

*Don't ever take sides with anyone against the Family again. Ever.*

Michael Corleone – The Godfather

#### Abstract

Witness tampering is a kind of obstruction of justice, but in the context of domestic violence, it falls under the category of crimes that are usually not punished. A mantle of family privacy which used to cover a spouses' assault, threats of physical violence, or rape, may make practitioners reticent to consider imposing criminal penalties for witness tampering. Prosecutors may lose the testimony of their star witness because an abuser, or his or her family, is encouraging a victim-witness to change her, or his, story, especially when coercion or threats come from a family member acting as a go-between for the abuser. I seek to examine the legal and social implications of this possible unspoken exception to the doctrine of witness tampering, and the consequences of failing to hold accountable batterers and their families in the wake of Giles, Davis, and Crawford. Formerly, prosecutors of domestic violence prosecutions could use evidence of domestic violence, such as statements to police about the incident, to prosecute even if the witness/ victim was uncooperative. Hearsay was admissible if probative and reliable, and the witness was unavailable. First, I would like to prove the existence of this and other obstacles to prosecuting perpetrators of domestic violence, and second, to explore the reasoning behind it. Is there a legal justification for prosecuting witness tampering in other contexts, such as mafia or gang prosecutions, but not when the tampering 3<sup>rd</sup> party is trying to preserve a family or marriage instead of an illegal enterprise? Is there a hidden mens rea requirement that allows selective prosecution of only certain group criminality? I see problematic implications to prosecuting only some witness tampering, and seek to explore possible solutions from other prosecutions against groups that seek to protect themselves, so that a prosecutor can continue their prosecution when a family has closed ranks.

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A woman<sup>1</sup> who chooses to testify against her intimate partner must overcome incredible personal and practical obstacles, but when her extended family takes his side, they can become the greatest obstacle of them all. When a family functions like a mafia or gang family and intimidates a witness to protect itself, any member of that family that dissuades or intimidates her should be punished under available obstruction of justice statutes.

## **Introduction**

Despite existing charges available for witness intimidation, it is seldom punished in the context of domestic violence prosecutions. It is even more rare to punish intimidation when it is carried out by others on behalf of the abuser, when he is in jail or under a restraining order. Though there is a lack of studies on the subject, practitioners have told me that it is widespread and can be as dangerous as the abuse itself.<sup>2</sup> I posit that the reason for this reluctance to prosecute witness intimidation of domestic violence victim/witnesses, an independent crime in itself, is an adherence to an outdated notion of family privacy that was once part of the body of law.

Concern for family privacy once prevented domestic violence prosecution altogether. In a case from 1824 which reflects the attitudes of the times, the judge affirmed a finding of “not guilty” in a domestic assault case because “family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy.”<sup>3</sup> Only through educational efforts pioneered by second-wave feminists and taken up by professionals in the field of law, medicine, and psychology have laws finally come to reflect the true nature of the problem. With the passage of the Violence Against Women Act in 1994 and the Domestic Violence Prevention Act in California in 1993, state agencies have come to take the problem seriously. Now there are civil

as well as criminal solutions for the safety of an abused woman, in the form of specialized restraining orders at courts that only hear domestic violence cases. These can prove difficult to enforce, however, and require another act in violation of the order before police can step in. They also require the victim to report the crime, which requires her to overcome all the same obstacles as a witness testifying in court.

Prosecuting domestic violence poses serious challenges to the criminal justice system. Domestic violence occurs most often in the home<sup>4</sup>, and for that reason, in many cases the only two witnesses to the incident are the victim and the abuser: "... because there are usually only two witnesses to domestic violence – the assailant and the victim ..."<sup>5</sup>. Prosecutions often fail for lack of evidence, because evidence of domestic violence is either impossible to get in because of restrictions on the admissibility of domestic violence evidence, or because victims refuse to testify<sup>6</sup>. When a domestic violence victim can overcome the many reasons she personally may have to refuse to testify, she still faces intimidation in many instances. One study found that nonparticipation resulted in dismissal in 60% of domestic violence prosecutions in New York City's criminal courts.<sup>7</sup>

This is illegal under several state and federal laws, which I will discuss in more detail below, but each of these laws are problematic in application. The state laws are used to give out CPOs and the federal laws only come into play when the offending parties are a seriously problematic quasi-family, like a gang or a drug cartel.

