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Balancing Liberty, Dignity and Safety: The Impact of Domestic Violence Lethality Screening

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BALANCING LIBERTY, DIGNITY, AND SAFETY: THE IMPACT OF DOMESTIC VIOLENCE LETHALITY SCREENING

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ABSTRACT

This Article undertakes the first ever analysis of the consequences of the justice and legal system's extensive use of lethality assessment tools for women subjected to abuse. An increasing number of states are now requiring their police, prosecutors, civil attorneys, advocates, service providers, and court personnel to assess women in order to obtain a score that indicates the woman's lethality risk because of domestic violence. The mandated danger assessment screen of all women subjected to violence focuses only on the risk of homicide and thereby limits the definition of what is domestic violence. In addition, the accompanying protocol for the screen addresses the homicide risk by directing women into particular courses of action, some of which may actually increase their risk. This Article argues that the state's and legal system's pervasive use of lethality assessment tools encroaches on women's dignity unnecessarily and even detrimentally. To better address the domestic violence experienced by women, society needs to ensure that its pursuit of one goal—the reduction of homicide—does not undermine its other goals—such as the respect necessary for the woman's dignity and autonomy. To address these concerns, this Article first suggests that there should be full transparency to both the woman

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subjected to abuse and legal system actors about the benefits and disadvantages of lethality assessments. Second, all administrators of lethality assessments should ensure they obtain the woman's informed consent to conduct the screening or permit the woman to decline the screen. Third, in order to address the serious concern of coercion, risk assessment administrators should engage in woman-centered counseling, so that options for courses of action are evaluated through the lens of the woman's objectives.

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> I work in the State's Attorney's office. I worked with Sandra's employer to arrange an intervention. She had no idea who I was or why we were meeting. Once Sandra entered her employer's conference room, I introduced myself and told her that her friend and employer were concerned about her and believed that she was at risk of being killed by her partner. I then asked Sandra a series of questions from the Danger Assessment, which is designed to measure the person's risk of being killed due to domestic violence. Her score indicated she was at high risk of being a fatality. I gave Sandra her score—it was a 23 out of 24. When I told Sandra the number, it was like "hitting her over the head with a 2x4. Tears came up. Until that time she had no clue."[1]

INTRODUCTION

Sandra's situation shows the potential for tension between the state's interest and the interest of the woman subjected to domestic violence whenever the legal system is involved. The conventional wisdom is that state intervention in domestic violence relationships is crucial because it saves women's lives. State intervention, however, comes at a cost, which is that it negatively impacts the dignity and autonomy of women subjected to abuse. For instance, if women decide to address the violence differently from the state, then the state is quick to dismiss their decisions. This dismissal often rests on a finding that women suffer from a "false consciousness," or, as the official said about Sandra, that women have "no clue." The state concludes that women fail to recognize their true risk of danger and the need to address the violence because women subjected to abuse are so coercively controlled by their abusers that they fail to recognize their risk of danger and the need to address the violence. The different responses serve as justification for the state to make interventions in women's lives that override their autonomy. These interventions not only may jeopardize women in abusive relationships, but also may undermine the very principle of dignity that our society treasures for its citizens.

This Article explores this troubling result through an analysis of a current trend in the legal system's response to domestic violence:

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[1] Sandra is a fictional name but her story is based on a real woman's experience as relayed by a State's Attorney official at the Roundtable Discussion of Possible Uses of Intimate Partner Violence Danger Assessment Tool Predicting Future Risk at the University of Baltimore School of Law (Feb. 8, 2008) [hereinafter Roundtable on Danger Assessment Tool] (notes on file with *Cardozo Law Review*) (paraphrased as based on notes). *See also* Telephone Interviews with State's Attorney official (notes on file with *Cardozo Law Review*). According to the official, Sandra thanked him for the screening. *Id.* Because the official had lost contact with Sandra, the author was unable to interview her to learn more about her past and current situation. *Id.*

conducting danger assessments of women subjected to abuse. The assessment purports to quantify the woman's risk of being a victim of homicide as a result of domestic violence. States are now requiring or encouraging their police, prosecutors, civil attorneys, advocates, service providers, and court personnel to assess women in order to obtain a score that indicates these women's lethality risk. This Article employs a critical and timely analysis of the consequences of the use of such assessments as an example of the broader issues facing the legal system's response to domestic violence: specifically, the harm that results from the legal system's belief that its goal of saving lives is the best goal for the state and for women subjected to abuse. In fact, this Article argues that the greatest goal of the state would be to empower women and support their dignity and goals for autonomy in the face of violent relationships. In the end, such a state response would serve to increase women's safety and serve the state's important role of protecting its citizens' liberty.

The original danger assessment tool was created as a public health intervention and continues to be used today. The current danger assessment is a statistical tool that asks women a series of twenty questions, the responses to which are weighted and calculated to obtain a particular score indicating her future risk of being a victim of homicide. The questions are based on various risk factors clinicians, researchers and women subjected to violence themselves have determined to be indicative of future risk of violence. The danger assessment tool was initially created to predict risk of homicide, but has since been used to predict re-assault. As such, it focuses on the risk of future physical violence and usually the risk of future severe physical violence. Police, prosecutors, civil attorneys, service providers and courts are using and mandating lethality screens with more frequency in more jurisdictions.[2] Therefore, this Article undertakes the first ever analysis of the consequences—both intended and unintended—of the legal system's use of these tools for women subjected to abuse.

This analysis looks at the assumptions that appear to underlie the danger assessment tool. One apparent assumption underlying the implementation of the danger assessment tool is that domestic violence always results in homicide, or at the very least severe physical violence, despite the fact that these are not the most prevalent of domestic violence harms.[3] Women subjected to domestic violence cite to the

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[2] READING THE SIGNS (Md. Network Against Domestic Violence, Bowie, Md.), Fall 2009, *available at* http://www.mnadv.org/Fall%25202009%2520LAP%2520NewsletterFINAL2.pdf (reporting that the Lethality Assessment Program, which was initiated in Maryland, has expanded to ten other states).

[3] *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 66 (2000); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1112, 1118 (2009) (citing, inter alia, Mary Ann

harms from emotional and psychological abuse as being more detrimental than the physical abuse to which they are subjected.[4] Another apparent assumption is that women subjected to domestic violence lack decisionmaking capacity and therefore, cannot make good decisions about their relationship with the abuser unless they choose to separate from him or take other action approved of by system actors.[5] Accordingly, underlying the danger assessment tool is the belief that it can be used to "raise" women's consciousness[6] to see the "truth" of their abuse and future risk of abuse and take action accordingly by accessing domestic violence services.[7] Finally, the screening protocol attached to the tool prescribes certain responses to steer women subjected to abuse into the legal system or to domestic violence services, such as battered women shelters and hotlines. However, as discussed in this Article, the legal system and services may not actually improve women's lives and might in fact endanger them.

Part I of this Article analyzes the Danger Assessment Tool (DA) and its shorter screen companion, the Lethality Assessment Program (LAP). This Part examines the goals of the tools and their mandated extensive use by legal system actors. Part II of this Article explores the current legal landscape relating to dignity as a constitutional liberty interest. In this Part, the Article also analyzes specific applications of dignity rights, such as patient informed consent laws and determinations

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Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 754 (2005) (arguing for psychological research to study domestic violence as coercion and thereby to move beyond "accounting of specific assaultive acts")); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960-61 (2004) (arguing that criminal law needs to define domestic violence crimes as not merely transactions of physical violence but also as a pattern of power and control being exerted).

4 *See* SCHNEIDER, *supra* note 3, at 65-66 (noting that women "frequently describe the threats and verbal abuse as more devastating than the physical").

5 *See id.* at 186; Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 622, 649-53 (2000).

6 Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 85, 96 (Jacquelyn C. Campbell ed., 2d ed. 2007) [hereinafter Campbell, *Prediction of Homicide*] ("Judging from women's remarks as they complete the calendar, it seems to function as a consciousness-raising exercise, helping to cut through the denial and minimization that is a normal response to abuse.").

7 *See infra* Part I.A. As stated in a recent newsletter on the Maryland Lethality Assessment Program:

> The point of the LAP's expansion and growth is to save more lives. The more jurisdictions that participate and the more first responders that become involved, the greater the total number of victims we will reach, and the greater number within each jurisdiction we will make aware. This is critically important concept, because if just one element of our system is identifying high danger victims, that means we are only reaching that part of the population served by that lone part of the system. . . . The question really does become: How do we help victims self-identify and encourage them to seek domestic violence services?

READING THE SIGNS (Md. Network Against Domestic Violence, Bowie, Md.), Spring 2009, at 2, *available at* http://www.mnadv.org/Spring%20LA%20Newsletter09.pdf.

of competence or mental capacity. Part III analyzes the affect of the DA and LAP on the dignity of women subjected to domestic violence. This Part considers questions of test reliability, women's agency, state objectives, women's experience of abuse and the effectiveness of domestic violence services while analyzing the encroachment by the state on women's dignity and autonomy through its use of the lethality assessment. Finally, Part IV proposes some ways in which the state can modify its use of the danger assessment tool in order to lessen its effect on women's dignity. The proposals include: (1) providing transparency regarding the objectives and means of the DA and LAP; (2) requiring informed consent of the woman before using the tool; and (3) engaging in woman-centered counseling to determine whether and how the woman wants to use tool and otherwise address the violence in her relationship. In the end, such modified state responses would serve to increase women's safety and serve the state's important role of protecting citizens' dignity.

I. THE DANGER ASSESSMENT TOOL AND THE LETHALITY ASSESSMENT PROGRAM[8]

A. *Original Goals of the Danger Assessment Tool*

Jacquelyn Campbell initially created the DA in 1985 as a tool for public health workers to predict the risk of homicide for women subjected to abuse.[9] As Campbell states, the DA also was "designed to assist battered women in assessing their danger of being murdered (or seriously injured) by their intimate partner or ex-intimate partner."[10]

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[8] Because of the broad introduction of the lethality assessment program—a shorter screen of the DA—into the justice and legal system's response to domestic violence, this Article focuses on the DA and the LAP. It should be noted that there are other risk assessment tools as well, but discussion of them is beyond the scope of this Article.

[9] Campbell, *Prediction of Homicide*, *supra* note 6, at 86-88; Jacquelyn C. Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, 8 ADVANCES IN NURSING SCI. 36, 36 (1986); *Danger Assessment*, DANGERASSESSMENT.ORG, http://www.dangerassessment.org/WebApplication1/pages/product.aspx (last visited Oct. 26, 2010). The Danger Assessment does not predict homicide for men subjected to abuse. The Danger Assessment was created through "four retrospective research studies . . . where battered women were killed or seriously injured by their abusers or where battered women killed or seriously injured their abusers." Campbell, *Prediction of Homicide*, *supra* note 6, at 94. Campbell has revised the tool based on open-ended interviews with women who were abused and learning their perception of risk. *Id.* at 95; *see also* Donna St. George, *Police Tool Assesses Domestic Abuse "Lethality,"* WASH. POST, Oct. 2, 2007, at B01.

[10] Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 657-58 (2009) [hereinafter Campbell, *The Danger Assessment*]. It is not clear that at the time of development of the DA there was any evidence that women failed to assess appropriately the danger except for the evidence that homicides did occur. The existence of homicides may show

According to Campbell, homicide is the leading cause of death for African American women and the seventh leading cause of premature death for all women in the U.S.[11] It is the third leading cause of death for Native American women ages fifteen to thirty-four.[12] Ninety percent of all women killed are murdered by men with whom they have or had a relationship.[13] For women murdered by current or former intimate partners, two-thirds to three-quarters of them were previously subjected to domestic violence by their murderer.[14]

In explaining the development of the DA, Dr. Campbell identified the decrease of homicide as her only goal. To decrease homicide, Campbell appeared to draw upon this seemingly logical formulation: identify the risk and then intervene to save the woman's life.[15] More specifically, assume women subjected to abuse do not understand their risk of being killed; assume the only way women will understand the risk is by being told of it; create an assessment instrument to measure women's risk of lethality from intimate abuse; assess the women; score the risk; share the score with the women; assume that by learning their score, women will now understand the risk of being killed; assume women will determine that not being killed is their number one goal; assume women will then leave their abusers (by any of the proscribed means: calling a domestic violence hotline to learn more about domestic violence and shelters, moving to a shelter, calling the police to arrest and incarcerate their abusers, assisting the prosecutor to convict and jail their abusers, filing for and obtaining a temporary and then final protective order that includes an order requiring abusers to stay away and not contact the women);[16] and assume that upon leaving, women will no longer be subjected to domestic violence and women's risk of future lethality will be minimized. Campbell cites research that indicates that the majority of women subjected to abuse do "eventually leave their abusers."[17] The danger assessment is intended to speed up

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that although the risk was predicted, there were no actions to avoid the risk, or the actions to avoid the risk were unsuccessful.

11 Jacquelyn C. Campbell, Editorial, *Dangerous Times; In Economic Downturn, the Risk of Domestic Violence Grows While Services Shrink*, BALT. SUN, June 14, 2009, at 27A. Previously, homicide was cited as the second leading cause of death for African American women ages fifteen to thirty-four. Campbell, *Prediction of Homicide*, *supra* note 6, at 85.

12 Campbell, *Prediction of Homicide*, *supra* note 6, at 85.

13 *Id.* at 86.

14 *Id.* While most femicides are attributed to domestic violence, most domestic violence does not result in femicide. *See infra* text accompanying notes 274-75.

15 Campbell, *Prediction of Homicide*, *supra* note 6, at 86 ("[I]t is clear that one of the major ways to decrease spousal homicide is to identify and intervene with abused women at risk to be killed by or to kill their abuser.").

16 In addition to leaving, the woman may deter the domestic violence by ensuring that her abuser receives an effective intervention for domestic violence or is punished by the criminal justice system. *Id.* at 87.

17 *Id.* at 86.

the woman's decisionmaking by giving her the revelation that she is at risk of homicide.

As discussed in more depth in Part III, the simple premises underlying the danger assessment and its implementation have some weaknesses that undermine the DA's effectiveness. First, as stated above, part of the formulation for the DA appears to be a belief that the woman will leave her abuser once she understands her risk of homicide.[18] Implicit in this belief is that the separation will stop the homicide or future violence.[19] A focus on separation as the lynchpin to violence cessation or reduction is flawed because even as Dr. Campbell recognizes, "women are often highly at risk for homicide and repeat severe violence for the first year after they have left their abusers (with the first three months especially dangerous) or when it is clear to the abuser that the woman is leaving for good."[20]

Second, another weakness of the danger assessment tool is that it is based on the premise that women are not making good decisions about their risk of homicide. Yet, the developers of the tool state that "[f]rom in-depth interviews with battered women, it is apparent that the majority carefully weigh the pluses and minuses of the overall relationship, both in terms of their safety and well-being and that of their children."[21]

Third, the danger assessment assumes that all women do not understand their risk of homicide. This assumption exists despite the finding that "the majority [of women] carefully weigh the pluses and minuses of the overall relationship, both in terms of their safety and well-being and that of their children."[22] Therefore, these women appear to be in a position to make appropriate decisions. According to Campbell, some women "have not realistically appraised the potential for homicide. Even though the majority of women interviewed had at

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[18] *Id.* at 86-87.

[19] *Id.* (citing MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (1990); Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003 (2006)). *But see* Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 485, 488 (2008).

[20] Campbell, *Prediction of Homicide*, *supra* note 6, at 87 (citing MARTIN DALY & MARGO WILSON, HOMICIDE (1988); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003); Kathryn E. Moracco et al., *Femicide in North Carolina, 1991-1993: A Statewide Study of Patterns and Precursors*, 2 HOMICIDE STUD. 422 (1998); Janice Roehl et al., Intimate Partner Violence Risk Assessment Validation Study, Final Report (May 2005) (unpublished research report), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf (co-authored by creator of the DA)).

[21] *Id.* (citing DALY & WILSON, *supra* note 20; Barbara Hart, *Beyond the Duty to Warn: A Therapist's Duty to Protect Battered Women and Children*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 234 (Kersti Yllo & Michale Bograd eds., 1988); Moracco et al., *supra* note 20; Roehl et al., *supra* note 20).

[22] Campbell, *Prediction of Homicide*, *supra* note 6, at 87.

least considered the possibility of homicide, they might have found it too frightening to dwell on or may underestimate their risk."[23]

Fourth, the danger assessment presumes that the assessment is necessary because it is the only way women will understand their risk of homicide. Accordingly, the developers state the tool is intended to assist those "[a]dvocates in wife abuse shelters [who] are extremely concerned about women leaving the shelter without knowing how dangerous their situations might be. Thus clinicians . . . need to make sure women realize the potential of homicide . . . and to give them a way to *realistically* assess their risk of homicide."[24] But, again, Campbell herself states that currently "the best assessment is probably a combination of a psychometrically tested instrument or system, the assessment of the victim of domestic violence, and an experienced clinician's judgment."[25] Recognizing the reliability of women's judgments regarding risk, Campbell also states that "[t]he DA is meant to be a collaborative exercise between a domestic violence advocate, health care professional, and/or criminal justice practitioner and the abused woman herself."[26]

Finally, the premise of the danger assessment tool also raises concerns because it is based in part on system actors' objectives, such as the desire to not misunderstand a patient's risk of abuse and then see in the newspaper that the patient was killed the next day.[27] Accordingly, the developers of the DA see it as "both an ethical and legal imperative, as well as an aid to sleeping well at night."[28] Because it appears that clinicians felt responsible for failing to predict and warn against future homicides of women due to domestic violence, the DA is a defensive tool enabling the clinician to make more reliable predictions. And the tool is then used to justify intervention in the woman's decisionmaking rather than assessing and attaining the woman's objectives: Campbell states that "unilateral professional action might [be taken] . . . when her emotional trauma is so great that the professional believes she is unable to make reasonable decisions about her own safety."[29] As a result, by

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23 *Id.*

24 *Id.* (emphasis added). While there are citations to research that support the assertion that women find the possibility of homicide too frightening to dwell on or underestimate their fear, the term "realistically" was not defined and is unclear in its meaning in this context.

