The Prosecutor

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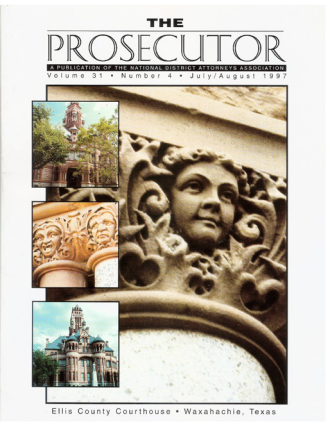
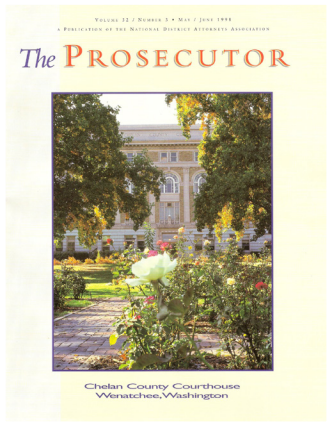
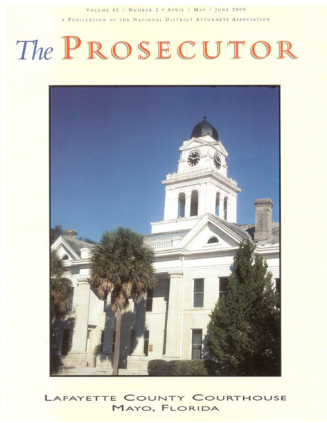
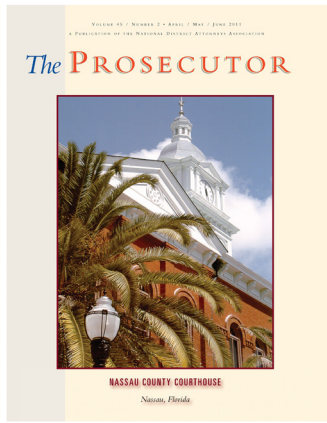
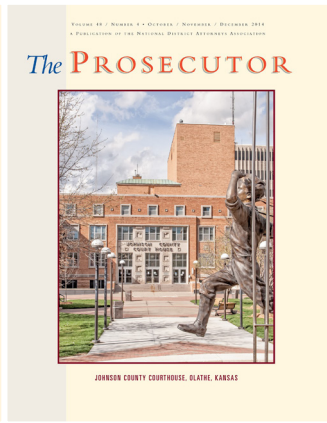
CELEBRATING 70 YEARS

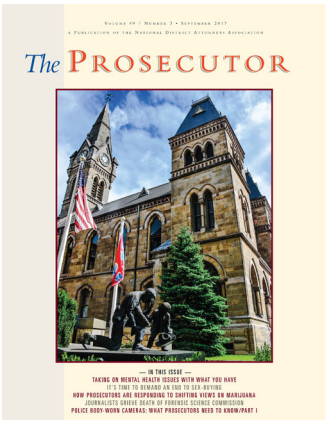


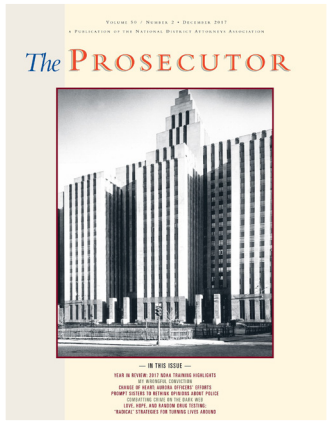


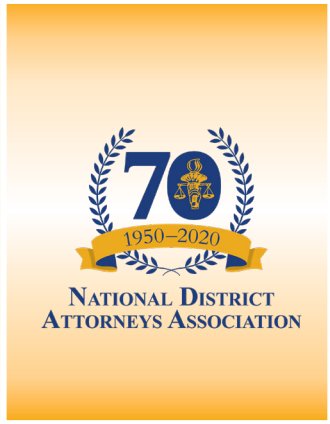


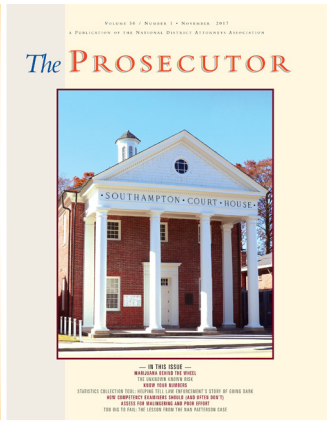


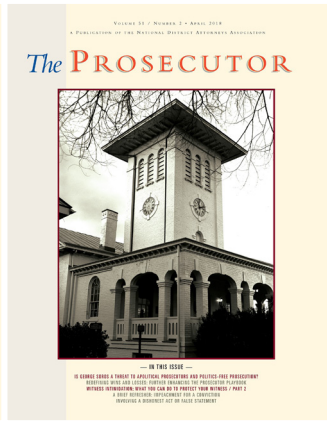


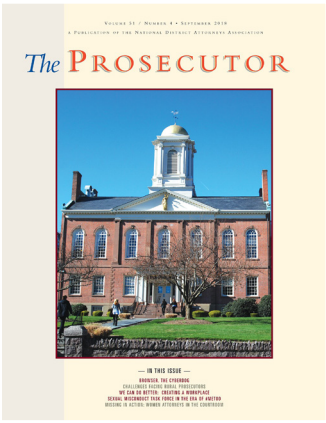


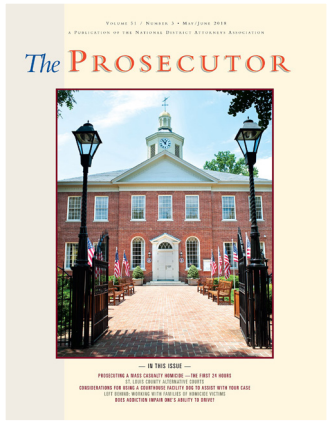


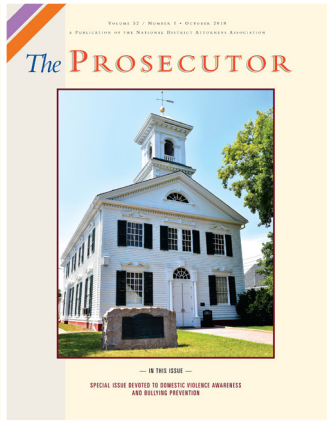


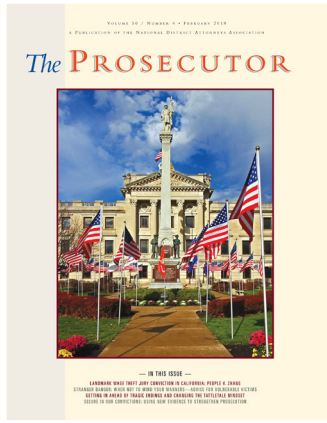


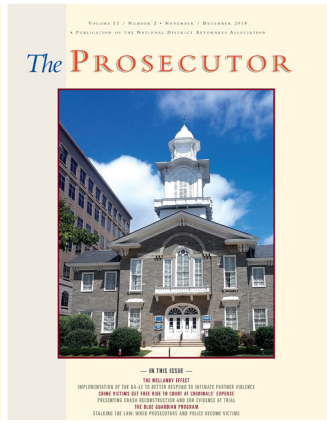












IN THIS ISSUE

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National District Attorneys Association

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Our courses cover a wide range of issues, from human trafficking and domestic violence, to lessons on leadership and prosecutor wellness. We have variety of topics to meet all your CLE needs! New course offerings will be published on regular basis. Check out a full list of our virtual learning sessions at **https://ndaa.org/training-courses/**

Special Note: Select courses have been approved for CLE credit by the Virginia State Bar and may provide ethics credit.

Join us for our upcoming virtual sessions!

- **Abusive Head Trauma: Collaborating to Prove Child Abuse** — *October 5, 2020 from 11:30 am to 5:30 pm EDT*
- **Challenges with Immigration Issues for Victims of Domestic Violence** — *October 6, 2020 at 2:00 pm EDT*
- **Community Prosecution in a Pandemic: Ideas and Strategies to Engage your Constituents and Ensure Justice** — *October 13, 2020 at 11:30 am EST*
- **Performance Measures: Effective Tools to Assess and Evaluate Attorney and Non-Attorney Staff** — *October 14, 2020 at 11:30 am EST*
- **Talking About Race: Implicit Bias** — *October 15, 2020 at 11:30 am EST*
- **Cold Cases-Step by Step: Investigation, Pre-Trial Strategies and Case Presentation Techniques** — *October 20, 2020 from 11:30 am to 1:30 pm EST*
- **Preparing and Presenting Firearms Evidence & the Ballistics Expert** — *October 27, 2020 from 11:30 am to 1:00 pm EST*
- **Homicide 101 the Basics Learning Series** — *November 10, 2020 from 11:00 am to 3:30 pm EST*
- **The Creative Visual Closing Argument** — *November 16, 2020 at 11:45 am EST*
- **Understanding & Utilizing 21st Century Forensic Evidence Virtual Training** — *December 1–3, 2020 from 11:30 am to 5:00 pm EST*
- **Elder Abuse: Financial Exploitation, Physical & Sexual Assaults and Homicide** — *December 7, 2020 from 11:30 am to 1:30 pm EST*
- **Prosecutor Wellness: Work Hard, Play Hard** — *December 8, 2020 at 2:00 pm EST*
- **DNA 101 The Basics** — *December 9, 2020 from 11:30 am to 4:00 pm EST*

Webinar recordings now available from our previous sessions!

- **Prosecuting DUI Cases**
- **Mastering Masking Digital Course**
- **Human Trafficking and the Impact on Commercial Driver's Licenses**
- **CFPB Tools and Resources for Military Consumers and Older Americans**

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During the COVID-19 crisis, NDAA is here to provide our members and the broader legal community access to online trainings with CLE credit in order to help satisfy state bar requirements. Our goal is to ensure that lawyers throughout the country continue to receive the vital training needed as our criminal justice system undergoes unprecedented changes.

If you have questions or require more information, please send an email to **training@ndaajustice.org.**

Register for any of these webinars at **https://ndaa.org/training-courses/**

If you would like to become a NDAA member, please join at **https://ndaa.org/membership/join/**

The Prosecutor

A Publication of the National District Attorneys Association

About the Cover
This year NDAA celebrates its 70th Anniversary! In recognition of this major milestone within the association, our October 2020 edition includes a collage of previous covers going as far back as 1997.