This leaves women to fend for themselves – whether they return to their abusers after the case is unsuccessfully prosecuted, they are at risk. Exes attack their ex-partners at a higher rate than married partners<sup>8</sup>. Many women also believe that they can return after an unsuccessful prosecution. Unfortunately, women have a tendency to overestimate their safety.<sup>9</sup> When

femicide occurs at a rate of 1,500 per year<sup>10</sup>, for every completed femicide, there are 9 attempts<sup>11</sup>, and these numbers do not include missing persons, it is easy to see why we must take witness intimidation in domestic violence as seriously as witness intimidation in other violent crime.

### **I. The Characteristics of a “Classic Abusive Relationship”: From a Legal Perspective and a Psychological Perspective**

In *Giles v. California*, Justice Souter suggested that when a “classic abusive relationship” is identified between the accused and the unavailable witness, there should be an inference of intent to silence the victim<sup>12</sup>. Justice Scalia wrote that such a relationship would be “highly relevant to the inquiry” of whether acts of violence were committed to silence a victim, and thus admissible under the forfeiture by wrongdoing exception.<sup>13</sup> The reason for this designation of a “classic abusive relationship” is that research from the last thirty years has identified certain patterns in relationships prone to domestic violence that establish control over a victim and make her increasingly isolated, and the violence increasingly escalated, to the point where a victim’s life may be in danger. These relationships account for 21% of all violence experienced by women.<sup>14</sup>

According to Bureau of Justice statistics, 510,970 women were victims of violence at the hands of their partners in 2005.<sup>15</sup> Other estimates put this number at 3-5<sup>16</sup> – the discrepancy is a function of the type of data collection. In a survey of domestic violence filing in 16 large urban counties, 3,750 were filed in May 2002<sup>17</sup>, and of these cases, only half obtained statements from the victim<sup>18</sup>. A third were discontinued by the prosecution or dismissed by the courts<sup>19</sup>, but that varied by county – in one such county the conviction rate was 17%.<sup>20</sup> Nearly half had a prior history of violence between them.<sup>21</sup> According to Jacqueline C. Campbell, a researcher

developing a safety assessment for law enforcement, shelters, and hospitals, only 10% of incidents result in arrest.<sup>22</sup>

Unsuccessful prosecutions occur for a variety of reasons, such as the victim/witness not cooperating, or pretrial diversion programs.

It is worth noting that the reasons why a victim of domestic violence might choose not to cooperate with prosecution are many. Like victims of rape and child abuse, victims are extremely vulnerable psychologically after abuse, and are often suffering from post-traumatic stress disorder or depression as a result of the incident. Rather than being seen as wronged parties, outside of the legal context they are often blamed for getting into or staying in long-term relationships with men who abuse them, and this takes a psychological toll on a victim's ability to cooperate as well. Stockholm syndrome may have come into play, and a belief in the ability of the court system to rehabilitate their abuser. The abuser himself may have swung into the "honeymoon phase" of the cycle, if their relationship tends to have one, and may try to convince her that he has changed – phone calls from jail to victims are common, and when abusers are caught they just lose their phone privileges.

Additionally, these women are, or at least were at one time, in love with their abusers – they may still feel such a connection with him that it makes them unwilling to testify to the abuse. They may desire a father in the home for their children, or have an emotional investment in a two-parent household. Women involved with abusers often feel shame – because they did not see their abuser for who he was before becoming entangled with him, or because they did not leave after they saw him change [personal experience from the hotline]. Some may go from an abusive childhood home to an abusive relationship.[women's health survey] Some may feel they deserve it.

Some may have financial concerns, and some of these concerns could be alleviated by the intervention of domestic violence agencies or the civil half of the domestic violence services available to women, such as concerns about how they will support themselves and their children when support orders are available. Even if a woman has an independent means of supporting herself and a place to go if he is out on bail, she may still face threats or dissuasion.

Though a victim's reluctance to participate in prosecution could be seen as an indication that the victim/witness is unreliable or that the incident never occurred, what is more likely is that the victim/witness is being intimidated, dissuaded, or manipulated by her abuser or his family.

Some commentators find this problematic – the question of “why do they stay” comes up often in discussions of domestic violence. I personally find it irrelevant to any discussion of prosecution. A woman should not have to earn the right to protection by the law. Even if her behavior can be seen as “weak” or even counterproductive to her own case, a crime has still been committed against her, and everyone involved should work to put her abuser in jail.

