6) Superintendent or other employee at a juvenile correctional institution; (b) Commencing a criminal prosecution or a proceeding for the revocation of a parole or probation, or seeking or assisting in such a prosecution or proceeding; or (c) Causing the arrest of a person in connection with a crime, or who hinders or delays such a victim, agent or witness in his effort to carry out any of those actions is guilty of a category D felony and shall be punished as provided in NRS 193.130. 2. As used in this section, "victim of a crime" means a person against whom a crime has been committed.

New Hampshire	N.H. REV. STAT. ANN. § 641:5	Tampering with witnesses or informants
------------------	---------------------------------	--

A person is guilty of a class B felony if: I. Believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to: (a) Testify or inform falsely; or (b) Withhold any testimony, information, document or thing; or (c) Elude legal process summoning him to provide evidence; or (d) Absent himself from any proceeding or investigation to which he has been summoned; or II. He commits any unlawful act in retaliation for anything done by another in his capacity as witness or informant; or III. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in paragraph I.

New Jersey	N.J. STAT. ANN. § 2C:28-5	Tampering with witnesses and informants; retaliation against them; bribery of witnesses or informants
------------	---------------------------	---

a. Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he knowingly attempts to induce or otherwise cause a witness or informant to: (1) Testify or inform falsely; (2) Withhold any testimony, information, document or thing; (3) Elude legal process summoning him to testify or supply evidence; or (4) Absent himself from any proceeding or investigation to which he has been legally summoned. The offense is a crime of the second degree if the actor employs force or threat of force. Otherwise it is a crime of the third degree. Privileged communications may not be used as evidence in any prosecution for violations of paragraph (2), (3) or (4). b. Retaliation against witness or informant. A person commits a crime of the fourth degree if he harms another by an unlawful act with purpose to retaliate for or on account of the service of another as a witness or informant. c. Witness or informant taking bribe. A person commits a crime of the third degree if he solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection a.(1) through (4) of this section.

New Mexico	N.M. STAT. ANN. § 30-24-3	intimidation of a witness; retaliation
		witness; retaliation against a witness

A. Bribery or intimidation of a witness consists of any person knowingly: (1) giving or offering to give anything of value to any witness or to any person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding to testify falsely or to abstain from testifying to any fact in such cause or proceeding; (2) intimidating or threatening any witness or person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding for the purpose of preventing such individual from testifying to any fact, to abstain from testifying or to testify falsely; or (3) intimidating or threatening any person or giving or offering to give anything of value to any person with the intent to keep the person from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings. B. Retaliation against a witness consists of any person knowingly engaging in conduct that causes bodily injury to another person or damage to the tangible property of another person, or threatening to do so, with the intent to retaliate against any person for any information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings given by a person to a law enforcement officer. C. Whoever commits bribery or intimidation of a witness is guilty of a third degree felony. D. Whoever commits retaliation against a witness is guilty of a second degree felony.

New York	N.Y. PENAL LAW § 215.00	Bribing a witnesses
----------	-------------------------	---------------------

A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding upon an agreement or understanding that (a) the testimony of such witness will thereby be influenced, or (b) such witness will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding. Bribing a witness is a class D felony.

N.Y. PENAL LAW § 215.10	Tampering with a witness in the fourth degree
-------------------------	---

A person is guilty of tampering with a witness [in the fourth degree] [n1] when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person. Tampering with a witness in the fourth degree is a class A misdemeanor.

	Tampering with a witness in the third
	degree

A person is guilty of tampering with a witness in the third degree when, knowing that a person is about to be called as a witness in a criminal proceeding: 1. He wrongfully compels or attempts to compel such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at such proceeding by means of instilling in him a fear that the actor will cause physical injury to such person or another person; or 2. He wrongfully compels or attempts to compel such person to swear falsely by means of instilling in him a fear that the actor will cause physical injury to such person or another person. Tampering with a witness in the third degree is a class E felony.

		Tampering with a witness in the second degree
--	--	---

A person is guilty of tampering with a witness in the second degree when he: 1. Intentionally causes physical injury to a person for the purpose of obstructing, delaying, preventing or impeding the giving of testimony in a criminal proceeding by such person or another person or for the purpose of compelling such person or another person to swear falsely; or 2. He intentionally causes physical injury to a person on account of such person or another person having testified in a criminal proceeding. Tampering with a witness in the second degree is a class D felony.

N.Y. PENAL LAW § 215.13	Tampering with a witness in the first degree
-------------------------	--

A person is guilty of tampering with a witness in the first degree when: 1. He intentionally causes serious physical injury to a person for the purpose of obstructing, delaying, preventing or impeding the giving of testimony in a criminal proceeding by such person or another person or for the purpose of compelling such person or another person to swear falsely; or 2. He intentionally causes serious physical injury to a person on account of such person or another person having testified in a criminal proceeding. Tampering with a witness in the first degree is a class B felony.