The Prosecutor, ISS No. 0027-6383, National District Attorneys Association. Views expressed in the articles in this publication are those of the authors and do not necessarily represent the views of the National District Attorneys Association. *The Prosecutor* is published by NDAA for its members as part of their member benefits.

Articles
The Prosecutor encourages its readers to submit articles of interest to prosecutors for possible publication in the magazine. Send articles to Nelson Bunn, nbunn@ndaajustice.org

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"I Am in the Room, Too"

By **AIMEE K. CLYMER-HANCOCK**
First Assistant Commonwealth's Attorney, Graves County, Mayfield (KY)

Fear is a strong emotion that understandably dominates the hearts and minds of most violent crime victims and witnesses. It is fear that can contribute to a victim's silence in the face of abhorrent abuse. It is also fear that drives witnesses to hide, particularly when they know they've seen something that demands action. And action in the face of fear is nothing short of heroic.

I love my job because every day I see heroes. Although these "heroes" may not see themselves in the same light, their behavior falls squarely in line with my personal definition of the word. In my eyes, it is nothing short of heroic for a victim of violence to answer the call of the prosecutor and put their life in our hands. It is one thing to be driven to call 911 in the critical moment when your life is being threatened and your choices are limited. It is quite another to make the choice to continue in your efforts to prosecute your abuser when the emotions have cooled, and the immediate threat has passed.

Victims of violence place their lives in our hands with no real guarantee as to the outcome of our efforts. As all prosecutors know, there is no guarantee that we can keep our victim or witness safe from harm and there is never a guarantee regarding the jury's verdict. And in the case where our victim's life has been tragically taken, our heroic witnesses bear the incredible burden of serving as the "voice of the victim" despite their own fear of the perpetrator.

Almost every time I meet with a victim or a witness to a violent crime, I am asked one question: how are you going to keep me safe? This question comes in a variety of ways, but always hits me hard because there is simply no easy answer. Of course, there are precautions discussed at length, tools of protection that can be employed and the comfort that, in my jurisdiction, crimes of Intimidating and Retaliating are their own Felony offenses.

However, none of these "lawyerly" discussions seem to bring peace to my victims or witnesses. These proposed answers always feel hollow, void of emotion and too small a promise to combat the reality of the impending threat. But I have discovered the power of a genuine phrase I now say often, and repeat as needed, to victims and witnesses alike: "I am in the room, too." When I am confronted with a victim's fear or a witness' concern over their personal safety at trial and the talk of precautions, laws and proactive safety plans do not ease the mind, this simple phrase has proven invaluable.

"I am in the room, too" communicates two powerful messages: (1) I acknowledge your very real fear and (2) I am placing myself voluntarily in front of the threat. I have witnessed this simple phrase break down the walls built by fear. These words are a comfort, I believe, because it is a human response that tells the recipient you are not alone. Whether your victim is seven years old or 37, there is something universally comforting about being told that another human being is willing to face and fight what you fear the most.

It is such a humbling experience to be "in the room" for families who have lost a loved one to violent crime. It is a privilege to take their case to trial, to demand truth and to bear witness to the closure only a jury trial and a verdict of guilty can provide. It is an honor to witness the transformative experience that justice brings to the grief stricken. All at once, the final piece of the puzzle fits. But of course, the prosecutor is not alone in the room. I am grateful to every judge, law enforcement officer, bailiff, court security personnel, victim's advocate and probation and parole officer who puts themselves "in the room, too." I thank you for standing up and responding to what I believe to be a most sincere call to community service.

So, the next time you are confronted with a victim or a witness who is paralyzed to act and fearful to speak their truth at trial, may I humbly suggest you answer from the heart instead of the head and compassionately remind them: "I am in the room, too."

Clymer-Hancock is the creator of the Graves County Commonwealth's Attorney's Office "Vulnerable Victim Unit" which specializes in the prosecution of predators who perpetrate child physical and sexual abuse, any crimes evidencing exploitation of the elderly, human trafficking, sexual violence and cases involving domestic violence related assaults or murder.

I love my job because every day I see heroes. Although these "heroes" may not see themselves in the same light, their behavior falls squarely in line with my personal definition of the word.

"Disappear for a Week and Leave Your Phone": Nevada Supreme Court Takes the Right Approach to Witness Intimidation

By **CHAD PACE**
Deputy District Attorney, Douglas County, Minden (NV)

Domestic violence touches all too many families. Batterers' commonly manipulate the love and emotion within a family to dissuade their victims from testifying. The Nevada Supreme Court addressed this kind of witness tampering when it first considered the forfeiture-by-wrongdoing doctrine in 2019.

Domestic violence touches all too many families. Batterers' commonly manipulate the love and emotion within a family to dissuade their victims from testifying.

The United States Supreme Court first considered the forfeiture doctrine in the 1878 case, Reynolds v. United States.[1] In Reynolds, an accused polygamist concealed one of his wives to preclude subpoena service. The Court held that Reynolds forfeited his Confrontation Clause rights, and the Court admitted the wife's prior testimony into evidence.[2] The Court stated, "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."

More than 140 years later, the Nevada Supreme Court took its first look at the forfeiture doctrine. State v. Anderson recognized, "a defendant may forfeit the right to confrontation. In particular, 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.'"[3]

I. NO FACE, NO CASE. WIDESPREAD WITNESS TAMPERING IN DOMESTIC VIOLENCE PROSECUTION

Prosecutors and advocates have known for many years that witness tampering is a significant problem in domestic violence cases, and that victims recant or refuse to appear at trial because of a perpetrators' threats of retaliation. The U.S. Supreme Court recognized that domestic violence is a crime "notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial."[4] As many as 80% of domestic violence victims recant initial accounts of abuse and do not participate in prosecution after a batterer's interjection and influence.[5]

After batterers dissuade their victims' appearance, prosecutors must often proceed to trial without the victim's participation.[6] Nevada Revised Statue 200.485(9) requires prosecutors move forward with a case even without victim testimony unless the prosecutor knows the case cannot be proven or that the arrest was not supported by probable cause. Victims cannot "drop the charge" in Nevada. Thus, many cases move forward without victim participation. Photos, nontestimonial statements, and medical records are often powerful evidence

[1] *Reynolds v. United States*, 98 U.S. 145, 159, 25 L.Ed. 244 (1879).

[2] Prior testimony subject to cross examination would not violate the Confrontation Clause under modern jurisprudence. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[3] *Anderson v. State*, 135 Nev. Adv. Op. 37, 447 P.3d 1072, 1075 (2019) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

[4] *Davis v. Washington*, 126 S.Ct. 2266, 165 L Ed.2d 224, 2006).

[5] "Domestic Abusers: Expert Triangulators, New Victim Advocacy Models to Buffer Against It" by Amy E. Bonomi & David Marti, # Springer Science+Business Media, LLC, part of Springer Nature 2020.

[6] A victim cannot choose to "drop" domestic violence charges. Nevada Revised Statute 200.485(10) requires the State to prosecute domestic violence unless the prosecutor knows the allegation is not supported by probable cause or the case cannot be proven.

regardless of the victim's ability to participate in the case. Nonetheless, juries want to hear from the victim.[7]

The victim's problematic absence is compounded by the Confrontation Clause. Face-to-face confrontation is the cornerstone of Sixth Amendment Confrontation Clause jurisprudence.[8] Without the victim's presence, her prior statements to law enforcement and investigators are most often barred from evidence by the Confrontation Clause. Thus, the jailhouse slang saying "no face no case" holds true for the majority of cases. Defendants have every incentive to preclude their victim's testimony at trial.

II. BEYOND VIOLENCE. THE SOFT TOUCH APPROACH.

Perhaps surprisingly, batterers rarely use violent threats to dissuade victims. In a recent study of 25 heterosexual couples, in which the male perpetrator was detained for felony domestic violence, only one perpetrator directly threatened the victim. Instead, batterers regularly manipulate minds and hearts to persuade victims not to testify.[9] For example, perpetrators instruct victims on what should be said in court or done before prosecution. Batterers' instruction are a "minimization" technique used to downplay the abuse, evoke sympathy, and encourage the victim's recantation. The soft touch is used more often and more effective than the direct threat. Repetitious minimization influences the victims into re-defining the abuse narrative, recanting prior statements, and refusing to appear at trial.

III. "DISAPPEAR FOR A WEEK." ATTEMPTED MURDER AND WITNESS TAMPERING IN ANDERSON.[10]

On August 23, 2016, Arnold Anderson and Terry Bolden began to argue about $200.00 outside a Las Vegas apartment complex. The two fought, and Anderson told his daughter Arndaejae "Jad" Anderson to get his gun. She did. Anderson shot Bolden 5 times, striking him in the head, chest, and leg.

Bolden's girlfriend, Rhonda Robinson, and Jad witnessed the shooting. Robinson and Bolden both identified Anderson as the shooter in a photo lineup. Jad told a Clark County District Attorney's Office investigator that she witnessed Anderson shot Bolden, and that Anderson told her to provide an alibi. The State charged Anderson with attempted murder, robbery, and battery with a deadly weapon causing substantial bodily harm.

The morning of the second day of trial, Anderson made a call from jail to Jad's phone number. Anderson told the person on the other end of the call "to disappear for a week" and "to leave [her] phone and go someplace else" so that authorities could not track her. The State moved to introduce the witness's out of Court statements to the investigator. Anderson objected and argued that Jad was not on the phone. He further argued that Jad's unavailability was not caused by what he said on the phone, and an outstanding warrant for Jad's arrest was the reason she did not appear.

The District Court held that the jail call was sufficient evidence to prove that Anderson intended to procure the witness's absence, and he forfeited his confrontation clause rights. The Nevada Supreme Court heard the appeal.

IV. NEVADA SUPREME COURT ADOPTED THE MODERN, MAJORITY VIEW

To prove forfeiture, the State must show that the defendant intended to prevent a witness from testifying. In Anderson, the Nevada Supreme Court specifically addressed this issue as a matter of first impression. Justice Stiglich writes, "the

[7] All defendants charged with domestic violence are entitled to trial by jury. *Andersen v. Eight Juridical District Court*, 135 Nev. Adv. Op. 42 (Sept. 12, 2019) (granting defendants charged with misdemeanor domestic violence the right to trial by six jurors).