Sometimes she doesn't want to testify because she's under the control of her abuser. Some have noted that intimidation is inherent to domestic violence – whether an abuser's motive is to force his partner to clean the house or to drop charges, the same methods are used.

Neither the abuse nor the control motive come and go. Evidence of a pre-existing abusive relationship shows a present control motive. Violence is part of a continuing pattern of batterer behavior in an abusive relationship, rather than a series of isolated incidents. An abuser's efforts to control a battered partner don't just go away. It is enduring. Once an abuser is facing domestic violence charges, the defendant “typically devotes his efforts to achieving the following goals: (1)

persuading the woman to drop the charges and not to testify if charges do proceed; and (2) receiving the lightest possible consequences from the court.<sup>23</sup>

A practitioner called this type of intimidation “the crime within the crime,” an apt description for the unseverable nature of the control an abuser wields.<sup>24</sup>

One of the tools formerly available to prosecutors in California is no longer an option. Prosecutors once could threaten her with incarceration under contempt charges if she refused to testify twice. Through legislative action, this has recently been changed. In the prior session of the California Senate, a bill was passed that modified section 1219 of the California Code of Civil Procedure, making jailing domestic violence victims for contempt no longer an option for criminal judges<sup>25</sup>. Known as a shield law, this law also has protected sexual assault victims from being jailed for refusing to testify.<sup>26</sup> Though this does make prosecution more difficult, it seems unnecessarily harsh to jail a victim of a crime for non-participation in the trial for the crime. Punishing intimidation is likely to yield the same results, and will be fair to victims.

## **II. Three Cases From the Last Decade Strengthen the Sixth Amendment Confrontation Clause, but Inhibit Evidence-Based Prosecution**

Due to increased restrictions on the admission of hearsay through three recent Supreme Court decisions, hearsay evidence is not as admissible as it once was. Before 2004, prosecutors had access to certain kinds of hearsay statements when witnesses were unavailable. Such statements could be police reports detailing past violence from prior incidents or statements made to 911 calls after the initial emergency has abated, and these are no longer admissible as exceptions to the hearsay rule.

Until *Crawford v. Washington*<sup>27</sup>, courts used a two-part test for the admission of hearsay, requiring that the prosecution prove that the declarant was unavailable, and that the statement is

sufficiently reliable.<sup>28</sup> Reliability could be met if the statement fell under a “firmly rooted hearsay exception.”<sup>29</sup> Tom Lininger points out that during this era, the only two hearsay exceptions that were not “firmly rooted” were the residual exception and the exception for an accomplice’s custodial confession.<sup>30</sup>

Crawford v. Washington changed all that. Using historical analysis of the Confrontation Clause, Justice Scalia found that “... Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”<sup>31</sup> The sixth amendment right to confrontation was strengthened, at the expense of vulnerable witnesses who are likely to be unavailable, such as sexual assault victims, child victims of violence crime, and domestic violence victims.<sup>32</sup> Though examples such as “*ex parte* in-court testimony or its functional equivalent... or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”<sup>33</sup> the concept of “testimonial” was unclear at the time, and caused confusion that was only cleared up with a follow-up case, Davis v. Washington.<sup>34</sup>

Incidentally, Ms. Crawford’s statement to police was unavailable not because she was refusing to testify, but because her husband invoked the marital privilege barring a spouse from testifying without the other spouse’s consent.<sup>35</sup> Mr. Crawford had been charged with assault and attempted murder after he stabbed a man he suspected of raping Ms. Crawford, not domestic violence.<sup>36</sup>

Clarification came in Davis v. Washington<sup>37</sup> – actually a consolidation of cases decided together to illustrate what is and is not “testimonial.” “Testimonial statements” are statements given to police or other investigators about domestic violence incidents. If a statement is made to alleviate an “ongoing emergency,” such as a 911 call, it is admissible.



The two cases are both domestic violence cases, but the critical differences are under what circumstances the domestic violence evidence is introduced.

On February 1, 2001, Michelle McCottry dialed 911 and then quickly hung up. Since hang-ups often indicate grave danger, the 911 operator immediately returned the call. A hysterical and sobbing McCottry answered and told the operator, ‘He’s here jumpin’ on me again.’... McCottry identified her attacker as Adrian Davis.<sup>38</sup>

Davis had fled the scene<sup>39</sup>, but the immediacy of the danger Michelle McCottry was in is evident from the commentator’s description.