25 *Id.* at 89.

26 Campbell, *The Danger Assessment*, *supra* note 10, at 670.

27 As Campbell writes, "The possibility of reading in the paper that an abused woman seen in a research or safety planning or clinical interaction has been killed is a constant concern to advocates and professionals." Campbell, *Prediction of Homicide*, *supra* note 6, at 87.

28 *Id.* Researchers creating and studying danger assessment tools state that the use of danger assessment tools is an "ethical imperative." N. Zoe Hilton & Grant T. Harris, *Assessing Risk of Intimate Partner Violence*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS, *supra* note 6, at 105, 118.

29 Campbell, *Prediction of Homicide*, *supra* note 6, at 87.

design, it is not created to effectuate the goals of the women subjected to domestic violence.

The DA goals are clear: to screen for lethality risk and intervene to reduce the risk of homicide. Both of the assumptions underlying the DA's goals as well as the balancing of safety and dignity it directs raise concerns. These concerns are discussed more thoroughly in Part III in relation to the LAP and the DA.

B. *The Danger Assessment Tool Composition*

To best analyze the DA's goals, it is important to understand the DA tool's composition and utilization. There are two parts to the danger assessment tool.[30] The first part of the DA uses a calendar and requests that the woman identify the severity of each instance of abuse over the past year.[31] As Campbell states, "[t]he calendar portion was conceptualized as a way to raise the consciousness of the woman and reduce the normal minimization of [the abuse], especially given that using a calendar increases accurate recall in other situations."[32] In this portion, the woman is asked to identify each date on which she was abused and to rate the severity of the incident according to the following scale:

1. Slapping, pushing; no injuries and/or lasting pain
2. Punching, kicking; bruises, cuts, and/or continuing pain
3. "Beating up"; severe contusions, burns, broken bones, miscarriage
4. Threat to use weapon; head injury, internal injury, permanent injury, miscarriage
5. Use of weapon; wounds from weapon[33]

According to Campbell, the calendar portion is important because women see the increase of severity in a way that they would not if they were discussing the abuse without that context.[34]

The second part of the DA is a twenty question instrument "which uses a weighted scoring system to count yes/no responses of risk factors

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30 Roehl et al., *supra* note 20, at 20.

31 *Id.*; *Danger Assessment*, *supra* note 9.

32 Campbell, *The Danger Assessment*, *supra* note 10, at 658. Campbell further states that "[i]n the original [DA] development, 38% of women who initially reported no increase in severity and frequency of physical violence in the past year changed their response to *yes* . . . after filling out the calendar portion of the [DA]." *Id.*

33 Campbell, *Prediction of Homicide*, *supra* note 6, at 93.

34 *Id.* at 96. "Thus, using women's general recall of whether or not the abuse is increasing in severity and/or frequency as a predictor of homicide may not be entirely accurate without some sort of specific cuing such as using the calendar." *Id.*

associated with intimate partner homicide."[35] The questions include the following:

1. Has the physical violence increased in severity or frequency over the past year?
2. Does he own a gun?
3. Have you left him after living together during the past year?
   3a. (If you have *never* lived with him, check here ___)
4. Is he unemployed?
5. Has he ever used a weapon against you or threatened you with a lethal weapon?
   (If yes, was the weapon a gun? ___)
6. Does he threaten to kill you?
7. Has he avoided being arrested for domestic violence?
8. Do you have a child that is not his?
9. Has he ever forced you to have sex when you did not wish to do so?
10. Does he ever try to choke you?
11. Does he use illegal drugs? By drugs, I mean "uppers" or amphetamines, "meth," speed, angel dust, cocaine, "crack," street drugs or mixtures.
12. Is he an alcoholic or problem drinker?
13. Does he control most or all of your daily activities? For instance: does he tell you who you can be friends with, when you can see your family, how much money you can use, or when you can take the car?
    (If he tries, but you do not let him, check here: ___)
14. Is he violently and constantly jealous of you?
    (For instance, does he say "If I can't have you, no one can.")
15. Have you ever been beaten by him while you were pregnant?
    (If you have never been pregnant by him, check here: ___)
16. Has he ever threatened or tried to commit suicide?
17. Does he threaten to harm your children?
18. Do you believe he is capable of killing you?
19. Does he follow or spy on you, leave threatening notes or messages on answering machine, destroy your property, or call you when you don't want him to?
20. Have you ever threatened or tried to commit suicide?[36]

The scoring of the DA is based on different questions' assigned weight.[37] Based on one's score, one is placed in a category of danger

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[35] *Danger Assessment*, *supra* note 9.

[36] Campbell, *Prediction of Homicide*, *supra* note 6, at 93; Jacquelyn C. Campbell, *Danger Assessment* (2004), http://www.dangerassessment.org/WebApplication1/pages/da/DAEnglish2010.pdf.

risk: Variable Danger; Increased Danger; Severe Danger; and, if at the highest risk, Extreme Danger.[38] The DA's recommended, though not required, protocol provides suggestions for the woman being assessed based on the danger rating she receives.[39] For instance, a woman assessed at the lowest rating is "informed that one's risk can change quickly and to watch for certain warning signs."[40] Women at the next level are "advised to seek safety assistance from social services support groups, law enforcement, and the judiciary."[41] Finally, women assessed at the highest rating "require assertive safety measures from criminal justice professionals, such as denial of bail for the batterer, heightened parole supervision, and only supervised child visitation."[42] Using the scores, the test administrator determines interventions that the administrator believes will decrease the assessed women's lethality risk.

The DA has been studied for its validity and effectiveness in predicting future lethality. Regarding the DA's reliability, the results are mixed. One study found that the DA reliably predicted re-assault.[43] The DA tool made only a "small but statistically significant contribution to . . . predicting new incidents of assault or serious threats up to four months later."[44]

In 2005, a study reported that "[t]he four categories of danger based on the [DA] are highly and significantly associated with the level or type of abuse during the follow-up."[45] According to a 2000 study, a "high [DA] score significantly increased the odds of new assaults and threats, even when controlling for extent of prior violence."[46] That same study found that the "predictive accuracy of the [DA] in follow-up studies has been supported when scored from offender file review and

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37 Jacquelyn C. Campbell, Anna D. Wolf Endowed Chair, Johns Hopkins Univ. Sch. of Nursing, The Danger Assessment: Assessing Risk of Intimate Partner Homicide, PowerPoint Presentation at the Roundtable Discussion of Possible Uses of Intimate Partner Violence Danger Assessment Tool Predicting Future Risk at the University of Baltimore School of Law, at slide 33 (Feb. 8, 2008) (on file with *Cardozo Law Review*).

38 *Id.* Others have reported that the scoring is from least dangerous to most dangerous: "Variable Danger," "Elevated Danger," "High Danger," and "Highest Danger." Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC'Y 277, 285 (2009).

39 Hitt & McLain, *supra* note 38, at 285.

40 *Id.*

41 *Id.*

42 *Id.*

43 Roehl et al., *supra* note 20, at 21.

44 Hilton & Harris, *supra* note 28, at 113 (citing A.N. Weisz, R.M. Tolman & D.G. Saunders, *Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions*, 15 J. INTERPERSONAL VIOLENCE, 75-90 (2000)).

45 Roehl et al., *supra* note 20, at 55.

46 Hilton & Harris, *supra* note 28, at 113 (citing Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERSONAL VIOLENCE 63 (2000)).

victim interview."[47] On the other hand, a different study found that while the danger assessment results registered true positives (people assessed at high danger who were later re-assaulted or killed) in sixty-six percent of the cases, the results also recorded false positives (people assessed at high danger who were not later re-assaulted/killed) in thirty-three percent of the cases.[48]

As compared to other risk or lethality assessments, the DA appears to be the most reliable. The 2005 study reported that when predicting any future assault, the danger assessment was the only tool studied that provided "statistically significant associations with instrument/method-defined risk categories."[49]

Regarding the reliability of women's own predictions of risk, one study found that women's perception of risk of reassault was more accurate than the abbreviated danger assessment.[50] Another study determined that "[v]ictims' baseline-level rating of likelihood of reassault was also significantly associated with actual reassault experience."[51]

Although the data does not establish that the danger assessment is a superior predictive tool for reassault as opposed to women's own predictions,[52] the research shows that danger assessment tools are more reliable than clinicians' own assessments of the women's risk. As numerous studies have shown, one important benefit of danger assessment tools is that they are "consistently more valid [at predicting future risk of violence] than relying on assessors' experience, memory, familiarity with relevant research, and intuition."[53]

Regardless of its statistical reliability, the DA is restricted by how it is measuring future risk of domestic violence.[54] Specifically, the DA's risk prediction is imperfect because it considers only the act of physical violence and not the woman's individual experience of the violence, her own understanding of the violence and her protection against it and outside systems and system actors who operate to protect

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47 *Id.* (citations omitted).

48 Roehl et al., *supra* note 20, at 21 (discussing the results of a 2004 study by Heckert and Gondolf).

49 *Id.* at 58.

50 *Id.* at 21 (discussing the results of a 2000 study by Weisz, Tolman and Saunders); Hilton & Harris, *supra* note 28, at 110 ("[W]omen's own predictions are relevant to the assessment of the risk of wife assault recidivism." (citations omitted)).

51 Roehl et al., *supra* note 20, at 58. The DA was "significantly associated with *severe* or potentially lethal abuse during the follow-up period." *Id.* The study showed that another tool, the DVSI, also showed the same validity. *Id.*

52 *See supra* note 50 and accompanying text; *see also infra* Part III.B.

53 Hilton & Harris, *supra* note 28, at 117.

54 Campbell, *Prediction of Homicide*, *supra* note 6, at 91, 99. Dr. Campbell states that Ellen Pence's Community Safety Audit System has promise for assessing protections communities have in place to protect abuse victims. *Id.* at 99. In addition, DV MOSAIC, a computerized tool, has potential for lethality risk assessment for threats. *Id.*

women from violence. Hence the DA's reliability is similarly restricted.

C. *The Lethality Assessment Program*

The DA was created in order to improve the predictive capacity of health workers' clinical assessment. Because many women who are abused seek out the civil and criminal justice system,[55] justice and legal system actors increasingly are using predictive risk assessment tools in varying forms.[56] The LAP requires law enforcement to conduct a modified DA screen along with an established mandatory protocol that hopes to connect victims of domestic violence assessed at high risk with domestic violence hotlines and other domestic violence services.[57] In addition, courts, attorneys and domestic violence service providers are requiring and relying on lethality risk assessments to establish domestic violence in civil and criminal cases and distribute services.

1. The LAP's Current Goals

The LAP program has many goals, many of which are similar to the DA's goals. The LAP hopes that it will keep women subjected to domestic violence and other members of society safer.[58] The program aims to give women subjected to abuse "a sense of urgency" about their situation by providing knowledge of their lethality risk.[59] The police

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[55] *See* Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 509 (2002); Phyllis W. Sharps et al., *Health Care Providers' Missed Opportunities for Preventing Femicide*, 33 PREVENTIVE MED. 373, 377 (2001).

[56] *See infra* note 120 for further discussion of the ways in which the legal system is using danger assessment tools.

[57] MD. NETWORK AGAINST DOMESTIC VIOLENCE, LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS: LEARNING TO READ THE DANGER (n.d.) [hereinafter LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS], *available at* http://mnadv.org/Natl%2520LAP%2520Packetns.pdf.

[58] David M. Sargent, Law Enforcement Trainer & Coordinator of Lethality Assessment Project, Remarks at Roundtable on Danger Assessment Tool, *supra* note 1 [hereinafter Sargent, Roundtable Remarks] (notes on file with *Cardozo Law Review*). The LAP organizers state: "It improves victim safety! In Maryland, the incidence of domestic homicides has declined by an average of 13% over the past three years. We believe this is a direct result of using the LAP." *The Lethality Assessment Program—Maryland Model*, MD. NETWORK AGAINST DOMESTIC VIOLENCE, http://www.mnadv.org/lethality.html (last visited Oct. 29, 2010). However, there is no research that confirms that there is a causative effect between the LAP and the homicide decline.

[59] As stated in the LAP training newsletter,

> [T]ell her: (1) She's in a dangerous situation; (2) In situations like hers' people have been killed. *(Be sure to say this to the victim)*; (3) You are going to call the domestic

identify the women at the greatest risk of homicide "for the purpose of opening eyes."[60] Once the women's eyes are opened and they feel a sense of urgency, the program hopes women subjected to abuse will be empowered to address their violent situation.[61] In the end, the LAP wants to decrease the rate of reassault and thus homicides resulting from domestic violence.[62]

The program hopes that empowered women will address their violent situation. The program wants women to access domestic violence services because it believes reassault of women subjected to abuse decreases when they do so.[63]

In addition, the LAP aims to improve and confirm police officers' and other system actors' judgment of lethality risk. Similar to the DA, the LAP hopes to "offer an improvement over clinical judgment and may have more predictive power than a clinical application of risk markers (i.e., a clinical assessment guided by risk markers) . . . ."[64] With its short screen of eleven questions, the LAP intends to assist police officers and other first responders to be more accurate in their assessment of homicide risk for domestic violence victims.[65] The

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violence hotline for advice *(The number is on the screen)*; and (4) You would like her to speak with the hotline worker when you finish.

Training Bulletin, READING THE SIGNS (Md. Network Against Domestic Violence, Bowie, Md.), Aug. 2009, at 1, *available at* http://www.mnadv.org/LAP%20Bulletin2.pdf.

60 Sargent, Roundtable Remarks, *supra* note 58.

61 *Id.*

62 The LAP claims that the reassault rate of women subjected to domestic violence was reduced by 60% when they went into a battered women's shelter. *Training Bulletin*, *supra* note 59, at 2. The report unfortunately does not specifically cite an authority to support its assertions, nor does it say for how long the reduction of the reassault risk occurred and whether it was just while the women were in the confidential, temporary residence of the shelter. These facts would provide helpful information towards understanding the danger assessment tool and its usefulness for women.

63 *Id.*

> There is a 60% reduction in risk of severe assault when victims utilize domestic violence services. . . . Abused women who used domestic violence services were almost never the victim of murder or attempted murder. . . . Only 4% of victims of actual or attempted intimate partner homicide utilized domestic violence programs. . . . 28% of domestic violence victims identified in Maryland by the LAP as high risk went in for services. None have been killed or seriously injured.

MD. NETWORK AGAINST DOMESTIC VIOLENCE, LETHALITY ASSESSMENT PROGRAM: THE MARYLAND MODEL [hereinafter MARYLAND MODEL BROCHURE] (citations omitted), *available at* http://www.mnadv.org/MNADV%20LAP%20Brochure.pdf. In addition, the LAP program tells the first responder that his "main task" is "trying to get the victim on the phone. If she doesn't get on the phone, the hotline can't work with her and encourage her to go into services. Getting the victim into domestic violence services is likely the victim's best chance of survival and the main objective of the program." *Training Bulletin*, *supra* note 59, at 1.

64 D. Alex Heckert & Edward W. Gondolf, Predicting Levels of Abuse and Reassault Among Batterer Program Participants 5-11 (Feb. 2004) (unpublished research report), *available at* http://ncjrs.gov/pdffiles1/nij/grants/202997.pdf (examining predictive abilities of risk markers, risk assessment inventories, and batterer types for predicting future assault).

65 I prefer to use the term "person subjected to domestic abuse" rather than "domestic violence victim." *See* Johnson, *supra* note 3, at 1112 n.13 (citing Ann Shalleck, *Theory and*

police also find the LAP helpful as an objective measurement that helps confirm and articulate the police officers' intuitive fear for a victim's life.[66]

The LAP is intended to increase collaboration between system actors as well. LAP organizers cite to the fact that prior to the LAP, about fifty percent of the homicides involving domestic violence had a police officer involved on at least one occasion.[67] According to LAP, prior to it, only four percent of domestic violence homicide victims had ever utilized domestic violence services.[68] Knowing the likelihood that police officers will have contact with women at high lethality risk in the future, the LAP hopes to have officers connect victims of domestic violence with domestic violence services for safety planning, information and resources. To date, LAP cites that it "has substantially improved the collaboration and services provided by law enforcement officers and other first responders, domestic violence programs, and professionals in the community."[69]

Through collaboration, the LAP also hopes to direct resources to women who are at the highest risk of homicide.[70] Criminal justice system actors, such as law enforcement, prosecutors and courts, can use risk assessments to triage their services, according to researchers.[71] Social and advocacy service actors, hotlines, battered women's shelter workers, advocacy and counseling programs, emergency medical providers and other health care workers can also use the risk assessment instruments to allocate their scarce resources.[72]

2. The LAP's Beginnings in Maryland

The LAP was created in Maryland and has been used systematically throughout the state. As stated above, the LAP is based

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Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused, 64 TENN. L. REV. 1019, 1023-28 (1997)). When talking about the DA and LAP creators, I often use the term domestic violence victims because that is the term used by them.

66 Sargent, Roundtable Remarks, *supra* note 58.

67 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 4.

68 *Id.*

69 *The Lethality Assessment Program—Maryland Model*, *supra* note 58.