[8] *Chavez v. State*, 125 Nev. 328, 337, 213 P.3d 476, 483 (2009).

[9] "Meet me at the place we used to park." A.E. Bonomi et al. / Social Science & Medicine 73 (2011) 1054e1061.

[10] Not to be confused with *Anderson v. Eight Judicial District Court*, 135 Nev. Ad Op 42) (granting domestic violence defendants the right to misdemeanor jury trials).

preponderance standard provides the appropriate burden of proof for purposes of the forfeiture-by-wrongdoing exception to the Confrontation Clause."[11] Forfeiture is equitable because "no one shall be permitted to take advantage of his own wrong."[12]

Importantly, the Court recognized that violence and threats are a rare form of witness tampering. The opinion does not reference any such specific conduct. Instead, the Court maintains fidelity to the law and discusses only the accused's "wrongdoings."

V. A NEW TOOL TO REDUCE FAMILY VIOLENCE

Although Anderson was not a domestic violence case, the decision is important precedent for domestic violence prosecution. The Nevada Supreme Court signaled to prosecutors that the forfeiture doctrine is a viable tool. Batterers will not benefit from their threats, instructions, and soft touch persuasion. "No face, no case" is not a maxim batterers can rely upon after forfeiting Confrontation Clause rights.

[11] *Anderson v. State*, 135 Nev. Adv. Op. 37, 447 P.3d 1072, 1076 (2019).

[12] *Anderson v. State*, 135 Nev. Adv. Op. 37, 447 P.3d 1072, 1076 (2019) (quoting *Reynolds v. United States*, 98 U.S. 145, 158-59, 25 L.Ed. 244 (1879).

REGINALD R. HENDERSON

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Job Responsibilities

Supervises over 100 Criminal Court/General Sessions Assistant District Attorneys

Advises Memphis Police Department Homicide/ Robbery Units of Charging Perimeters

Professional Memberships and Activities

Moms Demand Actions — Member of Body

Memphis Crime Stoppers Board — Distributes awards to Tipsters that give information Former Faculty Member National Advocacy Center (NAC)

Faculty Member for Trial Advocacy Course — District Attorney General's Conference (Memphis)

Certificate of Appreciation from City of Memphis Division of Police Services

MEET A NDAA MEMBER

1. **What was the most unusual or interesting job you've ever had?**
   Advising MPD Homicide during the filming of TV Show "The First 48" while on location in Memphis

2. **What are 3 words to describe NDAA?**
   Advocacy, Innovative, Justice

3. **What's on your Wish List for the next 10 years?**
   I would love to see something similar to the NAC being re-established to give prosecutors around the country an opportunity for state of the art training.

4. **What are your hopes for the Prosecution Profession?**
   To be viewed by the public as a "servant" of the people who do their jobs with integrity and the highest sense of justice and fair play.

5. **What's one of the best meals you've ever had?**
   Commander's Palace, New Orleans, LA

6. **Favorite movie lines?**
   "Frankly, my Dear, I don't give a damn."
   "I'm going to make him an offer, he can't refuse."
   "May the force be with you."
   "Go ahead, make my day."

7. **Favorite meal?**
   Filet Mignon, loaded baked potato, lobster, asparagus, wine and strawberry cake

8. **What's on your playlist?**
   Jill Scott, Bruno Mars, Niki Minaj, T-Pain, Toni Braxton, Ella Mae

9. **What are 3 words that describe you?**
   Happy, Extrovert, Chill

10. **What are some of your favorite travel spots?**
    Atlanta, New Orleans, Chicago, Miami

11. **What is your favorite family tradition?**
    Cooking for our family reunions...
    Fish fries/homemade ice cream/BBQ

Why Men Who Are Domestic Violence Victims Don't Report

By **WENDY L. PATRICK**
Deputy District Attorney, San Diego County, San Diego (CA)

Recent headlines announcing arrests of girlfriends and wives for physically abusing their NFL-player boyfriends or husbands[1] have prompted the question we don't ask often enough: for all of the male-on-female domestic violence cases we hear so much about, how many men are victimized?

In reality, many male domestic violence victims suffer in silence. Despite men being often much larger physically than their partners, many consistently fail to report being physically abused. Why? Research gives us some answers.

MEN ARE VICTIMS TOO

I have prosecuted many women for abusing their husbands and boyfriends, as well as same-sex partners. Such "non-traditional" intimate partner violence happens more frequently than people think. There is nothing legally or physically that prevents a much larger man from being victimized by a smaller partner. The size differential, unfortunately, often only makes him more unwilling to report it. Researchers help to explain why.

Andreia Machado et al. (2017) examined the help seeking behavior of male victims abused by women.[2] Recognizing the worldwide problem of intimate partner violence (IPV), they note the paucity of research exploring cases with female perpetrators and male victims. Interviewing ten men in Portugal between the ages of 35 and 75 who had sought help from police or domestic violence agencies, they sought to understand the nature of violence they experienced, as well how it adversely impacted their lives.

Machado et al. found a consistent pattern of violence, including a progression of abuse beginning with factors such as jealousy, control, and social isolation, similar to what is referred to in the research as the cycle of violence. Factors that intensified violence included housework, children, betrayal, divorce, and economic issues.

WHY MEN DON'T REPORT

Machado et al. also addressed the issue of nonreporting. For most of the men in their study, they found that seeking help had a negative emotional impact. They found that most of the male victims reportedly experienced gender-stereotyped treatment from professionals and services, and that seeking formal help frequently led to secondary victimization in the form of statements or behavior that could cause them further distress. In fact, seeking formal help itself had a negative impact on well-being, aggravating their victimization.

For most of the men in their study, they found that seeking help had a negative emotional impact.

Venus Tsui et al. (2010)[3] also studied help seeking behavior among male victims of partner abuse, and discovered some common themes among the sample they studied. Their study included 68 agency representatives in the United States who completed a survey to identify issues related to male victims suffering from partner abuse: half of them referenced responses from male clients, with the other half consisting of responses from male victims.

[1] https://www.foxnews.com/sports/ravens-d-j-fluker-victim-domestic-abuse-girlfriend-arrested-assault-chargers.

[2] Machado, Andreia, Anita Santos, Nicola Graham-Kevan, and Marlene Matos. 2017. "Exploring Help Seeking Experiences of Male Victims of Female Perpetrators of IPV." Journal of Family Violence 32 (5): 513–23. doi:10.1007/s10896-016-9853-8.

[3] Tsui, Venus, Monit Cheung, and Patrick Leung. 2010. "Help-Seeking among Male Victims of Partner Abuse: Men's Hard Times." Journal of Community Psychology 38 (6): 769–80. doi:10.1002/jcop.20394.

SILENCED BY SOCIAL STIGMA

Tsui et al. found that men do not seek assistance because of what they describe as "societal obstacles against men and lack of support." Obstacles mentioned include denial, fear, shame and embarrassment, stigmatization, and what the authors note is most important: the fact that they did not receive equal treatment as a service target. They note that consequently, men minimize their abuse and attempt to avoid social stigma regarding their inability to protect themselves, and often end up concealing or denying the abuse.

Tsui et al. further observe that regarding societal expectations, men are viewed as "unacceptable" marital violence victims, recognizing that such a designation could be considered a "social taboo." They also note male reluctance to view themselves as victims stems from considering their complaints to be a major weakness.

Perhaps most significantly in terms of examining abused men who are much larger than their abusive female partners, Tsui et al. note that when abuse involves physical violence, battered men do not report the abuse out of fear that they would be "laughed at, humiliated, or reversely accused of being the abuser due to a belief that men are physically capable of fighting back when being challenged."

CHANGING PERSPECTIVES AND POSITIVE DIRECTIONS

Research confirms what many members of police agencies and practitioners already know and are actively working to address: the need for law enforcement and victim assistance groups to meet the unique issues faced by male victims, and continue to refine the availability of specialized services tailored to provide assistance to this underreported victim group. This in turn will increase public awareness of the problem, and hopefully minimize the adverse effects of stigmatization or fear, promoting public safety for everyone.

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Do Implicit Biases Impact Intimate Partner Violence Cases?

By **JENNIFER COX, PH.D.**
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ELIZABETH MACNEIL, B.A.
Graduate Student, The University of Alabama, Tuscaloosa (AL)

Intimate partner violence (IPV) is a public health issue with substantial, tangible personal and societal consequences. Through a historical lens, IPV is broadly considered a gendered phenomenon, with men acting as the abusers and women experiencing the abuse. In the research considering IPV case adjudication, this gendered notion of the crime plays out — social scientists examining real life IPV case adjudication report male IPV defendants are more likely than female IPV defendants to be prosecuted, convicted, and receive more severe sentences.[1,2,3] We acknowledge IPV disproportionately affects women and echo concerns regarding the complete erasure of a gender-based framework.[4] However, the Centers for Disease Control and Prevention estimates that 33.3% of men have experienced physical violence, sexual violence, or stalking by an intimate partner,[5] which is likely an underestimation of actual prevalence.[6] Further, IPV is as pervasive in same-sex couples as it is in opposite-sex dyads.[7] Thus, only considering stereotypical IPV (i.e., between an abusive man and a victimized woman) significantly limits our understanding of, and ability to combat, this problem.

Intimate partner violence (IPV) is a public health issue with substantial, tangible personal and societal consequences.

In recent years, the psychological construct of implicit bias has gained attention in social science and lay media. Implicit biases are unconscious attitudes that arbitrate positive or negative feelings, thoughts, or actions to a social stimulus.[8] Simply put, implicit biases are attitudes regarding a specific group (e.g., women, same-sex couples), of which the individual is not consciously aware. Research consistently indicates that implicit biases are not associated with explicit attitudes (e.g., attitudes of which the individual is aware). For example, an anti-racist individual may still harbor implicit racial biases. Implicit association tests (IATs) measure how quickly an individual pairs two concepts with evaluative

1 Kris Henning & Lynette Feder, Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes, 32 Criminal Justice and Behavior. 612 (2005).

2 Emily C. Hodell, Nesa E. Wasarhaley, Kellie Rose Lynch & Jonathan M. Golding, Mock Juror Gender Biases and Perceptions of Self-Defense Claims in Intimate Partner Homicide, 29, J Fam Viol. 495 (2014).