	Intimidating a victim or witness in the third degree
	5 5 5

A person is guilty of intimidating a victim or witness in the third degree when, knowing that another person possesses information relating to a criminal transaction and other than in the course of that criminal transaction or immediate flight therefrom, he: 1. Wrongfully compels or attempts to compel such other person to refrain from communicating such information to any court, grand jury, prosecutor, police officer or peace officer by means of instilling in him a fear that the actor will cause physical injury to such other person or another person; or 2. Intentionally damages the property of such other person or another person for the purpose of compelling such other person or another person to refrain from communicating, or on account of such other person or another person having communicated, information relating to that criminal transaction to any court, grand jury, prosecutor, police officer or peace officer. Intimidating a victim or witness in the third degree is a class E felony.

	Intimidating a victim or witness in the second degree

A person is guilty of intimidating a victim or witness in the second degree when, other than in the course of that criminal transaction or immediate flight therefrom, he: 1. Intentionally causes physical

injury to another person for the purpose of obstructing, delaying, preventing or impeding the communication by such other person or another person of information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer or for the purpose of compelling such other person or another person to swear falsely; or 2. Intentionally causes physical injury to another person on account of such other person or another person having communicated information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer; or 3. Recklessly causes physical injury to another person by intentionally damaging the property of such other person or another person, for the purpose of obstructing, delaying, preventing or impeding such other person or another person from communicating, or on account of such other person or another person having communicated, information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer. Intimidating a victim or witness in the second degree is a class D felony.

	Intimidating a victim or witness in the first degree
--	--

A person is guilty of intimidating a victim or witness in the first degree when, other than in the course of that criminal transaction or immediate flight therefrom, he: 1. Intentionally causes serious physical injury to another person for the purpose of obstructing, delaying, preventing or impeding the communication by such other person or another person of information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer or for the purpose of compelling such other person or another person to swear falsely; or 2. Intentionally causes serious physical injury to another person on account of such other person or another person having communicated information relating to a criminal transaction to any court, grand jury, prosecutor, police officer or peace officer. Intimidating a victim or witness in the first degree is a class B felony.

North Carolina N.C. GEN. STAT. ANN. § 14-226	Intimidating or interfering with witnesses
--	--

(a) If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony. (b) A defendant in a criminal proceeding who threatens a witness in the defendant's case with the assertion or denial of parental rights shall be in violation of this section.

North Dakota	09-01	Tampering with witnesses and informants in proceedings
		proceedings

1. A person is guilty of a class C felony if he uses force, threat, deception, or bribery: a. With intent to influence another's testimony in an official proceeding; or b. With intent to induce or otherwise cause another: (1) To withhold any testimony, information, document, or thing from an official proceeding, whether or not the other person would be legally privileged to do so; (2) To violate section 12.1-09-03; (3) To elude legal process summoning him to testify in an official proceeding; or (4) To absent himself from an official proceeding to which he has been summoned. 2. A person is guilty of a class C felony if he solicits, accepts, or agrees to accept from another a thing of pecuniary value as consideration for: a. Influencing the actor's testimony in an official proceeding; or b. The actor's engaging in the conduct described in paragraphs 1 through 4 of subdivision b of subsection 1. 3. a. It is a defense to a prosecution under this section for use of threat with intent to influence another's testimony that the threat was not of unlawful harm and was used solely to influence the other to testify truthfully. b. In a prosecution under this section based on bribery, it shall be an affirmative defense that any consideration for a person's refraining from instigating or pressing the prosecution of an offense was to be limited to restitution or indemnification for harm caused by the offense. c. It is no defense to a prosecution under this section that an official proceeding was not pending or about to be instituted. 4. This section shall not be construed to prohibit the payment or receipt of witness fees provided by statute, or the payment, by the party upon whose behalf a witness is called, and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time spent in attendance at an official proceeding, or in the case of expert witnesses, a reasonable fee for preparing and presenting an expert opinion.

Ohio	OHIO REV. CODE ANN. § 2921.01	Intimidation of attorney, victim or witness in criminal case
------	----------------------------------	--

(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges or a witness involved in a criminal action or proceeding in the discharge of the duties of the witness. (B) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness. (C) Division (A) of this section does not apply to any person who is attempting to resolve a dispute pertaining to the alleged commission of a criminal offense, either prior to or subsequent to the filing of a complaint, indictment, or information, by participating in the arbitration, mediation, compromise, settlement, or conciliation of that dispute pursuant to an authorization for arbitration, mediation, compromise, settlement, or conciliation of a dispute of that nature that is conferred by any of the following: (1) A section of the Revised Code; (2) The Rules of Criminal Procedure, the Rules of Superintendence for Municipal Courts and County Courts, the Rules of Superintendence for Courts of Common Pleas, or another rule adopted by the supreme court in accordance with Section 5 of Article IV, Ohio Constitution; (3) A local rule of court, including, but not limited to, a local rule of court that relates to alternative dispute resolution or other case management programs and that authorizes the referral of disputes pertaining to the alleged commission of certain types of criminal offenses to appropriate and available arbitration, mediation, compromise, settlement, or other conciliation programs; (4) The order of a judge of a municipal court, county court, or court of common pleas. (D) Whoever violates this section is guilty of intimidation of an attorney, victim, or witness in a criminal case. A

violation of division (A) of this section is a misdemeanor of the first degree. A violation of division (B) of this section is a felony of the third degree.