70 Janice Roehl et al., Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study 1 (Dec. 2005) (unpublished research report) [hereinafter Roehl et al., The RAVE Study], *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf; Roehl et al., *supra* note 20, at 4. A final LAP goal to which researchers cite that is also linked to collaboration is that the level of dangerousness permits the system actor to tailor responses to the domestic violence so as to ensure that an offender's civil rights are not unduly violated and so as to not unduly disrupt victims' lives. *Id.*

71 Roehl et al., The RAVE Study, *supra* note 70, at 1.

72 *Id.*

on the DA, but it employs a shorter questionnaire of only eleven questions,[73] with a specific protocol for being used in the field when responding to 911 calls, for instance.[74]

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[73] David M. Sargent & Jacquelyn C. Campbell, *Assessing Lethality in Domestic Violence Cases*, 70 GAZETTE, no. 2, 2008 at 30, *available at* http://www.rcmp-grc.gc.ca/gazette/vol70n2/gazette-vol70n2-eng.pdf. The Screen asks the following questions:

> A "Yes" response to any of Questions #1-3 automatically triggers the protocol referral.
>
> 1. Has he ever used a weapon against you or threatened you with a weapon?
> 2. Has he/she threatened to kill you or your children?
> 3. Do you think he/she might try to kill you?
>
> Negative responses to Questions #1-3, but positive responses to four or more of Questions #4-11, trigger the protocol referral.
>
> 4. Does he/she have a gun or can he/she get one easily?
> 5. Has he/she ever tried to choke you?
> 6. Is he/she violently or constantly jealous or does he/she control most of your daily activities?
> 7. Have you left him/her or separated after living together or being married?
> 8. Is he/she unemployed?
> 9. Has he/she ever tried to kill himself/herself?
> 10. Do you have a child that he/she knows is not his/hers?
> 11. Does he/she follow you or leave threatening messages?
>
> An officer may trigger the protocol referral, if not already triggered above, as a result of the victim's response to the below question, or whenever the officer believes the victim is in a potentially lethal situation.
>
> Is there anything else that worries you about your safety? *(If "yes")* What worries you?

Domestic Violence Lethality Screen for First Responders (on file with Cardozo Law Review).

[74] A Lethality Assessment Committee made up of law enforcement officers, a criminal prosecutor, an investigator, a probation and parole officer, domestic violence advocates, and researchers has created the short screen and protocol for its use. *See Lethality Assessment Program*, MID-SHORE COUNCIL ON FAM. VIOLENCE, http://www.mscfv.org/lflaprog.html (last visited Oct. 29, 2010). One description of this program states the following:

> The Lethality Assessment Program is an innovative initiative which partners law enforcement personnel and domestic violence service providers in an effort to identify and assist victims of domestic violence who are at risk of being killed.
>
> Over the past five years, an average of 69 women, children and men died in Maryland as a result of domestic violence. The Maryland Network Against Domestic Violence (MNADV) recognized the importance of supporting the efforts of first responders to identify and respond to potentially lethal situations. With that in mind the MNADV developed the Maryland Domestic Violence Lethality Screen and Protocol for First Responders, which offers practical methods of working with victims to assess and act upon the danger they may face.
>
> With the support of a Violence Against Women grant through the Governor's Office of Crime Control and Prevention, the MNADV established a statewide Lethality Assessment Committee, comprised of law enforcement officers, a prosecutor, an investigator, a parole and probation agent, domestic violence advocates, and researchers who have done significant work in the area of domestic violence. The committee's work is a vital combination of field experience and scientific research.
>
> The committee developed a short screen which is an application of the research of Dr. Jacquelyn Campbell of the Johns Hopkins University, who created the nationally respected domestic violence Danger Assessment, and is a member of the MNADV team. The screen and accompanying protocol that the committee developed is designed to provide law enforcement personnel with a tool, that can be administered at the scene. When they identify individuals who are more likely to be the victim of homicide

After responding to a 911 call, the police conduct the LAP assessment of the victim according to the protocol.[75] In addition, in at least one county in Maryland, petitioners seeking civil protective orders are required under law to bring their ex-parte protective order to the sheriffs' offices in order to have the sheriffs serve the petition and order on the respondents. This is required in order to provide the sheriffs with an opportunity to perform a danger assessment.[76] If the woman is screened at a high risk, the screen information is provided to legal services providers who contact the woman and offer representation.[77]

Whether in response to a 911 call or a request for service of process, if the resulting danger assessment score is high, the protocol states that the police officer should advise the victim of the assessment "that [the police officer] need[s] to call hotline[78] and [the police officer] would like for victim to speak with counselor."[79] The protocol makes clear that the police officer should remember that he/she is "seeking the victim's permission."[80] Yet, the next step of the protocol coaches the

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or near homicide at the hands of their partner, they can initiate a protocol to connect them with a domestic violence service provider.

Id; *see also* LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57; Sargent & Campbell, supra note 73. One domestic violence organization involved in the current use of the short screen states that "[w]hen [law enforcement personnel] identify individuals who are more likely to be the victim of homicide or near homicide at the hands of their partner, they can initiate a protocol to connect them with a domestic violence service provider." *Lethality Assessment Program*, *supra*. For more information clarifying the protocol for first responders and emphasizing the need to strongly encourage the woman to speak to the hotline and to reconsider if she at first refuses, see *Training Bulletin*, *supra* note 59, at 1. In a later section, the bulletin states that while the officer should strongly encourage the woman to speak to the hotline, the officer should not demand it. *Id.* at 2. But the protocol continues by saying that the officer should tell the woman that the officer is going to call the hotline for advice and then would like the woman to talk to the hotline. *Id.* at 1. There is no indication of what advice the officer is seeking from the hotline, other than to convince the woman to speak to the hotline.

75 Sargent, Roundtable Remarks, *supra* note 58.

76 Interview with Attorney (name withheld for privacy purposes; notes on file with *Cardozo Law Review*). Now the LAP program states that two counties are conducting the lethality screen immediately after a temporary protective order is granted. LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 12. It is not clear whether the counties are making those petitioners go to the police station or whether the court is doing the screen.

77 Interview with Attorney, *supra* note 76.

78 Domestic violence hotlines offer a variety of services, such as safety planning, crisis intervention, domestic violence education, and referrals to domestic violence shelters, counseling, police and emergency services. *See, e.g.*, NAT'L DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org (last visited Oct. 29, 2010).

79 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 7. Two of the creators of the protocol state that "[a]lthough officers traditionally refer victims to domestic violence service providers, the victims seldom make the call." Sargent & Campbell, *supra* note 73, at 30. Therefore, the "hallmark of the protocol is this: if the Lethality Screen identifies a victim as being in 'high danger,' the police officer making that assessment calls the local domestic violence hotline from the scene." *Id.*

80 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 7. In addition, the LAP's August 2009 Training Bulletin states that the police officers "should strongly

police officer to coerce compliance: "If victim does not want to speak with counselor, tell victim you need to speak with counselor to seek guidance and gently ask victim to reconsider."[81] And the next step states, "If the victim still does not want to speak with counselor, use same procedures as in first response."[82]

> [T]he officer provides safety planning advice to the victim and reviews factors that are predictive of death, so the victim can be on the lookout for those factors in future. The officer encourages the victim to contact a domestic violence program, provides the victim with police contact information, and may take other actions such as advising the victim how to obtain a protection order.[83]

If the victim at anytime chooses to speak with a counselor, "the officer responds to the outcome of that telephone conversation, perhaps becoming involved in coordinating a safety plan with the victim and counselor."[84]

The LAP protocol makes a small effort to recognize the woman's decisionmaking authority. It reminds the police officer to "[r]ecognize that the victim is in charge!"[85] The protocol ends with a warning of the inherent power differential between the police officer and the victim and provides this corrective protocol: "*Simply because of your presence as a law enforcement officer, the victim may feel compelled to speak with the hotline counselor when you ask. Tell the victim whether or not she/he chooses to speak with the counselor, you are there to help her/him.*"[86]

Despite this small effort, the protocol and subsequent materials provide a very strong contrary message that first responders should not listen to women's decisions. The protocol repeatedly makes clear that police officers are to "encourage" the victim to speak with the hotline. In reviewing the LAP's implementation, the program criticizes police officers for their poor performance of connecting victims to the hotline and reminds them that they should restrain from following victims' wishes to not speak with the hotline.[87] The coercion does not stop with

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encourage—never demand—victims to speak to a counselor." *Training Bulletin*, *supra* note 59, at 2.

81 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 7.

82 *Id.* at 7.

83 Sargent & Campbell, *supra* note 73, at 31.

84 *Id.* at 30.

85 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 7.

86 *Id.*

87 *See* LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57 (discussing the need for the police officers to "encourage" the victim to participate but, without clear explanation, saying that this should not be the same as making a demand). The LAP program newsletter states that one area in which improvement is necessary is that the officers were not always calling the hotlines if the victim did not want to speak to them. READING THE SIGNS, *supra* note 2, at 2. The newsletter also states that new protocols have been created for hotline workers to have this communication with the domestic violence victim in order to encourage her to enter services. *Id.*

the law enforcement office. Once the officer is able to get the victim to speak with the hotline, it is then the counselor's job to encourage the victim to come in for services.[88]

For the calendar years 2006 through 2008, first responders conducted 11,931 lethality screens and found 6626 of the victims (56%) in high danger. Of those victims assessed as in high danger, 3768 (57%) spoke to a counselor on the telephone and of those who spoke to a counselor, 1042 of them (28%) went for services.[89] As of September 2008, 19 of 20 domestic violence programs and 87 out of 110 law enforcement agencies in all twenty-four counties in Maryland were conducting danger assessment screenings and referring victims to services.[90] The LAP Program cites that it has been successful at coordinating the community response to domestic violence.[91] Police are now talking with hotline workers or legal services about specific victims who screen in the high danger category. And from all the victims screened, about 10% sought services.

After the initial police and hotline contact with the domestic violence victim, domestic violence service providers follow up with the screened victims assessed at the high danger risk level. The advocates and the law enforcement officer may visit the victim at home or call the victim shortly after the initial screening.[92] The LAP report states that 56% of the victims who were screened at high danger and received

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88 Sargent, Roundtable Remarks, *supra* note 58.

89 READING THE SIGNS, *supra* note 7, at 1. Although not available for the above data set, which covered the entire 2008 calendar year, another data set stated that from January 2006 to September 2008, a period of thirty-three months, first responders conducted 9839 lethality screens and found 5610 (57%) in high danger and 3599 (37%) in non-high danger; 630 (6%) did not answer. Of those victims assessed to be in high danger, 3118 (56%) spoke to a counselor and of those, 859 (28%) went for services. LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 11. For those victims who were assessed at the sheriffs' office when requesting service of a protective order and petition, in 2008 the sheriffs conducted 552 screens and found 78% of the victims to be in high danger. And of the high danger victims who spoke on the telephone with a counselor, 68 (32%) went in for services. READING THE SIGNS, *supra* note 7, at 2.

90 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 11.

91 READING THE SIGNS, *supra* note 2, at 2. A Coordinated Community Response (CCR) to domestic violence "consists of an ongoing collaboration among entities such as the judiciary, police, prosecutors, probation, advocacy groups, and social service agencies." Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1517 (2008). For a fuller discussion of CCR, see Lori Ann Post et al., *An Examination of Whether Coordinated Community Responses Affect Intimate Partner Violence*, 25 J. INTERPERSONAL VIOLENCE 75, 86-91 (2010) (finding that any impact on intimate partner violence by a coordinated community response could not be established). *See also* Melanie F. Shepard et al., *Enhancing Coordinated Community Responses to Reduce Recidivism in Cases of Domestic Violence*, 17 J. INTERPERSONAL VIOLENCE 551 (2002).

92 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 12; *see also* Sargent, Roundtable Remarks, *supra* note 58.

follow up contact accessed services, as opposed to the state average of 28% of domestic violence victims who accessed services.[93]

These follow up visits have also enhanced the coordinated community response according to LAP organizers. Specifically, they state that through the program, police have learned that they did not previously know how to communicate and serve victims of domestic violence who were so-called "precontemplators."[94]

Another lesson law enforcement officers have had to figure out is how to contain the risk of violence, such as which interventions are necessary in order to change the potential path that the victim is headed down.[95] Although admitting that the police use of the DA is not "a perfect science," the LAP organizers believe that it is the best police tool for changing that path and protecting women at risk of homicide.[96]

3. Expanded Nationwide Use of LAP and Risk Assessment Tools

In addition to its use by first responders, four counties in Maryland now screen victims of domestic violence using the LAP after the court grants a temporary protective order.[97] One county in Maryland conducts a lethality screening when a woman files for a protective order.[98] In addition, a Maryland state-wide legal services organization for victims of domestic violence conducts a danger assessment during each intake interview.[99]

As the result of federal funding, the LAP program is being used by counties in Delaware (pilot), District of Columbia (pilot), Florida, Georgia, Indiana, Missouri, New Hampshire and Oregon.[100] Police departments in Oklahoma, Missouri and Vermont have been trained for the implementation of the LAP.[101] As U.S. Senator Barbara Mikulski

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93 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 12 (highlighting data from the second and third quarters of 2008). For instance, as of February 2008, in Maryland's Washington County 50% of the victims screened who spoke to a counselor went into services. Sargent, Roundtable Remarks, *supra* note 58.

94 *Id.* "Precontemplators" is a term describing people who "tend to deny there is a problem, resist change, see more negative aspects to change than positive ones, and are not amenable to 'action' intervention." Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 104-05 (1999).

95 Sargent, Roundtable Remarks, *supra* note 58.

96 *Id.*

97 READING THE SIGNS, *supra* note 2, at 2 (noting that Harford, Montgomery, Carroll, and Frederick counties now screen victims after the issuance of a protective order).

98 Editorial, *Helping Women at Risk; A Maryland Program Aimed at Averting Domestic Violence is Given Deserved Recognition*, WASH. POST, Apr. 22, 2008, at A18.

99 Hitt & McClain, *supra* note 38, at 282 n.24.

100 *The Lethality Assessment Program—Maryland Model*, *supra* note 58.

101 *Id.*

(D-MD) stated in announcing the federal grant, "[n]ow we're going to take it nationwide to save lives nationwide."[102]

Courts across the country are experimenting with entering into evidence scores from lethality and other risk assessments.[103] Courts have admitted assessment scores into evidence in criminal cases for sentencing,[104] probation,[105] parole, bail,[106] bond[107] and alternative treatment decisions.[108] Courts also have admitted lethality and risk assessments as evidence in civil cases such as civil protective orders,[109]

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102 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 14.

103 *See infra* notes 104-13.

104 Courts in Colorado, Connecticut, Delaware, Nebraska, Vermont and Canada conduct risk assessments in sentencing. Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171, 178-86 (2000); *see also* Hitt & McClain, *supra* note 38, at 277 n.65. In Minnesota, courts are required to conduct a risk assessment before sentencing in criminal domestic violence matters. *Id.* at 292 n.95 (citing MINN. STAT. § 609.2244 (2009)).

105 In Colorado and Connecticut, probation departments are required to conduct risk assessments in domestic violence matters. Hitt & McClain, *supra* note 38, at 292 nn.97-100.

106 Courts in Ohio are required by state law to use a risk assessment tool before setting bail or bond:

> To the extent that information about any of the following is available to the court, the court shall consider all of the following . . . before setting bail . . . : (1) Whether the person has a history of domestic violence or a history of other violent acts; (2) The mental health of the person; (3) Whether the person has a history of violating the orders of any court or governmental entity; (4) Whether the person is potentially a threat to any other person; (5) Whether the person has access to deadly weapons or a history of using deadly weapons; (6) Whether the person has a history of abusing alcohol or any controlled substance; (7) The severity of the alleged violence that is the basis of the offense, including but not limited to, the duration of the alleged violent incident, and whether the alleged violent incident involved serious physical injury, sexual assault, strangulation, abuse during the alleged victim's pregnancy, abuse of pets, or forcible entry to gain access to the alleged victim; (8) Whether a separation of the person from the alleged victim or a termination of the relationship between the person and the alleged victim has recently occurred or is pending; (9) Whether the person has exhibited obsessive or controlling behaviors toward the alleged victim, including but not limited to, stalking, surveillance, or isolation of the alleged victim; (10) Whether the person has expressed suicidal or homicidal ideations; (11) Any information contained in the complaint and any police reports, affidavits, or other documents accompanying the complaint.

OHIO REV. CODE ANN. § 2919.251(B) (West 2010); *see also* Hitt & McClain, *supra* note 38, at 292 n.94 (citing OHIO REV. CODE ANN. §2919.251 (West 2006)).

107 In Maryland, courts have used the DA score to hold abusers on no bond. David Cordle, Chief Investigator, State's Attorney's Office, Anne Arundel County, Remarks at Roundtable on Danger Assessment Tool, *supra* note 1 [hereinafter Cordle, Roundtable Remarks] (notes on file with *Cardozo Law Review*).

108 In New York, the domestic violence unit courts use risk assessments to evaluate the appropriateness of alternative treatment options for substance abusers. Hitt & McClain, *supra* note 38, at 292-93.

109 In Prince George's County, Maryland, the District Court Clerk's office conducts the danger assessment screening when women subjected to abuse file for a protective order. Editorial, *supra* note 98.

custody,[110] and visitation cases.[111] Courts are interested in knowing the final assessment score as a guide to determining whether or not abuse occurred and the risk of future abuse.[112] So far, the judges in Maryland have accepted the danger assessment score without any evidentiary battles.[113]

In addition to the Maryland legal services organization's use, attorneys nationwide are experimenting in increased usage of lethality and risk assessments. Private attorneys have attempted to introduce into evidence danger assessment scores in custody disputes; these efforts have been met with mixed success.[114] One scholar proposes that attorneys representing women subjected to domestic violence conduct risk assessments and be permitted to disclose high risk scores when necessary to protect the client.[115]

Service providers for women subjected to domestic violence also use the danger assessment. One domestic violence full-service provider in Baltimore, Maryland receives lethality screens performed by the police over the preceding twenty-four hours.[116] Upon receipt, the service provider calls all the women who were screened and informs them of available services from legal services to shelters.[117] Another domestic violence service provider used the danger assessment in hopes that high homicide risk scores would serve as a "lightning bolt" for women subjected to abuse and cause them to enter services and leave

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110 One Maryland judge relied upon the DA score in ruling on a motion to modify custody, finding that the court had the discretion to get as much information as possible. *See* Roundtable on Danger Assessment Tool, *supra* note 1.