3 Marissa Stanziani, Jennifer Cox & C. Adam Coffey, Adding Insult to Injury: Sex, Sexual Orientation and Juror Decision-Making in a Case of Intimate Partner Violence. 65 J of Homosexuality. 1325 (2017).

4 Elizabeth Reed, Anita Raj, Elizabeth Miller & Jay G. Silverman, Losing the "Gender" in Gender-Based Violence: The Missteps of Research on Dating and Intimate Partner Violence. 16 Violence Against Women. 348. (2010).

5 Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marcis-Jo Kreshnow & Jieru Chen, The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release, National Center for Injury Prevention and Control, 2018.

6 Katrina Kubicek, Miles McNeeley & Shardae Collins, "Same-sex Relationship in a Straight World": Individual and Societal Influences on Power and Control in Young Men's Relationships, 30 J of Interpersonal Violence. 83 (2015).

7 Lisa Langenderfer-Magruder, Darren L. Whitfield, N. Eugene Walls, Shanna K. Kattari & Daniel Ramos, Experiences of Intimate Partner Violence and Subsequent Police Reporting Among Lesbian, Gay, Bisexual, Transgender, and Queer Adults in Colorado: Comparing Rates of Cisgender and Transgender Victimization, 31, J of Interpersonal Violence. 855 (2016).

8 Anthony G. Greenwald & Mahzarin R. Banaji, Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes, 102, Psych Review. 4 (1995).

attributions or stereotypes to determine if one concept is more quickly associated with a particular connotation.[9] Legal scholars, social science researchers, and lay individuals have increasingly called for the consideration of implicit biases within the context of the legal system.[10] For example, Rachlinski and colleagues[11] argue the small differences in behavior due to implicit biases may compound to result in significant consequences in the criminal justice system. Levinson and colleagues[12] even call for developing IATs to specifically measure legal constructs, for example, a test to determine if one implicitly associates Black individuals with concepts like "guilty" and White individuals with concepts like "not guilty." However, very little research actually applies the IAT within a criminal justice context. Given the far-reaching consequences of many criminal legal cases, empirical research investigating the validity and utility of the IAT in the criminal courtroom is necessary.

RESEARCH STUDY

We conducted an experimental research study to explore if the sex and sexual orientation of the IPV defendant/victim dyad influences prosecutorial case processing decisions. We were also interested in whether prosecutor implicit biases, as measured by the IAT, were associated with case processing decisions. Because IPV is a highly gendered crime, we focused on the gender roles IAT and the sexuality IAT. The gender roles IAT measures the strength of associations between gender categories (i.e., female, male) and gender stereotyped occupations (i.e., nurse, scientist). The sexuality IAT measures the strength of associations between sexual

[9] Mahzarin R. Banaji & Anthony G. Greenwald, Implicit Gender Stereotyping in Judgments of Fame, 68 J Personality and Social Psych. 181 (1995).

[10] Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 Fordham L. Rev. 1511 (1999-2000).

[11] Jeffrey J. Rachlinksi, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, Does Unconscious Racial Bias Affect Trial Judges? 84 Notre Dame L. Rev. 1195 (2008-2009).

[12] Justin D. Levinson, Huajian Cai & Danielle Young, Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test, 8 Ohio St. J. Crim. L. 187 (2010-2011).

orientation (i.e., gay, straight) and positively or negatively valenced words (e.g., clean, dirty).

We recruited 241 prosecuting attorneys from across the United States via email solicitations and word of mouth. Our sample was representative of each geographical region and resembled the broader U.S. prosecutor population in that participants were largely male and White. Participants reported an average of 10 years prosecutorial experience.

Participants completed all study procedures online during two study sessions, separated by approximately five days. During the first session, prosecutors completed both IATs. During the second session, prosecutors read a police case file which included a criminal investigation unit case summary, official statements given to law enforcement by the victim and alleged aggressor, and a medical report from a hospital physician who treated the victim. Researchers worked with a local assistant district attorney so that this file would closely resemble the depth and breadth of information a prosecutor receives at the initial stages of a case.

Within the case file, we manipulated the sex and sexual orientation of the couple involved. Specifically, we created four separate case files — straight couple/female victim, straight couple/male victim, gay couple/male victim, lesbian couple/female victim — and each participant read only one file. The only differences between the case files were the names and sexes of the victim and defendant; all other information was identical.

Participants were also given statutory definitions (based on a single jurisdiction) and specific statutes for crimes that may be applicable given the alleged incident. After reading through all of this information, participants responded to questions regarding whether and how they would proceed with case processing (e.g., what charge to apply, plea bargain offer). Participants also had the opportunity to provide written feedback regarding the factors they considered most important when making these decisions.

Results indicate the sex of the victim did not impact prosecutors' dichotomous (yes/no) decision to proceed with criminal charges or offer a plea deal. However, when asked to choose which criminal statute to apply, prosecutors were 65% more likely to impose the harshest criminal statute when the incident included a female victim, compared to when the incident included a male victim. Similarly, when the victim was female, prosecutors were 61.5% more likely to offer the most severe plea option. In other words, when the victim was a male, prosecutors were more likely to offer lenient plea deals. However, there were no statistical differences in prosecutor decisions due to the sexual orientation of the IPV couple.

We also looked at prosecutor implicit gender role attitudes and implicit attitudes regarding sexual orientation. We found these implicit associations, as measured by the IAT, did not impact decision making. There was no association between IAT scores and prosecutorial case processing decisions.

IMPLICATIONS

Social science should not be conducted in a vacuum and our goal is to apply research to better understand, and broadly improve, the world around us. In that respect, we offer potential considerations based on the results of this study and cumulated psychological research. First, we believe it is important to emphasize that the research on implicit biases is robust and compelling. These unconscious attitudes do exist. However, it is less clear as to whether implicit associations influence deliberative decision making. The present research indicated prosecutor decisions were not related to IAT scores; however, the extralegal factor of victim sex was considered (likely subconsciously) in case processing. In a high-pressured situation in which an individual must act quickly (e.g., police encounters with potentially dangerous individuals, early case assessment in demanding and understaffed prosecuting

offices), implicit associations may serve as one mechanism to reduce cognitive load.[13,14] However, when the individual has the necessary time to process all available information, consider multiple routes of proceeding, and deliberate consequences for each route, they may be more likely to override any automatic associations. Indeed, an initial step in reducing implicit biases is simple awareness of these automatic associations.[15] Thus, when considering IPV cases, regardless of the sex and sexual orientation of the individuals involved, we encourage prosecutors to actively consider whether case processing decisions would be different with a male victim or female defendant.

In written free-responses, many participants emphasized the complexity of case processing decisions and acknowledged that these decisions are rarely based solely on legal evidence. Instead, prosecutors must necessarily consider resources available in their jurisdiction and office, community norms, victim cooperation and credibility, among other things. Social science research suggests this concept of "convictability" is a significant determinant in case processing.[16,17] However, "convictability" is an elusive and circular concept (i.e., How do you know if a case if convictable? If you get a conviction!), which is influenced by a myriad of potentially biasing factors at every level of case processing, from arrest to conviction. For every case, we encourage prosecutors to revisit their "convictability" criteria and consider if factors such as defendant sex or victim sexual orientation are influencing their perceptions of convictability in a manner that is inconsistent with the goal of equal justice under the law.

Additionally, written feedback from participants emphasized the difficulty of processing these cases. Participants characterized these types of cases as "emotionally draining" and "among the most difficult to prosecute" because of the complicated interpersonal dynamics of the individuals involved. As mental health professionals, these reflections suggest to us that attorneys working these cases may benefit from additional support at the organizational and supervisory levels. For example, decreased caseloads for attorneys working IPV cases may allow prosecutors adequate time to consider alternate scenarios and the extent to which extralegal factors influence their case processing decisions.[18] In addition, prosecutors may benefit from consultation from experienced peers or supervisors, with the goal of offering support and guidance for managing these difficult cases. Consultation may serve an additional function of challenging the prosecuting attorney to "check" their decisions and examine the extent to which extralegal factors are influencing case processing.

CONCLUSIONS

The results from this study suggest prosecutor implicit biases did not impact decisions regarding applicable criminal statutes or plea bargaining in IPV cases. However, consistent with previous social science research, prosecutors apply more severe criminal statutes in IPV cases with female victims and offer more severe plea bargains. We encourage prosecutors to consider how extralegal factors may influence case processing decisions and seek consultation with experienced colleagues to challenge potential stereotypes and biases.

Jennifer Cox, Ph.D., is an Associate Professor of Clinical Psychology at The University of Alabama. Her research focuses on the intersection of psychology and the legal system, including judicial decision making. She also maintains a private practice conducting forensic mental health assessments. Elizabeth MacNeil is a graduate student in Clinical Psychology at The University of Alabama. Her research focuses on prosecutorial discretion and the adjudication of gendered crimes. *This research was supported by the National Science Foundation (Award Number: 1748371). Study materials and statistical analyses are available from Dr. Cox upon request (Jennifer.m.cox@ua.edu).*

[13] Mahzarin R. Banaji & Anthony G. Greenwald, Blind Spot (2013).

[14] Lois James, The Stability of Implicit Racial Bias in Police Officers, 21 Police Quarterly. 30 (2018).

[15] Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T. L. Cox, Long-term reduction in implicit race bias: A prejudice habit-breaking intervention, 48 J. Experimental Social Psychology 1267 (2012).

[16] Lisa Frohmann, Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking. 31 Law & Society Review 531 (1997).

[17] Cassia Spohn & Jeffrey Spears, The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions, 13 Just. Q. 649 (1996).

[18] Eric Rassin, Reducing Tunnel Vision with a Pen-and-Paper Tool for the Weighting of Criminal Evidence, 15 J. Invest Psychol Offender Profil 227 (2018).

Stop. Do Not Pass Go. Do Not Compel Your Domestic Violence Victim to Court.

By **TRACY M. PRIOR**
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Imagine a domestic violence victim who has survived abuse at the hands of a lifelong partner. Children witnessed the abuse for years, and the victim finally had the courage to report the abuse; yet as many victims do, pulled back once the system took hold. This victim felt it was better to recant the initial story because of fear, shame, or embarrassment. Then this victim did not report to court in response to the properly served subpoena because that victim had four children to get to school who needed the benefits of a dual income, and that abuse had actually stopped recently.