In *Hammon v. Indiana*, Amy Hammon came to the door to greet police. She assured them that “everything was okay”, but gave them permission to enter.<sup>40</sup> Police saw a broken heater and initiated questioning, discovering that a fight had occurred and that Amy’s husband had pushed her down into the broken glass.<sup>41</sup> However, her statement was considered testimonial. “There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened.”<sup>42</sup>

The holding of *Hammond* was criticized in Justice Thomas’s dissent for asking judges to ascertain the primary motive of law enforcement at the scene of a crime, when their motive is more likely to be ensuring safety *and* gathering evidence.<sup>43</sup> , both functions being part of an officer’s job. It has also been critiqued for requiring judges to subjectively determine when an emergency ends.<sup>44</sup>

*Giles v. California*<sup>45</sup> is another case where the Supreme Court stepped in to bolster sixth amendment confrontation rights at the expense of domestic violence victims. A man in a

tumultuous relationship with a woman killed her.<sup>46</sup> Three weeks prior, she had reported domestic violence, including an incident where he held a knife to her throat and threatened to kill her if she cheated on him. In another incident, she went to his house and, claiming that he had been charged by her and believed that she was armed, he shot her six times.<sup>47</sup> She was unarmed, and several of the shots were fired while she was lying on the ground.<sup>48</sup> He claimed self defense, but was convicted at trial. The Supreme Court remanded the case based on improper inclusion of hearsay evidence.

Writing for the majority of six, Scalia wrote that the sixth amendment required that the accused shall enjoy the right to be confronted with the witnesses against him, and that confrontation in this case required live witness testimony, but acknowledged that two common-law doctrines had historical weight – the dying declaration exception<sup>49</sup> and the forfeiture by wrongdoing exception.<sup>50</sup> He found that specific intent to procure absence is required to invoke the doctrine of forfeiture by wrongdoing.<sup>51</sup>

“The most controversial topic in *Giles* was the notion that domestic violence, by its very nature, might amount to wrongful conduct sufficient to forfeit confrontation rights.”<sup>52</sup> Justice Scalia acknowledged that a pattern of domestic violence would be relevant to prove whether intent was present, while Justice Souter and Justice Breyer expressed a willingness to infer intent when presented with sufficient proof of a pattern of domestic violence.<sup>53</sup>

Though this may be a step back in the right direction as far as recognizing that domestic violence prosecution is different from other prosecutions, in any case where the abuse is psychological up to a certain point where it turns physical, i.e. where the pattern has only one point thus far, it could result in the exclusion of evidence that could have shown a pattern of abuse, and helped balance the scales. As it stands, “the accused ‘gets a great benefit’ for causing

the victim's death, and such a benefit increases the temptation to murder... victims of domestic violence."<sup>54</sup>

### III. Prior Acts of Abuse

California has an exception to the rule against character evidence inclusion for domestic violence victims allowing for presentation of evidence of domestic violence if the evidence is from the last 10 years.<sup>55</sup> Commentators have noted that this rule has survived two challenges on constitutional grounds in California Courts of Appeal.<sup>56</sup>

### IV. Conditional Examination

Another way to get in evidence of domestic violence is, of course, to have the victim testify to it. Because abused women have many reasons not to want to be in court, no solution will answer them all. Cross-examination is an adversary process, and a defendant's attorney has a duty to his client to zealously defend him, i.e. make it as unpleasant as the attorney finds necessary.

Though a witness can refuse to testify, and no longer will be held in jail if in contempt<sup>57</sup> (though presumably will still be required to pay fines for it) another way for her to testify has been established. As of October 11 of this year, there is another way to allow the victim/witness to tell her story without requiring her to be in court during the trial. The California Senate just passed SB 197, which modifies Penal Code §1335 et. sec., to allow for conditional examination of, among others, domestic violence victims.