111 In New Jersey, a custodial parent subjected to abuse may request a risk evaluation regarding defendant's unsupervised visitation with his/her children. STATE OF N.J., DOMESTIC VIOLENCE PROCEDURES MANUAL § 4.14.4 (Oct. 2008 amended ed.), *available at* http://www.judiciary.state.nj.us/family/dvprcman.pdf. The court must order such an evaluation unless doing so is arbitrary and capricious. *Id.*

112 Roundtable on Danger Assessment Tool, *supra* note 1.

113 Cordle, Roundtable Remarks, *supra* note 107.

114 A Maryland State's Attorney Investigator who had conducted a DA in the context of a criminal case was called as witness in a custody case involving the woman subjected to abuse. The investigator was placed on the witness stand and questioned regarding his experience. He was offered and subsequently qualified as an expert witness in danger assessments. Cordle, Roundtable Remarks, *supra* note 107. *But see* Malenko v. Handrahan, 979 A.2d 1269, 1277-78 (Me. 2009) (denying use of telephonic testimony by expert witness in custody case regarding the danger assessment of parent because counsel had failed to make proper disclosure of the expert).

115 Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 937 (2006) (proposing that the DA be appended to Model Rule 1.6 of the Rules of Professional Responsibility, the rule governing the ability of attorneys to disclose confidential information in order to protect against harm, so that all attorneys have a tool to assess risk). Conner recommends that experts be available to assist in risk assessment and the ethical issues resulting from such assessment. *Id.*

116 *Dealing With the Onslaught*, HOUSELINE (House of Ruth Md., Baltimore, Md.), Mar. 2010, at 1, *available at* http://www.hruth.org/files/library/SpringNews09_000.pdf.

117 *Id.*

their abuser.[118] In addition, there are reports that the DA is being used by ambulance attendants, paramedics, social workers, and counselors.[119]

Given the range of ways in which the legal and justice system addresses domestic violence, the ways in which the danger assessments are being used—and could potentially be used—are quite extensive.[120] Although use of lethality assessments is becoming very widespread, it is still quite new and there is very little case law discussing their use. Only one published case discusses the DA In that case, the court did not admit testimony regarding the danger assessment in a custody case.[121]

It is important to note that the LAP has not yet been subject to any published validity testing.[122] Nonetheless, creators of the lethality screen attribute any decrease in homicide rates to the LAP, even though the numbers at best can only show a correlated and not a causative relationship. Specifically, the creators stated that the lethality screen contributes to decreased homicide rates because only one of the then 5143 screened victims was killed and in 2007, the number of domestic violence fatalities in Maryland was at its lowest since 1991.[123] The LAP creators also have stated that domestic violence-related homicides have been reduced by thirteen percent and credits the use of the LAP for this reduction.[124]

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[118] Jeanne Yeager, Exec. Dir., Mid-Shore Council on Family Violence, Remarks at Roundtable on Danger Assessment Tool, *supra* note 1 [hereinafter Yeager, Roundtable Remarks] (notes on file with *Cardozo Law Review*). For more information on the lethality assessment program at the Mid-Shore Council on Family Violence, see *Lethality Assessment Program*, MID-SHORE COUNCIL ON FAM. VIOLENCE, http://www.mscfv.org/lflaprog.html (last visited Oct. 29, 2010).

[119] Hitt & McClain, *supra* note 38, at 282. MNADV reports that hospitals in Maryland and Georgia as well as faith communities throughout Maryland are poised to begin using the danger assessment tool. *The Lethality Assessment Program—Maryland Model*, *supra* note 58.

[120] Hitt & McClain, *supra* note 38, at 282 (citing potential in-court uses for the DA: (1) Criminal Proceedings: including grand jury; probable cause and bail setting hearings; criminal trials; sentencing; and probation revocation hearing; (2) Civil Proceedings: including civil protective orders; family law cases (custody, visitation, divorce); and abuse and neglect cases. Potential out-of-court uses: police assessment; victim-advocate counseling; safety planning for victim-witness; prosecution prioritization).

[121] Malenko v. Handrahan, 979 A.2d 1269, 1277-78 (Me. 2009). For a full discussion of the admissibility of the DA, see Hitt & McClain, *supra* note 38.

[122] Sargent, Roundtable Remarks, *supra* note 58.

[123] Sargent & Campbell, *supra* note 73.

[124] *The Lethality Assessment Program—Maryland Model*, *supra* note 58.

II. DIGNITY

A. *Dignity as Related to Domestic Violence*

Elizabeth Schneider, a leading scholar in the area of domestic violence law, has explored three realms in which a person's privacy right, linked to the liberty interests of dignity, may be in tension with the state's interests:[125] (1) individual control over one's personal development;[126] (2) the right to make decisions regarding one's family structure and intimate matters;[127] and (3) the control of one's body, the caretaking of one's self, and the freedom of movement.[128] Although these three realms represent areas of fundamental rights, they are subject to some control by the state's power and thus subject to regulation if there is a showing of a heightened state interest to do so. And because privacy has been seen as a negative right,[129] justifying the state's failure to intervene, Schneider, along with others, has correctly suggested that the privacy right has contributed to the early lack of state involvement in domestic violence.[130] Schneider argues that although much has been written about the negative consequences of privacy on the legal response to domestic violence, little has been discussed about the positive consequences.[131]

This Article serves, in part, as a response to Schneider's plea for feminists to place the right of liberty on the agenda for women subjected to domestic violence. Here, I focus specifically on the liberty interest of dignity, albeit with a different twist than Schneider perhaps has intimated. Schneider appears to advocate that the right to privacy

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125 Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974-75 (1991) (citing Justice Douglas' articulation of the realms of privacy in *Roe v. Wade* and *Doe v. Bolton*).

126 *Id.* at 995 (quoting Justice Douglas' description of this realm as "autonomous control of the development and expression of one's intellect, interests, tastes and personality").

127 *Id.* (quoting Justice Douglas' description of this realm as "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children").

128 *Id.* (quoting Justice Douglas description of this realm as "freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf").

129 Negative liberty is the "freedom from interference by other persons," whereas "positive liberty is the real ability to achieve self-direction," including affirmative government action to provide basic living conditions. *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 771 n.138 (2007) (citing ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122-45 (1969)).

130 SCHNEIDER, *supra* note 3, at 87.

131 *Id.* at 89. Since Schneider's article was written, a few articles have addressed the issue of privacy and the liberty notion of autonomy in domestic violence. *See, e.g.*, Goldfarb, *supra* note 91, at 1490; Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 4 (2009); Johnson, *supra* note 3, at 1112-13; Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 558 (2006).

ensures the right to live free of violence.[132] I argue in this Article that women subjected to abuse should have the right[133] to dignity and autonomy by having freedom with respect to development and expression of their individuality, their intimate associations and the control of their body, movement, and care for themselves. I argue for the right for women subjected to abuse to stave off the State from interfering with their decisionmaking around the violence.[134] I argue that the right of women to define their relationships with their partners, because of and despite the violence, should be superior to the State's interest in addressing violence, except in extreme circumstances.

As documented by Schneider and others, the pendulum has swung from the early days of state non-involvement in domestic violence to mandatory state involvement in many phases of the criminal and civil justice system responses to domestic violence.[135] The latest such mandatory intervention is the LAP. I argue that the LAP and other lethality assessments are poised to be more pervasive than any other previously used intervention because they are being imposed not just by law enforcement, such as the mandatory arrest of any perpetrator of domestic violence, or by prosecutors, such as the no-drop prosecution policies, but also by civil attorneys, domestic violence shelter workers, domestic violence hotline workers, health care workers, judges and

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[132] Schneider, *supra* note 125.

> Battered women seek autonomy, freedom of choice with respect to the basic decisions of life concerning intimate association, freedom from battering and coercion, and freedom to be themselves. They seek the freedom to survive free from violence. We need to begin to articulate these affirmative claims as abortion activists did in *Roe*.

Id. at 998.

[133] This right would be categorized as a negative right, a limitation on the state's power to act. Gruber, *supra* note 129, at 771 n.138 (discussing positive and negative rights). A positive right is one that provides a personal entitlement to the right. Unfortunately, the Supreme Court has spoken against a positive right of state protection against violence. *See* Castle Rock v. Gonzalez, 545 U.S. 748, 764-67 (2005) (finding no personal entitlement to police enforcement of restraining orders and therefore no due process violation from police failure to do so); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989) (finding that the Due Process Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security, and therefore nothing in the Clause requires the State to protect life, liberty or property of its citizens against invasion by private actors). Although I believe a positive right should exist and women should have a remedy if prevented from accessing services and support they believe will best address the violence in their relationship, I do not make that argument here.

[134] I concede that the right of privacy can be subject to police powers and regulated if there is a heightened state interest, *see* Schneider, *supra* note 125, at 995, but where the balance is struck is an important part of what this Article is discussing. To date, the balance has been struck too far on the side of intervention by the state under its police powers initiatives, impeding too much on a woman's right to dignity.

[135] *See* Goodmark, *supra* note 131 (providing a feminist critique of various mandatory interventions in domestic violence); Johnson, *supra* note 3, at 1148-50; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 278-82 (2005) (analyzing the various mandatory interventions in the domestic violence legal system).

court personnel. Accordingly, we now need to determine the boundary line across which state and the domestic violence legal system intervention may not cross into an individual's right to dignity. The issues raised by state intervention involve the three realms of liberty articulated above: one's personal development; one's family and intimate life; and one's body and freedom of movement.[136]

This Article argues that the State's use of the LAP needs to be analyzed through the rubric of one's dignity. This liberty right should foster a zone of autonomous decisionmaking for women that includes the right to not be screened, the right not to hear the results of the screen, the right to reject the results, the right to not be directed to particular courses of action and the right to maintain a relationship with the person who has been violent to them in the past—even when the screen indicates there is a high risk of lethality.[137]

B. *Constitutional Liberty and Dignity*

Human dignity is an important concept from philosophy.[138] One prominent conception is that the existence of human dignity derives from the achievement of being autonomous, that is, self-governing.[139]

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136 *See supra* text accompanying notes 125-28.

137 *But see* Jones, *supra* note 5, at 608-09; Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 121-23 (1999).

138 Although the philosophical literature is rich with discussions of human dignity, Immanuel Kant and John Stuart Mill's conceptions appear to be most prominent in American law. RONALD BONTEKOE, THE NATURE OF DIGNITY 32-33 (2008); William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 53 (Michael J. Meyer & William A. Parent eds., 1992); Susan Shell, *Kant's Concept of Human Dignity as a Resource for Bioethics*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL OF BIOETHICS (2008), *available at* http://bioethics.georgetown.edu/pcbe/reports/human_dignity/human_dignity_and_bioethics.pdf The Kantian conception of human dignity "derives . . . from our ability as rational beings to recognize and place upon ourselves the restraining force of moral law. In so far as we are capable of doing this, . . . we possess *autonomy*—which is to say we are genuinely in command of ourselves." BONTEKOE, *supra*, at 6. The Millian conception is that "dignity attaches to human beings simply by virtue of their capacity to explore the unknown and to share their discoveries, rather than because, as 'rational beings' they are (unrealistically) presumed to have the capacity to recognize and act upon objective ethical truths." *Id.* at 31.

139 BONTEKOE, *supra* note 138, at 32; SUSAN MELD SHELL, KANT AND THE LIMITS OF AUTONOMY 2 (2009) (stating that Kantian autonomy is not just the capacity to choose, but the capacity to be self-governing); Parent, *supra* note 138, at 53 (discussing the Kantian view that "the dignity of humanity consists in its capacity for giving universal moral laws, a capacity he calls autonomy. Autonomy, in turn, is the same thing as positive freedom. The person whose reason is legislative and who acts from such legislation is, then, free and autonomous . . . . [W]e possess dignity only to the extent that our existence doesn't stand under spatial-temporal conditions and isn't governed by the laws of nature.").

Another is that human dignity is egalitarian and exists in all people when granted the freedom to explore and investigate.[140]

These concepts of human dignity have been incorporated into several areas of the law, such as international law[141] and United States constitutional law.[142] The Supreme Court often discusses human dignity as related to personal autonomy or "the inviolability of persons from intrusions by the state."[143] The concept of human dignity often "focuses on the inherent worth of each individual."[144] And the Court often discusses dignity as essential to equality.[145] As Ronald Dworkin writes, "[c]ardinal in the [U.S. political] culture is a belief in individual human dignity: that people have the moral right—and the moral responsibility—to confront for themselves, answering to their own conscience and conviction, the most fundamental questions touching the meaning and value of their own lives."[146] Human dignity thus requires decisionmaking capacity, and provides opportunities for

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140 BONTEKOE, *supra* note 138, at 33.

141 *See, e.g.*, Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 215-18 (2008) (discussing the use of "human dignity" in international human rights law, Germany and South Africa's constitutional law, and France, Canada and India's jurisprudence); Nora Jacobson, *A Taxonomy of Dignity: A Grounded Theory Study*, 9 BMC INT'L HEALTH & HUM. RTS., no. 3, 2009 at 4-6, http://www.biomedcentral.com/content/pdf/1472-698X-9-3.pdf (researching the social processes that promote and violate dignity in order to inform international health and human rights law).

142 Human dignity is found as a constitutional value in First Amendment free speech cases; Fourth Amendment unreasonable search and seizure cases; Fifth Amendment right against self-incrimination cases; Eighth Amendment cruel and unusual punishment cases; and Fourteenth Amendment equal protection and liberty cases. *See generally* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 150-84 (1984); Judith Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934-41 (2003).

143 Resnick & Suk, *supra* note 142, at 1937 (noting that in abortion and discrimination cases, dignity is used to explore concepts of personal autonomy, and in search and seizure cases, dignity is used to discuss limits on state intervention); Neomi Rao, Three Concepts of Dignity in Constitutional Law (Mar. 22, 2010) [hereinafter Rao, Three Concepts of Dignity] (unpublished manuscript) (on file with *Cardozo Law Review*) (discussing what Rao categorizes as inherent, substantive and dignity as recognition conceptions).

144 Rao, Three Concepts of Dignity, *supra* note 143.

145 Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053, 1059, 1080 (2009) (discussing the focus on dignity in Justice Ginsburg's equal protection jurisprudence); Rao, Three Concepts of Dignity, *supra* note 143, at 4 (discussing "intrinsic dignity," in constitutional caselaw, which includes "a presumption of human equality—each person is born with the same quantum of dignity . . . without appraisal by any other standard"). This equality notion exists in international human rights law as well. For example, the United Nations Universal Declaration of Human Rights provides in the preamble a "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." Alan Gewirth, *Human Dignity as the Basis of Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 138, at 10, 12.

146 Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. CHI. L. REV. 381, 426 (1992).

decisionmaking, but exists in humans regardless of how they exercise their capacity for decisionmaking.[147]

As seen in Supreme Court cases, the right to liberty provides a right to human dignity and the ability to exercise autonomy.[148] If a state action infringes on a person's fundamental right, then the courts must review the action with a heightened level of scrutiny.[149] If the person is deemed incompetent, then the state also will consider its *parens patriae* role in its decision to infringe.

Four areas of law relevant to this Article's focus in which the right to dignity[150] and liberty are discussed include: abortion, refusal of treatment, right to die and sodomy law cases. All of these cases are decided under the Substantive Due Process Clause of the Fourteenth Amendment of the United States Constitution, which states that no State

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147 Rao, Three Concepts of Dignity, *supra* note 143, at 22 ("Inherent dignity cannot turn on substantive evaluations of how effective our choices may be, because there is an inherent dignity in the self apart from the exercise of autonomy.").

148 *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("The [sodomy] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."); Washington v. Glucksberg, 521 U.S. 702, 726, 779 (1997) ("Like the decision of whether or not to have an abortion, the decision how and when to die is one of the most intimate and personal choices a person may make in a lifetime, a choice central to personal dignity and autonomy.... In that period when the end is imminent... the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm." (internal quotations and citation omitted)); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992) (holding that matters such as "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment"); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (holding that the liberty interest protected by the Fourteenth Amendment includes granting "a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"); Webster v. Reprod. Health Servs., 492 U.S. 490, 548-49 (1989) ("[F]ew decisions are 'more basic to individual dignity and autonomy' or more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to a end a pregnancy." (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986))).

149 *Glucksberg*, 521 U.S. at 762 (Souter, J., concurring) (discussing the history of the substantive Due Process Clause); Ronald Dworkin, *Euthanasia, Morality, and Law Transcript*, 31 LOY. L.A. L. REV. 1147, 1156 (1998) (observing that the Constitution recognizes a liberty interest as "of dramatic importance").

150 There are many other areas in which the right to dignity is implicated and analyzed under the Constitution's Due Process Clause. *See supra* note 142. For an expansive discussion of dignity in constitutional law, including all of the areas in which the right is implicated, see also Rao, Three Concepts of Dignity, *supra* note 143 (discussing dignity as inherent worth (as seen in privacy, Sixth Amendment right to self-representation, sexual autonomy, free speech, and race and gender equality); dignity as coercion (such as in cases of persons with diminished capacity, abortion, bioethics, and right to die cases); dignity as social welfare goods (such as public benefits and education); and dignity as recognition (hate speech)).

shall "deprive any person of life, liberty or property, without due process of law."[151]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of the Court stated that because abortion decisions, being in the realm of family life, are "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [they] are central to the liberty protected by the Fourteenth Amendment."[152] As such, the liberty right provides one the "right to define one's own concept of existence, of meaning, or the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[153] As Justice Stevens stated in his separate opinion, the "authority to make such traumatic and yet empowering decisions is an element of basic human dignity."[154]

In *Casey*, the Court also reiterated that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."[155] In abortion cases, the Court has focused on the Due Process Clause and its protection of "a realm of personal liberty which the government may not enter,"[156] such as the right of women to have some control over their own procreation.[157] As stated in *Casey*, the line of abortion cases since *Roe v. Wade* stands not only for a rule of liberty but also a rule "of personal autonomy and bodily integrity" that recognizes that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."[158] In *Webster v. Reproductive Health Services*, Justice Blackmun authored a separate opinion in which he explained that "few decisions are 'more basic to individual dignity and autonomy' or more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy."[159]

Similar to the above line of cases, the Court has recognized that a person has a significant due process liberty interest in refusing medical treatment under the Due Process Clause of the Fourteenth

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151 U.S. CONST. amend. XIV, § 1.