Oklahoma	OKLA. STAT. ANN. tit. 21, § 455	Preventing a witness from giving testimony — Threatening witness who has given testimony
		· ·

A. Every person who willfully prevents any person from giving testimony who has been duly summoned or subpoenaed or endorsed on the criminal information or juvenile petition as a witness, or who makes a report of abuse or neglect pursuant to Sections 7103 and 7104 of Title 10 of the Oklahoma Statutes or Section 10-104 of Title 43A of the Oklahoma Statutes, or who is a witness to any reported crime, or threatens or procures physical or mental harm through force or fear with the intent to prevent any witness from appearing in court to give his testimony, or to alter his testimony is, upon conviction, guilty of a felony punishable by not less than one (1) year nor more than ten (10) years in the State Penitentiary. B. Every person who threatens physical harm through force or fear or causes or procures physical harm to be done to any person or harasses any person or causes a person to be harassed because of testimony given by such person in any civil or criminal trial or proceeding, or who makes a report of abuse or neglect pursuant to Sections 7103 and 7104 of Title 10 of the Oklahoma Statutes or Section 10-104 of Title 43A of the Oklahoma Statutes, is, upon conviction, guilty of a felony punishable by not less than one (1) year nor more than ten (10) years in the State Penitentiary.

§ 456	Bribing witness — Subornation of
	perjury

Any person who gives or offers or promises to give to any witness or person about to be called as a witness in any matter whatever, including contests before United States land officers or townsite commissioners, any bribe upon any understanding or agreement that the testimony of such witness shall be influenced, or who attempts by any other means fraudulently to induce any witness to give false

testimony shall be guilty of a felony, but if the offer, promise, or bribe is in any way to induce the witness to swear falsely, then it shall be held to be subornation of perjury.

	OKLA. STAT. ANN. tit. 21, § 650.6	Assault or battery or assault and battery upon officer of state district or appellate court, Workers' Compensation court, witness or juror — Penalty
--	-----------------------------------	--

A. Every person who commits any assault upon any officer of a state district or appellate court, or the Workers' Compensation Court, including but not limited to judges, bailiffs, court reporters, court clerks or deputy court clerks, or upon any witnesses or juror, because of said person's service in such capacity or within six (6) months of said person's service in such capacity, shall be guilty of a misdemeanor punishable by imprisonment in the county jail for not more than one (1) year, by a fine not to exceed One Thousand Dollars (\$ 1,000.00), or by both such imprisonment and fine. B. Every person who commits any battery or assault and battery upon any officer of a state district or appellate court, or the Workers' Compensation Court, including but not limited to judges, bailiffs, court reporters, court clerks or deputy court clerks, or upon any witnesses or juror, because of said person's service in such capacity or within six (6) months of said person's service in such capacity, shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years, by a fine of not more than Five Thousand Dollars (\$5,000.00), or by both such imprisonment and fine.

U	Or. Rev. Stat. Ann. § 162.265	Bribing a witness
---	----------------------------------	-------------------

(1) A person commits the crime of bribing a witness if the person offers, confers or agrees to confer any pecuniary benefit upon a witness in any official proceeding, or a person the person believes may be called as a witness, with the intent that: (a) The testimony of the person as a witness will thereby be influenced; or (b) The person will avoid legal process summoning the person to testify; or (c) The

person will be absent from any official proceeding to which the person has been legally summoned. (2) Bribing a witness is a Class C felony.

OR. REV. STAT. ANN. § 162.285	Tampering with a witness

(1) A person commits the crime of tampering with a witness if: (a) The person knowingly induces or attempts to induce a witness or a person the person believes may be called as a witness in any official proceeding to offer false testimony or unlawfully withhold any testimony; or (b) The person knowingly induces or attempts to induce a witness to be absent from any official proceeding to which the person has been legally summoned. (2) Tampering with a witness is a Class C felony.

Pennsylvania	18 PA. CONS. STAT. ANN.	Intimidation of
	§ 4952	witnesses or victims

(a) OFFENSE DEFINED. — A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to: (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime. (2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge. (3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge. (4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant. (5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence. (6) Absent himself from any proceeding or investigation to which he has been legally summoned. (b) GRADING. — (1) The offense is a felony of the degree indicated in paragraphs (2) through (4) if: (i) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person. (ii) The actor

offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person. (iii) The actor's conduct is in furtherance of a conspiracy to intimidate a witness or victim. (iv) The actor accepts, agrees or solicits another to accept any pecuniary or other benefit to intimidate a witness or victim. (v) The actor has suffered any prior conviction for any violation of this section or any predecessor law hereto, or has been convicted, under any Federal statute or statute of any other state, of an act which would be a violation of this section if committed in this State. (2) The offense is a felony of the first degree if a felony of the first degree or murder in the first or second degree was charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection. (3) The offense is a felony of the second degree if a felony of the second degree is the most serious offense charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection. (4) The offense is a felony of the third degree in any other case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection. (5) Otherwise the offense is a misdemeanor of the second degree.

18 PA. CONS. STAT. ANN. § 4953	Retaliation against witness, victim or
	party

(a) OFFENSE DEFINED. — A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or a party in a civil matter. (b) GRADING. — The offense is a felony of the third degree if the retaliation is accomplished by any of the means specified in section 4952(b)(1) through (5) (relating to intimidation of witnesses or victims). Otherwise the offense is a misdemeanor of the second degree.