It was sponsored by the Los Angeles District Attorney's Office, and supported by the California Partnership to End Domestic Violence; Peace Over Violence, California National Organization for Women; California Communities United Institute; and the California District

Attorneys Association. It was opposed by the California Attorneys for Criminal Justice and the California Public Defenders Association.<sup>58</sup>

[Is this like laws in other states? Is CA at the cutting edge, or behind, or in the middle? ]

A conditional examination functions, essentially, like a deposition in a civil case.<sup>59</sup>

This bill may go a long way towards meeting the needs of both domestic violence victims and criminal defendants. It specifies two situations where a witness may be conditionally examined: the conditional examination may take place only if a defendant has been charged with misdemeanor or felony domestic violence, the defendant has been informed of his rights, and the witness's life is in danger. I speculate that proving that the witness's life is in danger is going to be difficult, due to the same mistaken framing of the problem of a witness's danger that prompted me to write this paper: if the abuser is in jail, how could her life be in danger? The reality is that even when he is incarcerated, the family can go to work on her and convince her to drop.

The second situation, proposed but not adopted, where a conditional exam would have been permitted is if a defendant is charged with domestic violence and there is evidence criminal charges arising out of the same acts have been previously dismissed and refiled, as specified, the people or the defendant may, if the defendant has been fully informed of his or her right to counsel as provided by law, have a witness examined conditionally.

The purpose of this, I surmise, was to give prosecutors a chance to persuade the witness that she can testify safely; perhaps even to have a chance to try to bring cases that were dropped because of Crawford concerns. The comments section of the hearing notes that "California ... lacks a procedure to preserve the testimony of a witness when a prior domestic violence case is dismissed and re-filed due to the unavailability of that witness."<sup>60</sup>

I am concerned that this bill may be vulnerable to invalidation via Crawford. Depositions are specifically identified as testimonial:

Various formulations of this core class of “testimonial” statements exist: “*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, ... extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, *depositions*, prior testimony, or confessions.”<sup>61</sup>

However, the overall concern with the opinion seems to be that the defendant be afforded cross-examination. In a deposition, the defendant *does* have the opportunity to cross-examine the defendant; to question the witness and offer objections. Also, in this type of examination a magistrate is present, unlike a deposition where usually the only parties present are counsel, the court reporter, and the party being deposed.<sup>62</sup> Presumably the presence of a magistrate will allow objections to be decided immediately, and perhaps even allow the victim/witness a greater measure of safety.

A third situation is if a defendant has been charged in a case of domestic violence and there is evidence that a victim or material witness has been or is being dissuaded by any means from cooperating with the prosecution or testifying at trial.

This strikes me as problematic because of § 1340 – “the defendant has the right to be present in person and with counsel at the examination, and if the defendant is in custody, the officer in whose custody he or she is ... must take the defendant thereto, and keep him or her in the presence and hearing of the witness during the examination.”

I question the utility of allowing a domestic violence abuser to question the same person he has been intimidating from across a table. Just as an abuser does not suddenly stop trying to control his victim just before he kills her, an abuser is not going to cease intimidating her just because she is being questioned. The closer he is able to get to her, the more she will be intimidated and motivated to change her story out of fear, and making this section counter to its purpose.<sup>63</sup> Taken in conjunction with the phrase about counsel<sup>64</sup>, if the defendant is representing himself, the victim could be examined at close proximity *by the abuser*. This could do her as much psychological damage as testifying in open court.

So, this bill will likely ease some of the burdens on prosecutors trying to prosecute cases through the new restrictions on their ability to use out-of-court statements, but problems remain.

## V. Other Victim-Focused Solutions

### a. Services

Another way to allow a witness to testify safely is to give her access to services such as domestic violence agencies. However, with the unprecedented cuts to funds available to domestic violence agencies, this option is less available to domestic violence victims of all kinds, not just witnesses.

Early domestic violence shelters were not state affiliated. They were grassroots organizations run out of private homes, and many of the staff or volunteers of these organizations “were skeptical of an affirmative role for the state; they saw the state as maintaining; enforcing; and legitimizing male violence against women....”<sup>65</sup> Eventually these groups began to lobby for change, and their efforts resulted in the DVPA and VAWA.

Ironically, these organizations bear similarities to services offered for gang and mafia witnesses – they are both confidential locations, and both groups of victims traditionally use restraining orders.<sup>66</sup>

The challenges to such programs also parallel each other – both types of programs struggle for funding. Witness Intimidation programs in government offices must rely on state victim aid funds, private grant money, and local government to attempt to protect their witnesses.<sup>67</sup> Domestic Violence agencies are somewhat supported by private donations, but also get funds from state governments, and as seen by the Governor’s solution to the budget crisis this past summer, domestic violence agencies should not count on that funding.<sup>68</sup>

Domestic violence shelters already have to turn away abused parties and their children, but with aggressive cuts from the state in recent years,<sup>69</sup> referring witnesses to them is not practicable as a solution.