Insert an untrained or undertrained prosecutor who is not equipped with the myriad of legal ways in which to secure attendance of domestic violence victims to court, or how to prove a case without a victim's testimony, but who sincerely intends to get justice for this victim. That prosecutor pulls out a tool that is widely used in other prosecutions, the request for a bench warrant to issue against the victim. The judge grants that request since the prosecutor submitted a proof of service and the victim had not appeared. The prosecutor — unhappy that the trial could not "go" — is satisfied because proper legal process occurred and moves on to the next case.

Then we see the aftermath. That domestic violence victim is walking down the street one day, four children in tow, and is contacted by a law enforcement officer for whatever justifiable reason, and ultimately the officer finds out the victim has a warrant for arrest. The officer arrests the victim; the four children are placed in a local holding facility; and a cycle of secondary trauma has now attacked this victim maybe even worse than some of the initial abuse.

Or change the scenario: The well-intended prosecutor is told by a district attorney investigator or a paralegal that the victim is avoiding service or evading the officer process server. The prosecutor gets her ducks in a row and requests a material witness warrant pursuant to her state's Penal Codes Material witness warrants are used in traditional prosecutions to secure witnesses who may be evading service. Some legal authority allows for the witness to be taken into custody, be brought before the court, and then be entitled to the appointment of counsel and a hearing. The witness could remain in custody until the trial date to ensure attendance.

Again, we witness the aftermath. The domestic violence victim gets arrested and held in custody. The victim may have had children, a job, or a semblance of stability — all of which are now in complete disarray. The victim's abuser may continue to control or perpetrate while the victim is in jail through jail phone calls. Is the victim now in a better place to "participate" in our prosecution? I think not.

While warrants can be an important tool to ensure that cases move forward and violent abusers are held accountable, prosecutors must also recognize the real tensions that exist for domestic violence, particularly in the case of victims.

It is best practice not to request warrants compelling domestic violence victims to court. While warrants can be an important tool to ensure that cases move forward and violent abusers are held accountable, prosecutors must also recognize the real tensions that exist for domestic violence, particularly in the case of victims. This does not mean these tools should be removed from a prosecutor's discretion, but rather best practices should be implemented to ensure the use of these warrants promotes the best interests of justice and the victims involved in the case. Prosecutors must weigh these dynamics against every set of facts. Trial prosecutors should equip themselves with the many existing legal tools that best balance the case moving forward without causing secondary trauma to victims by bringing them to court in handcuffs.

A victim's failure to appear in court is not uncommon. Victims may fail to appear by avoiding subpoena service,

disobeying a subpoena, or recanting. Domestic violence prosecutors must recognize the myriad of reasons why victims might not want to come to court. Despite attempts at legal service of process, victims may be scared, embarrassed, or threatened by the abuser with consequences for going to court.[1] The victim may be caught in the cycle of violence[2] and going to court may worsen the abuse. If a prosecutor has a reasonable belief that victims are uncooperative or unlikely to appear for a preliminary hearing or trial, it is essential to investigate their motivation for non-compliance (e.g., fear, reconciliation, embarrassment, cultural or religious pressures, economic disincentive). This information can be pertinent for any potential forfeiture by wrongdoing hearing or simply to educate the jury or judge as to why the victim is not appearing in court.

One of the first questions a prosecutor can ask when a victim may be evading service is whether the victim's testimony is needed to prosecute the case. While domestic violence often happens behind closed doors with no "independent" witnesses, perhaps there are other forms of "corroboration" for the victim's statement, e.g., photographs of the scene or a 911 call with statements that are non-testimonial and "spontaneous" or "excited utterances" per the rules of Evidence. Are there jail calls that corroborate the victim's initial statement or show consciousness of guilt on the part of the abuser? Can officers lay a proper foundation for the victim's initial on-scene statement creating admissibility as an excited utterance? Is there a prior incident of abuse or a prior victim that can be introduced as propensity evidence or some other form of accepted character evidence pointing to motive, intent, lack of accident, or common scheme or plan?

A prosecutor should then legally brief the issues supporting the prosecution without calling the victim to the stand and get legal rulings from the court. Legal rulings will often result in settlement of the case once the judge learns of case law authorizing admission of spontaneous statements at the scene or non-testimonial statements from a 911 call.[3] An investigator may be able to tie this all together by testifying how many attempts were made to secure the victim's attendance, but to no avail. This can provide the context a jury may need as to why the victim did not testify, followed up in closing argument by the prosecutor reminding the jury that the evidence is what proves the case, not necessarily whether a named victim testifies. We do this all the time, especially in murder cases where there is no live testimony from the deceased.

Simply put, discouraging warrants to compel domestic violence victims to court is the best practice for providing the best trauma-informed treatment of victims. Even further, prosecutorial agencies should adopt protocols and policies that address the compulsion of victims to court and think through the scenario that may happen when warrants are issued for domestic violence victims. Prosecutor offices are strongly encouraged to require approval from the elected District Attorney or a high supervisory level employee prior to requesting a warrant for a domestic violence victim.

There are many things prosecutors can do short of asking that a warrant be issued for a domestic violence victim's failure to appear:

- Work proactively with staff or advocates to educate the victim about the court process and calm any fears. Staff members, paralegals, and advocates can be trained to educate domestic violence victims that once they come to court, they can tell their "side of the story" and that all they are required to do is tell the truth.

Survivors of domestic violence already have the weight of the world on their shoulders — we owe it to them to use every tool possible to best balance their protection with the advancement of our case.

- Educate victims that the subpoena is an order of the court, and it is not the victim's fault or choice to be subpoenaed to court. Lessening the pressure on victims can sometimes make them feel better about appearing.
- Find the criminal justice partner that developed the best rapport with the victim (e.g., the police officer, the nurse) and enlist their help to make a phone call or text to the victim.
- Enlist community advocates to discuss with victims that they only need to come to court and tell the truth. Remind victims they will be surrounded with services and support, including an advocate, court accompaniment, or perhaps even an escort to and from their next destination.
- Prosecutors can remind victims that when they are on the witness stand, the prosecutor will ask a litany of questions that show the accused it is not the victim's fault they are present in court. Questions can include:
    1. "Did you want to be here today?"
    2. "Isn't it true you love [the accused?] and still want to live with [the accused?]"
    3. "The only reason you are here today is because you got a court order to be here, correct?"
    4. "You want [the accused] to know you still love him/her, correct."
    5. "And you didn't even report this abuse to the police correct?"
    6. "Will you tell the truth here today even though you don't want to be here?"
- Ask to trail the case for a couple hours until you have enough time to personally connect with the victim.
- Ask to trail until the afternoon or the next day so your staff with whom the victim built rapport with can re-initiate contact with the victim.
- Keep the court informed about all the attempts your staff is making to get victim into court.
- Dismiss and re-file the case pursuant to state statues allowing as such in Domestic Violence cases when applicable.
- Request that the court have a hearing to determine whether the victim's continued refusal to testify can be deemed "unavailability" pursuant to the evidence code, and then admit the preliminary hearing transcript should state statues allow it.
- Request a warrant (as a last resort) to "be held" but not issued and then work to connect with the victim in a trauma-informed way. Often, the existence of a non-issued warrant combined with a compassionate explanation of the importance of coming to court to tell the truth will encourage victims to appear.

In the end, domestic violence cases must stand independent of victims. If we require the victim's testimony in order to prove the case, perhaps we should not have issued, charged, or filed it. This is the essence of evidence-based prosecution that is continually reinforced as best practices nationwide.[4]

Specially trained prosecutors know to build their case around a victim, not further burden a victim by compelling them to court. Survivors of domestic violence already have the weight of the world on their shoulders — we owe it to them to use every tool possible to best balance their protection with the advancement of our case.

[1] Linda A. McGuire, *Criminal Prosecution of Domestic Violence* (1999) p. 8 < http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.494.8315&rep=rep1&type=pdf> (accessed Aug. 3, 2020).

[2] Rebecca McKinstry, *"An Exercise in Fiction": The Sixth Amendment Confrontation Clause, Forfeiture by Wrongdoing, and Domestic Violence in* Davis v. Washington (2007) 30 Harv. J. L. & Gender 531, at pp. 532, 539.

[3] *People v. Corella* (2004) 122 Cal.App.4th 461, 469.

[4] National District Attorney's Association, National Domestic Violence Prosecution Best Practices Guide (July 17, 2017) < https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-June-23-2020-1.pdf > (accessed Aug. 3, 2020).

Excessive Force: A Legislative Solution (Intern Edition)

By **EDWARD GROOME**
Fall 2020 Intern, NDAA

The United States has an enduring history of civil rights protests, and this past summer has seen one of the longest sustained protests of racial injustice in recent memory. Countless Americans have taken to the streets over the killing of George Floyd and the shooting of Jacob Blake, calling for police accountability. The enduring national conversation surrounding police killings has prompted Congress to debate various packages aimed at addressing these structural issues. In this moment where we once again grapple with questions of police accountability, it is essential to address much needed change through legislative action, at the federal level, by defining and penalizing excessive force from police officers.

MISCONDUCT AND INACTION

Historically, the task of disciplining officers accused of excessive force has been left to police departments themselves. A good example is the New York Police Department (NYPD), which in 2015 was found to have refused to act in one third of substantiated cases involving officer misconduct, according to a report from New York City's Solicitor General.[1] These cases were not uncovered by officers themselves but were referred to the department by the Civilian Complaint Review Board, the oversight agency tasked with monitoring incidents of misconduct reported to them by the public.

A lack of clear statutory limits on police power to use force and cultural biases that favor police are limiting the ability of prosecutors from doing the necessary work of holding officers accountable. Studies have shown that the behaviors which constitute police misconduct have been poorly defined, and that accusations of police misconduct often do not result in an indictment or a conviction.[2] The most common remedy a department policing itself may offer the public is to remove the officer from duty. This solution is entirely inadequate to addressing the real problem of police violence and misconduct more generally. Oftentimes, these officers will simply move to another city and join the police force while concealing their prior record of misconduct.[3] Worse, the lack of clear statutory penalties for using excessive force, and the reliance on police departments to discipline their own leads to situations where officers may not be charged appropriately. When charged, officers may ultimately receive a lighter sentence than a civilian would for the same act.