Puerto Rico	P.R. LAWS ANN. tit. 33, § 4434	Preventing or dissuading witnesses from attending trial
-------------	-----------------------------------	--

Any person who prevents or dissuades a person who is or may become a witness, from attending or offering his/her testimony in any investigation, proceeding, hearing or judicial or administrative matter or any other proceeding authorized by law, shall be punished with a term of imprisonment of not more than six (6) months, a fine of not more than five hundred dollars (\$500), or both penalties at the discretion of the court. However, the court may impose the penalty of rendering community service in lieu of the term of imprisonment.

P.R. LAWS ANN. tit. 33, § 4435a

Threats to witnesses

Whoever threatens to inflict bodily injury on a person or his family, or damage to his patrimony, whenever said person is a witness, or who, because of his knowledge of the facts, may be called to give testimony at any inquiry, proceeding, hearing or judicial or administrative proceeding punishable in excess of five thousand dollars (\$5,000), with the purpose that said witness shall not testify, or shall give partial testimony or shall change it, shall be punished by imprisonment for a fixed term of three (3) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of five (5) years; if there should be extenuating circumstances, it may be reduced to a minimum of two (2) years.

Rhode Island

R.I. GEN. LAWS § 11-7-11

Bribery of witness

Any person who shall corruptly give or offer to give any sum of money or any bribe, present, or reward, or any promise or security to obtain or influence the testimony of any witness to any crime or to induce the witness to absent himself or herself from, or otherwise avoid or seek to avoid appearing or testifying at, any hearing shall be guilty of a felony and upon conviction shall be imprisoned for not more than seven (7) years, or fined not more than one thousand dollars (\$ 1,000), or both. Nothing in this section shall be construed to make an agreement between the victim and the defendant to dismiss a criminal charge unlawful.

R.I. GEN. LAWS § 11-32-5

Intimidation of witnesses and victims of crime

(a) Any person who, by expressly or impliedly threatening to commit any unlawful act, maliciously and knowingly communicates with

another person with the specific intent to intimidate a victim of a crime or a witness in any criminal proceeding with respect to that person's participation in any criminal proceeding shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars (\$ 500), or imprisoned not more than one year, or both. (b) Any person who, with the specific intent to intimidate a victim of a crime or a witness in any criminal proceeding with respect to that person's participation in any criminal proceeding, causes a physical injury to or damages the property of any person or expressly or impliedly threatens to cause physical injury to or damage to the property of any person, or, with specific intent to intimidate, acts for pecuniary gain shall be guilty of a felony and, upon conviction, shall be fined not more than five thousand dollars (\$ 5,000), or imprisoned not more than five (5) years, or both. (c) As used in this section, "criminal proceeding" means the filing of a criminal complaint, any grand jury proceedings, any trial or hearing conducted in any court relating to a criminal matter, any proceeding before the parole board or any official inquiry into an alleged criminal violation. (d) Nothing in this section shall be construed to prevent an attorney from interviewing any witness or victim or from otherwise investigating a matter on behalf of a client in an otherwise lawful manner.

South Carolina	S.C. CODE ANN. § 16-9-340	Intimidation of court officials, jurors or witnesses
-------------------	---------------------------	--

(A) It is unlawful for a person by threat or force to: (1) intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness, arbiter, commissioner, or member of any commission of this State or any other official of any court, in the discharge of his duty as such; or (2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court. (B) A person who violates the provisions of subsection (A) is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than ten years, or both.

South Dakota	S.D. Codified Laws § 22- 11-19	Tampering with a witness-felony
--------------	-----------------------------------	---------------------------------

Any person who injures, or threatens to injure, any person or property, or, with intent to influence a witness, offers, confers, or

agrees to confer any benefit on a witness or prospective witness in an official proceeding to induce the witness to: (1) Testify falsely; (2) Withhold any testimony, information, document, or thing; (3) Elude legal process summoning the witness to testify or supply evidence; or (4) Absent himself or herself from an official proceeding to which the witness has been legally summoned; is guilty of tampering with a witness. Any person who injures, or threatens to injure, any person or property in retaliation for that person testifying in an official proceeding, or for cooperating with law enforcement, government officials, investigators, or prosecutors, is guilty of tampering with a witness. Tampering with a witness is a Class 4 felony.

Tennessee	TENN. CODE ANN. § 39- 16-107	Witnesses

(a) A person commits an offense who: (1) Offers, confers or agrees to confer anything of value upon a witness or a person the defendant believes will be called as a witness in any official proceeding with intent to: (A) Corruptly influence the testimony of the witness; (B) Induce the witness to avoid or attempt to avoid legal process summoning the witness to testify; or (C) Induce the witness to be absent from an official proceeding to which that witness has been legally summoned; or (2) Is a witness or believes the person will be called as a witness in any official proceeding and solicits, accepts or agrees to accept anything of value upon an agreement or understanding that: (A) The witness's testimony will be corruptly influenced; (B) The witness will attempt to avoid legal process summoning the witness to testify; or (C) The witness will attempt to be absent from an official proceeding to which the witness has been legally summoned. (b) This section does not apply to the payment of additional compensation to an expert witness over and above the amount otherwise prescribed by law to be paid a witness. (c) Nothing in this section shall be deemed to nullify or repeal any contempt power of any judge of any court of this state. (d) Bribing a witness is a Class C felony.