152 *Casey*, 505 U.S. at 851.

153 *Id.*

154 *Id.* at 916 (Stevens, J., concurring in part and dissenting in part).

155 *Id.* at 849.

156 *Id.* at 847.

157 Webster v. Reprod. Health Servs., 492 U.S. 490, 548 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part).

158 *Casey*, 505 U.S. at 857.

159 *Webster*, 492 U.S. at 548-49 (Blackmun, J., concurring in part and dissenting in part) (citing Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986)).

Amendment.[160] For instance, in *Cruzan v. Director, Missouri Department of Health*, where guardians of a patient in a persistent vegetative state argued for the right to refuse life-sustaining treatment on behalf of the patient, the Court assumed that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[161] As Justice O'Connor stated in her concurring opinion:

> Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.[162]

To determine whether or not the liberty right has been violated, the person's liberty interest must be balanced against the state's interests.[163] Here, the Court found that the state's interests were the protection and preservation of human life[164] as well as a *parens patriae* interest[165] in the protection for the incompetent person of the "personal element" inherent in the choice between life and death.[166] Accordingly, the Court found that to protect the incompetent patient's liberty, the state may require the guardian to show by clear and convincing evidence the incompetent patient's desire to terminate life-sustaining treatment.[167] Justice Brennan stated in his dissent a narrower view of the state's interest. He reasoned that a state cannot have a general interest in protecting and preserving life abstracted from the specific person's interest in "living that life" that would outweigh the person's interest in refusing medical treatment.[168]

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160 *See* Washington v. Harper, 494 U.S. 210, 221-22 (1990). Specifically, the Court has found that this right is based in liberty, not privacy rights. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 n.7 (1990).

161 *Cruzan*, 497 U.S. at 279.

162 *Id.* at 289 (O'Connor, J., concurring).

163 *Id.* at 280-81.

164 *Id.* at 280.

165 *Id.* at 315 (Brennan, J., dissenting) (noting that the majority implicitly recognized the state's *parens patriae* interest).

166 *Id.* at 281. As Justice Brennan described in his dissent, this *parens patriae* interest is in "safeguarding the accuracy of" the determination of how Cruzan would exercise her liberty rights in this situation regarding accepting or refusing life support. *Id.* at 315 (Brennan, J., dissenting).

167 *Id.* at 280. The Court in this case did not decide the issue of whether the state would need to defer to a guardian's decision to end life if the guardian showed that this was the patient's wish by clear and convincing evidence. *Id.* at 287 n.12. Some of the factors that may be relevant to such a decision are alluded to in Justice Brennan's dissent. Specifically, he states that because maintaining Cruzan on life support systems will not necessarily benefit society as a whole, or any third party, nor will doing so avert any harm to a third party, there cannot be any sufficient state interest that would require Cruzan to remain on such systems. *Id.* at 313 (Brennan, J., dissenting).

168 *Id.* at 313-14 (Brennan, J., dissenting).

In *Washington v. Glucksberg*, the Supreme Court affirmed an autonomy and dignity interest in how and when one dies because of its highly personal nature, but found that it did not rise to the level of a constitutional liberty interest.[169] The Court, therefore, upheld a state law making assisted suicide a felony.[170] The Court observed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[171] Upon examination of the assisted suicide ban, however, the Court found that there was no fundamental liberty interest in assisting suicide based on this nation's tradition and history of outlawing such assistance. Accordingly, the Court held that the Due Process Clause did not forbid the State from banning assisted suicide because such a ban was rationally related to legitimate state interests in preserving human life among other interests.[172] In this case, the right to dignity was outweighed by the State's interest in preserving life.

Finally, in *Lawrence v. Texas*, the Supreme Court articulated a liberty and dignity interest in private sexual conduct in one's home in striking down Texas' sodomy laws as unconstitutional. The Court found the state's infringement on the liberty interest to be profound: the laws criminalizing sodomy touch "upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[173] Further, the liberty right to choose without being punished as criminals "should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[174] Adults should be able to choose relationships involving sodomy within their homes and also "retain their dignity as free persons."[175]

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169 Washington v. Glucksberg, 521 U.S. 727-28 (1997) (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

170 *Id.* at 702.

171 *Id.* at 726-27.

172 *Id.* at 728-35. The Court noted that in addition to preserving life, other state interests implicated by the assisted suicide ban include: "(2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses." *Id.* at 728 n.20 (citation omitted). In exploring the state interest in preserving life, the Court found that "all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. The State has an interest in preventing suicide, and in studying, identifying, and treating its causes." *Id.* at 730 (citations omitted).

173 Lawrence v. Texas, 539 U.S. 558, 567 (2003).

174 *Id.*

175 *Id.*

The constitutional cases involving liberty and dignity emphasize the protection of personal decisions relating to family and personal relationships and also the right to refuse life-saving medical treatment. In deciding whether a state's interference with a dignity right violates the Constitution, the courts will balance the constitutionally-protected dignity right against the heightened scrutiny of the state's interests. However, where the dignity rights implicate something that does not have traditional state protection, such as assisted suicide, the courts review will be far less searching because the dignity right will not be seen as a fundamental liberty interest.

Women subjected to abuse have a dignity right in being able to choose how best to address the violence in their intimate relationships. This dignity right implicates her interconnectedness to the person committing the abuse and also focuses on her as a person commanding respect and the right to create space for individual choice. State intrusion such as steering or coercing the woman's choices regarding the violence in her relationship encroaches on her dignity interest and thus needs to be subjected to heightened scrutiny as seen in the abortion, refusal of treatment and sodomy law cases. Unlike assisted suicide, there is a tradition of state non-interference in the realm of intimate relationships, even violent ones, and therefore, a less searching review would be inapposite.[176]

This Article argues that the state's interest in intervention in family and intimate relationships must be weighed against concerns for autonomy and dignity. In the case of domestic violence, the state's interventions that focus exclusively on the physical violence in family and personal relationships and ignore other dynamics that may be positive and strengthening could be inappropriately infringing on women's dignity. And when state interventions focus on only one remedy—separation of the parties—the state's actions may be unduly impinging upon the women's dignity interest in personal relationships and determining what is safest for her.[177]

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[176] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 10-11 (1999) (discussing the long history of the state condoning domestic violence). It is important to note that in the past few decades there have been attempts to address this norm of state non-interference in domestic violence. *See, e.g.*, *id.* at 11-12; Miccio, *supra* note 135, at 278-81 (stating, for instance, that by 1994 most states had laws mandating police officers to arrest perpetrators of domestic violence). Nonetheless, there is not a long tradition, as there is with suicide, of state intervention.

[177] It is important to recognize that scholars have critiqued the presumption that our society is based on liberal individualism because it belies the interconnected, dependent family unit at its core. *See, e.g.*, Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 70 (2006). This Article does not argue for the construction of a legal system based solely on autonomy because it is true that such a system would be disconnected from how families actually operate and would fail to recognize fully the operation of subordination in society through gender, race, class, and other identity characteristics. *See, e.g.*, Margaret E. Johnson, *"Avoiding Harm*

C. *Specific Analyses of Dignity Rights*

1. Patient Informed Consent

The scholarship regarding patient choice is instructive to the analysis of the dignity right and the legal system's response to domestic violence in the form of danger assessments.[178] As seen in the discussion of the *Cruzan* and *Glucksberg* cases above, patients have a liberty interest in patient choice—the right to make decisions regarding their medical treatment. Patient choice is the preferred outcome due to its basis in principles of autonomy and dignity.[179] The scholarship discussing this area analyzes methods, such as patient informed choice, which are intended to balance patients' dignity rights with the state's interests in the preservation of human life.

As Marsha Garrison explains, "Courts have long held that every human being of adult years and sound mind has a right to determine what shall be done with his own body and . . . they have uniformly concluded that the physician who treats a patient without his consent is liable for battery."[180] Patient choice is promoted through regulatory restraints on the medical profession. In order to protect a patient's dignity and autonomy and the state's interest in citizens' health, health care providers are required to allow for patient's informed decisionmaking regarding treatment.[181] Courts have developed the doctrine of "informed consent" to protect the patient's right to make a decision based on accurate information about the risks and benefits of a particular procedure; a patient may bring an action against a physician who fails to accurately describe material risks and benefits if the patient can show detrimental reliance on the physician's failure to provide complete information.[182]

Because patient dignity and autonomy are so strongly protected in the medical arena, "most medical decisions . . . are not subject to any governmental regulation whatsoever. In the United States today, the doctor who wants to offer her patient a particular treatment, even an experimental treatment, is free to do so unconstrained by any governmental rule or regulatory agency," provided the doctor obtains

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Otherwise:" Reframing Women Employees' Responses to the Harms of Sexual Harassment, 80 TEMP. L. REV. 743, 753-54 (2007).

178 Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1632 (2008).

179 *See supra* text accompanying notes 161-72; *see also* Garrison, *supra* note 178, at 1632; Rhonda Gay Hartman, *AIDS and Adolescents*, 7 J. HEALTH CARE L. & POL'Y 280, 306 (2004) (finding that patient autonomy is rooted in constitutionally protected decisional liberty).

180 Garrison, *supra* note 178, at 1631-32 (footnote and internal quotation marks omitted).

181 *Id.*

182 *Id.*

informed consent from the patient for the treatment.[183] Therefore, as a way to balance the state's interest in preserving life and the patient's very strong interest in dignity and autonomy, the government regulation of most medical decisions is minor but there must be informed consent by the patient. The law of informed consent can provide useful guidance for the administration of the LAP. The benefits of providing useful information, fact gathering, and connection to other resources can result from the LAP administration. A modification of the LAP protocol that might ensure that these benefits are not outweighed by the costs of coercing women subjected to abuse and do not impinge on their dignity is to require obtaining informed consent from the woman before administering the screen.

2. Competence

Competency determinations also involve a balancing of the costs and benefits of state intervention on human dignity. A competent adult has an "unqualified liberty interest . . . to refuse any and all medical treatments *even if the consequences are fatal.*"[184] This strong protection of patient dignity and autonomy and discouragement of state intervention (save for the requirement of informed consent) is lessened when society views the patient as incompetent to make a decision.[185] Society often unreflectively views the elderly,[186] the infirm,[187] adolescents[188] and, I would argue, often persons subjected to domestic violence[189] as incompetent to make decisions. For instance, although the Court has ruled that minors have constitutionally-protected decisional liberty,[190] the state's *parens patriae* responsibility is added to the state's interest in promoting health and welfare to counterbalance the adolescent's strong interest in decisional autonomy.[191]

One of the important questions in determining the balance of liberty, dignity and safety is determining who is a competent

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183 *Id.* at 1633. But, as seen in *Glucksberg*, physician-assisted suicide is not permitted, even with informed consent, because of the tradition of the state outlawing such assistance. Washington v. Glucksberg, 521 U.S. 702, 728-35 (1997).

184 Martin T. Harvey, *Adolescent Competency and the Refusal of Medical Treatment*, 13 HEALTH MATRIX 297, 303 (2003) (emphasis added).

185 Hartman, *supra* note 179, at 281-84.

186 Rubinson, *supra* note 137, at 122.

187 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

188 Hartman, *supra* note 179; Harvey, *supra* note 184.

189 Jones, *supra* note 5.

190 Hartman, *supra* note 179, at 299 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979), which nonetheless upheld state regulation of adolescent abortion decisionmaking, and *Parham v. J.R.*, 442 U.S. 584 (1979), which upheld an involuntary civil commitment of a minor).

191 *Id.*

decisionmaker.[192] Understanding competency is therefore important to understanding the state's ability to encroach on one's dignity and is specifically relevant to this Article's discussion of states' mandated lethality assessments of women subjected to domestic violence.

Helpful guidance regarding competency can be found in the Rules of Professional Conduct for lawyers, which govern attorney-client relationships. Under Rule 1.14 of the ABA Model Rules of Professional Conduct, lawyers are given guidance for representation of clients with "diminished capacity."[193] Of course, this begs the question of what is "diminished capacity" due to minority, mental impairment or some other reason. The Rules do not provide a definition of capacity.[194] Commentators have shown that capacity varies in meaning depending on the context and the decision to be made.[195] As a result, there is no agreed-upon definition of having the capacity to make decisions.[196] Despite these indeterminacies, one scholar states that perhaps the most used definition is that decisionmaking capacity requires: "(1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices."[197] Decisionmaking capacity must be judged against a "person's own habitual or considered standards of behavior and values."[198] Importantly, a person does not lack capacity because she makes decisions that people disagree with or do not understand or because she makes risky decisions.[199] Of course, what risks get

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192 Jones, *supra* note 5.

193 MODEL RULES OF PROF'L CONDUCT R. 1.14 (2010), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html.

194 Similarly, the earlier model rules failed to provide a helpful definition of competence, which preceded the term "diminished capacity." Rubinson, *supra* note 137, at 125.

195 Charles P. Sabatino, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, (ALI-ABA Course of Study, Sept. 28-29, 2006), WL SM054 ALI-ABA 89, 103-05 [hereinafter Sabatino, *Assessment of Older Adults*], *available at* http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf (reviewing the various meanings of capacity in different legal transactions).

196 Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?*, 16 J. AM. ACAD. MATRIMONIAL LAW. 481, 483-84 (2000) [hereinafter Sabatino, *Representing a Client with Diminished Capacity*], *available at* http://www.aaml.org/tasks/sites/default/assets/File/docs/journal/Journal_vol_16-2-6_Client_with_Diminished_Capacity.pdf.

197 *Id.* at 485. There are other suggested formulations. For instance, Peter Margulies employs six factors in assessing contextual capacity: "(1) ability to articulate reasoning behind decision; (2) variability of state of mind; (3) appreciation of consequences of decision; (4) irreversibility of decision; (5) substantive fairness of transaction; (6) consistency with lifetime commitments." Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1085-90 (1994).

198 Sabatino, *Representing a Client with Diminished Capacity*, *supra* note 196, at 485.

199 *Id.* at 486. One suggestion for self-reflection on alleged risk is to ask the following:

1. Is the risk new or old?
2. Are there concrete instances of failure?
3. How grave is the risk?

measured should not necessarily be based on the measurer's values, which can inappropriately infringe upon the dignity and autonomy of the person being measured.[200]

A serious concern with capacity assessment is that the assessor will view differences between the assessor and the person being assessed as indicators of decisionmaking capacity. Accordingly, the rule of thumb is to presume capacity and the ability to make decisions.

Under Comment 6 to Rule 1.14 of the ABA Model Rules of Professional Conduct, lawyers should do the following in assessing the client's capacity and whether it is diminished:

> [T]he lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[201]

Once diminished capacity is determined, the Model Rules are clear that under Rule 1.14(a) "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[202] Accordingly, similar to my recommendation that lethality screeners presume decisionmaking capacity of women subjected to abuse, the Rules presume a normal attorney-client relationship despite diminished capacity.[203] This presumption supports recognizing dignity, autonomy, and liberty through such means as client-centered lawyering, a lawyer representation model that facilitates client decisionmaking based on client's objectives even if client has diminished capacity.[204]

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4. Is the risk imminent or remote?
5. What is the risk of harm to others?
6. How objective is the assessment of risk?
7. Is the risk chosen or accidental?

Id. at 497.

200 These are exactly the concerns Sabatino raises regarding lawyering for the elderly. He states, "Our culture is risk averse in its conventional caring for older persons. The result is that much of the risk assessment we as professionals, family, or friends do easily inclines towards trumping autonomy with safety." *Id.*

201 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2010), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html; *see also* Sabatino, *Assessment of Older Adults*, *supra* note 195, at 100-01.

202 MODEL RULES OF PROF'L CONDUCT R. 1.14(a).

203 Sabatino, *Representing a Client with Diminished Capacity*, *supra* note 196, at 489-90; *see also infra* Part III.B.

204 Critically, as discussed at length by Robert Rubinson regarding representation of elderly clients, the parties involved in client-centered counseling need to be aware of and not perpetuate

The Model Rules can be instructive in guiding society's sometimes unreflective view of women subjected to domestic violence as suffering from diminished capacity or competence, or, in other words, a false consciousness about the abuse. In judging capacity, the Model Rules are clear that one cannot substitute his value system for another.[205] If a woman subjected to abuse chooses to stay in a relationship that contains violence, her decision does not necessarily demonstrate diminished capacity or false consciousness, even if another person would choose to leave the relationship. The social science research shows that women subjected to abuse are making choices all the time regarding the violence in their lives. Sometimes the objectives that they are trying to accomplish and the consequences they are weighing to help select the right option involve much more complicated factors than are apparent to an outsider.[206] Making a decision about capacity must be centered on the woman's goals and, if following the most common definition, must focus on whether she is able to communicate and understand information and deliberate and articulate her decisions. Such a process would no doubt provide greater respect for her dignity and decisionmaking autonomy.

If at the end of the process the woman's capacity was found to be diminished (and as seen above, that is an entirely contextual, individualized, fluid and uncertain determination), the Model Rules require a presumption that the lawyer nonetheless should maintain a normal attorney-client relationship. Therefore, when conducting the

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the subordination that can result from stereotyping elderly persons' competence in the name of effectuating their autonomy. Rubinson, *supra* note 137, at 150-59. But there is an exception to the maintenance of a normal client-lawyer relationship. Under Rule 1.14(b):

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

MODEL RULES OF PROF'L CONDUCT R. 1.14(b). Recommendations from a conference focused on this Model Rule included:

> If the lawyer takes protective action under Model Rule 1.14(b), the lawyer actions shall be guided by: 1. The wishes and values of the client to the extent known; otherwise, according to the client's best interest; 2. The goal of intruding into the client's decision-making autonomy to the least extent possible; 3. The goal of maximizing client capacities; 4. The goal of maximizing family and social connections and community resources.