## VI. Using Existing Statutes

California already has both state and federal laws available to charge any intimidating party.

If a victim is subject to a violation of any federal statute, including the interstate domestic provisions of VAWA<sup>70</sup>, she is under the protection of the Rights of Crime Victims section – “A crime victim has the following rights: (1) The right to be reasonably protected from the accused.”<sup>71</sup> This act is enforced through regulation via the same agencies that are identified in the above section. Domestic violence victims should have access to federally funded programs for witness protection in addition to victims of crimes perpetrated by gangs.

Intimidation of witnesses is subject to punishment under California law as well. Section 136.1 of the penal code punished witness intimidation as a felony. However, some language in

the statute may be preventing utilization of this code section for its proper purpose in domestic violence cases. Any person who “knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law”<sup>72</sup> is punishable by “imprisonment in a county jail for not more than one year or in the state prison.”<sup>73</sup> Even attempted dissuasion is punishable in the same way.<sup>74</sup>

Using these laws to punish witness intimidation would show victims that they are protected by law, and would also function to keep them safe once the violating family member was arrested.

One section could be used against the victim, however. Malice, necessary to a violation, is presumed not to be present when the dissuader is “a family member who interceded in an effort to protect the witness or victim.”<sup>75</sup> So, if a brother-in-law told his sister-in-law that his brother had a terrible temper, that he was concerned for her, and that she should not testify, prosecutors would have to overcome the presumption, or prove that the one the brother-in-law was helping was actually the brother.

Sources I encountered in this search were concerned primarily with protecting innocent residents of gang/drug cartel controlled urban areas who became witness to crimes. “[Prosecutors interviewed] agree that, in smaller jurisdictions and domestic violence cases, the intimidator was most likely to be the defendant.”<sup>76</sup> Interestingly, these prosecutors acknowledge that “if victim and witness intimidation is known to be aggressively prosecuted in a given jurisdiction, then the primary actors often become the gang, family, or friends of the defendant”<sup>77</sup>, but do not seem to include domestic violence prosecutions in this observation.

This may be because domestic violence prosecutions have another barrier to break through. Though courts and legislators have come to the point where they will intervene in a



marriage or other intimate relationship to protect a woman from abuse, they still are reluctant to protect her from other members of his family because they have yet to acknowledge that a batterer may use others as a proxy to retain control over his victim.

Olsen's article *The Myth of State Intervention in the Family* perfectly explains the context in which we should evaluate whether to punish an intimidating family member. Her article explains how the concept that a state is improperly intruding into a family when it seeks to protect one member of that family is, as she puts it, incoherent. Drawing a parallel between family non/intervention and *laissez fair* ideals, which touted non-intervention but insisted on the enforcement of contracts and the protection of property interests, she explains that the staunchest opponents of intervention in the family still seek state help in retaining the power they have over their children.

Once a state undertakes to protect a family member from another family member *at all*, the state risks violating equal protection if it does not protect all equally. In the same vein, once a state undertakes to punish witness dissuasion committed by domestic abusers themselves, the state cannot claim that punishing witness dissuasion by other family members is an intrusion into a private matter. Whether dissuading to protect a gang, a drug cartel's operations, or the functioning of an otherwise normal family, witness dissuasion is a crime.

## VII. Conclusion

When a family closes ranks and functions like a similarly situated criminal organization – i.e. they become like the mafia or a gang, then laws that were perhaps intended to prevent intimidation by these organizations should be utilized to punish them for their crimes. Domestic violence victims are in danger when their abusers get away with things, so we should punish anyone who allows these things to take place.

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<sup>1</sup> Though domestic violence, sometimes called intimate partner violence, is a crime that can be committed by men or women, against victims that are the same or opposite genders, I will be addressing violence perpetrated by a man against a woman, because that is the most common case. Lawrence A. Greenfield et. Al., Bureau of Justice Statistics, *Violence by Intimates: Analysis of Data on Crimes by current or Former Spouses, Boyfriends, and Girlfriends 14-15* (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf> (reporting that 21% of violence experienced by women is committed by an intimate, while 2% of violence experienced by men is committed by an intimate).