TENN. CODE ANN. § 39- 16-507	Coercion; witnesses

(a) A person commits an offense who, by means of coercion, influences or attempts to influence a witness or prospective witness in an official proceeding with intent to influence the witness to: (1)

Testify falsely; (2) Withhold any truthful testimony, truthful information, document or thing; or (3) Elude legal process summoning the witness to testify or supply evidence, or to be absent from an official proceeding to which the witness has been legally summoned. (b) A violation of this section is a Class D felony.

Texas	TEX. PENAL CODE ANN. § 36.05	Tampering with Witness

(a) A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding or coerces a witness or prospective witness in an official proceeding: (1) to testify falsely; (2) to withhold any testimony, information, document, or thing; (3) to elude legal process summoning him to testify or supply evidence; (4) to absent himself from an official proceeding to which he has been legally summoned; or (5) to abstain from, discontinue, or delay the prosecution of another. (b) A witness or prospective witness in an official proceeding commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in Subsection (a). (c) It is a defense to prosecution under Subsection (a)(5) that the benefit received was: (1) reasonable restitution for damages suffered by the complaining witness as a result of the offense; and (2) a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case. (d) An offense under this section is a state jail felony.

TEX. PENAL CODE ANN.	Obstruction or
§ 36.06	Retaliation

(a) A person commits an offense if he intentionally or knowingly harms or threatens to harm another by an unlawful act: (1) in retaliation for or on account of the service or status of another as a: (A) public servant, witness, prospective witness, or informant; or (B) person who has reported or who the actor knows intends to report the occurrence of a crime; or (2) to prevent or delay the service of another as a: (A) public servant, witness, prospective witness, or informant; or (B) person who has reported or who the actor knows intends to report the occurrence of a crime. (b) In this section: (1) "Honorably retired peace officer" means a peace officer who: (A) did

not retire in lieu of any disciplinary action; (B) was eligible to retire from a law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the officer's employment with the agency; and (C) is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only because the law enforcement agency that employed the officer does not offer a pension or annuity to its employees. (2) "Informant" means a person who has communicated information to the government in connection with any governmental function. (3) "Public servant" includes an honorably retired peace officer. (c) An offense under this section is a felony of the third degree unless the victim of the offense was harmed or threatened because of the victim's service or status as a juror, in which event the offense is a felony of the second degree.

Utah	Tampering with a witness — Receiving or soliciting a bribe
	or soliciting a bribe

(1) A person is guilty of the third degree felony of tampering with a witness if, believing that an official proceeding or investigation is pending or about to be instituted, or with the intent to prevent an official proceeding or investigation, he attempts to induce or otherwise cause another person to: (a) testify or inform falsely; (b) withhold any testimony, information, document, or item; (c) elude legal process summoning him to provide evidence; or (d) absent himself from any proceeding or investigation to which he has been summoned. (2) A person is guilty of the third degree felony of soliciting or receiving a bribe as a witness if he solicits, accepts, or agrees to accept any benefit in consideration of his doing any of the acts specified under Subsection (1). (3) The offense of tampering with a witness or soliciting or receiving a bribe under this section does not merge with any other substantive offense committed in the course of committing any offense under this section.

(1) As used in this section: (a) A person is "closely associated" with a witness, victim, or informant if the person is a member of the witness', victim's, or informant's family, has a close personal or business

relationship with the witness or victim, or resides in the same household with the witness, victim, or informant. (b) "Harm" means physical, emotional, or economic injury or damage to a person or to his property, reputation, or business interests. (2) A person is guilty of the third degree felony of retaliation against a witness, victim, or informant if, believing that an official proceeding or investigation is pending, is about to be instituted, or has been concluded, he: (a) (i) makes a threat of harm; or (ii) causes harm; and (b) directs the threat or action: (i) against a witness or an informant regarding any official proceeding, a victim of any crime, or any person closely associated with a witness, victim, or informant; and (ii) as retaliation or retribution against the witness, victim, or informant. (3) This section does not prohibit any person from seeking any legal redress to which the person is otherwise entitled. (4) The offense of retaliation against a witness, victim, or informant under this section does not merge with any other substantive offense committed in the course of committing any offense under this section.

Vermont	VT. STAT. ANN. tit. 13,	Obstruction of
	§ 3015	justice

Whoever corruptly, or by threats or force, or by any threatening letter or communication, intimidates or impedes any witness, grand or petit juror, or officer in or of any court or agency, in a contested case, of the state of Vermont, or causes bodily injury to such person or intentionally damages the property of such person on account of such person's attendance at, deliberation at, or performance of his or her official duties in connection with a matter already heard, presently being heard or to be heard before any court or agency, in a contested case, of the state of Vermont, or corruptly or by threats or force or by any threatening letter or communication, obstructs or impedes, or endeavors to obstruct or impede the due administration of justice, shall be imprisoned not more than five years or fined not more than \$5,000.00, or both. For the purposes of this section, "agency" and "contested case" shall have the meanings set forth in subsection 801(b) of Title 3.