Proceedings of the Conference on Ethical Issues in Representing Older Clients: Recommendations of the Conference, 62 FORDHAM L. REV. 989, 991 (1994). Accordingly, the Model Rules provide a permissive option for an attorney to seek outside guidance or even a surrogate decisionmaker for a client the attorney determines to be of diminished capacity and facing harm. Such an option obviously negatively affects the client's autonomy and places the balance in favor of society's view of what is necessary to protect the client.

205 *See supra* note 201 and accompanying text.

206 *See infra* Part III.

LAP on women subjected to domestic violence, if the state followed the Model Rule's presumption of permitting the client to maintain the capacity to make decisions despite a finding of diminished capacity, it would greatly increase respect for the dignity of women subjected to abuse.

III. DIGNITY, DOMESTIC VIOLENCE AND THE LETHALITY ASSESSMENT PROGRAM

Because the LAP shares some of the same assumptions included in the DA, it also shares some of the weaknesses regarding its effectiveness. This Part analyzes the costs and benefits of the LAP and DA in meeting state goals of safety in light of the impact on the dignity of women subjected to abuse.

A. *A Question of Reliability: How Replacing Women's Stories with Relatively Young Social Science Instrument Impacts Dignity*

Many in the legal and domestic violence system are eager to use the level of danger identified by the DA and the LAP rather than women's own stories of abuse. Judges and lawyers want the lethality risk score to be the evidence of the domestic violence. Reliance on the tool's lethality score would truncate any court inquiry into the types of abuse to which the woman was subjected, such as economic, emotional, psychological, physical and sexual, the full range of harms she suffered, and the remedies she is seeking. As a result, women might be prevented from telling their stories of complex abuse; courts would instead reconstruct a homicide-focused story because the lethality score only indicates homicide risk. Women who have low scores would be dismissed as having not suffered abuse, as opposed to perhaps having suffered abuse that is actionable but does not create a high risk of homicide. Such categorization of women subjected to abuse has already happened. Shelters and legal service providers are designating their services to women with the highest lethality risk score.[207] As a result, it is more difficult to locate a forum in which to hear the broader stories of how women are being affected by the abuse in their life and their resulting need for resources.

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[207] Campbell, *The Danger Assessment*, *supra* note 10, at 667-68.

This reliance on the DA and LAP instruments is especially problematic given the reliability-based concerns with these tools.[208] The LAP has never been validated by research.[209] The DA reliability studies have shown mixed results. Even Campbell states that there is no consensus in the literature on the issue of reliability.[210] She further states that "determining the predictive validity of any lethality risk assessment is nearly impossible because of . . . low base rates or rarity of occurrences, ethics, [and] lack of accurate information about risk factors after a homicide."[211] Sociologists Heckert and Gondolf conclude that "[t]he clinical utility of such instruments as prediction tools . . . remains debatable."[212] The DA creates many false positives, so women are placed in the high risk category when they should not have been.[213] Not only do false positive results undermine the test's reliability, but they also might cause decisionmakers in the future to disregard all high risk candidates as false positives. In the end, shifting to relatively young social science tests to determine resource allocation may significantly harm the dignity of all women subjected to abuse as they attempt to exercise their autonomy and to access legal remedies and other services.

B. *A Question of Agency: How Assuming Women Suffer from False Consciousness and Inadequate Decisionmaking Regarding Domestic Violence Impacts Dignity*[214]

For its effectiveness, the LAP intends first, for women to become aware of their risk of future danger and second, for women to take action to protect themselves, including accessing services. Implicit in the LAP's goal of keeping women safe is the assumption that women are not keeping themselves safe.

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208 *See supra* text accompanying notes 43-54, 122. In discussing lethality assessments, "[e]xperts caution that such assessments are often wrong. Only a small percent of domestic violence cases that show warning signs actually result in a homicide, said Murray Straus, a sociology professor at the University of New Hampshire, Durham." Megan Twohey, *Too Many to Stop: County's Overwhelmed Special Prosecution Unit Sees 90 High-Risk Cases a Week. It Can Handle Only 30.*, CHI. TRIB., Mar. 12, 2009, at C1.

209 *See* Conner, *supra* note 115, at 921 (providing an overview of various lethality assessment tools and the research finding that they are flawed); Sargent, Roundtable Remarks, *supra* note 58.

210 Campbell, *Prediction of Homicide*, *supra* note 6, at 96.

211 *Id.* at 99.

212 Heckert, *supra* note 64, at 7 (citing P. Kropp et al., *The Spousal Risk Assessment (SARA) Guide: Reliability and Validity in Adult Male Offenders*, 24 LAW & HUM. BEHAV. 101-18 (2000)).

213 *Id.*

214 The ability to choose, as opposed to the specific choices made, is often at the heart of the dignity analysis. *See* Rao, Three Concepts of Dignity, *supra* note 143, at 22-31 (citing Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992)).

The research indicates that women, however, are taking actions in order to protect themselves and to deal with the violence in their lives. In a 2003 report in the National Institute of Justice Journal, researchers found that "[m]ost women try to leave an abusive relationship. Three-fourths of homicide victims and [eighty-five] percent of women who had experienced severe but nonfatal violence had left or tried to leave in the past year."[215] In a 2005 study of the danger assessment, researchers stated that "women in this study took significant steps to protect themselves from further abuse. In fact, most participants were recruited from sites where they were already receiving assistance or taking action."[216] For instance, women who scored in the DA's "extreme danger" category were more than five times more likely to go someplace where the offender could not find them than women who scored in the DA's variable danger category.[217] Also, the higher the risk category, the more likely it was that the women had no voluntary contact with the offender.[218] Similarly, "[w]omen in the high-risk categories . . . tended to be more likely than other women . . . to receive counseling, do safety planning, change the locks on their doors, or obtain a weapon for protection . . . ."[219] As the 2005 study concluded:

> [W]omen's actions suggested that they were predicting risk of re-assault in concordance with the risk assessment instruments and strategies we were evaluating, and taking effective steps to reduce the risk of assault. These actions were also correlated with victims' own perception of risk that their partner or ex-partner would harm them.[220]

An important question in the analysis of the danger assessment goals is whether, in fact, women suffer from a false consciousness of their risk of future violence or a diminished capacity in their ability to decide how best to address the domestic violence in their lives. Regarding women's consciousness of risk, recent studies show that women's prediction of future assault is quite reliable.[221] A 2000 study found that "women's perception of danger was the single best predictor of re-assault, a stronger predictor than any of the [ten] items from the

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215 Carolyn Rebecca Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, NAT'L INST. JUST. J., Nov. 2003, at 4, 6, *available at* www.ncjrs.gov/pdffiles1/jr000250c.pdf.

216 Roehl et al., *supra* note 20, at 82.

217 *Id.*

218 *Id.* at 66.

219 *Id.*

220 *Id.* at 78. One interesting point to all of this is that the researchers surmise that perhaps victims' perception of risk is high because they were taking into account their protective action plans when assessing their risk—something that risk assessment instruments do not yet do. *Id.* at 80.

221 *See* Conner, *supra* note 115, at 921-22.

Danger Assessment available in criminal justice records."[222] Another 2000 study found that women's prediction "was the strongest single predictor of re-assault."[223] A 2003 study found "women's perception of risk to be a significant predictor of revictimization by an intimate partner" and stronger than three other instruments, but not as strong as the DA.[224] Rather, the best predictor was the DA plus the woman's perception of her risk.[225] Similarly, these three studies showed that victims are "impressive predictors of their own risk" and their predictions were "significantly associated with re-assault."[226] Another study found that:

> Women's perceptions of risk were important predictors of repeat reassault throughout our multiple outcome analyses. If we can understand how women derive these perceptions, we might be able to improve other prediction efforts. We therefore attempted to identify variables associated with the women's perceptions. The strongest variables were physical and nonphysical abuse, drinking behaviors and access to the partners—all of which are conventional risk markers. The women apparently rely on a constellation of abuse or a more complex process to improve their predictions. [227]

Women accurately perceive and are able to predict risk, and therefore, researchers want to study women so the researchers can replicate how they predict risk in order to make a better risk-prediction tool.[228] Researchers want this better tool to help women so they can better plan for safety. There is something wrong with this logic. The decision that social science should replicate, and thus supplant women's decisionmaking is detrimental to women's dignity and autonomous rational thinking and decisionmaking capacity.

Many women do not live with a false consciousness about their risk of reassault. They have high levels of predicting their risk of harm. Nonetheless, their level of prediction, just like the danger assessment

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222 Roehl et al., *supra* note 20, at 14 (citing Arlene N. Weisz et al., *Assessing the Risk of Severe Domestic Violence: The Importance of Survivor's Predictions*, 15 J. INTERPERSONAL VIOLENCE 75 (2000)). This finding is especially important because the LAP screen uses only eleven questions out of twenty from the DA. *See supra* note 73.

223 Roehl et al., *supra* note 20, at 14 (citing Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, J. INTERPERSONAL VIOLENCE 10, 63-74 (2000)).

224 *Id.* at 14-15 (citing Edward W. Gondolf & D. Alex Heckert, *Determinants of Women's Perceptions of Risk in Battering Relationships*, 18 VIOLENCE & VICTIMS 371 (2003)).

225 *See id.* at 15.

226 *Id.* at 77. Under a ROC analysis, "only the DA and victim's perception of risk are significantly better than chance" for predicting any abuse "and the DA improves upon the victim's perception of risk but only marginally." *Id.* at 79. "Overall, the DA and victims' estimates were consistently better than [chance], with the DA performing somewhat better than victims' estimates." *Id.* at 80.

227 Heckert & Gondolf, *supra* note 64, at iv.

228 *See id.*

tool, is not one-hundred percent. Women's imperfection at risk prediction, however, does not mean women are so-called "precontemplators,"[229] persons who do not actively engage in predicting their future danger. As the 2005 research study of various risk assessment and methods states "women's perception of risk did better than the other assessment methods or almost as well as the DA, the most predictive of those tested. But even the women's prediction left much of the re-assault unanticipated."[230] In other words, neither women nor the danger assessment or LAP tools are perfect predictors but they operate similarly with similar success.

Further, the discourse that women suffer from a false consciousness or diminished capacity is grounded in a negative judgment of the decisions women make when subjected to abuse. As a result, the response to such false consciousness is increased state intervention and decreased autonomy and dignity for women. For instance, some have argued that women subjected to domestic violence who do not make avoidance of homicide their one and only goal or do not avoid the risk of homicide by accessing services suffer from a "diminished capacity." Therefore, these women should not be entitled to autonomous decisionmaking. As discussed *supra*, our society has a framework to determine capacity, and if diminished capacity is found, to remove decisionmaking from those persons.[231] Under that framework, Ruth Jones has suggested that courts should appoint a guardian for certain women subjected to coercively controlling domestic violence.[232] Jones argues that "some battered women may be immobilized by the violence and the abuser's control" and therefore unable to make decisions to survive the violence.[233] But Jones does not clarify why she believes greater state intervention is necessary. It is not clear what Jones believes the woman's objectives should be or how state intervention through guardianship will actually help achieve those objectives.[234] To the extent that Jones would appoint a guardian, she believes such women would only need a limited guardianship.[235] She

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229 *See supra* note 94.

230 Roehl et al., *supra* note 20, at 81.

231 For instance, children are appointed guardians ad litem, and the elderly who have diminished capacity are also appointed guardians. Rubinson, *supra* note 137, at 124-27. For further discussion of diminished capacity determinations, see *supra* Part II.C.2.

232 Jones, *supra* note 5, at 610, 612-13.

233 *Id.* at 627.

234 *Id.* at 627-28.

235 *Id.* at 643. Moreover, Jones would require petitions for appointment of a guardian to include more than conclusory statements that a woman is battered and at risk for physical injury. *Id.* at 648-49. In addition, to appoint a guardian, the court would need to find that the woman is so coercively controlled that she is in danger of serious physical injury as a result of her incapacitation and that she is unaware of her condition and unable to use available resources. *Id.* Therefore, a coercively-controlled battered woman is defined both by the effect of abuse on her ability to protect herself and the control of her abuser. *Id.* at 651. Importantly, Jones recognizes

believes that state intervention should limit control, not the choices of autonomous individuals.[236] Despite her stark recommendations, Jones cautions that "there is an inherent tension in every guardianship proceeding between protecting an individual and preserving her autonomy,"[237] and therefore, it is possible that the guardian who believes he is protecting the woman will in fact infringe too greatly and detrimentally on her autonomy.[238]

The scholarship on capacity undermines Jones' argument that some women subjected to abuse should have the state remove their decisionmaking autonomy. As discussed *supra*, factors going to a diminished capacity decision involve the ability to understand information and articulate bases for decisions.[239] The research shows that women are taking actions all the time in response to the violence.[240] Therefore, a diminished capacity ruling should not be the result of a disagreement of methods, such as the state disagreeing with the action she is taking because it is not the action the state wants her to take. A diminished capacity decision must be based on a determination that the woman has failed to understand information relating to the abuse or has failed to articulate the bases for her decision on how to respond to the abuse. Moreover, even if she were found to suffer from diminished capacity, a rare and extreme decision, the presumption for attorney-client relations is that they should maintain a normal relationship. If instead, the extreme action is taken and a guardian is appointed, even for a limited time, the woman subjected to abuse loses her autonomy and is labeled as incompetent simply because she chose to deal with the violence differently than the state would like her to. Such an intervention by the state no doubt negatively, and unjustifiably, impacts the woman's dignity.

Throughout society's response to domestic violence, systems have been created that override a woman's choices based on a concern that the woman is so controlled by her abuser she is not able to make her own choice. This is reflected in policies like mandatory arrest policies,[241] no-drop prosecutions,[242] and courts' refusal to permit a

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that "[a] battered woman who fails to flee from her abuser because it is dangerous to leave or because she has nowhere to go is not incapacitated and does not need a guardian: she needs resources." *Id.*

236 *Id.* at 645-47.

237 *Id.* at 643.

238 *Id.* at 643-45.

239 *See supra* text accompanying note 197.

240 *See supra* text accompanying notes 215-20; *see also* Michelle Fugate et al., *Barriers to Domestic Violence Help Seeking: Implications for Intervention*, 11 VIOLENCE AGAINST WOMEN 290, 307 (2005) ("Most survivors of abuse are resilient and strategic, and they actively pursue safety for themselves and their children.").

241 Goodmark, *supra* note 131; Miccio, *supra* note 135.

242 Goodmark, *supra* note 131; Miccio, *supra* note 135.

petitioner to dismiss her protective order case.[243] Because the policies have been applied across the board, without a true inquiry into whether or not the woman is being coercively controlled in such a way that absolutely extinguishes any of her decisionmaking ability, the effect of such policies is to deny women's dignity by removing any decisionmaking authority from women.

To make a decision that one suffers from diminished capacity is difficult, complex and nuanced.[244] For a court or a society to remove a person's decisionmaking ability limits that person's dignity and cannot be done without careful attention to the actual person's capacity for decisionmaking.[245] Absent extreme circumstances, society should follow the woman's decision about how best to address the violence in her life. If during the administration of the LAP protocol, the woman tells the police officer she does not want to be assessed, learn her danger score, talk to the hotline or access services, the officer should attend to her decision. There should be no coercion. Rather, the officer should present these options thoughtfully as options to be considered and weighed by her through the lens of her life and her understanding of the benefits and disadvantages of each option.[246]

Women subjected to domestic violence are active decisionmakers. As decisionmakers, women can rationally decide not to call the hotline or access services. Their decisionmaking involves weighing options against consequences in their full lives, as opposed to simply accepting that accessing services will reduce homicide risk, which the state would have as her one and only goal. Such weighing of options is reflected in one service provider's review of how the lethality screen impacted women's accessing of the provider's services. One year of data showed that of the 354 victims of domestic violence screened, only two percent wanted services.[247] The service provider learned that their initial belief that telling victims that they scored at high risk of homicide would compel them to enroll in services or separate from their abuser was wrong.[248] Instead, the organization found that the woman's decisionmaking around addressing the violence was coupled with decisionmaking around her economic situation, the children's situation,

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243 Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 41 (2007).

244 *See, e.g.*, Margulies, *supra* note 197, at 1082 ("Capacity is the black hole of legal ethics."); Rubinson, *supra* note 137, at 127 ("[I]nquiries concerning competence are intensely contextual and thus not susceptible to a 'one size fits all' definition.").

245 Rubinson, *supra* note 137, at 127.

246 For further discussion of this proposal, see *infra* Part IV.C.

247 Yeager, Roundtable Remarks, *supra* note 118. Interestingly, without providing more information, the organization stated that many of the women screened had not been in services before. *Id.*

248 *Id.*

and many other factors.[249] Also, the organization saw that women were taking their time making their next move after being assessed for homicide risk and speaking with the hotline.[250] For instance, the organization found that women would come in for further services two weeks after initially calling the hotline because they first had to create a safety plan for themselves.[251] The organization found that women's actions after receiving the danger assessment information depends on what their situation is, whether they are in crisis or not and what their goals are regarding the relationship.[252] Often what women want is a relationship that is not violent, not necessarily to end the relationship altogether.[253] Learning from its experience, the organization is figuring out how to make their services available to women when they are ready to access them.[254]

In addition to the above concerns, there are some benefits from the lethality screens in furthering women's dignity. For instance, if used properly, the DA and LAP can provide helpful information. The calendar portion of the tool can help women ensure that they identify and capture all of the instances of abuse.[255] Civil lawyers representing women subjected to abuse similarly see some benefits in using the danger assessment tool when interviewing potential clients for fact gathering.[256] In addition, the attorney and client's discussion of the resulting lethality risk score can also result in helpful fact gathering for the woman's pursuit of legal relief.[257]

The interchange regarding the assessment score and the present risk factors provides an excellent opportunity for the woman to reflect on her goals for her relationship and make considered decisions regarding future actions.[258] If the woman chooses to be assessed, her knowledge of her risk for homicide can help her decisionmaking should the violence escalate later.[259] If screened, women subjected to abuse could benefit from a counseling session that involves a discussion of the risk factors in light of the woman's objectives of how to address the

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249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 Campbell, *Prediction of Homicide*, *supra* note 6, at 96.