CHARGES AMID GEORGE FLOYD CASE

When George Floyd was killed in Minneapolis, the officer responsible, Derek Chauvin, was charged by the Hennepin County Attorney with third degree murder for causing the death of another while evincing a depraved mind without regard for human life (Minnesota Code Section 609.195). Initially, Floyd's family and many protesters expressed outrage at this charge, believing the prosecutor was unwilling to charge the officer with a more serious offense, and asking for the charge to be upgraded. The state Attorney General later partnered with the County Attorney's office and both offices agreed to increase the charge against Chauvin to second-degree murder, with a concurrent charge of manslaughter in the second degree. While this may be hailed as a just call, there is a very real potential for Officer Chauvin, and his fellow officers, to

[1] Eure, P.K. and Peters, M.G. (2015). Police Use of Force in New York City: Findings and Recommendations on NYPD's Policies and Practices. New York City Department of Investigation Office of the Inspector General for the NYPD. pp. 49.

[2] Fyfe, J.J. and Kane, R. (2006). Bad Cops: A Study of Career Ending Misconduct Among New York City Police Officers. United States Department of Justice.

[3] Grunwald, B. and Rappaport, J. (2020). The Wandering Officer. *The Yale Law Journal*. Vol. 129 No. 6.

receive a lighter sentence now because of this upgraded charge. A charge of second-degree murder requires that the prosecutor prove either that Chauvin used deadly force while in the commission of another felony, in this case manslaughter (Minnesota Code Section 609.19). While adding another felony charge is a common prosecutorial practice to levy a more severe initial charge, this case raises an uncomfortable question: Would Chauvin's conduct led a criminal charge had George Floyd survived the encounter?

NON-FATAL USES OF FORCE

Minnesota law does provide specific penalties for cases of police misconduct, but the maximum sentence is only one year in prison, making misconduct by officers a gross misdemeanor (Minnesota Code Section 609.43), and not the concurrent felony necessary for a murder charge in a case of wrongful death. Had Chauvin also been a civilian, his actions would almost certainly fall under the category of assault, a felony offense, but because of his status as an officer, his misconduct and improper use of force is considered a misdemeanor, necessitating a concurrent manslaughter charge, rather than assault or misconduct charges, to bring a charge of murder in the second degree. Without the proper criminal statutes governing this area of law, a prosecutor's hands will be tied on the strength of the charges they can bring. A prosecutor may attempt to prosecute an officer for assault in a case similar to this example, but the fact that police have the legal authority to use force complicates the process and may lead to less severe charges than the officer's conduct warrants.

While there is no national standard for collecting data on fatal police encounters, the data that is available suggests that it is vanishingly rare for officers to be convicted of murder in police shooting cases, with the most common successful charge being manslaughter.[4] For non-lethal cases of police brutality, obtaining a conviction is even more difficult. In the absence of clear statutory limits for legitimate uses of force, and a lack of penalties for such uses of force, juries find it incredibly difficult to draw a line between uses of force that are acceptable and those that are not acceptable.

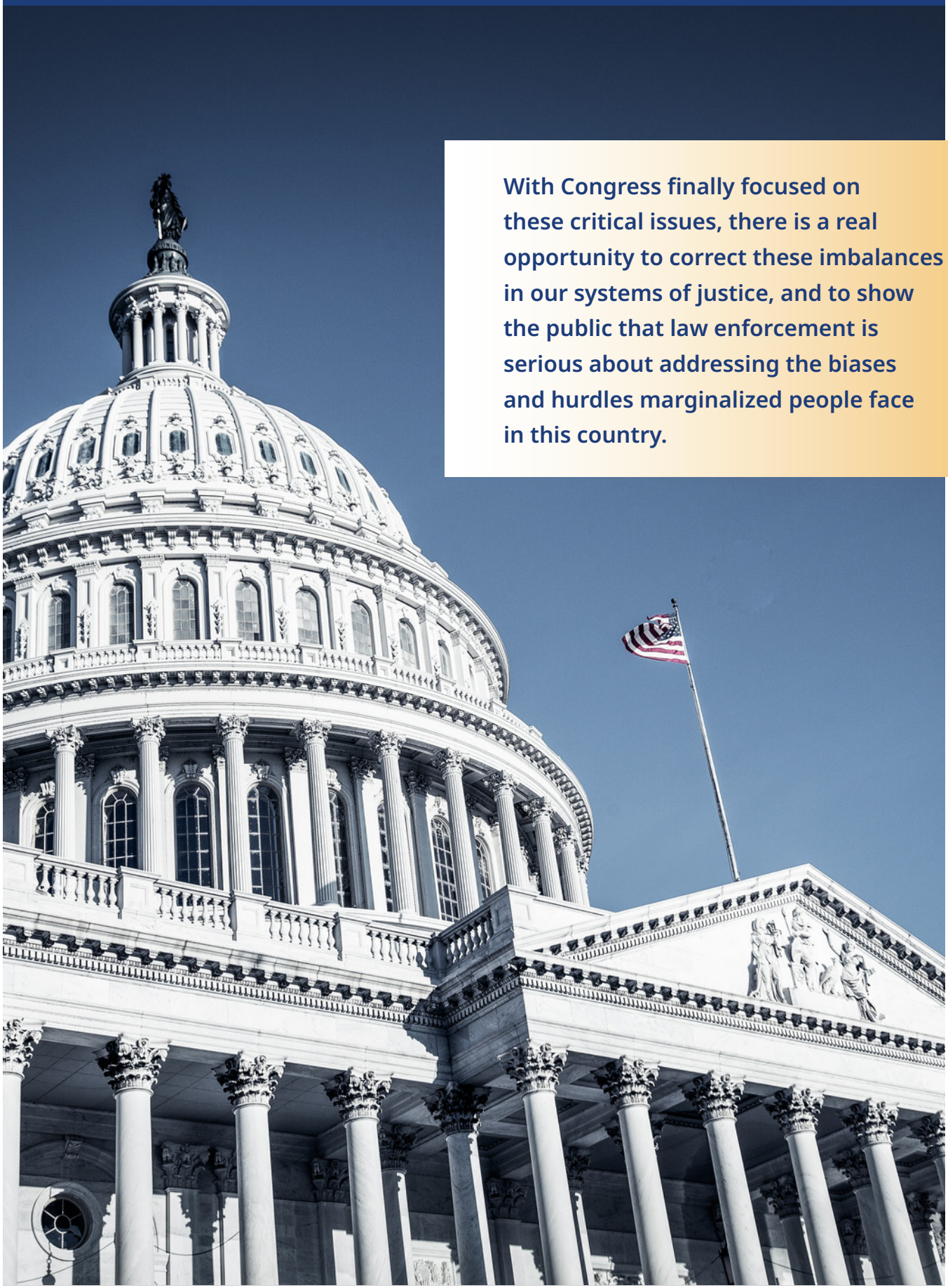
The case that is most illustrative of this point is the shooting of Jacob Blake. There are many details that have yet to be made publicly available about this case, but it is undeniably a fact that Kenosha police officers are instructed to "use only the amount of physical force reasonable and necessary to arrest, apprehend, or restrain a person."[5] Use of deadly force is only permitted where it is necessary to prevent death or great bodily harm. While the case is ongoing, it provides an insight into how broadly officers may interpret department guidelines on their uses of force and raises questions about the reluctance of legislatures to address the issue statutorily. The absence of clear statutory guidance on this subject has led many to the process of civil litigation, where qualified immunity comes into play.

CHALLENGES WITHIN CASE LAW

The Supreme Court has numerous times recognized that individuals have a right to be free from police brutality, and citizens are empowered to sue officers for violations of their civil rights under 42 USC Section 1983. However, the Court has also narrowed the scope of this section while expanding the doctrine of qualified immunity for officers. While affording officers these protections is warranted to ensure frivolous lawsuits do not impede police departments' ability to keep the peace, the "clearly established" doctrine prevents victims from bringing a successful suit against officers unless the specific deprivation of rights they suffered has previously come before a federal court (Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Court has gone even further than this, extending these civil protections to all but the "plainly incompetent" or those who willfully violate the law (Malley v. Briggs, 475 U.S. 335, 106 (1986)).

[4] Philip Matthew Stinson. (2020). The Henry A. Wallace Police Crime Database.

[5] Kenosha Police Department Policy and Procedure Manual. Subject: Use of Force.



With Congress finally focused on these critical issues, there is a real opportunity to correct these imbalances in our systems of justice, and to show the public that law enforcement is serious about addressing the biases and hurdles marginalized people face in this country.

Such standards make the process of seeking accountability a near impossible task, when there is little hope of a successful criminal conviction, and a civil suit will likely be dismissed.

The state of the law on qualified immunity reveals a more concerning failure of the federal government to act on police brutality. Section 1983 grants citizens the right to sue public officials acting under color of law for violating their rights, but there are few, if any, statutes defining how a public official may violate a person's rights, or a concise definition of excessive force at the federal level, and so it has been left entirely for courts to decide what constitutes a violation of civil rights. This interferes with the prosecution of officers who violate federal laws that relate to policing.

18 USC Section 242 makes violations of civil rights by those acting under color of law a criminal act, but to effectively prosecute officers for excessive force, they must prove that they violated a right protected by the Constitution, which must have been clearly established previously. Since these rights have been left vaguely defined at best in statutes, the only clear way to establish a right would be through a successful civil action. This is a high bar for victims to meet since courts rely on the clearly established doctrine to decide whether a case can proceed, requiring the right to have been established already. For prosecution, this standard allows police officers to escape criminal liability by relying on the same doctrine of establishing rights. Furthermore, it is the case that under Section 242, cases of excessive force rarely rise to the level of felony offenses, since it must be proven that the officer acted willfully to knowingly violate the law. In fact, the standard for willfulness sets a bar that is difficult for prosecutors to meet when trying to prove a case in court. A prosecutor must demonstrate "a specific intent to deprive a person of a federal right made definite by decision or other rule of law" (Screws v. United States, 325 U.S. 91 (1945). When considered alongside the restrictive nature of the clearly established doctrine, this means prosecutors have a high burden for proving intent under Section 242, and that the alleged violation of rights can be dismissed because those rights have not been properly defined.