Virgin Islands	V.I. CODE ANN. tit. 14, § 404	Offering or giving bribes to witnesses

Whoever- (1) gives, offers, or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any

understanding or agreement that the testimony of such witness shall be thereby influenced; or (2) attempts by any other means fraudulently to induce any person to give false or withhold true testimony-shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both.

V.I. CODE ANN. tit. 14, § 1505	Influencing the testimony of witnesses

Whoever- (1) practices any fraud or deceit on; or (2) knowingly makes or exhibits any false statement, representation, token or writing to- any witness, or person about to be called as a witness, upon any trial, proceeding, inquiry or investigation authorized by law, shall be fined not more than \$200 or imprisoned not more than 1 year, or both.

	V.I. CODE ANN. tit. 14, § 1507	Preventing or dissuading witnesses from attending trial
--	-----------------------------------	--

Whoever willfully prevents or dissuades any person who is or may become a witness, from attending any trial, proceeding or inquiry authorized by law, shall be fined not more than \$200 or imprisoned not more than 1 year, or both.

§ 1510 or t	aliating against threatening a ness
-------------	---

(a) Whoever- (1) uses force, threat, or intimidation against any person called or to be called as a witness at any trial, proceeding, inquiry or investigation authorized by law relating to a felony (as defined in section 2 of this title), with intent to influence or prevent the testimony of such person or in retaliation for any testimony given, or any record, document or other object produced by such person; or (2) uses force, threat, or intimidation against any person who provides information relating to a felony (as defined in section 2 of this title), to a law enforcement officer or other employee of the local or federal government who is responsible for investigating or prosecuting offenses-shall be fined not more than \$2,000, or

imprisoned not more than ten years, or both. (b) Whoever- (1) uses force, threat, or intimidation against any person called or to be called as a witness at any trial, proceeding, inquiry or investigation authorized by law relating to a misdemeanor (as defined in section 2 of this title), with intent to influence or prevent the testimony of such person or in retaliation for any testimony given, or any record, document or other object produced by such person; or (2) uses force, threat, or intimidation against any person who provides information relating to a misdemeanor (as defined in section 2 of this title), to a law enforcement officer or other employee of the local or federal government who is responsible for investigating or prosecuting offenses-shall be fined not more than \$500, or imprisoned not more than one year, or both.

Virginia	VA. CODE ANN. § 18.2-	Bribery of witnesses
	441.1	

If any person give, offer, or promise to give any money or other thing of value to anyone with intent to prevent such person from testifying as a witness in any civil or criminal proceeding or with intent to cause that person to testify falsely, he shall be guilty of a Class 6 felony.

VA. CODE ANN. § 18.2-460	Obstructing Justice
--------------------------	---------------------

A. If any person without just cause knowingly obstructs a judge, magistrate, justice, juror, attorney for the Commonwealth, witness or any law-enforcement officer in the performance of his duties as such or fails or refuses without just cause to cease such obstruction when requested to do so by such judge, magistrate, justice, juror, attorney for the Commonwealth, witness, or law-enforcement officer, he shall be guilty of a Class 1 misdemeanor. B. Except as provided in subsection C, any person who, by threats or force, knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, attorney for the Commonwealth, witness, any law-enforcement officer, or an animal control officer employed pursuant to § 3.2-6555 lawfully engaged in his duties as such, or to obstruct or impede the administration of justice in any court, is guilty of a Class 1 misdemeanor. C. If any person by threats of bodily harm or force knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law-enforcement officer, lawfully engaged in the discharge of his duty, or to obstruct or impede the

administration of justice in any court relating to a violation of or conspiracy to violate § 18.2-248 or subdivision (a) (3), (b) or (c) of § 18.2-248.1, or § 18.2-46.2, or § 18.2-463, relating to the violation of or conspiracy to violate any violent felony offense listed in subsection C of § 17.1-805, he shall be guilty of a Class 5 felony. D. Any person who knowingly and willfully makes any materially false statement or representation to a law-enforcement officer who is in the course of conducting an investigation of a crime by another is guilty of a Class 1 misdemeanor.

Washington	WASH. REV. CODE ANN. § 9A.72.090	Bribing a witness
------------	-------------------------------------	-------------------

(1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to: (a) Influence the testimony of that person; or (b) Induce that person to avoid legal process summoning him or her to testify; or (c) Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned; or (d) Induce that person to refrain from reporting information relevant to a criminal investigation or the abuse or neglect of a minor child. (2) Bribing a witness is a class B felony.

WASH. REV. CODE ANN.	Intimidating a
§ 9A.72.110	witness

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to: (a) Influence the testimony of that person; (b) Induce that person to elude legal process summoning him or her to testify; (c) Induce that person to absent himself or herself from such proceedings; or (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child. (2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official

proceeding. (3) As used in this section: (a) "Threat" means: (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or (ii) Threat as defined in RCW 9A.04.110(25). (b) "Current or prospective witness" means: (i) A person endorsed as a witness in an official proceeding; (ii) A person whom the actor believes may be called as a witness in any official proceeding; or (iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child. (c) "Former witness" means: (i) A person who testified in an official proceeding; (ii) A person who was endorsed as a witness in an official proceeding; (iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or (iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child. (4) Intimidating a witness is a class B felony.