<sup>2</sup> Telephone Interview with Carolyn Reed, Consultant to Contra Costa Police Department, (Oct. 26, 2009).

<sup>3</sup> *Calvin Bradley v. The State*, 1 Miss. (Walker) 156 (1824).

<sup>4</sup> Richard Gelles, *No Place to Go: The Social Dynamics of Marital Violence*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 46, 48 (Maria Roy ed. 1977).

<sup>5</sup> Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 Tex. L. Rev. 857, 869 (April 2009).

<sup>6</sup> *Id.* at 868.

<sup>7</sup> See Robert C. Davis, *Victim/Witness Noncooperation: A Second Look at a Persistent Phenomenon*, 11 J. Crim. Just. 287, 288.

<sup>8</sup> Bureau of Justice Statistics, *Intimate Partner Violence in the U.S., Nonfatal intimate partner victimization rate per 1000 females by marital status, 1993 – 2005* (2009) available at <http://ojp.usdoj.gov/bjs/intimate/table/wommar.htm>.

<sup>9</sup> Jacquelyn C. Campbell, Ph.D. Assoc. Dean for Faculty Affairs/Professor, Johns Hopkins Univ. Sch. of Nursing, Opening Plenary: at the Domestic Violence Symposium of the Criminal Justice Inst. of the L. A. County Dist. Attorney's Office (November 4, 2009).

<sup>10</sup> Bureau of Justice Statistics, *Intimate Partner Violence in the U.S., Homicide Trends in the U.S.*, (2009) available at <http://ojp.usdoj.gov/bjs/homicide/tables/intrehtab.htm>.

<sup>11</sup> Jacquelyn C. Campbell, Ph.D. Assoc. Dean for Faculty Affairs/Professor, Johns Hopkins Univ. Sch. of Nursing, Opening Plenary: at the Domestic Violence Symposium of the Criminal Justice Inst. of the L. A. County Dist. Attorney's Office (November 4, 2009).

<sup>12</sup> *Giles v. California*, 128 S.Ct. 2678, 2708 (2008), *concurring*.

<sup>13</sup> *Id.* at 2693.

<sup>14</sup> Lawrence A. Greenfield et. Al., Bureau of Justice Statistics, *Violence by Intimates: Analysis of Data on Crimes by current or Former Spouses, Boyfriends, and Girlfriends 14-15* (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>.

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<sup>15</sup> Bureau of Justice Statistics, *Intimate Partner Violence in the U.S., Victim Characteristics* (2009) available at <http://www.ojp.usdoj.gov/bjs/intimate/victims.htm>.

<sup>16</sup> Jacquelyn C. Campbell, Ph.D. Assoc. Dean for Faculty Affairs/Professor, Johns Hopkins Univ. Sch. of Nursing, Opening Plenary: at the Domestic Violence Symposium of the Criminal Justice Inst. of the L. A. County Dist. Attorney's Office (November 4, 2009).

<sup>17</sup> Erica L. Smith and Donald J. Farole, Bureau of Justice Statistics, Special Report, Profile of Intimate Partner Violence Cases in Large Urban Counties, available at <http://ojp.usdoj.gov/bjs/pub/pdf/pipucluc.pdf> (October 2009).

<sup>18</sup> *Id* at 5.

<sup>19</sup> *Id* at 6.

<sup>20</sup> *Id* at 6.

<sup>21</sup> *Id* at 1.

<sup>22</sup> Jacquelyn C. Campbell, Ph.D. Assoc. Dean for Faculty Affairs/Professor, Johns Hopkins Univ. Sch. of Nursing, Opening Plenary: at the Domestic Violence Symposium of the Criminal Justice Inst. of the L. A. County Dist. Attorney's Office (November 4, 2009).

<sup>23</sup> Tim Donaldson and Karen Olson, "Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases after *Giles v. California*, 36 Lincoln L. Rev. 45.

<sup>24</sup> Telephone Interview with Carolyn Reed, Consultant to Contra Costa Police Department, (Oct. 26, 2009).

<sup>25</sup> 2009 Cal. Legis. Serv. Ch. 35 (S.B. 1356).