256 Interview with Attorney, *supra* note 76 (stating that the lethality screen's questions of whether the woman has ever been choked, for example, have led to important additional information for women's legal cases).

257 Judith A. Wolfer, Attorney, Domestic Violence Legal Clinic, House of Ruth, Remarks at Roundtable on Danger Assessment Tool, *supra* note 1 [hereinafter Wolfer, Roundtable Remarks] (notes on file with *Cardozo Law Review*).

258 *Id.*

259 Campbell, *Prediction of Homicide*, *supra* note 6, at 100 (noting that violence usually does escalate in cases of "heightened risk").

violence in her life and appropriately generates and evaluates various means by which the woman could achieve her objectives. In addition, the DA and LAP can serve as useful tools in support of the decisions made by women subjected to abuse.

One legal services attorney stated that the women she assesses are coming in because they recognize they are at risk and have chosen to respond with legal action.[260] Therefore, these women often have given considerable thought to the pros and cons of such a decision, and the assessment can often be a helpful tool in her ability to achieve her goal by providing additional information about the abuse. In addition, one woman subjected to abuse, Dawn, says that when she wanted to use the criminal justice system to incarcerate her abuser, the DA was effective in helping her to do so.[261] As Dawn states, the assessment "saved my life" because it provided her with that extra bit of information to confirm her decision to proceed and cooperate with the prosecution of her ex-boyfriend.[262]

The discussion of domestic violence and risk factors also can serve as a meaningful educational tool for system actors regarding the risk of homicide that can increase women's dignity. A survey of police regarding the LAP and their more involved role[263] indicated their satisfaction with this tool.[264] They relay that the tool has assisted the officers to better understand the risk of domestic violence.[265] In addition, judges have reported that the DA can be a vehicle for understanding more about the domestic violence in a relationship, especially when the petitioner in a civil protective order matter is pro se.[266] Although these benefits are important, standing alone they do not justify the use of the LAP. Unlike system actors, however, women subjected to abuse have not yet been systematically surveyed for their opinion on the effectiveness of the DA and the LAP.

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260 Wolfer, Roundtable Remarks, *supra* note 257.

261 Interview with Dawn (Feb. 13, 2009) (last name withheld for privacy purposes) (notes on file with *Cardozo Law Review*).

262 *Id.* It should be noted that the use of danger assessment screens within an attorney-client relationship seems less coercive than their use in crisis settings of police officers responding to 911 calls.

263 A Washington Post article on the DA reported:

> Under the new approach . . . police who answer domestic 911 calls take a far more involved role with the victims they encounter at the scene. When a case shows a high risk of lethality, police talk to the victim about the danger, phone a counselor immediately and encourage the victim to talk. Since early last year, 900 people have done so.

St. George, *supra* note 9.

264 LETHALITY ASSESSMENT PROGRAM FOR FIRST RESPONDERS, *supra* note 57, at 10.

265 *Id.* ("One [law enforcement officer] noted that it made officers more conscious and thoughtful that 'a person is at peril.'").

266 Roundtable on Danger Assessment Tool, *supra* note 1.

If the LAP is used as a source of information and a tool by which the woman can achieve her goals, it has the potential to enhance her dignity by respecting her choices regarding personal development, her intimate life, and her body and freedom of movement. On the other hand, if the LAP is seen as a tool to raise women's consciousness because the LAP negatively judges women's responses to domestic violence, such use is unfounded and serves to undermine women's dignity.

C. *A Question of Goals: How Limiting Women's Objectives in their Relationships Impacts Dignity*

Another major weakness of the danger assessment and lethality assessment program is that it directs the woman subjected to abuse to make decisions about her life based on only one data point—risk for future homicide—and only one objective—eradicating the risk. What the assessments do not provide for is consideration of the woman's varying objectives regarding her life, as related to economic resources, caretaking of her children, loving her partner, and so on.[267] Under the danger assessment tool, the state's priority becomes saving the woman by decreasing the likelihood of homicide, even if her other goals suffer as a result. In the end, as recognized by Campbell, "[t]he risk is that the clinician becomes paternalistic and prescribes certain courses of action that have not been shown to be protective. Or that the victim, even when presented with the evidence of high risk, chooses not to take action to protect her—or himself."[268] Despite the fact that the assessment creator recognizes this risk, the current protocol for the LAP, for instance, does not provide good guidance as to what is paternalistic and how paternalism should be avoided.[269]

To avoid coerciveness, the protocol suggests that the assessor modify his or her "assertiveness in safety planning, restricting but not eliminating choices presented to victims."[270] While somewhat helpful in principle, such counseling remains coercive because it suggests "in

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267 Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19-21 (1991) (observing that women's response to violence in a relationship relies on numerous goals: their experience of the violence, economic security, love of partner, and view of life outside of the relationship, among others).

268 Campbell, *Prediction of Homicide*, *supra* note 6, at 100.

269 Paternalism is the system or practice of controlling or governing others in a well-intentioned, yet intrustive, manner. Campbell states that prescribing a course of conduct that is not shown to be protective is paternalistic. Such conduct may or may not be paternalistic, but it certainly is the wrong prescription. *See id.* at 100. Another example Campbell provides of paternalism is when the clinician tells a woman what to do, but the woman does not do it. *Id.* Again, this may demonstrate that it was paternalistic, but in and of itself, it is not paternalism.

270 *Id.*

situations of highest risk, a practitioner could present choices in terms of what might be done but not accept doing nothing."[271] Accordingly, the protocol directs the assessor to neither identify nor permit the woman to identify every available option to address the violence in her relationship, such as not separating from her abuser. In addition, the protocol asserts that the counselor should not be transparent about the limitations of the danger assessment tool. The protocol mentions that accessing outside resources, like the National Domestic Violence Hotline, can be helpful to persuade an unwilling victim to separate from her abuser.[272]

The state should not interfere with a woman's dignity by using the DA or LAP to coercively limit how she may respond to abuse. Women should be able to pursue their objectives in their relationships. The decision by the woman subjected to abuse regarding how she will address the violence in her life is a basic decision about her intimate life, her personal development and her body and freedom of movement. She should have "the right to define [her] own concept of existence, of meaning"[273] under the right to liberty. As stated earlier, the state should not use the DA or LAP to infringe on a woman's dignity based on the state's interest in preserving life except in the very rare case where the woman shows a lack of competency such that the state is filling a *parens patriae* role. If the state must interfere with this right, it should be through the least restrictive means such as woman-centered counseling, following informed consent and transparency, as discussed below in Part IV.

D. *A Question of Experience: How Measuring for Homicide as the Only Form of Domestic Violence Impacts Dignity*

Given their limited scope, relying on the DA and LAP given their limited scope also serves to undermine women's dignity in decisionmaking. As stated above, the DA and LAP measure only the future risk of homicide and not the risk of all forms of domestic violence. Any emphasis on the lethality screens in evaluating and determining the woman's and society's response to domestic violence must be with the understanding of the limitations of what the screens are measuring.

The percentage of domestic violence that results in homicide is a small fraction of the total incidence of domestic violence in the United States. According to a 2008 study issued by the Centers for Disease Control, 23.6% of all U.S. women (approximately 36,733,948 women)

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271 *Id.*

272 *Id.*

273 Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992).

and 11.5% of all U.S. men (approximately 17,405,736, men) were subjected to domestic violence during their lives.[274] The CDC study estimated that "1,200 women are killed and 2 million injured in domestic violence annually."[275]

If the tool continues its reach into all areas of the systemic response to domestic violence, both legal and nonlegal, we will have built an entire intervention system that is based on an important, but very small, proportion of domestic violence victims: those at serious risk of homicide. If the DA and LAP become the definers of domestic violence, only those women at high risk would be deemed worthy of allocated domestic violence resources.

The problematic result is a conflation of domestic violence that results in homicide and all other forms of domestic violence. For instance, a legal service provider's website has three links under the heading "What is Domestic Violence." One of the links is to a danger assessment screen without any discussion that the DA was designed to measure only the likelihood that one's domestic violence will end in a homicide.[276] I have already written extensively elsewhere on the negative consequences of the conflation of severe physical violence with "domestic violence."[277] With a pervasive use of the DA and LAP, the likelihood increases that the system will define the risk of homicide as the only true form of domestic violence.

Already, the conflation has impacted attorney-client relations. In legal services offices where the attorneys are required to conduct the lethality screen during intake, attorneys state that there is no transparency regarding the narrowness of the domestic violence being screened before the test is conducted.[278] Attorneys often fail to disclose the score of the assessment because they worry that placing a number on a woman's experience of a broad range of domestic violence will invalidate how she experiences her abuse.[279] For instance, if the woman is subjected to emotional and psychological abuse, but little physical abuse, she may end up with a low danger assessment score because she

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274 Will Dunham, *Quarter of U.S. Women Suffer Domestic Violence: CDC*, REUTERS, Feb. 7, 2008, http://www.reuters.com/article/idUSN0737896320080207. Approximate population totals are based on total United States population in 2009 (307,006,550) with 50.7% female (155,652,321) and 49.3% male (151,354,229). *See State and County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Oct. 29, 2010).

275 *Id.*

276 *Get Help*, HOUSE OF RUTH MD., http://www.hruth.org/get-help.asp (last visited Oct. 29, 2010). Also under the heading are links regarding domestic violence dynamics and a warning signs document, both of which include a broader range of domestic violence. *Id.*

277 Johnson, *supra* note 3.

278 Interview with Attorney, *supra* note 76. In addition, the attorney told me that the attorney did not receive training for how to provide the final score to the potential clients and what to do with the information. *Id.*

279 *Id.*

does not face a high risk of homicide. Nonetheless, she is and feels that she is subjected to domestic violence.[280]

The conflation of domestic violence and domestic violence that has a high risk of homicide also raises the concern that women subjected to other forms of abuse will be denied their experience of abuse as well as access to domestic violence resources. The DA was not created to measure the risk of future reassault.[281] Nor was it created to identify the risk of sexual assault, emotional abuse, psychological abuse or economic abuse.[282] Therefore, as system actors, including domestic violence advocates, police, prosecutors, petitioners' attorneys and judges, look to the DA and the LAP to identify victims of domestic violence, they need to be clear that these assessments only measure the risk of homicide. Of the population of women subjected to domestic violence in all its forms, as stated above, homicide represents only a very, very small portion of those women.[283] A domestic violence definition based on homicide risks, therefore, limits domestic violence to murder and ignores all other social and political aspects—most importantly the many pervasive or severe ways power and control are exerted.[284] While preventing homicide is a societal goal, systems should not divert their domestic violence resources to only those women subjected to domestic violence who are the highest risk of homicide. The system actors should recognize that women subjected to abuse but not subjected to homicide risk are still subjected to domestic violence and, therefore, should be listened to regarding their stories of abuse and provided access to helpful services.[285] With the pervasive use of the

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280 *See generally* Johnson, *supra* note 3, at 1115-24.

281 That being said, the DA has been tested for effectiveness in predicting re-assault. The results of those tests vary in terms of its effectiveness in prediction, and at least one study showed that women's own predictions were more reliable. *See supra* text accompanying notes 43-53.

282 *Id.*

283 Campbell, *supra* note 6, at 90 ("[H]omicide is rarer than other forms of violence. Spousal homicide is even rarer and therefore even more difficult to predict.").

284 EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (2007) (examining the coercive control involved in domestic violence); Johnson, *supra* note 3, at 1110-15 (citing, inter alia, Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 481-82 (2008) (identifying women more often harmed than men by "Coercive Controlling Violence," a form of physical and emotional violence characterized by power and control)).

285 I am not advocating that all domestic violence services are necessarily in the best interests of women subjected to abuse, as discussed further *infra* Part III.E. Rather, I make this point here to underscore the limited population for whom domestic violence resources are being made available. Fortunately, there are some exceptions to service providers providing resources only to those screened at high risk. In a recent report regarding a very short new lethality assessment screen created for emergency departments, the researchers state explicitly that those women who do not meet the criteria for high risk should be told that they face risk of future violence and should be treated as they would have been without the screening protocol and "receive some minimum amount of information (e.g., [domestic violence] resource material, hotline phone

danger assessment tool as the litmus test for whether someone has been subjected to domestic violence, there is a concern that the woman's entire experience may be discounted, affecting her dignity.

E. *A Question of Means: How "Strongly Encouraging" Women to Enter Domestic Violence Services as the Only Way to Address Domestic Violence Impacts Dignity*

Implicit in the LAP is the belief that steering women to services, such as shelters, counseling, hotlines and legal services, after being screened will decrease homicides among women subjected to domestic violence.[286] Although one would expect domestic violence services to decrease homicide and other abuse, the research does not support this conclusion in all situations.[287] In fact, some resources, like shelters, may actually increase the woman's risk of violence. As one scholar noted, this is because:

> The risk of intimate partner homicide is highest when a victim of domestic abuse tries to leave the relationship. Such a *retaliation effect* or backlash may also be triggered by an intervention—such as a restraining order, arrest, or shelter protection—that angers or threatens the abuser without effectively reducing contact with the victim.[288]

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numbers)." Carolyn Snider et al., *Intimate Partner Violence: Development of a Brief Risk Assessment for the Emergency Department*, 16 ACAD. EMERGENCY MED. 1208, 1213 (2009).

286 Unfortunately, in the LAP literature there is no published authority to support the contention that services will decrease the likelihood of homicide for all women. The literature on lethality screens does rely on published studies regarding the effectiveness of civil protective orders and arrests. *See id.* at 1213 nn.25-28. A newly-created, much shorter screen developed for use in emergency departments introduces a more individualized understanding of how a woman subjected to abuse might respond to domestic violence. *Id.* at 1213. In this report, the health care workers should:

> [O]ffer to call a social worker or to help connect the patient with an agency that provides services for IPV victims who can discuss with the patient options for enhancing her safety. These options will depend on whether the victim is committed to staying in the relationship with her abusive partner, or would like to leave, as well as the patient's resources and family responsibilities.

Id. A 2003 article in JAMA stated that although "[s]creening instruments are available to identify women who have been abused . . . no studies to date have evaluated the effectiveness of screening to reduce violence or to improve women's health. In addition, data about the potential harms associated with screening are lacking." C. Nadine Wathen & Harriet L. MacMillan, *Interventions for Violence Against Women: Scientific Review*, 289 J. AM. MED. ASS'N 589, 598 (2003).

287 Wathen & MacMillan, *supra* note 286, at 598 (finding after a literature review that there is no evidence to "evaluate the effectiveness of shelter stay as a means of decreasing the incidence of violence"). This same article did identify a 2002 study as "fair evidence that those who received a specific program of advocacy counseling services reported a decreased rate of reabuse and an improved quality of life during the subsequent 2 years." *Id.* For more information on this study, see *infra* note 306.

288 Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, NAT'L INST. JUST. J.,

A report published in the National Institute for Justice Journal found that domestic violence hotlines, along with domestic violence units in police departments and prosecutors' offices "appear to be associated with retaliation by abusive partners."[289] Although such resources are clearly aimed at assisting those subjected to domestic violence and decreasing the abuse, they may actually have the opposite effect.[290] Moreover, although reducing the exposure of women to the persons committing the abuse can be critical for the safety of women subjected to severe violence, such exposure reduction is difficult to achieve.[291] Services that only slightly reduce a woman's exposure to the person committing the abuse or that fail to completely reduce exposure "can be worse than doing nothing at all for persons in severely violent relationships."[292] The report concludes that "[t]he fact that retaliation occurs doesn't mean that prevention strategies are a bad idea. Instead, prevention should be tailored to individual needs."[293] Given the findings of the above report, it perhaps makes sense that another study found that "[d]espite protective actions, thirty-one percent of the women were physically abused between the baseline and followup interviews, a time period of [five] months to more than a year."[294] Even with women's actions to access services, such services are not necessarily effective in terms of creating a violence-free life.

Historically, the impact of domestic violence services on reducing violence or otherwise improving a woman's life has been under-researched.[295] Regarding community-wide interventions, such as shelters, there were similarly no definitive studies of shelter effectiveness because there was no agreement among researchers as to methods by which women could achieve a violence-free life—was it empowering women and supporting their decisionmaking or was it separation from the abuser?[296] There was no clear way to measure empowerment, despite it being the common method used by shelters for obtaining the goal of being violence-free.[297] Moreover, there were indications that women's subsequent living arrangements apart from

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Nov. 2003, at 20, 23, *available at* http://www.ncjrs.gov/pdffiles1/jr000250f.pdf; *see also* Block, *supra* note 215, at 6. Although leaving can cease the abuse, when it does not, the continuing abuse is often more severe than if there had been no attempt to leave. *Id.* The study found that "[h]er attempt to leave was the precipitating factor in [forty-five] percent of the murders of a woman by a man." *Id.*

289 Dugan, *supra* note 288, at 24.

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.*

294 Roehl et al., The RAVE Study, *supra* note 70, at 14.

295 NAT'L RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 107 (Nancy A. Crowell & Ann Wolbert Burgess eds., 1996) (discussing Tutty study of shelters).

296 *Id.* at 104.