STEPS FORWARD

It is fortunate that we find ourselves amid historic calls for new legislation protecting the civil rights of Americans. After decades of inaction on this issue, Congress looks to be making tangible steps toward a more comprehensive approach to excessive force. Two bills touching on this issue, the George Floyd Justice in Policing Act (HR 7120), and the JUSTICE Act (S. 3985), have been introduced in the House and Senate, respectively. Only the House bill deals with reforming Section 242 and doing away with the willfulness standard, replacing it with either "knowingly" engaging in illegal conduct, or doing so "recklessly". The Senate bill emphasizes the use of federal grants for the purpose of training officers in de-escalation and training officers to intervene when they see their fellow officers using excessive force.

These reforms, while certainly much needed, do not address the root of the problem, which is the failure of Congress to adequately define excessive force, and the right of Americans to be free from such force. Section 242 is not specific in defining this right, and both prosecution and civil litigation against negligent or incompetent actions taken by officers requires a clear definition. The Supreme Court has been clear that for an officer to be held accountable for violating one's rights, they must be clearly established, and defined "with specificity" (City of Escondido v. Emmons, 586 U. S. (2019)). It is not enough to modify the standards for prosecution. Congress must also specifically define excessive force in statute to set clear boundaries and ensure law enforcement officers act in the best interest of the communities they serve. Much has been made of the power of prosecutorial discretion to hold officers accountable, but too often the limits Congress has placed on federal prosecutors through its inaction go unaddressed in these discussions. If we are to truly hold police officers to a higher standard, then it is necessary entrust prosecutors with the tools they need to be successful in these cases. To clarify this blurred area of law would be to simultaneously reform the doctrine of qualified immunity, preserving its protections for competent and law-abiding officers, and to allow the excessively violent to be held accountable and face criminal charges or potential civil liability. With Congress finally focused on these critical issues, there is a real opportunity to correct these imbalances in our systems of justice, and to show the public that law enforcement is serious about addressing the biases and hurdles marginalized people face in this country.

Edward Groome is a senior at American University (Class of 2021), majoring in Political Science. Participating in NDAA's Fall 2020 Internship Program, Edward has an interest in the legislative process and attending law school in the future.

New and Updated Resources at the National Traffic Law Center

By **NDAA'S NATIONAL TRAFFIC LAW CENTER**

The National Traffic Law Center (NTLC) is proud to have created several products in the last year designed to aid traffic safety professionals in reducing injuries and fatalities on our roads, and we are looking forward to another great year. Our work is made possible by the generous support and funding from the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHSTA) and the Federal Motor Carrier Services Association (FMCSA) as well as the National Association of State Boating Law Administrators (NASBLA), the United States Coast Guard, and Responsibility.org. The NTLC is also grateful to the subject matter experts and their organizations for giving their time and efforts toward these projects.

NEW RESOURCES, AVAILABLE NOW

Investigation and Prosecution of Cannabis-Impaired Driving

The use of marijuana has seen a steady increase throughout the United States as many states now allow it to be used for treatment of medical conditions or for recreational purposes. As the opportunity for legal use of marijuana increases, the concern related to the impact of usage on highway safety has also grown. Highway safety offices across the country consider drugged driving to be a significant threat to public safety, including cannabis-impaired driving. In response, and with funding from NHTSA, the NTLC published in July 2020 a resource entitled *Investigation and Prosecution of Cannabis-Impaired Driving*. This monograph supplies law enforcement officers and prosecutors a tool to become more educated about what cannabis is, the signs and symptoms of cannabis impairment and how to effectively prosecute these types of impaired driving cases. The monograph includes in-depth descriptions of how to best use drug recognition experts and toxicologists to support these cases as well as ways to fight against the most common defense challenges. Contributors to this monograph included: International Association of Chiefs of Police (IACP) Drug Evaluation and Classification (DEC) Coordinator (Eastern Region) and retired Nahant, MA Police Sergeant Don Decker, former Colorado Traffic Safety Resource Investigator Kevin Deichsel, IACP DEC Program Manager (Western Region) Chuck Hayes, Colorado Traffic Safety Resource Prosecutor (TSRP) Jen Knudsen, Wyoming TSRP Ashley Schluck, Oklahoma TSRP Jeff Sifers, Michigan TSRP Ken Stecker, and Raleigh, NC Police Lieutenant Eric Sweden. This monograph is available for download at no cost by clicking on the hyperlink above or on the NTLC website in the Traffic section under Publications.

Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement

In July 2020, with funding from FMCSA, the NTLC published a new monograph entitled, *Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement*. The NTLC brought together a working group consisting of prosecutors, law enforcement, and a research scientist over several months to create a new monograph about prosecuting CDL holders who engage in distracted driving. More specifically, the monograph is a primer for prosecutors and law enforcement about the investigation and prosecution of distracted driving cases involving large commercial vehicles. Contributors to the monograph included: York County [Pennsylvania] District Attorney's Office First Assistant Tim Barker, Indiana State TSRP Chris Daniels, Virginia Tech Transportation Institute Research Scientist Jeffery Hickman, Ph.D., Delaware State Police Sergeant Anthony Mendez, and Washington State TSRP Miriam Norman. Distracted Driving CDL Enforcement for Prosecutors and Law Enforcement is available for free download by clicking on the hyperlink above or on the NTLC's website in the Traffic section under Publications. Alternatively, contact NTLC Program Coordinator Metria Hernandez, to request a free printed copy.

Mastering Masking

Two years ago, the NTLC produced a masterclass on the prohibition against Masking CDL offenses entitled, *Mastering*

Masking: Legal and Ethical Consequences of Plea Negotiations Involving Commercial Driver's Licenses (Mastering Masking). Until recently, Mastering Masking was solely offered as a live full-day module-based course. The NTLC is now pleased to offer an on-demand, interactive digital version of the Mastering Masking course on the NTLC website. This course was made possible with funding from FMCSA and partnering with the National Center for State Courts. Like the in-person course, this digital version is comprised of three modules: Convictions, Masking and Ethics, and Disqualification. The participant is taught how to master Masking by prosecuting a fictional traffic case of a CDL holder, while being educated about the legal and ethical implications of Masking CDL offenses. The NTLC plans to offer CLE credit for the course, pending State Bar approvals. Applicants should check the CLE banner on the course registration for updates about CLE approval. For additional information, click on the hyperlink above or select E-Learning on the Training tab of the NDAA website.

For additional information or assistance with Masking and other CDL related issues, please contact Senior Attorney, Romana Lavalas.

Human Trafficking and the Impact on Commercial Driver's License

In addition to the new Mastering Masking online course, the NTLC has developed a new course module entitled, *Human Trafficking and the Impact on Commercial Driver's Licenses*. In 2018, the "No Human Trafficking on Our Roads Act," (NHTRA) was signed into law. This legislation was the result of the Department of Transportation's effort to keep the nation's highways and other avenues of commerce free from human and labor trafficking. Among other measures, NHTRA empowered the FMCSA to issue a new rule that would prevent any driver who uses a commercial motor vehicle (CMV) to commit a felony involving a "severe form of human trafficking" from operating a CMV in the future by permanently banning the driver's CDL. Human Trafficking and the Impact on Commercial Driver's Licenses was designed to educate prosecutors and others about FMCSA's newest CDL disqualification. This course module may be presented as a stand-alone training, or as a supplement to existing courses. The course currently exists as an "on demand" webinar which may be accessed through the above hyperlink or on the NTLC website on the E-Learning page of the Training tab. A Participant Guide is also available for online course attendees to follow along with the webinar. For those interested in adapting the course for teaching in their own jurisdiction, contact Senior Attorney Romana Lavalas, or NTLC Project Coordinator, Metria Hernandez, to obtain a free customizable copy of the course materials, including the course PowerPoint, Instructor and Participant Guides.

NEW & UPDATED RESOURCES, AVAILABLE SOON

Constitutional Law Issues in Impaired Driving Cases

With support from NHTSA, the NTLC will publish in late 2020 the *Constitutional Law Issues in Impaired Driving Cases* monograph. This monograph addresses issues most commonly faced in impaired driving cases involving the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Not intended to replace the thorough research necessary for the proper handling of these important cases, it will serve as a quick reference guide for prosecutors and law enforcement. This monograph is being developed with contributions from the following Traffic Safety Resource Prosecutors: North Carolina's Ike Avery, Arizona's Beth Barnes, Kentucky's Tom Lockridge, Georgia's Jason Samuels, and Michigan's Ken Stecker. This monograph will be available for free to download from the NDAA website.

Cops in Court

The NTLC is also updating the *Cops in Court* curriculum with support from NHTSA. This update streamlines the prior curriculum and incorporates a drugged driving factual scenario. It additionally includes drug-impaired driving videos upon which the law enforcement officer student practices his/her report writing skills. In addition to report writing skills, this course includes modules in which the students practice engaging in direct examination and cross-examination questions. The course is intended for lesser-experienced law enforcement officers, but experienced officers may benefit as well. This update was provided with NHTSA funding and the dedication of the following traffic safety professionals: West Virginia TSRP Nicole Cofer, Kentucky TSRPs Aaron Ann Cole and Tom Lockridge, Maine TSRP Scot Mattox, Idaho TSRP Jared Olson, and Kansas Highway Patrol Lt. Matthew Payne. This updated curriculum will be available in Fall 2020.

HGN: The Science and The Law

Additionally, the NTLC is updating the HGN: The Science and The Law monograph with support from NHTSA. The horizontal gaze nystagmus test is part of the standardized field sobriety tests used by law enforcement officers and is often the most confusing part of the battery of tests. The update to this manual includes the assistance of Dr. Karl Citek, an optometrist and world recognized expert on HGN, who makes complicated scientific topics easily understandable. This guide will not only benefit prosecutors, but law enforcement officers and judges as well. Included in this monograph are links to updated information about which states accept HGN testimony easily and which states have greater hurdles to cross. This monograph will be available in Spring 2021.

CDL (Commercial Driver License) Quick Reference Guide and the Masking Quick Reference Guide

In addition to creating new content, the NTLC has been updating existing CDL resources with funding from FMCSA. The *CDL Quick Reference Guide* is a tool organized by subject matter to aid users in quickly finding basic information on common CDL related topics. The most popular resource, the Masking Quick Reference Guide, uses helpful examples to assist users on how to identify Masking in plea negotiations. Both guides are getting a refresh and will be available in Fall 2020.