WASH. REV. CODE ANN. § 9A.72.120

Tampering with a witness

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to: (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or (b) Absent himself or herself from such proceedings; or (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency. (2) Tampering with a witness is a class C felony.

West Virginia	W. VA. CODE ANN. § 61-5-27	Intimidation of and retaliation against public officers and employees, jurors and witnesses; fraudulent official proceedings and legal processes against public officials and employees; penalties
---------------	----------------------------	--

(a) Definitions. As used in this section: (1) "Fraudulent" means not legally issued or sanctioned under the laws of this state or of the United States, including forged, false and materially misstated; (2) "Legal process" means an action, appeal, document instrument or other writing issued, filed or recorded to pursue a claim against person or property, exercise jurisdiction, enforce a judgment, fine a person, put a lien on property, authorize a search and seizure, arrest a person, incarcerate a person or direct a person to appear, perform or refrain from performing a specified act. "Legal process" includes, but is not limited to, a complaint, decree, demand, indictment, injunction, judgment, lien, motion, notice, order, petition, pleading, sentence, subpoena, summons, warrant or writ; (3) "Official proceeding" means a proceeding involving a legal process or other process of a tribunal of this state or of the United States; (4) "Person" means an individual, group, association, corporation or any other entity; (5) "Public official or employee" means an elected or appointed official or employee of a state or federal court, commission, department, agency, political subdivision or any governmental instrumentality; (6) "Recorder" means a clerk or other employee in charge of recording instruments in a court, commission or other tribunal of this state or of the United States; and (7) "Tribunal" means a court or other judicial or quasijudicial entity, or an administrative, legislative or executive body, or that of a political subdivision, created or authorized under the constitution or laws of this state or of the United States. (b) Intimidation; Harassment. It is unlawful for a person to use intimidation, physical force, harassment or a fraudulent legal process or official proceeding, or to threaten or attempt to do so, with the intent to: (1) Impede or obstruct a public official or employee from performing his or her official duties; (2) Impede or obstruct a juror or witness from performing his or her official duties in an official

proceeding; (3) Influence, delay or prevent the testimony of any person in an official proceeding; or (4) Cause or induce a person to: (A) Withhold testimony, or withhold a record, document or other object from an official proceeding; (B) alter, destroy, mutilate or conceal a record, document or other object impairing its integrity or availability for use in an official proceeding; (C) evade an official proceeding summoning a person to appear as a witness or produce a record, document or other object for an official proceeding; or (D) be absent from an official proceeding to which such person has been summoned. (c) Retaliation. It is unlawful for a person to cause injury or loss to person or property, or to threaten or attempt to do so, with the intent to: (1) Retaliate against a public official or employee for the performance or nonperformance of an official duty; (2) Retaliate against a juror or witness for performing his or her official duties in an official proceeding; (3) Retaliate against any other person for attending, testifying or participating in an official proceeding, or for the production of any record, document or other object produced by a person in an official proceeding. (d) Subsection (b) offense. A person who is convicted of an offense under subsection (b) is guilty of a misdemeanor and shall be confined in jail for not more than one year or fined not more than one thousand dollars, or both. (e) Subsection (c) or subsequent offense. A person convicted of an offense under subsection (c) or a second offense under subsection (b) is guilty of a felony and shall be confined in the penitentiary not less than one nor more than ten years or fined not more than two thousand dollars, or both. (f) Civil cause of action. A person who violates this section is liable in a civil action to any person harmed by the violation for injury or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs and other expenses incurred as a result of prosecuting a civil action commenced under this subsection, which is not the exclusive remedy of a person who suffers injury or loss to person or property as a result of a violation of this section. (g) Civil sanctions. In addition to the criminal and civil penalties set forth in this section, any fraudulent official proceeding or legal process brought in a tribunal of this state in violation of this section shall be dismissed by the tribunal and the person may be ordered to reimburse the aggravated person for reasonable attorney's fees, court costs and other expenses incurred in defending or dismissing such action. (1) Refusal to record. A recorder may refuse to record a clearly fraudulent lien or other legal process against a public official or employee or his or her property. The recorder does not have a duty to inspect or investigate whether a lien

or other legal process is fraudulent nor is the recorder liable for refusing to record a lien or other legal process that the recorder believes is in violation of this section. (2) If a fraudulent lien or other legal process against a public official or employee or his or her property is recorded then: (A) Request to release lien. The public official or employee may send a written request by certified mail to the person who filed the fraudulent lien or legal process, requesting the person to release or dismiss the lien or legal process. If such lien or legal process is not properly released or dismissed within twenty-one days, then it shall be inferred that the person intended to harass the public official or employee in violation of subsection (b) of this section and shall be subject to the criminal penalties in subsection (d) of this section and any other remedies provided for in this section; or (B) *Notice of* fraudulent lien. A government attorney on behalf of the public official or employee may record a notice of fraudulent lien or legal process with the recorder who accepted the lien or legal process for filing. Such notice shall invalidate the fraudulent lien or legal process and cause it to be removed from the records. No filing fee shall be charged for the filing of the notice. (h) A person's lack of belief in the jurisdiction or authority of this state or of the United States is no defense to prosecution of a civil or criminal action under this section. (i) (1) Nothing in this section prohibits or in any way limits the lawful acts of legitimate public officials or employees. (2) Nothing in this section prohibits or in any way limits a person's lawful and legitimate right to freely assemble, express opinions or designate group affiliation. (3) Nothing in this section prohibits or in any way limits a person's lawful and legitimate access to a tribunal of this state or prevents a person from instituting or responding to a lawful action.