297 *Id.*

their batterers were not an effective measurement of the ultimate goal of a violence-free life because violence still continued even with separation.[298]

Some studies, however, show that there were positive effects from shelter stays.[299] For instance, one study showed that women suffered from lower levels of "depression, fear and anxiety, and emotional attachment to batterers and increased feelings of personal control overall" and "overall higher quality of life, and increased satisfaction with social supports."[300] Another study showed there was a decrease of violence for some women if they took active control of their lives.[301]

A study of professional services for abused women found that the services were most effective if they offered woman-centered services that included active listening.[302] Directive services that told the women they were in danger were not effective.[303] The most helpful approaches by service providers for women subjected to emotional, sexual and physical abuse included listening respectfully, taking the woman seriously and believing her story.[304] The most unhelpful responses were giving unsolicited advice, questioning her story, and criticizing her decisions.[305] Responses that were ranked as helpful, but less so,

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298 *Id.* at 105.

299 *Id.* at 105-06.

300 *Id.*

301 *Id.* at 106.

302 Bonita Hamilton & John Coates, *Perceived Helpfulness and Use of Professional Services by Abused Women*, 8 J. FAM. VIOLENCE 313, 319 (1993).

303 *Id.*

304 Based on the number of women reporting, as indicated in parentheses, this study indicated the following as the most helpful approaches for women subjected to emotional abuse: listened respectfully and took me seriously (21); believed my story (not identified); helped me see my strengths (16); helped me see how I'd been losing self-confidence (14); helped me plan for change (13); helped me understand the effects on the children (10); directed me to someone who did help me (7); other (3). *Id.* at 319. For women subjected to sexual abuse, the list is as follows: listened respectfully and took me seriously (19); believed my story (20); let me know that I am not alone (19); recognized the impact it had on me (19); helped me see my strengths (13); helped me plan for change (6); other (5). *Id.* For women subjected to physical abuse, the following approaches were listed as most helpful: listened respectfully and took me seriously (17); believed my story (17); helped me understand the effects on the children (10); asked me directly if I am being physically hurt (12); helped me see that I was in danger (10); helped me figure out ways to make my situation safer (10); gave me advice that I needed (9); helped me to see ways to end the abuse in the future (8); directed me to someone who did help me (7); other (not identified). *Id.* One difficulty with this study is that it does not define what the definition of "most helpful" is. And of course, because the goal of the LAP is to decrease homicides, it is not clear that the LAP's goals match up with this study's goals of what is the most helpful to women subjected to abuse.

305 Women subjected to emotional abuse identified the following responses as the most unhelpful: gave me advice which I did not wish to follow (24); did not tell me of any other agency or professional service that could help me (19); did not listen carefully (16); did not have an accepting attitude (14); other (17). *Id.* at 320. Women subjected to sexual abuse identified the following unhelpful responses: questioned my story (27); denied the impact it had on my life (25); suggested I must have wanted it (16); blamed me for what happened (11); other (22). *Id.* And women subjected to physical abuse identified the following approaches as unhelpful:

included helping the woman plan for change, helping her see she was in danger, and directing her to someone who did help her.[306]

These results raise some suggestions for the LAP program and its protocol. A promise of the LAP program is its potential to ratify women's concerns about their risk of future harm and to connect women to services, like a hotline, where someone could listen nonjudgmentally without giving unwanted advice.

On the other hand, these results raise additional concerns for the LAP program and its protocol. When law enforcement officers "strongly encourage" women to speak to the hotline as part of the LAP, the officers' actions could be seen as judgmental and giving unsolicited advice. In addition, the LAP program does not employ the most helpful strategy of listening respectfully.

A 2001 study showed that separation was not the best reducer of domestic violence. Although researchers started with this assumption, they realized their assumption was false.[307] The study results did not fully support the theory that limiting exposure to violent intimates reduces partner homicide.[308] Some findings showed that resources focused on separation "may have lethal consequences."[309]

Accordingly, the 2001 study found that given the complex reality of people's lives, especially those who share children or property, intimate relationships are difficult to end without some contact.[310] When services focus only on the strategy of exposure reduction, they are out of step with the complicated reality of these relationships and their approach can be more dangerous than the status quo.[311] A 2005 study showed that one reason women do not access domestic violence

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criticized me for staying (29); suggested my partner and I get counseling together (22); went along with me when I said it wasn't that serious (16); questioned the truth of my story (15); helped me see that I was in danger (10); other (6). *Id.*

306 A similar study showed that when advocates worked with women subjected to abuse, helped them assess their personal needs and goals, and assisted them in accessing resources such as "housing, employment, legal assistance, transportation, child care, health care, counseling for the children, and social support," these women reported less physical violence, less depression, and a higher quality of life over a two year period than women who were not paired with an advocate. Epstein, *supra* note 176, at 19-20. And women paired with an advocate who wished to end the relationship with their abusers were more effective at doing so. *Id.* at 20.

307 Laura Dugan et al., Exposure Reduction or Backlash? The Effects of Domestic Violence Resources on Intimate Partner Homicide, Final Report 35 (Jan. 12, 2001) (unpublished research report), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/186194.pdf.

308 *Id.*

309 *Id.*

310 *Id.* at 36-37.

311 *Id.* at 37; *see also* LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 112-14 (2008) (arguing for a survivor-defined approach to domestic violence services that would not require survivors to separate from their abusers by changing funding criteria, adopting broader views of effective services, gaining better understanding of diverse survivors' goals, and enhancing independent judgment by advocates).

services is because they did not want to end their relationships and believed the services would require them to do so.[312] Given that the LAP's main goal is to connect women in crisis to hotlines as a means to reduce the risk of homicide, an important question that this approach raises is what strategy the hotline employs. If the hotline is solely focused on separation, it may not always be the safest approach for the woman subjected to abuse.

The concerns regarding the LAP program mirror existing critiques of the legal system's response to domestic violence. The expansive use of danger assessments in the legal system makes it a system that prioritizes one view of what the goal should be and one way to do it: the goal of saving a woman's life by raising her consciousness and sending her to services. What the current pervasive use of danger assessment does not do is focus on how to promote a woman's goals within her relationship and around the violence, including whether to rearrange her relationship, leave or do something else altogether. In addition, the expansive use of danger assessments highlights the need to ensure that any use of such assessments is done in a woman-centered, woman-driven, dignity-enhancing manner. This tool could be one way of providing information that can inform and evaluate options rather than limiting options and steering decisionmaking to the one "right" answer predetermined by the legal system. The expansive use of the DA and LAP shows the danger of these instruments being used to further coerce women subjected to abuse into domestic violence services that may not help achieve women's goals and may in fact decrease their safety.

IV. RESTRIKING THE BALANCE

To better address domestic violence experienced by women, society needs to ensure that the pursuit of one goal—the reduction of homicide—does not undermine other goals—such as the respect necessary for the woman's dignity and autonomy. In order to strike a better balance, the legal system needs to maintain the strengths of the danger assessment tool and the lethality assessment screening program while minimizing the unintended consequences in the area of a woman's dignity and autonomy.

Our society and legal system should consider some fundamental issues as it makes decisions about its use of danger assessments. First, we should consider the manner in which the state and our legal system support, or at the very least do not undermine, women's dignity.

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312 Fugate et al., *supra* note 240, at 302-03. On the other hand, another barrier found for women accessing domestic violence services was lack of awareness of the services. *Id.* at 305.

Second, we should consider the manner in which the state and our legal system support informed decisionmaking by women subjected to domestic violence. Third, we should consider the manner in which the state and our legal system limit or decrease any coerciveness that could be experienced by women subjected to abuse when assessed by the lethality screens. Fourth, we should consider the manner in which the state and our legal system ensure that the lethality screens are used only in appropriate contexts and only as one of many options available to women seeking advice. Fifth, we should consider the manner in which the state and our legal system ensure that the lethality screens are used only with women who consent to the screening after understanding its strengths and weaknesses.

Respect for women's dignity is necessary to effectuate the greatest level of satisfaction for women subjected to domestic violence. As a bottom line, the legal system should be increasing women's dignity—or at the very least, not decreasing it. To this important end, the legal system should be transparent to women regarding its use of danger assessments and use the danger assessments only in the context of determining women's goals and the generation and evaluation of options relating to her goals. Feminists early on in the battered women's movement focused on the importance of autonomy and self-determination in order to improve women's lives despite the domestic violence.[313] Such a focus alleviated a woman's feeling of isolation and improved her ability to access the resources she wanted to access, thereby improving her quality of life.[314] However, with the influx of state intervention and increased funding streams, this women-centered focus has not always been present.[315] Respecting women's dignity and autonomy around responding to domestic violence is critical to decreasing abuse.[316] To evaluate the LAP and its use of the DA, our evaluation needs to be re-centered on women's dignity.

This Article seeks to strike a new balance between the state's interest in preserving life and the woman's interest in dignity. Much thought has already been given to a balance of liberty, dignity and safety in other areas, such as health law. Scholarship and the law in those areas provide welcome guidance to the domestic violence arena and the creation of principles for state and other intervention. Based on that work, this Article proposes some changes to the existing use of the LAP.

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313 Johnson, *supra* note 3, at 1125-26.

314 Angela Moe Wan, *Battered Women in the Restraining Order Process: Observations in a Court Advocacy Program*, 6 VIOLENCE AGAINST WOMEN 606, 611 (2000).

315 Goodmark, *supra* note 131, at 9-10 (discussing advocates' support for mandatory arrest laws and increased funding for state mandatory intervention in domestic violence).

316 Johnson, *supra* note 3, at 1127-28.

First, this Article suggests that there be full transparency to women subjected to abuse and legal system actors about the LAP's benefits and disadvantages. Second, this Article suggests that to balance the state's interest of preserving life—and any *parens patriae* concerns it may have—that the LAP administrators ensure they obtain the woman's informed consent to conduct the screening or permit the woman to decline the screen. Third, this Article suggests that to decrease the possibility of coercion when the LAP administrator is "strongly encouraging" the woman to talk to the hotline or otherwise attend domestic violence services, that the LAP administrator engage in woman-centered counseling, based on "client-centered counseling," as defined by clinical legal education scholarship. To this end, the administrator would learn about the woman's actual goals in her relationship with the person abusing her and there could be an airing of not only options, of which speaking to the hotline is one option, but also the pros and cons of those options, with the resulting decision made by the woman.

A. *Transparency*

The first recommendation to increase women's dignity is to make the assessment transparent both to women and legal system actors. For instance, before the LAP is administered to a woman subjected to abuse, the administrator should discuss with the woman that the danger assessment tool only measures the risk of homicide and not any other form of domestic violence. Similarly, this transparency must be afforded to the institutional actors, such as courts, police, prosecutors, probation and parole officers, attorneys and domestic violence advocates to ensure that the danger assessment score does not become the benchmark for evaluating whether a woman was subjected to domestic violence nor a default, unreflective litmus test for who should be provided scarce resources, such as shelter beds, legal services and counseling services. Because the DA and the LAP were not created to measure the risk of future violence that does not result in homicide or other nonphysical forms of abuse, all system actors need to understand the incredibly narrow information that it provides.

In addition, the administrator should disclose that the DA's reliability studies are mixed.[317] As Websdale has stated, domestic violence risk assessment is a young science. And although the DA has been found to have greater reliability than other assessment tools, its

317 *See supra* Parts I.B. and III.A.

reliability is not unchallenged.[318] Moreover, the administrator should disclose that the lethality assessment tool used in the LAP has not been validated at all yet.[319]

In addition, in order to respect women's dignity, system actors need to understand the limits on the reliability of the DA and LAP. For instance, such actors need to understand that women's prediction of risk is almost as reliable as the current danger assessment tool, and because the LAP has yet to be studied, women's prediction is more reliable than the LAP. This information needs to be shared with women who interact with the system so that they have the necessary, relevant information to weigh the consequences of proposed actions to reach their objectives.

B. *Informed Consent*

The second recommendation to increase women's dignity is to use health law's existing balance between the state's and a patient's interests to encourage a better balance in the justice and legal systems' response to domestic violence. Specifically, the literature regarding patient consent and refusal of medical treatment laws is helpful to this inquiry. Before providing any medical treatment, a medical provider must obtain consent from a patient who has been provided all relevant information.[320]

Because the danger assessment tool was created in the health care context, the doctrine of informed consent seems relevant to its administration. Under this doctrine, no assessor should conduct the danger assessment or lethality screen before providing full information to the woman subjected to abuse about the potential consequences of the assessment and obtaining her written consent to proceed with the screening. In addition to the transparency issues discussed above, some additional consequences include that the information provided and resulting score will not be subject to confidentiality, that the resulting score may be used to define her experience of the violence rather than her more complete story of the abuse to which she has been subjected, and that legal and other domestic violence resources may be distributed based on her score.

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318 *See supra* Parts I.B. and III.A.

319 *See supra* Part III.A.

320 *See supra* note 182 and accompanying text.

C. *Woman-Centered Counseling*

The third recommendation to increase women's dignity is that all administrators of the lethality assessment tool engage in a decisionmaking model similar to client-centered counseling. Because women subjected to abuse are not the clients of the LAP first responders, I will term the decisionmaking process "woman-centered counseling." This counseling process will evaluate whether or not the lethality screen and protocol are one option of many that could further the woman's goals in addressing the violence in her relationship. Although "client-centered counseling" comes from lawyering scholarship and thus focuses on the attorney-client relationship,[321] I believe its process for respecting dignity and autonomy can improve the implementation of the danger assessment and lethality screen programs and the assessor-assessee relationship. A central tenet of client-centeredness is that one "should generally afford clients the opportunity to make decisions."[322] As Binder and his co-authors state, "[c]lients should have primary decisionmaking power in part because of the simple truth that *problems are theirs*" and not the lawyer's.[323] Accordingly, the "clients' subjective assessments of likely consequences lie at the heart of determining maximum client satisfaction" with the decisions with which they will have to live.[324] Client-centered counseling provides the client with a "process of identifying and evaluating options and likely alternatives."[325] Put another way by scholars who call for "engaged client-centeredness," the lawyer's job is to help the client achieve her goal. If providing advice, that advice needs to be grounded in the client's values and provided

321 DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 272 (2d ed. 2004) (observing that client-centered counseling is facilitated client decisionmaking such that attorney finds out, pays attention to and is controlled by client objectives, desires and needs, and client generates potential solutions and consequences); STEPHEN ELLMAN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 74 (2009) (preferring the new term "engaged client-centered counseling"). There is a similar counseling structure in the medical field called patient-centered counseling. Elizabeth Tobin Tyler, *Allies Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Social Inequality*, 11 J. HEALTH CARE L. & POL'Y 249, 267-68 (2008) ("Like client-centered counseling and narrative theory in law, a patient-centered, narrative approach conceives medicine and the physician's role in a broader context," including all facets of the patient's situation and the physician's awareness of her own norms and values, in order to treat patients "as whole human beings.").

322 BINDER ET AL., *supra* note 321, at 272.

323 *Id.*

324 *Id.* at 273.

325 *Id.* at 285.

along with a full context within which the client can evaluate the value of the opinion.[326]

To effectuate these goals, a counselor needs to elicit information and, using empathic, active listening, understand the client's objectives so that any alternatives for potential solutions can be evaluated according to these objectives.[327] Then, along with the client, the counselor needs to brainstorm potential solutions and the possible consequences that might result from the various solutions.[328] All of the client's experiences, non-legal and legal concerns, need to be considered.[329] Then, the bases for the client's predictions need to be understood on the route to the client making a well-informed decision.[330] Here, the lawyer "does not just accept the client's choice without probing. She asks questions and seeks the client's articulation of her rationale."[331] The lawyer's role of facilitating client decisionmaking means that the lawyer needs to take time and listen.[332] Without doing so, "engaged client-centered counseling is difficult to conduct, and may present risks of judgmentalness and domination of some clients."[333] Importantly, the attorney needs to assist the client to reach the best decision she can, but do so by staying on the side of "client-centered assistance" and not "paternalistic interference."[334]

Any implementation of the DA or LAP should include transparency and informed consent, and should be conducted according to these principles of client-centeredness. Informed consent should begin with the very first decision, which is whether the woman subjected to domestic violence wants to even conduct the assessment. In order to facilitate the decision regarding this assessment, the assessor needs to explore and understand the woman's objectives. These objectives need to be broadly writ, regarding her life, her relationship with the person subjecting her to abuse, her other relationships, the violence in the relationship, and the other aspects of her life and relationships. Once the objectives are clear, the options available to the woman, including doing nothing, undergoing the assessment, receiving the assessment score, using the assessment score, and determining the next steps (including accessing services), can be identified and then evaluated based on the woman's objectives. Throughout this process, the woman's decision should be honored and not coerced.

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326 ELLMAN ET AL., *supra* note 321, at 73, 85.
327 BINDER ET AL., *supra* note 321, at 283.
328 *Id.*
329 *Id.*
330 *Id.*
331 ELLMAN ET AL., *supra* note 321, at 85.
332 *Id.*
333 *Id.*
334 *Id.* at 279.

CONCLUSION

An increasing number of states are now requiring their police, prosecutors, civil attorneys, advocates, service providers and court personnel to assess women in order to obtain a score that indicates the woman's lethality risk. The mandated danger assessment screen of all women subjected to violence focuses only on the risk of homicide and thereby limits the definition of domestic violence. In addition, the accompanying screen's protocol addresses the homicide risk by directing women into particular courses of action, some of which may actually increase her risk of death. The pervasive use of this tool improperly encroaches on the woman's dignity and autonomy. For society to better address domestic violence experienced by women, society needs to ensure that its pursuit of women's safety does not undermine its respect for women's dignity. To address these concerns, first, there should be full transparency to women subjected to abuse and legal system actors about the benefits and disadvantages of danger assessments and specifically, the DA and the LAP. Second, all administrators of lethality assessments should ensure that they obtain women's informed consent prior to conducting the screening. And third, in order to address the serious concern of coercion, risk assessment administrators should engage in woman-centered counseling for each decision starting with the decision to be assessed or not, so that all possible responses to the domestic violence are evaluated through the lens of that woman's objectives.