<sup>26</sup> Cal. Civ. Pro. Code § 1219(b) (West 2009).

<sup>27</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>28</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>29</sup> *Id* at 66.

<sup>30</sup> Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 758 (May 2005).

<sup>31</sup> *Crawford*, 541 U.S. at 59.

<sup>32</sup> Matthew Mangino, Protecting Victims of Abuse: Confrontation Right May Jeopardize Safety of Children, Domestic Violence Victims, [http://www.mattmangino.com/passing/view\\_blog.cfm?id=8](http://www.mattmangino.com/passing/view_blog.cfm?id=8) (a prosecutor's blog entry expressing concern about the plight of victims after *Crawford*).

<sup>33</sup> *Id* at 51-2.

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<sup>34</sup> *Davis v. Washington*, 126 S. Ct. 547 (2005).

<sup>35</sup> *Crawford v. Washington*, 541 U.S. at 40.

<sup>36</sup> *Id.*

<sup>37</sup> *Davis v. Washington*, 126 S. Ct. 2266.

<sup>38</sup> Monica Vozakis, *Case Note; Davis v. Washington*, 126 S. Ct. 2266, 7 Wyo. L. Rev. 605 (2007).

<sup>39</sup> *Davis v. Washinton*, 126 S.Ct. at 813.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id* at 815.

<sup>43</sup> *Davis*, 126 S. Ct. at 841 (Thomas, J., *dissenting*).

<sup>44</sup> Monica Vozakis, *Case Note; Davis v. Washington*, 126 S. Ct. 2266, 7 Wyo. L. Rev. 605 (2007).

<sup>45</sup> *Giles v. California*, 128 S.Ct. 2578 (2008).

<sup>46</sup> *Id* at 2681.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id* at 2682.

<sup>50</sup> *Id* at 2683.

<sup>51</sup> *Giles*, 128 S.Ct. at 2683.

<sup>52</sup> Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 Tex. L. Rev. 857, 874 (April 2009).

<sup>53</sup> See Donaldson, 36 Lincoln L. Rev. at 48

<sup>54</sup> Lininger, 87 Tex. L. Rev. at 864, (quoting Justice Roberts in *Giles*)

<sup>55</sup> Cal. Evid. Code § 1109, at (e) (West 2009).

<sup>56</sup> Pamela Vartabedian, *The Need to Hold Batterers Accountable Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 Santa Clara L. Rev. 157 (2007) (Discussing *People v. Johnson*, and *People v. Jennings*)

<sup>57</sup> Cal. Civ. Pro. Code § 1219(b) (West 2009).

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<sup>58</sup>Hearing before the Assembly Committee on Public Safety, Regular Session 2008-2009 (Statement of Senator Mark Leno, Chair).

<sup>59</sup> E-mail from Robert Calhoun, Professor, Golden Gate University School of Law (Nov. 12, 2009) (on file with author)

<sup>60</sup>Hearing before the Assembly Committee on Public Safety, Regular Session 2008-2009 (Statement of Senator Mark Leno, Chair) at H, (quoting the author of the bill)

<sup>61</sup> Crawford v. Washington, 541 U.S. at 40 (emphasis is mine).

<sup>62</sup> Cal. Penal Code § 1339 (West 2008)

<sup>63</sup> During my time at the Domestic Violence agency, I would accompany women to their restraining order hearings. Much of my job was to keep her away from her abuser, and stay between him and her, such that he couldn't stare her down across the room.

<sup>64</sup>Cal. Penal Code § 1340 (West 2008)

<sup>65</sup> 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 (2003)

<sup>66</sup> Kerry Murphy Healy, *Victim and Witness Intimidation: New Developments and Emerging Responses*, National Institute of Justice (Oct. 1995), 6

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

<sup>68</sup> Denis C. Theriault, *California restores funding for domestic violence shelters*, S.J. Mercury News, Oct. 21, 2009

<sup>69</sup> *See id.*

<sup>70</sup> 18 U.S.C. § 2661 *et seq*

<sup>71</sup> *Id* at (1).

<sup>72</sup> Cal. Penal Code § 136.1(a)(1) (West 2008).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id* at (3)

<sup>76</sup> Kerry Murphy Healy, *Victim and Witness Intimidation: New Developments and Emerging Responses*, National Institute of Justice (Oct. 1995), 5

<sup>77</sup> *Id.*

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