Wisconsin	WIS. STAT. ANN. § 940.201	Battery or threat to witnesses

(1) In this section: (a) "Family member" means a spouse, child, stepchild, foster child, treatment foster child, parent, sibling or grandchild. (b) "Witness" has the meaning given in § 940.41 (3) (2) Whoever does any of the following is guilty of a Class H felony: (a) Intentionally causes bodily harm or threatens to cause bodily harm to a person who he or she knows or has reason to know is or was a witness by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened. (b) Intentionally causes bodily harm or threatens to cause bodily harm to a person who he or she knows or has reason to know is a family member of a witness or a person sharing a common domicile with a witness by reason of the witness having attended or testified as a witness and without the consent of the person harmed or threatened.

WIS. STAT. ANN. § 940.42	Intimidation of
	witnesses;
	misdemeanor

Except as provided in § 940.43, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor.

	Intimidation of witnesses; felony

Whoever violates § 940.42 under any of the following circumstances is guilty of a Class G felony: (1) Where the act is accompanied by force or violence or attempted force or violence, upon the witness, or the spouse, child, stepchild, foster child, treatment foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness. (2) Where the act is accompanied by injury or damage to the real or personal property of any person covered under sub. (1) (3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2) (4) Where the act is in furtherance of any conspiracy. (5) Where the act is committed by any person who has suffered any prior conviction for any violation under §§ 943.30, 1979

stats., §§ 940.42 to 940.45, or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under § 940.42 to 940.45 (6) Where the act is committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section. (7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony.

WIS. STAT. ANN. § 940.44	Intimidation of victims; misdemeanor
	misacincanor

Except as provided in § 940.45, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade, another person who has been the victim of any crime or who is acting on behalf of the victim from doing any of the following is guilty of a Class A misdemeanor: (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge. (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

_	Intimidation of victims; felony
	victinis, iciony

Whoever violates § 940.44 under any of the following circumstances is guilty of a Class G felony:(1) Where the act is accompanied by force or violence or attempted force or violence, upon the victim, or the spouse, child, stepchild, foster child, treatment foster child, parent, sibling or grandchild of the victim or any person sharing a common domicile with the victim. (2) Where the act is accompanied by injury or damage to the real or personal property of any person covered under sub. (1) (3) Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or (2) (4) Where the act is in furtherance of any conspiracy. (5) Where the act is committed by any person who has suffered any prior conviction for any violation under § 943.30, 1979 stats., §§ 940.42 to 940.45, or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation under §§ 940.42 to 940.45 (6) Where the act is

committed by any person for monetary gain or for any other consideration acting on the request of any other person. All parties to the transactions are guilty under this section.

WIS. STAT. ANN. § 943.011 Damage or threat to property of witness

(1) In this section: (a) "Family member" means a spouse, child, stepchild, foster child, treatment foster child, parent, sibling or grandchild. (b) "Witness" has the meaning given in § 940.41 (3) (2) Whoever does any of the following is guilty of a Class I felony: (a) Intentionally causes damage or threatens to cause damage to any physical property owned by a person who is or was a witness by reason of the owner having attended or testified as a witness and without the owners consent. (b) Intentionally causes damage or threatens to cause damage to any physical property owned by a person who is a family member of a witness or a person sharing a common domicile with a witness by reason of the witness having attended or testified as a witness and without the owners consent.

WIS. STAT. ANN. § 946.61

Bribery of witnesses

(1) Whoever does any of the following is guilty of a Class H felony: (a) With intent to induce another to refrain from giving evidence or testifying in any civil or criminal matter before any court, judge, grand jury, magistrate, court commissioner, referee or administrative agency authorized by statute to determine issues of fact, transfers to him or her or on his or her behalf, any property or any pecuniary advantage; or (b) Accepts any property or any pecuniary advantage, knowing that such property or pecuniary advantage was transferred to him or her or on his or her behalf with intent to induce him or her to refrain from giving evidence or testifying in any civil or criminal matter before any court, judge, grand jury, magistrate, court commissioner, referee, or administrative agency authorized by statute to determine issues of fact. (2) This section does not apply to a person who is charged with a crime, or any person acting in his or her behalf, who transfers property to which he or she believes the other is legally entitled.

Wyoming	WYO. STAT. ANN. § 6-5-305	Influencing, intimidating or impeding jurors, witnesses and officers; obstructing or impeding justice; penalties
---------	---------------------------	--

(a) A person commits a felony punishable by imprisonment for not more than ten (10) years, a fine of not more than five thousand dollars (\$5,000.00), or both, if, by force or threats, he attempts to influence, intimidate or impede a juror, witness or officer in the discharge of his duty. (b) A person commits a misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than one thousand dollars (\$1,000.00), or both, if, by threats or force, he obstructs or impedes the administration of justice in a court.