Cannabis Impairment Detection Workshop Manual

Ever wondered how best to train law enforcement officers to detect cannabis impaired drivers? For decades, trainees have practiced administering the Standardized Field Sobriety Tests on individuals dosed with alcohol in a training environment. Now cannabis impaired driving is more common than ever, and law enforcement officers need training on detecting those drivers. Responsibility.org and the NTLC teamed together to create a Manual designed to assist organizations in hosting a cannabis impairment detection workshop. Prosecutors and law enforcement officers can learn from experts how to create training workshops where law enforcement officers can observe and test individuals under the influence of cannabis. This Manual provides insight and tips for anyone interested in hosting their own cannabis impairment detection workshop. This Manual will be available in Fall 2020. For additional information, contact Staff Attorney, Erin Inman.

Boating Under the Influence Training Module

The NTLC recently partnered with the National Association of State Boating Law Administrators (NASBLA), who was awarded a grant from the United States Coast Guard to create a new training module for prosecutors and law enforcement officers to improve their ability to work together to achieve effective adjudication of boating under the influence (BUI) cases. Bridging the gap between the citation, investigation, and successful prosecution of BUI cases requires preparing investigating officers for their courtroom testimony. This preparation facilitates their ability to successfully recall and communicate to a judge and jury the facts and opinions that resulted in the arrest decision made by the officer. The training module is intended to supplement existing NASBLA training curriculum to enhance courtroom preparation for boating enforcement officers. Look for this module in Fall 2021. For additional information, contact Staff Attorney, Erin Inman.

ON-GOING AVAILABLE RESOURCES

Between the Lines

The NTLC continues to publish the *Between the Lines* (BTL) newsletter on a monthly basis. This newsletter includes case studies, summaries about U.S. Supreme Court decisions, trending traffic safety issues, and more. This past year, articles included How the Movement for Criminal Justice Reform Impacts the Rules of the Road, What Can We Learn From Rural US?, and Kentucky TSRPs Adapt Training During COVID-19 with TSRP Tips of the Day. It will continue to be distributed in electronic format via e-mail and will also be available on the NDAA's and NTLC's webpages. TSRPs, prosecutors, and law enforcement officers are not only encouraged to forward newsletter ideas and suggestions to NTLC staff but are also invited to serve as guest authors of articles of interest. If you would like to subscribe to Between the Lines, please email, please email info@ndaajustice.org. To access past issues, visit the NTLC's website in the Traffic section under Publications.

Prosecuting DUI Cases Training

The NTLC's on-line training course — *Prosecuting DUI Cases* — is an on-demand, free training course for new and practicing prosecutors. The course was developed in cooperation with Responsibility.org and the National Center for State Courts by national experts to equip prosecutors with the knowledge, information, and confidence necessary to effectively prosecute impaired driving cases. The course walks the learner through a first-person simulation of preparing for the prosecution of a fictional DUI case. The training covers topics including the importance of DUI prosecution, preliminary case review and evaluation, trial and witness preparation, alcohol toxicology, as well as common defenses and trial tactics. Also included is a Resources Section which links to the NTLC website Publications page containing all monographs (e.g., DWI Prosecutor's Handbook, Challenges and Defenses II, and HGN: The Science and The Law). Completion of all slides, along with successfully passing a knowledge assessment quiz, earns the learner a certificate of completion and, in many instances, 1.5-2.5 hours of CLE credit with his/her state bar. To register for this course, please click on the above hyperlink or visit the NTLC webpage on the E-Learning page of the Training tab.

CONCLUSION

The NTLC is pleased to announce that the CDL programming budget has been fully funded for the coming fiscal year by an award from the DOT's Commercial Driver's License Program Implementation (CDLPI) program. As a result, the NTLC will continue to support FMCSA's "One Driver-One License-One Record" initiative, by providing training and resources on critical Commercial Driver's License issues, including Masking, Disqualification, and other issues specific to the commercial driver. Therefore, readers are reminded the CDL Attorney(s) are available to offer technical assistance and virtual training to jurisdictions requesting it. Contact Senior Attorney Romana Lavalas at rlavalas@ndaajustice.org for more information or to schedule a CDL training.

The National Traffic Law Center, and its parent organization, the National District Attorneys Association have long provided technical assistance and resources for prosecutors and allied professionals. Whether a law librarian looking for an elusive 1997 NHTSA publication, or a state Traffic Safety Resource Prosecutor preparing a Prosecuting the Drugged Driver course for local prosecutors, the NTLC is here to help. Please visit the NTLC Website to access other traffic safety related materials and if you have a particular request click here: Technical Assistance Form.

MEET THE NDAA TEAM

JOANNE E. THOMKA

Director, National Traffic Law Center

Job Responsibilities

I manage and perform the development and implementation of curricula, training and technical assistance related to traffic safety issues including impaired driving, commercial driver licenses and other motor vehicle related prosecutions for prosecutors, law enforcement and other traffic safety professionals.

Qualifications

Juris Doctor, Vermont Law School 1987

Recipient of the following awards in the field of traffic safety:

- J. Stannard Baker Award
- NHTSA Public Service Award
- Kevin E. Quinlan Award for Excellence in Traffic Safety

Professional Memberships and Activities:

Transportation Research Board

- Member of the Traffic Law Enforcement Committee
- Member of the Alcohol and Other Drugs Committee

National Sheriffs' Association

- Member of the Traffic Safety Committee

Highway Safety Coalition

- Member

Lifesavers.org

- Member of the Board of Directors
- Co-Track Leader for Criminal Justice/Law Enforcement Working Group

1. **Before working at NDAA, what was the most unusual or interesting job you've ever had?**
   Definitively being a prosecutor

2. **What do you like most about NDAA?**
   The ability to assist prosecutors and law enforcement officers to gain knowledge and confidence to perform their very difficult jobs every day.

3. **What are 3 words to describe NDAA?**
   Service, Dedication, Professional

4. **Where is your hometown?**
   Norwell, MA

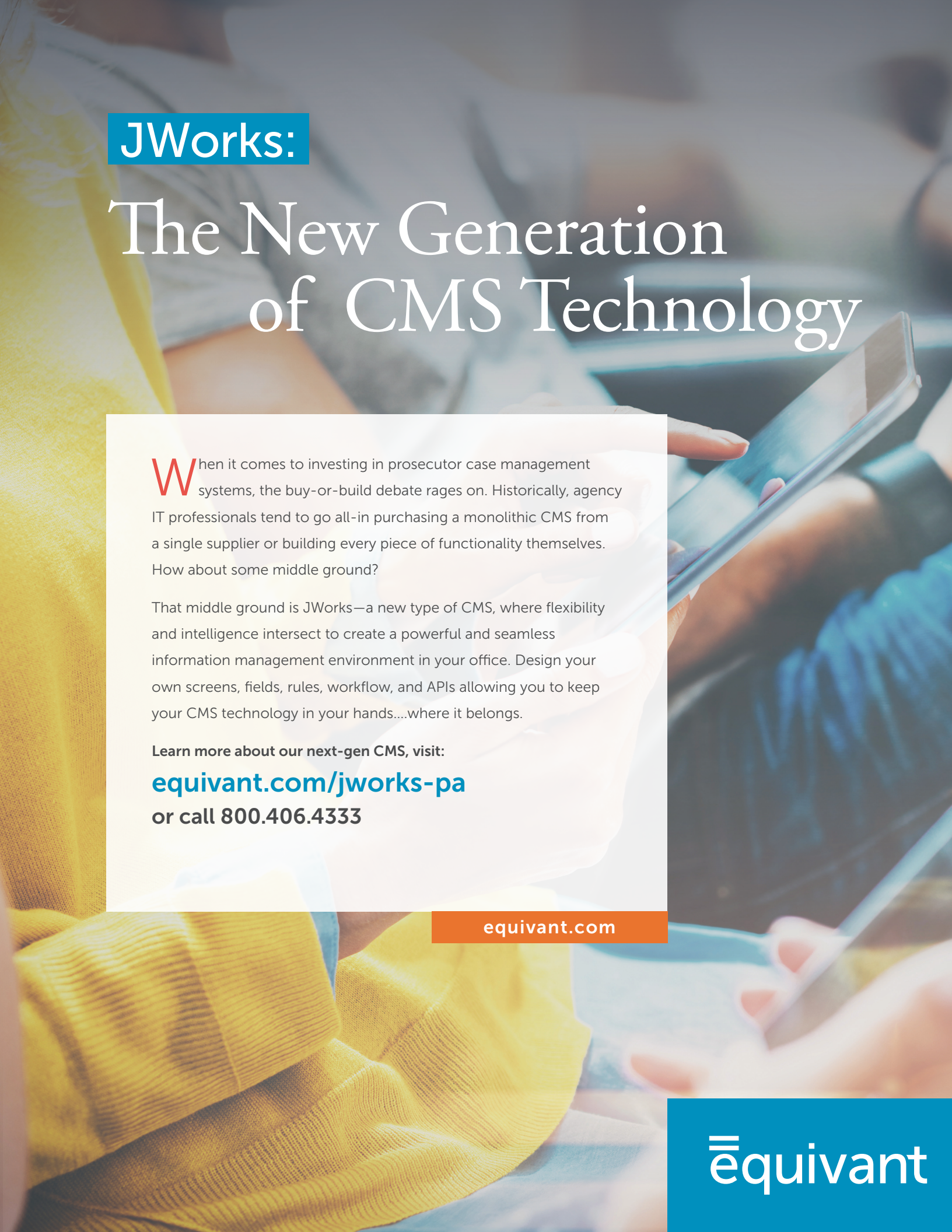
5. **Who inspires you?**
   Maureen McCormick — Chief of Vehicular Crimes, Nassau County District Attorney's Office, Mineola, NY

6. **What is your favorite family tradition?**
   Christmas Eve at my brother's house

7. **What is the best concert you attended?**
   Grateful Dead, Rich Stadium, Buffalo, NY

8. **What book did you read last?**
   The Book Thief by Markus Zusak

9. **Favorite travel spot?**
   The United Kingdom



JWorks:

The New Generation of CMS Technology

When it comes to investing in prosecutor case management systems, the buy-or-build debate rages on. Historically, agency IT professionals tend to go all-in purchasing a monolithic CMS from a single supplier or building every piece of functionality themselves. How about some middle ground?

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NDAA's magazine, *The Prosecutor*, is the premiere publication for prosecutors around the country. To make sure that the publication's content aligns with NDAA's mission to be the voice of America's prosecutors, we would like to invite you to contribute content.

For more information, please visit

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